

VOLUME II OF II

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Oct 18 2023

Certiorari to Darlington County
Honorable J. Derham Cole, Circuit Court Judge

S.C. SUPREME COURT

DAMYON M. COTTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000782

APPENDIX

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ATTORNEYS FOR RESPONDENT

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- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 2126114 15 years 85% Concurrent
- (b) 2126114 15 years 85% Concurrent
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. denied Relief
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. Unknown
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A

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- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel
- (b) The Court Lacked Judicial Power (Jurisdiction)
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Counsel did not investigate fingerprint, it was not in discovery,
- (b) This kidnapping indictment does not have the knowing element, & Counsel did not object,
- (c) Counsel missed several objections at trial, did not object to direct verdict being denied

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

- (b) the name and location of the Court in which each was filed:

- i. N/A
- ii. N/A
- iii. N/A

- iv. N/A

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(c) the disposition thereof:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(d) the date of each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. N/A

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. N/A
- iii. N/A

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16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) _____
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
 (b) your trial, if any? Kristie Wise & Rick Jones
 (c) your sentencing? Same
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Leslie Ann Firestone
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

NO

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:

- i. _____

 ii. _____

 iii. _____

- (b) the proceedings at which each such attorney represented you:

- i. Trial & Sentencing

 ii. Appeal

 iii. _____

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19. State clearly the relief you seek in filing this application.

Turnt my case vacated, and the judgment ousted.

20. Are you now under sentence from any other court that you have not challenged?

STATE OF SOUTH CAROLINA)

County of Darlington)

VERIFICATION

I, Danny C., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

*Danny C.

SWORN to and subscribed before me this 7th day of July, 2021.

Catherine A. Amos (L.S.)
Notary Public

My Commission Expires: 12-22-2029

FILED
2021 JUL 13 A 9:25
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.
Revised 3/2003

21 CP 160559

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Danay C. [Signature], hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

* [Signature]
Applicant

SWORN or affirmed to and subscribed before me this
7th day of July, 2021.

Catherine A. Amos
Notary Public

My Commission Expires: 12-22-2029

FILED
2021 JUL 13 A 4 25
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.
Revised 3/2003

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

Damyon M. Cotton, SCDC No. 359012

Applicant,

v.

State of South Carolina

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Case No. 2021-CP-16-0559

RETURN AND MOTION TO DISMISS

SCOTT B. JONES
CLERK OF COURT/R.D.
DARLINGTON COUNTY, S.C.

2021 OCT 18 A 5:53

FILED

NOW COMES Respondent, the State of South Carolina, making return and moving to dismiss Applicant Damyon M. Cotton's July 13, 2021 application for post-conviction relief. Respondent would respectfully show the Court:

I. PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections. Applicant was indicted for kidnapping and first degree criminal sexual conduct by the Darlington County Grand Jury at its July 2013 term. (2013-GS-16-1438; -1439). Applicant was represented by Attorneys Christie Wise and J. Richard Jones, and Assistant Solicitors John W. Holt and Patti Parker, of the Fourth Circuit Solicitor's Office, prosecuted the case. On February 24, 2014, Applicant proceeded to a jury trial before the Honorable J. Michael Baxley. On February 26, 2014 the jury convicted Applicant, as indicted, of kidnapping and first degree criminal sexual conduct. Judge Baxley then sentenced Applicant to a term of fifteen years' imprisonment for each of the offenses, to be served concurrently.

Applicant appealed and the appeal was perfected by Attorneys Lesley A. Firestone and Lara M. Caudy. Applicant presented the following issue on appeal:

1. Did the trial court err in admitting evidence of a prior alleged bad act involving a single, isolated incident with a female that was wholly unrelated to and not the subject of the charged offense?

The South Carolina Court of Appeals affirmed the conviction on March 3, 2017. *State v. Cotton*, Op. No. 2017-UP-356 (Ct. App. Filed September 6, 2017). Applicant petitioned for a rehearing, and the petition was denied on October 19, 2017.

Applicant petitioned the South Carolina Supreme Court for a writ of certiorari, which was granted on April 19, 2018. Applicant presented the following issues:

1. In light of *State v. Perez*, and in particular Justice Hearn's concurrence in that case, should this Court should overrule *State v. Wallace* and apply the common scheme or plan exception equally to sexual and nonsexual offenses alike?
2. Did the court of Appeals err in affirming the trial court's admission of a prior alleged bad act involving a single, isolated incident with a female that was wholly unrelated and not the subject of the charged offense, under the common scheme exception to Rule 404(b), SCRE?

The Supreme Court of South Carolina affirmed the conviction on June 13, 2019. *State v. Cotton*, Op. No. 27965 (Sup. Ct. Filed May 6, 2020). The remittitur was sent on July 8, 2020.

II. FACTUAL HISTORY

The victim, age nineteen at the time of trial, testified that she first met Petitioner through a "chat line" over the phone.¹ (App.10-11). After exchanging numbers on the chat line, the victim and Petitioner talked on the phone and ultimately arranged to go to the movies together on February 1, 2013. (App.11-12). Petitioner picked the victim up around 6:30 pm, but when they arrived at the movie theater, Petitioner "didn't want to go in" and instead tried to force the victim's head onto his penis. (App.12; 166-167). After the victim refused to provide oral sex, Petitioner then

¹ The victim subsequently explained that although she initially met Petitioner over the chat line, she saw him in person one time at a friend named Tanzy's house. (App.21-22; 132-133).

drove the victim to K-Mart to look for Valentine's Day gifts. (App.13). Upon arrival, Petitioner decided he did not want to go inside and instead again attempted to make the victim perform oral sex. (App.13). He then tried to give the victim cash to go buy something from the store but the victim threw the money back at Petitioner. (App.13). The victim subsequently asked Petitioner to take her home. (App.14). Petitioner refused and instead took the victim's phone and drove her out to Turnpike Road to a wooded area. (App.14). Petitioner told the victim that she "been telling him a long time" that she was going to "give him some" and "now is the time." (App.14). He also threatened to "take a gun out" if the victim did not cooperate. (App.20).

At that point Petitioner leaned over and tried to take off the victim's pants. (App.15-16). When he was unable to do so, he exited the car, went around and opened the passenger side door, and dragged the victim out of the car. (App.16-17). The victim told Petitioner she did not want to have sex but Appellant told her she had to do it since it was time. (App.17). In an attempt to dissuade Petitioner, the victim told him she was pregnant and that she had herpes. (App.18). Petitioner said "we'll fix that," put on a condom, and vaginally penetrated the victim. When Petitioner was finished, he threw the condom in the woods and gave the victim back her clothes. (App.18). Petitioner and the victim, who was crying, got back in the car and Petitioner began apologizing, saying he loved the victim, and asking her not to call the police. (App.18-19). He returned the victim's phone to her when they got on Highway 52. (App.162). Petitioner then dropped the victim off at home. The victim walked the long way around the car so she could memorize Petitioner license plate number. As soon as she walked in the house, she ran to her mother and told her she had been raped. (App.19).

The victim's mother testified she was watching television on the evening in question when the victim, looking disheveled, came in the house and immediately told her she had been raped.

(App.194-195). The victim's mother noticed the victim's jeans were not buttoned when she came inside and testified that these jeans had not been broken when the victim left the house. (App.195). The victim's mother took the victim to the hospital immediately, where a nurse performed a rape kit. (App.196). Although the victim had some difficulty communicating,² the victim told the nurse exactly what happened with a good bit of detail. (App. 241-242; 245-246). The nurse also collected the victim's clothing, including her jeans, and took swabs from the victim. (App.243).

Police officers from Florence and Darlington counties responded to the hospital and interviewed the victim. (App.197-198). The victim provided a statement to police that was consistent with her trial testimony. (App.165-68; 202-209; 213-226; 502-503). Using the license plate number the victim provided, police ultimately figured out Petitioner's name and created a photo lineup. (App.224-225). The victim picked Petitioner out as the man who raped her. (App.225). The evidence collected from the victim on the night of the rape was later submitted to SLED for analysis and Petitioner's DNA was found on the buttonhole of the victim's jeans. (App. 249-260; 277-279).

III. CURRENT APPLICATION

In his current application for post-conviction relief, Applicant alleges he is being held in custody for the following reason:

1. Ineffective Assistance of Counsel
 - a. Counsel did not investigate fingerprint, it was not in discovery
 - b. Counsel missed several objections at trial, did not object to direct verdict being denied
2. The Court lacked Judicial Power (Jurisdiction)
 - a. The Kidnapping indictment does not have the knowing element, and counsel did not object.

² The victim suffered from a "learning disability" and "mental difficulties" which made it more difficult for her to communicate clearly. (App.15; 135-137; 194; 242).

Attached and incorporated herein are Applicant's records from the Darlington County Clerk of Court's Office, the South Carolina Department of Corrections, the record on appeal and trial transcript, and the current application for post-conviction relief. Respondent reserves the right to alter or amend this return upon receipt of any relevant materials.

IV. MOTION TO DISMISS

Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. Because there is no question of law or fact to necessitate a hearing, Respondent requests the Court not appoint counsel in this matter, and instead issue a Conditional Order of Dismissal indicating the Court's intent to dismiss the application and its reasons for so doing.³ See S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief); *Re: Appointment of Counsel in Post-Conviction Relief Cases Before the Circuit Court*, S.C. Sup. Ct. Order filed October 6, 2008; Rule 71.1(d), SCRCP (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). Respondent moves for summary dismissal for the following reasons:

Statute of Limitations

The application should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

³ A proposed Conditional Order of Dismissal consistent with this return and motion to dismiss is concurrently submitted for the Court's consideration.

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A). The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996).

The means of counting days with respect to the statute of limitations are proscribed by the South Carolina Rules of Civil Procedure. In computing the statute of limitations:

[. . .] the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday.

Rule 6(a), SCRCP. “*Mailing does not constitute filing*. When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer.” *Pelzer v. State*, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008) (emphasis added and citations omitted). A post-conviction relief application is considered filed for purposes of the statute of limitations when it is delivered and received by the Clerk of Court, not when it is notarized or delivered to prison personnel for mailing. *Mose v. State*, 420 S.C. 500, 803 S.E.2d 718 (2017).

Applicant was convicted on February 26, 2014, and the remittitur from his direct appeal issued on July 8, 2020. The current application was not filed until July 13, 2021— after the one-year statutory filing period expired. Therefore, the application should be summarily dismissed as barred by the statute of limitations.

V. GENERAL DENIAL

Respondent denies each allegation not expressly admitted, qualified, or explained.

VI. CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court dismiss this application as it is barred by the statute of limitations.

Respectfully submitted,

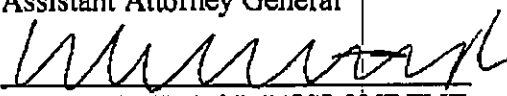
ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

WILLIAM H. RAY
Assistant Attorney General

By:


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

10/15, 2021

State of South Carolina)
)
County of Darlington) The Court of General Sessions
) Fourth Judicial Circuit
) 2021-CP-16-0559

DAMYON COTTON,)
)
 Plaintiff,)
)
 vs.) Transcript of Record
)
THE STATE,)
)
 Defendant.)
)

)

Darlington, South Carolina
July 27, 2022

B E F O R E:

The Honorable J. Derham Cole

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

Mr. Steven W. Fowler, Esquire
Attorney for Plaintiff

Ms. Chelsey F. Marto, Esquire
Attorney for Defendant

Lisa S. Carter
Circuit Court Reporter

I N D E X

WITNESSESPAGE

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EXHIBITS

NO.

DESCRIPTION

EV.

(NO EXHIBITS WERE INTRODUCED DURING HEARING)

1 MR. FOWLER: Good morning, Your Honor.

2 THE COURT: Good morning. Ms. Marto?

3 MS. MARTO: Yes, Your Honor. May it please, the
4 Court?

5 We are here today in the case Damyon Cotton vs. the
6 State of South Carolina. This is a Darlington County
7 case and the docket number 2021-CP-16-0559. My name
8 is Chelsey Marto and I rise on behalf of the
9 respondent. Mr. Steven Fowler represent the
10 applicant in this matter.

11 The applicant ---

12 THE COURT: All right. Mr. Fowler, are you ready
13 to proceed?

14 MR. FOWLER: Yes, sir, I am.

15 THE COURT: All right. Call your first witness.

16 MR. FOWLER: I believe -- do you have anymore Ms.
17 Marto?

18 MS. MARTO: Did you want me to give a -- call the
19 case, Your Honor, give a brief procedural history
20 Okay.

21 THE COURT: I thought you just did.

22 MS. MARTO: Okay.

23 THE COURT: I mean, y'all are both aware of what
24 we're here for.

25 MR. FOWLER: Yes, sir.

1 THE COURT: Okay. You can proceed.

2 MR. FOWLER: Yes, sir. May I speak with Mr.
3 Marto?

4 THE COURT: Sure.

5 MR. FOWLER: Your Honor, if we're ready to proceed
6 I'd like to call to the stand Mr. Daymon M. Cotton.

7 THE COURT: All right. As he takes the stand, tell
8 me what allegations, specifically, that you're
9 wishing to proceed on.

10 MR. FOWLER: Your Honor, if you'll review 10 and
11 11 of the applicants application, or of my clients
12 application, application Post-conviction Relief,
13 ineffective assistance of counsel, lack of judicial
14 power of the court, and there's various other facts
15 that we feel like we'll prove that out to today.

16 THE CLERK: Raise your right hand please. Do you
17 swear from the testimony you give this court be the
18 truth, nothing but so help you God?

19 MR. COTTON: Yes, ma'am.

20 THE COURT: So no allegation are being made other
21 than what is presented and set forth in Paragraphs 10
22 and 11 of the application?

23 MR. FOWLER: Your Honor, just briefly, he and I
24 have spoken about this application. We've spoken
25 about each one of the statements that have been

D. Cotton- Direct Examination by Mr. Fowler

6

1 provided and those are, that's the universe of what
2 we plan to discuss today, Your Honor.

3 THE COURT: Okay. Proceed.

4 MR. FOWLER: If I may proceed?

5 DAMYON COTTON, first being
6 duly sworn, testified as follows:

7 Direct Examination by Mr. Fowler:

8 Q. Please spell your full name for the court?

9 A. D-a-m-y-o-n M-a-r-q-u-i-s-e C-o-t-t-o-n.

10 Q. Okay. And you wish to proceed with this
11 Post-Conviction Relief hearing today, correct?

12 A. Yes, sir.

13 Q. Okay. When is your release date?

14 A. September 1, 2025.

15 Q. And you still wish to proceed today, correct?

16 A. Yes.

17 Q. Okay. And you and I spoke last week, correct?

18 A. Yes, sir.

19 Q. And we've spoken this morning, correct?

20 A. Yes, sir.

21 Q. And you've received some information from me
22 about the PCR process, correct?

23 A. Yes, sir.

24 Q. In moving forward with this and, Your Honor, I
25 may go back and forth to the, to my client somewhat

D. Cotton- Direct Examination by Mr. Fowler

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1 liberally if that's okay with the court?

2 THE COURT: It is.

3 Q. On 10(a), the questions that you've -- just a
4 moment. You filled out an application in the
5 Darlington Court of Common Pleas for Post-conviction
6 Relief, is that correct?

7 A. Yes, sir.

8 Q. And is this your application?

9 A. Yes, sir.

10 Q. Okay. And this is your, if I may may turn to
11 the back of it, and this is your verification of
12 that, correct?

13 A. Yes, sir.

14 Q. On 10(a) it states that, "State concise to the
15 grounds on which you base your allegation that you're
16 being held in custody unlawfully," and the first
17 thing you mentioned is ineffective assistance of
18 counsel, is that correct?

19 A. Yes, sir.

20 Q. And what do you mean by that?

21 A. What I mean by that is if I was properly, how can
22 I say, informed about what I was going against at
23 trial, it would have been at least halfway familiar
24 with it, like, due to counsel not, you know, like
25 telling me certain stuff before I came to trial then

D. Cotton- Direct Examination by Mr. Fowler

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1 maybe that would help the outcome of it.

2 Q. Okay. So do you feel like your attorney's hacks
3 from this application were prejudicial to you?

4 A. Yes, sir.

5 Q. Okay. And do you feel like your attorney was
6 ineffective?

7 A. Yes, sir.

8 Q. Okay. Now, you said in 10(a) that the issues
9 were not disclosed, is that correct?

10 A. Yes, sir.

11 Q. All right. Tell me a little bit about that? What
12 wasn't disclosed?

13 A. First, it will be that, when I first was in the
14 county jail, I had my motion of discovery brought to
15 me and I had Ms. Wise, of course, as my public
16 defender and she stated that I will only be going up
17 against a statement in my trial. So I came to trial
18 and the second day of my trial, that's when I found
19 out about an alleged another person's fingerprint
20 involved in my case. Pretty much state there's
21 another person's fingerprint on top of mine.

22 Q. Okay.

23 A. And they didn't know who it belonged to.

24 Q. So you're saying that there were, there was an
25 additional person's fingerprint involved in this?

1 A. Yes, sir.

2 Q. Okay. And when did you find out about it?

3 A. The second day of my trial.

4 Q. Okay. So when -- do you know if that was in, was
5 presented to you through any kind of discovery or
6 anything like that?

7 A. No, sir. Actually, the solicitor bought it up.

8 Q. Okay. So what's your understanding of -- okay,
9 now just to be clear, you said there was another
10 fingerprint and you were not informed of it, correct?

11 A. Yes, sir.

12 Q. Okay. So what was your understanding of why this
13 other fingerprint was not provided to you before like
14 I guess, the second date of trial?

15 A. Because in the county jail our preliminary
16 evidentiary hearing was waived by the sol, by the
17 public defender's Office. And I honestly believe if
18 they weren't waived and that fingerprint would have
19 been disclosed in my motion then they probably
20 would've find out who actually committed a crime if
21 there was a crime even committed and got the right
22 person.

23 Q. And so some of, some of our topic may overlap a
24 little bit here, but it's still within the Number 10
25 and 11. You said earlier on my direct of you, that

D. Cotton- Direct Examination by Mr. Fowler

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1 you were not informed, okay, was it only the
2 fingerprint or was it other items or issues that you
3 feel you were not informed of?

4 A. It was the fingerprint and in my trial, at the
5 first day of trial, I found out that there was
6 another statement against me that wasn't disclosed in
7 my motion of discovery either.

8 Q. Okay.

9 A. So I found out two different things that could
10 have been key to my case it would've been in my
11 motion during my trial.

12 Q. Okay. So so far and we might touch on these
13 briefly over, again, you're saying there was another
14 fingerprint that you did not, in this matter that you
15 did not find out about till trial, is that correct?

16 A. Yes, sir.

17 Q. You're saying there was another previous
18 statement by another person that you did not learn
19 about until trial, is that correct?

20 A. Yes, sir.

21 Q. And you're saying that you were not informed of
22 these until the trial actually happened, correct?

23 A. Yes, sir.

24 Q. Okay. You also mentioned to me earlier about,
25 on the stand, about the evidentiary hearing -- well,

D. Cotton- Direct Examination by Mr. Fowler

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1 is there anything else about the fingerprint or the,
2 that you'd like to discuss or bring up to the court's
3 attention at this time?

4 A. No, sir.

5 Q. Okay. You mentioned that there was an
6 evidentiary hearing that was waived, tell me a little
7 bit about that? What's your understanding of that?

8 A. Well, I thought that in county jail that if you
9 put in for speedy trial you're obligated to a
10 preliminary or evidentiary hearings to see the facts
11 of what the case is based on. And all of sudden like
12 my was waived along with like four or five other
13 peoples.

14 Q. Okay. All right. Now, are you referring to a
15 preliminary hearing or evidentiary hearing? Are you
16 kind of saying those are the same things? Or what's
17 your understanding of the difference between
18 evidentiary hearing and a preliminary hearing?

19 A. I mean, pretty much like a preliminary hearing is
20 based on like the facts of what they have against
21 you. Evidentiary hearing is showing actual physical
22 evidence of what they have to tie you towards this
23 alleged case.

24 Q. Okay. Did you have a preliminary hearing in this
25 matter?

D. Cotton- Direct Examination by Mr. Fowler

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- 1 A. No, sir.
- 2 Q. Okay. Did you have an attorney at that time?
- 3 A. Yes, sir.
- 4 Q. Okay. Did they ask for a preliminary hearing?
- 5 A. Yes, sir.
- 6 Q. Okay.
- 7 A. It was waived.
- 8 Q. Okay. So the preliminary hearing was waived?
- 9 A. Yes, sir.
- 10 Q. Okay. Did you have a separate evidentiary
- 11 hearing in this matter?
- 12 A. Yes, sir.
- 13 Q. Well, you did or did not have an evidentiary
- 14 hearing?
- 15 A. No. I didn't. I didn't have one.
- 16 Q. Okay. Why was that?
- 17 A. Because it was waived.
- 18 Q. Okay. By who?
- 19 A. They said the public defender's Office.
- 20 Q. Okay. So both your preliminary hearing and a
- 21 potential evidentiary hearing we're both waive, is
- 22 that's correct?
- 23 A. Yes, sir.
- 24 Q. Would you've wanted either or both of those?
- 25 A. Yes, sir.

1 Q. And why is that?

2 A. Because I know for a fact that I didn't commit a
3 crime. But if there was somebody else who actually
4 committed a crime and he deserves to be the one
5 sitting in here and I think that would be most fair.

6 Q. Okay. All right. Anything else about the
7 waving of the evidentiary hearing that you wish to
8 bring to the court's attention?

9 A. No, sir.

10 Q. Anything about the waiving of the preliminary
11 hearing that you wish to bring to the court's
12 attention?

13 A. No, sir.

14 Q. Okay. Do you feel like the waiving of these two
15 separate hearings as you understand them, was
16 prejudicial to you?

17 A. Yes, sir.

18 Q. Why is that?

19 A. Because if I had to wait until my trial date to
20 find out that there was another person who was
21 actually committed a crime or who they didn't
22 understand who it was, then he needs to be the one
23 sitting in prison, not me.

24 Q. All right. You mentioned that there were two
25 statements that were against you in a common scheme

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1 or plan, something along those lines, that's our
2 discussion earlier ---

3 A. Yes, sir.

4 Q. --- and last week? Tell me about these two
5 separate statements that you, I believe -- well,
6 maybe you can help me on this. You're saying that
7 there were two statements that were entered into
8 evidence were used at your trial that you didn't know
9 about, correct?

10 A. Yes, sir.

11 Q. Was it one or two?

12 A. Just one.

13 Q. Okay. What was that statement that you
14 understand it to be? Or was?

15 A. Well, it was, it was pretty much the same
16 kidnapping allegations, but I didn't know anything
17 about this statement until I went to trial after I
18 picked my jury. I didn't know anything about it
19 until my public defender, at the time, stated that
20 the solicitor is gonna try to bring in another
21 statement to use under Rule 404(b) which common
22 scheme or plan.

23 Q. Okay. And you didn't know anything about that
24 before the
25 trial?

1 A. No, sir.

2 Q. Okay. Was it in your discovery?

3 A. No, sir.

4 Q. Okay. Did you review your discovery with your
5 attorney?

6 A. Yes, sir.

7 Q. Okay. What -- well, then what was -- why was it
8 not brought up at that time, I guess?

9 A. I have no idea. When I first saw my public
10 defender in the county and she showed me my motion of
11 discovery, she stated this is what I was going up
12 against in trial. I said, okay, I'm ready to fight
13 whatever it is. It was just one statement and then
14 it had a big x under the rest of the paperwork where
15 it says, like continue, but there was nothing else,
16 but one statement.

17 Q. Okay. And who was your attorney -- just to be
18 specific, who was your attorney at your trial?

19 A. Christie Wise.

20 Q. Okay. Christie Wise. Was she an independent
21 attorney or was she with the public defender's
22 office?

23 A. She was with the public defender office.

24 Q. All right. Anything else about this statement
25 that you feel like the court needs to be aware of

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1 today?

2 A. No, sir.

3 Q. All right. In 10(b), you mentioned that the
4 court lacked judicial power or jurisdiction in this
5 matter, what do you mean by that? Or not in today's
6 hearing, but in your trial or your hearing date?

7 A. Yes, sir. I was arrested by Darlington County
8 and during the time I sat in the county waiting on my
9 warrant, Darlington County said that they have no
10 idea why I was in Darlington County if they stated
11 that a crime happened in Florence County. But yet
12 there is no crime scene ever found or any evidence to
13 show them I ever committed a crime or was around any
14 of these alleged crimes scenes.

15 Q. Okay. When you said they said they wondered why
16 you were in Darlington County, who said that?

17 A. The officer who came and arrested me for my
18 house.

19 Q. Okay. Well, did they ever give you a reason why
20 you were in Darlington County?

21 A. They just said I'm waiting on warrants.

22 Q. Okay. Who said that?

23 A. The officer that arrested me.

24 Q. Okay. Did you ever talk with your attorney
25 about that, why you were being tried and the case was

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1 in Darlington as opposed to Florence County?

2 A. Yeah, we, we spoke about it, but like she said it
3 was just a statement so she didn't really think it
4 really held any leverage.

5 Q. Well, I guess what I'm getting at is if you're
6 saying that the crime scene was allegedly not in
7 Darlington, did you ever go over with your attorney
8 why you were being tried in, you know, in Darlington
9 as opposed to Florence County?

10 A. No, sir.

11 Q. Okay. Did they ever bring up the jurisdictional
12 issue to you?

13 A. No, sir.

14 Q. Okay. And you feel like they should have?

15 A. Yes, sir.

16 Q. Okay. Why do you feel like they should have?

17 A. Because if you say that I committed a crime in
18 county which is not true, but then you say I turned
19 around and committed a crime in this county, then
20 somebody's off balance somewhere because I can't be
21 in two places at one time. So, obviously, it wasn't
22 me.

23 Q. Anything else about that you feel like needs to
24 be brought to the court's attention?

25 A. No, sir.

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1 Q. In 11(a) which I think relates perhaps back to 10
2 a little bit in our discussions, but you said, could
3 you read -- well, I got it, "counsel did not
4 investigate fingerprint, it was not in discovery."
5 So we're touching base on this fingerprint. You
6 mentioned it to the court earlier so, you know, let's
7 try not to be too repetitive here. But are you
8 saying -- you're saying -- you said earlier there was
9 a fingerprint that was a potential other person in
10 this matter, correct?

11 A. Yes, sir.

12 Q. And that they -- that your attorney never
13 investigate it, correct?

14 A. Yes, sir.

15 Q. Okay. I mean, and you did not -- and when did
16 you find out about it?

17 A. The second day of my trial.

18 Q. Okay. So in terms of that fingerprint, there was
19 no investigation, no private investigator so to
20 speak, ever looked into that second fingerprint?

21 A. No, sir.

22 Q. And did your attorney ever go into it with you in
23 depth?

24 A. No, sir.

25 Q. Okay. All right. Do you know why it was not in

1 discovery, in your discovery before trial?

2 A. No, sir. This is my first time ever hearing about
3 it at trial and I kind of like was looking like why
4 wasn't that in my motion of discovery.

5 Q. Do you feel like that was prejudicial to you?

6 A. Yes, sir.

7 Q. Do you think your attorney performed inadequately
8 in getting that information to you?

9 A. Yes, sir.

10 Q. Do you feel like that's why you are where you are
11 now?

12 A. Yes, sir.

13 Q. Okay. Anything else about the fingerprint that
14 you wish to bring to the court's attention?

15 A. No, sir.

16 Q. You mentioned something about a Brady violation
17 with me earlier, anything on that?

18 A. Just that I believe, personally, if that
19 fingerprint would have been enclosed in my motion of
20 discovery, then I would've been able to prepare
21 myself more for what I was going against at trial.
22 But me not even knowing about that what other
23 statement that, you know what I'm saying, it kind of
24 put me like a blind 'cause I didn't know what I was
25 walking into.

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1 Q. All right. Anything else -- well, let's go to
2 11(b), okay. The kidnapping does not have -- okay,
3 and I'm trying to read your print here a little bit,
4 I'm getting a little bit older. The kidnapping --
5 read 11(b) to me please.

6 A. Kidnapping indictment does not have the knowing
7 element and counsel did not object.

8 Q. Okay. And you and I went over this earlier,
9 correct?

10 A. Yes, sir.

11 Q. Okay. What does that mean?

12 A. It means if someone alleged they were kidnapped
13 and had their personal items taken from them, okay,
14 when they went to the hospital and went through all
15 this test and proper procedures, if you were a
16 kidnapped why wasn't the same phone that you stated I
17 took being placed in evidence, so they can prove some
18 way, some how that we were actually together or that
19 you were actually around me confined.

20 Q. Okay. Did your attorney ever move or request
21 that, that telephone -- and you're referring to the
22 telephone of the alleged victim, correct?

23 A. Yes, sir.

24 Q. Okay. Did your attorney ever move or request that
25 that telephone be put into evidence?

1 A. No, sir.

2 Q. Okay. Did your attorney ever request that that
3 telephone be, be seen by you?

4 A. No, sir.

5 Q. And you feel like that was prejudicial to you?

6 A. Yes, sir.

7 Q. Okay. So your attorney's performance was
8 inadequate in that regard?

9 A. Yes, sir.

10 Q. Okay. Anything else about that telephone or the
11 way it was handled that you'd like to bring to the
12 court's attention?

13 A. No, sir.

14 Q. Okay. And you also mentioned that there was an,
15 as you know we're not, we're just going over your
16 attorney's performance ---

17 A. Yes, sir.

18 Q. --- and how it was potentially prejudicial to
19 you, but I believe you mentioned that there was a
20 rape kit?

21 A. Yes, sir.

22 Q. Was any of that rape kit information -- a rape
23 kit on the alleged victim, correct?

24 A. Yes, sir.

25 Q. Around the time of the alleged incident, correct?

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1 A. Yes, sir.

2 Q. Was any of that ever put into evidence or....

3 A. Yes, sir.

4 Q. Okay. But you indicated that there was no issue
5 with it or what was ---

6 A. Yeah, they ---

7 Q. --- what was your attention on that?

8 A. They didn't find any evidence of me actually
9 committing a crime ever.

10 Q. You said they didn't?

11 A. Yes. No, sir.

12 Q. And whose they?

13 A. The officers, the doctors at the hospital, like,
14 they stated there was not nothing wrong with the
15 alleged victim.

16 Q. All right. All right. And also, you had a
17 previous relationship with the alleged victim, is
18 that correct?

19 A. Yes, sir.

20 Q. What was that?

21 A. It was toxic. I'd say that.

22 Q. All right. Was that ever brought out at trial?

23 A. Yes, sir.

24 Q. Okay. What did you -- what's your thoughts on
25 that, how it was presented by your counsel?

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1 A. I honestly believe that if I could've avoid all
2 the arguments then I wouldn't ---

3 Q. You also -- anything else about that?

4 A. No, sir.

5 Q. Okay. You also mentioned that you may need to
6 help spell this, but also continuing on 11(b) that
7 there was a potential other person who might have
8 some information about you or help, potentially
9 helpful to you, is that correct?

10 A. Yes, sir.

11 Q. And I believe that name was Tanzy?

12 A. Yes, sir.

13 Q. How do you spell that, do you know?

14 A. I guess, T-a-n-z-y.

15 Q. Okay. Now, who was Tanzy?

16 THE COURT: Excuse me, Mr. Fowler. You said that's
17 set forth in 11(b), 'cause it's not in my copy?

18 MR. FOWLER: Okay. Well, I think the connection
19 is that the person that we're referring to might have
20 had some involvement in the kidnapping, under the
21 alleged kidnapping ---

22 THE COURT: Well, I'm under this question, you
23 said you asked him to read it 'cause you couldn't,
24 but I'm or say who it was, but I'm just saying
25 there's nobody -- there's no name appears in 11(b).

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1 MR. FOWLER: Okay.

2 THE COURT: Is there -- is there an amended
3 application?

4 MR. FOWLER: Your Honor, no. At this point, these
5 were just some notes that he and I have discussed.

6 THE COURT: Well, that's fine, but I'm just saying
7 when you refer to something being in the application
8 and it's not there it's confusing for the record.

9 MR. FOWLER: Yes, sir. Strike that.

10 THE COURT: Okay.

11 MR. FOWLER: Strike that line of questioning.

12 Q. But there was a willingness, apparently, to maybe
13 go with you into alleviate any kidnapping charges, is
14 that correct?

15 A. Yes, sir.

16 Q. Okay. And what's -- how did your attorney
17 approach that at trial or in representation of you?

18 A. I mean, she really didn't. She just went off of
19 what she heard from the alleged victim and I never
20 heard anything else about it.

21 Q. Okay. Anything else about the kidnapping ---

22 A. No, sir.

23 Q. --- element? Okay. And then in 11(c), would
24 you read that to the court please?

25 A. "Counsel missed several objections a trial, did

1 not object to directed verdict being denied.

2 Q. Okay. Tell me a little bit about that?

3 A. Well, um, it was like certain things in my
4 transcript that I actually read after my trial. Like
5 for one, when Solicitor Holt asked Ms. Webb (ph), "is
6 it quite common to find other people's DNA on top of
7 people when they're involved in cases?" And she
8 said, "No, it's not uncommon. It's actually very
9 common that we find other people's DNA involved in
10 cases." So I was like, wow, that was something I
11 didn't know to begin with because how y'all don't
12 know who this other person is and yet sled doesn't
13 even know who this person is. So I felt like she
14 should've object to the fact of him giving, asking
15 her that question, I mean, y'all didn't even disclose
16 to me that there wasn't anybody else involved in my
17 case.

18 Q. And you contend that 11(c) had something to do
19 with evidentiary Rule 404(b), is that correct?

20 A. Yes, sir.

21 Q. How -- and that's -- what is 404(b) in your
22 understanding?

23 A. It's a common scheme or plan.

24 Q. Okay. And how does that relate to what we're
25 talking about now?

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1 A. Because this solicitor at the time used the
2 second statement in my trial that I didn't know
3 about. Said try to bring upon similarities and make
4 it seem like I've sat back and premeditated and
5 thought about committing a crime when that was not
6 true. And for the fact that I've never been
7 incarcerated ever in my life except for public
8 disorderly conduct. So how can you just go out and
9 say under Rule 404(b) you gonna use a statement that
10 there is no evidence on, just a written statement, it
11 stated that I committed a crime.

12 Q. Okay. Anything else about 11(c) that you wish to
13 bring to the courts attention?

14 A. No, sir.

15 Q. Okay. We've gone over 10 and 11 of your PCR
16 application, is that correct?

17 A. Yes, sir.

18 Q. Is there anything else about those two items that
19 you wish to bring to the court's attention?

20 A. No, sir.

21 Q. Okay. So overall, based on your testimony today,
22 how would you characterize your attorney's
23 performance?

24 A. How would I characterize it?

25 Q. Yes, sir.

1 A. Poorly.

2 Q. Okay. And do you feel like that's the reason why
3 you were sentenced to what you were sentenced to?

4 A. Yes, sir.

5 Q. Okay.

6 MR. FOWLER: No further, questions, Your Honor.

7 COURT REPORTER: That name of the sled agent, was
8 that Whalen, you said?

9 MR. COTTON: No, ma'am, Webb.

10 COURT REPORTER: Wells?

11 MR. COTTON: Webb.

12 COURT REPORTER: Webb?

13 MR. COTTON: Yes, ma'am.

14 COURT REPORTER: Thank you.

15 MR. COTTON: You welcome.

16 MR. FOWLER: And could you spell that for the
17 court reporter?

18 MR. COTTON: W-e-b-b.

19 MR. FOWLER: Thank you, Your Honor.

20 THE COURT: Ms. Marto?

21 MS. MARTO: Yes, Your Honor.

22 Cross-Examination by Ms. Marto:

23 Q. Morning, sir. So what evidence in this case were
24 you provided with before trial?

25 A. It was just a statement. The statement in my

D. Cotton- Cross-Examination by Ms. Marto

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1 motion for discovery. That's it.

2 Q. What was the statement?

3 A. It was a statement written by Ms. Cuzack (ph).

4 Q. Okay. And that was the victim that you went to
5 trial for, correct?

6 A. Yes, ma'am.

7 Q. Do you recall if you were indicted by a grand
8 jury in this case?

9 A. Yes, ma'am.

10 Q. Okay. So you stated that you thought that the
11 crime occurred in Florence not Darlington, correct?

12 A. Yes, ma'am. Going off what the officers in the
13 county jail told me.

14 Q. Okay. And did you bring this to counsel's
15 attention?

16 A. Yes, ma'am. I asked her -- she came to see me
17 when I first got the really understanding what was
18 going on, I asked Ms. Wise I said, if they stated
19 that I committed a crime in Darlington, but yet they
20 say it's not Darlington it's in Florence, then that's
21 two different counties and that means I would be
22 going to another county, 'cause I just want to make
23 sure I didn't get moved or anything because my family
24 is right there in Darlington County.

25 Q. So it's your testimony that no part of this crime

1 occurred in Darlington County?

2 A. No, ma'am.

3 Q. Do you recall where the victim lived?

4 A. No, ma'am.

5 Q. So the night of the incident was the first time
6 you met the victim in person, correct?

7 A. No, ma'am.

8 Q. No, you had met her before?

9 A. Yes, ma'am.

10 Q. Okay. And so what is your testimony concerning
11 the DNA evidence, are you saying that it's not your
12 DNA evidence on the pants or ---

13 A. All I'm saying is how the solicitor tried to form
14 it and make it seem like I was just all around, I
15 would have did something -- what I was stating is
16 there was a time when me and this alleged person were
17 together and then we weren't and that was a week
18 before all this even co-inspired. So what I was
19 stating is I know how my fingerprint got on, but I
20 do. But if there's somebody else's fingerprint on
21 top of mine who actually committed the actual crime
22 then they should be one sitting here.

23 Q. So you're saying somebody else committed the
24 crime?

25 A. That's what I'm -- that's what it looks like to

D. Cotton- Cross-Examination by Ms. Marto

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1 me.

2 Q. Okay. But the DNA evidence that came out at trial
3 stated that it was your DNA, correct?

4 A. Yes, ma'am.

5 Q. And what was ---

6 A. A partial of my DNA plus somebody else's who they
7 didn't know who it belonged to.

8 Q. Okay. And that was on the button on her pants,
9 correct?

10 A. It was button, yes.

11 Q. And you testified at trial, correct?

12 A. Yes.

13 Q. And what was your testimony concerning the DNA
14 evidence at trial, do you recall?

15 A. No.

16 Q. Do you recall stating that it got there because
17 you gave her a hug?

18 A. Yes.

19 Q. Okay. So you testified to that, correct?

20 A. Yes.

21 Q. So you knew enough to prepare your testimony
22 concerning that point, correct?

23 A. Yes.

24 Q. Now, concerning the evidentiary hearing was that
25 a motion to suppress hearing, is that what you're

1 referring to?

2 A. No, ma'am.

3 Q. Okay. What was the evidentiary hearing supposed
4 to bring forward?

5 A. Just everything that they had against me and what
6 I was going against at trial.

7 Q. Okay. So basically, what you're requesting is
8 that your motion for discovery be fulfilled in a
9 hearing, is that correct? A. No. That's not what
10 I'm asking.

11 Q. Okay. But you're requesting a hearing before the
12 trial, correct?

13 A. Yes.

14 Q. Okay. And what difference do you think that would
15 have made?

16 A. It would have made a significant difference
17 because if there was somebody else's fingerprint that
18 came about after the fact that I've already been in
19 trial for two days and maybe if that fingerprint
20 would have been disclosed in my motion of discovery I
21 would have been better prepared on trying to find out
22 who is this person here. If I know I didn't commit
23 an actual crime then who is this person that maybe
24 committed the actual crime.

25 Q. Okay. So -- but again, your fingerprint was found

D. Cotton- Cross-Examination by Ms. Marto

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1 on the button of her jeans, correct?

2 A. Yes.

3 Q. Okay. And the statement you're referring to that
4 was the statement from the other victim that was used
5 as part of prior bad acts, correct?

6 A. Yes, ma'am.

7 Q. And you had no awareness of that whatsoever?

8 A. No, ma'am.

9 Q. Why do you think that the phone should have been
10 taken into evidence?

11 A. Because if somebody -- if someone allegedly
12 kidnaps you and you stated that they took your phone
13 from you -- during the statement you state that they
14 took your phone, why did the police when they came
15 in, saw you at the hospital, why didn't you give them
16 the phone to prove that you was, at least, something,
17 at least, something really happened to you.

18 Q. What would have proved, sir?

19 A. It would proved a lot because you can't say you
20 were kidnapped if you willingly got in a car with
21 somebody.

22 Q. And you're stating that the phone would have
23 shown that she willingly got in the car with you?

24 A. No. It would've showed that she was actually
25 allegedly kidnapped as she said if she was kidnapped

1 at all.

2 Q. I'm -- what I'm trying to figure out is how it
3 would have proven that she was kidnapped?

4 A. Because if you state someone who does something
5 to you, that's just hearsay. There's no probable
6 cause. If you say you were kidnapped and you go to
7 the hospital and you're talking to authorities and
8 you say, yeah, he took my phone. And don't think the
9 smartest thing would be to do is to prove that you
10 were actually kidnapped by giving them your phone and
11 to be taken into evidence so they can swipe for
12 fingerprints.

13 Q. Okay. And so when you're saying that the rape
14 kit said it wasn't you, what you're referring to is
15 that there was no match in terms of semen or saliva?

16 A. No, ma'am.

17 Q. And that came out at trial, correct?

18 A. Yes, ma'am.

19 Q. So your primary grievance is that you were not
20 aware of any of the evidence beyond the initial
21 statement from a victim, correct?

22 A. Yes, ma'am.

23 Q. Did you ask your attorney why there was no
24 evidence in this case?

25 A. Yes, ma'am.

D. Cotton- Redirect Examination by Mr. Fowler

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1 Q. What was her response?

2 A. Her responses was we were preparing for this
3 trial for a year and I felt like they should have
4 been, out of everything that's coming about during
5 the trial, it should have been in the county jail
6 when I found any of that out. But as she told me as
7 this close, she works with not just me but most
8 people and sometimes things get pushed back. Like I
9 said that should have been priority number one, me,
10 and having all this evidence brought forth in my
11 motion of discovery.

12 Q. Okay. So basically, she said that the case has
13 been pending for a while and she didn't know what
14 happened to the evidence, but she wanted to proceed
15 to trial with you anyway?

16 A. No, ma'am. That's not what I'm saying.

17 Q. Okay.

18 A. What I'm saying is I wasn't the only person Ms.
19 Wise was seeing in the county jail at that time.
20 There was like eight or nine of us on her agenda.
21 But what I was saying is I told her we when we first,
22 after the first three or four months like I'm trying
23 to figure out what's really going on. So as she
24 stated it's going to take time to really to get
25 everything and collaborate everything and to go with

1 what they have to help me with. So I was like, okay,
2 I respect that. I understand that, you know, I said
3 your plate is full. But I still think more could
4 have been done that really bring forth and shed light
5 on what was not true to begin with in motion of
6 discovery.

7 Q. So did you bring up to the judge at your trial
8 that you didn't feel like you had all the evidence in
9 the case?

10 A. It was brought up to him. He was brought up but
11 nothing ever came about it.

12 Q. Okay. But your counsel -- did you raise that or
13 did counsel ---

14 A. No, my counsel raised it. She raised it but it
15 was, the judge still allowed it. She objected.

16 Q. Okay.

17 MS. MARTO: No further question.

18 MR. FOWLER: If I may, Your Honor?

19 Redirect Examination by Mr. Fowler:

20 Q. You're saying based on what opposing counsel
21 mentioned is that your fingerprint or fingerprints,
22 whatever, could have been on her clothing or items
23 based on your and her previous relationship, correct?

24 A. Yes, sir.

25 Q. Okay. It didn't necessarily need to be at a, at

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1 the scene of the crime, so to speak, correct?

2 A. No, sir.

3 Q. Okay. You mentioned that she brought up the
4 phone, you're saying that the phone could have
5 answered a lot of questions about the alleged
6 victim's ---

7 A. Yes, sir.

8 Q. Let me finish the question just briefly, it could
9 have -- could have raised -- it could have answered a
10 lot of questions about the alleged victim's state of
11 mind at that time, correct?

12 A. Yes, sir.

13 Q. Okay. And that could have been helpful to you,
14 correct?

15 A. Yes, sir.

16 Q. Okay. And are you saying that there was a lack
17 of communication from the attorney to you based on
18 what Ms. Marto asked you?

19 A. Yes, sir. In certain parts. In certain -- in
20 certain aspects of it.

21 Q. How so?

22 A. Because there was times when I was supposed to
23 see Ms. Wise that she couldn't make it that day or
24 the next day so it would be like a day or two I'm
25 going without seeing her. So when she came it would

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1 be all in of what the solicitor had informing her to
2 let me know about taking a plea or copping out to a
3 plea and I wasn't doing that.

4 MR. FOWLER: No further questions, Your Honor.

5 THE COURT: You may step down.

6 MR. FOWLER: Your Honor, after speaking with my
7 client, we have no further witnesses.

8 THE COURT: Ms. Marto?

9 MS. MARTO: Yes, Your Honor, we would call Ms.
10 Christie Henderson to the stand.

11 THE CLERK: Do you swear or affirm the testimony
12 you give this court the truth, and nothing but the
13 truth so help you God?

14 MS. HENDERSON: I do.

15 CHRISTINE HENDERSON, first
16 being duly sworn, testified as follows:

17 Direct Examination by Ms. Marto:

18 Q. Good morning, ma'am.

19 A. Good morning.

20 Q. So you represented Mr. Cotton in his underlying
21 criminal proceedings, correct?

22 A. Yes, ma'am.

23 Q. And did you take over the case from its
24 inception?

25 A. I did.

C. Henderson- Direct Examination by Mr. Marto

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1 Q. Okay. So how many meetings did y'all roughly
2 have together?

3 A. Numerous. And by way of background, this case is
4 obviously very old. It's 2013, 2014. I reached out
5 to the public defender's office of the Fourth Circuit
6 requesting all of my records. Everything that I
7 received I do not believe was the full comprehensive
8 file. There were not the exact documentations and
9 records of my numerous jail visits with Mr. Cotton.
10 But I've met with him well into the double digits. I
11 met with his family on multiple occasions, they're
12 seated behind you. I met with this gentleman.

13 Q. Okay. And what substantively did y'all discuss
14 during those meetings?

15 A. Everything related to his case. Everything
16 related to his defense. By way of a little more
17 background, I was initially appointed on five charges
18 involving two separate victims, a Yasmin Cuzack (ph)
19 and a Minor [REDACTED] With one of those victims there
20 were three charges of lewd act on a minor charge, a
21 criminal sexual conduct in the first degree charge,
22 and a kidnapping charge. On the second victim there
23 was a kidnapping charge and criminal sexual conduct
24 charge. We ended up going to trial on only one of
25 these victims, Yasmin Cuzack (ph). There was also

1 lingering in the background two other alleged
2 victims. One had had charges -- one victim there
3 were charges that had been brought against Mr.
4 Cotton, I believe in 2011. That was a cousin. And
5 an other victim, Kaprina Pate (ph), was in 2010.
6 Charges had not been brought, but the State was
7 trying to use all four of those individuals to
8 establish, all three of those individuals to
9 establish Lyle prior bad acts.

10 Q. And were you aware of this before trial?

11 A. I was. And Mr. Cotton and I, as well as his
12 family, discussed that in detail on numerous times.
13 In fact, I have one note in the file that was
14 provided to me and I remember bits and pieces of this
15 meeting, meeting with his grandmother, he called her
16 mother, Ms. Connie Cotton and this was in February of
17 2013 where we discuss specifically the family
18 members.

19 Q. And concerning the evidence in this case, was
20 there any forensic evidence?

21 A. There was. There was a serology report. There
22 was DNA analysis that I recall off the top of my
23 head.

24 Q. Okay. Do you recall the fingerprint?

25 A. Yeah. And that's what I'm referring to when I say

C. Henderson- Direct Examination by Mr. Marto

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1 the DNA analysis. Yes, ma'am.

2 Q. And you obtain that before trial?

3 A. I can't remember the exact details, I just pulled
4 when I was listening to Mr. Cotton's testimony. The
5 date on the DNA report that was February 18, 2014. I
6 believe this trial began on the 23rd or 24th of 2014.
7 I do know that Solicitor, Assistance Solicitor Holt
8 and I had discussed these fingerprints that were
9 allegedly found, DNA swabs that were found, excuse
10 me, the DNA that was found on the alleged victim's
11 pants well in advance of receiving the report and I
12 know for a fact that I relayed that to Mr. Cotton.

13 Q. Do you recall if there was a preliminary hearing
14 in this case?

15 A. I do not recall. I do know I worked at the
16 public defender's office here in Darlington from 2012
17 to 2014. It was my rule of thumb to request
18 preliminary hearings on all major cases that I had,
19 especially jail cases as Mr. cotton's case was. The
20 chief public defender in the time, AC Michael
21 Stephens, probably around 2013, I really can't tell
22 as this case was so long ago or recall as this case
23 was so long ago, made it a general rule of thumb
24 within our office to waive all preliminary hearings
25 as I understood it. The solicitor's office was just

C. Henderson- Direct Examination by Mr. Marto

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1 direct indicting those cases that were dismissed at
2 preliminary hearings. And we, unfortunately, did
3 not have the resources or manpower to attend
4 preliminary hearings that were frankly futile.

5 Q. Okay. So it's your testimony that this was way
6 before the trial, correct?

7 A. Yes, ma'am.

8 Q. Okay. Do you recall any discussions about an
9 evidentiary hearing occurring?

10 A. I'm not sure what he's referring to regarding an
11 evidentiary hearing. We had extensive pre-trial
12 motions, a Lyle's motion that encompass a good, an
13 hour at most, an hour at the minimum, two hours, I
14 really can't recall, but we certainly went into the
15 evidence in detail pre-trial.

16 Q. Do you recall any evidence coming up at trial
17 that was a surprise to you?

18 A. No.

19 Q. And did you show Mr. Cotton all discovery you
20 obtained?

21 A. I did.

22 Q. Now, do you recall discussions about the victim's
23 cell phone?

24 A. Not off the top of my head, I do not. I've
25 reviewed the file. I've reviewed the information

C. Henderson- Direct Examination by Mr. Marto

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1 that was provided to me by the Fourth Circuit Public
2 Defender's Office. I did not.

3 Q. Okay. Do you have any reason to believe that it
4 would been helpful in establishing a defense?

5 A. No, I do not.

6 Q. Do you recall any discussions about the
7 jurisdiction being improper concerning whether it
8 took place in Florence versus Darlington?

9 A. Yes. That was discussed at length. Mr. Cotton
10 failed to disclose to the court that he was, it was
11 alleged that he committed an act at the Julia Movie
12 Theater against this alleged victim in Florence, then
13 drove back to Darlington County in a wooded splitted
14 area off of Turnpike Road, committed the offense that
15 we were on trial for. Myself as well as Mr. Rick
16 Jones, the deputy public defender at my office who
17 sat with me on this case and assisted and was very
18 well aware of this case, and I rode the alleged route
19 that was set forth in the incident report. There was
20 no jurisdictional issues.

21 Q. Okay. And did you communicate that to Mr.
22 Cotton?

23 A. Yes. Multiple times.

24 Q. And based upon the rape kit that was shown at
25 trial, do you recall what the findings of that were?

1 A. Yes. I do I believe Mr. Cotton simply trying to
2 re-litigate issues that were already brought up in
3 trial. I tried to hone in on the fact that there was
4 no seamen, there were no bodily fluids found as
5 indicated on that rape kit. The solicitor's
6 argument, the State's argument which, obviously,
7 prevailed was that that was because he wore a condom.

8 Q. Okay. And you called a witness from sled to
9 testify to that, correct?

10 A. I did. To my recollection. I don't want to miss
11 state anything.

12 Q. Is Mr. Cotton's testimony about what happened
13 consistent with what was brought out at trial?

14 A. When you say, up here today?

15 Q. Yes.

16 A. To my recollection no nor was it consistent with
17 my conversations and Mr. Jones's conversations.

18 Q. Okay.

19 A. When Mr. Jones was present with me, I can't speak
20 for him.

21 MS. MARTO: One moment, Your Honor. No further
22 questions.

23 MR. FOWLER: Your Honor, may I have just one
24 moment please.

25 Cross-Examination by Mr. Fowler:

C. Henderson- Cross-Examination by Mr. Fowler

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1 Q. You said there was a movie theater allegedly
2 involved in this or some kind of, he would be there,
3 something along those lines?

4 A. Yes, sir. So the allegations were that the
5 incident of which he was tried for involving victim
6 Yamis Cuzack (ph) in which he was charged with one
7 count of kidnapping and one count of criminal sexual
8 conduct in the first degree began in Darlington
9 County where he picked her up from her home. The
10 allegations were that they drove from Darlington
11 County to the Julia Movie Theater in Florence County.
12 There was a Kmart in that vicinity that they
13 allegedly went to, to purchase Valentine's Day gift.
14 There was some sort of forceful alleged sexual act on
15 his part, him and forcing Ms. Cuzack (ph) to give him
16 oral sex, is my recollection. The allegations were -
17 --

18 Q. Well, I guess, I get -- if I may, the question
19 was there, was there a movie theater involved, is
20 that correct?

21 A. In Florence County that they then left from and
22 drove back to Darlington County where the incident,
23 where Turnpike Road, the incident in which he was
24 tried.

25 Q. So there was a movie theater involved, correct?

1 A. Yes.

2 Q. Did you ever asked for any kind of video camera
3 evidence from the movie theater?

4 A. I was not able to find any of that and I argued
5 that in trial as well, why the State did not present
6 any surveillance video, trying to attack the
7 reasonable doubt that existed.

8 Q. Okay. You mentioned that you couldn't remember
9 the details on the fingerprint issue, is that
10 correct?

11 A. I could remember the details of the fingerprint
12 because Mr. Cotton and I had discussed it. I can't
13 remember the exact details of what was contained in
14 the report and the exact testimony in court.

15 Q. Okay. Were you aware that he and the alleged
16 victim were in a relationship before, not too long
17 before these acts allegedly happened?

18 A. I was. That was discussed extensively at trial by
19 my cross-examination of the alleged victim as well as
20 my direct examination of Mr. Cotton.

21 Q. Okay. In terms of the cell phone, so you did not
22 -- you did not ask the prosecution at that time for
23 the alleged victim's cell phone, is that correct?

24 A. I don't recall specifically ever asking for a
25 cell phone. I would ask for that evidence that I

C. Henderson- Cross-Examination by Mr. Fowler

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1 thought was relevant and necessary to his defense if
2 I did not have it.

3 Q. Well, wouldn't a cell phone be helpful in terms
4 of finding out, you know, text messages, videos
5 things like that from the victim?

6 A. It could or it could be incredibly harmful.

7 Q. Okay. But you don't know either way, correct?

8 A. Correct.

9 Q. Okay. Now, what about his arrest, was he ever
10 arrested for anything? I mean, when was he arrested
11 for this, you know, what he was charged with do you
12 know -- do you remember that situation?

13 A. Sure. He was arrested On February 13, 2013 for
14 the incident involving Ms. Yasmin Cuzack (ph) that
15 allegedly occurred on February 1, 2013. And during
16 that arrest he was also served to my recollection
17 with warrants involving a separate victim, an alleged
18 Ms. Minor [REDACTED] for an incident that occurred in
19 2013, excuse me, 2012, allegedly.

20 Q. All right. And as to the -- as to his statements
21 earlier today about a previous statement coming in,
22 that did not come in until the trial, the days of the
23 trial, is that correct?

24 A. Sir, I'm not sure I understand your question.

25 Q. Okay. Were you here for his testimony?

1 A. Yes.

2 Q. Okay. You heard that there was a previous
3 statement that was brought in only the week of trial,
4 is that correct?

5 A. Yes. That's what I understood to hear.

6 Q. Okay. And, is that correct, in your opinion?

7 A. To my recollection, no.. I can't recall as there
8 were numerous alleged victims that we were having to
9 deal with, with Mr. Cotton's case. But to my
10 recollection, all statements were received in advance
11 of trial and Mr. Cotton, Mr. Jones and myself
12 discussed in detail all statements and evidence
13 against him.

14 MR. FOWLER: If I may have a moment, Your Honor.
15 After speaking with my client, no further questions,
16 Your Honor.

17 MS. MARTO: No further questions, Your Honor.

18 MR. WISE: Thank you, judge.

19 MS. MARTO: No further witnesses, Your Honor,

20 THE COURT: Anything else to present?

21 MR. FOWLER: After consulting with my client, no,
22 sir.

23 THE COURT: Okay. I'll review it and issue an
24 order.

25 MS. MARTO: Thank you, Your Honor.

1 MR. FOWLER: Thank you, Your Honor.

2 THE COURT: Thank you.

3 (CONCLUSION OF HEARING HELD ON JULY 27, 2022)

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CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Fourth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Fourth Circuit Court for Darlington County, South Carolina, on the 27th day of July, 2022.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

Lisa S. Carter

Lisa S. Carter

Circuit Court Reporter

July 19, 2023

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

Damyon M. Cotton, #359012,
Applicant,

v.

State of South Carolina
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Case No. 2021-CP-16-0559

ORDER OF DISMISSAL

This matter comes before the Court by way of Applicant Damyon M. Cotton's July 13, 2021, application for post-conviction relief. Respondent made its return and motion to dismiss on October 15, 2021. The Honorable Michael Holt, circuit court judge, denied the State's motion to dismiss following a motion hearing held on March 15, 2022. An evidentiary hearing was convened July 27, 2022, at the Darlington County Courthouse. Steven W. Fowler, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto, Esquire, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Christie Wise Henderson, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders or commitment of the Darlington County Clerk of Court. In July 2013, the Darlington County Grand Jury indicted Applicant for kidnapping (2013-CP-42-1438) and first degree criminal sexual conduct. (2013-GS-16-1439). Applicant was represented by Christie Wise

FILED
2023 MAR 21 A 10:06
SCOTT B. HUGGINS
CLERK OF COURT/C.D.
DARLINGTON COUNTY, S.C.

[Handwritten signature]

Henderson, Esquire and J. Richard Jones, Esquire, and Assistant Solicitors John W. Holt and Pattie Parker, of the Fourth Circuit Solicitor's Office, prosecuted the case. On February 24, 2014, Applicant proceeded to trial before the Honorable J. Michael Baxley, circuit court judge, and a jury. On February 26, 2014, Applicant was convicted, as indicted, of kidnapping and first degree criminal sexual conduct. For which, he was sentenced to a term of fifteen years' imprisonment for each of the offenses, to be served concurrently.

Applicant filed a timely appeal, and the appeal was perfected by Attorneys Lesley A. Firestone and Lara M. Caudy, Esquires. Applicant presented the following issues on appeal:

Did the trial court err in admitting evidence of a prior bad act involving a single, isolated incident with a female that was wholly unrelated to and not the subject of the offense.

The South Carolina Court of Appeals affirmed the conviction on March 3, 2017. *State v. Cotton*, Op. No. 2017-UP-356 (Ct. App. Filed September 6, 2017). Applicant petitioned for a rehearing, and the petition was denied on October 19, 2017.

Applicant petitioned the South Carolina Supreme Court for a writ of certiorari, which was granted on April 19, 2018. Applicant presented the following issues:

1. In light of *State v. Perez*, and in particular Judge Hearn's concurrence in that case, should this Court overrule *State v. Wallace* and apply the common scheme or plan exception equally to sexual and nonsexual offenses alike?
2. Did the Court of Appeals err in affirming the trial court's admission of a prior alleged bad act involving a single, isolated incident with a female that was wholly unrelated and not the subject of the charged offense, under the common scheme exception to Rule 404(b), SCRE?

The Supreme Court of South Carolina affirmed the conviction on June 13, 2019. *State v. Cotton*, Op. No. 27965 (Sup. Ct. filed May 6, 2020). The remittitur was sent on July 8, 2020.

Statement of Relevant Facts

The victim, age nineteen at the time of trial, testified that she first met Applicant through a "chat line" over the phone.¹ (App. 10-11). After exchanging numbers on the chat line, the victim and Applicant talked on the phone and ultimately arranged to go to the movies together on February 1, 2013. (App. 11-12). Applicant picked the victim up around 6:30 pm, but when they arrived at the movie theater, Applicant "didn't want to go in" and instead tried to force the victim's head onto his penis. (App. 12; 166-167). After the victim refused to provide oral sex, Applicant then drove the victim to K-Mart to look for Valentine's Day gifts. (App. 13). Upon arrival, Applicant decided he did not want to go inside and instead again attempted to make the victim perform oral sex. (App. 13). He then tried to give the victim cash to go buy something from the store, but the victim threw the money back at Applicant. (App. 13). The victim subsequently asked Applicant to take her home. (App. 14). Applicant refused and instead took the victim's phone and drove her out to Turnpike Road to a wooded area. (App. 14). Applicant told the victim that she "been telling him a long time" that she was going to "give him some" and "now is the time." (App. 14). He also threatened to "take a gun out" if the victim did not cooperate. (App. 20).

At that point Applicant leaned over and tried to take off the victim's pants. (App. 15-16). When he was unable to do so, he exited the car, went around, and opened the passenger side door, and dragged the victim out of the car. (App. 16-17). The victim told Applicant she did not want to have sex but Applicant told her she had to do it since it was time. (App. 17). To dissuade Applicant, the victim told him she was pregnant and that she had herpes. (App. 18). Applicant

¹ The victim subsequently explained that although she initially met Applicant over the chat line, she saw him in person one time at a friend named Tanzy's house. (App. 21-22; 132-133).



said "we'll fix that," put on a condom, and vaginally penetrated the victim. When Applicant was finished, he threw the condom in the woods and gave the victim back her clothes. (App. 18). Applicant and the victim, who was crying, got back in the car and Applicant began apologizing, saying he loved the victim, and asking her not to call the police. (App. 18-19). He returned the victim's phone to her when they got on Highway 52. (App. 162). Applicant then dropped the victim off at home. The victim walked the long way around the car so she could memorize Applicant license plate number. As soon as she walked in the house, she ran to her mother and told her she had been raped. (App. 19).

The victim's mother testified she was watching television on the evening in question when the victim, looking disheveled, came in the house and immediately told her she had been raped. (App. 194-195). The victim's mother noticed the victim's jeans were not buttoned when she came inside and testified that these jeans had not been broken when the victim left the house. (App. 195). The victim's mother took the victim to the hospital immediately, where a nurse performed a rape kit. (App. 196). Although the victim had some difficulty communicating,² the victim told the nurse exactly what happened with a good bit of detail. (App. 241-242; 245-246). The nurse also collected the victim's clothing, including her jeans, and took swabs from the victim. (App. 243).

Police officers from Florence and Darlington counties responded to the hospital and interviewed the victim. (App. 197-198). The victim provided a statement to police that was consistent with her trial testimony. (App. 165-68; 202-209; 213-226; 502-503). Using the license plate number the victim provided, police ultimately figured out Applicant's name and created a

² The victim suffered from a "learning disability" and "mental difficulties" which made it more difficult for her to communicate clearly. (App. 15; 135-137; 194; 242).



photo lineup. (App. 224-225). The victim picked Applicant out as the man who raped her. (App. 225). The evidence collected from the victim on the night of the rape was later submitted to SLED for analysis and Applicant's DNA was found on the buttonhole of the victim's jeans. (App. 249-260; 277-279).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Counsel did not investigate fingerprint, it was not in discovery
 - b. Counsel missed several objections at trial, did not object to direct verdict being denied
2. The Court lacked Judicial Power (Jurisdiction)
 - a. The Kidnapping indictment does not have the "knowing" element, and Counsel did not object.

At the PCR hearing, Applicant proceeded forward on the allegations raised in the original application and:

1. Ineffective assistance of counsel:
 - a. For waiving his evidentiary and preliminary hearings.
 - b. Failure to use rape kit at trial.
 - c. Failure to review discovery.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant testified that Counsel did not investigate a fingerprint and nothing regarding another fingerprint being found was anywhere in discovery. Applicant stated that he was unaware that a fingerprint existed as it was not disclosed in his motion. Applicant testified that he waived both his preliminary hearing and evidentiary hearing but believes he would have

wanted either one. He stated that the State mentioned two separate statements and they were used at trial in a way that he was not aware of. Applicant stated that Counsel brought up evidence not addressed in the motion for discovery while visiting him in jail.

Applicant testified that he believed the Court did not have judicial power because he was held in Darlington County, but the crime took place in Florence County. Applicant testified that he would have been more prepared at trial if he knew about the statement and fingerprint in advance. Applicant testified that he did not think the rape kit proved he committed a crime against the victim. Applicant testified to the fingerprint was on the button of the victim's pants and his DNA got on the victim's pants from a hug. Applicant stated that that was not the first night he met the victim. He stated that the rape kit does not show a match to him.

Counsel Testimony

Counsel testified she met with Applicant several times. Counsel testified she spoke with him about five charges. Counsel testified she met with Applicant's family member, Connie Cotton. Counsel stated the DNA analysis serology report showed the DNA on the victim's pants belonged to Applicant and he was told about this evidence. Counsel attested to filing extensive pre-trial motions and discussing the evidence in detail with Applicant before trial. She stated that she reviewed discovery with Applicant before trial. She stated that this evidence was not helpful to the defense.

Counsel discussed with Applicant that there were no jurisdictional issues, and this was discussed with Applicant before trial. Counsel concluded her testimony by stating she could gain no evidence proving that they were ever at the movie theatre.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Darlington County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, the direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by the South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

When an Applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the



range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”

Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Fingerprints

Applicant alleges ineffective assistance of counsel for “failure to investigate” the fingerprint evidence. *Strickland* makes clear that Defense counsel “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” 466 U.S. at 691. When highlighting failure to investigate as a ground for a larger ineffective assistance of counsel claim, judicial determination of this claim’s validity is evaluated for “reasonableness [under] all the circumstances” with “a heavy measure of deference to counsel’s judgments” applied. *Id.* That said, counsel is required to, at minimum, “interview potential witnesses and make an independent investigation of the facts and circumstances of the case”, *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quoting *Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), *aff’d*, 828 F.2d 670 (11th Cir.1987)), including aggressively re-examining all the government’s forensic evidence and conducting analyses of all other available forensic evidence.” *Id.* (quoting *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)).

Counsel is not obligated to “investigate lines of defense that he has chosen not to employ at trial.” *Strickland*, 466 U.S. at 682 (quoting *Washington v. Strickland*, 693 F.2d 1243, 1255 (5th Cir. 1982)). Further, “[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Counsel testified that she discussed this with Applicant prior to trial and that she did not think this was helpful at trial. Accordingly, Applicant has not met his burden of proof and relief is denied.

Jurisdiction

Applicant claims Counsel was ineffective for failure to bring up a lack of jurisdiction issue. Counsel credibly testified that this case was properly heard in Darlington and that this fact was brought up to Applicant before trial. Accordingly, relief is denied.

Objections

Applicant claims Counsel was ineffective for failure to object during the trial. Whether failure to object constitutes deficient performance generally hinges on whether a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where “counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel”).

Applicant has failed to identify anything Counsel specifically did not object to that he needed to object to to avoid a finding of deficiency. Additionally, there has been no showing of prejudice. Accordingly, relief is denied.

Object to Directed Verdict

Applicant claims Counsel was ineffective for failure to object to the directed verdict. This objection would have been fruitless, and no prejudice was inflicted as a result. Accordingly, relief is denied.

Failure to Review Discovery

Applicant claims Counsel was ineffective for failure to review discovery. Counsel credibly testified that she reviewed discovery with Applicant prior to trial. Accordingly, relief is denied.

Failure to Use Rape Kit

Applicant claims Counsel was ineffective for failure to present the rape kit at trial. Counsel credibly testified that she did not think the evidence discussed at the PCR hearing was helpful to the defense. This is a reasonable strategic reason for not presenting this and Counsel is not deficient as a result. This Court also declines to find what in the rape kit would have led to a different result at trial. Accordingly, relief is denied.

Waiver of Preliminary/Evidentiary Hearing

Applicant also claims Counsel was ineffective for waiving the preliminary and evidentiary hearings. In South Carolina, there is no constitutionally protected right to a preliminary hearing. *State v. Keenan*, 278 S.C. 361, 296 S.E.2d 676 (1982). Additionally, a preliminary hearing is not held if the defendant is indicted by a grand jury or waives presentment before the preliminary hearing occurs. Rule 2(b) SCRCrimP. Further, a preliminary hearing can be waived through “[p]lea negotiations and silence before the trial court regarding the desire for a preliminary hearing when entering a guilty plea. *O’Neil v. State*, 277 S.C. 230, 231, 285 S.E.2d 352, 353 (1981) (citing *Bonnettee v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981)).

This was waived by Applicant. Accordingly, relief is denied.

Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry’s written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991),

an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 16th day of March, 2023.


 J. DERHAM COLE
 Presiding Judge
 Fourth Judicial Circuit

_____, South Carolina

FILED
 2023 MAR 27 A 11:06
 SCOTT B. SUGGS
 CLERK OF COURT/R.O.D.
 DARLINGTON COUNTY, S.C.