NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A

POST CONVICTION RELIEF

RECEIVED

Jan 16 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

Daniel Coble, Circuit Court Judge

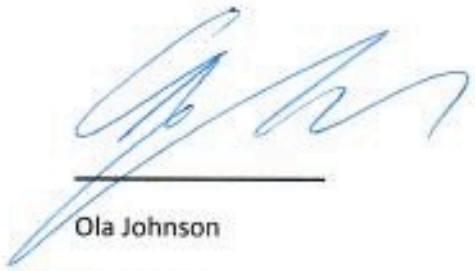
Case No. 2019-CP-32-00624

The State,.....Respondent,

David R. Brown,.....Appellant,

Notice of Appeal

David R. Brown appeals the order of the Honorable Daniel Coble, dated December 19th, 2023, which denied his application for Post-Conviction Relief with prejudice. Appellant received written notice of the order on December 20, 2023.



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FILED

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON 2024 JAN -2 PM 12:12	)	IN THE COURT OF COMMON PLEAS IN THE ELEVENTH JUDICIAL CIRCUIT
David Ray Brown, #166900, LISA M. COMER CLERK OF COURT LEXINGTON SC Applicant,	)	Case No.: 2019-CP-32-00624
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before this Court from a *pro se* application for post-conviction relief made by David Ray Brown filed on February 11, 2019. On February 26, 2019, the Clerk of Court initially appointed Overture Walker to represent the Applicant. The Respondent made a Return to the application on May 28, 2019. On September 30, 2019, the Court relieved Mr. Walker and appointed Ola Johnson to represent the Applicant.

The record before this Court shows that on March 29, 2021, Applicant, through counsel, filed a motion to authorize discovery, alleging that a court order authorizing Applicant to engage in discovery was needed because "Applicant is not in possession of the discovery from the trial counsel and other files necessary to support [his] case." *Notice of Motion and Motion to Authorize Discovery* at 1, *Brown v. State*, No. 19-CP-32-00624 (Lexington, S.C., Ct. Common Pleas, Mar. 29, 2021). On August 25, 2021, the State ("Respondent") served its return to Applicant's motion, arguing that the motion be denied. On April 11, 2022, the parties appeared before the Honorable George M. McFaddin, Jr., for a hearing on Applicant's motion, with Ola A. Johnson representing Applicant and Taylor Z. Smith of the South Carolina Attorney

General's Office representing Respondent. On October 5, 2022,[1] Judge McFaddin entered his order denying the Applicant's motion. The October 5, 2022 order reveals that at the hearing, Applicant argued that he needs court authorization to engage in discovery so that he can get the following: (1) a chain of custody form concerning a DNA sample collected by law enforcement officers from Applicant; (2) medical and/or other records for the victim in the underlying crime concerning her allegation that she had been raped by someone other than Applicant in the past; and (3) the victim's cell phone records.

On June 9, 2023, appointed counsel Ola Johnson made an amended application.

On October 24, 2023, an evidentiary hearing was held before this Court. The Applicant was present and represented by his appointed counsel Ola Johnson. The Respondent State of South Carolina was represented by Deputy Attorney General Donald J. Zelenka. Testimony was received from the Applicant and his trial counsel Benjamin Stitely.

After the hearing, the Court took the matter under advisement. After reviewing all records and evidence before the Court, this Court finds the 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. The Court finds as follows:

PROCEDURAL HISTORY

David Ray Brown (Applicant) is presently incarcerated in the South Carolina Department of Corrections pursuant to orders of the Lexington County Clerk of Court. During its January of 2016 term, the Lexington County Grand Jury indicted Applicant with four counts

[1] The Applicant's counsel at the outset of the October 24, 2023 PCR hearing brought this October 5, 2022, filed October 14, 2022, order denying his discovery request to this Court.

of criminal sexual conduct with a minor, second degree (2016-GS-32-00160, -00161, -00162, and -00163). The applicant was represented by Benjamin A. Stitely, Esquire, and Assistant Solicitors Rhonda W. Patterson and Shannon Davis prosecuted the case on behalf of the Eleventh Circuit Solicitor's Office. On January 19-21, 2016, Applicant proceeded to a jury trial before the Honorable R. Knox McMahon. He was convicted as indicted on all four counts. On January 25, 2016, the Judge McMahon sentenced Applicant to twenty years' imprisonment for three of the charges, with all three running concurrently, and an eight-year, consecutive sentence on the fourth, and with credit for time served for an aggregate sentence of twenty-eight (28) years imprisonment.

On January 29, 2016, Mr. Stitely filed a Notice of Appeal on behalf of Applicant. Chief Appellate Defender Robert M. Dudek perfected the appeal and filed an *Anders*[2] brief. In the *Anders* brief, the Applicant, through appellate counsel Dudek, raised the following issue:

> Whether the court erred by not admitting the sexual text messages the alleged victim was exchanging with other men at the same time she was communicating with appellant, since appellant had the right, under the rule of completeness, to introduce the text messages as a whole for context in support of his defense that the alleged victim used him as the "fall guy" for having sex with her to protect the other men?

State v. Brown, Anders Brief of Appellant, p. 1. The South Carolina Court of Appeals affirmed in an unpublished opinion. *State v. Brown*, 2018-UP-116 (2018). The Remittitur was sent on April 10, 2018.

ALLEGATIONS FOR RELIEF AS AMENDED

In his initial *pro se* Application for Post-Conviction Relief filed February 11, 2019, Applicant alleges that she is being held in custody unlawfully based on:

[2] *Anders v. California*, 386 U.S. 738 (1967).

1. Ineffective assistance of counsel
    a. Detrimental reliance
    b. Failed to advise
2. Due process violations
    a. Undue delay of documents
    b. Vindictive prosecution
3. Prosecutorial misconduct
    a. Perjury
    b. Fraud
4. Involuntary plea

The Applicant on June 9, 2023, made an amended application raising the following allegations as additional grounds regarding his claim of ineffective assistance of counsel as to Benjamin Stitely as follows:

> I. Prior to the trial, Applicant's counsel Benjamin Stitely, failed to explain the details of the Applicant's case.
>
> 2. Applicant's counsel. Benjamin Stitely, failed to retain a DNA expert to review the state's evidence and testify for the defense.
>
> 3. Applicant's counsel, Benjamin Stitely, failed to meet with the applicant a sufficient number of times to properly review the evidence and discuss this case with applicant.
>
> 4. Applicants counsel, Benjamin Stitely failed to object to the admission of cellular phone text message records based on inconsistencies between the records submitted and those contained within the Verizon records.
>
> 5. Applicant's counsel, Benjamin Stitely, failed to properly investigate the facts of this case.
>
> 6. Applican1's counsel, Benjamin Stitely failed to advise defendant to testify and failed to advise him of the importance of explaining the details of when he lost his phone.
>
> 7, Applicant's counsel, Benjamin Stitely, failed to request a jury charge that was more favorable to the defense.
>
> 8. Applicant's counsel, Benjamin Stitely failed to object to the DNA chain of custody.
>
> 9. Applicant's counsel, Benjamin Stitely failed to advise applicant of the potential negative impact his statements at sentencing could have on his appeal.

10. Applicant's counsel, Benjamin Stitely, failed to bring up the other male DNA that was found in the states report.

11. Applicant's counsel, Benjamin Stitely failed to object to the state's indictments listing multiple incident dates and ranges.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, and weighed the testimony accordingly. Before the Court are Applicant's records from the South Carolina Department of Corrections, the transcript of Applicant' s trial, the records of the Lexington County Clerk of Court regarding the subject convictions, Applicant' s appellate records, and the original and amended applications for post-conviction relief and the Respondent's Return. This Court has reviewed the records submitted to it by the parties, the legal arguments made by the attorneys, and the pleadings. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

Trial Summary of the Facts

This case arises from a series of incidents between a thirteen-year (13) old female victim and forty-one (41) year old David Ray Brown. Brown found the victim on Facebook where he posed as a younger male in chatting communication with her, under the profile name of Aaron Justin Fills Goodwin. This communication evolved to where he successfully persuaded her to send naked pictures of herself to him. He used this activity to hold something over her. This communication eventually led to four separate occasions of sexual intercourse between the 41-year-old male and child. Eventually after the last encounter, she finally advised someone at school after Brown indicated he would continue to blackmail her. This eventually led to the Applicant's arrest.

The then 16-year-old victim was the State's first witness at trial. Tr.p. 105. She stated she met Justin Goodwin on Facebook and eventually began texting with him every day. Tr.p. 105-107. She told Goodwin her age (13) and thought Goodwin was 17 or 18. Tr.p. 107. She described texting multiple nude pictures of herself to him. They decided to secretly meet in October in a field near a deer stand near her house at 9 pm. Tr.p. 109. Although it was difficult to see, she could tell it was not Justin from the picture that she was provided. Tr.p. 110. She claimed that she kept quiet because she did not know what to do and was scared. She identified the Applicant at trial as the person who claimed to be Justin. Tr.p. 110. The Applicant initially groped her, and she told him "No". He next threw her on the ground and raped her. He then told her that it would be OK. Tr.p. 110-111. She did not scream because she did not want to get in trouble. She confirmed that Applicant penetrated her vagina with his penis in that incident. They were together for around two hours. Tr.p. 112-113.

The victim stated she continued to talk with the Applicant because she liked the attention, but he became abusive when she did not do what he wanted. Tr.p. 112-113. He told her he loved her. However, she claimed that she did not want to meet again and made excuses.

However, she met with the Applicant a second time in November 2013 after she became 14 years old. Tr.p. 113-114. They met at the same spot and he "forced me into sex" again. Tr.p. 113-114. She might have told a friend Robert but did not tell her mother. She claimed she still texted with the Applicant and continued to send him nude pictures because he threated to expose the earlier ones if she did not do it. Tr.p. 115-116. She stated that she like the attention he gave her

stating that she was beautiful and perfect.[3] However, she claimed he threatened her by asserting if she did not sneak out, he would expose the pictures. Tr.p. 116.

She was scared for her college goals if the defendant released her pictures. She was afraid that if the college found out about people sending nude pictures, they probably would not accept her, and her college goal would be ruined. She claimed the defendant used her college goals against her after she told the defendant about her goals. Tr.p. 116.

She stated they met a third time at the same time and place on a Thursday. Tr.p. 117. She declared she again was forced it vaginal sex. Tr.p. 117-118.

She stated they met a fourth time at the same place on a Saturday going into a Sunday. Tr.p. 118. She stated she tried to make excuses, to avoid the meeting, but again he threatened to expose the pictures on Facebook. She stated by that time she was angry about the threats. At the fourth meeting, she again claimed she was forced into vaginal sex. Tr.p. 119. He said they only communicated a little after the fourth event because she told on him that next Monday and he got mad because he was blocked from her on Facebook. Tr.p. 119.

The victim told Ms. Elizabeth [Park-Floyd], her school mental health counselor that next day that she had been raped by "Justin," using the name she had gotten off Facebook. Tr.p. 120-121. She also told the school resource officer Michael Griggs. Officer Griggs used the victim's phone and called Applicant and told him to not call again. Tr.p. 122-123.

[3] The victim also described that the Applicant had bought her blue hoodie and pink sweatpants from Hollister, because she had told him it was her favorite store. Tr.p. 1321-122.

She next met with Lexington County Investigator Renee Strickland. She told her about being raped by Justin and that it was not the same person as the photograph in Facebook. Tr.p. 123. Although she was unable to identify the perpetrator during the initial meeting with Investigator Strickland, she asserted she was eventually able to do so. She stated because the real Facebook post of the perpetrator, "David the Guitarist," friended her in August or September and she blocked him because he was too old. Tr.p. 124. She thought it was a week or two after she got the request from "Justin." She also gave Investigator Strickland some panties that she had worn and her cellphone. Tr.p. 124-126. After the initial meeting with Investigator Strickland, she went to a doctor's office in Richland and a rape kit was done. Tr.p. 126.

The victim identified the photograph of David the Guitarist as the photograph she saw on Facebook. Tr.p. 127. After an in camera proceeding,[4] the victim identified the Facebook picture of Justin as the person she thought she was communicating with. She next identified the picture of David the Guitarist as the person she met at the deer stand four times. Tr.p. 146-148. She testified that the person in Exhibit 1 (David the Guitarist) was the person she met four times and had sex with. Tr.p. 147-148.

The victim, over objection, reviewed State Exhibit 9 which included a series of text messages purportedly between the victim's phone and the Applicant's telephone number. The

[4] In the in camera proceeding, counsel Stitely objected to the foundation of the Facebook pictures. He also urged that it should open the door to other inquiry of the victim as to why she had turned down other Facebook requests. However, Stitely stated he did not have a problem with her in-court identification, was concerned about the messages related to the posts. The trial court initially opined that it satisfied evidence Rule 901, Tr.p. 131-139. Counsel Stitely further objected to the admissibility of cellphone records through her. Tr.p. 141. Stitely complained that the extractions from her cellphone. Tr.p. 142-144. Judge McMahon found that the victim could testify about her memory of the texts, but the texts have to be authenticated in addition by Detective Phipps. Tr.p. 144-145. The trial court overruled the objections to the Facebook pictures. Tr.p. 145.

messages between them included compliments, among other matters. However, she pointed out messages on November 17, 2013 which indicated he had not deleted all the nude pictures because he stated some were too good. He responded to her he was upset because she had blocked him on Facebook, although she claimed her brother blocked a lot of people. She claimed the series of messages on that date were because she wanted him to delete the photographs that he threatened to post and how it could affect her. Tr.p.162-165.[5]

On cross-examination, counsel developed that the victim did not want her mother to know she was meeting someone. Tr.p. 188. She was advised by Justin that her best friend at the time was also Facebook friends with the alleged "Justin." Tr.p. 192. She said she made up an excuse about her brother blocking the account. Tr.p. 195. She stated after the second meeting, it did not surprise her that she was having a pleasant text conversation with someone else. Tr.p. 197. She stated that the blackmailing texts must have been deleted from her telephone. Tr.p. 199. She did delete the pictures because she did not want her brother to see them. Tr.p. 199-201. She said that the Applicant gave her a "pinky promise" that he would delete the photographs. Tr.p. 205.

Michael Griggs served as a school resource officer at Sandhills Middle School in Gaston, South Carolina. Tr.p. 208. Griggs remembered that Elizabeth Park Floyd was a mental health worker at the school. She informed him the minor had reported being in a sexual relationship. Tr.p. 211. Griggs told the minor not to delete any of the messages. Griggs said he texted the telephone number that the minor gave him, and he left a text message introducing himself as a police officer. He told the person in the text "not to disseminate the photographs at all," and not to contact the

[5] Prior to cross-examination, counsel Stitely referred to State Exhibit 9 relating to texts involving other persons who suggest their participation in sexual activity. Tr.p. 170-176, 178-183. The Court opined that properly framed questions about her demeanor and pleasant texts during the period would be appropriate, but not inferences related to sex with others. Tr.p. 185-186.

minor again. Tr.p. 214-215. He was unable to leave a voice message after he called the number because it had not been set up. Griggs said he started investigating the "Justin Feels Good Goodwin" Facebook account. Tr.p. 217. On cross examination Griggs admitted that the minor told him most of her text messages had already been deleted, and "I only saw a few." Tr.p. 223.

Former Lexington County Investigator Renee Strickland testified she was assigned the case on November 18, 2003. She spoke with the victim in the presence of her mother. Tr.p. 228. It was indicated to her that the incident happened at night in October and November of 2013 at her property. Tr.p. 229. She was told the victim was 13 at the time and had recently turned 14. She received the victim's telephone and submitted it for analysis. Tr.p. 230. Strickland looked at the cell phone and saw the texts that Officer Griggs had sent and a few messages but was aware the victim had mentioned deleting some messages. Tr.p. 231. The victim and her mother told her about the Facebook posts and showed her pictures of Justin and David the Guitarist from Facebook. Tr.p. 232-233. Investigator Strickland was able to later identify David the Guitarist as 41-year-old David Brown. Tr.p. 232-233. She learned who the carrier of the cellphones was and prepared a search warrant for the records initially from Sprint and then from Verizon. Tr.p. 234. She received a cell phone record report from Verizon. When asked about whether there were any numbers on the report that interested her, she indicated a certain number was on the report that was consistent with a number reported by Applicant's mother that she had learned from a booking report. Counsel Stitely objected, and the trial judge then gave a limiting instruction. Tr.p. 237-243. She noted this number appeared on the phone log numerous times. Investigator Strickland learned the number was from a Tracfone but was unable to get subscriber information.

Investigator Strickland met with the Applicant on January 18, 2014 and gave him his Miranda rights, although he was not under arrest at the time. Tr.p. 245-247. In the interview, Brown

told her that the identified number was his number, although he claimed to not have the telephone any longer. Tr.p. 247. She also received a DNA sample from him using a buccal swab kit. Tr.p. 247-248.She submitted the buccal swab to Lexington County Evidence for submission to SLED for analysis. Tr.p. 248-249. She identified the Applicant's buccal swab and three pairs of the victim's underwear she received from the minor when they met. State's Exhibits 14,15,16. She also identified photographs of the underwear she received. Tr.p. 250-251. She indicated that the items did not appear tampered with in any way. Tr.p. 251-252. Strickland stated she submitted the underwear to Evidence and requested they be submitted to SLED for analysis. The items were admitted as evidence without objection from the Applicant. Tr.p. 252-253.

During the interview, Investigation Strickland also found it interesting that the Applicant was wearing similar clothes to those describe by the minor, a grey colored sweater or sweatshirt, blue jeans and work boots. Tr.p. 249.

Investigator Strickland went to the victim's house, reviewed the scene, and located the deer stand. She also stated that she confirmed the birthdate of the Applicant. Tr.p. 254-255.

On cross-examination, counsel Stitely pointed out that the interviews with the minor were on November 22 and 23. She described the victim's demeanor on the first day as a flat affect, not conveying much emotion and that she did not seem scared, embarrassed, or disturbed. Tr.p. 256. She reported that Applicant came to her office voluntarily, voluntarily gave his DNA, and voluntarily gave his phone number. Tr.p. 256-259. She was advised by the Applicant that the number belonged to him at one time, that he no longer had the original phone, that he ported the number to a new phone, but had lost that second phone. Tr.p. 258-259. Investigator Strickland confirmed that the clothing Applicant wore was not uncommon for someone in construction but took notice of it because it was like what had been described by the victim. Tr.p. 259.

Temple Hart, the sexual assault nurse examiner (SANE) at Palmetto Heath Richland described her treatment of the minor victim on November 19, 2013, at 6:06 PM. Tr.p. 264-265. The victim indicated to her that she had been raped on three occasions on November 11,14 and 16. Tr.p. 267. The victim described it as penile penetration and that she thought it was someone she met on Facebook. Tr.p. 267. Nurse Hart then described her procedure during the examination, including the swabbing of the mouth, vagina and rectum, and checking for injuries. She did not find any injuries, which was not unexpected. Tr.p. 268-270. She collected the panties the victim had on that date. The swabs were admitted without objection after the procedure in sealing the items was developed. Tr.p. 273-276. Nurse Hart stated that she sealed the items and placed them in the refrigerator until law enforcement picked them up. Tr.p. 272. There was some fluid on the panties that she did not identify. Nurse Hart stated that they gave the victim treatment, including sexually transmitted infection testing and gave her medicine to prevent those diseases, as well as medication to prevent pregnancy and antibiotics. Plan B.

On cross-examination, she indicated in her notes that the assailant was Justin Goodwin, and he was a 16- to 18-year-old Caucasian. Tr.p. 279-280. Counsel further pointed out the victim gave three dates in November that she placed in her notes and confirmed the victim did not indicate an October date or she would have noted it. Tr.p.281. She again confirmed that there were no injuries such as bruising, redness, or swelling when she was examined. Tr.p. 281. She did not find it uncommon in rape cases, but there is no test that exists for rape or that indicates a sexual assault occurred, other than the patient's disclosure. Tr.p. 281. She stated that there is no way to look at a victim's genitals and decide if it was consensual or not. Tr.p. 282. She confirmed the treatment she received was routine based upon and individual asserting unprotected sexual assault and penile penetration. Tr.p. 283.

Senior Analyst Karen Milbrodt with Verizon Wireless testified as a record custodian and presented information from their business records for the telephone number ending in 3982 from July 1, 2013 through November 30, 2013. Tr.p. 287-290. She stated Exhibit 17 were based upon those records from a subpoena is a combination of two records of incoming and outgoing call detail and cell address location combined and redacted from the original. Tr.p. 290. State Exhibit 23 was the complete file and was entered without objection. Tr.p. 291.

The defense objected to State Exhibit 17. Counsel objected to the admission of State Exhibit 17 because it was a document prepared by someone other than Verizon. The trial court found that the document was from her records, State Exhibit 23. State Exhibit 17 was entered over objection by the trial court, citing *State v. Gulledge*, 326 S.C. 220, 487 S.E.2d 590 (1997). Tr.p. 293-294.

Milbrodt verified that subscriber information on TracFones is unavailable to Verizon. Tr.p. 295. The logs included the number the subscriber dialed to make the call, the date and time, whether it was incoming or outgoing, length of call, cell tower information. State Exhibit 25 accurately represented the calls extracted from Verizon records. Milbrodt reviewed the documents and specifically note calls made on September 20, 2013 to #8259, on October 3, 2013 to #8259 and on November 10, 2013 to# 2310. Tr.p. 298-300. She testified that the content of text messages can only be supplied by Verizon if requested within 3 to 5 days of transmission. Tr.p. 301.

On cross-examination, counsel developed that subscriber information of the Tracfone prepaid service belonged to the supplier and she did not know if they could supply the records or whether the number was ported. Tr.p. 302-304. She testified she was aware of the concept of "spoofing" where a number shows up showing a number rather than the actual number. Tr.p. 305. She said the information does not show who made or received the calls. Tr.p. 306.

Investigator Michael Phipps of the Forensic Services Department of the Lexington Sheriff's Department, over objection, was qualified as an expert in forensic computer examination and forensic cell phone examination and analysis. Tr.p. 311-313. He stated he was asked to examine the victim's cell phone and to look for contacts with # 3982. He performed an initial Cellebrite extraction on December 27, 2013. Tr.p. 314-319. They processed after the initial program was completed with the Cellebrite Physical Analyzer and created a spreadsheet, identify the contact lists, photos, videos, texts, chat screens, music, and third-party applications used for communicating. This is compiled and given back to the investigator on a disk. Tr.p. 319-320. Investigator Phipps stated a second extraction of the victim's phone was done on December 7, 2015 with a newer piece of hardware and updated software. Tr.p. 321-322. The number on the phone searched was #2310 and the targeted number from Verizon was #3982. They were able to find texts on the second dump that they were unable to find on the first dump. Tr.p. 321-322. Investigator Phipps described the map he made using the location data. Tr.p. 324-326. State Exhibit 26.

Investigator Phipps stated the information showed that #3982 dialed #8259 in September, October, and November 2013. Tr.p. 326. After a hearsay objection was made, Investigation Phipps testified about two addresses -one associated with the victim and the other associated with the suspect. Tr.p. 320-330. He referred to a November 5, 2013, entry which showed a call originated from #8982, called #2310 and hit cell tower number 515 which was close to the defendant's location. Tr.p. 331.On November 10, 2013, a call made at 2304 before midnight for 47 minutes and was hit on cell site 534 and in the direction of the victim. He opined that most of the text messages on the cellphone had been deleted and they only recovered partial texts. Tr.p.534 and cross-examination of Investigator Phipps concerning the map he prepared (State Exhibit 26), he

confirmed there is not a guarantee that the phone is going to hit the cell tower closest to it. Tr.p. 224-225. He also confirmed that it depends on how busy a tower is, and it will find the next available tower. He admitted that the records showed the victim was texting multiple people during the time frame in the extraction from October to November. Tr.p. 337-338. He stated in the forensic version of Cellebrite that they used, they are unable to intentionally add something or take something off the cell phone. Tr.p. 338-339. He stated in this case 99% of the material was deleted to start with and then over-written. He stated that there would be holes and missing pieces throughout the recovery. Tr.p. 339. He stated that they found images in the first extraction but did not have the data with him in court and it was on his forensic examination computer. Tr.p. 340.

On re-direct, Investigator Phipps stated he was sure he looked at the photos after the first extraction. He stated he knew if he saw any photos that would have applied to this case, he would have reported it in 2013. He did not have any recollection of giving the prosecution information about any photographs being applicable to the case. Tr.p. 341.

The trial judge, out of the jury's presence, inquired of the prosecution about the December 2013 report and photographs. Assistant Solicitor Patterson reported there were photographs, but no photographs of naked pictures of what she described she sent to "Justin." Tr.p. 342. Counsel Stitely indicated he was just inquiring because he never received any pictures in discovery. Stitely stated he was not making a Rule 5 violation motion. Tr.p. 342-343. Judge McMahon then confirmed that there were no exculpatory photographs under Brady. Tr.p. 342-343.

Paul Meeh, a SLED Forensic Scientist was qualified as an expert in DNA Analysis and statistical comparison field. Tr.p. 345-347. Counsel Stitely objected to the testimony because someone else at SLED made the cuttings on the specimens he tested. Tr.p. 351. He stated in his conversations with the solicitor before trial that he indicated to them he did not need the chain of

custody who transferred the items to SLED from Lexington County. Tr.p. 352. He was concerned and initially wanted to hear from the individuals who could state where the items, like 4.1, came from. Tr.p. 352. The Assistant Solicitor, Shannon Davis, indicated that Mr. Meeh would testify that he will use his report as a basis for his opinion and that he does have knowledge of the items. Tr.p. 353.

The trial court held an *in camera* hearing on this issue. Analyst Meeh testified about the manner the items were numbered from the parent item in the container to the cuttings including the parent number. For example, in the pouch identified as #5 would have item 5.1 and any hair or debris would be 5.1.1 or 5.1.2. Tr.p. 353-354. This explanation satisfied the defense. Tr.p. 354-355.

Analyst Meeh testified that he received the items including the SANE kit, the buccal swab from Brown, the victim's buccal swab, the cuttings from green panties 4.1, debris of 3 hairs from item 4 and a cutting from other panties as item 5.1. Tr.p. 356. He was also able to get DNA profiles from the buccal swabs from the victim and Brown. Tr.p. 362-363.

As to item 4.1 there had been semen indicated. Tr.p. 365. He attempted an STR DNA Profiling and differential extraction on item 4.1. He was unable to initially get a clean male profile from the regular STR SNA type. He then moved to Y-Typing which is super sensitive because it only works on the male profiles. Tr.p. 366, 369. This was done after resolving that there were appropriate steps taken to avoid contamination. Tr.p. 365-66. He stated he was able to identify a Y profile on the victim's underwear, item 4.1. Tr.p. 369. The Y STR DNA profile of a major contributor to the mixture matches the Y STR DNA profile of David Ray Brown. Tr.p. 370- 376. He described the difference between a major contributor and a minor contributor. He stated the Y on 4.1 is a mixture of two individuals. Tr.p. 371. He opined this did not come from a random

encounter. Tr.p. 375. It was located in the crotch of her underwear. Tr.p. 375. The actual result of probability of randomly selecting an unrelated male having the Y STR DNA profile matching the major contributor is 1 in 240. He stated that a male relative would match, but more than 99% of the world's population would be excluded. Tr.p. 375.

Concerning the other underwear, item 5.1, he found that the Y STR Profile was partial and matched the Y STR profile of the Applicant. Tr.p. 377.As to this profile result it was 1 in 210 match to the Applicant or male relatives Y STR Profile. This item was still 99% exclusion of the population. Tr.p. 377-378. He noted that the victim's DNA profile and profiles from 4.1 and 5.1 were a definite match. In addition, the items matched the victim's STR Profile in a 1 in 206 sextillion chance of a match. He concluded to a reasonable degree of scientific certainty that items 4.1 and 5.1 included the DNA of the Applicant and the victim. Tr.p. 378-379, 386.

On cross-examination, Meeh described the fact that they were testing a simple length of a short random repeat (STR). He further noted the concept of allele frequency or allele distribution. Tr.p. 381. He noted the difference in the certainty he had on the victim's DNA probabilities and the Applicant's potential DNA on the items He described the limitations of an unrelated individuals and how they compute in 4 or 5 categories to take into account interbreeding. He suggested that the statistics he reported were the most conservative. Tr.p. 384. He confirmed the DNA number does not help if it was a father or a son or paternal brother's son would be difficult. He stated that his "fairly certain" response was based upon the underwear and location on 4.1 and the 5.1 was from underwear she reported wore a week later that was collected by the SANE nurse. However, he was not able to put a time with any certainty when the DNA was placed on the specimen. Tr. p. 384-385.

A general motion for a directed verdict was made and denied. In response, the State urged that they had sufficient evidence to support the crime including the dates of birth of the victim and defendant, the cell phone and text records that the Applicant identified as his cell phone number and the DNA evidence involving the Y STR match. Tr.p. 387-88. Judge Newman denied the motion.

The trial court next inquired of the Applicant concerning his right to testify. Tr.p. 390-396. The Applicant indicated to Judge Newman that he made the decision to not testify. Tr.p. 396. Judge Newman concluded although Applicant only had an 8th grade education that his decision to not testify was freely and voluntary and intelligently made. Tr.p. 396.

Judge Newman further learned that the defense did not intend to put up evidence in his defense. Tr.p. 397, 399-400.

Ineffective Assistance of Trial Counsel

Applicant' s allegations of ineffective assistance of trial counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "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*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel' s performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386

S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney' s performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When 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 v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109– 10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel' s performance need not be optimal to be reasonable.").

Second, counsel's deficient performance must have prejudiced Applicant such 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, 386 S.E.2d at 625. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "This does not require a showing that counsel' s actions 'more likely than not altered the outcome,' but the difference between *Strickland*' s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington*, 562 U.S. at 111– 12

(quoting *Strickland*, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371–72 (4th Cir. 2015) (*quoting Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

In some cases, overwhelming evidence of guilt will preclude a finding of prejudice. "A reasonable probability of a different result does not exist when there is overwhelming evidence of guilt." *Hillerby v. State*, 431 S.C. 323, 333, 847 S.E.2d 500, 505 (Ct. App. 2020) (citing *Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991)). For evidence to be "overwhelming," such that it categorically precludes a finding of prejudice, the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of "a reasonable probability . . . the factfinder would have had a reasonable doubt" cannot possibly be met. *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018).

Amended Allegations One and Three - Failed to Explain Details in Applicant's Case Failed to Meet Sufficient Times Prior to Trial.

In his initial amended application, Brown contends that counsel Stitely failed to explain the details of his case prior to trial after he was retained. The Applicant testified at the hearing that he did not know much about the details of his case. He claimed that counsel Benjamin Stitely never met with him after he retained him. He also complained that Stitely he did not hire a private investigator or a DNA expert. The Applicant stated that he had an earlier lawyer, David Belding, who he thought was trying to pressure him into a guilty plea offer, after he learned about the DNA evidence match. However, he claimed he felt uncomfortable with Belding, so he decided to hire a lawyer right across from the courthouse who he thought would fight for him. Contrary to counsel

Stitely's testimony, he denied that he ever indicated he was in love with the victim to counsel. He claimed his statement to the trial judge at sentencing that admitted he knew the victim was an attempt to butter stuff up and was said because he had lost hope and was false.[6]

Counsel Stitely stated that he practiced criminal law for over 18 years. He indicated his prior practice had involved criminal sexual conduct cases. He felt he was experienced in DNA matters and cellphone data matters. He stated that the Applicant hired him after an earlier lawyer. when the case was set for a trial in September, and he got it continued. He met with the Applicant prior to trial but could not state the specific amount. Stitely testified that the Applicant was out on bond, so this was not a situation he was on the street before trial. Stitely stated Brown could have come into my office. Subsequently, Stitely stated he went to Assistant Solicitor Rhonda Patterson to seek a potential offer in the case. She indicated to him the possibility of non-violent and to not recommend any sentence, but Brown was not interested in any plea offer. The case was then tried two months later. Stitely indicated that in his discussions with the Applicant there was no defense in the case. The Applicant claimed to him that he and the victim had connected and that they were in love. Stitely explained to him that was not a lawful defense to criminal sexual conduct with a

[6] In the sentencing proceeding, the Applicant made a plea in mitigation. Tr.p. 508-513. In his statements to Judge Newman, he stated he had three or four profiles on Facebook. He claimed he was drinking "like a fish" at the time and used the Justin Goodwin profile to talk to people. He claimed he did not pay attention to the age of people he was commenting on. He stated when he started talking with the victim, it just clicked. Tr.p. 510.She had indicated to him in their discussions that she was harassed at school and called names and he advised her not to listen to them, claiming he was trying to help her. He admitted that they texted back and forth in the morning before she went to school. He claimed he was not stalking her. He felt she was being treated that same way he had been treated growing up. He admitted the pictures in Exhibit 2 that was on his profile was not him and he did not know who it was. He confirmed that State Exhibit 1 was him. Tr.p. 512. He admitted he sent a friend request to the victim in September under his profile (David the Guitarist) but claimed she had already friended him under Justin Goodwin before. He claimed the reason for meeting the victim social. He claimed, "but the intentions for what was said is untrue it was only for companionship that I wasn't getting." Tr.p. 512-513.

minor. He advised him it was a statutory problem concerning consent. Simply put, Stitely told him that you can't do that because it is not a lawful defense, when he was around 40 years old, and the victim was 13 or 14 years old.

This Court must find that the Applicant has failed in his burden of proof on this allegation based upon the credible testimony of counsel. There is no established "minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel." *United States v. Olson*, 846 F.2d 1103, 1108 (7th Cir.1988) (there is no constitutional minimum number of meetings between attorney and client and observes that an experienced attorney may get more out of a single meeting than a neophyte); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005); *Campbell v. Polk*, 447 F.3d 270, 279, n.2 (4th Cir. 2006) ("we cannot conclude that the fact that Campbell's counsel only met with him five times before trial made them ineffective."). "'[B]revity of consultation time between a defendant and his counsel, alone,' 'cannot support a claim of ineffective assistance of counsel.'" *Davis v. State*, 44 So. 3d 1118, 1130 (Ala. Crim. App. 2009) (*quoting Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984)); *White v. Godinez*, 301 F.3d 796, 800 (7th Cir. 2002) ("A brief consultation does not by itself establish that counsel's performance was inadequate."); *Chavez v. Pulley*, 623 F. Supp. 672, 685 (E.D. Cal. 1985) ("brevity of consultation time between a defendant and his counsel alone cannot support a claim of ineffective assistance of counsel," especially where the defendant "fails to allege what purpose further consultation with his attorney would have served and fails to demonstrate how further consultation with his attorney would have produced a different result").

The importance of counsel's communication with the Applicant concerning his acknowledgement that he was in love with the victim undermines his complaint about counsel's performance:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. . . .

Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984). See *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014); *Reeves v. State*, 415 S.C. 366, 376, 782 S.E.2d 747, 752 (Ct. App. 2015).

This Court must find that counsel Stitely adequately communicated with the Applicant prior to trial and provided the details of the case. This Court finds as a fact, based upon the credible evidence of counsel Stitely, that he was advised by Applicant that he was in love with the minor victim and that that he had engaged in the relationship. This information from the Applicant guides the nature and extent of further communication and actions by counsel. The Court further finds that the Applicant was aware of the DNA results that linked him with the victim's underwear and of the cellphone data that was consistent with his own communications with the victim. The Applicant has failed to show any piece of evidence he was not aware of prior to the trial since he essentially confirmed the existence of the crimes with his communications. The Court further rejects that Applicant's assertion that they met zero times after Stitely's retention. This Court finds that prior to the trial the Applicant was advised that his theory of a consensual relationship with the minor victim did not provide a defense to the charges of criminal sexual conduct with a minor.

He has failed to show deficient performance.

Similar, the Applicant has failed to show Sixth Amendment prejudice. There is no evidence or other matter presented to this Court that further discussions would have impacted on the trial in any matter. His allegations one and three must be dismissed.

DNA

Allegation Two – DNA Expert Not Retained.

In his second allegation, he complains that counsel failed to retain a DNA expert to assist in his defense. As noted above, SLED DNA Analyst Paul Meeh testified at trial about the specimens from two of the victim's underwear being consistent with the Applicant's Y-STR DNA Profile. Tr.p. Tr.p. 370-379, 386. The applicant testified that they did not talk about DNA evidence and thought that they could have kept out DNA evidence because there were other DNA possibilities. Counsel Stitely testified that he did not hire a DNA expert because his DNA was on DNA fragment from the victim's underwear, based upon his conversations with his client. He stated that he was familiar with DNA and fairly familiar with DNA evidence prior to the trial. He acknowledged there were a number of standards and that the odds in the statistical data were not significant.

This Court must find the failure to retain a DNA expert was not ineffective assistance of counsel. First, as the trial record conclusively shows in the above summary related to witness state witness Meeh, counsel Stitely revealed a sound understanding of the DNA evidence in this case, particularly since his client had earlier advised him about his admitted relationship with the victim so that his DNA on the items would have been a possibility. The Applicant and trial counsel were aware of the DNA results prior to trial and the Applicant indicated he was aware of the results before he retained Stitely to represent him. There is no evidence presented as to what a retained

DNA expert would have done to aid the defense. *See Dempsey v. State*, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) ("[C]ounsel's decision not to call an expert witness to rebut the state's expert witness was a legitimate trial strategy," (citing *McLaughlin v. State*, 352 S.C. 476, 575 S.E.2d 841 (2003))) The initial question is normally whether these alleged failures were deficient. Under *Strickland*, there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A decision "not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* This Court must conclude that counsel was not deficient in his decision not to retain an independent DNA expert. The decision by Stitely to not retain a DNA expert was a reasonable strategy since it would likely not have led to favorable results.

Assuming arguendo that the Applicant's counsel was deficient, this Court must find that Brown has also failed to show Sixth Amendment prejudice. Other than the Applicant's testimony, the Applicant did not call any witnesses to testify concerning the DNA evidence or need for a DNA expert. It is merely speculative that these allegedly favorable expert witnesses would have aided in his defense. *See Dempsey v. State*, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."); *see also Porter v. State*, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) ("Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR."); *Frasier v. State*, 306 S.C. 158, 160-61, 410 S.E.2d

572, 573 (1991) (finding trial counsel was not deficient in failing to procure an expert witness to challenge DNA evidence presented at trial where the record established that counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence); *Lorenzen v. State*, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (citing *Frasier v. State*, 306 S.C. 158, 410 S.E.2d 572 (1991)). As noted above on the deficiency prong, Sixth Amendment prejudice has not been shown by the prepared and vigorous cross-examination. *See also Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998); *Porter v. State*, 368 S.C. 378, 385–86, 629 S.E.2d 353, 357 (2006). This Court finds that the Applicant has failed to prove either deficient performance or prejudice under the Sixth Amendment related to this allegation. It must be dismissed.

Allegation 8 – Failed to Object to DNA Chain of Custody

In his eight amended allegation, he contends that counsel should have objected to the admission of evidence based upon an alleged lack of the chain of custody prior to going SLED Analyst Paul Meeh. As noted above the evidence, the initial evidence of the chain of custody of the underwear, DNA swabs, and DNA testing was presented through then Lexington County Investigator Renee Strickland and SLED Analyst Meeh. Strickland indicated the victim and her mother brought the underwear to her which she sealed, placed in Sheriff's Department evidence with directions to send it to SLED and it was sent to SLED. Tr.p. 124-126, 252-253. She personally took the DNA swabs from the Applicant and similarly sealed those and had them sent to SLED. Tr.p. 247-249. Nurse Temple Hart, the SANE nurse took swabs from the victim, as well as the panties the victim was wearing that date, sealed them and placed them in the refrigerator until law enforcement picked them up. Tr.p. 272-276. During SLED Analyst Meeh's testimony, counsel Stitely affirmed that he had advised the State that he was not challenging the chain of custody

concerning the transfer of items to SLED. Tr.p. 351-352. The trial court held a hearing at that point to resolve to counsel Stitely's satisfaction, his concerns about the chain. Tr.p. 354-355.

In the Applicant's PCR testimony, he testified that his counsel allegedly failed to discuss those issues with him, and he felt, in hindsight, that counsel could have kept the evidence out. He asserted that there was partial DNA evidence and speculated it could have come from anybody. Brown testified that in his review of the SLED report, other male evidence was found on the materials that suggested she was sexually active, and it could have removed the Rape Shield Statutes availability, which he also complained about. Counsel Stitely stated this case was interesting because the minor victim was having text conversations with other males. At that pretrial motion hearing, counsel speculated that the DNA being used against the Applicant could be one of the other individuals in the texts. Tr.p. 101. However, the trial court denied the admissibility of those text records under the Rape Shield Law. S.C. Code § 16-3-659.1. *See* Tr.p. 77-102. Counsel testified that he looked at the DNA chain of custody and was unable to show a break in custody. He noted the Applicant had volunteered to do the DNA swab and there was not going to be a DNA issue in the case.

The Applicant has failed to show that counsel was deficient. He has failed to show that there was an actual break in the chain of custody related to the DNA evidence specimens. The Applicant presented no evidence about a break in the chain that counsel should have pursued at trial. As noted, counsel did not object to portions of the chain witnesses prior to trial and was satisfied with Meeh's testimony addressing his concerns. The Applicant has failed to show that counsel's investigation into the chain was negligent, or that his decision related to the presentation was deficient.

Additionally, Sixth Amendment prejudice was not shown. As above, his speculation is insufficient to show counsel's intentional omission in failing to require the presentation of the complete chain would have resulted in Sixth Amendment prejudice. With the absence of evidence of a break in the chain, there is no reasonable probability the result of the proceeding would have been different. The Applicant has failed in his burden of proof. This allegation is denied and dismissed.

Allegation Ten - Failed to Bring Up Other Male DNA in the State's Report.

In his tenth allegation, the Applicant asserts that his counsel failed to present evidence of other males DNA that was in the State's DNA Report. Counsel stated that he re-read the Report, and he did challenge that it could have been another paternal male relative could not be excluded, as stated in the Report. Tr.p. 383-385. He also included these questions about relatives in his argument before the jury. Tr.p. 427-428. Analyst Meeh further indicated that also on item 4.1 was a second Y contributor. Unredacted State Exhibit 29 was introduced at trial which was the SLED DNA Report. Tr.p. 368.[7]

The Applicant's assertion must be denied. As counsel Stitely credibly testified, he did refer to the male relative information in the State's DNA report both during his examination and closing argument. His performance cannot be deemed deficient. Further, prejudice cannot be shown because the unredacted SLED Report was presented to the jury. Tr.p. 368. He failed in his burden of proof in showing either deficient performance or prejudice.

Allegation 4 – Failed to Object to Text Message Records

[7] State Exhibit 29 included the following language related to item 4.1: "Paternal male relatives of David Ray Brown may not be excluded as the contributor of this profile. Due to low level DNA, the partial Y-STR DNA profile developed from the minor contributor to this item is not suitable for interpretation."

In his fourth allegation, the Applicant contends that counsel failed to object to the admission cellular of text message records based upon the inconsistencies in the records admitted and those from Verizon. At the hearing, the Applicant complained that there was inconsistency inn the two extractions done by the State. He further suggested that counsel should have retained a cell phone expert. He also generally complained that there was a second extraction done before the trial. The Applicant further asserted that he did not have his cell phone at the time of the incident.[8] He said the phone number he used to have was used against him. He stated that although there was an allegation that he had communication with the victim, there was no investigation to support its admission of the texts by his lawyer. He further claimed that his counsel did not know that he lost his phone. The jury had asked a question about the phone that should have been answered in the testimony. ("When did David say he lost his phone" Tr.p. 450).[9] Further he claimed that there were a series of records that were not in the original extraction and Verizon records so he contended that everything should have been suppressed.

At the time of the PCR hearing, counsel Stitely did not recall that there was an issue about the lost cell phone. However, the trial testimony reveals that counsel made specific inquiry about the cell phones of the Applicant. Counsel further stated that he was more proficient than most

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[8] During the trial, counsel Stitely brought out in his cross-examination of Investigator Strickland that when he was interviewed by her that he no longer had the either that original phone that he acquired the telephone number or the second phone that was lost. Tr.p. 258-259. However, he did confirm that the identified telephone number was his number at one time. Tr.p. 258. See also, Investigator Strickland on direct discussing the Applicant indicating he did not have the original phone and that he had lost the second phone that he had ported the identified number. Tr.p. 247.

[9] In response to the question, the jury was replayed the testimony of Investigator Strickland's testimony after Judge Newman gave a cautionary instruction. Tr.p. 453-486. On direct examination, she indicated that he did not have the original and had lost the second phone that he had ported the number. Tr.p. 472. The second discussion concerning the lost phone is at Tr.p. 483-434.

lawyers in matters concerning cellphones. He did not see a defense to the use of the cellphone data connected with the phones. He confirmed that he did not hire a cell phone expert.

First, counsel initially objected to Exhibit 17 concerning cell phone records because it was different than her Verizon records in State Exhibit 23, but the objection was overruled. Tr.p. 293-294. A failed strategy does not constitute deficient performance. *People v. Kevorkian*, 248 Mich.App. 373, 414–415, 639 N.W.2d 291 (2001). As shown in the trial summary, there were two extractions of the victim's cell phone using different software versions of Cellebrite, including the most recent version just prior to the trial. Tr.p. 314-322. Investigator Phipps made a map using the cellphone cell tower data. Tr.p. 324-326. On cross-examination, counsel sought to limit the impact of the cell tower data by noting it is not as accurate as it may appear because of the ability to ping any tower if it is more available than the closest tower. Tr.p. 224-225.[10] Counsel was also able to bring out that a significant number of text messages had been deleted prior to the extractions. Tr.p. 339

[10] In 2020, after this trial, the South Carolina Court of Appeals in *State v. Warner*, 430 S.C. 76, 89, 842 S.E.2d 361, 367 (Ct. App. 2020), aff'd in part and remanded, 436 S.C. 395, 872 S.E.2d 638 (2022), affirmed the trial court's admission of cell site location information (CSLI) testimony, and joined the many other jurisdictions that have deemed CSLI reliable enough to pass the Rule 702 gate, citing e.g., *United States v. Hill*, 818 F.3d 289, 298 (7th Cir. 2016). The Applicant has failed to show the existence of any theory of excluding the testimony in 2015. The vast amount of case authority would not place reasonable counsel on notice of a deficient advocacy if they did not vigorously seek to keep out such evidence. *United States v. Graham*, 796 F.3d 332, 364 (4th Cir.2015) ("... a cell phone connects to the cell tower emitting the strongest signal, and that cell sites in urban areas have a two-mile maximum range of connectivity. He testified further that, aside from proximity, factors such as line of sight and volume of call traffic may affect the ability of a particular cell tower to connect to a phone, but in any case the phone must be located within two miles of any cell tower in the Baltimore area in order to connect to it.") *United States v. Ransfer*, 749 F.3d 914 (11th Cir.2014) (Custodian of records OK to talk about cell phone pinging to nearest tower. Id. at 937–938; "Detective Christy ... explained ... The cell phone will "ping" the nearest tower unless it is at capacity, in which case it will ping the next available tower. Accordingly, the cell phone tower records are an approximation of the phone's location at the time of the call." Id. at 931, n. 18). *United States v. Davis*, 785 F.3d 498, 501–02 (11th Cir.2015):

Further, counsel Stitely at the pretrial motion hearing on the State's rape shield statute motion urged that some of the texts in question with the defendant and other individuals may be relevant under the rule of completeness in light of the crosstalk occurring. Judge Newman deferred ruling until the actual presentation of evidence. Tr.p. 58-59. The defense counsel later urged the admission of text messages with Robert Aarddd and Dalton Harcy. See also Tr.p. 90-101. Judge Newman opined that the messages about sexual act and pregnancy test discussions. Tr.p. 101. [11] During the victim's testimony, the text messages she had from her cellphone were presented in Exhibit 9. In her testimony, she referred to a certain text made on November 17. Tr.p. 161-165.

Counsel Stitely made a motion to allow the admission of text messages involving another person, Dalton Marcy, which included sexual statements to the victim. Tr.p. 170-171. He urged to allow its introduction because it was particularly relevant to the time period the state had introduced with the specific text messages on the same hour and within 2 hours after an assault took place and that she was talking to another male about his penis. Tr.p. 171. He sought the opportunity to cross-examine her about those texts. Tr.p. 172-176, 178-185. Judge Newman, upon the defense motion, limited the admission of the texts to evidence that she was having pleasant conversations with a third party and demeanor evidence, but denied the admission of any evidence of sex or inferences of sex in those conversations. Tr.p. 186. Counsel made his limited inquiry about this "pleasant conversation" at Tr.p. 197, l. 1-16.

The Applicant has failed to show that his counsel was deficient. He apparently claims that because he claimed he lost his cellphone that should make the admission of messages related to the telephone number he admittedly owned inadmissible. This is a jury issue, not an issue of admissibility and goes to the weight of the evidence, not its admissibility. Particularly, other than

[11] This issue was raised in the Anders brief of the Appellant in the direct appeal.

his statements to Investigator Strickland, there was no evidence to support his claim of a lost phone presented to the jury. However, other than the Applicant testifying, there was not suggested how this information could have been addressed by counsel. Nevertheless, the jury twice heard the self-serving statements in which the Applicant had claimed the phone was lost during the testimony of Investigator Strickland and reheard it when it was replayed during the deliberations.

Similarly, like his assertion that a DNA expert should have been retained, his belated assertion that a cellphone expert should have been retained has not shown either deficient performance or prejudice. Defense counsel was aware that the Applicant had been communicating with the victim based upon his own discussions with him. The Applicant has not presented any evidence that either of the extractions were done in error or that the cell phone extraction and CSLI witness was improperly qualified. To the contrary, the record reveals that the extractions were done consistent with the standards at the time the case was tried in 2016. The Applicant has failed to present any basis to have challenged the extractions as a matter of law or fact.

The Applicant asserted during the hearing that his trial counsel was ineffective because he failed to call an expert on the matter of the cellphone and on the matter of the cellphone pings. Other than broadly asserting that trial counsel should have retained an expert on "cellphones" and cell towers or pings, the Applicant does not explain what the expert would have testified to, how it would have been beneficial to Applicant's case, and how it would have undercut the state's against him. (See generally id.).

Aside from his testimony and his trial counsel's testimony, Brown again did not offer any other witnesses to testify on his behalf at the PCR hearing. Therefore, it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense. *See Dempsey v. State*, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005); *Lorenzen v. State*, 376 S.C. 521, 530, 657 S.E.2d

771, 776–77 (2008).

In summary, counsel was not deficient as it related to cellphone and the admission of certain text messages.[12] He failed to present a legal reason to exclude the data at trial that counsel either did not consider or was unsuccessful in presenting. Similarly, he failed to meet his burden in showing Sixth Amendment prejudice where the state's case was overwhelming based upon the testimony of the victim, the corroborative nature of the identification, and the inculpatory evidence of the DNA and there is no reasonable probability that the evidence would have been excluded related to the cell phone extraction, cellphone messages and CSLI location evidence.

Allegation Five - Failed to Investigate Facts.

In his fifth amended allegation, the Applicant generally states, without any specification, that counsel Stitely failed to investigate facts. During the PCR hearing, the Applicant testified he did not have any investigation in his case and complained that his counsel did not hire a private investigator. The Court has addressed the claimed failures related to DNA, CSLI, and text messages related matters above. Other than those assertions, the Applicant fails to assert what "fact" counsel failed to investigate.

Counsel testified that he did not hire a private investigator in the case and asserted that he had only done so in very few situations. He claimed upon his review of the evidence, he saw no benefit in hiring an investigator for the facts. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691, 104 S. Ct. in

[12] The Applicant has to present a basis to exclude the text messages. This court, like the trial court, must find that the state made a sufficient showing of authentication. *See State v. Green*, 427 S.C. 223, 830 S.E.2d 711 (Ct. App. 2019), aff'd as modified, 432 S.C. 97, 851 S.E.2d 440 (2020) (messages on social media from defendant contained sufficient distinctive characteristics for authentication)

2066. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.*

Brown's trial counsel was aware of Brown's assertion to him that he was in love with the minor and acknowledged his involvement with her. "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.*

The Court must find his general complaint about an alleged lack of investigation must be denied. Further, Brown again did not offer any other witnesses to testify on his behalf at the PCR hearing about any missing fact or lead in the investigation, rather than merely pointing to the evidence that was introduced at trial that was unfavorable to him. Therefore, it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense. *See Dempsey v. State*, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005); *Lorenzen v. State*, 376 S.C. 521, 530, 657 S.E.2d 771, 776–77 (2008). He has failed to prove both prongs.

Alternately, as will more clearly be set out below, his admission of guilt within the plea in mitigation should foreclose his ability to have post-conviction relief. In the sentencing proceeding as earlier set out in allegation one, the Applicant made a plea in mitigation. Tr.p. 508-513. In his statements to Judge Newman, he implicitly admitted his improper involvement with the minor victim. Tr.p. 508-513. *See Whetsell v. State*, 276 S.C. 295, 277 S.E.2d 891 (1981); *but see Johnson v. Catoe*, 336 S.C. 354, 358, 520 S.E.2d 617, 619 (1999) (distinguishing *Whetsell* to its limited facts).

The South Carolina Supreme Court considered the effect of a post-verdict admission of guilt in *State v. Sroka*, 267 S.C. 664, 230 S.E.2d 816 (S.C.1976). In *Sroka*, the court considered the appeal of a defendant convicted of armed robbery, writing:

> We affirm because the guilt of the appellant is conclusively shown by the record and any alleged error could not have been prejudicial. Any doubt about the correctness of this conclusion is eliminated by the admission of appellant in open court, after conviction and during the pre-sentence inquiry by the trial judge, that he had participated in the robbery with a sawed-off shotgun. Further review of the record, therefore, is rendered unnecessary. *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 [(1971)]; *State v. Miller*, 266 S.C. 409, 223 S.E.2d 774 [(1976)].

Id. at 817. For this added reason, he failed in his burden of proof showing prejudice in trial counsel alleged failure to investigate.

Allegation 6 – Failed to Advise to Testify

In his sixth allegation, the Applicant generally contends that he failed to advise him to testify and explain the importance of explaining the details of when he lost the phone. He stated that he was going to testify at trial, but claimed his attorney told him that that it was best that he does not take the stand because everything looked good. The Applicant testified that, in hindsight, he should have testified because the jury asked a question during deliberation about when he lost his cellphone. Contrary to the testimony this Court found credible, counsel Stitely testified that his client had advised him, as stated above, about his involvement with the minor and his communications with the minor.

The Court inquired the Applicant about his right to testify. Tr.p. 390-397. The Applicant waived his right to testify. As noted above, subsequent to the verdict, the Applicant contemporaneously made inculpatory statements to the trial judge at sentencing which would have been inconsistent with his claims of innocence by conceding that he was Justin and had communications with the victim.

This Court must find, in light of the post-verdict statement to the Court that counsel was not deficient in his advice to not testify. Although the Applicant now suggests that he could have addressed their deliberation inquiry about the lost phone which evolved from his earlier statement

to Investigator Strickland, this Court must find more credible the admissions of guilt he made to counsel Stitely and his post-verdict admissions of actual communications and interests with the victim to the extent of almost falling in love with her (Tr.p. 510, l. 18-21), answering her calls to him and purchasing clothes for her. Tr.p. 510-511.

These comments immediately after trial (and after the inquiry by the jury about the phone) were consistent with the information he had provided counsel before trial. It almost contained an admission he was using the phone to communicate with her. Counsel was not deficient in advising the Applicant to testify based upon the version of guilt he was revealing to counsel at the time. As stated before, "[S]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). His claim that he made these comments only because he had lost hope and that they were false and would not have been said if he actually testified, is rejected by this Court as not credible. His allocution was consistent with his contemporaneous and initial comments to counsel and the suggestions that there was nothing wrong with his consensual relationship with the victim. He has failed to show deficient performance and prejudice under *Strickland*.

Allegation Seven – Failed to Request Favorable Jury Charge

In this allegation, the Applicant claims that counsel should have requested a jury charge that was more favorable to the defense. However, there was no specific jury charge suggested by the Applicant during the PCR hearing or in the amended application. The Applicant just indicated at the hearing in his testimony that he wanted a better charge but did not indicate what it was. If this arises from his claims to his counsel pretrial that his involvement with the victim was consensual and should not be crime, the suggestion for a consent defense was not available because the Applicant was 41 at the time and victim was 13 and 14 years old. See S.C. Code § 16-3-655

(B). Counsel could not be deficient in failing to request a charge that is not available as a matter of law.

The Court, however, must conclude that the Applicant failed in his burden of proof in presenting a particular jury charge that counsel should have requested. Failing to do so, the Court must find that the allegation must be denied.

Allegation 9 – Failed to Advise Applicant About the Negative Impact of His Statements at Sentencing.

In his ninth allegation, he contends that counsel was deficient in failing advise the Applicant about the negative impact of his statements at sentencing. Counsel stated that his general comments to his clients is to not say anything after the verdict. Counsel Stitely stated what he told Judge McMahon is what he told him which was the problem with their defense. The Applicant stated that he did acknowledge his involvement with the victim, but claimed now that it was false, and he was just trying to butter up the judge.

The right to allocution refers to the common law practice of the court "formally inquir[ing] of the defendant whether he had anything to say why sentence and judgment should not be pronounced." *State v. Phillips*, 215 S.C. 314, 54 S.E.2d 901 (1949); *State v. Trezevant*, 20 S.C. 363, (1884); see also BLACK'S LAW DICTIONARY 40 (5th Ed.1979) (defining "allocution" as "formality of court's inquiry of prisoner as to whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction"). *See also Bassett v. Commonwealth*, 222 Va. 844, 284 S.E.2d 844 (1981) (Allocution is the defendant's right to speak on his own behalf after the fact finder determines guilt but before the judge pronounces sentence). *See State v. Stokes*, 345 S.C. 368, 376, 548 S.E.2d 202, 206 (2001).

This Court finds that counsel was not deficient in his advice to the Applicant. The Applicant chose to tell the trial court what he had been telling counsel in his voluntary exchange with the

Court. His exchange with the judge satisfied the requirement for allocution. *State v. Phillips*, 215 S.C. 314, 54 S.E.2d 901 (1949) (noting that a lengthy conversation after plea and before sentence between the court and a defendant would meet the requirement for allocution). Similar, the Applicant failed to show prejudice that the result of the sentencing would have been different toa reasonable probability. On the four indictments, the Applicant was facing an aggregate sentence of 0-20 on each indictment for an aggregate potential sentence of 80 years. Judge Newman sentenced the Applicant to 20 years on each indictment concurrent. Sixth Amendment prejudice has not been shown. The Applicant has failed to meet his burden of proof under *Strickland*.

Allegation Eleven – Counsel Failed to Object to the State's Indictments

In the final allegation, the Applicant claims that counsel should have objected to the four indictments. He claims he was shown the indictment for the first time at the outset of the trial. He admitted that he was aware prior to trial that he was charged with incidents in October and November prior to the trial and receipt of the indictments. The record shows that he was indicted on January 19, 2016 for criminal sexual conduct with a minor second degree under S.C. Code §16-3-655((b)(1) (14 years of age or less) involving the same victim for separate dates: 2016-GS-32-00160 (on or about November 8, 2013); 2016-GS-32-00161 (on or about November 11, 2013); 2016-GS-32-00162 (on or about November 16, 2013); and 2016-GS-32-00163 (October 1-28, 2013).

Counsel Stitely stated that he reviewed the indictments and that they were written with specific dates. He testified that everything he received in the case he received from the State was provided to the Applicant upon their receipt. Counsel confirmed he had adequate knowledge about the specific dates and prepared to move forward.

The Applicant has failed to show deficient performance with the receipt of the indictments.

There was no assertion that a motion to quash the indictments was available since they were valid on their face and had adequate specificity. The Applicant has failed to prove Sixth Amendment prejudice. The ground is dismissed.

Pro Se Allegations in Original Application.

In his pro se application, the Applicant also asserted that there was a due process violation by an alleged delay in document delivery and an alleged vindictive prosecution. There was no evidence presented in the pleadings or evidence before this Court concerning his due process violation by the delayed delivery of the documents. The evidence concerning the indictments is presented in the above allegation. It does not present a Due Process violation where the Applicant and counsel were aware of the charges. The allegation is denied.

The Applicant also raises conclusory claims asserting "vindictive prosecution," "perjury" and "fraud" as prosecutorial misconduct. There was no evidence presented in any manner before this Court to support any of those specifications. The asserts are denied based upon lack of proof.

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 application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate

review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice; and

2. The Applicant be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 19 **day of** Dec, **2023.**

DANIEL COBLE
Presiding Judge
Eleventh Judicial Circuit

Richland, South Carolina