

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari to
Colleton County

Honorable Perry M. Buckner, Trial Judge
Honorable Edgar W. Dickson, First PCR Judge
Honorable Kristi F. Curtis, Second PCR Judge

Appellate Case No. 2024-001271

LESLIE TWYMAN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO PETITION
FOR A WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE**

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 2. Petitioner’s case should be remanded to the PCR court for the limited purpose of issuing a supplemental order addressing his claims that counsel was ineffective for (1) allegedly advising Petitioner to reject a plea offer because he would prevail on appeal if convicted; (2) not objecting to testimony by the victim’s mother that she saw semen on the victim; (3) not arguing as part of his motion for a directed verdict that no evidence showed the victim *submitted* to a sexual assault because of being kidnapped or confined; and (4) as to appellate counsel, not arguing a directed verdict should have been granted on first-degree CSC. However, because the alleged Doyle violation was not clearly raised at the PCR hearing, a remand on that issue is not warranted. Further, Petitioner has waived a remand for rulings on issues he did not raise in his petition for a writ of certiorari.

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QUESTIONS PRESENTED

1. Whether the PCR court correctly found petitioner was entitled to a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), where defense counsel candidly admitted petitioner wanted him to file an appeal, he neglected to file that appeal, and the state conceded petitioner was entitled to Austin relief?
2. Whether this Court should remand petitioner's case to the PCR court where the circuit court determined it did not have the authority to order the remand where former PCR counsel admitted his deficiency in failing to file a Rule 59(e) motion to reconsider even though the PCR order failed to make specific findings of fact and conclusions of law in accordance with section 17-27-80 of the South Carolina Code since a remand is proper under these circumstances pursuant to Fishburne v. State, 427 S.C. 505, 515, 832 S.E.2d 854 (29019)?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Respondent has conceded Petitioner did not voluntarily waive his right to appeal the denial of his first PCR application and is thus entitled to a belated appeal of that order.
2. Should this case be remanded to the PCR court for the limited purpose of issuing a supplemental order addressing his claims that counsel was ineffective for (1) allegedly advising Petitioner to reject a plea offer because he would prevail on appeal if convicted; (2) not objecting to testimony by the victim's mother that she saw semen on the victim; (3) not arguing as part of his motion for a directed verdict that no evidence showed the victim *submitted* to a sexual assault because of being kidnapped or confined; and (4) as to appellate counsel, not arguing a directed verdict should have been granted on first-degree CSC charge? Further, because the alleged Doyle violation was not clearly raised to the PCR court, should this Court decline to remand this issue? Finally, has Petitioner waived a remand for rulings on issues he did not raise in his petition for a writ of certiorari?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections serving an aggregate twenty-five-year sentence. In 2010, the Colleton County Grand Jury indicted Petitioner for first-degree criminal sexual conduct (CSC) and third-degree CSC (2010-GS-15-00849). On April 18, 2011, Petitioner proceeded to a jury trial before the Honorable Perry M. Buckner, III. Public Defender Harris S. Beach represented Petitioner, and Assistant Solicitor Benjamin Shelton prosecuted the case. The jury convicted Petitioner as indicted, and Judge Buckner sentenced Petitioner to concurrent terms of twenty-five years for first-degree CSC and ten years for third-degree CSC.

Petitioner filed a direct appeal, which was perfected by Appellate Defender Susan B. Hackett. On appeal, Petitioner argued the trial court erred in not granting his motion for a directed verdict on the third-degree CSC when (I) the language in the indictment indicated the State was proceeding under a theory that appellant “forcibly” penetrated the accuser, which negated the aggravated component of the statute, and (II) the accuser was not mentally defective or incapacitated as defined in section 16-3-651(e) or (f) of the South Carolina Code. The Court of Appeals affirmed on the merits. State v. Leslie Twyman, 2013-UP-325 (filed July 17, 2013). The remittitur was sent August 9, 2013.

On February 11, 2014, Petitioner filed an application for post-conviction relief (PCR; 2014-CP-15-00127) alleging:

1. Ineffective Assistance of Trial Counsel;
 - a. Trial Counsel only renewed motion for directed verdict on third-degree criminal sexual conduct and not first-degree criminal sexual conduct.
 - b. Trial counsel should have objected to Solicitor leading the witnesses.
2. Ineffective Assistance of Appellate Counsel:

- a. On third-degree criminal sexual conduct, more to be amended later.

Petitioner did not file an amended application.

On October 29, 2014, an evidentiary hearing convened before the Honorable Edgar W. Dickson. Petitioner was represented by Tristan Shaffer, Esquire. At the hearing, Petitioner orally amended his application to allege:

1. Ineffective assistance of appellate counsel: appellate counsel failed to brief the issue regarding the trial court's denial of a directed verdict motion as to first-degree CSC.
2. Ineffective assistance of counsel:
 - a. To the extent the argument regarding the directed verdict motion of first-degree CSC was unpreserved, trial counsel was ineffective for not preserving that argument.
 - b. Failed to impeach victim by using a DVD statement.
 - c. Failed to move to have the solicitor elect between CSC first and CSC third.
 - d. Failed to object to the mother's statement involving seeing what she believed to be semen.
 - e. Failed to argue victim might have been lying because she was diverting eye contact.
 - f. Advised applicant not to accept a six-year plea offer.

On December 21, 2015, Judge Dickson issued an order denying and dismissing the application with prejudice. Petitioner did not appeal.

On June 24, 2019, Petitioner filed a second PCR application alleging he did not voluntarily waive his right to appeal his first PCR application (2019-CP-27-00436). Petitioner further asserted he should be able to appeal any issue raised at the first hearing but not addressed by the PCR court due to PCR counsel's failure to file a motion pursuant to Rule 59(e), SCRCP. Petitioner attached a draft of a Rule 59(e) motion signed by PCR counsel but never filed. Critically, the Motion raises additional issues that were not raised in the application or at the start of the hearing. Specifically, the allegations related to the PCR court's failure to address (3) trial counsel's withdrawal of a

question to the victim's mother, (5) trial counsel's failure to object to the prosecution eliciting testimony about Applicant's refusal to provide a statement to police, and (7) trial counsel's failure to present the "Narrative Summary of Abuse" DVD to the jury were not raised in the application or clearly raised at the PCR hearing. (App. 390-96).

Respondent filed a return conceding the belated appeal issue. (App. 489). However, Respondent requested a hearing on the issue of whether the case should be remanded pursuant to Fishburne. At the hearing, Respondent again conceded Petitioner was entitled to a late appeal but asserted the circuit court lacked jurisdiction to remand the prior PCR court's order for additional findings. Thereafter, the circuit court issued an order finding (1) Petitioner was entitled to a belated appeal of the order dismissing his first PCR application and (2) the circuit court lacked the authority to remand the issue to the first PCR court for additional findings. This petition for writ of certiorari followed.

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

- 1. Respondent concedes Petitioner did not voluntarily waive his right to appeal the denial of his first PCR application and should receive a belated appeal of that order.**

Respondent has conceded the evidence shows Petitioner did not voluntarily waive his right to appeal the denial of his first application for PCR. Thus, Respondent concedes this Court should review that order pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

- 2. This Court should remand this order to the PCR court for the limited purpose of issuing a supplemental order addressing whether counsel was ineffective for (1) allegedly advising Petitioner to reject a plea offer because he would prevail on appeal if convicted; (2) not objecting to testimony by the victim's mother that she saw semen on the victim; (3) not arguing as part of his motion for a directed verdict that no evidence showed the victim *submitted* to a sexual assault because of being kidnapped or confined; and (4) as to appellate counsel, not arguing a directed verdict should have been granted on the first-degree CSC charge. However, because the alleged Doyle violation was not clearly raised at the PCR hearing, a remand on that issue is not warranted. Further, Petitioner has waived a remand for rulings on issues he did not raise in his petition for a writ of certiorari.**

Petitioner contends the order denying his first PCR application should be remanded to the PCR court for additional findings because the court failed to address all of the issues he raised. Specifically, he avers the first PCR court failed to address issues regarding whether counsel was ineffective for (1) not objecting to an alleged Doyle violation; (2) advising him to turn down a plea offer; (3) failing to object to testimony of the victim's mother that she saw semen on the victim; and (4) failing to argue, as part of his directed verdict motion, that no evidence showed the victim *submitted* to a sexual assault because of being kidnapped or confined. He further avers the PCR court failed to address whether appellate counsel was ineffective for not arguing a directed verdict should have been granted on first-degree CSC. Respondent agrees this order should be remanded to the PCR court for the limited purpose of issuing a supplemental order addressing whether counsel was ineffective for (1) allegedly advising Petitioner to reject a plea offer because he would

prevail on appeal if convicted; (2) not objecting to testimony by the victim's mother that she saw semen on the victim, (3) not arguing as part of his motion for a directed verdict that no evidence showed the victim *submitted* to a sexual assault because of being kidnapped or confined; and (4) as to appellate counsel, not arguing a directed verdict should be granted on first-degree CSC. However, because the issue regarding the alleged Doyle violation was not clearly raised at the PCR hearing, a remand on that issue is not warranted. Finally, Petitioner has waived a remand for rulings on issues he did not raise in his petition for writ of certiorari.

Issue preservation is a fundamental component of appellate procedure in South Carolina. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of preservation is “to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review.” Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006).

To preserve an issue for appeal, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). Thus, an issue—including a constitutional one—cannot ordinarily be raised or considered on appeal unless it was first presented to and ruled upon by the trial court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005).

Generally, South Carolina's issue preservation requirements apply in PCR cases. See Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (recognizing “the general rule that issues which are not properly preserved will not be addressed on appeal” is applicable in a PCR case). Thus, in *most* PCR cases where a party fails to properly preserve an issue or ensure a ruling is obtained, the issue will be unpreserved and will not be addressed on appeal. See Fishburne v.

State, 427 S.C. 505, 518, 832 S.E.2d 584, 590 (2019) (Hearn, J., concurring) (“[I]n most instances where a party fails to file a Rule 59(e) motion when required to do so, we will find the issue unpreserved and decline to address the merits.”); Reese v. State, 425 S.C. 108, 109, 820 S.E.2d 376, 376-377 (2018) (explaining the law requires filing a proper motion to alter or amend when “a PCR order does not contain specific findings of fact and conclusions of law”). However, even when a party fails to file a needed post-ruling motion, our Supreme Court has recognized a limited remand may be appropriate due to the constitutional guarantee of the right to effective assistance of counsel that is “engrained in PCR cases” *when a PCR order fails to contain the requisite findings of facts and conclusions of law as to all issues raised*. Fishburne, 427 S.C. at 516, 832 S.E.2d at 589 (emphasis added); Simmons v. State, 416 S.C. 584, 591, 788 S.E.2d 220, 224 (2016) (recognizing “our jurisprudence permits a remand under such extraordinary circumstances”); Moses v. State, 442 S.C. 263, 271, 898 S.E.2d 174, 178 (Ct. App. 2024) (“Only under extraordinary circumstances—such as when a PCR court fails to make sufficiently specific findings of fact—do the interests of justice permit a court to reach unpreserved issues.”).

- a. This order should be remanded to the PCR court for the limited purpose of issuing an order addressing whether counsel was ineffective for (1) allegedly advising Petitioner to reject a plea offer because he would prevail on appeal if convicted; (2) not objecting to testimony by the victim’s mother that she saw semen on the victim; (3) not arguing as part of his motion for a directed verdict that no evidence showed the victim submitted to a sexual assault because of being kidnapped or confined; and (4) as to appellate counsel, not arguing a directed verdict should have been granted on the first-degree CSC charge.*

At the start of the PCR hearing, Petitioner orally amended his application to allege appellate counsel was ineffective for not raising an issue related to the trial court’s failure to direct a verdict on the first-degree CSC charge. (App. 390-93). Likewise, he orally amended the application to allege the following specific claims of ineffective assistance of trial counsel:

- a. To the extent the argument regarding the trial court's failure to direct a verdict on the first-degree CSC was unpreserved, trial counsel was ineffective for not preserving that argument.
- b. Failed to impeach victim by using a DVD statement.
- c. Failed to move to have the solicitor elect between CSC first and CSC third.
- d. Failed to object to the mother's statement involving seeing what she believed to be semen.
- e. Failed to argue victim might have been lying because she was diverting eye contact.
- f. Advised applicant not to accept a six-year plea offer.

(App. 390-94). Although Respondent initially objected to these issues because Petitioner did not provide prior notice of them, Respondent later agreed to proceed on these allegations. (App. 396).

Respondent agrees the PCR court's order of dismissal does not clearly rule on these issues and thus did not comply with section 17-27-80 of the South Carolian Code. (App. 476-77). Thus, Respondent submits this order should be remanded to the circuit court for the limited purpose of issuing an order addressing whether counsel was ineffective for (1) allegedly advising Petitioner to reject a plea offer because he would prevail on appeal if convicted;¹ (2) not objecting to testimony by the victim's mother that she saw semen on the victim;² (3) not arguing as part of his

¹ Although Petitioner claimed he rejected the plea because counsel told him the appellate courts would reverse any conviction due to the lack of DNA evidence, counsel denied advising Petitioner that the appellate courts would reverse his conviction based on the lack of DNA evidence. (App. 431, 441). This is ultimately an issue of credibility for the PCR court; however, Respondent notes the PCR court found counsel's testimony credible and Petitioner's testimony not credible.

² This testimony was cumulative to the DNA expert's testimony that the victim's vaginal swabs contained semen. (App. 108, 176). Further, Respondent agrees with trial counsel's assessment that there was not a valid objection to the mother's testimony. (App. 428). Respondent also notes that notwithstanding his burden, Petitioner did not set forth a valid legal objection to this testimony at the PCR hearing. Specifically, when questioned about this issue, Petitioner merely asserted the DNA expert indicated "there was no semen found in the panty line." (Pet. 434-35). This was inconsistent with the DNA expert's actual testimony that although she was unable to develop a

motion for a directed verdict that no evidence showed the victim *submitted* to a sexual assault because of being kidnapped or confined;³ and (4) as to appellate counsel, not arguing a directed verdict should have been granted on first-degree CSC.⁴

b. A remand on the alleged Doyle violation is not warranted because that issue was not clearly raised at the PCR hearing.

In his PCR application, Petitioner did not raise an issue with an alleged Doyle violation, nor did he file an amended application raising this issue. (App. 371-76). At the start of the hearing, when Petitioner set forth his oral amendments to the PCR application, he did not raise any issue with an alleged Doyle violation. (App. 390-94). Likewise, although Petitioner briefly testified he

DNA profile from the semen, she found semen on in the victim’s vaginal swab. (App. 176-78). Respondent notes the petition for writ of certiorari is the first time Petitioner has alleged this testimony violated Rule 701, SCRE.

³ Appellate counsel acknowledged it was an “open question” in South Carolina whether the use of the present tense “submits” in the statute required the victim to submit to the kidnapping concurrently with the sexual assault. (App. 408-13). She further acknowledged she would have needed to further research the issue—including looking into definitions of words in the statute—before deciding whether to present it on appeal. (App. 410). In other words, the argument advanced at the PCR hearing related to the first-degree CSC charge was a novel argument. Because it was novel, counsel was not deficient for not raising it. *See Pantovich v. State*, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019) (“[A] collateral review proceeding is ill-suited for announcing a new rule of substantive law pertaining to an underlying trial; appellate courts are to do so only in the rarest of circumstances. This is especially true in a retrospective PCR analysis under Strickland, which seeks to determine whether counsel was ineffective at the time of the alleged [W]e do not require attorneys to be clairvoyant in anticipating changes to the law” (emphasis added)).

⁴ Although trial counsel made a very generic argument that the court should direct a verdict on the first-degree CSC charge, the majority of his argument focused on third-degree CSC, and he did not provide a specific argument related to the first-degree CSC charge. (App. 269-70). To the extent he raised an argument about first-degree CSC that was sufficient for appellate review, the State presented sufficient evidence through the victim to survive a directed verdict motion. Specifically, the victim testified that she went to a neighbor’s home at Petitioner’s request to watch the son (whom she had watched before); once at the home, Petitioner forced her to perform oral sex on him and penetrated her vagina and anus. (App. 194-200). This testimony was sufficient for the jury to find Petitioner lured the victim to the home using false pretenses in order to sexually assault her. Further the victim testified that after Petitioner penetrated her, she tried to leave but he would not allow it. (App. 201). This testimony was sufficient for the jury to find he sexually assaulted her by forcibly preventing her from leaving. Because evidence clearly supported first-degree CSC, it is not reasonably likely an appellate court would have reversed on this ground.

thought counsel should have objected when the solicitor asked an officer if he made a statement, and although Petitioner briefly questioned counsel about this issue after the State recalled counsel, **Petitioner did not orally amend his allegations at any point during the hearing to set forth this issue or ask the Court to rule on it.** (App. 436-37, 444).

The mere questioning of a witness without more is not sufficient to raise an issue to a PCR court. Because of the nature of PCR actions—which seek to evaluate an attorney’s representation of a client—testimony is often elicited that is not directly related to an issue in order to give context to the representation as a whole; thus, there is often no basis to object on relevance even if testimony does not directly relate to an issue raised. A passing question during examination is not sufficient to adequately raise an issue to the PCR court or put the PCR court on notice that it is an issue the Court is being asked to consider. See Queen’s Grant II, 368 S.C. at 373, 628 S.E.2d at 919 (noting a key purpose of issue preservation is “to give the trial court a fair opportunity to rule on the issues”). Petitioner did not clearly raise this issue to the PCR court at any point prior to or during the hearing, and the PCR court did not have adequate notice that this was an issue it should rule on. Thus, the PCR court did not err in failing to rule on this issue.

The rationale underlying Fishburne and the purpose of the remand was based on the requirement that PCR courts adequately rule on issues raised. See Fishburne, 427 S.C. at 512, 832 S.E.2d at 587 (“Over the years, we have issued numerous opinions addressing a PCR court’s failure to make adequate findings of fact and conclusions of law regarding duly raised issues.”); *id.* at 514, 832 S.E.2d at 588–89 (“The cases this Court remanded for specific findings were *unique cases in which the Court attempted to remind circuit court judges and parties* that: (1) specific findings of fact and conclusions of law were required; and (2) a Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review. Although

the cases apparently have not accomplished the Court's goal, they do not change the general rule that issues which are not properly preserved will not be addressed on appeal.” (emphasis added) (quoting Marlar, 375 S.C. at 410, 267 S.E.2d at 267)).

Fishburne does not stand for the proposition that a deficiency by PCR counsel can form the basis for a remand. Fishburne, 427 S.C. at 516, 832 S.E.2d at 589 (2019) (“[B]ecause the United States Constitution's Sixth Amendment guarantee to a defendant's right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party's procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel *when the PCR court's order does not comply with section 17-27-80.*” (emphasis added)); *c.f.* Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (“Aice asks this Court here to carve out an exception that well may swallow Rule 50(3). It is a troubling prospect indeed to us that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys. As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under Aice's view.”); *id.* at 451, 409 S.E.2d at 394 (“Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice.”).

Likewise, Fishburne (notwithstanding its name) does not stand for the proposition that a PCR court must engage in a fishing expedition to try to decipher every conceivable issue that may exist based on witness testimony. *See Fishburne*, 427 S.C. at 512, 832 S.E.2d at 587 (“Over the years, we have issued numerous opinions addressing a PCR court's failure to make adequate

findings of fact and conclusions of law regarding *duly raised* issues.” (emphasis added)). The PCR act requires allegations be raised with specificity, and preservation requirements exist to ensure a trial court has adequate opportunity to rule on an issue. See S.C. Code Ann. § 17-27-50 (providing a PCR application shall “specifically set forth the ground upon which the application is based”); Queen’s Grant II, 368 S.C. at 373, 628 S.E.2d at 919 (noting a key purpose of issue preservation is “to give the trial court a fair opportunity to rule on the issues”). A court does not have adequate opportunity to rule on an issue that is not clearly raised. Because the issue regarding an alleged Doyle violation was not clearly raised, the PCR court did not err in failing to address that issue in its order. Thus, a remand is not warranted on the alleged Doyle issue.

c. Petitioner has waived a remand for rulings on issues he did not raise in his petition for a writ of certiorari.

Initially, Petitioner has not challenged any ruling in the PCR court’s order; he merely asks for a remand to address additional issues that were not addressed specifically in the PCR court’s order. Thus, any ruling in the first PCR court’s order is law of the case. See State v. Fripp, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012) (finding trial court’s ruling not challenged in appellate brief is law of the case).

Further, although additional issues were raised at the PCR hearing, Petitioner only raises five specific issues in his petition that were not ruled upon. Petitioner has thus waived a remand on any additional allegations raised at the hearing but not specifically ruled upon. This Court should limit the remand to the consideration of issues that Petitioner requested be considered. Respondent agrees that four of the five issues raised in the Petition for a Writ of Certiorari should be remanded to the PCR court for specific rulings. However, the issue regarding the alleged Doyle violation was not adequately raised to the PCR court and thus should not be remanded for further consideration.

CONCLUSION

Based on the foregoing, Respondent requests this Court order a limited remand to allow the PCR court to issue a supplemental order addressing whether counsel was ineffective for (1) allegedly advising Petitioner to reject a plea offer because he would prevail on appeal if convicted; (2) not objecting to testimony by the victim's mother that she saw semen on the victim; (3) not arguing as part of his motion for a directed verdict that no evidence showed the victim *submitted* to a sexual assault because of being kidnapped or confined; and (4) as to appellate counsel, not arguing a directed verdict should have been granted on first-degree CSC.

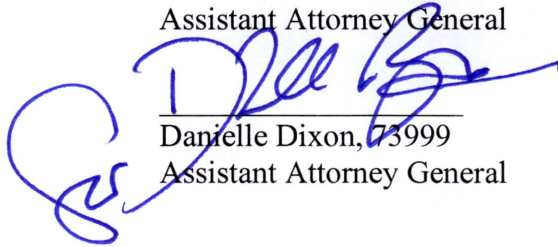
Respectfully Submitted,

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This 6th day of August, 2025.