

VOLUME II OF II

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Kershaw County

S.C. SUPREME COURT

Honorable Daniel McLeod Coble, Circuit Court Judge

NAKIA K. JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000553

APPENDIX

KATHRINE H. HUDGINS
Senior Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

D. RUSSELL BARLOW
Senior Assistant Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
GUILTY PLEA HEARING TRANSCRIPT DATED JUNE 22 – 26, 2015	1
INDICTMENTS	645
SENTENCING SHEETS.....	649
<u>STATE V. JOHNSON</u> , OP. NO 2018-UP-109 DATED MARCH 14 TH , 2018.....	651
APPLICATION FOR POST-CONVICTION RELIEF	659
MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR POST-CONVICTION RELIEF	666
RETURN, MOTION FOR A MORE DEFINITE STATEMENT, & PARTIAL MOTION TO DISMISS	682
AMENDMENT TO APPLICATION FOR POST-CONVICTION RELIEF.....	695
SECOND AMENDED POST-CONVICTION RELIEF APPLICATION.....	698
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED SEPTEMBER 12, 2023	700
ORDER OF DISMISSAL.....	763

1 defendant, a Nikki Chisolm.

2 A. That's correct.

3 Q. Do you recall Ms. Chisolm being contacted
4 during that interview from the defendant's phone?

5 A. From the defendant's phone?

6 Q. Or a call being made to Nikki?

7 A. I do recall a call being made to her.

8 Q. And do you recall the phone number that was
9 given for Ms. Chisolm?

10 A. Give me just one second. [REDACTED] [REDACTED].

11 Q. Okay. And during that, did the name Louise
12 Pinkney also come up?

13 A. Yes.

14 Q. And what was the number for her?

15 A. The number I have for Ms. Pinkney is
16 [REDACTED] [REDACTED].

17 Q. During the course of your investigation, did
18 these names become significant to you with respect
19 to the defendant's statement?

20 A. They were relayed to me by him through the
21 interview that those were people who had been either
22 incoming or outgoing calls to him that night -- that
23 afternoon.

24 Q. And during the course of that interview, did he
25 actually confirm that there was a call on his phone

1 at, I believe, 5:54 or whatever with Pamela Hall, an
2 outgoing call?

3 A. He did confirm it. He didn't understand it,
4 but he did confirm it.

5 Q. Do you recall whether he actually had his
6 service weapon in the car or on him when he was
7 placed into custody?

8 A. He didn't have it on him at -- from the
9 interview. I think -- I didn't go look in the car,
10 someone else did. But I think there was a .22
11 rifle.

12 Q. But not his actual service weapon --

13 A. No, ma'am.

14 Q. -- that you're aware of?

15 A. That I'm aware of, no, ma'am.

16 MS. SIMPSON: I beg the Court's indulgence.

17 BY MS. SIMPSON:

18 Q. I want to talk to you about a couple locations
19 brought up in this case. With respect to Stevens
20 Road and the, I believe, Fountain Grocery Store --

21 A. Yes, ma'am.

22 Q. -- is that in pretty close proximity?

23 A. Several miles. It's not far.

24 Q. Okay. So one could drive there fairly quickly?

25 A. Yes, ma'am.

1 Q. And in the course of your investigation, I know
2 a graveyard's been mentioned. Tell the jury a
3 little bit about your initial understanding about
4 the graveyard and what you subsequently learned
5 about which graveyard was being referred to.

6 A. My initial thought when they mentioned a church
7 right down the road from the home and graveyard, not
8 too far from the home on Stevens Road there's a
9 church on the right-hand-side of the road with a
10 small graveyard. That was my initial thought, that
11 that was the incident location. It was later
12 determined that it was actually another church
13 probably a mile or so past that into Lee County. So
14 there was a difference at first before we -- I
15 actually thought where the incident location was. I
16 thought it was one church, but it ended up being
17 another church a little bit further up the road.

18 Q. And having worked in Kershaw County and around
19 this area, are you pretty familiar with the
20 St. Matthews and Bethany Cemetery and Stevens Road,
21 all the places that had been --

22 A. Down in the Turkey Creek area, yes, ma'am, I'm
23 familiar.

24 Q. Did you say Turkey Creek?

25 A. That's what the locals call it, Turkey Creek.

1 (State's Exhibit Nos. 13, 14, and 15 marked for
2 identification.)

3 Q. I'm going to show you what's been marked as
4 State's 13, 14 and 15. Do you recognize these?

5 A. Not so close, please.

6 Q. Sorry.

7 A. I do recognize them.

8 Q. And do they fairly and accurately depict the
9 location in the picture?

10 A. Of Bethany Cemetery, yes, ma'am.

11 MS. SIMPSON: Your Honor. At this time, I
12 would offer State's 13, 14 and 15 in to evidence.

13 MR. JOHNSON: No objection.

14 THE COURT: Thank you.

15 (State's Exhibit Nos. 13, 14 and 15 admitted in
16 to evidence.)

17 Q. So the Bethany Cemetery in State's 13 and 14
18 and 15, was that actually the cemetery or graveyard
19 area --

20 A. It was later determined to be that location
21 instead of the first one I went to.

22 Q. And with respect to close proximity, just so we
23 can sort of orient ourselves, Stevens Road, is that
24 fairly close to this?

25 A. It's fairly close. It's not on Stevens, but

- 1 it's very close.
- 2 Q. And what about relationship with the Stevens
- 3 Road location, Bethany Cemetery, and Fountain
- 4 Grocery?
- 5 A. They're all within several miles of each other.
- 6 Q. So one could drive it in a matter of minutes?
- 7 A. Yes, ma'am.
- 8 Q. And was -- **Minor** was she interviewed a
- 9 second time in this case as well?
- 10 A. As far as a forensic?
- 11 Q. Yes.
- 12 A. Yes. She was actually interviewed a second
- 13 time at the request of a SLED agent that was
- 14 involved in the case.
- 15 Q. And did you learn that her first interview had
- 16 actually ended due to her being sick?
- 17 A. I actually watched the forensic interview where
- 18 she got sick and it was ended early.
- 19 Q. Okay. So you were present and observing?
- 20 A. No, ma'am. I watched the video after it was --
- 21 Q. Oh, watched it.
- 22 A. Yes, ma'am.
- 23 Q. The person you spoke with on the date of
- 24 October 11th, 2011, and ultimately charged with
- 25 criminal sexual conduct charges, do you see him in

1 the courtroom today?

2 A. Yes.

3 Q. Can you point him out?

4 A. Mr. Nakia Johnson, he's between his two
5 co-counsels, wearing what appears to be a
6 bluish-black suit.

7 MS. SIMPSON: Your Honor, let the record
8 reflect he's identified the defendant.

9 THE COURT: Yes, ma'am.

10 MS. SIMPSON: Thank you, Sergeant Bailey.
11 Please answer any questions from the Defense.

12 THE COURT: Mr. Johnson?

13 MR. JOHNSON: May it please the Court.

14 THE COURT: Yes, sir.

15 CROSS-EXAMINATION

16 BY MR. JOHNSON:

17 Q. Let's start with that night. Someone from your
18 department called to Fairfax, to Allendale, and he
19 came right back up, didn't he?

20 A. Yes, sir.

21 Q. Okay. And I think that you read him his rights
22 and he signed the waiver, didn't he?

23 A. That's correct, sir.

24 Q. Okay. And he talked with you freely, didn't
25 he?

1 A. Yes, sir.

2 Q. Okay. So he really did not hold back from
3 saying what he thought was going on, did he? Did he
4 hold back anything from you --

5 MS. SIMPSON: Objection; calls for speculation
6 as far as what the defendant held back or didn't.

7 THE COURT: Sustained.

8 BY MR. JOHNSON:

9 Q. When he got back, before you started
10 questioning him, you had the warrant already, didn't
11 you?

12 A. Yes, sir. The warrant was in-hand.

13 Q. So all of the questioning that was done, it
14 wasn't done to get information; he was already
15 charged, wasn't he?

16 A. No, sir. There was an arrest warrant for him.
17 But it was up to my discretion whether he was
18 actually processed on the warrant.

19 Q. So -- and the arrest warrant was done just
20 solely based upon the allegations that were given to
21 you and nothing else?

22 A. Based on the statements made by the mother and
23 the victim in the case and the records we had from
24 the mother's phone.

25 Q. Okay. And I just want to be sure, you had

1 nothing else, other than the allegation from the
2 mother -- which you said you didn't talk to the
3 girl, so allegation from the mother and the mother's
4 phone records?

5 A. That's correct, sir.

6 Q. All right. In the video, I saw y'all were
7 looking at the phone records. I'd like to ask you
8 something. I think the State has some marked up
9 there if you want to -- if we could look at the
10 phone records.

11 THE COURT: That's exhibit 10; is that correct?

12 MS. SIMPSON: Yes, sir.

13 BY MR. JOHNSON:

14 Q. I'd like for you to turn to Item No. 828, 829.

15 THE COURT: 828 and 829.

16 THE WITNESS: I'm not sure how to find that on
17 this report, Your Honor.

18 THE COURT: Mr. Johnson, you know how to find
19 it?

20 MR. JOHNSON: Yes, sir.

21 THE COURT: Come show him how to find it,
22 please.

23 MR. JOHNSON: It's an item number.

24 THE COURT: It's an item number, not a
25 telephone number.

1 BY MR. JOHNSON:

2 Q. Did you locate the 828 and 829?

3 A. Yes, sir, I have.

4 Q. Were you in yesterday when the gentleman from
5 the phone company was testifying?

6 A. When he was trying to explain the Greenwich
7 Mean Time? I never understood it, but I followed
8 what he was saying.

9 Q. Well, let me try to explain it.

10 A. What I meant by that, Mr. Johnson, is I don't
11 understand Greenwich Mean Time. I understand the
12 four-hour conversion, I just never understood why
13 there's such a thing as the Greenwich Mean Time.

14 Q. All right. Well, anyhow, I'll start you with
15 828 and 829. Let's walk down to it.

16 A. Yes, sir.

17 Q. We understand, I think, from his testimony that
18 2145 would be 1745 because of the four-hour
19 deduction difference between the Universal Time and
20 the Eastern Standard Time. Would you agree with
21 that?

22 A. Yes, sir, I would.

23 Q. All right. At 819, 10/11/11, at 2147, there
24 was a call that went to voicemail from [REDACTED]

25 [REDACTED] to -- and the one that's calling it is the

1 originating number, and the one that's terminating
2 is the one the call goes to; do you understand that?

3 A. Yes, sir.

4 Q. Okay. So the calling number in that was -- and
5 I think you gave -- just a few minutes ago, you gave
6 the name for the number [REDACTED] I think that was
7 Ms. --

8 A. Ms. Nikki Chisolm.

9 Q. Yes, sir. So Ms. Nikki Chisolm called him at
10 2145?

11 A. Yes, sir. I see that.

12 Q. And that was Nakia Johnson's number she called
13 to?

14 A. [REDACTED], the last four digits, yes, sir.

15 Q. Right. And then at Item No. 20, there was --

16 THE COURT: At 8:20?

17 MR. JOHNSON: Item No. 820.

18 BY MR. JOHNSON:

19 Q. There was another call right behind Nikki
20 Chisolm at two minutes -and 33 seconds from the
21 number [REDACTED] [REDACTED], and the terminating number
22 was Nakia Johnson's number; is that correct?

23 A. Yes.

24 Q. Okay. And then Item No. 821, which would be
25 2148, which would be 5:48, there was another call

CROSS-EXAMINATION OF RICK BAILEY BY MR. JOHNSON

511

1 from [REDACTED] to Nakia Johnson's number; is that
2 correct?

3 A. Yes, sir.

4 Q. Okay. All right. So if you watch the video,
5 one of the questions y'all had for him was -- y'all
6 said he didn't get a phone call from Nikki until
7 6:30-something. So isn't that two phone calls
8 before 6:00?

9 A. I lost my place. 821, okay. I'm not
10 understanding what the number below that one is
11 that's got the F out beside it.

12 Q. I think that's call forwarding. That's my
13 understanding from the little training I had.

14 THE COURT: Well, ask your question again. He
15 can either answer it or he can't.

16 BY MR. JOHNSON:

17 Q. Okay. There's no question that there was a
18 call at item 819 from Nikki Chisolm to Mr. Johnson,
19 then there was a call out of 820 from Louise Pinkney
20 to Nakia Johnson, and then at 821 there was another
21 call from Nikki Chisolm to Nakia Johnson?

22 THE COURT: When you say 821, you mean the item
23 not the time?

24 MR. JOHNSON: Item No. 821.

25 THE COURT: All right. Let's keep the record

1 straight.

2 Is that a question?

3 BY MR. JOHNSON:

4 Q. The question was, were there calls placed from
5 those numbers to Nakia Johnson?

6 A. It says in the originating number -- I'm
7 assuming that's a call. I'm not sure. Like I said,
8 the forwarding thing, I think, is throwing me off a
9 little bit.

10 Q. Okay. If you remember the testimony of the man
11 from AT&T, he said the number that's the calling
12 number is the originating number; is that correct?

13 A. I think that's right.

14 Q. Okay. And the terminating number would be the
15 number that was called; is that correct?

16 A. Correct.

17 Q. Okay. All right. So go right back to those
18 items again. Those numbers called Nakia Johnson's
19 number, correct, based upon the phone bill?

20 A. Based on this bill, yes, sir.

21 Q. And this is from AT&T?

22 A. I have to take your word for it.

23 Q. Well, you'd have to take his word for it,
24 correct --

25 A. Right.

CROSS-EXAMINATION OF RICK BAILEY BY MR. JOHNSON

513

- 1 Q. -- the guy that testified, because he testified
2 these were the correct bills. So this is from AT&T;
3 is that correct?
- 4 A. Yes, sir, I guess so.
- 5 Q. All right. Then there's a phone call, Item No.
6 8- -- 822 and 823 got ones by it. But Item No. 824,
7 there's a phone call from the number that is Nakia
8 Johnson, the [REDACTED] and it called [REDACTED] which is
9 Ms. Pamela Hall's number; is that correct?
- 10 A. I believe that's her number, yes, sir.
- 11 Q. Is that correct?
- 12 A. I think so, yes, sir.
- 13 Q. Okay. And then Item No. 826 at 2152, there was
14 another call from [REDACTED] and that call went to
15 Ms. Pamela Hall's number; is that correct?
- 16 A. Yes, sir.
- 17 Q. Okay. Now let's go to item 828. Item No. 828,
18 829, same phone call at 2154. And 2154 would be
19 5:54; is that correct?
- 20 A. Yes, sir.
- 21 Q. All right. At 2154 a phone call came from
22 Nakia Johnson's number to Ms. Pamela Hall's number;
23 is that correct?
- 24 A. Yes, sir.
- 25 Q. All right. And that was the number that y'all

1 were talking about in the station that that was the
2 time -- whatever was going on with Nakia and
3 Minor that's the time they're supposed to be in
4 the cemetery or wherever they're supposed to be;
5 right?

6 A. That's supposed to be, like, a two-minute call,
7 so I'm guessing.

8 Q. Well, that's the only two-minute call between
9 the numbers on here, correct; the only two-minute
10 call from his phone number and her phone number;
11 correct?

12 A. Yes.

13 Q. Okay. So this was the call that y'all were
14 talking about?

15 A. Yes. I'd have to assume that.

16 Q. Okay. And to verify this was the call y'all
17 were talking about, immediately after that, on 830,
18 there was a call from Ms. Pamela Hall's number back
19 to Nakia's number for a minute and 25 seconds?

20 A. Yes, sir.

21 Q. Okay. And that was the time that -- I think
22 y'all was saying on the video that that was the time
23 she called him back and said bring the child home;
24 is that correct?

25 A. Yes.

1 Q. All right. Now, as the investigating officer,
2 did you have an opportunity to watch the video from
3 Mr. Ron Fountain's store?

4 A. Yes, sir, I did.

5 Q. You watched the whole video?

6 A. Yes, sir.

7 Q. Did you hear the testimony from Mr. Capps about
8 what time Mr. Johnson was in the store?

9 A. Yes, sir.

10 Q. Okay. Mr. Capps said Mr. Johnson was in the
11 store at 5:58; is that correct?

12 A. That's what he said.

13 Q. Okay. And the call originated at 5:54,
14 correct, the one from Mr. Johnson to Ms. Hall?

15 A. Yes, sir. Was it Item No. 828?

16 Q. Yes, sir.

17 A. Yes, sir.

18 Q. And it was at 5:54, and the call last two
19 minutes; correct?

20 A. Correct.

21 Q. Were you in here when Ms. Pamela Hall
22 testified?

23 A. Yes, sir.

24 Q. Okay. And she testified -- and I think --
25 MS. SIMPSON: Objection, Your Honor, with

1 respect to pitting witnesses.

2 MR. JOHNSON: I'm not -- I'm just asking --

3 THE COURT: Ask the question and then I'll --

4 MR. JOHNSON: Okay.

5 BY MR. JOHNSON:

6 Q. Did you hear Ms. Hall's testimony?

7 A. I did.

8 Q. Okay. And she testified and answered yes to my
9 question that it was -- 5:54 was the call that she
10 was talking about; is that correct?

11 A. If I'm not mistaken, I believe that's right.

12 Q. Okay. And she also testified that she called
13 back at --

14 MS. SIMPSON: Objection, Your Honor.

15 MR. JOHNSON: Your Honor, I'm just -- I'm not
16 pitting --

17 MS. SIMPSON: Pamela Hall's testimony --

18 THE COURT: He's not pitting, he's just saying
19 that's what she said --

20 MR. JOHNSON: Yeah.

21 THE COURT: -- and did he hear it.

22 Overruled.

23 MR. JOHNSON: Thank you.

24 BY MR. JOHNSON:

25 Q. So if the call was at 5:54 and the call lasted

1 two minutes, that would be 5:56; would that be
2 correct?

3 THE COURT: If that's --

4 A. Plus two minutes would be --

5 Q. If the call was at 5:54 and allegedly lasted
6 two minutes, then that -- 2 plus 4 is 6, it would be
7 so 5:56; would that be correct?

8 A. That makes sense, yes, sir.

9 Q. All right. And then there was another call for
10 a minute and 25 seconds, so that would be 5:56 and
11 another minute would be 5:57; is that correct?

12 A. I'm assuming you're speaking of item 830.

13 Q. Yes, sir.

14 A. Okay. That's what's on the record, 5:57.

15 Q. That was on the record. So we know -- based
16 upon the testimony that was presented and the
17 records, we know at 5:58, he was in Mr. Ron
18 Fountain's store; is that correct?

19 A. 5:50-something and some change.

20 Q. 5:58 on the -- from the testimony that
21 Mr. Capps said, 5:58, he was in the store.

22 A. I'm not sure if it's 5:57 and some change or
23 5:58, but just rounding off, that sounds about
24 right.

25 Q. Okay. Wherever you want to round it off at.

1 But now -- and you said the cemetery was more than a
2 mile or so from the store; is that correct?

3 A. A few miles. It's not far.

4 Q. Okay. So if you're in the cemetery -- I'm just
5 asking you, do you think that you can get from
6 that cemetery --

7 MS. SIMPSON: Objection, Your Honor.

8 THE COURT: He can't give an opinion. He's not
9 qualified to give an opinion.

10

11 BY MR. JOHNSON:

12 Q. On the video at 5:58, he was walking around in
13 the store. We don't have -- okay. Could someone be
14 in the cemetery and the store at the same time?

15 MS. SIMPSON: Objection -- well, I take that
16 back. I withdraw my objection.

17 A. I would think not. It would be a pretty nice
18 trick.

19 Q. All right. That's good. Let me go on to
20 another question. So Nakia was a police officer.
21 And I think the other officer in there that was
22 asking the questions about the DNA, that was Officer
23 Chris Phillips; is that correct?

24 A. Yes, sir.

25 Q. Okay. And at that time y'all had not even had

1 the DNA results?

2 A. No, sir. I know they were trying to take DNA
3 samples, but to have the DNA results back, no, sir.

4 Q. All right. So in other words, you were trying
5 to entice him -- using police tactics and trying to
6 entice him to admit something?

7 A. I wasn't.

8 Q. Not you, but that's what was going on?

9 A. It was a tactic that he was using.

10 Q. Okay. Okay. And he -- and if you watch the
11 video, he continued to say, I didn't do it; is that
12 correct?

13 A. Yes, sir.

14 Q. So we're talking the difference in the phone
15 call at the cemetery at 5:57 and being in the store
16 at 5:58; is that correct?

17 A. Going by your records here, yes.

18 Q. Okay. And the video we saw showed Nakia and
19 Minor in the store; is that correct?

20 A. That appeared to be Minor with him, yes.

21 Q. Okay. And the video showed her going -- matter
22 of fact, to pick up candy and show him which one --
23 did you watch the video?

24 A. Yes.

25 Q. Okay. Candy or something, showing him about

1 the candy?

2 A. I think both hands had something in them, yes.

3 Q. Okay. And, matter of fact, when you started
4 watching the video, he was in the back of the store
5 already and she was walking around in the store; is
6 that correct?

7 A. Seemed like -- if I remember right, it seemed
8 like he was coming in from the side. But he walked
9 into the shop where the camera was at.

10 Q. Okay. Wasn't he coming from the back aisles in
11 the video?

12 A. I'm not sure how the cameras are situation in
13 the store.

14 Q. Would you like to see the video?

15 A. It doesn't matter. I agree that he came from
16 somewhere in the store.

17 Q. Okay. Well, you agree he came from somewhere
18 in the store?

19 A. Yes.

20 Q. Which would say he was already in the store at
21 5:58; isn't that correct? If he had come from
22 somewhere, he had to be in the store.

23 A. By the time on Mr. Fountain's video, yes.

24 Q. Okay. You remember Officer Phillips taking the
25 telephone and saying the network doesn't lie?

- 1 A. I'm sorry?
- 2 Q. Do you remember Officer Phillips at the time
- 3 taking Mr. Johnson's telephone and saying the
- 4 network doesn't lie?
- 5 A. I remember that.
- 6 Q. He said, forensically, it doesn't lie.
- 7 A. Uh-huh.
- 8 Q. Mechanically, it don't lie?
- 9 A. I think it was electronically.
- 10 Q. Okay. Okay. I'm assuming it applied to the
- 11 phone, but it doesn't apply to the video?
- 12 A. I don't understand the question.
- 13 Q. Wouldn't -- you're saying you're not sure
- 14 whether the video is giving the proper time. You
- 15 don't know whether the time is proper or not, but
- 16 it's the time that is on the video?
- 17 A. It's the time that is on the --
- 18 Q. And it's the time that shows him in the store?
- 19 A. That's what it shows on the video.
- 20 Q. And he was in the store at 5:58?
- 21 A. According to the video.
- 22 Q. Okay. And **Minor** was in the store with him?
- 23 A. Yes, sir.
- 24 Q. Okay. What was the weather like that day?
- 25 A. I'm sorry?

1 Q. What was the weather like that day?

2 A. They said it had rained earlier that day. When
3 I was called to the scene, the rain had slowed down
4 to a light drizzle, if I remember correctly, when I
5 got there.

6 Q. Okay. Was there some forecast -- and it might
7 have been just rain. But was there some forecast --
8 if you remember, fine; and if you don't --

9 A. I don't.

10 Q. Was there some forecast about a storm coming?

11 A. Honestly, I couldn't tell you.

12 Q. Okay. Was the questioning about the telephone
13 network a strategy to make him -- entice him to say
14 something just like the testimony about the -- about
15 the DNA? Was the testimony about --

16 A. No, sir. I was honestly trying to understand
17 why -- what was coming from Ms. Hall's phone and
18 what the allegations were to match up to his phone.
19 I was really trying to understand and get, I guess,
20 his side of the story to try to poke holes in his
21 story or get to the bottom of what was going on. It
22 wasn't used as a tactic to elicit any kind of a
23 response; I was looking for information.

24 Q. But if you would have followed with that phone
25 bill, wouldn't what he told you mirror the phone

CROSS-EXAMINATION OF RICK BAILEY BY MR. JOHNSON

523

1 records?

2 A. No, sir. He stated he was on the phone with
3 Nikki Chisolm. And even with your records, he
4 wasn't on the phone with Nikki Chisolm when the
5 butt-dial went to Ms. Hall.

6 Q. He said he wouldn't. But that's the whole
7 thing: Weren't you the one who said it was a
8 butt-dial? He never said he did a butt-dial, did
9 he?

10 A. And that was for lack of a better term. I
11 don't know what the correct terminology --

12 Q. But you were the one who brought up butt-dial.
13 He never said he did a butt-dial, did he?

14 A. He said he never called her, but we showed that
15 it was an outgoing call.

16 Q. He said -- if you look at the video -- the good
17 thing about this, the video is going to go with the
18 jury. If you look at the video -- if you look at
19 the video, didn't he repeatedly tell you she called
20 him to -- and then the records says she called him
21 two or three times and then he called her back?
22 Doesn't the record -- didn't he say that?

23 A. I think the record -- and I think that's what
24 Ms. Hall was telling me, that she called several
25 times. I guess -- and he even confirmed about pop

1 oil skins [phonetic]. I don't even know what that
2 is.

3 But she called him back after she had heard the
4 conversation at 5:54, I think it was. So there were
5 phone calls back and forth, yes, sir, to answer your
6 question.

7 Q. I want to make sure your reasoning for
8 arresting this police officer was because there were
9 discrepancies in the phone call in your mind; that's
10 one of the reasons?

11 A. The allegations --

12 Q. The allegations --

13 A. -- and the phone call.

14 Q. Okay. And there was no proof in the
15 allegations other than the allegations?

16 A. The allegations and what I had on the phones at
17 the time.

18 Q. And when you said you had some other evidence
19 he didn't have, there was really no other evidence,
20 was there?

21 A. Just the sworn statements by Ms. Hall.

22 Q. Okay. Do you remember how long he stayed in
23 jail after he was arrested?

24 MS. SIMPSON: Objection, Your Honor; relevance.

25 THE COURT: Sustained.

CROSS-EXAMINATION OF RICK BAILEY BY MR. JOHNSON

525

1 BY MR. JOHNSON:

2 Q. You do understand that the time of the phone
3 call, the technology, the electronics, all of that
4 says he was in the store?

5 A. At which time? And I'm not being aloof, I'm
6 just -- if you'll refer to a number.

7 Q. The 5:50, he was in the store.

8 A. The 5:54, that's the phone call, I think. We
9 said the time on the phone call was --

10 Q. Okay. But he was walking around in the store
11 at 5:58. He couldn't get in there to walk around
12 without already being in the store.

13 A. I guess. I don't know.

14 Q. And the other thing too: I think y'all were
15 using information from Ms. Hall's phone to ask him
16 questions and using information from his phone and
17 asking questions; is that correct?

18 A. Yes, sir.

19 Q. And when his answers didn't equate with
20 Ms. Hall's phone, that was when y'all said there
21 was a problem; is that correct?

22 A. His statements in the interview were that he
23 never called her; that it was an incoming call from
24 her, when it's actually showing an outgoing call to
25 her. That was the discrepancy.

- 1 Q. Okay. But the phone records show the
2 two-minute call came from her -- to his phone from
3 her, didn't it?
- 4 A. No, sir.
- 5 Q. That 5:54, it didn't --
- 6 A. The phone call shows an outgoing call from his
7 phone to her phone.
- 8 Q. At 5:54?
- 9 A. And that's when she heard what she heard and
10 she put it in her statement. It wasn't an incoming
11 call, it was an outgoing call from Mr. Johnson's
12 phone to Ms. Hall's phone.
- 13 Q. But didn't he tell you over and over he wasn't
14 sure, he was just guessing at the time? Didn't he
15 tell you that?
- 16 A. He gave us several times.
- 17 Q. Okay. But didn't he tell you that? Didn't he
18 tell you over and over, I don't know why, I don't
19 understand, you know, what's on the phone is on the
20 phone, but I knew I talked to these people? Didn't
21 he tell you that?
- 22 A. Yeah, he said he didn't know.
- 23 Q. Okay.
- 24 A. He said he couldn't explain why it showed him
25 having an outgoing call when he said it was an

REDIRECT EXAMINATION OF RICK BAILEY BY MS. SIMPSON

527

1 incoming call.

2 Q. Okay.

3 A. He couldn't explain it.

4 Q. Okay. The officers in the room said it was an
5 incoming call. Didn't he say it was an outgoing
6 call?

7 A. No, sir.

8 Q. Doesn't the phone records say it was an
9 outgoing call?

10 A. From him to Ms. Hall.

11 Q. Correct.

12 A. Yes, sir.

13 Q. And you'll agree that at 5:58 he was in the
14 store?

15 A. According to your phone records and what's on
16 the video.

17 Q. According to my records or AT&T's records?

18 A. The same.

19 MR. JOHNSON: That's all.

20 THE COURT: Redirect?

21 MS. SIMPSON: Brief, Your Honor.

22 REDIRECT EXAMINATION

23 BY MS. SIMPSON:

24 Q. I'll actually start with the phone. At the
25 time of the interview -- and let's be clear. He was

1 arrested the day of the disclosure; correct?

2 A. Within hours. The dates were different, but
3 within that day.

4 Q. And the phone -- you're not actually utilizing
5 the records at that point; correct?

6 A. Correct.

7 Q. What do you have to do in order -- or were
8 you -- what phone were you looking at? Was it
9 records or a physical phone?

10 A. A physical phone.

11 Q. Whose phone was it?

12 A. Mr. Johnson's.

13 Q. Okay. So y'all didn't actually have the
14 records at that time?

15 A. Like this here?

16 Q. The phone records.

17 A. No, ma'am.

18 Q. In order to get the phone records, what did you
19 do have to do?

20 A. Send off a search warrant.

21 Q. Okay. So after he was arrested, did your the
22 investigation, along with SLED's, continue in this
23 case?

24 A. Yes, ma'am.

25 Q. And in order to get an arrest warrant, tell the

1 jury the process you have to go through as an
2 officer. Do you get to just write up something and
3 say, hey, I'm going to arrest him based on what I
4 write down?

5 A. It's not that easy.

6 Q. Tell the jury what you have to do.

7 A. We have to establish what they call probable
8 cause. Probable cause is a little bit less than
9 what you would call reasonable doubt, which is
10 required here today for a conviction. Probable
11 cause means you have to prove that because of the
12 circumstances surrounding the affidavit you fill
13 out, this alleged crime probably happened.

14 Q. And who do you -- before we get into too much
15 of a legal discussion, who do you present it to? Is
16 information presented to someone who actually --

17 MR. JOHNSON: Your Honor, I object to
18 relevancy.

19 THE COURT: Well, you opened the door on didn't
20 he have an arrest warrant at that time, so she can
21 ask how he gets the warrant.

22 Who did you go before to get the warrant,
23 that's the question.

24 THE WITNESS: I went in front of a county
25 magistrate here in Kershaw County.

1 BY MS. SIMPSON:

2 Q. Okay. So at that time, after you presented the
3 information to the Magistrate, were you actually
4 issued the warrant?

5 A. I was actually issued the warrant.

6 Q. Did you actually serve it at that time?

7 A. At the time that --

8 Q. As soon as you got it, before he walked in?

9 A. No.

10 Q. And I believe you stated on direct that it's
11 your discretion whether you actually serve it.

12 A. My affidavit is -- like you said, it's my
13 discretion whether someone is actually processed on
14 a warrant that I obtain.

15 Q. And as I said, your investigation -- she -- had
16 the victim even been forensically interviewed yet?

17 A. No, ma'am. That was not until the next day.

18 Q. So that was after the arrest. And with respect
19 to the testing in this case, the forensics that were
20 presented to SLED, when was that done? Was that
21 subsequent to his arrest as well?

22 A. It was after his arrest.

23 Q. Going to the whole can you be in two places at
24 once and the timing on the records and the Fountain
25 Grocery Store, I want to focus on what counsel was

REDIRECT EXAMINATION OF RICK BAILEY BY MS. SIMPSON

531

1 talking to you about on cross.

2 With respect to surveillance systems and
3 locations, have you had some experience in dealing
4 with surveillance equipment from wherever?

5 MR. JOHNSON: Objection, Your Honor. I don't
6 know that he's qualified to talk about surveillance.

7 MS. SIMPSON: I'm asking about --

8 THE COURT: He can testify about his
9 experience; he can't give opinions.

10 THE WITNESS: Can she repeat the question,
11 please?

12 BY MS. SIMPSON:

13 Q. In your experience as an investigator, have you
14 dealt with different surveillance systems?

15 A. Yes, ma'am.

16 Q. And what types of cases have you dealt with
17 them?

18 A. Bank robberies, homicides, armed robberies,
19 petty thefts, things of that nature.

20 Q. Okay. And are surveillance systems always
21 accurate in your experience?

22 MR. JOHNSON: Objection; that asks for an
23 opinion.

24 MS. SIMPSON: I think he --

25 THE COURT: The ones that you've dealt with,

1 not an opinion. The ones that you've had first-hand
2 knowledge with.

3 BY MS. SIMPSON:

4 Q. With respect to the ones you actually dealt
5 with, are they always accurate with respect to the
6 timestamps on it and what time the incident actually
7 occurred?

8 A. Most of the ones I deal with, the time and
9 dates are set by the actual owner-operator, so that
10 could differ. My wristwatch may say something
11 different than your wristwatch. But I have noticed
12 from time to time the information on a video that I
13 retrieve does not match the information I have on my
14 watch or my cell phone or something of that nature.

15 Q. And going to the video from the store, are we
16 within the timeframe of the incident, whether it's a
17 matter of minutes or seconds off, per Pamela Hall,
18 as to when this occurred, the phone call and
19 disclosure?

20 A. Within the same amount of time or timeframe,
21 but I'm not sure about exact time.

22 Q. So we're not exact. But who is in the store on
23 the video?

24 A. Mr. Johnson and Minor

25 Q. Okay. Is anybody else with them?

- 1 A. I didn't see anybody --
- 2 Q. Okay. And --
- 3 A. -- that I could relate.
- 4 Q. And was that consistent -- them being in the
5 store consistent with what you learned in the course
6 of your investigation?
- 7 A. As far as he usually took them to buy candy and
8 things of that nature. I mean -- and her being the
9 sole person with him at that time is consistent.
- 10 Q. Okay. And based on your investigation for how
11 this came about that night, where was he going when
12 he left the house with the victim?
- 13 A. He told us and, I think, Ms. Hall that he was
14 going to the store to buy the kids candy.
- 15 Q. And that's actually confirmed in the video --
- 16 A. Yes, ma'am.
- 17 Q. -- that they're in the store on that day?
- 18 A. Yes, ma'am.
- 19 Q. Going to the phone call that counsel
20 addressed -- and we'll just stick with the one at
21 5:54, the main call at issue here. I don't know
22 what item number it is --
- 23 A. 828.
- 24 Q. 828. That is an outgoing call; correct?
- 25 A. Yes, ma'am.

1 Q. And with respect to Mr. Johnson's statement and
2 his interview, who did he indicate he was actually
3 talking to during this call, or did he indicate?

4 A. He stated that he thought he was talking to
5 Nikki Chisolm. But that number wasn't on the phone
6 log. It was an outgoing call from his phone to
7 Pamela Hall's.

8 Q. Okay. And with respect to what he says in the
9 interview about Nikki Chisolm and that conversation,
10 what was the nature of that conversation that he was
11 having with Ms. Chisolm?

12 A. Sexual in nature.

13 Q. Sexual in nature?

14 A. Yes, ma'am.

15 Q. And --

16 MS. SIMPSON: Beg the Court's indulgence.

17 I believe that's all I have for you, sir.

18 THE COURT: Thank you. You may step down.

19 Next witness.

20 MR. JOHNSON: Your Honor, may it please the
21 Court. I know the rule, but just for the purpose of
22 the record, she went into new items that I didn't
23 get to ask.

24 THE COURT: All right.

25 Answer any questions Mr. Johnson may have.

RE CROSS-EXAMINATION OF RICK BAILEY BY MR. JOHNSON

535

1 RE CROSS-EXAMINATION

2 BY MR. JOHNSON:

3 Q. Two questions.

4 A. Yes, sir.

5 Q. At 2147 item 819, that was a call from Nikki
6 Chisolm to him; is that correct?

7 THE COURT: Ask that again.

8 Q. At item 819 and the time of 2147, there was a
9 phone call from Nikki Chisolm to Mr. Johnson; is
10 that correct?

11 A. That's what it shows on here, yes.

12 Q. Okay. And item 821 at 2148, there was another
13 call from Nikki Chisolm to Mr. Johnson; is that
14 correct?

15 A. Yes.

16 Q. And that was before 2154?

17 A. I'm sorry?

18 Q. That was -- 2148 is before 2154?

19 A. Yes, sir.

20 MR. JOHNSON: Thank you, Your Honor.

21 THE COURT: You may step down.

22 Next witness, please.

23 MS. SIMPSON: Beg the Court's indulgence one
24 moment.

25 Your Honor at this time, the State rests.

1 THE COURT: Madam Forelady, ladies and
2 gentlemen of the jury, that concludes the evidence
3 on behalf of the State. I need to spend 10 or 15
4 minutes with the lawyers. We'll come back out and
5 I'll tell you where we are. Please leave your
6 transcript in the chair. Do not discuss the case
7 and do not deliberate.

8 (The jury exits the courtroom at 3:52 PM.)

9 THE COURT: All right. Let's take five.
10 Mr. Johnson, I'll be discussing with your client his
11 right to testify when we come back out after you
12 make any motions that you may have.

13 MR. JOHNSON: Yes, sir.

14 THE COURT: Go ahead and prepare him for that.
15 We'll take a real short break and be right back.

16 (Short break.)

17 THE COURT: Mr. Johnson -- well, first of all,
18 any motions by the State?

19 MS. SIMPSON: No, Your Honor.

20 THE COURT: By the Defendant?

21 MR. JOHNSON: Your Honor, looking at all of the
22 evidence in the light most favorable to the State, I
23 move at this time, Your Honor, on the charge of
24 criminal sexual conduct first degree, that there was
25 no evidence put in the record in Kershaw County

1 that -- there was no evidence in the record that he
2 had any contact, sexual penetration, physical
3 contact --

4 THE COURT: How about in the computer room?
5 Wasn't that house in Kershaw County?

6 MR. JOHNSON: That wasn't -- my understanding,
7 that wasn't before 11. When I read the transcript,
8 she said everything started at 11.

9 THE COURT: She said it started three years
10 ago.

11 MR. JOHNSON: No. That was Fairfax stuff,
12 which is another county.

13 THE COURT: Go ahead. What else?

14 MR. JOHNSON: Just the standard motion on the
15 other two charges. I mean, honestly, looking at the
16 evidence, I guess it is evidence that would go to
17 the jury. But on that one, I was paying close
18 attention to that one all through the trial just to
19 make sure.

20 THE COURT: All right. Ms. Simpson, what
21 evidence do we have in the record that it happened
22 in Kershaw County?

23 MS. SIMPSON: With respect to the Kershaw
24 County incidents themselves, we do have the computer
25 room. And Defense counsel's motion relies only on

1 the forensic interview where Mr. Kellin was
2 interviewing and the victim initially said, yeah, it
3 started when I was 11. But, in reality, we have the
4 timeframe dating back to 2007 --

5 THE COURT: On a number of occasions. There
6 was a good bit of testimony saying -- about going
7 back several years.

8 MS. SIMPSON: Yes, Your Honor. And during that
9 time -- and part of the reason we put up both
10 Melissa Hall and Stacey Hall, which you have that
11 information on the record, the computer room was
12 actually at Melissa Hall's residence, and that's the
13 [REDACTED] You also have her living
14 with Aunt Stacey at [REDACTED], which is in
15 Kershaw County. And while it didn't happen at the
16 house, what he would do is when he would visit, he'd
17 take her to a dirt road, which is also located in
18 Kershaw, one that she was actually able to remember
19 that we didn't put on the record.

20 As far as timeframes, we have them prior to --
21 her date of birth is [REDACTED] [REDACTED]. During the
22 time of this disclosure, she was actually 11;
23 however, even with the defendant's statement, he was
24 present, she would have been in Kershaw County at
25 times or at least enough to go to jury prior to ten

1 in which penetration was occurring, sexual batteries
2 were occurring, be it oral or vaginal, because she
3 stated that while, yes, it began in Fairfax, that is
4 also where the sexual batteries, beyond just
5 touching and fondling and things of that nature,
6 began. And once it began, it continued.

7 This is a case of chronic abuse, so of course
8 dates and times. I think there's clearly enough on
9 the record from the testimony of all these witnesses
10 in their totality to include Ms. Hall that would
11 present enough evidence for the CSC first to be
12 presented to the jury, and that point they can give
13 it any weight that they so need.

14 THE COURT: Mr. Johnson?

15 MR. JOHNSON: Your Honor, suppose they did -- I
16 went through the interview and I listened to the
17 testimony. And there was -- both of her forensic
18 interviews said it happened at 11, and on her
19 testimony in the trial, she never said it happened
20 before 11. Now, I think we can make the assumption
21 that maybe it happened, what time it happened at the
22 aunt's house. But we don't know when it happened.
23 But none of the testimony in the record says it
24 happened before 11.

25 And, Your Honor, it's so jumbled because of the

1 charges from 2007 to now. But if you look
2 specifically at Kershaw County, there's no testimony
3 that it happened in Kershaw County. There may be
4 testimony it happened in some of the other counties,
5 but none in Kershaw.

6 MS. SIMPSON: Your Honor, I believe Mr. Johnson
7 actually just kind of made the point. He said that
8 there had been no testimony. But with respect to
9 the victim's actual direct testimony, she said that
10 while it started in Fairfax, at some point they
11 moved back to her grandmother's property. And,
12 again, she actually said it had been going on for a
13 period of years. It's when she would have been back
14 at her grandmother's property, which is Stevens Road
15 here in Kershaw County. And the -- he was
16 clearly -- the testimony has always been that he
17 always visited, of course from the children and the
18 aunt, and when he did, that would be on occasions
19 that he would either send her mom to the store or
20 take her down the dirt road. And so -- and that is
21 based on her direct testimony.

22 The second forensic interview and transcript
23 he's relying on, of course, is not in evidence. So
24 we're left with her testimony that was presented on
25 the stand which is before the jury. And I believe

1 there is more than enough to go to the jury as the
2 rule requires the existence.

3 THE COURT: All right. Mr. Johnson, I'm going
4 to respectfully deny your motion. I think there's
5 sufficient evidence in the record that, if the jury
6 believes it and they believe it's been proven to
7 them beyond a reasonable doubt, would support a
8 verdict for criminal sexual conduct both in the
9 first and in the second degree and/or lewd act. So
10 I'm going to respectfully deny your motion.

11 MR. JOHNSON: Thank you, sir.

12 THE COURT: Any other motions by anyone?

13 MS. SIMPSON: Nothing from the State.

14 THE COURT: All right.

15 Mr. Johnson -- Mr. Nakia Johnson, if you would
16 please stand. Please raise your right hand. Do you
17 swear or affirm the testimony you're about to give
18 will be the truth?

19 THE DEFENDANT: I don't plan to give any
20 testimony, Your Honor.

21 THE COURT: Do you swear or affirm the
22 testimony you're about to give me will be the truth?

23 THE DEFENDANT: Yes.

24 THE COURT: I'm not going to ask you for any
25 testimony, I'm just going to ask you some questions

1 and make sure you understand. You may be seated.

2 THE DEFENDANT: Yes, sir.

3 THE COURT: I'm not going to elicit any
4 testimony from you. I want to make sure you
5 understand your right to remain silent. Fair
6 enough?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: All right. We've reached the stage
9 in the trial where you can tell your side of the
10 story; in other words, you can present your defense.
11 And, obviously, you don't have anything to prove.
12 The burden of proof is on the State to prove your
13 guilt beyond a reasonable doubt. So you have no
14 requirement to prove anything.

15 But if you choose to do so, you obviously can
16 put up your defense. And what that consists of is
17 you can call witnesses to testify on your behalf,
18 you can introduce relevant exhibits, and you can get
19 on the witness stand and testify and tell your side
20 of the story. So listen to me. I'll give you a
21 chance to respond.

22 If you do that, obviously you'll be subjected
23 to the same cross-examination as anyone else who
24 testifies in a trial.

25 Does he have a record that would --

1 MS. SIMPSON: No, Your Honor, not that I'm
2 aware of. No.

3 THE COURT: So you'd be subject to
4 cross-examination. Now, under the Constitution of
5 the United States the state of South Carolina, you
6 have the right to remain silent. A person who is
7 accused of a crime in our state or in the United
8 States is never, ever required to testify in a
9 trial. You have the absolute constitutional right
10 to remain silent. And if you exercise that right,
11 part of my instructions will be that you have no
12 obligation to prove anything; you have the absolute
13 right to remain silent. And I will tell the jury
14 the fact that you do not testify in this case cannot
15 be used against you in any manner whatsoever, no
16 inferences can be drawn from the fact that you did
17 not testify, and they can't hold that against you in
18 any manner whatsoever.

19 I will further instruct them that they can't
20 even talk about the fact that you didn't testify,
21 and they can't even consider it when they deliberate
22 your guilt or innocence. You have the absolute
23 right to remain silent. And if you exercise that
24 right, it is your constitutional right, and they
25 can't hold it against you.

1 Now, do you understand your right to remain
2 silent?

3 THE DEFENDANT: Your Honor, yes, I do.

4 THE COURT: And, obviously, you can get the
5 advice of your lawyers, anyone else, but when it
6 comes down to the bottom line, it's obviously your
7 choice. And if you need any additional time to talk
8 to Mr. Johnson, I'll be glad to give it to you, or
9 you can tell me now because, obviously, we got
10 another hour. If you're going to testify, we have
11 to do it this afternoon.

12 THE DEFENDANT: Your Honor, my testimony has
13 already been made that night when I turned myself in
14 to the Kershaw County Sheriff's Department. And
15 that's the only statement I wish to make at this
16 time.

17 THE COURT: So you do not wish to testify?

18 THE DEFENDANT: No, sir.

19 THE COURT: Thank you.

20 Mr. Johnson, do you have any other witnesses?

21 MR. JOHNSON: No other witnesses. And the
22 Defense rests.

23 THE COURT: All right. Anything else we need
24 to inquire?

25 MS. SIMPSON: No, Your Honor.

1 THE COURT: All right. I'm going to bring the
2 jury in and tell them that that concludes all the
3 testimony in the case and what is left are the final
4 arguments and my charge, and that we'll start court
5 in the morning at 9:15.

6 (The jury enters the courtroom at 4:11 PM.)

7 THE COURT: Madam Forelady, ladies and
8 gentlemen, fist order of business, please give us
9 the transcripts you were provided. The transcript
10 itself is not evidence in the case. You will have
11 the disc to play if you need to. So please pass
12 those down and give it to the bailiff.

13 Madam Forelady, ladies and gentlemen, as you
14 heard when we took this last break, the State has
15 rested, which means they've completed all of their
16 testimony. The Defense, likewise, has rested;
17 they're not going to present any testimony. So that
18 concludes all of the testimony that we'll hear in
19 the trial of the case. I've still got about an
20 hour's worth of work to do with the lawyers. I have
21 to go over my instructions with them, make sure that
22 I have everything included that deals with all of
23 the subjects. That will take us to 5:00 or 5:30.
24 So what I think I'll do is have all of that out of
25 the way and start at 9:15 in the morning. I don't

1 have to wait on anybody in the morning. We'll start
2 at 9:15.

3 And what will happen in the morning is, first
4 thing out of the gate, the State will make their
5 final arguments, followed by Mr. Johnson. Once
6 those two arguments are made, I'll instruct or
7 charge you on the law. And my instructions are
8 probably 15 minutes, and then you'll be in a
9 position to receive the case and start your
10 deliberations. And when you do that, you'll receive
11 all of the evidence that's been admitted into the
12 trial of the case. And we'll go over the protocol
13 of that.

14 I want you to go home and have a wonderful
15 evening, get some rest. Y'all have been wonderful.
16 Y'all have paid great attention, I really appreciate
17 it. You're great to work with. Don't discuss the
18 case with anyone, don't let anyone discuss it with
19 you. Don't do any kind of research and do not
20 deliberate amongst yourselves. You'll do that
21 tomorrow. Please everyone be here by 9:15 in the
22 morning.

23 (The jury excused for the evening at 4:14 PM.)

24 THE COURT: All right. Ladies and gentlemen,
25 my normal charge is this: Start off by, the fact

1 that he's been indicted and arrested and charged is
2 not evidence in the case; presumption of innocence,
3 multiple indictments, you have to consider each one
4 of them separate and apart from the other;
5 reasonable doubt is the kind of doubt to cause a
6 reasonable person to hesitate to act, and also
7 firmly convinced charge; credibility of witnesses,
8 duties of the judge and the jury, not to infer
9 anything from what I've done up here, prior
10 conviction of a witness for credibility purposes,
11 failure of the defendant to testify, right to remain
12 silent in other words. I think that's all the
13 general charge.

14 Then I'll charge the criminal sexual conduct
15 first and second, lewd act. I'll charge that
16 statute about corroboration, unanimous verdict,
17 formal verdict, guilty or not guilty, three separate
18 verdict forms.

19 Ms. Simpson, anything else you would like?

20 MS. SIMPSON: Your Honor, just a question. I
21 understand your reasonable doubt will include the
22 hesitate to act. Is the firmly convinced language
23 from Darby? I just want to know for purposes of --
24 is it proof that leaves you firmly convinced? Can I
25 know what it is?

1 THE COURT: It's the standard charge we give
2 all over the state. It's the very few things in
3 this world that you can know with absolute
4 certainty, but the law doesn't require that; if
5 you're firmly convinced, however -- you know what
6 I'm talking about. I'll read it to you right now.

7 MS. SIMPSON: Thank you.

8 THE COURT: All right. Proof beyond a
9 reasonable doubt is proof that leaves you firmly
10 convinced of the defendant's guilt. There are very
11 few things in this world that we know with absolute
12 certainty, and in criminal cases the law does not
13 require proof that overcomes every possible doubt.
14 If, based on your consideration of the evidence, you
15 are firmly convinced that the defendant is guilty of
16 the crime charged, you must find him guilty.

17 If, on the other hand, you think there's a real
18 possibility that he's not guilty, you must give him
19 the benefit of the doubt and find him not guilty.

20 MS. SIMPSON: Thank you.

21 THE COURT: Is that from Darby?

22 MS. SIMPSON: It is.

23 THE COURT: It says it's from State v. Mchoney
24 or State v. Needs. Maybe I should update that.

25 MS. SIMPSON: This may be old too, Your Honor.

1 This case may actually be older; it's from '96.

2 THE COURT: 1998.

3 All right. Anything else about the general
4 charge from the State?

5 MS. SIMPSON: No, Your Honor.

6 THE COURT: Mr. Johnson?

7 MR. JOHNSON: Your Honor, I just want to ask
8 about the collaboration charge, particularly with
9 this lewd act. This case -- the statute changed, I
10 think, in 2012. In 2011 when this happened, I'm
11 asking the Court, I thought you had to have the
12 collaboration evidence in 2012 -- I mean 2011, but
13 they changed the statute in 2012. And I know you
14 don't need it now. But -- and also, there's the
15 thought out there that even if you can charge it,
16 it's not necessarily a thing that you have to
17 charge.

18 So I would propose that the charge about
19 collaboration [sic] that needs to -- do not need to
20 collaborate [sic] the testimony. I would ask the
21 Court to consider not charging that.

22 THE COURT: What's that statute, ladies?

23 MS. SIMPSON: 16-3-657.

24 THE COURT: All right. Mr. Johnson, it says:
25 The testimony of the victim need not be corroborated

1 in prosecutions under 16-3-652, which is criminal
2 sexual conduct in the first degree, as well as
3 criminal sexual conduct in the second degree with
4 minors.

5 Ladies, why should I not charge it?

6 MS. SIMPSON: Your Honor, I think the case law
7 is directly on point that if it is the appropriate
8 law in the case, which here it clearly is, our
9 legislature intended it, and as long as it's
10 charged, I think, within the context of credibility
11 of witnesses, like somewhere in line with your
12 charge, that it is appropriate and needs to be
13 charged.

14 THE COURT: Why not charge it, Mr. Johnson?

15 MR. JOHNSON: Your Honor, I think the recent
16 case law says it's up to the Court's discretion
17 whether to charge it.

18 THE COURT: Well, hand -- you got that case?

19 MR. JOHNSON: No, sir. But I guess I'll try to
20 find it.

21 And the other things is, this case occurred in
22 2011, Your Honor. And I could be wrong, but I don't
23 think I'm wrong. On the lewd act --

24 THE COURT: I'm not going to charge it on the
25 lewd act.

1 MR. JOHNSON: Oh, okay.

2 THE COURT: It just -- I don't think it covers
3 lewd act. Does it?

4 MS. SIMPSON: No, Your Honor, I don't think it
5 does.

6 THE COURT: 652 and 658.

7 MR. JOHNSON: Okay. Well then, Your Honor, the
8 only thing is it's in the Court's discretion. If
9 you charge it, I don't have anything, Your Honor.

10 THE COURT: What is lewd act?

11 MS. SIMPSON: 16-15-0140.

12 THE COURT: 16-15 what?

13 MS. SIMPSON: 140.

14 THE COURT: So that's not included in those --
15 that section? So you're right on the lewd act.

16 MS. SIMPSON: And, Your Honor --

17 MR. JOHNSON: Your Honor, once you've given
18 your charge though -- once you give that, you got
19 your lewd act and your criminal first and your
20 criminal second. I guess, unless you go specify
21 lewd act --

22 THE COURT: I stated that the prosecution for
23 criminal sexual conduct with a minor in the first
24 degree and the second degree, no corroboration is
25 necessary, or I'll read the statute.

1 MR. JOHNSON: Okay.

2 THE COURT: And I won't mention lewd act.

3 MR. JOHNSON: All right, sir.

4 MS. SIMPSON: And along those same lines -- in
5 that same vein, as far as criminal intent and the
6 lewd acts, of course, the intent for that charge
7 versus the strict liability defenses of criminal
8 sexual conduct with a minor. Just as far as what
9 order the charge is going to be read.

10 THE COURT: The charge will be read criminal
11 sexual conduct in the first, criminal sexual conduct
12 in the second, and lewd act.

13 MS. SIMPSON: Okay.

14 THE COURT: The defense has been indicted and
15 charged with the offense of lewd act. In order to
16 prove lewd act, the State must prove beyond a
17 reasonable doubt whatever the elements are --

18 MS. SIMPSON: All right. Thank you.

19 THE COURT: -- which are that the defendant was
20 over the age of 14, that the defendant willfully and
21 lewdly committed or attempted to commit a lewd or
22 lascivious act upon the -- on or on the body or its
23 parts of the child under the age of 16 with the
24 intent to arouse. And I'll define what lewd means
25 and lascivious means, and that's it. Very simple

1 charge. Where did you come in with strict
2 liability?

3 MS. SIMPSON: No. I mean, as far as, like,
4 mistake of age is not a defense, consent is not a
5 defense, with respect to the criminal sexual conduct
6 with a minor in the first degree and the second
7 degree; however, with lewd act, it differs in that
8 respect.

9 THE COURT: I'm just going to charge the
10 statute.

11 MS. SIMPSON: Okay. Thank you.

12 THE COURT: Anything else?

13 MR. JOHNSON: Nothing else from the Defense,
14 Your Honor.

15 THE COURT: We find the defendant not guilty,
16 we find the defendant guilty on each separate
17 verdict form. There will be three verdict forms.

18 All right. Thank y'all. Anything else for the
19 record before we break for the evening? We need to
20 delete from the exhibits the disc of the young girl
21 who did not testify.

22 MS. SIMPSON: It was never actually entered, it
23 was just marked for identification. So --

24 THE COURT: But we'll probably need to leave
25 that as a Court's exhibit in case anybody -- but

1 we'll certainly not let it go back to the jury.

2 Anything else?

3 MS. SIMPSON: Nothing from the State.

4 MR. JOHNSON: Nothing from the Defense.

5 (Court's Exhibit No. 1 marked for
6 identification.)

7 (Court in recess for the evening.)

8 THE COURT: Anything for the record by the
9 State before we have final arguments?

10 MS. SIMPSON: No, Your Honor, nothing from the
11 State.

12 THE COURT: And Mr. Johnson?

13 MR. JOHNSON: Nothing from the Defense, Your
14 Honor.

15 THE COURT: Okay. Bring the jury in, please.

16 (The jury enters the courtroom at 9:20 AM.)

17 THE COURT: Good morning.

18 THE JURY: Good morning.

19 THE COURT: Okay. As I said yesterday, we're
20 down to the final arguments. The State will go
21 first, followed by the Defendant. At the conclusion
22 of that, I'll charge you or instruct you on the law,
23 and then you'll be in a position to begin your
24 deliberation.

25 Please pay close attention to the lawyers. As

1 I've said, you've now heard all of the evidence that
2 you're going to hear, and that's where you'll make
3 your decision. The final arguments are like opening
4 statements: It is not evidence in the case.

5 Obviously they are adversaries for each particular
6 side and they'll be arguing the evidence in the
7 light most favorable to their position. But you've
8 heard the evidence and that's where you make your
9 decision.

10 So, having said that, the State may proceed.

11 MS. SIMPSON: Thank you, Your Honor. May it
12 please the Court.

13 The face of a predator, what exactly does it
14 look like? Well, for the victim in this case,
15 **Minor** it wasn't some stranger in the street
16 wearing a mask and carrying a gun and hiding under
17 the cover of darkness; no, it was someone she knew,
18 someone she loved. And he didn't need a gun or a
19 mask because he had the most powerful weapon of all:
20 A veil of trust, together with a position of
21 authority and control that only an adult can have
22 over a child, especially one who is in a
23 father-figure type role.

24 No, the face of her predator was that of the
25 defendant, Nakia Johnson. Nakia Johnson, like her

1 father, and was the father to her three siblings; he
2 was trusted, a police officer; her mother trusted
3 him, loved him. And over the course of a period of
4 years, he not only betrayed that trust, but he stole
5 the most precious gift that is given, and that is
6 Minor's childhood and her innocence. And,
7 members of the jury, make no mistake about it, as we
8 go through the facts in this case, there's only one
9 victim, and that is Minor

10 Now, this is contrary and completely
11 contradictory to what the defendant and the Defense
12 would have you believe, because they would have you
13 believe that Nakia Johnson is the victim in this
14 case. As he said in opening statements, this is his
15 nightmare, he's a victim of Minor he's a victim
16 of the police, people he worked with, his friends,
17 his colleagues; he's a victim of Pamela Hall, he's a
18 victim of the State, this is his nightmare. Poor,
19 poor Nakia Johnson.

20 Well, let's be clear, Nakia Johnson is no
21 victim. He is smart, manipulative and, I submit,
22 perhaps even charming at times because he was
23 trusted and he was loved, but, most importantly for
24 this case, he was feared.

25 Good morning, members of the jury. As you've

1 learned during the course of this trial, my name is
2 Nicole Simpson and I, together with my co-counsel
3 Kathryn Cavanaugh, together we represent the State
4 of South Carolina, the citizens of Richland and
5 Kershaw Counties, and the victim, Minor
6 And as solicitors, it's our job to prosecute all
7 crimes that occur here. And as a result of his
8 actions from a period of time from 2007 until the
9 day this finally came out in 2011, the defendant has
10 been charged with three separate offenses; criminal
11 sexual conduct with a minor in the first degree,
12 criminal sexual conduct with a minor in the second
13 degree, and lewd act. And we'll get to those.

14 But first, I want to thank you. I want to
15 thank you for your time, your patience, and your
16 service in this case. It's often said that jury
17 service is perhaps the greatest service that a man
18 or woman can render his or her country during times
19 of peace. Well, that couldn't be more true than it
20 is here today, because this is a very important
21 case. It is important to the State, it is important
22 to the defendant, and it is important to the victim
23 and her family. And while our system of justice
24 could do without the lawyers, it could do without
25 the judges, it cannot do without you. And so I

1 thank you.

2 Now, this is my only opportunity to address you
3 directly, and I'm going to talk to you about the
4 evidence in this case, some of it, as well as the
5 law as it applies to the facts in this case, because
6 as the State, we bear the burden of proof.

7 Now, the roles in this courtroom are very
8 defined. As the State, we serve as ministers of
9 justice, and it's our job to bring forth to you the
10 relevant admissible evidence to prove our case.
11 Defense counsel's job is to represent his client or
12 their client to the best of their ability and ensure
13 his rights to a fair trial. Now, the Honorable
14 Judge Early is the sole judge of the law in this
15 case. And at the end, he's going to instruct you on
16 the law as you're to apply it to the facts. And
17 with that said, ladies and gentlemen of the jury, no
18 one is going to stand up here and say you don't have
19 the most important job in this courtroom, because
20 you're the sole judges and finders of fact. And
21 what that means is, each one of you here today is
22 wearing a black robe and individually and
23 collectively, you must decide, and only you can
24 decide, if the defendant is guilty. How will you do
25 that? Well, you must consider the evidence and

1 testimony presented in this case.

2 Now, criminal cases are somewhat unique because
3 I, don't know if any of you have ever sat on a civil
4 trial or something of that nature, but in a criminal
5 case, the defendant has the absolute constitutional
6 right to confront each and every witness against
7 him. And what that means is that as the State, we
8 must bring to you live testimony from the witness
9 stand. You've heard reference to certain reports
10 and videos and things of that nature, statements,
11 written statements. Well, we can't just put in a
12 video or just put in a report, because that witness
13 needs take the witness stand and be subject to
14 cross-examination. Now, there are a couple
15 exceptions, because you did have a video and, and as
16 my co-counsel told you in her opening, that was
17 because it met the requirements for you to see. But
18 we couldn't just put in that video. No, Minor
19 had to get up there, take this witness stand, and
20 talk to you about what happened to her and then be
21 subject to cross-examination. The real only
22 exception in this case to that, is the defendant's
23 statement. Now, I would say that we brought you all
24 the credible evidence that we can. But we put in
25 his statement. And we'll get back to his

1 credibility.

2 Now, in every criminal case, the defendant is
3 presumed innocent until proven guilty. And what
4 that means is that as the State, we must prove to
5 you each element of the crime for which the
6 defendant has been charged beyond a reasonable
7 doubt. And we bear the burden of proof in this
8 case, just as we do in the prosecution of every
9 criminal case. And I remind you that while our
10 burden is high, as it should be, it is not
11 insurmountable. And I submit to you that after your
12 deliberations, you will see that we've met our
13 burden here today. And I also remind you that every
14 defendant who is ever convicted at a jury trial,
15 started his trial or her trial until she was
16 ultimately or he was ultimately found guilty beyond
17 a reasonable doubt. And as I said, in this case, on
18 these facts, we welcomed our burden.

19 So what exactly is it that we're referring to
20 when we say proof beyond a reasonable doubt? Well,
21 the Judge will instruct you that proof beyond a
22 reasonable doubt is essentially proof that leaves
23 you firmly convinced of the defendant's guilt.
24 There are very things that we know in this world
25 with absolute certainty, and the law does not

1 require the State to produce proof that overcomes
2 all doubt or every possible doubt, but only that
3 doubt which is reasonable.

4 Now, there are three offenses -- and before I
5 get to the facts, I'm going to talk to you about
6 what the defendant has been charged with, because
7 you will consider each of these separately and
8 individually. One of the first charges is criminal
9 sexual conduct with a minor in the first degree.
10 And a person is guilty of this offense if he engages
11 in a sexual battery of a minor less than 11 years of
12 age; that means up until the age of 10 and that
13 means up until the age of 10. You've heard the
14 testimony, **Minor** was age seven when these events
15 started, up through until she was almost 12. And
16 we're going to get back to the time period in this
17 case.

18 A sexual battery, as you saw on the board, is
19 any intrusion however slight of any part of a
20 person's body or of an object into the genital or
21 anal openings of another person's body, except when
22 such intrusion is accomplished for medically
23 recognized reasons. There's also sexual
24 intercourse, cunnilingus, fellatio, or anal
25 intercourse.

1 When the defendant made Minor perform anal
2 sex on him, that is a sexual battery; when he rubbed
3 her in her vaginal area, that is a sexual battery;
4 when he performed oral sex on her, that is a sexual
5 battery; when he was in that truck with her and put
6 his private, his penis, in hers and told her to ride
7 and moved her up and down, that is a sexual battery;
8 while they were in that computer room and he made
9 her take off her clothes and get on top of him while
10 he sat in the chair and made her move up and down,
11 that is a sexual battery. And she suffered a sexual
12 battery time and time again. We'll get to that.

13 He's also charged with criminal sexual conduct
14 with a minor second degree. This is essentially
15 very similar to the first: A person is guilty of
16 criminal sexual conduct with a minor in the second
17 degree if the actor engages in the sexual batteries
18 we just discussed with a victim who is at least 14
19 years of age or less, but is at least 11. So from
20 the time period that she was 10 to 11, criminal
21 sexual conduct with a minor second degree applies.
22 So that year before, that lucky accidental -- and
23 that's what it was, thank goodness. As counsel
24 referred to it, that fatal mistake, that phone call,
25 butt-dial, accidental, whatever, disclosure, until

1 that day, that is where this applies.

2 And then finally, he's charged with lewd act.
3 Essentially, it is unlawful for a person over the
4 age of 14, which the defendant clearly is, to
5 willfully and lewdly commit or attempt a lewd or
6 lascivious act upon or with the body or its parts of
7 a child under the age of 16 -- so ages 7 to 11 --
8 with the intent of arousing, appealing to or
9 gratifying the lusts or passions or sexual desires
10 of the person of the child.

11 I'm going to make you mines, he said. And even
12 when he would rub himself as she was naked -- and
13 she didn't know the technical terms, and we'll get
14 to that. And as he touched her breasts in the
15 beginning and then went down to her stomach and
16 private areas on top of the clothing, underneath the
17 clothing, kissing on those areas, those things are
18 lewd acts. Rubbing, touching. And it doesn't
19 matter her age. We'll come back to this one again.

20 But the Judge is going to instruct you that the
21 testimony of the victim need not be corroborated in
22 a criminal sexual conduct case. Now the reason for
23 this, I submit, is that the Legislature has
24 recognized the unique nature of criminal sexual
25 conduct cases over versus, say, a murder or armed

1 robbery where you might have forensic evidence such
2 as blood or shell casings at the scene, a bunch of
3 DNA, things of that nature, a lot eyewitnesses. No.
4 Rape, and that's what this is, is a crime of
5 secrecy. It occurs behind closed doors and most
6 often over a period of time, be it a matter of
7 weeks, months or, as in this case, years. And so
8 what that essentially means, bottom line, is if you
9 believe **Minor** that is enough to find the
10 defendant guilty.

11 But you don't have to just believe her, because
12 we've brought you more than that. But before we get
13 to the State's case, I want to address a few things,
14 because in every case that we prepare for, we have
15 to kind of anticipate what a defense may be.
16 Sometimes in cases such as murder or burglary or
17 whatever it may be, it's I did it but I had a good
18 reason to do it, I was justified in what I did. I
19 acted in self defense, some of it is I wasn't there,
20 I was somewhere else, there's no way this could have
21 happened. And sometimes, as here, it kind of has a
22 theory of evolution. Because it didn't happen, I
23 didn't do it, but they can't point the finger to
24 anybody else because there is no one else. So in
25 his statement, which I beg you to listen to as you

1 consider the evidence, he knows he's got to explain
2 away certain things. And I think their opening and
3 questioning of the witnesses in this case kind of
4 led us to the defense, where I believe they may be
5 going.

6 He initially said and brought up to you a
7 quarter: There are two sides to every story. Well,
8 yes, that's true. But there is only one truth. And
9 that is your job, your duty in this courtroom, to
10 find the truth. He also told you the defendant and
11 the victim's mother had sex that day. He raised
12 Minor took care of her like her father; we
13 agree. That phone call wasn't made in the
14 graveyard, but in the store. The implication of
15 this and everything else that he said during the
16 course of this trial is that if you don't believe
17 that phone call, that butt-dial, then just
18 completely disregard everything that Minor said
19 on this witness stand because she just got up there
20 and lied. You can't believe a word she says because
21 if it didn't happen within a matter of exact
22 minutes, and we'll get back to that, this way, then
23 you can't believe it. But there's one -- and,
24 look -- timestamp on the video and phone call.

25 I believe one of the questions yesterday was

1 you can't be in two places at once. I agree you
2 can't. But what that does is it ignores the
3 testimony, because he said Investigator Capps, I
4 believe, 5:58, he's in the store. And as much as he
5 tried to get Sergeant Bailey to say, yes, 5:58,
6 meaning, yes, it had to be real time 5:58 he was in
7 the store, he told you, the investigator and
8 Mr. Fountain, it's not necessarily accurate, it may
9 be within a matter of minutes. Sometimes the
10 systems are off within a matter of hours. The
11 timestamp in this case doesn't really matter, and
12 I'll get to why in a few minutes.

13 Additionally, the defendant's own statement
14 validates that a sexual phone call was made and that
15 Pamela heard the conversation. He can't get around
16 that. And listen to his extensive evolving,
17 changing reasons for that call. Look at the video.
18 I'm going to tell you to look at it. Because what
19 does it do? It corroborates both Pamela and
20 Minor What did they all tell you? He came into
21 town that day going to the store. Where did they
22 end up? The store.

23 Now, I submit to you, and Minor got on the
24 stand and told you, I believe I went to the store or
25 I don't know, or I believe I stayed in the truck. I

1 believe that's what it was. He's like, you stayed
2 in the truck? I believe so, I don't know. Well, I
3 submit, members of the jury, that this was kind of
4 an everyday thing; that perhaps they went in the
5 store first before the graveyard. The reality is it
6 doesn't matter what came first, what came second.
7 And Pamela said, I can't tell you whether they were
8 in the graveyard or the store, all I can tell you is
9 what I heard. I heard my baby's voice on that
10 phone.

11 He also said a lot of allegations and no proof,
12 no proof. Again, ignore [Minor's] testimony. He
13 saved all his questions for the end. Well, the real
14 question here is, why would [Minor] lie? His
15 response: Mother put it up to her. But even that
16 one doesn't make sense. And we'll get to it. No
17 injuries.

18 The medical testimony. And we'll get to that,
19 because as much as the Defense wants you to believe
20 that there has to be scarring, lacerations, things
21 of that nature, the fact of the matter is -- and we
22 know that [Minor] already had her period, she's
23 very mature for her age, and the vaginal area is
24 made for penetration. So chronic abuse over time,
25 there's not going to be any injuries unless some

1 object was used. And she didn't claim that he was
2 sticking tools in her or that he beat her. There
3 was no force. By this point, she followed his
4 commands. She was in a state of submission. Pamela
5 put **Minor** up to it, mad because of other women.
6 Really? That was their problem from day one, day
7 one.

8 Let's talk about the State's case and the
9 evidence that we brought to you. You heard from
10 Officer Jerry Barnwell who responded to the scene
11 that night. And what did he tell you? Because this
12 is key: Because for once, which is rare, I would
13 submit Pam Pamela Hall acted exactly the way a
14 mother should when she finds out or even thinks that
15 her daughter is being sexually assaulted by a grown
16 man, the father of her children.

17 And Officer Barnwell described her demeanor on
18 the scene. And, yes, she admitted to him, I pulled
19 his gun on him, I threatened to kill him, I was
20 going to shoot him, because I know what I heard.
21 And the defendant said, oh, I told her call police,
22 call police. But was he there when they got there?
23 No. He left. And remember, she gave him his gun
24 back. If he wanted to wait around for police, he
25 could have. But you heard him, and he described the

1 demeanor of Minor too; upset, crying.

2 You heard from Minor Pamela Hall,
3 Temple Hart, Melissa Hall; we brought to you the
4 custodian of records -- and we're going to get to
5 that phone call -- David Kellin who interviewed
6 Minor the day after this happened. She didn't
7 even get out of the hospital until 1:00 in the
8 morning, and then the next day she has to go and
9 talk to him. And watch that interview. Does she
10 know -- and I believe defense counsel questioned her
11 time and time again. Well, do you remember telling
12 Mr. Kellin this, do you remember telling him that,
13 you didn't tell him this, you told him that, you
14 didn't tell him this. No, I didn't tell him.
15 Everything was happening so fast. And remember,
16 she's sick to her stomach. That interview has to
17 end. And when did she get sick? The day all this
18 came out. So judge her demeanor, watch that video,
19 and judge her demeanor on this witness stand.

20 Laurie Caldwell. Now, that taped interview
21 didn't come in. But it didn't need to because
22 Minor told you about what happened to her. You
23 also heard from Investigator Capps who got the video
24 from the store as well as Ron Fountain, the owner of
25 the store, which clearly the defendant knew because

1 he even said in his statement, Mr. Fountain was
2 coming in and out of the store.

3 And Mr. Fountain knows when people get there
4 because he knows that customers get off at 5:00.
5 He's not looking at a clock or a timestamp. He told
6 you, no, it's not accurate, we get robbed all the
7 time, police are here all the time, it's not always
8 accurate.

9 Captain Steve Knafelc. What did he tell you?
10 He wasn't directly involved in this case, but then
11 sometime last year he took the victim who remembered
12 the dirt road and they went to that dirt road. She
13 was directing him. Now, she said, and let's be
14 clear, this isn't the only dirt road it happened on.
15 She said, there were a lot more, but I can't
16 remember which ones, but this one stood out to me.
17 Why? Because of the power lines and the lights from
18 the road. So she didn't try to say it happened on
19 this dirt road, this one, this one, this one. And
20 if you're going to make it up, make it good, make it
21 as bad as you possibly can.

22 Paul Meah, the DNA analyst. And I'll address
23 this a little later, but the reality is, the night
24 this happened, he didn't get to do what he was
25 trying to do. There's no semen because he didn't

1 get to have sex with her because that phone call and
2 that call he got back from Pamela interrupted him.
3 So there isn't going to be any DNA. And he told
4 you, even if DNA is there, you can't really time it,
5 things of that nature. And the reality is, if it
6 was something other than semen, it would have to be
7 blood, there are no signs that he physically
8 assaulted her because he didn't have to. The
9 threats that he made over the course of time -- I
10 mean, this was her way of life. He didn't have to
11 threaten her. And remember too, it's his truck, his
12 DNA is going to be all over the place. And like I
13 said, no semen, and he knows it. And we'll get to
14 it. That's why he just kind of laughs it off. DNA?
15 My DNA ain't on her. Of course he knows. He's a
16 police officer, he's conducted investigations.

17 Dr. Susan Luberoff. Again, she testified
18 normal exams are normal, they are a common, typical
19 thing, we expect to find nothing. The reason we do
20 this is because children, we can ensure their safety
21 and make sure nothing else is going on, be it
22 diseases or physical abuse. It's a matter of
23 course. The reality of it is, we expect to find a
24 normal exam.

25 Dr. Alison Foster. Now, she got up there and

1 testified about some of the dynamics of child abuse
2 and things that are contrary to what adults may
3 think or what you may believe about what a person
4 would do in a certain situation. And then you heard
5 from Sergeant Rick Bailey who testified about the
6 investigation in this case.

7 Now, I want to go to, perhaps, the most
8 important witness in this case, and that is Minor
9 And she had a lot of testimony. And I'm not
10 going to go through it all, but this is testimony
11 that the Defense wants you to just simply ignore.
12 Well, I submit you can't. And judge her
13 credibility. What did she say? It started when she
14 was living in Fairfax. That would have been back in
15 2007 -- or they left in 2007 with her mother, which
16 is corroborated. And why did they leave? She said
17 we left because of abuse and cheating, and they
18 moved back to Kershaw with Grandma down 341. That's
19 that Stevens Road trailer on that property here in
20 Kershaw.

21 Now, when they moved back in 2007, the
22 defendant was still a part of their life, he still
23 visiting, Nakiah J. was born, the other children were
24 her. And there's no doubt, no one is questioning
25 that she was supportive, that he was a father,

1 because that is the facade. That's the trusted man,
2 that's the one that takes care of everybody. So
3 who's going to believe **Minor** over him?

4 She told you, we moved to a trailer in
5 Bishopville; yes, a trailer that the defendant
6 bought. He would come visit and act normal, and
7 then he would tell me to go to a place or take me
8 someplace by myself. These are crimes of
9 opportunity. She said he would send her mama to the
10 store and get something then hurry up let's go. I
11 mean, he was watching, looking to see if anybody was
12 coming. And the other kids, remember, they're just
13 too young, they're not going to know what's going
14 on. Stick them in the bathroom, send them in the
15 other room, send them outside. And if you think it
16 takes a very long time to get something done, it
17 doesn't. And what did she tell you? He didn't
18 straight jump in to having sexual intercourse with
19 her. It started with questions: Do you have pubic
20 hair growing down there? And then the touching,
21 grooming, touching my breasts, after he asked, are
22 you going to tell? Are you going to tell? I would
23 say no.

24 And then he'd pull my pants down and pull his
25 pants down, kiss me on the lips. She said, he

1 rubbed my arms, my breasts, and put his private in
2 my private. Sometimes he'd ask if I liked it and
3 I'd say yes so it would be over fast.

4 Now, once the grooming is done, this happens
5 every chance he gets. He would pull his pants down
6 and tell me the suck it. When questioned, suck
7 what? His penis. What was he doing? Well, he'd
8 move my head back and forth. When ejaculating --
9 and she didn't know the term. Let's be clear,
10 masturbation, ejaculation, she's not familiar with
11 all these sexual terms. She just calls it white
12 stuff or whatever a child would call it, what they
13 see. He would get a towel or a rag, kiss my thighs,
14 put his penis in my private and he would rub it.
15 And what did he tell her? He said, all our lives
16 will be over if you tell. He was a police officer,
17 she knew he had a gun, and said he'd kill her mama
18 if she told. It happened any time he could.

19 And at some point, if you remember, they
20 actually moved back with him to Fairfax while Pamela
21 is in rehab for a short period of time. Always
22 stayed to myself and acted like nothing happened,
23 but when he moved back, it got worse. Hours after
24 hours, in the bathroom, in the laundry room, his
25 room. And even when her mom was there in Fairfax,

1 she would be sleeping or somewhere.

2 Aunt Missy's house, the computer room, here in
3 Cassatt. And this is huge because this is --
4 Dr. Foster talked about episodic memories. So she
5 kind of remembered the way it happened. But it
6 definitely happened in the computer room at Aunt
7 Missy's. He would come down to visit and then he
8 would put a towel under the door so no one could
9 see. He would tell me to sit on his lap, talking to
10 me or moaning as he did it, kissing and rubbing,
11 moving up and down constantly; you know I'm going to
12 make you mine, right there, don't move, does it feel
13 good?

14 Also during this time, she mentioned a truck
15 which is consistent with what she said from day one.
16 He would pull off so no one could see, pull pants
17 down. Remember what she told you about one of the
18 times when it first happened? He told me to ride.
19 I said, I don't know how. Well, I will teach you.
20 And then it happened again and, I submit, over and
21 over again.

22 Now, she also told you about a couple other
23 things. She said it happened a Disney World, the
24 beach, and whenever visiting on Stevens Road or Aunt
25 Missy's, which we've kind of talked about. I'm

1 going to start at the bottom here. He'd been doing
2 it a while, so she didn't tell anyone, still
3 uncomfortable. Drove down dirt roads, which we've
4 addressed, different ones, but could only remember
5 one. Like I said, if she remembered them all, just
6 point them out, or if you're making it up, it's that
7 one, it's that one, it's all the dirt roads at
8 times, multiple times, moved back with Grandma.

9 And all this moving around, she's back and
10 forth, back and forth over the course of the years.
11 But guess who's always there, even when he's
12 overseas there for the civilian law enforcement? He
13 comes back. You heard the testimony, he comes back
14 and visits because he bought them a trailer in March
15 of that year. So he's always, whenever he's in
16 town, he's visiting. And he's either visiting Aunt
17 Missy's house or Stevens Road, because that's where
18 Pamela had to go when he wasn't able to support her
19 or they weren't in Fairfax with him.

20 Now, you may wonder too why Melissa Hall and
21 Stacey Hall took the witness stand. Because they're
22 like, hey, I didn't see anything, there were no
23 signs, I had no idea this was going on. Well, you
24 heard about their shifts, 12 hours at a time,
25 12-hour shifts. And he would send Pamela to the

1 store. The reality is, they were put up because he
2 is the one who had the children. Other people, and
3 there have been a lot of people's names being
4 referred to in the house, they weren't there. He
5 had the opportunity, corroboration, evidence, proof.
6 That's why we brought them to the stand. And
7 Stacey, she testified about the Stevens Road and
8 them living there. And they knew the defendant
9 would come visit, but didn't have a relationship
10 with him. And if Pamela is putting them up to it,
11 why not get your sisters to help you lie and say,
12 hey, I saw it when I walked in? No, get a grown-up
13 on your side.

14 Disney World, what did she tell you? They went
15 one time, which he says and Pamela says. And at
16 that point, what she remembers is he moved the
17 covers up and down so that she could see his penis,
18 at one point told him to stop because it hurt,
19 rubbed himself. Now, in one of her interviews, she
20 says something to the effect of, it didn't really go
21 all the way through, he was maybe touching himself.
22 And then she was questioned about it, but you didn't
23 say 'cuz it hurt. But it makes perfect sense.
24 We'll get to what Minor says about her
25 disclosures over time, because, I submit, no one

1 said it better than she could.

2 Corroboration. Beach day trip, in the ocean,
3 touching me under the water, my mom was with my baby
4 sister in the water watching her. The hotel in the
5 Bishopville, sent mom to the store, laying in the
6 bed. Now, I submit here, and probably with several
7 other things, defense counsel is probably going to
8 get up here and say, why on earth would he do this
9 in the ocean with people around swimming, it's
10 impossible. Why Disney World? Why when he only had
11 a matter of minutes? The people around, the why, I
12 submit, for the thrill of it. There's kind of a
13 rush in that I might get caught, but I'm just so
14 arrogant, I'm just so good, for the thrill of it.

15 And in that same vein, a lot of times, it's
16 argued, that positions, and I submit defense counsel
17 may get up here and do this too because **Minor** was
18 questioned on the stand about, oh, you can't go down
19 the road pulling your pants down or whatever. And
20 she said, oh, yeah, you can. Well, that computer
21 chair, oh, the way she said, the position she said,
22 it's impossible to happen. The time periods, there
23 wasn't enough time. Nobody said it takes a lot of
24 time to have sex. And this isn't intimate
25 lovemaking, this is the rape of a child.

1 Minor her final thing, the day her mom
2 found out -- and remember, Minor doesn't say,
3 he's been touching on me or anything like that. The
4 day -- she told you what she remembers: We were in
5 the graveyard, I think I stayed in the car, I don't
6 know. Again, I submit she doesn't know because it
7 happened all the time. And what was she focused on?
8 Probably the fact that her mama almost killed him
9 that night and that she finally had to tell somebody
10 what was happening.

11 Pulled her pants down. Didn't say he got her
12 panties off, didn't say that he was able to rape her
13 in the car or anything of that nature. She tells
14 you about the argument on the phone, the defendant
15 was speeding, driving crazy. Mom asked her, what
16 happened? What happened? She denies. Nothing,
17 nothing. It's not until she's confronted with, I'm
18 going to take you to a home, per her testimony, that
19 she finally gets scared and says, yeah, he's been
20 touching on me. Not details, just, yeah, he's been
21 touching on me.

22 Confrontation in the car. Now remember -- and
23 this is key, because it's going to be the thing
24 throughout this case. He didn't say, hey, I didn't
25 do it. He said, Pam you're stupid, why would I do

1 something like this? And ask Minor Tell her I
2 didn't do it. Minor says, yeah, you did. And
3 you judge her demeanor on the stand when she was
4 telling you these things. She sat in that car, her
5 mom, gun to the defendant's head, and begged, Mama,
6 don't do this, you've got four of us, who is going
7 to take care of us?

8 On cross, what did you hear from her? Well,
9 she told me -- or he told me to get in the car. I
10 believe defense counsel said, you're saying he
11 forced you? Yeah, he forced me to go. So he
12 dragged you by the arm? No, he told me to, he
13 commanded me to. A police officer commanded her to
14 do something. Her father -- and, yes, he was like a
15 father -- who raised her, told her to do something.
16 And by year four, yeah, she's going to do it. Pants
17 down, we talked about that and possibility.

18 What she told or didn't tell Mr. Kellin.
19 Again, watch her demeanor in the interview. She
20 said and told you on the stand, I can't point to
21 everything, I can only point to a few. What is 30
22 days or the next day to four years? Minor is
23 not that little 11-year-old girl anymore; she's a
24 teenager who took the stand. But she told you about
25 what happened to her. And she said, I still can't

1 go to therapy because I'm not ready. She said -- so
2 were you really afraid of him? I'm always afraid.

3 Again, when questioned on her memory, why you
4 didn't you tell this, why didn't you tell that, all
5 these little details, this that and the same, I
6 always remember. And she said, I knew I had to get
7 up here today. And I submit that had she had this
8 same story -- and if you're going to lie, keep it
9 simple -- then it would have been the same to
10 Mr. Kellin, it would have been the same to her mama,
11 it would have been the same to all of the
12 interviewers, exactly the same; no changes, no extra
13 details, no nothing, and the same on this witness
14 stand. I submit to you, her disclosures make her
15 more credible.

16 Then we get to Mama, which is who the
17 defendant, and let's be clear, is really blaming
18 because it's who he has to blame. But what reason
19 does Pamela Hall have to put her daughter up to this
20 now? What did she tell you? Father of her three
21 children. She met the defendant going through a
22 roadblock back in 2001. Both married at the time,
23 she was separated, but they were having an affair.
24 She got pregnant, had **Nakiah J.** moved to Fairfax, and
25 then she left in 2007 and moved back in with Mom on

1 Stevens Road where this was going on.

2 Reasons they moved: Cheating, other woman; he
3 was abusive, but she eventually started to fight
4 back too. She told you, oh, yeah, we got into it,
5 there were always other woman. So why now is she
6 going to come up with this story involving
7 allegations to her daughter? He provided for her,
8 paid her bills, took care of her children, would
9 always visit with them, even when she moved to
10 Stevens Road, bought the trailer in Bishopville.
11 She told you he visited them at Aunt Missy's house.
12 Now, mind you, Pamela, who was not always working,
13 was having to go back to Aunt Missy's house, she was
14 having to stay with her mom when he's not providing.
15 And when this all comes about, let's be clear, she's
16 not living with him, he hasn't threatened to kick
17 her out of the house or take all the money away.
18 That day they had sex, they were doing pretty good.
19 There were no arguments. There's no testimony, even
20 in his own statement, that they were arguing. And
21 she told you, we argued all the time, we got into
22 it, he disrespect ed me or whatever the case, and it
23 was always about other woman. I had no clue about

24 Minor

25 He left for a while but would come back and

1 visit during that year, that's the year he's
2 deployed. Rehab, she told you, yeah, I had to go, I
3 had my own issues, I had to deal with what I was
4 going through. But at no point throughout this --
5 and Melissa Hall, Stacey, everyone you heard from,
6 she's still around. Minus that short period, she's
7 still with her kids.

8 On the day of the disclosure, came to get
9 youngest daughter, which defendant says, ns spend
10 the day. Going to the store, all the kids wanted to
11 go, including her. So it was strange that he left
12 on that day without the other children. But
13 remember, he hadn't seen Minor in a little bit.
14 This was that opportunity that we talked about.
15 But, and she told you, it wasn't unusual for him to
16 take just Minor And again, we know that they
17 went to the store because they're in that store.
18 That's why you have that video.

19 Now, she called because she knew the kids
20 wanted to go. And he says, no, I'm coming back to
21 get them. But he doesn't come back. And this store
22 isn't miles and miles away; we're talking a matter
23 of minutes. House, cemetery store, dirt roads all
24 in between.

25 Phone call, couldn't hear anything at first,

1 saying hello, hello, hello, and he's talking to her.
2 What does she tell you she heard? Do you want to
3 get on top or do you want me to get on top? I want
4 to nut inside you, but you know why I can't. No
5 response. Do you know? And then she heard her
6 baby's voice, because I will get pregnant. Her
7 baby's voice. It wasn't some other woman. She was
8 used to that, she always dealt with that.

9 And remember what she said about the
10 defendant's demeanor? And we'll get to that. Hangs
11 up, calls back, bring my baby home now. Now, in the
12 statement, which I ask you to watch and listen to,
13 he says, yeah, she was arguing, kind of plays it
14 off, I don't know what she was yelling at. I assume
15 she heard some conversation from another woman. He
16 knows what she heard. And he takes her baby back,
17 pulled in, and she can see that Minor was scared.
18 Told her to get out. She was angry, yelling,
19 cursing at the defendant, asking Minor what
20 happened, what happened? She said Minor denied
21 several times, and finally she confronts her with
22 what Pam remembers. Now, this isn't the exact same
23 story that Minor has, and I submit that makes it
24 more credible because otherwise they're going to
25 think that it fits, it's exact. What does she say?

1 I know what I heard, tell me now or I'm taking you
2 to a doctor and they will be able to tell me.
3 Finally she says, he's been touching on me.

4 And then what does the mother do? She pulls
5 his service weapon and threatens to kill him. And
6 she told you that, she told police when she called
7 them. And the only thing that saved his life that
8 day is the person, the child, like a daughter, that
9 he'd been victimizing year after year after year.
10 That is the only thing that saved his life. Please,
11 Mama, don't do it.

12 I would imagine defense counsel's probably
13 going to argue a lot of the things that -- the
14 reason we put the expert up here. Well, we did it
15 for a reason and that's because chronic abuse in
16 children is a widely studied area because the
17 behaviors are not necessarily exactly what you would
18 expect. And she discussed specifically delayed
19 disclosures, tentative disclosures, how things come
20 about over time. That's consistent with what
21 **Minor** said. And things that affect an ability
22 for a child to tell? The family dynamic, authority
23 figure, Nakia Johnson, a father, a police officer, a
24 provider, which he was, the biological parent to
25 other children, her mom's trust in him. While she

1 might not have trusted him with other women, she
2 certainly trusted him with her kids. Threats, and
3 she believed them.

4 Bottom line, that little girl, from age 7 to
5 11, believed him. And even he said in his own
6 interview, I ain't scared to die. If he said that
7 in an interview, imagine his demeanor when he
8 threatened **Minor** I will kill your mother, I
9 will send her back to jail, I will kill her, because
10 she would tell and I would go down, and I'm not
11 going down like that.

12 Accidental disclosures, what did she tell you
13 about those? Quick coping skills, the child will
14 initially deny. That's usually the first stage.
15 Adults do it too, to be quite frank. Nope, didn't
16 happen. But then you get tentative disclosures over
17 time.

18 Chronic abuse. And what chronic means is just
19 ongoing. And that's somewhat different than acute
20 which would be freshly committed right then, maybe a
21 one-time incident. It affects the ability's child
22 [sic] to recall details because they're spending
23 most of their mental energy suppressing the abuse,
24 avoidance, and coping.

25 Episodes blend together over time. And listen

1 to what she says, it usually happened, the same
2 thing happened, what usually happened always did,
3 what happened next was just like it did. She was
4 hesitant to go into details on that first interview,
5 just that it happened, because this was her way of
6 life. He developed, he created, a way of life that
7 no child should have to endure.

8 Developmental challenges as compared to adults.
9 When questioned about times and dates -- and I
10 submit adults do pretty poorly too when asked to
11 recall certain times and dates. Children perform
12 particularly poorly. So you attempt to relate it to
13 things they can understand, like I was in 5th grade
14 at the time or I lived here or I was doing this,
15 something they can relate to. And sequencing of
16 events is very difficult too. You know, it's
17 difficult for adults, but especially for children.
18 First, second, third, fourth, fifth. If she could
19 recall all that, yeah, that would give pause and
20 cause for a lot of questions if she remembered
21 exactly what happened every day and could tell you
22 it happened at 10:00 that day on -- back in 2008 on
23 February 2nd. If she could spout that out, yeah,
24 you question her. But she didn't try to. She told
25 you what she could remember. She told you about her

1 life.

2 Script memory. It allows you to be efficient
3 in explaining repetitive events or behaviors.
4 That's what I just said; the way it usually
5 happened, normally does. That's the way we describe
6 it in chronic abuse.

7 Episodic events can describe times that stand
8 out in a child's mind. May not be the worst or the
9 worst time. The beach, Disney World, times they
10 went somewhere. I knew it was in the truck, in the
11 car, the computer room at Aunt Missy's, those are
12 things she could tell you.

13 And they're going to be like, why didn't she
14 tell? Why didn't she tell? Why didn't she tell?
15 Well, a number of reasons: With **Minor** the abuse
16 started and progressed. I submit he kind of
17 developed her personality, which already was kind of
18 a quiet, she said, a kind of keep-to-myself kind of
19 personality. She held all this in. She is the
20 target child. There are no allegations here that he
21 was touching on **Nakiah J.** or **Kyrie J.** or K.K., any of his
22 biological children. No. It was **Minor** the
23 oldest. And she loved her brothers and sisters.

24 And look, the reality of the family unit, it
25 wasn't perfect. They were back and forth, her mom,

1 she saw some of the abuse. But home is supposed to
2 be the safest place. And a child can't just get up
3 and leave. So what do they try to do? They try to
4 keep the family dynamic intact. Her little sister
5 was the Daddy's girl closest to her. And her little
6 brother and sister, she loved them. She was the
7 oldest. And her mother, even with all their
8 problems, loved him, cared about him. He was
9 trusted by other the adults. Who is going to
10 believe me?

11 He's a police officer. And a police officer,
12 in the eyes of a child, is even on a higher level
13 than that of an adult. They wear a uniform, they
14 carry a gun, they handle the law. And a man, again,
15 that word, powerful. It was the only life she knew.
16 It always happened, he would do it whenever he
17 could. **Minor's** testimony is enough. If there
18 were no other witnesses in this case, if you believe
19 what she said, it's enough.

20 Now, as I said, the Defense wants you to
21 believe pretty much that if the phone call didn't
22 happen exactly the way that they said it happened
23 and the times were off, then you can't believe
24 anything that she said. Well, the phone records in
25 this case, which we put in, essentially -- and I

1 kind of highlighted them a little poorly. But 5:54,
2 that's the time of the call that's been at question
3 here today. 203, no doubt that call was made.
4 Pamela's phone shows it, Nakia Johnson's phone shows
5 it, and that's the call -- he doesn't even in his
6 statement -- well, now they want to kind of gloss
7 over that? That's that call he knows he's got to
8 start explaining away early. And listen to that
9 conversation, that long explanation, which is all
10 over the place. Because he knows he's got to
11 explain it away.

12 Then immediately after, 125, Pamela Hall, bring
13 my baby home now. And he does. He tries to act
14 like, oh, I just assumed she was mad because of
15 other women and that's why I went home and then I
16 just started yelling. And then look, we have
17 numerous phone calls from Nakia to Pam, and he also
18 calls Nikki because he needs Nikki, Nakia to Pam,
19 Nakia to Pam, Nakia to Pam. Finally, Pam to Nakia,
20 but nothing happens, no real conversation. But just
21 look at the amount of calls outgoing Nakia to Pam,
22 Nakia to Pam, Nakia to Pam, forwarded to voicemail,
23 outgoing, outgoing, outgoing. Please don't call the
24 police, he's trying to get to Pam, calm down, you
25 know this is ridiculous. But this time, he's not

1 going to be able to talk his way out of it, because
2 this isn't a grown woman, it's her baby.

3 And finally they talk, which is consistent with
4 what she says. And he also talks to Nikki, no
5 doubt. But those calls -- and I'll go back for just
6 a second -- where he says, I thought I was on the
7 phone with Nikki, I know I talked to Nikki in the
8 store, I was talking to her on the phone, that is
9 not what the records show. At no point does he have
10 a connected call with Nikki. Yes, Nikki is calling
11 him, but it's forwarded to voicemail. The only
12 person he talked to for a period of time prior to
13 the call to Pam is Louise Pinkney. But this Nikki
14 Chisolm call, forwarded to voicemail. He never
15 heard Nikki, he wasn't talking to Nakia. They
16 weren't planning to get up that day when he was
17 picking up his child. And we'll get to that. But
18 basically, they want you to narrow it down, 5:54,
19 the video, it said 5:58 or 6:00, whatever; he can't
20 be here and be there when this phone call happened.

21 Well, he tell s you the phone call happened, he
22 admits it. And I don't care whether the store came
23 first. I submit that's most likely thing. **Minor**
24 doesn't necessarily remember. But I submit that he
25 went to the store -- and you watch that video, you

1 watch [Minor's] behavior. Yes, she's getting
2 stuff, but they're distant. Her demeanor, she's
3 kind of leaning over twirling her hair. Hadn't seen
4 him in a while, but I guarantee you she knows what's
5 coming. And it's in the relevant timeframe.

6 I'm almost to the end. Bottom line is this:
7 Why should you believe [Minor] Because if you
8 accept that the victim's testimony need not be
9 corroborated, then the only question left is, why
10 should you believe her? Well, she took an oath on
11 that stand. And she's talked to people, yes.
12 Defense said, have you talked to this person, have
13 you talked to that person, did you talk to this
14 person? Well, she told you, I didn't tell them
15 details, I didn't tell them details, I told some of
16 the details to the interviewers. And then finally,
17 what did she do? She took an oath, she got on this
18 witness stand and talked to you about what happened
19 to her.

20 And do you really think that this was fun for
21 her? Years later -- and she did all that to
22 victimize this poor man? Got up here and told you
23 things that adults don't even like to talk about.
24 She has absolutely no incentive to lie. What does
25 she have to gain or lose? Absolutely nothing.

1 Nothing. Her family is broken up, everything she
2 was trying to keep intact is apart; nothing to gain
3 or lose by taking this witness stand here today.

4 And a child who is mad, which even he didn't
5 say she was ever mad at him or angry; well, they get
6 over it. Okay, I got my way, he's never around
7 anymore, I'm done. But even he says, I had no
8 problems out of her, she was perfectly fine. So why
9 would she lie?

10 And her testimony, as I said earlier, it's
11 corroborated by the medical evidence. Look at her
12 behaviors, judge her demeanor on the stand.

13 Minor told you what she could. She told you the
14 truth about what happened. She got up there and she
15 was questioned, did you tell the truth, did you tell
16 the truth? Yes, I told the truth, yes, I told the
17 truth. Testimony corroborated by the defendant's
18 own statements. And we'll get to that.

19 And finally -- well, not finally. But then is
20 Minor really sophisticated enough to pull off
21 this lie? Because, like I said, we're years down
22 the road, she's already lied to her mama, who ut her
23 up to it -- and we'll get to Pam's reasons to lie,
24 because she has done -- then she lied to law
25 enforcement, went through uncomfortable medical

1 exams, and she just decided, rather than keep it
2 simple, say he was touching on me or he raped me,
3 she comes up with all these details, details that
4 the Defense wants you to ignore. Well, don't be
5 distracted, don't be fooled. And if lying why not
6 exaggerate the lie?

7 She was questioned, did it happen in the police
8 car? No, it didn't happened there; it only happened
9 in the truck and the car. And why not say, oh, he
10 hit me, there were times he would push me, he shoved
11 me down, he forcefully made it happen? And when it
12 didn't happen, she told you it didn't happen. Her
13 grandmother's house, which was next door, it didn't
14 happen in the house when she was there, it happened
15 in that truck, in that car, on those dirt roads.
16 She told you where it happened, she told you what
17 she could remember.

18 Defense reasons for **Minor** to lie make no
19 sense. Well, basically, they kind of do because she
20 has none. She has no reason to lie, except for the
21 fact that Pam put her up to it because all these
22 other women.

23 Basis is knowledge for sexual acts. And what
24 you haven't heard is there's all these men in the
25 house or anything. She's not shown a ton of stuff

1 that she sees all the time. She doesn't know the
2 exact words, as an adult would as if they had
3 coached her, such as say he masturbated, say he did
4 this, that, adult terminology. She describes what
5 happened. And where else does she get this
6 information?

7 Her demeanor on the stand -- and the Judge is
8 going to instruct you on the credibility of
9 witnesses. And credibility is essentially this:
10 Believability. And that's what this case comes down
11 to, believability. And you can believe some of what
12 a witness says, you can believe all of what a
13 witness says, or you don't have to believe anything
14 that a witness says. That is up to you and you
15 alone. But we do ask that you judge certain things;
16 importantly, the demeanor on the stand or in the
17 videos of the evidence that you will have back there
18 with you.

19 Also consider whether that witness was hesitant
20 or forthright in testifying. Was the testimony
21 consistent, corroborated by other evidence? Even
22 though **Minor's** doesn't have to be corroborated,
23 it is. And most importantly, did that witness have
24 any reason to be biased or prejudiced in this case?

25 Finally, members of the jury, defendant's

1 statements and defenses. Some of this is from the
2 video and some of this was just from the
3 questionings that were elicited in what I anticipate
4 that Defense counsel will get up here and stand
5 before you and try to say. But in his statement, he
6 said, I raised her like a dad. Yes, we agree. And
7 then, funny, he starts saying Pam wanted to go
8 through his phone records that day. Hmm, how
9 convenient. But they had sex and everything was
10 fine. He was going to get the little girl and go.
11 No arguments.

12 And what did he say? And you can listen to it
13 because this is exactly from his statement: Pam
14 told him, get down here right now, this, that and
15 the third, I was already around the corner and she
16 pulled my service weapon; bring the child out,
17 talking about **Kamari J.** and let me go so you can
18 stop -- you, Pam, can stop all this foolishness.

19 It's always something to some nature that she
20 starts going on about. And I'm thinking that, you
21 know, you know she heard me on the phone with a
22 girl, and that's what our problem has been the whole
23 time, me and other women. He starts explaining away
24 the phone call because he knows what Pam heard and
25 he knows what he said. And in this interview -- and

1 here's the key, because here today they're trying to
2 distance themselves from that phone call -- confirms
3 that the phone call occurred. Just says it was a
4 sexual call in nature to Nikki Chisolm. Something
5 to the effect of, you want me to tap that ass?
6 Police called Nikki and she says she didn't talk to
7 him until closer to 7:00. His phone records,
8 corroboration.

9 Attorney to Sergeant Bailey -- oh, and let me
10 back up. And he says Pam wanted a Nutty Buddy
11 instead of pork rinds. Terminology, language. And,
12 as I said, the defendant is smart. And pay
13 attention to what he says. Attorney to Sergeant
14 Bailey: Told you he didn't do it the whole time.
15 Listen carefully. What is he really saying: Why am
16 I going to lie about that? DNA: I don't have to
17 lie about that. I promise you, DNA, come on, man.
18 Basically, he knows his DNA isn't there. When the
19 officer says, we've got the test results, he knows
20 good and well they don't have the test results back,
21 and he knows his DNA is not there because his semen
22 isn't on there because he didn't get away with it
23 that day.

24 Couple months, couple weeks since he's been
25 around, no arguments or problems with **Minor**

1 They question him: Why is she making this up? All
2 I can think is Pam put her up to this. She just
3 doesn't care; Pam. I've been trying to set her
4 straight. And then they ask her [sic] again, kind
5 of goes on. He said, here's the deal, she still
6 loves me, man. Because he's so awesome. This is
7 his arrogance: She still loves me, that's the
8 problem. Well, if she loves you, why would she want
9 to see you go down? Because she knows for a fact
10 that she's just not going to be that woman to take
11 me there, and she knows it.

12 Why this day, they ask him. And that's a good
13 question: Why this day? They were already
14 separated, he was providing for her children, they
15 had sex, no arguments, no threats, and there really
16 weren't any issues about women that day; yeah, in
17 the past, but not that day. And again, listen,
18 doesn't say he didn't do it. He continues to say,
19 why would I lie about that? Pay attention to what
20 he says.

21 Members of the jury, there are two important
22 witnesses who did not take this witness stand and
23 testify in this courtroom. And that is common sense
24 and human nature. And I'm going to ask that you use
25 your common sense and what you know about human

1 nature when you decide this case. And when you do,
2 I submit, there will be only one just verdict.

3 Now, as I prepared for this case, I was
4 reminded of a quote by President Theodore Roosevelt.
5 He said that no man is above the law, no man is
6 below it, and we ask no man's permission when we
7 require him to obey it; said that truth is the
8 mother of justice. And it is your job, your duty
9 here today, to find the truth and to seek justice.

10 Now, [Minor] has done all that she could do.
11 And I'm going to ask that when you go back in your
12 jury room, you consider the evidence, and you hold
13 the defendant, Nakia Johnson, accountable for his
14 actions in sexually assaulting [Minor] for a period
15 of years. Find him guilty of criminal sexual
16 conduct with a minor in the first degree, find him
17 guilty of criminal sexual conduct with a minor in
18 the second degree, and you find him guilty of lewd
19 act. Thank you.

20 THE COURT: Madam Forelady, members of the
21 jury, y'all okay? Bathroom anyone?

22 One second, Mr. Johnson. One second, please.

23 Go ahead. Let him go use the restroom.

24 Everybody sit tight for just a second.

25 (Brief pause in the proceedings.)

1 THE COURT: Okay. Mr. Johnson.

2 MR. JOHNSON: May it please the Court, Your
3 Honor.

4 THE COURT: Yes, sir.

5 MR. JOHNSON: Two questions came to my mind
6 about this case: Why and what? And I watched this
7 courtroom the whole week, and my question is, why
8 can't Nakia explain why **Minor** said this? Because
9 fear; you feel it hovering over the courtroom. Why?
10 Well, he can't. All he can do is tell what he
11 knows. All he can do is tell his position.

12 Here is what we know: He was up here, the
13 phone calls matched the call that come from his
14 phone. Now, there are different stories about why
15 he went back home. In his video -- and I want y'all
16 to watch the video because the video -- when he made
17 that video or when they were questioning him, it
18 wasn't made for the -- he didn't know that video was
19 coming in, he didn't know, so he wasn't putting no
20 one -- or pretending. He came to answer questions.
21 He didn't even know he had a warrant. They asked
22 him to come back and talk with them.

23 He came back, he signed the waiver, he talked
24 with them and he answered the questions the best he
25 could. I mean, what can he say? All he can say is

1 what you know. It seems like if he doesn't say he
2 did it, then it's a problem. He just needs to go
3 ahead and fess up because a child said it, and if
4 the child said it, that's it.

5 And that's the fear of this case. That's the
6 fear of these kinds of cases, because everybody in
7 their minds are concerned about, why would the child
8 say this? But why does he have to give you an
9 explanation? Because he has the same question: Why
10 would she say it?

11 Yes he was a good father, yes he took care, yes
12 he did all of those things. Why would she say it?
13 So because he can't explain why she said it, does
14 that make him guilty? No, it doesn't.

15 And that's why our courts have what we call the
16 presumption of innocence. A person is presumed
17 innocent until proven guilty, because there's times
18 like this that -- what do you say other than what
19 you know? I didn't do it. I mean, what else can
20 you say? And everybody wants an explanation. I
21 can't give it to you, all I can tell you is I came
22 back and I told the truth. Okay.

23 Let's look at the facts some. There is no DNA.
24 Okay. There is that big man, that from 2007 until
25 2011, who was supposed to be having sex with who was

1 much littler then, having sex with her. From 2007
2 until 2011 with somebody sitting on you, somebody
3 going up and down on you, somebody sticking their
4 penis in you, over and over again. Is there not
5 over some kind of sign? Is there not one scratch,
6 one scrape, one anything? And all he can say is, I
7 didn't do it. How do you prove you didn't do it?
8 Only thing they can do is show what they got. No
9 signs -- both medical experts, no signs of
10 penetration; the SLED man, no DNA. All he can say,
11 I don't know.

12 And they cross-examined him or questioned him
13 pretty hard at that police station or at the
14 sheriff's department. Yes, they did. They tried
15 every trick or every strategy. And I think the
16 assumption is because he's a police officer, he
17 knows their techniques, so he was ready for them.
18 How would he know they were going to take the
19 phone -- take his phone, look at the network and
20 come back and say, the only call you had to Pam -- I
21 mean to Nikki was 6:39, when there were other calls
22 on the phone? How would they know that?

23 They came back and said, why is your DNA on
24 this girl? My DNA is not on this girl. Why would
25 your DNA be on this girl? They were, like, rough

1 with it. And the other man, Lieutenant Hickmon, he
2 was in there. And he kept saying, explain to me why
3 she would do that. I don't know, I don't know, I
4 don't know. Were there any other previous history
5 of him doing this? No. She even said that he said
6 he didn't do it to nobody else. Why just her?

7 And what amazes me, this jury is drawn for
8 Kershaw County. They have to prove the acts. The
9 solicitor has to prove the acts that were done in
10 Kershaw County. They put in acts from Florida, they
11 put in acts from Allendale. No proof that any of it
12 is true, they're putting it in. And they're saying,
13 throw them all together because he has so many
14 accusations, just find him guilty. You can't have
15 this many accusations and not be guilty of this.
16 Well, if you didn't do it, all you can say is I
17 didn't do it. And I'm telling you, on that film he
18 said, I didn't do it, I didn't do it, I didn't do
19 it.

20 Now, there were six minutes -- and I want y'all
21 to look at those videos. There was a six-minute
22 time period -- and let me explain this is little
23 bit. And you're going to have this, the phone
24 records, in the back with you. Because we started
25 talking about the items, this is the item number.

1 This is the date, this would be the time the calls
2 were made. The originating number will the number
3 that was called from and the terminating number
4 would be the number that is called to.

5 All right. Now, you will see that beginning at
6 item -- now, this doesn't go back with you, but the
7 bills go back with you. You'll see beginning at
8 item 818, there's a phone call from [REDACTED] I t was
9 determined that the [REDACTED] was Pam's number. That
10 number called [REDACTED], which is Nakia's number. You
11 will see item 19 where [REDACTED] [REDACTED] [REDACTED], which is
12 Nikki's number, that number called Nakia's number.
13 If you'll go to the cross-examination or you will go
14 to the interview you'll hear the officer saying, you
15 didn't have but one call from Nikki at 6:30, why are
16 you lying to us? And kept saying -- he was trying
17 to explain. That's all he could do; explain the
18 best he could. And at one point in the video, he
19 said, but look, if that's the case, the everything I
20 must be saying is wrong. But I know when I was
21 talking, I was in the store.

22 Well, here's what we do have: We have the call
23 that everybody agrees on, the call at 5:54, which
24 would be 2154. We have no question about that, that
25 that's the only two-minute, three-minute call that

1 came from Pam's phone. There's no question that the
2 video from the store will show that he was in the
3 store.

4 And here's what they said about the video from
5 the store: It's not accurate. The phone record is
6 accurate, the telephone is accurate, the network is
7 technologically accurate, forensically accurate,
8 everything is accurate but the video from the store.
9 So how do you be in the store on the phone talking
10 and -- and you got the video, watch the video.
11 Anything that I say different from the video,
12 disregard what I'm saying. Watch the video. He's
13 on the phone talking, has two cans of beer. Minor is
14 walking around the store getting what she wants,
15 brings it to him and shows him, takes it back
16 because they were trying to find what Pam want, that
17 was 5:58.

18 If the phone call came in at 5:54, it lasted
19 for two minutes, that's 5:56. They said after 5:56,
20 she called back and said bring my child home, so
21 that means they were still at the graveyard. So
22 that means 5:56, 5:57, so how did they get from the
23 graveyard to the store -- on the video -- and if you
24 watch the video, they were already in the store
25 walking around. How did he do it? All he can do is

1 say, I didn't do it. I don't know about -- he
2 doesn't know about why she said all this other
3 stuff. And how could he prove that to you? He
4 doesn't know why.

5 Now, can we guesstimate like the State did?
6 Can we guesstimate as to why or can we infer as to
7 why? Yes, we can. And at the end of the day,
8 you're going to make the determination. But the
9 Judge is going to charge you, I believe, that you
10 must be firmly convinced, firmly convinced, beyond a
11 reasonable doubt. And a reasonable doubt would
12 cause one to hesitate to act. So let me ask you
13 something: Is it enough to hesitate -- even if you
14 don't believe it, is it enough to wonder, to
15 hesitate because he was in the store while they said
16 he was in the graveyard?

17 There's another thing: I don't know why -- and
18 I like how the Solicitor glossed over it. She said,
19 well, when she was on the stand, she couldn't
20 consistently remember anything. I think that's what
21 she told you, the 12 of you: She said, I was not in
22 the store. She has the record. She said, I wasn't
23 in the store. And Mr. Ron Fountain said she was in
24 the store, Deputy Bailey said she was in the store,
25 and the video shows her in the store walking around

1 with the candy. Why would she come and say I wasn't
2 in the store today?

3 Well, the State wants you to say, well, she's a
4 child, it's been a long time, and she may have
5 forgotten. But is that enough to hesitate? Does
6 that firmly convince you? No, it don't have to
7 absolutely prove it. But is that enough?

8 And then again, what happened in Kershaw
9 County? Let's suppose it was true. And it's not,
10 but let's suppose it is. What happened in Kershaw
11 County? Even if it was so, it should be prosecuted
12 somewhere else. Why would Kershaw County be doing
13 it?

14 The expert that testified about -- she
15 testified on common tendencies of children. At the
16 end of the day, all she said was, this might help
17 you and this might not help you. I want to tell you
18 what children do. Do all of them do the same thing?
19 No. Do some do it? No. All of this is just fluff
20 that helps put nails in the coffin of this
21 defendant.

22 The forensic interview, you know, it's a big
23 deal, they disclose. Let me tell you what
24 disclosing is. Disclosing is you, someone, telling
25 someone else something. That's a disclosure. All

1 they wrote down is what they was told. So if they
2 wrote down that which is not true, then all they can
3 tell you is what was told to them that wasn't true.

4 And the power of the State's case is it's a
5 child. And nobody in your community wants to uphold
6 anybody doing anything wrong to a child. Forget
7 about the principles of the law, forget about
8 innocent until proven guilty, forget about firmly
9 convinced, forget about hesitate to act, beyond a
10 reasonable doubt. Not only do you have the facts --
11 and I didn't tell you the time in the store; Officer
12 Capps told you the time in the store. The other
13 thing is, you heard me ask Officer Capps, wasn't
14 there two other videos? You heard me ask him, well,
15 where are the other videos? We're just going to
16 give you this one, give you the one I want you to
17 see, because it's their job to convict him.

18 You are supposed to be judges of the facts.
19 And God knows it's hard because either way you go --
20 you're balancing between two situations, and all you
21 can do is make a decision. And maybe your heart is
22 just floating, well, this is a child. Nakia Johnson
23 cannot explain why. He can tell you where he was,
24 he can tell you what he didn't do, he can tell you
25 he was in the store at 5:58, the video can tell you

1 he was in the store at 5:58. The phone calls were
2 made at 5:54.

3 And I heard the Solicitor talking about all the
4 other calls. If somebody drew a gun -- if your
5 girlfriend drew a gun on you, tells you to get out
6 her yard, by their testimony -- his testimony is he
7 told her, if you look at the video -- his testimony
8 is he told her to call the police.

9 He said, call them while I'm here now, I got to
10 go back, I have to go back, the weather is storming,
11 go ahead and call them. His testimony was she said,
12 get the F out my yard, I'm not -- I'm not going to
13 call the -- that's his testimony. Her testimony is
14 she went right in the house and called the police.
15 Well, the question is, what time did she call? How
16 long after it happened?

17 Please don't make him prove why if he doesn't
18 know why. Make them prove that he did it. And
19 they're counting on the emotion and the number of
20 allegations, even though the allegations weren't in
21 Kershaw County. So, really, I guess, they will make
22 y'all universal decision makers all across wherever
23 he was charged.

24 You notice that -- please look at Dr. Killings
25 [sic] video. She told Mr. Killings, I don't know

1 where the road was. She told them she went down
2 there four times down with him in the white truck.
3 And he said, where is the road? Just listen. She
4 said, I don't know where it is. Three years later,
5 out of the clear blue sky, she calls them and says,
6 I know where the road is. Well, we're coming to
7 court in Kershaw County. If you don't have
8 something in Kershaw County, you've got no case in
9 Kershaw County.

10 So all of a sudden, we've got a road in Kershaw
11 County where she told Dr. Killings that --
12 Mr. Killings, well, she told him well, it happened
13 when I was at 346 Stevens Road. Please look at the
14 video. She told y'all it happened at Aunt Missy's
15 house. Is that enough to hesitate to act? Is that
16 enough to make you think? Are you firmly convinced?

17 The Judge is going to tell you if you have a
18 question and you're not firmly convinced, then it's
19 your job to set him free. You have to be -- before
20 you find him guilty of criminal sexual conduct, the
21 battery, sexual penetration, you have to find that
22 he did it in Kershaw County. Even though he didn't
23 do it, you have to find that he did in Kershaw
24 County. Where is the proof that he did it in
25 Kershaw County?

1 She also said, well, the computer room was at
2 346, then she said the computer room was at Aunt
3 Missy's house. The next time she said, he made me
4 sit on him in the computer room, then the next time
5 she said, he only took pictures in the computer
6 room. I mean, is there some accountability for her
7 testimony or does she just get the pass because
8 she's a child? And if she does, then what happens
9 to our system?

10 You're supposed to take the facts as you find
11 it, whether you like them or not. We don't have to
12 like Mr. Johnson. And, certainly, the thing that
13 amazes me, if you watch the video, he said I'm
14 appalled at this whole idea of this happening, and
15 anybody that would do that to a child, it's
16 appalling. But make sure he did it. Can we blame
17 the mom? I guess we could. But he doesn't know why
18 she did it.

19 Now, maybe when Nakia saw -- when **Minor** saw
20 her mother draw that gun and threaten to kill him
21 and she could realize what was going to happen to
22 her mama, she said, look, Mama, come on. Whatever
23 she needed to say from there to make sure her mama
24 was safe, I don't know if that happened or not.
25 That's an inference that can be drawn. I don't

1 know.

2 And the other thing that amazes me is, they got
3 a warrant before he got back. He wasn't even back
4 yet. They only had the allegations from the mother
5 and they hadn't even talked to the child yet. They
6 had the warrant. Now, Detective Bailey said, well,
7 he had the discretion whether to serve it or not.
8 You don't get a warrant unless you're going to serve
9 a warrant.

10 And he came in, signed the waiver, answered
11 every question. Nobody told him they had a warrant
12 because they wanted to hear what he had to say. So
13 he told them what he had to say. And after he told
14 them what he had to say, probably one of the most
15 humiliating things for a police officer to do is to
16 stand up, spread his hands, put his hands behind his
17 back, and go to jail. And what can he tell you?
18 How can he prove himself innocent? He couldn't
19 prove himself innocent then, can't prove himself
20 innocent today.

21 And no -- our law provides -- yes, our law
22 provides you need no collaboration. If somebody
23 said it, you can convict a person based on somebody
24 saying it. Yes, you can do it, that's the law, with
25 criminal sexual conduct first and second. If they

1 say it, if the jury determines they want to convict,
2 that's enough. The question becomes: Did he do it?
3 Because somebody said somebody did something, does
4 that mean he did it? Because you can't prove that
5 you didn't do it, does that mean you did? And the
6 only other objective fact is the video and your
7 phone bill and the inconsistent testimony that she
8 gave.

9 He gets no pass for his inconsistent testimony,
10 but she gets a pass for hers because she's a child.
11 He gets no credit because the phone bill added up
12 with the same time he was in the store in the video
13 because the video got to be inaccurate because the
14 child said it, so the video is inaccurate.

15 And I am asking you on his behalf, I'm begging
16 you on his behalf, to please -- you have those --
17 take the time to watch those videos, listen to her
18 testimony on those videos, listen to her testimony
19 on those videos, listen to what went on on this
20 stand, please take the time to look at these phone
21 bills and sum up all of the physical evidence.

22 And here's the summation of it: SLED says no
23 DNA, Nurse Hart says she found a redness that could
24 be consistent with or not consistent with, and
25 Dr. Luberoff, the doctor, says, it's a normal exam.

1 And here's the thing: Not only normal for that day,
2 there is no signs of her being touched. Not just
3 that day in time, but from 2007 until now, after all
4 of this penetration, not one mark, not one scrape,
5 not nothing. And the reason is, is because she's a
6 child. And if there's lubricants that's in her
7 body, that will cover that up. That's their reason.

8 And you heard the Solicitor say, it was a
9 violent crime. And you heard Dr. Luberoff say, the
10 only way it will show up is if it's violent. Well,
11 that big man continually going into that little girl
12 starting at 2007 -- she would have been six, seven,
13 eight years ago. No signs. And they want you to --
14 not no signs only in Kershaw County, no signs from
15 any county, and they want you to convict him.

16 The difference between criminal sexual conduct
17 first and criminal sexual conduct second is that one
18 occurs under 11 and one occurs 11 and above. Nobody
19 has told you how old she was when it occurred. Was
20 it 11 and above? Was it under 11? When did it
21 occur? Where did it occur? Was it in Allendale?
22 Was it in Florida? Was it at the beach beside
23 Myrtle Beach? Was it in Kershaw County?

24 Mr. Johnson has a right to be scared, has a
25 right to be afraid. Anybody sitting in this seat

1 should be scared, they should be afraid. Whether
2 you did it or didn't do it, you better be afraid,
3 because the 12 of you are going to have to decide.
4 And whatever you decide determines his fate. So,
5 yes, he's fearful. He's fearful then, he's fearful
6 now.

7 Who presented anything in his past that would
8 make him do this? It's almost like he's Jekyll and
9 Hyde, if you listen to the Solicitor talk. He's
10 Mr. Hyde the daddy and then he's Dr. Jekyll. Is
11 there any trace -- give us any -- was there any
12 trace of penetration, any? Is there any kind of --
13 and how do you prove touching? You just have to
14 say, I believe her. Is there any trace of
15 penetration, any?

16 And I submit there's none, not any trace. If
17 the doctors testified to it, how do you convict him
18 of it? Because she's a child. Because you don't
19 want this going on in the community because our
20 voice speaks for the community here. And -- but
21 isn't it the voice for the community that you seek
22 the truth?

23 I generally have a lot of good phrases. I
24 don't have one today. There's one legal term used
25 the word, veredicto, it means to speak the truth.

1 We're asking you, begging you, to be objective in
2 evaluating the evidence, to be fair in evaluating
3 the evidence, look at all the -- take the time and
4 look at the facts, listen to the facts, look at the
5 video at the store, look at his video, look at
6 Mr. Killings' video.

7 And anything that I say that is not on the
8 video, disbelieve me. Anything that is on the
9 video, then take it and do the right thing. What's
10 the right thing in this case? Well, we'll know what
11 that is when y'all come back with a verdict.

12 But I would suggest to you that from the
13 Defense's prospective, he didn't do it. He didn't
14 touch her when she was under 11, he didn't touch her
15 when she was 11, he didn't penetrate her when she
16 was under 11, he didn't penetrate her when she was
17 11, and he hadn't touched or penetrated her since
18 she was 11. And he cannot answer your question as
19 to why, he cannot answer Lieutenant Hickmon's
20 question as to why; all he can do is tell you what
21 he did.

22 You remember when I came up here and I said
23 this case is about who you believe, believability?
24 And that's the truth, it is. And sometimes doing
25 the right thing is hard. Sometimes you have to

1 wrestle with your own self to follow the law.
2 Because we believe that if you follow the law in
3 this case, if you look at the fact that there's a
4 video where she said she wasn't in the store but she
5 was in the store walking around toting candy,
6 there's a video saying he was in the store at 5:58
7 when the phone bill and all of the allegations are
8 he was in the cemetery, is that enough to cause you
9 to hesitate to act? Are you firmly convinced?

10 And you got a right to believe one witness, you
11 got a right to believe all of the witnesses. And
12 here's the other thing: You may believe everybody
13 and just don't know which one. Well, then that's
14 reasonable doubt. That is a doubt that causes you
15 to hesitate to act. And just like baseball, the tie
16 goes to the runner. So if you have anything that
17 causes you to hesitate to act, it's your duty.

18 Solicitor told you she took the stand, took an
19 oath. Well, you took an oath. You took an oath
20 that you won't stand for bias, prejudice, I will do
21 the right thing because it's the right thing to do,
22 and I want justice is prevail, even sometimes if I
23 don't like the feeling of the justice that I got to
24 give. But for the system to work right, you have to
25 do -- follow the law which the Judge charges you as

1 he gives it to you.

2 And as I go to my seat, I want you to listen to
3 this: Firmly convinced that he's guilty, guilt
4 beyond a reasonable doubt. A reasonable doubt will
5 cause one to hesitate to act. And innocent until
6 proven guilty. And he's not guilty until the 12 of
7 you come back in here and say he's guilty.

8 There's a song on, I think it was the
9 Temptations, when I was a boy, and the song says too
10 proud to beg. There's a lot on the line today, so
11 I'm not too proud to beg, not because I think
12 Mr. Johnson is guilty, but because it's scary.
13 There's an overwhelming amount of allegations
14 against him that he can't prove himself innocent.
15 And if you follow the law, he doesn't have to.

16 I've done the very best I can do for Nakia.
17 Kind of like a baby now; he's out of my hands and
18 I'm giving him to the 12 of you. Please do what's
19 right, please be fair to him, please let your
20 decision be without prejudice or passion or
21 emotional feeling. Let it be justice. Thank you.

22 THE COURT: Madam Forelady, ladies and
23 gentlemen of the jury, we've been going about two
24 hours. Let's take a short break, stretch of the
25 legs. My charge is about 10 or 15 minutes, not very

1 long. Please don't start any deliberations or
2 discussions of the case. We'll take a break, a
3 bathroom break, and we'll start back in about ten
4 minutes. Okay?

5 (The jury exits the courtroom at 11:13 AM.)

6 THE COURT: All right. We'll stand at ease for
7 about ten minutes. Thank you.

8 (Short break.)

9 THE COURT: Bring the jury in, please.

10 (The jury enters the courtroom at 11:27 AM.)

11 THE COURT: Madam Forelady, ladies and
12 gentlemen of the jury, my charge is sort of two
13 parts. The first part deals with general
14 propositions of law that we charge in all criminal
15 cases. Once we do that, we'll go to the specific
16 charges in these three indictments. And I'll
17 explain those to you.

18 First of all, let me remind you that the fact
19 that the defendant was arrested, charged, and
20 indicted in this case is not evidence in the case
21 and cannot be considered by you as evidence of guilt
22 in the case, nor does it create any presumption or
23 inference of guilt. These indictments are simply
24 the charging documents by way this case comes into
25 the courtroom. So that's not evidence in the case,

1 it's just the charging documents. So don't infer
2 anything from the fact that he has been indicted.

3 In this case, we're dealing with three separate
4 indictments; criminal sexual conduct with a minor in
5 the first degree, criminal sexual conduct with a
6 minor in the second degree, and lewd act upon a
7 child. Each indictment charges a separate and
8 distinct offense. You must decide each indictment
9 separately on the evidence and the law applicable to
10 it uninfluenced by your decisions as to the other
11 indictments. In other words, you have to look at
12 each one of them separate and apart from the other.
13 You can convict him on one or both or all three or
14 you can find him guilty on one and not guilty on the
15 other or any of those combinations. So you must
16 consider each one separate and apart from the
17 others. There are three indictments and there will
18 be three verdict forms as to each indictment, which
19 I will explain to you at the conclusion of my
20 charge.

21 Now, as to each of these indictments, the
22 defendant has pled not guilty. And a plea of not
23 guilty puts the burden on the State of South
24 Carolina to prove the defendant guilty to you beyond
25 a reasonable doubt. A person charged with

1 committing a criminal offense is never required to
2 prove himself innocent. I charge and instruct you
3 that it is an important constitutional rule of law
4 that a defendant in a criminal trial, no matter how
5 serious the charges may be, will always be presumed
6 to be innocent of the crimes for which he's been
7 indicted unless guilt has been proven by evidence
8 satisfying of you of that guilt beyond a reasonable
9 doubt.

10 The presumption of innocence does not end when
11 you begin your deliberations, but it stays with the
12 defendant throughout the trial unless you reach a
13 verdict of guilt based on evidence satisfying you of
14 that guilt beyond a reasonable doubt. I further
15 charge you that the presumption of innocence is not
16 just a mere legal phrase or theory; it is a
17 substantial constitutional right to which each
18 defendant has unless you're satisfied from the
19 evidence that the defendant's guilt has been proven
20 to you beyond a reasonable doubt.

21 Now, what is a reasonable doubt? You've heard
22 the lawyers argue that in their closing arguments,
23 and let me just reiterate it again. Our state
24 Supreme Court defined a reasonable doubt, and
25 they've defined it, actually, in two different ways,

1 both meaning that's what you have to prove beyond a
2 reasonable doubt. A lot of times they'll say a
3 reasonable doubt is the kind of doubt that would
4 cause a reasonable person to hesitate to act. The
5 kind of doubt that would cause a reasonable person
6 to hesitate to act.

7 Proof beyond a reasonable doubt is also known
8 as proof that leaves you firmly convinced of the
9 defendant's guilt. There are very few things that
10 we deal with in the world today that we know with
11 absolute certainty. And in criminal cases, the law
12 does not require proof that overcomes every possible
13 doubt. If based on your consideration of the
14 evidence you are firmly convinced that the defendant
15 is guilty of the crimes charged, then you must find
16 him guilty. If, on the other hand, you think
17 there's a real possibility that the defendant is not
18 guilty, then you must give the defendant the benefit
19 of the doubt and find him not guilty.

20 Now, ladies and gentlemen, as we first started
21 out on Tuesday, and when I gave you some
22 instructions on Wednesday at the start of the trial
23 of the case, I told you that you and I have separate
24 and distinct duties to perform during the trial of
25 the case.

1 Obviously, my job is to rule on the
2 admissibility of evidence -- we had very few
3 objections during the trial of the case -- and my
4 other job is to instruct you on the law in the case.
5 And you've taken an oath to accept the law as I give
6 it to you; therefore, if you believe the law should
7 be something other than what I say or you have some
8 preconceived idea about what the law is, you have to
9 set that aside and accept the law as I give it to
10 you.

11 Also, because I'm the judge of the law and
12 you're the judges of the facts, I can have
13 absolutely no opinion about the facts. That is your
14 decision to find the true facts. So if at any time
15 during the trial of the case you've looked over here
16 and I was smiling or frowning or raising my eyebrows
17 or doing whatever, and you thought I had an opinion
18 about the facts, please disregard that. The law
19 does not allow me to have any opinion about the
20 facts. I sit in cases day in and day out, week
21 after week, and sometimes I have to raise my
22 eyebrows. I have no opinion about the facts.

23 You are the finders of the facts. And by doing
24 that, obviously, you have the biggest job in the
25 case because you've got to determine what the true

1 facts are. You're the finders of the facts, so you
2 take those facts and apply them to the law as I give
3 it to you, and you'll be in a position to render a
4 true and just verdict at the conclusion of the case.

5 And in exercising your job as the judges of the
6 facts, obviously you have to determine the
7 credibility of the witness whose have testified in
8 the case. Credibility simply means believability.
9 Who do you believe? What evidence convinces you of
10 its truth? You have to analyze and evaluate the
11 evidence and determine what the true facts are.

12 Now, in exercising that job of determining what
13 the true facts are and determining the believability
14 of the witnesses who have testified in the case, you
15 have the right to believe one witness over several,
16 several over one; you can disregard everything a
17 witness says, you can believe a portion and
18 disregard the other. I ask that you use your common
19 sense that you use on a daily basis dealing with
20 family, friends, husbands, wives, children,
21 employees, employers. You know when someone is
22 telling the truth. And I ask that you use that
23 common sense in performing your job here today in
24 determining what witness was credible and what
25 witness was not.

1 You also have the right to consider whether any
2 witness has exhibited any interest, bias, prejudice,
3 or any other motive in the case, and you can also
4 consider the appearance and manner of a witness
5 while on the witness stand. So use all of your
6 skills that you've accumulated over the years in
7 determining who's tell the truth, and from that you
8 can make your decision of what the true facts are.

9 We've had a couple of witnesses who testified
10 as experts. And normally our rules of evidence do
11 not permit a witness to testify as to opinions
12 and/or conclusions. We have an exception under our
13 rules of evidence to that which we call the expert
14 witness exception. A witness who by education and
15 experience has become an expert in some art,
16 science, or profession may state an opinion as to
17 any relevant and material matter in which the
18 witness claims to be an expert. And they may also
19 state the reasons for their opinion.

20 You should consider any expert opinion received
21 in evidence in this case and, like any other
22 witness, give it the weight, if any, you think it
23 deserves. If you decide that an opinion of an
24 expert witness is not based on sufficient education
25 and experience or if you conclude that the reasons

1 given in support of the opinion are not sound or
2 that the opinion is outweighed by the other
3 evidence, you may disregard the opinion entirely.

4 An expert witness' testimony is to be given no
5 greater weight than that of any other witness simply
6 because the witness is an expert. Further, you're
7 not required to accept an expert's opinion even
8 though it's not contradicted.

9 I instruct and emphasize to you that the fact
10 that the defendant did not testify is not a fact to
11 be considered by you in any way during your
12 deliberation and in your consideration on the
13 question of the guilt or innocence of the defendant.
14 It must not be considered by you in any manner
15 whatsoever. A defendant has the constitutional
16 right to remain silent, and the assertion of that
17 right to remain silent must not be considered by you
18 during your deliberations. Madam Forelady, that's
19 one of your duties is to make sure that the fact he
20 didn't testify is not part of your consideration,
21 part of your deliberations, and is not to be
22 mentioned in your deliberations, and no inferences
23 are to be drawn from the fact that he did not
24 testify. He's not required to prove his innocence.
25 The burden of proof remains on the State to prove

1 his guilt to you beyond a reasonable doubt.

2 One of the witnesses who testified in the case
3 had a past criminal record. A person who has a past
4 criminal record is competent to testify during the
5 trial. The past record does not affect the ability
6 of that witness to testify. The past record may
7 only be considered by you, if at all, in determining
8 the witness' believability. Remember, you're the
9 judges of the facts and the believability of any and
10 all witnesses. So that was the only consideration you
11 can give to the witness' past record.

12 All right. Madam foreman, ladies and
13 gentlemen, that is sort of the general propositions
14 of law. Let's turn to the three indictments in this
15 case. And, really, it's the -- the elements of
16 these three offenses is not that difficult. The
17 first offense is criminal sexual conduct with a
18 minor in the first degree.

19 The defendant is charged with first-degree
20 criminal sexual conduct with a minor. The State
21 must prove to you beyond a reasonable doubt that the
22 defendant engaged in a sexual battery with the
23 victim. Must prove to you beyond a reasonable doubt
24 that the defendant engaged in a sexual battery with
25 the victim. The statute under which this law is

1 defines sexual battery as sexual intercourse,
2 cunnilingus, fellatio, anal intercourse, or
3 intrusion, however slight, of any person's body or
4 with any object into the genital or anal openings of
5 another person's body. So you must prove that he
6 engaged in sexual battery which is basically sexual
7 intercourse, fellatio, cunnilingus, that sort of
8 thing.

9 The State must also prove beyond a reasonable
10 doubt that the victim was less than 11 years old at
11 the time of the battery. Consent, willingness,
12 indifference or ignorance on the part of the minor,
13 if any, as to what was taking place does not in any
14 way affect the charge of criminal sexual conduct
15 with a minor, because a married woman under the age
16 of 14 cannot legally consent to sexual intercourse.

17 The other indictment is -- or the second
18 indictment is criminal sexual conduct with a minor
19 in the second degree. The defendant is charged with
20 second-degree criminal sexual conduct with a minor.
21 The State must prove beyond a reasonable doubt that
22 the defendant, once again, engaged in a sexual
23 battery with the victim. And sexual battery is
24 defined as the same as in the first degree, as
25 sexual intercourse, cunnilingus, fellatio, anal

1 intercourse, or an intrusion, however slight, of any
2 part of person's body or any object into the genital
3 or anal openings of a person's body. And then the
4 State must prove beyond a reasonable doubt that the
5 victim was at least 11 but not more than 14 at the
6 time of the battery or the intercourse.

7 Now, ladies and gentlemen, also, there's a law
8 that our Legislature has enacted under Section
9 16-3-657 which says: The testimony of the victim
10 when someone is charged with criminal sexual conduct
11 with a minor in the first or second degree need not
12 be corroborated in these prosecutions.

13 The last indictment is what we call lewd act
14 upon a child. The defendant is charged with
15 committing a lewd act upon a minor. A minor is a
16 person under the age of 18. The State must prove
17 beyond a reasonable doubt that the defendant was
18 over the age of 14. Next, the State must prove that
19 the defendant willfully and lewdly committed or
20 attempted a lewd or lascivious act on or with the
21 body or its parts of a child under the age of 16
22 with the intent to arouse, appeal to, or gratify the
23 lusts, passions, or sexual desires of the defendant
24 or the child.

25 That statute defines the terms willfully, that

1 means voluntarily, intentionally, and with specific
2 intent to do something the law forbids. Lewd means
3 obscene, lustful, indecent, or lecherous.
4 Lascivious means tending to excite, lust, lewd,
5 indecent, obscene, or intending to deprave the
6 morals in respect to such relations.

7 Ladies and gentlemen, those are the three
8 indictments that you have to determine after you
9 determine what the true facts as to whether or not
10 the State has proven these cases to you beyond a
11 reasonable doubt.

12 As I told you, you have to decide each one of
13 them separate and apart from the other. You can
14 find him guilty on one and not guilty on the others
15 or not guilty on all three or guilty on all three,
16 any combination thereof, depending on whether or not
17 you determine the State has proven these elements to
18 you beyond a reasonable doubt.

19 Madam Forelady, you'll have in the jury room a
20 verdict form as to each indictment. It will simply
21 say: As to the offense of criminal sexual conduct
22 with a minor in the first degree, we the jury find
23 the defendant not guilty or guilty. The same thing
24 for second degree, criminal sexual conduct with a
25 minor, the same thing with lewd act upon a child.

1 You'll have three that you'll have to decide all
2 three separate and apart from the others. Your
3 verdict has to be unanimous. All 12 of you have to
4 agree as to the verdict on all three indictments.

5 Now, we're here participating in our criminal
6 justice system. As I told you earlier, you have the
7 most important job of anyone in the courtroom
8 because you have to determine what the true facts
9 are. And we're to determine that simply based on
10 the evidence that you've heard in this courtroom,
11 uninfluenced by anything on the outside. We have no
12 enemies to punish, no friends to reward. You're
13 under an oath to make a careful deliberation of the
14 evidence that you've heard and determine whether or
15 not the State has proven these indictments to you
16 beyond a reasonable doubt.

17 If at any time during your deliberations you
18 have a question that you need to ask me, the proper
19 procedure is to write it out on a pad. You'll have
20 a legal pad back there. Knock on the door and hand
21 it to the bailiff. Sometimes I can answer it,
22 sometimes I can't, depending on what your question
23 is. But if I can't answer it, I'll do the best I
24 can to tell you why at the conclusion of why I
25 can't.

1 I'll ask you to step back into your jury room
2 in just a second. I'll ask you not to start
3 deliberating until -- I have to ask the lawyers if
4 I've left anything out or if I need to delete
5 anything or change anything. And then we have to
6 gather up all of the evidence and bring it back to
7 you. I think we have a couple of DVDs. If you want
8 to look at those -- if you want to look at them,
9 just knock on the door and tell us that. We'll
10 bring the computer back there and there's a screen
11 back there and you can look at it.

12 All right. I'll ask you to return your jury
13 room. Don't start deliberating until I send word.
14 I'll send the verdict forms and exhibits back to
15 you.

16 Mr. Bailiff, please separate the alternates.

17 THE BAILIFF: All right, sir.

18 THE COURT: All right. Y'all go back to your
19 jury room.

20 (The jury exits the courtroom at 11:48 AM.)

21 THE COURT: Any requested additions, deletions,
22 objections, modifications to the charge by the
23 State?

24 MS. SIMPSON: No, Your Honor, nothing from the
25 State.

1 THE COURT: Mr. Johnson?

2 MR. JOHNSON: Nothing from the Defense, Your
3 Honor.

4 THE COURT: Will y'all please come forward,
5 review the evidence to make sure we have it all
6 accounted for, view the verdict form, so we can send
7 it back and the jury can start deliberating.

8 MS. SIMPSON: We're good.

9 THE COURT: Y'all want to come look at this
10 verdict form?

11 Let the record reflect, please, that both sides
12 have reviewed all of the evidence, all exhibits are
13 accounted for, both sides reviewed the verdict form.
14 There's no objection to the verdict form; is that
15 correct Ms. Simpson?

16 MS. SIMPSON: No, Your Honor.

17 THE COURT: You do have an objection?

18 MS. SIMPSON: They're fine. I'm sorry.

19 MR. JOHNSON: No objection from the Defense.

20 THE COURT: All right. We'll stand at ease.
21 It's 11:50 a.m.

22 (The jury begins deliberations at 11:50 AM.)

23 (Court's Exhibit Nos. 2, 3 and 4 marked for
24 identification.)

25 THE COURT: Is the State ready to receive the

1 verdict?

2 MS. SIMPSON: The State is ready.

3 THE COURT: Mr. Johnson, ready?

4 MR. JOHNSON: Yes, sir.

5 THE COURT: Everyone in the courtroom, please
6 listen carefully. Y'all have all been a wonderful
7 audience, y'all have behaved yourselves greatly.
8 However, if you're unable to -- I don't know what
9 the verdict is, obviously, not guilty or guilty. I
10 will not allow any outbursts, any show of emotion.
11 If you do, you'll be subject to contempt of court.
12 So, fair warning, if you're unable to control your
13 emotions, please leave now. Thank you.

14 (The jury enters the courtroom at 2:56 PM.)

15 THE COURT: Madam Forelady, have you reached a
16 verdict?

17 THE FOREWOMAN: Yes, Your Honor.

18 THE COURT: Hand it to me, please.

19 Madam Clerk, you may publish the verdict,
20 please.

21 THE CLERK: Thank you, Your Honor.

22 This is the State of South Carolina, County of
23 Kershaw. The State of South Carolina vs. Nakia
24 Karreim Johnson. On Indictment No. 2014-GS-28-419,
25 as to the offense of criminal sexual conduct with a

1 minor in the first degree, we the jury find the
2 defendant not guilty. Signed by Katinia B. Davis,
3 Foreperson.

4 On indictment 2014-GS-28-420, as to the offense
5 of criminal sexual conduct with a minor in the
6 second degree, we the jury find the defendant
7 guilty. We unanimously agree. Signed by Katinia B.
8 Davis, Foreperson.

9 As to Indictment No. 2014-GS-28-910, as to the
10 offense of lewd act on a minor child, we the jury
11 find the defendant guilty. We unanimously agree.
12 Signed Katinia B. Davis, Foreperson.

13 Madam Forelady, ladies and gentlemen of the
14 jury, are these your verdicts? If so, please
15 signify by raising your right hand.

16 THE COURT: Let the record reflect all have
17 raised their hands.

18 Anything for the jury before I dismiss them by
19 the State?

20 MS. SIMPSON: Nothing from the State, Your
21 Honor.

22 THE COURT: By the Defendant.

23 MR. JOHNSON: Not at this time, Your Honor.

24 THE COURT: Madam Forelady, ladies and
25 gentlemen, you've been a wonderful jury. I travel

1 all over the state and have juries everywhere.
2 Y'all have just been a great jury. You have paid
3 close attention, you've been attentive. And this is
4 not an easy civic duty, particularly in these types
5 of cases. And I thank you on behalf of the citizens
6 of Kershaw, the judiciary, and the people in the
7 state. You know, it's a tough job. But you
8 performed it well and you can look at yourselves in
9 the mirror and be proud of yourselves. I thank you.

10 That will conclude your services here this
11 week. What I have left to do now, I have to
12 sentence him, which will be done in the next few
13 minutes. You're welcome to stay for that or you're
14 welcome to leave.

15 Your wonderful clerk will send you a big check.
16 We got Chairman of County Council up here; maybe we
17 can agree to get him to up the checks. Seriously,
18 you'll be getting a check. If you need a work
19 excuse --

20 THE CLERK: Step across to my office and my
21 staff will have them ready for you.

22 THE COURT: Thank you. I've enjoyed being with
23 you. You're welcome to stay or welcome to go.

24 Okay. Prepare some sentence sheets for me,
25 please. Ms. Simpson, what's the sentence range on

1 CSC second with a minor?

2 MS. SIMPSON: Zero to 20 years, Your Honor.

3 THE COURT: Lewd act?

4 MS. SIMPSON: Zero to 15.

5 THE COURT: Madam Forelady and ladies and
6 gentlemen of the jury, there's a sentence sheet that
7 I have to fill out, and it's taking them about two
8 or three minutes to prepare it. And as soon as we
9 get that, we'll complete the sentencing.

10 All right. Mr. Johnson.

11 NAKIA JOHNSON

12 being first duly sworn, testified as follows:

13 THE DEFENDANT: Yes.

14 THE CLERK: Thank you.

15 THE COURT: Ms. Simpson, as I understand from
16 earlier --

17 MS. SIMPSON: Yes, Your Honor.

18 THE COURT: -- proceedings is that the
19 defendant does not have a prior record.

20 MS. SIMPSON: That is correct.

21 THE COURT: Anything the State wishes to put on
22 the record before I sentence him?

23 MS. SIMPSON: Your Honor, at the appropriate
24 time, there is a statement from Minor

25 Minor is not going to read it, but our victim

1 advocate would like to present it to the Court.

2 THE COURT: All right. If you'll hand it up.

3 Have you given it to Mr. Johnson?

4 MS. SIMPSON: No. It's a handwritten statement
5 that she just did. I'll be happy to show it to him
6 first.

7 THE COURT: All right. Anything else?

8 MS. SIMPSON: Other than that, Your Honor, no.
9 I think the trial -- you heard the facts and they
10 speak for themselves.

11 THE COURT: Mr. Johnson?

12 MR. JOHNSON: Your Honor, may it please the
13 Court. That's all I can say. You've heard the
14 whole trial, you've heard the facts, you've seen
15 everything. The only thing I can ask, Your Honor --
16 you know, our position and the decision has been
17 made. We'd just ask that --

18 THE COURT: That you were amazed?

19 MR. JOHNSON: No, sir. I said the decision has
20 been made. And all I ask is that you show as much
21 mercy as you possibly can.

22 THE COURT: Mr. Nakia Johnson, anything you
23 want to tell me?

24 THE DEFENDANT: Yes. I'm still -- I'm sticking
25 to the story --

1 THE COURT: I can't hear you.

2 THE DEFENDANT: I'm innocent of all these
3 charges. That's all I have to stay at this time.

4 THE COURT: Well, Mr. Johnson, I've listened to
5 all of the evidence, and I concur with the jury's
6 decision. I think the case was proven beyond a
7 reasonable doubt. There's no reason in this whole
8 wide world this child would come in here and relay
9 the story that she relayed, other than the fact that
10 it happened.

11 Madam, you want to read this so we can have it
12 in the record?

13 VICTIM ADVOCATE: Yes, sir.

14 June 26th, 2015. I truly hope my prayers will
15 be answered. Even though the acts were brought to
16 attention, I still can see terrible and disgusting,
17 sickening things happening all over again. My whole
18 life was affected by Mr. Key. My first day back to
19 school after the event was published to the world
20 was the worst day of my life. Everyone was looking
21 at me, some stopped to asked questions. At that
22 moment, I wanted to be locked in a bottle floating
23 at sea. That's where mostly peace is found.

24 I was very highly ashamed. I had to talk to
25 people I barely knew. I was so nervous and

1 embarrassed to tell what happened to me. I vomited
2 everything time I thought about it. I thought if I
3 tried putting it out of my mind, I would do great.
4 But things just did not happen that way. I was
5 still afraid and could vision in my mind things that
6 you did to me and how sickening it made me feel.

7 I hated you. I wanted bad things to happen to
8 you. I wanted you to hurt and cry and to be taken
9 advantage of the way you took advantage of me. You
10 made my life a living hell. You violated me,
11 abusive and used me, physically and mentally. I
12 trusted you because I felt you were someone who
13 protected people from bad things and bad people.
14 But you did not, because you were the monster who
15 hides in light and did bad things.

16 I did what you asked me to do because I was
17 afraid of you. You said you would take away my mom,
18 the only person then in my life who I felt loved me
19 and I would then be alone. I didn't think of
20 myself, but how it would affect my two sisters and
21 brother.

22 But I'm stronger now and I know that I did not
23 do anything to cause the hurt and shame you brought
24 into my life. I can look in your face and tell you
25 that I'm not afraid of you anymore. There's nothing

1 you can do to me to feel to make me feel bad about
2 myself. On the other hand, now I look at you as a
3 sick person who harmed a little girl who never did
4 anything to you but accepted you as a stepfather and
5 trusted you with love and respect.

6 What you did to me did not make you a big man,
7 Mr. Key, it only made you a man with no respect for
8 yourself and nobody else. I'm stronger, much
9 stronger now, and I want to grow up to be a lawyer
10 or a child protector so I can protect innocent kids
11 from big, bad monsters like you.

12 I really thank my support team who helped me.
13 With that being said, I rest my case.

14 THE COURT: Let's make that part of the record,
15 please, ma'am.

16 (Court's Exhibit Nos. 2, 3 and 4 marked for
17 identification.)

18 THE COURT: Anything else, Mr. Virgin Johnson?

19 MR. JOHNSON: No. You've heard the facts.

20 THE COURT: Mr. Nakia Johnson, obviously one of
21 my biggest responsibilities in this job is to
22 protect innocent children. And somebody in your
23 position, being a stepfather to this child, it's
24 just despicable the way you took advantage of her.

25 The jury has given you a lot of mercy not

1 finding you guilty for first degree, which would
2 have subjected yourself to a minimum of 25 years to
3 life. On the criminal sexual conduct with a minor
4 in the second degree, I have the discretion to
5 sentence you anywhere from zero to 20 years, and on
6 the lewd act, I have the discretion to sentence you
7 to zero to 15 years.

8 As to Indictment 2014-GS-28-00420, the
9 indictment for criminal sexual conduct with a minor
10 in the second degree, the sentence of the Court is
11 that you be committed to the state department of
12 corrections for a period of 20 years.

13 As to Indictment -910 of lewd act, sentence of
14 the Court is that you be committed to the state
15 department of corrections for a period of 15 years.
16 They'll run concurrent. Good luck.

17 MS. SIMPSON: Thank you, Your Honor.

18 MR. JOHNSON: Thank you, Your Honor.

19 THE COURT: Everybody remain seated, please.

20 Madam Forelady, ladies and gentlemen of the
21 jury, let me explain a little bit about that.
22 Criminal sexual conduct in the second degree, I have
23 discretion between zero and 20 years. It's
24 classified as a most serious offense, which means a
25 number of things. We have a three-strike law in

1 South Carolina, so if he gets out and gets in
2 trouble again for these types of activities, he can
3 go to jail for the rest of his life.

4 The more important thing is that's what we call
5 a no-parole sentence, so he'll have to serve 85
6 percent of that before he can get out. He will not
7 be eligible for parole, so he'll do 17 years. I ran
8 them concurrent, at the same time, but he's -- he'll
9 be there for a while.

10 Thank you very much for your service, and I've
11 enjoyed working with you. I'll let y'all go now.
12 Thank you.

13 (The jury is excused at 3:15 PM.)

14 THE COURT: Mr. Johnson, I'll give you ten days
15 to make any posttrial motions.

16 MR. JOHNSON: Thank you, Your Honor.

17 THE COURT: Young lady, you're a great girl. I
18 hope everything is going to work out for you. Okay?

19 **Minor** Yes, sir.

20 THE COURT: Good luck.

21 (Court's Exhibit No. 5 marked for
22 identification.)

23 -- END OF TRANSCRIPT OF RECORD --

24

25

C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal in the Criminal Court for Kershaw County, South Carolina, on the 23rd - 26th days of June, 2015.

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

December 1, 2015

*s/Bethanie K. Creppon*Bethanie K. Creppon
Circuit Court Reporter

WITNESSES

(S) Inv. R. Bailey
- KCSD

ARREST WARRANT NUMBER

DP00083

ACTION OF GRAND JURY
TRUE BILL

Foreperson of Grand Jury
Date:

MAY 28 2014

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2014-GS-28-0420

The State of South Carolina

County of

Kershaw

COURT OF GENERAL SESSIONS

JUNE TERM 2014

116

THE STATE
vs.

Nakia Karreim Johnson

Indictment for
CRIMINAL SEXUAL CONDUCT WITH A
MINOR, 2ND DEGREE (AGE 11-14)

SC Code: 16-03-0655(B)(1)
CDR Code: 0396

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

FILED FOR RECORD
2014 MAY 28 PM 2:47
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

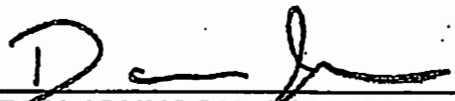
RECEIVED
INDICTMENT JUL 02 2015
SC Court of Appeals

At a Court of General Sessions, convened on May 28, 2014, the
Grand Jurors of Kershaw County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR
2ND DEGREE (AGE 11-14)

That Nakia Karreim Johnson did in Kershaw County, State of South Carolina, on or between October 16, 2010 and October 11, 2011, willfully, unlawfully and feloniously engage in sexual battery with a minor who was fourteen (14) years or less but who was at least eleven (11) years of age, to wit: **Minor** in violation of Section 16-03-655(B) [formerly Section 16-3-655(2)], S. C. Code of Laws, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


DAN JOHNSON, SOLICITOR

WITNESSES

(S) Inv. R. Bailey - KCSD

ARREST WARRANT NUMBER

DP00112

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

AUG 20 2014

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2014-GS-28-0910

The State of South Carolina

County of

Kershaw

COURT OF GENERAL SESSIONS

AUGUST TERM 2014

79

THE STATE
vs.

Nakia Karreim Johnson

Indictment for
LEWD ACT ON A MINOR CHILD

SC Code: 16-15-0140
CDR Code: 2468

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

FILED FOR RECORD
2014 AUG 20 PM 2:46
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

STATE OF SOUTH CAROLINA)

COUNTY OF KERSHAW)

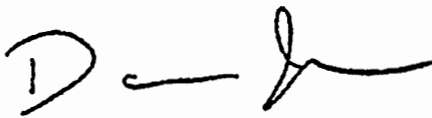
INDICTMENT

At a Court of General Sessions, convened on August 20, 2014, the
Grand Jurors of Kershaw County present upon their oath:

LEWD ACT ON A MINOR CHILD

That Nakia Karreim Johnson, being over fourteen years of age, did
in Kershaw County on or between January 1, 2007 and October 11, 2011,
willfully and lewdly commit a lewd or lascivious act upon or with the body of
a child, less than sixteen (16) years of age, to wit: Minor [REDACTED] with the
intent of arousing, appealing to, or gratifying the lust or passions or sexual
desires of said defendant or of the victim. All in violation of Section 16-15-
0140, S. C. Code of Laws, (1976, as amended).

Against the peace and dignity of the State, and contrary to the
statute in such case made and provided.



DAN JOHNSON, SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS 649

COUNTY OF Kershaw

STATE VS.

Nakia Karreim Johnson

AKA:

Race: BLACK Sex: M Age: 21

DOB: SS#: 77500

Address:

City, State, Zip:

DL#: 77500

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO: Sex / Criminal sexual conduct with minor, or Attempt - victim 11 to 14 yrs of age inclusive - Second deg

INDICTMENT/CASE#: 2014GS2800420

A/W#: 2014GS2800420

Date of Offense: 10/11/2011

S.C. Code § : 16-03-0655(B)(1)

CDR Code #: 0396

SENTENCE SHEET

in violation of § 16-03-0655(B)(1) of the S.C. Code of Laws, bearing CDR Code # 0396

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45

-w/minor-1st-or Lewd-Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

SIMPSON, NICOLE

SC Bar# 77500

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered: PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:	\$
§ 14-1-206 (Assessments 107.5 %)	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100
§ 56-5-2995 (DUI Assessment)	\$12
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 47.9 (Public Def/Prob)	\$500
§ 14-1-212 (Law Enforce. Funding)	\$25
§ 14-1-213 (Drug Court Surcharge)	\$150
§ 50-21-114(BUI Breath Test Fee)	\$50
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea
Proviso 90.5 (SCCJA Surcharge)	\$5
3% to County (if paid in installments)	\$
TOTAL	\$

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: Jana McDonaldCourt Reporter: Bethanie Cuppen

SCCA 17 (03/2011)

Presiding Judge

Judge Code: 2136Sentence Date: 6/26/15

STATE ~~650~~ SOUTH CAROLINACOUNTY OF
STATE

Kershaw

VS.

Nakia Karreim Johnson

AKA:

Race: BLACK Sex: M Age: 40

DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip:

DL#: [REDACTED] SID#: [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1996)

in violation of § 16-15-0140 of the S.C. Code of Laws, bearing CDR Code # 2468

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☒ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

SIMPSON, NICOLE

SC Bar# 77500

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 14-65-28-420
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine: \$ _____
§ 14-1-206 (Assessments 107.5 %) \$ _____
§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ _____
§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____
§ 56-5-2995 (DUI Assessment) \$12 \$ _____
§ 56-1-286 (DUI Breath Test) \$25 \$ _____
Proviso 47.9 (Public Def/Prob) \$500 \$ _____
§ 14-1-212 (Law Enforce. Funding) \$25 \$ _____
§ 14-1-213 (Drug Court Surcharge) \$150 \$ _____
§ 50-21-114(BUI Breath Test Fee) \$50 \$ _____
§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____
Proviso 90.5 (SCCA Surcharge) \$5 \$ _____
3% to County (if paid in installments) \$ _____
TOTAL \$ _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2014GS280910

A/W#: DP00112

Date of Offense: 10/11/2011

S.C. Code § : 16-15-0140

CDR Code #: 2468

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

2136

6/26/15

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD
NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY
PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Nakia Karreim Johnson, Appellant.

Appellate Case No. 2015-001436

Appeal From Kershaw County
Doyet A. Early, III, Circuit Court Judge

Unpublished Opinion No. 2018-UP-109
Heard December 5, 2017 – Filed March 14, 2018

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood,
for Appellant.

Attorney General Alan McCrory Wilson, Assistant
Attorney General William M. Blicht, Jr., and Solicitor
Daniel Edward Johnson, all of Columbia, for
Respondent.

PER CURIAM: Nakia Johnson appeals his convictions of second-degree

criminal sexual conduct (CSC) with a minor and lewd act on a minor (lewd act). On appeal, Johnson argues the trial court erred in refusing to grant a mistrial because (1) the State's expert witness in child abuse assessment testified family members generally question how they failed to recognize that abuse was occurring and (2) the child advocacy interviewer testified he instructed Victim to tell the truth during the forensic interview. We affirm in part, reverse in part, and remand for a new trial.

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "The decision to grant or deny a mistrial is within the sound discretion of the trial judge." *State v. Stanley*, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Douglas*, 369 S.C. at 429–30, 632 S.E.2d at 848. "To show prejudice, the appellant must prove 'that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof.'" *State v. Brown*, 411 S.C. 332, 339, 768 S.E.2d 246, 249 (Ct. App. 2015) (quoting *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)). "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." *Stanley*, 365 S.C. at 34, 615 S.E.2d at 460.

EXPERT'S TESTIMONY

Johnson argues the trial court erred in refusing to grant a mistrial after the State's expert witness in child abuse assessment testified family members in abuse cases generally question how they failed to recognize that abuse was occurring. Johnson asserts this testimony improperly bolstered the Mother's and Aunts' testimony because they testified they were not aware of the recurring abuse of Victim. Johnson asserts an expert testifying about the behavioral characteristics of family members of abuse victims exceeds the scope of *Brown*¹ and *Anderson*.² We

¹ *Brown*, 411 S.C. at 341–42, 768 S.E.2d at 251 (holding an expert's "specialized knowledge of the behavioral characteristics of child sex abuse victims was relevant and crucial in assisting the jury's understanding of why children might

disagree.

"[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). "The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). "Consequently, 'it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter.'" *Brown*, 411 S.C. at 343, 768 S.E.2d at 252 (quoting *Kromah*, 401 S.C. at 358–59, 737 S.E.2d at 500). A child abuse assessment expert can "testify to the behavioral characteristics of sex abuse victims." *Anderson*, 413 S.C. at 218, 776 S.E.2d at 79.

The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility.

Id. at 218–19, 776 S.E.2d at 79.

The trial court qualified Dr. Allison Foster, chief psychologist at the Assessment & Resource Center (ARC), as an expert in child abuse assessments. When asked if family members always know what was happening to a child, Dr. Foster answered,

No, they do not. And one of the most painful dynamics in child sexual abuse cases involving family members is that mothers -- and I'll say mothers because most often it is the mother who is saying, how could I not have seen

delay disclosing sexual abuse, as well as why their recollections may become clearer each time they discuss the instances of abuse").

² *State v. Anderson*, 413 S.C. 212, 220–21, 776 S.E.2d 76, 80 (2015) ("The sole purpose of [a forensic interviewer's] jury testimony is to lay the foundation for the introduction of the videotape, and the questioning must be limited to that subject. There is to be no testimony to such things as techniques, of the instruction to the interview subject of the importance of telling the truth, or that the purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted.").

something was going on? So every week -- and at my job at the ARC, that's a question that --

Johnson objected, and the trial court held a bench conference. The trial court instructed the jury to "[d]isregard that last statement and answer." After the jury was excused from the room, the trial court allowed Johnson to place his objection on the record. Johnson moved for a mistrial, arguing Dr. Foster's testimony bolstered the credibility of Mother's testimony and was prejudicial because there was no physical evidence. The trial court denied the motion for a mistrial, finding Dr. Foster's testimony was not a comment on Mother's credibility and the court's instructions to the jury to ignore the comment were sufficient.

We hold the trial court did not err in denying Johnson's motion for a mistrial because Dr. Foster's testimony did not bolster Mother's testimony.³ The State properly followed the procedure in *Anderson* by calling an expert who had no prior involvement with the case. Dr. Foster never interviewed Victim or Mother, and she did not have any prior knowledge of the case. Dr. Foster never commented—directly or indirectly—about the credibility of Victim's allegations. Although Dr. Foster's testimony that family members did not always know when a minor was being sexually abused mirrored Mother's testimony that she did not know Johnson was abusing Victim, this testimony did not rise to the level of bolstering Mother's testimony. *See Brown*, 411 S.C. at 345, 768 S.E.2d at 253 ("The fact that [an expert's] testimony corroborated some of the minor victims' reasons for delaying disclosure of the abuse does not mean her testimony improperly bolstered their accounts."). Moreover, the trial court struck Dr. Foster's statement about family members not always being aware of abuse. Thus, had there been error, such was cured by striking the testimony, and it did not rise to the level of being so prejudicial as to require a mistrial. *See Stanley*, 365 S.C. at 34, 615 S.E.2d at 460 ("The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way."). Therefore, we find the trial court did not abuse its discretion in

³ We find Johnson's bolstering argument as to the Aunts' testimony unpreserved. *See State v. Adams*, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) (stating a defendant may not argue one ground below and another on appeal). On appeal, Johnson argues Dr. Foster's testimony bolstered "other family members[]" testimony. However, at trial, Johnson argued Dr. Foster's testimony bolstered "the credibility . . . of what was said by the mom and the daughter."

refusing to grant a mistrial. *See id.* at 33, 615 S.E.2d at 460 ("The decision to grant or deny a mistrial is within the sound discretion of the trial judge.").

FORENSIC INTERVIEWER'S TESTIMONY

Johnson argues the trial court erred in denying his motion for a mistrial when the forensic interviewer testified his procedure for an interview includes asking interviewees if they will tell the truth. Johnson contends this goes directly against the supreme court's holding in *Anderson*. Johnson asserts the testimony was prejudicial because the case turned on the credibility of Victim because there was no physical evidence in the case. The State admits the comment by the forensic interviewer was "arguably improper" according to *Kromah* and *Anderson*, but it "was minimal and did not warrant a mistrial."

In *Kromah*, our supreme court held forensic interviewers should avoid testifying that they instructed the child to be truthful. 401 S.C. at 360, 737 S.E.2d at 500. In *Anderson*, the supreme court clarified "[t]here is to be no testimony [by a forensic interviewer] . . . of the instruction to the interview subject of the importance of telling the truth" 413 S.C. at 221, 776 S.E.2d at 80. "This type of testimony, which establishes the 'particularized guarantees of trustworthiness,' necessarily conveys to the jury that the interviewer and law enforcement believe the victim and that their beliefs led to the defendant's arrest, these charges, and this trial, thus impermissibly bolstering the minor's credibility." *Id.*

At trial, David Kellin, the forensic interviewer, described how he began the interview with Victim:

I begin by introducing myself, and very briefly in the beginning, we talk about just general topics. We check and see if they're aware that this is being recorded. . . . [W]e encourage them to -- if they don't know something, to say they don't know; if they don't understand, to say I don't understand and not to guess. We also ask in the beginning if they will . . . tell the truth during the interview process.

We agree with Johnson that the forensic interviewer's testimony was improper under *Kromah* and *Anderson*. In *Anderson*, our supreme court explicitly stated forensic interviewers are not to testify about instructing victims to tell the truth during forensic interviews because that testimony "necessarily" vouches for the victim's credibility. *See id.* In the instant case, Kellin testified he begins forensic

interviews by asking victims if they would tell the truth during the interview process. The trial court refused to strike this testimony or grant a mistrial. It is difficult to tell from the record presented whether the jury heard Kellin ask this question or Victim answer the question when the forensic interview was played at trial. The State argues Kellin's one comment did not rise to the level of being so prejudicial as to require a mistrial. Although it is true the prejudice in *Anderson* was "overwhelming" and Kellin's testimony only mentioned truth-telling once, we feel constrained by the language in *Kromah* and *Anderson* to find any mention of the word "truth" during a forensic interview or during a forensic interviewer's testimony to be improper. *See Anderson*, 413 S.C. at 220, 776 S.E.2d at 80 ("The prejudice on this record is overwhelming.").

Although we find the trial court erred in allowing Kellin to testify that he asked Victim if she would tell the truth in the forensic interview, we believe this error only requires reversal of Johnson's conviction for second-degree CSC with a minor because only that conviction depended solely on the credibility of Victim. *See State v. Chavis*, 412 S.C. 101, 110, 771 S.E.2d 336, 341 (2015) ("The determination whether a bolstering error is harmless depends on whether the case turns on the credibility of the victim."). We affirm Johnson's lewd act conviction because Mother's testimony about overhearing Johnson and Victim's conversation corroborated Victim's testimony regarding the graveyard incident. Victim testified Johnson told her to get into the car to go to the store, and he left before Mother and the other children could come. Victim indicated Mother called to ask Johnson why he left her and the other children. Victim recalled Johnson took her to a graveyard instead of the store and told her to pull down her pants. Victim indicated Johnson pulled down his pants and started touching her, but the incident stopped because Mother was "still on the line." Victim testified they "hurried up and went to the store," and he took her home.⁴

Similarly, Mother testified Johnson took Victim to the store but left her and the other children at home. She indicated she called Johnson to ask why he left without them and to tell him to get items from the store. Mother recalled she later got an incoming call from Johnson, but he did not say anything when she answered the phone. Mother then heard the following conversation between Johnson and Victim:

⁴ The State entered a surveillance video into evidence showing Johnson and Victim at the store that day.

I heard him say, you know I want to nut in you, but I can't. . . . Then I heard him say, you know why? And she didn't say anything. He said, do you know why? And she said, because I'll get pregnant. And he asked her did she miss him. She didn't say anything. And he asked her how does she want to do it; does she want to get on top or does she want him to get on top. And I think she said, you on top.

We find Mother's testimony about the telephone call corroborated Victim's testimony about the graveyard incident, and the graveyard incident was enough evidence for the jury to convict Johnson of lewd act. *See State v. Norton*, 286 S.C. 95, 97, 332 S.E.2d 531, 532–33 (1985) (explaining, under the crime of lewd act, it is unlawful "for any person" over fourteen to "wil[l]fully and lewdly commit or attempt [to commit] any lewd or lascivious act upon or with the body . . . of a child under" fourteen "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child" (quoting S.C. Code Ann. § 16-15-140 (1976)⁵)). Mother's testimony, however, does not corroborate Victim's testimony about any of the other incidents. The graveyard incident itself is not enough to support Johnson's conviction for second-degree CSC with a minor because there was no evidence of penetration. *See* S.C. Code Ann. § 16-3-655(B) (2015) (defining second-degree CSC with a minor as "engag[ing] in a sexual battery with a victim" who is between eleven and fourteen years old); S.C. Code Ann. § 16-3-651 (2015) (defining "sexual battery" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body"). Therefore, we affirm Johnson's conviction for lewd act with a minor and reverse and remand for a new trial on second-degree CSC with a minor.

CUMULATIVE ERROR

Johnson argues he is entitled to a new trial pursuant to the cumulative error doctrine based on (1) the improper bolstering of the family members' testimony by the State's expert witness and (2) the improper bolstering of the Victim's testimony by the forensic interviewer. We disagree.

⁵ Lewd act is now third-degree CSC with a minor. *See* S.C. Code Ann. § 16-3-655(C) (2015).

"The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013). "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." *Id.*

We find no merit to this argument because we hold the trial court did not err in regards to Dr. Foster's testimony.

CONCLUSION

For the foregoing reasons, we affirm Johnson's conviction for lewd act with a minor. We reverse his conviction for second-degree CSC with a minor and remand for a new trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS, THOMAS, and MCDONALD, JJ., concur.

FORM 5

STATE OF SOUTH CAROLINA)

County of Kershaw)Nakia Karreim Johnson)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2021-CP-28-014APPLICATION FOR
POST-CONVICTION REVIEWJANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

2021 JAN 11 AM 11:05

FILED FOR RECORD

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Correctional Institution
386 Redemption Way McCormick, SC 29899
2. Name and location of Court which imposed sentence Kershaw County
Court of General Sessions Camden, SC
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Criminal Sexual Conduct w/minor 2nd degree 2014-GS-28-0420
 - (b) Lewd act on a child 2014-GS-28-0410

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) June 26, 2015
- (b) 20 yrs Sentence 85%
- (c) 15 yrs Sentence to be ran concurrent with above Sentence
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. Appeals Court
- ii. South Carolina Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Court of appeals Case # 2015-001436 reverse in part
- ii. South Carolina Supreme Court 2018-001355 Remanded in part
- iii. _____
- (c) the date of each such result:
- i. 3/2018
- ii. 1/2020
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

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CLERK OF COURT
Kershaw County, S.C.

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

- (a) I was not in the County where these charges originated from.
- (b) My Attorney did ^{not} raise a defense.
- (c) _____

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

- (a) Video of myself and alleged victim in Lee County presented at
- (b) Officer testimony at preliminary hearing states I was in Lee County ^{trial.}
- (c) _____

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

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

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

- (a) the specific nature thereof:

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

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

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Kershaw County, S.C.

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2021 JAN 11 AM 11:05

JANET C. HASTY
CLERK OF COURT
Kershaw County, S.C.

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

No

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

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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JANET C. HASTY
CLERK OF COURT
Kershaw County, SC

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

(a) _____

(b) _____

(c) _____

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

(a) your arraignment and plea? yes(b) your trial, if any? yes(c) your sentencing? yes(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

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

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

i. Virgin Johnson Jr. Esquire410 Summers Avenue Orangeburg, SC 29115ii. Charles Grose404 Main Street Greenwood, SC 29646

iii. _____

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

i. Trialii. Appeal

iii. _____

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

This sentenced vacated and all charges and
Criminal record expunged.

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

No. Only charges from Section 4

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 JANET C. HASTY
 CLERK OF COURT
 Kershaw County, S.C.

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Kershaw)

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

Nakia Johnson

SWORN to and subscribed before me this 6th
 day of January, 2021.

[Signature] (L.S.)
 Notary Public

My Commission Expires: 02/26/2028

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2021 JAN 11 AM 11:05

JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Nakia Johnson [REDACTED], hereby apply for leave to proceed in this action without prepayment of security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

Nakia Johnson
Applicant

SWORN or affirmed to and subscribed before me this
15th day of December, 2020.

Lakisha D. Gray
Notary Public

My Commission Expires: 01/13/30



STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

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2021 JAN 27 AM 1:57

In The Court of Comm Pleas

2021-CP-28-014

Nakia K. Johnson
Petitioner

JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

MEMORANDUM OF LAW
IN SUPPORT OF APPLICATION
FOR POST CONVICTION RELIEF

Vs.

The State of South Carolina
Respondent

INDICTMENT No(s): 2014-GS-28-0910

Come now, applicant to present his memorandum of law in support of application for Post-Conviction Relief.

Statement of the Case

On October 11, 2011, the alleged victim in this case and her mother alleged the applicant, Nakia Johnson, committed child sexual abuse. The state arrested and indicted Mr. Johnson for First-degree Criminal Sexual Conduct with a Minor, Second-degree Criminal Sexual Conduct with a Minor, and Committing a Lewd Act on a Minor Child. R. 526-29.

From June 22-26, 2015, the state tried Mr. Johnson before the Honorable Dayet A. Early, III and a jury in Kershaw County. Nicole Simpson and Kathryn Cavanaugh represented the state. Virgin Johnson, Jr. (no relation) and Corey Williams represented Mr. Johnson. The jurors found Mr. Johnson not guilty of First-degree Criminal Sexual Conduct with a Minor but returned guilty verdicts for Second-degree Criminal Sexual Conduct with a Minor and Lewd Act. R.513-14. Judge Early sentenced Mr. Johnson to twenty years imprisonment for Second-degree Criminal Sexual Conduct with a Minor and fifteen years imprisonment for Lewd Act. The sentences are concurrent. R. 521; R. 524-25. Mr. Johnson appeals his convictions of Second-degree Criminal Sexual Conduct (CSC) with a Minor and Lewd Act on a Minor (Lewd Act). Unpublished Opinion No. 2018-UP-109 Heard December 5, 2017-Filed March 14, 2018. The court's affirm Mr. Johnson's conviction for Lewd Act with a Minor and reversed and remand for a new trial on Second-degree CSC with a Minor.

STATEMENT OF ISSUES

1. Trial Counsel was ineffective for not requesting the courts to quash the indictment as to the non-specific 4-year period covered in the indictment unconstitutional.
2. Trial Counsel failed to preserve defendant's direct verdict motion at the conclusion of the evidence.
3. Trial counsel was ineffective for not presenting evidence pursuant to Rule 19(b) SCRCrimp
4. Trial counsel was ineffective for failing to object to the jurisdiction defect.

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CLERK OF COURT
KERSHAW COUNTY, S.C.

GROUND

Applicant was denied the right to Effective Assistance of Counsel guaranteed by the 6th and 14th Amendments to the United States Constitution and by Article I§3 and 14 of the South Carolina Constitution and during the guilt or innocence phase of his trial.

ARGUMENT FOR ISSUE #1

Trial counsel was ineffective for not requesting the courts to quash the indictment as to the non-specific 4-year period covered in the indictment was unconstitutional.

FACTS

In post-conviction, a Petitioner may be granted relief based on ineffective assistance of counsel under the sixth amendment to the United States Constitution if he shows: (1) That the counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) That he was prejudiced by counsel's ineffective performance: *Strickland v. Washington*, 466, U.S. 668, 104 S.Ct. 2052(1984). To prove prejudice, Petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. *Cherry v. State*, 300 S.C. 115, 386 S.E.2D 624 (1989). A reasonable probability, is simply a probability sufficient to determine confidence in the outcome of the trial.

In this case, Applicant was indicted at the 2014 term of the Kershaw County Grand Jury for (3) three separate indictments:

1. Criminal Sexual Conduct with a minor 1st degree
2. Criminal Sexual Conduct with a Minor 2nd degree (Age 11-14)
3. Lewd Act on a Minor Child

The Petitioner was tried June 22-26 of 2015 and the jury returned a guilty verdict on the charges of Criminal Sexual Conduct with a Minor 2nd degree (Age 11-14), and Lewd Act on a Minor Child. The Criminal Sexual Conduct with a Minor 2nd degree was reversed and remanded for a new trial. The Courts' affirmed Johnson's conviction for Lewd Act with a Minor by the Court of Appeals, Appellate Case No. 2015-001436.

Now comes Petitioner to show trial counsel ineffectiveness. Trial counsel was ineffective for not requesting the courts to quash the indictment as to the non-specific four and one-half (4 ½) year period rather than a day was unconstitutionally overboard because it lacked specificity as to when alleged acts occurred.

Indictment that notified defendant that alleged offense of Lewd Act Upon a Minor occurred at an unspecific time over a four and one half (4 ½) period rather than a day was unconstitutionally overboard and vague, in violation of defendant's due process rights, because they lacked specificity as to when the alleged acts occurred.

An indictment is a critical document in criminal defense preparation that is grounded in constitutional and statutory principles, see S.C. Const. art. 1, §11 and also S.C. Code Ann. §17-19-10 (2014).

Given the expansive time frame and lack of specificity as to this time frame, defendant was prejudiced by the defects of the indictments although the difficulty the prosecution faces in identifying exact dates in child abuse cases, the class of criminal case as defendants should not translate into an exception that operates to circumvent constitutional and statutory principles.

Petitioner asserts the following case law in support of his argument,

1. State v. Baker, 411 S.C. 583, 769 S.E. 2d 860
The Court of Appeals erred in affirming the circuit court judges' denial of his motion to quash the indictment. He contends the indictment were unconstitutionally overboard and vague as the indictment alleged the offense occurred at an unspecified time. Concurring per Justice Beatty, J., The "indictment" is the charge of the state against the defendant, the pleading by which he informed of the fact, and the nature and score of the accusation.
2. State v. Tumbleston, 376 S.C. 98-99, 654 S.E. 2d at 853-54 when an indictment is challenged based on an overly broad time period, our courts have considered whether time is a material element of the offense and whether the time period covered by the indictment occurred prior to the return of the indictment by a grand jury.

CONCLUSION

For the foregoing reason, petitioner Nakia K Johnson respectfully request that this Honorable Court reverse his conviction and remand for a new trial.

AGRUMENT FOR ISSUE #2

Trial counsel failed to preserve defendant's Direct Verdict Motion at the conclusion of the evidence.

In this case, defense counsel failed to preserve appellate's Direct Verdict Motion for appeal. At the conclusion of the evidence on behalf of the state, the court requested any motions by the defense counsel. At this time, defense counsel did not specifically renew or preserve appellate's direct verdict motion on the Lewd Act on a Minor Child. Please see...Tr. Pg-536 and 537. On pg. 537 of the transcript line 14-15, defense counsel never states specifically the name of the motion to be renewed. Just stating, "Standard Motion," is not enough to preserve for appeal. State v. Bailey, 298 S.C. 1, 377 S.E. 2d 581 (1989). (Finding defense counsel's statement at the end of all the evidence that he was making the "Standard Motions" did not preserve the issue of

direct verdict for appeal. State v. Taylor, 333 S.C. 159, 508 S.E. 2d 870 (1998) (Noting a general or nonspecific objection presents no issue for appellate review); see also State v. Harry, 321 S.C. 273, 468 S.E. 2d 76-79 (ct. App. 1996). Stating, ("A motion for a direct verdict made at the close of the [state's] case is not sufficient to preserve error unless renewed at the close of all the evidence.

Defense counsel's ineffectiveness was highly prejudice. The record contains no evidence that appellant's counsel moved for a proper direct verdict or an arrest of judgement. The state never presented any evidence that the indicted charge of Lewd Act on a Minor was committed in Kershaw County in violation of section 16-15-0140, S.C. Code of Laws, (1976, as amended).

It is necessary that every circumstance relied upon by the state be proven beyond a reasonable doubt. In cases where the state has failed to present evidence of the offense charged, a criminal defendant is entitled to a direct verdict. State v. Cherry, 361 S.C. 588, 606 S.E. 2d 475 (2004). The evidence introduced by the state in this case was insufficient to withstand applicant's motion for direct verdict.

In Post-Conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the sixth amendment to the U.S. Constitution if he shows: (1) That counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) That petitioner was prejudiced by counsel's ineffective performance: Strickland v. Washington, 466 U.S. 668, 104 S.ct. 2052 (1984).

To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 115, 386 S.E. 2d 624 (1989). A reasonable probability is simply a probability sufficient to determine confidence in the outcome of the trial. For trial counsel's failure to preserve petitioner's direct motion at the conclusion of the evidence. Petitioner request this court for the conclusion for the foregoing reason to respectfully reverse his conviction and remand for a new trial.

Trial counsel was ineffective for not presenting evidence pursuant to rule 19(b) SCRCrimp

In this case, defense counsel failed to present evidence pursuant to rule 19(b) SCRCrimp. This rule allows a petitioner the right to present evidence from a denial of a motion of direct verdict. Stating:

"If defendant's motion for direct verdict at the close of the evidence offered by the state is not granted, the defendant may offer evidence without having reserved the right."

If trial counsel would have presented the evidence that, in the absence of an indictment by the grand jury of the county of Lee County S.C. where the alleged offense was committed, the circuit court of Kershaw County with whom, indicted and convicted applicant lacked subject matter jurisdiction over the offense. Please see...State v. Beachum 288 S.C. 325, 342 S.E. 2d 597 (1986); and Summerall v. State, 278 S.C. 255, 294 S.E. 2d 344 (1982).

State v. McCoy, 98 S.C. 133, holds a criminal defendant is entitled to a direct verdict when the state fails to present evidence that the offense was committed in the county alleged in the indictment. Although Kershaw County indicted and convicted applicant, the state presented no evidence that applicant's alleged Lewd Act on a Minor child conviction occurred in Kershaw County.

Facts of the matter of this case is that, On October 11, 2011, Lee County was notified by Kershaw County of a possible Lewd Act on a Minor Child occurred in Lee County Jurisdiction. Please see Incident Report of Lee County Sheriff's Office as exhibit 1A, and voluntary statement of the victim's mother, "Pamela Hall", at the Lee County Sheriff's Department as exhibit 1B.

Article 1, Section 17 and Article VI, Section 2 of the constitution require criminal prosecutions to be tried in the county in which the offense was committed in the absence of a change of venue. Applicant's trial counsel was ineffective under the prevailing professional norms of Strickland v. Washington, 466 US. 668, 104 S.ct. 2052. Counsel's ineffectiveness prejudice applicant due to counsel failing to present evidence pursuant to rule 19(b) SCRCrimp. If counsel would have presented evidence that the state presented no evidence that Kershaw County had subject matter jurisdiction or territorial jurisdiction to convict and sentenced applicant in Kershaw County, there would have been a reasonable probability that but for counsel's error, the result of the proceeding would be different.

CONCLUSION

For the foregoing reason, applicant, Nakia K. Johnson respectfully request that this Honorable Court reverse his conviction and remand for a new trial.

AGRUMENT FOR ISSUE #4

Trial counsel was ineffective for failing to object to the jurisdiction defect

Article I, Section II. of the South Carolina Constitution provides, in part:

No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed.

The courts have interpreted this provision to mean that, in the absence of an indictment by the grand jury of the county where the offense was committed or a valid waiver of presentment of indictment, the circuit court lacks subject matter jurisdiction over the offense. State v. Beachum, 288 S.C. 325, 342 S.E. 2d 597 (1986); Summerall v. State, 278 S.C. 255, 294 S.E. 2d 344(1982).

Here in applicant's case trial counsel failed to challenge Kershaw County Authority to indict and convict applicant of Lewd Act on a Minor Child that occurred in Lee County, in the absence of a change of venue or a valid waiver of presentment of indictment. Although an incident report and voluntary statement listed as Exhibits 1A and 1B was conducted by the Lee County Sheriff Office, after Lee County investigation, a warrant was never issued for applicant's arrest for a Lewd Act on a Minor Child, and nor was the incident pursued any further by the Lee County Sheriff's Office. There was a preliminary hearing heard February 21, 2012 by presiding Judge Roderick M. Todd, Jr. This preliminary will be listed as Exhibit 1C. At this preliminary hearing investigator Mr. R. Bailey for the Kershaw County Sheriff's Office testified that the alleged incident of Lewd Act on a Minor, in which applicant was convicted for, took place in Lee County S.C., please see pg. 8 Line 12-25 and pg. 9 Line 1-5 of preliminary hearing clearly showing that investigator R. Bailey knew that Lee County had jurisdiction over the alleged Lewd Act on a Minor charge. Mr. Bailey was also the sole witness that testified at applicant's Grand Jury hearing August 20, 2014 of Kershaw County Docket No. 2014-GS-28-0910 of the Lewd Act on a Minor as the same act that occurred in Lee County. Please see applicant's indictment as Exhibit 1D.

Trial counsel's ineffectiveness not to object or challenged Kershaw County jurisdictional authority to indict and convict applicant for the alleged crime that took place in Lee County S.C. was well below the prevailing professional norms of Strickland v. Washington, 466 U.S. 668 104 S.ct. 2052, of effective assistance of counsel at a critical stage of proceeding.

Applicant was highly prejudiced by trial counsel ineffectiveness based on the fact that Lee County took no jurisdiction action to arrest, indict, or convict applicant after their investigation of the alleged Lewd Act on a Minor offense, applicant would be free.

CONCLUSION

For the foregoing reason, applicant Nakia K. Johnson respectfully request that this Honorable Court reverse his conviction and remand for a new trial.

IN THE COURT OF COMMON PLEAS

State of South Carolina
County of Kershaw

Indictment No: 2014-GS-28-0910

Nakia K. Johnson
Petitioner,
V.
State of South Carolina
Respondent.

Certificate of Service

I, Nakia K. Johnson, applicant, do hereby certify that on this date I have served a copy of my PCR application along with my Memorandum of Law in support of PCR application to Chief Clerk of Court Office of 1121 Broad Street, Camden, S.C. 29020 by depositing one copy of the same in the U.S. mail, first class postage prepaid through the McCormick Correctional Institution mail service.

INCIDENT REPORT
Lee County Sheriff Office

Exhibits 1 A

CASE NUMBER

11-10-0064

EVENT	INCIDENT TYPE		COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE V.
	1. 11A - CRIMINAL SEXUAL CONDUCT W/ A MINOR		☒ YES ☐ NO	☐ YES ☐ NO	04 (Church/Synagogue/Mosque)		☐ Individual ☐ Business ☐ Financial Inst ☐ Government ☐ Relig. Orgn. ☐ Soc./Public ☐ Other ☐ Unknown ☐ Police Off.
2.		☐ YES ☐ NO	☐ YES ☐ NO				
3.		☐ YES ☐ NO	☐ YES ☐ NO				
INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER)				ZIP CODE	WEAPON TYPE		
				29032-	40-Personal Weapons (Hands, Fists,		
INCIDENT DATE		24 HR. CLOCK	TO	DATE	24 HR. CLOCK	DISPATCH DATE/TIME	
10/11/2011		21:08		10/12/2011	2:00	10/11/2011 21:08 21:55	
COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT		RESIDENT	RACE	SEX	
HALL, PAMELA		#1 #2 #3		J S O U	B	F	
ADDRESS		CITY		STATE	ZIP CODE	LOCATION NO.	
				SC	29032-		
VICTIM'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT		RESIDENT	RACE	SEX	
Minor		#1 #2 #3		J S O U	B	F	
HEIGHT		WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ECT.		
ADDRESS		CITY		STATE	ZIP CODE	LOCATION NO.	
RD		CASSATT		SC	29032-		
VISIBLE INJURY (VICT. 1)		EXPLAIN - M - Apparent Minor Injury		COMPLAINT OF NON-VISIBLE INJURIES: ☐ YES ☒ NO			
VICTIM (NO. 1) USING: ALCOHOL ☐ YES ☐ NO ☐ UNK		DRUGS: ☐ YES ☐ NO ☐ UNK		TYPE:			
TWO-MAN VEH. ☐ ONE-MAN VEH. ☐ DETECTIVE/SPLASMT. ☐ OTHER ☐		ALONE ☐ ASSISTED ☐		* J - This Jurisdiction S - State O - Out of State U - Unknown			
SUSPECT		NAME (LAST, FIRST, MIDDLE)		RACE	SEX	AGE	
☐ RUNAWAY		JOHNSON, NAKIA KARRIEN		B	M	36	
☐ WANTED		FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ECT.		ETH.	DATE OF BIRTH	HEIGHT	
☐ WARRANT				N		6'04"	
☐ ARREST		ADDRESS		CITY	STATE	ZIP CODE	
☐ JAIL		308 GREGG ST		Fairfax	SC	29827-	
☐ SUBMONS		SUBJECT (NO. 1) USING: ALCOHOL ☐ YES ☐ NO ☐ UNK		ARRESTED NEAR OFFENSE SCENE ☐ YES ☐ NO		DATE/TIME OF OFFENSE	
		DRUGS: ☐ YES ☐ NO ☐ UNK		TOTAL # ARRESTED 0		10/11/2011 21:08	
NARRATIVE							
ON THE ABOVE DATE AND TIME LEE COUNTY WAS NOTIFIED BY KERSHAW COUNTY OF A POSSIBLE CSC THAT MAY HAVE OCCURRED IN OUR JURISDICTION. UPON MY ARRIVAL I WAS MET BY INVESTIGATOR R. BAILEY. BAILEY STATED THAT P. HALL REPORTED TO THEM A SEXUAL INCIDENT THAT HAPPENED TO HER 11 Y/O DAUGHTER. HALL STATED THAT JOHNSON DIALED HER NUMBER AND SHE OVER HEARD JOHNSON TELLING HER 11 Y/O DAUGHTER THAT HE WANTED TO NUT IN HER BUT HE COULD NOT AND THEN ASKED HER DO SHE KNOW WHY. HALL STATED THAT Minor REPLIED " BECAUSE I'LL GET PREGNANT". HALL SAID THAT JOHNSON THEN ASKED Minor DID SHE MISSED HIM AND Minor DIN'T REPLY. HALL STATED THAT JOHNSON ASKED Minor DID SHE WANT TO GET ON TOP OR DID SHE WANT HIM TO GET ON TOP. HALL SAID THAT AT THAT TIME SHE HUNG THE PHONE UP AND CALLED JOHNSON BACK AND TOLD HIM TO BRING HER DAUGHTER HOME NOW. HALL STATED THAT AFTER QUESTIONING HER DAUGHTER, SHE TOLD HER THAT HE FORCED HER TO GIVE HIM ORAL SEX AT THE BETHANY CEMETERY OFF EDWIN HALL ROAD IN LEE COUNTY, ON TUESDAY 10/11/11. HALL STATED THAT Minor TOLD HIM IT WAS GOING ON SINCE 2007 AND THAT THEY HAVE HAD SEX AT HER AUNT'S HOUSE ON CASSATT RD IN KERSHAW COUNTY AND ONCE IN							
JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY				JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY			
PROPERTY EST.							
TYPE (GROUP)						TOTAL VALUE	
STOLEN							
DAMAGED							
BURNED							
RECOVERED							
SEIZED							
COUNTERFEIT							
SUBJECT IDENTIFIED		SUBJECT LOCATED		ACTIVE ☐ ADM. CLOSED ☐		ARRESTED UNDER 18 ☐ EX-CLEAR UNDER 18 ☐	
☐ YES ☒ NO		☐ YES ☒ NO		☐ UNFOUNDED		ARRESTED 18 AND OVER ☐ EX-CLEAR 18 AND OVER ☐	
REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENEIED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ JUVENILE - NO CUSTODY		DATE		UNIT NUMBER		APPROVING OFFICER	
6466 - Lt. Patrick R. Hickmon		10/12/2011		6466			
FOLLOW-UP INVESTIGATION		OFFICER					
☐ YES ☒ NO							

AGENCY I.D.
SC0310000

SUPPLEMENTAL INCIDENT REPORT
Lee County Sheriff Office

CASE NUMBER

11-10-0064

NCJC

INQ. ENTD.

☐ ORIGINAL REPORT	☐ SUPPLEMENTAL REPORT	☐ ADDITIONAL VICTIMS	☐ ADDITIONAL STOLEN PROPERTY	PAGE <u>2</u> of <u>3</u> PAGES
☐ MODIFIED ORIGINAL	☐ CASE STATUS CHANGE	☐ ADDITIONAL OFFENDERS	☐ ADDITIONAL RECOVERED PROPERTY	

VICT/SUBJ. I.D. OVERFLOW	☐ COMPLAINANT	NAME (LAST, FIRST, MIDDLE)		VICTIM RELATIONSHIP TO SUBJECT			RESIDENT	RACE	SEX	AGE	D.O.B.	ETH	
	☐ VICTIM #	KERSHAW COUNTY SHERIFF'S OFFICE		#1	#2	#3	J	S	O	U			
	☐ SUBJECT #	HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ECT.							
	☐ RUNAWAY	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	HOME PHONE	EMPLOYER PHONE				
	☐ WANTED	HWY 34		LUGOFF	SC	29078-		(803) 425-1512					
	☐ WARRANT	☐ VICTIM NO. ☐ VISIBLE INJURY: ☐ NO ☐ YES		☐ COMPLAINT OF NON-VISIBLE INJURIES ☐ NO ☐ YES		☐ VICTIM USING ALCOHOL: ☐ NO ☐ YES ☐ UNK		☐ TWO-MAN VEHICLE ☐ DETECTIVE/SPLASMT ☐ ALONE					
	☐ ARREST	EXPLAIN		☐ NO ☐ YES		DRUGS: ☐ NO ☐ YES ☐ UNK		☐ ONE-MAN VEHICLE ☐ OTHER		☐ ASSISTED			
	☐ JAIL	☐ SUBJECT NO. ☐ USING ALCOHOL: ☐ NO ☐ YES											
	☐ SUMMONS												
	☒ Reporting	USING DRUGS: ☐ NO ☐ YES TYPE:								☐ UNK			

HORRY COUNTY WHILE THEY WERE AT THE BEACH. THE ORAL INCIDENT HAPPENED INSIDE OF LEE COUNTY ON STEPHENS ROAD. JOHNSON WAS INTERVIEWED AT THE KERSHAW COUNTY LAW ENFORCEMENT CENTER WHERE HE DENIED THE INCIDENTS. KERSHAW COUNTY WARRANT M- 100485 WAS SERVED ON JOHNSON . A LEE COUNTY WARRANT IS PENDING..

SUPPLEMENT: LT. P HICKMON

ON WEDNESDAY, 10/12/11, PAMELA HALL THE MOTHER OF THE VICTIM (Minor). CAME INTO THE OFFICE AND WROTE A 3 1/2 PAGE STATEMENT OF WHAT SHE HEARD AND WHAT HER DAUGHTER TOLD HER.

JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY		JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY	
STATUS	TYPE	VIN AND/OR LICENSE NO.	BOAT HULL NO. AND/OR REG. NO.
☐ STOLEN	☐ VEHICLE	SERIAL AND/OR OWNER APPLIED NO.	STATE
☐ RECOVERED	☐ GUN	YEAR OF REGISTRATION	YEAR OF EXPIRATION
☐ FOUND	☐ BOAT	YEAR	MAKE
☐ TOWED	☐ LICENSE PLATE	MODEL	STYLE
☐ SUSPECT	☐ SECURITIES/BONDS, STOCKS	COLOR	BRAND NAME
☐ VICTIM	☐ ARTICLE	NC NO.	DENOMINATION
		ISSUER	SECURITIES DATE
		MISCELLANEOUS	

TYPE (GROUP)	TOTAL VALUE
STOLEN	
DAMAGED	
BURNED	
RECOVERED	
SEIZED	
COUNTERFEIT	

SUBJECT IDENTIFIED	SUBJECT LOCATED	ACTIVE	ADJ. CLOSED	ARRESTED UNDER 18	EX-CLEAR UNDER 18
☐ YES ☒ NO	☐ YES ☒ NO	☐ UNFOUNDED		☐ ARRESTED 18 AND OVER	☐ EX-CLEAR 18 AND OVER
REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ JUVENILE - NO CUSTODY					
REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
6466 - Lt. Patrick R. Hickmon	10/12/2011	6466			
			FOLLOW-UP INVESTIGATION	OFFICER	
			☐ YES ☒ NO		

AGENCY I.D.
SC0310000

SUPPLEMENTARY INCIDENT REPORT
Lee County Sheriff Office

CASE NUMBER

11-10-0064

NCIC

INQ. ENTD.

☐ ORIGINAL REPORT
 ☐ SUPPLEMENTAL REPORT
 ☐ ADDITIONAL VICTIMS
 ☐ ADDITIONAL STOLEN PROPERTY
 PAGE 3 of 3 PAGES
☐ MODIFIES ORIGINAL
☐ CASE STATUS CHANGE
☐ ADDITIONAL OFFENDERS
☐ ADDITIONAL RECOVERED PROPERTY

ON THURSDAY, 10/20/11, ARREST WARRANT M-860029 WAS SERVED ON NAKIA K. JOHNSON AT THE KERSHAW COUNTY DETENTION CENTER.

ON MONDAY, 10/24/11, I (HICKMON) ATTEND A BOND HEARING AT THE KERSHAW COUNTY COURT HOUSE, WHERE JOHNSON BOND WAS DENIED.

NARRATIVE

ADMINISTRATIVE

SUBJECT IDENTIFIED ☐ YES ☒ NO		SUBJECT LOCATED ☐ YES ☒ NO		☒ ACTIVE ☐ ADM. CLOSED ☐ UNFOUNDED		☐ ARRESTED UNDER 18 ☐ ARRESTED 18 AND OVER		☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER			
REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH				2. ☐ NO PROSECUTION		3. ☐ EXTRADITION DENIED		4. ☐ VICTIM DECLINES COOPERATION		5. ☐ JUVENILE - NO CUSTODY	
REPORTING OFFICER(S)				DATE		UNIT NUMBER		APPROVING OFFICER		DATE	
6466 - Lt. Patrick R. Hickmon				10/12/2011		6466					
								FOLLOW-UP INVESTIGATION		OFFICER	

SHERIFF
DANIEL SIMON



PHONE (803) 484-5353
FAX (803) 484-5794

LEE COUNTY SHERIFFS DEPARTMENT
113 GREGG STREET
P.O. BOX 89
BISHOPVILLE, SC. 29010

VOLUNTARY STATEMENT

NAME: <u>James Dale</u>	
ADDRESS: <u>201 Cassa H SC</u>	
DATE OF BIRTH: <u>[REDACTED]</u>	SS#: <u>[REDACTED]</u>
HOME PH: <u>803 425-7179</u>	CELL PH: <u>865-365-8659</u>
DATE: <u>10-12-11</u>	BEGINNING TIME: <u>5:00</u>

Walter came to pick up my daughter yesterday & he waited until all the other kids came home. He helped with their homework & after about 2 hrs. I went down the street & I heard Walter ask him was he going to the store & he told him to bring him a beer. I came back and he was going out the door & I asked him what he was going & he said to the store to get some candy & I said I want to go. He said come on & I went to get my shoes & when I came back he was gone. I called & asked why he left us & he said I'm at the stop sign. I'm coming - he never came back. I called & asked what I wanted & he told him & he said they didn't have it. So I told him to get something else & he said they didn't have that either.

I have read this statement consisting of 1 page(s) each page of which bears my signature and I do affirm that the facts and statements contained herein are true and correct. I have received a copy of this statement.

Signature: <u>James Dale</u>	Ending time: <u>5:30-4</u>
Witness: <u>[Signature]</u>	Witness:

VOLUNTARY STATEMENT

OF Parmer Hall

(CONT.)

he called him back a few minutes later & he didn't answer, he was still talking to my mom & sister when my phone rang. I said he'd about 3 times & he didn't say anything, I walked down the hall & I heard him talking, he listened for about 3 mins until I couldn't take it anymore. I heard him say, "I want to put in you but I can't do that. Do you know why she didn't say anything?" He said why & she said she'll get pregnant. He said do you miss me & she didn't respond. He asked how do you want to do this. You want to get on top or you want me to. She didn't ~~respond~~ respond. I hung up & called & told him what I heard & he denied it. I told him to bring my daughter home & I was calling the police. He pulled up & she jumped out the car & said what's wrong mama what's wrong. I made her go in the house & I jumped in the car & we drove down the street. I asked him why & told him I heard it. He denied it & said he was talking to someone else. I hit him a few times & pulled his gun on him & told him I'll kill him if

PAGE NO. 2 OF 4

Signature: <u>Parmer Hall</u>	Ending time: _____
Witness: <u>[Signature]</u>	Witness: _____

of Pamela Hall VOLUNTARY STATEMENT

(Cont.)

he ever touch or contact me or my children. He walked back home with him following me. I went in the house & got her and told her that she needs to tell the truth because I was going to take her to the doctor & she said she touched my breast one time & we went back outside & I made her get in the car & tell him what she just told me & she did & he denied it & he said he reached & put her seatbelt on. I still had his gun & I gave it to him & said get out of my yard because I was calling the police & went in the house. I called her back out & asked her what happened. She said that when I called the first time he had her in the graveyard & had her pants down touching her & he made the old oral sex on him & afterwards made her bend over & he stopped & called. They left the graveyard & went to the store & when they left the store I called & said I heard & he told her to say that he didn't say anything like that. Told her that I would go to jail. She later told me

Pamela Hall
Signature

[Signature]
Witness

VOLUNTARY STATEMENT

OF Pamela Neel (CONT.)

everything that has happened. I called
the police.

~~PH~~

~~PH~~

~~PH~~

~~PH~~

PAGE NO. 4 OF 4

Signature: <u>Pamela Neel</u>	Ending time: <u>5:30</u>
Witness: <u>[Signature]</u>	Witness:

WITNESSES

(S) Inv. R. Bailey - KCSD

ARREST WARRANT NUMBER

DP00112

**ACTION OF GRAND JURY
TRUE BILL**

Foreperson of Grand Jury
Date:

AUG 20 2014

VERDICT

Foreperson of Petit Jury
Date:

Exhibit 1D
DOCKET NO. 2014-GS-28-0910

The State of South Carolina

County of

Kershaw

COURT OF GENERAL SESSIONS

AUGUST TERM 2014

79

**THE STATE
vs.**

Nakia Karreim Johnson

**Indictment for
LEWD ACT ON A MINOR CHILD**

**SC Code: 16-15-0140
CDR Code: 2468**

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

FILED FOR RECORD
2014 AUG 20 PM 2:46
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

ATTEST-True, Correct & Certified
Copy of Original on File in this
Court
Donna C. Hasty
Clerk of Court

Kershaw County

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

Nakia K. Johnson, #364541,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2021-CP-28-041

RETURN, MOTION FOR A MORE
DEFINITE STATEMENT, & PARTIAL
MOTION TO DISMISS
(Counsel Appointed)

FILED FOR RECORD
2021 APR 12 PM 12:05
JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

In response to Applicant Nakia K. Johnson's action for post-conviction relief (PCR) commenced January 11, 2021, Respondent, the State of South Carolina, makes this return:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections (SCDC). Applicant was indicted during the August 2014 term of the Kershaw County Grand Jury for first degree criminal sexual conduct with a minor (2014-GS-28-0419), second degree criminal sexual conduct with a minor (2014-GS-28-0420), and lewd act on a minor child (2014-GS-28-0910). Applicant was represented by Virgin Johnson, Jr., Esquire. Assistant Solicitors Nicole Simpson and Kathryn Cavanaugh of the Fifth Circuit Solicitor's Office prosecuted the case.

Applicant's case proceeded to a jury trial June 22-26, 2015, before the Honorable Doyet A. Early, III. The jury found Applicant not guilty of first-degree criminal sexual conduct with a minor, but found Applicant guilty of second-degree criminal sexual conduct with a minor and committing a lewd act on a child. Judge Early sentenced Applicant to serve concurrent terms of

twenty years for second-degree criminal sexual conduct with a minor, and fifteen years for committing a lewd act. Applicant appealed.

Counsel E. Charles Grose, Jr., Esquire, represented Applicant on appeal. Following briefing and oral argument, the Court of Appeals affirmed Applicant's conviction for a lewd act, reversed his conviction for second-degree criminal sexual conduct with a minor and remanded for a new trial solely on his vacated conviction for second-degree criminal sexual conduct with a minor in an unpublished decision. *State v. Johnson*, 2018 -UP- 109 (filed March 14, 2018). Thereafter, both parties filed a Petition for Rehearing. The Court denied the petitions by Order dated June 21, 2018, finding no material fact or principle of law was overlooked or disregarded, which would warrant a rehearing.

Applicant and the State subsequently submitted petitions for writ of certiorari to the South Carolina Supreme Court on July 26, 2018. The Court granted Applicant's petition as to the single issue of whether the trial court properly denied Applicant's motion for a mistrial related to the admission of testimony. Following briefing and oral argument, the Court dismissed the original grant of Applicant's petition as improvidently granted by Memorandum Opinion No. 2020-MO-002 (Filed January 22, 2020). The Remittitur was issued January 22, 2020.¹

¹ As of April 7, 2021, review of the public index and discussion with the Solicitor's Office indicates that the portion of Applicant's charges remanded for a new trial (criminal sexual conduct – second degree) are still pending and unresolved. As such, Respondent submits Applicant may only proceed with this PCR for the affirmed conviction of lewd act on a minor (2014-GS-28-0910).

II. FACTS GIVING RISE TO THE CONVICTION

Applicant was the step-father of the victim, and had been married and divorced to the victim's mother. Applicant and the victim's mother maintained a relationship and living arrangement with their shared children and the victim. (ROA. 32). When the victim was approximately eleven years old, Applicant learned she began growing public hair and subsequently began to sexually abuse her. (ROA. 37). Applicant abused the victim for years whenever and however the opportunity presented itself. (ROA. 38-61). Including any time the victim's mother or other adults were out of the house. Applicant would send the other children to a different part of the home before proceeding to abuse and rape the victim. (ROA. 37-38).

Over a course of several years, Applicant forced the victim to perform oral sex on him and engage in vaginal intercourse by threatening the victim that he would have to kill her mother if she found out because the mother would tell on Applicant (ROA. 39-41). The victim's mother became aware of the abuse when Applicant and the victim left to go to the store, but instead Applicant took the victim to a graveyard and began to abuse her again. (ROA. 62, 118). The mother called Applicant to tell him what to get to the store, and when her call was answered, no one could hear her. The victim's mother overheard the following conversation:

At first I couldn't make out what he was saying, but then I heard him say, you know I want to nut in you, but I can't. And I didn't hear anything. Then I heard him say, you know why? And she didn't say anything. He said, do you know why? And she said, because I'll get pregnant. And he asked her did she miss him. She didn't say anything. And he asked her how does she want to do it; does she want to get on top or does she want him to get on top. And I think she said, you on top.

(ROA. 119). Applicant realized the victim's mother had overheard this conversation and they argued on the phone before the mother told Applicant to bring her daughter back. (ROA. 63). Applicant then rushed back to the home, where the mother was waiting and pulled the victim from the car and confronted Applicant, asking the victim what happened (ROA. 26-27; 64-65). The victim initially denied anything happened, but eventually admitted what Applicant did to her. (App. 64-65). Applicant denied abusing the victim, but the victim responded, "yes, you did." (ROA. 65). The mother then pulled a pistol on Applicant and told him to leave before calling police. (ROA. 26-27; 64-65). The police arrived took the victim to the hospital for a physical examination and interviews with the family resource center. (ROA. 67). Investigators from the Kershaw County Sheriff's Office contacted Applicant and requested he provide an interview, Applicant cooperated and denied abusing the victim. (ROA. 373-374).

III. CURRENT APPLICATION

Applicant timely commenced this PCR action on January 11, 2021. Applicant asserts he is being held in custody unlawfully, alleging:

1. I was not in the county where these charges originated from
 - a. Video of myself and alleged victim in Lee County presented at trial. Officer testimony at preliminary hearing states I was in Lee County.
2. My attorney did not raise a defense

As requested relief, Applicant is seeking to vacate his sentences and charges, and to have his criminal record expunged.

Attached herewith and incorporated herein are the Kershaw County Clerk of Court records regarding the subject conviction, Applicant's SCDC records, the trial transcript, the appellate

records (including the record on appeal), and the records of this PCR action. Respondent reserves the right to amend this return upon receipt of any relevant materials

IV. MOTION FOR A MORE DEFINITE STATEMENT

Respondent interprets Applicant's claim that trial counsel did not raise a defense as an allegation of ineffective assistance of counsel. The Uniform Post-Conviction Procedure Act requires applicants to "*specifically set forth the grounds upon which the application is based.*" S.C. Code Ann. § 17-27-50 (1985) (emphasis added). In an application for post-conviction relief, it is incumbent upon the applicant to make a *prima facie* showing entitling them to relief before an evidentiary hearing will be scheduled and held. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). Rule 71.1(d), SCRPC, provides appointed PCR counsel "shall insure that all available grounds for relief are included in the application and shall amend the application if necessary."

Here, Applicant has failed to state with any specificity the facts giving rise to his allegations as required by section 17-27-50. Therefore, Respondent moves pursuant to Rule 12(e), SCRPC, and Rule 71.1(d), SCRPC, to require Applicant, through PCR counsel, to provide a more definite statement of his allegation of ineffective assistance of counsel for failure to raise a defense.

Furthermore, Rule 8(a), SCRPC, requires all civil pleadings include "a short and plain statement of the facts showing that the pleader is entitled to relief." Accordingly, Respondent moves to require Applicant to file an amended application well in advance of the hearing scheduled in this matter. If Applicant fails to file a timely and responsive amended application setting forth

specific allegations for relief, Respondent reserves the right to move to dismiss the application for failure to state a claim.

V. RESPONSE TO ALLEGATIONS

Applicant alleges counsel Virgin Johnson failed to raise a defense during trial. Respondent interprets this claim as an allegation of ineffective assistance of counsel and further submits this claim is without merit. To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989).

“The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases.” *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To establish prejudice, the applicant must prove “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.

Strickland requires trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688–689. “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” *Id.* at 691. Therefore, judicial scrutiny of counsel's performance

must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Counsel must, at a minimum, make some effort to interview potential witnesses identified by the defendant, and make an independent investigation of the facts and circumstances of the case. *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011); *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). To support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. *Id.*

Allegation counsel failed to raise a defense

Applicant alleges that trial counsel was ineffective for failing to raise a defense in connection to the affirmed conviction of lewd act with a minor. Respondent submits this claim is meritless. In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. *Id.* (citing *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State*, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)).

Here, Applicant failed to present any evidence or testimony to establish he had a meritorious defense that counsel failed to present. Applicant's application wholly fails to present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. *See Palacio v. State*, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); *Moorehead*, 329 S.C. at 334, 496 S.E.2d at 417 (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where

applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); *Skeen v. State*, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Therefore, Respondent moves for Applicant, through his appointed counsel, to amend this allegation to include sufficient specific facts to support this claim. *See* S.C. Code Ann. § 17-27-50 (2014) (requiring an applicant to “specifically set forth the grounds upon which the application is based”); *see also Welch v. MacDougall*, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (stating it is incumbent upon an applicant to make at least a *prima facie* showing entitling him to relief before an evidentiary hearing will be scheduled and held). Notwithstanding, Respondent submits that Applicant’s allegation is without merit. Once a more definite statement is provided, Respondent requests an evidentiary hearing be held on the claim of whether counsel was ineffective for failing to raise a defense concerning Applicant’s conviction for a lewd act. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR application “alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court”).

VI. PARTIAL MOTION TO DISMISS

Applicant additionally raises issues regarding evidence presented by the State at trial. Applicant specifically claims that he was not in the county where the criminal charges originated

from, referencing a video of himself and the victim in Lee County presented at trial, and mentions officer testimony about his presence in the lee county at a preliminary hearing. The record reflects that trial counsel made objections on these grounds, and the Court subsequently issued a ruling denying counsel's motion (ROA. 415-420). Therefore, these allegations were preserved for appellate review and should be summarily dismissed for failure to state a cognizable claim under the Uniform Post-Conviction Relief Act.² The post-conviction relief court cannot consider the sufficiency of the evidence against a convicted defendant. S.C. Code Ann. § 17-27-20(a)(6). Under the Uniform Post-Conviction Procedure Act (the Act), an application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1974).

Pursuant to the Act, an applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

² S.C. Code Ann. § 17-27-10 to -160.

5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

S.C. Code Ann. § 17-27-20. Further, section 17-27-20(b) statutorily limits jurisdiction of the PCR Court by expressly stating, “[t]his remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.”

PCR relief is only proper when the application collaterally attacks the validity of the conviction or sentence. *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). “In a direct appeal, the focus generally is upon the propriety of rulings made by the circuit court in response to a party’s motions or objections. In PCR, the focus usually is upon alleged errors made by trial or plea counsel. Therefore, when asserting the erroneous admission of evidence, a violation of a constitutional right, or other errors in a proceeding, the applicant generally must frame the issue as one of ineffective assistance of counsel.” *Id.* at 363-64, 527 S.E.2d at 747.

Applicant’s remaining allegations of a discrepancy between his location and the county where the criminal charges were ultimately brought is clearly an issue for direct appeal. Because Applicant’s remaining allegations raise only direct appeal issues, which are procedurally barred in PCR, Respondent moves to summarily dismiss Applicant’s remaining allegations pursuant to Rule 12(b)(6), SCRPC, for failure to state a cognizable claim and pursuant to § 17-27-70 because there

is no genuine issue of material fact which would necessitate an evidentiary hearing and this allegation should be dismissed as a matter of law.

VII. ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to *Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019), or, alternatively, Respondent will request a continuance in the matter. *See id.* at 245, 834 S.E.2d at 203 (Kittredge, J., dissent) (“If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.”).

Pursuant to section 17-27-150 of the South Carolina Code, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Further, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State well in advance of the evidentiary hearing. As noted above, Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State. *See Love*, 428 S.C. 231, 834 S.E.2d 196.

VIII. ANY AND ALL OTHER ALLEGATIONS

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

IX. CONCLUSION

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held on the issue of ineffective assistance of counsel after Applicant, through his counsel, amends the application to provide the required specificity for the allegations.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

YASMEEN E. KLEIN
Assistant Attorney General

By: for Michael D. Daniels
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

April 9, 2021

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	FIFTH JUDICIAL CIRCUIT
 NAKIA JOHNSON,	)	 CASE NO.: 2021-CP-28-00014
	)	
Applicant,	)	
	)	
v.	)	AMENDMENT TO APPLICATION
	)	FOR POST CONVICTION RELIEF
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

FILED FOR RECORD
2022 SEP 19 AM 9:58
JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

Applicant, by and through his undersigned attorney, hereby amends his application for Post-Conviction Relief. This amended complaint adopts and includes all grounds in the original application filed January 11, 2021, by Applicant. Applicant further alleges as additional grounds regarding his claim of ineffective assistance of counsel as to Virgin Johnson as follows:

1. Applicants counsel Johnson failed to challenge the admissibility and voluntariness of the Applicants statement. (P. 57)
2. Applicants counsel Johnson failed to properly investigate the case or discuss the evidence with Applicant.

3. Applicants counsel Johnson failed to object to evidence of prior bad acts introduced by the state.
4. Applicants counsel Johnson failed to meet with the Applicant a sufficient number of times.
5. Applicants counsel Johnson failed to put up a defense for Applicant.
6. Applicants counsel Johnson failed to call Dr. James Ruffing as a defense expert witness.
7. Applicants counsel Johnson failed to object to the testimony of Pamela Hall regarding evidence of a domestic violence and infidelity by Applicant (p. 229, Line 19, p. 230, Line 1-2), (p. 238, Line 14-15).
8. Applicants counsel Johnson failed to challenge the jurisdiction of the court based on evidence of the states allegations taking place in another county.
9. Applicants counsel Johnson failed to call Nikki Chisolm, Louise Pinckney or Rhonda Johnson as witnesses for the defense.
10. Applicants counsel Johnson failed to call the private investigator, retained by the Applicant, to testify.
11. Applicants counsel Johnson failed to sufficiently argue a directed verdict motion at trial.
12. Furthermore, the Applicant requests that he be permitted to Amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed

issues arise during the course of the hearing that have not been specifically addressed in the Application. *See Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,



OLA JOHNSON

Attorney for Applicant

P.O. Box 549

Lexington, SC 29071

803-360-8692 Phone

olajohnsonlaw@gmail.com

This 16 day of September, 2022

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	FIFTH JUDICIAL CIRCUIT
 NAKIA JOHNSON,	)	 CASE NO.: 2021-CP-28-00014
	)	
Applicant,	)	
	)	
v.	)	SECOND AMENDED
	)	POST CONVICTION RELIEF
STATE OF SOUTH CAROLINA,	)	APPLICATION
	)	
Respondent.	)	
_____	)	

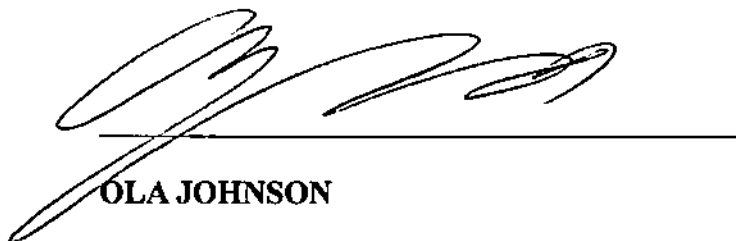
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 JANET C. HASTY
 CLERK OF COURT
 KERSHAW COUNTY, S.C.

Applicant, by and through his undersigned attorney, hereby amends his application for Post-Conviction Relief dated January 11, 2021. This second amended complaint adopts and includes all grounds in the original application and the amended application filed September 19, 2022. Applicant further alleges as additional grounds as follows:

1. Applicants counsel Johnson failed to move to quash the indictment as to the 4 year period covered in the indictments as unconstitutional.
2. Applicants counsel Johnson failed to preserve the defendants directed verdict motion

3. Applicants counsel Johnson failed to present evidence pursuant to SCRCP Rule 19
4. Applicants counsel Johnson failed to object to the jurisdiction defect in the states case.
5. Applicants counsel Johnson failed to argue the appropriate case law to object to the evidence of prior bad acts presented by the state.
6. Furthermore, the Applicant requests that he be permitted to Amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. *See Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,



OLA JOHNSON

Attorney for Applicant

P.O. Box 549

Lexington, SC 29071

803-360-8692 Phone

olajohnsonlaw@gmail.com

This 29 day of December, 2022

State of South Carolina)
)
County of Kershaw)

In the Court of Common Pleas
Fifth Judicial Circuit
2021-CP-40-0014

Nakia K. Johnson,
Applicant,
vs.
State of South Carolina,
Respondent.

Transcript of Record

September 12, 2023
Columbia, South Carolina

B E - F O R E:

The Honorable Daniel Coble, Judge

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

Ola A. Johnson, Esquire
Attorney for the Applicant

D. Russell Barlow, III, Assistant Attorney General
Attorney for the Respondent

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

I N D E X

<u>Witness/Description</u>	<u>Page No.</u>

Louise Pinkney	

Direct Examination by Mr. Johnson.	6

Nakia Johnson	

Direct Examination by Mr. Ola.	11

Cross-examination by Mr. Barlow.	40

Redirect Examination by Mr. Ola.	30

Virgin Johnson, Jr.	

Direct Examination by Mr. Barlow	31

Cross-examination by Mr. Ola	42

Certificate Page.	63

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Page No.</u>

No Exhibits Introduced.		

1 MR. BARLOW: May it please the court? Russ Barlow on
2 behalf of the State of South Carolina. This is the
3 post-conviction relief matter of *Nakia K. Johnson v. The*
4 *State*, case number 2021-CP-28-00014 out of Kershaw County.

5 Applicant was indicted for the August 2014 term of the
6 Kershaw County Grand Jury for first degree criminal sexual
7 conduct with a minor, 2014-GS-28-0419; second degree
8 criminal sexual conduct with a minor, 2014-GS-28-0420; and
9 lewd act on a minor child, 2014-GS-28-0910. Applicant was
10 represented by Virgin Johnson, Jr., Esquire, and assistant
11 solicitors Nicole Simpson and Kathryn Cavanaugh of the
12 Fifth Circuit Solicitor's Office prosecuted the case.

13 Applicant's case proceeded to a jury trial June 22nd
14 through the 26th of 2015 before the Honorable Doyet A.
15 Early, III. The jury found applicant not guilty of first
16 degree criminal sexual conduct with a minor. They found
17 applicant guilty of second degree criminal sexual conduct
18 with a minor and committing a lewd act on a child. Judge
19 Early sentenced applicant to serve concurrent terms of
20 twenty years for second degree criminal sexual conduct with
21 a minor and fifteen years for committing a lewd act.

22 Applicant timely filed a direct appeal; Charles Grose,
23 Jr., Esquire, represented applicant on appeal. Following
24 briefing and oral argument, the Court of Appeals affirmed
25 applicant's conviction for a lewd act and reversed his

1 conviction for second degree criminal sexual conduct with a
2 minor and remanded for a new trial solely on his vacated
3 conviction for second degree criminal sexual conduct with a
4 minor in an unpublished opinion, *State v. Johnson*, 2018 UP
5 109 filed March 14, 2018. Thereafter, both parties filed a
6 petition for a rehearing. The court denied the petition by
7 order dated June 21, 2018, finding no material fact or
8 principle of law was overlooked or disregarded which would
9 warrant a rehearing.

10 Applicant and the state subsequently submitted
11 petitions for writ of certiorari to the South Carolina
12 Supreme Court on July 26, 2018. The court granted
13 applicant's petition on whether the trial court properly
14 denied applicant's motion for a mistrial related to the
15 admission of testimony. Following briefing and oral
16 argument, the court dismissed the original grant of
17 applicant's petition as improvidently granted by
18 memorandum, opinion number 2020 MO 002, filed January 22,
19 2020. The remittitur was returned to the lower court on
20 January 22, 2020.

21 Applicant timely commenced this PCR action on January
22 11, 2021. In the original application, Your Honor, he
23 asserted two, two arguments of ineffective assistance of
24 trial counsel. As requested relief, he wants his charges
25 vacated and to have his criminal record expunged.

1 On September 16, 2022, applicant filed an amended
2 application to allege eleven additional ineffective
3 assistance of counsel claims. On January 3, 2023,
4 applicant filed his second amended PCR application alleging
5 an additional five ineffective assistance of counsel
6 claims.

7 As of this morning, Your Honor, review of public index
8 indicates that the portion of applicant's charges remanded
9 for the new trial, the criminal sexual conduct second
10 degree, they are still pending and unresolved. So as such,
11 we submit that, that the only matter that we can proceed on
12 in this PCR is the affirmed conviction of the lewd act with
13 a minor, which is 2014-GS-28-0910.

14 THE COURT: All right. Yes, sir.

15 MR. JOHNSON: Your Honor, I believe that's correct.
16 That's the charge we can go forward on.

17 I have one other issue I wanted to clarify maybe
18 before we start the hearing.

19 (COUNSELORS CONFER.)

20 MR. JOHNSON: Judge, we've resolved that issue. I'll
21 just put on the record. We've got an original application,
22 my amended application, and a second amended, and if Your
23 Honor does not have those, I can pass up copies at this
24 time.

25 THE COURT: I have them.

L. PINKNEY - DIRECT EXAMINATION BY MR. JOHNSON

6

1 MR. JOHNSON: You have that? All right, Judge, and
2 we'll go forward at this time.

3 THE COURT: Call your first witness.

4 MR. JOHNSON: Judge, the first witness is actually
5 going to be a Ms. Louise Pinkney called out of order
6 because of a medical appointment she has. So, we'd call
7 Ms. Pinkney at this time to testify.

8 THE COURT: All right. If you'll come up over here,
9 ma'am.

10 LOUISE PINKNEY, BEING DULY SWORN,
11 TESTIFIES AS FOLLOWS:

12 THE COURT: Grab a seat right there. State your name
13 for the record.

14 WITNESS: Good morning, Your Honor. My name is Louise
15 Pinckney.

16 THE COURT: Could you spell your last name?

17 WITNESS: P-i-n-k-n-e-y.

18 MR. JOHNSON: Thank you, Your Honor. Your Honor, I'll
19 just put on the record. Since my last name -- my name is
20 Ola Johnson. My last name is Johnson. My client's last
21 name is Johnson, and the trial attorney's name is Johnson.
22 I want to use the full names when we go through this
23 questioning.

24 DIRECT EXAMINATION BY MR. JOHNSON:

25 Q. Good morning, Ms. Pinkney. Now, you're familiar with

L. PINKNEY - DIRECT EXAMINATION BY MR. JOHNSON

7

1 my client, Nakia Johnson?

2 A. Yes, sir.

3 Q. Okay. How long have you known him?

4 A. Fifteen years.

5 Q. Okay, and in relation to this case, do you know Ms.
6 Pamela Hall?

7 A. Yes.

8 Q. Okay. Was she the mother of the victim?

9 A. Yes, sir.

10 Q. Okay. Did you have any experience with her or her
11 testimony you wanted to provide about her credibility?

12 A. Yes, sir.

13 Q. And tell me about that.

14 A. In the past, she has lied on her children to get what
15 she wants. It was a incident where she called my phone and
16 said her daughter had a fever of ---

17 MR. BARLOW: Your Honor, I'm going ---

18 A. --- a hundred ---

19 MR. BARLOW: To object to hearsay.

20 A. And three.

21 THE COURT: Hold on.

22 Are we trying to prove the truth of what she's saying?
23 Is there some type of credibility issue? Where are we
24 going with that?

25 MR. JOHNSON: Just that she could have been called to

L. PINKNEY - DIRECT EXAMINATION BY MR. JOHNSON

8

1 address the credibility of that witness, Your Honor. Since
2 that witness testified, she could have been recalled to
3 address that credibility issue. I think it would be
4 relevant since there is a transcript showing Ms. Hall
5 testified. They put her credibility at issue.

6 MR. BARLOW: If they were going to put Ms. Hall's
7 credibility at issue, they could have subpoenaed Ms. Hall
8 to be here as well so that we could cross-examine her as
9 well.

10 THE COURT: I think the issue is that -- what you're
11 saying is that the attorney Virgin Johnson should have
12 called this witness?

13 MR. JOHNSON: Correct.

14 THE COURT: To counter Ms. Hall?

15 MR. JOHNSON: Correct.

16 THE COURT: And so what she's going to say would
17 directly be under 608(a), a character witness for
18 impeachment purposes attacking the credibility. So, she
19 could have testified at the original trial to what she's
20 about to say for impeachment purposes?

21 MR. JOHNSON: Correct.

22 THE COURT: So, I think she'd be a proper character
23 witness to attack, and so this would have been a proper
24 witness. So, I'm going to overrule your objection and let
25 -- to hear what she would -- I mean, I don't want to be

L. PINKNEY - DIRECT EXAMINATION BY MR. JOHNSON

9

1 here all day, but what she would testify to have attacked
2 Ms. Hall.

3 MR. JOHNSON: Thank you, Your Honor.

4 Q. Go ahead, Ms. Pinkney. What were you saying about the
5 credibility of Ms. Hall?

6 A. I said I received a phone call when we were en route
7 to Atlanta, and she stated that her daughter, the baby
8 girl, had a fever of 103.9, and that she was at the point
9 of having seizures. And come to find out that was not
10 true. The child was not sick, did not have a fever.

11 And the second thing was she called my phone and told
12 me that if she could not be with Nakia Johnson, that nobody
13 would be with him. She would put him in a place that
14 nobody could have him.

15 Q. Okay. She said that about Mr. Nakia Johnson, my
16 client?

17 A. Yes, sir.

18 Q. Okay, and did she also make statements to you -- or,
19 excuse me, did you also have information about you being on
20 the phone with Mr. Nakia Johnson during some of these
21 alleged incidents?

22 A. Yes, sir. On the day of the alleged incidents when he
23 was in the store, he and I were on the phone. I don't
24 remember the time because it's been years ago, and him and
25 the alleged victim was in the store. And I heard her

L. PINKNEY - DIRECT EXAMINATION BY MR. JOHNSON

10

1 talking back and forth to him, and she told -- he told her
2 to get what you're going to get because I got to get back
3 on the road because it's -- the weather is going to get
4 bad.

5 Q. Okay, and did you have conversations with the
6 attorney, Mr. Virgin Johnson, about these things?

7 A. Yes, sir, I did.

8 Q. And did Mr. Virgin Johnson bring you to sit outside
9 the courtroom during the trial?

10 A. Yes, sir.

11 Q. Okay, and during the trial of Mr. Nakia Johnson, did
12 the attorney ever bring you in to testify?

13 A. No, sir.

14 Q. Okay.

15 MR. JOHNSON: Your Honor, those are all the questions
16 I have.

17 MR. BARLOW: Nothing from the state, Your Honor.

18 THE COURT: All right. Thank you, ma'am. You may
19 step down.

20 (THE WITNESS EXITS THE STAND.)

21 MR. JOHNSON: Your Honor, my only other witness is Mr.
22 Nakia Johnson.

23 NAKIA K. JOHNSON, BEING DULY

24 SWORN, TESTIFIES AS FOLLOWS:

25 THE COURT: Grab a seat. State your name for the

N. JOHNSON - DIRECT EXAMINATION BY MR. JOHNSON

11

1 record.

2 WITNESS: Nakia Johnson.

3 DIRECT EXAMINATION BY MR. JOHNSON:

4 Q. Mr. Johnson, who represented you during these criminal
5 charges and during this trial?

6 A. Mr. Virgin Johnson.

7 Q. Okay, and during that representation, was there an
8 issue that you felt should have been explored regarding
9 testimony about an incident occurring in Lee County in
10 relation to these charges?

11 A. Yes, he did.

12 Q. Okay. Tell me about that. Did that come up at a
13 pretrial hearing?

14 A. Yes. My biggest issue was that the jurisdiction of me
15 being in the store, which is located in Lee County, I felt
16 that he didn't present that issue well as far as presenting
17 it in court. And there was also issues where I thought
18 that when stuff was being said, he never objected in a
19 timely manner.

20 Q. Okay.

21 MR. JOHNSON: And moving on to my amended application,
22 Your Honor -- I've got them numbered. I'm going to start
23 here with number 1. Applicant's counsel, Johnson, failed
24 to challenge admissibility of voluntariness of applicant's
25 statement. Let me reference that in the transcript. I

N. JOHNSON - DIRECT EXAMINATION BY MR. JOHNSON

12

1 believe that's starting on page 55. They're going over the
2 *Denno* hearing.

3 Q. Mr. Nakia Johnson, do you recall during the trial this
4 part of the trial where there was a *Denno* hearing?

5 A. Yes.

6 Q. Okay. During that part of the trial, your attorney,
7 Mr. Virgin Johnson, did he explain to you why during this
8 *Denno* hearing he actually seemed to abandon his challenge
9 to the voluntariness of your statements? Did he ever
10 explain why he did that?

11 A. No, he didn't.

12 Q. Okay, and during the trial itself, didn't the state
13 offer a videotaped interview where they used your
14 statements against you, alleging that you had made an
15 admission about a phone call made to the victim's mother
16 that tied into their theory of the case?

17 A. Yes.

18 Q. Okay.

19 MR. JOHNSON: And number 2, Your Honor, just for the
20 record, Judge, they do go on to -- the actual *Denno* started
21 around 55, page 55, 56. Page 380 of the transcript is
22 where we get into the discussion of the importance of the
23 defendant's statement, and they're claiming he made
24 admission about making a phone call, and I just want to put
25 that on the record.

N. JOHNSON - DIRECT EXAMINATION BY MR. JOHNSON

13

1 Q. Number 2, applicant's counsel, Virgin Johnson, failed
2 to properly investigate the case of discuss evidence with
3 applicant. Tell me about that. What kind of a job did he
4 do in reviewing evidence with you?

5 A. Well, we spoke on several occasion, and I was under
6 the impression we were going to go forth with the evidence
7 that I had. And I paid for an investigator that never
8 showed, and I also paid for a Dr. Ruffing that was supposed
9 to come as well. I spoke with Dr. Ruffing, like, a day
10 before they remanded me in the county, and Mr. Ruffing had
11 agreed to show up for the hearing. And I also relayed that
12 to Mr. Johnson, Mr. Virgin Johnson. And when I appeared to
13 court the next day, I never saw Mr. Ruffing, and Mr.
14 Johnson never explained to me why my witness never showed
15 up.

16 Q. Okay. He never had those conversations with you?

17 A. He never had those conversations with me.

18 Q. Okay.

19 MR. JOHNSON: And moving on to number 3, Judge, in my
20 amended application, focusing on the testimony of the
21 victim, we've got, I believe, in the neighborhood of page
22 156, 157.

23 Q. Do you remember that testimony being offered during
24 the trial, Mr. Johnson?

25 A. Which? Say again.

N. JOHNSON - DIRECT EXAMINATION BY MR. JOHNSON

14

1 Q. The victim's testimony.

2 A. A little bit of it, yes.

3 Q. Okay, and as Miss -- well, as the juvenile victim
4 testified, was there an explanation by Mr. Virgin Johnson,
5 your attorney, explaining to you why he failed to make a
6 timely objection to the testimony regarding incidents that
7 occurred outside of Kershaw County, specifically relating
8 to the testimony starting on ---

9 MR. JOHNSON: I'm, I'm referencing, Judge, page 157,
10 line 22, starting there about testimony in Fairfax, which I
11 believe is in Allendale County, and that follows on to the
12 next page.

13 Q. Did the attorney Virgin Johnson make any explanation
14 to you as to why he did not make contemporaneous objection
15 at that time to those statements?

16 A. No. We never talked about it.

17 Q. Okay, and you felt like that would've been appropriate
18 to preserve an objection to these, these alleged incidents
19 taking place outside of ---

20 A. Yes.

21 Q. --- Kershaw County?

22 A. Because that was my biggest, biggest concern.

23 Q. All right, and how many times ---

24 MR. JOHNSON: Moving on to number 4, Your Honor.

25 Q. How many times did attorney Virgin Johnson meet with

N. JOHNSON - DIRECT EXAMINATION BY MR. JOHNSON

15

1 you in total to prepare for trial?

2 A. Maybe ten times in the four-year span. Maybe ten.

3 Q. Okay, and alluding to ---

4 MR. JOHNSON: We're going to number 5, Your Honor.

5 Q. Do you feel like Mr. Virgin Johnson put up a
6 sufficient defense for you at trial?

7 A. No, because, one, he never brought the witnesses that
8 I -- that I asked him to, nor did he put up a defense at
9 all. I mean, I was totally shocked when he rest. I was
10 totally shocked, and I ---

11 Q. Okay.

12 A. --- kind of gave a look when I was in the courtroom.
13 And, you know, everybody was talking about my appearance
14 toward what I -- what I should've been doing while in front
15 of the jury instead of listening to what I was at least
16 trying to bring forth to their attention so they could put
17 that on the record because I knew, me being prior law
18 enforcement, that that's one of the things that you need to
19 do.

20 Q. Okay. You say he failed to call witnesses. That
21 includes Dr. Ruffing that you mentioned earlier, as well as
22 Ms. Pinkney who just testified?

23 A. Right.

24 Q. Okay.

25 MR. JOHNSON: Your Honor, I'm going to move on to

N. JOHNSON - DIRECT EXAMINATION BY MR. JOHNSON

16

1 number 7. This is in regards to the testimony of Ms.
2 Pamela Hall, starting on page 229, line 19, and then I have
3 listed page 230, line 1 through 2, and pages 238, line 14
4 through 15. That's on my application.

5 Q. Mr. Nakia Johnson, did your attorney, Mr. Virgin
6 Johnson, explain to you why he failed to object to the
7 testimony of Ms. Pamela Hall about an evidence -- or an
8 event related to a domestic violence and infidelity that
9 she alleged against you during that testimony?

10 A. No, he did not.

11 Q. Okay, but he did not object?

12 A. He did not object, no.

13 Q. Okay.

14 MR. JOHNSON: Judge, moving on to number 8.

15 Q. Do you feel like -- well, referencing -- this is the
16 challenge or objection to jurisdiction. The evidence --
17 did Mr. Virgin Johnson make a sufficient objection against
18 allegations that they brought up that happened in either
19 Lee County or in Allendale County, Fairfax? Do you feel he
20 made a sufficient objection to those?

21 A. No, and also I would like to put on the record that I
22 also had bank statements and I also had my work time sheets
23 that would probably put most of that stuff to rest, but --
24 and I was under the impression that that was one of the
25 things we talked about during the time before trial, way

N. JOHNSON - DIRECT EXAMINATION BY MR. JOHNSON

17

1 before trial, that those are the things that I was
2 concerned about because, like I said, if I can prove that I
3 wasn't in the county during that timeframe, then that would
4 have been a little bit more enlightenment to at least bring
5 forth before the jury.

6 Q. Okay, and you said in addition to Ms. Pinkney, you
7 felt like there were other witnesses, a Nikki Chisholm and
8 Rhonda Johnson, that should have been called?

9 A. Right, and according to the records that they pulled
10 from my phone, I was on the phone also with Nikki Chisholm.
11 And my sister was also a character witness and could vouch
12 for the, the -- me being more so in Allendale County, more
13 so in another country, and also not able to really --
14 because being -- have any contact with the victim during
15 those timeframes. Those were the things that I wanted
16 those witnesses to do.

17 Q. Okay.

18 MR. JOHNSON: And moving on to number 10, Your Honor.

19 Q. You already testified there was an investigator that
20 was not called. You ---

21 A. Right.

22 Q. You used an investigator, had been retained.

23 A. Right.

24 Q. Moving on to number 11, do you feel that Mr. Virgin
25 Johnson did a sufficient job of arguing a directed verdict

N. JOHNSON - DIRECT EXAMINATION BY MR. JOHNSON

18

1 motion at trial?

2 A. No.

3 Q. And why is that?

4 A. Because he never said directed verdict. He said
5 something similar to a standard motion and ---

6 Q. He got -- okay, did he -- he didn't really get into
7 details, did he?

8 A. No, he didn't.

9 Q. And he -- did he explain to you why?

10 A. No, he didn't.

11 Q. Okay, and you feel like ---

12 MR. JOHNSON: Well, moving on, Your Honor. Judge,
13 we'll go to the second amended post-conviction relief
14 application at this time.

15 Q. Do you recall, starting on number 1, any motion made
16 by Mr. Virgin Johnson to quash indictments or to challenge
17 this timeframe that was brought up in the indictment? Did
18 he try to challenge it based on that? Do you recall him
19 ever doing that?

20 A. No, sir.

21 Q. Okay.

22 MR. JOHNSON: And, Judge, we're going back to number 2
23 on the second amended post-conviction relief application.
24 This goes back to directed verdict motion. I believe this
25 is page 537, line 14.

N. JOHNSON - DIRECT EXAMINATION BY MR. JOHNSON

19

1 Q. And in that, starting on line 14 when Mr. Virgin
2 Johnson, they asked him about after he addressed the CSC
3 charge, seems they're asking him about -- the court says:
4 Go ahead. What else? Starting line 13. Mr. Johnson says:
5 Just the standard motion on the other two charges. Is
6 that, that what you're referring to ---

7 A. Right.

8 Q. --- you feel that was a sparse directed verdict
9 motion? It did not get into the ---

10 A. Right.

11 Q. --- details of it? And no argument made by Mr. Virgin
12 Johnson that you can recall about the details of prior bad
13 acts under *Lyle* or, or the details of why this should be
14 challenged?

15 A. Not at all.

16 Q. Okay.

17 MR. JOHNSON: And related to number 3, Your Honor.

18 Q. Under Rule 19, that's also related to you feel he made
19 an insufficient job of putting up evidence on his directed
20 verdict motion?

21 A. Yes.

22 MR. JOHNSON: And number 4, Your Honor, this is
23 repeating some of the previous information.

24 Q. Page 157 to challenge jurisdiction, there was no -- or
25 you, you don't recall there being any challenge to the

N. JOHNSON - DIRECT EXAMINATION / CROSS-EXAMINATION 20

1 testimony of the victim about incidents or an assault
2 taking place in Fairfax, which is outside of Kershaw
3 County?

4 A. None at all.

5 Q. In relation to number 5, do you feel like he did a
6 sufficient job arguing the case law regarding prior bad
7 acts and trying to suppress all this testimony about
8 previous events, whether in Lee County or Fairfax? Do you
9 feel he did a sufficient job there?

10 A. Not at all.

11 Q. Is there anything else you wanted to add about any
12 deficiencies in Mr. Johnson's representation?

13 A. Well, we, we pretty much covered the, the gist of it,
14 and I don't really want to waste the court's time. I'm
15 just here to clear my name, for one, and let everybody know
16 that I am ready to go to court or do what I need to do to
17 clear my name.

18 Q. All right.

19 MR. JOHNSON: Judge, we have no more questions.

20 THE COURT: All right.

21 MR. BARLOW: Thank you, Your Honor. May it please the
22 court?

23 CROSS-EXAMINATION BY MR. BARLOW:

24 Q. Start with do you recall being indicted in Lee County
25 as well?

1 A. No.

2 Q. You do not recall being indicted in Lee County?

3 A. Not at all. I just had an arrest warrant.

4 MR. BARLOW: Your Honor, the court has it before it,
5 and Mr. Ola is aware of it. I included all of the
6 indictments that were included from Lee County, including a
7 waiver of jurisdiction.

8 Q. Let's jump right in. In the failure to challenge the
9 admissibility or the voluntariness of your statement, what
10 challenge should he have made?

11 A. As far as -- say that one more time.

12 Q. What challenge should he have made?

13 A. To what?

14 Q. To the voluntariness of your -- or the admissibility
15 of your statement, the video statement you gave?

16 A. Well, I mean, I, I don't really care about that as
17 much because I didn't -- I -- for one, all I said was the
18 phone call. I have no problem with the phone call. My
19 biggest problem was with bad acts that never happened, for
20 one.

21 Two, it was just to the point where a lot of the stuff
22 that was being said were -- was not true totally. And then
23 we have proof because she did two forensic interviews where
24 she stated one thing and then went back and stated
25 something totally different. And I was under the

N. JOHNSON - CROSS-EXAMINATION BY MR. BARLOW

22

1 impression that that was enough right there to at least let
2 it go on itself. But, you know, other things happened, and
3 I never got an opportunity for Mr. Johnson ---

4 Q. Sir.

5 A. --- to explain that to me.

6 Q. Sir, that, that was before the court, though, was it
7 not?

8 A. I mean, whatever. I mean ---

9 Q. And that ---

10 A. --- all I'm saying is we -- we're here because I felt
11 like I did not get a sufficient amount of attorney
12 representation at my trial.

13 Q. Let's move on to allegation number 2, failed to
14 properly investigate the case. Okay, what evidence should
15 he have investigated?

16 A. I've already spoke about the bank statements and, and
17 the timeframe and the -- I never knew anything about the
18 camera, the photo, the recording of the VHS camera until
19 the day of court, when I should've known that the second
20 after the state had it.

21 Q. Well, you mentioned that you had an investigator.

22 A. Right.

23 Q. Did he provide ---

24 A. Only thing ---

25 Q. --- any ---

N. JOHNSON - CROSS-EXAMINATION BY MR. BARLOW

23

1 A. --- that I was in the county when he came to see me.
2 I was locked up in Richland County. When he came to see
3 me, he told me straight up that they didn't have anything
4 on me; those was his exact words. I met him, met with him
5 one time as far as talking about my case, and other times
6 at Mr. Virgin's office during the times that I did go by
7 and see him.

8 Q. So, you only met with him one time?

9 A. Yes.

10 Q. But on direct, you said you met with him ten times.

11 A. I said Mr. Virgin Johnson ten times. I have never
12 talked with -- I only talked with -- I only saw the -- I
13 only talked with the investigator one time and only saw him
14 during the times that I visited Mr. Johnson when he was
15 there.

16 Q. Do you recall -- moving on to allegation number 3, do
17 you recall that Mr. Virgin Johnson actually did object to
18 the prior bad acts evidence?

19 A. No.

20 MR. BARLOW: Your Honor, it starts on page 101 and
21 goes through page 116 where the court finds that *Marticci*,
22 *Weaverling*, and one other case all apply to this case as a
23 continuation of the crime.

24 Q. Move on to allegation number 5. What defense should
25 be put up?

N. JOHNSON - CROSS-EXAMINATION BY MR. BARLOW

24

1 A. Would do you mean as far as a defense?

2 Q. Well, your ---

3 A. I'm not an attorney, so I'm not sure.

4 Q. Your allegation is that he failed to put up a defense.

5 What defense ---

6 A. Well, I mean ---

7 Q. --- should he have done?

8 A. At least, at least not rest after I went through two
9 or three days of them saying everything that they thought
10 they had on me. At least bring up my witnesses. At least
11 bring in someone that can, can validate that I was not in
12 Kershaw County during those timeframes. At least let --
13 allow me to get on the stand so I can tell them exactly
14 what happened that day and not be speculation from people
15 that was not there, or never knew what was going on during
16 that timeframe. That's my point. That's the only defense
17 that I thought that, that needed to be brought up. Not
18 just rest after having going through two or three days of
19 them bringing up forensic interviewers and everybody else
20 that didn't -- wasn't there or had no clue of what was
21 going on during that timeframe.

22 Q. Okay. Failure to call Dr. James Ruffing as a defense
23 expert, what would -- what would Dr. Ruffing ---

24 A. Well ---

25 Q. --- offer?

1 A. From the conversations that myself and Mr. Ruffing
2 had, he stated that there -- that there was a whole lot of
3 leading questions that was in that video. I learned that
4 from him, by speaking with him. My attorney never told me
5 anything about leading, leading questions that was in that
6 video. And the only reason that I know that there were
7 leading questions in that video, because I spoke Mr.
8 Ruffing, and I also spoke with other attorneys while
9 incarcerated after reviewing my, my, my paperwork once I
10 got behind bars.

11 Q. So, it's your understanding that in a child forensic
12 exam, they are not allowed to lead the child?

13 A. Well, they have, and they also admitted to it in a
14 prior court on the record. It was also shown in the --
15 where they said that -- something about telling the truth
16 or she -- the alleged victim also something about being
17 coached or saying -- or coming straight out and saying that
18 someone did talk -- she did talk to somebody on several
19 different times. So, I don't know what they were -- being
20 said. And my lawyer, to my opinion, should have at least
21 found out what was being said so I can understand or we can
22 kind of mirror what was being said so we can kind of, you
23 know, put to rest some of those allegations.

24 Q. Okay. We'll move on to allegation number 7, failure
25 to object to the testimony of Pamela Hall. My question for

N. JOHNSON - CROSS-EXAMINATION BY MR. BARLOW

26

1 you is that those very vague references, the two references
2 to a domestic violence and infidelity, do you believe that
3 your trial would have been different if those two things
4 had not been said?

5 A. Of course, because not only did the jury look at me as
6 a pedophile, they also looked at me as a terrible person
7 that could be domestic violence or that could -- have the
8 opportunity to present myself with some kind of domestic
9 violence, yes.

10 Q. But you weren't on trial for domestic violence.

11 A. It doesn't matter. I wasn't no -- I wasn't on trial
12 in Fairfax or Lee County, but they brought that up. So, I
13 mean, if it wasn't that important, they wouldn't have
14 brought it up. My, my attorney didn't bring it up. I
15 didn't bring it up. So, evidently the state thought it was
16 kosher to bring it up during that trial. So, if it --
17 you're bringing it to me. I didn't bring it to them.
18 That's what I'm -- that's what I'm saying.

19 All I wanted him to do was address it. At least, you
20 know, find some kind of case law that, that kind of refutes
21 what's being said or at least bring my -- let me look at it
22 and get the opportunity to see it with my eyes and at least
23 find a date or a time I had allegedly done these crimes.
24 That's my biggest argument.

25 Q. And you have an allegation of failure to quash the

1 indictment for -- as the four-year period is
2 unconstitutional. How is that unconstitutional?

3 A. I mean, it's not giving me an opportunity to present
4 myself or find out -- like I said, those time sheets and my
5 work schedule, at least start from the first date, the date
6 of January 1, 2007. I can probably prove that I was more
7 likely at work, not in Kershaw County during those times.
8 And from my understanding, I was being tried, tried in
9 Kershaw County. And in 2007, I know for a fact that I was
10 in Allendale County. I worked that day, as a matter of
11 fact. And, and **Minor** [phonetic] was not even in the
12 county during that time, and I could have proved that as
13 well.

14 Q. You have an allegation of failure to object to the
15 jurisdiction defect in the state's case. Do you recall him
16 -- again, I know it's a repeat of one of the prior
17 allegations that you have, but again he did -- your counsel
18 did object to the -- to the jurisdiction defect, or not
19 really -- rather not the defects but the jurisdiction
20 issues between Fairfax and, and Kershaw.

21 A. I, I don't recall ---

22 Q. And ---

23 A. I don't recall him objecting to the jurisdiction.
24 That would have been great in the -- in my appeal when I
25 went up for my appeal. And I'm not sure at this time

N. JOHNSON - CROSS-EXAMINATION BY MR. BARLOW

28

1 whether, whether he objected or not for that. But it was
2 another -- a lot of other things that he did not do. And
3 if he did that, then -- I'm not saying that he did
4 everything wrong. Only thing I'm saying, a lot of the
5 stuff that I would like for him to do more, he did not do.
6 That's all I'm saying.

7 Q. And lastly was the failure to argue appropriate case
8 law to object to the evidence of prior bad acts. What case
9 law should he ---

10 A. Well, I ---

11 Q. --- have used?

12 A. I, myself, had a opportunity to look at *State v.*
13 *Nelson*, *State v. Baker*, and *State v. Tutton*. And one of
14 the biggest things that I saw that, that kind of stuck out
15 to me was the fact that most of those guys had in their
16 cases, there was, with lewd act, it was more so evidence
17 that was presented against them.

18 In my case alone, it had no sign of no kind of
19 evidence. It was my word against her word, and they took
20 -- everybody took her word because she had been forensic
21 interviewers bolsting [sic] her, her testimony. And she
22 also had her, her aunt and her mother to bolst [sic] her
23 testimony when, for one, didn't nobody question their
24 character. And if, if he would have gave me the
25 opportunity at least get up on the stand and talk about the

1 things at that point in time, the jury could have saw for
2 themselves that a lot of this stuff that he said -- or they
3 said in court was -- could have been refuted by the, the
4 evidence that we had at that time.

5 Q. Sir, do you recall the court asking you if you -- and
6 going through the colloquy with you regarding your right to
7 testify at trial?

8 A. Well, of course, and I also told him that I wanted to
9 testify right after -- but we went on recess. He said --
10 I, I told him while we were -- I was in the cell in the
11 courthouse. I told him that I did want to testify. He
12 told me after the case or after we got there, before we got
13 in front of the judge that he did not want me to testify
14 because he thought that I was emotional. And there was no
15 reason for me to kind of refute that and -- because his
16 biggest thing was my appearance to what the jury would be
17 looking at if I would have kind of gone into it with him.

18 And the only thing I was going to let him know was
19 that, one, I was not emotional at all. I was just ready to
20 tell my side of the story because no one had ever asked me
21 my side of the story.

22 Q. You had that opportunity but didn't take it, though.

23 A. I mean, I was informed by my lawyer that he did not
24 want me to go on stand. But I also did not want him to
25 rest. I wanted him to bring forth my witnesses; even if I

N. JOHNSON - REDIRECT EXAMINATION BY MR. JOHNSON

30

1 did not testify, I wanted him to bring forth my witnesses.

2 MR. BARLOW: Beg the court's indulgence.

3 (A PAUSE.)

4 MR. BARLOW: Nothing further, Your Honor.

5 THE COURT: Any redirect?

6 MR. JOHNSON: Just briefly, Your Honor.

7 REDIRECT EXAMINATION BY MR. JOHNSON:

8 Q. You're saying your attorney didn't call any witnesses?

9 A. No, he didn't.

10 Q. Okay, and you feel like you were fully informed of the
11 decision he made about failing to object during the trial,
12 just ---

13 A. Not all -- not at all.

14 MR. JOHNSON: No more questions, Your Honor.

15 MR. BARLOW: Nothing, Your Honor.

16 THE COURT: All right. Thank you, sir. You may step
17 down.

18 (THE WITNESS EXITS THE STAND.)

19 THE COURT: Any other witnesses from the ---

20 MR. JOHNSON: Nothing further, Your Honor. That's it.

21 MR. BARLOW: Your Honor, the state would call Mr.
22 Virgin Johnson.

23 THE COURT: Before we -- we're going to take a short
24 recess, ten-minute recess. Then we'll go right into the
25 state's case.

V. JOHNSON - DIRECT EXAMINATION BY MR. BARLOW

31

1 MR. BARLOW: Thank you, Your Honor.

2 (OFF THE RECORD.)

3 THE COURT: All right. Thank you.

4 MR. BARLOW: State calls Mr. Virgin Johnson.

5 VIRGIN JOHNSON, JR., BEING DULY

6 SWORN, TESTIFIES AS FOLLOWS:

7 THE COURT: Grab a seat. State your name for the
8 record.

9 WITNESS: Good morning. My name is Virgin Johnson,
10 Jr.

11 DIRECT EXAMINATION BY MR. BARLOW:

12 Q. Mr. Johnson, how long have you been practicing law?

13 A. Since 1980.

14 Q. And how much of that has been criminal law?

15 A. Probably 60 percent of it.

16 Q. And are you currently employed?

17 A. Yes, sir. I'm the city judge for the City of
18 Orangeburg, and I, I do some civil practice. I don't do
19 criminal now.

20 Q. And were you appointed or retained in this case?

21 A. I was retained.

22 Q. And approximately how long before trial were you
23 retained?

24 A. Oh, it was a -- it was right after he got arrested.

25 THE COURT: Speak into that microphone so she can hear

V. JOHNSON - DIRECT EXAMINATION BY MR. BARLOW

32

1 you.

2 WITNESS: Yes, sir.

3 Q. And during that time, did you get discovery?

4 A. Yes, sir, I did.

5 Q. And did you review discovery with the applicant?

6 A. Yes, sir, I did. Nakia is a police officer. He is
7 very fact oriented. Yes, sir, I did. Not only discovery.
8 It was the prelim for Kershaw County was when I think I got
9 to get him out of jail because they wouldn't let him out of
10 jail. And then we did a prelim for Lee County. So -- and
11 I think he was at Lee County. So, all of the evidence and
12 stuff we had opportunity to discuss.

13 Q. Okay, and understanding that this was a CSC case, but
14 can you give us a brief overview of what the state's
15 evidence was?

16 A. Well, the problem with this case was the state was
17 bringing in evidence from what I would call hearsay that
18 happened over a period of time. That was the big issue for
19 this case.

20 And then the other problem was it initiated in Lee
21 County but it wind up getting charges in Kershaw County.
22 So, there was -- it wasn't clear, I think, to Nakia which
23 county we were dealing with. We had indictments in Lee; we
24 have indictments in Kershaw.

25 Q. And do you recall that Lee County dismissed their

1 charges pending or, rather, with leave to refile depending
2 on what happened in Kershaw County?

3 A. Yes, they did.

4 Q. Okay. What was your defense strategy in this case?

5 A. We discussed a lot of stuff. Like I say, Nakia is a
6 police officer. The other thing is he's my cousin, so I
7 know him personally. He's an officer, and he's very fact
8 -- was a police officer. He's very fact oriented.

9 And your question was? What was your question?

10 Q. What was your defense strategy in this case?

11 A. Well, we talked about calling all of those people he
12 talked about calling. At the end of the day, some of it
13 was repetitive and at the end of the trial -- during the
14 trial, we got to cross-examine on most of the issues that
15 he had a problem about. It came a decision whether or not
16 he was going to decide to take that last argument, or he
17 was going himself to put people up to testify. At the end
18 of the day, the decision was made not to put anybody up and
19 to -- and to have last argument before the jury because of
20 the seriousness of these charges.

21 Q. So, that was a strategic decision?

22 A. That's the -- that was a very strategic decision.

23 Q. Okay. Let's jump right into these allegations. They
24 -- do you recall challenging or not challenging the
25 admissibility and voluntariness of applicant's statement

V. JOHNSON - DIRECT EXAMINATION BY MR. BARLOW

34

1 during the *Jackson v. Denno* hearing?

2 A. Oh, I can see how they say that. Here's what I think
3 they didn't pay attention to. The night he was arrested,
4 he did a video, he did a audio, he signed a Miranda
5 warning, and the officer, one of the two officers that did
6 that testified at the *in-camera* hearing. And after he
7 testified, I said it wasn't any need with a -- for
8 voluntariness when you've got a signed Miranda.

9 You're a police officer. You've got the signed
10 Miranda, you got audio, video, and one of the officers that
11 were in the room testified. I did say that I didn't need
12 -- we didn't -- I don't think we needed to call the other
13 officer, and that's how I think where they got the thing
14 that I did not -- there was issue about voluntariness. I
15 just thought there was enough not to keep calling people.
16 You know, it had gotten to the point where they proved the
17 voluntariness.

18 Q. That was a -- was that a professional decision based
19 off that ---

20 A. Well, it was a lot more strategic. This case is so
21 mingled and involved. First of all, y'all from Richland --
22 I mean, y'all from Kershaw, and this is y'all's circuit. A
23 lot of things we did was balancing Lee County versus
24 Kershaw County. I preferably would have rather tried it in
25 Lee County honestly because it's a more favorable jury.

1 Kershaw County is, for better choice of words, is more
2 conservative. So, everything we did factored in where we
3 were and what we were doing.

4 There were some things I wanted -- I wanted to limit
5 them hearing. So, so, at some point in time I said, well,
6 look. You done heard it once. They already done put in
7 the Miranda. You got audio and video. I just didn't want
8 to keep -- I didn't want the judge in the *in-camera* hearing
9 and I didn't want the jury if we got to that just to hear
10 us keep going through the same thing over and over.

11 Q. Okay. Move on. So, you've already answered the
12 question on discussing the evidence with him, but there is
13 an allegation that you failed to properly investigate the
14 case. Basically he testified to the doctor and the
15 investigator.

16 A. Okay, I sent the investigator up to Kershaw County,
17 sent him to Lee County. He went to the jail; he talked
18 with him. He was there when we talked at the office. I
19 talked to Nakia, Nakia I don't know how many times, not
20 only as it relates to client. Like I said, we, we were
21 family. We talked about this case every time we talked.
22 Honestly, he knows a lot about this case because of his
23 past profession, because of how much because we talked
24 about it. I couldn't even count the number of times we
25 discussed this case.

V. JOHNSON - DIRECT EXAMINATION BY MR. BARLOW

36

1 Q. All right. Do you recall objecting to the prior bad
2 acts evidence?

3 A. Yes. I was hoping that the judge would kick that,
4 which would mean I wouldn't have to deal with the lewd act
5 at all. I asked for the 403 analysis and then after the
6 403 analysis, I asked. I said, well, look. Then let's do
7 the 401 because it may be more prejudicial than probative
8 if you -- Judge Early came back and said no. I think I'm
9 going to let it in.

10 After reviewing some case law, I handed up some cases.
11 I don't for what they were, and the solicitor handed up
12 some cases. He took all of that. If you look at the
13 transcript, he took all of that with him that night.
14 Reviewed it all. Came back. Said no, I think I'm going to
15 let it in. Well, after that, all I could do now is
16 cross-examine and fight it, and that's what I did.

17 Q. Another allegation, you failed to meet with him
18 sufficient number of times.

19 A. In my opinion, I met with him plenty of times.

20 Q. Do you -- do you recall approximately how many times
21 you met with him?

22 A. I don't think ten would be in the -- ten would be in
23 the -- twenty, thirty. Talk on the telephone about it,
24 talk when we saw one another. So, I mean, in my mind we
25 met a lot in this case. And, quite frankly, I mean, again,

1 he's family. Quite frankly, I didn't want him to be
2 convicted. I was -- I was very concerned about that, so we
3 put more effort into this case.

4 Q. We'll jump to allegation -- I believe it's allegation
5 6, but failed to call Dr. James Ruffing. Do you recall why
6 you did not call Dr. Ruffing?

7 A. My reason is simple. You got to pay the investigator
8 -- I mean, you got to pay the expert to be there. When I
9 was looking through my stuff, I didn't realize I had this.
10 I had a email from him asking -- if I can find it -- asking
11 about the finances. There are several -- there are several
12 emails. I don't know, and it addressed the issue of when
13 court was. This was, I think, a week or two before court,
14 with me discussing with him about coming to court, him
15 mentioning the finances.

16 Q. Okay.

17 A. If somebody wanted to see it, I don't mind. I mean --
18 okay.

19 Q. And we'll move on to allegation number 7. You failed
20 to object to the testimony regarding domestic violence and
21 fidelity during the testimony of Pamela Hall. Do you
22 recall that?

23 A. I don't recall it, but I can probably tell you why I
24 did it. I can probably tell you that.

25 All right, this whole thing started because Nakia took

V. JOHNSON - DIRECT EXAMINATION BY MR. BARLOW

38

1 his stepdaughter with him to, to the store. Happened so
2 they lived in Kershaw County. The store was in Lee County.
3 How this whole thing started was allegedly that the child's
4 mother heard something over the phone. Well, here's what
5 -- it's bad enough that I'm dealing with there are
6 allegations of having sexual conduct with a child, but Ms.
7 Louise Pinkney, who is a wonderful person back there, who
8 was his -- I think I would say his fiancée -- he was on the
9 phone with her. There was another girl by the name of
10 Chisholm. I think it got -- there was a phone cross up.
11 If the mother heard it, I think that how the mother heard
12 it, and he had just left the other woman. So, at some
13 point in time, I just didn't want to highlight -- I just
14 didn't want to highlight there were so many women, and I
15 was trying to just -- it was said. I just wanted to kind
16 of get by it. I just didn't want to highlight the fact
17 here is another woman in this situation that already -- we
18 got three women in the situation and a child. At some
19 point in time, I was just trying to cut it off.

20 Q. Was that a strategic reason?

21 A. Yes, it was on my part. Yes, it was, and, and, and
22 Nakia sat right by me and another attorney sat on the other
23 side of him. There was nothing, just out of our closeness,
24 there's nothing that went on we didn't discuss. So, we
25 discussed it.

1 Q. Moving on, let's -- I know that there's an allegation
2 for failure to challenge the jurisdiction, but do you
3 recall challenging the jurisdiction?

4 A. No, I didn't, and here is the reason simply. Kershaw
5 had its indictments; Lee had their indictments. There was
6 nothing to challenge. I think Nakia thought because of
7 what happened in Lee County, we shouldn't have been able to
8 do it in Kershaw County, and I agreed the Lee County
9 indictment shouldn't be tried in Kershaw. But because of
10 Lee County, they got Kershaw indictments also. So, yes, I
11 didn't challenge it, but I didn't see a need because they
12 were separate counties and indictments in separate
13 counties.

14 Q. And moving on to the next one, you failed to call
15 Nikki Chisholm or Rhonda Johnson.

16 A. Rhonda is his sister. Nikki is the other lady on the
17 phone. No, I did not call them because it came down to
18 whether or not we want -- take our shot with the last
19 argument, and if I'd called anybody or either called him,
20 then we wouldn't have been able to have the last argument.
21 And we determined that we thought it was more strategic for
22 us to have the last argument.

23 I believe it was strategic because, number one, the
24 worst CSC, the jury came back with not guilty. The CSC
25 second on appeal -- and if you look at the transcript, I

V. JOHNSON - DIRECT EXAMINATION BY MR. BARLOW

40

1 argued over and over for, look, this shouldn't be let in,
2 and so on appeal they overturned it. But once the judge
3 says it's in, I can't make him let it out. I just got to,
4 you know, address it best I could, and that's what I did.

5 Q. We'll move on to allegation 10 where you did not call
6 the private investigator. Did the private investigator
7 provide anything substantive for Nakia's case?

8 A. No. He went out and look at the spot. The little
9 girl took the, the investigator from Kershaw out down a
10 dirt road in the woods, and all he could have testified to
11 is I went to a dirt road in the woods.

12 This allegedly happened three or four, five years ago.
13 There was no need -- there was no need to call him. There
14 was no value, and then we would've lost last argument.

15 Q. All right, and do you recall arguing the directed
16 verdict motion?

17 A. Yes, and I did highlight the CSC first. I did
18 highlight that a lot. And on the -- and I also did do on
19 the -- on the lewd act and CSC second, I did say that --
20 standard motions on that. I did do -- I did that.

21 Q. And next allegation is failure to move to quash the
22 indictment as to the four-year period being
23 unconstitutional.

24 A. Correct.

25 Q. Do you feel that that period was unconstitutional?

V. JOHNSON - DIRECT EXAMINATION BY MR. BARLOW

41

1 A. Personally? You know, I have to be honest. Yeah, I,
2 I thought it was. I thought a lot of stuff -- I didn't
3 think it should have come in, but the judge make the
4 decision, and he was a great judge. He made the ruling,
5 and I had to live with it, and I -- excellent judge. I
6 just -- that was the -- that was the call he made, and I
7 had to deal with it.

8 You asked me my personal opinion.

9 MR. BARLOW: Beg the court's indulgence.

10 (A PAUSE.)

11 Q. One last question. There was testimony from Nakia
12 that you told him not to testify but he wanted to testify.
13 Do you recall that?

14 A. Did we discuss him not testifying? Yes, sir. Did we
15 discuss which is better? Yes, sir. At the end, we
16 determined -- because when Judge Early asked him did he
17 want to testify, he got up and he said no. I'll let what I
18 said in my statement and all stand. So, so, so, that was
19 discussed with us, and we made a strategic decision.

20 And I still think it benefit him because he would have
21 gotten another, I think, another twenty years. I think
22 he's out now because of the decisions we made during that
23 time.

24 MR. BARLOW: Thank you.

25 Nothing further, Your Honor.

V. JOHNSON - CROSS-EXAMINATION BY MR. JOHNSON

42

1 CROSS-EXAMINATION BY MR. JOHNSON:

2 Q. Mr. Johnson.

3 A. Yes, sir.

4 Q. Just wanted to ask you. Starting at the beginning of
5 the amended application -- well, starting at the very first
6 PCR application, did you choose not to go into any
7 testimony from the preliminary hearing about incidents from
8 Lee County? Did you feel like that was not beneficial to
9 go into that because of an admission made at a prelim in
10 Lee County?

11 THE COURT: You need to speak up, Mr. Johnson.

12 MR. JOHNSON: I'm sorry.

13 Q. Did you feel -- you were aware there were statements
14 made at a preliminary hearing about some of these
15 allegations being -- taking place in Lee County?

16 A. Yes, I was aware.

17 Q. Did you intentionally not want to go into that prior
18 testimony? Was that not -- you felt that was not
19 helpful?

20 A. At what point in time are we talking about?

21 Q. During the trial, bringing up the testimony from the
22 prelim ---

23 A. I.

24 Q. --- in Lee County.

25 A. When I did the 403 and the 4 -- I went into it.

1 Q. So, you, you talked about some incidents being in Lee
2 County. You're talking about your objection to that?

3 A. Yeah. My objection was there was -- the little girl
4 testified. My objection was that none of it should have
5 come in. She testified, too, about from Allendale County,
6 from Lee County, from Kershaw County, and it -- personally
7 for me, again, I wouldn't have let it in. I didn't think
8 it should have come in, and judge said it could. There was
9 nothing else, so I did my best then on cross-examination.

10 Q. Okay.

11 MR. JOHNSON: Judge, moving to number 1 in the amended
12 application.

13 Q. Mr. Johnson, talking about the *Denno* hearing, and I'm
14 starting off on page 55 of the transcript, the judge is
15 asking about further questions. You stated line 6 on 55,
16 page 55, saying:

17 There's no need for me to continue to ask
18 questions after I heard his testimony, that the
19 *Denno* hearing is about voluntariness.

20 And then on line 18, 19, you said:

21 Your Honor, as far as the voluntariness part, I
22 have no more questions.

23 Do you feel like you could have done more to establish
24 your objection to the statements as being involuntary
25 during this hearing?

V. JOHNSON - CROSS-EXAMINATION BY MR. JOHNSON

44

1 A. No, and here's my reason. There were two officers
2 that took the statement that night from a police officer.
3 Number one, he signed a Miranda which said it was
4 voluntary. Number two, there was a audio that we could
5 hear. Number three, there was a -- I think there was a
6 video.

7 I cross-examined the first officer in the *in-camera*
8 hearing. The second officer was going to testify to the
9 identical same thing. I did say yes, I didn't think we
10 need to call the second officer, but I did cross-examine
11 the first officer, along with all the other information,
12 and that is how that happened when I said I didn't think we
13 need to do it.

14 Q. Is it true that if you had gone on to question the
15 other officer and pursued more questioning during the
16 *Denno*, they could have said something that would have
17 affected the voluntariness of the statement about their
18 actions towards the defendant, correct?

19 A. I don't believe so because, like I said, I did both
20 prelims. I knew this case. No, I don't think -- nothing
21 was out there I didn't know, no.

22 Q. Is it possible if you don't ask a question, you can't
23 say you really know the answer, correct?

24 A. Okay, if you're asking me is it possible, I'd have to
25 say everything is possible. Was it probable? No.

1 Q. Okay.

2 MR. JOHNSON: Judge.

3 Q. Oh. Just again to that point, as they get into the
4 statement and the actual statements they used that were the
5 subject of the *Denno* hearing, isn't it true that your
6 client -- they introduce the video where there's damaging
7 -- what they considered a damaging statement where he made
8 an admission about a phone call they actually used at
9 trial, correct?

10 A. I don't remember, but if you say so, it's in the
11 transcript, then yes.

12 Q. Well, I'll just reference ---

13 MR. JOHNSON: Judge, I'm referring to page 380, and
14 they talk about in the transcript page 380 the admission to
15 a phone call.

16 Q. That was the whole reasoning behind bringing up his
17 statement. He admitted to the phone -- they were seeking
18 proof of this phone call.

19 A. Okay. Okay. Yeah.

20 Q. As you testified, it began with a phone call they
21 alleged from him ---

22 A. Correct.

23 Q. --- to Ms. Hall.

24 A. Yes.

25 Q. Correct? Okay.

V. JOHNSON - CROSS-EXAMINATION BY MR. JOHNSON

46

1 MR. JOHNSON: And on -- moving on to number 2, Your
2 Honor.

3 Q. In the investigation of the case, you said the
4 investigator went out to the woods. Did this private
5 investigator you had do anything else in connection to the
6 case?

7 A. He, I think he got the indictments from both counties
8 for me. I think he went and talked to Nakia once and, and,
9 you know, he helped me with the preparation of the case,
10 yes.

11 Q. Did you attempt to interview the victim or the
12 victim's mother?

13 A. I think -- I don't think I -- with the victim, no.
14 They, they were-- I think I tried to talk to the victim and
15 that was different. Now, I don't remember whether I tried
16 to talk to the victim's mother or not.

17 Q. Okay. You don't ---

18 A. But I know definitely I didn't talk to the victim.

19 Q. Okay. You don't have any reports or anything
20 indicating that you had the investigator attempt to do
21 that.

22 A. Not with me, no, sir.

23 Q. Okay.

24 MR. JOHNSON: Moving on to number 3, Your Honor, the
25 discussion of prior bad acts and Lyle and these evidence

1 and incidents testified to by the victim, Judge. I'm just
2 going to ask a question and put in some case law to
3 different cases I've discussed with the attorney general.

4 Q. Mr. Johnson, did you bring up one case that was *State*
5 *v. Tutton*, T-u-t-t-o-n? This was a 2003 case, Court of
6 Appeals, South Carolina, 354 SE 319 580 SC 2d 186. Do you
7 recall raising that and discussing the elements of *Lyle*
8 evidence to the court?

9 A. I don't remember if *Tutton* was one, but it was two or
10 three cases I raised, yes, sir.

11 Q. Okay.

12 A. *Tutton* could -- it's very -- probably could've been,
13 yes.

14 Q. Okay.

15 MR. JOHNSON: And, Judge, I'll just put on the record
16 one more case. *State v. Baker*, 769 SE 2d. 869, 2015 case.

17 Q. Do you remember if that was part of the argument as
18 well?

19 A. I don't remember, but if it's in there, it's in there.

20 Q. Okay, and when you go back to the actual testimony of
21 the victim ---

22 MR. JOHNSON: Judge, I'm referring to page 157 of the
23 transcript.

24 Q. Do you recall the testimony of the victim in this
25 case?

V. JOHNSON - CROSS-EXAMINATION BY MR. JOHNSON

48

1 A. Yes. The victim testified.

2 Q. Do you recall that?

3 A. She testified.

4 Q. Okay, and I can bring you a copy of the transcript if
5 you'd like to review it.

6 A. Okay.

7 Q. But my question is starting on 157. When we get down
8 to questioning starting on line 22 and as it follows
9 through the page 158, do you understand -- or do you have
10 -- what is the reasoning you had for not objecting to this
11 testimony by the victim about events in Fairfax which were
12 outside of Kershaw County? Why, why did you fail to make
13 an objection there?

14 A. Okay, the only reason I would have is once I made the
15 objection, all of that was part of what I asked the judge
16 not to put out -- not to let in. Once he said it was in,
17 the only thing I could do now is cross-examine and, and
18 such. So, I dealt with it the best I could.

19 Q. Okay. Do you feel that you should have made an
20 objection contemporaneous? When the evidence, when the
21 testimony was being offered, shouldn't you have stood up
22 and made an objection to preserve your, your motion and
23 your pretrial motion and your objection to preserve it?
24 Shouldn't you have made an objection at that time?

25 A. Okay, if I didn't, I should have done it. I'm not

1 going...

2 Q. But you, you didn't do it?

3 A. Not from the transcript, no.

4 Q. Would you like me to hand it to you so you can refute
5 it?

6 A. I already said no, it's not -- if it ain't in the
7 transcript.

8 Q. Okay. You said on ---

9 MR. JOHNSON: Judge, moving to number 4.

10 Q. You felt you did meet with him a sufficient number of
11 times?

12 A. Yes, I did.

13 Q. Nakia Johnson?

14 A. Yes, I did.

15 Q. And did you go into ---

16 MR. JOHNSON: Number 5, Your Honor.

17 Q. Did you go into discussion of putting up a defense by
18 actually -- do you remember talking to Ms. Pinkney about
19 her testimony in detail?

20 A. I want to say yes because she was at each prelim, and
21 we discussed the case after the prelim, and she was a
22 faithful, loyal soldier of his trying to help him. She
23 would call. So, I think her testifying, I would think we
24 talk about it. I mean, I don't remember in detail, but she
25 was there when nobody else was there. So, I would have

V. JOHNSON - CROSS-EXAMINATION BY MR. JOHNSON

50

1 thought we testified it -- she -- we talk -- no, we talked
2 about it.

3 Q. Since she had testified today, she could have provided
4 testimony about the credibility or lack thereof of Ms.
5 Hall. Do, do you feel like that would -- that would have
6 been important?

7 A. I think she could have given the same testimony she
8 gave at the trial, but then we would have -- then we would
9 have lost the last argument. So, yes, she could have done
10 that.

11 Q. Okay.

12 MR. JOHNSON: Judge, moving on to number 6.

13 Q. You had mentioned Dr. Ruffing. Did Dr. Ruffing
14 produce any reports or anything that would be useful to the
15 defense?

16 A. No, sir, but I, I talked with him several times. I
17 thought -- Nakia turned around to talk to me a minute --
18 just a minute ago before I walked up. I thought Nakia went
19 up and talked with him. I know Nakia talked with him.
20 There was something about some payments, and Nakia told me
21 just now that he wired him the money. I do know they
22 talked one time, and I do know I talked with him several
23 times before the trial. And his question was, was he was
24 going to get paid or how he was going to get paid or when.

25 Q. Okay. Were -- do you have -- do you have -- you don't

1 have any knowledge about anything substantive that he could
2 have said that was beneficial to the defense?

3 A. Well, he would have -- he would've had to deal with --
4 he would've been in opposition of the experts that the
5 state put up, yes, sir. That's what it -- that's what it
6 would have been.

7 Q. Okay. Do you know what his statement would have been?

8 A. I do not.

9 Q. Okay.

10 A. I do not.

11 Q. Okay.

12 A. Other than the fact he thought it was -- maybe he
13 shouldn't have let all of that -- well, no, because he
14 dealt with the -- he dealt with the ---

15 Q. Okay.

16 A. --- the experts the state had, and it would have been
17 the methodology of how they questioned the child. He
18 would've probably said it wasn't done like it should have
19 been done.

20 Q. Okay. Moving on to number 7, did you recall ---

21 MR. JOHNSON: And, Judge, I'm referring to this
22 reference to testimony of Ms. Pamela Hall, page 229
23 starting on line 2 -- or line 19. Then page 232, line 1
24 through 2. Page 238, line 14 to 15. That's all listed in
25 my amended application.

V. JOHNSON - CROSS-EXAMINATION BY MR. JOHNSON

52

1 Q. Do you recall not objecting to Ms. Hall's testimony

2 ---

3 A. Yes.

4 Q. --- as she went into a discussion of a domestic
5 violence allegation against my client and infidelity?

6 A. Yes. The, the more I think about it, I don't think I
7 object. And I think I was sitting at the table trying to
8 figure out should I object or, or should I not because also
9 in the back of my mind, I'm dealing with how much I was
10 going to object to her because she drew a pistol on him,
11 and I was trying to make a argument as to why she drew the
12 pistol on him and they didn't charge her. So, so,
13 strategically I just -- probably just thought at the moment
14 it was -- just wasn't the best thing to do. But, but no, I
15 didn't.

16 Q. Do you -- so, you didn't object. You also did not
17 make a motion for mistrial at that time.

18 A. No.

19 Q. Okay. Moving on to number 8, the jurisdiction issue
20 and these allegations in other counties. Given the nature
21 ---

22 MR. JOHNSON: And I'm talking about back on 157 and
23 testimony, Your Honor, from the victim about incidents in
24 Fairfax which, I believe, are now in Allendale County.

25 Q. Do you recall why you did not object and list the

1 specific argument under these cases that I've cited in the
2 case law regarding *Lyle* there was -- since there was no
3 testimony from the victim pinning down a time of when these
4 assaults took place? And since some of this case law,
5 specifically, I believe, the one I've cited with *Tutton*,
6 talks about inadmissible evidence being excluded, evidence
7 being excluded when it falls outside the period made on the
8 indictment, the formal allegation, and since that timing
9 issue of when, when an assault took place can be important
10 for a *Lyle* decision, why did you not cross-examine or
11 object to testimony or cross-examine thoroughly to explore
12 timing since under *Tutton* evidence and testimony can be
13 excluded if it falls outside this range and however much
14 time would exist ---

15 A. Well.

16 Q. --- since there's no specificity in the victim's ---

17 A. Okay.

18 Q. --- testimony?

19 A. Well, I thought I covered that in the
20 cross-examination. I mean, once the judge said it was
21 coming in, all I could do is cross-examine on it, and
22 that's what I tried to do, and I did cross-examine on the
23 time. There was a ---

24 Q. Okay.

25 A. --- time clock where -- that could show where they say

V. JOHNSON - CROSS-EXAMINATION BY MR. JOHNSON

54

1 they were one place and, and there was a -- the video at
2 the store show that they were in the store the same time.
3 I did cross-examine on all of that, but I couldn't stop it
4 from coming in because the judge said it was coming in.

5 MR. JOHNSON: Your Honor, moving on now to number 9.

6 Q. You testified about Nikki Chisholm, Louise Pinkney, or
7 Wanda Johnson, and just the same question there.
8 Specifically since Ms. Pinkney testified today, you felt
9 that her testimony would have been something that
10 strategically would have been more harmful. Is that what
11 you're saying?

12 A. What I'm saying is we discussed whether or not last
13 argument would have been better for him or putting up some
14 witnesses. At the end of the day, we decided -- he
15 preferred for us to have the last argument. That's what
16 happened.

17 Q. Okay, and moving on to number 10 with the private
18 investigator, you had the power to ask the private
19 investigator, you had the ability to get a private
20 investigator to actually go and attempt to interview the
21 victim or Ms. Hall or other people involved. Isn't that
22 true?

23 A. Yes, sir.

24 Q. And you did not do that?

25 A. I did not do what? To which people?

1 Q. You did not have an investigator go interview or
2 attempt to interview Ms. Hall or the victim.

3 A. Well, first of all, the state was guarded with the
4 child. Now, as far as those experts and all of that, I
5 interviewed them myself.

6 Q. Well, just specifically now I'll limit it to Ms. Hall,
7 the adult who was the parent. You could have had her
8 interviewed.

9 A. Okay, Ms. Hall has a option whether she want to talk
10 or not. As far as the child, they would not allow us to
11 talk with the child.

12 Q. Okay, and I'll just limit my question.

13 A. Okay.

14 Q. I'm not trying to go -- I'm not trying to cause you a
15 headache, but just in relation to Ms. Hall, you say she has
16 an option to talk to you. Did you attempt to talk to her?
17 Say will you please talk to me?

18 A. As far as Ms. Hall?

19 Q. Yes.

20 A. Ms. Hall's attitude through this whole thing was, was
21 very bad. Ms. Hall was the problem. No, I did not attempt
22 to talk to Ms. Hall.

23 Q. That was my question. Thank you.

24 A. But I also ---

25 MR. JOHNSON: Your Honor, no ---

V. JOHNSON - CROSS-EXAMINATION BY MR. JOHNSON

56

1 A. I also had all of Ms. Hall's testimony. I
2 cross-examined Ms. Hall. I covered every issue with Ms.
3 Hall. I had the prelim. I had all of that. It sounds
4 like you are saying we didn't do -- I didn't do what I
5 should do.

6 When people don't -- when -- even though the witnesses
7 are not the state's witnesses, if the state don't encourage
8 them to testify, they don't testify. I did everything I
9 could do to get every piece of information about this case.
10 I did. If you look at the cross-examination and all of
11 that, I brought up everything you were talking about now
12 during the cross-examination.

13 Q. Okay. Thank you.

14 MR. JOHNSON: Judge, moving on to number 11, the
15 argument in the directed verdict motion.

16 Q. And I believe you already testified yourself. When it
17 comes to lewd act, do not get into detail. You kind of
18 said go with standard motion, but you did not get into the
19 details under why it should be a directed verdict, why
20 these issues prevent these out-of-county incidents from
21 being testified to, or why they would not be sufficient to
22 support a conviction. You didn't go into detail.

23 A. I didn't go into detail on those, but if you look, I
24 went into a ton of detail on the CSC first. That was the
25 one that I thought I should win. I did win it at trial.

1 What I did was put -- through everything I did was
2 protect the record to make sure the record was protected
3 because I thought honestly we were going to win on appeal.
4 And on appeal, if you look at the court, the case, the only
5 reason that we didn't get both the lewd act and the
6 criminal sexual conduct overturned on appeal was the
7 mother's testimony hearing over the phone. The court said
8 that was collaboration. The court said there was no
9 collaboration for the criminal sexual conduct because I
10 showed that in my cross-examination. On the lewd act, the
11 court said look. Since she said she heard the phone -- I
12 think it was the phone -- that was enough collaboration.
13 That's the only reason that he got convicted on that.

14 Q. Okay.

15 MR. JOHNSON: And, Your Honor, moving on to number 1
16 on the second amended post-conviction relief application.

17 Q. Did you make any challenge to the indictments, to
18 cross indictments?

19 A. No, I did not.

20 Q. Do you feel like there could have been a chance that
21 something could be successful in challenging that? Isn't
22 that something that's happened in the past where people
23 challenged indictments and ---

24 A. Maybe I'm repeating myself. I didn't think there were
25 any grounds to challenge the indictment, but I do think

V. JOHNSON - CROSS-EXAMINATION BY MR. JOHNSON

58

1 there were grounds to challenge the fact of the timeframe,
2 and that's what I challenged.

3 Q. Okay.

4 MR. JOHNSON: And number 2, Your Honor, regarding the
5 verdict -- directed verdict motion.

6 Q. That's what you just addressed, I believe. You, you
7 testified about that, and you did sort of leave the
8 directed verdict motion as to the lewd act to that
9 statement about ---

10 A. That's true.

11 Q. --- that was a more general motion?

12 A. That's true.

13 Q. Okay.

14 MR. JOHNSON: And under number 3, Your Honor, also
15 regarding directed verdict, there's a failure to present
16 evidence. I think he's already answered that question,
17 Your Honor, about how he made that motion in regards to the
18 lewd act.

19 Number 4, applicant's counsel, Johnson, failed to
20 object to jurisdiction defect.

21 Q. When the victim testified, I believe you already
22 testified you did not object at that time while the victim
23 was testifying to renew your objections to the
24 out-of-county incidents in Fairfax and Lee County.

25 A. Now, I made some objections when she was testifying.

1 I just don't know ---

2 Q. Okay.

3 A. I don't remember which one.

4 Q. Well, I've got on page 157 a specific one where she's
5 testifying about Fairfax, and I can bring that to you.

6 A. Okay. That's fine.

7 Q. Okay.

8 THE COURT: We've already covered this. This is the
9 one he didn't object to.

10 MR. JOHNSON: Yes, sir. He said he wasn't sure. I
11 wanted to make sure he could read it.

12 THE COURT: All right. Well, per his prior testimony,
13 he said it was -- was this the one that ---

14 A. Okay, which one do you want me to read?

15 Q. Just start down here. She talks about Fairfax.

16 A. Okay.

17 Q. It goes into ---

18 A. And backing up just a little bit in Fairfax, did
19 you ever do anything there that made you feel
20 uncomfortable?

21 And the -- and the answer was yes.

22 Tell the jury about what happened at Fairfax.

23 All right, again I've already been told that
24 information is coming in. The court has already said look.
25 I'm going to let that in.

V. JOHNSON - CROSS-EXAMINATION BY MR. JOHNSON

60

1 Q. Yes, sir.

2 A. Okay.

3 Q. Thank you.

4 MR. JOHNSON: And just last one, number, number 5.

5 Your Honor. As we stated, it was the *Tutton* case, the

6 *Baker* case, and the appropriate arguments regarding *Lyle*.

7 Q. You said that you feel like some of that could have
8 been argued, but you're just not sure which ones were
9 brought up on direct. Is that what your answer was?

10 A. Okay, I'm trying to understand what you're saying.

11 Q. The case law, the two cases I cited earlier, *Tutton*
12 and the *Baker* case, are you -- are you -- do you remember
13 whether or not you argued those specific elements about
14 justification under *Lyle* bringing in incidents that could
15 have fallen and been excluded under that *Lyle* rule if the
16 victim's testimony is not pinpointing a time for the
17 assault? Do you recall whether or not you argued those
18 cases or got into any more detail about that?

19 A. If you're asking me did I go into the detail just like
20 you said it now, the whole purpose again for 403 was to say
21 none of this evidence should come in. Because of time,
22 because of propensity, none of it should be in. The judge
23 said I'll take these cases; I'll read them overnight. I'll
24 come back tomorrow, and I will determine whether y'all --
25 we'll let them in.

1 He reviewed the 403 process and the 401 process, and
2 he said I'm going to let them in on all three: criminal
3 sexual conduct first, criminal sexual conduct second, and
4 lewd act. From that point on, my focus was protecting the
5 record, and I think I did because the jury found him not
6 guilty on the first. The appeals court and the Supreme
7 Court reversed the second. I mean, so I think I did what I
8 was supposed to do.

9 MR. JOHNSON: Thank you.

10 Judge, no more questions.

11 THE COURT: Thank you.

12 MR. BARLOW: Nothing from the state, Your Honor.

13 THE COURT: All right. Thank you, sir. You may step
14 down.

15 WITNESS: Your Honor, may I be excused?

16 THE COURT: Any objection?

17 MR. BARLOW: No objection from the state.

18 MR. JOHNSON: No, sir.

19 THE COURT: You are free to leave.

20 WITNESS: Thank you, sir.

21 THE COURT: Thank you.

22 (THE WITNESS EXITS THE STAND.)

23 THE COURT: Anything else from the state?

24 MR. BARLOW: Nothing, sir.

25 THE COURT: Anything else from the defense -- or the

1 applicant?

2 MR. JOHNSON: No, sir. That's it.

3 THE COURT: All right, what I'm going -- I think I
4 know what the -- I'm going to review the application. I
5 think I see what the issues are in this case. I'm going to
6 review the applications, the testimony I've heard today,
7 and I have the record here. I think this is clear what the
8 issues are, and I'm going to take this under advisement
9 while I consider everything I heard today, review all that,
10 and I'll have an answer to you very shortly, okay?

11 MR. JOHNSON: Yes, Your Honor.

12 MR. BARLOW: Thank you, Your Honor.

13 THE COURT: Thank y'all for being here today.

14 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE 12TH DAY OF SEPTEMBER, 2023.

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

/S/Elizabeth B. Harris, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

DECEMBER 2ND, 2023

STATE OF SOUTH CAROLINA
COUNTY KERSHAW

Nakia K. Johnson,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT
)

) CASE NO. 2021-CP-28-00014
)

) **ORDER OF DISMISSAL**
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FILED FOR RECORD
2025 JAN 14 PM 4:21
GINGER M. FARMER
CLERK OF COURT
KERSHAW COUNTY, SC

Presiding Judge: Hon. Daniel Coble
Applicant's Attorney: Ola A. Johnson, Esq.
Respondent's Attorney: D. Russell Barlow, II, Esq.
Plea Counsel: Virgin Johnson, Jr., Esquire.
Date of Hearing: September 12, 2023
Court Reporter: Elizabeth B. Harris

This matter comes before the Court by way of Nakia K. Johnson's (Applicant) Application for Post-conviction Relief (PCR), filed on January 11, 2021. On January 27, 2021, Applicant filed a Memorandum in Support of Applicant's Application for Post Conviction Relief. On September 19, 2022, Applicant filed an Amended Post Conviction Relief Application. On January 3, 2023, Applicant filed a Second Amended Post Conviction Relief Application.

On September 12, 2023, an evidentiary hearing was held at the Richland County Courthouse before the Honorable Daniel Coble. Senior Assistant Deputy Attorney General D. Russell Barlow, II, represented Respondent. Applicant was present and represented by Ola A. Johnson, Esquire. At the hearing, Applicant proceeded *solely* on the allegations related to his affirmed conviction for Lewd Act with a Minor (2014-GS-28-0910).¹ In support of these claims,

¹ Applicant's CSC, 2nd Degree conviction was remanded for a new trial, and is currently pending as of January 8, 2025. State v. Johnson, No. 2015-001436, 2018 WL 1315136 (S.C. Ct. App. Mar. 14, 2018).

Applicant testified on his own behalf, and presented testimony from Louise Pinkney. Respondent presented testimony from Virgin Johnson, Jr., Esquire. (Trial Counsel).

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

Applicant is not presently confined in the South Carolina Department of Corrections (SCDC). During the August 2014 term of the Richland County Grand Jury, Applicant was indicted for First Degree Criminal Sexual Conduct with A Minor (2014-GS-28-0419), Second Degree Criminal Sexual Conduct with a Minor (2014-GS-28-0420), and Lewd Act with a Minor (2014-GS-28-0910).² Applicant was represented by Virgin Johnson, Jr., Esquire, and Korey L. Williams, Esquire. Fifth Circuit Assistant Solicitors Nicole Simpson and Kathryn Cavanaugh prosecuted the case.

On June 22-26, 2015, a jury trial commenced before the Honorable Doyet A. Early, III. At the conclusion of trial, the jury convicted Applicant of Second-Degree Criminal Sexual Conduct with a Minor and Lewd Act with a Minor. The jury acquitted Applicant of First Degree Criminal Sexual Conduct with a Minor. Judge Early sentenced Applicant to serve concurrent terms of twenty (20) years for Second Degree Criminal Sexual Conduct with a Minor and fifteen (15) years for Lewd Act with a Minor.

² During the March 2012 term, the Lee County Grand Jury indicted Applicant for Criminal Sexual Conduct with a Minor—2nd Degree (2012-GS-31-55). Applicant was represented by Tony Desaussure, Esquire. On October 24, 2011, Applicant appeared for a bond hearing and waived jurisdiction to Lee County in Kershaw County. That charge was dismissed with leave to restore pending the outcome of his Kershaw County cases.

Applicant filed a timely Notice of Appeal. E. Charles Grose, Jr., Esquire (Counsel Grose), perfected Applicant's appeal to the Court of Appeals, presenting the following issues:

- I. Should the trial court judge have granted a mistrial when the State's expert witness, Dr. Allison Foster, testified that the "most painful dynamics in child sexual abuse cases involving family members is that mothers [and other adults]... [questioning] how could I not have seen something was going on" when the State presented testimony of the child's mother and other family members not being aware of the alleged child abuse and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?
- II. Should the trial judge have granted a mistrial when David Kellin, a child advocacy interviewer, testified he instructed the child to "tell the truth during the interview process," when that testimony is prohibited by State v. Kromah and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?
- III. Should this Court grant a new trial based on cumulative error doctrine?

Following briefing and oral argument, the Court of Appeals affirmed Applicant's conviction for a Lewd Act with a Minor, reversed his conviction for Second Degree Criminal Sexual Conduct with a Minor, and remanded for a new trial solely on his vacated conviction for Second Degree Criminal Sexual Conduct with a Minor. State v. Johnson, Op. No. 2018 -UP- 109 (S.C. Ct. App. filed March 14, 2018).

On March 29, 2018, Applicant filed a Petition for a Rehearing. On April 10, 2018, the State filed a Petition for a Rehearing. The Court of Appeals denied the Petitions by order on June 21, 2018.

On July 23, 2018, Applicant filed his Petition for Writ of Certiorari to the South Carolina Supreme Court, raising the following issues:

- I. I. Should the trial court judge have granted a mistrial when the State's expert witness, Dr. Allison Foster, testified that the "most painful dynamics in child sexual abuse cases

involving family members is that mothers [and other adults]... [questioning] how could I not have seen something was going on" when the State presented testimony of the child's mother and other family members not being aware of the alleged child abuse and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

- II. Should the trial judge have granted a mistrial when David Kellin, a child advocacy interviewer, testified he instructed the child to "tell the truth during the interview process," when that testimony is prohibited by State v. Kromah and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

On July 26, 2018, Respondent filed its Petition for Writ of Certiorari. On October 19, 2018, the Supreme Court denied the State's Petition, and granted Applicant's Petition as to question I. Following briefing and oral argument, the South Carolina Supreme Court dismissed the appeal as improvidently granted. State v. Johnson, Op. No. 2020-MO-002 (S.C. Sup. Ct. filed January 22, 2020). The Remittitur was returned to the circuit court on the same day.

CURRENT ACTION BEFORE THIS COURT

Applicant timely commenced his PCR action and alleged he was being held in custody unlawfully due to ineffective assistance of Trial Counsel for the following reasons:

1. "I was not in the county where these charges originated."
 - a. Video of myself and alleged victim in Lee County Presented at Trial
2. My attorney did not raise a defense.
 - a. Officer testimony at preliminary hearing states I was in Lee County

On September 19, 2022, Applicant filed his first amended PCR application and alleged the following allegations of ineffective assistance of Trial Counsel:

3. Failed to challenge the admissibility and voluntariness of the Applicant's statement.

4. Failed to properly investigate the case or discuss the evidence with Applicant.
5. Failed to object to prior bad acts introduced by the state.
6. Failed to meet with Applicant a sufficient number of times.
7. Failed to put a defense for Applicant.
8. Failed to call Dr. James Ruffing as a defense expert witness.
9. Failed to object to the testimony of Pamela Hall regarding a domestic violence and infidelity by Applicant.
10. Failed to challenge the jurisdiction of the court based on the evidence of the state's allegation taking place in another county.
11. Failed to call Nikki Chisolm, Louis Pinckney, Rhonda Johnson as witnesses for the defense.
12. Failed to call the private investigator, retained by Applicant, to testify.
13. Failed to sufficiently argue a directed verdict motion at trial.

On January 3, 2023, Applicant filed his second amended PCR Application and alleged additional allegations of ineffective assistance of Trial Counsel as follows:

14. Failed to move to quash the indictment as to the 4-year period covered in the indictments as unconstitutional.
15. Failed to preserve the defendant's directed verdict motion.
16. Failed to present evidence pursuant to SCRPC Rule 19.
17. Failed to object to the jurisdiction defect in the state's case.
18. Failed to argue appropriate case law to object to evidence of prior bad acts presented by the state.

Before this Court are Kershaw County Clerk of Court records regarding the subject's conviction and sentences, Applicant's records from the South Carolina Department of Corrections, Applicant's Trial transcript, Applicant's Appellate records, Applicant's PCR transcript, and the records of Applicant's current PCR action.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act³ (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

³ S.C. Code Ann. §§ 17-27-10 *et seq.*

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCF; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; accord. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome

the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of Trial Counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S. at 112.

Finally, the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his

application for post-conviction relief. See Rule 71.1(e), SCRPC (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Cl. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

This Court finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant he rendered adequate assistance and exercised reasonable professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS

- Allegation 1:** Trial Counsel failed to challenge jurisdiction where the video of [Applicant] and Victim in a store was in Lee County.
- Allegation 2:** Trial Counsel failed to raise a defense where an officer testified in a preliminary hearing that Applicant was in Lee County.
- Allegation 10:** Trial Counsel failed to challenge the jurisdiction of the court based on the evidence of the State's allegations taking place in another county.
- Allegation 17:** Trial Counsel failed to object to the jurisdiction defect in the State's case.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to challenge the jurisdiction of the trial court.

The allegations presented to this Court and the testimony taken at the evidentiary hearing on these allegations seemingly conflate subject matter jurisdiction, venue, and the admission of prior bad acts evidence. Out of an abundance of caution, the Court will address subject matter jurisdiction and venue here and will address the prior bad acts evidence at allegation numbers five (5) and eighteen (18), *infra*.

Subject Matter Jurisdiction

"Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Pierce v. State, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000). "The circuit court has original jurisdiction in all criminal matters except those where an inferior court is given exclusive jurisdiction." State v. Dudley, 364 S.C. 578, 582, 614 S.E.2d 623, 625 (2005); S.C. Const. Art. V, § 11 (Supp. 2004). "Circuit courts obviously have subject matter jurisdiction to try criminal matters." State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). In general, the requirements of subject matter jurisdiction are satisfied when appropriate charges are filed in a competent court. State v. Dudley, 354 S.C. 514,

523, 581 S.E.2d 171, 176 (Ct.App.2003), aff'd as modified, 364 S.C. 578, 614 S.E.2d 623. Thus, the Applicant must present evidence that his case is of some class over which the circuit court has no authority to preside.

Here, Applicant's conviction involved a criminal charge in the Court of General Sessions. This Court finds the circuit court had subject matter jurisdiction, and Applicant has failed to present any facts or evidence that the conviction he challenges in this application is in a class over which the circuit court does not have the authority to preside.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial counsel or any prejudice flowing therefrom. Thus, these allegations must be **DENIED** and **DISMISSED**.

Venue

The South Carolina Supreme Court in Evans held that "although an accused has a right to be tried in the county in which the offense is alleged to have been committed, we hold this right is not jurisdictional." State v. Evans, 307 S.C. 477, 480, 415 S.E.2d 816, 818 (1992), overruled in part by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)). "The right to be tried in the county in which the offense is alleged to have been committed, then, is a matter of venue." State v. Crocker, 366 S.C. 394, 403-404, 621 S.E.2d 890, 895 (Ct. App. 2005).

Because the trial court had jurisdiction over Applicant, the issue is whether venue was properly laid in Kershaw County. "The standard for establishing venue is not a stringent one, for 'venue, like jurisdiction, in a criminal case need not be affirmatively proved, and circumstantial evidence of venue, though slight, is sufficient. . . ." Id. at 404 (quoting State v. Williams, 321 S.C. 327, 334, 468 S.E.2d 626, 630 (1996)). Importantly, "where some acts material to the offense ... occur in one county, and some in another, venue is proper in either county." Id. "[A]ny

objection to improper venue is waived if not raised by a timely objection." 21 Am.Jur.2d Criminal Law, § 364 (1981); 1 Charles E. Torcia Wharton's Criminal Procedure, § 34 (13th ed. 1989).

Here, Trial Counsel did not challenge the venue before the jury was sworn; therefore, any objection to improper venue was waived.

This Court now turns to whether Trial Counsel's failure to object to improper venue was deficient and whether the alleged deficiency prejudiced Applicant. This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. From the record, this Court finds that there was testimony presented to the jury that Applicant committed acts on the Victim while in Kershaw County. Evidence, even if circumstantial and slight, is sufficient to support venue in Kershaw County. See Crocker, *supra*. Based on this finding, any objection by Trial Counsel would have been overruled and Trial Counsel cannot be deficient for failing to raise a futile objection. See State v. Hutchinson, 215 W. Va. 313, 323, 599 S.E.2d 736, 746 (2004) (citing Clark v. Collins, 19 F.3d 959, 966 (5th Cir.1994) ("Failure to raise meritless objections is not ineffective lawyering; it is the very opposite."); Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs)).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or

omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 3: Failed to challenge the admissibility and voluntariness of Applicant's statements.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to challenge the admissibility and voluntariness of Applicant's statements. This Court finds this allegation is without merit.

"The process for determining whether a statement is voluntary, and thus admissible, is bifurcated; it involves determinations by both the judge and the jury. First, the trial judge must conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence." State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007), quoting Jackson v. Denno, 378 U.S. 368, 376 (1964). "Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007). "A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his or her rights under." Arrowood, 375 S.C. at 366, 652 S.E.2d at 442. Volunteered statements of any kind are not barred by the Fifth Amendment. Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Rhodes, 779 F.2d 1019, 1032 (4th Cir.1985) ("Miranda does not protect an accused 'from a spontaneous admission made under circumstances not induced by the investigating officers or during a conversation not initiated by the officers.'").

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not explain that he abandoned his challenge to voluntariness of Applicant's statement at the Jackson v. Denno hearing. (PCR Tr. p. 12). Applicant testified that at trial, the state offered a videotaped interview where they used his statements against him, alleging that he made an admission about a phone call to the Victim's mother that tied into their theory of the case. (PCR Tr. p. 12).

On cross-examination, Applicant testified, "I don't really care about that as much because I didn't – for one, all I said was the phone call. I have no problem with the phone call. My biggest problem was with bad acts that never happened for one." (PCR Tr. p. 21). Applicant testified, "Two, it was just to the point where a lot of stuff that was being said were -- was not true totally." Id. Applicant testified, "We have proof because [the Victim] did two forensic interviews where [the Victim] stated one thing and then stated something totally different." Id. Applicant testified he was under the impression the Victim's inconsistent stories would be enough to dismiss on its own. (PCR Tr. p. 22). Applicant testified he never got the opportunity for Trial Counsel to explain that to him. Id.

On direct examination, Trial Counsel testified that the night Applicant was arrested, his statements to law enforcement were recorded on video and audio after Applicant was Mirandized, and Applicant signed a Miranda waiver. (PCR Tr. p. 34). Trial Counsel testified that one of the two officers testified at the in-camera hearing. Id. Trial Counsel testified there "wasn't a need for voluntariness when you've got a signed Miranda form." Id. Trial Counsel testified, "You're a police officer. You've got the signed Miranda, you got audio, video, and one of the officers that were in the room testified." Id. Trial Counsel testified, "I don't think we needed to call the other officer, and that's how I think where they got...an issue about voluntariness." Id. Trial Counsel

testified there was enough evidence to prove voluntariness. Id. Trial Counsel testified the decision not to challenge the admissibility and voluntariness of Applicant's statement was "a lot more strategic." Id. Trial Counsel testified, "Everything factors in where we were and what we were doing." (PCR Tr. p. 35). Trial Counsel testified the jury heard it once and admitted the signed Miranda form, in addition to audio and video. Id. Trial Counsel testified he did not want the jury to hear them go through the same thing over and over. Id.

On cross-examination, Trial Counsel testified there was nothing more he could have done to establish his objection to the statements as involuntary. (PCR Tr. p. 43). Trial Counsel testified two officers took the statement that night from a police officer. (PCR Tr. p. 44). Trial Counsel testified "number one" [Applicant] voluntarily signed a Miranda form. Id. Trial Counsel testified "number two" there was an audio, and "number three" he thinks there was a video. Id. Trial counsel testified he cross-examined the first officer along with the other information at the in-camera hearing and the second officer would testify to the same thing. Id. Trial Counsel testified it would not have mattered if he went on to question the second officer and pursued more questioning during the Denno hearing. Id.

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, supra. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, supra. This Court finds Trial Counsel articulated a reasonable reason for withdrawing the challenge to the voluntariness of Applicant's statements to law enforcement. Trial Counsel credibly testified that Applicant, a former police

officer, signed a Miranda waiver, and the officers that took Applicant's statement testified at the Jackson v. Denno hearing. Trial Counsel credibly testified that his decision not to challenge the admission of Applicant's statement was strategic, and the jury heard the statement once and he did not want them to hear it again. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). This Court further finds that even if Trial Counsel challenged the admission of Applicant's statement, it would have been futile considering the evidence that Applicant's statement was given voluntarily. Applicant cannot show that the result of his trial would have been different when the argued matter would have been admitted over any objection. See State v. Hutchinson, 215 W. Va. 313, 323, 599 S.E.2d 736, 746 (2004) (citing Clark v. Collins, 19 F.3d 959, 966 (5th Cir.1994) ("Failure to raise meritless objections is not ineffective lawyering; it is the very opposite."); Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs)).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 4: Failed to properly investigate the case or discuss the evidence with Applicant.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to properly investigate the case or discuss the evidence with Applicant. This Court finds this allegation is without merit.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. "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." Id.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a

different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

PCR Evidentiary Hearing

On direct examination, Applicant testified he spoke to Trial Counsel on several occasions. (PCR Tr. p. 13). Applicant testified he paid for an investigator and an expert named Dr. Ruffing, who never showed up for trial. Id. Applicant testified Trial Counsel never explained to him why Dr. Ruffing did not show up for trial. Id. Applicant testified Trial Counsel never had those conversations with him. Id.

On cross-examination, Applicant testified he's already spoken about the bank statements and timeframe. (PCR Tr. p. 22). Applicant testified he "never knew" about the "camera, the photo, the recording of the VHS camera" until the day of court. Id. Applicant testified he should have known that information the moment the State had it. Id. Applicant testified he was locked up in Richland County when the investigator came to see him. (PCR Tr. p. 23). Applicant testified he met with the investigator once, who stated, "They didn't have anything on me; those was his exact words." Id.

On direct examination, Trial Counsel testified he sent the investigator to Kershaw County and Lee County to speak to Applicant, and the investigator was there when Applicant and he spoke at the office. (PCR Tr. p. 35). Trial Counsel testified he spoke to Applicant many times about the case and could not count the number of times. Id. Trial Counsel testified that Applicant knew a lot because of his profession in law enforcement. Id.

On cross-examination, Trial Counsel testified that Applicant received indictments from Kershaw County and Lee County. (PCR Tr. p. 46). Trial Counsel testified that he did not speak with the Victim in this case, and he was not sure if he had the investigator speak with the mother of the Victim. Id.

Findings

As an initial matter, this Court finds Trial Counsel's testimony on this matter credible and persuasive and Applicant's testimony not credible or persuasive. This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, supra. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, supra. This Court finds that Applicant has failed to produce evidence of what Trial Counsel could have discovered had Trial Counsel investigated his case further. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial.).

This Court finds Trial Counsel credibly testified that he and Applicant discussed his case numerous times and he reviewed the evidence with Applicant. While Applicant testified to items that may have been helpful in his trial, Applicant produced none of those items to this Court. Rather, Applicant merely presented his testimony which this Court finds not credible or persuasive. Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)); see also Moorehead v. State, 329, 496

S.E.2d 415 (1998) (failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result). Applicant has failed in his burden of showing what evidence Trial Counsel and he could have further reviewed that would have changed the outcome of his trial.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 5: Failed to object to prior bad acts introduced by the State.

Allegation 18: Failed to argue appropriate case law to object to the evidence of prior bad acts presented by the State.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to object to prior bad acts introduced by the State and for failing to argue appropriate case law to object to the evidence of prior bad acts presented by the State. This Court finds these allegations are without merit.

An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable'

action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[c] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland

standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." See Rule 404(b), SCRE. "A close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception." State v. Cheeseboro, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001), cert. denied, 122 S. Ct. 1310 (U.S. 2002). "[W]here the defendant's own actions link two crimes together, evidence of one crime is admissible as proof of the other under the common scheme or plan exception." Cheeseboro, 346 S.C. at 546, 552 S.E.2d at 311, citing State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990).

Trial

At trial, the following occurred on Applicant's motion to exclude prior bad acts:

[Trial Counsel]:	Your Honor, mine are rather quick. Number one is -- one motion [handed up is the motion for an in-camera hearing to determine the admissibility of any 404(b) evidence, Your Honor.
The Court:	What do you anticipate?
[Trial Counsel]:	The discussions of other acts like this that were done in other counties that, in my opinion, should not be admissible because they go to his character.
The Court:	Which one of you ladies want to address that?
Ms. Cavanaugh:	Your Honor, I will.
The Court:	Ms. Cavanaugh.
Ms. Cavanaugh:	As far as --
The Court:	What he's talking about, there's been some allegations that something may have taken place in Fairfax and the beach and Bishopville. I forget what --

Ms. Cavanaugh: Yes, sir, Your Honor. There were allegations -- first of all, you had the opportunity to view the victim's statement to David Kellin, which he indicated these acts had been going on for a period of three years. As she indicated in the video, they lived in different areas of the state and these acts occurred in those different areas. We believe, under the 404(b), common scheme or plan, that those acts that occurred outside of Kershaw County come in under 404(b), as well as the res gestae theory, Your Honor. We have at least three cases on point --

The Court: If you would give me those cases so I can review them tonight and I'll make a ruling in the morning before we start.

Ms. Cavanaugh: Yes, sir, Your Honor.

The Court: And also please give it to Mr. Virgin Johnson. And I keep saying Mr. Virgin Johnson because the defendant's last name is Johnson as well.

[Trial Counsel]: Your Honor, and, of course, the next logical step, if the Court rules that it come in, I'm going to move to the more prejudicial than probative --

The Court: You want a 403 analysis.

[Trial Counsel]: Yes, sir.

The Court: All right. Let me -- I know what you're talking about; the other alleged events that took place that was testified to by the alleged victim. Let me look at these cases tonight. I'll make a ruling on that in the morning, and then I'll also do -- if I decide to let them in, then I'll let you make a 403 argument on prejudicial versus probative. Fair enough?

[Trial Counsel]: Yes, sir.

Ms. Cavanaugh: Your Honor, I am handing up State v. Weaverling, State v. Martucci, and State v. Mathis.

....

The Court: . . . As to the other alleged incidents that occurred outside of this jurisdiction, I have reviewed the cases as presented by the State, including State vs. Weaverling, State vs.

Martucci, and State vs. Mathis, and I find that -- obviously we're all familiar with Rule 404 and State v. Lyle. And I made an analysis under that, and I find that there had been a number of cases that have a common factual pattern of this case which have allowed the other acts to be brought into the case as an exemption to Lyle under the common scheme or plan. I find in this case there's a close degree of similarity or connection between the other bad acts and the crime in which the defendant is on trial, and I find that their probative value outweighs the prejudicial value under 403 and I'll allow that testimony.

(Trial Tr. pp. 101–103; 116–117).

PCR Evidentiary Hearing

On direct examination, Applicant testified Trial Counsel did not do a sufficient job arguing the case law on prior bad acts. (PCR Tr. p. 20).

On cross-examination, Applicant testified he did not recall Trial Counsel objecting to the admission of prior bad acts. (PCR Tr. p. 23). Applicant testified that in State v. Nelson, State v. Baker, and State v. Tutton there was more evidence against the defendant's in those cases where they were charged with lewd act than was presented against him. (PCR Tr. p. 28). Applicant testified that in his case it was his word against the Victims. (PCR Tr. p. 28). Applicant testified that the Victim's mother, aunt, and the forensic interviewer bolstered the Victim's testimony. Id.

On direct examination, Trial Counsel testified that "[He] was hoping that the Judge would kick that, which would mean [he] wouldn't have to deal with the lewd act at all." (PCR Tr. p. 36). Trial Counsel testified that he requested the trial court conduct a 403 analysis. Id. After the 403 analysis, Trial Counsel testified, "Well, look then let's do the 401 because it may be more prejudicial than probative," but Judge Early denied Trial Counsel's request and let it in Id. Trial Counsel further testified after reviewing some case law, both he and the solicitor handed the Judge

cases, and the Judge took all of that with him that night and ultimately ruled he would admit testimony on prior bad acts. Id. Trial Counsel testified he could only cross-examine and fight it, which is what he did. Id.

On cross-examination, Trial Counsel testified that he did not recall if State v. Tutton was the case he brought up, but it was two or three cases he brought to the trial court's attention. (PCR Tr. p. 47). Trial Counsel testified that the Victim testified at trial. (PCR TR. p. 48). Trial counsel testified his reasoning for not objecting to the Victim's testimony about events in Fairfax was, "All of that was part of what I asked the Judge not to put out – not to let in." Id. Trial Counsel testified, "Once [trial judge] said it was in, only thing I could do now is cross-examine, so I dealt with it the best I could. Id. Trial Counsel testified, "If I didn't, I should have done it," when asked why he did not make an objection to preserve his pre-trial motion. (PCR Tr. pp. 48–49).

Findings

From the record, this Court finds that Trial Counsel made appropriate pretrial objections to the prior bad act evidence, and the trial court appropriately assessed the objection and overruled Trial Counsel. However, Trial Counsel did not contemporaneously object during trial and failed to preserve the matter for appellate review. For this reason, this Court finds Trial Counsel's performance on this matter deficient when he failed to contemporaneously object and preserve the matter for appeal.

Turning to prejudice, after a review of this record, this Court finds the trial court's ruling on the prior bad acts based on Martucci⁴, Mathis⁵, and Weaverling⁶ was correct, and Applicant's prior bad acts were admissible and would not have been reversed on appeal. This Court finds

⁴ State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008).

⁵ State v. Mathis, 359 S.C. 450, 597 S.E.2d 872 (Ct. App. 2004).

⁶ State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Cr. App. 1999).

Applicant cannot show prejudice because the evidence was admissible, and the trial court's ruling would not have been reversed on appeal. Therefore, while Trial Counsel's failure to contemporaneously object was deficient, Applicant has failed to overcome his burden in proving prejudice flowing from Trial Counsel's representation. See Butler, supra.

Based on the foregoing, this Court finds Trial Counsel's performance was deficient for failing to contemporaneously object to the prior bad acts evidence; however, Applicant has failed to show any resulting prejudice from Trial Counsel's deficient performance.

Turning to Applicant's assertion that Trial Counsel did not argue the correct case law. Applicant represented in the PCR evidentiary hearing State v. Baker⁷ and State v. Tutton⁸ as supporting case law that Trial Counsel should have argued to keep the prior bad act evidence out. After a review of the case law presented, this Court does not agree and finds Applicant's assertion unfounded.

In Baker, the indictments stretched over a six-year period with two separate victims. Baker was not apprised of the amended indictments until two weeks before trial, and his employment records were destroyed, which he contended would have provided an alibi defense. Applicant's case is distinguishable from the Baker case in that Applicant was indicted on 2014-GS-28-0910 for a lewd act with a minor child on August 20, 2014, and his trial began nearly a year later on June 22, 2015. Applicant was not given a mere two weeks to prepare his defense. Additionally, there was only one victim in this case, and Applicant never presented an alibi defense. This Court is not convinced that this case would have made any difference if raised at trial.

⁷ State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015).

⁸ State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Cl. App. 2003).

In Tutton, there were separate victims with multiple differences in the alleged acts. Applicant's case is distinguishable in that there was only one victim here and the record provides a pattern of behavior of a longstanding history of continuous abuse between the same parties. Again, this Court cannot find that if Trial Counsel had provided this case, then his objection would have been sustained.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, these allegations must be **DENIED** and **DISMISSED**.

Allegation 6: Failed to meet with Applicant a sufficient number of times.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to meet with Applicant a sufficient number of times. This Court finds allegation is without merit.

Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. Campbell v. Polk, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency); United States v. Olson, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte). "Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with

his client twice before trial as long as counsel devoted sufficient time to insure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared.).

South Carolina case law has established that even if Counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter) (finding "Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation."), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Additionally, "brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating "how additional preparation or communication would have resulted in a different outcome." Id.; see Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); Skeen v. State, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel met with him maybe "ten times in the four-year span." (PCR Tr. p. 14).

On direct examination, Trial Counsel testified in his opinion he met with Applicant "plenty of times." (PCR Tr. p. 36). Trial Counsel testified that he spoke to Applicant over the phone and

met in person numerous times. *Id.* Trial Counsel testified that Applicant is family, so he invested "more effort" in his case because he did not want him convicted. (PCR Tr. p. 37).

On cross-examination, Trial Counsel testified that he believed he met with Applicant a sufficient number of times. (PCR Tr. p. 49).

Findings

As an initial matter, this Court finds Trial Counsel's testimony credible and Applicant's testimony on this matter not credible. This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe, supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler, supra*. This Court finds Trial Counsel credibly testified that he met with Applicant a sufficient number of times. Trial Counsel credibly testified he would discuss the case with Applicant over the phone, in person, any chance he would get. Furthermore, Applicant failed to present any additional evidence on how additional time spent in consultation with Applicant would have resulted in a different outcome.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

- Allegation 7:** Failed to put up a defense.
- Allegation 8:** Failed to call Dr. James Ruffing as a defense expert witness.
- Allegation 11:** Failed to call Nikki Chisolm, Louise Pinkney, and Rhonda Johnson as witnesses for the defense.
- Allegation 12:** Failed to call the private investigator retained by Applicant to testify.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to call Dr. James Ruffing, Nikki Chisolm, Louise Pinkney, Rhonda Johnson, and a private investigator to testify in his defense. This Court finds these allegations are without merit.

At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented, consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have

made a difference at trial. See, e.g., Smith v. State, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); Edwards v. State, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); Glover, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was not deficient by failing to call alibi witnesses when two witnesses who testified at PCR hearing did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. See, e.g., Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may have corroborated or bolstered defendant's credibility so that the findings at trial could have been favorable to the defendant); Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

PCR Evidentiary Hearing

On direct examination, Louise Pinkney (Pinkney) testified that in the past, Pamela Hall (Hall), the mother of the Victim, lied about her children. (PCR Tr. p. 7). Pinkney testified that she received a call when she and Applicant were en route to Atlanta, claiming one of the children was sick with a fever and having seizures; however, the child was not ill. (PCR Tr. p. 9). Pinkney testified that Hall also called her and told her that "if [Hall] could not be with [Applicant], that

nobody would be with him. [Hall] would put him in a place that nobody could have him." Id. Pinkney testified that she sat outside the courtroom during Applicant's trial but was never called to testify. (PCR Tr. p. 10).

On direct examination, Applicant testified Dr. Ruffing told him he would testify at his trial but was not called to testify. (PCR Tr. p. 13). Applicant testified Trial Counsel did not put a sufficient defense for him. (PCR Tr. p. 15). Applicant testified, "No, he never brought the witnesses that I – that I asked him to, nor did he put up a defense at all. I mean, I was totally shocked when he rest." Id. Applicant testified, "And, you know, everybody was talking about my appearance toward what I – what I should've been doing while in front of the jury instead of listening to what I was at least trying to bring forth to their attention so they could put that on the record." Id.

Applicant testified that he was on the phone with Nikki Chisolm, and the phone records would have shown that. (PCR Tr. p. 17). Applicant testified that his sister could have been a character witness and could have "vouch[ed] for the, the - - [him] being more so in Allendale County, more so in another country, and also not able to really - - because being - - have any contact with the victim during those timeframes." Id. Applicant testified that "[t]hose were the things that I wanted those witnesses to do." Id.

On cross-examination, Applicant testified Trial Counsel should have "At least not rest after [he] went through two or three days of them saying everything that they thought they had on me." (PCR Tr. p. 24). Applicant testified Trial Counsel should have "At least bring up my witnesses." Id. Applicant testified Trial Counsel should have "At least bring in someone that can, can validate that I was in Kershaw County during those timeframes." Id. Applicant testified that Dr. Ruffing

told him that "there was a whole lot of leading questions" in the forensic interview of the Victim. (PCR Tr. p. 25).

On direct examination, Trial Counsel testified Nakia is "very fact-oriented." (PCR Tr. p. 33). Trial Counsel testified Applicant is a police officer and his cousin. Id. Trial Counsel testified his defense strategy consisted of "calling all those people [Applicant] talked about calling. Id. Trial Counsel testified some of it was repetitive, and at the end of the trial, they got to cross-examine most issues Applicant had a problem with. Id. Trial Counsel testified a decision was made not to put anybody up and to have the last argument before the jury due to the seriousness of the charges. (PCR Tr. p. 33). Trial Counsel testified it was a "very strategic decision." (PCR Tr. p. 33).

Trial Counsel testified that you have to pay the expert to be present at the trial. (PCR Tr. p. 37). Trial Counsel testified that he decided not to call Rhonda or Nikki because he would have lost the last argument. (PCR Tr. p. 39). Trial Counsel testified that the only thing the private investigator could have testified to is that he went to the dirt road in Kershaw County where the Victim claimed Applicant would take her and that there, in fact, was a dirt road there. (PCR Tr. p. 40).

On cross-examination, Trial Counsel testified that Dr. Ruffing would have testified in opposition to the State's experts, but he did not know what Dr. Ruffing would have testified to. (PCR Tr. pp. 50–51). Trial Counsel testified that he and Applicant discussed putting witnesses up for defense but decided they wanted the last argument. (PCR Tr. p. 54). Trial Counsel testified that he did not send the investigator to interview the State's experts because he interviewed them himself. (PCR Tr. p. 55).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Notably, the only witness Applicant called was Pinckney, and this Court finds her testimony to be not credible, and her testimony would not have changed the outcome of Applicant's trial. Applicant did not provide the testimony of any of the other witnesses he claimed Trial Counsel was ineffective for not calling. Thus, Applicant has failed to carry his burden of proof, and Trial Counsel cannot be found deficient, nor can any prejudice be shown from the alleged deficiency for failing to call the witnesses he listed. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented, consistent with the rules of evidence).

Additionally, Trial Counsel credibly testified that Applicant decided not to call anyone in his defense so that they would not lose the last argument. Where Trial Counsel articulates a valid strategic reason for his action or inaction, Trial Counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has

failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial counsel or any prejudice flowing therefrom. Thus, these allegations must be **DENIED** and **DISMISSED**.

Allegation 9: Failure to object to the testimony of Pamela Hall regarding domestic violence and infidelity by Applicant.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to object to the testimony of Pamela Hall regarding domestic violence and infidelity by Applicant. This Court finds this allegation is without merit.

An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

Trial

On direct examination of Pamela Hill (Hill), Hill testified to the following:

So he pulled his gun on me that night. And he got a call -- I think it was on Cameron Church Road [phonetic]. So I rode with him to the call, and when we got there -- I think it was Lieutenant Liam Blakely and Darlene Dillinger. I ended up, I think, right there by -- no, I think I rode back with Darlene. We got into an altercation then because I had braids in my hair and he pulled a few of my braids out that night.

(Trial Tr. pp. 229–230). Later, on direct examination, the following colloquy occurred:

- Q. Were y'all still cordial? Like, did y'all get along in your relationship well enough? Was your relationship still intimate?
- A. We got along, we was still intimate, but we still had our arguments here and there.
- Q. Okay. And what were those arguments generally over?
- A. Mostly we would argue about him cheating with other people.
- Q. Okay. Cheating with other women and --
- A. Yes, ma'am.

(Trial Tr. p. 238).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not object to Hall's testimony about cheating and domestic violence. (PCR Tr. p. 16).

On cross-examination, Applicant testified that if Trial Counsel had objected to Hall's testimony, then the result of his trial would have been different. (PCR Tr. pp. 25–26).

On direct examination, Trial Counsel testified to the following:

- Q. And we'll move on to allegation number 7. You failed to object to the testimony regarding domestic violence and fidelity during the testimony of Pamela Hall. Do you recall that?
- A. I don't recall it, but I can probably tell you why I did it. I can probably tell you that. All right, this whole thing started because Nakia took his stepdaughter with him to, to the store. Happened so they lived in Kershaw County. The store was in Lee County. How this whole thing started was allegedly that the child's mother heard something over the phone. Well, here's what -- it's bad enough that I'm dealing with there are allegations of having sexual conduct with a child, but Ms. Louise Pinkney, who is a wonderful person back there, who was his -- I think I would say his fiancée -- he was on the phone with her. There was another girl by the name of Chisholm. I think it got -- there was a phone cross up. If the mother heard it, I think that how the mother heard it, and he had just left the other woman. So, at some point in time, I just didn't want to highlight -- I just didn't want to

highlight there were so many women, and I was trying to just -- it was said. I just wanted to kind of get by it. I just didn't want to highlight the fact here is another woman in this situation that already -- we got three women in the situation and a child. At some point in time, I was just trying to cut it off.

Q. Was that a strategic reason?

A. Yes, it was on my part. Yes, it was, and, and, and Nakia sat right by me and another attorney sat on the other side of him. There was nothing, just out of our closeness, there's nothing that went on we didn't discuss. So, we discussed it.

(PCR Tr. pp. 37–38).

On cross-examination, the following colloquy occurred with Trial Counsel:

Q. Do you recall not objecting to Ms. Hall's testimony --

A. Yes.

Q. -- as she went into a discussion of a domestic violence allegation against my client and infidelity?

A. Yes. The, the more I think about it, I don't think I object. And I think I was sitting at the table trying to figure out should I object or, or should I not because also in the back of my mind, I'm dealing with how much I was going to object to her because she drew a pistol on him, and I was trying to make a argument as to why she drew the pistol on him and they didn't charge her. So, so, strategically I just -- probably just thought at the moment it was -- just wasn't the best thing to do. But, but no, I didn't.

Q. Do you -- so, you didn't object. You also did not make a motion for mistrial at that time.

A. No.

(PCR Tr. p. 52).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Trial Counsel

provided a reasonable strategy for not objecting to the testimony as he did not want to highlight that testimony to the jury. Where Trial Counsel articulates a valid strategic reason for his action or inaction, Trial Counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992); see also Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial").

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

- Allegation 13:** Failed to sufficiently argue a directed verdict motion at trial.
- Allegation 15:** Failed to preserve Applicant's directed verdict motion.
- Allegation 16:** Failed to present evidence pursuant to Rule 16, SCRCrimP.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to sufficiently argue a directed verdict motion at trial, for failing to preserve Applicant's directed verdict motion, and for failing to present evidence pursuant to Rule 16, SCRCrimP. This Court finds these allegations are without merit.

When considering a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Larmand, 415 S.C. 23, 30, 780 S.E.2d 892, 895 (2015) (citing Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). The role of the trial court is only to determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). If there is any direct or circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). "In deciding motions for a directed verdict. . . the evidence and all reasonable inferences which may be drawn from it must be viewed in the light most favorable to the non-moving party. If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury." Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 611, 518 S.E.2d 591, 597 (1999).

"[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict . . . must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) (citing State v. Fogle, 256 S.C. 149, 181 S.E.2d 483 (1971)). The trial court should grant a directed verdict

when the evidence merely raises a suspicion that the accused is guilty. A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

Trial

At trial, the following colloquy occurred on Applicant's motion for a directed verdict:

The Court:	Mr. Johnson -- well, first of all, any motions by the State?
Ms. Simpson:	No, Your Honor.
The Court:	By the Defendant?
[Trial Counsel]:	Your Honor, looking at all of the evidence in the light most favorable to the State, I move at this time, Your Honor, on the charge of criminal sexual conduct first degree, that there was no evidence put in the record in Kershaw County that -- there was no evidence in the record that he had any contact, sexual penetration, physical contact --
The Court:	How about in the computer room? Wasn't that house in Kershaw County?
[Trial Counsel]:	That wasn't -- my understanding, that wasn't before 11. When I read the transcript, she said everything started at 11.
The Court:	She said it started three years ago.
[Trial Counsel]:	No. That was Fairfax stuff, which is another county.
The Court:	Go ahead. What else?
[Trial Counsel]:	Just the standard motion on the other two charges. I mean, honestly, looking at the evidence, I guess it is evidence that would go to the jury. But on that one, I was paying close attention to that one all through the trial just to make sure.
The Court:	All right. Ms. Simpson, what evidence do we have in the record that it happened in Kershaw County?
Ms. Simpson:	With respect to the Kershaw County incidents themselves, we do have the computer room. And Defense counsel's motion relies only on the forensic interview where Mr. Kellin was interviewing and the

victim initially said, yeah, it started when I was 11. But, in reality, we have the timeframe dating back to 2007 –

The Court: On a number of occasions. There was a good bit of testimony saying – about going back several years.

Ms. Simpson: Yes, Your Honor. And during that time – and part of the reason we put up both Melissa Hall and Stacey Hall, which you have that information on the record, the computer room was actually at Melissa Hall's residence, and that's the [REDACTED]. You also have her living with Aunt Stacey at [REDACTED] which is in Kershaw County. And while it didn't happen at the house, what he would do is when he would visit, he'd take her to a dirt road, which is also located in Kershaw, one that she was actually able to remember that we didn't put on the record. As far as timeframes, we have them prior to – her date of birth is October 16th, 1999. During the time of this disclosure, she was actually 11; however, even with the defendant's statement, he was present, she would have been in Kershaw County at times or at least enough to go to jury prior to ten in which penetration was occurring, sexual batteries were occurring, be it oral or vaginal, because she stated that while, yes, it began in Fairfax, that is also where the sexual batteries, beyond just touching and fondling and things of that nature, began. And once it began, it continued. This is a case of chronic abuse, so of course dates and times. I think there's clearly enough on the record from the testimony of all these witnesses in their totality to include Ms. Hall that would present enough evidence for the CSC first to be presented to the jury, and that point they can give it any weight that they so need.

The Court: Mr. Johnson?

[Trial Counsel]: : Your Honor, suppose they did – I went through the interview and I listened to the testimony. And there was – both of her forensic interviews said it happened at 11, and on her testimony in the trial, she never

said it happened before 11. Now, I think we can make the assumption that maybe it happened, what time it happened at the aunt's house. But we don't know when it happened. But none of the testimony in the record says it happened before 11. And, Your Honor, it's so jumbled because of the charges from 2007 to now. But if you look specifically at Kershaw County, there's no testimony that it happened in Kershaw County. There may be testimony it happened in some of the other counties, but none in Kershaw.

Ms. Simpson:

Your Honor, I believe Mr. Johnson actually just kind of made the point. He said that there had been no testimony. But with respect to the victim's actual direct testimony, she said that while it started in Fairfax, at some point they moved back to her grandmother's property. And, again, she actually said it had been going on for a period of years. It's when she would have been back at her grandmother's property, which is [REDACTED]. And the -- he was clearly -- the testimony has always been that he always visited, of course from the children and the aunt, and when he did, that would be on occasions that he would either send her mom to the store or take her down the dirt road. And so -- and that is based on her direct testimony. The second forensic interview and transcript he's relying on, of course, is not in evidence. So we're left with her testimony that was presented on the stand which is before the jury. And I believe there is more than enough to go to the jury as the rule requires the existence.

The Court:

All right. Mr. Johnson, I'm going to respectfully deny your motion. I think there's sufficient evidence in the record that, if the jury believes it and they believe it's been proven to them beyond a reasonable doubt, would support a verdict for criminal sexual conduct both in the first and in the second degree and/or lewd act. So I'm going to respectfully deny your motion.

(Trial Tr. pp. 536–541).

PCR Evidentiary Hearing

On direct examination, Applicant testified that he did not feel Trial Counsel did a sufficient job arguing the directed verdict motion. (PCR Tr. pp. 17–18). Applicant testified that Trial Counsel did not say directed verdict and did not get into the details. (PCR Tr. p. 18). Applicant testified that the directed verdict motion was sparse. (PCR Tr. p. 19).

On direct examination, Trial Counsel testified that he argued the directed verdict motion on the CSC-1st and the other two charges. (PCR Tr. p. 40).

On cross-examination, the following colloquy occurred:

- Q. And I believe you already testified yourself. When it comes to lewd act, do not get into detail. You kind of said go with standard motion, but you did not get into the details under why it should be a directed verdict, why these issues prevent these out-of-county incidents from being testified to, or why they would not be sufficient to support a conviction. You didn't go into detail.
- A. I didn't go into detail on those, but if you look, I went into a ton of detail on the CSC first. That was the one that I thought I should win. I did win it at trial. What I did was put -- through everything I did was protect the record to make sure the record was protected because I thought honestly we were going to win on appeal. And on appeal, if you look at the court, the case, the only reason that we didn't get both the lewd act and the criminal sexual conduct overturned on appeal was the mother's testimony hearing over the phone. The court said that was collaboration. The court said there was no collaboration for the criminal sexual conduct because I showed that in my cross-examination. On the lewd act, the court said look. Since she said she heard the phone -- I think it was the phone -- that was enough collaboration. That's the only reason that he got convicted on that.

(PCR Tr. pp. 56–57).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Applicant has failed to present what argument Trial Counsel should have made that would have resulted in a different outcome. Rather, Applicant only testified that Trial Counsel did not sufficiently argue the directed verdict motion. Such speculation and conjectural allegations do not demonstrate that Trial Counsel's performance was not reasonable or affirmatively prove that Applicant was prejudiced. "It is not enough for the [Applicant] to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial counsel or any prejudice flowing therefrom. Thus, these allegations must be **DENIED** and **DISMISSED**.

Allegation 14: Failed to move to quash the indictment as to the 4-year period covered in the indictments as unconstitutional

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to move to quash the indictments as to the 4-year period covered in the indictments as unconstitutional. This Court finds this allegation is without merit.

When a timely objection to the sufficiency of an indictment is made, the circuit court should evaluate the indictment by determining: (1) whether the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called on to answer and how to plea; and (2) whether it apprises the defendant of the elements of the charged offense. State v. Tumbleston, 376 S.C. 90, 96-97, 654 S.E.2d 851, 852 (Ct. App. 2007) (citing State v. Gentry, 363 S.C. 90, 102-103, 654 S.E.2d 494, 500 (2005)). Whether the indictment could be more definite or certain is irrelevant. Tumbleston, 376 S.C. at 97, 654 S.E.2d at 853 (citing Gentry, 363 S.C. at 102-103, 654 S.E.2d at 500). An indictment is legally sufficient when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly the nature of the charged offense is easily understood. Tumbleston, 376 S.C. at 97, 654 S.E.2d at 853.

If an indictment is challenged on the ground that it encompasses a purportedly overbroad time period, the circuit court should determine whether time is a material element of the offense and whether the time period covered by the indictment occurred prior to the grand jury's return of the indictment. Id. at 98-99, 654 S.E.2d at 853-854. If time is not a material element of the

charged offense, the exact date the offense was committed need not be alleged. *Id.* at 99, 654 S.E.2d at 854.

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe, supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler, supra*. This Court finds that after a review of the record, Applicant's indictment sufficiently apprised him of the charges against him and put him on notice of what he had to defend at trial were sufficient. Nevertheless, this Court further finds Applicant's allegation fails as a matter of law.

Notably, time is not a material element of lewd act on a minor. *Tumbleston*, 376 S.C. at 101, 654 S.E.2d at 855; *see also State v. Wingo*, 304 S.C. 173, 403 S.E.2d 322, 323 (Ct. App. 1991). Thus, the State is not required to include the precise day, or even year, of the accused's conduct, and sex crime indictments alleging offenses occurring during a specified time period are sufficient when the circumstances of the case warrant considering an extended time frame. *Tumbleston*, 376 S.C. at 101, 654 S.E.2d at 855. A young child victim cannot reasonably be expected to recall the exact dates of sexual abuse. *Id.* Furthermore, even if Trial Counsel would have challenged the indictment, his challenge would have been futile. *see Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both *Strickland* prongs); *U.S. ex rel. Link v. Lane*, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Notably, State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015), was decided just prior to Applicant's trial. The Court in Baker found Baker was prejudiced by the State amending his indictments to cover a six-year time frame just two weeks before trial by "significantly limiting [Baker's] ability to combat the charges against him." Baker, 411 S.C. at 590, 769 S.E.2d at 864. This Court, as previously found *supra*, again finds Baker distinguishable from Applicant's case and not applicable. See Allegation 18, *Findings, supra* at p.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

[CONCLUSION PAGE FOLLOWS]

CONCLUSION

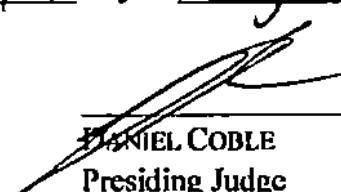
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED with PREJUDICE.**

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), an 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 PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 14 day of Jan, 2025.



 DANIEL COBLE
 Presiding Judge
 Fifth Judicial Circuit

Richland, South Carolina