RECEIVED

Mar 04 2026

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Colleton County
Court of Common Pleas
The Honorable Edgar Dickson, Circuit Court Judge
Case No. 2014-CP-15-00127

LESLIE TWYMAN, PETITIONER

V.

STATE OF SOUTH CAROLINA, RESPONDENT.

NOTICE OF APPEAL

Leslie Twyman appeals the denial of his application for post-conviction relief. The post-conviction relief application was heard by the Honorable Edgar W. Dickson on October 29, 2014. The original order of dismissal was filed on December 21, 2015, and served on counsel on March 1, 2016, but no appeal was taken. After being granted a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), this Court remanded the case back to the circuit court on November 19, 2025, to issue an order that complies with S.C. Code Ann. § 17-27-80 (2014) and Rule 52(a), SCRCP. The signed order was received by undersigned counsel on February 23, 2026. The order of dismissal was filed with the Colleton County Clerk of Court on February 25, 2026.

This 4th day of March, 2026.

Jessica M. Saxon
S.C. Bar No. 80719
Appellate Defender
South Carolina Commission on
Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211
(803) 734-1330
Attorney for Petitioner

cc: D. Russell Barlow, II, Esquire
The Honorable Gary Hale, Colleton County Clerk of Court

STATE OF SOUTH CAROLINA COUNTY OF COLLETON	)	IN THE COURT OF COMMON PLEAS IN THE FOURTEENTH JUDICIAL CIRCUIT
Leslie Twyman, #345787, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2014-CP-15-00127 **ORDER OF DISMISSAL WITH PREJUDICE**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 11, 2014. On November 19, 2025, the Supreme Court of South Carolina issued an Order vacating the original order of dismissal for insufficient findings of fact and conclusions of law and remanded the matter back to this Court. This Order follows:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted in October 2010 and January 2011 by the Colleton County Grand Jury for criminal sexual conduct – first degree (CSC-1st) (2010-GS-15-0849) and criminal sexual conduct – third degree (CSC-3rd) (2010-GS-15-0849). Harris S. Beach (Trial Counsel) of the Colleton County Public Defender's Office represented Applicant. Assistant Solicitor Ben Shelton of the Fourteenth Circuit Solicitor's Office prosecuted the case.

On April 18, 2011, Applicant proceeded to a jury trial before the Honorable Perry M. Buckner, III, circuit court judge. The jury convicted Applicant as indicted, and on April 20, 2011, Judge Buckner sentenced Applicant to imprisonment for twenty-five years for CSC-1st and for ten years for CSC-3rd, with both sentences to be served concurrently.

Applicant's Direct Appeal

Applicant timely filed a Notice of Appeal. Appellate Defenders Elizabeth Franklin-Best and Susan B. Hackett (Appellate Counsel) from the South Carolina Commission on Indigent Defense-Office of Appellate Defense perfected the appeal by raising the following:

> (I) The trial court judge erred when he did not grant appellant's motion for a directed verdict for criminal sexual conduct, 3rd degree because the language in the body of the indictment indicated that the state was proceeding under a theory that appellant "forcibly" penetrated the accuser which negated the aggravated component of the CSC 3rd statute which also proscribes sexual conduct against persons who are "mentally incapacitated."; and
>
> (II) The trial court judge erred in not granting appellant's motion for a directed verdict because the accuser was not mentally defective or incapacitated as defined under S.C. Code Ann. § 16-3-651(e) or (f).

Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. State v. Leslie Twyman, Op. No. 2013-UP-325 (S.C. Ct. App. filed July 17, 2013). The Remittitur was returned to the circuit court on August 9, 2013.

Applicant filed a timely Notice of Appeal. The Appeal was perfected by Appellate Defenders Elizabeth Franklin-Best and Susan Hackett. Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Twyman, No. 2013-UP-325 (S.C. Ct. App. July 17, 2013). The Remittitur was sent on August 9, 2013.

Applicant's Initial Post-Conviction Relief Action: **2014-CP-15-00127**

Applicant filed his first application for post-conviction relief on February 11, 2014. In that application, Applicant alleged he was being held in custody unlawfully based on:

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

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

As requested relief, Applicant stated he was seeking a vacation of his conviction and sentences and/or a new trial and/or resentencing.

The State made its return on August 20, 2014, requesting that an evidentiary hearing be held. An evidentiary hearing was held on October 29, 2014, before the Honorable Edgar W. Dickson, circuit court judge. Applicant was represented by Tristan Shaffer, Esquire. Trial Counsel and Appellate Counsel Hackett both testified at the evidentiary hearing, as did Applicant. Following the evidentiary hearing, Judge Dickson denied and dismissed the application with prejudice by filed order on December 21, 2015. Applicant did not file an appeal.

***Applicant's Second Post-Conviction Relief Action:* 2019-CP-15-00484**

Applicant filed his second application for post-conviction relief on June 24, 2019. In that application, Applicant alleged he was entitled to belated appellate review of his initial post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). He also stated he was entitled to raise any issues not adequately addressed in the order denying his first PCR and that his prior PCR counsel failed to file any necessary motions pursuant to Rule 59(e), SCRCP. Applicant attached several exhibits to his post-conviction relief application, including unfiled *pro se* motion to alter or amend the order denying his first application, correspondence he sent prior PCR counsel Shaffer, an affidavit from prior PCR counsel Shaffer acknowledging that Shaffer failed to file any post-trial motions or appeals on Applicant's behalf, a letter Applicant sent the South Carolina Supreme Court, and the response from the Court.

The State made its Return and Partial Motion to Dismiss on July 1, 2020. An evidentiary hearing was convened on July 20, 2022, at the Beaufort County Courthouse before the Honorable Kristi F. Curtis, circuit court judge. Applicant was present at the hearing and was represented by

James F. Falk, Esquire. Assistant Attorney General Lauren Mims of the South Carolina Attorney General's Office represented the State. Applicant testified on his own behalf, and called Applicant's former PCR counsel, Tristan M. Shaffer, Esquire. On July 25, 2024, Judge Curis granted Applicant relief pursuant to Austin v. State and denied all other allegations.

Applicant filed a timely Notice of Appeal. Jordan M. Wayburn from the South Carolina Commission on Indigent Defense-Office of Appellate Defense filed a petition for writ of certiorari pursuant to Austin v. State raising the following:

> (I) Whether the PCR court correctly found petitioner was entitled to a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), where defense counsel candidly admitted petitioner wanted him to file an appeal, he neglected to file that appeal, and the state conceded petitioner was entitled to Austin relief
>
> (II) Whether this Court should remand petitioner's case to the PCR court where the circuit court determined it did not have the authority to order the remand where former PCR counsel admitted his deficiency in failing to a Rule 59(e) motion to reconsider even though the PCR order failed to make specific findings of fact and conclusions of law in accordance with S.C. Code Ann. § 17-27-80 since a remand is proper in these circumstances pursuant to Fishburne v. State, 427 S.C. 505,515,832 S.E.2d 584,589 (2019).

The State filed its return on August 6, 2025. On November 19, 2025, the South Carolina Supreme Court issued a filed order vacating this Court's December 21, 2015, order and remanding the matter back to this Court to issue an order that complies with § 17-27-80 of the South Carolina Code (2014) and Rule 52(a), SCRCP.

SUMMARY OF FACTS ADDUCED AT TRIAL

Twyman was staying at Jessie Mae Gooding's residence. He lured his eighteen-year-old victim (Victim) into the residence under false pretenses and proceeded to rape her. Victim has an I.Q. of 55 and is emotionally developed at the equivalent of a six or seven-year-old. (Trial Tr. p. 142; 144).

Jessie Mae Gooding was the State's first witness. Her involvement in her church's outreach program led her to let Twyman, and sometimes his wife, stay with her after he lost his home. Gooding's son Conrad is a disabled, bedridden veteran. Victim lived down the street. Sometimes, Victim would come to the house and sit with Conrad. However, Gooding supervises her and brings Victim back and forth from the house when Victim sits with Conrad. Gooding would ask Victim's mother first before asking Victim over to the house. (Trial Tr. pp. 63–66).

On August 21, 2010, Gooding was away while Twyman was home with Conrad. Twyman called Gooding on the cell phone and said a friend was picking him up at the house, and he would have Victim sit with Conrad. Gooding gave it some thought, then called back because Twyman had told him the night before that he had no friends. Victim answered the phone. Victim said Twyman was outside. Later, Victim's mother called Gooding, and consequently, Gooding called Twyman and said an accusation was made against him. Twyman denied the accusation. Gooding went to Victim's house, where police were already interviewing Victim. Victim was upset and said she was feeling pain. (Trial Tr. pp. 67–73).

Victim's stepfather (Stepfather) testified that he was outside in the yard when Victim came running to the house and said, "Mamma, Mamma, something happened to me down the street, this man attacked me." (Trial Tr. p. 88). Victim's Mother (Mother) testified Victim came home disturbed and too upset to speak clearly; it took her ten minutes to calm down. Stepfather called 911. Mother took Victim to the bathroom and saw white semen in her underwear. (Trial Tr. pp. 99–104).

The forensic DNA analyst was able to determine there was semen in the underwear, but because there was no sperm, she was unable to complete a DNA analysis. (Trial Tr. pp. 171–173).

The sexual assault examination revealed extensive swelling and redness in the vaginal and anal areas. Specifically, the findings were redness and swelling in the labia majora, perineum, and labia minora, with swelling in the vestibule and redness in the posterior fourchette. There was swelling and redness in the vagina in general. There was redness and bleeding in the cervix. (Trial Tr. pp. 248–249). Maria Flynn, an RN, testified that the injuries were consistent with a vaginal assault and blunt force trauma on the cervix. (Trial Tr. pp. 261–262).

Mother testified that Victim is not allowed to leave the house without permission, which she did that day. (Trial Tr. pp. 108–109). Mother explained, "She has to realize she can't do what she want to do because she 18." (Trial Tr. p. 112).

Officer Brandon Craven responded to the 911 call. He testified he never met Victim before, but he quickly determined that she not only had a speech impediment, but that she was mentally handicapped as well. Victim was upset and shocked. (Trial Tr. pp. 113–116). Detective Gathers, who also came to the house, testified that Victim was upset the entire time he was there, which was about two hours. (Trial Tr. pp. 121–122).

Patty Lohr is a language pathologist who has worked with Victim for four years. Victim has verbal apraxia. (Trial Tr. pp. 130–131). On cross-examination, Lohr was asked about Victim's cognitive functioning, to which she responded: "Jessica is more on a child-like level. Academically, her levels are lower. But as far as common sense type things, she's right on the money." (Trial Tr. p. 134).

Carol Marks is Victim's special education teacher and testified that Victim's overall I.Q. is 55. She is mildly mentally disabled. Her reading is at a third-grade level, her math at a second-grade level. Marks was asked about an equivalent age for Victim's emotional needs, and she

responded that Victim's emotional needs were equivalent to a six or seven-year-old. (Trial Tr. pp. 142–144). Marks further testified as follows:

> Q: Psychological. Or her ability to experience the world around her and comprehend the world around them. How they're - specifically, what they do today, how is it going to affect them tomorrow? Is she able to grasp, the decisions that she makes today, what bearing that's going to have tomorrow?
> A: Somewhat. I ... wouldn't say it would be like an adult, like her age level, an 18 year old, no, absolutely not but the basic age level of a six or seven year old, they know if they break the TV, that they're going to be in trouble for a couple days. She has that ability. But long term, I would say no. She's not able to do that.
> Q: Is she able to comprehend the effect on herself and others of her own action, to the point of a normal functioning person.
> A: No.
> Q: Can you be specific about that?
> A: Just the fact that, like I said, she's a six or seven year old in her mind. So she's not - she is looking out for herself, just like any six year old will do. They're - they're in their own time frame, their own kind of world.
> Q: So she's not, to a certain degree, able to appraise the nature of her actions?
> A: To a certain degree.

(Trial Tr. pp. 144–145). Marks testified that she believed Victim would always need someone to care for her. (Trial Tr. p. 146). Marks also testified that since August 2010, Victim has retreated into herself. (Trial Tr. p. 149).

Elizabeth Schein-Pearson testified that Victim qualifies for special services at her school with a primary disability of mental disability. Victim had an I.Q. of 56 on December 8, 2010. Pearson testified that Victim does not think fast on her feet. Pearson opined Victim will always need someone to assist her in understanding her world. (Trial Tr. pp. 156–157). On cross-examination, Pearson testified that often times she does not appreciate the outcome of her actions. Pearson also testified, when questioned about whether Victim knew right from wrong, that Victim can appreciate the parameters of what is expected of her: "[b]ut if she's to infer that something she has not experienced before or no one's told her about before, she's deferred the outcome of that. She's not going to be able to." (Trial Tr. p. 160).

Victim testified that she was at home watching television when Twyman knocked on the door and asked her to watch Ms. Gooding's son. She went to Gooding's house and was watching a cartoon. Twyman said he wanted her to be a model. Then he unzipped Victim's pants, took a picture of her privates with a cell phone. She went into the bathroom. When she came out, Twyman put his penis in her mouth and put his penis in her butt two times. Then he put his penis in her private part. Twyman threatened Victim by telling her she could go to jail if she told what happened. Victim ran out the back door after Twyman blocked her from going out the front door. She ran home and told her mother what happened. (Trial Tr. pp. 187–200).

Twyman testified on his own behalf. He testified he was staying with Gooding because he and his wife had a bad drug habit. The wife went to jail because they had a domestic violence incident, and they lost their apartment. Twyman confirmed that he called Gooding to let her know he was going to have Victim watch her son. In his version of events, when he went to ask Victim to sit with Conrad, Stepfather answered the door. Victim's sister walked Victim halfway to Gooding's house, and Twyman took her the rest of the way. According to Twyman, while they both smoked, they had a conversation about school, Victim said she was going to college. Twyman testified that Victim complimented Twyman on a suit he had worn previously. Twyman claimed Victim asked Twyman about his wife and their relationship. Twyman testified, "We was just talking cool, regular and stuff." (Trial Tr. pp. 282–283). Twyman also testified that Victim said she had intercourse with her stepfather. (Trial Tr. p. 284).

CURRENT ACTION BEFORE THIS COURT

This Court held a status conference on this matter on December 18, 2025. Jordan M. Wayburn, Esquire, represented Applicant. Senior Assistant Deputy Attorney General D. Russell

Barlow, II, represented Respondent. By agreement of the parties, the following issues were raised to this Court at the initial post-conviction relief evidentiary hearing:

1) Ineffective Assistance of Trial Counsel
   a) Failure to object to the Doyle issue.
   b) For not making that directed verdict argument, if it was not preserved.
   c) ~~Failure to impeach the victim through the use of the DVD statement.~~[1]
   d) Failure to move to have the solicitor elect between CSC 1st and CSC 3rd.
   e) Failure to object to the mother's statements about seeing semen.
   f) ~~Failure to argue the victim might have been lying because she did not make eye contact, as opposed to state's theory she was ashamed.~~[2]
   g) For advising Applicant not to accept the plea offer because "the CSC first would likely get thrown out later on."
2) Ineffective Assistance of Appellate Counsel
   a) For not arguing directed verdict was proper on the CSC 1st charge because there was no evidence the victim "submitted" in connection to the kidnapping under subsection (b) of the CSC 1st statute.

Additionally, during the status conference, this Court requested that the parties submit briefs addressing the issues raised at the initial PCR evidentiary hearing.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[3] (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

[1] Applicant, through counsel, withdrew this allegation.
[2] Applicant, through counsel, withdrew this allegation.
[3] S.C. Code Ann. §§ 17-27-10 to -160.

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).

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), SCRCP; 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 that "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

This Court has had the opportunity to review the parties' briefs, the records before it, including the Colleton County Clerk of Court records of the underlying conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the records from this PCR action.

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), SCRCP (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 (Ct. 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 fact 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 his 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).

ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Allegation 1a: Ineffective Assistance of Trial Counsel for failure to object to the Doyle issue.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to object to the Doyle[4] issue. This Court finds this allegation is without merit.

Under the United States and South Carolina Constitutions, criminal defendants have a constitutional right not to be compelled to incriminate themselves during trial. See U.S. Const. amend. V (prohibiting a criminal defendant from being "compelled in any criminal case to be a witness against himself[.]"); S.C. Const. art. I, § 12 ("[N]or shall any person be compelled in any criminal case to be a witness against himself."). Pursuant to that right, both comments by the prosecution on a defendant's silence and instructions by the trial judge indicating a defendant's silence constitutes evidence of guilt are prohibited. Griffin v. California, 380 U.S. 609, 615 (1965); see Doyle v. Ohio, 426 U.S. 610, 618 (1976) ("[W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.").

"In particular, the State may neither comment upon nor present evidence at trial of a defendant's decision to exercise his right to remain silent[.]" Edmond v. State, 341 S.C. 340, 346,

[4] Doyle v. Ohio, 426 U.S. 610, 618 (1976).

534 S.E.2d 682, 685 (2000); see McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000) ("Specifically, the solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense."); State v. Weaver, 361 S.C. 73, 88-89, 602 S.E.2d 786, 794 (Ct. App. 2004) ("As a corollary of this right, a prosecutorial comment, whether direct or indirect, upon a defendant's failure to testify at trial is constitutionally impermissible."). "The obvious purpose [of that prohibition] is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions." Edmond, 341 S.C. at 346, 534 S.E.2d at 685; see Wainwright v. Greenfield, 474 U.S. 284, 292 (1986) ("The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony.").

However, the mere mention of a defendant's decision to exercise his right to remain silent during trial does not automatically constitute reversible error. See State v. Truesdale, 285 S.C. 13, 17, 328 S.E.2d 53, 56 (1984) ("When such a violation occurs, the question remains, however, whether it is cause for reversal or is harmless error beyond a reasonable doubt."), rev'd on other grounds by Truesdale v. Aiken, 480 U.S. 527 (1989). Instead, such testimony requires reversal only when its admission results in prejudice to the defendant. Gill v. State, 346 S.C. 209, 221, 552 S.E.2d 26, 33 (2001); see State v. Johnson, 306 S.C. 119, 129, 410 S.E.2d 547, 553 (1991) (declining to reverse Johnson's conviction as a result of the introduction of testimony establishing Johnson invoked his right to counsel after determining the admission of that testimony was not prejudicial to Johnson's case). Significantly, the burden rests upon the defendant to establish the admission of the testimony deprived him of a fair trial. Gill, 346 S.C. at 221, 552 S.E.2d at 33; see also Weaver, 361 S.C. at 89, 602 S.E.2d at 794 ("[A]lthough it is improper for the solicitor to

indirectly comment on a defendant's failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one.").

In determining whether the defendant was prejudiced by the admission of testimony concerning his post-arrest silence, any error resulting from the admission of that testimony will not result in reversal if a review of the entire record establishes the error was harmless beyond a reasonable doubt. State v. Arther, 290 S.C. 291, 296, 350 S.E.2d 187, 190 (1986); see United States v. Hastings, 461 U.S. 499, 509 (1983) ("[T]he [United States Supreme] Court has consistently made clear it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]"). In reviewing the record to determine whether an error was harmless, the following factors should be considered: (1) whether the reference to defendant's right to remain silent was a single reference; (2) whether the reference was repeated or alluded to at another point during trial; (3) whether the prosecutor tied the defendant's exercise of his right directly to his exculpatory story; (4) whether the exculpatory story was totally implausible; and (5) whether the evidence of guilt was overwhelming. Edmond, 341 S.C. at 348, 534 S.E.2d at 686-687; see Truesdale, 285 S.C. at 18-19, 328 S.E.2d at 56 (identifying the factors relied upon in the opinion of the Fifth Circuit Court of Appeals in Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977), as relevant factors to be considered in determining if a Doyle violation is harmless).

However, none of those factors is alone dispositive, and the specific circumstances of each case should be considered individually on a case-by-case basis to determine whether the error was harmless beyond a reasonable doubt. Truesdale, 285 S.C. at 19, 328 S.E.2d at 56; see Alderman v. Austin, 695 F.2d 124, 126, n. 7 (5th Cir. 1983) (instructing that the factors for determining whether a Doyle violation is harmless identified in Chapman v. United States, 547 F.2d 1240 (5th

Cir. 1977), are not to be treated as rigid rules or applied strictly to all cases); see also United States v. Shaw, 701 F.2d 367, 382 (5th Cir. 1983) ("Subsequent cases have illustrated, however, that factual situations are not always amenable to description with the rigid Chapman types. Consequently, we have held Chapman inapplicable and the error to be harmless even though the defendant's story is 'not totally implausible,' but the evidence of guilt is 'substantial.' " (citations omitted)); see, e.g., State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding [of harmlessness]; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.").

Trial

At trial, the following colloquy occurred during the direct examination of Detective Jodi Taylor:

Q: And also in this case, did you have an opportunity to interview Mr. Twyman?
A: Yes, I did.
Q: Did you Mirandize him?
A: I did.
Q: Did he fill out a Miranda form?
A: He did fill out the Miranda form, yes.
Q: Would he make any statement to you?
A: He would not -- he refused to sign and waive his rights and make a statement.

(Trial Tr. p. 216).

2014 PCR Evidentiary Hearing

On direct examination, the following colloquy occurred with Applicant:

Q: Now, at some point in your transcript, the -- or at some point during your trial, the Solicitor had asked one of the officers, or one of the detectives, if you ever made any statement to them. Do you recall that?
A: Sir, yes, sir.
Q: And they said, no, you had not. Is that correct?

A: Sir, yes, sir.
Q: Do you think your attorney should have objected to that
A: Sir --
Q: -- as a comment on your right to remain silent?
A: Sir, yes, sir.

(2014 PCR Tr. pp. 54–55).

On redirect examination of Trial Counsel, he testified that he did not think the line of questioning was objectionable. (2014 PCR Tr. p. 62).

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 additionally finds that 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 the record does not support Applicant's assertion that this was a Doyle violation. The testimony regarding Applicant's refusal to waive Miranda rights was a brief, factual statement about the investigation's chronology rather than an improper comment on his right to remain silent.

Assuming, *arguendo*, this block of testimony was a Doyle violation, we turn to the factors outlined in Edmond and Truesdale, *supra.* First, the reference to the Applicant's right to remain silent was singular. Second, this reference was neither reiterated nor alluded to at any other juncture during the trial. Third, the Solicitor did not connect the Applicant's right to remain silent with his testimony. Importantly, this allegation arises from approximately 9 lines of testimony on a single page from a single witness throughout the trial. The Solicitor did not reference the Applicant's invocation of his Constitutional rights in his closing statement. The brief mention of the Applicant's exercise of his Constitutional rights constitutes, at most, a harmless error, as it was

mentioned only once and not referred to again during the trial. Furthermore, the Solicitor did not attempt to leverage the invocation of the Applicant's rights against him, nor did he utilize this testimony in his closing remarks. Consequently, the Applicant has not demonstrated any deficiency on the part of counsel, nor has he shown that he was prejudiced by any purported deficiency.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonable, 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 is **DENIED** and **DISMISSED.**

Allegation 1b: Ineffective Assistance of Trial Counsel for failure to make and preserve the directed verdict argument.

Applicant alleged Trial Counsel's representation was constitutionally ineffective for not making that directed verdict argument, if it was not preserved. This Court finds this allegation is 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).

Findings

Applicant contends that Trial Counsel failed to appropriately make and preserve the directed verdict argument on both charges for CSC-1st and 3rd. This matter is easily resolved from the record before this Court, where, before sentencing, Trial Counsel renewed the motion for a directed verdict and moved for a new trial. The trial court ruled as follows:

> I believe there was clearly evidence introduced during the trial of this case that supported both of those offenses. And for that reason, I respectfully deny your motion for directed verdict as to Count Two at the close of the case and at the close of all the evidence, and I decline now to grant a new trial, or substitute this Court's judgment for that of the jury, when I think the jury clearly had sufficient evidence from which to convict your client of both counts.

(Trial Tr. p. 352). The trial court's ruling precludes any finding of prejudice. It is clear from the record that even if Trial Counsel had properly raised the motion for a directed verdict on both counts, it would not have been successful, and Applicant cannot show any prejudice from the

alleged deficiency. See State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 477–78 (2004) ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."). Here, the record provides that evidence was presented to the trial court supporting the charges. Any motion for a directed verdict would have been denied. See State v. Ham, 268 S.C. 340, 342, 233 S.E.2d 698, 698 (1977) ("Where the determination of guilt is dependent upon the credibility of the witnesses, a motion for a directed verdict is properly refused.").

This Court addresses the preservation argument at **Allegation 2a**, *infra*.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonable, 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 is **DENIED** and **DISMISSED.**

Allegation 1d: **Ineffective Assistance of Trial Counsel for failure to move to have the Solicitor elect between CSC-1st and CSC-3rd.**

Applicant alleged that Trial Counsel's representation was constitutionally ineffective for failing to move to have the solicitor elect between CSC-1st and CSC-3rd. This Court finds this allegation is without merit.

2014 PCR Evidentiary Hearing

Trial Counsel testified that this issue was raised with the judge, that they had researched the matter, and that case law indicated that the solicitor could proceed on both charges because of

differences in the statutes. (2014 PCR Tr. 45). Trial Counsel further testified he thought the State presented sufficient evidence to support the charges Applicant was facing. (2014 PCR Tr. 44, 45).

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.* Applicant did not provide any basis that Trial Counsel could have moved to have the Solicitor only pursue one charge. See Ball v. United States, 470 U.S. 856, 859, 105 S. Ct. 1668, 1670, 84 L. Ed. 2d 740 (1985) (finding the Supreme Court has long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case).

The South Carolina Supreme Court held that the Blockburger same-elements test is the only test for determining a double jeopardy violation in both multiple-punishment and successive-prosecution cases. Stevenson v. State, 335 S.C. 193, 198, 516 S.E.2d 434, 437 (1999). The court emphasized that the focus should be on the elements of the offenses, not on their application to specific facts of the case. Id. Applying this framework to criminal sexual conduct degrees, the offenses contain distinct elements. CSC-1st requires proof of aggravating circumstances such as aggravated force, concurrent victimization, or drugging. S.C. Code Ann. § 16-3-652. CSC-3rd contains alternative elements, including knowledge "that the victim is mentally defective, mentally incapacitated, or physically helpless, and aggravated force or aggravated coercion was not used to accomplish sexual battery." S.C. Code Ann. § 16-3-654(1)(b). This distinct element structure suggests the offenses would satisfy the Blockburger test for separate convictions. See State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000) (overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (in affirming vacation of defendant's conviction for third

degree CSC pursuant to § 16–3–654(1)(b) where defendant was indicted only for first degree CSC, court stated former was not a lesser included offense of latter because it contained two additional elements not included in the latter)).

Additionally, the record before this Court shows that Trial Counsel presented the argument to the trial court, which rejected it, relying on McFadden, *supra*. (Trial Tr. pp. 349–352). Any motion by Trial Counsel on this matter would not have been successful. Furthermore, this Court finds that CSC-1st and CSC-3rd are statutorily different as CSC-3rd contains different elements and they are legally distinct offenses that can support separate convictions.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonable, 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 is **DENIED** and **DISMISSED.**

Allegation 1e: **Ineffective Assistance of Trial Counsel for failure to object to mother's statements about seeing semen.**

Applicant alleged that Trial Counsel's representation was constitutionally ineffective for failing to object to the mother's statement involving seeing what she thought to be semen.

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[] 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.").

2014 PCR Evidentiary Hearing

Trial Counsel testified that it would have been a little late to object to the mother's comment about the semen, assuming no DNA match was able to be made, because the mother testified prior to the DNA expert. (PCR Tr. 42). Further, Trial Counsel testified that he did not think he had any basis to object to it. (PCR Tr. 46). Applicant agreed that the State's DNA expert testified that the victim's vaginal swab showed semen.

Findings

In a post-conviction relief action, a Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813, 814 (1985). Applicant failed to set forth a valid, legal objection that Trial Counsel should have made. Trial Counsel articulated that he did not object because he did not think he had any basis to object to it. Furthermore, Trial Counsel testified that the DNA expert testified *after* the mother, and it would have been a "tad late" to then object. Applicant merely alleged that Trial Counsel should have objected without setting forth on *what* grounds. Notably, Forensic DNA analyst Amanda Webb testified at trial that she found semen on the vaginal swabs collected in the sexual assault kit of the Victim. (Trial Tr. pp. 163–173).

Nevertheless, even if this Court were to find this testimony was objectionable, this Court cannot find that, but for this question, there is a reasonable probability the outcome of the trial would have been different if the DNA expert testified to finding semen. See Rutland v. State, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial."). Furthermore, this Court finds that any objection would not have been meritorious. 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).

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 1g: **Ineffective Assistance of Trial Counsel for misadvising Applicant not to accept the plea offer because "the CSC first would likely get thrown out later on."**

Applicant alleged that Trial Counsel's representation was ineffective for advising Applicant not to accept the plea offer because "the CSC first would likely get thrown out later on." This Court finds this allegation is without merit.

A defendant has the right to effective assistance of counsel during the plea-bargaining process. Davie v. State, 381 S.C. 601, 607, 675 S.E.2d 416, 419 (2009) (citing Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996)); Lafler v. Cooper, 566 U.S. 156, 162 (2012) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). Misadvising a defendant such that he rejects a plea offer and instead proceeds to trial may constitute deficient performance. See. e.g. Lafler, 566 U.S. at 161 (counsel misadvised defendant "that the prosecution would be unable to establish his intent to murder [the victim] because she had been shot below the waist."); Lee v. United States, 582 U.S. 357 (2017) (counsel misadvised a noncitizen defendant that he would not be deported as a consequence of his guilty plea). To show prejudice from the improvident rejection of a plea offer

based upon the misadvice of counsel, an applicant must show (1) that but for the ineffective advice there is a reasonable probability the plea offer would have been presented to the court, (2) that the court would have accepted its terms, and (3) that the conviction, sentence, or both would have been less severe under the terms of the plea than was in fact imposed. Lafler, 566 U.S. at 164.

2014 PCR Evidentiary Hearing

On direct examination, Applicant testified that he rejected the plea offer because Trial Counsel told him that if he took it to trial and lost, the higher court would throw it out. (2014 PCR Tr. p. 49).

Trial Counsel testified that he informed Applicant of the plea offer, and Applicant stated that he did not commit the crime and would not accept the offer. (2014 PCR Tr. p. 39). Trial Counsel testified that he reviewed what Applicant was charged with and the maximum sentence Applicant could receive. (2014 PCR Tr. p. 39). Trial Counsel testified that he told Applicant that DNA was an element and that it was evidence that would help him, not that they would throw out his conviction. (2014 PCR Tr. p. 59).

Findings

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's testimony persuasive on this issue and Applicant's testimony not persuasive. This Court is convinced that Trial Counsel did not tell Applicant his charges would be thrown out on appeal if he lost at trial. Applicant was fully apprised of the plea offer and chose to reject it and proceed to 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.**

Ineffective Assistance of Appellate Counsel

Allegation 2a: **Ineffective Assistance of Appellate Counsel for not arguing that a directed verdict was proper on the CSC 1st charge because there was no evidence the victim "submitted" in connection to the kidnapping under subsection (b) of the CSC 1st statute.**

Applicant alleged Appellate Counsel's representation was constitutionally ineffective for not arguing a directed verdict was proper on the CSC 1st charge because there was no evidence the victim "submitted" in connection to the kidnapping under subsection (b) of the CSC 1st statute. This Court finds this allegation to be without merit.

If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2dat 826; see also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error). Although ineffective assistance of appellate counsel claims for failure to raise a particular issue on direct appeal can be successful, the United States Supreme Court has reiterated that it is "difficult to demonstrate that counsel was incompetent." State v. Robbins, 528 U.S. 259, 288 (2000). While appellate counsel is required to provide effective assistance of counsel,

"appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy ..." Jones, 463 U.S. at 754. Additionally, our South Carolina Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Smith, 528 U.S. at 288 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Findings

As an initial matter, the burden of proof lies with the Applicant. See Butler, *supra*. Appellate Counsel testified on this matter, yet her statements were largely speculative. Crucially, she did not assert that she would have chosen to raise this issue or that doing so would have likely resulted in a favorable outcome. Instead, Appellate Counsel merely speculated about the issue's validity, indicating she "would have wanted the opportunity to conduct research and determine whether to present that issue." It is important to underscore that Appellate Counsel who testified at the PCR hearing was not the same defender who filed the initial briefing on appeal. Additionally, the appellate defender who wrote the initial brief was not called to testify at the evidentiary hearing.

Nevertheless, the plain language of CSC-3rd statute at that time was read into the record by Appellate Counsel as follows:

> The CSC first charge that the indictment specifically was under Subpart (b), which was the victim submits to sexual battery by the act, or under circumstances where the victim is also the victim of forcible confinement, kidnap[p]ing, extortion, et cetera. So, it's Subpart (b), dealing with kidnap[p]ing, generally.

(2014 PCR Tr. p. 22). Appellate Counsel testified that the act of submitting and kidnapping would have had to occur simultaneously. (2014 PCR Tr. pp. 22–24). This Court disagrees. Contrary to Appellate Counsel's interpretation of the statute, there is no requirement that the submission and kidnapping occur simultaneously; rather, the submission and kidnapping can occur concurrently. Appellate Counsel's interpretation was simply splitting hairs unnecessarily. Applicant deliberately lured a handicapped girl to his home with the intention of committing rape. Therefore, the act of kidnapping was established at the moment he inveigled her to come over, and it was during this kidnapping that he raped her. While this Court is not lost on Appellate Counsel's desire to explore this issue further, such an assertion falls short of demonstrating any deficiency or prejudice on appellate counsel's part.

Ultimately, this Court must decide whether, had the issue been raised, the Applicant would have succeeded on appeal. See State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) ("When reviewing a denial of a directed verdict, [an appellate court] views the evidence and all reasonable inferences in the light most favorable to the [S]tate."). As previously stated, the evidence presented at trial was that Applicant inveigled the victim to his house and then raped her. There was also evidence that after the rape, she attempted to leave, and he blocked the exit. See State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984) (stating if the State presents any evidence which reasonably tends to prove the defendant's guilt, or from which the defendant's guilt can be fairly and logically deduced, the case must go to the jury). Any notion that Applicant would have prevailed on this issue on appeal is wildly speculative, contrary to logical sense, and goes against the plain reading of the statute.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Appellate Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

|CONCLUSION & SIGNATURE 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 is **DENIED and DISMISSED WITH PREJUDICE.**

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. 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. Attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The Application for Post–Conviction Relief is denied and dismissed with prejudice; and

2. Applicant shall be remanded to and remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 23rd **day of** February **, 2026.**

EDGAR W. DICKSON
Presiding Judge
Ninth Judicial Circuit

Orangeburg, South Carolina

Colleton County
Fourteenth Judicial Circuit
Public Index

Colleton County Home Page South Carolina Judicial Department Home Page SC.GOV Home Page

Switch View

Leslie Twyman VS State Of South Carolina

Case Number:	2014CP1500127	**Court Agency:**	Common Pleas	**Filed Date:**	02/11/2014
Case Type:	Common Pleas	**Case Sub Type:**	Post Convict Rel 500	**File Type:**	PCR
Status:	Dismissed	**Assigned Judge:**	Clerk Of Court C P, G S, And Family Court		
Disposition:	Dismissed by Court - not Rule 40J	**Disposition Date:**	12/21/2015	**Disposition Judge:**	Dickson, Edgar W
Original Source Doc:		**Original Case #:**			
Judgment Number:		**Court Roster:**			

Case Parties Judgments Tax Map Information Associated Cases **Actions** Financials

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
State Of South Carolina	Filing/Order of Dismissal with Prejudice	Filing		02/25/2026-11:58		
Twyman, Leslie	Motion to Amend PCR	Filing		12/22/2025-11:17		
Twyman, Leslie	Letter/Letter (SENTCOPY OF DISMISSAL TO TWYMAN)	Filing		05/07/2019-12:50		
Twyman, Leslie	Order/Dismissal	Order		12/21/2015-10:35		
State Of South Carolina	Return	Filing		08/26/2014-15:25	12/21/2015-15:25	
Twyman, Leslie	Email to A Henley/PCR on 03/05/2014	Filing		03/05/2014-16:37	12/21/2015-16:37	
Twyman, Leslie	Post Conviction Relief	Filing		02/11/2014-15:23	12/21/2015-15:23	