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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Case No. 2021-CP-32-2343

William H. Heath, #376266, ... Petitioner,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant, William H. Heath, appeals the order of the Honorable Perry H. Gravely, filed on or about July 24, 2026.

August 6, 2026

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STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

William H. Heath, SCDC #376266,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT

Case No.: 2021-CP-32-02343

ORDER OF DISMISSAL

LISA COMER
CLERK OF COURT
LEXINGTON, SC

2026 JUL 24 AM 11: 14

FILED

This matter comes before this Court by a *pro se* application for post-conviction relief filed on July 15, 2021. On September 2, 2021, the Clerk of Court for Lexington County appointed Ashley A. McMahan to represent the Applicant. On August 16, 2023, the Respondent filed its Return and Motion to Make a More Definite Statement. On December 11, 2023, the Applicant through counsel served an Amended Post-Conviction Relief Application consisting of 188 pages of *pro se* handwritten allegations.

An evidentiary hearing was held December 18-19, 2023. Testimony was received from the Applicant and Colin Spangler, one of his trial counsels. The Applicant was present and represented by Ashley A. McMahan. The Respondent was represented by Deputy Attorney General Donald J. Zelenka.

At the conclusion of the hearing, this Court requested each party to submit a memorandum of law as to why relief should be granted or not granted. This Court after review of each party's submission requested Respondent to submit a proposed order of dismissal. After submission and review of the proposed order, the Order by the Court is as follows.

I. Procedural History

The Applicant is presently confined within the South Carolina Department of Corrections. Applicant was indicted at the August 2016 term of the grand jury of Lexington County for criminal sexual conduct, first degree (2016-GS-32-02100); criminal sexual conduct, second degree (2016-GS-32-02097A); and two counts of criminal sexual conduct, third degree (2016-GS-32-02098 - 02097). Wayne Floyd,[1] Esquire, and Colin Spangler, Esquire, represented Applicant at his trial. The case was prosecuted by Deputy Solicitor Suzanne Mayes and Assistant Solicitor Kate Usry.

The Applicant proceeded to a trial by jury on May 7-11, 2018, in Lexington County before the Honorable R. Knox McMahon. At the conclusion of trial, Applicant was found guilty as indicted on all charges. He was sentenced to ten years for each count of criminal sexual conduct in the third degree, 20 years for criminal sexual conduct in the second degree, and life for criminal sexual conduct in the first degree. The sentences to be served consecutively.

Direct Appeal

Applicant then filed a timely notice of appeal on May 18, 2018. He was represented on appeal by Appellate Defender David Alexander of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who raised the following issues on appeal on Applicant's behalf:

> I. Whether, under Rule 403, SCRE, where appellant was accused of sexually abusing his daughter, the trial court erred in admitting into evidence and allowing the State to display highly inflammatory images of pornography found on Appellant's iPad with watermarks from websites called "IncestTV.com" and "daughterdestruction.com" where the unfair prejudice grossly outweighed the probative value?

[1] **This Court takes notice that the Applicant's primary trial counsel, H. Wayne Floyd, died on August 24, 2021.**

II. Whether the trial court erred in admitting as a hearsay exception the complainant's responses to questions from police officers after the alleged assault?

III. Where the criminal sexual conduct with a minor in the first-degree statute was amended to increase the maximum penalty from thirty years' imprisonment to life imprisonment during the middle of the date range alleged in the indictment, did the trial court err in sentencing Appellant to life imprisonment under the amended statute?

Following submission of the case upon the briefs, the Court of Appeals affirmed in part, but reversed the trial court's decision as to sentencing, and remanded for re-sentencing. *See State v. Heath*, Op. No. 2020-UP-018 (S.C. Ct. App. filed January 29, 2020) ("Without a factual finding as to when the abuse occurred, the trial court should have sentenced Heath within the pre-amendment maximum of thirty years' imprisonment").

Resentencing Hearing

Subsequent to the filing of this application, Applicant's re-sentencing hearing was held on September 29, 2022, before the Honorable Walton J. McLeod, IV. Deputy Solicitor Suzanne Mayes represented the State at the hearing, and Sarah Mauldin, Esquire, represented Applicant. The resentencing was based upon the remand for resentencing on the criminal sexual conduct with a minor in the first degree under the age of 11 years old from the vacated life sentence. At the conclusion of the re-sentencing hearing, Judge McLeod sentenced Applicant to the new maximum of thirty years, to be served *consecutively* to Applicant's other sentences. He has an aggregate 70-year sentence. *September 29, 2022, Tr.*p. 31, l. 15-20.

II. Summary of Facts Giving Rise to the Conviction

Victim, who was twenty (20) years old at the time of trial, testified to years of abuse she received from Applicant, her father. Victim recalled the abuse began when she was in the second grade, approximately seven or eight years old, and lived on Peachland Drive. The incidents involved Applicant: (1) performing oral sex on Victim; (2) rubbing his penis on Victim's vagina; (3) digital manipulation of the interior and exterior of her vagina. She tried to resist these assaults, but Applicant struck her or used other physical force against her. He also threatened further harm to Victim if she disclosed the abuse to anyone. The assault continued over the years at the family's various homes, including their Smith Pond Road residence, where the family moved to when Victim was approximately fourteen or fifteen years' old. Around this time, Applicant escalated the abuse, forcing Victim to perform fellatio and using Victim's hand to stimulate his penis. He would ejaculate inside Victim's mouth, on her body, or on occasion into cloth objects. The abuse continued throughout Victim's high school career and to their third home on Nazareth Road. (Tr.p.331, line 12–Tr.p.343, line 19).

Victim recalled a specific assault which occurred during her senior year around December 1, 2014, at the Smith Pond Road residence. She recalled the event because December 1st is Applicant's birthday. Either on that day or sometime after midnight on the December 2nd, Applicant rubbed his penis on Victim and groped her. During the assault, he had his iPad with him and used it to watch pornographic videos. He had often used the iPad for such purposes throughout Victim's high school career. (Tr.p.362, line 10–Tr.p.364, line 9; Tr.p.389, line 20–Tr.p.390, line 6).

On April 26, 2015, Applicant again assaulted Victim. Again, he used his iPad to watch pornographic videos. At trial, Victim identified State's Exhibit 22 as a still image from the pornographic video Applicant watched during the April 2015 assault. During this particular assault, Applicant removed Victim's clothes and "straddled [her] legs and then . . . rub[bed] his private parts against [hers] from the back." He also "used his fingers" and "his mouth" on Victim from behind her. Before Applicant climaxed, Victim escaped and locked herself in her bedroom. She contacted her aunt and revealed the abuse. The Aunt contacted police who in turn went to Victim's home. Victim gave a statement to police and told them "[a]lmost every single thing" about the history of his abuse. (Tr.p.346, line 22–Tr.p.357, line 13; Tr.p.366, line 21–Tr.p.372, line 19; State's Exhibit 22).

Shauna Galloway Williams, an expert in the area of child sexual abuse assessment and treatment, testified about the commonality of delayed disclosure in child sex abuse cases. She noted that it may take years for children to report abuse and that numerous factors, such as fear, familial relationships with the abuser, and normalization of the behavior can all factor into the delay. On the process of normalization, Williams explained children are often groomed for abusive behavior through the introduction of sexual material, such as magazines, movies, and other materials, including pornography. (Tr.p.397, line 11–Tr.p.422, line 7).

Brigitte DeGuzman, the nurse who performed the sexual assault examination on Victim, noted Victim informed her that her father had licked her anus. DeGuzman collected Victim's clothing, swabbed her body for DNA evidence, and performed pubic hair combings. (Tr.p.434, line 8–Tr.p.456, line 6).

Officer Caleb Black was the first office to arrive at Victim's home on the night of April 26, 2015. He arrived within ten minutes of the police station receiving the call. When he spoke with Victim, "her eyes were red. She was crying. She was obviously upset." When he asked what happened, Victim disclosed Applicant had "made [her] do things that [she] did not want to do," including rubbing his penis on her and that her father had physically forced her to perform oral sex on him." While he waited for other officers to arrive on the scene, Victim cried into her pillow. (Tr.p.497, line 18–Tr.p.499, line 23; Tr.p.504, line 13–507, line 13).

Trial counsel objected to Officer Black's testimony regarding Victim's statements, claiming they were hearsay. The State responded by arguing they were hearsay exceptions based on the exceptions for excited utterances and statements confirming time and place. He noted Victim spoke with Officer Black shortly after a startling event—the sexual assault—and made under the stress of that excitement. Trial counsel countered by arguing the assault occurred "maybe a half hour earlier" and should not be considered an excited utterance based on that length of time. Pointing to prior rulings by the Supreme Court of South Carolina, the State argued an excited utterance can be made hours after an event occurs, provided the utterances arise from the Victim's excited state. Further, evidence from other witnesses as to the complained sexual assault are admissible to corroborate the time and place the assault occurred. After hearing the parties' arguments, the trial judge concluded the statements were admissible in full due to the excited utterance exception, res gestae, and information regarding timing and location of the assault through the time and place exception. (Tr.p.499, line 24–Tr.p.504, line 4).

Similarly, Officer Marlo McCann of the Lexington County Sheriff's Office testified Victim was upset and scared when she found her at the house and that she stated she had been assaulted that night and on multiple occasions previously. Trial counsel moved for a mistrial, arguing Officer McCann exceeded the time and place exception when she testified Victim informed her, she had been assaulted multiple times in the past. In response, the State noted Officer McCann's testimony was proper because she could testify as to the time and place of each assault disclosed to her. Agreeing with the State, the trial judge denied the motion. (Tr.p.508, line 24–Tr.p.517, line 3; Tr.p.598, line 9–Tr.p.602, line 11).

Agent Donna Money of SLED analyzed the DNA recovered from Victim and her clothing. DNA collected from saliva in the interior rear of Victim's underwear contained the mixture of two DNA profiles, with the major contributor of the DNA being Applicant. Additional, a hair collected from Victim's rectal swab matched Applicant's DNA profile. (Tr.p.559, line 18–Tr.p.577, line 10).

Michael Phipps, a Lexington County Sheriff's Deputy, an expert in forensic examinations of digital device, analyzed Applicant's iPad and generated an extraction report using the information and electronic "artifacts" found on it. Deputy Phipps discovered data files related to pornography which were logged on the device on December 2, 2014 (Image A), and April 26, 2015 (Image B). These artifacts were created by hitting the "home" button on the device and it taking a "screenshot" of what the user was viewing at that moment. Officer Phipps admitted he had no way of knowing how long an image was open on the iPad before the home button was hit and a snapshot is created. (Tr.p.584, line 18–Tr.p.597, line 16; State's Exhibits 22, 37, 38).

Trial counsel objected to the admission of Image A, claiming images which were not generated on the alleged offense date were not relevant to the crimes charged. Trial counsel conceded Image B was relevant, but objected to displaying it to the jury, claiming displaying a pornographic image would unfairly prejudice the jury against Applicant. He believed mentioning Deputy Phipps's testimony about the existence of Image B to the jury, was the extent of the admissibility of the information. In response, the State noted both images corresponded to the indicted charges and corroborated Victim's testimony; notably Victim testified the December 1, 2014 assault "went into, potentially, December 2 (2015)" so it felt Image A, similar to Image B, was relevant and admissible. The trial judge ruled the images were probative of Applicant's guilt because they corroborated Victim's testimony. (Tr.p.592, line 20–Tr.p.597, line 23).

He testified Image A had a "watermark" graphic in the bottom corner which read "IncestTV.com." Phipps noted the website hosted videos which primarily contained videos of adults role-playing incest scenarios. State's Exhibits 22, 34, 35, and 36 were artifacts created on August 26, 2015 at 12:25 AM, 9:39 PM, 10:39 PM, and 11:19 PM. Image B (State's Exhibit 22), which was the artifact created at 10:39 PM, contained a watermark reading "daughterdestruction.com." Phipps confirmed this website, similar to IncestTV.com, is pornographic in nature. (Tr.p.603, line 1–Tr.p.626, line 17).

III. ALLEGATIONS RAISED IN THE APPLICATION FOR POST-CONVICTION RELIEF AND AMENDED APPLICATION

In his initial application for post-conviction relief, Applicant set forth the following claims of ineffective assistance of counsel:

1. Ineffective Assistance of Trial Counsel
   i. Failure to Object
      a. "State's witnesses describing websites which were unduly suggestive and attacked Defendant's character."
      b. "Watermarks on photographs with specificity, which were unduly suggestive and attacked Defendant's character."
      c. "Indictment consolidation under Rule 404(b) Common Scheme or Plan, or ask for limiting instructions on evidence under same Rule."
      d. "State's witnesses' testimony that improperly bolstered the victim's credibility."
      e. "Photographs with specificity about the unfair prejudice they imposed."

f. "Solicitor testifying in closing arguments which shifted the burden to the Defendant, who didn't testify."

g. "Solicitor's improper comments in closing arguments which aroused the jurors' passions and prejudices, it so infected the trial which unfairness as to make the resulting conviction a denial of due process."

h. "States witness perjured their self about DNA testing."

i. "Under Excited utterance exception States witness went into detail of Hearsay that would have happened outside of timeframe allowed (over 10 years ago) and trial counsel failed to object."

j. "Trial counsel failed to object when victim perjured herself by testifying that she recognized the underwear when earlier in trial at an in-camera-hearing she stated that she would not be able to identify them (underwear)."

ii. Failure "to subpoena or call credible witnesses for defense even after they were named in jury selection process."

iii. Failure to call "two State's witnesses (Police Officers) to the stand to testify, that were directly involved with the crime scene and investigation but were not called by the State. Their testimony would have brought clarity to Defendant's Fourth Amendment Issue. (Deputy Geitz) (Master Deputy Ashley)."

iv. Counsel failed to question the validity of the DNA report that contained "handwritten" results, while majority of report was computer generated, which could point to possible fabrication of results. Counsel could have questioned whether "handwritten" results would show on computer when report was accessed."

2. Ineffective Assistance of Appellate Counsel

i. "Appellant Counsel did not accurately report facts in brief."

ii. "Appellant Counsel withheld pages of the transcripts from the Court, which showed consolidated indictments and this could have affected their ruling on issues."

iii. "Appellant Counsel refused to exhaust all State remedies on Direct Appeal. Many errors can be seen in the opinion of the Court of Appeals, and should have been addressed in a Rehearing, but Counsel refused."

3. Judicial Error caused by ineffective assistance of counsel.

See PCR Application (question #10 and #11) and attachments.

Amended Application of December 11, 2023.

In the amended application, with the assistance of counsel (001-002) and the *pro se* attachments of 186 pages, (003-188) the Applicant makes the following allegations:

I Ineffective Assistance of Counsels Wayne Floyd and Colin Spangler:

a. Failure to move to have the watermarks and website names redacted pursuant to SCRE 403. While the pictures may be more probative that prejudicial, the names of the websites listed in the watermarks on them were unfairly prejudicial and unnecessary to make the State's point. *See State v. Nelson*, 331 SC 1, 501 SE2d 716 (1998).

b. Counsels failed to object throughout the trial, the result of which had the objections occurred the cumulative effect of these errors would have warranted a new trial. (See **Applicant's handwritten amendments to his PCR application attached and incorporated herein as Attachment A.**) South Carolina Appellate Courts and the 4th Circuit Court of Appeals have recognized cumulative error analysis of trial errors. *See e.g. Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998), *Green v. State*, 351 SC 184, 569 SE2d 318 (2002); State v. Peterson, 287 SC 244, 245, 335 SE2d 800, 801 (1985) (overruled by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), the Supreme Court reversed the death sentences imposed upon Peterson and his co-Defendant, Stubbs, and remanded the cases for a new trial "[d]ue to the collective impact of numerous errors committed by the trial court ... " , see also *Rebutting the "Strong Presumption of Reliability" for Effective Assistance: The Pursuit of Cumulative Analysis for Strickland Claims in South Carolina*, 65 S.C. L. Rev. 685 (2014) (Benjamin Dudek).

i. Other jurisdictions have recognized cumulative errors in reviewing ineffective assistance of counsel, see *Cirincione v. State*, 119 Md. App. 471, 506, 705 A.2d 96, 112- 13 (1998).

In the appointed counsel incorporated 188 page Attachment A of the Amended Application that counsel adopted by reference, is a *pro se* handwritten document consisting of 188 pages which reads as follows:

1. Indictments
2. Counsel-consolidation – Rule 404(b)
3. Jackson v. Denno
4. Rose Heath as a witness – Confrontation Clause
5. Jury Tampering
6. Defendant Intoxicated – Counsel not calling for in-camera hearing and allowing Defendant to testify.
7. Fourth Amendment
8. Defendant in custody?
9. Who took the photographs – tampering with evidence? – confrontation clause
10. Defense counsel attacking the character of the Defendant – misrepresenting client
11. This is where its obvious that Floyd & Spangler are helping the State cover their mistakes
12. Defense counsel should have motioned for mistrial-judge was coaching prosecution on how to get evidence in
13. Vouching
14. Improper corroboration – See text messages also.
15. Hearsay
16. Defense counsel bolstering state witnesses testimony by asking exact same questions the State did of the same witnesses, just to have their testimony repeated
17. Threats to {"Victim"]
18. Testimony that shows state solicitor fabricated evidence
19. Defense getting facts wrong concerning events, timelines etc.
20. Rule 404 attacking character
21. Leading
22. Things that defense counsel should have hired an expert for or looked into
23. Text messages
24. Consolidation -- evidence admitted Rule 404 issues
25. Res Gestae, excited utterance, first impression, Rule 404 (b)
26. Testimony that goes against what's already been testified to that was not questioned
27. Burden shifting
28. Defense opening the door
29. Defense attorneys attacking my character
30. Pornographic images
31. Leading

A. Suggestive
B. Speculation
C. Timeline information for April 26th

D. Limiting instructions
E. Elements as it goes to April 26th for DNA, coercion etc.
F. {"Victim"] says she didn't tell Rose- goes to Maye's suggesting to judge that she did. Prosecutorial misconduct
G. Pornographic images being Id; used in consolidation ruling in limine
H. Authentication of reports and ruling using unauthenticated report not put into evidence
I. Things that Floyd and Spangler should have objected to, fought harder
J. Judge McMahon ruling wrong on 404 (b), counsel not correcting wrong by objecting etc., ruling or stating wrong case law
K. Prosecutorial misconduct
L. Testimony that goes against other testimony that counsel never questions
M. Testimony that needed to be questioned because its wrong. Perjury.
N. State trying to cover up that officers came into house without permission
O. Delayed reporting – bolstering, improperly corroborating and vouching
P. Defense counsel not calling Defendant to testify in-camera for 4th Amendment issue, confrontation clause issue
Q. Voir dire
R. Improper bolstering, improper corroboration from expert witness
S. Ex-parte testimony from expert witness that defense counsel should have motioned declared a mistrial
T. Judge vouching for alleged victim, attacking character, biased. Look at this one Judge Making inflammatory comments about Defendant. Mistrial – Margie Branham
U. Structural error of trial. Evidence coming in and not being objected to under the 404 (b) exception in which trial was structured
V. Chain of custody
W. DNA/serologist. DeGuzman (same nurse). Miscellaneous hair found
X. Things I'm not sure about.

1. **Indictments**
    - 3 out of 4 indictments not true-billed as of 5/11/15.
    - As of September, 2023, now all have true bill stamp on them, which suggests fraud upon the court.
    - 2016-GS-32-02100 states on or about September 16, 2004 through September 15, 2007. In September 2004 – May 2005, I either wasn't living at any said addresses, Peachland Drive or Smith Pond Road, and from November 2024 – May 2005 did not have custody of either {"Victim"] Heath or Nicholas Heath. DSS can confirm this as well as Michael Jeffcoat – guardian ad litem.

- During cross-examination of Selma Heath, Mayes (Deputy Solicitor) reads a report about a medical issue ["Victim"] was having that should have been excluded because it would have confused the jury into thinking that Defendant had done something wrong to ["Victim"]. Additionally at the time of this report ["Victim"] was not in the custody of William Heath. So the indictment is ambiguous and vague which led the jury to believe William Heath done something wrong and was guilty because the date on the doctor report and the indictment coincide with each other making Heath look guilty. Trial counsel had multiple opportunities to attack these defects as well as the prejudice that arose from their inability to adequately put up a sensible defense (Tr.p.660 L.22 – p.665 L.14).
- Indictment 2016-GS-32-02100 contains dates September 16, 2004 through September 15, 2007, which would have made ["Victim"] one day shy of ten years old, yet its stated many times throughout trial that she was up to 11 years old. Defense never raised this issue, so there was a two year gap between 2016-GS-32-0200 and 2016-GS-32-02097A (September 17, 2022 through September 15, 2013). Counsel was ineffective for allowing the state and the court to state dates and ages other than what's on these indictments. As well as allowing in prior bad acts within these two years without limiting instructions. The state prosecutor professed many times to the jury that this was ongoing and never stopped except when ["Victim"] was out of the house for six weeks, yet the testimony as well as the indictments say this it not true. Counsel failed to supply effective assistance.
- Indictment 2016-GS-32-02097A states between September 17, 2011, through September 15, 2013, which again leaves quite a substantial gap between September 15, 2013 and December 1, 2014 from indictment 2016-GS-32-02098. Then from December 1, 2014 to April 26, 2015, from indictment 2016-GS-32-02097 you have that additional gap there. Now all throughout the trial Maye's statements were that this was continuous, a continuous ongoing thing, so this brings it to the point where she has made herself a witness that was not confronted, due to there being no testimony what soever in the record that states her baseless claims. And because defense allowed this to go uncontested, this makes them ineffective as counsel, which in turn deprived me a fair trial, violated my due process rights which includes denying me the right to confront a witness.

In camera

- (Tr. p. 233 L. 13-18)

Defense is a year before we even lived on Peachland Dr. Her age is wrong as other things

In camera

- (Tr. p. 234 L. 3-10)
  So, this is for timeline purpose to show that the defense should have known through this testimony that a lot of timelines didn't add up. Including the dates on indictments are wrong

In camera

- Mayes: Was there ever a period of time when you weren't being assaulted?
  ["Victim"]: Only whenever I was out of the house. (Tr. p. 234 L. 19-21)

  So here you can look at the indictments and the actual testimony of ["Victim"] and see that this is a lie. Wayne could have brough the truth out, but he allowed these lies to become truth in the judges eyes to therefore give the wrong ruling to clear and convincing evidence. Ineffective. No due process.

- (Tr. p. 247 L. 19-25)
  Show me in the indictment where it goes up to the age of 11. In fact, show me on that same indictment where it goes to age 10. Then show me on paper where in November through May of 2024 where we even had custody of ["Victim"].

- (Tr. p. 334 L. 11-20)
  Now from the previous paragraph show me with the information here where I lived at Peachland Dr. at all in 2004. You can't. How more ineffective can you be as an attorney than to not know this. He was told too.

- (Tr. p. 339 L. 23- p. 340 L.5)
  You see here's the problem. When these witnesses say or testify to one thing then the state solicitor state's that testimony totally different. Mayes states elsewhere in the record that we moved to Smith Pond Rd. in the third grade. Defense don't keep up with the solicitor's lies. Ineffective.

- (Tr. p. 359 L. 21-25)
  This is just to offer you up the timeline.
- (Tr. p. 360 L. 14-21)
  Same thing, for timeline purposes only.

- (Tr. p. 362 L. 11-24)
  This will go to the photographs, because she says that 1st of December not the 2nd at 10:30 pm. So the ruling under 403 would have been that it was more prejudicial that probative.

- (Tr. p. 371 L 19-21)
  If this is true then why does Mayes continue to bash the character of Rose Heath as if she had told her something, even more so why didn't defense counsel bring this to light. Ineffective.

- (Tr. p. 373 L 21 – p. 374 L.4).
  And Ashley all of this shows how the indictments don't line up with the testimony. So this shows just how ineffective the defense counsel actually is. I've told them about all of these dates and times and they've heard the testimony and they still don't do a dame thing about it.

- (Tr. p. 636 L. 19 – p. 637 L.17)
  Same as previous paragraph. He's heard, he's seen and was told again and again and still don't mention this indictment. How can he let this judge get it wrong too. Had defense counsel fixed this maybe the judge wouldn't have ruled the way he did.

- (Tr. p. 641 L. 4-14)
  Previous paragraph also. Here the judge does rule wrong because of the indictment being flawed when put next to testimony. Counsel was ineffective.

- (Tr. p. 699 L. 25 – p. 70 L. 2)
  Pay attention to this one because attorneys especially state prosecutors to fix mistakes made in trials. Here, you see Mayes has realized it, what's wrong with the indictment and that's why she stops at age 9 now. Counsel should have seen this and questioned. I am going to follow up on this misconduct.

2. **Counsel**
   - Was Colin Spangler under Rule 403 trial experience, allowed to perform pre-trial proceedings alone, without another seasoned attorney qualified to oversee Spangler? Did Colin Spangler have this documented through or with the South Carolina Supreme Court? (Tr. p. 12 L. 1 – p. 43 L. 4)
   - Was Wayne Floyd ineffective for failing to withdraw from representation when a health condition (terminal cancer) impaired his fitness to practice law, violating Rule 407 South Carolina Rules of Professional Conduct.
   - Under Rule 407 South Carolina Rules of Professional Conduct, both attorneys Wayne Floyd and Colin Spangler were negligently unprepared for trial by:

- Trial counsel spent less than two hours speaking with and preparing client, William Heath, for trial. Ineffective Assistance.
  - Triel counsel failed to secure necessary witnesses needed to assure that William Heath received a fair trial. These witnesses names, not all, were part of voir dire yet none were ever subpoenaed or called at trial, except one. (Tr. p. 81 L. 19 – p. 135 L. 19)
  - Trial counsel was unprepared for trial in failing to file a motion for severance of indictments. (Tr. p. 12 L. 13 – p. 13 L.13)
- Counsel not requesting a continuance after pre-trial motions for time to prepare for trial, on what was ruled on to securing any witnesses needed due to pre-trial proceedings. Defendant had no explanation and no preparation or strategy for what was ruled on. Defendant had no understanding as to how counsel was going to proceed under said rulings. Counsel was not prepared to defend. Ineffective assistance of trial counsel. No due process.
- Trial counsel Colin Spangler opened the door for the court to use State v. Wallace to consolidate the indictments by saying: "the court spent a lot of time talking about State v. Wallace, and that case is instructive here." Wallace is not instructive here. This case (Wallace) involved prior bad acts from a separate victim. In this case, (heath), the alleged victim is singular. Spangler then starts referring to similarities which is the basis for the ruling in Wallace. Theres no mention to Lyle, which is the prior bad act case from the 1920s. Since then Wallace and Hallman, both used here in this ruling have been overruled and Lyle is once again in place with Perry. Then Deputy Solicitor Mayes states: "As to the Wallace case, I submitted that simply because it does reinforce the admissibility of the 404 (b) evidence and sets forth the criteria, specifically when there are separate victims. Here though, we have to look to Kirton and McClellan and its progeny because that deals with it being the same victim." So the court states : " So we go forward with both parties citing State v. Wallace, 384 S.C. 428, directing the court to look at various factors. (Tr. p. 12 L. 1 – p. 43 L. 4)

  All this is to say that Spangler directed the court to use Wallace which prejudiced the Defendant. This makes trial court ineffective and denied due process.
- Trial counsel was ineffective for not objecting to the court using written police reports. (Tr. p. 12 L. 1 – p. 43 L. 4)
- Trial counsel was ineffective for allowing court to use police reports that were unauthenticated. (Tr. p. 12 L.1 – p. 43 L. 4)
- The alleged victim was present in the courtroom and could have testified before the court thus allowing defense to cross-examine witness and facts being used to consolidate. The court ruled on similarities and dissimilarities, yet not all the facts used to consolidate were in the police reports. Defense never questioned where this information was generated from. Which would make counsel ineffective (Tr. p. 12 L.1 – p. 43 L.4)

- Defense counsel never presented any evidence to combat the consolidation. Defendant could have testified yet was never call to the stand to do so. (Tr. p. 12 L. 1 – p. 43 L. 4)
- After the court found dissimilarities similar under State v. Wallace to consolidate indictments under Rule 404 (b). trial counsel failed to object to any testimony from witnesses or evidence that required an in-camera hearing before being admitted into evidence. Court: Although I have not heard the testimony by the alleged victim, I have read the statements. That's all I have been offered. The Court doesn't make the record, the lawyers do. I am ruling on the record that's before me now in limine – and it must be by clear and convincing evidence and testimony." (Tr. p. 38 L. 13-19) (Tr. p. 12 L.1 – p. 43 L. 4) All this is to say that every witness that testified, testified to the April 26, 1015 indictment except for ["Victim"]. Even Margie Branham never mentioned any dates from here testimony which goes also to limiting instructions. There were never any objections to rule 404(b) at all. This shows just how ineffective defense counsel actually was. Every witness and every piece of evidence "required" and in-camera hearing and to have a 403 balancing test to determine probative v. prejudice. This amounts to a structural error that can never be deemed harmless. This is why as you read all of the DSS accusations on my wife, as well as being accused of breaking up all the time with my wife. So that you will know we separated one time in 2004, a year "before" the testimony that states I did something. So, this was tailored up by Mayes and ["Victim"] went along with it. We were separated for about a month and never separated again till 2014 which was another month. Both of these were due to me having a drinking problem and only because of that.

3. **Jackson v. Denno**
   - Trial counsel failed to call Defendant to testify at in-camera hearing pertaining to Jackson v. Denno. In doing this Marlo McCann was able to give two very different answers to where she was when the Defendant was brought to her. Marlo McCann: Yes, I was actually by my vehicle, which is where I have having them bring him to speak with me. (Tr. p. 49 :. 16-17)
     Marlo McCann: I was sitting in you vehicle and when Sergeant Black and Deputy Franklin walked him out, I had him sit in the passenger front seat next to me (Tr. p. 50 L. 19-21) She (McCann) was outside the vehicle when we first spoke. That's why Mayes ask here where she was specifically to let her know that she answered wrong. The Statement she says I made was before Miranda outside of the vehicle, that's why its admissible. Still Wayne or Colin never asked my to testify. I didn't even know that I could till I got here and looked it up in the Westlaw. Had they allowed my to, I wound have been very specific about it, just as I will at PCR.

4. **Rose Heath as a witness**

- Usry: You called her mother. Where was her mother at the time?
  Margie: Work.
  Q. Where were you at that time:
  A. I was at my home in Chapin.
  Q. So you maintained contact with ["Victim"] during that time?
  A. Yes. Before the police got there.
  Q. Dide you go to her that night?
  A. No
  Q. Why not?
  A. Because her mother was taking care of everything. Her mother called the police, her mother met her at the house. (Tr. p. 474 L. 17 – p. 457 L.22)
- Mayes: And what arrangements were made for her to go to the hospital:
  McCann: I spoke with Rose and Rose decided to drive her to the hospital instead of having her transported up there by ambulance. (Tr. p. 516 L.22 – p. 517 L. 1)

Both of these points contain hearsay within them that was not objected to by defense counsel. Also because of this it violated my right to confront Rose as a witness as well as how it improperly corroborated other testimony.

- Mayes: Your Honor at this time, pursuant to South Carolina Rules of Evidence, Rule 803 (6), the state does not offer this CAD report as evidence.

Spangler: Your Honor, we do object to hearsay. There are statements within this document that qualify as hearsay within hearsay. Although the document itself might qualify for 803 (6), so statements within the document are hearsay. (Tr. p. 160 L. 18 - p. 161 L.1)

- Mayes: Now does the record also indicate who made the call?
  Nikki Rogers: The caller was Rose Heath.
  Mayes: And does it indicate what number the caller was calling from:
  Nikki Rogers: Yes (803) 542-5081 (Tr. p. 165 L. 308)

So they took the hearsay out of the document, but then Rodges spoke of the hearsay. How would she know that is Rose on the phone? How would she know? That makes Rose a witness and once again I have the right to confront this witness. Another reason that trial counsel was ineffective, denied me due process.

- Usry: How do you recognize that item:
  Black: It was a sheriff's dept. form, a consent to voluntary search explained by, at the time, Sergeant Lint and witnessed by me,
  Q. And what was that form regarding:

A. The residence at 1746 Nazareth Road and it was signed by RoseMarie Heath. (Tr. p. 212 L.2 – p. 213 L. 13)

Another time that Rose needed to be confronted as a witness. Counsel for defense don't see that they are creating a constitutional issue, yet don't seem to even see that, which shows how ineffective they actually are.

- Mayes: May we approach your Honor?
  Court: Yes, Ma'am (sidebar conference)
  Court: Alright. Where on 378 is this phrase of employment? Is it the one here on Sunset, in town, Lowe's? Which is it?
  Mayes: Yes sir, Your Honor. I believe its on 378 between the interstate and town.
  Court: All Right, has any member of the jury panel ever been employed now or in the past by Lowe's located on highway 378 in Lexington County?

I'm assuming all of our jury is familiar with highway 378 coming into Lexington from Columbia, and the Lowe's is right there near the light where you turn into Whiteford Subdivision. If you haven't driven by it, I'm sure you've sat in traffic near it. But if your familiar with that location, has any member of the jury panel ever been employed by Lowe's on 378 now, presently employed, or in the past? If so please stand. (Tr. p. 102 L. 19 – p. 103 L. 14). This is where Rose worked or used to till my arrest. So now we're getting into jury tampering and this is not the only one. So you'll notice that they never mention Rose's name in Voir Dire and that's because they don't want her to testify. Again, proof of jury tampering and so that she can't be confronted. This falls squarely on defense for allowing this to happen. Pages of Voir Dire (Tr. p. 80 L. 12 – p. 122 L. 14).

- In-Camera 4th Amendment
  McCann: This is a Lexington County Sheriff's Dept. consent to search form. This is actually the original form that was signed by Rosemarie Heath that night and witnessed by Sergeant Robbie Lint and Sergeant Caleb Black. (Tr. p. 266 L. 9-13) Another opportunity to call Rose to the stand yet defense counsel don't see it. Even though its in-camera they sill miss it. And yet something else why is McCann Corroborating this when she had nothing to do with it? In front of a jury this would be improper corroboration. Why is McCann doing this? She didn't have it signed. This is hearsay.
- In-Camera
  Mayes: In fact, who was it who called law enforcement to report this incident request that they come out to the resident
  McCann: Rosemarie Heath (Tr. p. 267 L. 5-8)
- In-Camera
  Usry: The evidence in this case indicates a valid consent was obtained by Rosemarie Heath. She was a Co-op/co-tenant of the house shared the bedroom with him. Furthermore, the Defendant is on scene the entire time during this from maybe 11:30

when officers respond to when he's arrested between 3:00 and 3:30 AM. (Tr. p. 318L. 4-11)

Again this is self evident why Rose needed to testify but didn't. She could have been asked where I was when she signed that form, if she did at all. This would have been proof they were moving me around so I wouldn't refuse that search. Even though this is in-camera, does that confrontation clause still take precedent?

- *In camera*

  Court: Further, the consent by Rose Heath is valid to search the house in light of the fact there was no objection by Mr. Heath, and there's absolutely no evidence or testimony whatsoever that—even looking at the time, if he was led away; there is no evidence whatsoever that he was led away because of concerns that he would not consent. There's no objections whatsoever. So as to the I-pad, it would be admissible. (Tr. p. 328 L. 21 – p. 329 L.4)

Again, Ashley, not just corroboration that Rose voluntarily signed it but yet it was absolutely never authenticated by Rose. Now were taking in to many different issues. Even under Crawford v. Washington, this is exactly why they came up with the clause because of the ex-parte concerning Sir Walter Raleigh.

- Mayes: But did you make it clear that something of a sexual nature had occurred between your father and you?

  ["Victim"]: Yes

  Q. And based on that, do you know whether she took any action form of notifying anybody else:

  A. Yes, she did.

  Q. And as a result, do you know if the police were notified to come to your home?

  A. They were (Tr. p. 356 L. 4-6)

Here's another opportunity for counsel to confront Rose, yet they get this in through hearsay within hearsay without objection. So may constitution issues.

- Floyd: Were you living – is that your mother there sitting behind you?
- ["Victim"]: Yes (Tr. p. 373 L. 11-12)

Proof that Rose is in the courtroom, where she has been since day one

- Margie: I called her mother. (Tr. p. 743 L. 18-22)
- Margie: I texted her because I knew her mother was working evenings, a third-shift job, and I knew she didn't like to be at home with her father alone. (Tr. p. 471 L, 6-8)

Rose didn't work a third shift job, she was filling in for somebody for one night. Another big reason that the confrontation clause not happening really prejudice me unfairly. Additionally, here we have more hearsay. So many things that these attorney's did not do to a standard practice.

5. **Jury Tampering**
    - Court: Your purpose as jurors is to find and determine the facts of the case. (Tr. p. 138 L. 11-12)
    - Mayes: When you say in the morning, Your Honor…
      Court: I'll try to be here by 11:30.
      Mayes: Okay. We will make those arrangements Your Honor. (Tr. p. 253 L. 18-22)

    - Court: As for as our schedule, I was directed by someone who is not my supervisor to sign an order to hold court Thursday. I did not do so because they are not in my chain of command. I was directed by the South Carolina Supreme Court of Administration to contact Chief Justice of the South Carolina Supreme court by email, which I have dove, and requested the authorization to work Thursday, which is a court state holiday. I received a response: Talk to the clerk and get back with me. I haven't been able to contact the clerk or space with the clerk, so that is where we are at as for as working Thursday. I assume tomorrow – I will continue to try this afternoon, to contact the clerk and contact the Chief Justice back. But just so you will know, that is the status of Thursday at this time.
    - (Tr. p. 254 L. 6-22)
    - (Tr. p. 284 L. 14-16)
    - (Tr. p. 330 L. 1-14)
    - (Tr. p. 395 L. 24 – p. 396 L.4)
    - (Tr. p. 396 L. 15-20)
    - (Tr. p. 607 L. 12-24)
    - (Tr. p. 650 L. 7- p. 651 L.9)
    - (Tr. p. 653 L. 17 -24)
    - (Tr. p. 693 L. 19-22)
    - (Tr. p. 141 L. 16-20)

You'll notice that's the trial schedule is constantly being oved around whether it be start time or finish time up to working on a state holiday. Then being directed by someone who he won't name and is not in his chain of command. This is jury tampering! In the end this court fixes it where the jury deliberates just a few hours before their max time that they can work. Theres a reason the court asks the jurors to work late. So they can put pressure on them for a verdict. That email needs to be found so we know who's directing this judge and why he would even do such a thing?

- Court: These are very good experienced lawyers. (Tr. p. 147 L. 1)

This judge cannot comment on these attorneys. That is jury tampering. And Stating his opinion on the case. If I may: my attorneys were so bad, incompetent that with that comment they surely felt I was guilty if the lawyers couldn't defend me correctly. So with that comment the defense should have motioned for a mistrial. There's absolutely no way to cure that comment.

6. Defendant Intoxicated

- (Tr. p. 161 L. 23 – p. 162 L. 19)
- (Tr. p. 177 L. 13-16)
- (Tr. p. 183 L. 17 – p. 184 L. 4)
- (Tr. p. 211 L. 8-12)
- (Tr. p. 298 L. 16 – p. 299 L.3)
- (Tr. p. 347 L. 18 – p. 349 L.3)

So everyone of them said they could smell odor of alcohol yet none of them thought I was intoxicated. Why didn't defense call for in-camera hearing on this? I was intoxicated I drank at least (15) 24oz beers that day, and had stopped only about an hour before they arrived. When I went to bed. Defense could have asked why they didn't give me a sobriety test. I can guarantee you if I had been driving a car they would have said I was drunk. Counsel was ineffective for not questioning this. Which goes to the question of was I too drunk to understand what they doing, what they were asking me, did I think I was under arrest. Yes, I did.

7. Fourth Amendment

- (Tr. p. 176 L. 2-13)
- (Tr. p. 184 L. 19-P. 185 L.3)
- (Tr. p. 193 L. 15 – p. 194 L.3)
- (Tr. p. 197 L. 12-23)
- (Tr. p. 199 L. 11-18)
- (Tr. p. 209 L. 4-9)
- (Tr. p. 212 L. 2 – p. 213 L.13)
- (Tr. p. 216 L. 3-4)
- (Tr. p. 265 L. 25 – p. 266 L. 19)
- (Tr. p. 498 L. 13-19)

So when I pointed down the hallway, that was not an invite for them to rush in my house. This was not me giving permission to enter. Another thing is before this I had went to ["Victim"]'s door while they were at the door and told her the police were there to talk to her, and I yelled at her because I thought she called them because I made her do dishes. They left that out and Wayne never questioned them about it.

Something else, is why did they take my robe? Franklin testifies that I was wearing boxers and a T-shirt. Maybe they took some hair off my robe to put in the rape-kit. Makes no sense why they would take it.

Then Franklin changes his story and defense counsel never asks why. I never showed them where ["Victim"]'s bedroom was, I pointed, but that was not an invite to raid my house. Another thing if you get the police reports from the Abhan, resisting arrest charges from 2002 you will understand why I didn't do anything when they came in my house unwanted. I need their reports anyway to attach that conviction since they opened the door at resentencing. Also I believer that Ashley's or Justin Ashley's police report tells a different story than what Blacks's story is. So maybe that's why he didn't come to court, and Ashley is the officer with whom I was not allowed to confront in court. He wasn't there.

Now notice 1:37 AM is when Rose signed the consent to search, so that means she was outside of the residence and I was sill inside. Because McCann read Miranda at 2:02 I believe. So that's proof that they removed my from the house so they could search it. I should have been the one they asked. While were on that how can the court rule that me and Rose were co-tenants when she never testified?

That would be hearsay to assert the truth of the matter. Another issue. Another reason counsel was ineffective. Additionally another confrontational clause violation, because who told the judge we lived together and why did he accept it without defense questioning that person.

The Black perjury his testimony when he state's the buccal swab consent is to search my house. I'm out of order but pay attention where Spangler filed the motion, bring it up then when the judge asks if his going to present any evidence or testimony. He says no Your Honor. WTF Ashley who does that? How damn ineffective can you get.

Then again McCann improperly corroborates that Robbie Lint obtained a consent to search the residence from Rose Health. Rule 602.

The Franklin says that I asked him if I could go to my bedroom to put some shorts on. He followed me to the room. If I didn't think I was in custody why then would I ask him that question?

- (Tr. p. 267 L. 22 – p. 268 L.17)
- (Tr. p. 271 L. 21 – p. 272 L.6)
- (Tr. p. 273 L. 2-5)
- (Tr. p. 276 L 24 – p. 277 L. 17)
- (Tr. p. 279 L. 5-13)
- (Tr. p. 281 L. 9-12)
- (Tr. p. 282 L 9-12)

- (Tr. p. 287 L. 13 – p. 288 L. 1)
- (Tr. p. 288 L. 15 – p. 290 L.5)
- (Tr. p. 290 L. 10-14)
- (Tr. p. 292 L. 8 – p. 294 L. 11)
- (Tr. p. 299 L. 12-21)
- (Tr. p. 299 L. 22 – p. 300 L.3)
- (Tr. p. 300 L. 23 – p. 301 L.10)
- (Tr. p. 301 L. 21-23)
- (Tr. p. 306 L.18 – p. 308 L. 7)
- (Tr. p. 309 L. 12-16)
- (Tr. p. 309 L. 19 – p. 310 L.8)
- (Tr. p. 311 L. 13-21)
- (Tr. p. 320 L. 24 – p. 321 L. 5)
- (Tr. p. 321 L. 7-21)
- (Tr. p. 322 L. 12-16)
- (Tr. p. 323 L. 13-25)
- (Tr. p. 324 L. 19-23)
- (Tr. p. 326 L. 7-10)
- (Tr. p. 326 L. 25 – p. 327 L.4)
- (Tr. p. 327 L. 13 – p. 328 L. 4)
- (Tr. p. 328 L. 5-15)
- (Tr. p. 328 L. 21 – p. 329 L.4)

So Master Deputy Ashley, I guess as the one that supposedly found the I-pad and this needed to be questioned. Before or after Rose signed the consent? And even so his name is mentioned so I have a right to confront a witness that took pictures of a potential crime scene.

McCann confirms that I was still inside the house at 1:32 AM , when Rose signed the consent form. Lint says he spoke to me shortly after he got there at 12:30AM. So did he speak to me first or Rose at 1:37 AM? Why didn't defense counsel ask this?

The Lint says the same a Black saying that I was giving them permission to search my house until they are asked about it. So both of them attempted to perjury their testimony.

And the I-Pad is already marked for Id., so Spangler was off in time on his motion to suppress if its already marked.

Why didn't defense counsel ask any of the officers or detective why they didn't as me for consent, since I was he one inside the residence.

Then Lint reads the consent for and improperly authenticates Rose signature. Don't there need to be testimony from Rose Heath whether or not she signed it. I don't know if she did or not.

Mayes is committing prosecutorial misconduct at (Tr. p. 290 L. 10-14) so these officers are just saying that Rose did this signed that. That I said this, did that without defense counsel questioning anything. This is exactly why they have the confrontation clause. This is becoming a bigger issue than any other case I've ever read. My defense counsel has shut me off from telling the truth by not letting me testify. So all this is to say that if they would have let me testify and called Rose to the stand the trust would have come out. Ashley, you can follow the times and see exactly what they did. And Colin only filed that motion to eat up time so that Friday would be last day. I mean why would you file a motion then don't call no witnesses to testify or put up any evidence. He wasted time. So they removed me from the house to search it, take pictures etc. It is what it is and needs to be amended to this PCR. Even the judge says no evidence or testimony whatsoever.

Pages 39-50

8. Defendant in custody?

(Tr. p. 177 ll. 3-7)
(Tr. p. 177 ll. 17-22)
(Tr. p. 182 l. 19 - p. 183 l. 4)
(Tr. p. 183 ll. 11-16)
(Tr. p. 184 ll. 5-14)
(Tr p. 187 l. 18-p. 188 l. 1)
(Tr. p. 267 l. 18-21)
(Tr. p. 511 l. 22 – p. 512 l. 1)

Again I would have asked Fraklin if I could put some pants on if I didn't think I was in custody. Franklin wouldn't have had to provide security in my home unless I was in custody. He was marking sure I stayed calm. That sounds like someone that thinks they are in custody. Ashley (p. 184 l. 5-14) this is what you don't hear and shows how me not being allowed to do any in-camera hearings testimony infected my whole trial. So they made me walk outside while ["Victim"] was leaving. It wasn't because I wanted to go outside. They would not let me go back inside my house. And heres a fact you didn't hear. Rose had locked the residence and had to come back to the house to unlock the door. So was I removed yes, was I already in custody, yes. They all say the same thing, that I couldn't go anywhere without an officer with me. That is definitely in custody. Furthermore, I never waived my Miranda rights. If I would have I would have signed that damn paper.

9. Who took the photographs – tampering with evidence? – confrontation clause

(Tr. p. 185 ll. 22-25)
(Tr. p. 186 ll. 4-13)
(Tr. p. 268 ll. 11-17)

So in the beginning, nobody said who took the pictures. They (State) questioned everybody until McCann said Ashley took the photographs. And Ashley is the witness in my PCR application as one of the witnesses that needs to be confronted, because there were questions of whether or not he turned on the I-pad, and this all pays into me being under arrest or not, as well as McCann vouching for the alleged victim or improper corroboration. It was stated that I was free, not under arrest. McCann interviewed ["Victim"]. Interviewed me so she says. Then arrested me based on evidence collected at the scene. Now she's basically saying that she believes ["Victim"]'s story, which is vouching for her credibility, because they didn't take the I-pad into custody until after they arrested me which means they either turned it on and looked through it and found something or they are vouching. But either way its not a harmless error. Then of course the whole constitutional clause because Ashley was not at my trial as a witness.

Kill off.
When asking Deguzman a question he says at the and down at the bottom which takes it out of the context in which it was asked which more than likely confused the jury. He worked against the Defendant by saying that.

Improper Judicial Intervention

12. Defense counsel should have motioned for mistrial-judge was coaching prosecution on how to get evidence in

(Tr. p. 200 l. 1 – p. 208 l. 6)

Usry: The state argues that the testimony that were attempting to elicit falls under Ruyle 803(2) as an excited utterance. The officer has put on the record that he responded…the victim was emotional and upset.
Black: When she said he made her do things that she did not want to do, I asked her what she meant, and then sent went to describe the alleged assault.
She said that he rubbed his penis o her. At that point she asked that Master Deputy Ashley leave the room. She said she would be more comfortable speaking to just one person. And she left
So because she was feeling more comfortable I do believe that everything past this point is not an exited utterance anymore. And as well as before it was obvious that it was due to law enforcement being there in force or multiple units that gave rise to the excitement, not the event she says happened.
Black: She told me in the past he physically forced her to perform oral sex on him and that she used her mouth on his penis tonight.
That statement takes it out of excited utterance, because its obvious that she's reflecting speaking of a past event.

Court: The issue, as I see it, based on the record before the Court now when I read Denis in more detail and another case, I think its Stahlnecker, 690 S.E.2d 565, Dennis cites Jolly vs. State, 443 S.E. 2d 566, and advises the court that the rule against hearsay prohibits the admission of evidence, of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies.
The first of course is - - I thought it was Outten, but it's the outcry testimony, which is limited to time and place in a criminal sexual conduct case. The second, the res gestae or excited utterance exception allows corroborative rape testimony without time and place. And the third, I do not think is relevant here at this time. But they all address corroborative testimony.
For example, in Dennis, the judge did allow the emergency room nurse who allowed the victim – who examined the victim to read her commentary regarding what the victim told her. The victim testified in detail about the incidents, robbery, abduction, sexual assault, the judge then allowed

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The nurse to read from her notes, And also, the res gestae or excited utterance allows corroborative rape testimony.

So at this stage in this record, this isn't corroborative. It may become corroborative. I don't know. But it is not corroborative at this time. So my ruling is that it's not hearsay but its not corroborative.
Court: I said it's not hearsay, but at this point in the record it's not corroborative. The Sergeant's testimony is not corroborating any prior testimony. If you take res gestae and you go back to Copelan and whoever Copeland's coDefendant was, it was a death penalty case out of Berkeley County many years ago, where this testimony is admitted tat this time and it's not hearsay, it's— it's offered for the truth of the matter asserted, therefore it's evidence—I don't know if you call it direct or circumstantial, but it's evidence that the offense occurred.
I think this type of evidence, among other requirements that have to be met for it to be res gestae , has got to be offered as corroboration. From what I've heard, what's in the record from the witness, Mr. Rodgers, Deputy Franklin, And Sergeant Black, it's not corroborative at this time. It may become corroborative upon the testimony of a party in which the state is attempting to corroborate.

Judge Timmerman would probably rule, well you can't prove everything on a pencil point, And that's true. But at the same time, I can predict anything but the future. I don't know who is or is not going to testify. And whoever that witness may be, whether it's Ms. Heath or someone else. But testifies---well, I can't make an anticipatory ruling either.
But I think given the right—well, I can't make an anticipatory ruling. That's my ruling at this time.

- And this Ashley is the first of three times or more that his judge overstepped his bounds. Not only did he tell them how to get the exception in on Black's testimony, but he also told how to get the corroborative testimony from the Sane nurse. And just so you will know the defense counsel never objected to this or no exception being applied to the Sane nurses improper corroboration. Which of course would have been stopped had Wayne or Colin objected. And I haven't heard the oral argument, but I'm pretty sure this is what David Alexander may have been talking about. He said quote "the state admitted that they whiffed that softball." Ashley, I do believe

- 12.3
- This is that softball. This should have been a mistrial called or motioned for. But there's still a few more to go.
- (Tr. p. 470 L. 1- p. 496 L. 25)

Court: Well, it's become aware—if Ms. Branham became aware of Ms. Heath's feelings about her father, that didn't have—the foundation of that could be personal knowledge, observation, that she observed, not only that was told her. She can't testify, well she told me this.

But I can observe and give an <u>opinion</u> about a person's feelings for another person by observations. I could be misperceiving it, but it's my perception. I could be wrong on that. If I see two people that totally avoid each other or two people that never speak to each other or observe two people that every time they do speak to each other, it would be a conversation I would not want to be a part of.

So she has to have personal knowledge, can't be based on hearsay statements. So it may be hearsay and you say, well, you thought she was going to testify to, but it may be some other foundation besides statements to Ms. Branham by Miss Heath. And I don't know what it is.

Usry: I agree what someone told her is hearsay. I'll attempt to rephrase the question.

Court: What is the basis of her knowledge, Solicitor?

I don't know.

Usry; The basis of her knowledge would be her years of what she's testified to of knowing ["Victim"] and observing her behavior over the years. There's a period of time they did live together, that's already in the record the fall of 2014 as well as simply being an Aunt to ["Victim"].

Floyd: It's with great reluctance, but I feel I have to move for a mistrial, I think your Honor has just directed the Solicitor how they need to ask the question to get the evidence in.

-Ashley within this conversation Margie is still on the witness stand. SO they're not directing the Solicitor, but their conversation is coaching Margie on how to answer the question. Wayne objected to the wrong prejudice. For this there simply is no cure. A mistrial is warranted. This witness should not have been allowed to testify afterwards. Then the Court stated "I can observe and given an opinion about a person's feeling for another person by observations. I though only an expert could offer opinion testimony? So all this is to say that the court once again practiced.

Improper judicial intervention.

- (Tr. p. 508 L. 14- p. 528 L.14)
- (Tr. p. 597 L. 24 – p. 602 L.11)

Floyd: Your Honor, just for the record during the testimony of Sergeant McCann, it cam up about a statement given by the alleged victim, and at that time the court allowed the questioning of the witness as to that statement pursuant to Rule 801 (d) about a prior statement of the witness. And pursuant to the provisions of 801 (d)(1), that testimony is allowed, however, its limited to the time and place of the incident.

Ashley, I don't know if they think I'm not going to figure this stuff out, but that is not what that means at all and I want it amended to my PCR. You know a prior statement would be one made to someone before my arrest. That she complained to someone. That is what prior statement means. I see everything that they're trying to do and its going to stop. This right here shows how the defense attorney's are helping the solicitor. And how they are attempting to misguide people in their appeals. Its bad enough when they wont put up a defense, but its another thing when they attempt to steer you away from justice. And that's exactly what they're trying to do. All three of these issues should have been a mistrial and need to be amended to the PCR to reflect that. This too is improper behavior for an attorney.

Even Mayes says that McCann would have been able to testify as to each indictment because ["Victim"] disclosed them to her. No, not at all, what in the hell is prior about them. She didn't tell McCann about them before this charge on April 26, 2025. So its nothing prior about it.

Transcript: our page numbers 051-075

13. Vouching

- **Black: Vouching**

  Black: Under calls like this, I try to always do things the same way. I introduce myself. And I don't remember the specific question, but something along the lines of what happened, are you okay? **(Tr. p. 200, ll.1-4).**

  Black: She was crying, visibly upset. At that time, it was almost 16 years of me being a police officer, I could tell something had happened. **(Tr. p.200, ll.14-16).**

  Black: It's the same questions every time. It's either what happened or are you okay. Since it was a welfare check, the two (2) general questions. **(Tr. p.201, ll.7-9).**

  Black: These type of calls, I always introduce myself and start with the opening question, what happened, are you okay. **(Tr. p.499, ll. 14-17).**

Black: At that point, I walked outside to the yard away from everybody else. So I removed myself from the house at that time for a short period. **(Tr. p.210, l.5).**

- **(Tr.p.357, l.23 – p.358, l.5).**
  Mayes is vouching for ["Victim"] here, by making out that the alleged victim is always to be believed period. And again, no objection from defense counsel.

- **(Tr. p.209, l.23 – p.210, l.14).**
  Allowed vouching with no objection.

- **(Tr.p.210, ll. 5-24).**
  Allowed vouching of witness with no objection.

- **(Tr.p.261, l.18-p.262, l.1).**
  Even though this is not in front of jury, Mayes does this again in front of the jury in closing and so defense counsel had two (2) chances to object to vouching yet did no such thing.

- **(Tr. 356, l.21-p.358, l.5).**
  Mayes is vouching by making the jury think everyone is supposed to believe ["Victim"] no matter what. That's what she's conveying to the jury. No objection to vouching from defense counsel.

- **(Tr. p.392, ll.10-25).**
  Solicitor is again conveying to the jury that the alleged victim is always to be believed, no matter what. She's also making it sound as it I'm controlling Rose or suggestive. No objections from Defense.

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- **(Tr. p.417, l.21 – p.418, l.10).**
  Here defense should have objected and called for a mistrial. Williams has vouched for all alleged victims with this testimony. She is saying they always need to be believed.

- **(Tr. p.418, l.18-p.419, l.7).**
  Again, she's vouching for all alleged victims, and because of this, nobody can get a fair trial with this type of testimony. Defense should have objected and motioned for a mistrial.

- **(Tr.p.420, l.21-p.421, l.4).**

She's vouching and improperly corroborating previous testimony and Mayes is also leading questions with this witness. There should have been an objection.

- **(Tr. p.430, l.25-p.431, l.17).**
  Again, no objection to Williams saying that every alleged victim should be believed by everybody. This should have been a mistrial.

- **(Tr.p. 461, ll.4-9).**
  Defense counsel should have hammered her on how does she know it's a pubic hair. She improperly corroborated the State's case.

- **(Tr. p.516, ll.4-19).**
  It sounds as if they're vouching for her when they refer to her as "the sexual assault victim. Defense should have objected to that statement.

- **(Tr.p.523, l.17-p.524, l.4).**
  They're vouching for the alleged victim. So there was no evidence other than I-pad that wasn't looked at till I believe 3 months later. So they're saying that they believe the story of the alleged victim because that's all that they had. This should have been questioned by the Defense and or called for a mistrial.

- **(Tr.p.693, ll.6-18).**
  Vouching. No objection to this prosecutorial misconduct. There's a lot of prosecutorial misconduct, and all of it that state needs to be amended to this PCR no matter what.

- **(Tr.p.693, ll.19-22).**
  Vouching, prosecutorial misconduct. No objection from defense. She's saying believe the victim.

14. Improper Corroboration – See Text Messages also

- Usry: And when you indicated earlier after you finished talking to her, she was crying into her pillow.
  Black: Yes, ma'am
  Q: Is that what's depicted in this picture?
  A: I don't remember which pillow it would be, but I do remember her – and I noted in my report that she was crying into a pillow.
  (Tr.p.214, ll.15-22).
  I believe this is a picture that shows (2) Kleenex placed on a pillow in her room which I don't believe I have. So does that photo improperly corroborate testimony here?

  Mayes: You mentioned that you told your Aunt in what format or in what way?

["Victim"]: Text message.
Q: I'll show you an item and ask you whether or not you recognize it.
A: Yes.
Q: Okay. What is it?
A: It's the text message I sent her from my phone
(Tr.p.370, ll.17-25).
Can she corroborate what's on someone else's phone as being sent to her? How would she know this? It's not her phone. How would she know? Is this improper corroboration?

Ms. Galloway Williams: So you're asking me if a child was interviewed and did not disclose when they were interviewed?
Floyd: Yes.
A: Then that was another opportunity for them to disclose when they didn't disclose. And there could be factors that are influencing that. Those same factors that influence the delayed disclosure could impact a child not disclosing in an interview. The non-offending care giver could also have an impact on that since you brought that up.
Q: I appreciate you picking up on that. Isn't it also possible because it didn't occur?
A: So if a child's interviewed and they don't disclose –
Court: That's a different issue. We've talked about that outside the presence of the jury, doesn't mean it did or didn't occur. That's the jury's decision on that. I think that bumps up on a different issue.
(Tr.p.431, l.21-p.433, l.7).

So first, these interviews that she supposedly had, where in the hell is that even coming from? There was never any accusation or interview, to my knowledge. Ashley, this is vouching, improper. . .

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. . . corroboration, attacking my character, and where in the hell does this even fit into the 404(b)? Where's the *in camera* hearing to determine the admissibility of this? If Wayne is talking about DSS, which wouldn't be admissible under 404(b) anyway, where is he getting his information from that she was interviewed about being molested or whatever? Where is this coming from? This is exactly why this expert's testimony should have been proffered in an *in camera* before found to be admissible. Then again goes back to the motion in limine and how counsel is so ineffective that they don't object to anything under 404(b) or rule 403.

- Mayes: So still wearing the same clothing from the time of the assault?
  DeGuzman: Right.
  (Tr.p.441, ll.18-20).
  Again, there should be an objection for vouching, improper corroboration. How would that nurse know that? How would she know?

- Mayes: Do you also inquire as to whether this was a single event or whether its been chronic in nature.
  DeGuzman: Typically with children, we do ask if this has happened before.
  Q: And what is the time frame in which ["Victim"] reported to you that this has been happening?
  A: She told me that – 10 years.
  (Tr.p.442, l.20-p.443, l.1).

  So during this whole testimony the defense never once objected to hearsay. What exception did this go to? Not excited utterance because now it's after 5:00 a.m. in the morning. Her vitals show that she's calm, relaxed, this is what Judge McMahon was telling them what to do in so many words during Black's testimony. Why wouldn't Wayne or Colin object to this?

- Mayes: One more thing, can you tell us whether, if a patient has not changed clothes since the assault, whether it's routine to collect their under clothing?
  DeGuzman: Yes.
  Q: And does your protocol tell you whether or not the underwear of ["Victim"] was collected?
  A: I checked yes and noted that it was pink.
  (Tr.p.454, ll4-11).

  Defense counsel should have objected to vouching, improper corroboration. How would she know? So because she collected her clothes, she's corroborating that . . .

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. . . ["Victim"] has not changed clothes. Throughout much of DeGuzman's testimony and some of it elicited from Defense counsel where she asserted the truth of the matter though an out-of-court statement. In example – "Do this or I won't pick you up from school." This cannot be harmless errors.

- **(Tr.p.478, ll.2-7)**
  Usry: What is that picture of?
  Margie: That's the house – one of their trailers. I'm not sure if it's Smith Pond or the Nazareth Road.
  Q: The Nazareth Road –

  So Margie didn't know and Usry gave her the answer to her own question.

- **(Tr.p.461, ll.4-9).**
  I guess this in Improper corroboration and also the mention that she don't when it got there, so how would she know it's a pubic hair she wouldn't. The Defense should be asking how she knows it's a pubic hair. This is ineffective assistance of

counsel by allowing the witness through questions from the defense to improperly bolster not just the alleged victim's testimony, but to improperly corroborate her story.

- **(Tr.p.456, l.25-p.457, l.2).**
  Improper corroboration. How would she know except through hearsay. Counsel is doing the same thing that the State's doing and I believe his attempting to cover the State's ass, because they don't want to call Rose to the stand. This also brings up a confrontation clause issue since they brought that up. Counsel is ineffective for attempting to get a witness who lacks personal knowledge to improperly corroborate State's case.

- **(Tr.p.463, ll.1-9).**
  Improper corroboration and bolstering through hearsay from witness who lacks personal knowledge. Defense counsel should have objected to this line of questions. Ineffective assistance.

- **(Tr.p.465, ll11-19).**
  Improper corroboration through hearsay that has no exceptions from witness with no personal knowledge. Counsel was ineffective for not objecting.

- **(Tr.p.465, l.23-p.466, l.12).**
  Improperly corroboration of State prosecutors theory and allowing witness to improperly corroborate that hair was from Defendants . . .
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  . . . pubic area and was pubic hair. Defense counsel was ineffective for not objecting to witness calling hair, pubic hair. Witness improperly corroborated without objection that pubic hair combings were the result of intertwined pubic hair combings. State's solicitor's question was leading which resulted in improper corroboration without any objection by defense counsel. Ineffective assistance.

- **(Tr.p.472, l.8-p.473, l.20).**
  Improper corroboration through hearsay statement that was not objected to by defense counsel which rendered ineffective assistance of counsel.

- **(Tr.p.474, ll. 2-5).**
  Improper corroboration through hearsay that was not objected to by trial counsel which was ineffective assistance of counsel.

- **(Tr.p.475, ll.5-9).**
  Improper corroboration through hearsay statement which trial counsel didn't object to which rendered ineffective assistance of counsel.

- **(Tr.p.491, l.6-p.495, l.5).**

This is improper corroboration, improper bolstering and hearsay. She could never become aware of her feelings through observations. And also observations can be and are hearsay. Counsel never objected.

- **(Tr.p.516, ll.20-21).**
  Counsel should have objected to this because McCann was not with alleged victim throughout the night. She might have had knowledge of what clothes she had on the outside but that's all. This statement improperly corroborates that alleged victim didn't change when McCann don't have that knowledge. Defense counsel should have objected. Could have asked McCann if she knew what kind of underwear she was wearing, but simply did not properly defend the Defendant. Ineffective assistance.

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- **(Tr.p.499, ll.14-17).**
  Improperly corroborated that something bad happened to alleged victim. This may sound repetitive, but black testified multiple times to this same subject which multiplied the prejudice caused by this. Just the question "What happened?" leads any jury to believe he sees something that would make him say that. Counsel had multiple times to object to this testimony, at least three times. Ineffective assistance.

15. Hearsay

- **(Tr.p.203, l.11-p.204, l.11).**
  Take note that besides no objection being made, Black's testimony goes outside of excited utterance when she mentions in the past. An excited utterance has to be about the startling event, not ten or so years ago or however long she says. Also take note that defense counsel should have recognized that if this was to fall under an excited utterance , I can assure you that she would not be asking one of the police to leave so she will feel more comfortable with only one. That just wouldn't happen. So she mentions past and what happened. Out of time and out of place.

  Also keep in mind that Wayne Didn't object when Black's direct testimony goes outside time and place in his testimony later on.

- Mayes: What would he say in that regard?
  ["Victim"]: He said he would kill me or my mother, shave my hair off. Sometimes he didn't seem to care if I threatened to tell, just say, yeah tell people what I do for you or that they would take me away from my mother if I did. **(Tr.p.343,ll.7-12).**

So there's hearsay and attacking my character, and this does not fit within common scheme or plan for all indictments and such. So December 1, 2014 and April 26, 2015, as reference, there's no mention to any of this type of behavior. So this tells us that one there should have been an objection and two within that objection the differences between this testimony as it fits within the 404(b) consolidation, trial counsel not once ever objects to 404(b), never.

- **(Tr.p.356, ll. 4-16).**
  More hearsay. How would she know if the police were called? Also hearsay within hearsay. And she's referring to Rose calling the police, and again, no objection and no confrontation of Rose as the one who called the police.

- **(Tr.p.357, ll. 6-10).**
  Not only hearsay, but leading questions with hearsay, Counsel didn't object. How does she know who directed Rose or even if they did at all?

- **(Tr.p.357, ll. 20-22).**
  Hearsay. How would she know this? We hadn't had contact with her since my arrest, then when Rose was arrested. Almost 3 years. How would she know? Counsel should have objected.

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- **(Tr.p.392, ll. 22-25).**
  How would she know this? Rose worked at Lowe's up until she was arrested, over 10 years she worked there. There was, again, no objection to this testimony for hearsay. Additionally, Mayes is suggesting that I'm over Rose or controlling her which is attacking my character. Yet no objections.

- **(Tr.p.442, l.20-p.447, l.10).**
  Again, no objection to this hearsay. And even if it fell within an exception, it still wasn't ruled on because counsel never objected.

- **(Tr.p.456, l.13-p.460, l.12).**
  You see now when Wayne is covering for the State by offering up hearsay as well to make it a harmless error. He was ineffective for doing this as well as showing that he is corrupted. You'll also notice that he gets DeGuzman to improperly corroborate that Rose brought ["Victim"] to the hospital.

- **(Tr.p.462, ll. 10-20).**
  Again, Wayne making it harmless error because his offering up hearsay without an exception. This issue needs to be front and center on this PCR.

- **(Tr.p.463, ll. 1-9).**

More hearsay, no objection.

- **(Tr.p.464, l.15-p.465, l.19).**
  So here she improperly corroborates the time of the alleged assault through hearsay without an exception without any objection.

- **(Tr.p.471, ll. 6-8).**
  Hearsay and it's wrong. Rose only worked that one night to cover for somebody. Other than that she worked 1st shift. Margie also corroborated Improperly and vouched for ["Victim"] saying she didn't want to be home alone with me. And again, not the first objection whatsoever.

- **(Tr.p.472, ll. 8-10).**
  Again has to be through hearsay. No objections from defense.

- **(Tr.p.473, ll. 18-20).**
  How would she know except through hearsay? No objections to hearsay.

- **(Tr.p.474, ll. 2-5).**
  How would she know any of this except through hearsay? . . .

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. . . Once again, no objection. This also improperly corroborates the time that they say something's happening.

- **(Tr.p.474, l.17-p.475, l. 22).**
  How would she know when the police got there? How would she know ["Victim"] was in the living room. How would she know Rose called the police? All through hearsay. All improper corroboration. Vouching. Yet not the first objection. Excuse me, he objected to some of it, but after the answer was said. It's so much hearsay that it denied me a fair trial with just Margie's testimony.

- **(Tr.p.478, l. 24- p.479, l. 19).**
  At this point the defense should have motioned for a mistrial based just on the amount of hearsay that came in through this witness.

- **(Tr.p.491, l. 16-p.492, l.12).**
  Ashley, explain to me how me and Rose splitting up for a month has anything to do with this trial. Rule 404(b), Rule 403. Do you see how everything is based on attacking my character? I'm not going to let this rest ever! Why don't counsel object? This is ineffective assistance of counsel.

- **(Tr.p.492, l. 15-p.493, l. 10).**
  Again Rule 404(b), Rule 403, yet again, no objections this is suggestive and character attacking. It's all hearsay.

- **(Tr.p.493, l. 11-p.494, l. 5).**
  How would she know if Rose is except through hearsay. And under Rule 404(b) this has nothing to do with this trial. No objections again from counsel.

16. Defense Counsel bolstering state witnesses testimony by asking same questions the state did of the same witnesses, just to have their testimony repeated.

- **(Tr.p.386, l. 12-p.387, l. 11).**
  So the defense is asking the same exact questions that the prosecutor did, just to have the same exact answer said which bolsters that witnesses testimony. This is not the only instance where it happened, but this one shows the prejudicial effect it had, the unduly prejudicial effect. And because of this, it made the Defendant look guilty because the defense attorney didn't ask no real questions, no effort. This shows how unprepared and rises to the level of conspiracy.

17. Threats to ["Victim"]

- *In camera*:
  Floyd: On the night of – when the police were called April 2015, you're not saying that your father threatened you?
  ["Victim"]: Not verbally.
  (Tr.p.240, ll. 6-9).

  So why didn't Wayne use this when going through the State report or when cross-examining ["Victim"]? There were questions about threats. I believe some instances they say I did threaten her, not to pick her up from school or something. But here, had the defense counsel taken notes this could have been brought out. And this is exactly what makes that same report so unduly prejudicial because it states different answers than said here. Counsel was ineffective here.

18. Testimony that shows state solicitor fabricated evidence

- *In camera*
  Floyd: And I think you also said he never had ejaculated, is that correct?
  ["Victim"]: Not that night.
  (Tr.p.240, ll. 3-5).

  In camera
  Mayes: What is the time on the Miranda form in which the Defendant waived his Miranda rights and agreed to speak with you?
  McCann: 2:02a.m.
  (Tr.p.267, ll. 18-21).

These two fit together with what's testified to later. So the first one Mayes in closing arguments speculates that I did ejaculate and that I "wiped off." And again, this also could have been used with the serologist and DNA analyst testimonies where they stated they were looking for semen, where this testimony says something different. This shows that counsel was not just unprepared, but was not mentally available at trial.
The next is where Mayes is fabricating that I waived my Miranda rights which is not the truth. Had defense called me to testify at this *in camera* hearing, the result would have been very different. This is also burden shifting.

- Mayes: Beyond that, she testified that in third grade they moved to South Pond Road and the acts continued at ages eight and nine and that it, again, included oral sex, and she also described digital penetration, beginning with that time frame, all being sufficient for an act of sexual battery, whether at Peachland Drive or Smith Pond Road.

  (Tr.p.638, l.14 – p.639, l.4)

  So she was in the second when we moved to Smith Pond Road. But what's puzzling is how can I be convicted, or whatever, on multiple counts in multiple homes, yet there's only one indictment with a very broad amount of time. So where did the jury convict me at? Was it from Peachland Drive or South Pond Road? I do believe this shows just how unfair this whole trial was. How it violated my Due process rights. How my counsel's representation well below the standards of effective. I do believe there's questions about what house did I get convicted from? How can you properly defend someone if you don't know? Why didn't he or they object to this structure of the entire trial?

19. Defense getting facts wrong concerning events, timelines etc.

- ***In camera.***
  Floyd: And there was a time when you came back to Peachland. You all got back together at Peachland' is that correct?
  ["Victim"]: Yes.
  Q: And that's when you got back together with your momma and your daddy and your brother?
  A: Yes.
  Q: When you lived at Peachland, you had your own bedroom?
  A: Yes.
  Q: Did your brother have his own bedroom?
  A: Yes.
  Q: And your Momma and Daddy, they had their own bedroom?
  A: Yes.
  (Tr.p.234, ll. 11-25).

So had the defense called me to testify in this clear and convincing evidence hearing, I could have testified that this was anything but clear and convincing. Number one, she didn't "come back" to Peachland because we all moved there together. Number two, she didn't get back together with her brother because her brother was always with her. But you see how twisted up he got this to make it sound like they took her away, and only her. Third, and I told you this already, Peachland Drive house only had two bedrooms. and you need to go to the county records office and get that information on that dwelling. It will show a two-bedroom house. Now don't you think that judge's ruling would be very wrong based on these incorrect facts that the defense not only couldn't defend, but he's the cause. There's no way that judge would have found her testimony clear and convincing had the defense got this right and that makes them ineffective. This error was so wrong it affected the entire structure of the trial.

In camera

- Floyd: And back when you were living with your grandmother, wasn't DSS involved in your situation there?
  ["Victim"]: Yes.
  Q: And didn't you have a DSS caseworker?
  A: Yes.
  Q: And didn't they send you to a doctor?
  A: I don't know.
  Q: You don't remember Dr. Luberoff?
  A: Yes.
  Q: And how about Dr. Dupas, educational psychologist?
  A: I don't remember them.
  . . . [end of our numbered pages 051-075]

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Q. Do you remember all those people talking to you and questioning you about your whole situation?

A. Not really

Q. Well, did you ever tell any of those people that your father was sexually abusing you?

A. I don't know, I don't remember.

(Tr. p. 238 L. 4-22)

The thing about this whole line of questions is that it has absolutely nothing to do with the trial. Dr. Luberoff was my kids pediatrician. They didn't go to him because of DSS. Again, DSS was not involved in this because of any accusations about sexual abuse. You see Wayne has made it sound like my kids were removed from our custody because of sexual abuse. And that's not true. He was told this was not true. Yet he totally destroyed my chance of getting a fair trial here. How can a judge rule that this is clear and convincing when it's not even true. As I said before attorney Michael Jeffcoat was my kids guardian ad litem. Why didn't Wayne ask him? I'm going to call it what it is bullshit! It's a structural error. How more ineffective can you get than this. Also the whole DSS testimony is not allowed under 404(b). Tell me how is that related to those charges. It's not at all!

In-camera

- Floyd: In fact, didn't you and Jared (cousin) often or at least on more than one occasion or at least one occasion look at your dad's porn?
- ["Victim"]: No.
- Q. You don't ever remember doing that?
- A. No. (Tr. p. 239 L. 7-14)
- Again, Ashley, how could this testimony or questions do anything but attack my character. Yeah it's in camera, but I don't have no porn collection or anything like that. How do you think that question affected this judges ruling on clear and convincing evidence. You could not convince me that Wayne is not helping this solicitor. It's no way he aint. And that makes the defense ineffective.

In camera

- Floyd: Did you get upset when he used - - he and your mom used some of his money to buy equipment for his business?
- ["Victim"]: I'm sorry?

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Q. Did you get upset when they used some money they set aside for you to buy equipment for his business?

A. I didn't know he used my money to buy equipment for the business.

Q. You don't remember talking to him about that?

A. No.

(Tr. p. 241 L. 2-8)

Rose took money out of her account, which I had no access to, to pay off her car $2000. I sent you some of my bank statements. I made $2000 a day. I can assure you I did not need her money. But it disturbs me to no end that Wayne made me look like this. How do you think that affected this judges ruling. This only served to attack my character. It didn't even belong in court. I think Wayne was drunk and ineffective.

In camera

- Spangler: Yes, your honor. As we set forth in the motion we filed this morning and handed up earlier, the seizure of the ipad just doesn't comport with any Fourth Amendment concerns here.

(Tr. p. 312 L. 22-25)

How can Spangler say it doesn't fit with any concerns. I think he got it wrong. Is he telling the court he don't care about this issue. I think he brought it up to kill time. To help with the jury tampering. I mean this should have been a pre-trial motion to begin with anyway. This shows how ineffective both of them actually are.

20. Rule 404 attacking character

- (Tr. p. 338 L. 8-11)

The court ruled that there would be similarities, but there's a big difference between being home or at work or as well as being at home asleep or at work that is a dissimilarity. Counsel should have objected under Rule 404 on this. This needed to be objected to at the first stage of the trial.

- (Tr. p. 338 L. 12-23)

When she said she knew something would happen as well as "I've had prior experiences with - - he would get angry and threaten to kill me. This is attacking my character and should have been objected to. Hell, it should have been a mistrial.

- (Tr. p. 338 L. 24 – p. 339 L. 13)

So here again we have 404(b). ["Victim"] states that she learned not to resist, but according to her testimony from April 26, 2015 she was resisting, so this would not go together. So also she got hit here supposedly and December 1, 2014, April 26, 2015, as well as any of the second degree one. Oh, wait can you figure out which charge she is even talking about here. Because if it don't go with all four indictments then it shows it shouldn't have been consolidated. Even so limiting instructions could have cured that, but there were none. Counsel never objected to any of this.

- (Tr. p. 339 L. 20-22)
  And know she's attacking the character of her mother. Mayes is trying to shift the burden. Bur just even mentioning that is attacking my character because she's making us sound like a bunch of freaks. This should have been objected to.

- (Tr. p. 342 L. 21 – p. 343 L. 12)

First she's attacking my character saying she knew I would hurt her. How did she know? Where's any corroboration. Then the hearsay when she say what I supposedly said or the statement. Defense counsel never objects to any of this.

- (Tr. p. 345 L. 13 – p. 346 L. 21)
  Rule 404. What does my marriage have to do with this trial? Nothing. The State cannot attack my character by eliciting testimony that I was have marriage problems. As I said Rose and I separated one time since 2004 and that was in August of 2014, however that was once since this supposedly happened at Peachland. So this testimony was not permitted at trial. This should have been objected to. Oh, its also burden shifting because its not corroborated. The only way to change the jury's mind is for me to testify or for Rose to testify.

- (Tr. p. 347 L.2 – p. 348 L. 25)
  Attacking my character again. Mayes opening question says it all. Now if ["Victim"] would have said I was drinking when something happened that would not be the same as Mayes starting with that question. All these mistakes warrant a reversal because when the defense don't object to anything and this character evidence gets in there's no cure.

- (Tr. p. 391 L. 15-23)
  I can tell you this, no matter what she says that is attacking my character just because that DSS don't have anything to do with my kids or this trial. It did not belong here. Wayne and colin knew this. Wayne opened the door to it. He could have called in any of the DSS people to cure it, but at this point there simply is no cure. Floyd did this on purpose. At this point he couldn't have got a mistrial because he's the one that opened the door. Spangler should be disbarred for allowing this to happen.

- (Tr. p. 391 L. 24 – p. 392 L.9)
  Here's some more attacking my character. So many chances they had to object and never did. In effective assistance.

- (Tr. p. 393 L. 10)
  So, every time they mention DSS or divorce I'm writing it down to show you how bad it looked to the jury. Are you tired or seeing it yet: Well the defense should have objected, only then will it stop.

- (Tr. p. 492 L. 15 – p. 493 L. 10)

Here's another one that speculation and suggestive, you could take this a couple different ways. Put yourself in the jury's place or ask yourself what did I first think when I read this. Then you'll see the unduly prejudicial nature or it.

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- (Tr. p. 526 L. 5-13)

  Again Judge McMahon didn't allow it in under Rule 404 consolidation for me, So why wouldn't the defense object to this? How is this relevant to this trial? Its not. This should have never happened. Ineffective Assistance. Burden Shifting, Character Attacking.

- (Tr. p. 618 L.1 – p. 619 L. 9)
  So the defense objected to only the pictures not to States 38, States 37 or Phipps reading of what the watermark said, the watermark itself, the description of the website, the speculation and suggestive nature that it's a paid website as if I were paying for it. Phipps states website all deal with incest in some form, they're categorized in three categories mother-son, father-daughter, and brother sister. This attacked my character and under Rule 404(b) and Rule 403 are not allowed. Out of the photos the most unduly prejudicial photo was the enlarged version displayed to the jury. Additionally, this photo was from December 2, 2014 at 9:10 pm, was not identified by alleged victim, was out of range of time of alleged assault so the probative value was very little while the prejudicial effect very unfair, unduly prejudicial. The alleged victim never described anything about the photo or even if she saw it. She simply stated he used his I-pad. Defense counsel never did explain what was prejudicial about the photos after objecting. Spangler only states, the jury is going to see them and could only unfairly prejudice the jury against the Defendant. There was never an objection when Detective Phipps began describing what the websites were. This attached the Defendants character and prejudiced the jury against him. Counsel was ineffective for not objecting with specificity or not objecting at all to any of the photographs. Furthermore, under Rule 404(b) these photographs as well as the Ipad itself or even testimony that Defendant watched porn was not a part of a common scheme or plan so this evidence should not have come in without a Rule 403 balancing test. However, defense counsel never objected to any of the consolidation factors.

- (Tr. p. 623 L. 7 – p. 625 L. 13)
  Counsel never objected to States 36 and States 34 which states 36 is a blowup of States 34 for the 26th at 9:39 pm. There was never time mentioned when the assault would have happened so the photo never corroborated the time. Then again State's 22

- which was identified earlier in trial and was not objected to at that time either. So States 22 from April 26th at 10:39 pm in which the alleged victim never stated any form of timeline when the assault would have happened. Again defense counsel never objected to the photographs 36, 34, 22, 37, or 38 when they were introduced as to what the prejudice was and how it was going to unduly prejudice the Defendant. Spangler kept on renewing his previous objection which was not specific about what the prejudice even was. And again when Detective Phipps reads the description of the website daughterdestruction.con the defense don't object to the attacking of the character of the Defendant. Further more there was no evidence presented as to where any of the two websites were even visited. Even Phipps states that the videos are sold to multiple sites. So the watermark with its prejudicial nature that attacked the Defendants character should have been objected to as well as any description of any of the websites. Additionally, there was nothing in the photographs that would have answered any question the jury would have had about the Defendant using an I-pad. It was more prejudicial than probative. There also was never a rule 403 balancing test done on the photographs. In fact the judge never looked at any of the photographs to even do a proper 403 analysis.

- (Tr. p. 625 L. 17-21)
  I put this in here just to show the displaying of the photo to the jury.

- (Tr. p. 661 L. 1 – p. 663 L. 1)
  This type of questioning has no place in this trial. Under Rule 404(b) this DSS is not a part of any of this. Wayne Floyed opened the door and look, he wont even object to this type of questioning. Ineffective Assistance.

- (Tr. p. 696 L. 8-16)
  And here we go again with incest to, along with absolutely no objection. Now Mayes needs to answer where in their transcripts does ["Victim"] give a description of a video in December? Where is it?

- (Tr. p. 697 L. 25 – p. 698 L. 7)
  And here she starts with daughterdestruction.com. These need to be raised as issues because if not the court will find it harmless error. And again Mayes says she described this video too. Where? Agaiu no objection no effective counsel.

21. Leading

- (Tr. p. 340 L. 9-16)
  She's (Mayes) is leading ["Victim"] asking if it happened at Smith Pond Rd. And also look at it this way also, how old is she here. Mayes jumps around so much with her questions theres no way a juror would know the age or what indictment that testimony goes to. Wayne or Colin should have objected to these types of questions. They were ineffective.

22. Things the defense counsel should have hired an expert for or looked into

- (Tr. p. 615 L. 12 – p. 617 L. 25)
  So Phipps had to research it himself, so he should not have been qualified to testify to this because he's not an expert if he don't know. The defense should have researched this and or hired an expert of their own. Why wouldn't you do one or the other? Whose to say that Phipps ain't wrong? I can tell you this that stuff must have been in the background because I didn't see it. You know Ashley, Rose used to close out stuff like that on that I-pad because I never did. So I find it very suspicious that this comes up. Another thing while were at it. That I-pad was used by everybody in my house it wasn't used by me exclusively. And something else the one thing I know how to do was to keep somethimg in my favorites. So with that being said a lot of them auto-parts stores, Lowes, Tractor Supply etc. I would keep them as favorites because my business depended on these places. So I wouldn't have had to type them in. I don't' know if my defense counsel ever looked at that. I mean as ineffective as they were, I doubt it.

- (Tr. p. 628 L. 10-p. 629 L. 17)
  I'm going to say this in one question: Why wouldn't you back to see what date that or them particular websites were accessed? Ineffective Assistance

- (Tr. p. 630 L. 24 – p. 631 L. 20)
  Well they had to come from somewhere, so where? I don't buy that answer. I don't think they want to go back because it will take it out of the dates that they have. They didn't just appear. That's why the defense should have researched this or hired an expert instead of relying on an expert who's not qualified and works for the State. This is ineffective assistance.

- (Tr. p. 494 L. 24 – p. 496 L. 8)
  Here the defense never called that number or looked into what that was that Margie was calling. They acted liked she was doing something wrong and it made them look stupid to

the jury. But this just goes to show how unprepared they really were and how they didn't investigate anything.

- (Tr. p. 610 L. 25 – p. 611 L. 10)
Here, this testimony again shows that the states expert wasn't qualified to be an expert because is uncertain. He states it's probably exiting, so

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- He's not positive. This is where the defense should have hired their own expert.

23. Text Messages

- (Tr. p. 370 L. 17 – p. 371 L. 3)
I'm not sure about this. Is this improper corroboration? Maybe self-serving hearsay because the photos show both parts of that conversation. I'm not even sure what she's showing her.

- (Tr. p. 470 L. 23 – p. 472 L. 15)
Again this whole line of questions is improperly corroboration. Margie is saying she's learning this through text messages which is hearsay. And even more so how does she really even know for sure that its ["Victim"] she's texting? In a text message conversation is there even a way to be 100% positive. And I believe they're trying to improperly corroborate the time through the test messages, but the pictures I believe do not show the times. So this is improper corroboration, if the jury has these pictures.

- (Tr. p. 476 L. 6 – p. 477 L. 6)
I need to know if these pictures were put into evidence. If so, that would be improper corroboration, because there's no way to prove who's on the other end of the phone without voice recognition or some other means of identification. I guess I'm trying to say these should be authenticated by both parties.

24. Consolidation – evidence admitted Rule 404 issues

- (Tr. p. 370 L. 6-13)

So here, they're objection to the I-pad coming into evidence under the Fourth Amendment, but they should also be objecting under consolidation using 404(b) this don't fit with the other or all indictments so an in camera hearing is required. There the court must do a balancing test using Rule 403. This evidence was not presented pretrial when consolidating indictments so it therefore should be objected to under 404(b).

- (Tr. p. 378 L. 9-13)
  So under the consolidation of indictments under 404(b) using Wallace, here's another dissimilarity. My son Nicholas was living with us up until 2012 when he went into the Army. Counsel should have objected.

- (Tr. p. 379 L. 17-23)
  This is corroboration from the last issue and shows that counsel did not provide adequate representation during pre-trial motions as well as during trial itself.

- (Tr. p. 592 L. 20 – p. 593 L. 12)
  Again, this is another missed opportunity to establish the prejudice behind the consolidation, 404(b), 403 balancing test. This evidence simply does not fit with all indictments and therefore shows that the prejudice is overwhelming as to why it should not be admitted. Counsel only objects to relevance and no other prejudice or unduly prejudicial effect from it being admitted.

- (Tr. p. 593 L. 13 – p. 594 L. 10)
  Ashley, How is he going to argue about the dates aren't relevant on the dates not listed on the indictment, then he allows or don't argue about these photos not being relevant as to the two indictments where the I-pad was not used. Why didn't he say these photo's aren't relevant to two of the indictments therefore are too prejudicial to allow in under the consolidation, Rule 404(b). Why didn't he do that? Because he wasn't prepared or effective.
- (Tr. p. 594 L. 13 – p. 595 L. 9)
  Don't you think that all of this testimony should have been proffered before the jury heard and saw it. How can the judge make any kind of decision when he don't even know what the evidence is ie, the photos. How does he know about December 1 and 2 before hearing Phipps testimony. This is why he allowed it in because he didn't hear no in camera testimony. And it would

have been required had defense counsel objected to the consolidation anywhere in the record, not just here but anywhere. This shows just how ignorant and unprepared they actually were.

- (Tr. p. 595 L. 12 – p. 597 L. 17)

This is where its confusing. So why is he objecting to photos that have not been put into evidence yet? When they go to display them he just renews his objection to evidence that has not been put in yet, ie. The enlarged versions that were displayed. In other words he didn't object to the enlarged versions, or the fact that they even enlarged them. What was the purpose for enlarging them is what he should have been asking the court. He also says that displaying them is just not necessary. Well that's not a reason. He never mentions the watermarks with the name of the website that they never showed was actually visited. The description of the website that can't show where it was visited. So my question would have been, show me where the website was logged into. And it don't corroborate ["Victim"]'s testimony. She Id' States 22 and only States 22 so how can the December 1&2 be relevant? How can it be if it was not Id' or there aint something within that picture that needs to be looked at. What is the actual photo corroborating? Counsel was not specific, they didn't show the prejudice, mention the Rules of evidence that it was violating, as well as Rules of Court. Counsel was ineffective.

- (Tr. p. 656 L. 15 – p. 664 L. 20)

Show me on the face of any of the indictments with the testimony of the alleged victim where this testimony is probative. Why didn't counsel object to this. Because they opened the DSS door. However as I said before this testimony attacks my character, is out of the consolidation under 404(b), is unduly prejudicial under rule 403, and last is not relevant to the duties with 2004 as well as half of 2005 my children were not even in my custody. We didn't live at Peachland Dr. until May or June of 2005. Counsel knew the dates were wrong, heard the testimony, still did nothing about it. Could have even called witnesses from DSS, but they couldn't because of prejudice that would put on the States case and would therefore warrant a mistrial. I guess is what I'm saying it started with consolidation, indictments being wrong dates, defense opening the door about DSS, and simply not objecting to anything has caused this snowball effect, and there is no cure for it. This counsel was beyond ineffective.

25. **Res Gestae, excited utterance, first impression, Rule 404 (b)**

- (Tr. p. 460 L. 10-12)

This is only put in here because Deguzman's description is basically saying that anything she says is no longer under excited utterance.

- (Tr. p. 501 L. 11-14)

So remember this statement because Black goes outside of any sexual assault that happened that night. Defense counsel never objected to this, and that's why you don't hear about it in my direct appeal because if it aint objected to, it can't be raised in direct appeal. So it will need to be raised here in PCR as ineffective assistance of counsel.

- (Tr. p. 502 L. 5-13)

I'm not sure if they put this in to throw me off of the fact that DeGuzman read ["Victim"]'s statement from the SANE report without an exception and without it being admitted into evidence. But if they are, it's not happening, these issues are going to be raised.

- (Tr. p. 505 L. 6 – p. 506 L. 2)

Just four pages previously USRY said it wasn't going to go outside of what had happened that night and the Defense Counsel still didn't object to it. Talk about being asleep at the wheel. This should have been objected to and grounds for a mistrial, because this can never be harmless.

- (Tr. p. 598 L. 11 – p. 602 L. 11)

So first, I want to say that if you go back to when the Detective testified, you don't hear any open objection and that's because trial counsel was being intimidated by the Judge and they were afraid to object. So number one that makes them unfit to defend anyone in court. Second, Rule 801 refers to and Floyd also referred to a prior statement of the witness. Now, Ashley, I don't know how anyone else construes this but I look at it as a "prior" statement meaning prior to that specific incident that the witness, who is also the alleged victim previously complained. And if you look at it it makes sense because that is why it would be limited to time and place, because otherwise it would fall under Rule 404 and one of its exceptions. Then when Mayes speaks to it, you see she mentions incidents with an S. Then, again mentions multiple incidents, multiple

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Indictments. Then with Mayes other statement about it being a complete exception to hearsay. So my question or answer to that is only a damn idiot wouldn't be able to figure out if it were a complete exception to hearsay, then why in the hell didn't they just use that for Black's testimony instead of excited utterance? This right here shows the misconduct of not just the Solicitors office but the judge and the attorneys. This needs to be raised as ineffective assistance because I'm going to follow this one to the end.

26. Testimony that goes against what's already been testified to that was not questioned

- (Tr. p. 459 L. 16 – p. 461 L. 13)

A couple of issues with this. I don't believe anything was published to the jury if they're talking about putting that report in evidence, it never was put into evidence!

So Deguzman asked alleged victim if her anus had been penetrated she said no fingers, no to penis then nurse marked yes to object for licking, which should have been questioned. Then down in non genital acts where it says licking she checked that too. So that could have confused the jury if they looked at it. I mean if you see two separate things checked most people wouldn't refer to the same thing in two separate sections of a report. This would be improper corroboration. Than the serologist and DNA analyst said they went by the nurse protocol report as to what they test and how they test. So it states right there in the report, no ejaculation, yet they tested for semen which came up negative. Then they couldn't test for saliva, because they could only test one thing supposedly. Also in here Deguzman mentions one hair on the rectal swab, yet SLED gets two hairs. How is that possible. Now also this is why the defense

Pages 101-150

Counsel was ineffective for stipulating to the chain of custody.

Then the nurse refers to the hair as pubic hair. Now she don't know where that hair came from. This should have been addressed in a motion for a mistrial. So it invaded the province of the jury because it improperly corroborated the states statements and theories as to how the hair got there. But because we lived together that hair could have come from anywhere in my house, anywhere off of my body. So when they referred to it as a pubic hair this vouched for the alleged victim. As well as everything else mentioned.

If you're confused imagine how the jury was, much this has got you twisted up. On the stand I will be able to explain everything in explicit detail. So all this is to say that the defense counsel heard this testimony and still missed the mark when it came to questioning sled serologist and DNA analyst. So they were ineffective.

- (Tr. p. 517 L. 14-22)

Now this is a big one, because she also states that she was sitting in her vehicle then she wasn't. And now this she admits she asked me 26/2 questions before she read Miranda rights to me. I've always said that she asked me that question about the I-pad outside the vehicle, before she read Miranda rights. Also this was ineffective assistance of counsel because they didn't call me to testify at the in camera Jackson v. Denno hearing. So this is an issue.

27. Burden Shifting

- (Tr. p. 392 L. 10-25)

This is self-explanatory as to burden shifting. She made it sound like Rose was not testifying because then she wouldn't have any support. The only way to change this theory would have been for either me or Rose to testify. Counsel should have objected to this.

- (Tr. p. 459 L. 6-15)

Again self-explanatory. I would have had to get on the stand and testify to the fact that I had only ever picked ["Victim"] a few times since she started school in kindergarten. Now counsel should have questioned this because I told Wayne when she said this. So once again they were completely ineffective.

28. Defense Opening the door

- (Tr. p. 373 L. 21-14) sic

This is where Wayne Floyd opened the door to DSS which is one of the most ineffective things he done. It totally denied me a fair trial. Just by the jury hearing that my children were removed from our home tainted the jury pool. There was no curative action that would ever fix that. Just this would get my case overturned but everything needs to be put in, because when I get a new trial, they would be able to do the same thing again if it ain't ruled on.

29. Defense Attorneys Attacking My Character

- (Tr. p. 374 L. 8 – p. 375 L. 2)

Floyd referring to me and Rose being separated, but here's the thing, we weren't separated at all when DSS took our kids away. We were back together. Michael Jeffcoate was the guardian Ad litem, Stephanie Amacker was the caseworker, and Monty Caughman was the attorney for DSS. You probably know Monty and Jeffcoat, so ask them about it. Ineffective Assistance.

- (Tr p. 381 L. 7 – p. 382 L. 19)

Again, why do they keep on talking about any marital problems that Rose and I may have had. This is attacking my character. They are ineffective.

- (Tr. p. 627 L. 9-18)

Spangler makes the comment "websites that the Defendant has been on." This is not just attacking my character but it also is improperly corroborating that it was me on the website. Theres no proof of who accessed those sites so this was damaging. This was ineffective.

- (Tr. p. 631 L. 11-13)

So again here Spangler again improperly ... (appear to be a page missing in amendment)

The next page begins but does not appear to be related to Section 29.

"into conspiracy."

- (Tr. p. 603 L. 19 – p. 604 L. 6)

Help me to understand this. If state's 30 was not put into evidence how can they put a report into evidence from that disc? Is this why they decided to do the motion for mistrial so that I would forget what they ruled on. Is this to misguide the judicial process, because it sure as hell look that way. So back to the disc. Everything came off of that disc, so how or why can they put parts or pieces of it in if the disc itself ain't in evidence. Is this so Spangler can keep objecting to States 30 like his objecting to the other photo's but he's really not? This would definitely be ineffective.

- (Tr. p. 605 L. 19 – p. 606 L. 5)

Again if he objected to States 30 why wouldn't he object to this, if it's part of it. Is this ineffective assistance.

- (Tr. p. 608 L. 4-21)

So if his allowing all of this in why didn't he get the dates when the actual web-site was (ILLEGIBLE and CUT OFF – Pg 106

30. **Pornographic Images**

have been on my computer or ipad for a year or two and I wouldn't have known it. How would I know. Hell, I don't even know how to burn a CD on a computer, do you think I could do all that other stuff they talked about. You see I think Spangler helped the prosecutor by saying only specific dates, because this would stop them from finding out when it was actually pot on the ipad or accessed and that would be bad for their case. Ineffective, Yes.

- (Tr. p. 610 L. 25-p. 611 L. 6)

This is where the Defense should have researched this or hired an expert to help them understand instead of relying on the States expert witness. How can they say you were watching something when they say that's it's exiting. I don't know a lot about computer stuff, but I do know that something can be playing in the background. So I don't see how they can say an exit is proof you were watching something or even know it's even playing. Defense was ineffective for not researching how that system operated or hired an expert. They could have even asked for a continuance for that fact.

- (Tr. p. 611 L. 25 – p. 613 L. 25)

Ashley, can you see what they just did? Usry mentioned the other dates in front of the jury, Colin objected to the only specific dates, then they redacted it. What do you think the jury thought about that? That theres something there that the defense don't want us to see. This little incident attacked my character. That solicitor did that on purpose. This should have been a mistrial. There is no coming back from that. Spangler was probably part of the whole sham. He was ineffective for not raising the prejudice, the unduly prejudicial effect of that solicitor trying to introduce something she knew they were going to object to.

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- (Tr. p. 614 L. 4-24)

Here as I said before is an enlargement of a previous picture. Yet Spangler keeps doing as I said before he is still not objecting to anything. He's reincorporating the same objection. He needed to object to the enlargement specifically, then he needed to be specific about what in the photograph will cause the prejudice and why its unduly prejudicial. Watermarks, attacking character, does not fit into common scheme or plan under Rule 404(b), Wallace similarities etc.,. etc., etc. You know Ashley everytime a piece of evidence was introduced at this trial, had the defense objected under Rue 404(b) there as supposed to be an in camera hearing to determine if it was admissible under the rule. Whether it be Wallace, Lyle, or now Perry the defense simply did nothing but allow that whole damn consolidation to taint this whole trial. This denied me due process. IT was a structural error that cannot ever be cured. Even the delayed disclosure wouldn't fit within that 404(b) because it has to be proved by the same witnesses. All the witnesses were from April 26, 2015 including this one here. This is ineffective assistance at it's worse.

- (Tr. p. 619 L. 10 – p. 620 L. 13)

You see, even here he don't object to the state putting any of this into evidence. So exactly what is he objecting to. Nothing! Counsel was ineffective for failing to object to unduly prejudicial evidence being moved or put in evidence by the state which includes any and all photographs from the I-pad with pornographic images with watermarks.

- (Tr. p. 620 L. 21 – p. 621 L. 10)

Again, I don't think that because that extraction report wasn't put in, is this allowed. But even more the time stands at 12:25 AM and that's outside of the time frame specified earlier.

- (Tr. p. 622 L. 11-18)

So who is the user hitting the button. Who is it? How unduly prejudicial is this if they can't prove who the user was. Seems as if this required an in-camera hearing and the Court would have found the evidence clear and convincing that I was the user and that it fit within 404(b). So here you go more unduly prejudicial evidence that was inadmissible. Defense was ineffective for allowing this.

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- (Tr. p. 626 L. 11-21)

Again my Facebook can be access by anyone in possession of the Ipad. The password automatically comes on. So they're trying to say that because Facebook was accessed that it was me. Why didn't counsel question this. This was ineffective.

- (Tr. p. 694 L. 24 – p. 695 L. 5)

I know she's trying to give a reason for enlarging the photo and showing it to the jury. If the video is paused that's not probative to anything. Furthermore, had the Defense made an objection under Rule 404(b), I don't see how this judge could have found this evidence clear and convincing. Clear and convincing is different than being admissible. Defense was ineffective on every issue that I'm raising within these pages.

31. Leading

- (Tr. p. 337 L. 24 – p. 338 L. 7)

All these questions are leading. And so much that theres testimony that she states that I didn't use my fingers until at Smith Pond Rd. But Counsel never objects to any leading questions.

- (Tr. p. 339 L. 14-19)

And here you see the unduly prejudicial effect of them leading questions, because I did not have a bedroom at Peachland. I told you before that me and Rose slept on an air mattress that we had to blow up every night. This was a temporary home. Defense counsel knew this and didn't even question her about it.

- (Tr. p. 339 L. 20-22)

What do you think the jury thought when they heard that question. Then later on followed by Rose being arrested, and how they made it out that Rose wouldn't protect ["Victim"] if she ever had to. Counsel did nothing. I was never represented at this trial.

- (Tr. p. 340 L. 24 – p. 342 L. 20)

Leading. That's all I can say and that Defense counsel never objected. Ineffective Assistance.

- (Tr. p. 345 L. 13-24)

Leading and getting into attacking character. Ineffective Assistance.

- (Tr. p. 349 L. 25 – p. 350 L. 8)

Leading and more than likely rehearsed. Ineffective Assistance.

- (Tr. p. 350 L. 19-20)

No where does ["Victim"] say she was seated. Ineffective Assistance.

- (Tr. p 351 L. 7-17)

"Based on your past experiences." Leading Ineffective Assistance.

- (Tr. p. 353 L. 11-18)

Leading. Ineffective Assistance.

- (Tr. p. 356 L. 7-16)

Leading and hearsay. Ineffective Assistance

- (Tr. p. 357 L. 6-10)

Leading. Ineffective Assistance.

- (Tr. p. 360 L. 22 – p. 361 L. 19)

Leading. Ineffective Assistance

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- (Tr. p. 362 L. 25 – p. 363 L. 16)

Leading. Ineffective Assistance.

- (Tr. p. 367 L. 14-16)

Leading. Ineffective Assistance.

- (Tr. p. 371 L. 22 – p. 372 L. 19)

Leading. Ineffective Assistance.

- (Tr. p. 395 L. 2-3)

Leading. Ineffective Assistance.

- (Tr. p. 445 L. 18-22)

Leading and hearsay without exception. Ineffective Assistance.

- (Tr. p. 452 L. 2-12)

Leading, speculation, improper corroboration. Ineffective Assistance.

- (Tr. p. 472 L. 8-10)

Leading. Improper Corroboration. Bolstering. Ineffective Assistance.

A. **Suggestive**

- (Tr. p. 617 L. 5-13)

Mayes is suggesting that there's so much stuff on the I pad. Not only suggestive, but character attacking. This is even compounded when Usry hand mentioned the excessive dates from Phipps testimony. Counsel should have objected. Ineffective Assistance.

- (Tr. p. 695 L. 20 – p. 696 L. 2)

This is not just merely suggestive. Its speculation too. Attacking my character, prosecutorial misconduct. None of this was testified to. Theres no way that <u>any</u> competent lawyer wouldn't have objected to this. Ineffective Assistance.

- (Tr. p. 339 L. 20-22)

This speaks for itself. Its suggestive, and warrants a mistrial. Additionally, it attacks not just Rose's character but mine. Maybe this is why they didn't call her to testify, so they could do this. And because of this I believe the confrontation clause needs to come into this too. So counsel never objected to anything here. Ineffective Assistance.

B. Speculation

- (Tr. p. 355 L. 2-14)

This could be considered speculation as well as suggestive. Counsel should have objected to these types of questions. Ineffective Assistance.

- (Tr. p. 582 L. 5-8)

So speculation, suggestive, as well as prosecutorial misconduct. There was no testimony saying these were pubic hairs. How would the be able to tell? This was ineffective Assistance for not objecting and in the alternative Counsel never attacked the notion if they could tell whether they were pubic hairs. And even so, what about the fact that we lived in the same house, clothes laundered together, etc., etc., etc.

- (Tr. p. 632 L. 10 – p. 633 L. 10)

So all of this testimony is suggestive. We are dealing with evidence, proof of that evidence. Not suggesting to the jury or speculation to the jury that it could be this or it could be that. Facts and facts only. If there's no proof that I hit incognito or whatever it is, or that something is saved then you can't say it. Where's the proof it's saved. There ain't none, because it's not. So you don't say it. Ineffective Assistance of Counsel for not objecting to speculation, suggestive, and attacking my character.

- (Tr. p. 6334 L. 21-25)

She is speculating and suggesting here again that I have videos saved on my Ipad. Attacking my character by doing this. Ineffective Assistance for not objecting.

C. Timeline Information for April 26th

- (Tr. p. 354 L. 16-19)

So this is going to come into play when the hearsay from the Sane report says from 9:30 PM to 11:00 PM. Then Maye's talked over her testimony saying 9:00 to 11:00. Which is misconduct. But also times of videos along with everything else. This aint an issue, it's a timeline to help you and me when I testify.

- (Tr. p. 439 L. 1-15)

Again, this will go toward any type of exception they try to say the hearsay will have. As well as the hearsay from the Social worker telling her what time ["Victim"] arrived, which is another confrontational clause issue because of hearsay. You know confronting a witness that they're hearsay statement was testified to in court is the only cure for that said hearsay. If not then it's just not hearsay, but improper corroboration, which can never be harmless error.

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- (Tr. p. 502 L. 25 – p. 521 L. 2)

Mayes: I'm going to start here at the top.

(Miranda) What time is this?

McCann: 2:02 AM

D. Limiting Instructions

- (Tr. p. 338 L. 24 – p. 339 L. 13)

This shows why there needed to be limiting instructions. First, which indictment did this evidence to, because the Dec. 1, and April 26, are CSC 3rd degree. So are we to assume that they or this testimony goes to one or two or all. Who knows. And this is exactly the proof that the consolidation was a due process violation. This evidence don't prove the last two indictments so is the jury supposed to assume. Assume what? Counsel should have objected to consolidation, but even more so to limiting instructions. This made them Ineffective Assistance.

- (Tr. p. 339 L. 20-22)

Again, which indictment? And because of no limiting instructions and this being suggestive this warrants a mistrial. Ineffective Assistance, - Limiting instructions, Consolidation, Suggestive, Character Attacking.

E. Elements as it goes to April 26th for DNA, coercion etc.

- (Tr. p. 353 L. 1-4)

So if she was laying facedown, how would our pubic hair had become entangled? This is what the Sane Nurse said. Counsel was ineffective for not questioning this.

- (Tr. p. 354 L. 20 – p. 355 L. 1)

This is something that Sled serologist said as well as DNA Analyst that they go with the case scenario in the Sane report. Yet she states it here as well as in that report and the defense counsel never attacks the fact that they didn't follow the scenario of the Sane report, because they only checked for semen and not saliva on anal swab. Which goes against the fact that they found saliva on her underwear.

- (Tr. p. 388 L. 3-13)

And here counsel knows no ejaculation and they still don't question the serologist or DNA Analyst why they tested for semen and not saliva. The reason for this is if they found all that saliva on her underwear, then why wouldn't you test where you said it generated from? You know the defense should have just speculated that I was chewing on her underwear at that point. I know its funny, but its true and it shows you how ineffective these two attorney were.

F. ["Victim"] says she didn't tell Rose- goes to Maye's suggesting to judge that she did. Prosecutorial misconduct

- (Tr. p. 338 L. 12-17)

So all of this page is going to say that counsel knew that ["Victim"] had said multiple times at trial that she never told Rose. Yet Maye's with her prosecutorial misconduct stated again and again all throughout the trial, or suggested that Rose knew. And all these times counsel never once objected. So these testimonies show Counsel was not involved in the trial enough to properly defend me. That makes them ineffective.

- (Tr. p. 382 L. 9-21)

Here she tells Wayne Floyd, so how can they not object to Mayes testifying to something not stated in trial from testimony. That makes her a witness.

- (Tr. p. 383 L. 4-8)

Again Wayne asks ["Victim"] and he still don't say anything all the times that Maye's suggests it.

G. Pornographic images being Id; used in consolidation ruling in limine

- In camera (Tr. p. 242 L. 5-11)

Mayes: I'll show you another photograph, Do you recognize that?

["Victim"]: Yes.

Q. When did you last see that?

A. That night in April.

Mayes: This would be States 22 for Id, Your Honor.

So how did she Id that as used in a crime, she don't specify what date or anything else. Also how can the court find that clear and convincing evidence. But theres more. Why didn't counsel object to the photograph then as prejudice, to going to consolidation, to 404(b), to have a Rule 403 balancing test etc., etc., etc. This is ineffective assistance.

- (Tr. p. 246 L. 9-15)

Same in camera hearing here. So first issue here. They had to have the DNA and Serology report authenticated before the judge would rule on the evidence as being clear and convincing. And the Court looked at it and read it. Now what did he do with that extraction report. Seems like he not only didn't look at it, but did not give the defense an opportunity to object. But still the defense also that that she (State) was offering it as a Court Exhibit so they should have objected As before, to Consolidation, 404(b), 403 balancing test to determine probative US prejudice, But not on just the extraction report but the DNA Also. Defense should have objected to this which makes them ineffective. Note that defense counsel didn't object to pornographic images at this point.

H. Authentication of reports and ruling using unauthenticated report not put into evidence

- (Tr p. 662 L. 7-25)

This report was not authenticated, yet used for no other purpose than to attack my character from a date that had nothing to with any of these alleged offenses.

- (Tr. p. 669 L. 5 – p. 672 L. 6)

So here they know that none of that document has been documented. Additionally, none of it has been put into evidence by either the State or the defense. Then the defense attorney Wayne Floyd, Solicitor Mayes decide that it don't have to be authenticated and the judge allows it in. This is a total denial of due process, a constitutional issue as well as defense attorney's being beyond ineffective.

- (Tr. p. 671 L. 21 – p. 672 L. 6)

Here the unauthenticated Sane Report has been put into evidence. Take note that it was not put into evidence when the jury was in the courtroom. In other words court was not in session. This was ineffective assistance.

- (Tr. p. 675 L. 18 – p. 676 L. 13)

I don't know why he put that report in for the judge to use for a directed verdict. Please explain that to me. I'm sure eventually I'll figure it out. It just seems ineffective for him to put that Sane report in for the judge to use. Is it because it corroborates Therea's story? If so its improper.

- (Tr. p. 685 L. 18 – p. 686 L. 9)

This is what makes me think that that Sane report was supposed to be put into evidence while the jury was in. If so counsel was ineffective for not objecting and for putting that report in as Defense evidence.

I. Things that Floyd and Spangler should have objected to, fought harder

- (Tr. p. 400 L. 21- p. 401 L. 4)

The defense could have done better on an objection as to why an expert was not needed. So I'm going to argue this and keep in mind that some of what I say has already been ruled on, however when put together as a whole it will change the way the court will look at it.

So first, all of the delayed reporting and family dynamics all come from hearsay which is then a way for this witness or expert to basically vouch for the credibility of the alleged victim in this case. Second, ["Victim"] has already testified as to why she allegedly didn't tell, so anything else said by another witness could not nothing but improperly bolster what's already been said. You could say that it improperly corroborates as well.

Now, them two have been previously ruled on. However what this form of testimony is doing is asking the jury to believe the victims or alleged victims that this study has been done on. Theres no testimony from these alleged victims so its all hearsay. And now they (State) wants the jury to give a psychological evaluation of ["Victim"] to see if it fits the same factors as the alleged victims who they studied to get this information.

It's not as when a pathologist makes a finding or a CSI scientist shows where two bullets are a match by looking at a picture. They are asking to basically take a crash course in delayed reporting then through ["Victim"]'s testimony go and give your first psychological evaluation. This is not only unconstitutional, it's so prejudicial that this type of expert should not be allowed ever to report on this. Defense could have fought this a million and one ways but didn't. Howe about under 404(b) she's not the witness for April 26th. Where's the 403 balancing test required.

Further more with all of the DSS stuff how much more do you think that magnified that character attacking testimony?

- (Tr. p. 409 L. 8-14)

Even here child sex abuse expert. So this is to do nothing but bolster the alleged victims testimony. (ILLEGIBLE) she's being offered as that they're saying that she was abused, or needs to give an opinion as to whether she thinks the alleged victim was.

Also, it's unfair to do this or allow this testimony

I2

Because the solicitors questions can be tailored to bolster, corroborate, and vouch for the alleged victims testimony. And that's what was done here. Counsel never objected to any testimony from this witness that did that. Counsel was ineffective.

- (Tr. p. 513 L. 9-24)

How do you think the jury took that? Do you think that's why Wayne was afraid to object when Marlo McCann was testifying and Wayne had to wait till Phipps was testifying to address his objections from this. This was a mistrial just with what he said. How in the hell can you, or why should you need to let him know in advance? This is taking it to conspiracy and I'm going to address this in Court.

- (Tr. p. 515 L. 2-5)

Improper Corroboration. She's taking it out of time and place. This was not address in direct appeal because I'm not sure if Wayne even objected because of what I said earlier, being intimidated by the judge. So this is the prejudice caused by Wayne allowing himself to be intimidated without putting it on the record. This was ineffective,

- (Tr. p. 502 L. 17 – p. 504 L. 1)

So this part of the trial is already in another part under a different issue, and that just shows you how twisted up this whole trial actually was. But the purpose for this is that Defense Counsel needed to re-object or object at all to this after the ruling because there was no open-objection ever placed in the record. Floyd called for a side-bar, but no where is there any objections. As well as this happened moments after the judge ridiculed the defense counsel in front of the jury which was intimidating and could have caused the error. And if so should have been a motion for a mistrial itself. Counsel was ineffective for not objecting on the record to in admissible hearsay and after secret motion for mistrial, never re-objected to ruling on the record. This stopped Defendant, now Appellant, from raising issue on direct Appeal.

J. Judge McMahon ruling wrong on 404 (b), counsel not correcting wrong by objecting etc., ruling or stating wrong case law

- (Tr. p. 250 L. 21 – p. 251 L. 3)

See this should have been objected to because they are talking about victims. Even the judge points out that its plural. So counsel should have said something here or they could have objected when 404(b) evidence was introduced. This was ineffective assistance.

- (Tr. p. 251 L. 15-20)

So Hallman has been overruled. And so this goes to prove that many competent lawyers were objecting to its use. They were also objecting to Wallace which you don't see here. Why? Because he used it for consolidation and has now digarded it. Why didn't counsel object to that, Wallace has also been overruled. So now the court has changed its ruling based on Kirton instead. Why didn't counsel object? They were ineffective.

- (Tr, p. 253 L. 7-13)

So what about the I-pad extraction that was put in. Why didn't he mention that? They still put it in as a court exhibit. This was ineffective.

- (Tr. p. 262 L. 20-22)

So he didn't rule on it yesterday. He withheld his ruling till the court exhibits were put into evidence. See (Tr. p. 253 L. 12-13). Trial attorneys should have called for a mistrial because they were intimidated by this judge. They were clearly afraid of him, and this made them very ineffective, and unable to do their job.

- (Tr. p. 262 L. 25 – p. 263 L. 4)

Ashley, can bad acts or can you be tried the same for bad accts when really all are bad acts to the other indictments. Please explain how this is even constitutional. If this nutjob can tule that the bad acts are clear and convincing then he's saying he thinks I'm guilty. He's biased. This was a mistrial to even do this. Ineffective Assistance.

J2

- (Tr. p. 264 L. 1-7)

Is this because nobody objected to the consolidation at the start of the trial? What he's saying makes no sense. So who rules as to whether under rule 404(b) if that evidence is admissible. Is it that they need to object when its introduced in Direct Examination. Well they don't. And that's why they're ineffective as defense attorneys. Hell even I figured that out, and without Law School.

K. Prosecutorial misconduct

- (Tr. p. 267 L. 18-21)

Mayes: What is the time on that Miranda form in which the Defendant waived his Miranda rights and agreed to speak with you?

McCann: 2:02 AM

This is self explanatory. Don't know why counsel wouldn't object to this. They should have because I never signed my Miranda rights away and I never agreed to speak with them. This is ineffective assistance of counsel, as well as prosecutorial misconduct.

- (Tr. p. 452 L. 22 – p. 453 L.8)

So here is where the whole DNA process and the fact that Wayne Floyd stipulated to the chain of custody was ineffective assistance. Now compare this testimony to this *(Tr p. 542 L. 24 -- p. 543 L. 1) So both say a hair from the rectal swab correct. Now look at *(p. 575 L. 1-24) So how did (1) one hair from two other witnesses turn into two. That evidence is tainted. Someone planted a hair and counsel didn't catch that. What's even more interesting is when you read *(Tr. p. 691 L. 17-24) Maye's corroborates Nurse Deguzman's testimony "the nurse visualized, could physically see a hair." This is not just fraud upon the court it's ineffective assistance.

- (Tr. 553 L. 23 – p. 556 L. 8)

So first off a serologist don't test for DNA. And if Sled could only test for one type, why didn't counsel have it tested? And then based off the scenario, she didn't either swab vaginal or rectal, yet the case scenario was talking about licking. So if she had saliva that came from her behind and got on her underwear aint it safe to assume it would be on her body also, because that's where it would have transferred from according to the State. Yet, this proves that it didn't. I think they tested it and didn't turn it in. Just like the extra hair, there's some funny business going on here. This is still ineffective for not questioning anything. They were totally useless.

- (Tr. p. 576 L. 2 – p. 577 L. 10)

Even Maye's refers to "A" hair again, and this is after that previous testimony. Twice Counsel could have and should have motioned a mistrial or even questioned, but nothing. Ineffective Assistance.

K2

- (Tr. p. 579 L. 4 – p. 581 L. 12)

Spangler is trying to cover up the fact that Maye's and DeGuzman both referred to the hair as being pubic hair, which cannot be determined. So that's improper corroboration, bolstering, and as to Maye's I don't know since the Sane Nurse is actually the one that called it pubic hair. But it's still ineffective assistance because this was never questioned by counsel as far as DeGuzman goes. Ineffective Assistance. But you see Spangler trying to cure this mess-up but it's really too late when it comes to that type of testimony.

L. Testimony that goes against other testimony that counsel never questions

- (Tr. p. 267 L. 18-21)

I addressed this in section M1 under testimony that's wrong. This is a couple of difficult issues, but this is for prosecutorial misconduct, but can also be leading a witness. Counsel only had to look at Miranda from and they would have seen no signature that waived by Miranda rights. Ineffective Assistance.

- (Tr. p. 687 L. 5-8)

Court: Closing Arguments are different from opening statements; they may argue the law and the facts.

I only put this in as a reminder to me and you that this is what they are supposed to argue. Anything outside of that is unfair prejudice. Prosecutorial Misconduct.

- (Tr. p. 688 L. 24 – p. 689 L. 2)

Counsel was once again Ineffective for failing to object, motion for mistrial for prosecutorial misconduct, Hearsay within hearsay, suggestive, confrontational clause, Rule 404(b), Rule

403. These are not facts. And are or were inadmissible under Rule 404(b), which would have then required an in-camera evidentiary hearing and a balancing test which then also goes back to counsel not objecting to consolidation under 404(b) as well as not objecting to any of the evidence when it was presented at trial. And it also attacked my character.

- (Tr. p. 689 L. 18-20)

Prosecutor just vouched for the alleged victim. Counsel failed to object to prosecutorial misconduct.

- (Tr. p. 688 L. 3-7)

So which charge or indictment does this go to. Limiting instructions need to apply at all phases of the trial. Prosecutor vouched again for the credibility of the alleged victim. Also under 404(b) she attacked my character making reference that I was trying to "conceal it." Again which charge does the threats go to? Counsel was ineffective for failing to object, to motion for mistrial, for above reasons.

- (Tr. p. 690 L. 4-5)

Vouching and suggestive. Counsel should have objected, motioned for mistrial.

- (Tr. p. 690 L. 25 – p. 691 L. 6)

So prosecutor is suggesting ejaculation, which was never testified to. Additionally, referring to the

L2

Inadmissible hearsay from that Sane nurse that was allowed to be heard without objection and without any exception due to the lack of objection.

- (Tr. p. 691 L. 7-16)

So here under prosecutorial misconduct which counsel was ineffective for failing to object to suggestive, vouching, speculation, which is repeated from prior testimony that would have been inadmissible had counsel objected.

- (Tr. p. 692 L. 13-18)

Mayes is testifying things that were not testified to. Counsel was ineffective for not objecting to prosecutorial misconduct for not objecting to things not testified to in trial.

- (Tr. p. 692 L. 3-5)

The serologist never explained this at all. The DNA Analyst did. Counsel still should have caught this and objected to prosecutor testifying to evidence not presented in trial. Counsel was ineffective.

- (Tr. p. 692 L. 22 – p. 693 L. 5)

First this is improper corroboration. Then Thompson never testified to all that she stated that is improper corroboration of alleged victims testimony. Which vouched for the credibility of alleged victim. Was suggestive as well as speculative from the prosecutor, which would be prosecutorial misconduct. Counsel was ineffective for not objecting to prosecutor presenting evidence and testimony that was not part of the record.

- (Tr. p. 693 L. 7-18)

Improper Corroboration from the prosecutor to include vouching for the alleged victim. As well as speculation and suggestive to evidence not presented at trial. Counsel was ineffective for not objecting to prosecutorial misconduct for above reasons.

- (Tr p. 696 L. 8-16)

Show me where in those transcripts where she described that image. Improper Corroboration of prosecutor's speculation not in the record. Counsel was ineffective for not objecting not motioning for mistrial for prosecutorial misconduct.

- (Tr p. 696 L. 17 – p. 697 L. 2)

She just vouched for the alleged victim. Mistrial. This is also invading the province of the jury. Counsel was ineffective for not objecting to prosecutorial

L3

Misconduct.

- (Tr. p. 697 L. 13-20)

Again, show me in the record where there's evidence to corroborate this? Funny thing is I don't even know what that stuff is. This also attacks my character as if I have a collections of porn on my Ipad. This is the worst kind of person in the world, that gets people to believe something that "she" shows is not true. This should have been objected to and motioned for a mistrial. Counsel was ineffective for not doing this.

- (Tr. p. 697 L. 21 – p. 698 L. 1)

Again Mayes is saying things not testified to at trial which is vouching for the alleged victim. So ["Victim"] never described States 22, and furthermore anybody can identify it if that's the only choice. Furthermore she improperly corroborated Phipps testimony or actually not when she says that "we" "know" he hits the button. Where was this testified at. How do they know it was me? Counsel was ineffective for failing to object to prosecutorial misconduct.

- (Tr. p. 698 L. 1-13)

First is she attacked my character saying that about an obsession with wanting to have sex with my daughter. Then the comments "we know" which improperly corroborated McCann's testimony about that statement and invades the province of the jury. Then again "we know" she improperly corroborates the time of the assault. And this is the state prosecutor's office that's corroborating this, not law enforcement or anyone else. So now this prosecutor is a "witness" and I did not get to confront this witness. Now Dec. 2nd she improperly corroborates that I hit that button. So where is this in the record? Counsel was ineffective for not objection to any of this prosecutors misconduct which denied me a fair trial, due process.

- (Tr. p. 699 L. 13-21)

She's trying to cover for the alleged victim stating at Peachland she was made to come into my room, which didn't exist. Then she starts speculating about the finger or tongue comment. Counsel was ineffective for not objecting to or even addressing this to jury.

- (Tr. p. 700 L. 16 – p. 701 L. 6)

L4

This needs no explanation. It's self explanatory to the vouching for the alleged victim. Counsel was ineffective for not objecting to the prosecutorial misconduct and not motioning for a mistrial.

- (Tr. p. 718 L. 17-20)

I put this in here because Maye's is only saying this to cover her ass, but it's not going to help her or that defense counsel. I'm bringing it up here that defense counsel put that in evidence to cover for that prosecutor, so that judge could use it for the directed verdict. That not only shows prosecutorial misconduct, judicial misconduct, ineffective assistance, but also conspiracy under Ricco.

- (Tr. p. 719 L. 7-16)

She's vouching for alleged victim and attacking my character. My will only takes precedence in that house in Maye's fucked up mind. Pardon that comment. Counsel was ineffective for not objecting to prosecutorial misconduct.

- (Tr. p. 719 L. 21 – p. 720 L. 1)

So this would be a Brady violation, whether its against the state or against the defense counsel. Where was my DNA ever tested or excuse me the penile swab. Where does it show the results of that? This goes beyond ineffective and into some constitutional issues.

- (Tr p. 720 L. 2-14)

Where in the record is that testimony from the sister Margie? And again State Prosecutor vouching for the credibility of the alleged

L5

victim by attacking the mother of the alleged victim, who did not testify, yet pointed to her in the courtroom while making these comments. Then prosecutor attacking Defendants character again by commenting on any marital issues that either didn't exist or came about outside of indicted offenses. Prosecutor goes beyond vouching. Counsel was ineffective for failing to object and motion for mistrial because of prosecutorial misconduct.

- (Tr. p. 720 L. 15-20)

State prosecutor vouching for alleged victim and invading the province of the jury by guaranteeing them that this was true. She put the states guarantee behind the alleged victim. And the serologist's testimony. Ineffective Assistance.

- (Tr p. 721 L. 7-12)

Where's the testimony for this. Where is the cloud. Is it on the Ipad. Did Phipps find it? Did he testify to it, or about it? Counsel was ineffective for allowing State prosecutor to testify to testimony not found in record. Speculative. Defense Counsel was ineffective for not objecting, calling for a mistrial.

M. Testimony that needed to be questioned because its wrong. Perjury.

- (Tr. p. 267 L. 18-21)

I addressed this in prosecutorial misconduct section also. It's also leading a witness. Counsel only had to look at Miranda form and they would have seen no signature. Ineffective Assistance.

- (Tr. p. 291 L. 10-15)

This is not true. I told Wayne when he said it. We actually had to wait for over an hour while he tracked down a CSI office to get that kit. Also, it will come up later, but Franklin took my buccal swab to the sheriff's dept. not Lint. And also the brown bag it was in had a hole in it. I said this to Rose on the telephone when I first got there. So Lint is a liar. Not questioning witnesses made counsel ineffective.

- (Tr. p. 296 L. 24 – p. 297 L. 4)

This is what I was talking about from p. 291. He didn't have it or take it to the sheriff's dept. Defense counsel could have corroborated my story by getting the phone conversation I had with Rose almost 3 years prior. Counsel was ineffective for not properly questioning witnesses and offering proof of fabrication.

- (Tr. p. 297 L. 18-22)

Don't matter if it was sealed because it had a hole in the side of it. Yea, he may have put it in the locker, but I can guarantee he didn't take it to the sheriff's dept. Again if counsel would have questioned him about it, then found my conversation on the phone from the jail about it they could have discredited him as the liar he is. Counsel was ineffective for not doing this.

• (Tr. p. 335 L. 16 – p. 336 L. 4)
She had just finished middle school and was going into the ninth grade. Ashley, I want you to know that the only reason I went back into business was because I knew that ["Victim"] needed to go to college. Even though I made good money at Food Lion, just a Rose did at Lowes, we would have struggled to pay for her college. So went back into business. I hated cutting tree, but I could make hundreds of thousands of dollars a year so that's what I did. When I was arrested I had a lot of money saved up to give here when she left. TO this day she still don't know and neither does Rose. And that's the way I want to keep it. That's why it makes me sick when they say the crap that they do about me. But this is just another piece of the

M2

puzzle that defense counsel didn't hear when I told them. Even though it may not sound like a big deal, when they consistently get things wrong or distorted, that changed the entire story, and that's what happened. If they can't get this right what else is wrong? Counsel is just ineffective for being so ineffective.

• (Tr. p. 339 L. 14-19)
This is the biggest one. So each kid had their own bedroom in a two bedroom house. Where's my bedroom at? The dining room. Get the blueprint from the county of the house. I told both attorney's about this in court and neither of them questioned this. They are Ineffective.

• (Tr. p. 347 L. 1-12)
You know defense never questioned her as to why she said she kept on doing stuff after she said I stopped or something like that. So why would she keep working? Any good attorney would have questioned this cause she was lying. She got mad because I made her work period. Ineffective Assistance.

• (Tr. p. 350 L. 24 – p. 351 L. 6)
This goes hand and hand with the previous.

• (Tr. p. 349 L. 15-18)
I think I put this in here because of how in earlier testimony she said she learned not to resist. Does that sound like she's resisting? Defense never questioned this. They're just making everything up to fit how they want it to look. Counsel was ineffective for not properly questioning witnesses.

• (Tr. p. 368 L. 5-15)

Ashley, I haven't looked at it yet, but I believe I sent you a copy of Justin Ashley's report where he says that he was the one that knocked on the door. I'm sure that's one of the reasons they didn't want him to testify. Counsel was ineffective for not thoroughly cross-examining states witness or locating absent states witness for trial.

- (Tr. p. 445 L. 24 – p. 446 L. 14)

When you read this testimony you will see how because of nothing but the ineffective assistance of counsel is this witness and solicitor allowed to manipulate the hell out of that report. Let me ask you this, if your memory ain't good

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M3

And when you deliberate and read that report, that the defense counsel put in evidence, what would you think happened? Everything in this trial is all fabricated by some sick twisted people, starting with that solicitor. My counsel didn't question this witness properly so that made him ineffective.

(Tr. p. 446 l. 17 – p. 447 l. 10)

Here's more I don't need to say anything but this witness was not properly cross-examined about inconsistencies, that made him ineffective.

(Tr. p. 478 l. 16-21)

Do you see how this solicitor's dishonesty is taken over her person. She has to manipulate everything. My son always lived with us until he went in the army. Do you see even Margie will lie for that prosecutor. I told Wayne about this when she said it, though he never questioned her about it. Ineffective for allowing witnesses to lie without a proper cross-examination.

(Tr. p. 521 l. 19 – p. 522 l. 2)

This is the second or third time she asked this same question and counsel still didn't ask this witness about "where is this signed waiver at?" Where is it? Where is Williams signature at? Ineffective assistance.

(Tr. p. 536 l. 8 – p. 537 l. 8)

Now, she said SLED only allows them to one type of testing, yet she does two on the underwear, both or first semen, saliva. Yet, she said for the anal swab she could only do one type of test. Counsel not properly questioning witnesses.

(Tr. p. 537 l. 17-24)

This is suggestive questions. Counsel should have objected. Ineffective assistance.

(Tr. p. 537 l. 25 – p. 538 l. 3)

Again, suggestive again, then like in your face you piece of shit defense attorneys. That's what she's saying. Counsel should have objected to suggestive questions. But really again I thought Thompson said they could only test for one substance. Why didn't counsel questions this. Ineffective assistance.

(Tr. p. 538 l. 19-24)

I want you to remember this, I think it was in closing arguments where Mayes states the dots on the underwear that the serologist put there. She said that was where she could see the saliva. Now according to Thompson she tested areas for semen. Then cut out a piece of underwear and tested that for saliva. Why didn't counsel question this. I didn't get a good look at them from where I was sitting. This could have been brought to the attention of the jury in closing arguments. This makes counsel ineffective.

(Tr. p. 541 l. 17 – p. 542 l. 25)

Again, a hair from the rectal swab, not two. So somebody was tampering with evidence. Counsel was ineffective for not questioning how one hair turns into two. We don't know how it got there because counsel never questioned witness about this. Ineffective Assistance.

(Tr. 551 l. 9 – p. 553 l. 5)

So did she notate that or is she saying that? The Spangler just asks the same exact questions that the state did so the jury hears it twice. Counsel was ineffective for excessively repeating same questions as state prosecutors. Did not ask witness for notation she was referring to.

- (Tr. p. 570 L. 18 – p. 571 L.1)
  Money: And at three different locations you can see there are more than two DNA types present, and this is an indication that this was a mixture. This may be what the marks or dots on the underwear were that Mayes talked about in closing as saliva spots. So with more than two why didn't counsel question this. The fact is as I've said before that could come from laundry. You know I would sweat excessively while working. Is saliva the same basic thing as sweat? Because I can guarantee you my clothes were soaked everyday that I got home from work. This could have been brought out by defense counsel if they would have listened to anything I had to say. Counsel was ineffective for not properly questioning a witness. And this would make sense because the other DNA would be roses. Or as I also said her and Rose

could have changed underwear because me and Rose did have sex before she left to go to work that night.

MCI

- (Tr. p. 369 L. 3-25)

Mayes: I'll show you an item and ask you whether or not you recognize it.

["Victim"]: Yes.

Q. Who do those belong to?

A. Me.

Mayes: Your Honor this would be States 23 for evidence.

So she perjures her testimony here because in camera she could not positively Id those underwear.

- Mayes: Do you recall the underwear that you were wearing during that last assault? ["Victim"]: I don't know what they look like, but I'd be able to tell what they were.

  (Tr. p. 228 L. 5-8)

So she is just going along with whatever the State prosecutor wants her to say. This why all of the leading questions are so damaging because this prosecutor is giving her the answer, and all she has to do is say yes. Counsel was ineffective for not pointing out that perjury that was the result of coaching of the witness. Counsel could have brought the truth out to the jury, but refused to. Counsel was told about the perjury. Counsel was ineffective because of this.

- (Tr. p. 386 L. 3-5)

Floyd: And we had a picture of the couch. Have you identified that?

["Victim"]: Yes.

This is another perjury charge. I'll find where the couch picture was put in, but I remember that she didn't Id no couch.

Counsel was ineffective for not calling for witness to be charged with perjury. Counsel asked the question, so counsel should have already known if she'd Id' the couch. Counsel allowed State witness to perjure her testimony twice.

N. State trying to cover up that officers came into house without permission

- In-Camera (Tr. p. 305 L. 2 – p. 306 L. 9)

First off I never allowed them to come in. I pointed where her bedroom was when they asked me where ["Victim"] was. They barged in without asking. Did you ever here them, any of them, ask may I come in. No you don't, because they didn't. I've had a bad experience with a few Lexington cops, just pull up my ABHAN and get the police reports. I was charged with ABHAN because one of the officers got a scratch on his arm. A "Fucking Scratch". And they think I'm going to resist anything they do. Oh and the scratch didn't come from me, it was from a nail sticking out of the attic door.

Then ask them why they charged me with that. I'll tell you why, because they thought I was my brother. Then they wanted to give me 16 years for a scratch, resisting arrest, and threatening the life of a public official. And since Mayes brought this charge up in court I want to fight the elements of it because she was making out like it was a CSC charge. And oh, it was handled in Magistrate Court, so they didn't have subject matter jurisdiction to hear anything about it. This type of testimony, and they had all of the officers say the same thing as Franklin. This is burden shifting testimony. The only way to refute this is to testify. Counsel was ineffective for allowing officers testimony to be burden shifting, without objection. This one is in camera but was done many times in front of jury.

O. Delayed Reporting – Bolstering, Improperly Corroborating, and Vouching

- (Tr. p. 402 L. 20 – p. 403 L. 9)

Throughout all of this all that I keep hearing is how these other cases allowed it. Yet, there's no proffer about how and why this type of testimony needs to be used in this case. Defense counsel could have said that the alleged victim has already stated in the record why she didn't report, and that should be good enough. What I'm saying without a proffer from the alleged victim, then by the expert how is the court going to make any type of intelligent decision. They can't because its all based on some other case. Counsel should have made state show what testimony the jury needed help in understanding. Counsel was ineffective for not objecting to Court and State deciding on use of expert because of simply another case used here, and not based off of case in hand.

- (Tr. p. 406 L. 5 – p. 408 L. 2)

I sent you the case in one of the other letters that the court said the court could not qualify an expert based on the jurors occupations. And furthermore, earlier when the judge made the statement that he had a list of the jurors occupations shows that the judge was biased against the Defendant and was helping the State with the prosecution of this case which is more than obvious. This denied the Defendant a fair trial, due process. Defense counsel was ineffective for not objecting to Court using jurors occupations to use as a factor in whether an expert witness on delayed reporting was needed. This invaded the province of the jury, and the jurors therefore became psychologists instead of jurors.

P. Defense Counsel not calling Defendant to testify in-camera for Fourth Amendment issue, Confrontation Clause Issue

- (Tr. p. 264 L. 12 – p. 283 L. 6; Tr. p. 304 L. 12 – p. 329 L. 10)

So what we have here is an exparte hearing. This is the converse of Crawford v. Washington and if you read how the whole confrontation clause began with Sir Walter Raleigh. So the exact converse of that with the same issue at stake would be where defense counsel don't call the Defendant to the stand for any of the hearings as in this case. And also, but not in this case, if a Defendant was prohibited from taking the stand in his defense in front of the jury. So this is you could say like throwing a party for someone, and not inviting them to their own party. Counsel was ineffective for not calling Defendant to the stand for "any" of the in-camera hearings. This made the entire trial exparte which is a confrontation clause violation. A violation of due process.

- (Tr. p. 316 L. 15-19)
- (Tr. p. 317 L. 11-21)
- (Tr. p. 320 L. 24 – p. 321 L. 5)
- (Tr. p. 322 L. 12-16)
- (Tr. p. 323 L. 14-25)
- (Tr. p. 328 L. 21 – p. 329 L. 4)

Then of course we have another confrontation clause issue where the defense never called Rose Heath to the stand to corroborate if she even signed the consent to search. And I suspect that's why the judge ruled the way he did. To take the fact that Rose didn't testify out of mind. But again multiple times they mention her calling, not being supportive, being arrested for threatening a witness and now a Fourth Amendment issue. Do you see how bad these attorneys were? Would you want them to defend you ever? This goes beyond ineffective.

Q. Voir Dire

- (Tr. p. 404 L. 5-11)

Where in the transcripts do you ever see where the question in voir dire was "do you have children"? Defense Counsel allowing decisions to be made from references in the record, that are not in the record. Defense counsel was ineffective for not challenging state to produce information court stated was in the record.

- (Tr. p. 405 L. 14-19)

Counsel was ineffective for not objecting to the ruling that because jurors were not victims of sexual abuse an expert would be needed to help them understand why someone possibly delays reporting. This invades the province of the jury. That's like saying we need an expert to help the jury understand why the person getting robbed at gunpoint didn't fight back. Same issue, different scenario.

R. Improper bolstering, improper corroboration from expert witness

- (Tr. p. 410 L. 16 – p. 411 L. 25)

Within this paragraph six times this expert uses terms that improperly bolsters and corroborates the alleged victims testimony. So we have; very often; most times; very common; very often; in many cases; most times. And vouching for alleged victims credibility, Defense Counsel could have motioned the Court to do this testimony in camera as a proffer before allowing the jury to hear it, because most of this testimony is unduly prejudicial. Counsel was also ineffective for allowing this in Court without the required 403 balancing test under Rule 404(b), and without objection.

- (Tr. p. 415 L. 5-20)

This testimony only improperly bolsters and corroborates the alleged victims testimony. Which both witnesses were questioned by the same solicitor, so her questions to expert were tailored to bolster, not to help the jury understand. In order for this to not be prejudicial the Court would or should be required to establish first what, specifically, the jury would not be able to understand. This testimony takes it out of helping the jury to improper bolstering, vouching, and improper corroboration. Defense Counsel should have objected to the line of questions that would serve to only unduly prejudice the Defendant.

- (Tr. p. 417 L. 21 – p. 418 L. 4)

This testimony serves no other purpose than to convey to the jury that the alleged victim should always be believed. This is vouching for the credibility of the alleged victim in this case, and Defense Counsel never objected or made a motion for a mistrial.

- (Tr. p. 420 L. 21 – p. 421 L. 4)

This should have been objected to and counsel didn't. These questions are tailored to fit the scenario or to what's already been testified to, which makes it improper. It's no difference in these questions than if she would have been given information about the case. She's still giving her the information! Counsel was ineffective.

- (Tr. p. 421 L. 25 – p. 422 L. 7)

Again all these questions are leading right to the case. Counsel was ineffective for not objecting to leading questions, which improperly bolstered, improperly corroborated, and vouched for alleged victims credibility.

R2

- (Tr. p. 436 L. 13-20)

This was improper. I'm sure that she's not allowed to say the name of the case or the fact that it was with the same judge. This invades the province of the jury. It bolsters her testimony as well. This should have been motioned by defense counsel as a mistrial and or objection. This made counsel ineffective and denied Defendant a fair trial.

- (Tr. p. 450 L. 25 – p. 451 L. 7)

Counsel was ineffective for failing to properly question state witness. Alleged victim states she was laying face down on bed. How would pubic hair become intertwined that way? Also, I did not have pubic hair because I would sweat so much with the work that I did. Wayne knew this but he failed to bring this testimony to the attention of the jury.

- (Tr. p. 557 L. 19 – p. 559 L. 2)

Witness states she don't have an exact knowledge of stain, but then states that it originated from the interior. Defense counsel failed to properly question witness to properly bring out facts so jury could make a reasonable decision based on testimony. Counsel was ineffective.

- (Tr. p. 582 L. 25 – p. 583 L. 3)

Improper corroboration through hearsay. This witness has no personal knowledge of this. Defense Counsel should have objected to this.

- (Tr. p. 583 L 9-22)

I hope you see what I see, because Spangler is covering for the State by leading this witness. Totally ineffective. Why didn't he ask her why she answered Mayes' question without actually knowing the answer. This would have proved that this witness fabricates and goes along with the leading questions.

S. Ex-Parte Testimony from expert witness that defense counsel should have motioned declared a mistrial

- (Tr. p. 426 L. 23 – p. 428 L. 10)

I'm not sure how to actually say this other than she vouched for the credibility of the alleged victim. I was through a questioned elicited by the defense counsel. I'm not sure how this could be counsels fault, however I do believe he still could have motioned for a mistrial due to witnesses testimony being exparte as well as improperly bolstering and attacking my character by once again mentioning "the system in place". Yet none of those people had anything to do with this case except law enforcement. So counsel was ineffective for not eliciting questions to witness to cure harm or unduly prejudicial testimony from State witness. Ineffective Assistance.

- (Tr. p. 429 L. 6-19)

Counsel should have motioned for a mistrial declaring that expert witnesses testimony was exparte to State and alleged victims testimony. Expert witness was unreliable when she could not answer questions that were not in favor of alleged victims testimony. Which relayed to the jury to always believe the alleged victim, which was vouching. Counsel was ineffective for not making a motion for a mistrial.

T. Judge vouching for alleged victim, attacking character, biased. Look at this one Judge Making inflammatory comments about Defendant. Mistrial – Margie Branham

- (Tr. p. 430 L. 22 – p. 433 L. 7)

Court: That's a different issue. We've talked about that outside the presence of the jury, doesn't mean it did or didn't occur. That's the jury's decision on that. I think that bumps up on a different issue. Counsel was ineffective for not motioning for mistrial after judge makes comment on or about something not heard by the jury by testimony. The comment, even though I don't know what he's referring to, attacked the Defendant's character, as if something else had happened that they (Jury) don't know about. This comment would have led the jury to believe there's more than what's being testified to which would unduly prejudice the jury against the Defendant. A mistrial would have been the only cure, but defense counsel was so ineffective, they never addressed the inflammatory comment.

- (Tr. p. 480 L. 5 – p. 482 L. 21)

So here defense counsel actually didn't fully show what the entire objection should have been. Yes, the judge did tell the Solicitor how to get past the hearsay, but he also told the witness Margie Branham how to answer the questions. Branham was still on the stand the entire time this discussion was happening. So Floyd's objection was not specific enough to show the entire amount of unfair prejudice this was doing. Counsel was ineffective for not properly objecting to the prejudice the judges coaching the solicitor was going to cause. The court would have had no other choice than to grant a mi[s]trial had it been properly objected to.

- (Tr. p. 483 L. 22 – p. 489 L. 14)

Here the judge asks Floyd about any other foundation for his motion. This is where he should have mentioned the witness Margie Branham. As stated earlier, allowing the witness to hear this whole argument was even more prejudicial as the judges comments she heard. So its X2 now. Wait theres a third. Counsel was ineffective for not stating all the prejudice his comments and conversation or motions for mistrial would have affected the trial. A curative instruction wouldn't cure anything.

- In camera (Tr. p. 489 L. 19 – p. 491 L. 4)

So this is the proffer, but on direct she goes into so much more. Even so defense counsel should have still objected to question and answer being suggestive, bolstering, and vouching for the credibility of the alleged victim. And even more so it attacks

T2

my character, and under Rule 404(b) what part of common scheme or plan is this type of testimony anyway. Its propensity evidence and then you tie it along with the DSS testimony and you have a really bad attack on my character. Had counsel included everything together the unfair prejudice is overwhelming. This was ineffective assistance and denied me due process.

U. Structural error of trial. Evidence coming in and not being objected to under the 404 (b) exception in which trial was structured

- (Tr. p. 590 L. 12 – p. 592 L. 2)

This show ineffective assistance of counsel. So here, this disc fell under 404(b), consolidation issues, as well as 403. Yet, none of these objections were ever done from the very start of the trial. This mistake warrants a structural error ruling. All evidence in this entire trial falls under that consolidation under Wallace, Rule 404(b), and 403, yet was completely abandoned at the first witness.

V. Chain of custody

- (Tr. p. 532 L. 13 – p. 533 L. 2)

Show this shows the prejudice from when Wayne stipulated to the chain of custody. And the fact that somewhere along the line one hair turned into two. Counsel was ineffective for not doing a chain of custody with the proper witnesses testifying to evidence being handled.

- (Tr. p. 533 L. 7-16)

Again, counsel was ineffective for making sure that chain of custody was established, instead of stipulating to it to save time when an issue with a piece of evidence was in question.

- (Tr. p. 534 L. 12-19)

Counsel was ineffective for not following the entire chain of custody for evidence in this case. Defense Counsel stipulated to all evidence involved in case and never called or asked any witness' about chain of custody. This was ineffective that left a lot of questions about evidence being testified to very differently by multiple witnesses.

W. DNA/serologist. DeGuzman (sane nurse). Miscellaneous hair found

- (Tr. p. 448 L. 21 – p. 449 L. 12)

Counsel was ineffective for failing to properly question witnesses about questionable testimony. So here Deguzman states that ["Victim"] said she was not penetrated, which is also hearsay, but then later on she says as well as Wayne that she was penetrated by a finger I believe. So this testimony to the actual SANE report that it left the jury totally confused as to what was what. Counsel was ineffective.

- (Tr. p. 450 L. 7-16)

The miscellaneous materials envelope should have been questioned because the serologist I believe mentioned a miscellaneous hair found. So does that mean it just came off her body somewhere? Because that is very unduly prejudicial since we live together. I mean all of it is, but if they found that hair on say her arm, that needed to be established through questioning, proper intelligent questions to bring out facts. Counsel fell short of being ineffective for not questioning where the miscellaneous materials would have come from.

XYZ - Things I'm not sure about.

- (Tr. p. 647 L. 4-23)

This will come into play at resentencing, but for now its here.

- (Tr. p. 438 L. 20-21)

Mayes: Do you have notes in that record?

DeGuzman: Yes

I'm not sure if she's trying to make out that she's going to be reading her notes instead of the form or not. That's where she read the hearsay statement without an exception and Counsel didn't object.

- (Tr. p. 440 L. 5-19)

That's improper corroboration through hearsay. Defense Counsel failed to object. Ineffective Assistance.

- (Tr. p. 506 L. 22 – p. 507 L. 1)

Here is another confrontational clause issue. Also his improperly corroborating that Ashley called. We don't know that because Ashley was never called as a State witness. Defense Counsel was ineffective for bringing the right of a Defendant to cross-examine a witness.

- (Tr. p. 509 L. 2-8)

From a jurors perspective I would think that judges comment means there's another case or something of that nature. I think he's doing that on purpose or he's just bat-shit crazy. Counsel should have brought this to the attention of the court for a curative instruction.

- (Tr. p. 522 L. 15-25)

So this was before the Miranda, but that's not what they're trying to say. So it's the fact that Wayne didn't allow me to testify at the Jackson v. Denno hearing that caused this. But if they want to go that route and say that, then they are commenting on my right to remain silent and she repeats it, so now it's a constitutional issue. But either way Wayne failed or counsel failed to properly defend client.

- (Tr. p. 565 L. 20-22)

This report was never put into evidence. Counsel failed to object to using evidence not ruled on as being admissible.

- (Tr. p. 566 L. 13-23)

Now, do you believe than an average person would

XYZ(2)

Understand any of what they just said? Counsel was ineffective for failing to question a witness so that the average juror would be able to fully understand the evidence, the testimony.

- (Tr. p. 572 L. 4 – p. 573 L. 7)

What is an allele? Counsel was ineffective for failing to make sure that an average juror would be able to understand the evidence, testimony. Why don't we get ten people or 12 people from Walmart and ask them what an allele is.

- (Tr. p. 573 L. 24 – p. 574 L. 25)

You see that's where the one hair turned into two and that's why Mayes was trying to stop her so that she could word it to sound like it was just one hair that matched my DNA. We know it was one hair from the SANE nurses testimony. Defense should have seen this and questioned all these witnesses till the truth came out but he didn't. Then he stipulated on the chain of custody which was error and ineffective assistance. You see that's what Mayes does, is try to mind f- -k the jury with her dishonest way she questions people or witnesses.

ZA

- (Tr. p. 653 L. 11-14)

Counsel was ineffective for not being prepared and not calling witnesses to testify. Counsel opened the door to DSS which was not part of 404(b), then could have called witnesses to attempt to cure the harm, but that wouldn't have cured the harm, but didn't. Counsel had list of witnesses named in voir dire but never utilized any of them. Rose Heath's name was mentioned many times by the state and created a confrontation clause issue.

ZB

- (Tr. p. 749 L. 7 – p. 750 L. 16)

Defense counsel did not file a motion of brief for a new trial. Defense counsel Wayne Floyd based his entire reasoning whether or not to file this motion based on whether it would stop the court from sentencing or not. Defense counsel did not file any brief for a new trial within the ten day period, which denied Defendant/Appellant due process.

- (Tr. p. 4 L. 3-7)

Defense counsel should have objected to and or informed the court that the alleged victim was not six at the time of the alleged event. One of the bigger issues is in fact the dates this particular indictment anyway, but even with that Mayes cannot get the ages right. She purposely does this.

- (Tr. p. 4 L. 22- p. 5 L. 1)

So another issue as to that indictment as it goes to the sentencing phase of the trial.

- (Tr. p. 6 L. 14-20)

So here we have yet another Fourth Amendment issue, because they did look in my phone without a search warrant. So this statement backs up that fact. I didn't put it in as an issue before because nothing was presented at trial, but I will now because she mentions it here at sentence. That judge don't know what was in that phone, but Mayes does say incriminating evidence. Here, Mauldin did not read the transcript so she was unprepared for any type of objections.

- (Tr. p. 7 L. 11 – p. 16 L. 11)

Counsel failed to object to State using evidence that didn't have anything to do with the related dates on the indictment from 2004-2007. Counsel allowed the State to produce the majority of sentencing evidence outside of the range on the indictment.

- (Tr. p. 8 L. 2-5)

This is going to be fraud upon the court. I don't know who did these transcripts, but this is one of few mistakes. Margie was not in the courtroom. I have SCDC officers that can back that up, as well as I'm sure you can get an affidavit saying this from Margie. I will pursue this by other means if this is not raised.

- (Tr. p. 9 L. 18-21)

Here, I told Mauldin about this, but she did not object. So ["Victim"] had very short hair when she was younger. Her hair is long now. So does Mayes have personal knowledge of this? Can we assume that this is from 2004-2007? Counsel was ineffective for not objecting to State solicitor making comments without having personal knowledge.

- (Tr. p. 10 L. 17-23)

Here's the other part of the unfair prejudice on the confrontation clause due to Rose Heath not testifying at trial to corroborate that call. We don't know it was her, do we? Counsel failed to object to the use of uncorroborated evidence at sentencing phase of trial, which created a constitutional issue and that denied due process.

- (Tr. p. 12 L. 6-12)

Counsel was ineffective for not objecting to the state solicitor stating facts not presented at trial. It was never substantiated that the i-pad was mine. Anyone in the house was allowed to use that ipad, which is why it wasn't password protected.

- (Tr. p. 12 L. 19 – p. 13 L. 6)

Counsel fails to object to displaying pornographic images to the court which contained watermarks and images with the state solicitor describing the website. This attacked the Defendants/Appellants character and was inadmissible under Rule 404, 403, and was not part of the evidence from that particular indictment.

- (Tr. p. 13 L. 7-17) (go together [with above])

Again, same issue, the displaying to the court highly inflammatory photos that serve only to prejudice the Defendant unfairly. And then the watermarks of course. This actually goes with the issue before this.

- (Tr. p. 13 L. 24 – p. 14 L. 7)

Again, this corroborates whose testimony. Oh let's get this straight. It corroborates nobody's, because nobody said the time except for the SANE nurse that read the report which is another issue, because she asserted the truth of the matter when she did so, yet, she had no personal knowledge. So exactly "who" said the time. So this should have been objected to Mayes lying or stating something that is not in the record when she says would completely corroborate the period that Thersa reports having been abused "prior" to notifying family members and law enforcement arriving.

- (Tr. p. 14 L. 8-23)

Again, counsel should have objected to displaying these images to the court because they would serve to only have the court enhance the sentence due to the inflammatory nature of the images with the watermarks, as well as the description of the websites themselves.

- (Tr. p. 15 L. 2-20)

Here counsel failed to object to the use of arrest record that was not used in the original sentence. Furthermore, state solicitor Mayes enhanced a prior conviction from 10 years to 20 years and from non-violent to violent when stated to the court. This also was error of counsel to not object to.

- (Tr. p. 16 L. 20 – p. 17 L. 21)

This is full of lies! Her aunt did not take custody of her that night. What does "["Victim"] was EPC'd. Is that protective custody because that's a lie too. She was not removed from the home. Then she mentions Rose being charged for something she didn't do. Then finally another case of vouching for the alleged victim. Counsel failed to prepare for hearing and failure to object to prosecutorial misconduct.

- (Tr. p. 17 L. 21-23)

Ms. Branham is not in the courtroom. And I don't believe Ms. Branham even wrote that. Does that need to be authenticated? Counsel failed to object to use of unauthenticated hearsay statement that was not from the victim.

- (Tr. p. 17 L. 24 – p. 19 L. 2)

So, this was nothing but Margie stating that to Clamp and then her doing what she said she did. That came through hearsay and I'm not done with that either. ["Victim"] didn't live with Margie and hasn't for quite a few years. I've written ["Victim"] letters through these years and she's never done that before, so I know its coming from Clamp and Margie. She did not move in with Margie after my arrest. She moved to Texas to go to school. They are making out that she lived with Margie before she graduated high school and that's not true either. Counsel was ineffective for failing to object to States witness, or whatever she is, for stating facts that are not in the record and whom she had no personal knowledge of except through hearsay.

- (Tr. p. 19 L. 3-13)

Counsel was ineffective for failing to object to hearsay statement that was not authenticated and person was not in courtroom to authenticated said document. Contents contained questionable hearsay within hearsay,

- (Tr. p. 22 L. 12-18)

No knowledge of witnesses testifying to facts and/or events that were not contained in the record and had no personal knowledge of.

- (Tr. p. 24 L. 21 – p. 25 L. 2)

Counsel is ineffective for attempting to cover up that States witness is not in the courtroom reading the letter. Mauldin needs to be put under oath to testify to this.

- (Tr. p. 27 L. 12 – p. 28 L. 1)

Counsel was ineffective for being unprepared and testifying to things that are not truthful. I have been in a CBU unit since February 2019, and this shows just how poorly these attorneys are representing clients. This goes beyond ineffective.

- (Tr. p. 30 L. 12-15)

She should have not done that. Counsel was ineffective for giving the judge anything written from prior attorney that Defendant did/refused to allow to represent him. This created a conflict of interest and attorney Mauldin should have self-reported this to the disciplinary counsel.

- (Tr. p. 31 L. 3-7)

During this time Defense attorney went out courtroom with State Solicitor Mayes, Judge McLeod and Mayes had Defendant's ipad in hand. She showed the judge something that was on that ipad. I'm sure it would have been something not allowed in court. Additionally, that ipad was not part of the alleged crime for which the Defendant was being resentenced for. This shows misconduct on part of prosecutor as well as Ms. Mauldin for not reporting this infraction to the disciplinary counsel as well as to the judge.

- (Tr. p. 1-32 entire resentencing transcript)

MATERIAL BEFORE THE COURT

This Court has before it the records of the Lexington Court of General Session related to this case, the two volume record of appeal, the Final Brief of Appellant, the Final Brief of Respondent, and the opinion of the South Carolina Court of Appeals in State v. Heath, Op. No. 2020-UP-018 (S.C. Ct. App. filed January 29, 2020). The Court also has a copy of the Applicant's re-sentencing hearing transcript of September 29, 2022, before the Honorable Walton J. McLeod, IV.

In addition, this Court has also been provided a copy of the 302 page transcript of the PCR hearing on December 18-19, 2023.

STANDARD OF REVIEW

In his application, Applicant raises, among others, ineffective assistance of trial counsel. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other Defendants, the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668 (1984). Ordinarily, PCR allegations are centered upon an allegation that the Applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). 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* to determine whether counsel's conduct "was so ineffective as to require reversal" of the Applicant's conviction or sentence. 466 U.S. at 687. To obtain reversal of a conviction, the Applicant must prove that (1) their attorney's performance fell below an objective standard of reasonableness (the performance prong) and (2) the deficient performance prejudiced the defense to the degree that it deprived the Defendant of a fair trial (the prejudice prong). *Id.* at 690–95; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. The Defendant's burden for proving both of these components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. *Strickland*, 466 U.S. at 690. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Id.* at 700.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky,* 559 U.S. 356, 366 (2010). In order to prove deficient performance, the Applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably competent attorney.'" *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (*quoting Strickland,* 466 U.S. at 687). 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. *Strickland,* 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington*, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a Defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689; *see also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Thus, a fair assessment of attorney performance requires every effort be made 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. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

A reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." *Strickland,* 466 U.S. at 690. An Applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

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 689-690; *see also Harrington,* 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. *Harrington,* 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," *not* whether it deviated from best practices or most common custom. *Id.* (quoting *Strickland*, 466 U.S. at 690) (emphasis added).

The second, or "prejudice", prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a Defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an Applicant must demonstrate counsel's deficient performance prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695.

Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the Defendant of a fair trial.*" *Id.* at 687 (emphasis added). "An 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." *Id.* at 668. Moreover, the South Carolina Supreme Court has repeatedly held a PCR Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland,* at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the Defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the Defendant as a result of the alleged deficiencies". *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

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. To obtain reversal of a conviction, the Applicant must prove that (1) their attorney's performance fell below an objective standard of reasonableness (the performance prong) and (2) the deficient performance prejudiced the defense to the degree that it deprived the Defendant of a fair trial (the prejudice prong). Strickland v. Washington, 466 U. S. 668(1984).

Preliminary Factors and Concerns

Certain factors have made this Order difficult to review and consider. First, is the breadth of the pro se document, which appointed counsel attached to its amended application of December 11, 2023 and were not completely testified about during the PCR hearing. See *Jones v. State*, 348 S.C. 13, 14, 558 S.E.2d 517, 518 (2002) (forbidding counsel to act as a conduit for pro se filings and insisting that counsel "use professional judgment in reviewing the documents and [ ] submit the client's arguments only if relevant and only after they have been edited by counsel for review by the Court"). This was not done in this action.

Second, is the fact that trial counsel, Wayne Floyd, died prior to the hearing so any evidence about strategic decisions is not preserved unless it was stated in the trial record or was in the limited are of Colin Spangler responsibility and knowledge.

Third, is the fact that this Court is required to make specific findings of fact and conclusions of law on the issues raised. *See* S.C. Code Ann. § 17-27-80 (2014) (stating a PCR court must "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented"); *Fishburne v. State*, 427 S.C. 505, 512, 832 S.E.2d 584, 587 (2019) ("The PCR court's general denial of all claims not specifically addressed in the PCR court's order 'does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law.' " (quoting *Simmons v. State*, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016)); *id.* at 517, 832 S.E.2d at 590 (remanding the matter "to the PCR court for the issuance of a supplemental order setting forth findings of fact and conclusions of law on the PCR ground that was not addressed in the original order"); *id.* at 516, 832 S.E.2d at 589 (explaining that "because the United States Constitution's Sixth Amendment guarantee to a Defendant's right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party's procedural shortcoming ... to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80").

Fourth, counsel is presumed to be effective, and a PCR Applicant must overcome this presumption in order to be granted relief. *Simmons v. State*, 308 S.C. 481, 483, 419 S.E.2d 225, 226 (1992). Courts "considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Id.* at 104, 131 S.Ct. 770 (quoting *Strickland v. Washington*, 466 U.S. at 689, 104 S.Ct. 2052). "[T]here is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe,* 372 S.C. at 331, 642 S.E.2d at 596 (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052); *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011).

Fifth, recently in another case with a deceased lawyer, the Supreme Court held, "[we] have held that neither the PCR court nor the appellate court can conclude trial counsel exercised a valid trial strategy unless evidence is presented as to what the strategy actually was. *See*, e.g., *Weik v. State,* 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014); *Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010); *Gilchrist v. State*, 350 S.C. 221, 228 n.2, 565 S.E.2d 281, 285 n.2 (2002); *Bruno v. State*, 347 S.C. 446, 451, 556 S.E.2d 393, 395-96 (2001). *See Lindsey v. State*, No. 2019-001271, 2025 WL 3085693, at *19 (S.C. Nov. 5, 2025).

However, this is contrary to *Strickland v. Washington.* As the United States Supreme Court has observed, *Strickland* "calls for an inquiry into the objective reasonableness of counsel's performance, *not counsel's subjective state of mind.*" (*Emphasis added.*) *Harrington v. Richter*, supra, 562 U.S. at 110, 131 S.Ct. 770. As a result, the habeas court cannot "insist counsel confirm every aspect of the strategic basis for his or her actions." *Id.*, at 109, 131 S. Ct. 770. Likewise, trial counsel's testimony may identify specific strategic or tactical reasons counsel had for the challenged action, but the habeas court is not confined to consider only those reasons identified. Rather, in all circumstances, the strong presumption of *Strickland* that counsel exercised reasonable professional judgment requires the habeas court "to affirmatively entertain the range of possible reasons" trial counsel might have had for the challenged action. (Internal quotation marks omitted.) *Cullen v. Pinholster*, 563 U.S. 170, 196, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). Given the court's obligation to affirmatively contemplate possible strategic reasons for the challenged action, the strategic reasons identified by counsel's habeas testimony do not necessarily restrict or resolve the *Strickland* inquiry.

Accordingly, when trial counsel is not available to testify, the absence of such testimony does not alter the relevant inquiry. In that circumstance, as always, the court must contemplate the possible strategic reasons that might have supported the challenged action and then consider whether those reasons were objectively reasonable. *See, e.g., id.; Strickland v. Washington,* supra, 466 U.S. at 689, 104 S.Ct. 2052. *See Thomas v. Thaler*, 520 F. App'x 276, 283 (5th Cir. 2013) (habeas case challenging a deceased lawyer's failure to object and stay silent). The *Thomas* court noted that it had read *Strickland* as "call[ing] for an inquiry into the ***objective reasonableness*** of counsel's performance, ***not counsel's subjective state of mind*** [,] in the same opinion that it purported to affirm that a court still "may not indulge 'post hoc rationalization' for council's decision making that contradicts the available evidence of counsel's actions[.]" Reconciling those statements is no easy task, and it is unclear how, short of a candid admission that he was unfamiliar with the law, a lawyer might be deemed to have provided ineffective assistance for failing to raise an objection when strategy could conceivably justify silence. As Thomas's deceased lawyer [and Wayne Floyd] cannot provide answers, the reasons for her decisions at trial—if indeed they were "decisions" at all—will remain forever unknown. A federal court evidentiary hearing would do little good, if any, even if the facts discovered could be considered. The *Thomas* court concluded, "Because the trial transcript—the only evidence of deficient performance in the state and federal court records—does not indicate that defense counsel acted unreasonably in failing to object to the prosecutor's remarks, the CCA was not unreasonable in denying Thomas's petition" *without a hearing* as did the deferral court. Similarly, in *Callahan v. Campbell*, 427 F.3d 897 (11th Cir. 2005) one of the penalty-phase counsel passed away before the postconviction evidentiary hearing and, as a result, the United States Court of Appeals for the Eleventh Circuit relied on the record and presumed that counsel had reviewed the relevant documents, questioned Callahan's family and friends about mitigation, and had a discussion with Callahan about what mitigation to present during the penalty phase. *See* 427 F.3d at 932–36. As the Eleventh Circuit noted, the burden was on Callahan to prove that his deceased counsel did not take those steps. *See id.* at 933.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PRELIMINARY CONCLUSIONS

This Court, in this proceeding, is uniquely faced with an extraordinarily long and somewhat repetitive application and amended application, that often times appears to be random thoughts thrown together in illogical order. Upon review of the record of the trial, resentencing and this PCR proceeding, it is clear to this Court that the Applicant was represented by competent counsel who generally performed within the standards of competence for criminal lawyers as demanded under *Strickland v. Washington.* This is based upon the review of the actions of deceased defense counsel Wayne Floyd in the trial record and the actions at trial and credible testimony of Colin Spangler during this proceeding.

This Court makes the following preliminary findings of fact and conclusion of law related to this Sixth Amendment challenge. This Court finds that Applicant failed in his burden of proof to show either deficient performance or prejudice in the following matters based upon the credible testimony of Colin Spangler and the trial record:

1. No deficient performance or prejudice in counsel's investigation or the failure to retain an expert in cellphone or computer forensics or a fact investigator.
2. No deficient performance or prejudice related to advice concerning the Applicant's right to testify in the *Jackson v. Denno* hearing or trial.
3. No evidence of prosecutorial misconduct proven in the handling of witnesses, particularly the Applicant's wife and the victim.
4. No deficient performance or prejudice in counsel's handling of the consent to search.
5. No deficient performance or prejudice shown in counsel's failure to object to allegedly leading questions.
6. No 6^{th} Amendment prejudice shown in counsel's failure to object to any hearsay statement made at trial.

This Court also makes finding related to his claim of ineffective assistance of appellate counsel. In his application, Applicant raises various claims of ineffective assistance of appellate counsel. Specifically, Applicant alleges Appellate Counsel was ineffective for not accurately reporting facts in the brief; withholding pages of the transcripts from the Court showing consolidated indictments; and refusing to exhaust all state remedies on direct appeal.

A Defendant is constitutionally entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990).

The Court declined to adopt different rules for appellate and trial counsel in terms of strategy. *State v. Tisdale*, 357 S.C. 474, 594 S.E.2d 166 (2004). Appellate counsel has a professional duty to choose among potential issues according to their merit. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decisions to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. *Griffin v. Aiken*, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. *Thrift*, 302 S.C at 537; *Gilchrist v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005); *Anderson v. State*, 354 S.C. 431, 581, S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed present significant and obvious issues on appeal." *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.* Appellate counsel is not ineffective for failing to raise an issue that was not preserved for appellate review. *Legge v. State*, 349 S.C. 222, 562 S.E.2d 618 (2002).

The Applicant has failed to prove either deficiency or prejudice as to any alleged deficiency. *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). This Court finds that there was a lack of proof by the Applicant in this proceeding of any specific deficiency on the part of appellate counsel David Alexander. The Applicant failed to present any cogent claim that there was any particular issue that the Appellate counsel should or could have raised on appeal in addition or to the exclusion of the issues presented. The conclusory allegation must be dismissed.

CREDIBLE TESTIMONY OF COLIN SPANGLER

As noted above, this case presents a difficult presentation due to the nature of the adopted pro se allegation in the 188 page amended application and the death of primary counsel Wayne Floyd prior to the hearing. However, the Court was fortunate that the PCR testimony of Mr. Spangler was credible and presented an understanding picture of the strategy of the defense during the trial to focus on impeachment by the victim's inconsistent actions in the failure to report the alleged abuse when there were numerous opportunities over the years, use the Applicant's statement to the police to develop his defense without being subject to cross-examination, and use the victim's inconsistent statement to suggest a crime did not happen. At the outset this Court will set out the testimony of Mr. Spangler as credible testimony as it relates to the representation in Mr. Heath's case. With the finding of credibility to his time, the Court will also adopt them as findings of fact and incorporated by reference into numerous specifications set forth within the Order.

FINDINGS OF FACT IN TESTIMONY OF COLIN SPANGLER

The State called Colin Spangler, the second chair in the Applicant's trial, to testify. PCR 252. He stated that he was currently a lawyer at the law firm Floyd and Spangler in West Columbia. He stated that he was sworn into the Bar in November 2017. He had over 6 years current legal experience. He finished law school at the University of South Carolina in 2017, getting his undergraduate degree from University of Mary Washington in Virginia in 2014. PCR 252.

Spangler stated while in law school, he clerked for the Mike Kelly Law Group and the Attorney Generals' Office State Grand Jury Prosecution Unit. PCR 252-253. After law school, he initially worked for Dirk Derrick in Conway. After deciding to return to Columbia, he began working with Wayne Floyd in January 2018. PCR 253.

Spangler described his reasons for working for the late Wayne Floyd.[2] Floyd had been practicing for a long time. He was licensed in 1974 or 1976. Floyd practiced in West Columbia, Richland, and Lexington since then. He handled mostly criminal work but handled some personal injury work. Spangler described when he began working with him, Floyd's practice had evolved from having several lawyers with him to a smaller staff with himself, three paralegals, and a contract lawyer doing personal injury work. PCR 252. Spangler decided the fact that Floyd had previously been an FBI agent.

Spangler stated that when he began with Floyd, the initial six months he learned that Floyd enjoyed handling the criminal cases more than anything else. He said he learned criminal skills from Floyd then, but also learned a number of personal injury matters. Floyd had a general

[2] Floyd died on August 24, 2021. Cf. PCR 256.

practice matter with everything coming through the door, including wills, powers of attorney, and magistrate level matters. PCR 254.

Spangler stated that Heath's case was his second trial after he started in January 2018. PCR 255. In February or March, he stated that he and Floyd tried a weeklong murder trial during which Floyd was the lead counsel and Spangler was second chair. Spangler described his involvement in that case to be about the same as on Heath's case. PCR 255.

RULE 403 ISSUE. As to whether he had completed his Rule 403 trial experiences at the time of the trial, Spangler declared that he had completed them. PCR 255. He stated he completed the earlier material online and the actual full trial experience while he was still in Horry County in front of Judge John before he began working with Floyd. PCR 255-256.

SPANGLER'S ROLE. Spangler described that his role in the Heath trial was to assist Wayne in any way he needed. Spangler stated that his role initially was to go through all the discovery, get the documents together, go through discovery disks and make sure they had everything organized. PCR 256. His next step was to try to come up with defenses on the case. His role was also to script cross-examinations and direct examinations. PCR 256. Spangler described the great thing about working with Floyd was that he let Spangler do everything with Floyd right alongside him. PCR 256. He stated that they consulted with each other and that he did a lot of trial preparation by doing a lot of legal research. PCR 256-57.

Spangler stated] that Floyd was not a computer person. Spangler stated that he had access to computerized legal research (possibly Westlaw) during this case that allowed him to get printed copies of cases. PCR 257.

TRIAL PREPARATION: Spangler stated that his intensive role in the *Heath* case began in either February or March after the completion of the *State v. Marion Wilkes* trial. PCR 257.[3] Spangler stated that when he was hired by Floyd in January there was the pressing need by Floyd to have someone assist in the upcoming trials. PCR 257. Spangler stated that when he started on this case, he did not know what had been done. He indicated that he spent around a month preparing for trial.

Spangler described that a lot of the preparation by him was going through the great deal of discovery that they had already received. PCR 258. In the month leading up to the trial, there was additional discovery from the State for him to either pick up at the Solicitor's Office or receive in the mail. This occurred up to the week before the trial. He wanted to make sure that they had everything printed for trial and organized. PCR 258.

He stated that after he met with Applicant and his wife, there were some subpoenas they prepared based upon what they had said and materials in the discovery. These subpoenas included the Victim's records from Lexington School District 1 (Victim's school records) on April 25, 2018, Dr. Nicholas Depace, PhD (psychologist/therapist), Lexington Medical Center on April 25, 2018, and Dr. Douglass Luberoff (pediatrician). PCR 258-259.

Spangler indicated the meeting with Applicant and his wife would have been in the month before the trial. PCR 259. He stated that the heavy lifting in the trial preparation on this case was once it was placed on the trial roster, other than going through the discovery. PCR 259. Spangler testified that his file reflected that on a January 5, 2018 roll call an initial trial date was

[3] The State v Heath trial began May 7, 2018.

set for April 9, 2018. PCR 260. Spangler stated that this was the first time that Applicant would have learned about a trial date, which was three months before the actual trial. PCR 260.

APPLICANT'S VERSION: Spangler stated the Applicant indicated he was not guilty of many of the allegations. However, he indicated to Spangler two alternate theories. One involved the DNA forensics side of it and the second was another explanation concerning the iPad data. However, the defense was essentially that he was not guilty. PCR 260

Spangler described that the DNA defense theory was discussed at trial and involved the (Applicant's) hair being transferred to the victim by either a toilet seat or a bath towel. Spangler recalled mentioning a squirrel, a family pet that ran through the house, including the victim's room, as a possible source of the transfer. PCR 260-261.

Concerning the iPad defense theory, the assertion was that the Applicant did not intentionally visit the websites, but on other pornographic websites there were pop-up videos with a link attached to the video. Spangler stated as to incesttv.com, it was indicated to him that it must have come on his laptop by a pop-up and that he did not intentionally search for it. PCR 261. However, Spangler stated that Applicant admitted to viewing pornography on his device. PCR 261. Spangler qualified that Applicant mentioned to him how could the State prove who accessed the laptop or who was on the iPad at that time. Spangler indicated that he did not know if they wanted to go with that theory because the only other people in the house were the Victim, Applicant's wife. PCR 261. Spangler declared that was not a viable option for a defense. PCR 261.[4]

Spangler recalled having two or three discussions with Applicant and his wife while he was working with Floyd. PCR 262. Spangler did not know how often Applicant met with Floyd or how often they spoke on the telephone prior to Spangler's hiring. PCR 262. Spangler indicated that he had discussions about DNA and the DNA results with Applicant, who he claimed came up with the squirrel theory. PCR 262. Spangler explained that the issue with the stain on Victim's underwear with the saliva match was discussed with the Applicant. Spangler's recollection was that the Applicant indicated that it could have been transferred from living in the household, but that there was no specific act Applicant could remember that would have put that saliva or DNA there. PCR 262.

Regarding the Victim's statement to law enforcement, Spangler stated that they went over the statement with the Applicant. PCR 262. Spangler noted that in the Applicant's file there was a June 11, 2015, letter to Applicant, while he was still incarcerated, which referenced that Applicant was being provided an entire copy of the discovery material hand delivered to him by Floyd's paralegal, Michelle Walsh. PCR 262. Spangler stated that in the materials provided to the Applicant were the initial incident reports, as well as the handwritten statements of Applicant's wife and daughter. PCR 263.

[4] This iPad theory would have basically alleged that Victim or his wife was the person who was accessing the pornographic websites rather than Applicant during the critical time periods. This contrasts with Applicant's own admission that he would view pornography.

Spangler stated that in the meetings with Applicant after January 2018, they discussed all the evidence, including what his daughter was alleging, how to attack it, and their combined hope that Victim would not show up for trial. PCR 263, l. 18-21. Spangler stated that this hope that Victim would not show up for trial was based upon statements Applicant made to him. PCR 263-64.

In addition to meeting at least two or three times at the office, Spangler recalled going to the Applicant's mother's house and the Applicant was there, also. PCR 264.

APPLICANT'S DISCUSSION ABOUT VICTIM'S STATEMENTS: Spangler stated that Applicant claimed that he was shocked by his daughter's statements. He stated that Applicant claimed that no one would believe her. Applicant indicated to him that her statements were all lies. Applicant suggested that there was an internal family issue about money missing from the daughter's account. PCR 264-265. In addition, he recalled some discussion about his daughter's sexuality in one of the text messages. PCR 265. These were discussed, but Spangler opined that these were red herrings.

Spangler indicated that DSS records were also discussed. PCR 265. He stated that there were DSS records in the discovery material. PCR 265. These records were discussed because counsel was trying to figure out why DSS was involved with the family before this case. He and Floyd had questions regarding whether there had been an allegation about Applicant doing something similar or whether was it something different. Spangler recalled that it was something different than sexual abuse involving the children. PCR 265, l. 10-16.

THEORY OF DEFENSE: The theory of defense was that the State could not prove their case. PCR 265. It was based upon impeaching the Victim and casting doubt upon her statements. PCR 265. Spangler testified credibly that the biggest weakness in the State's case from their point of view was that the assaults had gone on for such a long time. He stated that the Victim was in public school, had been involved with DSS, was seen by four doctors during that time, and there was never an allegation to them that this had happened. As Spangler testified: "So it was just that, how could this be true if she had all these opportunities to reveal it, but did not." PCR 266, l. 1-6. The approach that they took before the trial court was to show "the existence of opportunities when she was silent about similar things." PCR 266, l. 10-11.

JACKSON v. DENNO: Spangler testified, that with respect to the Applicant's statement, the defense did not think this was a big deal because the Applicant's statements were not incriminating and there was not a confession to the crime, unlike other criminal cases. PCR 266. Spangler considered the *Jackson v. Denno* hearing a mere formality to make sure that the State had laid a proper foundation. Spangler stated that Floyd handled the hearing. Spangler suggested that the Applicant's statement may have been considered exculpatory as to the crime. PCR 267.[5]

[5] At the outset of the *Jackson v. Denno* hearing, Solicitor Mayes indicated that the State did not know if they intended to use the statement or not at the trial. Tr.p. 44. During the hearing Sgt. Marlo McCann was the State witness on the issue. Tr.p. 44-62. After the testimony, the State urged that the Advice of Rights form was given on April 27, 2015, at 2:02 am approximately 2 ½ hours after the initial officer arrived. Tr.p. 63. Sgt. McCann indicated that Applicant verbally waived his rights and agreed to speak with her about why she was there and responded to questions as to what happened and where the victim was and responded in a rational manner despite having alcohol on his breath. Tr.p. 63. She indicated that Applicant responded to the final question in reference to pornography which related to the incident that occurred that night. Tr.p. 63. The State relied upon ***State v. Saxon***, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973). [This Court notes that in *Saxon*, the Court held: "Concerning intoxication . . . The fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words. Therefore, proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying. Proof of intoxication, short of rendering the accused unconscious of what he is saying, "goes to the weight and credibility to be accorded to

CONSENT TO SEARCH HOUSE AND SUPPRESSION OF IPAD: Spangler testified that there was a discussion about the impact of Applicant's wife signing a consent to search at the scene. PCR 267. Spangler stated that he did some legal research at Floyd's request and then prepared and filed a motion to suppress. He stated that he filed the motion on May 9, 2018, which concerned trying to suppress the admission of the iPad. PCR 267. Spangler stated that the motion was based upon the fact that law enforcement had separated Applicant from his wife, that it was not incident to his arrest, and that the iPad was not subject to "in plain view." Spangler

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the confession, but does not require that the confession be excluded from evidence."]. Solicitor Mayes further denied the existence of any intimidation by law enforcement, arguing that Applicant voluntarily went to the vehicle, chose to speak with Sgt. McCann when he did not have to in a post-*Miranda* statement. Tr.p. 64. Defense counsel Floyd argued that it was given in intimidation while he was surrounding at various times by 6-armed law enforcement officers while he was wearing cargo shorts, led to the vehicle by officers, placed into the front seat of the vehicle and continued to surround him leading to the product of intimidation. Tr.p. 64-65. He further questioned the relevance of the statement, including Applicant's comment that he had looked at pornography on his iPad. Floyd moved for the statements to be suppressed. Tr.p. 65. Solicitor Mayes responded that the victim claimed that she was shown pornography during the assault which she claimed was confirmed by the extraction and the victim ID's an image to corroborate her disclosure. Tr.p. 65.

Judge McMahon found the statement was freely and voluntarily entered after proper advice of rights under Miranda. Tr.p. 66-69. He addressed his decision based upon the totality of circumstances with 6 armed officers at the location on Nazareth Road, the single wide trailer home, the Applicant's dress, how Applicant was led to the vehicle, his placement in the front seat with another officer in the back seat, the Applicant not being handcuffed during the inquiry, and the appearance of the smell of alcohol. Judge McMahon further denied that the facts of the existence of the law enforcement officers created coercion or intimidation leading to an involuntary statement. Tr.p. 68.

asserted that in the motion he contended that under *Georgia v. Randolph*[6] that law enforcement had to get Applicant's consent as well as his wife's consent. PCR 268.[7]

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[6] In *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006) the Supreme Court held that warrantless search was unreasonable as to Defendant who was physically present and expressly refused to consent. Unlike *Randolph*, in this case, there is no evidence that Applicant expressly refused to give consent. Although "the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given," *Florida v. Royer*, 460 U.S. 491, 497 (1983), the Defendant has the burden to present actual evidence that the police intentionally removed him from the residence to avoid a possible objection to the search, *see United States v. Parker*, 469 F.3d 1074, 1078 (7th Cir.2006); *United States v. Alama*, 486 F.3d 1062, 1066–67 (8th Cir.2007); *United States v. Brown*, 563 F.3d 410, 417 (9th Cir.2009); *United States v. McKerrell*, 491 F.3d 1221, 1228 (10th Cir.2007). Wife's consent to search the home she shared with her husband was sufficient basis for officers to enter home without a warrant, where there was no evidence that husband expressly refused the officers' entry into home at any time. *United States v. Uscanga-Ramirez*, 475 F.3d 1024 (8th Cir. 2007). Applicant's presence, without more, cannot reasonably be construed as an objection or an explicit refusal to consent. *United States v. Uscango-Ramirez*, 475 F.3d 1024, 1028 (8th Cir. 2007) ("There is no evidence that [the Defendant] expressly refused the officers' entry into the home at any time. Therefore, *Randolph* does not render the officers' entry into the home unreasonable") (internal citation omitted); *United States v. Lopez*, 547 F.3d 397, 400 (2d Cir. 2008) ("[The Defendant] concedes that his live-in girlfriend voluntarily consented to the search of their bedroom and that [the Defendant] did not object to the search"); *United States v. Cano*, 715 F. App'x 370, 372 (5th Cir. 2017) ("[T]here is no indication [the Defendant], who was present at the time of the entry, expressly refused the officers' permission to enter the residence").

[7] In the trial, counsel Spangler relied upon his motion to suppress the iPad. Tr.p. 312. He contended that the seizure of the iPad did not comport with the 4th Amendment. He initially claimed the search of the iPad was not part of a search incident to an arrest because it was not on his person when he was arrested in his living room. Tr. p. 312-313. He contended that plain view did not apply because the iPad screen was black when the witnesses looked at it. Tr.p. 313. Spangler pointed out *State v. Beckham*, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999). He contended that under the third prong of the incriminating nature of evidence must be immediately apparent but was not met. This prong was not met because the possession an iPad was not illegal and the screen being blank did not suggest that criminality was afoot. Tr. 314-315. Counsel Spangler further argued to Judge McMahon that that under *Georgio v Rondolph* requires the other co-tenant to give consent after one gives consent. Tr.p. 3115-316. Judge McMahon questioned counsel on this interpretation of *Randolph*. Counsel confirmed that Randolph specifically involved when one of the co-tenants had already objected. Tr.p. 316. Spangler argued that Heath was present at the house and asserted that although he did not verbally object to the search, he was led out of the residence which he contended created a 4th Amendment concern. He stated that they instead relied solely on the co-tenant wife's consent and they never received consent from Applicant. Tr.p. 317. In response, Solicitor Usry asserted that the consent by the wife was valid and sought to distinguish *Randolph* noting that law enforcement relied upon the co-tenant wife's consent. Solicitor Usry indicated that the wife was married to Applicant, lived in the house, and shared the bedroom. She noted that the Applicant was on the scene the entire time from 11:30 to 3:30. Tr.p. 318. She indicated that the Applicant never indicated any objection for the officers being present and was cooperative, even consenting to a buccal swab. She stated that, unlike *Randolph*, the Applicant was never removed but was present at the scene. She stated that there is no obligation on law enforcement to specifically ask the co-tenant who is also present at the scene for permission. Tr.p. 320. Here, there is no evidence that the police removed an objecting co-tenant for the purpose of avoiding an objection. Usry urged that the Applicant was present. She asserted that he was either in the home or right outside the home the entire time this was happening. Tr.p. 321.

Counsel Spangler testified that in his discussions with his client, Spangler thought that it was important that the iPad be suppressed based upon the bad things on it. Spangler stated from his discussions with Applicant that there was the issue of the Applicant being removed and then getting access to the house and consent to search. PCR 269. He was seeking to suppress the iPad to suppress the pornography. Spangler stated that Floyd gave the suppression motion issue to him because Floyd was handling a lot of witnesses. PCR 269. In addition, it was Spangler's responsibility because the motions had to be typed and Spangler could quickly use Westlaw to assist in his preparation of the motion. PCR 270.

OTHER DEFENSE MOTIONS. Counsel Spangler testified that he also prepared other motions in limine which addressed six (6) other issues. PCR 270. Spangler indicated he prepared and researched a motion and notice of intent to offer evidence under Section 16-3-657 to address

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Usry further stated that the iPad was also subject to seizure under the "plain view" doctrine based upon the original consent to enter. Sgt. McCann became aware that the iPad was used during the crime. Tr.p. 321. Usry stated that the victim indicated that she was shown pornography while the sexual assault occurred in the bedroom. They see an iPad on the bed in plain view as supported by the photographs already entered into evidence.

Usry also asserted that if there had been an objection, the search would have stopped, and they would have gotten a search warrant which she claimed would allow the admission under inevitable discovery based upon the existing probable cause. Tr.p. 321.

Spangler responded that there was no incriminating nature to the iPad in the plain view of the officers because the screen was dark. Tr.p. 322. Although there was no objection from the Applicant, Spangler contends that *Randolph* applies and it was clear that Applicant either took him into custody or led him out of the residence when the item was seized. Tr.p. 322.

Judge McMahon in addressing the plain view issue and his understanding of *Beckham*, found that law enforcement's entry into the residence was lawful as a welfare check and allowed into the residence by Mr. Heath. He found that the discovery of the evidence was inadvertent and he determined that the incriminating nature of the iPad was immediately apparent to law enforcement. Tr.p. 323.He determined that the iPad becomes incriminating based upon the nexus with the crime. Tr.p. 324. He finds the plain view exception applied because Sgt. McCann knew it and directed Dep. Franklin to seize it.

As to the application of Randolph. Judge McMahon found it distinguishable because Randolph had unequivocally refused permission to search, unlike Applicant, and there was no objection to the search while it was proceeding. Tr.p. 327. Judge McMahon rejected the assertion that Applicant additionally consent was required. Tr.p. 328-329.

an identified saliva sample in Victim's underwear and the source of vaginal pathogens found during the SANE examination. PCR 270.

He also prepared a motion to sever, which was brief. It cited *State v Williams* and *McCrary v. State,* 249 S.C. 14, 152 S.E.2d 235 (1967) and Rule 403 and 404. He indicated that that the State had prepared a lengthy motion to consolidate. Counsel stated that the record may suggest that the motion was not filed. However, the record supports that he argued against the motion to consolidate.

Counsel Spangler acknowledged that if his motion to sever had been granted it would have created a possibility of enhanced sentencing and a life without parole sentence. PCR 271. Counsel Spangler, however, did not recall if there was a discussion with Applicant about this possibility, but counsel Floyd may have discussed it with Applicant. PCR 271.

Counsel Spangler stated that in their discussion with Applicant, Applicant wanted the charges split up. The thought was that the only case with his DNA was the most recent incident. The theory was that his odds of a favorable verdict with a "he-said, she-said" case, were higher if the charges were not lumped in with the one that had the disputed forensic evidence. PCR 272. Spangler was firm that in their discovery meetings they discussed the forensic results, the DNA and the iPad results. PCR 272.

WITNESS LIST. Counsel Spangler testified that they put a lot of names on the witness list. These included other family members and some friends of his daughter. Spangler indicated that reason included that this would aid them in jury selection if they knew her. Additionally, Spangler indicated that if Victim heard all these names coming to support Applicant, she may not be willing to testify. PCR 272.[8] However, the only witness called at trial was Applicant's mother. PCR 272-273.

STRATEGY IN CALLING SELMA HEATH AS A WITNESS. Spangler stated that the strategy in calling the Applicant's mother as a defense witness was an attempt to get some good information about Applicant without the risks of calling Applicant and having him be cross-examined. PCR 272. Counsel noted the risks included the inculpatory jail calls that he made and the issues with the pornography on his iPad. PCR 273. He thought her testimony was a way to accomplish this and put a face on family support without opening the door. Spangler also indicated the Victim was very involved with her grandmother while growing up. It was important to the defense that there was no outcry by Victim to her grandmother. It was their defense strategy and belief that this would undercut Victim's story because Victim had all these opportunities to reach out to grandmother, but did not do so. PCR 273.

DISCUSSION ON APPLICANT'S DECISION TO TESTIFY. Spangler recalled discussions with the Applicant at Floyd's office, about the Applicant's possibility of testifying. PCR 273. He recalled them going through the items that could be used to impeach him and attack his credibility. PCR 274. Spangler noted that if Applicant took the stand he would have to answer for the pornography on his iPad and for the jail call statements. PCR 274.

Spangler testified that the discussions with the Applicant and his right to testify and his decision to testify occurred both before and during the trial. PCR 276-277. He recalled a discussion with Floyd and the Applicant during the trial during a break in the proceedings. PCR

[8] During the PCR hearing, Spangler did not locate his witness list. PCR 272. However, the trial record reflects the names of the potential witnesses during the jury selection. Tr.p. 113-115, 118-120.

277. Spangler stated that Applicant indicated to them that he understood and agreed with the advice not to testify. PCR 277.

JAIL CALL ISSUES: Spangler testified that he listened to the jail calls, which he opined were delayed in being received until a week or less before the trial. PCR 274. In reviewing his notes, he located calls that had concerned the defense. According to his notes, these calls included the following damaging information that would have to be explained:

> The Defendant saying, "Please try to make her understand. I'm not going to be the same person. I know she's mad. Tell her she don't want to be like that. I was that way for a long time. She don't have to forgive me. Just help get me out. Tell her to come get me out. I'm not going to try to win her heart back right away."
>
> Talking with his wife, his wife telling him, "Don't call again. I'm tired of talking to you. You call me names." Him saying get her referring, to [Victim], the daughter on the phone. "I want to know if she's going to drop them." Talking about the charges. Telling his wife to -- let's see.
>
> This is his wife saying this, "You don't remember what you do when you are drunk." Mr. Heath asking his wife, "Ask [victim]why she's done this."
>
> The wife, and this is what my note says, "You're always coming out of her room naked." Mr. Heath saying, "They took my iPad because I had porn on it."
>
> Oh, this one was – this one was horrible. Him saying, "When I get to heaven, I'm going to look down at [Victim] and put a curse on her."

PCR 272-275.

Spangler indicated that these calls were why the defense could not put Applicant or his wife on the witness stand. Spangler stated that their advice to Applicant was that he should not testify because of his damaging statements in these calls. PCR 275.[9] Spangler stated that he went

[9] During the trial, the Applicant waived his right to testify on the record after his mother testified. Tr.p. 672-674.

over his notes of these calls with the Applicant. PCR 275-276. Spangler confirmed that the Applicant understood that these calls coming into evidence could really damage him. PCR 276.

JACKSON V. DENNO TESTIMONY. Spangler stated that concerning the Applicant testifying during the *Jackson v. Denno* hearing that it would have been a discussion that Applicant had with counsel Floyd. PCR 276. Spangler claimed that these conversations were always held with the client related to the *Denno* hearing. PCR 276.

DISCUSSIONS WITH FAMILY MEMBERS. Spangler recalled the Applicant's wife being present at least at one meeting with Floyd that he attended. He stated, as Applicant testified in this proceeding, that the defense was not sure whose team she was on – the Applicant's or Victim's [the State]. They were unsure if she would be a good witness or a bad witness. Or even if she was going to testify for the State. PCR 277. An issue to the defense was that she had been charged with tampering with the witness, which made the issue of her testifying unclear. PCR 277-78. Spangler recalled that during one meeting she was present during the entire discussion. PCR 278.

Spangler also recalled that he spoke with the Applicant's son Nick, who was in the Army at the time. Spangler stated he learned how to get in touch with Nick from the Applicant and his wife. He was in South Korea. Despite the challenge, Spangler stated that he spoke with Nick on the telephone and took notes from the call on April 23, 2018. PCR 278. According to Spangler, he learned that Nick had moved away in July 2012 and that he did not see anything that he considered to be sexual abuse. Nick advised Spangler that his father had a bad drinking problem and that he would not be surprised if his father did these things when he drinks, but did not want to take sides, because he saw both his father's side and the Victim's side could be true. PCR 279.

However, Nick indicated to Spangler that he saw his father coming from his sister's room several times and did not see this as uncommon. He stated to Spangler that his father spent time in Nick's room as well and denied any sexual or physical abuse. He stated to Spangler that his father said perverted things when he was drunk which occurred often. Nick told Spangler that he did not see any motive for Victim to be making it up and described the relationship between his father and sister as sometimes terrible and sometimes great. PCR 279. Nick also indicated to Spangler that he did not think his Aunt Margie would get his sister to fabricate the assertions. Nick indicated to Spangler that he would not be back into the States until July 2018. He told Spangler that he did not think he could help them and said "he wouldn't be surprised if dad did it." PCR 279.

Spangler stated that based upon that information he did not take steps to subpoena Nick. He stated that he told Applicant that Nick told him that he does not remember anything helpful, but not the part that he would not be surprised if his father did it. PCR 280.

CELLPHONE COMPUTER EXPERT. Spangler did not recall any discussion with Floyd or Applicant about retaining a computer forensics expert. PCR 280. Spangler stated that in the earlier case he handled with Floyd, he knew enough about how the forensic reports were created. Spangler opined that he adequately cross-examined Det. Phipps. Spangler stated that he focused on the cross-examination of Det. Phipps on the fact that the web history he created from that night was all innocent things and that there was nothing pornographic that night. PCR 280-281. Spangler stated this conflicted with Victim's testimony related to viewing pornography that night. PCR 281.

DNA EXPERT. Spangler similarly testified that he did not discuss with Floyd or the Applicant about retaining an independent DNA expert or serologist. PCR 281. He recalled that in a conversation with Floyd and Applicant they discussed the location of where the hairs and saliva were found and that the hairs got transferred from a towel or some other source. PCR 281. He stated the source of that information was Heath. He noted that one of the hairs was found in the rectal are of Victim. PCR 281-82. At that time, it was relayed to counsel from Applicant that it was possibly that it was from a toilet seat, a towel or possibly a squirrel, as an explanation. PCR 282.

This DNA evidence was a major concern because it was otherwise a "he said-she said" case. These were issues that were difficult to overcome. PCR 282.

OTHER WITNESSES. Spangler stated that he did not recall if he spoke with Dr. Luberoff, but believed Floyd spoke with either Dr. Luberoff or Dr. Depace. PCR 282.

TEXT MESSAGES. Spangler stated that he had a discussion about the text messages Victim had with her aunt, Margie Branham. Spangler stated the messages were being used to support and corroborate the outcry from the April incident. Spangler went over the messages with Applicant. They had pictures of the screenshots. PCR 283. He stated that they received the information in discovery. They discussed the text "is he doing this to you because of your sexuality or something." PCR 283. This was one of importance to the case. Spangler did not recall if the text messages came into evidence at trial,[10] but he recalled the discussion with

[10] The actual text screenshots were not introduced. However, they were discussed with Victim and Margie Branham. PCR 370-71, 381, 472-473, 476, 477, 496.

Applicant because the defense was trying to figure out the family dynamics that would cause Victim to reach out to her aunt that night for the outcry. PCR 283-284.

Spangler did not recall interviewing the aunt but recalled that the Victim had moved in with her while they were preparing for trial. PCR 284. Under those circumstances, he doubts that they reached out to her.

SPANGLER'S ROLE. He stated he was second chair at trial and handled the smaller witnesses such as the 911 dispatcher, some of the forensic people and Det. Phipps for computer matters. PCR 284. He stated that Floyd did the opening, the closing and the sentencing. PCR 284.

Spangler stated that it was their practice that the person who was cross examining the witness would make the objections. He said if Floyd was doing the cross-examination, Floyd would do the objections and if he took the witness's cross-examination he would do the objections. PCR 284-285. Spangler stated that they worked together as the evidence was coming in to decide an objection as to a piece of evidence. PCR 285.

INTIMIDATION BY JUDGE McMAHON. Spangler firmly stated that Floyd was not intimidated by Judge McMahon. Spangler stated that Floyd had appeared in front of Judge McMahon over several years and in practice as opposing lawyers. PCR 285. Spangler, as a young lawyer, acknowledged that he found Judge McMahon intimidating. However, Spangler credibly stated that it did not stop him from making objections. PCR 285. Counsel Spangler indicated that there was also a reason they did not object on occasion:

> The reason that there are items in the record that could have been objected to, but we didn't is because the jury was in there and this was a case where we had a very sympathetic Victim and we did not want to look like aggressive bulldog lawyers beating up on this young girl. I remember that was a strategy part. Right. We wanted to go in and try to be as best as we could, the nice guys, even though we're representing the Defendant in the case.

PCR 286, l. 1-8. Importantly, Spangler stated that there was no piece of evidence that was prejudicial that they should have objected to that they did not do so. PCR 286, l. 9-13.

ADMISSION OF THE PHOTOGRAPHS AND WATERMARK. Spangler stated that he was involved with the admission of photographs from the iPad. PCR 286. He described the photographs as a screenshot from the iPad, and it was an image of a video that was being played on the iPad and across the photograph was a watermark from the pornographic website. He stated that the watermark was apparently done so no one could own it and try to sell it on their own. PCR 286.

Spangler indicated that he thought that by objecting to the video image itself that it also covered the contents of the picture. PCR 286-287. However, the Court of Appeals disagreed and asserted that it needed a different objection to the watermark language. However, Spangler still asserted that objecting to the picture, as a whole, did not require additional objection to each of the individual items in the picture one by one including the evident watermark language. PCR 287.

Counsel stated that several times during the trial they approached the bench and discussed matters with Judge McMahon, including the nature of the photograph which was presented to him. However, Spangler confirmed that Judge McMahon had the actual photographs in front of him when he ruled them admissible as relevant and not inadmissible under Rule 403.

PCR 288. Counsel opined that since the explicit matters were appearing in the exhibit which included the watermark, his broad objection would have covered the watermark since it was in front of the judge.

OTHER MATTERS. Spangler testified that he had outlined potential cross-examination on potential witnesses that he expected to take at the trial but did not recall if Floyd had drafted out potential examinations. However, Floyd's outline would have been handwritten rather than typed. PCR 288-289.

ISSUES WITH CLIENT. Spangler stated that the only concerns that Applicant indicated to him during the trial was an issue that the times (dates) being mentioned during the trial were not always accurate from Victim. These matters concerned where they lived at a particular time and the school being attended. PCR 289. This was both during the witness's testimony and after the testimony. PCR 289. Spangler stated that they were with the Applicant the entire time of the trial except at lunchtime. PCR 290.

After the State rested its case, Spangler stated that he was present when Floyd had his discussion with Applicant about his right to testify. PCR 290. Spangler opined that Applicant did not appear overwhelmed by the State's case against him. Spangler's recollection was that throughout the trial, Applicant was very confident that they would win. Spangler stated that when the Applicant was found guilty, he declared "I'm just shocked, I have no words." PCR 290.[11] Spangler did not recall Applicant being mad, upset or trying to fire them at any point. PCR 290.

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[11] The actual comment Applicant stated at the trial was: I'm still kind of shocked, to be honest with you. I'm at a loss for words." Tr.p. 756, l. 6-7.

Spangler found the Applicant demeanor different at this hearing than he was at the trial. PCR 290.

CROSS-EXAMINATION

At the outset of the cross-examination, PCR counsel questioned whether counsel Spangler was related to the Ghostbuster, which he denied.[12] PCR 291. Spangler confirmed that he had completed his Rule 403 trial experiences at the time of the trial, contrary to Applicant's assertion. PCR 291.

SUBPOENAS. Spangler testified that he specifically sent out subpoenas to the school district, a pediatrician, and a PhD from Lexington Medical. He stated that he requested all records, evaluations, notes, photographs and materials regarding Victim's treatment. PCR 291-92.

PORNOGRAPHY WEBSITE VISITS. Applicant also confirmed to them that he did not intentionally visit the sites (apparently referring to incesttv.com and daughterdestruction.com), but that he was visiting other pornography sites. Spangler confirmed that his information to them was consistent with Applicant's PCR testimony on the issue. PCR 292.

DISCOVERY REVIEW. Spangler indicated that the first batch of discovery was delivered to the detention center. He noted that after Applicant was released, there was no correspondence mailing the discovery, so Spangler assumed Applicant received it in person. He states that he and Applicant went over the discovery in person. PCR 292. Spangler testified that

[12] This is an apparent reference to Egon Spengler, a fictional character from the movie Ghostbuster who was played by the late Harold Ramis.

he did not have specific dates when they met, but it occurred after late January of 2018. Their files do not indicate the specific meeting dates. PCR 292-293.

WATERMARK REVIEWED BY TRIAL COURT. Spangler confirmed that they approached the bench with the two photographs with the watermarks, and he believed Judge McMahon viewed them. PCR 292.

WITNESS LIST. Spangler indicated that he thought if they did not include a name on their witness list that they could not call them. PCR 293.

BOND CONDITIONS. Spangler recalled that the Applicant was on a GPS monitor. He assumed that the conditions included that he was not supposed to communicate with Victim. PCR 294. Spangler indicated that the first time he met with Applicant was at the pre-trial hearing concerning the GPS monitor.

Spangler stated that the Applicant's wife was charged with the common law offense of intimidation of a witness. PCR 294. He recalled that Jason Chehoski was probably representing her based upon some correspondence that he received. He was aware that at some point the wife was represented. Spangler confirmed that he was aware that he could not speak to her without her attorney being present. PCR 294-295.

Concerning Applicant's prior criminal record, Spangler indicated he did not recall the specific nature of Applicant prior record, asserting that it incorrectly may have been Criminal

Domestic Violence or assault. PCR 295.[13] However, he did not think it involved a crime of moral turpitude.

Concerning the ranges of the dates on the indictments and the Applicant's moving to different locations and their children's custody, Spangle testified that although he did not recall the specifics, there was an issue as to where they lived and the addresses. Spangler did not think that they got clarification from the Applicant on that. Spangler thought that since the indictments listed Lexington County, the indictment would still be proper.[14] Spangler stated that if he was trying the case today, he would have attacked it if he was sure that the indictment was wrong. PCR 296. Spangler was questioned whether he had ever challenged an indictment and indicated that he had. Spangler could not recall which address he thought was wrong but thought it was likely the earlier charge which had an address which may have been wrong.[15] Spangler also recalled a time when the children did not live with the parents and lived with the grandmother. PCR 297. However, he did not recall if this period overlapped with some of the time period within an indictment. PCR 297.

Concerning DNA, Spangler indicated that whether to challenge the DNA process or the results would have been a decision that Floyd would have made rather than him. PCR 297.

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[13] His memory was incorrect according to the trial record. During the trial, Solicitor Mayes indicated that Applicant had a May 2004 conviction for ABHAN, threatening the life of a public official, and resisting arrest that he received a sentence of 10 years with 2 years of probation. She stated that this would be outside of the Rule 609 limit. Tr.p. 647. He also had a DUI matter that is not subject to impeachment. Tr.p. 647. The trial court concluded that he had no prior convictions that could be used for impeachment if he testified. Tr.p. 647-648.

[14] Spangler is correct that each of the indictment only reflected that each of the crimes occurred in Lexington County and did not specify the Applicant's home address on any of the indictments.

[15] Spangler is likely confused by the questioning and is speaking of either the arrest warrants or Victim's testimony, since the indictment only referred to the crimes occurring in Lexington County.

Concerning Heath's issue with the *Miranda* form where he did not sign the form, counsel Spangler stated that he did not recall at this time whether Applicant had signed the bottom of the form. Spangler stated that they did not devote all their efforts to the *Jackson v. Denno* and *Miranda* issue because he opined that there was nothing damning in the statement. PCR 298.

RE-DIRECT EXAMINATION. As noted earlier, Spangler corrected after reviewing the indictments that they all listed Lexington County only. PCR 299. He indicated that he may have been referring to the warrants. PCR 299. [16]

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[16] This Court finds that Applicant's testimony lacking the same credibility as counsel Spangler's testimony because it was essentially self-serving. His testimony related to the amended application and specifications are presented within each one. However, prior to addressing those individual matters, the Applicant also testified in the following summarized manner.

The Applicant William Heath testified that he retained Wayne Floyd and Colin Spangler shortly after his arrest. PCR 6-7. He stated that his wife had contacted Wayne. This was before Colin Spangler worked for him. PCR 7.

The Applicant testified that he was out on bond from August 3 until trial happened for three years. He claimed that he met with Floyd during roll call when he claimed they did not talk about the case. He asserted he only met Floyd at his office twice and that was 2 weeks before trial. PCR 7. He stated that he spent less than 2 hours total time discussing the case. PCR 8. Applicant stated that he spoke about my sister-in-law, and was obsessed with a phone number, from the phone records he was reviewing and wondered who she was talking to when she was supposed to have a conversation with his daughter. Heath contended that this was not important. PCR 8-9.

Concerning the websites that were pulled off the Applicant's iPad, Heath stated Floyd mentioned some of the sites pulled out of my iPad and talking about how the State were going to bring them in. Heath described the sites were the iPad screenshots that the State introduced at trial. PCR 9. He stated they were some pictures that were printed and on the photos were watermarks. PCR 9. He stated those were entered and jury allowed to see them Heath described the photos as disturbing and "horrible." PCR 10. Heath complained that at no time did Floyd seek to remove the watermarks. Heath stated that Colin Spangler was the one doing most of the objections on the photographs. PCR 10.

Heath stated that he met Colin for the first time when the State was trying to revoke his bond a few weeks before trial. PCR 10-11. Heath stated that this arose because the bondsman said he was behind with his payments and that Applicant told him he couldn't pay because he had broken his back. PCR 11. He also indicated that he charged his GPS device in the morning and then again in the evening. PCR 11.

Heath stated that when they met to talk about the case, they kept talking about the websites, but not about his defense. PCR 12. He stated that he had never been to trial and never been in trouble like that, so he didn't know what was going on. PCR 12. "I didn't think it was all that bad until I got to prison" or how disturbing it was" concerning his counsel. He claimed to have helped [inmates] do PCR and federal habeas corpus in prison. He claimed to have read a lot of their transcripts and compared them to his. PCR 12-13.

Heath denied that they had spoken about plea offers. PCR 13.

FINDINGS AND CONCLUSIONS RELATED TO THE TRIAL COUNSEL ALLEGATIONS

Initial Finding to Allegations of Failure to Object

Applicant alleges in his initial application that Trial Counsel was ineffective for failing to object in numerous different circumstances. These allegations were more fully set forth in the amended application which this Court will defer and incorporate by reference. 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.). For the reasons set forth in the findings and conclusions related to the Amended Application, Applicant failed in his burden of proof.

Initial Finding Specific to Allegations of Failure to Object to Testimony and Photographs as Impermissible Character Evidence

Concerning **Allegation I(a) and I(b)** in his original application, Applicant alleges Trial Counsel was ineffective for failing to object to the State's witnesses' description of websites and watermarks on photographs. Rule 404(a), SCRE, provides "evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." The purpose of Rule 404 is to exclude evidence that tends to prove a

Defendant's guilt based merely on his reputation or character, i.e., evidence which implies because this person is a bad guy or acted in a manner similar to this before, he is guilty. *State v. Gonzales*, 360 S.C. 263, 600 S.E.2d 122 (Ct. App. 2004) (*overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). Under Rule 404(a)(1), SCRE, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, is admissible. This rule is identical to the federal rule and is consistent with prior South Carolina case law.

Applicant contends that a witness's description of a website and watermarks on a photograph improperly attacked his character.[17] During the trial, the Victim testified that during the sexual conduct on April 26, the Applicant was viewing pornography on the iPad from which the photographs with the watermarks were recovered. Tr.p. 351-352. She indicated that he had used the iPad similarly in their past encounters. The evidence was properly admissible as part of the *res gestae* because it was integral to the crime and an understanding of the context in which the crime occurred. *See State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) ("The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the Defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred."); *State v. McGee*, 408 S.C. 278, 289,

[17] Applicant ignores the fact this evidence was used and admitted to corroborate the testimony of the Victim. Generally, corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. *State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984) (trial court did not err where admitted expert testimony of extent of witnesses' injury and its effect on her capacity where during cross-examination defense counsel attempted to discredit the witnesses' direct testimony by showing she suffered from lapses in memory). Evidence is admissible to corroborate testimony of a previous witness, and the jury makes the final decision on whether that testimony does or does not corroborate. Id. The Victim testified Applicant watched pornography during the later years of his abuse of her, specifically identifying the images introduced as ones Applicant watched on the night of April 26, 2015, the image being created during the window of time Victim testified she was assaulted.

758 S.E.2d 730, 736 (Ct. App. 2014) (holding evidence that was admissible under **res gestae** was "circumstantially [and] intimately connected with and explanatory of the crime").

The Applicant is correct that counsel did not adequately preserve the issue related to the watermarks in open court on the record to preserve the issue for an appeal.[18] However, the appellate procedural bar does not mean that the evidence was inadmissible. The appellate court determined that the admission of the photographs (which necessarily included the watermarks of the two websites (paid services) - *IncestTV.com* (Tr. 618,630, 631,696) and *DaughterDestruction.com* (Exhibit 22) (Tr.p. 624) (April 26, 11:21 PM)) were determined under Rule 403 by the appellate court to be probative and not inadmissible under Rule 403. Counsel Spangler credibly testified at the PCR hearing that the trial judge was provided and viewed the photographs with the watermark concerning its admissibility as related to this objection to the photographs under Rule 403 at the time State Exhibit 30 was offered. Tr.p. 591-597. Spangler thought since the watermarks were inherently part of the screenshots that his objection to the photograph would have necessarily covered the watermarks as well, for appellate purposes. The images were introduced, subject to Rule 403 objections. Tr.p. 620, 623-626. Judge McMahon, viewing the entire photographs with the watermarks, determined that the challenged photographs were in evidence subject to his prior ruling. Tr.p.620, l. 10-13.

[18] The Court of Appeals determined a procedural bar on the claims. "As to the watermarks on the images, Heath failed to preserve this issue for appellate review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal."). Heath never objected to Detective Phipps's testimony regarding the watermarks. Rather, Heath's objections at trial were to the displaying of pornography to the jury, he did not mention the watermarks or their unfair prejudice to the trial court. Thus, without raising the issue or drawing the trial court's attention to the watermarks' prejudicial nature, Heath failed to preserve this argument for appellate review." *State v. Heath*, 433 S.C. 506, 514, 860 S.E.2d 673, 677 (Ct. App. 2021).

In his pleadings and testimony, the Applicant has equated the admission of the watermarks on the photographs with inappropriate general propensity character evidence, relying upon *State v. Nelson,* 331 S.C. 1, 501 S.E.2d 716 (1998). However, unlike *Nelson,* these photographs were part of the *res gestae* with a probative purpose related to the specific offenses. In *Nelson,* children's toys, videos, photographs of young girls, and other evidence tending to depict the Defendant as generally as a pedophile were admitted at his trial for criminal sexual conduct and committing lewd acts on a minor. Here, the watermarks of the website or paid service were embedded into the photos and directly connected to the times of incidents.

Alternately, the evidence was admissible under Rule 404(b), SCRE as evidence of motive, in addition to the *res gestae* since it was directly, not just generally, connected to the incidents. *See, State v. Russo*, 157 Idaho 299, 308, 336 P.3d 232, 241 (2014) (the district court did not err in finding that the evidence of Defendant's fantasies and his collecting pornography that was consistent with those fantasies was relevant to his motive in this case); *State v. Rayfield*, 231 N.C. App. 632, 653–54, 752 S.E.2d 745, 760 (2014) (there was testimony at trial that Defendant showed the victim both child pornography and adult pornography, the evidence was admissible under Rule 404(b) as relevant to Defendant's motive or intent). In *State v. Rossignol,* the Idaho Court of Appeals held that "at a trial for sexual abuse, incest stories may be admissible as relevant to a Defendant's intent and motive to have a sexual relationship with his daughter." 147 Idaho 818, 824, 215 P.3d 538, 544 (Ct. App. 2009). Specifically, the Court of Appeals found that "incest stories" found on the Defendant's computer demonstrated his motive for sexually molesting his daughter. *Id.* At 825, 215 P.3d at 545. *State v. Brown*, 211 N.C. App. 427, 710 S.E.2d 265 (2011), aff'd, 365 N.C. 465, 722 S.E.2d 508 (2012) (evidence of Defendant's possession of incestuous pornography was admissible to show Defendant's motive, intent, and purpose). *See, e.g., United States v. Libbey-Tipton*, 948 F.3d 694, 702 (6th Cir. 2020) ("It is logical to infer that Libbey-Tipton's preference for pornography depicting prepubescent girls would translate from his actions in the molestation of his four-year-old cousin and serve as relevant evidence of whether it was Libbey-Tipton that downloaded the [child pornography] images. This connection aligns with the court's reasoning in admitting prior-act evidence to show intent and knowledge in [another case]."); *United States v. Torrez*, 869 F.3d 291, 301 (4th Cir. 2017) ("The Government produced evidence of pornographic videos showing violence against women who were sleeping, unconscious, or restrained. This evidence was admitted to show intent and motive, as well as modus operandi since Snell was murdered in the early morning in her bed, and officials discovered Appellant's semen on her bed sheets."); *United States v. Long*, 328 F.3d 655, 663 (D.C. Cir. 2003) (affirming admission of evidence of the Defendant's uncharged child pornography activities in the Defendant's trial for child pornography and related sex offenses, finding the evidence was relevant to intent); *Womack v. State*, 317 Ga.App. 496, 731 S.E.2d 387, 391 (2012) ("And here, the relevant pornography depicted scenes of rape and/or bondage, and Womack was indicted for committing the offense of forcible rape, which at points involved binding the victims' hands. Thus, this evidence did not merely show Womack's lustful disposition in general but instead depicted a lustful disposition toward a particular sexual activity and his bent of mind to engage in that activity." (internal quotation marks and footnote omitted)). *But see State v. Clark*, 452 S.W.3d 268, 284-93 (Tenn. 2014) (concluding that evidence showing that the Defendant viewed adult pornography in a case alleging sexual abuse of a child was erroneously admitted).

Even if this Court finds that counsel was deficient in his broad Rule 403 objection to the admissibility of the photographs, *Strickland* prejudice has not been proven. He has failed to show a reasonable probability the result would have been different. First, since the watermarks were embedded across the exhibits, it defies logic to believe that Judge McMahon ignored that content in his assessment of the Rule 403 objection by counsel Spangler before he allowed the unredacted exhibits to go before the jury. Tr.p. 591, 596, 11-614, 618-620.

The admission of the exhibits with the watermark did not undermine confidence in the outcome. In addition to the corroborating evidence of the photographs to the victim's testimony related to the summary of the evidence, set forth in the State's Original Return p. 3-5, Applicant does not show that there is a reasonable probability that the result of the proceeding would have been different had the watermarks been deleted. Even if the trial judge erred in admitting the unredacted images, any alleged deficiency does not to a reasonable probability undermine confidence in the verdict to a reasonable probability under *Strickland* given the overwhelming evidence of Applicant's guilt. Again, Applicant neither disputed at trial, nor does he presently challenge the idea, that the existence of Image B was properly admissible to corroborate Victim's testimony. Combined with Applicant's saliva and hairs recovered from Victim after the April 26, 2015 assault, Victim's testimony was not just persuasive, but overwhelmingly convincing.

Initial Finding Specific to Allegations of Failure to Object to Consolidated Indictments

The Applicant alleged in his original application ground I(c) an issue related to consolitation. This issue is more throughly presented in the response to the amended application in specification 2 below. This issue was raised at trial based upon the Applicant's motion to sever and the State's motion to consolidate. Tr.p. 13- 41. The Applicant has failed to show that counsel was deficient or that there was Sixth Amendment prejudice in the considation of the indictments. Counsel argued against consolidation, which was not deficient.Tr.p. 20-23.

For reasons more fully set forth below in specification 2, the ground is denied.

Initial Finding Specific to Allegations of Failure to Object to State's Witnesses' Testimony that Improperly Bolstered Victim's Testimony

Concerning initial application ground I(d), Applicant alleges trial counsel was ineffective for failing to object to State's witnesses' testimony that improperly bolstered the Victim's testimony. Evidence is admissible to corroborate testimony of a previous witness, and the jury makes the final decision on whether that testimony does or does not corroborate. *State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395. It is permissible for the testimony of one witness to bolster the testimony of another. *James v. Lister*, 331 S.C. 277, 500 S.E.2d 198 (Ct. App. 1998), *reh'g denied*, (June 19, 1998) and *cert. denied*, (Mar. 5, 1999). This ground is more fully addressed with the responses below to the Amended Application which are incorporated herein by reference.

Initial Finding Specific to Allegations of Failure to Object to Admission of Prejudicial Photographs.

Concerning original application allegation I(**e**), this is addressed in **I(b)** above, as well as in the specifications in the amended application.

Initial Findings Specific to Allegation of Failure to Object to Solicitor's Improper Comments.

Concerning Initial Allegations **I(f)** and **I(g)**, Applicant alleges Trial Counsel was ineffective for not objecting to the Solicitor's improper comments made in closing. Counsel Spangler testified that he would have objected if there was anything that he believed was unduly prejudicial. At the hearing, the Applicant raised statements and characterizations that he disagreed with by the State counsel. However, for the reasons more thoroughly set forth below related to amended allegations, the Court submits that he has failed to show any prosecutorial comment that in closing "aroused the jurors' passions and prejudices" and "so infected the trial with unfairness...mak[ing] the resulting conviction a denial of due process." Failing to show that condition precedent, he failed in his burden of proof under either prong of *Strickland.*

Initial Findings Specific to Allegation of Failure to Object to Perjury by The State's Witness.

Concerning initial application allegations, **I(h)** and **I(j)**, Applicant alleges Trial Counsel failed to object to perjury of State's witness about DNA testing, and the victim perjured herself in testimony about her "recogniz[ing] the underwear". A witness commits perjury when they willfully give false, misleading, or incomplete information under oath in a court record judicial, administrative, or regulatory proceeding. S.C. Code § 16-9-10. (Conflicting testimony in itself does not constitute perjury). Applicant contends Trial Counsel should have objected to the Victim's testimony concerning the underwear, misstating what the victim testified to at trial. The Victim never said she would not be able to identify the underwear, but testified, "I don't know what [the underwear] look like, but I'd be able to tell what they were." (Tr. p. 228, ll. 5-6). The Victim went on to testify that the underwear she wore on the night of the incident that started this action was the same underwear she wore to the hospital. (Tr.p. 228, ll. 11-14). The victim then identified the underwear when it was shown to her, which is consistent with her testimony. The Applicant failed in his burden to show either deficient performance or prejudice. This is also addressed within the Amended Application specifications which is incorporated herein by reference.

Initial Finding Specific to Allegations of Failure to Object to Witness Testimony Admitted as an Excited Utterance

Concerning initial application allegation I(i), Applicant alleges Trial Counsel was ineffective for failing to object to witness testimony that was admitted as an "excited utterance." Applicant contends Trial Counsel should have objected because the hearsay admitted under the exception "would have happened outside the timeframe allowed." An excited utterance is an exception to the rule against hearsay evidence. Rule 803(2), SCRE.

Applicant's contention Trial Counsel should have objected to admission of Victim's statement because the content of the statement would have happened outside the timeframe allowed confuses two different rules of evidence. Rule 609 allows evidence of a criminal conviction to come in against a Defendant for purposes of impeachment, subject to limitation that no more than ten years have passed since the conviction or release. Rule 609, SCRE. Here, the Victim's statement was admitted under a hearsay exception, not for impeachment purposes. The time period between the event and the statement is relevant, but not in the manner Applicant contends. The Court of Appeals upheld the admission and alternately held it was harmless error related to the statements to Sgt. Black. Deficient performance and prejudice cannot be proven. *State v. Heath*, 433 S.C. 506, 517, 860 S.E.2d 673, 679 (Ct. App. 2021).

Initial Finding Specific to Allegations of Failure to Object to Validity of a Computer-Generated Report with Handwritten Results

Concerning initial application allegation iv, Applicant alleges Trial Counsel was ineffective for failing to object to validity of DNA report that contained handwritten results, while the majority of report was computer generated. Applicant contends the inclusion of handwritten results could point to possible fabrication in the report. This allegation is without merit for failing to prove deficient performance or prejudice. In Applicant's case, the South Carolina Law Enforcement Division (SLED) conducted DNA tests and produced the report with the DNA results at trial. (Trial Tr. p. 246-247). This fact makes the DNA report a public record, and public records are ordinarily authenticated by proof of custody. Fed. R. Evid. 901; Rule 901 (b)(7), SCRE. Donna Money, an analyst in DNA casework department at SLED, conducted DNA tests in Applicant's case, prepared the report Applicant references, and testified to the contents of that report. (Trial Tr. p. 561-577). The Applicant's speculation fails to be credible proof and is rejected by this Court. The fact there is handwriting in the computer-generated report does not imply the report was fabricated, and Trial Counsel had no reason to believe it was fabricated based on the fact the preparer of the report testified to its contents. He failed to prove either deficient performance or prejudice.

Initial Finding to Allegation of Ineffectiveness for Failure to Call Witnesses

Applicant contends in original application allegation ii and iii that Trial Counsel was ineffective for failing to call witnesses for his defense, and for failing to call two of the State's witnesses that "would have brought clarity to Defendant's Fourth Amendment Issue." An Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy the burden of showing prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993). To show prejudice from failure to contact an allegedly favorable witness, a PCR Applicant must present the testimony of that witness at the PCR hearing or otherwise offer the testimony in accordance with the rules of evidence. *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995); *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998). The Applicant failed to present any other witnesses at his hearing. Further, counsel Spangler credibly testified about the reasons for not calling his wife to testify. His allegation must be dismissed.

FINDING OF FACTS AND CONCLUSIONS RELATED TO THE AMENDED APPLICATION

Indictment Issues (1)

In allegation 1/1 of the amended application, the Applicant in his pleading alleges that 3 out of 4 indictments were not true-billed, but September 2023 shows that they were true-billed and claims this is a fraud. Indictment 2016-GS-32-02100 asserts that a crime occurred between September 16, 2004, through September 15, 2007, but Applicant claims that he was not living at any of the addresses during that time and during a portion of the time did not have custody of either child. In the pleading, Applicant further claimed that during the cross-examination of his mother Selma Heath, a discussion of a report concerning a medical condition of Victim was presented which Applicant claims was not relevant and gave a false impression that Applicant had done something wrong. He contends that trial counsel had opportunities to attack these matters but did not, which amounted to prejudice and an inability to put up a defense.

In his amended application on 1/1 and 1/ 2 he also asserted that defense counsel never raised an issue as to indictment 2016-GS-32-02100 covering September 15, 2004, to September 15, 2007, that Victim was one day shy of ten years old yet stated throughout that she was up to 11 years old. He complained that counsel never raised an issue about a 2-year gap between indictment 02100 and indictment 2097A. He complains that counsel failed to object to restrict dates and ages other than what is in the indictments, as well as allowing prior bad acts without limiting instructions. The Applicant points out that there is a gap between indictments 2097A and 2098, yet the prosecutor argued that the assaults were continuous.

The Applicant, in the pleading, also asserts in 1/2 that testimony presented about when Victim lived on South Lake before they lived on Peachland Drive was incorrect, citing Tr.p. 233, l. 13-18 and Tr.p. 234, l. 3-10. The Applicant cites to Solicitor Mayes' question of Victim at corrected cite Tr.p. 243, l. 19-21 and asserts that Victim's response that "only whenever I was out of the house" was a lie and counsel Floyd failed to act to bring the truth out which caused the lies to become the truth. He also questions the testimony at Tr.p. 247, l. 19-25. He cites Tr.p. 334, l. 11-20 in the trial testimony of Victim and questions where the information was that he lived at Peachland at all in 2004. (Victim testifies the sexual assaults started when they lived at Peachland at age seven or eight and claims counsel did not address this.)

In 1/3 of the amended application, he cites to testimony at Tr.p. 339-340 and complains that counsel failed to correct the record when the solicitor stated that they moved to Smith Pond Road in the third grade. He similarly refers to Tr.p. 359, l. 21-25 (lived on Peachland in the second grade) and Tr.p. 360, l. 14-21 (moved to Smith Pond Road in second half of second grade) for timeline purposes. Applicant refers to Tr.p. 362, l. 11-24 (testimony that the last time something occurred was around the Applicant's birthday), and complains that the photographs stated December 1 and not December 2 at 10:30 PM and should have been objected to by counsel under Rule 403 as more prejudicial than probative. He also cites to Tr.p. 371, l. 19-21 (Victim testimony about the text messages and statement in April was the first time she had told an adult) and questions why the Solicitor continued to bash his wife as if she had told her something and claims defense should have objected.

In allegation 1/3 the Applicant also refers to Tr.p. 373, l. 21- p. 374, l. 4 (about the period Victim lived with her grandmother before Peachland while she was in the first grade and then moved to Peachland after the separation) which the Applicant claims shows that the indictment did not line up with the testimony. He asserts that counsel should have objected. He also points to

Tr.p. 636, l. 19-p. 637, l. 17 (directed verdict motion) and Tr. p. 641, l. 4-14 (directed verdict denial) in which he claims that counsel failed to point to indictment issues which he claims would have caused the judge to rule differently. On 1 / 4, Applicant refers to Tr.p. 699, l. 25-p. 700, l. 2 during the prosecution closing argument and claims it shows the earlier mistake in the indictment and stops at age 7. He contends that counsel should have seen this and questioned it.

During his PCR testimony relating to specification 1, as to the Indictment issue, the Applicant complained that it was wrong because in 2004 they did not have custody of the children and thus the date on the indictment is incorrect and Applicant did not live at Peachland. PCR 17. Applicant claimed that everything that was put into evidence, including solicitor Mayes impeaching his mother at a time when she had custody of his children, was wrong. PCR 17. He complained that the impeachment about something from the doctor's office also made him appear to have done something wrong. PCR 17-18.[19] He contended that Mayes should have left that alone and there would not have been prejudice. PCR 18. The Applicant claimed he told Floyd that was wrong, but he admits that he did not tell Spangler. Tr.p. 18.

His other complaints about the four indictments were that his copy did not have a TRUE BILL stamp on them, and he questioned how they got there and the signatures of the foreman. PCR 18-19.[20]

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[19] This is an apparent reference to the solicitor's cross-examination of the Applicant's mother Selma Heath. Tr.p. 662-663. During that questioning the State presented a reference to Dr. Luberoff reporting the grandmother taking the seven-year-old victim to the doctor reporting burning urination and blood and an addition report of Dr. DeSoto at Lexington Urgent Care where she reported blood in the child's urine. Tr.p. 662. Selma Heath denied these and any recollection of them. Tr.p. 662.

[20] Each of the indictments in the Clerks record proved to this Court reflect a TRUE BILL STAMP and the purported signature of the grand jury foreperson. 2016GS3202097 (criminal sexual conduct – third degree) (dated 8-8-16) (Warrant No. 1015A3210800154); 2016GS3202100(criminal sexual conduct with a minor – 1st degree)(dated 8-8-16) (Warrant No. 2015A3210200672); 2016GS32020976A (criminal sexual conduct with a minor – second degree) (signed 4-9-18) (warrant 18-STR-00008); 2016GS3202098 (criminal sexual conduct – third degree) (signed 8-8-16)(Warrant No. 201632102006761).

Heath furthered complained that he was not living on Smith Pond Road in 2004. He felt impeachment was the biggest thing. He claimed that the date runs up to Victim's ninth birthday, not her eleventh. However, he felt that there were inconsistencies with years missing or years on the indictments. He claimed that there was no specific time that any of this happened. He further felt that there were no limiting instructions. PCR 19-20.

The Court assumes that this complaint concerns the broad time frames in each of the indictments which were "on or about September 16, 2004 through September 15, 2007"(-2100); "on or about September 17, 2011 through September 2013" (-2097A); "on or about April 26, 2015" (-2097); "on or about December 1, 2014" (-2098).

This Court finds that counsel was not deficient in failing to object to the times frames in the indictment and that the trial judge to a reasonable probability would not have quashed any of the indictments for an alleged overly broad time frame. *See* S.C. Code Ann. § 17-19-20 (2014) ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided."); *State v. Gentry*, 363 S.C. 93, 102–03, 610 S.E.2d 494, 500 (2005) (explaining that if a Defendant timely objects to an indictment on the ground of insufficiency, "the circuit court should judge the sufficiency of the

To the extent the Applicant is raising a claim about the indictments, this Court rejects the allegation. The regularity of the proceedings of a court of general jurisdiction will be assumed in the absence of evidence to the contrary. *Pringle v. State*, 287 S.C. 409, 339 S.E.2d 127 (1986); *Tate v. State*, 345 S.C. 577, 581, 549 S.E.2d 601, 603 (2001). Further, he has failed to show counsel was deficient or caused prejudice under *Strickland* for failing to object to the indictments since they were all true billed.

indictment by determining whether (1) 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 upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the Defendant of the elements of the offense that is intended to be charged"); *contra State v. Baker*, 411 S.C. 583, 590, 769 S.E.2d 860, 864 (2015)(plurality opinion) (finding that when examining the indictments in view of all the surrounding circumstances, the appellant (not a parent) was prejudiced as he was undoubtedly taken by surprise and significantly limited in his ability to combat the charges against him, when two weeks before trial, the State presented the appellant with new indictments charging him with offenses that allegedly occurred over a six-year period, rather than three identifiable summers as alleged in the original indictments); *id.* at 592 n.5, 769 S.E.2d at 865 n.5 (We emphasize that our decision does not preclude the State from re-indicting Baker ... using appropriate time limitations for the charged offenses. Had the indictments alleged that the conduct occurred during the summer months of the years 1998 through 2004, ... we believe the indictments would have been sufficient."). Additionally, the Court is aware that a precise time is not an element of CSC with a minor in the first degree. *See State v. Tumbleston*, 376 S.C. 90, 99, 654 S.E.2d 849, 854 (Ct. App. 2007) (The specific date and time is not an element of the offense of first degree criminal sexual conduct." (quoting *State v. Thompson*, 305 S.C. 496, 501, 409 S.E.2d 420, 423 (Ct. App. 1991)). In doing so, "one is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given Defendant has been 'prejudiced,' i.e., taken by surprise and hence unable to combat the charges against him." *State v. Wade*, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991).

In *State v. Baker*, our Supreme Court determined that when viewing the indictments against

Baker in view of all the surrounding circumstances, Baker was prejudiced because he was "undoubtedly" taken by surprise and significantly limited in his ability to combat the charges against him. *Id.* at 590, 769 S.E.2d at 864. In its decision, our supreme court stated that Baker was presented with new indictments a mere two weeks before trial. *Id.* These indictments were no more specific than the original indictments, which covered only three consecutive summers. *Id.* at 586-90, 769 S.E.2d at 862-64. Our Supreme Court also noted that no temporal limitation was identified in the indictments despite the indictments covering a six year and three-month timeframe. *Id.* at 590, 769 S.E.2d at 864. The Supreme Court stated that Baker's defense was further hampered because employment records for two years of the relevant timeframe had been previously destroyed, which meant Baker could not adequately establish his whereabouts for almost a third of the timeframe. Id. at 591, 769 S.E.2d at 864. Our Supreme Court also determined, in view of the surrounding circumstances, that a six-year timeframe was too expansive for Baker to be able to effectively defend against. *Id.* "Although we recognize the difficulty the prosecution faces in identifying exact dates in child sexual abuse cases, the class of criminal cases should not translate into an exception that operates to circumvent constitutional and statutory principles." Id. at 592, 769 S.E.2d at 865.

Here, unlike in *Baker*, the timeframes of Applicant's indictments were not overbroad. *Compare State v. Wade*, 306 S.C. 79, 80, 409 S.E.2d 780, 781 (1991) (upholding indictment for first-degree CSC with a minor alleging digital penetration of the victim's vagina even though the timespan of the indictment was written as "during 1984 through 1985"), and *Tumbleston*, 376 S.C. 90, 101-02, 654 S.E.2d 849, 855 (Ct. App. 2007) (upholding indictments for first-degree CSC with a minor and lewd act upon a child covering a three-year timespan because "indictments for a sex crime that allege offenses occurred during a specified time period are sufficient when the circumstances of the case warrant considering an extended time frame"), with *Baker*, 411 S.C. at 590-91, 769 S.E.2d at 864 (holding that the trial court erred by failing to quash Baker's indictment for lewd act upon a child because Baker was re-charged two weeks before trial and his new indictment spanned an approximately six-year timeframe instead of the timeframe of his previous indictment, which included three summers only.

Unlike the *Bake*r Defendant, the matters included the father of the Victim who had access to the Victim throughout the periods and involved alleged conduct by the nature of the indictment. Further, the discovery and arrest warrants aided in this notice issue. Importantly, as the Court stated in *Tumbleston,* specific date and time is not an element of the offense. *State v. Tumbleston,* 376 S.C. 90, 101–02, 654 S.E.2d 849, 855 (Ct. App. 2007) (holding time is not a material element of CSC with a minor, and the State is not required to provide a specific "day, or even year" in an indictment, and noting "[t]he stealth and repetitive nature of the alleged conduct compels identification of the broader time period. The victim is a young child, whom one cannot reasonably expect to recall the exact dates of the sexual abuse") *See, State v. Adams*, 430 S.C. 420, 435, 845 S.E.2d 217, 225 (Ct. App. 2020).

This Court concludes that the Applicant has failed to prove prejudice under *Strickland.* There is no reasonable probability that had counsel moved to quash the indictments with the extended time periods, the trial judge would have granted them. The allegation must be denied.

This Court further notes that the substance of his other assertions was also raised in other sections of his amended application and will be addressed later in this Order.

Consolidation Issues (2)

The Applicant complained that besides the photographs, he felt the whole structure of the trial was wrong. He complained that they wrongly consolidated under *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009) all four charges and tried to get all five charges, noting that one remains pending. PCR 13-14. He stated that he didn't know anything that was going on until the pre-trial hearing. He said the defense was trying to sever and the State was trying to consolidate. Applicant stated that they consolidated the charges under *Wallace* at that time. He asserts that it had been overruled.[21] The Applicant claimed that he didn't understand at the time how prejudicial it was, because there are four different charges and four different times, and not proven by the same evidence. He stated it is just testimony from the same victim. PCR 13-14.

As to the April 26th matter, Applicant stated the police, nurse, hospital, and DNA analyst all were basically on the charge, but were prejudicial on the other three charges. He felt all the witnesses were for all the charges when all the evidence was based on one charge. He contended this bolstered the State's case on the other charges. The defense tried to sever, and the State relied on *Wallace*, to consolidate them. PCR 16. The Applicant referred to an unnamed 404 case[22] and pointed out that in *State v. Perry*, the Court corrected itself from cases being based upon similarities. PCR 17.

The record shows that Spangler prepared and made a motion for severance in opposition to the State's Motion to Consolidate at the beginning of the trial. He asserted that the State should have argued its Motion to Consolidate first and then he would respond with his Motion to Sever. These

[21] *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009) was overruled on May 6, 2020, in *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020),

[22] Probably *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

motions were argued at trial at the outset of the trial. Tr.p. 13-43. The State initially argued the Motion to Consolidate first. Tr.p. 13-20.

Spangler responded by complaining that the request was to consolidate 5 separate indictments over a 10 ½ year period. Tr.p. 20-23. He contended that the State's reliance on *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), overruled by *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020) was inadequate because the likeness in these charges was not similar enough to subject them to admission under Rule 404(b). He contended that just about every factor identified in *Wallace* – location, coercion, age of victims – is dissimilar. Tr.p. 20-21. Victim was 7-10 years old when the alleged assaults began and is a 17-year-old in the latter indictments and the nature of actions were dissimilar. Tr.p. 21. Some had physical harm and some acts had mental harm. He claimed that the acts were different in time and location. Spangler urged the danger in the consolidation was to create propensity evidence. Tr.p. 22. He cited *State v. Beekman* and *McCrary* in support. Tr.p. 22. *Cf. State v. Beekman*, 405 S.C. 225, 232, 746 S.E.2d 483, 487 (Ct. App. 2013) (concluding joinder of sexual abuse charges related to the Defendant's stepdaughter and stepson was appropriate in part because "his sexual abuse of each of the stepchildren would have been admissible in separate trials to show a common scheme or plan," and the evidence tended to show the Defendant had a common plan to sexually abuse his prepubescent stepchildren while in their family home), *aff'd*, 415 S.C. 632, 785 S.E.2d 202 (2018).

The State through Solicitor Mayes responded and relied upon *State v. Kirton* because it relied upon the same victim, which is consistent with the present situation. *State v. Kirton*, 381 S.C. 7, 31, 671 S.E.2d 107, 119 (Ct. App. 2008) ("[W]here there is a pattern of continuous conduct shown, that pattern clearly supports the inference of the existence of a common scheme or plan, thus bolstering the probability that the charged act occurred in a similar fashion."); *State v. Clasby*, 385 S.C. 148, 156-57, 682 S.E.2d 892, 896 (2009) (holding "prior incidents of sexual misconduct by Clasby [that] reveal[ed] the same illicit conduct ... prior to the ... indicted offenses" demonstrated a pattern that comprised evidence of a common plan or scheme). The State also referred to *State v. McClellan*, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984). Tr.p. 23. Solicitor Mayes pointed out in continuous contact with the same Victim, the Victim will never be the same age for every incident. Tr.p. 23. She stressed the reliance on *Kirton*. Tr.p. 24. There, it had occurred several times a month over six or seven years, which was similar to the instant situation covering over 10 years. Tr.p. 24. She stressed the similarity of the locations as being the residence although the residence changed over the years. She noted the sexual acts were multiple acts of oral sex. Tr.p. 25. She urged admissibility and consolidation.

Judge McMahon reviewed a series of cases, namely *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) and *State v. Whitener*, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955). He addressed the age of the victim to be that of a child and was adequately similar. Tr.p. 33. Further, he found the relationship to be similar. Tr.p. 33-34. He found the locations of the incidents to be similar as the home of the perpetrator. Tr.p. 34-35. Judge McMahon also found that the coercion or threats were similar. Tr.p. 35. Although there were dissimilarities, he did not distinguish between mental or physical threats. Judge McMahon also found that the fact that sometimes the mother was asleep rather than when she was at work was still not dissimilar enough. Tr.p. 36. Judge McMahon also found a pattern of similarity, noting that the reports did not indicate anal intercourse. Tr.p. 37. Judge McMahon, based upon the reports he reviewed, although without the testimony of the Victim, found the evidence met the clear and convincing burden. He addressed Rule 403 in reliance on *State v. Collins*, 409 S.C. 524, 531–34, 763 S.E.2d 22, 26–28 (2014) and Wallace and found the evidence to be "highly probative." Tr.p. 39-40. He determined that the evidence was admissible.

As to consolidation, Judge McMahon relied upon *Wallace* and *State v. McGaha*, 404 S.C. 289, 299, 744 S.E.2d 602, 607 (Ct. App. 2013). Judge McMahon found that the events here involved the same victim, similarities in the location of the family home, over a number of years, and proved by the same evidence through the same witness, the victim of sex abuse. Tr.p. 41. [As will be noted, the Applicant takes issue with the trial court's statement that "they can be proved by the same evidence through the same witness," which Applicant contends in this proceeding is to limit the evidence to the same evidence on each and all crimes.]. Tr.p. 41. Judge McMahon then consolidated all the indictments, except the charge of "intimidation of a witness." Tr.p. 41-42.

Counsel Spangler testified that he prepared a Motion to Sever which was brief. It cited *State v. Williams* and *McCrary v. State*, 249 S.C. 14, 152 S.E.2d 235 (1967) and Rule 403 and 404. He indicated that the State had prepared a lengthy motion to consolidate. Counsel stated that the record may suggest that the motion was not filed. However, the record supports that he argued against the motion to consolidate.

Counsel Spangler acknowledged that if his Motion to Sever had been granted it would have created a possibility of enhanced sentencing and a life without parole sentence. PCR 271. Counsel Spangler, however, did not recall if there was a discussion with Applicant about this possibility, but counsel Floyd may have discussed it with Applicant. PCR 271.

This Court finds that the Applicant failed to show that counsel was deficient in his presentation or argument related to consolidation. This Court finds that, based upon counsel's credible testimony and review of the actual argument, he was prepared and acted as reasonable counsel as demanded by *Strickland.* This Court further finds that the Applicant failed to show any act or omission on the part of counsel related to this issue that to a reasonable probability would have resulted in a different outcome.

Jackson v. Denno Hearing – Failure to Call Applicant (3)

In his allegation in his pleading in specification 3/1, the Applicant claimed that counsel failed to call him to testify at the *in camera Jackson v. Denno* hearing. He claimed that Sgt. McCann was able to testify where she was when Applicant was brought to her and he claimed gave inconsistent answers on whether she was by her vehicle or in her vehicle. Tr.p. 49-50. The Applicant claimed in his pleading that he was outside the vehicle when they first spoke, so her answer was wrong. He asserts that the statement he gave was before Miranda warnings were given while he was standing outside the vehicle and should be inadmissible. He asserts that his counsel never asked him to testify, and he claimed that he did not know that he could testify at that point.

During the PCR hearing, Applicant stated that he was never called in the *Jackson v. Denno* hearing. PCR 20-21. He claimed that he was never aware that he could have testified in the hearing outside of the jury's presence. He had a belief that you did not testify until it was all said and done. He stated that there was a *Denno* hearing and his statement was admitted. PCR 20. See Tr.p. 43-68. (*Jackson v. Denno* hearing). The Applicant claimed they never had a conversation with counsel about the hearing or his statement. PCR 21. He claimed that there was no discussion of *Jackson v. Denno*, when Judge McMahon revoked his bond the day before the trial started. He complained that it made it look like he was guilty or would leave. PCR 21.

This issue is also addressed below in section 26/2 which is incorporated herein by reference.

In his pleading, Applicant asserts that the testimony shows a conflict in the evidence because he contends that this testimony showed that she asked Applicant questions about his iPad outside of her vehicle before *Miranda* was given. Applicant claims that had counsel called him as a witness in the *Jackson v. Denno* hearing he would have testified to that fact. In the PCR hearing, Applicant claimed he told counsel Floyd that she was not sitting in the vehicle or prior to *Miranda* when she asked him about whether he watched pornography on his iPad and he acknowledged that he watched it on it before. Applicant claimed that his prior viewing of pornography on the iPad should not have been allowed into evidence because it attacked his character and had nothing to do with that night because he did not say he was watching it that night. PCR. 130-131. Applicant asserted that he should have been called at the *in camera* hearing and would have stated what he just said. PCR 131.

The record reflects that on the initial day of the trial, the State made the request for a *Jackson v. Denno* hearing. Tr.p. 44. Solicitor Mayes indicated that they did not know whether they were going to introduce the statement or not and needed to have the hearing. Tr.p. 44. At the close of the testimony of Sgt. McCann. the State indicated it had no further witnesses. Tr.p. 62. Defense counsel Floyd indicated that it did not intend to call any evidence or testimony on this issue. Tr.p. 62.

This Court finds that during the *Jackson v. Denno* hearing, Sgt. McCann testified that she was originally outside of the vehicle when she first observed the Applicant walking toward her to be interviewed as he left the home with Sgt. Black and Deputy Franklin. Tr.p. 49. She stated she then entered her vehicle and had Applicant placed in the passenger front seat next to her. She stated that she introduced herself and asked him if she knew why she was there and he claimed that he did not. Then she explained to Applicant that she would need to advise him of his *Miranda* rights and then she advised him of the allegations against him. Tr.p. 50-51. The Applicant signed the advice of rights form on April 27, 2015, at 2:02 AM. Tr.p. 51. After going through the form, she indicated at the hearing that she documented his statement in her supplemental report. In that report she reviewed it as follows:

A. When he initially came outside, I introduced myself. I asked William if he knew why we were at his residence, and he said he did not. I asked William if anything had happened there that night, and he said no. I then advised him of *Miranda* and informed him of the allegations that Theresa had made.

William said he would be willing to speak with me. He said he did not know why Theresa would say something like that. He said he loves both of his children and would not do anything to hurt either of them. He said tonight he had talked to Theresa about helping out more around the house because she stays, quote, "shut up in her room".

I asked William where they talked about her helping out and he said they had been sitting on the couch. I asked William what happened after that. William said he had gone to his room and Theresa had gone to hers.

I asked William if he had been watching porn on his iPad tonight. William said he does watch porn on it sometimes, but did not directly answer my questions whether he had watched porn on it that night or not.

Tr.p. 56-57, l. 11. (emphasis added) On cross-examination by counsel Floyd, Sgt. McCann indicated that Applicant was brought to her truck to speak with her as she went inside the house to speak with Victim. 57-58. McCann stated that when she spoke with him, he was inside her car and another officer, Sgt. Black, was in the back seat. Tr.p. 59.

During counsel Spangler's PCR testimony, he indicated with respect to Applicant's statement and the *Jackson v. Denno* hearing, counsel indicated that it was not a big deal because they felt Applicant did not give incriminating statements. PCR 266. Spangler indicated that the hearing was only a formality in this case to make sure that the State could lay the proper foundation. Spangler noted that counsel Floyd handled the hearing. Counsel asserted that the statement of the Applicant was possibly even exculpatory. PCR 267. Counsel Spangler testified that there would have been a discussion with Floyd and the Applicant about his decision to testify in the *Jackson v. Denno* hearing. PCR 276. Counsel Spangler testified that he learned from the other trial he had with Floyd, the discussion would always take place with the client that he could get on the stand and testify in the *Jackson v. Denno* hearing, as well as the right to testify during the trial. PCR 276. Spangler recalled the discussion about the right to testify took place initially before the trial in the vein that there are bad things that can come up if you take the witness stand. PCR 277. Spangler recalled a lengthy discussion during the trial about whether he was going to testify or not. PCR 277. He said that he was present when counsel Floyd had that discussion with Applicant. Spangler testified that as a result of the discussions Applicant indicated that he understood and agreed with the course of conduct. PCR 277.

The entire record before this Court contains credible evidence that the questioning about the iPad occurred after *Miranda* warnings were given. This Court further finds that there is no reasonable probability that the result would have been different had counsel called the Applicant to testify during *the Jackson v. Denno* hearing. Further, there was evidence from Victim that supported probable cause to seize the iPad, not just Applicant's self-serving comments.

This Court finds that the Applicant failed in his burden of proof related to the *Jackson v. Denno* hearing. First, this Court must initially find that the Applicant is not credible related to this issue. It is clear from counsel Spangler's credible testimony that counsel Floyd's practice was to have those discussions with the criminal Defendant. The Applicant's factual assertion that Sgt. McCann initiated a conversation with Applicant prior to *Miranda* outside of the vehicle with a question of whether he watched pornography on his iPad is not credible under the circumstances as to what was occurring. Further, the Applicant failed to show by credible evidence that he had told his lawyers about this assertion. He failed in this factual precedent to his claim.

This Court has further reviewed the testimony of Sgt. McCann during the *Denno* hearing and during the trial related to the circumstances of the Applicant's statement. This Court finds that her trial testimony was consistent with her hearing testimony. Sgt. McCann had already met with Victim prior to her interaction with Applicant. Tr.p. 512-513. Sgt. McCann described at the trial that next she introduced herself to Applicant while Victim went to get a change of clothes to take to the hospital. Tr.p. 517. She stated that she asked him a couple of questions and then gave the *Miranda* warnings. Tr.p. 517, l. 14-22. They were sitting in the car with Sgt. Black in the back seat. As in the *Denno* hearing, Sgt. McCann next informed Applicant of the allegations and then gave similar testimony she gave in the *Denno* hearing, ending with "I *then* asked William if he had been watching pornography on his iPad tonight. William said he does watch pornography on the iPad sometimes but did not directly answer me as to whether he had watched pornography on it that night or not". Tr.p. 522, l. 13-25.

This reveals and supports the timing of the iPad information. This is also consistent with counsel Floyd's argument in the *Denno* hearing that all this occurred in the vehicle as Applicant claimed to be surrounded by law enforcement. Tr.p. 64-65.

Applicant's claim is legally or factually untenable. "It is not necessary to address specifically and individually each and every one of these numerous instances of challenged trial tactics. It is sufficient to note that strategic choices made after thorough investigation are virtually unchallengeable." The Applicant has failed to prove deficient performance or prejudice.

Jail Calls

The Applicant complained that his bond may have been revoked so that they could listen to his jail calls. PCR 22. He contended that they listened to his calls. PCR 22. However, this does not raise a Sixth Amendment claim. It must be denied as a ground for PCR relief.

Wife Rose Heath As Witness – Confrontation Clause (4)

The Applicant complains that there were some things about the 911 call that was her on the phone. PCR 23. However, how do they know that?[23] He stated that they redacted the hearsay. He stated how do they know that it was her on the phone. He stated that they stated his wife signed the waiver of consent to search his house, but there is no proof that it was her. PCR 23. He stated that he was in was in the house when she arrived and they get his wife to sign the waiver after he was taken from the scene. Tr.p. 24. Applicant stated that they left him in the car with Sgt. Black. PCR 24. He stated that Rose was his wife. She was at the trial.[24] The Applicant

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[23] This is an apparent reference to Tr.p. 474 during Margie Branham's testimony where she indicated that her mother called the police. Also, Nikki Rogers with Lexington County 911 indicated that the caller was Rose Heath and was calling from a certain number. Tr.p. 165, l. 3-8. The Applicant contends that the identification of the caller was hearsay and should have been objected. The Court notes that Rose Heath was not called at trial. PCR 23.

[24] During the trial, Sgt. Black testified that the consent to voluntary search form for the residence was signed by RoseMarie Heath. Tr.p. 212 -213. There was no objection.

said she could have been called. Tr. p. 24. He noted that she was not even on the witness list. In fact, Judge McMahan asked, "does anyone work at Lowes 378"?[25] The Applicant contended that his wife was present at trial and could have been called as a witness.

The Applicant also contended that Rose drove Victim to the hospital and had to be called back because Rose had locked the door and the officers could not get inside. PCR 25.

As set throughout this Order, the Applicant's complaint about so-called confrontation issues and failure to call Rose as a witness are inadequate to prove ineffective assistance of counsel because any failure to object to comments by witnesses testimony was related to non-prejudicial collateral issues such as who drove Victim to the hospital, who called law enforcement and at what time, and issues related to her signing the consent to search the residence form. Under Applicant's theory, he mistakenly thinks that anytime a person is named, they have to appear as a witness or it is prejudicial Confrontation Clause error. This mistaken understanding of the law permeates throughout the amended application and will be discussed more thoroughly below within the other specifications.

At the outset, this Court must find that Rose Heath was not a required witness for the defense or the State as Applicant seems to suggest. She was not a witness to the incidents according to the Victim, who did not indicate to her any crime had happened until the night of April 26. Officers at the scene witnessed Rose Heath signing and being advised of the consent to search form. The

[25] Evidence was presented that Rose Heath worked at Lowes *in camera* and before the jury. Tr.p. 47, The jury was voir dired on whether they had been employed at Lowe's Tr.p. 102-103. The victim testified at trial that her mother worked at Lowe's when she was a child in second grade, after she had worked at Burlington Coat Factory. Tr.p. 335. The victim stated she was also working at Lowe's her last year of high school. Tr.p. 343. She stated that her father was home alone with her while her mother was working. Tr.p. 335.

Applicant failed to call Rose Heath as a witness at the PCR proceeding, so this Court is left to speculate about any further value about her potential testimony. In light of her pending charges at the time of the trial related to witness intimidation, it is not surprising that she was not called, although the substance of the testimony the Applicant seeks remains unknown and unproven.

The Applicant has failed to prove Sixth Amendment prejudice on these matters because there is no reasonable probability the result of the proceeding would have been different. Evidence would have still been presented that a call was made to 911, that law enforcement arrived at the residence, that the Victim arrived at the hospital, and that Rose Heath signed a consent to search form. He failed in his burden of proof to show Sixth Amendment prejudice based upon any failure to object. This Court will more specifically address the alleged Confrontation Clause issues throughout this Order which are incorporated herein by reference.

Jury Tampering (5)

The Applicant testified that during the trial Judge McMahon gave the jury instructions that they were to determine the facts in the case. He asserted that throughout the trial, they were starting at noon and going till 5 PM, starting at 9 am and going to 11:00. It was all over the place and worked on a court holiday after getting approval. PCR 27. See Tr.p. 254-255. Applicant opined that this was tampering with the jury.

Applicant was also concerned about Judge McMahon's behavior during the trial. Applicant complained that during his trial Judge McMahon heard a case before the Applicant's trial began, showed where he was trying another trial during Applicant's trial, sent the jury in/out, was ordered by "someone who is not his supervisor" to hold a hearing on Thursday and told Floyd that he couldn't do anything with [the trial] right now. PCR 28. He also was suspicious why court started late on the last day of the trial. PCR 28. It appeared to Applicant that he had fixed it to start deliberations at about 2:30 pm. It was also concerning to him that the latest they would work was 6 PM.

The Applicant stated that he complained to counsel Floyd about this. PCR 28. He stated that counsel told him that there was not anything he could do about it. PCR 28. Applicant stated that he did not mention it to Spangler because most of the time he talked with Floyd. PCR 29.

The only thing he recalled speaking about with Spangler was when Deputy Mike Phipps was testifying about the **websites** and describing them. PCR 29. The Applicant claimed that he wanted Spangler to stop Phipps and Spangler told him that he would address it on cross-examination. PCR 29. See Tr.p. 624, 627-631.

Defendant Intoxicated (6)

The Applicant asserts that they kept saying the Applicant was fine the night of his arrest, but the Applicant contended in his PCR hearing that he was actually "hammered." PCR 29-30. He said that they were not supposed to question him if he was intoxicated and should have given him a breathalyzer. PCR 30. He refers to numerous pages in the trial record that reference alcohol. Tr. p. 161 L. 23 – p. 162 L. 19; Tr. p. 177 L. 13-16; Tr. p. 183 L. 17 – p. 184 L. 4; Tr. p. 211 L. 8-12; Tr. p. 298 L. 16 – p. 299 L.3; Tr. p. 347 L. 18 – p. 349 L.3. In his pleading, Applicant claims that he should have called for an *in camera* hearing and claims he had at least fifteen 24 oz. beers that day. He also claimed that counsel should have asked why they did not give a sobriety test.

This Court finds that the Applicant is not credible related to the assertion that he was "hammered" on that date. Importantly, Applicant admits that he never told counsel Floyd that he was intoxicated at that time. The Applicant stated that he learned this was an issue when he got to prison. PCR 30. Further, the record shows that an *in camera* hearing was held in which evidence of his alcohol use was presented.

The testimony at trial revealed that the Applicant smelled of alcohol on the night of the incident. Tr.pp. 54-55, 183-184, 187-188, 211(could tell he had been drinking, but was cognizant and could speak fine), 298 ("not over-impaired"), 521(smelled a little bit, coherent, speech was not slurred). The trial evidence also revealed that Applicant was not impaired. Tr.p. 55 The trial court opined that the Applicant, despite the intake of alcohol, understood his rights. Tr.p. 66-68. See Tr.p. 65.

The Applicant has failed to prove deficiency by the existence of facts to support his self-serving claim or prejudice under *Strickland*. It must be denied.

Fourth Amendment (7)

The Applicant testified at the PCR hearing that when he answered the door, he did not invite the officer into his house. PCR 31. He stated that he mentioned this to Floyd but did not go into a lot of detail about it. Applicant stated that his counsel did not bring this up at trial. PCR 31. The Applicant felt the State was taking it as truth because no one was denying it. PCR 31-32. In his pleading, in specification 7/1 he cites numerous pages in the record. These include Tr. p. 176 L. 2-13 (Deputy Franklin – advising Applicant that they were there for a welfare check and Applicant responding that she was down the hallway); Tr. p. 184 L. 19-P. 185 L.3 (Deputy Franklin – decision made to arrest); Tr. p. 193 L. 15 – p. 194 L.3 (Deputy Franklin – cross-examination - Applicant points – hallway to Victim's room and Applicant did not prevent Deputy Franklin from speaking with Victim and voluntarily showed them where she was before he was arrested); Tr. p. 197 L. 12-23 (Sgt. Black – Deputy Franklin knocks on door and explains to Applicant why they were there Applicant pointed out where Victim's bedroom was); Tr. p. 199 L. 11-20 (Sgt. Black – when he went down the hallway to Victim's room, Applicant headed to the couch); Tr. p. 209 L. 4-9 (Sgt. Black – Victim understood why they were there for a welfare check); Tr. p. 212 L. 2 – p. 213 L.13 (Sgt. Black – discusses consent to search form signed by Rosemarie Heath at 1:37 AM with Sgt. Lint (State Exhibit 15) and consent to search form signed by Applicant at 3:04 AM for 1746 Nazareth Road (State Exhibit 16)); Tr. p. 216 L. 3- 4 (Sgt. Black - Applicant showed where Victim's bedroom was); Tr. p. 265 L. 25 – p. 266 L. 19 (*in camera* testimony by Sgt. McCann about the officer's obtaining Consent to Search forms and Sgt. McCann's knowledge that they shared marital property); (Tr. p. 498 L. 13-19 (Sgt. Black - testimony about Deputy Franklin interacting with Applicant at the front door concerning welfare check and Applicant pointing to bedroom and Sgt. Black walked to the bedroom door to check on Victim).

In his pleading at 7/1, Applicant denies that he gave the officer's permission or invited them into his house. Applicant also wrote that when the Deputy approached the Victim's bedroom door and told the Victim they were there to talk to her, Applicant asserted that he yelled at her because he thought she had called them because he made her do the dishes, but that information was left out of the statement and testimony. Applicant was also confused as to why they took his robe when Deputy Franklin testified that he was wearing boxers. He speculated that maybe they took hair off his robe and put it in the rape kit.

In his pleading at 7/2, the Applicant also claimed that Deputy Franklin changed his story by asserting that he showed them where the bedroom was when Applicant claimed that he only pointed to it. He suggested that the police reports from the 2004 ABHAN charge will explain why he did not do anything when law enforcement entered his house.[26] He asserts that there is a difference between Master Deputy Justin Ashley's report and Sgt. Black's testimony and he was unable to confront Master Deputy Ashley, who was not there.[27]

He contends that signing the consent to search form by Rose at 1:37 AM was when he was inside the residence and Rose was outside because Sgt. McCann did not read the *Miranda* warnings until 2:02 AM. He contends that he should have been the one they asked, rather than his wife, because they were co-tenants, which he contends was proof that they had removed him from the house so that they could search the property. He further contends that counsel was ineffective in failing to object.[28]

In his pleading, Applicant also complains that it was hearsay and a confrontation clause violation by the officers stating that he and Rose lived together and questioned why counsel accepted that assertion without questioning the person about their knowledge and ability to state that conclusion in the suppression hearing. This is frivolous because the Applicant does not assert that he and Rose were not married or living together at the time. At the outset, this Court finds that hearsay is admissible in suppression hearings. The claim must be rejected as a ground for relief.

This Court finds that Applicant's concern about the failure of counsel to object to the use of hearsay in the suppression hearing to be without merit in showing a Sixth Amendment violation. The rules of evidence are not strictly applied at hearings on motions to suppress, *U.S. v. Matlock*,

[26] This issue is also addressed below concerning the allegations set forth in Section N concerning "State trying to cover up that officers came into the house without permission."
[27] This assertion is likely related to the question of who knocked on the bedroom door. This matter is more fully set out in allegation M/2 below.
[28] In his cross-examination of Det. McCann, counsel Spangler pointed out that when Rose gave her consent that the Applicant was still inside the residence. Tr.p. 271-272. She stated the seizure of the iPad did not occur until after he was arrested and after he had waived his rights. She did not ask for Applicant's consent to the seizure of the iPad as evidence. Tr.p. 273.

415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). *State v. Pressley*, 288 S.C. 128, 131, 341 S.E.2d 626, 628 (1986), and the State need only show admissibility by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972). *See also U.S. v. Helms*, 703 F.2d 759 (4th Cir. 1983) (facts at a suppression hearing need to be established only by preponderance of evidence). In addition, the use of hearsay evidence in a hearing to determine the admissibility of evidence is proper and does not violate a Defendant's rights of due process and confrontation. *State v. Pressley*, 288 S.C. 128, 341 S.E.2d 626 (1986). Neither deficient performance nor prejudice can be shown.

This Court finds that the Applicant has failed in his burden of proof in showing that counsel was deficient concerning their handling of the Fourth Amendment issue related to entry into the home for a welfare check. Law enforcement was dispatched for a welfare check at 11:22 PM and arrived around 11:30 PM. Tr.p. 174-175. (Deputy Franklin). Arriving at the scene at about the same time was Deputy Franklin, Sgt. Black, Master Deputy Ashley and Deputy Geitz, who was a trainee at the time. Testimony was that they approached the door and Deputy Frankin knocked on the door and Applicant answered. Tr.p. 175. Deputy Franklin advised the Applicate they were there for a welfare check on Victim and asked Applicant where Victim was and he pointed down the hallway. Tr.p. 175. At that point, testimony was that they entered the residence and Deputy Franklin maintained contact with Applicant and Sgt. Black proceeded to the bedroom. Tr.p. 176.

This Court finds based upon the Applicant's assertions, as well as the trial record, that Applicant never asked law enforcement to leave the home prior to the wife's consent to search the residence. Although his belated reasons concerning the 2004 arrest were interesting as to why he never objected or requested the officers to leave, does not remove the fact that he never indicated to any of the law enforcement officers to leave.

This Court finds that law enforcement was authorized to do a welfare check based upon the information that they had received from the mother. In *State v. Counts*, Chief Justice Beatty addressed the continuing authority to do warrantless welfare checks. He stated in footnote 7 the following:

> Finally, the concurrence's fear that our decision will prevent law enforcement from conducting "welfare checks" at residences is unfounded. A "welfare check" is not a criminal investigative technique. As its name implies, a "welfare check" is conducted by law enforcement based upon concern for a person's welfare not to inquire about illegal activity at the residence. In the instance of a "welfare check," the implicit license to approach a home as referenced in *Florida v. Jardines*, 569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) is applicable. Thus, our decision should not be misconstrued, as done by the concurrence, to prevent law enforcement from conducting "welfare checks" at residences. We emphasize that our holding is limited to requiring law enforcement to have reasonable suspicion of illegal activity before approaching a targeted residence and conducting the "knock and talk" criminal investigative technique.

State v. Counts, 413 S.C. 153, 174, 776 S.E.2d 59, 71 (2015).

The general Fourth Amendment principles concerning entry into houses are well established. "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). While there is a presumption that crossing the threshold without a warrant is unconstitutional, *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004), the Supreme Court has recognized a number of exigent circumstances which qualify as "reasonable exceptions" to the warrant requirement. *Kentucky v. King*, 563 U.S. 452, 459–60, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011).

"One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury." *Brigham City v. Stuart,* 547 U.S. 398, 403–04, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). Law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury when they have an objectively reasonable basis for such a belief. *Id.* at 403, 126 S.Ct. 1943. This exception does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises. It requires only an objectively reasonable basis for believing that a person within the house is in need of immediate aid. *Michigan v. Fisher*, 558 U.S. 45, 47, 130 S.Ct. 546, 175 L.Ed.2d 410 (2009). "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" *Brigham City*, 547 U.S. at 403, 126 S.Ct. 1943 (quoting *Mincey v. Arizona*, 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)).

The Court must consider the totality of the circumstance when determining "whether a law enforcement officer faced an emergency that justified acting without a warrant." *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552, 1559, 185 L.Ed.2d 696 (2013). There is "no doubt" that officers do not violate the Fourth Amendment by opening a door and entering a home when faced with these types of emergency circumstances. *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 135 S.Ct. 1765, 1774–75, 191 L.Ed.2d 856 (2015). *See also Georgia v. Randolph*, 547 U.S. 103, 118, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006) ("it would be silly to suggest that the police would commit a tort by entering [a residence]...to determine whether violence...is about to (or soon will) occur."); *Ryburn v. Huff*, 565 U.S. 469, 132 S.Ct. 987, 181 L.Ed.2d 966 (2012).

The U.S. Supreme Court has held that law enforcement officers may enter private property without a warrant when certain exigent circumstances exist, including the need to "'render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'"

Kentucky v. King, 563 U.S. 452, 460, 470, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011); *see also Brigham City v. Stuart*, 547 U.S. 398, 403–404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (listing other examples of exigent circumstances). And, of course, officers may generally take actions that "'any private citizen might do'" without fear of liability. *E.g., Florida v. Jardines*, 569 U.S. 1, at 8, 133 S.Ct. 1409 (approaching a home and knocking on the front door). *Caniglia v. Strom*, 593 U.S. 194, 198, 141 S. Ct. 1596, 1599, 209 L. Ed. 2d 604 (2021). *See also, State v. Counts*, 413 S.C. 153, 776 S.E.2d 59 (2015) (officers' "knock and talk" procedure did not violate Defendant's state constitutional right to privacy).

It is certainly true that an officer's "warrantless search must be strictly circumscribed by the exigencies which justify its initiation...." *Mincey*, 437 U.S. at 393, 98 S.Ct. 2408. Unnecessarily extending the duration of the police presence after a lawful entry may indeed turn what was reasonable at its inception into an unreasonable intrusion. That, however, was not the situation in this case. The Court concludes that under the facts of this case there was no violation of the Fourth Amendment by any of the three deputies.

First, after the initial entry and discussion with Victim about her welfare, there is no evidence that Applicant, Victim, or her mother asked law enforcement to leave. On the contrary, the record shows that Rose Heath subsequently gave her consent to search the residence at 1:32 AM (or 1:37 AM). Tr.p. 266. The record also shows that law enforcement was called by the Victim's mother to complete a welfare check on behalf of Victim. Further, the Applicant asserts that defense should have presented evidence about his April 2004 arrest, when he allegedly scratched an officer to show that he was not willing to consent to their entry and to the officers remaining in the residence to support a claim that he did not consent to the entry. However, under a warrantless welfare check, the Applicant's consent was not necessary or relevant because they were authorized to enter without consent.

This Court finds that Applicant failed to prove that counsel was deficient in failing to object to the entry for the welfare check based upon failure by the State to affirmatively show Applicant himself consented to the entry. This consent was not relevant to its admissibility or authority under the Fourth Amendment. His protestations otherwise failed to create a Sixth Amendment violation.

The Applicant also complains in sections 7/2, 7/3 and 7/4 that Sgt. Black presented perjured testimony related to the buccal swab consent as if it involved the search of the house. He further complains that counsel Spangler stated that the defense was not presenting any evidence or testimony on the buccal swab consent issue. The Applicant complains to current PCR counsel in the pleading that this failure was ineffective. This Court finds the Applicant is not credible on this assertion. Sgt. Black at Tr.p. 212, l. 201213, l. 4 unequivocally testified that the consent to search form (State Exhibit 16) signed by Applicant was for consent to provide buccal swabs.

This Court rejects the factual basis for this assertion. Further, counsel Floyd developed on cross-examination that Applicant freely gave the buccal swab when he did not have to. Tr.p. 217, l. 14-218, l. 2; Tr.p. 277-276 (*in camera* testimony by Sgt. Lint about the consent to search for the buccal swabs signed by the Applicant). Further, on cross-examination by counsel Spangler of Sgt. Lint, he confirms that this consent to search form signed by Applicant was for buccal swabs and not the entire residence. Tr.p. 281, l. 1-13. This Court finds that deficient performance was not proven related to counsel's actions and there is no reasonable probability the result of the proceeding would have been different.

In section 7/2, Applicant also claims that Sgt. McCann improperly corroborated Deputy Lint concerning the consent to search the residence. He contends this violated SCRE Rule 602 (lack of personal knowledge). During the suppression proceeding, Sgt McCann testified that she was aware that Sgt. Lint had obtained a consent to search from Rose, witnessed by Sgt. Lint and Sgt. Black, at the scene. Tr.p. 266-267. Sgt. McCann also testified that she was aware the Rose resided at that residence and shared marital property. Sgt. McCann also indicated that she was aware that Rose was the individual who called law enforcement to the scene. Tr.p. 267. The trial record shows at the suppression hearing Sgt. Black testified about his presence when Sgt. Lint did the consent to search form with Rosemarie Heath at 1:37 AM. Tr.p. 212-213. *See also* Tr.p. 288-290. The Applicant has failed to show how counsel was deficient in failing to object in the suppression hearing under Rule 602 where hearsay is admissible and Sgt. Black testified about similar matters. In light of the evidence of the existence of the consent to search by Rose, the Applicant has failed to show any reasonable probability that the result of the proceeding would have been different, particularly in light of Sgt. Lint's testimony about this consent before the jury.

In this section, the Applicant asserts that Deputy Franklin testified that the Applicant asked him if he could go into his bedroom to put on shorts. Tr.p. 177, l. 3-7, p. 180, l. 5-9. In his pleading, Applicant asserts that he was "in custody" at that time, so why would he ask that question. Deputy Franklin testified that nothing happened in the bedroom when Applicant changed into the shorts. Deputy Franklin also indicated that nobody else went into the room until after Applicant was arrested. Tr.p. 186-187. The iPad was seized after the arrest according to Deputy Franklin. Tr.p. 187-188.

Further, it was the State's position that he was not in custody at that time and a decision was not made to arrest him until later. Tr.p. 50-51, 57-58. During the cross-examination of Sgt.

McCann, counsel attempted to assert that Applicant may have been intimidated by the presence of six officers. Tr.p. 58. Sgt. McCann also testified that she had indicated that he was free to go prior to the actual arrest. Tr.p. 59. *See also*, Tr.p. 60 (not in custody). Sgt. McCann indicated that the Applicant was not arrested after he gave a statement to her but was arrested later after he gave the buccal swabs. Tr.p. 61. During the trial, evidence was present that the decision to arrest occurred after 3:30 AM. Tr.p. 184-185.

In another *in camera* proceeding, Deputy Franklin indicated the decision to arrest was made by Sgt. McCann and that Deputy Franklin took him into custody and placed handcuffs on him. Tr.p. 306, 307, 311. Subsequent to the arrest, Deputy Franklin was directed to collect the iPad. Tr.p. 311. It was at this point that the trial judge inquired whether they had any evidence or witnesses to be heard on the motion which he indicated that he did not. Tr.p. 312.

Counsel Spangler then began his argument concerning the seizure of the iPad as violating the Fourth Amendment because Applicant was arrested in the living room, meaning the seizure of the iPad from the bedroom was not a search incident to an arrest, but a seizure. He next referred to the plain view doctrine and asserted that there was nothing incriminating about the iPad itself. Tr.p. 314-315. He also challenged that although Rose gave her consent to search and seizure under his interpretation of *Georgia v. Randolph,* if a co-tenant objects or is present in the home, his consent is required, although Applicant never verbally objected. Tr.p. 317. He claimed the evidence should be suppressed.

This Court finds that counsel was not deficient relating to the presentation in support of the entry into the residence, suppression of the buccal swabs or iPad. Applicant has further failed to show any omission on the part of counsel in this area that to a reasonable probability would have caused the result of the proceeding to be different.

In specification 7/3 Applicant cites another set of numerous pages without parentheticals. This Court has reviewed each those and makes the following added parentheticals: (Tr. p. 267 L. 22 – p. 268 L.17) *(in camera* exam of Det. McCann – learned through interview with Victim that iPad had been used during alleged assault before she spoke with Applicant and learned it was located in the bedroom after it had been photographed by Master Deputy Ashley in the master bedroom); (Tr. p. 271 L. 21 – p. 272 L.6)(defense *in camera* cross-examination of Det. McCann by counsel Spangler concerning the fact that Applicant was still inside the house when Rose signed the consent to search at either 1:32 or 1:37 AM); (Tr. p. 273 L. 2-5) (*in camera* cross-exam of McCann that once Applicant was placed under arrest she made the decision to seize the iPad); (Tr. p. 276 L 24 – p. 277 L. 17) (*in camera* exam of Lt. Lint after he arrived at the scene he was briefed by Det. McCann on her interview with Victim and his initial encounter with Applicant when he asked Applicant if he would consent to a buccal swab and he consented and was cooperative); (Tr. p. 279 L. 5-13) (in camera of Lt. Lint that Applicant signed the consent to search outside of residence and then went inside to perform the buccal swab); (Tr. p. 281 L. 9-12) (*in camera* cross-exam of Lt. Lint when he confirmed that Applicant signed a consent to search by a buccal swab and not of the entire residence); (Tr. p. 282 L. 9-12) (iPad marked for ID); (Tr. p. 287 L. 13 – p. 288 L. 1) (direct exam of Lt. Lint in describing his arrival after 12:30 and met with Det. McCann as lead investigator after she had interviewed Victim and what she had done. Rose Heath was made contact with by him and she agreed to give consent for law enforcement to be inside the residence for any search and photographs to be taken – State 15); (Tr. p. 288 L. 15 – p. 290 L.5) (direct of Lt. Lint describing consent to search form discussion with Rose Heath with consent to take property and other items as evidence for prosecution or investigation and the fact of her signature on the form); (Tr. p. 290 L. 10-14) (Lt. Lint does not indicate that there was any indication that either Applicant or Rose Heath withdrew the consent to search); (Tr. p. 292 L. 8 – p. 294 L. 11) (Lt. Lint testimony about Applicant being given his consent to search Applicant for a buccal swabs at 3:05 and proceeding to take the swabs inside the residence in the living room with the description of the forms on the buccal swab kit and receipt of his verbal permission to do the swab of the inner side of his mouth and his penis area); (Tr. p. 299 L. 12-21) (cross-examination of Lint by Floyd emphasizing that Applicant fully cooperated , did not appear impaired and understood everything); (Tr. p. 299 L. 22 – p. 300 L.3) (cross of Lint that his first involvement with Applicant was the buccal swab and the consent was signed at 3:05); (Tr. p. 300 L. 23 – p. 301 L.10) (cross of Lint that Heath lived there but the consent to search the house was only signed by Rose at 1:37 AM and Applicant was still present and may have been interviewed by McCann then); (Tr. p. 301 L. 21-23) (direct examination of Lint that Applicant verbally agreed to provide both swabs); (Tr. p. 306 L.18 – p. 308 L. 7) (direct of Deputy Franklin that after he placed handcuffs on him he made a search inside to arrest and obtained a cell phone and then at the direction of Sgt. McCann collected the iPad from the master bedroom based upon McCann decision and did not recall Applicant expressing an objection to taking the iPad mini or he would have documented it in his notes); (Tr. p. 309 L. 12-16) (cross-examination of Franklin by counsel Spangler that Applicant let him in the house and did not object to his presence); (Tr. p. 309 L. 19 – p. 310 L.8) (Franklin *in camera* cross that Applicant let him in the house and did not object although Franklin stated it was not his role to ask Applicant if he could search the house or seize items and the location of the arrest was in the living room); (Tr. p. 311 L. 13-21) (Franklin testimony on cross that Applicant was not in bedroom when iPad was picked up off the bed); (Tr. p. 320 L. 24 – p. 321 L. 5) (Solicitor Usry asserting that there is no evidence that Applicant was removed from the home for the purpose of avoiding his objection and he was present either in the house or right outside during the entire time and the State asserts the search and seizure was proper); (Tr. p. 321 L. 7-21) (Usry argument that when they are in the home based upon the original consent, Det. McCann had learned iPad was used to show victim porn while the assault occurred in the bedroom, when officers entered the room iPad on bed in plain view, as shown by pictures. Officers indicated if an objection was made they would have stopped and got a search warrant, which supports an inevitable discovery argument); (Tr. p. 322 L. 12-16) (Spangler argument that police took Applicant into custody and led him out and then went in and seized the iPad); (Tr. p. 323 L. 13-25) (Court discussion that under plain view the initial intrusion that supports the plain view must be lawful, and concludes it was lawful in response to a welfare check and were allowed into the residence by Applicant and the discovery of the evidence was inadvertent and did not enter with intent to find that iPad, and the incriminating nature of the evidence was immediately apparent to the seizing authority); (Tr. p. 324 L. 19-23) (trial court concludes plain view exception applies because the officers knew the incriminating nexus of the iPad with the crime); (Tr. p. 326 L. 7-10) (trial court discussion about *Georgia v Randolph* that officer had inquired of Randolph for permission to search which Randolph refused and then turned to wife who readily gave consent); (Tr. p. 326 L. 25 – p. 327 L.4) (trial court discussion about *Randolph* that consent to warrantless search by one of the occupants is not valid in the face of refusal by the other who was present at the scene); (Tr. p. 327 L. 13 – p. 328 L. 4) (trial court discussion about *Randolph* and the drawing of a fine line between when a Defendant with self-interest objects and the co-tenant's permission does not control and a situation when the Defendant is not asked and he lets officers in); (Tr. p. 328 L. 5-15) (trial discussion about Justice Souter's assertion that this is the line that the Court draws as long as there is no evidence the police had removed the potentially objecting tenant for the sale of avoiding an objection); (Tr. p. 328 L. 21 – p. 329 L.4) (trial court concludes the iPad is admissible under *Beckham* plain view doctrine and also based upon the consent of Rose Heath it was valid where there is no evidence of that Applicant was led away because of concerns that he would not consent).

This Court finds these cites supportive of the earlier findings that the decision of counsel in the handling of the suppression issue was reasonable and that deficient performance by counsel and particularly counsel Spangler in his argument was not proven. The Applicant also failed to prove any omission by counsel that to a reasonable probability would have resulted in a different result. As noted above, the iPad was admissible and evidence from the iPad corroborated Victim testimony about its use that night and earlier, but there was additional evidence beyond the iPad testimony of the saliva and hair and DNA that shows that confidence in the outcome would not have been undermined.

The Applicant additionally complained in 7/3 and7/4 that the defense failed to ask whether Lint spoke to Applicant or Rose first when he arrived and wanted to know why this was not asked, which is consistent with Sgt. Black's testimony. However, since the Applicant never proves that he verbally objected, this does not prove deficient performance. Similarly, his complaint as to why counsel failed to inquire of any of the officers why they did not ask Applicant for his consent either before or after Rose gave her consent does not show Sixth Amendment prejudice in the *in camera* setting because the evidence of Rose's consent was sufficient to validate the warrantless search.

In 7/4, the Applicant further contends that Solicitor Mayes committed misconduct at Tr.p. 290, l. 10-14. In that portion, she is asking Lt. Lint in the *in camera* proceeding whether at any point in time she ever got an indication that either Applicant or Rose objected or withdrew their consent to search. It appears that his complaint must be that since he never expressly or in writing consented to the search the predicate in her question was false. Applicant claims that if they had let him testify and called Rose to the stand "the truth would have come out." However, the Applicant in this proceeding failed to present credible evidence to show that Rose's consent at the time was not given or that she objected while the search was proceeding. In light of the failure of proof the assertion does not prove either ineffective assistance of counsel or prosecutorial misconduct.

Defendant in Custody (8)

In assertion 8/1 that Applicant alleged that he was in custody. He initially cites the following portions of the transcript, with the parentheticals added by this Court: (Tr. p. 177 ll. 3-7) (Franklin *in camera* testimony that they did not remain in the living room after they had entered because Applicant asked to put on his pants, so he followed him to the bedroom and he put on shorts and then returned to the living room); (Tr. p. 177 ll. 17-22) (Franklin testifies his role was to maintain security in the event a crime was committed on the scene and to keep Applicant calm and have generalized conversation); (Tr. p. 182 l. 19 - p. 183 l. 4) (Franklin stated he advised Applicant that they were there for a welfare check on daughter and did not explain anything further because his role was to maintain contact with Applicant, keep him calm and maintain security and remained with his the whole time); (Tr. p. 183 ll. 11-16) (Franklin testifies that after he had arrived Det. McCann and Det. Lint responded and Franklin maintained contact with Applicant while they investigated); (Tr. p. 184 ll. 5-14) (Franklin testifies that during the course of the investigation Applicant walked outside accompanied by officers and Franklin maintained contact walked with him and that he was not allowed to walk freely about the house); (Tr p. 187 l. 18-p. 188 l. 1) (Franklin testifies that Applicant at no point was allowed to consume alcohol from his arrival at 11:20 PM to 3:00 AM) (Tr. p. 267 l. 18-21) (Sgt. McCann *in camera* testimony about the *Miranda* form showing he waived his rights at 2:02 AM); (Tr. p. 511, l. 22 – p. 512 l. 1) (Sgt. McCann testimony about her contact with Rose Heath who had provided a statement about the event and that after speaking with Rose she knocked on the front door of the residence and was allowed in and then went down the hall to Victim's room and met with her and Sgt. Black).

In his pleading, Applicant questioned why he would have asked Franklin if he did not think he was in custody and why Franklin would have to provide security in the house if he was not in custody. Applicant directs PCR counsel to Tr.p. 814, l. 5-14 about Applicant being accompanied by officer when he walked outside and he claims that he was not allowed to go inside. He asserts that Rose locked the residence and had to come back to unlock the door. He continues to assert that he was removed and already in custody at that point and never waived his *Miranda* rights or he would have signed the paper.

The Applicant testified at the PCR hearing that the whole time he thought that he was in custody. PCR 32. The Applicant indicated that he had previously been charged with threatening a public official and assault and battery of a high and aggravated nature on a police officer and did not want to open that up. He stated that officer Franklin was standing over him and Heath did not have his pants on and followed him and he felt he was being watched the whole time and was unable to leave. PCR 32-33.[29] He stated that he told this to Floyd who didn't say anything and didn't act concerned. PCR 33-34. He claimed because he did not have a *Jackson v. Denno* hearing he did not know that he could have brought this up. PCR 34.

This Court finds that the Applicant has failed to prove that counsel was deficient because evidence that Applicant was present in the home, accompanied by officers when he went outside, and then returned in the home when he was arrested after he had given a statement was factually presented to the trial judge. Before he gave his statement, he was read his *Miranda* rights and did not invoke his right to remain silent and made a statement to Sgt. McCann. The critical information weas presented to Judge McMahon when he made his decision. As stated, he has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel acted differently related to this issue.

Tampering with Evidence – Who took the photographs – Confrontation Clause (9)

In this assertion, the Applicant testified that initially he did not know who took the photographs because in the transcript he claims that questions were asked about who took the pictures. PCR 34. He claimed that no one knew who took the pictures until Ashley admitted that he took the pictures. PCR 34.[30] The Applicant question in the PCR when the officer took the pictures because they were not done when he was in the house. PCR 34. He stated the photographs were allowed into evidence. He was concerned because there was a picture of the iPad on the bed and he had been there sleeping without the iPad on the bed. PCR 35. See Tr.p. 185-186. State Exhibit 8-12 depicts

[29] The record shows that the Applicant put on cargo shorts after law enforcement had entered the home. Tr.p. 177.

[30] Evidence during the trial was that Master Deputy Ashley photographed the interior of the residence. Tr.p. 268. (McCann)

the location of the iPad mini on William's bed (Franklin).[31]

The Applicant indicated that his counsel Floyd brought up a good point that in the picture the bed wasn't messed up and he weighed approximately 285 lbs.. The Applicant complained that

[31] This Court finds that the photographs of the residence were properly authenticated prior to admission. See Rule 901(a), SCRE (providing authentication is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims"); Rule 901(b)(1) and (4), SCRE (listing as examples of authentication "[t]estimony that a matter is what it is claimed to be" and an item's "[a]ppearance, contents, ... or other distinctive characteristics, taken in conjunction with circumstances").

> Q. Do these pictures fairly and accurately represent the incident location the night that you responded?
> A. They do.
> Q. Do they appear to have been changed in any way?
> A. No, ma'am.
> MS. USRY: Your Honor, the State moves State's 2 through 12 into evidence.
> MR. SPANGLER: No objection, Your Honor.
> THE COURT: State's 2 through 12 is in evidence without objection.

Tr.p. 178-179. Further, Deputy Franklin testified that nothing was messed within the bedroom when Applicant entered to change into his shorts and that no one went into the bedroom until after the arrest. Tr.p. 186. Testimony was presented that Deputy Franklin returned to the bedroom after the arrest to collect the iPad.

This Court finds that the Applicant failed to prove deficient performance or prejudice concerning the authentication of the photographs through Deputy Franklin. *See State v. Hurell*, 424 S.C. 341, 353–54, 818 S.E.2d 21, 27 (Ct. App. 2018) ("Normally, it is sufficient for the admission of photographs that a person familiar with the subject, such as a scene, testify that the photographs truly represent what they purport to depict." (quoting Alex Sanders & John S. Nichols, *Trial Handbook for South Carolina Lawyers § 19:12* (Sept. 2017))). Further, because the officer authenticated the photos through his testimony, the State was not required to establish a chain of custody for the photos. *See State v. Aragon*, 354 S.C. 334, 337, 579 S.E.2d 626, 627 (Ct. App. 2003) (holding establishing a chain of custody was not necessary when the evidence was "otherwise authenticated"); *see also United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982) ("The 'chain of custody' rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence.").

The Court further finds that the Applicant has failed to show prejudice by the failure to object to the admission of the photographs from the bedroom related to the iPad and the residence. There is no reasonable probability that the result of the proceeding would have been different. To the extent this allegation is raised, it must be denied.

Floyd did not challenge the authentication of the photographs or who took them. PCR 35.[32]

Defense Counsel attacking the character of the Defendant – Misrepresenting Client (10).

The Applicant testified that there was nothing in the record about a conversation with the Victim. He stated that counsel Floyd started talking about baby oil[33] and the Applicant questioned whether he was trying to insinuate something or speculate because it made it appear that he was trying to say he was doing something. PCR 36.

The Applicant complains about the cross-examination of Deputy Franklin when counsel Spangler ask him, "at any point did Mr. Heath tell y'all to leave, that he wasn't going to speak with him?" and Franklin responded, "no, he did not." Tr.p. 194, l. 14-18. The Applicant contended that this testimony was seen as an affirmation that he allowed for law enforcement to be there, but Heath now claims he did not. PCR 39. [34]

[32] The record reflects that counsel Spangler , not counsel Floyd, handled the witness and did not object.

[33] During the cross-examination of the victim, counsel Floyd inquired of the victim about whether she told the police in her statement about baby oil and the victim denied telling the police about it in her statement or at all when he was impeaching her about inconsistencies in her testimony and prior statements. Tr.p. 385. Sexual Assault Nurse Examiner (SANE) DeGuzman also testified on cross-examination about the use of lubricant when counsel Floyd asked her about her report on page 6 on the use of the lubricant. Tr.p. 460. Subsequently, Deputy Black confirmed that the victim did not tell him about the use of baby oil. Tr.p. 507.

[34] The Court find this limited cross-examination inquiry of Deputy Franklin did not show prejudice under *Strickland*. This was not new information that reasonable counsel introduced. Although the Applicant in hindsight did not like counsel presenting the question, Deputy Franklin had already testified similarly on direct examination. Tr.p. 176. Franklin testified that Heath allowed him to enter the residence and did not indicate that he did not want them in the residence). Tr.p. 177 (Deputy Franklin indicated that they had generalized conversations with him). The Court finds that Sixth Amendment prejudice was not shown by this limited question of Deputy Franklin. There is no reasonable probability the result would have been different had counsel Spangler not asked the question.

The Applicant then complains that SANE nurse DeGuzman talked about gonorrhea and chlamydia being negative and Victim's her urine upon counsel's questioning. He claims this does not sound right and thinks that they are mischaracterizing the record to his detriment. PCR 36.[35]

[35] This Court finds that the Applicant failed to show that counsel was deficient or prejudicial related to his concern related to counsel's questioning of SANE nurse DeGuzman, about sexually transmitted diseases. In his cross-examination, the following inquiry by counsel Floyd occurred:

> Q. Now, did you send any of the specimens off to the lab for testing for disease?
> A. Yes.
> Q. Did you get those lab results back?
> A. Yeah. The **gonorrhea and chlamydia were negative, and her urine, no.**
> Q. How about, didn't they find Gardnerella vaginalis?
> A. Yes.
> Q. And that can be transmitted sexually, can't it?
> A. It's not a sexually transmitted disease.
> Q. Can it be transmitted sexually?
> A. Yes, from -- you can get it from having sex, you can get it from douching. There are other ways to do it. The CDC is not sure how it's transmitted, but if you're sexually active, you're more vulnerable to it. But it's not a sexually transmitted disease. Q. I gotcha. But it's one you can get if you're
> sexually active?
> A. Yes, and if you're not.
> Q. And I think she testified -- or she told you that he had never penetrated her vagina with his penis; is that correct?
> A. That's correct.
> Q. Didn't she tell you she wasn't sexually active at all?
> . . .
> A. She did.

Tr.p. 451-462.

This Court finds that counsel was not deficient in his attempt to show inconsistencies in the victim's statements to law enforcement , her testimony, and SANE Nurse DeGuzman. The questions to ask on cross-examination carry the presumption of sound strategy which the Applicant has not overcome by this reasonable question related to statements give n by the victim. Further, assuming arguendo that counsel erred in asking the questions, he had failed to show a reasonable probability the result of the proceeding would have been different. His

The Applicant also complains that during the cross-examination of Victim, counsel kept questioning the victim whether she ever told anyone when she was nine years old that Applicant was sexually abusing her, or struck her on her face, or pulled her hair. PCR 39. The Applicant complained that counsel just kept repeating himself again and again and it was disturbing and unnecessary. PCR 39. [36]

The Applicant complains that he was not included in the decision by counsel to stipulate to the chain for custody of the buccal swab. PCR 40. See Tr.p. 400, l. 4-12. The Applicant read this portion of the record:

> MS. MAYES: Briefly, Your Honor, our understanding is that the Defense has stipulated to chain of custody on the buccal swab kit and the sexual assault protocol kit and, as a result, **that would allow us to release two witnesses who are here this afternoon for chain of custody**. Just need to put that on the record.
>
> THE COURT: Is that correct, Mr. Floyd?
>
> MR. FLOYD: That's correct, Your Honor.

Tr.p. 400, l. 4-12. (emphasis added). PCR 40. The Applicant testified that counsel never had

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unfounded speculation that counsel was helping the state does not rise to a constitutional violation.

[36] This Court has reviewed transcript related to this portion of the cross-examination of the victim by defense counsel Floyd. Tr.p. 174-178. Counsel 's strategy is evident to the Court. Counsel was attempting to show at ages 9,10,11,12,13,14,15 Victim never told anyone while the sexual assaults were occurring that the Applicant has sexually abused her, struck her, or pulled her hair as she had asserted was occurring at each stage. This Court finds this technique is not unreasonable or that no reasonable attorney would have done the same thing. Counsel Floyd was developing information consistent with their theory of the case about the failure to report support the theory that crime did not occur. This Court finds , assuming deficient performance that he has failed to show a reasonable probability that the result of the trial would have been different. His hindsight assessment does not show a Sixth Amendment constitutional violation.

a conversation with him about the stipulation before it was done. He claimed that counsel never told him why it was done and the Applicant contends that he would have never agreed to the stipulation.[37]

The Applicant also complains about counsel's questioning of the expert in delayed reporting, Ms. Galloway-Williams. The Applicant pointed to counsel Floyd's initial cross-examination of the witness confirming that she had never tested Victim in this case with the following inquiry: "so anything you're telling us today really has nothing to do with her

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[37] This Court finds that counsel was not deficient in stipulating to the chain of custody of the Applicant buccal swab. The State indicated that the additional chain witnesses were present and this stipulation would allow their release. The Applicant failed to show by credible evidence in this PCR proceeding that there was any defect in the chain of custody that would have prevented the evidence from the buccal swab to be introduced had the witnesses been required by their subpoena to remain. *See Knowles v. Bazzle*, No. 2:06–cv–1424–GRA–RSC, 2007 WL 1594412, at *8 (D.S.C. June 1, 2007) ("The record supports Judge Miller's determination that Petitioner failed to demonstrate a problem with the chain of custody, which in turn supports his determination that there was no error by counsel and no prejudice to Petitioner. The state court decision cannot be said to be contrary to clearly established federal law nor that it involved an unreasonable application of clearly established federal law."); *Hill v. Reed*, No. 2:060812 MBS, 2006 WL 3354509, at *7 (D.S.C. Nov.17, 2006) (concluding petitioner was not entitled to relief under § 2254 where trial counsel stipulated to the chain of custody and stating, "The petitioner did not present any evidence at the PCR hearing that there was any defect in the chain of custody....*See, e.g., Pryor v. Norris*, 103 F.3d 710, 713–14 (8th Cir.1997) (Defendant failed to establish prejudice from counsel's failure to object to chain of custody because she failed to show objection would have been sustained or that prosecution would not have established complete chain of custody if objection had been made)."); *see also Cowans v. Bagley*, 639 F.3d 241, 252 (6th Cir.2011) (rejecting petitioner's claim that trial counsel should have challenged whether the evidence remained in the police's chain of custody because, inter alia, the claim "falters on the prejudice prong of Strickland" where the petitioner "has not provided any evidence ... that raises a question about whether the palm print in fact ever left the State's custody").

The Applicant has failed to prove Sixth Amendment prejudice concerning reasonable counsel stipulation. There is no showing that had counsel not stipulated that the result of the proceeding have been different.

specifically, does it" and she answered, "that correct, it's not specific to her." Tr.p. 422, l. 24- p. 423, l. 1. The Applicant opined that this was very unnecessary and that he bolstered her as a blind witness. PCR 41-42. The Applicant asserted that she said some things in her testimony to suggest that she was not blind. PCR 42. [38]

The Applicant complained about counsel Floyd's cross-examination of SANE nurse

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[38] This Court finds that trial counsel's emphasis that the witness on delayed disclosure was a blind witness and was not speaking to the credibility of the victim's disclosure in this case a reasonable trial strategy. The question plainly sought to distance her testimony from the victim's actual testimony *See State v. Acker*, 435 S.C. 716, 869 S.E.2d 873 (Ct. App. 2022), cert granted. (trial court acted within its discretion in determining that expert's testimony met required reliability threshold for expert testimony, in trial for criminal sexual conduct with a minor and disseminating obscene material to a minor; **expert testified as a blind expert** on dynamics of child sexual abuse, addressing general concepts and characteristics of victims in such cases, testimony was based on expert's experience and research conducted in her field, and this research was based on case studies for which researches analyzed cases of known abuse to determine whether there were similarities among cases). *See State v. Barrett*, 416 S.C. 124, 131-33, 785 S.E.2d 387, 390-91 (Ct. App. 2016) (finding an expert's testimony regarding general behavioral characteristics did not improperly vouch for the victim's credibility because she never directly or indirectly commented on the victim's veracity and truthfulness or the credibility of the victim's claims and she did not limit her testimony to only those behavioral characteristics displayed by the victim). She did not comment on Child's credibility, and she did not seek to link her general characteristics testimony to any type of behavioral reaction Child may—or may not—have exhibited. See *id.*; *State v. Brown*, 411 S.C. at 345, 768 S.E.2d at 253 (2018) (finding the expert did not improperly bolster the victim's credibility because she testified in broad terms about the reasons victims delay disclosing abuse and she never applied her testimony to the victims in the case).

This Court finds that Sixth Amendment prejudice has not been shown by the Applicant questioning of this inquiry since it merely re-affirmed the blind witness concept for the jury. There is no reasonable probability that the result would have been different if counsel had not asked the question. The jury had already been informed of the same in the direct examination. Tr.p. 410. The assertion does not entitle the Applicant to relief.

DeGuzman regarding whether she asked Victim if he had ever done anything other than what he did tonight. PCR 42, citing Tr.p. 457, l. 15-25. The Applicant complains that this questioning appeared to be an attempt to bolster the testimony of Victim and later testimony the State presented about delayed disclosure. The Applicant contends that he does not know where the counsel was going there and believes it was error on his part. PCR 43. Heath felt that counsel was working for the State with these questions.[39]

Counsel Should Have moved for a mistrial - Judge was coaching witnesses (12)

In his testimony related to issue 12, Applicant complains that counsel did not ask for a mistrial when the State was seeking to introduce evidence as an excited utterance and Rule 803(2). PCR 44, citing Tr.p. 201-208. The Applicant pointed out that the officers stated that Victim was emotional and upset. See Tr.p. 200. When Sgt. Black asked Victim what she meant, she described the sexual assault. PCR 44. The Applicant pointed out that Sgt Black then asked Master Deputy Ashley to leave, contending that she would feel more comfortable speaking with one person. The Applicant complained that this would not be an excited utterance then because she was more comfortable. PCR 44-45. The Applicant contended that when Sgt. Black stated that Victim told him that in the past he had physically forced her to perform oral sex and that he had used his mouth and penis that night, it was reflection by Victim which removed it from being admissible as an excited utterance. His complaint was that the testimony went to a prior event. The Applicant

[39] This Court finds that counsel's strategic reason is obvious that he was again pursuing impeachment of the victim because the SANE nurse's response to the question was that the victim indicated to the nurse that Heath had not done anything like that before in her report. Tr.p. 457, l. 19-25. This Court must find the impeachment with inconsistent statements of the victim the assert that the crimes had not occurred is a sound strategy that reasonable counsel would do. This Court further finds that the Applicant has failed to prove prejudice by this inquiry of the SANE nurse.

claimed that he did not know why this was not addressed by either counsel Floyd or Spangler at trial or appellate counsel Alexander in the appeal. PCR 45.

During the PCR Hearing, this Court interjected during the testimony, noting that the evidence was objected to by trial counsel and ruled upon by Judge McMahon. PCR 46-47.[40] The Court questioned how this issue would apply in a PCR setting where the issue was actually ruled upon by the trial judge. PCR 46.

This Court finds that counsel cannot be found ineffective when the issue was argued at trial and raised in the appeal. Under the doctrine enunciated in *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975), errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993).

This Court finds that the appellate court addressed the merits of the excited utterance issue. In the direct appeal, the Court of Appeals concluded the evidence was admissible and harmless error also applied:

I. Hearsay

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[40] The *in camera* hearing on the excited utterance issue appears in the trial record at Tr.p. 201—208. Solicitor Usry urged that the trial court allow the introduction of the victim's statement to Sgt. Black as an excited utterance. She urged its admission because the victim was emotional and upset when the officer responded to the home for a welfare check. She stated that they had responded within 10 minutes. Tr.p. 201-202 . Counsel Floyd had objected to the statement and claimed it would not be an excited utterance because it was not in the heat of the moment and would not qualify. Tr.p. 202. The trial judge inquired about the actual testimony and an *in camera* examination occurred of Sgt. Black. Tr.p. 203-204. In the proffer, the witness indicated that the victim described the times when the assault happened. Tr.p. 204. Solicitor Usry relied upon *State v. Dennis*, 337 S.C. 275, 523 S.E.2d 173 (1999). Tr.p. 204. Counsel Floyd urged that responding to a question is not an excited utterance. Tr.p. 205.

In his pro se amendment, the Applicant reprints the entirety of Judge McMahon's in camera findings in denying the motion. Tr.p. 205-208.

Heath argues the trial court erred in admitting Victim's responses to law enforcement after the alleged assault. He asserts no evidence was presented to establish Victim was "excited" during the interview with Sergeant Black. We disagree.

An excited utterance is an exception to the rule against hearsay evidence. Rule 803(2), SCRE. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* "The rationale for the [excited utterance] exception lies in the special reliability accorded to a statement uttered in spontaneous excitement which suspends the declarant's powers of reflection and fabrication." *State v. Burdette*, 335 S.C. 34, 42, 515 S.E.2d 525, 529 (1999) (alteration in original) (*quoting State v. Blackburn*, 271 S.C. 324, 327, 247 S.E.2d 334, 336 (1978)).

"A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception." *State v. Davis*, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006). Our supreme court "has generally allowed as excited utterances statements made by the victim to the police immediately following a physical attack." *Burdette*, 335 S.C. at 43, 515 S.E.2d at 530.The passage of time between the startling event and the statement is one factor to consider, but it is not the dispositive factor." *State v. Stahlnecker*, 386 S.C. 609, 623, 690 S.E.2d 565, 573 (2010). Although there is no hard and fast rule as to the time period when an excited utterance ends, our courts have admitted a victim's statement to law enforcement as an excited utterance when the statement was made shortly after an alleged sexual assault. *See State v. Harrison*, 298 S.C. 333, 337, 380 S.E.2d 818, 820 (1989) (allowing under the *res gestae* exception, the statements of an alleged rape victim to an officer at the hospital upon the first opportunity to tell what had occurred); *State v. Quillien*, 263 S.C. 87, 96-97, 207 S.E.2d 814, 819 (1974) (concluding a rape victim's statements to police after she arrived at the emergency room were admissible under the *res gestae* exception).ng a physical attack." *Burdette*, 335 S.C. at 43, 515 S.E.2d at 530.

A. Merits

Here, Sergeant Black testified that when he arrived at the home, Victim was crying, her eyes were red, and she was visibly upset. Further, he stated she continued to cry into her pillow after he interviewed her. Only thirty minutes had passed since she was sexually assaulted by her father and Victim would have been under significant stress and emotional strain after having finally reported years of abuse by her father. The passage of time is but one factor to consider, and we do not believe the lapse of thirty minutes between the assault and Victim's statements to Sergeant Black precluded their admission under the excited utterance exception. *See Burdette*, 335 S.C. at 43, 515 S.E.2d at 530 (admitting Victim's statement to a law enforcement officer as an excited utterance when no more than one hour passed between the attack and the victim's statement); *cf. State v. Burroughs*, 328 S.C. 489, 498, 492 S.E.2d 408, 412 (Ct. App. 1997) (explaining that the former res gestae exception had the same temporal requirement as the excited utterance exception). We find these facts support the trial court's conclusion that Victim's statements to

Sergeant Black fell under the excited utterance exception.

Further, Heath's argument the excited utterance exception does not apply because the Victim was not "excited" is meritless. Our courts have ruled on multiple occasions that the excited utterance exception applies to a victim who was visibly upset and crying. *See Stahlnecker*, 386 S.C. at 623, 690 S.E.2d at 573 (holding a victim who "was upset and crying when she told her mother about the [sexual] abuse" was under the stress of excitement; thus, her statements were admissible as excited utterances). Rule 803(2), SCRE, requires that the declarant be under "the stress of excitement," not that the victim be excited. *See State v. Sims*, 348 S.C. 16, 22, 558 S.E.2d 518, 522 (2002) (holding declarant's statements were admissible under the excited utterance exception when declarant was "not crying or acting 'excited' in the sense of being animated when he made the statement" but whose demeanor was "characteristic of someone who [wa]s under the 'stress of excitement'"). The record reflects Victim was under the "stress of excitement." **Based on the foregoing, we hold the trial court did not abuse its discretion by admitting Victim's statements to Sergeant Black.**

B. Harmless Error

Moreover, any alleged error in admitting Victim's statements or Exhibits 22, 36, and 38 was harmless because the physical evidence against Heath was overwhelming. *See Collins*, 409 S.C. at 537, 763 S.E.2d at 29 ("The harmless error rule generally provides that an error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained."). **Victim testified Heath performed oral sex on her on April 26, 2016, and saliva matching Heath's DNA was found on the inside of Victim's underwear immediately following the assault. Further, hairs from Victim's rectal swab and pubic hair combing matched Heatb's DNA.** *See Collins*, 409 S.C. at 538, 763 S.E.2d at 29-30 ("Another description frequently cited is that error 'is harmless where a Defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.' " (quoting *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006)). **We find there was overwhelming physical evidence of Heath's guilt and therefore any alleged error was harmless.**

State v. Heath, 433 S.C. 506, 517–18, 860 S.E.2d 673, 679 (Ct. App. 2021) (emphasis added).

This Court finds that trial counsel was not ineffective related to this issue based upon the impact of *Simmons* and the Court of Appeals ruling on the merits. This allegation must be further denied because the Applicant failed to prove deficient performance or prejudice. To the extent that the Applicant seeks to assert that this is a different issue as it relates to the "in the past" evidence, this Court finds that the Applicant failed to prove Sixth Amendment prejudice. As the appellate court noted, the admission of the evidence of the discussion with Sgt. Black was harmless error. Similarly, regarding past conduct matters, the *Strickland* prejudice prong assessment requires a similar finding where Victim testified about past events and there was corroborative evidence presented concerning his past conduct. He failed to show a reasonable probability that the result of the proceeding would have been different.

Vouching (13)

The Applicant testified that the defense counsel did not object to the alleged vouching that occurred during the trial.[41] (13/2)[42] He testified that the SANE nurse read the hearsay statement

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[41] The Applicant categorizes his complaint as "vouching," but his concern is more about an assertion of bolstering and witness comments on the credibility of the victim. Our courts have previously held that "[t]he assessment of witness credibility is within the exclusive province of the jury," and that witnesses generally are "not allowed to testify whether another witness is telling the truth." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012); Specifically, 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. *State v. Hill*, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct.App.2011*); cf. Smith v. State*, 386 S.C. 562, 564–65, 689 S.E.2d 629, 631 (2010) (observing the forensic interviewer interjected impermissible hearsay into the trial, which improperly bolstered the victim's testimony; the forensic interviewer testified that the victim told her that the Defendant had sexually assaulted her and that she found the victim's statement "believable"*) See State v. Kramah*, 401 S.C. 340, 358–59, 737 S.E.2d 490, 499–500 (2013) *See State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) ("For an expert to comment on the veracity of a child's accusations of sexual abuse is improper."); Rule 608(a), SCRE (providing that opinion evidence regarding credibility "may refer only to character for truthfulness or untruthfulness," and "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise" (emphasis added)); *State v. Morales*, 439 S.C. 600, 606 n.1, 889 S.E.2d 551, 555 n.1 (2023) (explaining that the principles of law prohibiting improper bolstering are incorporated into Rule 608(a), SCRE). *See State v. Clark*, 444 S.C. 606, 613, 910 S.E.2d 481, 485 (2024), reh'g denied (Jan. 15, 2025).

[42] All lawyers have a responsibility to advocate zealously on behalf of their client. This responsibility is not diminished when the lawyer is the prosecutor in a criminal trial. We expect solicitors to "prosecute with earnestness and vigor" on behalf of the State. *Fortune v. State*, 428 S.C. 545, 552, 837 S.E.2d 37, 41 (2019) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.

off her notes. PCR 47. He complained that this was hearsay that should have been objected. He claimed that it did not fall under *res gestae* or excited utterance. PCR 48. This Court finds the assertion is without merit for relief because the Applicant failed to satisfy both prongs of *Strickland.*[43]

Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935)). A prosecutor arguing forcefully during closing argument that the jury should believe a particular witness is well within her proper role as a zealous advocate, so long as the argument is based on evidence admitted during trial.

Zealous advocacy crosses the line and becomes improper vouching, however, when the prosecutor indicates to the jury—even implicitly—that her argument as to the credibility of a witness is based on anything other than the evidence admitted. The verb "vouch"—when speaking "[o]f a lawyer before a jury"—means "to comment favorably on the credibility of one or more witnesses based on the lawyer's personal knowledge." *Vouch*, Black's Law Dictionary (11th ed. 2019). The legal concept of "vouching" prohibits a prosecutor from giving the jury any indication she knows something about the credibility of a witness that the jury does not know, or that is based on an event or proceeding outside the presence of the jury. *See State v. Kelly*, 343 S.C. 350, 368, 540 S.E.2d 851, 860 (2001) ("Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury." (quoting *United States v. Walker*, 155 F.3d 180, 184 (3d Cir. 1998))), *rev'd and remanded on other grounds, Kelly v. South Carolina*, 534 U.S. 246, 122 S. Ct. 726, 151 L. Ed. 2d 670 (2002); *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) ("Improper vouching occurs when the prosecution ... mak[es] explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony," or "when a prosecutor implies he has facts that are not before the jury"); 344 S.C. at 629, 545 S.E.2d at 818 (finding no vouching when the solicitor did not "imply special knowledge" of the witness's credibility). *See State v. Busse*, 439 S.C. 104, 109–10, 886 S.E.2d 208, 211 (2023).

[43] The Applicant does not cite to any particular section in his testimony and in his pleading the reference to a SANE nurse reading from her notes was actually a reference to the facts in *State v. Dennis* in section 12/2. The trial record shows that SANE nurse DeGuzman read from her notes related to the April 27, 2015 incident. Tr.p. 445. She stated the victim's report of the event from her notes. Tr.p. 443- 447. The prosecution went over DeGuzman's protocol and report from that day without objection. Tr.p 449. On cross-examination, counsel Floyd went through the report of DeGuzman, pointing out pages 5 and 6 and that the Victim indicated to her that he never penetrated her vagina with his penis or digitally. Tr.p. 459, 452.

However, this Court finds that the defense put the entire SANE report into evidence as Defendant's Exhibit #1. Tr.p. 669-672. It was admitted without objection from the State. On the record, counsel Floyd stated that he intended to argue from the report and that it would be better for it to be before the jury. The State asserted that the SANE nurse read the portion necessary for her medical diagnosis and treatment. Tr.p. 670.

During the defense closing argument, counsel Floyd referred to the report. Tr.p. 705. Counsel stated that he asked for the SANE report to be put into evidence because the defense wanted the jury to have it because he felt it went to the heart of the case. Tr.p. 708. He noted that when you are telling something it is hard to keep the stories straight. Tr.p. 708. Counsel pointed out page three of the report and the nurse's question on whether he had done something similar to what he did that night, and Victim stated no and described what he did that night as having oral sex on her and that he laid on top of her touched her genitals as she was on her stomach, and he licked her anus. Tr.p. 708. Counsel Floyd, however, pointed out that she did not tell the officers that, but did tell the SANE nurse. Tr.p. 708. Counsel pointed out, contrary to her testimony and the SANE nurse, that there was no allegation of cunnilingus Tr.p. 709. Counsel then focused on the victim's report to the SANE nurse that he had not done anything to her before that night. Tr.p. 709. He further pointed out that the Victim to the SANE nurse indicated that she had not been digitally penetrated by a finger, which may be different than what the state had indicated. Counsel then focused on the SANE report as it related to threats. Tr.p. 710. Counsel indicated the threat alleged that night was to make her do dishes, yet the state indicated that he hit her in the face, pulled her hair, threatened to kill her mother and threatened to kill her. Tr.p. 710. The report indicated that she had denied threats of harm. Tr.p. 710-711. The defense later stressed again the SANE report for the jury's consideration and again focused that she did not say at that time that he had done similar things before, that there was cunnilingus that night, that ere was no penetration, yet now the State tells the jury to forget that because she now declares when she was seven similar things occurred without any proof. Tr.p. 710-711. Then, he focused the jury on the charge for CSC third he focused the jury to remember what she said to the SANE nurse about it and should not cause the jury any hesitation to find him not guilty. Tr.p. 717.

The State in its closing tried to address the SANE report by asserting that it was focused on the event that night in her examination and claimed it did not matter to the nurse whether it had happened 100 times. Tr.p. 718-719.

This Court finds a reasonable strategy on the record related to the testimony of the SANE nurse and her report. Reasonable counsel, faced with the testimony of the victim about the event, is not deficient in pointing out inconsistencies in prior statement that suggest that a crime did not happen. Counsel Floyd was not deficient in pointing those matters out as well. It is clear to this Court that had he not brought out the inconsistent statements of the victim relating to the existence of any prior similar acts the Applicant would be here alleging that he was unreasonable. Strickland recognizes that reasonable counsel may address similar in a

The Applicant next asserted that Solicitor's examination of Margie Branham, the sister of Victim's mother, was improper and should have resulted in an objection and mistrial. He claims that when Margie Branham was testifying, Solicitor Usry was essentially telling her what to say. PCR 49-50. He contends that there should have been a mistrial requested. He complains that the testimony of Branham corroborated other testimony which made it inadmissible.

The complaint, according to the *pro se* amended portion, attacks the unobjected comments at Tr.p. 478, l. 2-7. Prior to that portion, counsel Floyd had successfully objected to hearsay. Tr.p. 472, l. 16-18 (sustained), Tr.p. 473, l. 2-15 (rephrase the question); Tr.p. 474, l. 8-16 (sustained); Tr.p. 475, l. 9-13 (sustained), p. 475 l. 20-25 (sustained).

The Applicant specifically takes issue with the following inquiry in which he claims the State put words in the witness Margie Branham's mouth:

Q. What is that picture of?

A. That's the house -- one of their trailers. I'm not sure if it's the Smith Pond or the Nazareth Road.

Q. The Nazareth Road -- what time period did they live at the Nazareth Road?

A. Not long, I mean, before Theresa came to live with me.

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variety of ways. The test is focused, however, on whether no reasonable counsel would have acted as counsel Floyd acted concerning the SANE report. The Applicant has failed in the burden of proof.

This Court also finds that the Applicant has failed to prove Sixth Amendment prejudice based upon counsel's actions related to the SANE report. This evidence was somewhat cumulative to other evidence in the record related to the victim's statements when she testified about what she told and did not tell the SANE nurse and law enforcement. The Applicant's tunnel vision viewing of the items of evidence being unfavorable has not satisfied the burden in light of the totality of the evidence which addressed the fact of the inconsistent statements made by the victim . It must be denied.

Q. And on April of 2015, did they live at Nazareth Road?

A. Yes, I'm pretty sure they did.

A. Yes, I'm pretty sure they did.

Q. And the Smith Pond Road, was that before or` after?

A. Before.

Tr.p. 478, l. 2-12.[44] The Applicant claims that Branham did not know which house the photograph was and that the solicitor told her it was Nazareth Road. The record, however, does not indicate what photograph was shown to the witness at that time.

This Court finds that the Applicant mischaracterizes the question and answer. The prosecutor is not asserting the answer for the witness. In context she has moved on to the time that Victim lived in the homes. The Applicant has not proved prejudice by counsel's failure to object to the Solicitor's reference to Nazareth Road after the witness was not sure that the photograph was of either Nazareth Road or Smith Pond. There is no reasonable probability that the result of the trial would have been different. There was no basis for a mistrial.

The Applicant makes a reference to Tr.p. 461, l. 4-9 during the testimony of SANE nurse DeGuzman. In that portion, counsel Floyd asked her on cross-examination if she knew how the pubic hair got there and she confirmed that it was from when DeGuzman combed it but did not know how it got there or how long it had been there. Tr.p. 451, l. 8-13.

The Applicant complains how SANE nurse DeGuzman could know it was pubic hair. The Applicant neglects that DeGuzman testified on direct examination she combed for pubic hair and

[44] A photograph of the house on Nazareth Road was introduced in the victim's testimony as State Exhibit 21.

that there was a specimen envelope named "pubic hair combing." Tr.p. 449-450. She testified that the pubic hair combings may be important because Victim claimed that the Applicant's genital had rubbed against Victim and that sometimes the pubic hair will get intertwined if they are against each other. Tr.p. 451. DeGuzman stated that when she does the combing, she does not always see the combed hair and debris but confirmed that she did comb Victim's pubic hair. Tr.p. 452. On cross-examination, counsel Floyd got the SANE nurse to also confirm that she combed the pubic area and collected it. She also declared that she knew she got a stray hair off the rectal swab. She stated she just closed (the envelope) up after the combing. Tr.p. 460-461.

The Applicant has mischaracterized DeGuzman's testimony and ignores the fact that this was defense counsel's questioning, not the State. She did not identify any particular hair from the pubic hair combing as pubic hair. See 461, l. 8 ("if there's pubic hair, it's from when I combed it."). The Court notes that this occurred upon defense counsel questioning. He failed to show deficient performance or prejudice under *Strickland* related to the "pubic hair" testimony of the SANE nurse.

The Applicant contends that there was improper corroboration by SANE nurse DeGuzman during counsel Floyd's cross-examination when he, not the State, asked her, "she was brought to the hospital by her mother, is that correct" and Deguzman answered, "that's what I understand."[45] This assertion fails to show deficient performance by counsel in asking this question. Sixth Amendment prejudice is not shown because Victim had already testified that her mother had taken

[45] Earlier during the trial, defense counsel inquired of Deputy McCann the victim was taken to the hospital by her mother and the officer left the scene and met them there. Tr.p. 61-62 (in camera; at the hospital). The victim testified that she went to the hospital with her mother. She acknowledged that she was directed to go to the hospital by an officer at the scene. Tr.p. 357.

her to the hospital. See Tr.p. 357.

In his *pro se* pleading, section 12/1, the Applicant also contended that Sgt. Black was vouching for Victim in his testimony at Tr.p. 200, 201, 210. PCR 53-55. In this testimony, Sgt. Black is describing his process in doing a welfare check under similar circumstances.[46] The Applicant complains in his document about Sgt. Black describing the state of Victim at that time when he arrived at the home as "she was crying, visibly upset. *At the time it was almost 16 years of me being a police officer and I could tell something had happened.*" Tr.p. 200, l. 11-16. PCR 53. No objection was made to the comment by the defense. In the PCR hearing, the Applicant complained about the failure to object.

Assuming that that counsel was deficient in not objecting to Sgt. Black's opinion that something had happened, because it was supportive of the excited utterance and the other forensic evidence presented that something did happen the Applicant has failed to show a reasonable probability that the result of the proceeding would have been different.

In this document in Section 12/1, and at that hearing, Applicant also complains about alleged vouching by Sgt. Black in his testimony about the steps he took at Tr.p. 209-210. PCR 55-56. Therein, Sgt. Black indicated that he had enough information to get major crimes involved after getting details from Victim, got his statement form and Victim started writing a statement while she was visibly upset and crying into a pillow. Tr.p. 210. There was no objection from the defense. This Court finds that prejudice has not been proven by the failure to object to these comments by

[46] The Applicant also complained that at Tr.p. 499, Sgt. Black testified similarly about his practice of introducing himself to a potential victim and questioning them on what happened. The Applicant did not like the fact that Sgt. Black repeated himself in the later testimony. PCR 54.

Sgt. Black.

In *State v. King*, 422 S.C. 47, 66–68, 810 S.E.2d 18, 28–29 (2017), the Supreme Court cautioned against the use of so-called investigative hearsay. In that opinion the Court stated its reasoning as follows:

> . . . we believe it is necessary to caution prosecutors against using "investigative information" as it appears this is an attempt to circumvent the rules against hearsay. *See, e.g., Lewis v. State*, 80 So.3d 442, 444 (Fla. Dist. Ct. App. 2012) (concluding that investigating officer's testimony that he developed a suspect and, in turn, a photographic lineup, after speaking with two non-testifying witnesses constituted inadmissible hearsay; stating, "[w]here the implication from in-court testimony is that a non-testifying witness has made an out-of-court statement offered to prove the Defendant's guilt, the testimony is not admissible" (citation omitted)); *State v. Magee*, 143 So.3d 532, 537 (La. Ct. App. 2014) ("The fact that an officer acted on information obtained from an informant may be relevant to explain his conduct, but may not be used as a passkey to bring before the jury the substance of the out-of-court information that would otherwise be barred by the hearsay rule." (emphasis added)).
>
> We are persuaded by the explanation offered by the Supreme Court of Kentucky. *Ruiz v. Commonwealth*, 471 S.W.3d 675 (Ky. 2015). In *Ruiz*, the court attempted to dispel any misconception that testimony from an investigating officer regarding the content of out-of-court statements was admissible. Specifically, the court explained:
>
> An out-of-court statement made to a police officer is judged by the same rules of evidence that govern any out-of-court statement by any out-of-court declarant. If it is relevant and probative only to prove the truth of the matter asserted by the out-of-court declarant, then the statement is hearsay, and its admission into evidence is governed by the traditional hearsay rule. And, as any other statement, if the out-of-court statement made to a police officer has relevance and probative value that is not dependent upon its truthfulness, and it is not offered into evidence as proof of the matter asserted, then by definition the evidence is not hearsay.
>
> * * *
>
> ** In such circumstances, because the out-of-court statement would not be subject to the hearsay rule, its admissibility would be determined by application of other rules of evidence. So-called "investigative hearsay" is still, fundamentally, hearsay. There is no special kind of evidence known as "investigative hearsay;" we have no rule of evidence called the "investigative hearsay rule." Use of the term imparts no meaningful information to the analysis that is not otherwise supplied by the word "hearsay."
>
> *Ruiz*, 471 S.W.3d at 680-82 (citations and footnote omitted).
>
> Based on this reasoning, we caution against the use and admission of

> "investigative information." While it may be couched in terms of explaining an officer's conduct during an investigation, it may not be used to offer the substance of an out-of-court statement that would otherwise violate our state's rules against hearsay.

State v. King, 422 S.C. 47, 66–68, 810 S.E.2d 18, 28–29 (2017).

This Court finds that counsel was not deficient in failing to object. "[A]n out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994).[47] Here, the investigative steps did not include an out of court statement but described what was occurring and Victim's demeanor at that time. This Court finds that the Applicant failed to prove prejudice under *Strickland* for the failure to object to this portion of Sgt. Black's testimony since the non-verbal

[47] However, this Court is aware that in 1996, the Supreme Court found that PCR relief needed to be granted and distinguished *Brown* in *German v. State*, 325 S.C. 25, 27, 478 S.E.2d 687, 688 (1996). The Court held therein that in *Brown*, statements regarding the Defendant's neighborhood were not hearsay because they were not offered to prove the truth of the matter asserted. Rather, the statements were offered to explain why the police began their surveillance. The *German* decision found *Brown* was distinguishable because the statements in *Brown* did not refer specifically to the Defendant's character. The statements referred to drug activity in the apartment complex in which the Defendant lived. However, in granting PCR in *German*, the Court held counsel should have objected to these statements as improper comments on petitioner's character and her failure to do so prejudicial. The Court also cited *State v. Pollard*, 260 S.C. 457, 196 S.E.2d 839 (1973) which reversed the Defendant's conviction because testimony was admitted that a police officer signed a warrant based upon information received in his investigation. The Court held the testimony was objectionable hearsay. The German court also cited *State v. Dennison*, 305 S.C. 161, 406 S.E.2d 383 (Ct.App.1991), the Court of Appeals followed *Pollard* in a case where evidence was that informants told the witness that the Defendant was engaged in distributing crack. The Supreme Court concluded in *German* that *Pollard* and *Dennison* were incorrectly decided. The *German* court held that the statements were not objectionable as hearsay. However, they were objectionable as improper comments on the Defendant's character. *Cf. State v. Middleton*, 441 S.C. 55, 66, 893 S.E.2d 279, 284 (2023) (finding evidence that the Defendant was avoiding appointments was not admissible under *Brown* or *King* since there was no appropriate nexus to its admissibility for relevance).

evidence of Victim's demeanor was admissible and the limited investigative steps that Sgt. Black testified in this portion were not objectionable as hearsay or improper vouching of the credibility of Victim.[48]

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[48] In this section of his *pro se* written document, Section 13/1, the Applicant also points to Tr.p. 261-262, involving Solicitor Mayes' argument on the admissibility of DNA evidence of the SLED serology report related to the Applicant's hair being located in the pubic combings as well as his DNA being found on a swab from the victim's genital region. Tr.p. 261-262. When she argues that the victim. He contends therein that the Solicitor urged that this evidence is admissible and relevant because it corroborates the victim's testimony about a sexual assault and long term pattern. *Id.* This Court finds no Sixth Amendment violation by this proper in camera argument by the State where prejudice cannot be shown.

The Applicant additionally asserts that counsel should have objected to the portion of the victim's testimony at Tr. 392, l. 10-25 which he claims the Solicitor is conveying to the jury that the victim is always to be believed and that he was controlling her. After a review of that portion of the record by this Court and similarly testimony about her mother's relationship with the Applicant and the Victim's reason in not confiding with her mother until that night, being that her mother is back with the Applicant now and her mother depends on him financially, this Court finds that the Applicant failed to prove error in the questioning of the victim with relevant evidence related to the alleged delayed disclosure. This Court denies that it was evidence of improper vouching. The Court further finds that the Applicant failed to prove prejudice in light of the admissible evidence.

In the next portion of his vouching assertion in his *pro se* pleading, section 13/2, p. 3, the Applicant asserted that the testimony of Ms. Galloway-Williams, the blind child abuse and treatment expert, was vouching and should have resulted in a mistrial. He refers initially to Tr.p. 417, l. 21- p. 18, line 10. There he contends she allegedly vouched for all alleged child abuse victims claiming that they should be believed. However, the Applicant misconstrues her admissible testimony about the need of a child abuse victim to have a support system to make a disclosure.

First, this Court finds as a fact that counsel Floyd objected to the witness's opinion testimony as an attempt to bolster the victim's testimony. Tr.p. 401-402.The State urged that this was a blind expert who had not interviewed the Victim , reviewed reports of law enforcement, or interviewed family members. Tr.p. 402-403. The trial judge found her expertise in the area adequate and the testimony generally admissible under Rule 702 and *State v. Brown*. Tr.p. 406-407. Importantly, Judge McMahon limited the evidence and determined that ".she would not be allowed to give any opinion as to the credibility or believability of the expert witness. And being a blind witness, she would have no basis for doing that anyway. So it is admissible." Tr.p. 406-408. Counsel cannot be deficient when he objected to the testimony at the outset as bolstering and was overruled.

"Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior." *State v. White*, 361 S.C. 407, 414–15, 605 S.E.2d 540, 544 (2004). While our supreme court has recognized an expertise in child abuse assessment, it has cautioned that "allow[ing] 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." *State v. Anderson*, 413 S.C. 212, 218–19, 776 S.E.2d 76, 79 (2015). The better practice "is not to have the individual who examined the alleged victim testify, but rather to call an independent expert." *Id*. at 218, 776 S.E.2d at 79. *State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018)(expert testimony on delayed disclosure by sexual abuse victims and the behavior of nonoffending caregivers was admissible).

Just as she did in *Jones*, Galloway-Williams presented blind testimony about general concepts in child abuse dynamics in Applicant's case. As the Court noted in *Jones*: "There is always a possibility that an expert witness's opinions are incorrect. However, whether to accept the expert's opinions or not is a matter for the jury to decide. Trial courts are tasked only with determining whether the basis for the expert's opinions is sufficiently reliable such that it may be offered into evidence." *Jones*, 423 S.C. at 639-640, 817 S.E.2d at 272. Here, the trial judge properly determined the basis of Galloway-Williams's opinion was sufficiently reliable as the Court's precedent requires.

As to the testimony on Tr.p. 417, l. 21- p. 418, line 10, the Applicant misconstrues her admissible testimony about the need of a child abuse victim to have a support system to make a disclosure. Because Galloway-Williams did not know anything about Victim's case, she could not have bolstered Victim's credibility. In regard to Petitioner's complaint about Galloway-Williams' testimony regarding false denials and false allegations, the Court of Appeals noted such testimony could not have bolstered Victim's testimony because "Galloway-Williams never treated child and never testified she believed Child, nor did she provide any indication that she had considered Child's specific disclosures.... Galloway-Williams never linked her general statements to this case or Child's credibility." *Acker*, 435 S.C. at 734, 869 S.E.2d at 882.

This Court finds that the Applicant has not proved ineffective assistance under Strickland related to this passage because this is not a statement that all alleged child abuse victims, including his victim, always need to be believed. It is only explaining why actual victims may delay disclosure.

The Applicant's next reference to Ms. Galloway-Williams's testimony is to Tr.p. 418, l. 18-419, l. 7. Therein, Applicant claims that the witness is again vouching for all alleged victims.

This Court finds that this testimony relates her expert opinion about the need for a support system to allow child abuse victim to need to have a non-offending supportive caregiver for a disclosure to be encouraged. She also testified that if the child victim is not supported or believed the child may feel it is not important and believe that they did something wrong. The Applicant mischaracterizes this testimony as well. The testimony does not address alleged child victims, but actual child victims in her explanation of reasons for delayed or non-disclosure. It was admissible testimony. The Applicant failed to prove deficient performance or prejudice.

He makes the same argument in reference to Galloway Williams testimony at Tr.p. 420, l. 21-p. 421, l. 4 and Tr.p. 430, l. 25- p. 431, l. 17. While there was no objection to either passage, this Court finds that the Applicant has failed in his burden to show that reasonable counsel would have made an additional objection. The 420-421 passage concerns whether a chronic abuse victim will make a full disclosure to the first person, finding that disclosure is a process and they don't generally expect every detail will be disclosed the first time. In the 430 - 431 passage, the expert states on re-direct she again emphasizes the importance of non-offending supportive caregivers as the most important thing for a child to be able to tell and get help.

This Court finds those portions are not vouching or bolstering the victim's actual credibility and finds that a reasonable counsel would not have objected. Further, counsel Floyd in his cross-examination emphasized that the expert's opinion is that it does not always apply and it is reported, but that there is no specific research on the particular time of a delayed report, but that family dynamics are a strong factor for the delay. Tr.p. 434-435. When counsel Floyd on re-cross asked about the possibility that the crime did not occur related to period on non-disclosures, the trial judge noted that it was a different issue and "doesn't mean it did nor didn't occur. That's the jury's decision to make." Tr.p. 433, l. 3-6.

The Applicant has failed to prove either prong under *Strickland* related to counsel's specific failure to object to these passages Galloway-Williams testimony.

The Applicant also asserts in his *pro se* pleading section 13/2 that Sgt. McCann's testimony at Tr.p. 516, l. 4-19 sounded like vouching since they referred to the victim as a "sexual assault victim." The Applicant mischaracterizes Sgt. McCann's comment. It was a more general and not a statement specific to the victim. The answer was actually why it was important for the victim to get to the hospital because "the sooner we get a sexual assault victim to the hospital to have the exam done, the more likelihood we have of recovering evidence that was left behind as a result of a sexual assault. If the victim has had an opportunity to bathe, shower, change clothes, any of the evidence is going to be gone at that point." Tr.p. 516 . This Court find that the Applicant failed to prove deficient performance or prejudice by counsel failure to object to this generalized comment, which was not vouching, but explaining why there would be a request to go to the hospital after a reported assault.

The Applicant further contends Sgt. McCann's comment at Tr.p. 523, l. 17-p. 524, l. 4 as vouching. The testimony referred to Sgt. McCann actions at the scene, speaking with the Applicant while the deputies got the swabs and they went inside with Heath while McCann stayed outside, and the determination to place Applicant under arrest after the swabs were collected and interviews of Victim and Applicant were conducted. Counsel did not object to this comment. This Court finds that the Applicant has failed to show Sixth Amendment prejudice by this unobjected comment by Sgt. McCann. "[A]n out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994). Here, the investigative steps did not include an out of court statement from either Victim or the Applicant. In light of the other forensic evidence including the DNA evidence, the Applicant has failed to show that the omission of an objection, that there was a reasonable probability that the result would have been different.

In this section 13/2, the Applicant also complains about the argument from the Solicitor about the impact of the DNA evidence but does not explain what the error is. Tr.p. 693, l. 6-18. This portion of the argument concerns the likelihood of his DNA with that saliva being found linked to the Applicant's DNA and that there is no other explanation other than the Applicant placing his mouth on her exactly as she described face down on the bed. He also complains about the portion of the State's argument at Tr.p. 693, l. 19-22, which concerns the evidence of the sexual battery that occurred when the Applicant placed a finger into her vagina and made her put her mouth on his penis. There is support in the record for these comments. See Tr.p. 353, l. 16-18 (" . . . at some point he used his fingers, and then he used his mouth on me from behind as well. ") (Victim's testimony). Tr.p. 340, l. 134-14 ("he would have me use my mouth on his private parts"). Tr.p. 341 (same) (Victim's testimony) Also, Tr.p. 342, l. 16-20. Tr.p. 350 (s4ame); Tr.p. 361 (same) Tr.p. 386, l. 14-16 (same) (Victim's testimony on cross-examination). The Applicant contends that counsel should have objected to this portion of the argument.

Contrary to the Applicant's characterization, it is not misconduct, but appropriate and zealous advocacy by the State. In *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975), the Supreme Court set forth the parameters of permissible prosecutorial argument. So long as the prosecutor stays within the record and its reasonable inferences, he may legitimately appeal to the jury to do their full duty. *Id.* at 92, 212 S.E.2d at 590. A solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony. *State v. Allen*, 266 S.C. 468, 224 S.E.2d 881 (1976). A review of the closing argument is based upon the standard of "whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hawkins*, 292 S.C. 418, 421, 357 S.E.2d 10, 12 (1987). *See State v. Caldwell*, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990) (a prosecutor may argue her case vigorously and give her version of the testimony, and what weight or credibility should be given to the evidence); *State v. Cannon*, 220 S.C. 614, 93 S.E.2d

The Applicant in this *pro se* section also complains about vouching by asking how long it was after the police came to the house that she had communication with her mother. PCR 55. Tr.p. 357, l 23- p. 358, l. 5. This portion involves the prosecutor's direct examination of the Victim. This Court has reviewed the portion of the transcript and finds that the questions by the prosecutor concerned whether her mother was supportive and the Victim's present relationship with her mother. There was no objection to this testimony. This Court finds that there was nothing objectionable about the testimony in this portion. The Applicant failed to prove prejudice or deficiency.

12/4 Improper Judicial Intervention

In the PCR hearing the Applicant complains that Judge McMahon intervened during Sgt. Black's testimony about a statement given by the Victim and the trial judge allowed the question. PCR 51. The Applicant refers in his *pro se* pleading to Tr.p. 508, l. 14-p. 528, l. 14; Tr.p. 597, l. 24-p. 602, l. 11. The Applicant refers to counsel Floyd's statement to the Court:

> *Floyd: Your Honor, just for the record during the testimony of Sergeant McCann, it came up about a statement given by the alleged victim, and at that time the court allowed the questioning of the witness as to that statement pursuant to Rule 801 (d) about a prior statement of the witness. And pursuant to the provisions of 801 (d)(1), that testimony is allowed, however, its limited to the time and place of the incident.*
>
> However, when Sergeant McCann testified about the alleged statement, instead

880 (1956). "A solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record." *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

This Court finds that counsel was not deficient in failing to object to the prosecutor's record based comments. Since the prosecutor is allowed to state their version of the case based upon evidence in the record, counsel failure to object to the comments did not satisfy prejudice under *Strickland*. He has shown no reasonable probability that the result of the proceeding would have been different had he objected.

> of limiting it to the time and place of the incident, she testified to the fact that it happened multiple times in the past, words to that effect. That's outside of the provisions of 801(d)(1) and was improper bolstering of the victim's alleged statements -- or alleged victim's statements. And, accordingly, we would move for a mistrial at this time.

Tr.p. 598, l. 11- p. 599, l. 3. (emphasis added). PCR 51-52. The Applicant referred back to Sgt. Black's testimony where he characterizes that Judge McMahon complained that he was not being advised in advance what the objections are going to be. He thought that counsel Floyd was intimidated by the Court for having to send the jury out. PCR 52-53. Cf. Tr.p. 201-208. The Applicant complains that the judge made the defense hold back on objections. PCR 52-53. The Applicant did not know if he objected to the sidebar or not, but Applicant felt that counsel was intimidated.

This Court has reviewed the record and particularly the testimony of Sgt. Black. The Court does not find that part of the record suggests intimidation by the trial judge. It does show that the court did not want to make an anticipatory ruling during the trial, which is appropriate. There is nothing in the "on the record" inquiries by the trial judge to suggest a mistrial was necessary or appropriate.

"The decision to grant or deny a mistrial is within the sound discretion of the trial judge." *State v. Adams*, 354 S.C. 361, 376, 580 S.E.2d 785, 793 (Ct.App.2003). A mistrial should only be granted when "absolutely necessary," and a Defendant must show both error and resulting prejudice in order to be entitled to a mistrial. *State v. Stanley*, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct.App.2005). *State v. Ward*, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007).

This Court finds that the Applicant has failed to prove Sixth Amendment prejudice by speculating what may have occurred in a sidebar. The burden upon him has not been satisfied.

Improper Corroboration, See Text Messages (14)

On the second day of the hearing, the Applicant refers to Tr.p. 431-433 as to Ms. Galloway-Williams allegedly corroborating Victim's interview. This was partially addressed previously in the portion involving vouching above. It is incorporated herein by reference. In his PCR testimony, the Applicant contends that the DSS evidence reference is not correct as it related to the DSS interview.[49] PCR 64-65 The Applicant states that Floyd was contending that Victim was interviewed by DSS which he claimed is not true. In the PCR hearing he stated that they were removed from their care for something different. This Court has reviewed the testimony and questioning at Tr.p. 431-433. The Applicant's characterization is incorrect. In that portion, counsel Floyd was trying to create a hypothetical inquiry with Ms. Galloway-Williams, not that the Victim was actually interviewed. This Court finds that counsel's brief inquiry did not create deficient performance or prejudice. The Applicant has failed to show how this prejudiced the case to

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[49] On cross-examination by counsel Floyd, in an *in camera* examination Victim testified that DSS was involved and had sent her to Dr. Luberoff when she was living with her grandmother. Tr.p. 238. On re-direct, the state followed up and inquired what prompted the DSS investigation and she was uncertain what prompted it but confirmed that there was a history of domestic violence between her parents. However, she could not recall what she had told DSS., but to her knowledge had not told anyone about the sexual abuse because she did not want to get in trouble with her father. Tr. 244-245. On cross-examination, in front of the jury, counsel Floyd again brought up the DSS involvement. Tr.p. 374. Counsel pointed out that Dr. Luberoff, the guidance counselor, and social workers got involved. Importantly, to his clear strategy to show a lack of prior reporting, counsel got Victim to confirm that Victim never told any of them about the sexual, physical abuse or pulling of the hair. Tr.p. 374-375. On re-direct, the State confirmed through Victim that DSS was involved because issues between her parents but had nothing to do with her. Tr.p. 391. Victim testified that she lived with her grandmother as a child when DSS became involved. Tr.p. 393. Victim stated that she did not feel comfortable in telling her grandmother what was happening. Aunt Margie Branham also testified about her awareness of DSS involvement with her sister family. Tr. 492. Branham confirmed that DSS was involved based upon the parents and had nothing to do with Victim. She stated that Victim was living with her at the time of the trial. Tr.p. 493.

During the defense case, counsel Floyd presented Selma Heath, the Applicant's mother and Victim's grandmother. She testified that Victim stayed with her from the time she was six weeks old until she went to school. She also indicated that she also had her for six months when DSS removed them. She indicated that she was in the first grade at that time. Tr.p. 656-658. On cross-examination by the State, Selma stated that she had some concerns about Victim's medical issues. Selma confirmed that DSS placed Victim and her brother Nick with her with her. Selma testified when Victim was seven in November 2004, however she denied taking her to DR. Luberoff or Dr. DeSoto for burning urination or blood. Tr.p. 662-663.

undermine confidence in the verdict.

The Applicant refers to Tr.p. 441 in section 14/2 involving SANE Nurse DeGuzman's testimony about when she interviewed Victim on whether she had on the same clothes or whether she changed clothes and stated she had on the same clothing as the night of the assault. According to DeGuzman, the Victim answered her protocol question that she had not changed clothes. Tr.p. 441, l. 12-20. In the PCR hearing, the Applicant questioned how the nurse could have had that knowledge. He asserts that the answer was improper and counsel should have objected. PCR 65. This Court finds that counsel was not deficient in failing to object to the answer of Victim to the protocol questions or the nurse's own conclusion as a result of the answer. Further, this Court finds that Sixth Amendment prejudice was not shown. During Victim's testimony, she testified that she did not change clothes, including that the underwear that she had on at the time of the assault was the underwear she was wearing during the examination. Victim testified at trial that the lady who did the examination took the underwear. Tr.p. 367-370. His assertion is without merit for relief.

The Applicant also complains in 14/2 about the State's question to the SANE nurse on whether she inquired if it had been single event or chronic in nature, and the nurse's response that typically with children they ask if it had happened before. PCR 65. Tr.p. 442-443. l. 1. The nurse testified that Victim reported the time frame to be ten (10) years. Tr.p. 443, l. 1. The Applicant complains that it was hearsay and that counsel should have objected. PCR 65. In his pleading, he asserted that this would not be an excited utterance at this time because Victim was calm. This Court finds that in his cross-examination, defense counsel referred to the nurse's notes on the protocol that, when asked whether Applicant had ever done anything like this previously, Victim responded "no." Tr.p. 457-458. This Court finds that the Victim's responses to the protocol were admissible under Rule 803(4)[50] for purposes of medical diagnosis and history. This Court further finds that it would be admissible as non-hearsay under Rule 801(d)(1)(d).[51]

This case was tried May 7-11, 2018. This Court is aware that on June 27, 2018, the Supreme Court decided *State v. Simmons*, 423 S.C. 552, 563–64, 816 S.E.2d 566, 572–73 (2018). Therein, the Court held the SCRE Rule 803(4) hearsay exception requires that the statements be provided for the purpose of and be reasonably pertinent to medical diagnosis or treatment. Under this decision Rule 803(4), SCRE, may well apply in a CSC case, but there must be a nexus between the information provided by the patient and the diagnosis or treatment of the patient. For example, after recent trauma, these types of statements can provide the doctor with specific areas to focus on or specific conditions to search for when performing the diagnostic physical exam and are reasonably pertinent to diagnosis or treatment. In this regard, "a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim." *State v. Burroughs*, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997). However, "[a] doctor's testimony as to history should include only those facts related to

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[50] Rule 803(4) reads as follows:
(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

[51] Rule 801(d)(1) (D) reads as follows:
(A) inconsistent with the declarant's testimony, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose, or (C) one of identification of a person made after perceiving the person, or **(D) consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident;**

him by the victim upon which he relied in reaching his medical conclusions. The doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses." *State v. Brown*, 286 S.C. 445, 447, 334 S.E.2d 816, 817 (1985); *see also* Rule 803(4), SCRE, Note (stating a "physician's testimony should include only those statements related to him by the patient upon which the physician relied in reaching medical conclusions" (*citing State v. Camele*, 293 S.C. 302, 360 S.E.2d 307 (1987) . *State v. Simmons*, 423 S.C. 552, 563–64, 816 S.E.2d 566, 572–73 (2018).

This Court does not need to decide whether this evidence of "ten years" is admissible under either Rule 801 or 803 because the Applicant is unable to prove prejudice under the Sixth Amendment. Most importantly, this Court find that the defense counsel in his cross-examination of the SANE nurse undermined the probative value of the ten year answer when he focused upon her protocol report that the Victim had responded "no" when asked by the nurse whether he had done anything other than what he did tonight. Tr.p. 457, l. 14-, p. 458, l. 2. Although the Court does not have counsel's reasoning in failing to object to the 10 year response due to his death, this Court finds the possible reasoning in the cross-examination evident where Victim denied facts which undermined the original statement that defense counsel wanted before the jury to further impeach her related to those events. However, this Court will not determine if the Applicant has shown deficient performance.

The Court will find that Sixth Amendment prejudice has not been proven. The Applicant has the burden of showing a reasonable probability that the result of the proceeding would have been different, assuming *arguendo* that counsel should have objected to the 10 year comment, This Court notes that if counsel chose to cross-examine Applicant on her "no" statement to the SANE nurse, it may have opened the door to the admission of the ten year response. The defense was focused upon focusing it defense upon Victim's failure to report the alleged occasions of Applicant's assault upon her as evidence that it did not occur over a period of time. The prejudice prong assessment is similar to a harmless error analysis, except the burden has shifted to the Applicant rather than the State.

"The admission of a hearsay statement that is cumulative to in-court testimony by the declarant can be harmless error, particularly when corroborated by other evidence." 4A Mich. Pl. & Pr. § 36:879 (2d ed.); *See also Schindel v. Commonwealth*,252 S.E.2d 302 (Va. 1979)(finding any error in admitting police officer's testimony concerning hearsay was harmless where witness' testimony proved essence of content of hearsay and Defendant's testimony provided further verification of content of such declaration). Further, "if the declarant himself testified at trial, any likelihood of prejudice was greatly diminished because the primary rationale for the exclusion of hearsay is the inability to test the reliability of out-of-court statements." *Id.; People v. Gursky*, 786 N.W.2d 579, 595 (Mich. 2010).

In *Simmons*, our Supreme Court found the admission of hearsay evidence identifying the perpetrator to be reversible error. *Simmons*, 423 S.C. 552, 816 S.E.2d 566, 573 (2018). The court first noted that since the witnesses provided similar information a harmless error seemed plausible. *Id.* at 423 S.C. 566 816 S.E.2d 574. Even so, the *Simmons* Court found it was unable to deem the error harmless due to the importance the state placed on the testimony. *Id.* The Court noted "[t]he State highlighted the testimony of Dr. Simmons, calling him as the first witness and emphasizing the importance of his testimony in determining credibility for a case that lacked any physical evidence." *Id.* This did not occur in Applicant's case where Victim had already testified before the jury about the alleged lengthy history of abuse, and the ten year comment was undermined in the testimony of SANE nurse as well as Victim's own testimony where she declared that she had not told anyone about sexual abuse. Tr.p. 374-378, 382, 385-386, 390.

In *State v Mitchell*, the South Carolina Supreme Court found that error is harmless when it could not reasonably affect the result of a trial. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d. 150, 151 (1985). "A harmless error analysis is contextual and specific to the circumstances of the case." *State v. Byers*, 392 S.C. 438, 447,447-48, 710 S.E.2d 55, 60 (2011). In *State v. Mitchell*, the court ruled hearsay testimony of a law enforcement officer regarding the ownership of a black jacket associated with a crime by Appellant's wife during an interview was inadmissible hearsay. *Id.* Though the court found the trial court did err in admitting the hearsay, the court ruled because there was abundant evidence in the record from which the jury could have found appellant guilty notwithstanding the hearsay, the error was harmless. *Id.*

In *State v. Chavis*, the South Carolina Supreme Court ruled that the testimony of two witnesses used to support other statements was inadmissible as hearsay; yet the overwhelming evidence of substantial guilt rendered the error harmless. *State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336 (2015). The Chavis Court found the evidence to be overwhelming where there were multiple witnesses and physical evidence in the form of photographs and medical records. *Chavis*, 412 S.C. 111 771. S.E.2d 341.

Like *Mitchell* and *Chavis*, the other strong evidence presented, which made up of much more than just DeGuzman's report, supported Applicant's conviction. First, the testimony of Victim provided a complete version of earlier events and subject to intense cross-examination. Second, the defense introduced the SANE report as evidence in its case. Tr.p. 686. Defense counsel in his closing emphasized that Victim told the SANE nurse he never did anything to her. Tr. 709. Last, the reference to the 10-year comment was not emphasized during the State's closing, in fact it was mitigated in the State's closing because the prosecutor claimed it was not the SANE nurse's job to determine if it happened one time or 100 times, but what happened that night. Tr.p. 718-719. Prejudice under *Strickland* has not been shown related to the failure to object to the "10" year answer by the SANE nurse.

The Applicant next testified in section 14/3 concerning Tr.p. 478, l. 2-7 involving the testimony of Margie Branham involving the identification of the photograph of the house. This same was addressed previously in this Order related to PCR 47-50.

The Applicant next testified about Tr.p. 461 related to nurse DeGuzman's comment about pubic hair within section 14/3 and 14/4. PCR 67-68. The Applicant testified that it was never identified as pubic hair. PCR 67. This issue was addressed previously in this Order related to section 13/2 above which is adopted herein by reference.

The Applicant asserts that counsel should have objected to Margie Branham's testimony that Applicant thought corroborated Victim's earlier testimony that she did not like to be home alone with the Applicant. PCR 68-69. The Applicant refers to Tr.p. 472-475. PCR 69-70. However, this Court has reviewed the cited testimony and finds that counsel Floyd objected to the testimony of Branham as hearsay, which were sustained. Tr.p. 472, l. 13-18, Tr.p. 474, l. 2-15, Tr.p. 475, l. 17-p. 476, l. 1. Contrary to the Applicant's assertions, the record shows that counsel did object. This assertion is denied.

The Applicant next refers to Tr.p. 516, l. 20-21 concerning Sgt. McCann's testimony whether Victim changed clothes prior to going to the hospital. PCR 70-71. The Applicant contends that how would Sgt. McCann know whether she changed clothes because Victim was with Sgt.

McCann some of the time and was with the Applicant earlier PCR 71. He contends also that counsel failed to address this in their cross-examination of Sgt. McCann. This same passage was addressed above related to section 13/2 on alleged vouching. The Court adopts and incorporates by reference that portion as if restated herein. The Court notes in the record that the Victim asserted that she had not changed clothes. Tr.p. 367-370. The Applicant has failed to prove deficient performance or prejudice related to this passage.

The Applicant testified concerning section 14/4 in his amendment specifically referencing Tr.p. 499, l. 14-17. PCR 71-73. In this section, Sgt. Black testified about his practice of explaining to a potential victim why he was there and either asking what happened or are you okay but did not recall which he said. The Applicant contends that this corroborated the Victim's complaint and was restated. As stated previously, this statement involved admissible testimony about law enforcement investigative steps and did not include hearsay. In addition, this portion of the testimony was addressed earlier in this Order addressing section 13/2 related to his testimony at PCR 54. The Court also incorporates that portion of the Order as set forth herein. He has failed to prove prejudice related to Sgt. Black's initial questioning statement.

Hearsay (15)

In his next portion of PCR testimony related to section 15/1, the Applicant testified generally about Sgt. Black's *in camera* testimony related to the statements of the Victim about the earlier events years before. PCR 72-73. The Applicant asserted that those could not be excited utterances. He refers to Tr.p. 203 in his testimony and Tr.p. 203, l. 11- p. 204, l. 11. He contends that this information was beyond "time and place" limitations in his amended pleading. In the *in camera* portion Sgt. Black does refer to "in the past he physically forced her to perform oral sex on him and that she used her mouth on his penis tonight." Tr.p. 203, l. 22-24. However, this Court finds that in the following portion of Sgt. Black's testimony to the jury he only refers to the events of that evening, not ten or so years as suggested in his pleading and testimony. Tr.p. 209, l. 18-22. (" that very night"). The objection by counsel as to hearsay was timely made to the proposed testimony based on hearsay and not an excited utterance. Tr.p. 207 to 208. The issue was ruled on the merits in the direct appeal. The appellate court stated as to the time factor: "Only thirty minutes had passed since she was sexually assaulted by her father and Victim would have been under significant stress and emotional strain after having finally reported years of abuse by her father. The passage of time is but one factor to consider, and we do not believe the lapse of thirty minutes between the assault and Victim's statements to Sergeant Black precluded their admission under the excited utterance exception." *State v. Heath*, 433 S.C. 506, 516–17, 860 S.E.2d 673, 678 (Ct. App. 2021). The Applicant has failed to show deficient performance or prejudice due to his timely objection.

The Court also notes that after Victim testified, Sgt. Black was recalled as a witness to testify in more detail about the statements Victim made to him. Tr.p. 499-507. In that portion, defense counsel again objected to the testimony as hearsay and not an excited utterance. Tr.p. 499. The State urged that the statements were admissible under excited utterance and time and place information from the disclosure of the assault and previous testimony. Tr.p. 500. The State noted the testimony would go to a sexual assault by her father going on over years and this was the first time she had talked to law enforcement. Tr.p. 501, l. 3-10. In that portion, Judge McMahon concluded:

> THE COURT: I think it's admissible under several exceptions. Looking at *State v. Dennis*, 321 SC 413, the court indicates: We recognize three exceptions to the

> rule against hearsay that allows prior consistent statements of a witness to be admitted. First, in criminal sexual conduct cases when the victim testifies, evidence from other witnesses that she complained of the sexual assault is admissible in corroboration limited to the time and place of the assault and excluding details or particulars. That's 401 SE 2d 143. Second, *res gestae* or *excited-utterance* exception allows corroborative rape testimony without the time and place exception, *State vs. Schumpert*, 312 SC 502; third, would not apply in this case, though it would be admissible under res gestae. But, again, *Dennis* is testimony from a nurse at a hospital remote from the scene of where the incident occurred. Also, 803(1) and 803(2), I find there is testimony of excitement: Red eyes, crying, obviously upset. So it would be admissible.

Tr.p. 502-503. Contrary to the Applicant's statement, counsel sought to limit the ruling to allow time and place evidence. Tr.p. 503, l. 19-21. However, the trial judge held that time and place exception did not apply under *res gestae* or excited utterance, citing *State v. Schumpert*, 312 S.C. 502, 506–07, 435 S.E.2d 859, 862 (1993) ("It is a well-settled exception to the hearsay rule that in criminal sexual conduct cases when the victim testifies, evidence from other witnesses that she complained of the assault is admissible in corroboration limited to the time and place of the assault and excluding details or particulars.") and *State v. Dennis,* 321 S.C. 413, 468 S.E.2d 674 (Ct. App. 1996) (nurse's testimony as to what victim told her was admissible as part of *res gestae).* Tr.p. 503-504. Further, in *Schumpert*, the Supreme Court concluded that "appellant misapprehends *res gestae*. *Res gestae* is a separate exception to the hearsay rule which allows corroborative rape testimony without the time/place restriction. *See, e.g., State v. Harrison,* 298 S.C. 333, 380 S.E.2d 818 (1989); see generally 3A *Wigmore on Evidence* § 1139 (3d ed.). *State v. Schumpert*, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993), overruled on other grounds by *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016).

During Sgt. Black's testimony, he stated that he asked her if any sexual act had taken place that night and that Victim responded, "that in the past her father had physically forced her to perform oral sex on him and that he referred to that as giving him a couple of minutes" and "that that night she had used her mouth on his penis." Tr.p. 505, l. 20-p. 506, l. 2. This court finds related to that evidence counsel was not deficient inasmuch as he made a timely objection to cover this evidence in both sections of the testimony of Sgt. Black. Further, this evidence was set out in the decision of the appellate court in deciding it was admissible as an excited utterance. Deficient performance and prejudice have not been shown. Further, it is also noted that the appellate court concluded that the evidence presented was harmless error.

The Applicant next referred to the testimony of the Victim at Tr.p. 343, l. 1-12. PCR 73. In that portion Victim testified that Applicant told her that if she told anyone about the sex act, he would hurt her. "He said he would kill me or my mother, shave my hair off, sometimes he didn't seem to care if I threatened to tell, just say, yeah, tell people what I do for you or that they would take me away from my mother if I did." The Applicant claims in section 15/1 that this was hearsay and counsel should have objected. PCR 73. The Court finds that the Applicant is wrong in his belief that this is hearsay or the counsel was deficient in failing to object. The Applicant's statements to Victim are admissible under SCRE Rule 804 (3) statement against interest and as an admission by party-opponent under SCRE Rule 801(d)(2). *See State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998) (Murder Defendant's statement that Victim had insurance policies on his life, that killing Victim would allow Defendant's mother to collect on those policies, and that Defendant's mother intended to give him $100,000 of proceeds to start business, were admissible as "admissions" of party-opponent); *State v. Doctor*, 306 S.C. 527, 413 S.E.2d 36 (S.C.1992) (out-of-court statements against penal interest, made by an unavailable declarant, are admissible in both civil and criminal trials). The Applicant has failed to show Sixth Amendment prejudice by the failure to object to admissible statements to Victim.

The Applicant next makes reference in 15/1 to additional testimony by Victim on Tr.p. 356, l. 4-16, Tr.p. 357, l. 6-10 and Tr.p. 357, l. 20-22. He contends these were each hearsay and should have been objected to by his counsel. PCR 73-74. In Tr.p. 356, l. 4-16, Victim describes her communication to Margie by text about what was going on with her father of a sexual nature and that Margie took action and notified the police to come to Victim's home. Contrary to the assertion of the Applicant, these questions were not leading questions. The Applicant has failed to show prejudice by the admission of evidence from Victim that Margie notified police as a result of her text. Further, Margie testified at trial that she contacted Victim's mother, and her mother called the police, not herself. Tr.p. 475, l. 20-23. Sixth Amendment prejudice is not shown. It is uncontested that the police showed up at Victim's home that night.

The Applicant makes reference to Tr.p. 357, l. 6-10 of Victim's testimony concerning who directed her mother to take Victim to the hospital. In his pleading in 15/1, he contends not only that the evidence was hearsay, but also complained about the leading questions. PCR 73-76. This portion read as follows:

Q. And, ultimately, did you go on to the hospital that night for a sexual assault exam?

A. Yes. I went with my mother.

Q. And who directed that your mother take you to the hospital for a sexual assault exam?

A. I don't remember who exactly.

Q. It was police officers?

A. Uh-huh.

Q. Did that happen while they were still there at the scene?

A. Yes.

Tr.p. 357, l. 3-16.

The true test of whether a question is leading and therefore improper on direct examination is whether, as said by the Court, it suggests the answer. *State v. Cook*, 204 S.C. 295, 28 S.E.2d 842, 846 (1944). However, a case will rarely be reversed on ground that trial judge permitted leading questions, and then only if there has been a clear abuse of discretion resulting in prejudice to objecting party. *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985).

The trial court is vested with broad discretion to control the mode of interrogation and the presentation of evidence. *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir.1988). SCRE 611(c) provides, "leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." The use of leading questions when examining a child, *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985), cert. denied, 286 S.C. 127, 332 S.E.2d 533 (1985), is still permissible under the first sentence of subsection (c) which allows leading questions when "necessary to develop the witness' testimony." Moreover, "the extent to which the use of leading questions may be indulged or limited is a matter primarily for the discretion of the trial judge and an appellate court will intervene only if there is a clear abuse of discretion." *United States v. Durham*, 319 F.2d 590, 592 (4th Cir.1963); *United States v. Oladokun*, 166 F.3d 336 (4th Cir. 1998).

Failure to object to leading questions has been resolved as trial strategy not to be second-guessed by the courts. *Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993). *U.S. v. Bosch*, 914

F.2d 1239, 1246 (9th Cir. 1990) rejected a claim of ineffectiveness from failure to object, noting that the appellant made no claim that the evidence was inadmissible without leading questions so the attorney could allow the leading questions without objecting. Counsel could have refrained from objecting to brief leading questions for practical and humanitarian reasons recited in *Bonin v. Vasquez*, 794 F.Supp. 957, 969 (C.D. Cal. 1992), aff'd. 59 F.3d 815 (9th Cir. 1995). *See also Jackson v. Bradshaw*, 681 F.3d 753, 763-64 (6th Cir. 2012) (extent of use overstated and use proper where the witness is reluctant or evasive).

A failure to object does not constitnte deficient representation unless a sound basis exists for objection. *See Roberts v. Thaler*, 681 F.3d 597, 611 (5th Cir. 2012) ("[C]ounsel is not required to make futile motions or objections.") (quoting *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990); *Emery v. Johnson*, 139 F.3d 191, 198 (5th Cir. 1997) (a futile or meritless objection cannot be grounds for a finding of deficient performance); *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."). Even with a sound basis, however, an attorney may render effective assistance despite a failure to object when the failure is a matter of trial strategy. *See Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993) (noting a failure to object may be a matter of trial strategy as to which courts will not second guess counsel).

With this in mind, even assuming deficient performance in this general respect, any assumed error was not prejudicial because any objection would have been toward the form and not the substance of the question. The State would have then presumably been given the opportunity to rephrase its questions and present the substance of the same information to the jury using non-leading questions. *See State v. Torres-Orellana*, 2021 UT App 74, 493 P.3d 711, 723, aff'd, 2024

UT 46, 562 P.3d 706 (2021); *See, e.g., State v. Sayre,* 3d Dist. No. 9-12-25, 2013-Ohio-4108, 2013 WL 5347361, ¶ 56 (where "[a]ll the objection would have done would be to cause the State to rephrase the question * * * there is no reason to believe that the objections would have affected the outcome of the case").

The Court finds that even if the trial court had sustained the objections made, the substantive testimony would have still been elicited, the State would have merely had to rephrase the questions. Indeed, counsel never received a ruling on the objection because the State moved on with its questioning. Further, this fails also because there was testimony from the Victim and the SANE nurse that the Victim was at the hospital with her mother. Thus, the Court finds that the Applicant has failed to prove a reasonable probability that the outcome of the proceeding would have been different even if counsel had obtained a favorable ruling on his objection to the leading questions.

The Applicant's reference to Tr.p. 357, l. 20-22 concerns Victim's testimony that whether her parents were still romantically involved and she indicated "yes." The Applicant asserts that she would not know that and that it was hearsay, asserting in his pleading that he had no contact with Victim for three years. This evidence has slight relevance to the charges. The Applicant has failed to show prejudice by the failure to object to the question or answer.

In section 15/2, Applicant addresses initially Tr.p. 392, l. 22-25, which was Victim's testimony that her mother was currently with Applicant and depended on him financially by working with him. In his PCR testimony and pleading, Applicant contends that Victim does not know this, but only knew that her mother quit her other job. PCR 76. This Court finds that even if counsel had objected, the Applicant failed to prove prejudice based on this collateral issue. The Applicant contends that the evidence inferred that Applicant had control over her mother and alleges this is attacking his character. However, this evidence was of minimal value concerning the crimes he was charged with against Victim.

The Applicant in 15/2 also points to Tr.p. 442, l. 20- p. 447, l. 10 in the SANE nurse's testimony about whether it was a single event. In the hearing, Applicant complained that the evidence was hearsay that was not objected to by counsel. PCR 76. This testimony was addressed in 14/2 previously above which is incorporated by reference. The Applicant has failed to prove prejudice under *Strickland* for the reasons stated therein.

The Applicant also asserts in 15/2 concerns about counsel's failure to object to Tr.p. 456, l. 13- p. 460, l. 12. PCR 76-77. This portion addresses counsel Floyd's cross-examination of the SANE nurse. In his pleading, Applicant complains that counsel Floyd is offering hearsay statements by the SANE nurse in his questioning which the Applicant felt was inappropriate.

The record of counsel's performance in examination and cross-examination of witnesses may show preparation and knowledge of the case. *Tinsley v. Borg*, 895 F.2d 520, 532 (9th Cir. 1990); *U.S. v. Taylor*, 832 F.2d 1187, 1195-96 (10th Cir. 1987); *United States v. Payne*, 741, F.2d 887, 894, fn. 9 (7th Cir. 1984). The claims, however, have generally lost to the response that cross-examination is a matter of trial tactics. *U.S. v. Rodriguez-Ramirez*, 777 F.2d 454, 458 (9th Cir. 1985); *U.S. v. Murray*, 751 F.2d 1528, 1535 (9th Cir. 1985); *Bible v. Schriro*, 497 F.Supp.2d 991, 1046 (D. Ariz. 2007) (that a cross-examination tactic was unsuccessful does not translate to ineffective assistance), affirmed *Bible v. Ryan*, 571 F.3d 860 (9th Cir. 2009); *Gallo v. Kernan*, 933 F.Supp. 878 (N.D. Cal. 1996) (record showed tactical reason not to impeach crying assault victim witness with prior inconsistent statement, noting that impeachment is a matter of trial tactics per *Gustav v. U.S.*, 627 F.2d 901, 906 (9th Cir. 1980).

Cross-examination must be objectively unreasonable and not flawless; an attorney's decision about the extent of cross-examination and refraining from certain lines of inquiry is entitled to great deference. *Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000), cited also in *Brown v. Uttecht*, 530 F.3d 1031, 1036 (9th Cir. 2008). Under *Strickland*, a reasonable strategy could have been to impeach her testimony by introducing inconsistencies in the statements she had already provided even if it ultimately added new details to her testimony. *See* 466 U.S. at 690, 104 S.Ct. 2052 (instructing courts to assess whether counsel has functioned to "make the adversarial testing process work"). An impeachment strategy serves a fundamental purpose within the adversarial process: helping judges and juries test a witness's truth by providing them the opportunity to assess the "possible biases, prejudices, or ulterior motives of the witness." *Davis v. Alaska*, 415 U.S. 308 at 316, 94 S.Ct. 1105 (1974); *see also Harris v. New York*, 401 U.S. at 225, 91 S.Ct. 643 (1971). See *Hartman v. Yost*, 146 F.4th 463, 476–77 (6th Cir. 2025); *Yarbrough v. Johnson*, 490 F.Supp.2d 694, 738-39 (E.D. Va. 2007) ("[a] hindsight review of any cross-examination will unquestionably reveal an opportunity to ask one more question or highlight one more point"); *see Strickland*, 466 U.S. at 689 ("it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable"). Therefore, trial counsel's strategic decisions during cross-examination are "virtually unchallengeable." *Moss v. Hofbauer*, 286 F.3d at 864 (6^{th}. Cir. 2002) (emphasis added). *Cf. Briggs v. State*, 421 S.C. 316, 333, 806 S.E.2d 713, 722 (2017) (open-ended cross-examination under the facts was deficient); *Huggler v. State*, 360 S.C. 627, 635, 602 S.E.2d 753, 758 (2004), abrogated by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (prejudice not shown by limited cross-examination).

As stated before, this Court is aware that impeachment of Victim by non-disclosure and inconsistent statements was a hallmark of the evident defense strategy. Specifically, counsel wanted to emphasize that in the SANE nurse's testimony Victim denied prior incidents occurring with the Applicant. Counsel, in that strategy, introduced the SANE report to support the inconsistent statement evidence. This Court, as noted above, finds that the Applicant has failed to prove prejudice by the manner counsel utilized the inconsistency in his closing argument.

The Applicant next points out counsel's questioning of the SANE nurse on cross-examination about whether Victim had indicated to her that Applicant had ever penetrated her vagina with his penis and that she was not sexually active within the past seven days, citing Tr.p. 462, l. 10-20. The Applicant complains that by introducing this testimony he made the alleged improper testimony harmless error in his pleading. The Applicant ignores the evident strategy was to win at trial by showing the inconsistent statements or evidence that the crimes did not happen. This was how a reasonable counsel would act. In other words, the Applicant failed to prove that no reasonable counsel would have acted as counsel Floyd. This Court finds that the answer to each question was consistent with the Applicant's defense. The Applicant refers to what he contends are inconsistent answers on the SANE form. PCR 77-78. The Applicant failed to show either deficient performance or prejudice by this cross-examination inquiry.

The Applicant next in 15/2 refers to Tr.p. 463, l. 19 of the SANE nurse's report that Victim indicated to her that she was a virgin in the prosecution's redirect by the State without objection. PCR 78-79. He complained that there is no test for virginity, implicitly that not only was the testimony hearsay, but that the witnesses lacked knowledge under SCRE Rule 602 on whether Victim was a virgin. PCR 78. Applicant has failed to prove deficient performance or prejudice by the failure to object to the evidence that Victim was a virgin and never had sex before by her self-report to DeGuzman. The evidence was admissible under the medical exception to assist in the diagnosis of bacterial vaginosis and Gardnerella vaginalis that counsel Floyd had brought up in his cross-examination, and the SANE nurse testified that someone who is sexually inactive can have it. Tr.p. 463, l. 10-17. SCRE Rule 803(4). *State v. Simmons*, *supra*. The evidence about a collateral issue was not proven prejudice under *Strickland* related to a lack of penile vaginal intercourse. The admission of this evidence after counsel had opened the door does not to a reasonable probability undermine confidence in the outcome.

In his next *pro se* specification in 15/2, Applicant refers to Tr.p. 464, l. 150 p. 465, l. 19, PCR 79. Applicant complains about the reference to the ten years response in the SANE nurse's re-direct examination. This issue was addressed and set forth above in an earlier part of this order in section 14/2 concerning similar testimony at Tr.p. 443. The conclusion that Applicant failed to prove deficiency due to the to objection is incorporated herein by reference. In the present challenged part on the redirect of DeGuzman concerning counsel asking about the threats on cross-examination, DeGuzman denied that she was trying to get the course of events over ten years and clarified that the questioning from her protocol was intended to only address the night of the incident. The Applicant complains that Victim did not tell the nurse when the assault happened and suggests the inquiry was improper. This Court finds that counsel was not deficient in failing to object to this redirect examination because it was a direct response to the Applicant's defense counsel's questioning about assertions that he had not done anything before what he did that night. Further, there is a failure to prove that had counsel objected, a reasonable probability that the result of the proceeding would have been different by this appropriate redirect examination.

The Applicant's additional referenced area in 15/2 is the testimony of Margie Branham at Tr.p. 471, l. 6-8, p. 472, l. 8-10, p. 473, l. 18-20, and Tr.p. 474, l. 2-5. PCR 80-81. The Applicant complains in this testimony that Margie is expressing that Victim did not like to be alone with her father when her mother was working nights filling in for someone else, which he contends is hearsay, included an incorrect statement, and gave a confusing statement about the working times of Victim's mother. PCR 80. In his pleading, Applicant contended his wife worked the first shift. This appears to be a suggestion that counsel should have objected under Rule 602 (lack of knowledge) or hearsay. Evidence that Margie learned from the Victim that she did not like to be alone with Applicant at night is admissible under the state of mind exception to hearsay under Rule 803(3). In his testimony, the Applicant apparently wanted testimony from what the evidence rules does not allow – the reason for the fear belief from Margie. PCR 81.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801, SCRE. Rule 803(3), SCRE, provides that a statement "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed" is not excluded by the hearsay rule. Our supreme court has held that, "while the present state of the declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not." *State v. Garcia*, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999). The court cautioned that "[i]f the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition—'I'm scared'—and not belief—'I'm scared because [someone] threatened me.' " *Id.* (*quoting United States v. Cohen*, 631

F.2d 1223, 1225 (5th Cir. 1980)).

In *Garcia*, appellant claimed the fatal shooting of his girlfriend was an accident. *Id.* at 73, 512 S.E.2d at 508. The victim's grandmother testified that on the day before the shooting, the victim indicated she had a bruise on her leg because appellant kicked her. *Id.* The victim's cousin testified that a week before the shooting, the victim stated appellant threatened to kill her if she ever left him. *Id.* at 74, 512 S.E.2d at 508. Our supreme court held the testimony was improperly admitted under Rule 803 stating, "While their testimony presents circumstantial evidence of the decedent's fear of appellant and concern for her safety, the testimony improperly reveals the reason for her state of mind (i.e., that appellant had kicked and threatened to kill her)." *Id.* at 76, 512 S.E.2d at 509.

State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006) involved a Defendant accused of moving in with his elderly mother and then killing her. 367 S.C. at 282–84, 625 S.E.2d at 643–44. One witness testified that the victim's demeanor changed from cheerful to unhappy and miserable once the Defendant moved in with her. *Id.* at 285–86, 625 S.E.2d at 644–45. Another witness stated that in the weeks before the crime, the victim became anxious and nervous and asked that no one touch anything in the Defendant's room because she was afraid. *Id.* at 286, 625 S.E.2d at 645. The supreme court held the witnesses' statements were properly admitted under *Garcia* because they did not include a reason for the victim's fear. *Id.* at 287, 625 S.E.2d at 646. The court also stated, "To read *Garcia* as *Weston* suggests would require us to hold that a witness may testify to the fact that the decedent was afraid, but not that the decedent was afraid of the Defendant. This is simply too constrained a reading of *Garcia*." *Id.* at 287–88, 625 S.E.2d at 646. Alternatively, the court noted that even if the testimony had been improperly admitted, *Weston* had not been prejudiced because two other witnesses gave similar testimony without objection. *Id.* at 288–89, 625 S.E.2d at 646. See also *State v. Hughes*, 419 S.C. 149, 155–56, 796 S.E.2d 174, 177–78 (Ct. App. 2017) (harmless error when reason for fear improperly given by witness).

In addition to concluding that counsel was not deficient in failing to object to the state of mind testimony, even if found inadmissible, the Applicant had failed to prove prejudice. The reasons for the fear were not given by Margie in the context of her general statement of Victim past concern. There is no reasonable probability on the basis of this record that the result of the proceeding would have been different.

In the next portion, the Applicant addresses in 15/2 alleged hearsay testimony from Margie at Tr.p. 472, 8-10, in which, after a hearsay objection by counsel that was sustained concerning what she learned in the text from Victim, Margie was asked whether she had become concerned and she stated she was. PCR 81. This is not hearsay because it goes to Margie's own personal concern which is not hearsay. Counsel was not deficient and prejudice was not proven.

In the next portion of 15/2, the Applicant refers to Tr.p. 473, l. 18-20 when Margie was asked in the conversations when did she learn that Victim was in danger, which resulted in Margie calling the Victim's mother. The Applicant contends that the knowledge of the danger is hearsay. This Court finds that this evidence is also admissible as state of mind for the reasons set for previously under *Garcia* and *Weston* and possibly other exceptions including present sense impression under Rule 803(1) which may have been triggered.[52] Prejudice under Strickland has not been proven by

[52] See Rule 803(1), SCRE (providing "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is not excluded by the hearsay rule); *State v. Prather*, 429 S.C. 583, 611, 840 S.E.2d 551, 565 (2020) ("To qualify as a present sense impression[,] '(1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event.' " (quoting *State v. Hendricks*, 408 S.C. 525,

this limited evidence.

In his final specification in 15/2, the Applicant in his pleading referred to Tr.p. 474, l. 2-5 when Margie was asked, "the danger you learned she was in, was that happening at that time or an earlier time or another time" and Margie responded, "it was happening at the time she texted me." For the reasons stated just prior this evidence was admissible under the exceptions to hearsay cited above under Rule 803(3) and possibly Rule 803(1). The Applicant further failed to prove prejudice based upon the overwhelming evidence of the April 26 event including Victim's own testimony and the forensic evidence including the DNA evidence recovered that evening. This evidence included Victim's testimony that she texted with her aunt (Margie). Tr.p. 355-356, 471.

The Applicant continues in section 15/3 to assert that Margie Branham's testimony at Tr.p. 474, l. 17- p. 475, l. 22 should have been objected to by counsel. Therein, witness Branham testified that she had called Victim's mother and learned that her mother called the police. The record shows that counsel's objections were sustained by the trial court based upon hearsay to Margie's testimony that Victim was in her living room when she was texting her and that her mother called the police and had met her at the house. Tr.p. 474, l. 9-13; $74, l. 20-25. Counsel properly objected and the objections were sustained so deficiency has not been shown. Similarly, prejudice has not been proven by this evidence which claimed would have been bolstering and corroborating.

He next refers in 15/3 to testimony in Tr.p. 478, l. 24- p. 479, l. 19, claiming that counsel should have moved for a mistrial by the amount of hearsay testimony from Margie Branham. In this testimony, Margie testified Victim's feeling toward her father and was asked to describe those feelings. Tr.p. 479, l. 1-17. At that point counsel objected to hearsay. Tr.p. 479, ll. 5-9, 18-19. In

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533, 759 S.E.2d 434, 438 (Ct. App. 2014))). See id. ("To qualify as a present sense impression: '(1) the statement must describe or explain an event or condition ....' " (*quoting Hendricks*, 408 S.C. at 533, 759 S.E.2d at 438)).

the discussion on the objection, the trial judge sustained the hearsay objection to the extent that Margie cannot testify to what Victim told her, only about what she observed. Tr.p. 480-481.

Judge McMahon further described examples of observations people have which can reveal their feelings toward each other generally and not by what someone says. Tr. p. 480-482. At that point, counsel Floyd moved for a mistrial because he opined that Judge McMahon had advised the State how to introduce the evidence. Judge McMahon denied the motion for a mistrial relying upon *State v. Nicholson*, 366 S.C. 568, 576–77, 623 S.E.2d 100, 104 (Ct. App. 2005).[53] Tr.p. 483 - 489. Judge McMahon further indicated that he did not give instructions to the Solicitor but indicated the manner a witness can have personal knowledge under the Rule. He expressed his concern about making an evidentiary ruling before he is aware of what the actual evidence will be that is proffered. Tr.p. 487. Judge McMahon also noted that *Nicholson* favorably cited an Illinois

[53] Judge McMahon in in denying the mistrial motion, read the following into the record:

> We find no error in the trial judge's intervention in this case. In *State v. Gaskins*, the supreme court, quoting *State v. Anderson*, reiterated the following "duties and limitations" that a trial judge must observe while conducting a trial:
>
> > A grave responsibility rests upon a trial judge. It is his duty to see to it that justice be done in every case, if it can be done according to law; and, if he thinks that the attorney for either party, either from inadvertence or any other cause, has failed to ask the witnesses the questions necessary and proper to bring out all the testimony which tends to ascertain the truth of the matter under investigation, we can see no legal objection to his propounding such questions; but, of course, he should do so in a fair and impartial manner, and should not by the form or manner of his questions express or indicate to the jury his opinion as to the facts of the case, or as to the weight or sufficiency of the evidence.
>
> In our view, the trial judge did not exceed the limits recognized in *Gaskins*. The jury was absent from the courtroom when the exchange at issue took place and thus could not have been affected by the trial judge's remarks. Moreover, the trial judge, when explaining to counsel what he required to lay a foundation, did not show any favoritism or otherwise indicate he had an opinion about the case. We therefore hold that, contrary to Nicholson's argument, the instructions did not result in the trial judge's assumption of an adversarial role in the case.

State v. Nicholson, 366 S.C. 568, 576–77, 623 S.E.2d 100, 104 (Ct. App. 2005). Tr.p. 485-486.

case as supportive of conclusion in footnote 11.[54]

An *in camera* proceeding then occurred with Margie testifying in response to the proffered question and counsel Floyd without the objection he previously had to the inquiry:

> BY MS. USRY (IN CAMERA):
> Q. Just very briefly on the point that we are now, I'm going to ask the question again, Margie. Are you aware of whether ["Victim"] -- excuse me, over the course of your years, did you have the opportunity to become aware of ["Victim"]'s feelings towards her father?
> A. Yes.
> Q. And did that knowledge play any part, if at all, in reaching out to ["Victim"] on April 26th of 2015?
> A. Yes.
> MS. USRY: Your Honor, that's the extent that I'm going to go into that, and then I'm going to move on to another issue.
> THE COURT: Mr. Floyd, questions?
> MR. FLOYD: No questions, Your Honor.
> THE COURT: Objections, Mr. Floyd?
> MR. FLOYD: Not to that.
> THE COURT: I think that's admissible.

Tr.p. 490, l. 4-25.

In his PCR testimony related to this specification, Applicant states that Margie had not spent that much time with them, especially with him, and only came over to spend time with her sister and her daughter. PCR 82. He also felt this pointed out a problem with the joinder of the

[54] In footnote 11 of the *Nicholson* case, the following was referred:

> Ft. 11 See People v. Robinson, 236 Ill.App.3d 313, 177 Ill.Dec. 244, 603 N.E.2d 25, 29 (1992) ("A trial judge may remind the prosecutor of the necessity to prove additional elements, examine witnesses to clarify material issues or eliminate confusion, and advise counsel on the proper phrasing of questions."); Village of Lodi v. McMasters, 31 Ohio App.3d 275, 511 N.E.2d 123, 124 (1986) ("During the trial, a judge may, in the interest of justice, act impartially in developing facts germane to an issue of fact to be determined by the jury."); 23A C.J.S. Criminal Law § 1180, at 51 (1989) (noting the trial judge "is the governor of the trial" and it is therefore "his duty[ ] to participate directly in the trial and to facilitate its orderly progress[ ] and insure that the issues are clearly presented to the jury").

State v. Nicholson, 366 S.C. 568, 577, 623 S.E.2d 100, 104 (Ct. App. 2005). Tr.p. 488.

charges. He claimed no one knew what Margie was talking about. PCR 82. [55]

As to this section, this Court finds that deficient performance was not shown. Applicant's counsel successfully objected to potential hearsay which was sustained by the trial court. He then made a motion for mistrial that was properly denied, under *Nicholson*. This Court finds as a result of *the in camera* hearing, the ultimate evidence set forth in Tr.p. 490 which set a basis for calling the Victim, did not include inadmissible evidence and did not require a mistrial. Sixth Amendment prejudice has not been proven.

The Applicant in 15/3 next asserts testimony at Tr.p. 491, l. 16-p. 492, l. 12 is irrelevant testimony. In that section, Margie testified that prior to April 26, 2015, Victim and Rose Heath lived with her from August 2014 to October 2014 when they moved out into the home on Nazareth Road with the Applicant. In his pleading, he claims this is inadmissible under Rule 404(b) and Rule 403. No objection was made. The Applicant claimed that Margie did not have all the knowledge because she did not know that he had not bought the house on Nazareth yet. PCR 84. He claimed that counsel did not have the knowledge either and did not address it in court. PCR 84. This Court finds that deficient performance has not been proven. The Applicant failed to prove that correcting the limited knowledge about property ownership would have created a reasonable probability that the result would have been different.

The Applicant continues his speculation in referencing 15/3 Tr.p. 492, l. 15 – p. 493, l. 10

[55] During the PCR hearing at this portion, Applicant's PCR counsel asked if he ever had a discussion with his counsel about the right to testify. PCR 83. The Applicant testified that they did at the end of the trial right before the State closed. PCR 83. Applicant indicated that counsel Floyd said you could testify or you don't have to. PCR 83. Applicant confirmed that the judge did ask him about it. The Applicant testified in this proceeding that he did not testify because he felt like they weren't doing what they should be doing and that it would make me look really bad because there was so much stuff in there that should not have been in there. He stated that he did not feel confident enough. PCR 83.

and Tr.p. 493, l. 11 – p. 494, l. 5. In his pleading he contends that each of these sections were not relevant and violated Rule 404(b). In his testimony he contends that Margie did not know anything about DSS matters. PCR 84. Applicant testified that Margie knew Applicant and Rose were going through some stuff that did not involve the children and was not a party. Applicant stated that she may have written letters to the governor when the children were taken away. PCR 84. The Applicant claimed the testimony attacked his character. PCR 85. He stated the DSS was still involved after they got the children back and moved to Peachland and understood that DSS had closed out their file at that time. PCR 85. The Applicant stated that he had a "pretty substantial drinking problem and "they" were trying to do everything to get him to stop. PCR 85. Applicant testified he got the children back in May 2005. PCR 85. He noted the indictment was prejudicial because Solicitor Mayes had impeached his mother (defense witness Selma Heath) when we did not have custody at that time. PCR 85-86.

In the PCR hearing, the Applicant was shown a DSS order dated May 26, 2005 which was introduced as Applicant's Exhibit 1. PCR 86. The Applicant testified that the time period of May 2005 was significant because of when the abuse occurred and they impeached his mother with a doctor's report in 2004 and spoke about Victim urinating. He claimed it sounded real bad and like he did something but claimed he did not have custody of the kids at that time. He asserted that the DSS Order was proof. PCR 86-87. He claimed at that period the children were staying at his parents' house, and he claimed his visit was limited to when he saw them at McDonald's with his parents. He confirmed that, according to the May 26, 2005 Order, he got the children back a few days later from his parents when he claimed to move into Peachland after they moved out of an apartment in a questionable environment. PCR 89.

The portions of the testimony from Margie in section 15/3 involved Margie testimony that Victim had medical issue with her menstrual cycle and was on a birth control pill, that she was aware that DSS was involved with Applicant and his wife, but it had nothing to do with Victim, that Victim currently lived with Margie, that Victim's mother did not live with Margie and currently lived with Applicant and remained married, and thought her sister was unemployed at the moment and therefore dependent on the Applicant. Tr.p. 492-494.

This Court finds that the evidence of DSS involvement did not create a Rule 404(b) issue because it explained why they were living with Margie the way the evidence was presented to the jury. He also complains that counsel failed to object to the comments about Rose living with him currently and claimed how would the witness know where her sister lived at the time of the trial. However, he did not say that information was wrong, only questioned the knowledge of the source for the collateral issue, again suggesting a Rule 602 issue, but failed to prove the response was wrong by credible evidence. This burden of proof related to these issues is upon the Applicant to show both deficient performance and prejudice from the failure to object. He failed to show that had counsel objected to the evidence of the collateral issues, the result of the proceeding would have been different.

Defense counsel bolstering state witnesses testimony by asking exact same questions the State did of the same witnesses, just to have their testimony repeated (16)

In section 16/1, the Applicant refers to Tr.p. 386, l. 12- p. 387, l. 11 where he contends defense counsel questions Victim about the April 26 incident and has her describe it again on cross-examination. The Applicant claims that this was improper because it bolstered the earlier testimony. In his pleading, Applicant claims this showed counsel was unprepared and it was prejudicial. The Applicant testified that counsel Floyd kept repeating what the state witness had said and got the same answer. PCR 89. The Applicant claimed it was not trying to get new information. The Applicant claimed that counsel did not tell him what the strategy was and Applicant opined that counsel Floyd just took whatever the State questioned the witness about as the truth. PCR 90.

This Court has already noted that the clear strategy was based upon Victim's inconsistent statements about this crime, which would include Victim's demeanor and presentation as a witness. This Court notes that counsel's strategy in the recounting of the event is set forth with counsel's question following the restatement:

Q. And then there was a period of time where you finally got up and left; is that correct?

A. Yes.

A. And you went and locked yourself in your bedroom?

Q. **The question I have for you is, if it was as easy, after you got up from there and went to go do your chores, why didn't you just go and lock yourself in the bedroom then?**

A. Because he was still persistent about going into the bedroom.

Q. But he was still persistent back then, according to you, that he wanted you to turn over; isn't that correct?

A. Yeah, but he was almost done anyway, what it seemed, so I just left.

Q. You just went and locked yourself in the bedroom , and he didn't bother you anymore, did he?

A. No.

Tr.p. 388, l. 22-p. 389, l. 10 (*emphasis added*).

This Court finds that counsel's strategy evident from the record was a reasonable strategy.

It gave context to the defense strategy that Victim could have prevented the whole April 26 crime if she had just locked herself in the bedroom initially. Although the strategy was unsuccessful, the Applicant has failed to convince this court that no reasonable counsel would not have repeated similar testimony from direct examination to make this point clearer. Even if counsel is deemed deficient, the restatement of the Applicant's version does not create *Strickland* prejudice. There is no reasonable probability that if counsel had not had victim discuss the April 26 event, the result of the proceeding would have been different. The Applicant failed in his burden of proof.

Threats to Victim (17)

In this portion, the Applicant refers to the *in camera* testimony of Victim concerning the Rule 404(b) showing of bad acts under *State v. Kirton*, 381 S.C. 7, 31, 671 S.E.2d 107, 119 (Ct. App. 2008) ("[W]here there is a pattern of continuous conduct shown, that pattern clearly supports the inference of the existence of a common scheme or plan, thus bolstering the probability that the charged act occurred in a similar fashion.").[56] The Applicant point again to Tr.p. 240, l. 6-9 of the in camera testimony when counsel Floyd asked Victim the following:

Q. On the night of -- when the police were called April 2015, you're not saying that your father threatened you are you?

A. Not verbally.

Q. In fact, he just was trying to get you –in fact he told you had to do housework, did he

[56] *See State v. Dinkins*, 435 S.C. 541, 555, 868 S.E.2d 181, 188 (Ct. App. 2021) (holding that prior instances of the Defendant's "repeated inappropriate conduct" towards the victim over a three-year period were admissible as evidence of "motive and intent" under Rule 404(b) because the prior conduct was "probative as to a pattern of grooming"); *id.* at 556, 868 S.E.2d at 188 (finding "[t]he charged and uncharged acts ... [were] logically connected within the pattern of grooming, which included an escalation of the conduct towards [the same] child"); *State v. Clasby*, 385 S.C. 148, 156-57, 682 S.E.2d 892, 896 (2009) (holding "prior incidents of sexual misconduct by Clasby [that] reveal[ed] the same illicit conduct ... prior to the ... indicted offenses" demonstrated a pattern that comprised evidence of a common plan or scheme).

not?

A. Yes, when I said no.

Tr.p. 240. L. 6-9.

The Applicant complains that counsel should have used this testimony from the Applicant when he was going through the SANE report with the SANE nurse or when he was examining Victim in front of the jury to impeach other statements she made related to threats. The Applicant testified that counsel should have followed up in the *in camera* proceeding questioning as to how Applicant had threatened her, if not verbally. PCR 90.[57] Applicant asserts that there were situations when Victim stated that if she did not do something he would refuse to take her to school or pick her up, which he claimed he would rarely do because he was driving a dump truck and pulling a woodchipper in an 18-foot trailer. PCR 90-91. The Applicant questioned, how telling his daughter to do homework or the dishes was coercion that he had to come to court for. Tr.p. 91. The Applicant felt that this was not covered by the defense on cross-examination. The Applicant testified that he told counsel Floyd he did not pick up Victim from school and that counsel could have addressed it by asking her how often her father picks her up. However, the Applicant did clarify that he did pick her up "every now and then" if Rose went to work because he left later than she did. PCR 90-91.

The Applicant seeks to change the context of the questioning which counsel limited to the night of April 26, not the other incidents in her life. Further, the assertion that he rarely took her to school was qualified by his assertion that he did take her every now and then when his wife went to work because she left earlier than he did. This Court finds his inconsistent answers bring

[57] This testimony was related to that night. During the trial Victim testified about the Applicant's verbal threats to kill Victim and her mother if she told anyone about their sexual conduct. Tr.p. 338, 343.

into question the reliability and credibility of his responses. The Court must find that he failed in his burden to show deficient performance by not asking Victim about how often her father took her to school to reveal or impeach the breadth of his earlier threats.

As this Court has stated throughout, the decisions about what questions to be asked in examination or in cross-examination falls within the presumption of a competent performance as a strategic decision under *Strickland.* The Applicant pointed out in the SANE nurse's testimony related to threats that she was told by Victim, "no threats of harm, but other types of statements such as do this or I won't pick you up at school or something like that." Tr.p. 459, l. 9-13. The Applicant has failed to show deficiency on counsel's part by not asking these questions when counsel's focus in the defense throughout was on inconsistent and delayed disclosures. The Applicant has failed to show this Court a reasonable probability that the result would have been different if the further questions about school, homework and chores related to "non verbally" threats would have been presented differently by the defense.

Fabricated Evidence on the Part of the Solicitor (18)

In section 18, the Applicant contended that the Solicitor was "fabricating evidence" and that counsel should have objected. In his pleading, he initially points to the *in camera* testimony of Victim on cross-examination by counsel Floyd on whether Applicant had ejaculated and she had stated "not that night" in reference to April 26. Tr.p. 204, l. 3-5.[58] He complains that in her

[58] This Court finds that in Victim's testimony before the jury, she testified that he had previously ejaculated in her hand, on her body, into a napkin, and into her mouth. Tr.p. 342. She testified that he did not ejaculate the evening of April 26 because she got up and left and then locked herself in her bedroom, leaving Applicant in his bedroom which had a bathroom. Tr.p. 354. However, she clarified that she did not know if he ejaculated or "wiped off" that night. Tr.p. 355. Counsel cross-examined Victim and confirmed that she said he had not ejaculated that night. Tr.p. 387-388. SANE nurse DeGuzman in her discussion asked Victim about ejaculation that night and she stated no. Tr.p. 445, 460. However, the SLED forensic serologist noted that even if there was no ejaculation, specimens could test positive for pre-ejaculation fluid and get a positive result. Tr.p. 545. However, there was no positive test for

closing argument she kept referring to him going into the bathroom and wiping off. PCR 92-93. This Court reviewed the record, and his complaint has no credibility. In her closing statement, the solicitor argued consistent with the evidence as follows:

... And then he rubbed himself on her, his genitals to her genitals repeatedly, for what seemed a long, long time. And then, as she stated to that SANE nurse, **he wanted to keep going and said something to the effect of, she could finish him off. She leaves. We know he's got a bathroom in bis room.** From there, she doesn't know what happened. **She never described ejaculation,** just everything up to that point.

Tr.p. 690-691.

This Court finds that the prosecutor's comments based upon the Victim's testimony and the SANE nurse's testimony were reasonable inferences based upon the testimony. As stated previously, under *State v. Caldwell*, the State is allowed to argue its version of the facts and reasonable inferences. Counsel was not deficient in failing to object to the closing argument. The Applicant's characterization of fabrication is without any credible support and rejected by this Court. Similarly, there is no Sixth Amendment prejudice shown from counsel failure to object based upon the existence of similar evidence in the record.

In his next claim, the Applicant refers in 18/1 to Tr.p. 267, l. 18-21 from the *Jackson v. Denno in camera* proceeding when the prosecutor inquired of Deputy McCann about what the time was on the *Miranda* form in which the Applicant agreed to waive his rights and the deputy responded 2:02 a.m. The Applicant testified that it is not true that he waived his rights. He claimed that if the defense had called him in the hearing, the result would have been different. In his PCR

semen. Tr.p. 554. However, testimony was also that the tests do not always show the presence of pre-ejaculate because it can be a mixture. Tr.p. 556.

testimony, the Applicant claims that he did not sign the bottom portion of the *Miranda* advice statement, although the top portion was signed. PCR 94-96. He claimed that he did not agree to speak with them, which he claims is supported by the fact that it was not signed in the other space on the form. The Applicant introduced the Advice of Rights form which was dated at 2:02 am. The Applicant contends this should have been brought out in the *in camera* hearing by his lawyers and they did not do it. PCR 95-96. Applicant's Exhibit 2. (Advice of Rights).

This Court finds that during the *Jackson v. Denno* hearing the Advice of Rights form was introduced as Court's Exhibit 3 as when Deputy McCann had the first conversation with Applicant when the Miranda warnings were formally given. Tr.p. 50-51. The testimony confirmed that it was Applicant's signature in the form which was dated 2:20 a.m. on April 27, 2015. Tr.p. 51. After going over the form and the individual portions of the *Miranda* rights, and that he witnessed the Applicant's signature confirming that he had read the statement of his rights and understood them, the prosecutor then asked:

Q. Now at the bottom, there is a waiver of rights. Can you tell me whether or not he ***verbally agreed*** to speak with you?

A. He did.

Tr.p. 54, l. 11-14. (emphasis added) (Court exhibit 3 for identification in the *Jackson* hearing). Tr.p. 52.

In her argument in the *Jackson v. Denno* hearing, the State corrected noted the written and verbal distinction related to the Miranda form:

> MS. MAYES: Your Honor, in Court's Exhibit 3, we have the Advice of Rights form, which Detective McCann has indicated was initialed by Mr. Heath as to each one of the rights. This occurs at 2:02 AM on 4/27/15, so approximately two and a half hours after the first officer would have arrived at the scene. It is also signed by

> Mr. Heath.
>
> Detective -- or Sergeant McCann also indicated he then **verbally waived his rights and agreed to speak with her** regarding the reason she was there and gave response to certain questions that she posed such as what happened, where were you, where was ["Victim"].

Tr.p. 61, l. 23-p. 62, l. 10. (emphasis added).

In the trial court's conclusion on the *Jackson v. Denno* hearing, Judge McMahon noted the unsigned portion in his conclusion when he had Court Exhibit 3, the advice of rights form before him acknowledging the unsigned portion:

> Also, the fourth sentence on the top part of the Advice of Rights form indicates: If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering questions at any time until you talk with a lawyer. That is also initialed.
>
> It appears a signature -- it appears -- I've never seen his signature before, but the last part of it appears to be Heath where he indicates he has read his statements of rights and understands them. ***I note the form has not been signed as a waiver of his rights by Mr. Heath nor anyone else.*** The officer, of course, testified that he did waive his rights and agreed to talk with him -- or with the officer.
>
> I take into account the totality of all the circumstances that there were six armed police officers at the location, 1746 Nazareth Road, which has been described as a single-wide trailer home, take into account the manner of Mr. Heath's dress; I take into account that he was led out to Officer McCann -- or escorted by another officer, placed in the front passenger seat, and there was another officer in the back seat.
>
> If I recall the testimony correctly, or at least by my notes, it indicates that at that time, he was not under arrest and was not handcuffed. The first task the officer testified she performed was the Advice of Rights; that although Mr. Heath smelled of alcohol, he appeared to -- as she saw him walk towards her car, his gait was fine, speech was fine, appeared to understand, speech was not slurred in any manner.
>
> I don't know that there's any coercion, threats or intimidation, even in the presence of armed officers and being placed in the front of a police vehicle. That may be a fact and consideration to be taken into account by the jury, but I do not think any of those facts and circumstances lead to the conclusion that whatever statements given were involuntarily given by preponderance of the evidence. And further, by the preponderance of the evidence, the statement was freely, voluntarily, knowingly, and intelligently made.

Tr.p. 66, l. 20-p.68, l. 14. (*emphasis added*).

Similar testimony from Sgt. McCann was also presented to the jury about the advice of rights and *Miranda* warnings and the waiver. Tr.p. 519-522. In front of the jury, the following occurred:

> If you decide to answer questions now without a lawyer present, you will still have the right to stop answering questions at any time. You also have the right to stop answering questions at any time until you talk with a lawyer. And then beneath that, it says: I have read this statement of my rights and I understand what my rights are.
>
> Q. And does it contain his signature at any location?
>
> A. It does. Down at the bottom under where it says I have read this statement of my rights and I understand what my rights are, his signature appears.
>
> MS. MAYES: This would be State's 26 for evidence, Your Honor.
>
> THE COURT: Mr. Floyd?
>
> MR. FLOYD: No objection, Your Honor.
>
> THE COURT: State's 26 in evidence without objection. (State's Exhibit No. 26 admitted into
>
> evidence.)

Tr.p. 519-520.

In addition, concerning the decision to voluntarily speak with McCann and the information on the form, the following occurred:

> Q. I'm going to start here at the top. What time is this?
>
> A. 2:02 AM.
>
> Q. And as we look here along each of the rights, what are we seeing here?
>
> A. Mr. Heath's initials.
>
> Q. And where it says I have read this statement of my rights and I understand my rights, whose signature is contained here?
>
> A. William Heath.
>
> Q. All right. Now, did he appear to understand your communications with him?
>
> A. He did.
>
> Q. Was there any evidence that he had consumed alcohol?
>
> A. I could smell a little bit of alcohol on his breath, but he was coherent, his speech wasn't slurred; I could understand him perfectly fine, he could understand me.
>
> Q. Now, in addition to the written waivèr, can you tell us whether or not he agreed to speak with you **verbally**?
>
> A. He did.
>
> Q. And, ***verbally***, did he waive any rights?
>
> A. He did.
>
> Q. Do you have with you any notations regarding that communication with him?

> A. I do. **After I gave Mr. Heath *Miranda*, I informed him of the allegations that had been made against him that night.** Mr. Heath said that he did not know why ["Victim"] would say something like that. He said he loved both of his children, would never do anything to hurt either of them. He said that night he had talked to Theresa about helping out more around the house because she stays shut up in her bedroom. I asked him where they had had that conversation and he said they had been sitting on the couch. I asked him what happened after that. He said he had gone to his bedroom and Theresa had gone to her room. I then asked William if he had been watching porn on his iPad that night and he said he does watch porn on the iPad sometimes, but he didn't directly answer me as to whether he had watched it that night or not.

Tr.p. 520, l. 25 - 522, l. 19. Sgt. McCann stated he specifically asked him about that night, and Applicant gave direct answers about that night. Tr.p. 522, l. 20-25. On cross-examination, counsel Floyd confirmed that Sgt. McCann questioned Applicant that night after he had been advised of his rights. Tr.p. 527, l. 15-21. Importantly, counsel developed that in the discussion, Applicant denied that he did anything wrong and fully cooperated with him. Tr.p. 527-528.

This Court finds that Applicant has failed to show that the prosecution was fabricating that Applicant waived his rights. The trial judge was aware and emphasized that the portion about voluntarily waiving his rights had not been signed. However, the evidence presented was that the Applicant verbally waived and agreed to speak. Although defense counsel did not point out the lack of a second signature, it is not a requirement under *Miranda*. The trial judge found the evidence of a verbal waiver and willingness to speak was supported in the evidence he received.

The Applicant speculates in his pleading that had he been called to testify the result of the *Jackson v. Denno* hearing would have been very different. However, his speculation is not supported by any credible evidence that he failed to voluntarily speak with Sgt. McCann. This is particularly true since the defense asserted at trial before the jury that the Applicant was fully cooperative with law enforcement.

This Court further finds that the jury was not misled. The jury had the Advice of Rights form before them and was aware that Sgt. McCann had stated that Applicant verbally waived and made the statement relative to the evening and that he watched pornography on his iPad.

The Court rejects the Applicant's claim of fabrication as not credible. This Court further finds that counsel was not deficient in failing to point out the evident fact that there was no second signature on the Advice of Rights when Sgt. McCann said that the waiver was verbal. This Court finds that there is no reasonable probability that the result of the proceeding, either the *Jackson v. Denno* hearing or the trial would have been different if defense counsel emphasized the lack of the signature.

In his written pleading related to prosecutorial fabrication in section 18, the Applicant points to Tr.p. 638, l. 14 – p. 639, l. 4. This portion involves Solicitor Mayes' argument on the directed verdict motion, not the closing argument as asserted in the pleading. In particular, the challenged prosecutor's statement is:

As to the charge of criminal sexual conduct with a minor first degree, the victim testified that the first event she recalled occurred at the residence on Peachland Drive when she would have been seven or eight. That included an act of oral sex and would certainly meet the definition of sexual battery. Beyond that, she testified that in third grade they had moved to Smith Pond Road and the acts continued at ages eight and nine and that it, again, included oral sex. She also described digital penetration beginning within that time frame, all being sufficient for an act of sexual battery whether at Peachland Drive or Smith Pond Road.

Tr.p. 638, l. 14 – p. 639, l. 4.

The Applicant in his pleading asserts that victim was in the second grade when they moved to Smith Pond Drive. He asserts that the indictment was too broad and should have specified whether it had occurred on Peachland or South Pond Drive. He complains that they did not complain about the structure of the trial.

This complaint concerning the argument involves the criminal sexual conduct in the first degree charge which covered a three year period. This indictment read:

> Next indictment, 2016-GS-32-02100, reads that William Howard Heath, date of birth December 1, 1967, did in Lexington County, South Carolina **on or about September 16th, 2004 through September 15th 2007,** willfully and unlawfully commit the offense of criminal sexual conduct with a minor in the first degree by engaging in sexual battery with the victim who was less than 11 years of age, to wit, sexual battery as defined in 16-3-651(h), including, but not limited to fellatio and/or cunnilingus and/or any intrusion, however slight, into the genital openings of the victim being a minor child, ["Victim"], date of birth 9/**/1997, in violation of 16-3-655(a)(1) of the South Carolina Code of Laws 1976 as amended. That is an indictment for criminal sexual conduct with a minor in the first degree.

Tr.p. 84-85.

The record shows that Victim testified that the first place the incidents happened was on Peachtree Drive where she claimed she lived when she was seven or eight years old. She stated it happened more than one time. Tr.p. 222-224. She then testified that they moved to Smith Pond Road when she was about eight years old. Tr.p. 223-224. Victim indicated that the things that she described occurred at Peachland also occurred on Smith Pond Drive, such as the Applicant using his mouth and fingers and his private part against hers or inside hers more than one time. Tr.p. 226.

On cross-examination by counsel Floyd, Victim testified that when she lived at Peachland for about half a year is when the abuse first happened when she was seven or eight years old. Tr. 233-35. Victim testified she moved from Peachland to Smith Pond when she was eight years old and incidents happened there. She lived there for ten years. Tr.p. 236. She confirmed that sexual incidents occurred to her when she was 9, 10, 11, 12, 13, 14. Tr.p. 237.

This Court finds that there is evidence in the record to support the prosecutor's statement on the directed verdict issue related to events from September 2004 to September 2007. The Applicant has failed to show either deficient performance or prejudice.

Defense Getting Facts Wrong Concerning Events and Timeline (19)

In his testimony, the Applicant contends that counsel Floyd got mixed up on his facts during his *in camera* questioning of Victim on Tr.p. 234, ll. 11-25. In that portion, counsel asked Victim in leading questions which suggested that the entire family got back together when they moved to Peachland and that Victim and her brother each had their own bedrooms. The Applicant stated that these leading questions gave the impression that Victim alone had been taken away but her brother was always with her. Applicant also claimed that there were only two bedrooms at Peachland and the testimony made it appear that there were three with each child having their own room. PCR 97-99. It was noted that in the DSS order both children were returned. PCR 98. Applicant contended that the leading question made it appear that Victim was removed and not the brother. PCR 98. He suggests this could have left an impression that Applicant had done something wrong.[59]

This Court finds that he failed to prove deficient performance. This Court does not find that the Applicant is credible related to this assertion. First, it is clear throughout this record that

[59] During this portion, the Applicant complained that he had not been advised about the "clear and convincing standard "for the admission bad act evidence. PCR 99-100. However, the record reveals that the standard was discussed by the trial judge discussed "clear and convincing" under his initial *State v. Lyle* and Rule 404(b) determination. Tr.p. 38. The standard was further discussed after Victim's testimony at Tr.p. 247-248. The trial made "clear and convincing" findings at Tr.p. 249-252. Defense counsel later argued that the clear and convincing standard had not been met. Tr.p. 262. The trial judge re-affirmed his earlier ruling on admissibility. Tr.p. 263. The judge noted that the pattern went to weight. Tr.p. 264.

the evidence of the DSS separation had nothing to do with Victim. Tr.p. 244-45 (domestic abuse-never told DSS about sex); p. 391 (DSS only concerned her parents, nothing to do with her); Tr.p. 493 (DSS had nothing to do with her); Tr.p. 661-662 (DSS had nothing to do with sex abuse). Further, the Victim testified at trial that she always had her own bedroom (which the Applicant did not dispute). Tr.p. 336. Further, there was evidence presented that her brother Nicholas lived with her during the DSS separation when they were placed with her grandmother. Tr.p. 662.

The Court finds that because the jury was consistently told that the DSS separation matter had nothing to do with Victim or sexual matters, assuming *arguendo* that the Applicant is correct that Peachland only had two bedrooms and not three, the Applicant failed in his burden to show a reasonable probability that the result of the proceeding would have been different.

The Applicant also refers in 19/1 to Tr.p. 238, l. 4-14. The Applicant in his pleading contended that the *in camera* questioning by counsel Floyd of Victim about Dr. Luberoff and Dr. Dupas and how she did not recall ever telling anyone that her father was abusing her had nothing to do with the trial. He contended that it would be confusing to the jury because DSS was not involved due to any sexual abuse and custody had not been removed on that basis. During the PCR hearing, the Applicant asserted that the jury hearing these questions from his counsel would cause the jury to think Applicant did something wrong. PCR 101. However, this Court finds that this defense inquiry of Victim was *in camera* and not before the jury. Further, it revealed again that Victim had not previously told these individuals of the existence of any abuse by the Applicant when given an opportunity to do so. Prejudice under *Strickland* has not been shown.

In his pleading, Applicant also refers to *in camera* questioning by the defense of Victim on whether Victim and her cousin looked at Applicant's pornography on more than one occasion that she denied. Tr.p. 239, l. 7-14. In his pleading, the Applicant asserted that this questioning by his defense counsel just attacked his character. However, this Court finds that this questioning was not in front of the jury, so prejudice has not been proven under *Strickland.*

In his pleading in 19/3, the Applicant complains about defense counsel's *in camera* questioning of Victim about whether she was upset about Applicant using her inheritance money to buy equipment for his business. Tr.p. 241, l. 2-8. Victim denied any knowledge of this assertion. The Applicant contended this inquiry was in error because Rose took the money from an account that Applicant did not have access and Applicant contended that he made $2000 a day and did not need the money. He complained that this attacked his character and could have affected the judge's ruling. He also suggested that counsel was drunk and ineffective. In the hearing, Applicant asserted that his wife took the money out of Victim's inheritance fund from when her brother died to pay off her car and that Victim thought Applicant was supposed to pay it back. PCR 102. Applicant claimed he gave counsel his financial statements which showed he made $2000 a day and did not need the money and he did not buy any equipment with it. It suggested to the Applicant that counsel was not aware of the facts. PCR 102-103. This Court finds that counsel in this *in camera* questioning was not in front of the jury, contrary to Applicant's testimony. It appears to the Court that counsel was using the *in camera* proceeding to establish or determine evidence of bias against Applicant on Victim's part to be later used in counsel's questioning before the jury. As to this *in camera* questioning, since it was not before the jury the Applicant failed to prove prejudice.

The Applicant in 19/3 next refers to *in camera* assertion by counsel Spangler of the fact that the seizure of the iPad did not comport with any Fourth Amendment concerns as set forth in their earlier motion they had filed. Tr.p. 312, l. 22-25. In his pleading, the Applicant takes issue with the comment and asserts that it reflected that counsel did not care about the issue. At the hearing, Applicant testified that he thought the motion was untimely and should have been brought up in a pre-trial proceeding. PCR 103-104. The Court finds that counsel Spangler further argued that the seizure of the iPad was improper on various grounds, albeit unsuccessfully. The Court finds that the motion was denied on the merits, but not on the basis of untimeliness. Tr.p. 313-329. This Court finds that challenged comment by counsel Spangler is taken out of context by the Applicant. He has failed to prove either deficiency or prejudice under *Strickland* based upon the comment.

404(b) Attacking Character (20)

In section 20/1, the Applicant challenges a series of questions by the State of Victim that he contends were objectionable under Rule 404(b) and that counsel failed to object. This Court finds that the Applicant has failed to prove a Sixth Amendment violation. He cites to Tr.p. 338, l. 8-11, p. 338, l. 12-23, l. 338, l. 24- p. 339, l. 13, p. 339, l. 20-22, p. 342, l. 21-p. 343, l. 12, p. 345, l. 13-p. 346, l. 21, p. 347, l. 2-p. 348, l. 25, p. 391, l. 15-23, p. 391, l. 24-p. 392, l. 9, p. 393, l. 10, p. 492, l. 15-p. 493, l. 10.

South Carolina law precludes evidence of a Defendant's prior crimes or other bad acts to prove the Defendant's guilt for the crime charged, except to establish: (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or (5) the identity of the perpetrator. *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923); *State v. Martucci*, 669 S.E.2d 598 (S.C.Ct.App.2008); *State v. Sweat*, 362 S.C. 117, 123, 606 S.E.2d 508, 511 (Ct.App.2004). If not the subject of a conviction, proof of prior bad acts must be clear and convincing. *State v. Weaverling*, 337 S.C. 460, 468, 523

S.E.2d 787, 791 (Ct.App.1999). When considering whether there is clear and convincing evidence, this court is bound by the trial judge's findings unless they are clearly erroneous. *State v. Tutton*, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct.App.2003). The record must support a logical relevance between the prior bad act and the crime for which the Defendant is accused. Id. at 329, 580 S.E.2d at 192. Even though the evidence is clear and convincing and falls within a *Lyle* exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the Defendant. *Id.* at 324, 580 S.E.2d at 189. *State v. Kirton*, 381 S.C. 7, 26, 671 S.E.2d 107, 116 (Ct. App. 2008).

"When considering whether there is clear and convincing evidence of other bad acts, this court is bound by the trial judge's factual findings unless they are clearly erroneous." *State v. Tutton*, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct.App.2003) (*citing State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001)). The determination of a witness's credibility is left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity. *Tutton*, 354 S.C. at 325–326, 580 S.E.2d at 190 (*citing State v. Rosier*, 312 S.C. 145, 149, 439 S.E.2d 307, 310 (Ct.App.1993)). *State v. Kirton*, 381 S.C. 7, 26–27, 671 S.E.2d 107, 116–17 (Ct. App. 2008). [60]

"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

[60] In *State v. Kirton*, 381 S.C. 7, 27, 671 S.E.2d 107, 117 (Ct. App. 2008) the Court found no error in finding evidence clear and convincing when Victim testified about the events that took place beginning at approximately age seven. While she could not remember details of the events from six years prior, she specifically testified Kirton touched her breasts and crotch and made her touch his penis. She professed the abuse occurred several times a month except when Kirton first started dating his girlfriend.

exception." *State v. Cheeseboro*, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001). Prior bad act evidence is admissible where the evidence is of such a close similarity to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh the prejudicial effect. *State v. Raffaldt*, 318 S.C. 110, 114, 456 S.E.2d 390, 392 (1995). The degree of remoteness between the other crimes and the one charged is one factor to be considered in determining the connection between them. *Id.* As the similarity becomes closer, the more likely the evidence will be admissible. *State v. Aiken*, 322 S.C. 177, 180, 470 S.E.2d 404, 406 (Ct.App.1996). "The acid test of admissibility is the logical relevancy of the other crimes." *State v. Cutro*, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998); *see also State v. Stokes*, 279 S.C. 191, 304 S.E.2d 814 (1983) (finding common scheme or plan exception requires more than mere commission of two similar crimes by the same person). ***When a criminal Defendant's prior bad acts are directed toward the same victim and are very similar in nature, those acts are admissible as a common scheme or plan.*** *State v. Weaverling*, 337 S.C. at 471, 523 S.E.2d at 792–793. *State v. Kirton*, 381 S.C. 7, 27, 671 S.E.2d 107, 117 (Ct. App. 2008).

Kirton is particularly useful in this Court's analysis. Therein, the Court stated:

> The case at bar is formed out of the same mold as *Weaverling* and *McClellan.* All of Kirton's alleged activity was directed toward the same victim. The six to seven year pattern of escalating abuse of Victim by Kirton is the essence of grooming and continuous illicit activity. Kirton began by rubbing the minor victim's breasts, proceeded to make her touch his penis, began touching her vagina as she got older, and finally culminated the sexual abuse by engaging in the intercourse for which he was charged. The prior sexual acts did not take place just once or twice, six or seven years ago. Victim indicated they happened several times a month for years. While the prior sexual acts are not the same as the exact crime for which Kirton was charged, Victim detailed a clear pattern of escalating sexual abuse and not a few isolated, unrelated incidents.
>
> Kirton's prior abuse of the minor victim was clearly "part of an overall plan or scheme devised by him to perpetuate the type of misconduct that occurred." *Tutton*, 354 S.C. at 330, 580 S.E.2d at 192. The probative value of the evidence was so

> great that it substantially outweighed the danger of unfair prejudice, confusion of the issues, or misleading the jury. The trial court properly found the evidence was admissible to show a common scheme or plan, and Kirton's continuous illicit conduct toward Victim was extremely probative to prove the charged criminal sexual conduct occurred.

State v. Kirton, 381 S.C. 7, 36–37, 671 S.E.2d 107, 121–22 (Ct. App. 2008).

This Court initially finds that after the conclusion of the *in camera* proceeding, the State asserted that the evidence of the ongoing pattern of sexual abuse had been shown by clear and convincing evidence and therefore admissible under Rule 404(b) relying upon *State v. Kirton*. Tr.p. 247-248. Counsel Floyd asserted that in his examination of the witness in the *in camera* proceeding, she lacked specifics of the time frame and that none of the evidence should be admissible. Tr.p. 248-249. Judge McMahon then found the evidence admissible under *Kirton*.

> THE COURT: All right. Well, looking for guidance at *State vs. Kirton* and listening to the testimony of Miss Heath on this matter, *Kirton* 381 S.C. 7, the victim in that case at the time of the testimony was 13 years of age, asked a number of questions, one of which was the first time it happened and he touched her private part goes back to her age of six or seven.
>
> As you read the transcript, which is included as part of the appellate decision written by Judge Ralph King Anderson, there are several pages, three, four, five pages of transcripts, there's also part of a transcript of an expert included in this, there appears to be generally the same type of characteristic of that child's testimony as it is in this testimony before the Court.
>
> When you get to the analysis of this particular testimony, as we've all noted throughout, South Carolina law precludes evidence of Defendant's prior crimes or other bad acts to prove the Defendant's guilt of the crime charged except to establish one of the factors of being common scheme or plan, embracing the commission of two or more crimes so related to each other that proof of one tends to establish proof of the other.
>
> It goes on to talk that it must be clear and convincing evidence when it is not subject to conviction, and further elucidates the law as to that standard, clear and convincing evidence specifically, as it goes to common scheme or plan. That's a close degree of similarity of connection between the prior bad act and the crime for which the Defendant is on trial.
>
> It's required to support admissibility on common scheme and plan exception, *State vs. Cheeseboro*, which was not a sexual offense. Obviously, this is -- and I have ruled previously that this is part of a common scheme and plan.

> Further, in citing ...*State vs Tutten*, ... sex crimes may be unique in this respect, that is common scheme and plan, because they commonly involve the same victims, that's pluralized, engaged in repeated incidents occurring under very similar circumstances.
>
> The reason for the general admissibility of such evidence under these circumstances is self-evident. Where there is a pattern of continuous conduct shown that pattern clearly supports the inference of the existence of a common plan and scheme, thus bolstering the probability that the charged act occurred in a similar fashion.
>
> So, the bar for admissibility does not produce the standard of clear and convincing evidence, it's just highlighting the testimony in the sex crime arena, so to speak.
>
> There's also cases which do not involve the same victim; for example, *State vs. Hallman*, 298 S.C. 172, 1989. **So I would find that that testimony, specifically against that backdrop and case law of *Kirton*, would be admissible. Further, it's clear and convincing.**
>
> I would take notice I've been handed up both the SLED lab report, Court's Exhibit No. 4, and Court's Exhibit No. 5; number 4 being the DNA analysis, number 5 being the serology analysis. And the DNA analysis does identify DNA profile items 1.4.1 and 1.5.1 is consistent with the DNA profile of Theresa Anna Heath, and DNA profile developed on item 1.5.2, pubic hair combings, and 1.6 matches the DNA profile of William Heath. The probability of randomly selecting an unrelated individual having a DNA profile matching this item as to William Heath is approximately 1 in 57 quintillion. Also, there is a mixture on item 4.1, cutting from the interior rear of underwear of at least two individuals. The DNA profile of the major contributor matches William Heath. As to that major contributor, this mixture is approximately 1 in 57 quintillion. The DNA profile of the minor contributor to this mixture is insufficient for interpretation. **I find that to be corroboration and going to the issue of clear and convincing evidence.**

Tr.p. 249, l8 – p. 252, l. 17. (emphasis added)

In the initial assertion in 20/1 , he asserts that the follow up question after Victim had already testified about evidence of Applicant's digital penetration at Peachland (Tr.p. 337-338) about where her mother was when it happened and Victim's response that she was either asleep or at work should have been objected under Rule 404(b). Tr.p. 338, l. 8-11. He contends that the response showed the evidence was dissimilar and therefore should not have been admissible because the mother may have been at different locations and counsel should have objected. PCR 104-105. This claim has no merit. In light of the decision by trial judge and *Kirton,* had counsel objected on that basis, there is no reasonable probability that the result would have been different. Although the mother may have either been sleeping or at work, like *Kirton*, Victim detailed a clear pattern of sexual abuse and not a few isolated, unrelated incidents. The Applicant's prior abuse of the minor victim was clearly "part of an overall plan or scheme devised by him to perpetuate the type of misconduct that occurred." Since the evidence was admissible, no prejudice under *Strickland* was shown.

In his next specification for relief in 20/1, he addresses Tr.p.338, l. 12-23. In this portion, the State asked Victim at what point did she tell her mother what was happening, and Victim declared that she was told by Applicant not to tell. Victim also stated and that she knew something would happen to her if she did tell because of prior experiences when she had told somebody something and he would get angry with her or he'd threaten to kill her or other things. The Applicant claims that the evidence about his prior threats towards her went to his character and should have been objected to and a mistrial sought. This Court finds that the record includes other evidence of his specific threats to kill her or her mother if she told anyone about his sexual conduct with her. Even if counsel had objected, there is no reasonable probability that the result would have been different because of the probative evidence of his threats or physical violence. See Tr.p. 339 (struck her if she resisted); p. 343 (he said he would kill me or my mother, shave my hair off" if she told about the sex acts). The Applicant has failed to prove a Sixth Amendment violation by failing to object to this inquiry.

In the next specification in 20/1, the Applicant refers to Tr.p. 338, l. 24-p. 339, l. 13. In this passage, Victim was asked, if as a child, she ever resisted or tried to resist which she declared that when she did that, he would hit her or pull her hair or arm and that it caused her to eventually learn to not resist. In his pleading, Applicant contends that counsel should have objected and asked for limiting instructions because her answer is unclear as to which indictment this goes to of the four before the court and supports why there should not have been consolidation of the charges. This Court finds that counsel was not deficient in failing to object and prejudice had not been shown based upon the other evidence noted above.

The next specification in 20/1 addresses Tr.p. 339, l. 20-22 on whether her mother was present during any of the incidents to which Victim responded, "no". The Applicant claims that counsel should have objected because the State is attacking the character of her mother and should have been objected to because it made it appear that they were a bunch of freaks. This Court finds the characterization of the question and response not accurate. As to this portion, his claim of a Sixth Amendment violation is without merit and frivolous.

In the next specification in 20/1 refers to Tr.p. 342, l. 21-p. 343, l. 12. This passage concerns when, after Victim had stated the Applicant had her come into her room while she had been sleeping and held her hand on his body part and ejaculated on her body or in her mouth, she was asked whether while in high school she ever told a teacher, a doctor or a nurse. Victim denied and explained that if she did, she knew that he would hurt her, including the threats to kill her or her mother or take her away from her mother. He complains that this evidence was an attack on his character in his pleading. He testified that his issue with this testimony about what he did was that there was no corroborating evidence, and the defense did not require her to state the specific times he hurt her in the 10 years. PCR 107-108. Therefore, this evidence was admissible as part of the *res gestae* of his crimes. The failure to object may have had a sound strategic reason for the defense to support that the failure to report had some probative value that the crimes did not occur consistent with the defense strategy. However, this Court finds that the evidence was admissible and failing to object did not prove prejudice under *Strickland.*

In the next specification in 20/1 and 20/2, he points to Tr.p. 345, l. 13 -p. 346, l. 21. In this portion, the State inquired of Victim what she remembered about her last year of high school and that she stated that she and her mother lived with her aunt from August to October because her mother was going to leave her father. Victim also declared that no assaults occurred during that period and she was not in contact with her father. She stated her mother went back to him and she eventually went back as well as what had happened before. The Applicant contends that this was not relevant evidence because the Applicant's marriage problems had nothing to do with it. He claims that he had separated one time in August 2014, and the evidence should not have been permitted and should have been objected to and they needed to testify or have Rose testify. He testified that they were legally separated only in 2004 and that the evidence made it appear that they were separated every six months, which was not accurate. PCR 107-108. The Court finds that the relevant evidence was that no assault occurred during the period that Victim was living with her aunt. The Applicant failed to show either deficient performance or prejudice to this relevant evidence.

In 20/2, the Applicant refers to Tr.p. 347, l. 2-p. 348, l. 25. In this portion, it specifically refers to the night of April 26. In that testimony, Victim stated that her mother had gone to work and Victim was worried because she was alone with the Applicant. She testified that Applicant did try and she resisted as long as she could by saying no and he would come up with stuff for her to do such as cleaning up the house, the dishes, the table and taking stuff outside which she did. She described that Applicant was drinking that night, and she feared that this meant he would get angrier when she says no and that the sexual act would take longer. She stated that when she had resisted sexual advances in the past, Applicant had hit her in the face with an open hand or pull her hair really hard more than one time. In his pleading, he contends that this attacks his character with her question about whether he was drinking. In his testimony, the Applicant admitted that he had a drinking problem and he would not have wanted that to come out at trial. PCR 108-109. This Court finds that counsel was not deficient in failing to object to the evidence about his drinking because it is relevant evidence and part of the *res gestae* of the evening. Evidence about his drinking was part of the case, including the propriety of his interrogation. *Strickland* prejudice has not been shown. See also, Tr.p. 177, l. 13-16, p. 183, l. 23-25, p. 187, l. 18-25, p. 211, l. 8-12, p. 298, l. 16-21, p. 217, l. 22-23, p.349, l. 1-9; p. 521, l. 13-17 (references to alcohol, drinking).

In his next specification on ineffective assistance of counsel, he refers in 20/2 to Tr.p. 391, l. 15-23. In this re-direct testimony after defense counsel had asked a series of questions about whether Victim had told various people and family that she had contact with about the abuse, Victim testified about whether it was something that she had wanted to tell her closest friends, which she denied. The State then asked Victim in response to defense questions about DSS and her understanding that the DSS issues had nothing to do with Victim, to which she stated it was about issues between her parents. In his pleading, the Applicant stated again that any DSS comments were attacking his character and that the defense could have called in any DSS person to explain it and cure the impression. He complained that his counsel opened the door to this evidence. At the hearing, the Applicant complained that counsel opened the door to the DSS testimony which had nothing to do with Victim and more to do with them putting pressure to address his drinking issue. Applicant contended that DSS was actually on their side. PCR 109-110.

This Court finds that counsel was not deficient in failing to object since the State was again clarifying the DSS intervention had nothing to do with child abuse of Victim. Taken in context of the actual testimony prejudice under *Strickland* has not been shown by the failure to object to the admissible redirect testimony.

In the next specification 20/2, he refers to Tr.p. 391, l. 24-p. 392, l. 9. In this evidence, the State on re-direct referred to defense counsel asking on cross-examination about Victim's parents wanting to get a divorce and Victim wanting her mother to leave Applicant because he was not the greatest person to be around because of what he was doing to her. The Applicant claimed that counsel should have objected because it was attacking his character. Counsel was not deficient in failing to object because it was directly related to counsel's questions regarding when she was staying somewhere else and did not tell anyone about the abuse. The re-direct was admissible evidence and prejudice had not been shown under *Strickland.*

In the next specification in 20/2, Applicant refers to Tr.p. 393, l. 1-10 on re-direct when the State inquired about counsel questions related to Victim's grandmother, who she lived with as a child when DSS and that she did not feel comfortable telling her about her abuse from her son. The Applicant in his pleading complains that this is prejudicial because it brings up DSS again and counsel should have objected. At the hearing, he complained similarly. This Court finds, as above, that counsel was not deficient in failing to object because it was admissible re-direct testimony in light of counsel's emphasis in his strategy to show the opportunities Victim had to tell others about the ongoing abuse but did not do so. Prejudice under *Strickland* has not been shown by the failure to object to admissible evidence.

The Applicant next refers in his PCR testimony to Tr.p. 492, l. 15-p. 493, l. 10 during the direct testimony of Margie Branham in which Branham testified about Victim's menstrual cycle issues and that she had been prescribed birth control pills and again addressed DSS involvement which had nothing to do with Victim. In this area of his pleading, the Applicant complained that the testimony could have led to speculation and improper inferences. At the PCR hearing, he testified that the evidence made it appear that they were separating all the time and instead asserted that he and Rose had a good marriage. PCR 111. This evidence was addressed previously in this Order related to section 15/3 which is incorporated by reference. Although the Applicant may not like the evidence, it was cumulative as to the DSS and not prejudicial under *Strickland* and not prejudicial related to the birth control pills. The claim is without merit under *Strickland*.

In section 20/3, Applicant refers to Tr.p. 526, l. 5-13 on the testimony of Sgt. McCann about speaking with Rose Heath at the scene and that she was later charged with intimidation of a witness. In his pleading, the Applicant complains that because Judge McMahon did not allow the intimidation of a witness charge to be included in the consolidated trial, the defense should have objected to this comment. (See Tr.p. 42).[61] At the hearing on this issue, the Court and counsel referred back to the earlier issue related to consolidation of the charges which was addressed earlier. PCR 112.

This Court is aware that the consolidation of charges and the admissibility of evidence under Rule 404(b) against any witness are separate issues. The fact that a crime is either not charged or consolidated in a case does not necessarily preclude its admissibility under either Rule 404(b), *res gestae*, or Rule 608 for impeachment or Rule 403. The issue here is that Rose Heath did not testify

[61] In the closing argument, the State made reference to Rose Heath being charged with witness intimidation suggesting that she was not a supportive parent. Tr.p. 720, l. 9-14. There was no evidence presented to the jury tying Rose's intimidation charge directly to Willima Heath.

and no evidence to support intimidation was presented beyond this brief comment related to Rose Heath nor any evidence connecting intimidation to Applicant. Rose Heath was not on trial in this case and did not testify. It is not clear from the record why deceased counsel Floyd did not object. *State v. Edwards*, 383 S.C. 66, 68, 678 S.E.2d 405, 406 (2009) ("[A] trial court may admit evidence of witness intimidation when the Defendant is established as the source of the intimidation."; *id.* at 70, 678 S.E.2d at 407 ("Without establishing that connection, the evidence concerning witness intimidation is unreliable and therefore inadmissible.").

However, it is clear that the Applicant failed in his burden of proof that, had he objected, there was a reasonable probability that the result of the proceeding would have been different. This evidence had minimal probative value because it only related to Rose, not the Applicant, and the independent probative evidence revealing overwhelming guilt of the Applicant included Victim testimony Heath performed oral sex on her on April 26, 2016, and saliva matching Heath's DNA was found on the inside of Victim's underwear immediately following the assault. Further, hairs from Victim's rectal swab and pubic hair combing matched Heath's DNA. This failed to satisfy the Applicant's burden under *Strickland.*

In his pleading, the Applicant in 20/3 next refers to Tr.p. 618-619 referring to that admission of the photographs with the watermarks of the websites.[62] This was addressed earlier in this Order

[62] In his pleading as to 20/3, the Applicant complained that counsel only objected to the pictures , not State Exhibit 37, 38, or Investigator Phipps reading what the watermark said, the watermark itself the description of the website, the speculation that it is a paid website "as if I was paying for it." He asserts that the testimony in the description of the Website attacked his character under Rule 404(b) because Phipps revealed the Website had sections categorized as "mother-son, father-daughter, and brother-sister." See Tr.p. 618, l. 7-18. In his pleading, the Applicant also complained that the particular photograph was from December 2, 2014, at 9:10 PM and was not specifically identified by Victim, was out of range of the time of the alleged assaults (April 26, 2015), (December 1-2, 2014) and therefore had no probative value. He contended that there was little probative value to the image which was highly prejudicial. The Applicant argued that Victim never described anything about the photograph or if she saw it and only stated that he used his iPad. He complained that the defense did not explain what was prejudicial about the photograph after objecting. He stated counsel was ineffective in not objecting with specificity

in allegation I(a) of the Amended Application by appointed counsel. During the PCR hearing, the same issue was presented in a discussion with the PCR Court on the description of the watermarks and the names from the website. PCR 112-113. Applicant acknowledged that the pictures were of

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to the photographs and the iPad or that the Applicant watched pornography because he claimed it was not part of the "common scheme or plan" and there should have been a Rule 403 assessment also.

This Court finds that this allegation in his pleading did not meet his burden of proof in showing a Sixth Amendment violation. Victim had already testified that a sexual assault had occurred around December 1, 2014 either on that date or after midnight December 2, which was the Applicant's birthday at the home on Smith Pond Road. Tr.p 362-363. Victim described that Applicant told her that it was for his birthday and she described the rubbing and digital penetration that occurred while the Applicant was watching pornography on his iPad. Tr.p. 363-364. In reference to State Exhibit 22, she recalled seeing that image in a video on his iPad. Tr.p. 366-67 that she saw on his iPad during the April event. Tr.p. 367-368.

Subsequently, the State sought to introduce the data files and photographs. Assistant Solicitor Usry sought to introduce the data files from December 2, 2014. Tr.p. 593. The trial judge recalled that Victim had testified about the December 1 incident. Tr.p. 593. Defense counsel Spangler argued that the material did not go to the specific dates of April 26, 2015, or December 1, 2014, and the data was not relevant. Tr.p. 594. Solicitor Usry argued that in the December 1 event the iPad was used during the assault and played pornography, and the victim had testified that it had gone into December 2. Usry stated this was an extraction report for December 2, 2014. Counsel Spangler argued it was still not relevant because the entry was on December 2 at 10 PM which was not close to the early morning on that date. Tr.p. 595. Spangler continued that displaying the images to the jury could only unfairly prejudice the jury against the Applicant because they are also going to hear that it is present on the iPad and in the web history. He urged that it was not necessary and not probative. Tr.p. 596.

Judge McMahon disagreed and concluded that the evidence had a high degree of "probability." [This may be a misstatement or typographical error for "probative value."]. He noted that the only direct testimony was Victim. Judge McMahon held that this evidence corroborates the testimony of Victim. Tr.p. 596. He assessed the evidence under Rule 403 on whether it was unduly prejudicial and *State v. Collins*. [*State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) ("We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." (citation omitted)). Judge McMahon found that the extraction from April 26, 2014, is relevant and deny the motion as far as it being unduly prejudicial. Tr.p. 596. Judge McMahon held that far as the "on or about December 1, 2014, indictment, he assumed that the counsel was seeking a Rule 403 analysis, Judge McMahon held that it is relevant and based upon his prior ruling not in violation of the standard of Rule 403. "It is highly probative; it is not unduly suggestive. As far as the timing, that would go to the weight and not its admissibility." Tr.p. 596-597. Judge McMahon confirmed that the State was only seeking to introduce the testimony as to those two dates which Solicitor Usry confirmed. Tr.p. 597, l. 5-17.

This Court finds that counsel did argue a Rule 403 objection to the photographs and particularly the December 1, 2014, date issue related to one of the photographs. Contrary to the assertion of Applicant, this Court finds that counsel was not deficient in his objection or argument to Judge McMahan as it related to the December 2, 2014, extraction or photograph or evidence about the iPad. He has made no credible showing that, had he argued it differently, there is a reasonable probability that the result of the proceeding would have been different. The assertion in his pleading must be denied.

a teenager, not of a young child. Counsel for the Applicant indicated that she had made a transcript of the oral argument from her review of the argument. PCR 113. It was pointed out that the exhibits were present by Respondent's counsel and this Court indicated that the descriptions were enough. PCR 113. This Court referred to Tr.p. 618. The Applicant, in reference to the trial testimony and argument of counsel Spangler asserted that he objected to the photographs *in camera*, but when the exhibits (State Exhibit 37 and 38) were introduced, he made the same objection. PCR 114.[63] See Tr.p. 614 State Exhibit 38 is an enlarged image of State Exhibit 37). The Applicant testified that that while counsel Spangler objected to the disc, he did not object to the actual photograph itself and did not object to the photograph that was enlarged. PCR 114-115. The Applicant stated that he wanted to make sure that it was put on the record in this proceeding that the objection is to the picture and not the disc because you have to be specific. He complained that counsel did not specify what the pictures were because it is totally different from the disc. PCR 115.

As stated herein, this Court must find that counsel Spangler and Floyd were not deficient in their argument and objections to the admission of the photographs. Further, he has failed to prove Sixth Amendment prejudice. His complaint that the photograph was enlarged caused it to be inadmissible is an inadequate showing of *Strickland* prejudice since the regular photograph was admissible. Second, the adoption of *in camera* arguments by defense that were rejected did not require an enhanced argument before the jury when the State sought to formally introduce the evidence and it was adequate by the defense to rely upon the *in camera* objection that was made.

[63] More specifically counsel Spangler at that time stated:" pursuant to our earlier objection, we reincorporate that objection, but have no further objection." Tr.p. 614, l. 13-15. On State Exhibit 37, it stated at the bottom of the screen stated "IncestTV.com." Tr.p. 618, l. 7. See also, Tr.p. 620, l. 1-13 introducing State Exhibits 34,35,36 and 22. ("no objection, we just note our prior objection") The trial judge acknowledged that the matters were in evidence, "subject to prior objection. I reaffirm my previous ruling". Tr.p. 620, l. 10-12,

The Applicant failed to prove as reasonable probability that the result of the proceeding would have been different.

In the next specifications in 20/3 and 20/4, the Applicant refers to Tr.p. 623, l. 7-p.625, l. 13. This evidence at trial involved State Exhibit 36, which was created on the iPad on April 26, 2015 at 9:39 PM in a snapshot and the large image with the watermark of "daughterdestruction.com." Tr.p. 624. Investigator Phipps described that website was an active website and those videos had evidently been sold to other pornography websites and services. He testified that it is not a currently existing website that is a paid service. He stated that the videos that are watermarked that way are on various websites and appear as a sample video. Tr.p. 624. Phipps declared that all the videos that he reviewed on the "daughterdesrtuction.com" website are pornographic and would be considered hard core porn, Tr.p. 624. Phipps testified that this image was captured on April 26, 2015, at 10:39 PM. Tr.p. 625. He stated that State Exhibit 34 was created April 26, 2014, at 9:39 PM. Tr.p. 625. He stated this photo was created by pressing the home function on the iPad device. Tr.p. 625.

The Applicant in his pleading and testimony contends that the defense never objected to State Exhibit 36 and State Exhibit 34 which were blow-ups. He contends that that there was never any time mentioned when the assault took place. PCR 115. He refers to State Exhibit 22 which was identified by Victim. PCR 115-116. [See footnote in earlier section related to State Exhibit 22].

During the PCR hearing, this Court inquired about the extent of the objections to the photograph at trial and on appeal. PCR 116-117. The direct appeal opinion concluded:

> I. Rule 403, SCRE
> Heath argues the trial court erred by admitting screenshots of pornography found on his iPad. He asserts these images and their watermarks were unfairly prejudicial, and therefore, inadmissible under Rule 403, SCRE. We disagree.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "[T]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case." *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009).

"Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder." *State v. Collins*, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014). "A trial [court] is not required to exclude relevant evidence merely because it is unpleasant or offensive." *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008). "[T]he standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of unfair prejudice that substantially outweighs the probative value of the evidence." *Collins*, 409 S.C. at 536, 763 S.E.2d at 28. **As to the watermarks on the images, Heath failed to preserve this issue for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal."). Heath never objected to Detective Phipps's testimony regarding the watermarks.** Rather, Heath's objections at trial were to the displaying of pornography to the jury, he did not mention the watermarks or their unfair prejudice to the trial court. Thus, without raising the issue or drawing the trial court's attention to the watermarks' prejudicial nature, Heath failed to preserve this argument for appellate review.

We find the trial court did not abuse its discretion in admitting these photographs because the court weighed the photographs' probative value against the danger of unfair prejudice. Victim testified that on April 26, 2016, Heath watched pornography on his iPad while he sexually assaulted her. Exhibit 22 and 36 were accessed on Heath's iPad on that date, and Victim identified Exhibit 22 as the pornography Heath watched during that assault. Detective Phipps testified Exhibit 38 was accessed on Heath's iPad on December 2, 2014, and Victim testified Heath sexually assaulted her around his birthday, which was December 1. Since these exhibits corroborate Victim's testimony about the circumstances surrounding how Heath sexually assaulted her, evidence supports the trial court's finding that these photographs were highly probative. *See Collins*, 409 S.C. at 534, 763 S.E.2d at 27 ("If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." (*quoting State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)); *State v. Hawes*, 423 S.C. 118, 130, 813 S.E.2d 513, 519 (Ct. App. 2018) (holding the trial court did not abuse its discretion in admitting crime scene photographs that established the circumstances of the crime and corroborated the testimony of a State's witness).

The corroboration of Victim's testimony of the events regarding her abuse was extremely probative. While the photographs do not paint Heath in a positive light,

> because they were part of the circumstances surrounding the crime, they were not unfairly prejudicial. *See Collins*, 409 S.C. at 536, 763 S.E.2d at 28 ("[T]he standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of unfair prejudice that substantially outweighs the probative value of the evidence."). **We therefore conclude the trial court did not abuse its discretion in admitting Exhibits 22, 36, and 38.**

State v. Heath, 433 S.C. 506, 513–15, 860 S.E.2d 673, 677–78 (Ct. App. 2021) (emphasis added). As stated previously, the Court of Appeals held "*Moreover, any alleged error in admitting Victim's statements or Exhibits 22, 36, and 38 was harmless because the physical evidence against Heath was overwhelming.*" *State v. Heath*, 433 S.C. 506, 518, 860 S.E.2d 673, 679 (Ct. App. 2021).

The Applicant further complained that counsel should have also objected to when Investigator Phipps was describing the website. PCR 117-118. Applicant contends that there was no proof presented that his credit cards were used and they could have done that. PCR 118. He complains that counsel Floyd did not ask Phipps if there was any proof that he had paid for the websites and the testimony was inadmissible.

This Court finds that the Applicant mischaracterizes the testimony of Phipps related to whether the websites were paid websites. As to incest.com, Phipps stated it was primarily a paid website, but it also has a public site that allows samples without having to pay. Tr.p. 618. Similarly, daughterdestreuction.com was not currently a paid website but the videos had been sold to other services and was a sample video. Tr.p. 624. Investigator Phipps is not claiming that Applicant paid for the videos that he was viewing, only that their source at some point was the cited website. His allegation is without merit.

This Court finds that defense counsel did not separately object to the watermark or testimony about the websites as noted in the direct appeal. However, this Court finds that the

Applicant has failed to prove prejudice under *Strickland*. The Court finds the Applicant failed to prove a reasonable probability the result would have been different. The Appellate Court had found the existence of harmless error. The evidence at trial was that during the sexual assaults in December and April the Applicant was viewing pornographic videos, which was supported by the evidence from the extractions. This information was admissible and corroborative of the testimony of Victim. The website names on the watermarks were probative evidence and supportive of what the Applicant was viewing while engaged in his criminal activity and Victim's testimony about being forced to view pornography at those moments. The allegation must be denied. [64]

In 20/4, the Applicant refers to the State's cross-examination of Applicant's mother, Selma Heath, by Solicitor Mayes at Tr.p. 661, l. 1-p. 663, l. 1. In these pages, Selma Heath is asked as a follow-up to counsel Floyd's questioning on direct specifically about whether she had concerns about Victim going back to her parents. Mrs. Heath responded that although there were medical issues, DSS did not let them down and she was concerned whether the children's medical needs would be met because they did not follow through. Mrs. Heath stated because of the concerns she and her husband went back to court. Tr.p. 661. Ms. Heath stated that DSS intervened because of Nick, their son, but again confirmed it had nothing to do with a sexual abuse investigation. *Id.*

She stated that treatment was required for both Applicant and Rose Heath, during which time Victim was not allowed to live with them. *Id.* Both Victim and her brother lived with her at that time. In this testimony as noted previously, Mrs. Heath described a situation where she denied taking her to Dr. Luberoff about the then seven-year-old victim having burning urination or to Dr.

[64] In 20/4, the Applicant cites to Tr.p. 625, l. 17-21. He notes that this cite is not a ground for relief, but a citation to where the exhibits were published to the jury. He did complain at the hearing that there was no objection to the publication to the jury. PCR 117. To the extent it is a ground, counsel was not deficient. Once a photograph is admitted into evidence it can be published to the jury.

Soto at Lexington Urgent Care. Tr.p. 662-663.

In his pleading, the Applicant again contends that counsel Floyd improperly opened the door on this evidence about the DSS situation, which suggested a bad act under Rule 404(b), and failed to object. In the PCR testimony, the appointed counsel noted that this issue was raised previously. This Court adopts the prior holding and finds counsel was not ineffective in opening the door to the DSS testimony of his mother. Sixth Amendment prejudice was not shown.

In 20/4, the Applicant cites to Tr.p. 696, l. 8-16. In this portion of Solicitor Mayes closing argument, she refers to the December 2, 2014, early morning hours when the Applicant captured the image. She asserted that, as if showing a pornographic video to a child was not enough, the video was Incest TV which Detective Phipps had described as having three channels, including fathers and daughters. She argued it was not randomly captured on his iPad, but was the image she described him using in December with his assault. *Id.*

In his pleading, Applicant complains that it was an unnecessary reference to Incest TV and complains that there was no description by Victim about the video in December. In the hearing, he complains that there was no objection to the explanation or description in the videos. PCR 118-119.

Also, in 20/4 he refers to the closing argument by Solicitor Mayes at Tr.p. 697, l. 25-p. 698, l. 7 to the daughterdestruction.com comments. In that portion, Solicitor Mayes argues, in reference to admitted State Exhibit 22 that was captured at 9:30, that she had seen this video on his iPad. Mayes notes that it was called daughter destruction. Mayes points out that this was not a guy looking at naked women on Playboy or the Playboy Channel, but someone with "a unique and distinct twisted obsession with having sex with his daughter. We know that he admitted to Sgt.

McCann that he used his iPad for porn." Tr.p. 698, l. 1-7. He claims this also needs to be raised in the PCR or it will be harmless error in his pleading.

This Court finds that counsel did not object to these two portions of Solicitor Mayes argument. However, Applicant is unable to show that, absent counsel's failure to object, the result of the proceeding would have been different to a reasonable probability. Each of the prosecutor's references were either a direct reference to testimony that had been admitted or reasonable inferences from that testimony. Contrary to the Applicant's characterization, there was no basis for the objection to the appropriate and zealous advocacy by the State. In *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975), the Supreme Court set forth the parameters of permissible prosecutorial argument. So long as the prosecutor stays within the record and its reasonable inferences, he may legitimately appeal to the jury to do their full duty. *Id.* at 92, 212 S.E.2d at 590. A solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony. *State v. Allen*, 266 S.C. 468, 224 S.E.2d 881 (1976). A review of the closing argument is based upon the standard of "whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hawkins*, 292 S.C. 418, 421, 357 S.E.2d 10, 12 (1987). *See State v. Caldwell*, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990) (a prosecutor may argue her case vigorously and give her version of the testimony, and what weight or credibility should be given to the evidence); *State v. Cannon*, 220 S.C. 614, 93 S.E.2d 880 (1956). "A solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record." *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

The evidence of Victim viewing pornography on the iPad during December 1-2, 2014, and

April 26, 2015, crimes were presented in the trial through Victim's testimony. Tr.p. 228-229 (pornography on iPad ever since he got it when there was an assault); Tr.p. 351-52 (watching pornography with sex acts taking place on iPad on April 26, 2015, during assault); Tr.p. 362 – 364, 366 (on December incident, Applicant was watching pornography on it). As noted above, the photographs were extracted from the iPad, revealing the watermarks consistent with the 2014 and 2015 assaults.

This Court finds that based upon the evidence in the record, deficient performance has not been shown because all reasonable counsel would have objected even though evidence was in the record and the argument was a reasonable inference. Assuming arguendo deficient performance, the Applicant failed to show *Strickland* prejudice. The record-based inferences were reasonable and there was overwhelming independent forensic evidence supporting the April 26, 2014 assault.

Leading (21)

In 21/1, the Applicant contends that defense counsel erred in failing to object to alleged leading questions at Tr.p. 340, l. 9-16. This portion occurs during the testimony of Victim after she had testified that she was living at Smith Pond Road while in the third grade and the improper things continued to happen. The Applicant takes specific issue with the following:

Q. While you were at Smith Pond Road, did these things continue to happen?

A. Yes.

Q. Did anything happen more than what you've told us already?

A. Yes.

Q. What was that?

A. He would have me use my mouth on his private parts as well.

Q. Did that happen at Smith Pond Road?

A. Yes.

Q. Were you still at Smith Pond at the end of middle school?

A. Yes.

Tr.p. 340, l. 6-19. (*Tr.p. 340, l. 9-16 emphasized*).

The Applicant contends in his pleading that she was asking a leading question by asking if it happened at Smith Pond Road and how old she was. He complains that the prosecutor was jumping around so much that it would be difficult for the juror to know what indictment this involved. He opined that counsel should have objected. In his PCR testimony, Applicant asserted that the prosecutor was giving Victim the answer.

This Court finds that the Applicant challenge is frivolous and that the questions were not leading questions – "did anything happen more than what you've already told us already", "what was that", "did that happen at Smith Pond Road" were not leading questions since the earlier predicate was a discussion about Smith Pond Road and the witness had already stated that she was at Smith Pond Road and the things that had happened at Peachland continued to happen. Tr.p. 339-340.[65] The Applicant has failed to show deficient performance or prejudice in this assertion under

[65] The true test of whether a question is leading and therefore improper on direct examination is whether, as said by the Court, it suggests the answer. *State v. Cook*, 204 S.C. 295, 28 S.E.2d 842, 846 (1944). However, a case will rarely be reversed on ground that trial judge permitted leading questions, and then only if there has been a clear abuse of discretion resulting in prejudice to objecting party. *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985).

The trial court is vested with broad discretion to control the mode of interrogation and the presentation of evidence. *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir.1988). SCRE 611(c) provides "leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." The use of leading questions when examining a child, *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985), cert. denied, 286 S.C. 127, 332 S.E.2d 533 (1985), is still permissible under the first sentence of subsection (c) which allows leading questions when "necessary to develop the witness' testimony." Moreover, "the

Strickland.

Things that defense counsel should have hired an expert for or looked into (22)

In section 22, the Applicant refers to Tr.p. 615, l. 12-p. 617, l. 25 during the direct examination of Detective Michael Phipps. In this portion of his testimony, Det. Phipps testified about the digital file State Exhibit 37. He mentions that there was a reference to Google Chrome in the report and another reference to "automatic snapshot". Tr.p. 619. Det. Phipps stated he had to research what automatic snapshot meant and found that on an apple device when you hit the home button it gives visual effect that looks like the full screen item shrinking in sort of an animation. *Id.* Det. Phipps testified that when that home button is hit, it also creates a still shot of what is on the screen so that the person is not doing it intentionally, but it is the behavior of the Apple operating system. Tr.p. 615-616. Det. Phipps stated that he had to research that effect and it was not something a common user would be aware of. Tr.p. 616. He indicated that there was no way the iPad could be held and looked through to find that image because it was embedded deep in the Apple operating system. Tr.p. 616. He stated that it could have been embedded in the system a long time and there was no way to tell exactly if the image was on the home screen before the home button was pushed. He testified that the image was captured on December 2, 2015, at 9:10

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extent to which the use of leading questions may be indulged or limited is a matter primarily for the discretion of the trial judge and an appellate court will intervene only if there is a clear abuse of discretion." *United States v. Durham*, 319 F.2d 590, 592 (4th Cir.1963); *United States v. Oladokun*, 166 F.3d 336 (4th Cir. 1998).

Failure to object to leading questions has been resolved as trial strategy not to be second-guessed by the courts. *Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993). *U.S. v. Bosch*, 914 F.2d 1239, 1246 (9th Cir. 1990) rejected a claim of ineffectiveness from failure to object, noting that the appellant made no claim that the evidence was inadmissible without leading questions so the attorney could allow the leading questions without objecting. Counsel could have refrained from objecting to brief leading questions for practical and humanitarian reasons recited *Bonin v. Vasquez*, 794 F.Supp. 957, 969 (C.D. Cal. 1992), aff'd. 59 F.3d 815 (9th Cir. 1995). *See also Jackson v. Bradshaw*, 681 F.3d 753, 763-64 (6th Cir. 2012) (extent of use overstated and use proper where the witness is reluctant or evasive).

PM but could have been on the computer for some time. Tr.p. 617.

In his pleading, the Applicant contends that counsel should have objected to the witness's qualification because he indicated that he had to research the "automatic snapshot" feature. He claims the defense should have hired an expert to determine if Det. Phipps was wrong. The Applicant claimed that the material must have been in the background because he claimed he did not see it. He also asserted that his wife and everyone else also had access to the iPad and would close it out. He claimed he knew how to do his favorites for the parts store and others for his business. In his PCR testimony, Applicant testified similarly about the fact that Det. Phipps had to research the issue and that it should have required an objection.

This Court finds that the Applicant failed to prove deficient performance. The fact that an expert indicates that he had to research information does not remove an individual's expertise but goes to the weight of his testimony. The Applicant has failed to show by any credible evidence that Det. Phipps' testimony was not accurate related to the "automatic snapshot" issue. The record shows that counsel Spangler cross-examined Det. Phipps on the snapshot issue, addressing the fact that the time on the snapshot did not tell the actual time the website was accessed by the Applicant and that Det. Phipps had no idea who actually accessed the website or pushed the home button. Counsel further questioned that, since there was no password on the iPad, anyone could have assessed it. Tr.p. 631. Counsel Spangler testified that they had no discussion between Floyd, Applicant and himself about a cellphone computer expert. PCR 280. However, Spangler indicated that in a prior case that he handled before Heath's case they had cellphone data. Spangler stated that he knew enough about how the reports were created. He opined that he adequately cross-examined Det. Phipps. Counsel stated that the only thing the defense could develop in cross-examination was the document that Det. Phipps created relating to the web history that night and other matters to suggest that it conflicted with Victim's testimony. PCR 280-281.

Counsel acted reasonably in not objecting to Det. Phipps' opinion about automatic snapshot data and was not deficient in his preparation or examination of Det. Phipps. This Court further finds counsel was not deficient in failing to retain a digital forensics expert to assist.

The Applicant failed to show that the retention of a digital forensic expert would have resulted in a different opinion as to this limited information related to the automatic snapshot.[66] It must be noted that no digital forensic expert was present in this proceeding to contradict Det. Phipps testimony. He failed in his burden of proof to show a reasonable probability that the result would have been different.

In the next reference in 22/1, the Applicant referred to Tr.p. 628, l. 10-p. 629, l. 17 which was the cross-examination by counsel Spangler of Det. Phipps. In his cross-examination, Det. Phipps confirmed that the search history indicated the time of the search and the search terms used,

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[66] See *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998) (our supreme court explained it has "repeatedly held a PCR Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice with the witnesses' failure to testify at trial." *Id.* at 303, 509 S.E.2d at 809); *see e.g., Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998) (holding an Applicant established prejudice where nurse's notes presented at PCR hearing corroborated lack of penetration in sexual assault case); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995) (determining that where witnesses Applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992) (finding an Applicant failed to establish prejudice where he did not offer witnesses at PCR hearing but merely alleged they would have provided him with an alibi defense and testified victims had recanted their trial testimony). "The Applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the Applicant's burden of showing prejudice." *Glover*, 318 S.C. at 498–99, 458 S.E.2d at 540.

cookies, and sometimes a URL code. Tr.p. 628-p. 629. These inquiries, however, led up to the late questions which revealed Det. Phipps could not point out any pornography sites that were visited on April 26, 2015, and that there was no mention of incest or pornography in that web history. Tr.p. 630.

In his pleading about this portion, he complains that counsel Spangler failed to ask what date the web history reflected that he had accessed the particular websites. In his testimony, he stated a similar concern. Tr.p. 120-121. The Applicant stated that he thought counsel should have presented when it originated and tellingly stated that his wife used to get on him about the stuff being in the background. PCR 121.

This Court finds that the Applicant failed to prove deficient performance. As noted previously, counsel was able to get a favorable response from Det. Phipps that he did not find access to a pornography site on April 26. Tr.p. 630. The decision on cross-examination as noted previously is generally a strategic decision. Cross-examination must be objectively unreasonable and not flawless; an attorney's decision about the extent of cross-examination and refraining from certain lines of inquiry is entitled to great deference. *Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000), cited also in *Brown v. Uttecht*, 530 F.3d 1031, 1036 (9th Cir. 2008). The Applicant failed to prove to this Court that counsel's examination was unreasonable.

The Applicant failed to prove *Strickland* prejudice. He failed to show a reasonable probability that the result would have been different concerning the inquiring of Det. Phipps as to when the websites had been accessed when Det. Phipps had already testified that he was unable to state that they were accessed in his web history or by who actually pushed the home button. Tr.p. 630-631. His allegation must be denied.

The Applicant in 22/1 next refers to Tr.p. 630, l. 24-p. 631, l. 20. In this portion of the cross-examination of Det. Phipps, counsel Spangler developed that the only pornography sites were in the app snapshot, which did not tell you what time the site was actually visited and cannot tell when someone typed in incest TV. In his pleading, he contends that this data had to come from somewhere and questions where it came from? PCR 121.

This is addressed above because the Applicant speculates that further research or inquiry could develop when these sites were accessed to allow for the snapshot. However, his speculation is insufficient to meet his burden of proof to show deficient performance or prejudice.

The Applicant next refers in 22/1 to Tr.p. 494, l. 24-p. 496, l. 8, which was counsel Floyd's cross-examination of Victim's aunt, Margie Branham. In this portion, counsel developed that Branham was texting with Victim and was asked if she was on the phone with someone else. Branham acknowledged that she was at a support group meeting that Sunday night which lasted from 7:30 PM – 9:00 PM. Tr.p. 495. She recalled that she began texting with Victim before 9:00 PM. Tr.p. 496. Branham acknowledged that she was involved in the support group and texting at the same time. *Id.*

The Applicant asserts in his pleading that the defense counsel never looked into that number or called it to determine who Branham was calling that night. The Applicant speculated that it made it look like Branham was doing something wrong before the jury and it backfired and looked stupid. He claimed that this revealed how unprepared they were. His PCR testimony was similar. Tr.p. 122. He stated that this was a number of a mental health group that counsel should have been aware. PCR 122.

This Court finds that the Applicant, assuming counsel should have called the number, failed to show a reasonable probability that the result of the proceeding would have been different. Counsel had developed that the victim was on the phone with someone – here the support group – when she was texting with Victim. The underlying strategy was the same – only the recipient of the phone call became known. This was purely a collateral issue. His complaint did not create a Sixth Amendment violation.

The Applicant in 22/1 and 22/2 refers to Tr.p. 610, l. 25-p.611, l. 10 in the direct examination of Det. Phipps. In this portion, Det. Phipps testified in reference to the Exhibit of April 26 at 6:45 PM, that the date and time was when the site was last visited and records that date and time. The Applicant, in his pleading, contends that it showed that the State's expert was not qualified because he was uncertain and used the word "probably exiting." In his PCR testimony, Applicant contends that this language suggested that he was not sure and was guessing and speculating. He contends that this supports the need to hire an expert.

This Court finds that counsel was not deficient in failing to object to the expert's testimony as improper because it was not definitive. The Applicant has failed to show that another expert could have testified different or that an objection would have been done by all reasonable counsel. As noted earlier, the Applicant has failed in his burden to show how the retention of an expert would have led to a similar or different opinion from the data.

The Applicant's speculation is insufficient to show *Strickland* prejudice.

Text Messages (23)

In this portion of 23/1, Applicant refers to Tr.p. 370, l. 17-p.371, l. 3 of Victim's direct testimony. In this portion, Victim stated that she communicated with her aunt in text messages and she reviewed a text message that she sent from her phone, but not its substance. She stated law enforcements obtained photographs from those messages. [The material reviewed was not presented as an exhibit].

The Applicant complains that this was improper corroboration or self-serving hearsay. However, the substance of the text messages was not introduced. The Applicant admits as much as he declares he does not know what was being shown to the victim.

The Court finds that counsel was not deficient in failing to object to this portion because the substance of the text message photographs were not introduced as an exhibit. The Applicant has failed to show deficient performance or prejudice under *Strickland* by his failure to object on frivolous grounds.

The Applicant in 23/1 next refers to Tr.p. 470, l. 23-p.472, l. 15. In this portion of Margie Branham's direct testimony, she confirmed that she talked with Victim on April 26 initially by text message to see how she was doing. She recalled that it was mid-evening. She stated that she texted her because she knew her mother was working evenings on third shift and knew she did not like to be home with her father alone, so she decided to text her and check on her. Branham testified that Victim respondent to her text in multiple texts. Branham stated the messaging lasted ten minutes to an hour. Tr.p. 470-471. As stated earlier, when asked what she learned in the conversation, defense counsel made an objection based upon hearsay that was sustained. Tr.p. 471, l. 23-p. 472, l. 6. Branham then described that in the process of reaching out, she became concerned and kept asking her questions. Tr.p. 472, l. 8-10. The trial court sustained another hearsay objection when Branham stated she kept asking her questions to figure out what was wrong and what Victim kept telling her. Tr.p. 472, l. 13-18.

In his pleading, the Applicant contended that the questions were improper corroboration and presents hearsay. He speculates again how they know the Victim is the one texting and that the State is seeking to improperly corroborate the text and asserts that the pictures do not show the times. He claims that this is improper corroboration if the jury has pictures of the conversations. In his PCR testimony he complains how Branham even knows it is Victim's phone that she is using to communicate. PCR 123. He complained that the photos of the messages do not show a time or date. He states that the photos Sgt. McCann took do show the time McCann took the picture of Branham's phone but not where it came from. PCR 123-124. He also complains again as to how Branham knew that Victim did not want to be home alone with Applicant and he described it as self-serving hearsay.

This Court finds as a fact that the photograph of the substance of the text messages between Victim and Branham were not introduced during the trial as an exhibit. This Court also finds in this portion that potential hearsay statements were timely objected to by the defense. As to his issue on whether Victim did not want to be alone with Applicant according to Branham, that issue was previously addressed in this Order in section 15/2. The Court incorporates by reference that portion of the Order. This Court finds that counsel was not deficient in this portion as the defense properly objected to the hearsay, which was sustained. This Court finds that the Applicant has failed to prove *Strickland* prejudice related to this portion.

The Applicant in section 23/1 refers to Tr.p. 476, l.6-p. 477, l. 6 during Branham's direct testimony. In this portion, Branham again indicated that she had a text conversation with Victim that night but did not call her. Tr.p. 476. Branham was shown a number of documents that she reviewed that were text messages from that night which were accurately reflected in the pictures. Tr.p. 476, l. 12-19. [Those documents or pictures were not introduced at the trial as exhibits].

Branham testified that she had the opportunity to talk with law enforcement at a later time and Det. McCann took photographs of the messages at that time. Tr.p. 477.

In his pleading, the Applicant claims that he needs to know if the text messages were put into evidence and then asserts, that if so, it was improper corroboration because he again claims that there is no way that Branham knows who is on the other part of the conversation without voice recognition to identify the person. He asserts that the text messages lack authentication. During the PCR testimony, Applicant asserted that it was further improper corroboration. PCR 124.

As stated above, this Court has reviewed the transcript of record and reviewed the exhibit list and has determined as a matter of fact that the photographs of the text messages were never introduced as exhibits and never published to the jury. His argument on this issue is therefore without merit because counsel could not object to items that were not introduced. His assertion fails to prove a Sixth Amendment violation under *Strickland.*

Consolidation – evidence admitted Rule 404 Issues (24)

In this 24/1 assertion, the Applicant claimed an issue of ineffective counsel related to Tr.p. 370, l. 6-13 during Victim's direct testimony. At that portion, the State offers the iPad as State Exhibit 14 subject to counsel Floyd's previous and restated objection. The trial court admitted the iPad.

In his pleading, Applicant asserts that while the defense has objected to the iPad coming in under the 4th Amendment, the defense should have objected to the iPad coming in under "consolidation using 404(b) and that they don't fit with the other or all indictments." He claimed that a balancing test is required under Rule 403 and should have been presented to the judge in pretrial proceedings. In his PCR testimony, he claims that because everything was consolidated, that should have required the same evidence. However, there is different evidence from the iPad. He contends that this proves that consolidation should have been denied. He asserts that the iPad contains prejudicial pictures and was only evidence coming in from April 26. PCR 125.

During the hearing, at that point, this Court noted that Rule 404 had already been ruled upon at the beginning of the trial with the consolidation issue. PCR 125-125. This Court finds that the Applicant's complaint about the admission of the iPad, which was properly seized and admitted, is without merit. Apparently, underlying his contention, though difficult to understand, may be that the iPad was not possessed or used by him during the entire time frame covered by all the indictments and therefore not admissible on any. His misunderstanding about a requirement in consolidation cases as having all the same evidence is incorrect. The Applicant failed to show either deficient performance or prejudice under *Strickland.*

In the next portion of 24/1, he points to Tr.p. 378, l. 9-13 during Victim's testimony relating to her assertion that the abuse started when they lived at Peachland with her mother, father and brother Nicholas. In his pleading, he contends under his theory of consolidation and Rule 404(b) that counsel should have objected because her brother was only living with them until he went to the Army in 2012. This Court finds his assertion is wholly frivolous. No deficient performance has been shown. Reasonable counsel under *Strickland* is not required to make a frivolous motion.

The Applicant in 24/1 also refers to Tr.p. 379, l. 17-23 in Victim's testimony in which Victim describes her brother going into the Army in 2012 when she was 13 or 14. He re-asserts the same frivolous argument as above. For the same reasons, the assertion fails to prove a Sixth Amendment violation. There is no basis to object due to an alleged lack of similarity related to her brother's Army service during a certain period covered in some of the indictments.

Applicant also refers in 24/1 to Tr.p. 592, l. 20-p. 593, l. 12 in which the extraction report (State 30) was objected to by counsel Spangler for relevance. After clarification that the summary page, user account page, web history on April 26, 2015, and data files from April 26 and December 1, 2014 were the focus of the admission, counsel acknowledged that he had no objection. Tr.p. 593. In his pleading, the Applicant contends that this was similar error under his misguided interpretation of the consolidation ruling and Rule 404(b), and Rule 403 because this evidence did not fit all the indictments. His assertion is frivolous and counsel had no Sixth Amendment duty to make the objection.

The Applicant next refers in 24/1 to Tr.p. 593, l.13-p. 594, l. 10 which follow the above section related to the extraction report and defense counsel's assertion that it is not relevant because there are no pornography websites on the April and December dates. In his pleading, Applicant complains that counsel Spangler is inconsistent in his argument that the dates not on the alleged day of the offense are not relevant and that he should have said that the photographs were not relevant and therefore too prejudicial. This Court finds that the Applicant has failed to show that counsel was deficient in his argument. Further, prejudice was not proven when the limited evidence from the extraction report was properly admitted and the Applicant's PCR theory of an objection to the report would not have to a reasonable probability been successful.

In this same series in 24/1, the Applicant refers to Tr.p. 594, l. 13-p. 595, l. 9 which follows the above passage. In this portion at trial, the prosecutor continues to argue that she only plans to focus evidence on the dates in questions when Victim testified the iPad was used and the pornography was playing, including Dec.1 and potentially Dec.2. Counsel Spangler responded that the testimony stated it was in the early morning hours of December 2 and that is not the same thing as December 2 at 10:00 PM. Tr.p. 595. In his pleading, Applicant asserts that this evidence should have been proffered pretrial and complained as to how the judge could have known whether it was December 1 or December 2 without viewing the photos and before hearing Phipps testimony. This Court finds that the Applicant has not proved deficient performance in his continuing complaint about counsel's argument on the admission of extraction report as limited. Further, the assertion has not shown prejudice under *Strickland* in his challenge to counsel's objection to the report and consolidation.

The Applicant in 24/1 also refers to the continuation of the argument at Tr.p. 595, l. 12-p. 597, l. 17 concerning the admission of the report. This portion has been set forth previously in this Order above in section 20/3 (footnote). Counsel Spangler argued it was still not relevant because the entry was on December 2 at 10 PM, which was not close to the early morning on that date. Tr.p. 595. Spangler continued that displaying the images to the jury could only unfairly prejudice the jury against the Applicant because they are also going to hear that it is present on the iPad and in the web history. He urged that it was not necessary and not probative. Tr.p. 596. Judge McMahon disagreed and concluded that the evidence had a high degree of "probability." [This may be a misstatement or typographical error for "probative value."]. He noted that the only direct testimony was Victim. Judge McMahon held that this evidence corroborates the testimony of Victim. Tr.p. 596. He assessed whether the evidence was unduly prejudicial under Rule 403 and *State v. Collins*. [*State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) ("We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." (citation omitted). Judge McMahon found that the extraction from April 26, 2014, is relevant and denied the motion as far as it being unduly prejudicial. Tr.p. 596. Judge McMahon held that as far as the "on or about December 1, 2014" indictment, he assumed that the counsel was seeking a Rule 403 analysis, and held that it is relevant and based upon his prior ruling not in violation of the standard of Rule 403. "It is highly probative; it is not unduly suggestive. As far as the timing, that would go to the weight and not its admissibility." Tr.p. 596-597. Judge McMahon confirmed that the State was only seeking to introduce the testimony as to those two dates which Solicitor Usry confirmed. Tr.p. 597, l. 5-17.

In his pleading to this section, Applicant complained that it was confusing to him that counsel was objecting to photographs that had not been put into evidence yet. He stated that the enlarged versions were displayed and that he did not object to the enlarged versions. He further complains that counsel did not require the State to prove where the website had been logged in and actually visited. He further questions why December 1 or 2 is relevant because she only ID'd State Exhibit 22 connecting it to April 26 and failed to mention the Rules of Court [Evidence].

This Court finds that these serial arguments have been addressed previously and fail to prove deficient performance. This Court finds that counsel did argue a Rule 403 objection to the photographs, particularly the December 1, 2014, date issue related to one of the photographs. Contrary to the assertion of Applicant, this Court finds that counsel was not deficient in his objection or argument to Judge McMahan as it related to the December 2, 2014, extraction or photograph or evidence about the iPad. He has made no credible showing, that had he argued it differently, there is a reasonable probability that the result of the proceeding would have been different. The assertion in his pleading must be denied.

In his final portion related to section 24/1, Applicant sets out Tr.p. 656, l. 15-p. 664, l. 20. This section involves the direct examination of Selma Heath by counsel Floyd and the cross-examination by the solicitor. During the defense case, counsel Floyd presented Selma Heath, the Applicant's mother and Victim's grandmother. She stated that she was close to Victim and familiar with Victim's relationship with Applicant. She testified that Victim stayed with her from the time she was six weeks old until she went to school. She also described other times when she would see her on the weekends when she was in high school before she moved to Texas. She indicated she saw her 6 to 8 days out of the month. Selma denied seeing Victim afraid of the Applicant when she was in high school. Tr.p. 657. She indicated that she had Victim for six months when DSS removed them. She indicated that she was in the first grade at that time. Tr.p. 656-658. She indicated the DSS allegations did not involve sex abuse. Tr.p. 658. After DSS returned the children to their parents, they continued to see Victim. She reiterated that she did not see any fear on the part of Victim. Tr.p. 659. Selma stated that she was shocked when she learned of the charges and that Victim had not told them. Tr.p. 659. Selma stated that Victim had never told her about any sexual abuse. Tr.p. 660. On cross-examination by the State, Selma stated that she had some concerns about Victim's medical issues when Victim was young. Selma confirmed that DSS placed Victim and her brother Nick with her. Selma complained that when DSS put them back into the home they did not follow up with their medical needs. Selma stated that she and her husband went back to court over it. Selma stated that DSS had intervened, not for a child abuse allegation, but because treatment was ordered for Applicant and his wife. Tr.p. 661. At that period, Victim and her brother were not allowed to live with Applicant and his wife.

Selma testified that when Victim was seven in November 2004 there were concerns about medical issues, however she denied taking her to Dr. Luberoff or Dr. DeSoto for burning urination or blood. Tr.p. 662-663. After confirming that she loved her son, Selma acknowledged that she did not live with the family on Peachland, Smith Pond Road or Nazareth Road but was only 15 minutes away. Tr.p. 663. She admitted that Victim could also have called her. Tr.p. 664.

In his pleading on this matter, Applicant demands that he be shown where in the face of the indictments and with the testimony of the alleged victim that Selma Heath's testimony is relevant. He asks why counsel did not object to the testimony, which he continued to contend attacked his character, is "out of the consolidation" inadmissible under Rule 404(4) and prejudicial under Rule 403. Applicant contends that counsel knew the dates of when they lived at Peachland and that the last entry was not relevant because they did not live at Peachland until May or June 2005, yet counsel and not call DSS to correct it.[67] He claimed that counsel was ineffective. He suggested that his counsel did not want a mistrial with this jury. He claimed it was a snowball effect from consolidation, wrong dates, defense opening the door about DSS, and that "not objecting to anything" was ineffective.

This Court finds that counsel was not deficient in calling Selma Heath. As counsel Spangler credibly testified, the defense strategy was to show the victim had opportunities to tell people throughout the period of Applicant's alleged abuse. The defense wanted to call Selma to get some good information about the Applicant without the risks of the jail calls and the other pornography. It was the defense hope to show that Victim was very involved with Selma and that there was no outcry. The defense reasonably asserted that this evidence undercuts Victim's story when she had these opportunities to tell someone what was happening, including her grandmother, doctors and DSS. This Court further finds, as more fully set out later, that counsel's advice related to calling the Applicant to testify was reasonable. A driving force to the advice was the inculpatory impact

[67] It must be noted in the face of this issue, PCR counsel did not call any DSS employees concerning the date.

of some of the jail calls that Applicant made. To the extent that the defense opened the door related to DSS involvement, even though it was unrelated to sex abuse, it was a sound strategy. The Applicant failed to meet his burden of proof with credible evidence related to statements about when they lived on Peachland and Smith Pond Road.

This Court further finds that Applicant failed to prove any prejudice from these strategic decisions. His allegation is without merit.

Res Gestae, Excited Utterance, Rule 404(b) (25)

In 25/1, the Applicant cites to Tr.p. 460, l. 10-12 during the cross-examination testimony of SANE nurse DeGuzman related to her own report at page 6 in which she confirmed that she descried Victim's demeanor as "controlled." In his pleading, he asserts that this shows anything she stated to Deguzman was not "excited utterance." The SANE nurse conducted her examination on April 16-17, 2015, on the morning of the incident after Victim's report of the incident that evening after she arrived at 3:45 am. (Tr.p. 440). The Applicant contends that her use of the term controlled suggests that an excited utterance would not apply and therefore should have been used by the defense to exclude the testimony. As noted above, it was essentially addressed in section 14/1 above. Therein, this Court fonds that the Victim's responses to the protocol were admissible under Rule 803(4) for purposes of medical diagnosis and history. This Court further finds that it would be admissible as non-hearsay under Rule 801(d)(1)(d). For the reasons previously set forth regarding the SANE nurse's testimony, which are incorporated herein by reference, the Applicant has failed to show the question by defense counsel was deficient and more particularly failed to prove *Strickland* prejudice.

In his next specification in 25/1, Applicant refers to Tr.p. 501, l. 11-14 during the State's argument on the admission of the Victim's statement to Sgt. Black in which the solicitor stated the stress of the excitement must be caused by the startling event or condition and related to the sexual event that occurred that night. The defense next urged that "there was no kind of testimony that the defense was excited..." Tr.p. 501, l. 17-19. In his pleading, Applicant asserts that Sgt. Black's testimony went outside of any sexual assault that happened and the defense did not object. PCR 127-128. The Applicant complained that the state's evidence went into years of reflection rather than the night of the incident. The Applicant asserts that this is why this issue was not raised in his direct appeal.

This Court finds that the Applicant's complaint about Sgt. Black's testimony was addressed previously and this Court's findings and conclusions are incorporated herein by reference. See Section 12 above.[68]

In his next specification in section 25/1, the Applicant refers to Tr.p. 502, l. 5-13 in the solicitor's argument related to the excited utterance issue of Sgt. Black. In this portion, the solicitor urged that the interval of excitement up to 11 hours was possible, relying upon *State v. Blackburn* and *State v. Quillian.* The Applicant in his pleading asserted that he was not sure that this was put in to throw Applicant off the fact that the SANE nurse read from her statement. However, Applicant stated that he wanted this issue raised in his PCR action. In the direct appeal, as noted

[68] In Section 12, this Court made the following findings and conclusions:

"This Court finds that trial counsel was not ineffective related to this issue based upon the impact of *Simmons* and the Court of Appeals ruling on the merits. This allegation must be further denied because the Applicant failed to prove deficient performance or prejudice. To the extent that the Applicant seeks to assert that this is a different issue as it relates to the "in the past" evidence, this Court finds that the Applicant failed to prove Sixth Amendment prejudice. As the appellate court noted, the admission of the evidence of the discussion with Sgt. Black was harmless error. Similarly, regarding past conduct matters, the Strickland prejudice prong assessment requires a similar finding where Victim testified about past events and there was corroborative evidence presented concerning his past conduct. He failed to show a reasonable probability that the result of the proceeding would have been different."

previously, the Court of Appeals specifically addressed the time factor: " *See State v. Sims*, 348 S.C. 16, 22, 558 S.E.2d 518, 522 (2002) (holding declarant's statements were admissible under the excited utterance exception when declarant was "not crying or acting 'excited' in the sense of being animated when he made the statement" but whose demeanor was "characteristic of someone who [wa]s under the 'stress of excitement'. The record reflects Victim was under the "stress of excitement." Based on the foregoing, we hold the trial court did not abuse its discretion by admitting Victim's statements to Sergeant Black. *State v. Heath*, 433 S.C. 506, 517, 860 S.E.2d 673, 679 (Ct. App. 2021).

It should be noted that at the time of this argument, the SANE nurse had already testified. For the reasons stated above, the Applicant failed to show a Sixth Amendment violation related to the SANE nurse's testimony.

In the next specification in 25/1, the Applicant refers to Tr.p. 505, l. 6-p. 506, l. 2 in Sgt. Black's testimony that when Victim told him Applicant had rubbed his penis on her, she asked the other deputy to leave because she was uncomfortable. Sgt. Black then asked her if any sexual act had taken place and she responded, "that in the past her father had physically forced her to perform oral sex on him and that he referred to that as giving him a couple of minutes" and "that night she had used her hand on his penis." The Applicant contends that this went outside of the night that the incident happened, and defense counsel should have objected to it. PCR 127-128. This same evidence from Sgt. Black and counsel's alleged failure to object was rejected above in sections 12 and 15, which are incorporated herein by reference. It must be denied as failing to prove a Sixth Amendment violation.

In his next assertion under 25/1 and 25/2, Applicant cites to Tr.p. 598, l. 11– p. 602, l. 11 which was the mistrial motion related to defense counsel's complaint during the testimony of Sgt. McCann about the assaults occurring over 10 years. In this specification, Applicant again asserts that counsel was intimidated by the judge and afraid to object, questions PCR counsel on how "prior statement" is interpreted and questioned "time and place" limitations and Rule 404 exceptions. Applicant notes that in solicitor Mayes arguments she speaks of multiple incidents and multiple indictment and wonders why the state did not use this for Sgt. Black's testimony. Applicants point out issues related to plural or singular as they are related to the rules and cases. Applicant describes that section as misconduct of the defense counsel, solicitor and trial judge. In his PCR testimony, Applicant states that his issue with counsel was that it was focused on prior statements and that the State was going outside of the night of the April 26 incident, and complained that in counsel Floyd's motion for mistrial he did not really argue anything. PCR 129.

This was initially raised above in section 12/4 concerning intimidation by the judge which is incorporated herein by reference. A review of this section is useful for resolution of this issue as well:

> MR. FLOYD: Yes, Your Honor. Your Honor, just for the record, during the testimony of Sergeant McCann, it came up about a statement given by the alleged victim. And at that time the Court allowed the questioning of the witness as to that statement pursuant to Rule 801(d) about a prior statement of the witness. And pursuant to the provisions of 801(d)(1), that testimony is allowed, however, it's limited to the time and place of the incident.
>
> However, when Sergeant McCann testified about the alleged statement, instead of limiting it to the time and place of the incident, she testified to the fact that it happened multiple times in the past, words to that effect. That's outside of the provisions of 801(d)(1) and was improper bolstering of the victim's alleged statements -- or alleged victim's statements. And, accordingly, we would move for a mistrial at this time.
>
> THE COURT: Thank you, Mr. Floyd. Solicitor?
>
> MS. MAYES: Yes, Your Honor. So pursuant to 801(d)(1)(d), the time and place in a criminal sexual conduct prosecution, the testimony is admissible as corroboration of the time and place of the assault or assaults. And here we have

multiple indictments.

The State's position is the detective would have been allowed under the rule to testify to the time and place of each assault that was disclosed to her. What was disclosed to her in that bedroom that night was that it had occurred multiple times over the past 10 years, since the second grade, which would be the time or time frame. She didn't go that far, and we didn't elicit the specific information about Smith Pond Road, which was also disclosed to her.

Under 801(d)(1)(d), the time and place is admissible of the criminal sexual conduct prosecution. And here, we've got the four separate indictments, two of which are ongoing in nature. So I just wanted to distinguish for the record that this rule is a complete exception to hearsay from excited utterance or something of that nature where it is all in relation to the most recent assault with the freshness of the assault. This rule would allow any witness to give corroborating testimony as to time and place.

So the State's position is that Detective McCann would have been allowed to testify to all of those locations, going back to Peachland Road, that was disclosed to her and the time frame involved. She did so, we did not elicit that information. But that is the State's position pursuant to Rule 801(d)(1)(d). [69]

THE COURT: Thank you, Solicitor. Mr. Floyd, anything further?

MR. FLOYD: Nothing further, Your Honor.

THE COURT: Looking at Rule 801(d)(1)(b), Statements which are not hearsay: A statement is not hearsay if the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement and the statement is, B, consistent with the declarant's testimony and is offered to rebut an expressed or implied charge against the declarant -- excuse me, and is offered to rebut an expressed or implied charge against the declarant of recent fabrication or improper influence or motive provided. However -- I'm reading the wrong provision -- (d)(1) -- it's (d)(1)(d), is it not, not (d)(1)(b)?

MS. MAYES: (d)(1)(d), Your Honor.

THE COURT: Consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim, that is correct here, and the statement is limited to the time and place of the incident. That's what we have here. It's not limited as is 803 because those are just exceptions to the hearsay rule. This says that this testimony is not an exception. The victim has testified. And it's limited to the time and place of the

[69] See Rule 801(d)(1)(D), SCRE ("A statement is not hearsay if ... [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident.").*Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991) (recognizing corroborative statements of alleged criminal sexual conduct victims that are limited to time and place of the alleged assault as a well-settled exception to the rule against admitting hearsay testimony). The rule expressly allows other witnesses to testify the victim complained of the assault, but only as to "time and place"; it specifically circumscribes such testimony by "excluding details or particulars." *State v. Schumpert*, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993).

> incidents. And that's what it was. I mean, it's -- it doesn't matter. It's not outcry. It doesn't matter when the sergeant talked to her, it matters that she testified at trial. And it is limited in that regard under that rule. So I would respectfully deny the motion for a mistrial. Anything further before we bring in our jury? Anything further, Mr. Floyd?
>
> MR. FLOYD: No, Your Honor. I do note that the rule is in the singular, not the plural.
>
> THE COURT: I understand. I don't think that has any substantive value whatsoever whether it's singular or plural. But I do note that. I noted that in here. I think the purpose of the rule is where it is limited and cannot go into details – if there were additional details given, they cannot go into those details. It's limited to -- the fact that the declarant testifies and then it's limited to time and place. But I do note that the incident is a plural noun.

Tr.p. 598, l. 11-p. 602, l. 11.

This Court finds that the Applicant failed to prove deficient performance. Counsel made the objection arguing it was limited to time and place. The state urged that Detective McCann would have been allowed to testify to all of the locations, including Peachland Road, that was disclosed to her and the time frame involved. Judge McMahon then allowed that the admission of Det. McCann's testimony as proper and denied the mistrial motion. Under this rule and the indictments before the court, it would allow the limited testimony related to all the incidents, not just April 26 as Applicant seems to suggest. In light of the trial judge's decisions, the Applicant had failed to prove *Strickland* prejudice.

Testimony that goes against what's already been testified to that was not questioned. (26)

In section 26/1 the Applicant initially refers to Tr.p. 459, l. 16-p. 461, l. 13 involving counsel Floyd's cross-examination of SANE nurse DeGuzman concerning her report. Counsel Floyd emphasized that in her report there was no statement of penetration of Victim's vagina or anus by a finger, object or penis, but that he rubbed his genitals against her and that he licked her anus and no ejaculation occurred. Counsel further emphasized her report included that Applicant used baby oil when Victim was on the bed because the SANE nurse asked about lubricant. As stated above, the SANE nurse described her demeanor as controlled in the report. Counsel further pointed out the nurse combed Victim's pubic area and collected a stray hair off of the rectal swab. He emphasized that she did not know when or how it got there.

The Applicant complained in the pleading that the report was not published to the jury.[70] He complained that the report had some confusing or inconsistent checks that should have been clarified by counsel for the jury. The Applicant stated that the serologist and DNA analyst went by the report as to what they should test, yet the report said no ejaculation and they still tested for semen. He asserted they could not test for saliva then. The Applicant stated that there was confusion because the nurse indicated she found one hair, yet SLED indicated that it received two hairs. He claimed this shows the defense should not have stipulated to the chain of custody for that reason. He complains, as before, to the classification by the SANE nurse of the hair being a pubic hair, contending that the hair could have come from anywhere. He asserts that counsel was ineffective in his questioning of each.

This Court finds that the Applicant failed to prove counsel was deficient. First, the SANE nurse's report was made an exhibit by defense counsel at the conclusion of the case. Tr.p. 672. This Court finds the SANE nurse testified about her specimen collection and why the pubic hair combing was done. She indicated it was done because of the Applicant allegedly rubbing his genitals against her genitals and also that she noted a stray hair from the rectal swab. Tr.p. 451-453. The DNA test of a hair from the pubic hair combing was consistent with the Victim's DNA. Tr.p. 574.The DNA analyst also testified that there were two hairs from the rectal swab. She

[70] To the contrary, the SANE report was ultimately made an exhibit and went to the jury. Tr.p. 672 (Defense Exhibit 1).

determined that the other hair, item 1.6, was consistent with the DNA profile of the Applicant. Tr.p. 575-577. Further, the saliva cutting[71] from the victim's underwear, item 4.1 (State Exhibit 28) was consistent with DNA of the Applicant. Tr.p. 563, It was determined that the main contributor to the mixture matched the full DNA profile of the Applicant. Tr.p. 565-66, 570-572.

The record shows that the focus of defense counsel Spangler's cross-examination was the possibility of direct or indirect transfer possibilities which went to the weight of the evidence. Tr.p. 579-581. Counsel was able to get DNA Analyst Money to also confirm the hair was visible and did not require a microscope. Tr.p. 579-580. Analyst Money also testified that she could not tell how the hair got there or the source of the hair and noted it was possible to have been body hair or pubic hair. Tr.p. 579. Counsel cannot be deemed deficient related to the number of hairs found during the SANE nurse examination.

Counsel Spangler on re-cross examination of Analyst Money returned to the chain of custody. Tr.p. 593. Analyst Money noted that the sealed CSC kit was received by SLED on July 30, 2015 and that it went to serology in April 2016 and Analyst Money received it May 2016.

This Court finds that the Applicant failed to prove deficient performance. He additionally failed to show a break in the chain of custody. Further, he failed to show that the characterization of the hair located during the pubic hair combing or rectal swab was deficient. Similarly, he failed to show how counsel was deficient as it related to the underwear testing for saliva and DNA. The Court found that defense counsel questioned the witnesses about the possibility of transfer, particularly relating to the hair. The Court found that this addressed the Applicant's concerns in

[71] SLED serologist Courney Thompson testified that she tested the cuttings from the underwear for semen which turned out negative. Tr.p. 537. It was presumptively positive for saliva. Tr.p. 537-540. She then sent it to DNA. Tr.p. 541. She testified that based upon her professional opinion the saliva stain originated from the interior of the underwear. Tr.p. 557

his pleadings that his hair could have come from anywhere since they lived together. In each of his specification, he failed to show prejudice – that there is a reasonable probability the result would have been different, particularly related to the chain of custody or the characterization of the hair as a pubic hair. His assertions must be denied.

In 26/2, the Applicant refers to Tr.p. 517, l. 14-22 during Sgt. McCann's testimony concerning the beginning of her interview with Applicant. She testified that she requested Sgt. Black and Deputy Franklin to ask Applicant to step outside and speak with her so they could get Victim out of her house and on her way to the hospital. Tr.p. 517. Sgt. McCann testified that she was able to get this done by her interview with Applicant when she asked Applicant a couple of questions and advised him of *Miranda* [rights]. Tr.p. 517, l. 20-22. Subsequently in her testimony, she introduces the advice of rights form and the statements Applicant made to her. Tr.p. 518-522.

In his pleading, Applicant asserts that the testimony shows a conflict in the evidence because he contends that this testimony showed that she had asked Applicant questions before she read him his rights, which he contends in his pleading were questions about his iPad that were asked outside of his vehicle before *Miranda*. Applicant claims that had counsel called him as a witness in the *Jackson v. Denno* hearing he would have testified to that fact. In the PCR hearing, he claimed he told counsel Floyd that she was not sitting in the vehicle prior to *Miranda* when she asked him about whether he watched pornography on his iPad, and he acknowledged that he watched it on it before *Miranda* was given. Applicant claimed that his prior viewing of pornography on the iPad should not have been allowed into evidence because it attacked his character and had nothing to do with that night because he did not say he was watching it that night. PCR. 130.-131. He asserted that he should have been called at the *in camera* hearing and would have stated what he just said.

PCR 131.

The record reflects that on the initial day of the trial, the State made the request for a *Jackson v. Denno* hearing. Tr.p. 44. Solicitor Mayes indicated that they did not know whether they were going to introduce the statement or not and needed to have the hearing. Tr.p. 44. At the close of the testimony of Sgt. McCann the State indicated it had no further witnesses. Tr.p. 62. Defense counsel Floyd indicated that it did not intend to call any evidence or testimony on this issue. Tr.p. 62.

This Court finds that during the *Jackson v. Denno* hearing, Sgt. McCann testified that she was originally outside of the vehicle when she first observed the Applicant walking toward her to be interviewed as he left the home with Sgt. Black and Deputy Franklin. Tr.p. 49. She stated she then went into her vehicle and had Heath placed in the passenger front seat next to her. She stated that she introduced herself and asked him if he knew why she was there and he claimed that he did not. She then explained to him that she would need to advise him of his *Miranda* rights and she advised him of the allegations against him. Tr.p. 50-51. The Applicant signed the advice of rights form on April 27, 2015, at 2:02 AM. Tr.p. 51. After going through the form, she indicated at the hearing that she documented his statement in her supplemental report. In that report she reviewed it as follows:

> A. When he initially came outside, I introduced myself. I asked William if he knew why we were at his residence, and he said he did not. I asked William if anything had happened there that night, and he said no. I then advised him of Miranda and informed him of the allegations that Theresa had made.
>
> William said he would be willing to speak with me. He said he did not know why Theresa would say something like that. He said he loves both of his children and would not do anything to hurt either of them. He said tonight he had talked to Theresa about helping out more around the house because she stays, quote, shut up in her room.
>
> I asked William where they talked about her helping out and he said they had

> been sitting on the couch. I asked William what happened after that. William said he had gone to his room and Theresa had gone to hers.
>
> *I asked William if he had been watching porn on his iPad tonight. William said he does watch porn on it sometimes, but did not directly answer my questions whether he had watched porn on it that night or not.*

Tr.p. 56-57, l. 11. (emphasis added). On cross-examination by counsel Floyd, Sgt. McCann indicated that Applicant was brought to her truck to speak with her as she went inside the house to speak with Victim. 57-58. McCann stated that when she spoke with him, he was inside her car and another officer, Sgt. Black, was in the back seat. Tr.p. 59.

During counsel Spangler's PCR testimony, he indicated with respect to Applicant's statement and the *Jackson v. Denno* hearing that it was not a big deal because they felt Applicant did not give incriminating statements. PCR 266. Spangler indicated that the hearing was only a formality in this case to make sure that the State could lay the proper foundation. Spangler noted that counsel Floyd handled the hearing. Counsel asserted that the statement of the Applicant was possibly even exculpatory. PCR 267. Counsel Spangler testified that there would have been a discussion with Floyd and the Applicant about his decision to testify in the *Jackson v. Denno* hearing. PCR 276. Counsel Spangler testified that he learned from the other trial he had with Floyd, that the discussion would always take place with the client that he could get on the stand and testify in the *Jackson v. Denno* hearing, as well as the right to testify during the trial. PCR 276. Spangler recalled the discussion about the right to testify took place initially before the trial in the vein that there are bad things that can come up if you take the witness stand. PCR 277. Spangler recalled a lengthy discussion during the trial about whether he was going to testify or not. PCR 277. He said that he was present when counsel Floyd had that discussion with Applicant. Spangler testified that, as a result of the discussions, Applicant indicated that he understood and agreed with the course of conduct. PCR 277.

The entire record before this Court contains credible evidence that the questioning about the iPad occurred after *Miranda* warnings were given. This Court further finds that there is no reasonable probability that the result would have been different had counsel called the Applicant to testify during *the Jackson v. Denno* hearing. Further, there was evidence from Victim that supported probable cause to seize the iPad, not just Applicant's self-serving comments.

This Court finds that the Applicant failed in his burden of proof related to the *Jackson v. Denno* hearing. First, this Court must initially find that the Applicant is not credible related to this issue. It is clear from counsel Spangler's credible testimony that counsel Floyd's practice was to have those discussions with the criminal Defendant. The Applicant's factual assertion is that Sgt. McCann would have initiated a conversation with Applicant prior to *Miranda* and outside of the vehicle she claimed to be sitting in with a statement on whether he watched pornography on his iPad, under the circumstances as to what was occurring. However, the Applicant failed to show by credible evidence that he had told his lawyers about this assertion. He failed in this factual precedent to his claim.

This Court has further reviewed the testimony of Sgt. McCann during the *Denno* hearing and during the trial related to the circumstances of the Applicant's statement. This Court finds that her trial testimony was consistent with her hearing testimony. She had already met with Victim prior to her interaction with Applicant. Tr.p. 512-513. She described at trial that next she introduced herself to Applicant while Victim changed her clothes to prepare to go to the hospital. Tr.p. 517. She stated that she asked him a couple of questions and then gave the *Miranda* warnings. Tr.p. 517, l. 14-22. They were sitting in the car with Sgt. Black in the back seat. As in the *Denno* hearing, she next informed Applicant of the allegations and then gave similar testimony she gave in the *Denno* hearing, ending with "I *then* asked William if he had been watching pornography on his iPad tonight. William said he does watch pornography on the iPad sometimes but did not directly answer me as to whether he had watched pornography on it that night or not." Tr.p. 522, l. 13-25.

This reveals and supports the timing of the iPad information. This is also consistent with counsel Floyd's argument in the *Denno* hearing that all this occurred in the vehicle as Applicant claimed to be surrounded by law enforcement. Tr.p. 64-65.

Applicant's claim is legally or factually untenable. "It is not necessary to address specifically and individually each and every one of these numerous instances of challenged trial tactics. It is sufficient to note that strategic choices made after thorough investigation are virtually unchallengeable." The Applicant has failed to prove deficient performance or prejudice.

Burden – Shifting (27)

In section 27/1 the Applicant cites to Tr.p. 392, l. 10-25 in response to State's question, Victim testified that Applicant was not a good person and her mother should not want to be around him, about whether her mother had stayed away from Applicant for more than a few weeks and whether Victim felt she could confide with her mother. Victim further testified that after she eventually told her mother about the assault, she is back with him now and depends upon him. The Applicant contends that it was burden shifting because it gave the impression that Rose was not testifying because she would not have any financial support, which he felt counsel should have objected. At the PCR hearing, Applicant testified that it was burden shifting because one of us would have had to testify. PCR 131.

This Court finds that the Applicant is not correct. The evidence about Victim's reasons for not confiding with her mother is relevant evidence. It was not subject to a proper objection because it may have required a response. Further, the Applicant has failed to show prejudice. The claim must be denied. This Court also adopts and incorporates by reference similar assertions related to this passage in the transcript in sections 13/1 and 15/2 herein.

In section 27/1, the Applicant refers to Tr.p. 459, l. 6-15 in which the SANE nurse is testifying about the type of threats that Victim reported to her and indicated that there were no threats of harm, just statements that if she did not do this, he would not pick her up from school. In his pleading, he opined that this was burden shifting because he would have to testify that he only ever picked her up when she started school in kindergarten. He claimed he told Floyd this and that he should have questioned her. In the PCR hearing, this was not specifically addressed. This was also addressed above in section 17 concerning alleged threats to the victim.

This Court must find that there is no legally viable burden shifting objection that defense counsel could or should have made at the trial. His assertion reflects a misunderstanding of the trial and rules. He failed to prove either deficient performance or prejudice.

Defense Opening the Door (28)

In this assertion, section 28/1, Applicant asserts that counsel was ineffective related to "Tr.p. 373, l. 21-14" which is an obvious typo. In his argument he asserts that defense counsel opened the door to DSS, which he claims was the most ineffective thing counsel did by allowing the jury to hear his children were removed without any curative instruction. During the PCR hearing, Applicant merely asserted it was opening the door. PCR 131-132.

This Court finds that the testimony on Tr.p. 373 does not specifically reference DSS but it is at the beginning of the cross-examination of Victim by counsel Floyd. This questioning related to where she lived during her childhood. At Tr.p. 373, l. 20-25, counsel develops that there was a period of time during the second half of her first grade that she lived with her grandmother. This Court finds that on Tr.p. 374, counsel Floyd developed that she moved back with her parents to Peachland after staying with her grandmother when DSS got involved. Further, counsel developed that during the time with her grandmother, she had a number of counselors, doctors, and social workers and never told them about her father's abuse. Tr.p. 374-375. As stated previously, this inquiry is consistent with the expressed trial strategy stated by defense counsel Spangler that Victim's failure to report the abuse to doctors and others over the period of time was the biggest weakness in the state's case, so the strategy was to impeach Victim with it. PCR 265-266. This Court finds, as it did previously, that this was sound strategy. This Court also finds that the Applicant failed to prove prejudice because it was also trying to address the State's theory of delayed disclosure. He failed to prove either deficient performance or prejudice. In addition, this Court incorporates by reference its findings related to Applicant's assertions about DSS evidence set for above in sections 11, 15/3, 19, 20/2, 20/4, and 24/1. The Applicant failed to prove a Sixth Amendment violation.

Defense Attorneys Attacking My Character (29)

In this assertion, he refers to Tr.p. 374, l. 8-p. 375, l. 2 of the Victim's cross-examination concerning the separation of Applicant and his wife asserting that defense counsel was wrong because they were not separated at all when DSS took away the children but were back together. PCR 131-132. This Court finds that the defense counsel's reference to "your mom and dad were separated, and you were living with your grandmother" (Tr.p. 374, l. 8-11) did not create *Strickland* prejudice whether or not it was accurate. The point of the inquiry was that Victim was not living with Applicant and was separated from him during this period. The assertions fail to create a reasonable probability that the result would have been different had the reference been limited to, as Applicant oddly suggests in his assertion, "when DSS took our kids away."

The Applicant further points in 29/1 to Tr.p. 381, l. 7-p. 382, l. 19 of the cross-examination of Victim by counsel Floyd about the fact that Victim had lived with Aunt Margie Branham for a period of time at the beginning of her senior year with her mother and Victim thought they were getting a divorce. Applicant asserts that this evidence attacked his character and that marital problems had nothing to do with this case. The Court finds as noted above these comments were consistent with the sound strategy to impeach Victim with the fact that she had not reported the ongoing or prior assaults when she was not under the presence of the Applicant. This is not deficient performance. Further, it was not Sixth Amendment prejudice. It must be dismissed.

The Applicant in 29/1 also refers to Tr.p. 627, l. 9-18 during counsel Spangler's cross-examination in Det. Phipps in which he has him refer to State Exhibit 33 related to websites that the Applicant had been on and Phipps response that the report had artifacts that related to this case. In his pleading, Applicant asserts that this question improperly corroborated that it was Applicant on the website and claimed that there was no proof that he was on the sites. This Court finds that counsel was not deficient in his questions. The record shows that counsel later asked Det. Phipps to confirm that he did not know who had actually assessed the websites and that anybody could have assessed it. Tr.p. 631, l. 11-20. This defeats the claim that Applicant is asserting. The Applicant ignores the strategy that Applicant's counsel was developing in his questioning of counsel Phipps.[72] The Court further finds that Sixth Amendment prejudice has not been shown because it is clear that counsel's question was not a concession as Applicant contends nor create a reasonable probability that the result would have been different had it not been asked in that manner.

Applicant in 29/1 next refers to Tr.p. 631, l. 11-13, which is also addressed above where counsel had Det. Phipps acknowledge that there was no way to tell when those sites were actually accessed by the Applicant. Applicant argues counsel again was improperly asserting what was, in Applicant's mind, a concession. However, he ignores the follow-up questions that confirmed it was not proof that he actually accessed the sites as noted above. The Applicant failed to show deficient performance or prejudice.

In the next portion of his filed application (which does not appear to be related to the above, he points to Tr.p. 603, l. 19-p. 604, l. 6, which is the direct examination of Det. Phipps referencing State Exhibit 31 (title page of the report of State 30 for ID) which the State moved into evidence without objection by counsel Spangler. [73] The Applicant questions how the title page of State Exhibit 30 can be put into the record as State Exhibit 31 without admitting State Exhibit 30. He complains about this process. State Exhibit 30 was the CD of the extraction report from August 24, 2016. Tr.p. 591. The defense objected to the admission of State's 30. Tr.p. 591, l. 24-26.

As noted previously, the argument about the admission of State 30 was addressed above related to Tr.p. 592-597. This Court finds that State Exhibit 30 and the need for State Exhibit 31 was addressed in 24/1 above which is incorporated herein by reference. Counsel was not deficient

[72] This Court finds that the parsing of words and sentences by Applicant in his pleading frequently ignores the obvious strategy or even his own prior statements. It must be noted that the Applicant had acknowledged to law enforcement that he viewed pornography on his iPad. Tr.p. 522.

[73] During the hearing, the Court noted a gap in the record. PCR 133-135.

related to this matter and prejudice has not been shown.

The Applicant next refers to Tr.p. 605, l. 19-p. 606, l. 5 which is the admission of State Exhibit 32, the user account page associated with the iPad without objection. The Applicant in his pleading asserts that it did not make sense to him why counsel did not object since it was part of State Exhibit 30 that he had objected to. This Court finds that counsel was not deficient in failing to object to the admissible and relevant "user account page" from the extraction of the iPad. The Applicant similarly has not proven prejudice under *Strickland.*

The Applicant next refers to Tr.p. 608, l. 4-20 which is the web history from the extraction of the iPad for April 26, 2015, that was part of State Exhibit 30. Applicant complains that counsel should have pursued the date when the actual website was typed in. The Applicant failed in his burden of proof in showing the material from the extraction that he is complaining about should have been presented. The strategy of counsel was evident that he was showing that the website was not logged into the date of the incident. This Court finds that to be sound strategy. The Applicant has failed to prove deficient performance on counsel action related to State Exhibit 33.

Pornographic Images (30)

In 30/1, the Applicant refers to Tr.p. 366, l. 21-p. 367, l. 16 during Victim's testimony when she recognized State Exhibit 22 as an image on his iPad that was from a video that he would place on the pillow near her head sometimes so she would see it. She testified that she recalled seeing it that last night (April 26, 2015). Applicant contended in his pleading that because Solicitor Mayes asked the victim leading questions, counsel should have objected to each one. Apparently, his complaint goes to that follow-up question of "and do you recall that image that night, that last night?" after Victim was shown and acknowledged Exhibit 22. Tr.p. 367, l. 14-16. PCR 132-133.

He complains that Victim never really identified the picture because she was just shown the picture and did not describe it. He stated this photo , as noted above, was from December 1 or 2. PCR 133. He claimed it had no relevance to the last date. The Exhibit was admitted as State Exhibit 22 during Det. Phipps testimony. Tr.p. 620, l. 12-13. Det. Phipps testified that State Exhibit 22 was an image that was logged on April 26 at 10:59 PM and was based upon the watermark daughterdestruction.com. Tr.p. 623-624.

This Court finds that Applicant's argument mischaracterizes the actual identification of the Exhibit by Victim that occurred at trial. She testified that the photograph was seen by her on the last night (April). The Applicant seems to argue that she must be mistaken because the exhibit was from December (according to the extraction) when he was also alleged to have committed a crime. This Court finds that Applicant has failed to show counsel was deficient related to the admission of the exhibit or her identification. He has also failed to show prejudice under *Strickland.* His assertion must be denied.

In the next specification in 30/1 is Tr.p. 602, l. 14-16 in which solicitor Usry states after the argument concerning the admission of State Exhibit 30 that she will leave State Exhibit 30 as ID only and continue with the other exhibits that they had pre-marked during the break. The Applicant asserts that counsel should have continued objecting when portions of State Exhibit 30 were introduced but during some time he asserted he incorporated his previous objection but had no further objection. He claimed that this was deficient since State Exhibit 30 was not in evidence. The Applicant ignores that Applicant's counsel had expressed its position in the argument and with the assertions did not have additional objections. The Applicant failed to show deficiency or prejudice.

In 30/2 (p. 3)[74] Applicant refers to no page but asserts that the pictures could have been on his computer for over a year, and he would not have known it and claimed a lack of knowledge on how to burn a CD. He thought that counsel Spangler helped the prosecutor by saying only specific dates because this would stop them from finding out when it was put on his iPad or accessed and claimed it would be bad for the case. This Court finds that the claim as alleged has not proven deficient performance on the part of counsel or deficiency by focusing on the dates of the incidents. Similarly, prejudice has not been proven.

The Applicant next in 30/2 refers to Tr.p. 610, l. 25-p. 611, l. 6 in the direct examination of Det. Phipps during which he was referred to the web history related to April 26, 2015, at 6:45 PM and asked when the device would have captured that history. He testified that the date and time is the last visited time for that particular entry, so it is probably exiting that site, going to the next entry when it records the date and time. Applicant complains that counsel should have researched or hired an expert related to this instead of relying on the state's expert. Applicant questions how there can be evidence that he is watching something when he is exiting when it is possible that something can be playing in the background based upon his experience. He states defense should have researched or asked for a continuance.

This Court finds that the Applicant has not proven deficient performance. He has made no credible showing that Det. Phipps's opinion was not correct or that another expert would have reached a contrary conclusion. The defense did not retain a computer or digital forensic expert. The defense counsels were aware that it was Applicant's position that their theory was the Applicant did not intentionally visit the websites. PCR 260, 292. Although he had admitted

[74] In the filed Amendment, there is no page 2 on file.

viewing pornography, Applicant had questioned counsel on how the State could prove that he had accessed the iPad at that time. Counsel Spangler confirmed that there had been no discussion about retaining an expert, but counsel Spangler had prior experience with cellphone data and how Phipps created the reports to prepare him for that testimony. Spangler credibly stated that he was able to show through the use of the report that in the web history on the critical date there was no pornography website. He suggested this conflicted with Victim's testimony. PCR 280-281.

The Court further finds that prejudice has not been proven by any alleged failure to retain a digital expert related to this collateral issue. Since he has not proven that Det. Phipps' opinion was disputed, he has failed in his burden of proof. It must be denied by this Court.

The Applicant in Section 30/2 also makes reference to Tr.p. 611, l. 11-24 during Det. Phipps' direct examination concerning his opinion about how data files were categorized during the extraction and reported into headings and the recovery of some images. Det. Phipps stated that the images can be created in a number of ways including actual photographs taken by the device, cached data from a website, or artifacts recovered from the behavior of the particular operating system. In his pleading, he complains that this is needless information because he asserted the State could not prove he was on the computer at that time and was not sending anyone any messages or Facebook entries or ordering anything other than someone being on an auto parts website. At the hearing, he complained that there was no cross-examination about how it got on there. PCR 136.

This Court finds, as stated previously, that counsel Spangler did question Det. Phipps about whether he could tell who was on the iPad when the sites were accessed and whether it was the Defendant, which he stated that he could not. Tr.p. 631. The Applicant failed to show deficient performance or prejudice related to this collateral issue.

The Applicant continues in 30/2 on Tr.p. 611, l. 25-p. 613, l. 25 during Det. Phipps' testimony related to State Exhibits 37 and 38, which were admitted in a redated form without further objection and referenced artifacts from image files in the data report which were captured and included an entry on December 2, 2014 at 9:10 PM (State 37). The Applicant asserted in his pleading that the State focused on certain dates and counsel Spangler objected that it went beyond the specific dates, which resulted in its redaction. Applicant claims that the jury would have assumed that the defense was hiding something. He claimed that this attacked his character and claimed counsel Spangler was part of "this sham." Applicant asserted that this was unduly prejudicial for the State to present something that they knew the defense would object to. Also, PCR 137.

This Court finds that counsel was not deficient. He made a proper objection which was consistent with the earlier agreed limitation by the State related to the defense objection and argument on State Exhibit 30. Tr.p. 596-597. Contrary to claim, the Applicant's counsel was acting within the reasonable standards of competence in his actions surrounding the admission of State Exhibits 37 and 38. The Applicant's speculation that it would appear the defense was hiding something could be as easily suggested that the State was improperly trying to sneak something in.

However, the Court must also find that the Applicant failed to prove prejudice. The record shows that nothing improper went before the jury nor was it discussed in any prejudicial form prior to redaction. There is no reasonable probability the result would have been different had counsel reacted differently.

In section 30/3 (p. 5), the Applicant refers to Tr.p. 614, l. 4-24 during Det. Phipps' testimony and relates to State Exhibit 38, an enlargement of State Exhibit 37, which was introduced subject to the defense objection which Spangler incorporated, but without further objection. In his pleading the Applicant complained that counsel was only reincorporating his earlier objection but claimed that he needed to object to the enlargement specifically. He claimed that counsel needed to be specific about what was in the enlargement specifically that caused the prejudice, such as the watermarks and attacking the character and 4040(b). The Applicant further claimed that it was a structural error that could not be cured. [75]

Applicant has failed in his burden of proof to show deficient performance. Counsel credibly

[75] This Court finds that the Applicant wholly misunderstands the term of "structural error." "The prejudice showing is in most cases a necessary part of a Strickland claim." *Weaver v. Massachusetts*, 582 U.S. 286, 300, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017). Generally, a petitioner "must demonstrate either that the error at issue was prejudicial or that it belongs to the narrow class of attorney errors that are tantamount to a denial of counsel, for which an individualized showing of prejudice is unnecessary." *Id.* at 308, 137 S.Ct. 1899 (Alito, J., concurring in judgment). "In the ordinary *Strickland* case, prejudice means 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting Strickland, 466 U.S. at 694, 104 S.Ct. 2052). "In post-conviction proceedings, the burden of proof is on the [petitioner] to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). Generally, "constitutional error does not automatically require reversal of a conviction." *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). However, structural errors are those constitutional errors that "should not be deemed harmless beyond a reasonable doubt." *Weaver*, 582 U.S. at 294, 137 S.Ct. 1899. "[T]he defining feature of a structural error is that it 'affects the framework within which the trial proceeds' rather than being 'simply an error in the trial process itself.'" *Id.* at 295, 137 S.Ct. 1899 (*quoting Fulminante*, 499 U.S. at 310, 111 S.Ct. 1246) (alterations omitted). "For the same reason, a structural error 'defies analysis by harmless error standards.'" *Id.* (*quoting Fulmin*ante, 499 U.S. at 309, 111 S.Ct. 1246 (alterations omitted)).

Weaver further explains that structural errors fall into one of three categories based on the rationale underlying their classification as structural: whether (1) "the right at issue is not designed to protect the Defendant from erroneous conviction but instead protects some other interest," (2) "the effects of the error are simply too hard to measure," or (3) "the error always results in fundamental unfairness." *Id.* at 295-96, 137 S.Ct. 1899. These categories "are not rigid" and "more than one of these rationales may be part of the explanation for why an error is deemed to be structural." *Id.* at 296, 137 S.Ct. 1899. However, "one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id.* The crucial determination for this Court is whether the particular structural error at issue here "counts as structural because it always leads to fundamental unfairness or for some other reason." *Id.* at 296, 137 S.Ct. 1899 (emphasis added).

This Court finds that the admission of the photographs does not amount to a structural error. His assertion is legally incorrect.

testified at this hearing that he believed that his objection to the photographs as being prejudicial also covered the content of the photograph, including the evident watermark on the photographs websites that were discussed in the testimony. PCR 286-287. Counsel also stated that Judge McMahon had the actual photographs present and reviewed at trial. PCR 287, 288, 293. This Court finds that the website watermarks of incestTV.com (on State Exhibit 37 and 38) (Tr.p. 618-619) in the right-hand corner was obvious to the trial court, though hard to read, and could not be ignored by the trial court when it made its earlier decision.

This Court finds that the Applicant failed to prove prejudice related to the enlarged redacted exhibit. First, the fact of the photographic enlargement did not prevent Det. Phipps from presenting evidence about the website on the photograph. Further, under the circumstances of this case, the Applicant failed to prove that even if the trial court had deleted the information or even the photograph in its entirety, there was a reasonable probability that the result of the proceeding would have been different. As noted before, the Court of Appeals had held that "the corroboration of Victim's testimony of the events regarding her abuse was extremely probative. While the photographs do not paint Heath in a positive light, because they were part of the circumstances surrounding the crime, they were not unfairly prejudicial." *State v. Heath*, 433 S.C. 506, 515, 860 S.E.2d 673, 677–78 (Ct. App. 2021). The Court of Appeals further opined that any alleged error in admitting Victim's statements or Exhibits 22, 36, and 38 was harmless because the physical evidence against Heath was overwhelming. *See Collins*, 409 S.C. at 537, 763 S.E.2d at 29 ("The harmless error rule generally provides that an error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained."). Victim testified Heath performed oral sex on her on April 26, 2016, and saliva matching Heath's DNA was found on the inside of Victim's underwear immediately following the assault. Further, hairs from Victim's rectal swab and pubic hair combing matched Heath's DNA. *See Collins*, 409 S.C. at 538, 763 S.E.2d at 29-30 ("Another description frequently cited is that error 'is harmless where a Defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" (*quoting State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006)). We find there was overwhelming physical evidence of Heath's guilt and therefore any alleged error was harmless." *State v. Heath*, 433 S.C. 506, 517–18, 860 S.E.2d 673, 679 (Ct. App. 2021). Although the Court of Appeals determined that trial counsel failed to specifically object to Det. Phipps' testimony about the watermarks or the watermarks on the photographs as not adequately preserved by a specific objection, the Appellate Court still found harmless error.

The Court finds that the Applicant has failed to show a reasonable probability that result of the proceeding would have been different had the Applicant specifically objected to the names of the website incestTv.com and daugtherdestruction.com from the enlarged screenshot or Det. Phipps testimony about the websites. [76] As with the harmless error determination by the court, the fact

[76] In *Johnston v. State*, 2014 Ark. 110, 3–4, 431 S.W.3d 895, 897 (2014) the Arkansas Court admitted similar images from the Defendant's laptop computer. The witness indicated that the vast majority of the pornographic images were incest related, with filenames and website names watermarked on them such as "wholefamilyincest," "dads permindaughters," "homeincestvideos," "daughterdestruction.com," "tryincest.com," and "incestsexcite.net." The investigator from Arkansas ICAC Task Force testified that the images did not necessarily feature underage females, although many of the actors were dressed or posed in such a manner as to appear young. The investigator testified that, because the Internet search history had been deleted on the computer, he did not have any proof that these websites had actually been visited. He indicated that many of the images on a webpage download automatically when the visitor enters a website and that some of the images in his report appeared to be from "banner ads," which the user does not even have to click on for the image to automatically download.

The defense contended that the images were inadmissible because there was no proof that he had viewed the pornography, pointing to ICAC Investigator Cone's testimony that all the images had been downloaded within a nineteen-minute interval and that there was no proof that anyone, including Johnston, had actually visited the websites. Johnston also argues that the circuit court abused its discretion in ruling that the images were admissible under Ark. R. Evid. 404(b). He asserts that the pornographic images were admitted purely as propensity evidence, introduced to show that he had a propensity for incestuous acts and that he acted in conformity with that Victim was forced to view the pornography during the sexual assaults and identified the photographs would have been admitted, as well as the other corroborating evidence, as either *res gestae* of the crime and also under Rule 404(b) as common scheme evidence.[77]

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this propensity when he raped his daughter. As set forth above, Rule 404(b) prohibits such propensity evidence unless it is independently relevant to an issue in the case, such as to show the Defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ark. R. Evid. 404(b). Johnston contends that the issue of whether pornography is admissible in a rape or sexual-abuse trial under Rule 404(b) has not yet been addressed by our appellate courts and instead cites cases from other jurisdictions, claiming that these cases have unanimously held that the admission of such evidence is error absent a showing that the pornographic materials were shown to or used to seduce the victim. Finally, in Johnston's third argument, he contends that, even if the circuit court properly admitted the evidence in question, it erred by concluding that the probative value of the evidence outweighed its prejudicial effect under Ark. R. Evid. 403.

The State responded that there was sufficient circumstantial evidence presented to show that the pornography found in the temporary Internet files of Johnston's computer belonged to him, given that he was the only resident of the house and that the images were all found under his username on his computer. With regard to Johnston's argument that the images were downloaded to his computer within such a short time frame that it would not have been possible for him to view them, the State contends that this argument goes to the weight of the evidence, not to its admissibility, and also notes that Johnston could have been saving the images for later viewing.

The State also asserts that the incestuous images are admissible under Rule 404(b) to show Johnston's motive and intent in raping his daughter. The State contended that the Rule 404(b) evidence was independently relevant because it tended to prove that the Defendant had a particular attribute that explained his motive for committing the crime. With respect to Johnston's argument that the probative value of the images is outweighed by their prejudicial effect, the State notes that there was testimony by C.J. that Johnston took photographs and video of her engaged in sexual acts with him and asserts that this renders the pornographic images in this case more probative than prejudicial under Rule 403.

The Arkansas court did not address the merits but found that the 37 photographs admitted from the websites was harmless error due to the overwhelming evidence of Johnson guilt which included the victim's detailed testimony of years of rape by Johnson, corroborating medical and forensic testimony including his DNA in the crotch area of a number of victim's underwear, vaginal swabs from the day after victim was raped and a tear in victim's hymen consistent with the allegation. The Court found that while Johnston argues that the incest-related website names and commentary contained on many of the images were prejudicial and would have invoked "disgust, repulsion, and even anger" by the jury, any prejudice resulting from these images pales in comparison to all the evidence presented regarding his repeated rapes of his daughter. Johnston v. State, 2014 Ark. 110, 5–6, 431 S.W.3d 895, 898 (2014).

[77] Subsequent to this 2018 trial, in *State v. Dinkins*, 435 S.C. 541, 556, 868 S.E.2d 181, 188 (Ct. App. 2021), the Court of Appeals found that the charged and uncharged acts there were logically connected within the pattern of grooming, which included an escalation of the conduct towards this child. *See, e.g., State v. Clasby*, 385 S.C. at 157, 682 S.E.2d at 897 ("[E]vidence that Defendant began touching and committing other sexual misconduct with victim when she was six or seven years old was admissible to show common scheme or plan during trial for the indicted offense of CSC with a minor, second degree[,] on the ground that the 'six to seven year pattern of escalating abuse

The Applicant in 30/3 next refers to Tr.p. 619, l. 10-p. 620, l. 13 during the testimony of Det. Phipps in which he refers to State Exhibits 34, 35 and 22 as being items related to the extraction report which had not been changed and introduced the exhibits, subject to his prior objection. In his pleading, Applicant contends that counsel did not object to this data, which he claims was unduly prejudicial. This Court finds as to this testimony, the Applicant has failed to show that counsel was deficient because this cited testimony was not objectionable. Further, Sixth Amendment prejudice has not been shown because there is a reasonable probability that the result of the proceeding would not be different in light of the decision of the Appellate Court, which allowed the admission of the photographs and the fact that there was no basis for the objection to this limited testimony.

The Applicant next refers in 30/3 to Tr.p. 620, l. 21-p. 621, l. 10 in Det. Phipps' testimony in which he testifies that State Exhibit 34 is reflected in the extraction report as starting after midnight at 12:26 on April 26 and runs through 11:21 PM on April 26. The Applicant asserts this evidence should have been objected to since the entire extraction report was not an exhibit and the time is outside of the time frame specified earlier. PCR 138-139. At trial, counsel asserted that the only relevant days were December 1 and April 26. Tr.p. 594. He stated that he did not have an objection to relevancy to April 26. Tr.p. 595, l. 21-24, p. 597, l. 9-17. However, he continued his objection

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of Victim by [Defendant was] the essence of grooming and continuous illicit activity.' " (second alteration in original) (*quoting State v Kirton*, 381 S.C. at 36, 671 S.E.2d at 121–22)). *See generally Weaverling*, 337 S.C. at 465-67, 523 S.E.2d at 789-90 (noting the victim stated the Defendant showed him "dirty" magazines, a pornographic movie, and nude photographs and the Defendant was convicted of disseminating harmful material to a minor). *Cf. State v. Eubanks*, 437 S.C. 458, 878 S.E.2d 335 (Ct. App. 2022) (evidence of victim watching pornography with Defendant).

to displaying the images under Rule 403. Tr.p. 596. This Court finds that deficient performance was not shown because the evidence was admissible and relevant to the date of the incident. His factual assertion is frivolous because the record does not support it. The Court similarly finds that prejudice was not proven.

The Applicant next in 30/3 refers to Tr.p. 622, l. 11-18 in which Det. Phipps testified that the image in the report on number 5 was created on April 26 at 10:39 PM and was created as a function of the automatic snapshot feature on the iPad when the user hits the home button. In his pleading, the Applicant questions the relevance because he claims it does not show who hit the home button and who the user was. Applicant contends that there had to be clear and convincing evidence that he was the user and that it fit within Rule 404(b) for it to be admissible. The Applicant failed to show that counsel was deficient in failing to object to this cited testimony. His claim does not address this testimony, which is relevant and admissible. Rather, it questions the impact of the circumstantial evidence that he was the user based upon Victim's testimony that Applicant was using the iPad on that date. The Applicant has failed to prove prejudice by counsel's failure to object. As stated previously, counsel on cross-examination of Det. Phipps developed that he could not tell who pushed the home button. Tr.p. 631. The Applicant failed to show a Sixth Amendment violation.

In section 30/4, the Applicant referred to Tr.p. 626, l. 11-21 when Det. Phipps refers to an image that was captured at 10:30 PM after the home button created snapshots of auto parts web browsing and had created a filler-type image, which was a path related to Facebook activity created by both the striking of the home button and the fact that Applicant had a Facebook page. In his pleading, the Applicant asserted that his Facebook page can be accessed by anyone using the iPad which he claimed was not password protected. He claimed counsel should have objected. PCR 138. The Applicant failed to show a valid objection to this relevant evidence and his assertion is otherwise frivolous since the testimony was admissible in the development of circumstantial evidence. He also failed to prove prejudice. Defense counsel, as noted above, pointed out the limited nature of Det. Phipps' conclusion. Tr.p. 631. This claim must be dismissed.

In section 30/4, the Applicant also refers to Tr.p. 694, l. 24-p. 695, l. 5 in the closing statement of Solicitor Mayes in which she refers to State Exhibit 37 showing the images captured on December 2nd and the enlarged image of State Exhibit 3 8including the little arrow when it is not playing. Solicitor Mayes further argued for the jury to use their common sense concerning the impact of someone hitting pause and instructed they will be able to see the full length of the video when they examine the image. Tr.p. 695, l. 6-17). In his pleading, Applicant asserts that Solicitor Mayes is trying to give a reason for enlarging the image and showing it to the jury, and questioned whether there was any relevance to the image being paused. He claims if counsel had objected under Rule 404(b), he does not see how the trial court could have found the evidence clear and convincing. He did not discuss the assertion at the PCR hearing.

This Court finds as it related to this portion of the Solicitor's argument that Applicant has failed to show deficient performance by any failure to object because the Solicitor was addressing admitted evidence and its reasonable inferences. *State v. Allen*, 266 S.C. 468, 224 S.E.2d 881 (1976)(a prosecutor may argue to a jury to return a verdict that she conceives it is their duty to return based upon the evidence presented in the trial); *State v. Caldwell*, 330 S.C. 494, 388 S.E.2d 816 (1990)(a prosecutor may argue her case vigorously and give her version of the testimony, and what weight or credibility should be given to the evidence); *State v. Cannon*, 220 S.C. 614, 93

S.E.2d 880 (1956). It is also proper for the Solicitor in closing arguments to hold up an exhibit to the jury or play tapes or recordings admitted into evidence. *State v. Tyner*, 273 S.C. 646, 258 S.E.2d 559 (1979); *State v. Mishoe*, 198 S.C. 215, 17 S.E.2d 142 (1941). This Court finds that prejudice has also not been proven by counsel's failure to object to this portion of the transcript. It must be denied.

Leading (31)

In this section Applicant cites to a number of transcript pages and claims that they were leading questions that should have been objected to by Applicant's counsel. As stated previously, the true test of whether a question is leading and therefore improper on direct examination is whether, as said by the Court, it suggests the answer. *State v. Cook*, 204 S.C. 295, 28 S.E.2d 842, 846 (1944). However, a case will rarely be reversed on grounds that trial judge permitted leading questions, and then only if there has been a clear abuse of discretion resulting in prejudice to objecting party. *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985) ("The law gives the trial judge wide discretion when ruling on an objection to a question on the ground that it is leading. A case will rarely be reversed on the ground that the trial judge permitted leading questions, and then only if there has been a clear abuse of discretion resulting in prejudice to the objecting party." (citations omitted)).

This Court begins its analysis by recognizing that Rule 611(C) does not preclude the use of leading questions on direct examination; instead, the rule provides that "it is within the trial court's discretion to allow leading questions on direct examination." The trial court is vested with broad discretion to control the mode of interrogation and the presentation of evidence. *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir.1988). SCRE 611(c) provides "leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." The use of leading questions when examining a child, is still permissible under the first sentence of subsection (c) which allows leading questions when "necessary to develop the witness' testimony." *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985), cert. denied, 286 S.C. 127, 332 S.E.2d 533 (1985). Leading questions may be asked of a child, particularly when the inquiry is directed to delicate matters of a sexual nature. *Id.* At 351-52. Moreover, "the extent to which the use of leading questions may be indulged or limited is a matter primarily for the discretion of the trial judge and an appellate court will intervene only if there is a clear abuse of discretion." *United States v. Durham*, 319 F.2d 590, 592 (4th Cir.1963); *United States v. Oladokun*, 166 F.3d 336 (4th Cir. 1998).[78]

Failure to object to leading questions has been resolved as trial strategy not to be second-guessed by the courts. *Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993). *U.S. v. Bosch*, 914 F.2d 1239, 1246 (9th Cir. 1990) rejected a claim of ineffectiveness from failure to object, noting that the appellant made no claim that the evidence was inadmissible without leading questions so the attorney could allow the leading questions without objecting. Counsel could have refrained from objecting to brief leading questions for practical and humanitarian reasons recited *Bonin v. Vasquez*, 794 F.Supp. 957, 969 (C.D. Cal. 1992), aff'd. 59 F.3d 815 (9th Cir. 1995). *See also Jackson v. Bradshaw*, 681 F.3d 753, 763-64 (6th Cir. 2012) (extent of use overstated and use

[78] In fact, in Ohio collateral proceeding their court has held the failure to object to leading questions does not constitute ineffective assistance of counsel. *State v. Jarrells*, 2024-Ohio-2816, 248 N.E.3d 346 (2024).

proper where the witness is reluctant or evasive). "[D]ecisions regarding when and how to raise objections are generally matters of trial strategy, and such strategic decisions do not constitute deficient performance unless they are so patently unreasonable that no competent attorney would have chosen them." *Lewis v. State*, 351 Ga. App. 603, 608, 831 S.E.2d 837, 841 (2019). "[I]t is sound trial strategy for opposing counsel to choose not to object to leading questions when the evidence will come in anyway." *Wheeler v. State*, 433 S.W.3d 650, 656 (Tex. App. 2014).

Failing to object to yes or no questions does not establish deficient performance or prejudice. In *King v. State*, 260 So. 3d 985, 1008 (Fla. 2018) the Florida court concerning yes or no questions found that *Strickland* had not been established by the failure to object, even assuming that counsel was deficient, citing *Happ v. State*, 922 So.2d at 192 ("In respect to those questions which are leading in the context of ... direct examination, it was not demonstrated that counsel was ineffective so as to breach the Strickland standard or that there was *Strickland* prejudice."). The Florida court found that even if counsel would have objected to the questions, the State could have elicited the same information from the witness simply by rephrasing the objected-to questions.[79]

A failure to object does not constitute deficient representation unless a sound basis exists for

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[79] North Carolina has explained certain guidelines for addressing leading questions:

> The trial judge in ruling on leading questions is aided by certain guidelines which have evolved over the years to the effect that counsel should be allowed to lead his witness on direct examination when the witness is: (1) hostile or unwilling to testify, (2) has difficulty in understanding the question because of immaturity, age, infirmity or ignorance or where **(3) the inquiry is into a subject of delicate nature such as sexual matters,** (4) the witness is called to contradict the testimony of prior witnesses, (5) the examiner seeks to aid the witness' recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required, (6) the questions are asked for securing preliminary or introductory testimony, (7) the examiner directs attention to the subject matter at hand without suggesting answers and (8) the mode of questioning is best calculated to elicit the truth. *State v. Greene*, 285 N.C. 482, 492–93, 206 S.E.2d 229, 236 (1974).

State v. Earls, 234 N.C. App. 186, 191, 758 S.E.2d 654, 657 (2014) (emphasis added) (14 year old victim).

objection. *See Roberts v. Thaler*, 681 F.3d 597, 611 (5th Cir. 2012) ("[C]ounsel is not required to make futile motions or objections.") (quoting *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990); *Emery v. Johnson*, 139 F.3d 191, 198 (5th Cir. 1997) (a futile or meritless objection cannot be grounds for a finding of deficient performance); *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."). Even with a sound basis, however, an attorney may render effective assistance despite a failure to object when the failure is a matter of trial strategy.

With this in mind, even assuming deficient performance in this general respect, any assumed error was not prejudicial because any objection would have been toward the form and not the substance of the question. The State would have then presumably been given the opportunity to rephrase its questions and present the substance of the same information to the jury using non-leading questions. *See State v. Torres-Orellana*, 2021 UT App 74, 493 P.3d 711, 723, aff'd, 2024 UT 46, 562 P.3d 706 (2021); *See, e.g., State v. Sayre*, 3d Dist. No. 9-12-25, 2013-Ohio-4108, 2013 WL 5347361, ¶ 56 (where "[a]ll the objection would have done would be to cause the State to rephrase the question * * * there is no reason to believe that the objections would have affected the outcome of the case").[80] Further, in the questions to Victim, an alleged victim of incest and criminal sexual conduct during childhood, the trial judge would likely have been lenient in allowing rephrasing, particularly when the inquiry is directed to delicate matters of a sexual nature. *State v. Hale*, 284 S.C. 348, 351–52, 326 S.E.2d 418, 420 (Ct. App. 1985).

[80] An objection to a leading question is actually a challenge to the form of the question. Myron H. Bright, Ronald L. Carlson, OBJECTIONS AT TRIAL 87 (1990). If the trial court sustains an objection to a leading question, counsel will often rephrase the question so that the witness will be permitted to subsequently parrot the answer suggested by the earlier leading question. *See Lawrence v. State*, 457 S.W.2d 561 (Tex. Crim. App. 1970). *See* Fred A. Simpson & Deborah J. Selden, *Leading Questions As A Ground for Appeal*, 12 App. Advoc. 14, 17 (1998)

In his first specification in 31/1 the Applicant refers to Tr.p. 337, l. 24-p. 338, l. 7 during the testimony of Victim after she had just testified that Applicant would use his lower region private parts to rub against her or he would use his fingers (Tr.p. 337, l. 22-23) and Victim had already testified that it had first started happening when she lived on Peachland Drive. (Tr.p. 334, l. 11-22). In Applicant's later challenged questions, Victim was asked as a follow-up "did that happen at Peachland?" Upon confirmation, Victim was asked, "you said he would use his fingers as well. So, I'm going to ask you, what part of his body would he touch with his fingers" and her response was vaginal region. The next follow-up was "do you know whether or not his fingers went inside your vaginal area" and Victim's response was "yes, it did." Tr.p. 337-338. The victim had earlier described that when she was referring to her private parts, she was describing her vagina. Tr.p. 336, l. 21-22, Tr.p. 337, l. 5-7.

In his pleading, Applicant contends that all these questions were leading and asserts that there was inconsistent testimony that she stated he did not start to use fingers until Smith Pond Road.[81] He complains that counsel should have objected.

This Court finds that Applicant failed to show Sixth Amendment prejudice when deceased counsel Floyd did not object to the questions as leading. The Applicant ignored that the same evidence had already been presented immediately prior to his challenged question as stated above. Here, the facts of the digital penetration of Victim's vaginal area by Applicant's fingers at Peachland had just been testified. The State's inquiry again was a recapitulation of evidence already introduced. The leading question clarified the previous testimony. The Applicant failed to

[81] This assertion is without merit on this ground. Whether there was inconsistency in the Victim's testimony does not impact whether a question should have been objected. This assertion goes the weight to be given the response, not its admissibility.

prove a reasonable probability that the result of the result of the proceeding (acquittal of the Peachland incident) would have been different if he had objected to the follow-up questions. The assertion must be denied.

In the next specification in 31/1, Applicant refers to Tr.p. 339, l. 14-19 during Victim's testimony when she was asked "where else in the house at Peachland do you remember something happening?" Victim had previously testified about Applicant coming into her room. Tr.p. 334, l. 23-25, p. 336, l. 9-17. Her response to this question was "just in my bedroom or his bedroom."[82] In his pleading, Applicant contended that the leading question had an impact because he claimed that he did not have a bedroom at Peachland and that he and his wife slept on a blow-up mattress. The Applicant claimed he told this to counsel at trial.[83] In his PCR testimony, Applicant asserted that Peachland was only a two-bedroom house, and he claimed that there was one for each child but none for the parents. PCR 139. He claimed that they used the blow-up mattress every night.

This Court questions the credibility of Applicant related to the description of living conditions at Peachland that they would not have a marital bedroom but have separate rooms for each child and has determined that he is not credible. The Court finds that he failed to prove that he provided this information to counsel. He also failed to present evidence, independent of his testimony, about the Peachland Drive home. The Applicant has failed to show deficient performance or prejudice

[82] In cross-examination at trial, counsel Floyd developed that her brother's room was next to her room at Peachland when her brother was in the next room and was three years older, or around 12. He never came in or said anything, nor did she speak with Nicholas about it. Tr.p. 378-80. This approach was consistent with the defense strategy.

[83] In the *in camera* hearing related to Peachland, Victim had testified that Applicant would come into her own bedroom or make her come into his room. Tr.p. 222, l. 21-23. She testified in that setting that it first happened in her bedroom. Tr.p. 223. She had already testified that when she lived at Peachland, she had her own bedroom, her brother had his bedroom, and her parents had another bedroom. Tr.p. 234. She also testified *in camera* consistent with her trial testimony that it occurred in either her bedroom or his bedroom. Tr.p. 235, l. 19.

to the question related to this specification. His complaint goes to Victim's answer which had already been stated *in camera*. This Court finds that the trial court more likely would have asked the solicitor to rephrase the question had it been objected to and the same evidence would have been presented as had been presented *in camera*. He failed to show *Strickland* prejudice.

In the next specification in 31/1, he refers to Tr.p. 339, l. 20-22 when Victim is asked whether her mother was present for any of the incidents where she was awake and a witness to it and Victim responded no. The Applicant complained about how the jury would have considered the question when evidence was later presented about Rose being arrested and suggested that she would not protect Victim. At the PCR hearing, he questioned whether counsel addressed this testimony in his cross-examination. PCR 140. This Court finds that this question is confusing and a complex question. However, the Applicant has failed to prove prejudice by an answer that merely indicates that Applicant's wife was not a witness to the incidents.

In his next 31/1 leading question specification, he refers to Tr.p. 340, l. 24-p. 342, l. 20 during Victim's testimony related to what happened between her and her father when she was 14 or 15 and the effects, including whether ejaculation that had occurred. In his pleading, he complains that the defense did not object to the leading nature of the questions. PCR 139-140. This Court finds that these were targeted questions that did not suggest the answer but rather were follow-up questions to the answers just given. *See State v. Tyner*, 273 S.C. 646, 653, 258 S.E.2d 559, 563 (1979) ("Appellant objected to the following question by the solicitor as leading: 'Q. Did you ever have any difficulty communicating with Mr. Tyner or he with you?' The trial judge overruled the objection and held the question was not leading. A leading question is one which suggests to the witness the desired answer. As the question propounded by the solicitor was not suggestive of an answer, it was not leading. Moreover, a trial court has broad discretion in the scope of questions permissible. In order to require reversal, appellant must show an abuse of discretion resulting in prejudice. Neither has been shown here." (citations omitted). This Court finds that Sixth Amendment prejudice has not been proven.

The Applicant next refers in 31/1 to Tr.p. 345, l. 13-24 during Victim's testimony when asked what she remembered about her last year of high school, which aunt she stayed with, what prompted her to stay with her aunt and whether there was a period when her mother actually left the house. The Applicant contends that these were leading questions and further attacked his character. The Court notes that this same section was also addressed above in sections 20/1 and 20/2 which are incorporated here by reference. Contrary to the assertion of the Applicant, the questions in this portion were not leading questions but were targeted questions or follow-up. He failed to prove deficient performance or prejudice as to his claim that counsel should have objected to these questions as leading. *See State v. Tyner*, 273 S.C. 646, 653, 258 S.E.2d 559, 563 (1979); *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985).

The Applicant next in 31/1 refers to Tr.p. 349, l. 25-p. 350, l. 8 in Victim's testimony regarding where she was living then (Nazareth Road), and the location in the house where that happened on April 26 that made her feel uncomfortable (on the couch). The Applicant asserts that counsel should have objected to it as leading and "likely rehearsed." Again, Contrary to the assertion of the Applicant, the questions in this portion were not leading questions but were targeted questions or follow-up. He failed to prove deficient performance and even so, *Strickland* prejudice as to his claim that he should have objected to these questions as leading or "rehearsed.". *See State v. Tyner*, 273 S.C. 646, 653, 258 S.E.2d 559, 563 (1979); *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct.

App. 1985).

In 31/1, the Applicant refers to Tr.p. 350, l. 19-20 during Victim's testimony in which she is asked "where were you seated" ("I was on the couch") after she had already testified that it had first happened on the couch when he had made her use her mouth on his private parts. Tr.p. 350. Counsel was not deficient because this was not a leading question. He failed to prove deficient performance and even so, Strickland prejudice as to his claim that he should have objected to this question as leading or "rehearsed." *See State v. Tyner*, 273 S.C. 646, 653, 258 S.E.2d 559, 563 (1979); *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985).

In his next specification in 31/1, he refers to Tr.p. 351, l. 7-17, in which, following Victim's testimony that Applicant had kept telling her to go into his bedroom, she was asked "based upon your past experiences, what happened next" (she had to go in there); "where in the room were the two of you" (on the bed); "whose bed" (his); "is this a room he shares with her mother" (yes); "did he have anything with him" (his iPad). The Applicant must prove deficient performance in showing a leading question that was objectionable. In his pleading, he focused upon the question "and based upon your past experience, what happened next." The use of leading questions when examining a child, is still permissible under the first sentence of subsection Rule 611(C) which allows leading questions when "necessary to develop the witness' testimony." Further, it is likely that had an objection been made and rephrased as to the April 26 incident without the "past experience" language that this challenged evidence covered, the same answer would have been given to a reasonable probability since Victim had previously testified similarly under oath in the *in camera* proceeding. See Tr.p. 228, l. 5-25. His allegation must be dismissed.

In his next specification, in 31/1 the Applicant cites to Tr.p. 353, l. 11-18 in the Victim's testimony after she had testified that Applicant would sit on the back of her thighs, and claims the following alleged leading questions were asked: "did any other part of his body touch you when you were in that position on the bed" (just his private parts and whatever touched me when he was sitting on me) and "what else do you recall him doing" (beside that, Applicant at some point used his fingers and then used his mouth from the behind). The Applicant failed to prove deficient performance because these are not leading questions. The questions did not suggest the answer and were necessary to develop the testimony. He failed to prove deficient performance and even if so, *Strickland* prejudice as to his claim that he should have objected to these questions as leading. *See State v. Tyner*, 273 S.C. 646, 653, 258 S.E.2d 559, 563 (1979); *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985).

In his next specification in 30/1, Applicant refers to Tr.p. 356, l. 7-16 during Victim's direct testimony as leading and hearsay when she is testifying about what she told her aunt in texts the night of April 26 after she had already testified about the actual sexual acts that had occurred that evening (Tr.p. 352-355). This same passage was discussed in 15/1 and 15/2 above which are incorporated by reference. These are clearly follow-up questions to her responses at Tr.p. 356, l. 4-6 that she texted her aunt to tell her what was going on. The leading questions, if that, merely clarified previous testimony and related to facts already established in Victim's testimony. Further, it was already established that law enforcement had arrived and been notified by someone that night. He failed to prove deficient performance and even if so, *Strickland* prejudice as to his claim that counsel should have objected to these questions as leading. *See State v. Tyner*, 273 S.C. 646, 653, 258 S.E.2d 559, 563 (1979); *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985).

In his next assertion in 31/1 he points to Tr.p. 357, l. 6-10 as being leading and should have been objected. In these questions of Victim, she is asked "who directed that her mother take her to the hospital for a sexual assault exam" (do not recall and "was it police officers" (yes). The first question is not a leading question since it had already been established that she had gone to the hospital with her mother for the examination. Tr.p. 357, l. 3-5. The second question was a follow-up that was consistent with the prior *in camera* testimony in which Sgt. McCann had indicated that she spoke with the mother and advised her that Victim needed to go to the hospital. Tr.p. 50, 62. Nevertheless, prejudice had not been shown by either the question or the answer where Sgt. McCann indicated she spoke with the mother to arrange Victim going to the hospital. Tr.p. 516. He failed to prove deficient performance and even if so, *Strickland* prejudice as to his claim that he should have objected to these questions as leading. *See State v. Tyner*, 273 S.C. 646, 653, 258 S.E.2d 559, 563 (1979); *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985).

The Applicant next refers to Tr.p. 360, l. 22-p. 361, l. 19 in 31/1 of Victim's testimony related to the Smith Pond Road home and whether he did similar matters and whether the things she had talked about before, including putting his mouth on her (yes), putting his finger in her private part, happened in that home when she was 8 and 9 years old (yes), and when she was 14 or 15. The Applicant asserts counsel should have objected to the leading questions. This Court acknowledges that some of these questions were leading, but Victim had already testified that these things happened while she lived at Smith Pond Road. Tr.p. 340, l. 9-p. 341, l. 5. This Court finds that counsel cannot be deficient for failing to object to the questions clarifying evidence that had already been introduced. This Court finds that Applicant failed to prove deficient performance and even if so, *Strickland* prejudice as to his claim that he should have objected to these questions as leading. *See State v. Tyner*, 273 S.C. 646, 653, 258 S.E.2d 559, 563 (1979); *State v. Hale*, 284

S.C. 348, 326 S.E.2d 418 (Ct. App. 1985).

In new section 31/2 concerning leading questions, the Applicant refers to Tr.p. 362, l. 25-p. 363, l. 16 during Victim's testimony where Victim is asked whether, on the last night he did something to her in the house, did he use anything that time (his iPad too), how do you remember him touching you (same as it always was, she was lying on her front and Applicant was just rubbing against her), who instructed her to lie in that position (he did), whether she knew he touched her (yes), and whether or not she knew that would have been inside her privates (yes). The Applicant in his pleading indicates that this should have been objected to as leading. As with much of the above, this testimony targeted December 1, 2014 incident that occurred at Smith Road Pond Road around his birthday. Tr.p. 362. Victim had already testified about incidents at Smith Pond Road. Tr.p. 360-361. She had also testified that he had used his iPad previously during these assaults when he first got the iPad. Tr.p. 351-352. She had also stated that Applicant used his mouth while at Smith Pond Road. Tr.p. 340. Similar evidence had already been introduced, and this challenged inquiry was again clarifying the prior testimony. This Court finds that counsel cannot be deficient for failing to object to the questions clarifying evidence that had already been introduced. This Court finds that Applicant failed to prove deficient performance and even if so, *Strickland* prejudice as to his claim that he should have objected to these questions as leading. *See State v. Tyner*, 273 S.C. 646, 653, 258 S.E.2d 559, 563 (1979); *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985).

In 31/2, the Applicant again asserts that counsel should have objected to Tr.p. 367, l. 14-16 of Victim's testimony when she was asked if she had seen State Exhibit 22 (ID) that night (April 26) and had already previously testified without objection that she had previously seen Exhibit 22 in a video that was on the iPad when he had placed it on the pillow. See Tr.p. 366, l. 21-, p. 367, l. 13. This was previously presented in 30/1 above, which is incorporated here by reference. The Court previously addressed this section. However, similar evidence had previously been introduced so that there would be no merit to an objection at that time as leading to evidence that had already been admitted concerning seeing the exhibit before. This question was to clarify her prior response. The Applicant failed to prove either deficient performance or prejudice.

In his next specification in 31/2, the Applicant refers to Tr.p. 371, l. 22-p. 372, l. 19 during Victim's testimony in which she was asked as follow-up to her statement to the police on that night (Tr.p. 371, l. 6- 18) whether this was the first time she had ever told anyone about what happened (yes), whether she told every single thing in her first statement to them (almost every single thing), whether it had been going on since she was a child (yes), whether she gave a more detailed statement to the nurse examiner (yes) after the examiner asked more detailed questions (yes), and if she had told her something for the first time (yes). Tr.p. 371-372.[84] Victim testified that she had left out of her initial statement "that he used his mouth on her behind at one point" that night. Tr.p. 372, l. 9-19. In his pleading, he contends that counsel was ineffective in failing to object to the questions as leading. This Court finds that the failure to object could be deemed part of the reasonable trial strategy to reveal the inconsistent statements. However, in light of this record Applicant has failed to show prejudice. Counsel did not suggest the answer that revealed that there was an incident in the anal area that night. However, at that point, Victim had already testified that Applicant had used his mouth on her behind that night. Tr.p. 353-354. See also 31/1 above. This Court finds that Applicant has failed to prove prejudice under *Strickland* for counsel's

[84] Victim testified that she had left out of her initial statement that "that he used his mouth on her behind at one point"that night. Tr.p. 372, l.

failure to object to these clarifying questions.

In his next specification in 31/2 he points to Tr.p. 395, l. 2-3, during Victim's redirect examination. Therein, Victim had previously testified that she did not make any noise during the assaults or scream out while her brother lived with her because she feared if someone heard she would get in trouble and she clarified that her father would hit her if she tried to get loud. Tr.p. 394, l. 9-20. She was asked whether telling people would have been a smart decision and Victim responded that she would get trouble if she did. The challenged question was that follow-up on whether she thought she would get hit again if she did (yes). Tr.p. 395, l. 2-3. The Applicant contends that this was leading and counsel was ineffective in failing to object. However, this Court finds that Victim had essentially stated that if someone heard tshe would get hit. This question was a developed and clarification question. Victim had previously testified on direct examination that she was told by Applicant not to tell and feared that he would threaten to kill her (Tr.p. 338), she stated that when she resisted, Applicant would hit her. Tr.p. 339. More specifically, Victim had testified that Applicant told her if she told about the sex acts, he would kill her and her mother. Tr.p. 343. She had also testified to a level of violence when she had resisted his acts by being struck in the face with an open hand or having her hair pulled. Tr.p. 348. This evidence was consistent with the challenged question in this section that had already been admitted. Counsel was not deficient in failing to object about getting into trouble if she told. This follow-up questioning addressed evidence that was already before the jury. The Applicant failed to prove prejudice under *Strickland* to any failure to object.

The next specification in 31/2 is Tr.p. 445, l. 18-22 during the direct examination of the SANE nurse when she was going over her protocol questions during the forensic examination and asked the SANE nurse what, if anything, was reported concerning any contact with the perpetrator's mouth and the nurse stated Victim said, "that her father licked her anus." Tr.p. 445, l. 18-22. The Applicant indicated in his pleading that it was leading and hearsay without exception and that counsel was ineffective in failing to object. This Court finds that the Applicant failed in his burden of proof. The State developed that the SANE nurse had made specific notations and questions for her specific medical diagnosis and treatment about which parts of the body may have been touched. Tr.p. 445. The nurse, as a follow-up, also stated that the medical inquiry was directed to a question about whether her anus had been penetrated by a penis or fingers and Victim had indicated, no. However, the nurse indicated yes to an object because at that point Victim stated her father licked her anus. The nurse had indicated on her report "nongenital acts" as licking and that Victim said anus. Tr.p. 446. This page was also addressed in Section 13 and in Section 12/2 related to vouching which is incorporated herein by reference.

The trial record shows that SANE nurse DeGuzman read from her notes related to the April 27, 2015 incident. Tr.p. 445. She stated the victim's report of the event from her notes. Tr.p. 443-447. The prosecution went over DeGuzman's protocol and report from that day without objection. Tr.p 449. On cross-examination, counsel Floyd went through the report of DeGuzman, pointing out pages 5 and 6 and that the victim indicated to her that he never penetrated her vagina with his penis or digitally. Tr.p. 459, 452.

However, this Court finds that the defense put the entire SANE report into evidence as Defendant's Exhibit #1. Tr.p. 669-672. It was admitted without objection from the State. On the record, counsel Floyd stated that he intended to argue from the report and that it would be better for it to be before the jury. The State asserted that the SANE nurse read the portion necessary for her medical diagnosis and treatment. Tr.p. 670.

During the defense closing argument, counsel Floyd referred to the report. Tr.p. 705. Counsel stated that he asked for the SANE report to be put into evidence because the defense wanted the jury to have it because he felt it went to the heart of the case. Tr.p. 708. He noted that when you are telling something it is hard to keep the stories straight. Tr.p. 708. Counsel pointed out page three of the report and the nurse's question on whether he had done something similar to what he did that night and Victim stated "no" describing what he did that night as having oral sex on him and that he laid on top of her, touched her genitals as she was on her stomach, and he licked her anus. Tr.p. 708. Counsel Floyd, however, pointed out that Victim did not tell the officers that, but did tell the SANE nurse. Tr.p. 708. Counsel pointed out, contrary to her testimony and the SANE nurse, that there was no allegation of cunnilingus Tr.p. 709. Counsel then focused on the victim's report to the SANE nurse that he had not done anything to her before that night. Tr.p. 709. He further pointed out that the Victim to the SANE nurse indicated that she had not been digitally penetrated by a finger, which may be different than what the State had indicated. Counsel then focused on the SANE report as it related to threats. Tr.p. 710. Counsel indicated the threat alleged that night was to make her do dishes, yet the State indicated that he hit her in the face, pulled her hair, threatened to kill her mother and threatened to kill her. Tr.p. 710. The report indicated that she had denied threats of harm. Tr.p. 710-711. The defense later stressed again the SANE report for the jury's consideration and again focused that she did not say at that time that he had done similar things before, that there was cunnilingus that night, that there was no penetration, yet now the State tells the jury to forget that because she now declares when she was seven similar things occurred without any proof. Tr.p. 710-711. Then, he focused the jury on the charge for CSC third and for the jury to remember what she said to the SANE nurse about it and that it should not cause the jury any hesitation to find him not guilty. Tr.p. 717.

The State in its closing tried to address the SANE report by asserting that it was focused on the event that night in her examination and claimed it did not matter to the nurse whether it had happened 100 times. Tr.p. 718-719.

This Court finds a reasonable strategy on the record related to the testimony of the SANE nurse and her report. Reasonable counsel, faced with the testimony of the victim about the event, is not deficient in pointing out inconsistencies in prior statement that suggest that a crime did not happen. Counsel Floyd was not deficient in pointing those matters out as well. It is clear to this Court that had he not brought out the inconsistent statements of the victim relating to the existence of any prior similar acts the Applicant would be here alleging that he was unreasonable. *Strickland* recognizes that reasonable counsel may address similar situations in a variety of ways. The test is focused, however, on whether no reasonable counsel would have acted as counsel Floyd acted concerning the SANE report. The Applicant has failed in the burden of proof.

This Court also finds that the Applicant has failed to prove Sixth Amendment prejudice based upon counsel's actions related to the SANE report. This evidence was somewhat cumulative to other evidence in the record related to the victim's statements when she testified about what she told and did not tell the SANE nurse and law enforcement. The Applicant's tunnel vision viewing of the items of evidence being unfavorable has not satisfied the burden in light of the totality of the evidence which addressed the fact of the inconsistent statements made by the victim. It must be denied.

In the next specification in 31/2, the Applicant refers to Tr.p. 452, 12-12 during the SANE nurses testimony after she had already described the fact that her routine protocol was to swab and comb the pubic hair area stating that she would comb down after she had set a sheet of paper under the patient's bottom, collect the sheet, fold it up and place it in an envelope (Tr.p. 451, l. 4-20). Solicitor Mayes then asks, "so the paper is underneath her, and you swab her pubic hair, any debris will fall onto the paper" (A. "as I comb through her hair"), whether she had any notations as to whether there was any debris or loose pubic hairs when she was combed ("typically, if I don't see it, I just say I did it") and whether in this case she did it (uh-huh). These were not objectionable leading questions because the SANE nurse had already testified that she had combed her pubic hair earlier. Tr.p. 449, l. 8-12. These questions were merely follow-up questions about evidence that was already presented about the protocol and the pubic hair combings. Counsel cannot be deemed deficient in failing to object to questions that clarified prior admitted testimony. This Court further concludes that since the similar evidence had been admitted previously, Sixth Amendment prejudice has not been shown by the failure to object. The Applicant has failed in his burden of proof.

In the final specification in 31/2, the Applicant points to Tr.p. 472, l. 8-10 during Margie Branham direct examination when she was asked about her process of reaching out to Victim, whether she had any reason to become concerned, and she responded, "yes." The Applicant contends that counsel should have objected to the question as being leading and improper corroboration and bolstering. This same passage was addressed above in Section 14 related to corroboration, Section 15/2 (hearsay) and Section 23/1 (text messages), which are incorporated herein by reference. This Court finds that this testimony was after a hearsay objection by counsel which was sustained concerning what Margie learned in the text from Victim. Margie was asked whether she had become concerned and she stated she was. This is not leading or hearsay because it goes to Margie's own personal concern. Counsel was not deficient and prejudice was not proven.

A. Suggestive. (A).

In his second series of allegations in his *pro se* pleading he asserts that certain matters in evidence were "suggestive." In his first specification, he asserts in Tr.p. 617, l. 5-13 during Det. Phipps' direct examination Solicitor Usry inquires whether if something was on the computer a long time, an image would not be saved in this manner unless someone hit the home screen? ("hitting the home button initiates this to be saved within the system") and "do you have the ability to tell how long an image had been on the home screen prior to the button being pushed?" ("I do not."). The Applicant in his pleading contends that question is telling the jury that the image was on the computer a long time and in the State's closing argument contended the image was on his iPad which he asserts was prejudicial. He contends that the question was suggestive and leading and should have been objected to by counsel. The Applicant ignores that this was a clarification question that followed up on Det. Phipps' prior testimony that the image, State Exhibit 37, was created when the person hit the home button as a still shot which was embedded within the Apple operating system. Tr.p. 615-616. Further, the second question related to how long the image was on the home screen was not a leading question. Counsel could not be deficient for failing to raise a frivolous objection. Prejudice under *Strickland* has not been shown because the similar "home button creates image in system" evidence had already been introduced. The assertion is without merit.

In A1, the Applicant next points to Tr.p. 617, l. 5-13 (which is the same section as above) and contends in his pleading that Solicitor Mayes was suggesting that there was much stuff on the iPad and that Solicitor Usry mentioned excessive dates.[85] This specification is unrelated to the section of the transcript the Applicant refers to in his pleading. His comment is not supported by the record. It appears to be a reference to an uncited portion of other comments or a closing argument. This assertion must be denied.

The Applicant refers in A1 next to Tr.p. 695, l. 20-p. 696, l. 2 during Solicitor Mayes closing argument in which she describes a possibility that the Applicant left the iPad and, to get it out of sleep mode, hit the home button and the home button would show what he was doing when he left the session. The Applicant in his pleading contends that counsel should have objected because it was speculation and none of it was specifically testified. This Court finds that the prosecutor is allowed, as stated previously, to argue reasonable inferences from the record. Contrary to the Applicant's assertion, there was evidence in the record that Applicant was watching pornography during the assaults upon Victim based upon her testimony. There was also testimony that the image was created by hitting the home button on December 2, 2014 at 9:10 PM and could have been on the iPad for some time prior. Tr.p. 617-618. This Court finds that Sixth Amendment prejudice has not be proven based upon the failure to object to the reasonable prosecutorial comment based upon the reasonable inferences that could be drawn from the testimony.

In his next specification in A1, the Applicant in his pleading returns to Tr.p. 339, l. 20-22 during Victim's testimony in which she was asked if her mother was present during the incidents where she was awake and a witness to it and Victim responded no. This was also raised in earlier sections 20/1 (404(b), 21 (leading) and twice in 31/1 (leading) set forth above which is

[85] In his testimony in the PCR hearing, the Applicant referred to Section A1 and responded to a leading question from his court-appointed PCR counsel that the next section referred to suggestive things the prosecutor did that were not objected to by counsel and asserted that "there's a lot" with "a lot of minutes." PCR Tr.p. 141.

incorporated herein by reference. In his pleading, Applicant asserts this question was suggestive and warrants a mistrial, as well as being an attack on the mother's character and his. Applicant notes that Rose was not called to testify. He claims that this is a Confrontation Clause issue. It is obvious to this Court that no objection was raised by the defense because they were aware that the State was not claiming that Rose was a "witness" to the assaults by Applicant upon Victim. There was no Confrontation Clause issue in this question because there was no testimonial statement that arose from Victim's testimony. The Applicant failed to prove prejudice under *Strickland* by any failure to object to this admissible evidence that the mother was not a witness to the assaults that Victim had testified about according to Victim.

B. Speculation (B).

In his first specification in B1 related to speculation, the Applicant refers to Tr.p. 355, l. 2-14 which involves the testimony of Victim being ask when she left the assault and locked herself in her room and her statement that Applicant was in his bedroom, which has a bathroom . She also testified that she did not know what happened after she left or whether he ejaculated that night April 26. In his pleading, the Applicant contends that counsel should have objected to the questions as speculative and suggestive. During the PCR hearing, Applicant testified that it was suggestive since she had left the room and counsel should have objected. This Court finds that the objection was frivolous and he failed to prove *Strickland* prejudice because Victim testified that she did not know what happened after she left the room. This assertion must be denied.

In the next specification in B1, the Applicant points to Tr.p. 582, l. 5-8 during redirect examination of SLED analyst Donna Money when the Solicitor inquired related to potential DNA transfer concerning defense counsel's questioning about trying to age how long the pubic hairs had been there on the rectal swab and how long it had been on her underwear. In his pleading, the Applicant again questioned that there was no testimony that the hairs were pubic hairs which he claims was speculation. The factual issue related to whether the hairs were properly identified as "pubic" hair has been raised previously and rejected as failing to show a Sixth Amendment violation. This Court incorporates by reference its conclusion in the following earlier sections in denying relief upon the factual pubic hair assertion in 13/2 (vouching), 14/3 (improper corroboration), 26/1 and 26/2 (testimony that goes against prior testimony), and 31/1 (leading). For the reasons set forth in those sections, the Applicant has failed to prove *Strickland* prejudice.

In his pleading on B1, the Applicant refers to Tr.p. 632, l. 10-p. 633, l. 10 involving the redirect examination of Det. Phipps which describes his responses on how a person would potentially play a video on an iPad by either downloading the video or streaming the video through the home network or in a Cloud account. Det. Phipps testified that the streaming did not have to occur from playing the video off the internet in order to capture an image by use of the home button. Det. Phipps prior to the challenged question had just stated that images had been captured by hitting the home button and did not have to be playing from a web addressed to be captured. Tr.p. 632, l. 3-9. This Court finds that this redirect questioning was in direct response to the evidence presented on cross-examination by counsel Spangler that the iPad's web history did not mention access to a pornography website on April 26. Tr.p. 630, l. 17-p. 631, l. 21.[86] In his pleading, the Applicant asserts that he claims the expert testimony was speculative about whether he had hit the home

[86] During the final closing argument by the State, Solicitor Mayes responded to the defense argument by pointing out the testimony that "with the Cloud videos, the evidence is not saved to the iPad, it's not saved to the video device, it's saved and it can be accessed via home network or via the Cloud without physically being present on the iPad." Tr.p. 721, l. 7-12. See Tr.p. 713, l. 18- p. 714, l. 3 (defense argument about the iPad did not have porn on it and could not tell when the internet sites had been accessed).

button and claimed a lack of proof. This Court finds that counsel's failure to object to the reply testimony directly related to counsel's cross-examination about the lack of a web history showing access to pornography sites at the critical time. The testimony was relevant to address that home button issue and Det. Phipps' expert opinion. *Strickland* prejudice was not proven when the evidence was proper expert opinion.

The final specification in Applicant's pleading to B/1 is Tr.p. 634, l. 21 -25 in which Solicitor Usry questions Det. Phipps on whether you can watch videos on an iPad ("you can") and whether you can access videos that are not on the web on your iPad ("you can"). In his pleading, the Applicant asserts that Solicitor Usry is speculating and suggesting that he has videos on his iPad, which attacked his character. This Court finds that the Applicant has failed to prove prejudice by his alleged failure to object to these questions. These questions were conclusory question and follow-up directly from Det. Phipps' testimony. Although a possible objection to the questions being asked and answered may have been sustained because of Det. Phipps' more substantial testimony related to the ways videos can be played on an iPad, *Strickland* prejudice was not shown where similar testimony had already been properly presented. There is no reasonable probability that the result of the proceeding would have been different had counsel objected.

C. Timeline Information for April 26th. (C).

In Allegation C1 related to the April 26th timeline, the Applicant refers initially to Tr.p. 354, l. 16-19 when Victim was asked how long the Applicant's private part was rubbing against her and Victim estimates 20 minutes. The witness had previously indicated that Applicant's underwear was off and following it she had indicated that he did not ejaculate because she left the room when he indicated that he wanted to finish. Tr.p. 354, l. 11-25. In his pleading, he indicated that this timing comes into play in the SANE Report that stated 9:30 to 11:00 pm and then Solicitor Mayes talked over her testimony, stating 9:00 PM to 11:00 PM, which he asserted was misconduct. However, in his pleading, the Applicant declared that this was not an issue but was to help Applicant when he testified. The Applicant has failed to prove prejudice in this evidence under *Strickland* related to Victim's 20 minute estimate.

In his next specification of C/1, the Applicant refers to Tr.p. 439, l. 1-15 during SANE nurse DeGuzman's direct testimony in which she noted that she arrived in the ER at the hospital at 5:52 AM and the patient was already there and had received a call from the social worker at 4:50 AM that the patient was already there. In his pleading, the Applicant points to the fact that the SANE nurse indicated she was told by the social worker that Victim had arrived at 4:50, which was hearsay and a Confrontation Clause claim which he asserts cannot be harmless. First, it is not improper hearsay testimony by the SANE nurse about the time she arrived at the hospital or when she received a call from the social worker to come to the hospital. The only issue according to the Applicant is evidence that Victim was there when the social worker called. There is no reasonable probability that had counsel objected and the 4:50 presence of Victim been excluded, that the result of the proceeding would have been different. The time the SANE examination began was after the SANE nurse's arrival, which was the critical time and the defense introduced the entire report into evidence. The allegation is without merit.

In the next specification, the Applicant refers to Tr.p. 502, l. 25 – p. 521, l. 2. This appears to be a typographical error because the Applicant then quotes Tr.p. 520, l. 25 – p. 521, l. 2. In the corrected portion, during Det. McCann's testimony, Solicitor Mayes asked Det. McCann (prior to taking the statement of Applicant) for her to look at that the top of the State Exhibit 26 (*Miranda* waiver) and state what time it was which was 2:02 AM. The Applicant makes no assertion of any error on the part of his counsel related to this specification. To this extent, no *Strickland* violation has been proven.

D. Limiting Instructions. (D)

In this section, the Applicant cites to Tr.p. 338, l. 24 – p. 339, l. 13 during Victim's testimony in which she is asked if she ever resisted when there were sex acts with her as a child and what would occur. Victim indicated that she did and that he would try to hit her and pull her there or pull her hair which caused her to learn not to resist. Portions of this same testimony were addressed previously above in 20/1 (404(b)) and 31/2 which are incorporated herein by reference. In the pleading, the Applicant contends that this evidence concerning the threats and actions of Applicant when she attempted to resist as a child should have received a limiting instruction because he claims it was unclear what indictment it went to because the December 1 and April 26 indictments were for criminal sexual conduct in the third degree. He contends that this evidence was not relevant to the later indictments and suggests a limiting instruction was necessary. He contends that counsel was ineffective in failing to request a limiting instruction. In his PCR testimony, he complains that no one is specifically saying what indictment this evidence pertains to and thinks counsel should have asserted the broad answer did not reveal what age Victim was related to the testimony and that counsel should have addressed this. PCR 142-143.

Counsel was not deficient in failing to request a limiting instruction because the evidence was relevant to show the pattern of resistance and non-resistance as a result, which was a relevant part of the *res gestae* for all the crimes and also showed the pattern of his crimes upon Victim. Other than complain, the Applicant in this proceeding has not proffered what exactly the "limiting instruction" language is that he claims that his counsel should have made. In the cited testimony, Victim testified that the sexual conduct began when she was seven or eight and in the second grade and continued.

Evidence which is logically relevant to a material element of the offense charged should not be excluded merely because it may also show guilt of another crime. *See State v. Tillman*, 304 S.C. 512, 518, 405 S.E.2d 607, 611 (Ct.App.), cert. denied, (Sept. 5, 1991). The general rule is that when evidence of other crimes is admitted for a specific purpose, the judge is required to instruct the jury to limit their consideration of this evidence for the particular purpose for which it is offered. *See State v. Steadman*, 216 S.C. 579, 59 S.E.2d 168 (1950); *State v. Smalls*, 260 S.C. 44, 194 S.E.2d 188 (1973); 23 C.J.S. Criminal Law, § 1032(3). The reasoning behind this rule is to protect against a jury convicting a Defendant just because he has committed other crimes and not because it has been proven that he is guilty of the crime for which he is accused.

An exception to this general rule was recognized in *State v. Nix*, 288 S.C. 492, 343 S.E.2d 627 (Ct.App.1986). There, the Court of Appeals held that a limiting instruction is unnecessary where "evidence of the other crime is admissible on the main issue or where the evidence admitted to show motive or intent is of acts which may well be supposed to have been done in furtherance or [sic] such motive or intent." In Corpus Juris Secundum under the section discussing evidence of other wrongs it states that "[e]vidence which has a direct bearing on, or relation to the commission of, the crime itself, so as to form part of the res gestae, is admissible without limiting instructions." 23A C.J.S. Criminal Law § 1208 (1989). *See State v. Johnson*, 306 S.C. 119, 126, 410 S.E.2d 547, 552 (1991).

The evidence he challenges was connected to all the offenses although it did not give a time frame other than it occurred as a child. However, the issue of resistance in her testimony did not reveal any limitation other than at some point she had learned not to resist the Applicant's demand for sexual activity. The focus of the evidence was on the fact that the victim had stopped resisting during her childhood which was relevant throughout and led to the April 26 outcry when she finally reported the assaults. Although "consent" was not an element related to the earlier indictments, the lack of resistance was clearly part of the *res gestae* of those childhood offenses. In addition, as to the later offenses, it also was relevant evidence to explain whether there was consent by Victim to the sexual conduct when consent was a defense. The Applicant failed to show an appropriate limiting instruction that counsel could have used. He failed to show prejudice under *Strickland.*

In the next specification under the limiting instruction section D claim, Applicant refers to Tr.p. 339, l. 20-22 during Victim's testimony on whether her mother was present and a witness to the incidents.[87] The Applicant similarly claims that counsel should have asked for a limiting instruction to show what indictment this general evidence goes to. However, it is clear that this question went to all the incidents and whether her mother was present or asleep. Although it was clear it did not apply to the April 26 incident since there was no reference by Victim that her mother was there when her testimony was that she was at work, it was necessarily addressing the incidents when she was not at work. The separate indictments charged the Applicant with criminal sexual conduct with a minor first degree involving a victim under the age of eleven years old between September 16, 2004 through September 15, 2007, another indictment charged criminal sexual conduct with a minor second degree between September 17, 2011 and September 15, 2013 involving a victim less than 16 and at least 14 years old and criminal sexual conduct third degree

[87] As noted previously, this passage of testimony was also addressed in earlier sections of the Order including section A1, 20/1 and 21.

with a minor is on or about December 1, 2014 and criminal sexual conduct with a minor third degree on April 26, 2015.

The Applicant has failed to show what "limiting instruction" would be appropriate because, again, both whether the mother was present during any of the assaults and Victim's response was applicable to all the charges. The Applicant, as above, failed to show *Strickland* prejudice by the evidence and counsel's alleged failure to request an undefined limiting instruction.

E. ***Elements as it goes to April 26th for DNA . coercion, etc. (E)***

In allegation E1, the Applicant initially refers to Tr.p. 353, l. 1-4 during Victim's testimony that she was laying on the bed face down at his direction. In his pleading, the Applicant asserts that if she was in this position, how could their pubic hair become entangled? In his PCR testimony, he refers to Nurse DeGuzman's testimony and claims counsel should have questioned this and further notes that Victim alleged no penetration. PCR 143. See also Tr.p. 451. Nurse DeGuzman had testified about the pubic hair combing and swabbing and stated Victim had pubic hair, and in her assault history, mentioned he rubbed his genitals against her genitals. She stated "sometimes pubic hair will get intertwined if they're against each other." Tr.p. 451, l. 4-7. As stated previously the SANE nurse described combing the pubic area down with the debris and loose pubic hair failing on a sheet as well as swabbing the area. Tr.p. 451 -452.

In his cross-examination of the SANE nurse, defense counsel inquired of her and she stated that she got a hair off the rectal swab and also had combed the pubic hair of Victim and did not know when the pubic hair got there or how long it had been there. Tr.p. 461. In response, on redirect the SANE nurse testified about Victim's report of genital contact and that based upon the nurse's training and experience the pubic hair combings are known to result in intertwined pubic hair combings. Tr.p. 466. The subsequent evidence also revealed that two hairs were submitted to DNA and one was consistent with Victim and the other was consistent with Applicant. Tr.p. 576-577. On cross-examination of the DNA analyst by counsel Spangler, she testified that she cannot determine the location of a hair and whether it was from someone's head or pubic area and was not the individual who did the hair visualization. Tr.p. 579.

This Court finds that the defense acted as reasonable counsel in addressing the testimony about the possibility of the Applicant's hair being recovered from the Victim's swabs or pubic combing in the cross-examination of the SANE nurse and DNA analyst. This Court further finds that Applicant has failed to show prejudice under *Strickland* with additional speculation about how Applicant's hair was recovered from Victim's body during her examination.

The Applicant in E1 next addresses Victim's testimony at Tr.p. 354, l. 20-p. 355, l. 1 in which she declared that he did not ejaculate that night because Applicant requested her to roll over so that he could finish, but Victim got up and left and locked herself in her room. In his pleading, he points to this testimony to question how defense counsel did not attack the fact that the SLED serologist and DNA analyst did not follow this scenario when they only checked for semen and not saliva on the anal (rectal) swab against the fact that they found saliva of Applicant on the underwear. In his PCR testimony, Applicant reiterated that Victim stated that there was no ejaculation, but the experts still tested for semen, yet there was nothing in the SANE report or case scenario about semen. PCR 144. He then questions why they were checking for semen and not saliva initially. PCR 144-145. The Applicant appears to question the competency of the analysts on their approach which ultimately lead to inculpatory evidence. This Court finds that he has failed to show a Sixth Amendment violation.

The record shows that SLED serologist Courtney Thompson described that she screened for semen on the swabs and underwear. Tr.p. 537-538. She stated that she then proceeded to test for saliva after the semen was negative. Tr.p. 538. Contrary to the claim by Applicant, defense counsel Spangler cross-examined the serologist about her choice to test for semen which was negative and saliva which was tested as presumptively positive. Tr.p. 554. The analyst noted that the tests for pre-ejaculate and ejaculate are the same test which came back negative. Tr.p. 554. She testified that she did not test for saliva. Tr.p. 554. When defense counsel asked why she did not test the vaginal swabs to see if Applicant's DNA was present, she stated that she was guided by the scenario that was provided in the SANE report and chose to test for semen first on those that she had available. The analyst stated that she did not test the vaginal swabs for saliva and tested them for semen. She did state that based upon the case scenario she made the cuttings in the underwear and sent them to DNA. Tr.p. 555-556. See also 536 (Thompson testified on direct that she made decisions on what to test from the scenario a victim gives at the hospital and the standardized form the SANE nursed fills out. Tr.p. 536-537).

The record also shows that DNA Analyst Money testified about the Applicant's DNA being a major contributor to the cutting from Victim's underwear and a consistent DNA match to Applicant with the one hair that was recovered. Tr.p. 565-566, 576-577.

This Court finds that counsel acted as reasonable counsel in his inquiry related to the testing that was done and the reasons for it. Counsel on cross-examination reiterated the reliance on the SANE report and the decisions to test for semen and pre-ejaculate rather than saliva. However, the saliva did show a presumptive positive on the underwear and was sent to the DNA Lab which resulted in a match with Applicant's DNA. He has failed to show that counsel was deficient when he acted with an informed understanding of the evidence as reasonable counsel rather than out of neglect or ignorance.

This Court further finds that he failed in his burden to show prejudice under *Strickland.* From his assertion in his pleading, he is unable to show anything in this assertion that undermines confidence in the outcome to a reasonable probability under *Strickland.*

In his final specification under E1, the Applicant refers to Tr.p. 388, l. 3-13. In this passage, Victim again testified, this time on cross-examination by counsel Floyd, that after she left Applicant she eventually went to her bedroom. Earlier, he questioned her testimony that he sat down on the back of her legs and rubbed his genitals against hers and did not ejaculate then. In his pleading, Applicant contends that it is evident that counsel was aware that Victim was stating that there was no ejaculation, but asserts that counsel failed to question the SLED analysts as to why they tested for semen. Applicant asserts that since they found all that saliva on the underwear" why wouldn't you test where it generated from."

This similar matter is essentially addressed above in the prior allegation. The Applicant has failed to show deficient performance by counsel Spangler in the manner that he addressed the SLED witnesses on their choice of testing. The Applicant has failed to show a reasonable probability that the result of the proceeding would have been different. He has shown no possible impact, other than speculation about the agent's decisions. In his pleading, he contends that the defense should have claimed that Applicant was just chewing on her underwear. He failed to show prejudice by counsel failing to indulge that same speculation. It must be dismissed.

F. [Victim] says she didn't tell Rose – goes to Mayes Suggesting to judge that she did . Prosecutorial Misconduct. (F).

In this section, the Applicant cites to Tr.p. 338, l. 12-17 of Victim's testimony in which she is asked whether she had told her mother what was happening (no), because she was told not to tell and knew something would happen to her, due to her prior experiences that if she told somebody and Applicant found out he would get angry or threaten to kill her. In his pleading, the Applicant contends that, because of similar testimony, counsel knew that Victim had said multiple times that she had never told Rose, yet the Solicitor repeatedly asked this which he claims was misconduct "or suggested that Rose knew." He claimed that counsel was not properly defending him and should have objected. At the PCR hearing, related to section F, the Applicant claimed that this passage showed that counsel was not involved in the case and was ineffective. PCR 145-146.

The Applicant has failed to show deficient performance related to this passage. This was previously addressed in Section 20/1 which is incorporated herein by reference. This Court has found that it was a main element of the defense strategy to show that the victim had numerous opportunities to tell adults, particularly her mother, about the activity with Applicant yet failed to do so to support their theory that the activity did not occur, so the evidence had a double edge. Counsel acted reasonably in not objecting to this evidence since it was consistent with their theory as further developed on cross-examination of Victim. This was not prosecutorial misconduct.

Similarly, prejudice has not been shown by Applicant's suggestion is that this was to prove that Rose knew when the strategy was the opposite and the testimony was the opposite. As stated throughout this Order, there was no factual claim presented that Applicant had ever told her mother during the history of the assaults since she was a child. Victim's testimony on this point was unequivocal. The Applicant failed to show any deficiency or basis to prevent the relevant evidence and failed to show a reasonable probability that the result of the proceeding would have been different.

In his next specification in F1, Applicant addresses Tr.p. 382, l. 9-21 and Tr.p. 383, l. 4-8 which is the cross-examination of Victim by counsel Floyd when he develops, consistent with the strategy set out above that, while she and her mother were living with her aunt and she thought that they were getting a divorce she did not tell her mother about the assaults at a time Applicant was not living with them. The Applicant asserts in his pleading that counsel Floyd only asked Victim about not telling her mother during this time while she was in high school and therefore could not object to the times Solicitor Mayes asked, which he frivolously claims made Mayes a witness. This Court finds that this allegation is very confusing by asserting that counsel Floyd did not cover all the periods that the assaults were occurring and whether she had told her mother. Counsel is allowed to limit this questioning as he deems appropriate.

This Court finds that the Applicant had failed to prove Sixth Amendment prejudice based upon counsel's apparent failure to ask the victim for each individual assault whether Victim told her mother. It is clear that the Applicant indicated that she had never told her mother throughout the history of the assaults. Although counsel limited the time frame in this question, the suggested questions were already addressed on direct examination and redirect when she confirmed that she first told her the night of the April 26 incident. Tr.p. 392. There is no reasonable probability the result of the proceeding would have been different. (See also Section 27/1 related to Tr.p. 392-393).

G. Pornographic images being ID; used in consolidation ruling in limine.(G).

In this specification on G1, the Applicant initially refers to the *in camera* testimony at Tr.p.

242, l. 5-11 in which Victim is shown State Exhibit 22 and Victim indicates that she last saw that in April and is referred to as ID. Matters concerning Exhibit 22 were previously discussed in this Order at 20/3, 20/4, 24/1, 30/1 and 31/2 which are incorporated herein by reference. In this portion of allegation G/1, in his pleading Applicant complained as to how Victim had ID'd that exhibit as being used in the crime when she did not specify the date or anything else. He complains as to how this identification of the exhibit can be clear and convincing evidence. He asserts that counsel was deficient in failing to object to the photograph and reasserts it being inadmissible and prejudicial to consolidation, Rule 404(b), Rule 403 balancing "etc., etc.,etc." During the PCR hearing, the Applicant merely testified that the matters in G1 had already been discussed.

This Court finds that the Applicant's assertion that counsel was deficient in failing to object to the question that identified Exhibit 22 is frivolous. The witness specifically identified the material in the photograph as being seen in April. Tr.p. 242. Although the Applicant may now question that identification, the fact is that she identified it. The evidence was later admitted at trial during Det. Phipps' testimony concerning images from the extraction report of the iPad. Tr.p. 619-622. The identification of the photograph was adequate in the *in camera* setting based upon counsel Floyd asking Victim about viewing porn with her brother which she denied ever getting caught or doing that. This opened the door to the State's *in camera* questioning. Tr.p. 239, l. 7-14. On re-direct, the State inquired as a follow-up to the counsel's questions about viewing pornography whether anyone other than her father had shown her pornography which she denied. Tr.p. 242, l. 1-4. The State then showed Victim State Exhibit 22 (for ID), which she stated that she saw that night in April. Tr.p.242, l. 5-13.

The Applicant's claim is wholly without merit. This was relevant and admissible evidence related to the April offense and connection to the Applicant's iPad. His conclusive complaint about consolidation and this exhibit is also without merit and does not make the exhibit inadmissible. The Applicant has failed to prove Sixth Amendment prejudice.

In G/1, the Applicant also refers to Tr.p. 246, l. 9-15 in which, after Victim's *in camera* testimony, Solicitor Mayes offered as court exhibits the SLED serology report (which Mayes asserted was positive for saliva from the cutting of the interior of the underwear), the SLED DNA Report (which she indicated that there were two hairs recovered and one of the hairs was recovered from the pubic hair combings and the other hair from the rectal swab during the sexual assault exam and the profiles were a match to Heath with a 1 in 57 quadrillion calculation) (Court Exhibits 4, 5, 6 for ID) and the extraction report of Mike Phipps) which Mayes contended confirmed the photographic images recovered on the night of April 26, 2015). The Applicant asserts that the DNA and Serology reports were not properly authenticated at that time before the trial judge found them "clear and convincing" in his pleading. The Applicant claims that the trial judge did not look at the items extraction report but did assert in his pleading that the judge looked at the DNA and serology reports.

In addition, Applicant claims that the trial judge did not give the defense an opportunity to object and they still should have objected to consolidation, 404(b), 403 balancing on each of the items and noted that counsel did not object to the photograph images either at this point.[88]

This Court finds that the Applicant failed to prove *Strickland* prejudice for failing to object to these three Court Exhibits in the *in camera* proceeding. Counsel was given the opportunity by the

[88] The trial record shows that the defense team did object to the Court Exhibits during these proceedings since they had not been actually introduced into evidence. The trial judge deferred ruling on the admissibility until the serologist and DNA analyst were available the next day even though it was the trial court's understanding that the Court Exhibit was offered without objection. Tr.p. 253, l. 7-17.

trial judge to present evidence or testimony at that point and declined to do so. Tr.p. 247, l. 7-9. At that point, Solicitor Mayes argued why the evidence of an ongoing pattern of sexual abuse upon a clear and convincing showing was admissible under *State v. Kirton, supra*. Tr.p. 247-248. This included by the times not covered by the indictments. The defense urged that the alleged victim's testimony was not specific enough to show clear and convincing evidence. Counsel Floyd contended that the evidence failed to show with adequate specificity the number of times or the location. The trial judge disagreed in his analysis that *Kirton*[89], *Cheeseboro*[90], *Tutton*[91] and *Hallman*[92] contrasted with the alleged victim's testimony. Tr.p. 249-252. In that setting Judge McMahon stated that he had received the SLED Lab Report, and the serology analysis which identified the matters consistent with the Solicitor's assertions. Tr.p. 251-252.

Judge McMahon made the following initial findings related to the DNA report :

> And the DNA analysis does identify DNA profile items 1.4.1 and 1.5.1 is consistent with the DNA profile of Theresa Anna Heath, and DNA profile developed on item 1.5.2, pubic hair combings, and 1.6 matches the DNA profile of William heath. The probability of randomly selecting an unrelated individual having a DNA profile matching this item as to William Heath is approximately 1 in 57 quintillion.
>
> Also, there is a mixture on item 4.1, cutting from the interior rear of underwear of at least two individuals. The DNA profile of the major contributor matches William Heath. As to that major contributor, this mixture is approximately 1 in 57 quintillion. The DNA profile of the minor contributor to this mixture is insufficient for interpretation.
>
> I find that to be corroboration and going to the issue of clear and convincing evidence.

Tr.p. 251, l. 24-p. 252, l. 17.

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[89] *State v. Kirton*, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122-23 (Ct. App. 2008)

[90] *State v. Cheeseboro*, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001).

[91] *State v. Tutton*, 354 S.C. 319, 580 S.E.2d 186 (Ct.App.2003). *See State v. Clasby*, 385 S.C. 148, 158, 682 S.E.2d 892, 897 (2009) (*Tutton* distinguished).

[92] *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989). *See State v. Perry*, 430 S.C. 24, 45, 842 S.E.2d 654, 665 (2020) (overruling *Hallman* in 2020).

The record shows that shortly thereafter, counsel Floyd noted that they were discussing objections to the Court Exhibits since they had not been actually introduced into evidence. Judge McMahon then indicated that he was withholding his ruling until the serologist and DNA expert testified the next day. Tr.p. 253, l. 7-17.

The next day Courtney Thompson, the SLED serologist, testified *in camera* and confirmed that she had examined the evidence in the serology department from the alleged victim and Applicant associated with SLED Lab No. L1510454. She testified that she had made a serology finding concerning the underwear and identified that Court Exhibit as her report of the findings and confirmed that was her signature on the exhibit which was a true and correct copy of her report. Defense counsel Floyd confirmed that the samples from the sexual assault kit were collected by the hospital and not her and that she did personally open the swabs that were collected.

The State next called SLED Analyst Donna Money who confirmed that her report was Court Exhibit 4 involving her DNA analysis. Tr.p. 249 . She stated that SLED issued the report and that her signature was on the report because it was her analysis. She stated that the exhibit was a true and accurate reflection of her analysis. Tr.p. 259-260. Defense counsel Floyd confirmed that Agent Money did not collect the samples that were forwarded to her by the serology department. Tr.p. 260.

Solicitor Mayes then argued that the reports had now been authenticated and corroborate that a sexual assault occurred on April 26, 2015 with the finding of Applicant's hair in the victim's pubic combings, as well as on the swab, and the finding as to the saliva in the victim's underwear. Tr.p. 261. The State urged that this corroborates the final assault as well as the previous assaults described in the victim's *in camera* testimony. Tr.p. 261.

Counsel Floyd argued that there was no testimony from the agents as to what the reports mean. He challenged whether the samples taken that night show a prior pattern of abuse.

Judge McMahon specifically found that the reports had now been authenticated., Tr.p. 262, l. 21-24. He further ruled and restated his earlier ruling:

> The Court ruled that the testimony of the victim was clear and convincing and that is the standard that I must apply to prior or subsequent bad acts that are not subject to a conviction. I found that yesterday. I reaffirm that finding today.
>
> It's even more clear and convincing with the authentication of the reports. For example, Court's Exhibit No. 5, the serological examination, item 4, indicated underwear; 4.1 indicated cutting from interior rear of underwear. Results of examination presumptive testing for saliva were positive.
>
> That item was forwarded to the DNA section. Item 4.1, same numbered on the DNA examination, cutting from interior rear of underwear, indicates the DNA profile developed from item 4.1 is a mixture of at least two individuals. The DNA profile of the major contributor of this mixture matches the DNA profile of William Heath and has been entered into the Combined DNA Index System, parenthetically, CODIS.
>
> The probability of randomly selecting an unrelated individual having a DNA profile matching the major contributor to this mixture is approximately 1 in 57 quintillion. The partial DNA profile of the minor contributor to this mixture is insufficient for interpretation.
>
> So the focus before me now is the in-camera and if that testimony is admissible. Based on the record before me now in-camera, I find there is clear and convincing evidence. And as far as it proves no pattern whatsoever, that goes to the weight, not the admissibility, and whatever weight and value the jury deems to give that testimony.

Tr.p. 262, l. 25-p. 264, l. 7.

The Applicant contends that counsel failed to object to have the exhibits authenticated before the trial judge made his ruling. This Court finds that Applicant has failed to prove prejudice under *Strickland*. When the authentication issue was pointed out to the trial court by defense counsel after the initial ruling, the trial court re-opened that issue and testimony by the two SLED agents was presented. As stated above, each agent confirmed their reports as true and correct which satisfied the legal requirements for authentication.

All evidence must be authenticated. *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018); 2 McCormick On Evid. § 221 (7th ed. 2016) ("[I]n all jurisdictions the requirement of authentication applies to all tangible and demonstrative exhibits."). Authentication is a subspecies of relevance, for something that cannot be connected to the case carries no probative force. The trial judge acts as the authentication gatekeeper, and a party may open the gate by laying a foundation from which a reasonable juror could find the evidence is what the party claims. Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). The authentication standard is not high, *Deep Keel, LLC v. Atlantic Private Equity Group., LLC*, 413 S.C. 58, 64–65, 773 S.E.2d 607, 610 (Ct. App. 2015), and a party need not rule out any possibility the evidence is not authentic. In the realm of authentication, the law, like science, is content with probabilities.

The court decides whether a reasonable jury could find the evidence authentic; therefore, the proponent need only make "a prima facie showing that the 'true author' is who the proponent claims it to be." *United States v. Davis*, 918 F.3d 397, 402 (4th Cir. 2019). Once the trial court determines the prima facie showing has been met, the evidence is admitted, and the jury decides whether to accept the evidence as genuine and, if so, what weight it carries. Rule 104(b), SCRE; *see United States v. Branch*, 970 F.2d 1368, 1370–72 (4th Cir. 1992); 5 Weinstein et al., *Weinstein's Federal Evidence* § 901.02[3] (2d ed. 2019). *State v. Green*, 427 S.C. 223, 229–30, 830 S.E.2d 711, 714 (Ct. App. 2019), aff'd as modified, 432 S.C. 97, 851 S.E.2d 440 (2020).

The Applicant failed to show a reasonable probability that the result of the proceeding would have been different had counsel objected to the failure to authenticate the court exhibits prior to the trial judge's initial ruling. Both exhibits were found by the trial judge to be authentic after the SLED agents testified. His ruling was well founded as a matter of law related to authentication. His assertion does not square with the record before this Court based upon the trial court's renewed analysis after authentication was proven. His claim that counsel was ineffective related to this omission is without merit and denied and dismissed.

H. Authentication of reports and ruling using unauthenticated report put into evidence. (H).

In his initial assertion in H/1, the Applicant refers to Tr.p. 662 , l. 7-25 during the cross-examination testimony of defense witness Selma Heath, the Applicant's mother. The witness was asked if she recalled taking Victim as a seven year old in 2004 to a doctor about burning urination and blood when the reporter indicated that the grandmother was with the child. The witness denied that she took her to Dr. Luberoff, although she had previously admitted that the children were in her custody in 2004. When the State corrected that the doctor was Dr. Soto at Lexington Urgent Care, the witness still denied it, although admitting that she was the only grandmother that the child was living with at that time. The Applicant contends in his pleading that the defense should have objected to these inquiries because there was no authentication of the reports and claimed that the evidence only attacked his character and was not relevant to any of the offenses.

The record shows that although the questions were asked Selma Heath denied it. The report was never introduced into evidence. See SCRE Rule 613 (Prior Statement of Witness). Further, the visit was never discussed in the closing argument after Ms. Heath's denial and the singular reference. Since it was not introduced as extrinsic evidence, the Applicant's assertion that authentication was required is without merit. Further, this Court finds that the brief reference assuming arguendo that an objection could have been made did not create Sixth Amendment prejudice. Even if the questions and answers were stricken from the record, there is no reasonable probability that the result of the proceeding would have been different in light of the other evidence presented.

In H/1, the Applicant also refers to Tr.p. 669, l. 5-p. 672, l. 6. In this section, defense counsel Floyd at the close of the defense case sought to introduce the SANE report of SANE Nurse DeGuzman that had been referred to during the State's case in chief. Solicitor Mayes noted that the document was around 15 pages and could have been part of the questioning of SANE Nurse DeGuzman earlier in the trial and could have been introduced then. The State initially opposed its introduction and contended that the failure to do so then and caused the entire report to not have been properly authenticated as a business record, but had no objections to the portions being admitted that the SANE nurse actually testified about, as noted earlier in this Order. Tr.p. 669-670. The trial judge suggested that since it was not authenticated, his choice was to get Dr. DeGuzman back which did not seem efficient. At that point, the State withdrew its initial objection to authentication of the whole report. Tr.p. 671. The SANE report was then introduced as Defendant's Exhibit 1, without objection. Tr.p. 671-672.

The Applicant argues in hindsight that his own exhibit should not have been introduced at that point because it was not authenticated at trial. This assertion for relief borders on specious. First, the Applicant has failed in his burden to show that the Defendant's Exhibit could not have been authenticated, particularly since parts of the report were testified to and the State withdrew its objection. Second, it was the Applicant's counsel, not the State, that was seeking to introduce the entire exhibit. Third, the Applicant has failed to show a reasonable probability that the result of the proceeding would have been different if the SANE report in full had not been introduced as a defense exhibit.[93] This assertion is without merit for post-conviction relief.

The next assertion in H/1 also refers to the SANE report. This reference is to Tr.p. 671, l. 21-p. 672, l. 6 which is incorporated in the portion above. The Applicant asserts in his pleading the SANE report was not put into evidence when the jury was in the courtroom which was ineffective assistance of counsel. This is totally frivolous. Although not placed in evidence in Tr.p. 671-672 which was *in camera* , Defense Exhibit 1, the SANE report, was placed into evidence before the jury at Tr.p. 685, l. 22- p. 686, l. 6, without objection from the State. The allegation is denied because the factual predicate does not square with the trial record. He failed to prove deficient performance or Sixth Amendment prejudice.

In his next H/1 assertion, Applicant refers to Tr.p. 675, l. 18-p. 676, l. 13 during which Judge McMahon refers to the SANE report in making his order denying the motion for a directed verdict at the close of the trial *in camera,* after the defense had indicated it was not offering other evidence than the SANE report. The Applicant asserts in his pleading that he did not know why the defense placed the SANE report into evidence which allowed the trial court to use it to deny the directed verdict motion because it corroborated Victim's version. This Court finds that his argument is without merit. The reference to the SANE report, which had not officially been made a part of the record yet in front of the jury, was legally necessary because Judge McMahon was required to take into account all evidence and testimony both by witness and Defense Exhibit 1 at the close of all the evidence. The Applicant's evidence had to be considered in the directed verdict

[93] This assertion turns the burden of proof on its head. His complaint is essentially that the State should have been successful in its initial objection to the defense's introduction of the SANE report as a defense exhibit. He now claims that because the State withdrew its objection to the evidence, it was a Due Process violation in allowing the defense to enter evidence without paper authentication.

motion. He has failed to show prejudice of a reasonable probability that the result of the proceeding, including the direct verdict motion, would have been different had the Applicant defense counsel not introduced Defense Exhibit 1, which included inconsistent information from the alleged victim. For reasons previously stated, the testimony of the victim and the forensic evidence was sufficient to satisfy these matters going to verdict.

In his final specification in H/1, the Applicant refers to Tr.p. 685, l. 18- p. 686, l. 9 which involves the introduction of Defense Exhibit 1 in front of the jury. The Applicant suggests in circular reasoning that he questions whether the SANE report was supposed to be put into evidence and claims that counsel was ineffective in failing to object to the evidence it was putting into evidence. This is wholly frivolous and unsupported by a fair reading of the record.

I. Things that Floyd and Spangler should have objected to, fought harder. (I).

In his initial specification in I/1, the Applicant refers to Tr.p. 400, l. 21-p. 401, l. 4 which involves the testimony of Shauna Galloway-Williams, the expert in child abuse assessment and treatment, including delayed reporting, contends that the defense could have done a better job objecting as to why an expert was not needed. [*Ms. Galloway-Williams's qualification and testimony was discussed previously in this Order at Sections 10 (ft. 18), Section 14 (corroboration), Section 12/1, Section 13/2 (ft. 8) (vouching) which are incorporated herein by reference*]. The record shows counsel Floyd initially objected, asserting that there should not be an expert of delayed reporting (in front of the jury) when asked by the court if he wanted to *voir dire* the witness after she was offered as an expert. Tr.p. 401, l. 2-5. Judge McMahon indicated that he did not want factual arguments in front of the jury and then recessed the jury to proceed *in camera*. Therein, counsel Floyd argued that this type of expert testimony is an attempt to bolster the testimony of the alleged victim and invades the province of the jury by attempting to explain an alternative as to why someone waited over ten years to report. Tr.p. 401-402. The expert is essentially trying to assert that you should believe her and discount the fact that they did not report it earlier. Counsel Floyd contended that this invaded the province of the jury in making a credibility determination.

At that point, Solicitor Mayes asserted that the witness is a "blind expert" and this type of testimony had been ruled admissible, citing *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), abrogated by *State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018) (testimony of state's expert on child abuse dynamics and delayed disclosures was not inadmissible as being within ordinary knowledge of jury), as a case the expert had been qualified and testified. Tr.p. 402. Solicitor Mayes confirmed to Judge McMahon that Ms. Galloway-Williams had not interviewed the alleged victim or reviewed her statements. Tr.p. 403.

Counsel Floyd then re-asserted that this type of expert witness testimony was not needed nor appropriate and recognized that many jurors have children and would be aware that children often don't report things. Tr.p. 404-405. Solicitor Mayes then responded that at that point the record was replete with questions to the prior witness about the delayed reporting or failure to report. Tr.p. 406.

Judge McMahon ruled that the potential testimony from the expert was admissible. Tr.p. 406-408. Relying upon *State v. Brown,* he reviewed the occupations of the jurors who would not have any prior knowledge from family members of sexual abuse directly due to the earlier voir dire. He reviewed her CV and SCRE Rule 702 and concluded that this field is not common knowledge for jurors in general or this jury specifically and would be of assistance to them. Tr.p.

407. He recognized that she would not be allowed to give an opinion as to the credibility or believability of the [expert] witness being a blind witness. Tr.p. 407-408.

The Applicant asserts that all of the expert witness's opinion related to delayed reporting and family dynamics that comes from hearsay and asserted that it is vouching for the witness's credibility. He contended that since the alleged victim had already testified as to why she did not tell, this would only be seen as bolstering what had been said by her. He complained that there was no testimony from the other alleged victims in the study, so the entire study is based upon hearsay. He contends that this is a psychological study of the alleged victim to see if she has the same factors as other victims. Applicant distinguished this analysis from that of the scientific determination by a pathologist or a CSI firearms examiner. He complained that counsel should have fought harder and resulted in a character attack.

This Court finds that trial counsel was not deficient but was reasonable in his objection to the qualification of the expert witness. He failed to present a line of his proposed objection in his pleading which goes more toward the weight of the opinion than its admissibility. This witness was a blind expert and was limited to characteristics of a failure to report rather than the credibility of the alleged victim's actual report. The Applicant has failed to prove prejudice. He failed to prove an omission by counsel which to a reasonable probability would have resulted in a different verdict. The specification is dismissed.

The Applicant also refers in sections I/1-I/2 to Tr.p. 409, l. 8-14, in which the trial judge described a witness's ability as an expert witness to give an opinion and that this witness is qualified as an expert in the field of child sex abuse and delayed reporting. He complains that this qualifying instruction to the jury about an expert witness is actually saying that the alleged victim was abused. He asserts that it was unfair to allow this testimony. He further complains that counsel did not object to any testimony by the witness.

This Court finds that counsel was not deficient in failing to object to this qualifying instruction after he had already objected to the need for expert testimony. This instruction was consistent with South Carolina law on expert witnesses when read in full. Tr.p. 408, l. 23-p. 409, l. 23. *See* Ralph King Anderson, Jr., *South Carolina Requests to Charge-Criminal*, 2023, §1-10 Expert Witness, p. 18-19. He has failed to prove prejudice related to the court's instruction after overruling the objection by the defense to exclude expert testimony.

Further, the assertion in I/2 that counsel never objected to any testimony of the expert witness is vague and non-specific as to what testimony he is referring to in this allegation. It must be denied as conclusory.

In specification I/2 the Applicant also refers to Tr.p. 513, l. 9-24 during the testimony of Sgt. McCann. In this portion, counsel Floyd, initially in front of the jury, objects to questioning by Solicitor Mayes about whether the Victim had reported to Sgt. McCann about the time frame of the sexual assault. Counsel objected that the State was "plowing the same ground and would get into hearsay" and "a certain amount of excited utterance." Solicitor Mayes referenced 801(d)(1)(d) and counsel Floyd stated it would be self-serving bolstering. Tr.p. 513, l. 9-15. Out of the jury's presence, counsel requested that the inquiry was a request for hearsay evidence from the alleged statement the victim gave to the officer. Solicitor Mayes indicated it was limited to time and place under Rule 801(d)(1)(d). Counsel conceded it was limited, then it would be admissible, abandoning the objection. Tr.p. 514. Sgt. McCann then testified that she was in Victim's bedroom speaking with her and she reported to McMann that the assault had occurred that evening in the living room and the Applicant's bedroom. Tr.p. 514-515.

In his pleading, the Applicant complains that counsel's actions in front of the jury may have left a negative impression that he was afraid to object and then later had to address it when Det. Phipps was testifying. Applicant claimed that this action was a mistrial based upon what counsel Floyd stated and was a conspiracy against Applicant. In his PCR testimony, the Applicant complains that counsel should have fought harder. PCR Tr.p. 150, l. 14-p. 151, l. 11.

This Court finds that the Applicant has failed to prove either deficient performance or prejudice related to counsel's actions on Tr.p. 513. Counsel's initial objection was reasonably withdrawn when the State limited the response to the question to time and place which was admissible under Rule 801(d)(1)(d). He failed in his burden of proof.

The Applicant next complains about Tr.p. 515, l. 2-5, during Sgt. McCann's testimony referred to above where she responds to the "time and place" question. In his pleading, he contends that the response by Sgt. McCann was improper corroboration and took it out of time and place. He complains that this suggested that counsel was intimidated by the judge without putting it on the record. He contends that this issue should have also been raised in the appeal but was not put on the record. This Court finds that counsel was not proven to be ineffective because this testimony was limited to time and place at Tr.p. 515, l. 2-5. This assertion must be dismissed.

In the final specification in I/2, the Applicant refers to Tr.p. 502, l. 17-p. 504, l. 1. This section concerns the testimony of Sgt. Caleb Black and whether Victim had indicated to him in response to an introductory question of "what happened" any criminal activity had occurred, which counsel objected to as hearsay after he state, "she did." Tr.p. 499, l. 14-23. In the cited portion, Judge McMahon, in reference to the State's assertion that the testimony should be admissible as "time and place" under Rule 801(d)(1)(d) and excited utterance, initially indicated that the testimony was admissible under several exceptions, referencing *State v. Dennis* and limited to time and place and *res gestae* or excited utterance. He noted that *Dennis* involved testimony from a nurse which was remote from the scene. Judge McMahon found that the testimony was admissible as an excited utterance, finding support in evidence that Victim was obviously upset, crying and with red eyes. Tr.p. 502-503. Counsel Floyd responded that if it was admissible that it be limited to time and place. Tr.p. 503, l. 19-21. Judge McMahon responded that the exception limiting it to time and place does not apply to excited utterance or *res gestae*, relying on *State v. Schumpert*, 312 S.C. 502, 506–07, 435 S.E.2d 859, 862 (1993).

In this portion of his pleading, he complains that this shows that the trial was twisted up because the defense was required to re-object and claimed he failed to do so and asserts that the trial judge ridiculed counsel. Applicant asserts that counsel was ineffective in failing to object on the record to what he claimed was inadmissible hearsay and suggested that counsel made a secret motion for a mistrial. He contends that failing to pursue the objection prevented the issue from being raised on appeal. During the hearing, Applicant testified that counsel failed to re-object when the State kept bringing up *res gestae* when they were discussing excited utterance. He again suggested that they should have fought harder and should have re-objected to preserve it for appeal. PCR 151-153.

This Court finds that the Applicant failed in his burden of proof related to this issue. It was similarly addressed above in this Order related to Section 15/1 which is incorporated herein by reference. This Court must find that counsel did timely object to the testimony and specifically asserted that it was not an excited utterance. Tr.p. 500, l. 5-6., l. 501, l. 16-21. The trial judge ruled that it was admissible as an excited utterance. Counsel was not required to re-object under those circumstances. His allegation is without merit. As to this limited specification he failed to prove deficient performance or prejudice.

J. Judge McMahon ruling wrong on 404(b), counsel not correcting wrong by objecting etc., ruling or stating wrong case law. (J).

In his first specification in section J/1, the Applicant refers to Tr.p. 250, l. 21-p. 251, l. 3. This section is a portion of Judge McMahon's ruling on the admissibility of Rule 404(b) evidence involving prior bad act evidence with Applicant and Victim and whether it had been proven by clear and convincing evidence. In the cited portion, Judge McMahon noted that he had ruled previously that the evidence was part of a common scheme and plan and he cited then to a case that he spelled as State v. "Tutten,"[94] asserting that sex crimes may be unique to common scheme and plan because they commonly involve the same victims and engaged in repeated incidents. Tr.p. 250-251. The Applicant complains that counsel should have objected because they are talking about victims, plural. At the hearing, the Applicant contends that Judge McMahon is using the wrong case law because they are talking about multiple victims, not a single victim. PCR 153. He contends that counsel should have objected because this impacted-on consolidation.

This Court finds that the Applicant failed to prove either deficient performance or prejudice by counsel's failure to object to Judge McMahon's use of a case referencing multiple victims. *State v. Tutton*, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct.App.2003). The problem with the Applicant's assertion is that although the multiple victims in the cited case was relevant, the fact that this was a pattern of continuous misconduct of sex crimes supported the existence of a plan.

[94] The actual spelling of the case is Tutton. *State v. Tutton*, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct.App.2003).

As cited in *Tutton*, the court stated in *Weaverling* that the pattern of sexual abuse represented "quintessential common scheme or plan evidence." The Applicant fails to show how the fact that in his case all the prior acts were against the single victim rather than multiple victims lessens it probative force to an extent that counsel acted as no reasonable lawyer would have acted or that there was a reasonable probability that the result of the proceeding would have been different had counsel pointed this factor out in his objections. It must be denied and dismissed.

In his next specification in J/1 Applicant refers to the continuing portion of the trial court's ruling at Tr.p. 251, l.15-20, where Judge McMahon refers to *State v Kirton* and *State v Hallman*, which he acknowledges did not involve the same victim, in support of his decision that "clear and convincing evidence" had been proven and would be admissible. For the same reasons as set forth above related to Tr.p. 250-251, Applicant has failed in his burden of proof.

In addition, he complains that the trial court cited *State v Hallman* which was subsequently overruled in State *v* Perry. *See State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), *overruled by State v. Perry*, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020). At the time of Heath's 2018 trial, our supreme court had not yet decided *Perry.* He testified at the PCR hearing that since these matters were pending at the time of the 2018 trial, counsel should have tried harder. PCR 153-154. A trial counsel will not be found deficient for failing "to be clairvoyant or anticipate changes in the law ...." *Gilmore v State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994). The Supreme Court has never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial. *Thornes v State*, 310 S.C. 306, 426 S.E.2d 764 (1993); *see also Robinson v State*, 308 S.C. 74, 417 S.E.2d 88 (1992); Arnette v. State, 306 S.C. 556, 413 S.E.2d 803 (1992); *Kirkpatrick v State*, 306 S.C. 359, 412 S.E.2d 389 (1991).

As stated earlier, the defense at trial argued that the evidence presented in the hearing was lacking because it did not give specific details about where it happened or how it happened. Tr.p. 248-249. The trial court rejected that argument. The claim that counsel should have objected to the use of those cases, including *State v Wallace* that were subsequently overruled in *Perry* is without merit for a determination of ineffective assistance of counsel in the 2018 setting. The assertion must be dismissed.

The Applicant in J/1 next refers to Tr.p. 253, l. 7-13, in the *in camera* proceeding when counsel Floyd asked about his objections to the Court Exhibits since they had not been actually introduced in evidence. Judge McMahon stated that he would withhold the ruling until after the serologist and DNA analyst testify the next day.[95] The Applicant complains in his pleading that counsel Floyd failed to discuss the iPad extraction report Court Exhibit that he asserts was put in. He claims this was ineffective. At the PCR hearing, he stated that they had already discussed this portion about the Court Exhibit and iPad extraction earlier.

This Court finds that the iPad data file and extraction report the Applicant referred to was Court Exhibit 6. Tr.p. 246, l. 1-15. The exhibit was only marked for identification during the *in camera* proceeding. Tr.p. 247, l. 5-6. The Court Exhibit was relied upon by the State in that proceeding asserting that "the extraction report of Mike Phipps confirms pornographic images recovered on the night of April 26th, 2015." Tr.p. 246, l. 13-15. The record further reflects, that at that time, the court exhibits were only marked for identification. They were not admitted as evidence in the trial at that time. The Applicant has failed to prove deficient performance. His assertion fails to prove

[95] This portion of the trial was also discussed in G/1.

Sixth Amendment prejudice.[96] It must be denied.

In the next specification in J/1, the Applicant refers to Tr.p. 262, l. 20-22 which was after the SLED DNA Analyst and serology expert had authenticated their records based upon the defense earlier authentication issue. The State, after the testimony, asserted that with the authentication of those records it corroborates the sexual assault that occurred on April 26, 2015 and the long term pattern of abuse by the existence of the Applicant's hair in the pubic combings and Applicant's hair from a swab taken from the genital area during the sexual assault protocol and the DNA finding of the saliva in the victim's underwear. Tr.p. 261-261. The defense urged that with the reports, no one explained what they meant and contested that they had supported a showing of a prior abuse or that it was clear and convincing evidence. Tr.p. 262. Judge McMahon then initially stated, "I ruled on that yesterday, I think , based upon the record before me. The reports have now been authenticated by the DNA Analyst, Agent Money, and that serology analyst, Agent Thompson." Tr.p. 262, l. 20-22. Judge McMahon, with the reports now authenticated restated his ruling, also finding: "it's even more clear and convincing with the authentication of the reports." Tr.p. 263, l. 5-6.

In his pleading about this specification of ineffective assistance of counsel, Applicant asserts

[96] A review of the record reveals that State 22 (photograph from iPad) was marked for identification at Tr.p. 242, l. 1-13 and admitted into evidence at Tr.p. 619-620, without objection but noting earlier objection. State Exhibit 31, the title page of the extraction report was introduced during the trial without objection Tr.p. 603, l. 16-p. 604, l. 6. The extradition report was in the State Exhibit 30 for identification purposes. Tr.p. 603, 9-11. See Tr.p. 602, l. 13-16 (State announced it was leaving State Exhibit 30 for ID only). State Exhibit 32, the user account page was introduced without objection. Tr.p. 605, l. 19-p. 606, l. 5. State Exhibit 33, the web history for April 26, 2015, was introduced without objection. Tr.p. 608, l. 5-21. State Exhibit 34, the data from the extraction report which starts at 12:25 AM through 11:21 PM on April 26 and images was introduces subject to the prior objections. Tr.p. 619-621, l. 10. State Exhibit 35, the poster of the most recent images created from State Exhibit 34 was also introduced subject to the defense's earlier objection. Tr.p. 620, l. 1-13. See also Tr.p. 621, l. 7- p. 623, l. 6. State Exhibit 37 was admitted into evidence in a redacted form without further objection. Tr.p. 612-613. State Exhibit 38, the screenshot, was introduced into evidence without further objection and was that was enlarged from State Exhibit 37. Tr.p. 614, l. 1-25.

that counsel should have objected because the trial judge had not ruled upon it the day before, citing Tr.p. 253, l. 12-13 when the trial judge, after his preliminary ruling, deferred ruling until the authentication. The Applicant claims in his pleading that counsel failed to object or request a mistrial based upon this misstatement because they were intimidated by the trial judge. In his PCR testimony, the Applicant testified that Judge McMahon had started to rule on it the day before, but then he stopped. The Applicant testified that the defense should have told the judge that he had not ruled on it the day before, but they never addressed it or asked for clarification. PCR Tr.p. 155, l. 4-p. 156, l. 17.

This Court finds that the Applicant failed to prove prejudice from his counsel's failure to point out that he had deferred the ruling awaiting authentication of the reports and the trial judge's statement was not completely accurate since he required prior to a final ruling the authentication of the reports. Importantly, despite Judge McMahon's statement, he considered the arguments anew and made an additional ruling giving specific attention to the authentication evidence. Tr.p. 262, l. 21-p. 264, l. 7. In particular, Judge McMahon found the issue before him in the *in camera* proceeding is whether the testimony is admissible. Judge McMahon declared, "based upon the evidence before me now *in camera,* I find there is clear and convincing evidence" and to the defense's argument that it proves no pattern whatsoever, Judge McMahon stated that goes to the weight and value the jury deems to give that testimony, not the admissibility. Sixth Amendment prejudice has not been proven when the trial judge clearly reconsidered the earlier ruling, the additional evidence of authentication, and the arguments of counsel. The specification is denied.

In his next specification under J/1, the Applicant refers to Tr.p. 262, l. 25-p. 263, l. 4, which is a portion of Judge McMahon's *in camera* ruling cited immediately above. In this portion, Judge

McMahon states that he ruled the testimony of the victim was clear and convincing and that was the standard to be applied to prior or subsequent bad acts that are not subject to a conviction and that he found it the day before and "I reaffirm that finding today." Tr.p. 262-263. In his pleading, Applicant asserts that the trial court conclusion cannot be constitutional when nearly all the bad acts are really bad acts on the other indictments. He contends that the trial judge was biased against him because "if this nutjob can rule that the bad acts are clear and convincing then he's saying he thinks I'm guilty" and biased. He asserts that his counsel should have moved for a mistrial. During the PCR hearing, the Applicant did not specifically address this issue.

This Court finds that the Applicant failed to prove either deficient performance or prejudice from his assertions. Judge McMahon's findings were based upon the argument made by counsel and the standard of determining whether there had been clear and convincing proof of these bad acts. Defense counsel was not deficient because they had already argued twice that Victim's testimony was not clear and convincing. Tr.p. p. 248, l. 19-p. 249, l. 7, p. 262, l. 4-19. This was the required standard of review that Judge McMahon was required to address. See *State v Wilson*, 345 S.C. 1, 5-7, 545 S.E.2d 827, 829-30 (2001) (holding the Court of Appeals erred in finding there was not clear and convincing evidence of the Defendant's prior bad acts due to questions regarding the testifying witness's credibility, and that such credibility issues are "an issue for the jury's consideration"); *id.* at 6, 545 S.E.2d at 829 ("[W]e do not review a trial judge's ruling on the admissibility of other bad acts by determining de novo whether the evidence rises to the level of clear and convincing. If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal."). The assertion that in making a "clear and convincing evidence" determination that defense counsel should have moved to recuse the trial judge because of bias reflects a misunderstanding of the law and requirements of admissibility. As Judge McMahon later stated, in addressing defense counsel's concern at trial it is a jury question which goes to whatever weight and value the jury wishes to give it. The Applicant has failed to show any reasonable probability the result would have been different had counsel asserted that the judge was biased because he found clear and convincing evidence. The assertion is denied for failing to prove a Sixth Amendment violation.

In his next specification, section J/2, he cites Tr.p. 264, l. 1-7, when Judge McMahon makes his ruling. It states:

> So, the focus before me now is the in-camera and if that testimony is admissible. Based on the record before me now in-camera, I find there is clear and convincing evidence. And as far as it proves no pattern whatsoever, that goes to the weight, not the admissibility, and whatever weight and value the jury deems to give that testimony.

Tr.p. 264, l. 1-7. In his pleading, the Applicant states that Judge McMahon does not make any sense in this conclusion and suggests it arises from Applicant's erroneous assertion that the defense did not object to consolidation and should have objected when the evidence was introduced on direct examination. During the PCR hearing, the Applicant revises his concern and testified that Judge McMahon never stated in this portion what was clear and convincing and counsel never sought clarification of it. He complained about DSS matters that were not part of the crime and how it could be clear and convincing. PCR Tr.p. 156, l. 16-p. 157, l. 10.

This Court finds the Applicant failed to prove either deficient performance or prejudice. As stated above, the defense did object to the admission of prior bad acts in its argument after the evidence was presented in the in *camera* proceeding. It is the evidence arising from that proceeding that was being addressed, including the evidence from Victim's testimony and evidence of a pattern of abuse between the Applicant and Victim. In the argument by the State, the unindicted bad act evidence concerned evidence that was not covered by the periods within the indictments. Tr.p. 247, l. 19- p. 248, l. 4. The defense asserted that the evidence failed to prove a pattern of sexual abuse sufficient to allow admission. Tr.p. 248-249, p. 25262, l. 4-19. The Applicant has failed to show that counsel was deficient in failing to respond to this ruling at the time it was made.

The Applicant has failed to show Sixth Amendment prejudice. The Applicant is unclear in this assertion what counsel was supposed to do because it was the role of the trial judge to rule on the admissibility of evidence, not the weight, as correctly stated in the ruling. *State v. Wilson*, 345 S.C. 1, 5-7, 545 S.E.2d 827, 829-30 (2001). *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *id.* ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); Rule 404(b), SCRE (providing that evidence of the Defendant's prior bad acts may be admissible for purposes other than to show the Defendant's propensity for the charged offense). Because of his failings in his assertions, the Applicant failed to prove a reasonable probability the result of the proceeding would have been different. The allegation must be denied and dismissed.

Prosecutorial Misconduct (K)

In assertion K/1, the Applicant cites Tr.p. 267, l. 18-21 in which Solicitor Mayes in an *in camera* proceeding, asks Sgt. McCann when showing her Court Exhibit 3 (the *Miranda* form)[97] and asks "what is the time on that *Miranda* form in which the Defendant waived his *Miranda* rights

[97] The *Miranda* form dated April 27, 2015, at 2:02 am with Applicant's signature was initially introduced as Court Exhibit 3 in the initial in camera proceeding. Tr.p. 51, l. 10-p. 52, l. 3. This form was subsequently introduced in front of the jury during Sgt. McCann's testimony as State Exhibit 26, without objection by counsel Floyd. Tr.p. 517, l. 20- p. 520, l. 9. Consistent with the *in camera* testimony the date is 2:02 AM. Tr.p. 521, l. 2.

and agreed to speak with you" and Sgt. McCann responded "2:02 am." In his pleading, the Applicant asserts that this was self-explanatory and does not know why counsel did not object to it. Applicant asserts that he never signed his *Miranda* rights away and never agreed to speak with them in claiming also "prosecutorial misconduct." During his PCR testimony, Applicant stated that this was already addressed previously. PCR 157.

This Court incorporates, by reference, its portion of the order related to 18/1 on solicitor fabricating evidence as it relates to Tr.p. 267 on the waiver of *Miranda* rights and the time of 2:02 AM. In this setting, he denies he waived his *Miranda* rights and agreed to speak with Sgt. McCann. The Court has concluded as a matter of historical fact that the Waiver of Miranda form was dated at 2:02 am on April 27, 2015. This Court cannot find that counsel had an objection to the admission of the document or the date as a false or fabricated comment when evidence was that in addition to the written waiver and date on the document Applicant agreed to speak with Sgt. Black after hearing his rights and verbally agreed to speak with her. Tr.p. 51-56.

This Court finds that the Applicant failed to further prove Sixth Amendment prejudice by failing to object. The trial judge had already heard the earlier testimony from Sgt. Black in the earlier in camera proceeding at Tr.p. 51-56 in which the fact of the *Miranda* warnings and the verbal waiver and agreement to speak was presented. There is no reasonable probability that the result would have been different had counsel asserted that the solicitor was fabricating evidence in her question. It must be denied.

In his next specification in K/1, the Applicant cites Tr.p. 452, l. 22-p. 453, l. 8 during SANE nurse DeGuzman's testimony in which she describes her protocol and findings and observation during her examination of Victim and swabbed her anus and slightly inside and noted a stray hair on the rectal swab from the region of the anus. In his pleading, Applicant contends that counsel was ineffective in stipulating to the chain of custody which was ineffective assistance of counsel because the later testimony at Tr.p. 542, l. 24-p. 543, l. 1[98] indicated one hair, but suggested that at Tr.p. 575, l. 1-24[99] that there were two hairs. The Applicant now claims that this discrepancy meant that additional hair evidence was planted and questions the SANE nurse's testimony that that she indicated that she could see the hair. The Applicant then points to Solicitor Mayes statement at Tr.p. 691, l. 17-24 which he claims corroborates the SANE nurse's testimony that the SANE nurse could see the hair and that hair from the rectal swab was a match. In his PCR testimony as to allegation K, his PCR counsel suggested that this had been addressed before. PCR 157.

This Court finds that the Applicant failed in his burden of proof to show deficiency or prejudice. This Court adopts and incorporates herein by reference the portions of this Order in sections 26/1, E/1 and G/1 related to the hair and rectal swabs and this portion of the testimony. As to whether defense counsel erred in stipulated to the chain of custody, he failed to show a break in the chain of custody, just a difference in testimony related to the number of hairs, which was evident in the trial record. His complaint that Solicitor Mayes reference on Tr.p. 691 in her closing argument to the testimony at by nurse DeGuzman that she could see the hair was supported by trial testimony. This Court finds that Applicant failed in his burden of proof in showing that counsel

[98] In the portion of the record at Tr.p. 542, l. 24-p. 543, l. 1 SLED serologist Courtney Thompson testified that that there was a hair from the pubic combings that she sent to DNA and a hair from the rectal swab was sent to DNA.
[99] In Tr.p. 575, l. 1-24, DNA Analyst Donna Money testified that there were two hairs submitted from the rectal swab and one of the hairs was consistent with Victim and the second hair (SLED item 1.6) matched the DNA profile of the Applicant. Analyst Money stated that the hairs from the rectal swab, in counsel Spangler's questioning, was not the person who did the hair visualization (collection?) but was fforwarded ahair in the tube that she described as very small and would not have required a microscope. Tr.p. 579.

was deficient in failing to object because the comment was directly related to the testimony at trial at Tr.p. 452 by the SANE nurse that she could see a hair, which was packaged and sent to SLED. *See Vasquez. State*, 388 S.C. 447, at 458, 698 S.E.2d 561 at 566 (2010) (stating a closing argument must stay contained to the evidence within the record or any reasonable inferences drawn therefrom).

More clearly, the Applicant failed to show *Strickland* prejudice which he has the burden to prove. There is no reasonable probability that had an objection been made to the closing argument that it would have been granted because Solicitor Mayes comment was based upon evidence in the record. *Vasquez*. Clearly then he has failed to show a reasonable probability that the Applicant would have been found not guilty had that objection been made.

He similarly failed to prove that there was a break in the chain of custody. The record shows that counsel stipulated to the chain of custody. See Tr.p. 400, l. 4-12.[100] As the record reflects, witnesses were prepared to testify related to the chain, the Applicant failed in his burden of proof to show had other witnesses testified that the result would have been different. Further the DNA expert and serologist did testify and revealed what Applicant is now considering a defect in the chain. These matters went to weight, not the admissibility and the number of hairs was available to the jury's consideration. It must be denied.

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> MS. MAYES: Briefly, Your Honor, our understanding is that the Defense has stipulated to chain of custody on the buccal swab kit and the sexual assault protocol kit and, as a result, that would allow us to release two witnesses who are here this afternoon for chain of custody. Just need to put that on the record.
> THE COURT: Is that correct, Mr. Floyd?
> MR. FLOYD: That's correct, Your Honor.

Tr.p. 400, l. 4-12. (emphasis added). PCR 40.

In the next specification in K/1 he refers to Tr.p. 553, l. 23-p. 556, l. 8 concerns the cross-examination testimony of SLED serologist Thompson by counsel Spangler concerning her testing of victim's swab and that they did not include semen or pre-ejaculate fluids and negative. The serologist also stated that she did not test for saliva. Tr.p. 554. Thompson described that based off the scenario given to her and she chose to do the semen test. She declared that she did not test the rectal swabs for saliva but did for semen. In his pleading the Applicant noted that a serologist does not test for DNA and could only test for either saliva or semen under the SLED policy and questions why his counsel did not test for the other. He asserts that if he was talking about licking in the scenario and if she had saliva from her behind that it would be a reasonable assumption that it would have gotten on her underwear. The Applicant speculates that they did test it for saliva and did not turn it in and asserts that this was consistent with the extra hair funny business. He stated that counsel was ineffective in not questioning it.

This Court disagrees with the Applicant's characterization of the evidence. The Court incorporates by the portion of the Order in section 26/1 and E/1 addressing the decisions on what to test and which test to use. This Court finds no credible basis that the rectal swabs were tested for saliva and then hidden as he speculates. This Court finds that counsel acted as reasonable counsel in his inquiry related to the testing that was done and the reasons for it. Counsel on cross-examination reiterated the reliance on the SANE report and the decisions to test for semen and pre-ejaculate rather than saliva. However, the saliva did show a presumptive positive on the underwear and was sent to the DNA Lab which resulted in a match with Applicant's DNA. He has failed to show that counsel was deficient when he acted with an informed understanding of the evidence as reasonable counsel rather than out of neglect or ignorance.

This Court further finds that he failed in his burden to show prejudice under *Strickland*. From his assertion in his pleading, he is unable to show anything in this assertion that undermines confidence in the outcome to a reasonable probability under *Strickland*.

In his next assertion in K/1, the Applicant cites Tr.p. 576, l.2-p. 577, l. 10 during the direct examination of DNA Analyst Money during which she describes that there were two hairs submitted from the pubic hair combings with one consistent with Victim and the other consistent with Heath. Tr.p. 576, l. 11-15. Agent Money described the identification of the hair to a reasonable degree of mathematical certainty as the probability of randomly selecting an unrelated individual having a DNA profile matching this item is one in 57 quintillion. She confirmed that she developed a DNA match 1) from the cutting from the interior of her underwear, 2) from the hair collected from the rectal swab (#1.6) and 3) from the hair from the pubic combings from Victim during her sexual assault protocol. Tr.p. 577, l. 1-10. In his pleading, the Applicant continues to complain that in her questioning she again refers to "a" hair. He contends that counsel should have moved for a mistrial which he claims was ineffective assistance of counsel.

This Court finds that the Applicant failed to prove counsel was deficient in failing to object to Solicitor Mayes use of the singular "a" in her questioning in this section. The claim is wholly frivolous when read in context. It must be denied. 6th Amendment prejudice has not been shown by counsel Spangler's failure to object to these questions at the conclusion of the direct examination summarizing the witness's finding of DNA results.

In section K/2 , the Applicant cites Tr.p. 579, l. 4-p. 581, l. 12 during counsel Spangler's cross-examination of SLED Analyst Money during which time she testifies that she cannot tell how long a hair had been located there, the source of the hair, or whether it was body or pubic hair.

Counsel Spangler also had Analyst Money acknowledge that the hair could be visualized by a naked eye and did not require a microscope. Also in his questioning, counsel Spangler was able to have Analyst Money confirm that she could not tell how long the DNA had been on the underwear, item 4.1 and that the cutting showed Applicant as a major contributor, but also in the mixture included at least two and possibly more minor contributors that she could not identify because there was not enough information for her to make that determination. Tr.p. 579, l. 4-p. 581, l. 12.

In his pleading concerning K/2, the Applicant asserts that counsel Spangler was trying to cover up the fact that Solicitor Mayes and the SANE nurse were referring to a hair as a pubic hair which could not be determined. Applicant asserts that this was improper bolstering by his counsel. Applicant complains that this was never question by counsel of the SANE nurse's reference to pubic hair.

This claim is as confusing as it is frivolous. His claim that counsel was trying to cover up the State's testimony. It is evident that counsel Spangler was pointing out the deficiencies and possibilities reflected in the limitations of the DNA testing where the evidence supported the existence of unidentified minor contributors, the possibility of transfer of the hair and the inability, though DNA, to determine the location on the hair contributors' body. This Court is constrained to find that counsel's cross-examination of Analyst Money was reasonable. Further, he has failed to show, by credible evidence and not speculation, that there existed a reasonable probability that had counsel asked other specific questions of Analyst Money that result of the proceeding would have been different where the DNA consistent with the Applicant was located in there different areas associated with Victim on that evening, not just one area. This Court also incorporates by reference its earlier portion of the Order addressing Tr.p. 579-581 and counsel Spangler's examination in section 26/1 and E/1.

L. ***Testimony that goes against other testimony that counsel never questions (L.)*** .

In section L, the Applicant refers to twenty-seven (27) separate portions of testimony that he submits was inconsistent with other testimony in the record. He claims that counsel was ineffective in failing to adequately address or object or challenge. This Court finds that he failed to prove either deficient performance or prejudice or both as set forth below.

In L/1, the Applicant addresses Tr.p. 267, l. 18-21, which involved the *in camera* examination of Sgt. McCann where she stated the time on the *Miranda* form in which he waived his rights and agreed to speak was 2:02 am. Here, the Applicant claims he also addressed it in section M/1 under testimony that wrong and related to issues about leading a witness and prosecutorial misconduct. He claimed all that counsel had to do was to look at the form to see that he had not signed a part of it. At the PCR hearing, he claimed that she was trying to say that there was a signature on the advice of rights form but that there was not. PCR 158. See PCR Applicant's Exhibit 2 (advice of rights form).

This was addressed previously by this Court above. The Court incorporates by reference its earlier findings and conclusions related to this portion of the transcript in sections 18/1, 26/2, and K/1 above. As noted, the evidence was that Applicant signed the advice of rights form and verbally waived it and agreed to speak with Sgt. Black. For the reason as previously set forth neither ineffective assistance nor prosecutorial misconduct was proven.

In his second specification, he cites Tr. p. 687, l. 5-8 during the trial court's opening charge that what attorneys tell you is not evidence and closing arguments are different that opening statements; they argue the law and the facts. Judge McMahon further instructed the jury about the importance of this part of the process and to give the parties their complete and undivided attention. In his pleading, the Applicant asserts that this is a reminder to the Applicant and his PCR counsel that anything outside is unfair prejudice and prosecutorial misconduct. This Court finds that this is a conclusory statement and does not state a claim related to that portion of the trial Tr.p. 687, l. 5-8.

The Applicant in L/1 next refers to Tr.p. 688, l. 24-p. 689, l. 2, during Solicitor Mayes initial closing argument in which she asserts that Victim after years of silence found courage to come into court and particularly, "and those years for [Victim] hope was the only weapon that she could hold because she knew that her mother would never protect her, never support her, would never leave him . . ." The Applicant claims that counsel was ineffective for failing to object or move for a mistrial. He claims these comments were prosecutorial misconduct, hearsay, Rule 404(b), Rule 403, not facts in the record and would have required an *in camera* hearing. During the PCR hearing, the Applicant testified that there was no evidence in the record that her mother would not protect her. PCR 159, l. 10-160, l. 3.

This Court finds that during Victim's testimony, she made references to her mother and a lack of support. In particular, Victim testified as follows on re-direct examination:

> Q. How did you feel about confiding any of this to your mother?
> **A. I didn't really want to tell her because of her going back constantly. I figured if I told her, she wouldn't do anything.**
> Q. And you did tell her eventually that night?
> A. Yes.
> Q. And she's back with him now?
> A. Yes.

Tr.p. 392, l. 13-21. (emphasis added).[101]

[101] At the outset of counsel Floyd's cross-examination of Victim, he had victim point out that her mother and her grandmother (his mother) were sitting behind "us." Tr.p. 373.

While the solicitor must confine his arguments to the evidence in the record and its reasonable inferences, *see State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990), failure to do so will not automatically result in reversal. *State v. Edgeworth*, 239 S.C. 10, 121 S.E.2d 248 (1961). A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *State v. Coleman*, 301 S.C. 57, 389 S.E.2d 659 (1990). *See also Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). The burden of proof is on Appellant to show prejudice. *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975). *See State v. Tucker*, 324 S.C. 155, 169, 478 S.E.2d 260, 267–68 (1996). "A solicitor's argument concerning the credibility of the State's witnesses based on the record and its reasonable inferences is not error." *State v. Caldwell*, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990).

Contrary to the assertion of the Applicant, there was some evidence in the record to support the inference that Solicitor Mayes made in her closing. This Court finds that the Applicant has failed to prove either deficient performance or prejudice of ineffective assistance of counsel under *Strickland* or prosecutorial misconduct.

In the next specification of L/1, the Applicant cites Tr.p. 689. l. 18-20 of Solicitor Mayes closing argument in which she was addressing the concept of fate and rhetorically declared:

"And for Theresa Heath, it was fate that led her here. She was always meant to have this day in this courtroom. It's fate that brought her here and justice will soothe her wounds".

The Applicant in his pleading asserts that the State vouched for the victim and implies that counsel should have objected.

This Court finds that counsel was not deficient in failing to object to this rhetorical and isolated comment. Sixth Amendment prejudice has not been shown by this comment which did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. To the contrary, it was a reasonable inference from the evidence based upon the State's theory that it was inevitable with the history of abuse that at some moment victim would reveal it. This was supported by the expert witness's delayed disclosure testimony. Tr.p. 412, 415-416. The claim must be dismissed.

In the next specification in L/1, the Applicant cites to Tr.p. 688, l. 3-7 in the initial part of the closing of Solicitor Mayers when she states: "[T]ime always reveals the truth. No matter what efforts he took to conceal it, no matter the threats, no matter how many times that little girl was too afraid to speak, the evidence in this case is undeniable, it's overwhelming." In his pleading the Applicant contends that Solicitor Mayes was vouching for Victim. He asserts that it was unclear what indictment this opening comment was addressing and how was there evidence that he was trying to conceal it. He opined counsel should have moved for a mistrial and failed to do so.

This Court finds that counsel was not deficient and prejudice under *Strickland* had not been shown. As above, the Solicitor was allowed to address the credibility of the witnesses based upon the evidence presented. The record included evidence that the victim was subjected to threats by the Applicant including possible death to herself and others if she revealed the abuse. Tr.p. 343, l. 3- 19.

> A. Because I knew if I did, he would hurt me.
>
> Q. Had he ever made any specific statements about what would happen if you told about the sex acts?

A. Yes.

Q. What would he say in that regard?

A. He said he would kill me or my mother, shave my hair off. Sometimes he didn't seem to care if I threatened to tell, just say, yeah, tell people what I do for you or that they would take me away from my mother if I did.

Q. What do you mean when he said tell people what I do for you?

A. Just that, you know, seems as if he was proud of it. Just that specific, like, what he was doing, tell people that he was doing that.

Q. Did you ever tell?

A. No.

Tr.p. 343, l. 3-17.

This Court finds that there was evidence in the record to support the solicitor's comments.[102] Had counsel objected there is a reasonable probability that the objection would have been overruled because of the existence of this testimony. This Court is aware that at the time of the meeting with the SANE nurse, Victim did not reveal these threats. However, the evidence from the victim's trial testimony allowed this permissible argument. His suggestion to the contrary did not prove a Sixth Amendment violation. *See Caldwell*, 300 S.C. at 506, 388 S.E.2d at 822 (no improper bolstering where Solicitor argued State's witnesses were credible and "should be admired for their fortitude in telling the truth about their own family member"). The allegation is denied.

In his next specification in L/1 he cites Tr.p. 690, l. 4-5 during the solicitor's closing where

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[102] The Applicant alleged that the trial court should have given limiting instructions. The record shows that the jury was advised before the arguments that what the attorneys say is not evidence and that attorneys may argue law and evidence. Tr.p. 687, l. 5-8. The trial judge later instructed on each of the indictments. Tr.p. 735-739. The judge also directed that each indictment should be decided separately. Tr.p. 741, l. 4-10.

she states: "*[A]s I stated, the evidence in this case is overwhelming and undeniable. And we're going to take a look at that now.* When we talk about the evidence in this case, we start with the physical evidence, the forensic evidence in this case." The solicitor next went through the witnesses summarizing the evidence presented to the jury. The Applicant contends that this was vouching and suggestive and counsel should have objected and moved for a mistrial.

This Court finds that the Applicant failed to prove prejudice under the Sixth Amendment. This isolated comment restating the argument that the evidence in the case was overwhelming was permissible comment under *Caldwell*. A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony. *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990). *See State v. Cooper*, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999). Courts must review an alleged improper argument in the context of the entire record. *State v. Patterson*, 324 S.C. 5, 482 S.E.2d (1997). Arguments must be confined to the evidence in the record and reasonable inferences therefrom, although failure to do so, will not automatically result in reversal. *State v. Huggins*, 325 S.C. 103, 481 S.E.2d 114 (1997). A new trial will not be granted unless the comments so infected the trial with unfairness so as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868 (1974); *State v. Bennett*, 369 S.C. 219, 632 S.E.2d 281(2006); *Patterson*. "[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made." *Bennett,* 369 S.C at _____. Even if the argument identified by Applicant was improper, the Court finds the solicitor's isolated statement did not "infect[ ] his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). As the Fourth Circuit explains, "Closing arguments ... are prone to exaggeration

[and] we rely on juries and the adversarial process to place them in perspective." *United States v. Sutherland*, 921 F.3d 421, 429 (2019). Applicant's ineffective assistance claim also fails to meet *Strickland*'s prejudice prong. Applicant has failed to show that there is a reasonable probability that the outcome of his case would have been different had counsel made the objection Applicant claims was necessary to provide effective assistance.

The Applicant in L/1 and L/2 continues to complain about the prosecution argument and cites to Tr.p. 690, l. 25-691, l. 6. In that portion the solicitor states: " And then, as she stated to that SANE nurse, he wanted to keep going and said something to the effect of, she could finish him off. She leaves. We know he's got a bathroom in his room. From there, she doesn't know what happened. She never described ejaculation, just everything up to that point." The Applicant in his pleading complains that the prosecutor is suggesting ejaculation which was never testified to and then asserts that her comments were to inadmissible hearsay that was allowed to be heard without objection.

This Court finds that a 6th Amendment violation was not shown by trial counsel's failure to object to the comment. This evidence existed in the record from the testimony of the SANE nurse and Victim. Tr.p. 354-355, 444-445,[103] 460. The Applicant failed to prove that there is a reasonable probability that the outcome of his case would have been different had counsel made the objection Applicant claims was necessary to provide effective assistance. *See State v. Cooper, supra.* The allegation is without merit under the 6th Amendment where prosecutorial misconduct

[103] In the report to the SANE nurse, although Applicant described that after 20 minutes, he stated that he wanted to touch her again and "finish himself off," victim then left the room. Tr.p. 444-445. When the SANE nurse specifically asked her about ejaculation, "she said no." Tr.p. 445. Concerning the April event, Victim testified that after about 20 minutes of his private part rubbing against her , he wanted her to roll over so he could finish but she got up and left. Tr.p. 355. She testified that when she left, he was in his bedroom which had a bathroom, but she did not know whether he ejaculated that night and did not know whether he wiped off. Tr.p. 355.

was not shown.

In his next specification in L/2 he cites to Tr.p. 691, l. 7-16 in the prosecution argument where the prosecutor describes that Victim went into a SANE examination and as the SANE nurse described pubic combings were taken during that examination because it was anticipated because of friction, genitals to genitals that an assailant's pubic hair can be intertwined with the victim's "and we know that from her pubic hair combings was a DNA match to a hair from William Heath." In his pleading, Heath contends that counsel should have objected to the vouching and speculation which is repeated from earlier testimony that would have been inadmissible had counsel objected. In his PCR testimony, the Applicant also questioned the factual assertion claiming that the friction between the genitals did not happen. PCR p. 161, l. 1-5. He also questioned whether the SANE nurse saw all the hairs. *Id.*

This Court finds, as to the closing argument, that there is no Sixth Amendment violation because her argument derives directly from the introduced testimony of the SANE Nurse and DNA Analyst, as appeared to admit in his pleading. The SANE nurse testified that about the reason for the examination and the friction between genitals as creating the possibility of the hair being intertwined and that genital to genital contact was reported. Tr.p. 451, l. 4-10, p. 466, l. 2-11. Further, the DNA Analyst reported that that Heath's DNA profile matched a hair from the pubic hair combings, item 1.5.2. Tr.p. 576, l. 2-25, p. 577, l. 1-10,

Since the argument accurately stated the evidence in the record this Court finds that counsel was not deficient in failing to object since he acted reasonably. Further, since the argument was permissible as directly from the evidence and reasonable inference from the record, there is no reasonable probability that had counsel objected, that the result of the proceeding would have been different. The allegation is without merit. His remaining concerns about whether counsel should have objected to the admission of the evidence are addressed in other portions of this order which are incorporated herein by reference. .

In his pleading the Applicant in L/2 next asserts that counsel should have objected to Tr.p. 692, l. 13-18 of the closing argument where the prosecutor points out the markings or lack of markings located on the underwear, State Exhibit 23, reflective of the serologist's findings about the location of the stain which was positive for saliva. In his pleading, the Applicant contends that the prosecutor was testifying to things that were not testified to from the serologist.

This Court finds that the serologist, Agent Thompson testified about how she screened the underwear, State Exhibit 23, and identified the areas by the use of a fluorescent light to identify areas where she should be testing and determined areas to do the cutting from the underwear. Tr.p. 538-540. She stated that she used this process to circle the interior rear so that she would be aware of the area once she turned off the light. Tr.p. 540. She stated the cutting tested positive for saliva. Tr.p. 540.

This Court finds that since there was a basis in the evidence at trial, the prosecutor's comments were reasonable based upon the testimony and its reasonable inferences. As stated above previously, a solicitor has a right to state his version of the testimony and its reasonable inferences and to comment on the weight to he given such testimony. *State v. Caldwell.* This Court finds that counsel was not deficient in failing to object because there was no legal basis to object. Similarly, the Applicant had failed to prove prejudice under *Strickland* since he failed to prove the existence of a reasonable probability that had counsel objected that the result of the proceeding would have been different. This claim is denied as failing to prove a Sixth Amendment violation.

In his next specification he refers to Tr.p. 692, l. 3-5 of the prosecution's closing where the prosecutor states that the *serologist* explained that the DNA match from Victim's underwear is also a DNA match to the Applicant. The Applicant, in his pleading asserts that the serologist never explained this at all, but the DNA Analyst explained it. He states that counsel should have caught this misstatement and objected.

This Court finds that the Applicant is factually correct that it was the DNA Analyst, not the serologist who testified about the DNA match with the underwear. Tr.p. 565-567, p. 577, l. 1-4. However, this Court finds it is further clear from a review of the context of the argument that the prosecutor was accurately describing the results of the DNA Analyst, not the results of the serologist, since she was describing those results. This Court finds as a matter of law that the Applicant failed to prove Sixth Amendment prejudice. This Court concludes that had counsel made an objection to the misstatement regarding the serologist as opposed to the DNA Analyst, there is no reasonable probability that the result of the proceeding would have been different because the prosecutor would have corrected the misidentification of the expert and the Court would have instructed the jury to rely on the evidence in the record. Confidence in the outcome has not been undermined.

In his next specification in L/2, the Applicant refers to Tr.p. 692, l. 22-p. 693, l. 5., in which the prosecutor comments about the serologist having explained her expert experience as a forensic serologist, that she knew right away that the stain originated in the interior of the underwear, and that the stain part would have been pressed against her body as she pulled the underwear up and back and further that there was so much DNA on the underwear that they could not find her DNA . The Applicant contends that her comments were improper corroboration because it vouched for the testimony of Victim and was speculative .

This Court finds that the serologist testified that it was very easy to identify which side of an item, interior or exterior, a stain originates from because it will glow and she will note which side by the way the light source glows. Tr.p. 552-553. The serologist opined that the saliva was on the interior rear of the underwear. Tr.p. 540, l. 5-21, p. 551, p. 557, l. 19-24. She acknowledged that she could not tell whether it was direct or indirect transfer. Tr.p. 550-551. However, the DNA expert testified that the cutting on the interior rear of the underwear was a mixture of at least two individuals and included a single source full DNA profile matching the Applicant but that there was not enough DNA mixture to determine the other minor contributor, including the victim. Tr.p. 571-573, 581, l. 19-21. On cross-examination concerning the saliva on the underwear the DNA expert could indicate how the DNA got there. Tr.p. 580. There was testimony by Victim that Applicant had pulled down her pants and underwear to her knees and then straddled her from behind and at some point, used his mouth touching her from behind. Tr.p. 352-354. There was also evidence from the SANE nurse that Applicant had indicated to her that Applicant had licked Victim's anus. Tr.p. 445-446, 447, 459, 465. The serologist testified that if a person licked a person, it would be a good way to transfer saliva, if still wet. Tr.p. 555. In Defendant's Exhibit 1, p. 3, it indicated that Victim had not changed clothes since the assault.

This Court finds that the Applicant failed to prove Sixth Amendment prejudice by the failure to object. Although the serologist did not precisely testify as the comments may have stated, there was testimony presented by the serologist, the SANE nurse, the DNA Analyst, as well as the Applicant to suggest that it was a reasonable inference from the evidence in the record. This Court finds that the Applicant has failed in his burden to show a reasonable probability that the result of the proceeding would have been different, if counsel had objected. The claim must be dismissed.

In his next specification in L/2 the Applicant refers to the next paragraph in the solicitor's argument, Tr.p. 693, l. 7-13 during which the solicitor refers to a the fact that the victim was wearing her same clothes after and that there was not enough of her DNA on the underwear to identify the saliva stain to identify her or be traced but that "there is no other explanation for that event than him placing his mouth on her exactly as she described when she's face down on his bed." The Applicant contends in his pleading that that this was improper corroboration and vouching for the Victim and speculation.

This Court finds that the Applicant has failed to show deficient performance or prejudice under *Strickland*. This portion has also been addressed previously in section 13/2 which is incorporated herein by reference. As noted above, there was testimony from the victim and forensic experts to support this version and inference. Under *Caldwell,* it was a permissible record based argument. Counsel was not deficient in failing to object and the Applicant failed to prove prejudice under *Strickland* due to the permissible argument.

In his next specification in L/2 the Applicant refers to Tr.p. 696, l. 8-16 of the prosecution argument about the video from incestTV.com which was referred to Detective Phipps' testimony, noting one channel refers to sex between fathers and daughters and was captured on his iPad which was the image she described him using. The Applicant in his pleading complains that counsel should have objected to this reference because the image was not described in the transcripts and considers it improper speculation and not evidence in the record. [104]

[104] A review of the evidence at trial reveals that State Exhibit 36 is a pornographic image of fellatio. State Exhibit 38 is a photograph of an image of individuals on a bed with a clothes female with her back turned which includes at the bottom right hand corner "IncestTV.com."

This Court has essentially addressed this issue previously above in the last specification in section 20/4 which is incorporated herein by reference. For the reason as set forth therein that Court finds that the counsel was not deficient in failing to object because there was evidence in the record to support the reasonable inferences based upon Det. Phipps extraction of the iPad, the images and timing of the video and photograph developed from the iPad data file and the testimony of Victim. *Caldwell, supra.* For similar reasons, the Applicant has failed in his burden to show that there was a reasonable probability that the result of the proceeding would have been different had counsel objected.

In his next specification in L/2, the Applicant refers to Tr.p. 696, l. 17-p. 697, l. 2, the next paragraph of the argument in which the prosecutor describes that this will be that last time she speaks and speculates what the defense may argue, noting that possibly they might assert that somebody else used the computer, although there were only two people present at that time, the Applicant and Victim, so she asserts that no one else used the computer (iPad) and it was not the mother because he is still using the sites after the assaults. The Applicant contends in his pleading that the prosecutor vouched for the victim and invaded the province of the jury and the prosecutor should have objected to the misconduct.

This Court finds that Applicant failed in his burden of proof in showing deficient performance or prejudice on counsel's failure to object. Under *Caldwell*, the prosecutor is allowed to argue the State's version as long as it does not rely on matters outside of the record. In this section, there is evidence in the record from Det. Phipps concerning the timing of the use of the computer and the Victim by her identifying of the exhibit and her testimony about the use of the iPad during the assault. Further, there was evidence from Victim and Margie Branham that her mother was at work at that time. Tr.p. 347, 473-474. Further, Det. Phipps noted that after the time of the assault, websites were being visited by someone interested in matters that would have interested Applicant involving auto parts stores at 11:19 PM. Tr.p. 626. This was permissible record based argument and an objection or request for a mistrial is without merit. The Applicant had failed to show that the failure to object resulted in Sixth Amendment prejudice.

In his next specification L/3, the Applicant refers to Tr.p. 697, l. 13-20 of the closing argument addresses that the pornographic videos he's watching and showing to victim do not show up in his search history and asserts that forensic digital expert Detective Phipps explained that a likely explanation was that videos had already been saved so that they are not something that Applicant can search though the internet in a cloud or other alternative network. The Applicant contends that there was no evidence in the record to support this assertion by the prosecutor and Applicant claims he does not know what that is and attacks his character as if he had a collection of pornography on his iPad. He contends that the prosecutor knew this was not true and it should have been objected to.

This Court finds a review of Detective Phipps testimony supports those challenged prosecutorial comments. On redirect examination Det. Phipps testified that that the images did not have to be captured from a web address to be playing and that a file could have been downloaded previously in either a home network and streaming off the home network or if there was a cloud account it could be streaming off that. Tr.p. 632, l. 7-16. Det. Phipps also testified that there is a function in Chrome called "incognito" that allowed the user to browse anonymously which was an additional explaining that someone could go to a website and not have those logged within the system. Tr.p. 633, 1-10. Det. Phipps further testified that a user can access videos that are not on the web from an iPad. Tr.p. 634, l. 21-25.

This Court finds that the Applicant has failed to show deficient performance or prejudice under *Strickland.* This portion has also been addressed previously in section B/1 which is incorporated herein by reference. As noted above, there was testimony from the Det. Phipps and Victim to support this version and inference in the prosecution argument. Under *Caldwell,* it was a permissible record based argument. Counsel was not deficient in failing to object and the Applicant failed to prove prejudice under *Strickland* due to the permissible argument.

In his next specification in L/3 (misconduct), he refers to Tr.p. 697, l. 21-p. 698, l. 1 during the prosecution argument. There, Solicitor Mayes asserts that State Exhibit 22 was an image captured at 9:30 and identified by Victim as having seen the video on the iPad which was identified as having the watermark daughterdestruction.com.

The Applicant contends that this comment was in error because Victim never described State 22 and claimed that the prosecutor improperly corroborated Det. Phipps testimony when she used the term "we" when she stated "and we know he hits the home button and this image is captured at 9:30." The Applicant questions in addition how did they know it was Applicant that hit the home button.

This Court finds that the Applicant has failed to prove deficient performance by the failure to object to the comments related to State Exhibit 22. This Court previously addressed claims related to this exhibit in sections 30/1 and 31/2 which are incorporated herein by reference. This Court finds, contrary to the Applicant's claim, Victim did testify about State Exhibit 22. Tr.p. 366-367.

Q. I'm going to show you what is 22 for identification at this time.

A. Uh-huh.

Q. Do you recognize that?

A. Yes.

Q. Where had you seen that image?

A. It was on his iPad.

Q. Were you paying close attention to the acts that were occurring on the iPad?

A. No.

Q. Do you recognize -- you recognize that image?

A. Yes.

Q. Do you know whether that was a photo or a video?

A. It was a video.

Q. When had you seen that video before?

A. He would place the iPad on the pillow near my head sometimes so I would see it.

Q. And do you recall that image from that night, the last night?

A. Yes.

Tr.p. 366, l. 21- p. 367, l. 16. His assertion otherwise is without merit.

Further, the prosecution's mere use of the word "we" in summarizing the testimony does not carry the implication that the prosecutor is relying upon outside information or her own special knowledge in the context stated by direct reference to evidence. *See State v. Busse*, 439 S.C. 104, 112, 886 S.E.2d 208, 212–13 (2023) (the prosecutor is playing her proper role as an advocate). *See State v. Reyes*, 432 S.C. 394, 853 S.E.2d 334 (2020); *Smith v. State*, 375 S.C. 507, 654 S.E.2d 523 (2007) (concluding any impropriety in the solicitor's closing argument was not sufficient to grant Defendant post-conviction relief where solicitor's improper use of the pronoun "I" was limited, did not recur throughout his argument, there was overwhelming evidence of the Defendant's guilt, and the trial judge instructed the jury not to consider counsel's statements as evidence) . Its reference is to the testimony of Det. Phipps related to State Exhibit 22. Det. Phipps related that the images in the extraction report set out in State Exhibit 35 were created when the user hit the home button. Tr.p. 622-623. These home button created images included State Exhibit 22 which was logged on April 26th at 10:39 PM which included the daughterdestruction.com watermark. Tr.p. 624-625. This Court further finds that State Exhibit 34, another image, was created at 9:39 PM. Tr.p. 623, l. 7-21, p. 625, l. 6-16. Here, there was minimal risk the jury would perceive the deputy solicitor stepped out of his role as an advocate. *Cf. Washington v. State*, 445 S.C. 233, 911 S.E.2d 536 (Ct. App. 2025).

This Court finds that the prosecutor erred in her statement that Exhibit 22 was created when the home button was hit at 9:30 when that image was captured based upon Det. Phipps testimony at 10:39 PM. Although counsel could have objected to the time, in context, this factual error did not undermine confidence in the verdict, particularly when the additional image exhibited in State Exhibit 36 was logged in at 9:39 PM.

This Court finds that the Applicant has failed to show deficient performance or prejudice under *Strickland*. As noted above, there was testimony from the Det. Phipps and Victim to support this version and inference in the prosecution argument. Under *Caldwell,* it was a permissible record based argument. Counsel was not deficient in failing to object and the Applicant failed to prove prejudice under *Strickland* due to the permissible argument. The Applicant has failed to prove a reasonable probability that had the Applicant objected there is a reasonable probability that the result of the proceeding would have been different. At most, the prosecutor would have corrected her comment that the image in State Exhibit 22 was created at 10:39 rather than 9:30. His allegation for relief must be denied.

In his next specification in L/3 he refers to Tr.p. 698, l. 1-13 during the closing of the State in which the solicitor states that the individual viewing this material is not looking at material of naked women in *Playboy*, but rather a unique and twisted obsession with having sex with his daughter and using his iPad with the images captured during the assault. The Applicant contends that the prosecutor is attacking his character about an obsession with sex with his daughter and again using the phrase "we know" in corroborating the assault.[105] He further complains that she indicated that he hit the pause button on a video on December 2.

This Court finds that these comments initially did not suggest that the prosecutor had any special knowledge about the events but was based upon the evidence of his history of assaults upon victim from her testimony and his acknowledgment of watching porn on his iPad and the inclusion of images on the iPad memory from incestTV.com and daughterdestruction.com. These were reasonable inferences from the evidence presented and appropriate advocacy on the part of the State. This Court finds that the Applicant has failed to show deficient performance or prejudice under *Strickland.*

As noted above, there was testimony from the Det. Phipps and Victim to support this version

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[105] A prosecutor's statement in closing argument to the jury in a federal fraud prosecution that the government was asking for a guilty verdict because "I believe" that the evidence had shown the guilt of the Defendants to be overwhelming was held to constitute proper comment, in *United States v Wayman* (1975, CA5 Ga) 510 F2d 1020, cert den 423 US 846, 46 L Ed 2d 67, 96 S Ct 84, wherein it was observed that although a prosecutor should not express his personal opinion as to the guilt of a Defendant based on facts not in evidence, it is not error of reversible dimensions for a prosecutor to express his opinion where it is based solely on evidence adduced at trial. The time has not yet come when a prosecuting attorney cannot argue the strength of his case—the weight and sufficiency of the evidence—and ask the jury for a conviction, reasoned the court. *See State v. Busse*, 439 S.C. 104, 112, 886 S.E.2d 208, 212–13 (2023) (the prosecutor is playing her proper role as an advocate).

and inference in the prosecution argument. The reference to December 2, 2014 is supported by the record. This Court has previously found evidence that December 1, 2014 was the Applicant's birthday. Victim indicated that Applicant assaulted her on that night and used his iPad. Tr.p. 389-390. Evidence from Det. Phipps indicated that State 37 included a snapshot of an entry on December 10, 2014 at 9:10 PM. Tr.p. 612, 617. There was evidence that the progress bar on the snapshot indicated the start stop time on the video and an arrow on State Exhibit 38 indicated its location and when it was stopped. Tr.p. 618-619, 632. Also, Tr.p. 593. However, the video did not need to be stopped when the video was captured when the home button was pressed. Tr.p. 632.

Under *Caldwell,* it was a permissible record based argument. Counsel was not deficient in failing to object and the Applicant failed to prove prejudice under *Strickland* due to the permissible argument. The Applicant has failed to prove a reasonable probability that had the Applicant objected there is a reasonable probability that the result of the proceeding would have been different.

In the next specification in L/3 Applicant continues his complaint about another section of the prosecution's argument, Tr.p. 699, l. 13-21 when the solicitor referred to State Exhibit 20 as the residence they lived at on Smith Pond Drive in 3rd and 4th grade and how Victim described how the assaults occurred and Applicant coming into his room or her room putting his mouth on her and his hands or finger in her privates. Solicitor then described that sexual battery included penetration of the vagina, did not have to be intercourse, but could include a finger or tongue or anything else. The Applicant complains that the solicitor was covering for Victim stating at Peachland she was made to come into his room which he claimed did not exist at Peachland and the solicitor then speculates about finger or tongue. Applicant claims counsel should have objected.

See also PCR 161.

This Court finds that Applicant failed to prove either deficient performance or prejudice by counsel's failure to object to this portion. There was evidence from Victim consistent with the prosecution argument as it related to incidents at Smith Pond Drive. Tr.p. 360, l. 8- p. 361, l. 19, p. 362, l. 11-20. Although not in this portion of the argument, Victim testified that it started when she was six or seven and they lived at Peachland prior to the second half of second grade, Tr.p. 336. His disagreement with Victim's testimony about Peachland had been addressed previously in section 18, 19, 20/1, 21, 31/1 which are incorporated herein by reference.

Under *Caldwell,* it was a permissible record based argument. Counsel was not deficient in failing to object and the Applicant failed to prove prejudice under *Strickland* due to the permissible argument. The Applicant has failed to prove a reasonable probability that had the Applicant objected there is a reasonable probability that the result of the proceeding would have been different.

In section L/3 and L/4, the Applicant refers to Tr.p. 700, l. 16-p. 701, l. 6 in the argument when viewing the criminal sexual conduct with a minor first degree and criminal sexual conduct with a minor second degree that it is inconceivable the first and only sexual assault would have been on the final night in April when there was overwhelming forensic evidence that what occurred that night was the result of years of abuse that built up by the threats and coercion and fear of him and the solicitor then describe the evidence that Victim described that he hit her and made threats and after a while you give in. Tr.p. 700-701. The Applicant, in his pleading contends that this was vouching and counsel was deficient.

> All lawyers have a responsibility to advocate zealously on behalf of their client. This responsibility is not diminished when the lawyer is the prosecutor in a

> criminal trial. We expect solicitors to "prosecute with earnestness and vigor" on behalf of the State. *Fortune v. State*, 428 S.C. 545, 552, 837 S.E.2d 37, 41 (2019) (*quoting Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935)). A prosecutor arguing forcefully during closing argument that the jury should believe a particular witness is well within her proper role as a zealous advocate, so long as the argument is based on evidence admitted during trial.

State v. Busse, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023).

This Court has previously indicated the evidence in the record through Victim's testimony about the ongoing threats made to her by Applicant if she told anyone including the potential of death to her and her mother. Tr.p.338, l. 12-23 (Victim declared that she was told by Applicant not to tell and that she knew something would happen to her if she did tell because of prior experiences when she had told somebody something that he would get angry with her or he'd threaten to kill her or other things). This Court finds that the record includes other evidence of his specific threats to kill her or her mother if she told anyone about his sexual conduct with her. See Tr.p. 339 (struck her if she resisted); p. 343 (he said he would kill me or my mother, shave my hair off" if she told about the sex acts). It also included evidence that she learned "not to resist" as a result of the threats. Tr.p. 339, l. 12-13.

This Court finds that Heath "disliked ... the inferential gloss that the Government chose to put on th[e] facts[ ] cannot be a ground for reversal, in light of attorneys' 'wide latitude' in crafting their closing arguments." *United States v. Valas*, 822 F.3d 228, 244-45 (5th Cir. 2016) (citation omitted).

This Court finds that the Applicant failed to prove counsel was deficient in failing to object to those comments. There was evidence to support what happened on April 26 by Victim's testimony, the forensic evidence from scientific experts, as well as the digital expert, which was reasonably described as overwhelming. The collateral evidence related to April 26 supports the credibility of Victim, who made assertions related to the earlier incidents. This Court must reject the assertion that it was improper vouching for the Victim. *See Busse, supra.* There was no indication that Solicitor Mayes was contending she had any special knowledge outside of the record but was arguing the strength of the state's case. This is acceptable advocacy under *Caldwell.*

Counsel was not deficient in failing to object and the Applicant failed to prove prejudice under *Strickland* due to the permissible argument. The Applicant has failed to prove a reasonable probability that had the Applicant objected there is a reasonable probability that the result of the proceeding would have been different.

The next specification he seeks to address in L/4 in Tr.p. 702, l. 8-10 during the state argument in which the prosecutor asserts "do not let them attack the victim, do not let them assail [Victim's] character as if she had done something wrong." In his pleading, Applicant contends this is speculation and vouching for the Victim. He further contends that her comment invades the province of the jury and asserts it deprives him of an opportunity to defend himself at trial." At the PCR hearing, Applicant similarly asserted that his counsel should have objected. PCR 162, l. 1-13.

This Court finds that the Applicant has failed to prove prejudice by failing to object to the solicitor's request to the jury to not let the defense in its closing attack the victim or her character. In context, the prosecutor followed this comment by noting in the defense cross-examination of Victim they asked her about whether as a child she liked to write stories and use her imagination and continued to summarize that her imagination may have been her only escape.

A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609–10, 602 S.E.2d at 744.

" 'While the solicitor should prosecute vigorously, his duty is not to convict a Defendant but to see justice done.' " *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (*quoting State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)). " 'The solicitor's closing argument must, of course, be based on this principle.' " *Id.* "A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." *State v. Reese*, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006). *Brown v. State*, 383 S.C. 506, 515–16, 680 S.E.2d 909, 914 (2009). "Improper comments do not automatically require reversal if they are not prejudicial to the Defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*; *see State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a Defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice").

Certainly, a prosecutor is entitled to call into question the credibility of a defense. *See, e.g., State v. Lunsford*, 318 S.C. 241, 246, 456 S.E.2d 918, 922 (Ct.App.1995) ("In telling the jury, 'so don't fall for that,' the solicitor was merely telling the jury that it should not credit defense counsel's argument regarding the absence of fingerprint evidence. A prosecutor may fairly point out 'matters which [the jury] should not consider.' "), cert. denied (1995). Likewise, a prosecutor may "legitimately appeal to the jury to do their full duty." *State v. Caldwell,* 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990).

Here, the comment was near the end of the closing argument and was based, in context, up an assertion that the record supported the victim's credibility and the reflection concerning the perceived attack upon the victim in her cross-examination by suggesting that she was a storyteller and that this was all a part of her imagination.[106] See Tr.p. 380-381. The state is seeking for the jury to consider her testimony as a whole in assessing credibility. Further, the jury was instructed on their role to consider only evidence from the witness stand and exhibits (Tr.p. 726) and there role in determining the credibility of the witnesses. Tr.p. 728-730. Further, the comments were not asking the jurors to stand in the shoes of the victim nor making a Golden Rule argument. The comment instead requested the jury to view the victim's credibility as a whole and not based upon the defense's leading question that asserted she was a storyteller. This was fair comment.

In the instant case, the solicitor's comments were confined to facts established during trial and their reasonable inference and, in the context of the entire record, were not so egregious as to have "infected the trial with unfairness as to make the resulting conviction a denial of due process." *Von Dohlen v. State.* These instructions were sufficient to cure any possible prejudice caused by the solicitor's comments.

In the next specification in L/4 the Applicant refers to Tr.p. 703, l. 9-13 during the argument during which the prosecutor urges in her final statement the following:

> Now, he will be held accountable for his actions, for the pain, the fear and the

[106] On cross-examination, Victim confirmed that as a child she liked to write stories and was very creative. Tr.p. 380. She confirmed that she would put her stories on the computer. She confirmed that everyone was amazed at her imagination. Tr.p. 380-381.

> long agonizing fight to be free. That's his payment. Let this be the last time he puts his hands on that child or any child in the future. Let this be the last time. The correct verdict in this case is guilty.

Tr.p. 703, l. 9-13. This portion followed the solicitor's summary about Victim's being a 14 year old girl that could not find the words and choked on her words related to criminal sexual conduct with a minor second degree and then as a 17 year old that had enough and brought the truth to light related to the criminal sexual conduct with a minor third degree. Tr.p. 703, l. 1-8.

The Applicant contends in his pleading that this comment forced the jury to convict him as an emotional response and invaded the province of the jury. He contends that counsel should have objected. At the PCR hearing, Applicant contends that the solicitor is asserting for the jury to lock him up and if they don't, he was going to do it to someone else. He asserts that counsel should have objected and moved for a mistrial. PCR 162-163.

This Court finds that the Applicant has failed to prove prejudice in counsel's failure to object to these final comments. This isolated clause clearly is a request by the solicitor to have the jury convict based upon its application to the evidence of the acts between Victim and the Applicant when she declared : "Let this be the last time he puts his hands on that child .... in the future. Let this be the last time." This is acceptable comment based upon the facts in evidence and the credibility of Victim. *Caldwell*. This Court finds that comment and the failure of counsel to object did not create 6th Amendment prejudice for reasons set forth below.

This Court finds the remaining structure of this phrase more problematic when further isolated as "Let this be the last time he puts his hands on ... *any child in the future*. Let this be the last time. Within his argument, this is the portion of the phrase Applicant seems more concerned about and likely equates it with unacceptable language from cases such as the "send a message" or "open season" to commit crimes type of cases. However, those cases are readily distinguishable. In *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873, 881-82 (2007), the Supreme Court addressed a prosecutor's closing argument during the sentencing phase that failure of the jury to impose the death penalty on Defendant would result in an "open season on babies" in the county. This clearly moved the jurors' responsibility beyond its duty to determine the fate of the Applicant. *See, Meggett v. State*, 1979 OK CR 89, 599 P.2d 1110 (1979) (remarks made by prosecutor during closing argument, that Defendant was "good citizen" like number of notorious criminals were "good citizens" and that finding Defendant not guilty would be same as telling community "it is open season on spouses Take your shot," were improper); *People v. Wright*, 186 Ill. App. 3d 159, 542 N.E.2d 367 (1989) (trial court's actions in sustaining objections to prosecutor's remarks during closing argument and in instructing jury to disregard remarks cured any prejudice in prosecution for aggravated sexual assault and home invasion; prosecutor asserted that it would be "open season on women in Chicago" and that"[y]ou can rape them and no one will ever be convicted of rape in this county if you buy that type of defense"); *State v. Lynch*, 123 Conn. App. 479, 502, 1 A.3d 1254, 1269–70 (2010) (the prosecutor improperly stated that should the jury find the Defendant not guilty, "it's going to be open season on small children." But the appellate court found the error was not so prejudicial as to deprive the Defendant of a fair trial): *Locklear v. State*, 317 Ga. 115, 891 S.E.2d 792 (2023) (trial court acted within its discretion in denying motion for mistrial following prosecutor's improper closing comments wondering whether Defendant was in a wheelchair at trial to weigh on jury's sympathies, characterizing jury's role as speaking for the community, and stating that it was "open season for murder" if jury found Defendant guilty of only voluntary manslaughter, where comments were fleeting, court sustained Defendant's objections, and court instructed that closing arguments were not evidence, that only testimony and other evidence presented during trial could be considered in reaching verdict, and that jury was duty-bound to consider facts objectively without favor, affection, or sympathy to any party and was not permitted to be governed by sympathy or prejudice or because of public opinion). *But see Ray v. State*, 527 So. 2d 166 (Ala. Crim. App. 1987) (Prosecutor's statement during closing argument in sexual abuse prosecution, in which he rhetorically asked whether it was "open season for perverts like this to run around," was not improper argument that evidence showed that Defendant was pervert, but plea to jury to discharge its duties; moreover, jury was immediately instructed by trial court that comment was not to be viewed as description of Defendant as pervert).

"A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Not all improper closing arguments, however, mandate reversal. "A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). When making this determination, we must "review the alleged impropriety of argument in the context of the entire record." *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981).

Prosecutors violate this edict when they stray beyond the Defendant's crimes and ask the jury to convict in order to "send a message to the community." *United States v. Runyon*, 707 F.3d 475, 514 (4th Cir. 2013); *see also United States v. Pupo*, 841 F.2d 1235, 1240 (4th Cir. 1988) (en banc). Such exhortations improperly invite the jury to focus on a larger social objective beyond the Defendant and his crimes. *Runyon*, 707 F.3d at 514–15; *Pupo*, 841 F.2d at 1240; *see also United States v. Monaghan*, 741 F.2d 1434, 1441 (D.C. Cir. 1984) ("A prosecutor may not urge jurors to convict a criminal Defendant in order to ... deter future lawbreaking. ... The amelioration of society's woes is far too heavy a burden for the individual criminal Defendant to bear."). So too do prosecutors step over the line when they ask jurors to place themselves in the victim's shoes. *See United States v. Hall*, 979 F.3d 1107, 1119 (6th Cir. 2020*); Gov't of the Virgin Is. v. Mills*, 821 F.3d 448, 458 (3d Cir. 2016); *United States v. Palma*, 473 F.3d 899, 902 (8th Cir. 2007). Even so, "[i]solated passages of a prosecutor's argument" often fail to violate due process. *See Donnelly*, 416 U.S. at 646, 94 S.Ct. 1868. But the prosecutor here focused the rebuttal argument on sending a message to the community and protecting the jurors' own children from sexual assault. *See Plymail v. Mirandy*, 8 F.4th 308, 317 (4th Cir. 2021), as amended (Sept. 7, 2021).

Here, the comments were focused and directed to this Defendant, not other potential law breakers in the community. In *United States v. Caro*, the 4th Circuit expressed skepticism about "the government's comments about messages sent to anyone other than" the Defendant, 597 F.3d 608, 625 n. 17 (4th Cir.2010)—skepticism that other circuits seem to share, *see, e.g., Sinisterra v. United States*, 600 F.3d 900, 910 (8th Cir.2010) (holding in a capital case that urging "the jury to send a message with its verdict" is improper because it "impinge[s] upon the jury's duty to make an individualized determination that death is the appropriate punishment for the Defendant"). *United States v. Ruiz*, 987 F.2d 243, 249 (5th Cir.1993) (prosecutor's statements that are "merely a plea to the jury to do its duty" are not error). *Also, U.S. v. Valas*, 822 F.3d 228, 243 (5th Cir. 2016) (prosecutor's statement telling jury to "protect [the child victim]" and "send a message and convict [Defendant] for sex trafficking of a minor" not improper because made in response to

Defendant's attack on child victim's credibility). *See, e.g., U.S. v. Foley*, 783 F.3d 7, 22 (1st Cir. 2015) (prosecutor's statement to jury that it was time to hold Defendant accountable not improper because direct response to defense strategy); U.S. v. Davis, 863 F.3d 894, 907 (D.C. Cir. 2017) (prosecutor's statement to jury that Defendant "not going to stop until somebody tells [them] to stop. Your job is to tell [them] to stop" not improper because prejudice sufficiently mitigated). *But see, e.g., U.S. v. Torres-Colón*, 790 F.3d 26, 33-34 (1st Cir. 2015) (prosecutor's question to jury asking whether they "would want the Defendant driving along the highway beside them" improper because invited jury to consider factors irrelevant to Defendant's guilt); *Plymail v. Mirandy*, 8 F.4th 308, 317-18, 320 (4th Cir. 2021) (prosecutor's statement to jury that they "must think about the message" their verdict would send and to think about protecting their children from rapists improper because "neither responsive nor proportional to defense counsel's comments"); *U.S. v. Gomez-Diaz*, 911 F.3d 931, 934-35 (8th Cir. 2018) (prosecutor's comment that jurors "the voice for" the victim improper because of appeal to jury emotion); *U.S. v. Barragan*, 871 F.3d 689, 707-08 (9th Cir. 2017) (prosecutor's statement emphasizing Defendant's dangerousness and urging jury to say "no more" improper because asked jury to consider community safety rather than guilt of Defendant);

Read in context, the State's remarks cannot be described as "calculated to inflame." See *id.* Indeed, the Solicitor's remarks in this case are more innocuous than other prosecutor statements that courts have held to be permissible. For example, in *United States v. Brown*, the prosecutor said—in a drug trial that "drugs are a terrible thing and they are ruining the society," and "it's up to you to do something about it and that is returning a verdict of guilty on these charges." *Id.* This court held that even these statements "did not rise to the level of an improper law and order appeal."

Id. The argument here was milder than that. Applicant has failed to show error in the State's purportedly inflammatory remarks.

This Court finds that these comments were fleeting at the conclusion of the prosecution's statements yet were also directed at the Applicant's personal actions. Moreover, as part of its general charge to the jury, the trial court defined evidence and explained that only testimony and other evidence presented from the witness stand and the exhibits presented in the trial could be considered in reaching a verdict. Tr.p. 726-730. The trial judge prior to the arguments instructed that closing arguments are not evidence. Tr.p. 687, l. 5- 12.

This Court is confident, however, that neither comment rendered the proceeding unfair, because the challenged comments were isolated, did not rise to the level of argument that might mislead or inflame the jury concerning its duty or divert it from its task and were made in the context of a case involving compelling evidence of numerous aggravating factors. *See Caro*, 597 F.3d at 625 n. 17 (finding that comments similar to those here, though perhaps improper, did not warrant reversal because they were not sufficiently prejudicial). This Court concludes that had counsel objected to either of the comments, the Applicant has failed to show a reasonable probability that the result of the proceeding would have been different.

In his next specification in L/4, the Applicant refers to Tr.p. 718, l. 17-20 during Solicitor Mayes's reply argument which asserted the Applicant's counsel put in evidence the SANE nurse protocol report (Defense Exhibit 1) because it only related to the final assault. Solicitor Mayes explained that it did not matter to the SANE nurse how often it happened whether it was 100 or one time because its purpose is what happened that night and where to swab. The Applicant complains that this comment was to cover her alleged mistakes and speculates that counsel put it in to "cover" for the prosecutor for a directed verdict. In his PCR testimony he claimed again that he did not know why counsel put the SANE report into evidence because there are a lot of mistakes in it. PCR 163.

This Court finds that the Applicant is not credible in his speculation that the defense team introduced the evidence to aid the prosecutor to convict him and get by directed verdict. As noted, prior to the admission of Defense Exhibit 1, the trial court had already denied directed verdict. Tr.p. 636-643. Defense Exhibit 1 was placed into evidence prior to the Applicant waiving his right to testify. Tr.p. 672. At the close of the State's and defense case and reply, the trial judge, as he must do, considered the additional evidence to address the renewed motion for a directed verdict which he denied. Tr.p. 675-676. During the defense argument, defense counsel specifically referred to the SANE report to emphasize Victim's comment that Applicant had not done this before as an inconsistent statement. Tr.p. 716, 717. This comment led to the solicitor's now challenged comment on reply.

This Court finds no deficient performance in counsel's failure to object to the reply comment to the extent it is a claim for relief. This court further has found it was reasonable defense strategy to seek to impeach Victim's testimony with the inconsistent statements and evidence of non-disclosure to contrast with the evidence and claims of delayed disclosure. This Court has within this Order further addressed similar claims in sections H/1, 13, 15/2, 26/11, 31/2 and throughout this Order when addressing the SANE nurse's testimony.

This Court further finds, had counsel objected to the comment in the reply argument, there is no reasonable probability that the result of the proceeding would have been different because the argument was based upon the record and its reasonable inferences.

In his next specification in L/4 the Applicant points to Tr.p. 719, l. 7-16 during the reply argument at which time Solicitor Mayes addresses whether the evidence of Victim describing the Applicant's voice raising his voice[107] in what she perceived was a threatening manner was evidence of a threat or coercion after counsel Floyd challenged the existence of coercion in his argument. The Applicant contends that the State was vouching for Victim in these comments and attacking his character. In his PCR testimony, Applicant asserts only that this is an issue that Spangler and Floyd did not address or object. PCR 163, l. 12-16.

His claim is frivolous. A prosecutor is entitled to call into question the credibility of a defense. *State v. Lunsford*. This Court finds that this is not vouching, but it is addressing the state's version in contrast to the defense version. *Busse, supra.*; *Caldwell*. Counsel Floyd specifically questioned the existence of coercion in his argument at Tr.p. 710-711, 717. The State properly responded based upon the evidence in the record. This was proper argument. The Applicant had no basis to object. He has failed to prove 6th Amendment prejudice.

In his next specification in L/4 he points to Tr.p. 719, l. 21-p. 720, l. 1 of the reply argument during which the solicitor in response to the defense closing about why her DNA was not on him that "we knew from her descriptions he was finishing off" based upon her recalling the last words to her to finish off or wipe off and he's going to clean , but she did not get the chance and his evidence is on her. Tr.p. 719-720. The Applicant in his pleading complains that this is a *Brady* violation and where was the penile swab to be tested and where are the results. In his PCR

[107] This is testimony from the SANE nurse from victim "After that, I still tried to do the housework instead of him doing that, but eventually he started to sound **threatening with his voice raising.** So I finally went to his bedroom like he told me to, and I laid down and he got on me and rubbed himself against me." Tr.p. 444, l. 17-22. (emphasis added). Victim testified about his voice being forceful that night and got angrier when she said no and eventually had to give in. Tr.p. 349, l. 14-21.

testimony, Applicant asserts only that this is an issue that Spangler and Floyd did not address or object. PCR 163, l. 12-16.

This claim is frivolous because this is proper reply and there is evidence in the record to support the State's inference. Victim testified that he indicated that he wanted the assault to continue so he could "finish", but she left and did not know whether he ejaculated or "wiped off." Tr.p. 354-355. She testified he was in the bedroom with a bathroom when she left. Tr.p. 355. She also testified that in earlier occasions that he had ejaculated over her body. Tr.p. 342.

This claim involves a proper reply response which is supported by evidence in the record and its reasonable inferences. In his closing argument, counsel Floyd pointed out that there was no DNA evidence from Victim on his penal swab which is supportive of her not performing fellatio on him. Tr.p. 712, l. 22-p. 713, l. 9, See also Tr.p. 300, l. 9-10 (request for penal swab).

This Court finds that the Applicant failed to show prejudice by the failure to object where the state was challenging why her DNA was not located on him. The ground asserted must be denied.

In his next specification in L/4 and L/5, he refers to Tr.p. 720, l. 2-14 in the reply argument in which the state argues that counsel Floyd had mentioned Rose Heath was a somewhat supportive mother and had called 911.[108] However, the prosecutor then asserted that her sister made it clear that she was going to take the situation in her own hands because she feared that Victim was in danger and Rose then calls 911. The prosecutor also pointed out that the next day the mother was back in contact with Applicant according to Sgt. McCann, yet over and again they would separate and get back together. The solicitor further pointed out that as they heard, they were charged with

[108] Counsel Floyd stated that when she heard of the accusation Victim's mother who called the police right away and took her to the hospital for the SANE examination. Tr.p. 706.

intimidation of a witness.[109]

The Applicant complains that there was nothing in the record from Margie Branham about this interaction with Rose and claimed the solicitor was vouching for Victim in these comments. He claims it was improper for the State to attack the mother as not being a supportive parent and attacking the Applicant based upon unrelated marital issues.

During Margie Branham's testimony, she stated that she believed that Victim was in danger based upon the text she had received and called her mother who was working. Branham indicated that she did not go to the scene that night after the call and texting with the Victim to make sure she was OK because mother had taken care of everything. Tr.p. 473-475.

This Court must find that 6th Amendment prejudice has not been shown by the failure to object by counsel concerning this portion of the prosecution reply argument in response to the defense argument about the mother calling 911 and taking her to the hospital. The Applicant's present focus is confusing because at trial it was inferentially beneficial to him that he was still together with the victim's mother. However, even if we assume that had counsel objected, the Applicant has failed to show any reasonable probability that the result of the proceeding would have been different because this was, at best, a collateral issue where there was no evidence the mother was a witness of any event. It must be denied.

In the next specification in L/5 the Applicant refers to Tr.p. 720, l. 15-20 of the reply argument when the solicitor indicated that while a person sharing a home would share DNA was a guarantee that no person's saliva is going to be inside of their child's underwear because , as the serologist noted, it requires a quick transfer and the stain has to be wet. In his pleading, the Applicant asserts

[109] Sgt. McCann testified that Rose Heath had been charged in this investigation with intimidating a witness. Tr.p. 526, l. 9-13.

that this was vouching for the victim and serologist and invading the province by the jury by making the guarantee.

This Court finds that evidence in the record revealed information that saliva stains were on Victim's underwear. It also revealed testimony from the serologist on defense cross-examination that "the transfer would have to be rather quick as once a stain or bodily fluid has dried, it's very stable and unlikely to have been moved." The serologist further testified if a transfer occurred it would have to be in the wet state. Tr.p. 549, l. 11-15.

This Court finds although the challenge word "guarantee" in this portion was problematic, it did not suggest its basis was knowledge outside of the record. Nevertheless, there is no reasonable probability that had the defense objected to the use of the term "guarantee" that there is a reasonable probability that the result of the proceeding would have been different. He has failed in his burden of proof.

In the next specification in L/5, the Applicant refers to Tr.p. 721, l. 7-12 of the reply argument during which the prosecution commented in response to counsel Floyd's reference to the iPad that with the Cloud video evidence is not saved to the iPad and physical device but it is saved and can be accessed through a home network or via the Cloud without being physically present on the iPad. This portion was previously addressed in section B/1 earlier which is incorporated herein by reference. In his pleading, the Applicant again contends that there is no evidence to support this comment because Det. Phipps did not indicate that he found it specifically either on the iPad or in the Cloud. He contends that an objection should have been made because the comment is not supported by the record.

This Court finds that there was similar testimony in the record during the redirect examination of Det. Phipps which describes his responses on how a person would potentially play a video on an iPad by either downloading the video or streaming the video through the home network or in an Cloud account and that the streaming did not have to occur from playing the video off the internet in order to capture an image by use of the home button. Tr.p. 632, l. 10-p. 633, l. 10.

This Court finds that the Applicant failed in his burden to show 6th Amendment prejudice from the failure to object. This Court finds the comments were a reasonable inference from the evidence in the record related to the videos being revealed as accessed when the snapshot was done which was not shown in the web history as the alternative. This was not shown to be an unreasonable inference. The Applicant failed to prove a reasonable probability that the result of the proceeding would have been different had counsel objected to the prosecution inference in light of Det. Phipps's testimony. It must be denied.

M. Testimony that needed to be questioned because it is wrong. Perjury. (M)

In the next specification styled M/1, the Applicant initially refers to Tr.p. 267, l. 18-21 which was testimony from Sgt. McCann during the *Jackson v. Denno* hearing about the Applicant's signature being on the Advice of Rights form. See State Exhibit 26. In his pleading, he acknowledges that this was addressed previously in his pleading (and this Order) in the prosecutorial misconduct section K and further claims that the prosecutor was leading the witness in the manner he asked the question about the form when in fact there was "no signature." PCR 163, l. 17-20.

This Court finds that this issue was generally addressed previously in theorder in portions addressing L/1 and K/1. This Court finds that a review of State Exhibit 26 (Court Exhibit 3) shows that the Applicant signed the portion that confirmed that he had been advised of his rights and understood what his rights were. A review also shows that there was no signature on the portion of the paper concerning waiver of rights. The Applicant ignores that at this point the trial judge had the court exhibit which showed the form was not signed on the waiver of rights section. However, this written signature is not a requirement, and the witness did not falsely state that the waiver of rights section was signed. As stated in the earlier portion of the *in camera* proceeding, Applicant verbally agreed to speak with Sgt. McCann. Tr.p. 54. At no time did Sgt. McCann indicate that portion of the form was signed. His claim otherwise must be rejected. He has failed in his burden to show the condition precedent to his assertion - there was no false statement. The allegation must be dismissed. Counsel cannot be deficient and prejudice has not been proven.

In the next specification in M/1 related to his claims of perjury he cites to Tr.p. 291, l. 10-15 during Sgt. Charles Lint's *in camera* testimony about the fact that he had a swab kit in her vehicle (which was followed by testimony that he was seeking to determine if he would consent to a buccal swab of his person and penis area). He complains in his pleading that this testimony was not true because they had to wait an hour to get the swab and that it was Franklin and not Lint who took it to the sheriff's department and that the brown bag the swab was in had a hole in it. Applicant contends that he said this to his wife when he got to the department by telephone. He claims that Lint is therefore a liar and his counsel failed to question Lint about this. At the PCR Hearing, Applicant testified that when they were driving him to the Sheriff's Department that Franklin brought the bag out and there was a hole in it and that he told his wife about it by telephone and that he told counsel Floyd about it. He stated that he wanted to make sure it was not tampered with, which goes to the chain of custody. PCR 163-164.

The Court for reason's noted below find that the Applicant has failed to show counsel was ineffective in failing to point out that a brown bag that Deputy Franklin possessed during the ride to the Sheriff's Department had a hole in it. The record shows that Lint took the buccal swabs and maintained custody and control by personally sealing the swabs after Applicant had swabbed himself. Tr.p. 295-297. This Court failed to find credible proof that a brown bag had a hole in it since the trial record includes evidence from Lint that he maintained custody and control of the item until it was entered at the Lexington County Sheriff's Department evidence room. Tr.p. 296-297. Applicant failed to prove either that counsel was deficient or prejudice under *Strickland.*

In a similar attack, in his next specification citing Tr.p. 296, l. 24-p. 297, l. 4. Applicant complains that counsel failed to corroborate his story about the hole in the bag by failing to get the jail telephone conversation he had with his wife about the hole in the bag. He claimed that counsel should have questioned witnesses about the hole in the bag. The alleged failure to get the phone conversations between Applicant and his wife is not deficient. The Applicant testified that he told counsel Floyd about the hole in the bag. PCR 164-165.

The alleged assertion that Applicant also told his wife about this is not relevant and likely inadmissible as hearsay. *See State v. Sweet*, 270 S.C. 97, 240 S.E.2d 648 (1978) (offered testimony of law clerk of Defendant's counsel that Defendant told clerk of facts allegedly imparted to Defendant by prosecntrix at time of incident was inadmissible as hearsay and self-serving, in that snch testimony related directly to Defendant's defense of consent and was testimonial in nature). In *State v. Terry*, 339 S.C. 352, 356, 529 S.E.2d 274, 276-77 (2000), cert. denied, 531 U.S. 882 (2000), the Court held that an exculpatory statement may not be admitted by a non-testifying Defendant pursuant to Rule 804(b)(3), SCRE.

Further, the Applicant failed in his burden of proof to show credible evidence of a relevant brown bag with a hole in it and that Sgt. Franklin rather than Sgt. Link was in custody of the swab kit until it was placed in the evidence room. In light of this failure of proof, he failed to prove deficient performance or prejudice.

Similarly, in a follow-up specification citing Tr.p. 297, l. 18-22 during Sgt. Link's testimony, he stated that the item remained sealed from the time it came into his custody at the scene with Applicant until it was placed in evidence. The Applicant in his pleading complains that it did not matter that the swabs were sealed because he alleges that there was a hole in the side of the bag and that he did not take it to the sheriff's department. He complains that counsel should have questioned Sgt. Link about this.

Despite the Applicant's protests in his pleading and his PCR testimony, the Court must find that Applicant failed to present credible evidence to support the claims that it was not Sgt. Link, but Deputy Franklin who had custody of the Applicant's swabs on the trip from his home to the sheriff's department and that the bag he claims Franklin was holding was the bag that contained the swabs and further the chain of custody was broken because that bag had a hole in it. This Court finds that Sgt. Link's testimony was credible that he took the swabs after Applicant swabbed himself and maintained custody, as reflected by his markings on the swab and maintained that they were sealed until placed into the evidence room. Applicant failed to prove any deficient performance on counsel Floyd or counsel Spangler related to the chain of custody or admissibility of the swabs and his allegation must be denied.

In the next specification in M/1 and M/2 Applicant refers to Tr.p. 335, l. 16 - p.336, l. 4 during Victim's testimony in which she states that she thought when her mother was working at Burlington or Lowes that her father may have already been working at Food Lion. However, she also clarified that he had restarted his tree cutting business. She also stated that she was uncertain when he started it, but it might have been when she was 6 or 7 years old and possibly lasted until she was in middle school.

In his pleading, the Applicant contends that this testimony was wrong because he claimed that he started the tree cutting business after Victim had finished middle school because he went back into that business because he felt Victim needed to go to college, which they would have otherwise struggled to pay for her college. Applicant stated that he hated the tree business, but could make over one hundred thousand a year cutting trees. Applicant claimed when he was arrested, he had a lot of money saved to give her when she left and that now he wants to keep that money. In the PCR hearing, Applicant testified that his wife did not work at Burlington when Victim claimed and had been out over a year and did not work at night like Victim claimed. He further testified that he worked later than his wife did and that she was home more with the children than he was. He claimed that if he was not at work, he was at the golf course. PCR 165-166. He claimed that these were facts that his defense team did not get correct. PCR 166.

This Court finds that the Applicant failed to prove either deficient performance or prejudice. Even if Victim was confused about when Applicant started (or returned) to have a tree cutting business and when her mother left working at Burlington, he failed to show that counsel was deficient in failing to further question her about the possible inconsistencies when her parents worked. She was not definitive in any of her answers. Tr.p. 335, l. 5-6 (and during second grade I believe she switched over to Lowe's. Tr.p. 336, l. 2-5 (I'm not exactly sure when he started (the tree cutting business), but I might have been six or seven and lasted until I was in middle school"). The Applicant asserts that this was later and indicated that it was connected with his need to make money for her college. This Court finds that the Applicant failed to prove prejudice by counsel's failure to question or point out her less than definitive answers about her parents' work history. It is clear that her parent's both worked and that there were frequent periods when he was home when his wife was at work (and he was not on the golf course). The Applicant has failed to prove a reasonable probability that the result of the proceeding would have been different, assuming arguendo that the Applicant was correct about his claimed work history.

In his next specification M/2, Applicant claimed his "biggest issue was the testimony of Victim in Tr.p. 339, l. 14-19 when she testified about where else in the house on Peachland she remembered something happening and she stated that it happened just in her bedroom or his bedroom.[110] In his pleading, the Applicant asserted that each child had their own bedroom and claimed that his bedroom was the dining room at Peachland. He claimed that he told both his attorneys about this and neither questioned Victim about this. In his PCR testimony, he stated that it was a two bedroom home and Applicant and his wife slept in the dining room. PCR 166-167. Applicant claimed that he told counsel Floyd at trial. However, Applicant asserted this never came up in the police reports, but he told counsel the house only had two bedrooms, and they only lived there about six months. PCR 166. He claimed that the dining room did not have curtains and that there was no way that something like that would have happened. PCR 167.

A review of the cross-examination related to the Peachland home does not show that there was any inquiry into whether the parents' bedroom was actually where the dining room was supposed to be. However, counsel did inquire about the fact that her brother's bedroom was next to her bedroom. Tr.p. 378-379.

[110] This portion was also addressed in the section on leading questions in 31/1 which is incorporated herein by reference.

The Applicant failed to prove that counsel was deficient in failing to present evidence that the parents' bedroom at Peachland was in a location for a dining room. The Applicant's assertion is not that the parent's had no bedroom, but only its location. Victim testified that it occurred "just in my bedroom or his bedroom." More importantly, the Applicant failed to prove prejudice in his complaint about counsel's inquiry about the dining room as parents' bedroom issue. He failed to show a reasonable probability related to the criminal incidents at Peachland that the result of the proceeding would have been different based upon this impeachment.

In his next specification in M/2 he refers to Victim's testimony at Tr.p. 347, l. 1-12 where she stated that she was worried when her mother went to work because of what happens when she is alone with him and he would try to do stuff with her and she resisted as long as she could and he would come up with stuff for her to do and she would do those things because he thought she would not want to and would give in, but she would do them anyway. This portion was included in a prior specification in 20/1 and 31/1 which is incorporated herein by reference.

In his pleading, the Applicant assert counsel never questioned Victim as to why she kept doing stuff after she said he stopped the abuse and kept working. At the PCR, PCR counsel pointed out that this was already discussed previously related to her doing chores. PCR 167.

The Applicant has failed to show that all reasonable counsel would have re-opened this inquiry about why she kept on doing chores once he stopped demanding having sex with her. Clearly, there is no reason to go into those matters again which were already developed in the record where there was evidence from her about the threatening and coercive behavior on his part and how she tried to resist. Contrary to Applicant's claim he failed to prove that all reasonable counsel acting under the standard of competence of lawyers practicing criminal law would have re-opened this line of inquiry. Applicant merely asserted that this inquiry would have suggested that she was lying. The Applicant failed to prove prejudice under *Strickland* by counsel's failure to engage in this inquiry about doing chores to avoid having sex with her father. He only claims that she got mad because she did not like doing work. Applicant failed to show that there was a reasonable probability that the result of the proceeding would have been different had Victim been asked why she kept working after he stopped asking her to have sex.

In the next portion of section M/2 he refers to Tr.p. 350, l. 24- p. 351 l. 6 when Victim testified that Applicant wanted her to do more chores on April 26 after he had her use his mouth on his private parts while she was on the couch and he was standing. She said that he kept wanting her to go into his bedroom and she kept saying "no", yet she eventually had to go into his bedroom. The Applicant contends that this portion "went hand in hand with the previous claim." The similar reasons set forth immediately above are applicable to this testimony about the April 26 incident. He failed to prove either deficient performance or prejudice.

In the next specification in M/1, the Applicant refers to Tr.p. 349, l. 15-18 in which she described the April 26 incident that Applicant's tone, when he was asking her to have sex that night, initially sounded desperate, but became angrier after she kept saying "no". She said she eventually gave in because otherwise something bad would happen. The Applicant asserts in his pleading that this conflicts with her earlier testimony that she learned not to resist and he questioned whether this portion did not make it sound like she was resisting. He asserts that the defense never questioned her about this alleged inconsistency in her testimony. PCR 167-168.

This assertion borders on the frivolous. He failed to show Sixth Amendment prejudice by failing to question whether this testimony actually suggested resistance or non-resistance.

Counsel's failure to suggest this alleged inconsistency showed that "they're just making everything up to fit how they want it to look" was not proven and confidence in the verdict was not undermined. Therefore, this claim is denied.

In his next specification in M/2 Applicant refers to Victim's testimony at Tr.p. 368, l. 5-15 when the State questions her whether she had the same underwear on when Sgt. Black knocked on her door to the bedroom and she opened the door and let him in. This was consistent with later testimony from Sgt. Black that when he arrived at the scene, he encountered Victim after Cpl. Justin Ashley walked down the hallway and pointed him to Victim's bedroom to do a welfare check and Sgt. Black indicated that he knocked on her shut door and Victim answered the door. Tr.p. 498-499.

In his pleading the Applicant asserts that this was false testimony because a report by Cpl. Justin Ashley, who did not testify, indicated that he was the person who knocked on the door. The Applicant complained that counsel should have cross-examined about this fact or had Cpl. Ashley testify about who actually knocked on the door. The Applicant testified similarly about the discrepancy but asserted "I don't know how much importance that is." PCR 168, l. 15-22.

This Court agrees that this discrepancy about who knocked on the door was of *de minimis* probative value. The critical evidence was Sgt. Black welfare check of the Victim and the demeanor that she had in those discussions, not who knocked on the door. This Court finds that a Sixth Amendment violation had not been proven because even if the jury became aware of the report that stated that Cpl. Ashley knocked on Victim's door, there is no reasonable probability that the result of the proceeding would have been different.

In the final specification in M/2 and M/3 the Applicant refers to Tr.p. 445, l. 24-p. 446, l. 14

of SANE nurse De Guzman's testimony during a follow up to her report about the perpetrator's mouth on Victim and her father licked her anus. She was asked by Solicitor Mayes if she had a specific question about "licking" and the nurse responded affirmatively and testified she asked her if her anus was penetrated by the penis and she stated by fingers and not by a penis. The SANE nurse stated that she stated her father licked her anus, which she noted in her report in nongenital acts as "licking" and "anus." See also Defense Exhibit 1, p. 6 of 13.

The Applicant complains that this section reveals how the testimony from the SANE nurse and her report were manipulated. He testified at the PCR that he felt everything was fabricated "by some sick twisted people" including the solicitor and his counsel did not question the people properly. During the PCR hearing, he asserted that he felt that his defense counsel did not adequately question her on this issue.

Strickland v. Washington, 466 U.S. 668 (1984) is the foundation for the presumed effectiveness of counsel's conduct, reciting at page 689 that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the Defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 466 U.S. at p. 689, 104 S.Ct. at p. 2065. In determining whether counsel's actions are reasonable, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance." The presumption is established to avoid the temptation to second-guess counsel's assistance and there is a strong presumption that counsel acted for tactical reasons rather than sheer neglect. *Cullen v. Pinholster*, 563 U.S. 170, 196, 131 S.Ct. 1388, 1407, 179 L.Ed.2d 577 (2011). An ambiguous or silent record cannot disprove the strong and continuous presumption of competence. *Chandler v. U.S.*, 218 F.3d 1305, 1314 n. 15

(11th Cir. 2000) (en banc).

This Court finds, upon reviewing the cross-examination of the SANE nurse that counsel aggressively questioned the nurse about her report and pointed out the favorable parts of the report, including particularly that she had indicated in the initial history that Applicant had not done anything other than what he did that night. This Court cannot conclude that counsel's cross-examination of the nurse was objectively unreasonable. [111] The Applicant's speculation that counsel "didn't question her good." This conclusory statement does not satisfy his burden of proof to show deficient performance against the presumption that counsel acted reasonably within the standards of competence. [112] Further, it cannot be ignored that counsel Floyd had died by the time these assertions were made in the amended pleadings.[113]

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[111] Cross-examination must be objectively unreasonable and not flawless; an attorney's decision about the extent of cross-examination and refraining from certain lines of inquiry is entitled to great deference. *Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000), cited also in *Brown v. Uttecht*, 530 F.3d 1031, 1036 (9th Cir. 2008). Brown added that proposed cross-examination may have backfired, *citing Yarborough v. Gentry*, 540 U.S. 1, 7, 124 S.Ct. 1, 4, 157 L.Ed.2d (2003)(per curiam). The extent of the cross-examination of an upset witness is a matter of strategy. *Becker v. Luebbers*, 578 F.3d 907, 919 (8th Cir. 2009).

[112] *Strickland* recites that there are countless ways to provide effective assistance in any given case and even the best criminal defense attorneys would not defend a particular client in the same way. 466 U.S. at p. 689, 104 S.Ct. at p. 2065. *See also Cullen v. Pinholster*, 563 131 S.Ct. 1388, 1403, 179 L.Ed.2d 557 (2011); *Harrington v. Richter*, 562 U.S. 131 S.Ct. 770, 789, 178 L.Ed.2d 624 (2011); *Edwards v. LaMarque*, 475 F.3d 1121, 1128 (9th Cir. 2007) (en banc) (there are many different, reasonable ways to try a case). Under *Cullen*, counsel has wide latitude in making decisions with constitutionally protected independence, recognizing also the strong presumption that significant decisions are made in the exercise of reasonable professional judgment.

[113] One may encounter circumstances where defense counsel had died and cannot explain rationale. The Court in *Callahan v. Campbell*, 427 F.3d 897, 933-36 (11th Cir. 2005) applied the presumption that counsel did what should have been done. *See Williams v. Anderson*, 460 F.3d 789, 803–04 (6th Cir.2006); *Rolan v. Vaughn*, 445 F.3d 671, 676, 682 (3d Cir.2006); *see also White v. Roper*, 416 F.3d 728, 731–32 (8th Cir.2005) (considering testimony of the "[s]econd chair" trial counsel in assessing the performance of lead trial counsel who had died after the trial); *cf. Lewis v. Horn*, 581 F.3d 92, 115 (3d Cir.2009) ("[W]e must first determine the nature and extent of the investigation that took place as well as the nature and extent of the communications that occurred.... This task is made difficult by the fact that Lewis's trial counsel is deceased [ ]...."); *Callahan v. Campbell*, 427 F.3d 897, 933 (11th Cir.2005) (presuming that counsel, who had died, exercised reasonable professional judgment where there was "no evidence of what he did to prepare").

This Court must further recognize in this specification and throughout this Order that it the Applicant's burden of proof to show that counsel was deficient which cannot be proven by his conclusory speculation that counsel should have done "better." Similarly, absent a showing of what "better" or questioning "her good on this stuff" he failed to prove prejudice under *Strickland* that there is a reasonable probability that the result of the proceeding would have been different. This conclusory allegation must be denied.

In his next specification in M/3 he points to Tr.p. 446, l. 17- p. 447, l. 10 during an earlier portion of the SANE nurse's direct examination when she was asked questions and responded that Victim told her about the perpetrator putting his mouth on her genitals and that she put her mouth on his genitals and that the perpetrator licked her. In his pleading the Applicant again contends that the nurse was not questioned properly on cross-examination about the inconsistencies. At the PCR hearing, he reiterated that she was not adequately cross-examined. PCR 169.

This Court adopts its findings and conclusion set forth in the immediately preceding section as incorporated by reference to this conclusory allegation as well. This assertion has failed to prove either deficient performance or prejudice.

In the next specification in M/3 the Applicant points to Tr.p. 478, l. 16-21 during the testimony of Margie Branham who testified that when the family lived at Smith Pond Road at times their son Nick also lived with them and then he went into the Army. In his pleading, the Applicant contends that the solicitor was dishonest and manipulating the evidence because "my son always lived with us until he went into the Army" and suggests that Margie will lie to that prosecutor. He asserts that he told counsel Floyd about this, but he never questioned Branham concerning it. At the hearing, the Applicant focused on the question "[A]t times he would live at that residence on Smith Pond

Road?" as being manipulation. PCR 169-170.

This Court finds that this assertion is frivolous where Branham's answer was " Yes, then he went into the Army." Tr.p. 478, l. 21. Although the question was leading, it was not manipulative where Branham's answer and Applicant statement are essentially the same thing – that Nick lived with the family on Smith Pond Road until he went into the Army. The Applicant has failed to prove either deficient performance or Sixth Amendment prejudice related to this specification.

In his next specification in M/3 he refers to Tr.p. 521, l. 19-p. 522, l. 2 during the testimony of Sgt. McCann in which she was asked after describing the advice of rights form (State Exhibit 26) and the Applicant's initials on each of the rights and his signature on understanding the rights that "in addition to the written waiver , can you tell us whether or not he agreed to speak with you verbally?" and she responded he did and verbally waived his rights. In his pleading, the Applicant notes that this was asked multiple times before and defense counsel never followed up with where the signed waiver is. In the PCR hearing. Applicant testified that he had asserted this to show multiple times they should have addressed it.

This Court finds as a fact that there was no signature on the portion of State Exhibit 26 that concerned "waiver of rights", although there was a signature and Applicant's initials on the Advice of Rights portion. The Applicant is correct that there was no "written waiver." He is also correct that counsel did not address this discrepancy between the question's implication and the answer to the actual question "can you tell us whether or not he agreed to speak with you verbally?" "he did." Tr.p. 521, l. 19-24.

As Applicant admits, this similar matter was raised in earlier portions of his pleading in sections related to 18/1, K/1 and M/1 related to the *in camera* proceeding. This Court incorporates its findings and conclusion as if restated herein. As noted in 18/1, this Court reviewed the *in camera* matters as well as the portion in this specification in front of the jury. This Court must conclude that the misstatement about the "written waiver" within the solicitor's question concerning a verbal waiver was incorrect and should have required an objection by reasonable counsel. However, this does not require the grant of relief because Applicant failed to prove 6th Amendment prejudice as noted within this Court's conclusion in the related sections. The jury had State Exhibit 26 before them which revealed the inconsistency with the solicitor's comment which is not evidence. Further, the focus of the question was whether Applicant verbally waived his rights and agreed to speak. This was the critical point. This Court finds that the Applicant failed to prove a reasonable probability that had counsel specifically pointed out that there was no signature on that portion the result of the proceeding would not have been different. Further support of this conclusion is that counsel Spangler credibly noted that they were not concerned about the admission of the statement. PCR 266-267. A review of the information set out by Sgt. McCann revealed that the Applicant denied the allegations against him and acknowledged that he did watch porn on his iPad, although he did not answer that he watched it that night. The Applicant failed to meet his burden of proof. It must be dismissed.

In his next assertion in M/3 the Applicant refers to Tr.p. 536, l. 8-p. 537, l. 8 during the examination of the SLED serologist, Courtney Thompson described how they determine what testing to do by reviewing the accounts at the hospital and her review of the SANE nurse report which she asserted she did in this case. Witness Thompson stated that she screened several swabs for the presence of semen and examined the victim's underwear for the presence of semen as well and took a cutting of her underwear and proceeded actually with saliva testing as the semen testing was negative. Tr.p. 537.

The Applicant, in his pleading, complained that the serologist testified that SLED only allows one type of testing, yet he contends that she did two on the underwear including semen and saliva, but could only do one type of test on the anal swab. He contends that counsel did not properly question the witnesses in a conclusory statement. At the hearing, the Applicant did not specifically address this portion.

This Court finds that this assertion is without merit for relief as Applicant failed to prove a Sixth Amendment violation. These claims were previously addressed in section E/1 which is adopted and incorporated herein by reference. This Court finds that counsel acted as reasonable counsel in his inquiry related to the testing that was done and the reasons for it. Counsel on cross-examination reiterated the reliance on the SANE report and the decisions to testfor semen and pre-ejaculate rather than saliva. However, the saliva did show a presumptive positive on the underwear and was sent to the DNA Lab which resulted in a match with Applicant's DNA. He has failed to show that counsel was deficient when he acted with an informed understanding of the evidence as reasonable counsel rather than out of neglect or ignorance.

This Court further finds that he failed in his burden to show prejudice under *Strickland*. From his assertion in his pleading, he is unable to show anything in this assertion that undermines confidence in the outcome to a reasonable probability under *Strickland*.

In his next specification in M/3, the Applicant refers to Tr.p. 537, l. 17-24 during the serologist testimony when she testified that semen is a bodily fluid and that sperm cells are located within the semen and is a common product of ejaculation. The Applicant contends that these were suggestive questions and that counsel should have objected. However, at the hearing the Applicant asserted that he was not sure why he asserted that and may have messed up. PCR 170, l. 17-20.

This Court finds this assertion is frivolous. The Applicant appeared to abandon it in his PCR testimony. This Court finds that he failed to prove either deficient performance or prejudice. It must be dismissed.

In the next specification in M/3 the Applicant refers to Tr. p. 537, l. 25- p. 538, l. 3 during the serologist's testimony in which the solicitor referred back to her prior testimony that she was checking for ejaculate or semen and checked for another bodily fluid and inquired what fluid and the serologist responded, " I screened the underwear also for saliva." In his pleading, the Applicant asserts that this was a suggestive question and claims that counsel should have objected and also claimed that he thought that the serologist could only test for one substance.

This Court finds that this specification is also frivolous. As with the preceding assertion, the Applicant appeared to abandon it in his PCR hearing. This Court finds that he failed to prove either deficient performance or prejudice. The State and witness were referring to evidence that was already presented. It must be dismissed.

In M/3 and M/4 that Applicant refers to Tr.p. 538, l. 19-24 during the serologist testimony in which she described finding that the underwear areas she screened for semen were negative and did a cutting out of the rear of the underwear and proceeded to test for saliva. In his pleading, the Applicant asserts that this testimony was different than Solicitor Mayes asserted in her closing argument about where she could see the saliva by use of the fluorescent light. See Tr.p. 692. The Applicant opines that counsel should have questioned this better and the markings on the underwear should have been brought out better in his questions and closing argument.

This Court finds that this same issue was essentially addressed earlier in L/2 concerning counsel's alleged failure to object to the closing argument related to Tr.p. 692, l. 13-18 above which is adopted and incorporated herein by reference. The Applicant ignores or misunderstands the paragraph immediately before the challenged portion in Tr.p. 538, l. 11-18 which states:

> The process that I went through with processing this pair of underwear is we first -- I first used what is called an alternate light source to help identify areas of fluorescence. The reason I use this is because bodily fluids such as semen and saliva are very fluorescent under this type of light and it can help me get an idea of where I should be testing.
>
> After I find the areas on the underwear that are fluorescent, I then used my semen screening test on it. The areas that I screened for semen were negative; however, I did cut a cutting out here in the rear of the underwear and proceeded with that for saliva testing.

Tr.p. 538, l. 11-24. It is apparent to this Court that the Applicant misunderstands the difference between a "screening" test which is a "presumptive" test and the "confirmatory" test for saliva.

This Court finds that the serologist, Agent Thompson testified about how she screened the underwear, State Exhibit 23, and identified the areas by the use of a fluorescent light to identify areas where she should be testing and determined areas to do the cutting from the underwear. Tr.p. 538-540. She stated that she used this process to circle the interior rear so that she would be aware of the area once she turned off the light. Tr.p. 540. She stated the cutting tested positive for saliva. Tr.p. 540.

This Court finds that since there was a basis in the evidence at trial, the prosecutor's comments were reasonable based upon the testimony and its reasonable inferences, and reasonable counsel would not have objected to the admission of the evidence or its explanation by the State. As stated above previously, a solicitor has a right to state his version of the testimony and its reasonable inferences and to comment on the weight to be given such testimony. *State v. Caldwell.* This Court finds that counsel was not deficient in failing to object because there was no legal basis to object. Similarly, the Applicant failed to prove prejudice under *Strickland* since he failed to prove the existence of a reasonable probability that had counsel objected that the result of the proceeding would have been different. This claim is denied as failing to prove a Sixth Amendment violation.

In his next specification in M/4 he cites to Tr.p. 541, l. 17 – p. 542, l. 25 during the serologist's testimony when she describes that on the pubic hair combings, she initially evaluates the hair she found in the envelope with a special microscope to identify if there was a hair root and if so to submit the hair for DNA analysis. She indicated that the root is where DNA material exists to develop a profile and must exist for DNA analysis. She indicated that she sent two hairs to the DNA section from the pubic hair combings. Thompson further testified that a rectal swab was submitted and she located a hair attached to the swab (with a root) which she also submitted to the DNA section.

In his pleading, Applicant complained about the hair on the rectal swab as being a single hair and not two hairs. He claims this suggests that evidence was tampered with, and he claims counsel should have questioned how one hair turns into two. He complains that counsel never questioned the witness about this.

This Court adopts and incorporates herein by reference the portions of this Order in sections 26/1, E/1, G/1 and K/1 related to the hair and rectal swabs and this portion of the testimony. For the reasons set forth there, he had failed to prove 6th Amendment prejudice under *Strickland* related to his interpretation of the number of hairs recovered as compared to the number of hairs tested and the results. It must be dismissed and denied.

In the next M/4 specification he refers to Tr.p. 551, l. 9 – p. 553, l. 5 during counsel Spangler's cross-examination of the serologist. In this portion, the defense inquired about the location of the saliva on the underwear portion closest to the body and oriented it through the use of fluorescent light. Counsel Spangler confirmed that the fluorescence on the inside of the underwear was stronger than on the outside and the possibility that it could have soaked through and here it was possible to note that the stain appeared to have originated on the interior. The serologist further restated on cross-examination that it tested presumptively positive for saliva.

In his pleading, the Applicant speculates whether the serologist just noted whether a stain appears to have originated or was she just saying that. He claimed that counsel Spangler just asked the same questions the State did so the jury just heard it twice.

This Court finds that the Applicant failed to show that counsel Spangler's cross-examination of the serologist was constitutionally deficient based upon his speculation from his own parsed reading of the record. He ignores the fact that the serologist had testified in the direct examination that the saliva stain was on the interior of the underwear. Tr.p. 540. On re-direct examination, the serologist clarified the inquiry from Applicant's counsel on cross-examination when she gave an opinion to a reasonable degree of scientific certainty that she believed the stain originated from the interior of the underwear. Tr.p. 557, l. 19-24. It appears that the defense counsel went as far as he could on his inquiry, which further allowed the State to clarify it with the opinion evidence. The Applicant further failed to prove prejudice when the serologist on re-direct answered the question that the Applicant in his pleading was seeking counsel to ask. It must be denied.

In his next specification in M/4, Applicant refers to SLED DNA analyst Money's testimony at Tr.p. 570, l. 18- p. 571, l. 1 during which she testified that the specimen from the interior rear of the underwear, SLED item 4.1, had indications in three different locations of a mixture of DNA profiles, with "more than two DNA types present." The analyst later testified that a male was a major contributor to the mixture and there was not enough information to determine the gender of the minor contributor. Tr.p. 571. However, the analyst was able to develop a full profile from 4.1 consistent with the profile of the Applicant. Tr.p. 573.

In his pleading, the Applicant complains that counsel did not adequately question whether these spots could have come from laundry because his sweat soaked clothes from work were laundered with her clothes. He also questioned whether saliva was the same as sweat which defense counsel did not bring out. He further asserted that the other DNA could have been Rose Heath's DNA as a contributor "because me and Rose did have sex before she left to go to work that night." During the PCR hearing, the Applicant questioned where the marks were on the underwear and spoke of the laundry concern. He felt that counsel should have questioned them about that as well as the mixtures. Tr.p. 171, l. 3-15.

This Court finds that during the cross-examination; counsel Spangler spoke about direct or indirect transfer including sharing towels related to transferring hairs. Tr.p. 578. However, on redirect examination, Solicitor Mayes did inquire of the DNA analyst who was asked on the impact on DNA when someone launders clothing with detergent and the analyst stated it could affect whether or not something is there. Tr.p. 582. However, there was no specific inquiry that it could transfer DNA material from item to another during the wash, as Applicant suggests his counsel should have developed. [114] The court's limit of the expert's testimony regarding specific

[114] This Court acknowledges that there have been cases where expert witnesses have testified that there is a chance of DNA transfers from items washed together. *State v. Craft*, 2022-553 (La. App. 3 Cir. 2/1/23), 355 So. 3d 1237, 1251, writ denied, 2023-00287 (La. 10/10/23), 371 So. 3d 456; *Commonwealth v. Bolin*, 290 A.3d 654 (Pa. Super. Ct. 2022) (transfer of DNA to clothes while folding laundry was a possibility); Ramos v. Lumpkin, No. CV SA-20-CA-01448-FB, 2024 WL 3614675, at *2 (W.D. Tex. July 31, 2024) (testimony that it was possible for semen to be transferred in comingled laundry); . *People v. Hoffman*, 244 A.D.3d 1588, 1598, 249 N.Y.S.3d 256, 266 (2025) (the court's limit of the expert's testimony regarding specific methods of DNA transfer through laundry was an abuse of discretion as there were no facts in evidence supporting the conclusion that Defendant contacted any of the piled laundry such that his DNA could have then been transferred to the victim); *State v. Biggs*, 2022-Ohio-2481, 192 N.E.3d 1306 (2022). (Defense counsel's failure to call his own expert to testify that source of male DNA found in victim's underwear could have been result of cohabiting with males did not prejudice Defendant and,

methods of DNA transfer through laundry was an abuse of discretion as there were no facts in evidence supporting the conclusion that Defendant contacted any of the piled laundry such that his DNA could have then been transferred to the victim (see People v. Bethea, 261 A.D.2d 629, 630–631, 691 N.Y.S.2d 79 [2d Dept. 1999], lv denied 93 N.Y.2d 1014, 697 N.Y.S.2d 572, 719 N.E.2d 933 [1999]).

Assuming arguendo that Applicant's speculation established that it is possible for saliva DNA to arrive on clothing while being laundered in a washing machine, the DNA analyst acknowledges that transfer was a chance. However, this "chance" would not have been relevant at trial unless the defense had also been able to establish at least some probability that the victim's underwear had been washed with an item containing saliva. No such probability was established at the post-conviction hearing. The evidence presented at trial was that the perpetrator licked Victim, that Victim did not change her underwear between the alleged incident and seizure by the SANE nurse into the sexual assault kit, and that the saliva was indicated to be on the inside of the underwear in the back area. There is no evidence that the underwear was laundered after the alleged incident. On cross-examination of the serologist, it was developed by counsel that since the saliva was dry when tested, it could not be determined how long the saliva had been present. Tr.p. 553, l. 12-22.

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thus, was not ineffective assistance of counsel, in Defendant's trial for gross sexual imposition arising out of his having stuck his hand inside victim's pajama pants and underwear, where forensic DNA analyst for state testified it was possible to have male DNA on one's clothing if one lives with a male, and DNA can be transferred in laundry or in clothes hamper).

The defense also developed that wet saliva could be transferred in a wet state. Tr.p. 459, l. 10- p. 560, l. 6. The jury also heard testimony from the experts on cross-examination that DNA matter could be transferred in various ways directly and indirectly. Tr.p. 582. Further, the prosecutor brought up the laundry possibility as impacting the presence of DNA.

Therefore, this Court cannot conclude that counsel performance in his cross-examination of the analyst prejudiced the Petitioner under *Strickland.* The Applicant has failed to prove that had the defense specifically presented the speculative chance that DNA may transfer between items of clothes in a laundry hamper or laundry, that there is a reasonable probability the result of the proceeding would have been different. Confidence in the outcome has not been undermined by this speculation.

In specification MCI, the Applicant refers to Tr.p. 369, l. 3-25 involving the testimony of Victim concerning State Exhibit 23 (underwear) in which she declares it is her underwear. In his pleading the Applicant contends that Victim commits perjury here because he claims that Victim could not positively identify the underwear during her *in camera* testimony at Tr.p. 228, l. 5-8 when asked if she could recall the underwear that she was wearing during the assault. The Applicant contends before the jury that she was being led by the prosecutor as to what to say. He contends that counsel was ineffective in failing to point out perjury as result of the coaching of Victim by the State. Applicant claims in his pleading that he told counsel about this "perjury" and he refused to do anything. During the PCR hearing, the Applicant was asked by PCR counsel whether the prosecutor was suggestive in her questioning about the underwear. He stated that Victim "could not recognize the underwear earlier." PCR 171, l. 24-25.[115] The Applicant

[115] This Court finds that Applicant's testimony on this point is not credible and is not a correct statement of fact. Victim was not asked to identify the underwear earlier because it was not shown to her. Tr.p. 228.

complains that counsel should have "hammered" on this which was not addressed. PCR 172.

The Court finds that the record does not support Applicant's assertion that Victim "couldn't recognize the underwear earlier." It only showed during the *in camera* proceeding Applicant ignores that during the *in camera* proceeding she was not asked to identify the particular underwear she was wearing. Contrary to the Applicant's conclusory misstatement, she also indicated that "but I'd be able to tell you what they were." Tr.p. 228. L. 7-8. Victim also indicated that the underwear that she was wearing during the assault was the same underwear that she wore to the hospital. Tr.p. 228, l. 5-14. The Applicant also ignores the fact that the SANE nurse testified that she recovered the underwear during the sexual assault examination when Victim indicated that she had not changed clothes since the assault. Tr.p. 441, l. 12-20, p. 454-455. See also Defense Exhibit 1, p. 11of 13.

This claim is frivolous because the condition precedent was not proven that Victim was unable to identify the exhibit. His claim is not credible from a review of the record by this Court. Thus, the Applicant also failed to prove the second prong of Strickland that there is a reasonable probability that the result of the proceeding would have been different and must be dismissed.

In his second specification in section MCI, Applicant refers to Tr.p. 386, l. 3-5. During the Victim's testimony she is asked about the April incident and her claim that it started on the couch. Tr.p. 385, l. 22- p. 386, l. 2. [See Tr.p. 350, l. 4-22. Testimony by Victim that the April 26 incident "first happened on the couch" in that living room]. The defense counsel on cross-examination stated to her in the challenged portion of her testimony that: "and we had a picture of the couch. Have you identified that?" and Victim stated: "yes." Tr.p. 386, l. 3-5. Counsel Floyd then asks her whether "that is the couch area" and "that's where you say it happened?" Tr.p. 386, l. 6-11.

The Applicant asserts in his pleading that this is also a "perjury charge" because Victim had not previously identified "the couch." He claims counsel was ineffective "for not calling for witness to be charged with perjury. He stated that counsel asked the question so he should have known if Victim had ID'd the couch" and he allowed the state witness to perjure herself twice. In the PCR hearing, the Applicant stated she never identified the couch, which he conceded was minor, but claimed it showed his defense counsel would let anything go. PCR 172, l. 11-16.

The Court finds that the record before this Court reveals that State Exhibits 3 and 4 are photographs of the residence and depict the living room sofa (couch). Tr.p. 179, l. 18-25. (Testimony of Deputy Timothy Franklin). In direct examination, Victim testified that the April 26 incident began on the couch in the living room. Tr.p. 350, l. 4-10. It does not appear from the record that Victim was shown photographs before the jury of the living room and couch during her *in camera* or direct examination.[116] This Court finds that the record also suggests that during cross-examination, defense counsel showed Victim a photograph of "the couch area" which she confirmed. Tr.p. 386, l. 6-11.

This Court finds that the Applicant failed to prove a Sixth Amendment violation in the incorrect inquiry of Victim that she had previously identified photographs of the couch area in the home. Although Applicant's statement appears correct in the record and the Victim's affirmance incorrect that she "identified" the photograph, a Sixth Amendment violation was not created by counsel's failure to correct the misstatement of Victim.[117] However, the record also shows that State Exhibit

[116] It is not shown on the record that Victim was present in the courtroom when Deputy Franklin identified and introduced the photographs of the living room with the couch.

[117] In the allegation, Applicant asserts that counsel was under a duty to call for the witness to be charged with perjury. Under the ethical rules, SCACR Rule 407, Rule 3.3 "a lawyer shall not knowingly ... (3) offer evidence that the lawyer knows to be false. If ...a witness call by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take remedial measures, including, if necessary, disclosure to the tribunal...).

4, among others, was shown to Victim for her review in the direct examination by the State. Tr.p. 364, l. 24-25. She stated that she had reviewed those photographs taken previously. Tr.p. 364, l. 17-23. [As noted above, State Exhibit 4 is a photograph of the living room area showing a couch. Tr.p. 179, l. 22-23 (State Exhibit 4)]. There is no reasonable probability the result of the proceeding would have been different. The record suggests Victim immediately identified the area she was being shown as the couch area where the April 26 incident began. This misstatement about the photograph had no effect on the outcome of the case.

N. State trying to cover up that officers came into the house without permission (N)

In his next specification in N/1 he refers to *in camera* testimony in Tr.p. 305, l. 2-p. 306, l. 9 during Deputy Franklin's testimony that that Applicant had spoken with him after he responded to the scene and did not object to the deputy being present in the home, did not object when Applicant met him at the door to him coming into the home and did not object while the deputy was in the home going into his bedroom and had no questions as to why he was at the residence. In this challenged testimony, Deputy Franklin confirmed that in his earlier testimony he had spoken with the Applicant in his living room about unrelated matters and never, by his mannerisms, indicate that he did not want the deputy in his home. See also, Tr.p. 175-178, p. 182-184.

The Applicant asserts in his pleading that he never allowed law enforcement to come in and claimed that they barged in without asking. Applicant claimed that he had a bad prior experience with Lexington police asserting that he was charged with assault and battery of a high and

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Although counsel Floyd was deceased at the time of the hearing and his position in unknown, it appears to this Court that the mistaken question about victim's alleged prior identification of the photograph of the couch was inadvertent since she had been shown a photograph of the couch during the direct examination but did not expressly identify it on the record. The Applicant's suggestion that it was perjury is without a basis.

aggravated nature because an officer got a scratch on his arm. He stated that this caused him in this circumstance to not resist anything that they wanted to do. He claims that in that incident the officers thought he was the Applicant's brother and that they wanted to give him 16 years and complains about the solicitor's office bringing this charge up in court when it was handled in magistrate's court and claims that the solicitor's office did not have any jurisdiction to hear it. [118]

As to the testimony about not objecting to their presence in the home, Applicant contends the evidence presented by the State was burden shifting and that the only way to refute it was for him to testify.[119] He contends in his pleading that counsel should have objected to the testimony as burden shifting, even though it was *in camera*. In his PCR testimony, Applicant acknowledges that this matter was addressed in earlier allegations. However, Applicant contends that counsel failed to raise a 4th Amendment violation because he never let them inside his home because the reason he let them in was based upon when he had previously been served a warrant and been charged. He stated that based upon that experience and his fear he was not going to stop law enforcement

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[118] Prior to the waiver of his right to testify before the jury, the State advised the court that the Applicant may be subject to impeachment under SCRE Rule 609 based upon a 2004 conviction for ABHAN, threatening the life of a public official, and resisting arrest with a sentence for 10 years, suspended with two years' probation. Tr.p. 647, l. 7-14. Solicitor Mayes indicated that it was just beyond the 10 year period and unable to be used to impeach. Tr.p. 647, l. 7-25. She asserted therefore he had no convictions that would subject him to impeachment. *Id.*

[119] As stated earlier in this Order , although not specifically addressed in South Carolina , this Court concludes that a criminal Defendant has no absolute or constitutional right to testify at a suppression hearing (see e.g. *United States v. Flores–Martinez*, 677 F.3d 699, 709 [5th Cir]; *United States v. Pierce*, 959 F.2d 1297, 1304, n 13 [5th Cir]; *Grady v. Com.*, 325 S.W.3d 333[Ky]). Whether a Defendant should be allowed to testify at a suppression hearing is a decision that should be left to defense counsel because it is a strategic litigation decision requiring expertise (*see People v. Adams*, 186 A.D.3d 842, 843, 129 N.Y.S.3d 179*; People v. Hines*, 172 A.D.3d 1225, 1226, 101 N.Y.S.3d 145); *People v. Kroll*, No. 162/17, 2026 WL 1017464, at *1 (N.Y. App. Div. Apr. 15, 2026). Cf., *See State v. Chang*, 144 Hawai'i 535, 545, 445 P.3d 116, 126 (2019) (requiring voluntary, knowing, and intelligent waiver of the right to testify at a suppression hearing). There is no decision in S.C. requiring the trial court to make an on the record waiver of a Defendant's decision to testify or not testify in either a 4th Amendment suppression hearing or a *Jackson v. Denno* hearing. To the extent the Applicant is suggesting such a right existed as a matter of law or procedure, this Court concludes he is in error.

from entering into the house. He further stated that he merely pointed to his daughter's room when they entered. He thought counsel's failure to address the 4th Amendment issue was inadequate. PCR 172-173.

This Court finds that the issue related to the officers' presence in the home was raised previously and addressed by this Court in allegation 7 above and allegation P below concerning Fourth Amendment, although these portions were not part of those discussions. This Court finds that the record credibly shows that the officers arrived to complete an appropriate welfare check, that Applicant let them into the home which they were entitled to be for that initial purpose. The Applicant also conceded that he never told them to leave once inside. Law enforcement later received consent to search the residence from the Applicant's wife which again allowed law enforcement to enter and remain during a more extensive period to complete a search.

The Applicant has failed to indicate any cogent and credible omission on the part of counsel related to this specification. His complaint that the only way to refute the state's presentation was for him to testify may be a fact like in every criminal prosecution, but alone as a free-standing statement does not prove a constitutional violation, particularly in the *in camera* proceeding. However, he also indicated in this proceeding that he never asked them to leave. This Court also finds that the Applicant is not credible when he contends in this proceeding that the officers "barged" in. This Court to the contrary finds credible that the officers explained that they were there on a welfare check and that the defense's evident strategy was that he was cooperating throughout the initial encounter. He failed in this specification to prove a reasonable probability that the result of the proceeding would have been different. The initial entry was based upon a valid "welfare check" that was not challenged, so whether Applicant personally consented or not was not relevant to the legality of the initial entry. His assertion must be denied and dismissed.

O. Delayed Reporting – Bolstering, Improperly Corroborating and Vouching (O)

In specification O/1, the Applicant initially refers to Tr.p. 402, l. 20-p. 403, l. 9 during which the trial judge indicated that he agreed with counsel Floyd that if qualified as an expert, her testimony could not be used to bolster or corroborate or comment on the credibility of the alleged victim and that as a blind expert on delayed reporting had not interviewed witnesses or reviewed any law enforcement reports related to the case. In his pleading, Applicant complained that throughout the trial he kept hearing how other cases allowed evidence of delayed reporting but claimed there was no proffer on why the testimony needed to be presented in this case. He claims that the defense could have asserted that the alleged victim indicated why she did not report it already and that should have been good enough. The Applicant complains that without a proffer from the alleged victim then the expert would have no nexus to this particular case rather than the testimony of the expert which was focused on some other case. He complains that counsel should have made the State show what testimony the jury needed help in understanding. In his PCR testimony, Applicant testified that this is to remind himself "of what they actually do."

This Court finds that this assertion is frivolous as a ground for relief. It appears that he takes issue with the legal concept of "blind expert" because he claims it is not tied to the alleged victim's testimony or actions. This faulty assertion does not prove that counsel was deficient, only the Applicant's misunderstanding of the law of "blind experts." This Court further notes that it has addressed the "delayed reporting expert" issue and adopts and incorporates herein those portions of this order as if restated herein. See Sections I/1, I/2. Also, Sections 10. Section 11, Section 12/1, Section 13/2 (Ft. 8), Section 28/1. It must be denied as a ground for relief as reasonable counsel would be bound by the "blind expert" caselaw.

In his next specification within O/1, the Applicant refers to Tr.p. 406, l. 5- p. 408, l. 2 during which the trial judge describes that the evidence had previously been found admissible through the same witness, including a prior case before him and referred extensively to *State v. Brown* and the impact on that discussion on the particular list of juror occupations and noted the occupations in Applicant's case, Judge McMahon's conclusion that the testimony would be useful to the jury and the expert would not be able to give an opinion on credibility and believability as a blind witness. In his written pleading, Applicant complains that his counsel did not challenge the need for the expert witness to testify and in going through the jurors' occupations he suggested to him a bias against the Applicant and helping the State which he contended evaded the province of the jury. In his testimony, he reiterated that there should have been something that pointed out the need for the testimony.

This Court finds that in this assertion, Applicant failed to prove that counsel was deficient. As noted earlier, counsel argued to the trial judge that this testimony was not needed. Tr.p. 404, l. 5 - p. 405, l. 13. Counsel Floyd asserted that the jurors had been around children or raised them and had common knowledge what children do and don't do and therefore expert testimony is not needed. Tr.p. 405. This Court finds that that counsel's trial argument was consistent with what Applicant is urging in this PCR proceeding. He has failed in his burden of proof. Further, he has failed to prove Sixth Amendment prejudice. It must be denied as a claim for relief.

P. Defense Counsel not calling Defendant to testify in camera for Fourth Amendment issue, Confrontation Clause Issue. (P)

In specification P/1 , the Applicant refers to Tr.p. 264, l. 12- p. 283, l.6 , p 304, l. 12-p. 329, l.

10 where the trial court held its suppression hearing concerning the search of the residence and seizure of the iPad consisting of the testimony of Sgt. McCann, Lt. Lint and Deputy Franklin and the arguments of counsel and holding by the trial judge admitting the iPad into evidence and finding that the search and seizure did not violate the Fourth Amendment. In his written pleading, the Applicant essentially argues that this seizure violated the Confrontation Clause because counsel did not call the Defendant for any of the hearings, equating it to the situation with Sir Walter Raleigh.[120] He claims that counsel had a duty to call the Applicant for any of the *in camera* hearings and it made the entire trial "ex parte." He additionally cites numerous pages with the parentheticals added by the Court allegedly in support of his position. (Tr. p. 316 L. 15-19) (trial court questions that defense motion cites *Randolph* and defense had asserted that consent from both co-tenants is needed when police move one party and consent from other and court wants to know where it is in *Randolph*); (Tr. p. 317 L. 11-21) (Spangler's argument in response to court's question that although he may not have verbally objected to the search and led out of the residence, there was a Fourth Amendment concern when consent was not obtained from him and relied upon

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[120] The Applicant reference to the swashbuckling figure of Sir Walter Raleigh likely comes from Justice Scalia's opinion in *Crawford v Washington* The Court insisted that it needed to revisit "the great political trials of the 16th and 17th centuries" to determine whether it violated the Confrontation Clause for a trial judge to admit otherwise inadmissible hearsay on the rationale that the hearsay possessed "adequate 'indicia of reliability." As Justice Scalia explained:

> One such [trial] was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favor." Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face ...." The judges refused ... and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," the jury convicted, and Raleigh was sentenced to death.

One of Raleigh's trial judges later lamented that "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." *Crawford*, 541 U.S. at 44 (alteration in original) (citations omitted).

co-tenant); (Tr. p. 320 L. 24 – p. 321 L. 5) (Solicitor Usry asserts that where there is no evidence police removed potential objecting co-tenant for the purpose of avoiding his objection and the Defendant is present the entire time it happened, either in the home or outside the home, the search and seizure was proper); (Tr. p. 322 L. 12-16) (Spangler's assertion that it is clear the police took him into custody, either led him out of the residence and then went and seized the item); (Tr. p. 323 L. 14-25) (Court discussion that under plain view the initial intrusion that supports the plain view must be lawful, and concludes it was lawful in response to a welfare check and were allowed into the residence by Applicant and the discovery of the evidence was inadvertent and did not enter with intent to find that iPad, and the incriminating nature of the evidence was immediately apparent to the seizing authority); (Tr. p. 328 L. 21 – p. 329 L. 4)((trial court concludes the iPad is admissible under Beckham plain view doctrine and also based upon the consent of Rose Heath it was valid where there is no evidence of that Applicant was led away because of concerns that he would not consent).

In his pleading the Applicant also claims that there was an additional Confrontation Cluse issue where the State did not call Rose Heath in the *in camera* proceeding to corroborate that she signed the consent to search form. He also claims that the comments towards Rose of her calling (the police), not being supportive, being arrested for threatening a witness, and now a Fourth Amendment suggested to Heath how bad the lawyers were and were ineffective.

At the PCR hearing concerning specification P, the Applicant testified that they were not going to call him to testify, but he claims he does not know why they did not call him to what happened and whether it was consensual and claimed, like in *Georgia v. Randolph*, he was removed and claimed Judge McMahon did not know that because he did not testify. PCR 174-175. Applicant testified that if called he would have stated that the police "absolutely removed" him and that he was in the house and they knew they wanted to search the house, but they never asked him. PCR 175, l. 14-17. He testified that when Rose arrived, they asked her to sign the waiver to search the house. He claimed that they removed him from the house because he was outside being questioned by Sgt. McCann. He claims that this supports that they actually removed him. PCR 175, l. 18-22. Applicant further testified that Lt. Lint was questioned about the buccal swab consent to search that he signed, and he claimed that Solicitor Mayes questioned Lt. Lint like it was about an alleged consent to search the house, not just about a buccal swab. PCR 176, l. 1-5. Applicant pointed out that when counsel Spangler questioned Lt. Lint, he admitted it was just for the buccal swab and not the house. PCR 196, l. 6-13.[121] Applicant concluded that counsel Spangler had not asked that question that Applicant had signed a consent to search the entire house. However, he testified that the important point was that he was removed from the house and that he was unable to say no to search his house. PCR 176, l. 14-16.

The Court must deny the assertion that counsel was ineffective in failing to call Rose Heath to testify in the suppression hearing to corroborate that she signed the consent to search. Rose Heath did not testify at the PCR hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a

[121] This Court finds that the issue concerning the examination of Lt. Lint and whether it suggested that Applicant had given written consent to the search of the house as opposed to a buccal swab was raised previously in specifications 7/2, 7/3 and 7/4. This Court adopts and incorporates by reference the Court's findings and conclusions. As stated therein, the Court finds that Applicant failed in his burden of proof in showing ineffective assistance of counsel or prosecutorial misconduct related to the testimony of Lt. Lint concerning the Applicant's consent to search for the buccal swab.

witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court has no basis to determine what Rose Heath would have testified. The Applicant has not met his burden of proof related to her potential testimony. As to her, the allegation must be dismissed.

This Court concludes that to the extent that he is claiming a free-standing Due Process or Confrontation Clause constitutional claim by the failure to have either Rose Heath or Applicant testify at the trial, his allegation must be dismissed as not cognizable.[122] Issues that could have been raised at trial or on direct appeal are not allowed. S.C. Code Ann. § 17-27-20(b). Therefore, PCR is not a substitute for an appeal and an issue that could have been raised at Applicant's trial or on appeal is not cognizable in an application for PCR. *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error, therefore, is not a cognizable claim for PCR. *Roscoe v. State*, 345 S.C. 16, 546 S.E.2d 417 (2001); *Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997); *Ashley v. State*, 260, S.C. 436, 196 S.E.2d 501 (1973); *Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993).

This Court further finds that the Applicant has failed to prove ineffective assistance of counsel related to the failure to present evidence at the suppression hearings. The Court will focus on the failure to call the Applicant. This Court has found credible the testimony of counsel Spangler that

[122] The Applicant contends that the failure to call Rose was a Confrontation Clause issue apparently because there was independent evidence presented that by witnesses that she signed a consent to search form. It appears to this Court, as suggested by his writings in the amended application, *all witnesses* to any matter are required to testify or it is a Confrontation Clause issue. His misunderstanding does not show a cognizable Confrontation Clause claim.

his co-counsel Wayne Floyd had the discussion with Applicant about his testimony related to the suppression hearings. The initial question to this Court is whether that discussion was reasonable and counsel Floyd's and counsel Spangler's strategic decision not to call Applicant in the suppression hearing was reasonable.[123]

First, this Court concludes that there is case law that a Defendant has no absolute right to testify at a suppression hearing. *See e.g. United States v. Flores–Martinez*, 677 F.3d 699, 709 (5th Cir. 2012); *United States v. Pierce*, 959 F.2d 1297, 1304, n 13 (5th Cir. 1992)); *Grady v. Com.*, 325 S.W.3d 333 (Ky. 2010). This issue has been considered by several federal courts. Most have concluded that a Defendant does not have the right to testify at a pretrial suppression hearing over his counsel's decision. *See Liberal v. United States*, 2011 WL 4055404, *5 (S.D. Fla. No. 10–23669–Civ, June 7, 2011) (magistrate judge's report), adopted, 2011 WL 4072633 (S.D.Fla. Sept. 13, 2011); *Parker v. Ercole*, 582 F.Supp.2d 273, 296–97 (N.D.N.Y.2008) ; *Torres v. Ortiz*, 2007

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[123] A criminal Defendant's right to testify is "a fundamental constitutional right." *Rock v. Arkansas*, 483 U.S. 44, 53 n. 10, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). Whether silence alone should be presumed to be a waiver is a more difficult question. As we explained in *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir.1991), some circuits require a Defendant to protest a lawyer's refusal to allow her to testify during trial to preserve the right. *Edwards*, 897 F.2d at 446–47; *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir.1991) (per curiam); *People v. Smith*, 176 Ill.2d 217, 223 Ill.Dec. 558, 680 N.E.2d 291, 302–03 (1997). At the other extreme, several state courts require judges to inquire of Defendants directly whether they want to testify. *See, e.g., People v. Curtis*, 681 P.2d 504, 514–15 (Colo.1984); *State v. Neuman*, 179 W.Va. 580, 371 S.E.2d 77, 81–82 (1988). The rule in the 7th Circuit "steer[s] a middle course," requiring a Defendant who wishes to raise this claim to meet a heightened pleading standard before the court must hold an evidentiary hearing on the question of waiver. *Underwood*, 939 F.2d at 476. In other words, a "barebones assertion by a Defendant, albeit made under oath, is insufficient"; something more, such as an affidavit from the lawyer who allegedly forbade his client to testify, is required. Id. And although South Carolina has not established a requirement for judge to question Defendants regarding their desire to testify at a suppression hearing, this Court would find that, as revealed in the issues in this case, prudent counsel may choose to put such waivers on the record outside the presence of the jury, as is standard practice in some courts. *See Taylor v. United States*, 287 F.3d 658, 662 (7th Cir.2002).

The variety in practice among the state courts and the various federal courts shows, unfortunately for Heath, that there is no standard clearly established by the Supreme Court of the United States that is binding on all. Even if this were not the case, the Applicant has failed to prove prejudice under *Strickland*, since Applicant's only argument is that if allowed to testify he would have explained his mental state based upon his prior experience with law enforcement and his own failure to express consent or non-consent to the search. Either way one approaches the question, Applicant cannot prevail. *Thompson v. Battaglia*, 458 F.3d 614, 619 (7th Cir. 2006)

WL 1234938, *10 (D.N.J. No. 06–2176(DRD), Apr. 26, 2007) (unpublished opinion); *Hemingway v. Henderson*, 754 F. Supp. 296, 302 (E.D.N.Y.1991) ("There is a difference between testifying at a trial that involves a determination of guilt or innocence and testifying at a preliminary hearing the purpose of which is to keep evidence from 'the trier of guilt or innocence for reasons wholly apart from enhancing the reliability of verdicts.' " (*quoting in part Lego v. Twomey*, 404 U.S. 477, 488, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972))); see also *Henry v. Ryan*, 2009 WL 692356, *44 (D.Ariz. No. CV02–656–PHX–SRB, Mar. 17, 2009) (unpublished memorandum) ("it is not clear that the constitutional right to testify at trial also applies to a pretrial hearing"); *United States v. Stewart*, 51 F.Supp.2d 1147, 1158 n. 4 (D.Kan.1999) (same as *Henry*), aff'd, 215 F.3d 1338 (10th Cir.2000) (unpublished table decision); *Narvaez v. United States*, 1998 WL 255429, *5 n. 6 (S.D.N.Y. No. 97 CIV. 8745(SS), May 19, 1998) (unpublished opinion and order) (Sotomayor, J.) (same as *Henry*; noting that "[i]t seems likely ... that the decision to put the Defendant on the stand in a pretrial evidentiary hearing has no special constitutional status beyond the right to present evidence on one's own behalf and is thus committed ... to trial counsel's professional judgment"); *cf. Black v. Uribe*, 2010 WL 4629934, *5 n. 6 (C.D. Cal. No. CV 08–7922 CAS (JCG), Aug. 12, 2010) (unpublished magistrate judge's report and recommendation) (right to testify does not extend to a preliminary hearing), adopted, 2010 WL 4628614 (C.D.Cal.2010).[124]

[124] A few federal courts, citing *Rock v. Arkansas* , 483 U.S. 44, 107 S.Ct. 2704, appear to have assumed, implicitly and without analysis, that such a right may exist. *See Jones v. United States*, 2011 WL 4702507, *2–3 (D. Utah No. 2:09–CV–360 TS, Oct. 4, 2011) (unpublished memorandum); *Wheeler v. United States*, 2011 WL 2491376, *16 (N.D.W.Va. No. 3:10cv13, Apr. 25, 2011) (magistrate judge's report and recommendation); *see also United States v. Roshood*, 249 Fed.Appx. 972, 972–73 (4th Cir.2007) (unpublished opinion) (per curiam) (right extends to hearing on motion to dismiss); *Reinert v. Larkins*, 379 F.3d 76, 95 (3d Cir.2004) (rejecting the Defendant's contention that counsel was ineffective because counsel did not inform him of his right to testify at a suppression hearing without analyzing whether the Defendant did in fact have such a right). *See Ferguson v. State*, 926 So.2d 469 (Fla.Dist.Ct.App.2006); *State v. Williams*, 137 Wash.2d 746, 975 P.2d 963 (1999). The court in *Ferguson* held that the trial court should have determined whether the Defendant had waived his right to testify at a suppression hearing. The court appears to have assumed that his counsel could not make that decision. 926 So.2d at 472. The

Whether a Defendant should be allowed to testify at a suppression hearing is a decision that should be left to defense counsel because it is a strategic litigation decision requiring expertise (*see People v. Adams*, 186 A.D.3d 842, 843, 129 N.Y.S.3d 179; *People v. Hines*, 172 A.D.3d 1225, 1226, 101 N.Y.S.3d 145).[125] Courts have held that counsel's failure to call a Defendant in a suppression hearing where counsel testified that he would have called him if it would have added something was a reasonable strategy and not deficient. *Everett v. State*, 54 So. 3d 464, 474 (Fla. 2010), as revised on denial of reh'g (Feb. 10, 2011). *See Hutchinson v. State*, 17 So.3d 696, 702 (Fla.2009) ("It is not deficient performance to make a strategic decision for the purpose of retaining credibility...."). *See Cooper v. McNeil*, 622 F. Supp. 2d 1242 (M.D. Fla. 2008) (defense counsel not deficient in failing to call Defendant to testify at hearing where the Defendant failed to show that Petitioner "must establish that no competent attorney would have taken the action that counsel, here, chose" to prove deficiency); *Pole v. Randolph*, 570 F.3d 922 (7th Cir. 2009) (defense counsel's failure to call Defendant as witness at hearing to suppress petitioner's confessions as involuntary did not deprive petitioner of effective assistance of counsel).

During counsel Spangler's testimony on the suppression issue, he did not specifically testify about the decision to not call Applicant or any discussion he had with the Applicant related to his testifying on the 4th Amendment and consent to search suppression hearing. He suggested that

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opinion does not include any analysis, and, to the extent it is inconsistent with our resolution of this issue, we decline to follow it. *Williams* involved a Washington rule of criminal procedure requiring the court to inform the Defendant of his right to testify at the suppression hearing, a rule for which there is no equivalent in Colorado. 975 P.2d at 965–66. Moreover, the *Williams* court expressly found that the violation of the rule was not a constitutional violation. Id. at 964, 966.

[125] Some courts have held where a Defendant seeks to testify at a suppression hearing, over the objection of his or her own counsel, particularly where, similarly to Applicant's testimony at this PCR that there was no showing that the Defendant's testimony would have been relevant to the suppression issues, the Defendant may be denied the opportunity to testify at the suppression hearing in the reasoned exercise of the trial court's discretion (*see People v. Peterson*, 6 A.D.3d 363, 777 N.Y.S.2d 48).

these were matters left to the discussion between the Applicant and counsel Floyd. As to the *Jackson v. Denno*, Spangler specifically testified the discussions with Applicant and his testimony at the suppression hearing would have been held with Floyd.[126] Spangler testified that there was a discussion about the impact of Applicant's wife signing a consent to search at the scene. PCR 267. Spangler stated that he did some legal research at Floyd's request and then prepared and filed a motion to suppress. He stated that he filed the motion on May 9 which concerned trying to suppress the admission of the iPad. PCR 267. Spangler stated that the motion was based upon the fact that law enforcement had separated Applicant from his wife, that it was not incident to his arrest, and that the iPad was not subject to "in plain view." Spangler asserted that in the motion he contended that under *Georgia v. Randolph*[127] that law enforcement had to get Applicant's consent as well as

[126] Spangler stated that concerning the Applicant testifying during the *Jackson v. Denno* hearing that it would have been a discussion that Applicant had with counsel Floyd. PCR 276. Spangler claimed that these conversations were always held with the client related to the *Denno* hearing. PCR 276.

[127] In *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006) the Supreme Court held that a warrantless search was unreasonable as to Defendant who was physically present and expressly refused to consent. Unlike *Randolph*, in this case, there is no evidence that Applicant expressly refused to give consent. Although "the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given," *Florida v. Royer*, 460 U.S. 491, 497 (1983), the Defendant has the burden to present actual evidence that the police intentionally removed him from the residence to avoid a possible objection to the search, *see United States v. Parker*, 469 F.3d 1074, 1078 (7th Cir.2006); *United States v. Alama*, 486 F.3d 1062, 1066–67 (8th Cir.2007); *United States v. Brown*, 563 F.3d 410, 417 (9th Cir.2009); *United States v. McKerrell*, 491 F.3d 1221, 1228 (10th Cir.2007). Wife's consent to search the home she shared with her husband was sufficient basis for officers to enter home without a warrant, where there was no evidence that husband expressly refused the officers' entry into home at any time. *United States v. Uscanga-Ramirez*, 475 F.3d 1024 (8th Cir. 2007). Applicant's presence, without more, cannot reasonably be construed as an objection or an explicit refusal to consent. *United States v. Uscanga-Ramirez*, 475 F.3d 1024, 1028 (8th Cir. 2007) ("There is no evidence that [the Defendant] expressly refused the officers' entry into the home at any time. Therefore, *Randolph* does not render the officers' entry into the home unreasonable") (internal citation omitted); *United States v. Lopez*, 547 F.3d 397, 400 (2d Cir. 2008) ("[The Defendant] concedes that his live-in girlfriend voluntarily consented to the search of their bedroom and that [the Defendant] did not object to the search"); *United States v. Cano*, 715 F. App'x 370, 372 (5th Cir. 2017) ("[T]here is no indication [the Defendant], who was present at the time of the entry, expressly refused the officers' permission to enter the residence").

his wife's consent. PCR 268.[128] Counsel Spangler testified that in his discussions with his client,

[128] In the trial, counsel Spangler relied upon his motion to suppress the iPad. Tr.p. 312. He contended that the seizure of the iPad did not comport with the 4th Amendment. He initially claimed the search of the iPad was not part of a search incident to an arrest because it was not on his person when he was arrested in his living room. Tr. p. 312-313. He contended that plain view did not apply because the iPad screen was black when the witnesses looked at it. Tr.p. 313. Spangler pointed out *State v. Beckham*, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999). He contended that under the third prong of the incriminating nature of evidence must be immediately apparent but was not met. This prong was not met because the possession an iPad was not illegal and the screen being blank did not suggest that criminality was afoot. Tr. 314-315. Counsel Spangler further argued to Judge McMahon that that under *Georgia v Randolph* requires the other co-tenant to give consent after one give consent. Tr.p. 3115-316. Judge McMahon questioned counsel on this interpretation of *Randolph*. Counsel confirmed that Randolph specifically involved when one of the co-tenants had already objected. Tr.p. 316. Spangler argued that Heath was present at the house and asserted that although he did not verbally object to the search, he was led out of the residence which he contended created a 4th Amendment concern. He stated that they instead relied solely on the co-tenant wife's consent and they never received consent from Applicant. Tr.p. 317. In response, Solicitor Usry asserted that the consent by the wife was valid and sought to distinguish *Randolph* noting that law enforcement relied upon the co-tenant wife's consent. Solicitor Usry indicated that the wife was married to Applicant, lived in the house, and shared the bedroom. She noted that the Applicant was on the scene the entire time from 11:30 to 3:30. Tr.p. 318. She indicated that the Applicant never indicated any objection for the officers being present and was cooperative, even consenting to a buccal swab. She stated that, unlike *Randolph*, the Applicant was never removed but was present at the scene. She stated that there is no obligation on law enforcement to specifically ask the co-tenant who is also present at the scene for permission. Tr.p. 320. Here, there is no evidence that the police removed an objecting co-tenant for the purpose of avoiding an objection. Usry urged that the Applicant was present. She asserted that he was either in the home or right outside the home the entire time this was happening. Tr.p. 321.

Usry further stated that the iPad was also subject to seizure under the "plain view" doctrine based upon the original consent to enter. Sgt. McCann became aware that the iPad was used during the crime. Tr.p. 321. Usry stated that the victim indicated that she was shown pornography while the sexual assault occurred in the bedroom, They see an iPad on the bed in plain view as supported by the photographs already entered into evidence.

Usry also asserted that if there had been an objection, the search would have stopped, and they would have gotten a search warrant which she claimed would allow the admission under inevitable discovery based upon the existing probable cause. Tr.p. 321.

Spangler responded that there was no incriminating nature to the iPad in the plain view of the officers because the screen was dark. Tr.p. 322. Although there was no objection from the Applicant, Spangler contends that Randolph applies and it was clear that Applicant either took him into custody or led him out of the residence when the item was seized. Tr.p. 322.

Judge McMahon, in addressing the plain view issue and his understanding of *Beckham*, found that law enforcement's entry into the residence was lawful as a welfare check and allowed into the residence by Mr. Heath. He found that the discovery of the evidence was inadvertent and he determined that the incriminating nature of the iPad was immediately apparent to law enforcement. Tr.p. 323.He determined that the iPad becomes incriminating based upon the nexus of the with the crime. Tr.p. 324. He finds the plain view exception applied because Sgt. McCann knew it and directed Dep. Franklin to seize it.

As to the application of Randolph, Judge McMahon found it distinguishable because Randolph had unequivocally refused permission to search, unlike Applicant, and there was no objection to the search while it was proceeding. Tr.p. 327. Judge McMahon rejected the assertion that Applicant additionally consent was required. Tr.p. 328-329.

Spangler thought that it was important that the iPad needed to be suppressed based upon the bad things on it. Spangler stated from his discussions with Applicant that there was the issue of him being removed and then getting access to the house and the consent to search. PCR 269. He was seeking to suppress the iPad to suppress the pornography. Spangler stated that Floyd gave the suppression motion issue to him because Floyd was handling a lot of witnesses. PCR 269. In addition, it was Spangler's responsibility since the motions had to be typed up and Spangler could quickly use Westlaw to assist in his preparation of the motion. PCR 270.

It initially appears to this Court that the Applicant has failed to prove deficient performance because he failed to show that no reasonable counsel would have failed to call Applicant in the 4th Amendment suppression hearing. The Applicant has wholly failed in fact to show that any reasonable counsel would have presented Applicant to testify because his testimony did not show any relevant factual matter that would have been successful in suppressing the evidence of the search or the impropriety of the entry. However, this Court, due to counsel Floyd's death does not have the expressed reasons, strategic or otherwise, for not calling Applicant for this Court to determine the strategy in that decision. *See Lindsey v. State,* 447 S.C. 93, 133–34, 924 S.E.2d 104, 126 (2025) (when there is no evidence as to why the deceased counsel did not retain or call a prison adaptability expert to testify, neither the PCR court nor the Appellate Court can conclude trial counsel exercised a valid trial strategy unless evidence is presented as to what the strategy actually was. *See, e.g., Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014); *Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010); *Gilchrist v. State*, 350 S.C. 221, 228 n.2, 565 S.E.2d 281, 285 n.2 (2002); *Bruno v. State*, 347 S.C. 446, 451, 556 S.E.2d 393, 395-96 (2001). Therefore, in light of the constraints of the *Lindsey* decision and the apparent qualification of the *Strickland* presumption that counsel performed competently, this Court will address the matter under *Strickland*'s prejudice prong.

Assuming arguendo that if deficient performance has been proven because the deceased lawyer's reasoning was not fully developed, Heath must still demonstrate, of course, that any alleged deficiency prejudiced him. *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052; Bynum, 560 F.3d at 685. To succeed on the prejudice prong of *Strickland*, Heath must demonstrate that, had he testified, there was both a reasonable probability that he would have prevailed on the motion to suppress and a reasonable probability that he would have been acquitted. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. *Accord, Pole v. Randolph*, 570 F.3d 922, 943 (7th Cir. 2009); *See also Thompson v. Battaglia*, 458 F.3d 614, at 620 (7th Cir. 2006) (a habeas petitioner claiming that a lawyer's failure to make a motion to suppress was ineffective must prove that the motion would have been meritorious). Health is unable to satisfy that burden of proof.

Heath's testimony during the PCR proceeding provides no basis for suppression of the evidence of the search or the seizure of the iPad. Heath's testimony is essentially that he did not orally object to the entry into his residence during the expressed welfare check because of a past experience with law enforcement years before which resulted in his own arrest. This Court initially notes that the evidence of Applicant's silence about the entry and reason for it is not relevant to that entry because Applicant consent was not required for their entry based upon welfare check. After the initial entry, law enforcement received consent to search from his wife, a co-tenant, which authorized the expansion and continuation of the entry and further search which resulted in the seizure of the iPad. His testimony that he was also not asked for consent and did not verbally object to the search, whether he was in the house or by Sgt. McCann vehicle did not provide any basis for the suppression. The fact that he was initially in the house and then escorted to the vehicle was presented during the suppression hearing and was not a contested fact in counsel Spangler's argument based upon *Georgia v. Randolph.*

As noted within the arguments of counsel at the suppression hearing, these facts were not contested. The Applicant, whose burden it was in this proceeding, failed to prove that the welfare check entry was improper or that Rose Heath lacked the authority to consent or that Applicant had verbally refused to consent to any search. Although he did not testify in the suppression proceeding, the Applicant failed to show a reasonable probability that the result of the suppression proceeding would have been different and a reasonable probability that he would have been acquitted. To the extent that the Applicant is focused on his argument of the seizure of the iPad, the Court additionally finds that even if the iPad or the extracted images had been suppressed, there is no reasonable probability that the result of the proceeding would have been different. The iPad and the information from it that was presented to the jury only corroborated its use as testified to by Victim by revealing images consistent with her testimony. However, confidence in the outcome is not undermined because of the additional forensic evidence presented through the DNA analyst and serologist related to the April incident and Victim's testimony about the event as well as his use of an iPad. Applicant failed to prove *Strickland* prejudice and ineffective assistance of counsel related to the 4th Amendment suppression and the claim under this section is denied.

Q. Voir Dire (Q)

In specification Q/1, the Applicant cites Tr.p. 404, l. 5-11 which involved a discussion about the qualification of Ms. Galloway-Williams to testify as a blind expert on child abuse assessment and treatment and delayed reporting. In the cited section, counsel Floyd is arguing that her testimony is not needed nor appropriate for expert testimony and that "all of our jurors have either raised children, been around children, know children" and the trial judge responded: "we know that from voir dire?" Tr.p. 404. In his pleading, Applicant asserts that nowhere during the voir dire at jury qualification were the jurors asked whether they had children. Applicant initially asserts that defense counsel was deficient in making an appropriate record for his argument and asserts that the defense counsel should have required the information to be produced by the State. In his PCR testimony, Applicant claims that counsel was addressing his argument of the jurors' occupations and the need for an expert. PCR 176-177. He speculates that defense counsel should have gotten into this about the jury making a psychological decision concerning victims which was not proper. PCR 177.

This Court finds that this initial claim on Q/1 is wholly frivolous. The comment was by defense counsel, not the State. The basis of his argument is that jurors did not need the expert based upon their common experience. The Applicant claim that he should have required the State to produce evidence whether or not the specific jurors had children is similarly frivolous. Sixth Amendment prejudice has not been shown where the number of jurors who had children would not have been determinative whether the expert was qualified to testify or not. The allegation must be dismissed.

In specification Q/1 in his pleading, he additionally cites Tr.p. 405, l. 14-19 which relates to the same issue of the qualification of the expert and the trial judge states that: "we can't assume that members of the jury panel were victims of sex abuse" and would know that because it was parsed out in voir dire and would know why they did or did not report it. In his pleading, Applicant contends counsel was ineffective in not objecting to the ruling that because jurors were not victims of sex abuse, an expert would be needed to understand delay in reporting. He claims this invades the province of the jury and equates to a person being robbed at gunpoint and not fighting back. He does not specifically address this portion in his PCR testimony. PCR 176-177.

This claim that counsel should have objected or argued differently is frivolous. The record shows that counsel made an argument to the trial judge that the expert was not needed under SCRE Rule 702. Tr.p. 404, l. 5-9, p. 404, l. 24-13. The trial court's comment about the jury panel discussion about victims of sex abuse is specifically related to the jury panel *voir dire* and counsel's argument. Tr.p. 100-101. (Potential Jurors 222, 109 were not selected). Further, the defense counsel challenge was sufficient to preserve the trial court's consideration. Alternately, the Applicant has failed to prove prejudice under *Strickland* concerning the witness's qualification as an expert. Nothing has been presented to support his speculation. This Court notes that this witness's testimony has also been addressed in earlier portions of this Order in grounds, particularly ground I, as well as ground 10, and 13/2, O, and R (below) which are incorporated herein by reference. The ground must be denied.

R. Improper bolstering, improper corroboration, from expert witness (R)

In specification R/1 the Applicant refers to Tr.p. 410, l. 16- p. 411, l. 25 concerning the testimony of the child abuse expert Galloway-Williams in which she gives expert witness testimony explaining the term of art "delayed reporting or delayed disclosure in child abuse cases" and based upon her training how common delayed disclosure is. In his pleading, the Applicant asserts that using the terms of delayed disclosure corroborates Victim's testimony. The Applicant further asserts that counsel should have requested this testimony be done *in camera* by a defense motion as a proffer because it is unduly prejudicial under Rule 403 and Rule 404(b). In his PCR testimony, the Applicant asserts that this matter was essentially raised before. PCR 177-178.

The allegation is frivolous. The witness testified as a blind witness over objection of Defense counsel. Contrary to the Applicant's claim in his pleading, at no time did the witness corroborate the victim testimony in explaining the terms or how often delayed disclosure occurs. Ms. Galloway-Williams was a blind expert, and her testimony was presented after Judge McMahon qualified her as an expert and the jury had been advised in the initial questioning that the witness had never met with Victim or counseled her. He claims that the witness's response to how often it occurred was factual corroboration for the State. His assertion fails to prove prejudice under *Strickland* in light of *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015).

In addition, his assertion that trial counsel should have demanded a balancing test under Rule 403 and 404(b) is also frivolous. Ms. Galloway-Williams was not testifying about any specific bad acts by the Applicant but as a blind expert without knowledge of any such acts and without presenting any specific evidence of a prior bad act by the Applicant. This assertion is frivolous and the Applicant has failed to prove either deficient performance or prejudice under *Strickland*.

In his next specification in R/1 the Applicant cites Tr.p. 415, l. 5-20 of the testimony of Ms. Galloway-Williams where she testified about a perpetrator's grooming of victims which can include exposing a child to sexualized material and behavior, such as pornography which the child may not have been exposed to previously. She also spoke of threats from a perpetrator that if the alleged victim told someone that something would happen to them or someone they love that played a role in delayed disclosure. In his pleading, Applicant asserts that this testimony bolstered and corroborated the alleged victim's testimony and complains that the victim and the delayed reported expert were both questioned by the same solicitor. Applicant complains that the State should have been required to establish what the jury would not be able to understand and the testimony was bolstering, vouching and improper corroboration and that defense counsel should have objected to this specific line of questions.

As to the reference to Tr.p. 415, this Court finds counsel's failure to object to the questions "what is meant by grooming" and how threats may be involved in delayed reporting was not proven to be deficient performance or prejudicial under *Strickland*. The Applicant's trial counsel had already objected to the admissibility of an expert on delayed reporting. This questioning and the responses of the blind expert were within her area of expertise. Had counsel objected there is no reasonable probability that the result of the proceeding would have been different because the evidence was admissible based upon the trial court's prior ruling. His assertion fails to prove prejudice under *Strickland* in light of *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015). *See also Weaverling*, 337 S.C. at 474–75, 523 S.E.2d at 794 ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible. Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor." (citations omitted)); *Brown*, 411 S.C. at 341–42, 768 S.E.2d at 251 (finding the 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 delay disclosing sexual abuse, as well as why their recollections may become clearer each time they discuss the instances of abuse"); See *State v. Barrett*, 416 S.C. 124, 133, 785 S.E.2d 387, 391 (Ct. App. 2016), *citing State v. White*, 361 S.C. 407, 414–15, 605 S.E.2d

540, 544 (2004) ("Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior."). *See also, State v. Galloway*, 436 S.C. 453, 464, 872 S.E.2d 646, 652 (Ct. App. 2022), aff'd, 443 S.C. 229, 904 S.E.2d 866 (2024) (the risk factors associated with childhood abuse admitted in this case were not likely to be within the common knowledge of jurors).

In specification R/1, the Applicant next refers to Tr.p. 417, l. 21-p. 418, l. 4 a parsed portion of Ms. Galloway-Williams testimony about the need for a support system to be present for a child to make a disclosure and noted that the initial response when a child makes a disclosure and in her experience that if a child is not believed it makes it less likely to tell again if the victim was not believed. The Applicant in his pleading asserts that the testimony served no purpose but to contend that an alleged victim should always be believed, which he contends is vouching for the victim in this case. He complains about the failure of defense counsel to object to the vouching of Victim in his case. In his PCR testimony, the Applicant stated that they had already gone into that in his earlier testimony portion in 13/2 concerning vouching.

This Court incorporates herein its finding and conclusion to the challenge to counsel's failure to object to specification 13/2 as it relates to Tr.p. 417-418 above. In summary, as to the testimony on Tr.p. 417, l. 21- p. 418, line 10, the Applicant misconstrues her admissible testimony about the need of a child abuse victim to have a support system to make a disclosure. Because Galloway-Williams did not know anything about Victim's case, she could not have bolstered Victim's credibility. About Applicant's complaint about Galloway-Williams' testimony regarding false denials and false allegations, the Court of Appeals noted such testimony could not have bolstered

Victim's testimony because "Galloway-Williams never treated child and never testified she believed Child, nor did she provide any indication that she had considered Child's specific disclosures...Galloway-Williams never linked her general statements to this case or Child's credibility." Acker, 435 S.C. at 734, 869 S.E.2d at 882.

This Court finds that the Applicant has not proved ineffective assistance under *Strickland* related to this passage because this is not a statement that alleged child abuse victims, including his victim, always need to be believed. It is only explaining why actual victims may delay disclosure.

In the next portion of specification R/1, the Applicant again refers to Ms. Galloway-Williams testimony at Tr.p. 420, l. 21 -p. 421, l.4, in which she stated, in response to the State's question that disclosure is a process and they do not expect a child to tell every single detail of every single abuse experience the first time they report. In his pleading, the Applicant asserts that counsel should have objected because this question was tailored to fit the scenario or was already testified to at trial which is improper. In his PCR testimony, Applicant noted counsel should have objected. PCR 178.

This same issue on counsel's failure to object to this portion of the expert's testimony was addressed above in section 13/2 which is incorporated by reference. In summary, this Court held that Applicant makes the same argument about Galloway-Williams testimony at Tr.p. 420, l. 21-p. 421, l. 4 and Tr.p. 430, l. 25- p. 431, l. 17. While there was no objection to either passage, this Court finds that the Applicant has failed in his burden to show that reasonable counsel would have made an additional objection. The 420-421 passage concerns whether a chronic abuse victim will make a full disclosure to the first person finding that disclosure is a process, and they do not generally expect every detail will be disclosed the first time. In the 430 - 431 passage, the expert states on re-direct she again emphasizes the importance of non-offending supportive caregivers as the most important thing for a child to be able to tell and get help.

This Court finds the referenced testimony is not vouching or bolstering the victim's actual credibility and finds that a reasonable counsel would not have objected. Further, counsel Floyd in his cross-examination emphasized that the expert's opinion is that it does not always apply and it is reported, but that there is no specific research on the particular timing of a delayed report, but that family dynamics are a strong factor for the delay. Tr.p. 434-435. When counsel Floyd on re-cross asked about the possibility that the crime did not occur related to period on non-disclosures, the trial judge noted that it was a different issue and "doesn't mean it did nor didn't occur. That's the jury's decision to make" Tr.p. 433, l. 3-6.

The Applicant has failed to prove either prong under *Strickland* related to counsel's specific failure to object to these passages Galloway-Williams testimony.

In the next portion of specification R/1, the Applicant cites Tr.p. 421, l. 25-p. 422, l. 7, at the conclusion of Ms. Galloway-Williams direct examination when she testified that, based upon her training, delayed reporting is very common when the perpetrator is a family member, and the relationship dynamics are very powerful. The Applicant contends in his pleading that counsel was ineffective for not objecting to the questions as leading and the improper bolstering. He did not address this in his PCR testimony.

This Court finds for similar reasons to the above passages that the Applicaut failed to prove ineffective assistance of counsel to the failure to object to the State's question on whether "delayed reporting by a child is common or uncommon when the perpetrator is a family member." Tr.p.

421, l. 25- p. 422, l. 3. This Court finds that it is not a leading question. The Court further finds that the answer was admissible opinion evidence. He failed to prove *Strickland* prejudice where an objection would have been denied. The Applicant failed to prove if counsel had made the proffered objection that there was a reasonable probability that the result of the proceeding would have been different.

In his next specification in R/2, the Applicant points to Tr.p. 436, l. 13-20 during the SANE nurse's testimony when she was asked whether she had testified previously as an expert and identified the name of the case as State v. Nate Martinez in Richland County before Judge McMahon in 2015 or 2016. In his pleading, the Applicant contends the evidence was improper because the witness should not be allowed to state the Defendant's name or that it was before Judge McMahon. Applicant contends that there should have been a motion for a mistrial and an objection. In his PCR testimony, Applicant asserted that this testimony improperly bolstered and gave credibility to her testimony and by naming Martinez, it was not known whether any of the jurors knew him. PCR 178.

This Court finds this assertion is frivolous. There is no preclusion for an expert witness to state that they had testified previously as an expert witness and to name the case. Further, there was no Sixth Amendment prejudice in disclosing that she had testified previously before Judge McMahon. He has wholly failed to prove that had counsel objected that there is a reasonable probability that the result of the proceeding would have been different or that a mistrial would have been granted.

In the next specification in R/2, the Applicant points to Tr.p. 450, l. 25-p. 451, l. 7 in which the SANE nurse testified about pubic hair combings and why they were done in the case. The nurse testified that in the assault history she had mentioned that he rubbed his genitals on her genital and that sometimes pubic hair will get intertwined if they are against each other. In his pleading the Applicant contends that counsel Floyd was ineffective for failing to properly question the SANE nurse when the alleged victim contended in her testimony that she was laying face down on the bed, Applicant questions how the hair could be intertwined that way and claimed that he did not have pubic hair "because it used to give me a rash because I would sweat so much at work" which he claimed counsel Floyd knew, but failed to bring out that testimony. The Applicant did not specifically discuss these alleged facts in his testimony. PCR 179.

This Court must find that Applicant failed to show prejudice in failing to inquire of the SANE nurse about the portion of the alleged victim's testimony and whether she was aware that Applicant claims he did not have pubic hair. The record shows that Applicant's hair was identified from the pubic hair combings through the DNA analysis and further that the Applicant's DNA was consistent with saliva on the victim's underwear. The Applicant has failed to show that had counsel taken these steps, assuming arguendo that he was deficient, that the result of the proceeding would have been different.

In the next specification in R/2, he refers to Tr.p. 557, l. 19-p. 559, l. 2 of SLED serologist Thompson opinion testimony that the stain originated from the interior of the underwear and counsel Spangler's re-cross-examination that revealed that she could not recall if the fluorescence was on both sides, yet noted in her case file that the interior appeared to be the side of origination of the stain. She clarified that there could have been florescence on the outside, but it could have been much weaker. In his pleading, Applicant asserts that defense counsel failed to properly question the witness to bring out facts to aid the jury to make a reasonable decision. Counsel testified similarly in the hearing. PCR 179.

This Court finds that Applicant failed to prove deficient performance. The record shows that counsel Spangler did bring this information to the jury in his re-cross-examination. The Applicant failed to prove that a different manner by a reasonable and competent attorney would have addressed this collateral fact. The Applicant has also failed to show Sixth Amendment prejudice since the information was revealed about the serologist's failure to recall if there was also a reaction on the outside of the underwear, when she described it as if at all, it was weaker than inside.

In his next specification in R/2 Applicant refers to Tr.p. 582, l. 25-p. 583, l. 3 which is the concluding opinion testimony by DNA analyst Money on relating to questions about the potential transfer of DNA and that when someone launders their clothes it could affect whether or not something is there and that her examination is from those items in the sexual assault kit done on the same date as the alleged sexual assault. The Applicant, in his pleading, asserts that this was improper corroboration through hearsay because the witness had no personal knowledge of the alleged assault and counsel should have objected.

This Court finds that this assertion is essentially frivolous because the material came from the sexual assault protocol on that date. Counsel in his re-cross-examination immediately addressed when the sexual assault kit was collected and the witness reviewed her chain of custody about when it was sealed, received by SLED received in serology and then when she personally received it. Tr.p. 583, l. 9-22. Evidence already introduced that the SANE nurse DeGuzman and Victim had established the timing of the sexual assault kit. There is no reasonable probability that the result of the proceeding would have been different had counsel made a hearsay objection.

In the final specification in R/2, the Applicant point to Tr.p. 583, l. 9-22, involving counsel

Spangler's recross-examination of the DNA analyst cited above related to her review of the SLED chain of custody and the fact that her examination did not take place until May 2016, over one year after the April 26, 2015 incident. The Applicant contends that counsel Spangler should have asked her why she answered the question without knowing the answer and proved that the witness was fabricating and goes along with leading questions. In his PCR testimony, the Applicant asserts that the witness did not know that information and was just testing the material and did not know what date the assault was, so it just bolstered the testimony of the alleged victim. PCR 179-180.

This Court finds that even if counsel would have objected under Rule 602, the Applicant has failed to show *Strickland* prejudice. As stated above the timing of the alleged assault occurring on April 26 and the sexual assault kit was completed on April 27, 2015. Defendant's Exhibit 1, Tr.p. 438-439 (testimony of SANE nurse). It was evident to the jury that the DNA analyst was not a witness to the incident. Further, the evidence about the preparation of the kit had been discussed in the testimony of the SANE nurse and that she was wearing the same clothes that night and had not changed clothes. Tr.p. 441, l. 12-20; Defendant's Exhibit 1, p. 10 of 12, p. 11 0f 13. Tr.p. 516-517 (Sgt. McCann did not allow her to change clothes). This Court further notes that Applicant's claim that the witness fabricated the testimony is not credible and has no basis. The ground must be denied.

S. *Ex Parte Testimony from expert witness that defense counsel should have motioned to declare a mistrial (S).*

In his initial speculation in section S/1, Applicant refers to Tr.p. 426, l. 23-p. 428, l. 10 during counsel Floyd cross-examination of Galloway-Williams's testimony. In that portion, counsel Floyd asked the witness a hypothetical question about where a child wants her parents to divorce and for the mother to leave and whether it would be a factor against delayed reporting. The witness responded initially that she could not answer that question, at which point counsel Floyd indicated that he was trying to ask the opposite scenario from her direct testimony about failing to report about a fear of breaking up a family. The expert opined that in her experience that she did not see in her research that a child does not make an outcry regarding sexual abuse as a way of making divorce or separation happen. Counsel Floyd objected that the expert's response was to his question.

In his pleading, Applicant asserts that the expert vouched for the credibility of the alleged victim in her response and felt counsel should have moved for a mistrial by reference to systems in place to assess those things. In his PCR testimony, Applicant asserted that her response was giving an opinion and defending the alleged victim, which she should not have been allowed to do. PCR 180-181.

This Court finds that the Applicant failed to prove either deficient performance or prejudice because his complaint is frivolous. This Court finds that counsel's questioning fell within the blind expert's expertise and research and was not related specifically to Victim or her credibility. Although, in hindsight that Applicant may not have liked her answer, the expert's answer was based upon an appropriate hypothetical presented by counsel. This Court finds that had the question not been asked and/or the responses stricken, the Applicant failed to show a reasonable probability that the result would have been because her testimony was limited as a blind expert to factors related to delayed disclosure, as found previously by this Court. It must be denied.

In the next portion of specification S/1, the Applicant again refers to expert witness Galloway-Williams at Tr.p. 429, l. 6-19 which is similar testimony related to defense counsel's hypothetical about a child victim wanting her mother to leave as being a factor in delayed response, because in her research it has not been listed as a reason for the delay. In his pleading the Applicant asserts that counsel should have moved for a mistrial because the expert witness was unreliable in her inability to answer the defense question which was not in favor of Victim's testimony. See also PCR 181, l. 15-19.

This Court finds that Applicant has failed in his burden of proof because there is no basis to support a mistrial by the expert witness's response to the defense question. It is clear to this Court that in her research the witness declared that a child desiring a parent's divorce had not been indicated a reason for a delayed response. As with the preceding portion, the Applicant had failed to prove *Strickland* prejudice under these distinct facts and limits of her expertise as a blind expert. Contrary to the assertion, her testimony was not specifically related to Victim, but to overall research in the area. Thus, Applicant's claim in this issue must be rejected.

T. Judge vouching for alleged victim, attacking character, biased. Look at this one Judge Making inflammatory comments about Defendant. Mistrial – Margie Branham. (T)

In the next specification T/1, the Applicant refers to Tr.p. 430, l. 22 – p. 433, l. 7 involving the redirect and re-cross-examinations of expert witness Galloway-Williams. In this portion, the State inquired about defense counsel's questioning about disruption of the family and how important it is to have a caregiver supportive of a child. The expert testified that it was critically important to have caregivers that believe and support the child and that non-offending caregivers are the single most important thing in a child being able to get help and heal from the trauma and the decision to tell. The expert further opined that if the non-offending caregiver is financially dependent on the perpetrator, it can have an impact. On recross, she further testified that if a child was interviewed by a specialist in child abuse and did not tell, it was an opportunity that there could be factors influencing that similar to the factors in in delayed disclosure, including a non-offending caretaker. When asked if the child was interviewed and did not disclose, the trial judge interrupted and declared it was a different issue and that it "doesn't mean it did not didn't occur." Tr.p. 433, l. 3-7.

In his pleading on this portion, the Applicant asserts that counsel was ineffective for not moving for a mistrial based upon the trial judge's comment related to something that the jury did not hear. He contends that the comment alone by the trial judge unduly prejudiced the jury and that there should have been a mistrial. At the hearing, the Applicant testified that these comments relate to his wife not supporting his daughter and that a parent is not allowed to not believe a child. Applicant contends that this was bolstering and should have been objected to and a mistrial declared. He further contends that counsel was ineffective because his questioning brought out the offensive testimony. PCR 181-182.

This Court finds that counsel failed to prove ineffective assistance by counsel. Counsel's inquiry and the trial judge's comment was likely referring to the earlier discussion about the limited role of a blind expert who cannot make credibility determinations. Tr.p. 402-409. This Court finds that the Applicant has failed to show an omission on the part of counsel, which to a reasonable probability would have resulted in a different outcome or a mistrial had an objection been made.

In his next portion of specification T/1, he refers to Tr.p. 480, l. 5 – p. 482, l. 21 during the direct examination of Margie Branham concerning the alleged victim's relationship with her father after an objection by defense counsel questioning the basis of Branham's knowledge. This matter was essentially raised and denied earlier in the Order in section 15/3 involving the same pages which are adopted and incorporated herein by reference. The cited pages concern the argument regarding hearsay evidence about the relationship, and the trial court's response about how knowledge about the relationship can come from what the witnesses personally observe. At that point, defense counsel Floyd moved for a mistrial based upon the trial judge's statement and what can make such knowledge admissible other than through words.

In his pleading as to the specification, Applicant complained that counsel Floyd did not fully explain what his entire objection should have been beyond the assertion that the judge told the solicitor how to introduce the evidence other than through hearsay. He asserts that because the witness heard the discussions between the trial court and counsel that she learned how to answer the questions without hearsay. Applicant claimed that counsel was ineffective in failing to show the prejudice by coaching of the trial judge. He felt a mistrial should have occurred. In his PCR testimony, he reiterated that this general assertion was discussed earlier in the PCR proceeding, his concern was that the mistrial motion should have also been based upon the fact that witness Branham was still seated in the witness chair when the coaching by the State occurred and learned how to answer the questions to get the evidence in. PCR 183-184.

This Court finds that counsel was not deficient in the manner this argument on mistrial occurred. The fact that Branham was seated and overheard the response was not presented in the mistrial motion at trial. However, the Applicant is incorrect that the trial judge coached the witness. A review of the actual testimony presented by Ms. Branham responded "yes" to the inquiry that based upon her observations she became aware of the daughter's feelings toward her father and that knowledge and observation played a part in her reaching out to the daughter on April 26, 2026. Tr.p. 491, l. 7-15. This Court finds that the Applicant has failed to show that prejudice under *Strickland* has been met by the failure to point out the witness was present during the discussion about a mistrial and the earlier hearsay objection. He has failed to show a reasonable probability that either that the mistrial motion would have been granted, or the result of the proceeding would have been different where the jury heard evidence that was admissible.

In the next specification in T/1, the Applicant refers to Trp. 483, l 22- p. 483, l. 14, which is the full discussion of the objection and mistrial argument related to the hearsay objection to Ms. Branham about the daughter's relationship with her father. This, as noted, is addressed in full previously in section 15/3 of this Order which is adopted and incorporated herein by reference. In his pleading on this specification, the Applicant contends that and reiterates the assertion that the witness should not have heard the legal discussion. At the PCR hearing, the Applicant asserted that the witness never left the courtroom. PCR 183-184.

For the reasons set forth in the preceding portion and in section 15/3, the Applicant has failed to prove that counsel was ineffective in the handling of the hearsay objection and request for a mistrial. It must be denied.

In his next specification in T/1 and T/2, the Applicant refers to Tr.p. 489, l. 19- p. 491, l. 4, which involves the *in camera* proffer of Ms. Branham's testimony that she had become aware of the alleged victim's feeling toward her father over the years and that it impacted on her reaching out to the alleged victim on April 26. As to these limited questions, the trial court found the testimony was admissible and trial counsel had no objection to the limited evidence. In his pleading, the Applicant contends that counsel still should have objected because it was bolstering and vouching for the credibility of the victim and claims this attacks on his character and further violates Rule 404(b) and is propensity evidence and ties into the DSS comments. See also, PCR 184, l. 7-12.

This Court finds the Applicant's assertion frivolous because the limited evidence in the proffer is not objectionable for any of the reasons the Applicant claims and merely shows that Ms. Branham reached out to the alleged victim that evening. He failed for the reasons previously stated in 15/3 and above, proved *Strickland* prejudice as to not objecting to the limited evidence in the proffer or its admission in Tr.p. 491, l. 7-15. It must be dismissed.

U. Structural error of trial. Evidence coming in and not being objected to under the 404 (b) exception in which trial was structured. (U)

In his next specification, in U/ the Applicant cites to Tr.p. 590, l. 12-p.592, l. 2, which is the testimony of Det. Phipps during which he described his extraction report with artifacts listed from the iPad, State Exhibit 30 which was a CD containing the extraction that was performed on August 24, 2016 which had begun the day before and was objected to his counsel at that time.[129] In his pleading, the Applicant complains that counsel was ineffective because he contends that the CD fell under Rule 404(b) consolidation issues and Rule 403 which counsel Spangler never cited. He claims that this is a structural error and makes passing reference to *State v. Wallace*, which he contends was abandoned with the initial witness at trial.

This Court finds this specification to be without merit for relief. This Court finds that deficient

[129] This Court notes that in an *in camera* proceeding following that objection, counsel Spangler objected to the admission of State Exhibit 30 based upon relevance. Tr.p. 592, l. 20-p. 597, l. 17. In the discussion between counsel and the trial court, it resolved with the admitted evidence being limited to evidence from April 26, 2015, and December 1-2, 2014. Tr.p. 596, l. 10- p.597, l. 11. Counsel Spangler as to the limited date had no further objection. Tr.p. 597, l. 9-11. This was previously addressed in this order in specification 24/1 which is incorporated herein by reference.

performance on the part of counsel Spangler was not proven. His initial objection to the CD was based upon relevance and through the discussion ultimately resulted in a limitation to relevant and admissible evidence from the extraction related to the charges arising from December 1-2, 2014 and April 26, 2015. The argument related to counsel's actions on the admission of that evidence was addressed in this Order related to specification 24/1 which is incorporated herein by reference. As noted therein, The Applicant failed to prove deficient performance or prejudice. The assertion must be denied.

V. Chain of Custody

In specification V/1, the Applicant refers to Tr.p. 532, l. 13- p. 533, l. 2, p. 533, l. 7-16, and p. 534, l. 12-19, which involves the testimony of SLED serologist, Courtney Thompson, concerning how the sexual assault kit arrived and was packaged with a seal on the box. She described the process of the kit being logged in, the seal being broken on the kit in the presence of the submitting officer and the sealed pouches being separated and then stored until an analyst from the department picks it up and takes it to their location to test. She acknowledged that there was underwear in the kit. The serologist further described State Exhibit 23 (underwear) and the portion that included her initials and date that she examined it, which is in compliance with the SLED protocol. In his pleading, Applicant asserts error in counsel Floyd stipulating to the chain of custody because somewhere along the line he claims that one hair turned into two hairs. He complained that counsel never called or asked any witness about the chain of custody.

The Applicant's claim that the evidence concerning the chain of custody and his assertion that there was only one hair recovered initially yet there was another hair also recovered has been addressed at various parts of this Order. The earlier discussion and findings by this Court are incorporated herein by reference. Those portions also address that Applicant has failed to prove that there was a break in the chain of custody, other than through his speculation in this proceeding. The parts of the Order adopted in this specification are sections 26/1 concerning counsel's failing to object to the chain of custody, K/1 referring to Tr.p. 452-453, 553-556, 576, 577, M/4 referring to Tr.p 541-542, and R/2 referring to Tr.p. 450-451.[130] This Court finds that as to this evidence that Applicant has failed to show a Sixth Amendment violation because he failed to show an actual break in the chain of custody on any item that would have resulted in its exclusion or to a reasonable probability would have resulted in a different verdict.

W. DNA/serologist. DeGuzman (SANE nurse). Miscellaneous hair found (W)

In his first specification in W/1 he refers to Tr.p. 448, l. 21-p. 449., l. 12 during SANE nurse DeGuzman's testimony about her protocol report on Victim and described that she was looking for DNA and injury information and would start from the top of the body to the bottom. She stated she would get DNA from the mouth. She stated that based upon the assault history that she swabbed her labia majora and minora on the outside because she stated that she was not penetrated, as well as her anus. She also stated that she combed her pubic area. She indicated that she had a specific swab for each.

In his pleading concerning this portion, the Applicant stated that counsel was ineffective because he did not adequately question the witnesses about this testimony. Applicant notes that the SANE nurse testified that the victim declared that she was not penetrated which Applicant contended was hearsay. He further points out that there was later testimony that she had penetrated by a finger. Applicant asserts that the testimony went back and forth from the nurse's testimony

[130] This Court further notes that in specification W below, the Applicant also raises a question about a miscellaneous hair found. It is also incorporated herein by reference.

and her actual report which would have confused the jury. He asserts that counsel was ineffective. See also PCR 185.

This Court finds that the Applicant's claim of ineffective assistance is without merit. The SANE nurse's testimony concerning the reasons why certain swabbing in areas as part of the sexual assault protocol were properly admitted and there was no objection that a reasonably competent defense attorney had a 6th Amendment requirement to make. The trial testimony by the SANE nurse that the alleged victim told her that she had not been penetrated which Applicant alleges was hearsay was admissible under SCRE 803(4). It related to statement for the purpose of medical diagnosis. This issue is particularly addressed in the post-trial decision in *State v. Simmons* which in pertinent part:

> This hearsay exception requires that the statements be provided for the purpose of and be reasonably pertinent to medical diagnosis or treatment. Rule 803(4), SCRE. Rule 803(4), SCRE, may well apply in a CSC case, but there must be a nexus between the information provided by the patient and the diagnosis or treatment of the patient. For example, after recent trauma, these types of statements can provide the doctor with specific areas to focus on or specific conditions to search for when performing the diagnostic physical exam and are reasonably pertinent to diagnosis or treatment. In this regard, "a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim." *State v. Burroughs*, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997). However, a] doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions. The doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses." *State v. Brown*, 286 S.C. 445, 447, 334 S.E.2d 816, 817 (1985); see also Rule 803(4), SCRE, Note (stating a "physician's testimony should include only those statements related to him by the patient upon which the physician relied in reaching medical conclusions" (*citing State v. Camele*, 293 S.C. 302, 360 S.E.2d 307 (1987)).

State v. Simmons, 423 S.C. 552, 563–64, 816 S.E.2d 566, 572–73 (2018).

The statement in the protocol that the SANE nurse testified concerning the lack of penetration is consistent with the qualification in *Simmons* that the purpose must be limited to the various areas to focus on or specific areas to search for when performing the diagnostic examination. This Court finds that had counsel objected the trial court would have overruled the objection based upon Rule 803(4).

The Applicant also noted that there was inconsistent testimony other than the SANE nurse about penetration. First, in counsel Floyd's cross-examination of the SANE nurse, he did bring out the evidence in the SANE nurse's report about no penetration of the vagina by finger or object. Tr.p. 459, l. 15-25.[131] During the alleged victim's *in camera* testimony, she testified that Applicant had used his finger when they lived at Peachland and at Smith Pond Drive. Tr.p. 226, l. 1-10. This similar testimony was presented to the jury by the alleged victim at Tr.p. 337-338 when she stated that when they lived at Peachland, he would use his fingers on her vaginal region. Tr.p. 337, l. 17-p. 338, l. 4. Importantly, the alleged victim also testified, contrary to the SANE nurse's information that on the night of the April incident the Applicant used his fingers. Tr.p. 353, l. 15-18, p. 354, l. 8-15. The alleged victim also testified that on the night of Applicant's birthday among other things, the Applicant's hand touched her inside her private parts. Tr.p. 363, l. 11-16. Further, as noted above, the defense put the entire SANE report into the record before the jury as Defense Exhibit 1. Tr.p. 672.

As this Court has determined throughout this Order based upon the obvious actions of counsel Floyd at trial, combined with the actions and credible testimony of counsel Spangler, a critical defense strategy was to show Victim's inconsistent statement to either impeach her credibility or even reflect that a crime did not exist, in addition to the failure to disclose. Here, Victim's denial of penetration to the SANE nurse related to the event of April 26 which was

[131] This portion of the trial was also addressed earlier in this Order in specification 26/1 related to Tr.p. 459, l. 15-23.

inconsistent and potential exculpatory related to her own trial testimony. See Tr.p. 353, l. 15-18, p. 354, l. 8-15. It is extraordinary to this Court that Applicant now claims through his own retrospective analysis that such evidence should have been excluded by his defense or that counsel was negligent in failing to do so. This Court finds that he has failed to show either deficient performance or prejudice related to the lack of penetration evidence. It must be dismissed.

In the next specification in W/1, the Applicant refers to Tr.p. 450, l. 7-16 during the SANE nurse's testimony during which the nurse read aloud the names of each of the swabs in the routine sexual assault protocol which were: " known standard DNA envelope, suspected body fluid envelope, suspected saliva envelope, vaginal swabs envelope, oral swabs envelope, rectal swabs envelope, fingernail scrapings envelope, vaginal, oral, rectal slide holder, pubic hair combings envelope, and miscellaneous materials envelope." In his pleading, the Applicant speculates that defense counsel should have addressed specifically the miscellaneous materials envelop because Applicant believes that he needed to establish through questioning where the alleged additional hair was found and speculates that it may have been in that miscellaneous envelope.[132] During the PCR hearing, the Applicant complained that all the swabs were tested and claimed that they did not find any DNA on the swabs (other than the hairs). He asserted that there was nothing on the alleged victim's body of DNA and Applicant's opined that his defense team could have attacked this better. PCR 185-186.

The record shows that the SANE nurse testified about a stray hair on the rectal swab that

[132] AS stated earlier in this Order the serologist testified that she evaluated the "pubic hair combings envelop and seeks to locate those hairs that may have a root that can be used for a DNA profile. She testified that if she located a root, she would refer the hair for DNA analysis, bit if it does not it is not forwarded. Tr.p. 541-542. She testified that she sent two hairs from the pubic hair combing to the DNA section. Tr.p. 542, l. 3-7. In addition, she indicated that she reviewed the rectal swab and found a hair attached to the swab. She testified that she sent that hair to DNA also. Tr.p. 542,

she collected from the anus and sealed it as well as the other swabs. (Tr.p. 452-453). She also testified about the pubic hair combings and the collection she made from those combings. Tr.p. 453. Counsel Floyd also inquired of the nurse about the collection from the rectal swab and pubic hair combings in his examination. Tr.p. 460-461.

During the testimony of the SLED Analyst Money, she testified that SLED item 1.5.1 was a hair from the pubic hair combing and was consistent with the DNA standard from Victim, item 1.4.2 was a hair from the rectal swab that was consistent with Victim's DNA, item 1.6 was a miscellaneous hair from the rectal swab which matched the DNA standard of the Applicant, and item 1.5.2 was a hair from the pubic combings that matched Applicant's DNA. Tr.p. 575-577.

Counsel Spangler's cross-examination focused on the concept of transfer of DNA and items with DNA.

This Court finds that the Applicant failed in his burden of proof to show that counsel Spangler was deficient in failing to focus any questioning about the miscellaneous envelope.[133] As noted earlier in this order and above the expert testified that the identifiable hair specimens came from the rectal swab and the pubic combings. There is no evidence presented that there was a break in the chain related to the sealed items, which is the Applicant's burden of proof. The testimony the Applicant relies upon is the evidence that went before the jury by the experts who were part of the chain of custody and the examiners. He has failed to prove that if counsel inquired further about the "miscellaneous materials" envelope that there is a reasonable probability that the result of the proceeding would have been different. His speculation is insufficient proof. It must be

[133] This Court notes that similar assertions about an alleged additional hair have been raised and addressed previously in this Order. This Court adopts and incorporates herein by reference its findings and conclusion related to specifications 13/2, 14/3, 26, K/1 (Tr. 553-556, 576-57),M/4 (Tr.p. 551, l. 9-p. 553, l. 5), R/2 (Tr.p. 450, l. 25- p. 451, l. 7), and V/1.

denied.

This Court further finds that his speculation that counsel could have attacked the fact that nothing in the way of DNA was found on the victim's body to support the charge is without merit. This Court finds that the Applicant's assertion is not credible because he ignores that the hairs were found on her body. He failed to prove a reasonable probability that the result would have been different had this theory been asserted in a different manner in the case.

XYZ. Things I'm not sure about (XYZ).

In his initial specification in XYZ/1, the Applicant cites Tr.p. 647, l. 4-23 during which the prosecution described the Applicant's criminal record in making a determination whether there were convictions that would be subject to impeachment if the Applicant testified. In his pleading, he contends only that this portion will come into play at re-sentencing. At the PCR hearing, Applicant testified that he was unclear why this was being brought up at that point rather than in at re-sentencing. PCR 187.

This Court finds that Applicant has failed to articulate a 6th Amendment claim in this portion. It is frivolous and must be dismissed because it was clearly all inquiry about potential impeachment convictions to allow for a decision to testify to be made knowingly.

In the next specification in XYZ/1, the Applicant cites to Tr.p. 438, l. 21-21 concerning the SANE nurse's testimony when she was asked at the outset if she had notes in the record related to Victim, which she responded yes. In his pleading, he does not know whether she was reading from her notes or from the sexual assault protocol form. He claims that she read a hearsay statement and counsel did not object. He did not address this at the hearing. PCR 187, l. 12-14. This Court finds that the assertion is frivolous and he failed to prove either deficient performance or prejudice under

Strickland.

In the next specification in XYZ/1 the Applicant refers to Tr.p. 440, l. 5-19 of the SANE nurse's testimony from her notes on the sexual assault protocol form that the SANE nurse filled out herself about Victim's date of birth and when Victim arrived at the hospital. In his pleading, Applicant asserts that it is improper corroboration and hearsay and that counsel was ineffective in failing to object. At the PCR hearing, Applicant asserted that the SANE nurse is reading off of someone else's notes because the SANE nurse did not arrive until 5:52 AM. [See Tr.p. 439, l. 5-17]. He claimed that this was improper corroborating.

This Court finds that the Applicant failed to prove either deficient performance or prejudice. These notes referring to the patient's arrival and birthdate as admissible as a part of the hospital's business records under Rule 803(6) as a business record exception to hearsay[134] because these items are obviously taken in the regular course of business related to a patient's time of arrival and birthdate at a hospital. The SANE nurse stated that she had filled out the data. An objection would not have been done as a duty by reasonably competent counsel. However, that Applicant has failed to prove deficient performance by counsel's failure to object to the testimony as hearsay. First, Victim previously had testified without objection to her date of birth, which was consistent with the nurse's testimony. Tr.p. 371, l. 4-5. Further, the defense introduced the sexual assault protocol as Defense Exhibit 1 which included that date of birthdate and hospital arrival on

[134] S.C.R.E Rule 803(6) reads: A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

April 27, 2015 at 3:45. Id.

For those same reasons the Applicant has failed to show prejudice from counsel's failure to object to the testimony where similar evidence was introduced. Further, there was testimony that Victim was taken to the hospital directly from the scene by her mother from Victim (Tr.p. 357, 368, 372, 385), and Sgt. McCann (Tr.p. 62, 270, 516-517, 525). The claim must be dismissed.

In the next specification in XYZ /1 the Applicant cites Tr.p. 506, l. 22-p. 507, l. 1 concerning the testimony of Deputy Black describing that after Master Deputy Ashley called in major crimes, Black stayed in the room with victim and provided her with a statement form for her to write what happened. The Applicant asserts that this is a Confrontation Clause issue because it improperly corroborated that Deputy Ashley called and that he was not called as a witness at trial to be confronted about this call. See also, PCR 187, l. 24-188, l. 2.

This Court finds that this claim is frivolous for relief. His assertion that he needed to confront Major Deputy Ashley does not create a Sixth Amendment violation. It is undisputed that Major Crimes arrived at the scene. Lt. Lint had previously testified that he received a call that he believed came from Master Deputy Ashley or Hicks about a possible sexual assault and he went to the scene. Tr.p. 286. Sgt. McCann of Major Crimes was called to the scene by Lt. Lint who was her sergeant at that time where she also met Master Deputy Ashley. Tr.p. 510-511.

The Applicant has failed to show had an objection been made that there is a reasonable probability that the result of the proceeding would have been different. The evidence would still have shown the arrival of law enforcement at the scene. Confidence in the outcome has not been undermined.

In his next specification in XYZ/1, the Applicant refers to Tr.p. 509, l. 2-8 during Sgt.

McCann's testimony when she was describing her work at Lexington County, Judge McMahon interrupted and erroneously indicated that this had already been presented in front of the jury but was corrected that it was *in camera* and the court apologized. In his pleading, the Applicant asserts that this required a curative instruction and opined that the trial court was doing this mistake on purpose. He asserted that counsel should have asked for a curative instruction. PCR 188, l. 2-18.

This Court must conclude that the assertion is lacking a sufficient showing of either deficient performance or prejudice. The trial judge apologized and corrected his error immediately. There is no reasonable probability that the result of the proceeding.

In his next specification in XYZ/1 he refers to Tr.p. 522, l. 15-25 involves Sgt. McCann's testimony about her interview with Applicant when he described asking Victim to help around the house and that she went to her room and he went to his bedroom. McCann testified that she then asked Applicant if he had been watching porn on his iPad and he declared that he did but did not directly answer whether he did that night or not. In his pleading the Applicant asserts that he claims that this was before Miranda warnings were given. He complains that Floyd did not allow him to testify at the *Denno* hearing and claims that counsel was ineffective. PCR 188-189.

This Court finds that the Applicant failed to prove deficient performance or prejudice. The claim is essentially that in hindsight Applicant contends that his counsel should have called him to testify that the *Miranda* warnings were given after his statement about viewing the iPad and not before. As addressed previously, assuming *arguendo* that the statement about watching the iPad would have been excluded he has failed to show a reasonable probability that the result of the proceeding would have been different. The iPad would have been inevitably seized based upon the statement of Victim concerning its use that night and there would have been sufficient probable cause for the extraction. His statement about watching porn, if excluded from the jury, would not to a reasonable probability, have resulted in a different outcome in light of the forensic evidence linking him that evening to the assault and testimony of the victim. Confidence in the outcome is not undermined. Further, this Court is constrained to question the credibility of the Applicant when the strategy was that he was fully cooperating with law enforcement throughout. This claim must be dismissed.

In his next specification in XYZ/1, he cites Tr.p. 565, l. 20-22 concerning the DNA Analyst reading from her report. The Applicant complains that the report was never introduced in court as an exhibit. He claims that counsel was ineffective in failing to object to a witness testifying from a document that was not made a part of the record.

This claim is wholly frivolous because there is no requirement that a document used to refresh a witness's recollection must first be made an exhibit. See S.C.R.E. Rule 803(5) (recorded recollection)[135] and Rule 612 (writing used to refresh recollection). There is no showing that the defense had not been provided a copy of the document of the DNA report in discovery and Applicant has not made such an assertion. There has been no Sixth Amendment violation when the Applicant's understanding of evidence law or procedure is mistaken. Counsel could not be deficient in failing to make a frivolous motion.

In his next specification in XYZ/1 and XYZ/2, the Applicant refers to Tr.p. 566, l. 13-23 during which the DNA analyst testified that the main contributor to the stain on the underwear item was the Applicant. In particular, the witness testified that in this item they were able to get a full DNA

[135] Under S.C.R.E Rule 803(5), the writing may not be received as an exhibit unless offered by an adverse party. This is what occurred with the admission of the sexual assault report, Defendant's Exhibit 1 after the SANE nurse had testified at the close of the case.

profile of the Applicant as a main contributor, as compared with a partial profile. In his pleading, the Applicant comments whether an average jury would have understood what the expert had just stated. He complained that his counsel was ineffective in failing to question the witness so that the average jury would been able to understand. At the PCR hearing, the Applicant indicated that he did not understand what the expert witness was stating and did not think the jury would either. PCR 189-190.

This Court finds that the Applicant failed to show that counsel was deficient as to this portion of the DNA expert's testimony. Spangler credibly testified that he had discussions with the Applicant about DNA and the DNA results with Applicant whom he claimed came up with the squirrel theory. PCR 262. Spangler was firm that in their discovery meetings they discussed the forensic results, the DNA and the iPad results. PCR 272.[136] During his cross-examination, counsel Spangler clearly got the expert to claim in understandable terms what she stated on direct examination about the cutting from the underwear:

Q. And that's the one you tested that came back as a mixture of two individuals?

A. At least two, yes.

Q. At least two individuals? So you were able to obtain a DNA match for Bill Heath?

A. For the major contributor, yes.

Q. And you can't tell us how many other contributors there are to that mixture?

A. It's at least two.

Q. At least two, could be three?

A. It's possible.

[136] Concerning DNA, Spangler indicated that whether to challenge the DNA process or the results would have been a decision that Floyd would have made rather than him. PCR 297.

Q. Six?

A. It's possible.

Q. Ten?

A. It's possible.

Q. You have no way of identifying who those individuals are, can you?

A. I cannot identify the minor contributor in this case.

Q. No idea who that minor contributor is?

A. It was just not enough information for me to make that determination.

Tr.p. 580, l.-581.

The Court finds that counsel Spangler acted as competent counsel in his handling of the DNA analyst. The fact that the Applicant did not understand, in hindsight, the inculpatory nature of the DNA evidence is not sufficient to create a 6th Amendment violation. The Applicant has failed to prove deficient performance and has also failed to prove Sixth Amendment prejudice.

In the next specification in XYZ/2 the Applicant cites Tr.p. 572, l. 4- p. 573, l. 7 of the DNA Analyst testimony and her description of an "allele" in her presentation. In his pleading, Applicant complains that counsel failed to make sure that the average juror would have been able to understand the expert's testimony about the allele and how it impacts on the DNA profile. In his PCR testimony. Applicant contends that the experts are not doing their job of making jurors understand. He contends that it is up to the attorneys to make the jurors understand.

This Court finds that Applicant's issue with the understanding or lack of understanding of the scientific term "allele" does not create a Sixth Amendment violation of the effective assistance of counsel. He has failed to assert that counsel was deficient in the preparation of his consideration of the expert evidence of the DNA profiles. His speculation about the jurors understanding. He failed to prove an act or omission on the part of counsel Spangler concerning this witness. In light of that failure, he failed to also prove 6th Amendment prejudice.

In the next specification in XYZ/2 he refers to Tr.p. 573, l. 24-p. 574, l. 25 involving the direct examination of the DNA analyst referencing the DNA profiles of the hair from the pubic hair combings and other material from Victim. Although not discussed in that portion of the cited testimony, Applicant returns to his assertion and speculates that when the prosecutor interrupted the witness that it sounded to him like Solicitor Mayes was trying to stop the witness from saying there was just one hair that matched the Applicant and returns to his assertion that the SANE nurse indicated that it was just one hair. He complains that defense counsel should have questioned all the witnesses until the truth came out. He complains the this was again error on his counsel's part by stipulating to the chain of custody and complains generally about the manner the deputy solicitor questioned her witnesses.

This Court finds that the Applicant has failed in his burden of proof for the reasons previously set out in the portions of the order addressing the chain of custody and his "one hair " theory which are adopted herein by reference. His speculation is not credible because prior to the series of cited questions the DNA analyst had already testified that she was able to conduct a full DNA profile from four of the five items forwarded to her. Tr.p. 573, l. 16-22. Thus, this claim must be dismissed.

In specification 2/A, the Applicant cites Tr.p. 653, l.11-14, which involves the conversations between counsel Floyd and the trial court about the fact he is going to put up testimony from Applicant's mother as a brief witness and potentially the Applicant. Counsel indicated that they did not have other witnesses. Counsel stated that he wanted to speak with the Applicant overnight about whether or not to testify. In his pleading, the Applicant complains that counsel was ineffective in not being prepared and not calling witnesses to testify. The Applicant claims that after opening the door by the comment about the DSS involvement with the family that was not part of bad acts under Rule 404(b), he could have called witnesses to cure the harm, but it would not have done so. He also complained that counsel had a list of witnesses provided during voir dire but none of those witnesses were called. Further, he complained that his wife's name was mentioned many times and claimed it created a Confrontation Cluse issue. During the hearing, he indicated that they had already discussed opening the door on the DSS matter. PCR 190, l. 17-22.

The issue of counsel's opening the door with the inquiry and DSS comment and the failure to call his wife as a witness has been raised and ruled upon throughout this Order. See Order related to allegation 1, 2, 14/2, 19/1, 19/2, 20/2, 20/4, 28/1, 29/1 and T/2. This Court incorporates those portions of the Order as if set forth herein. This Court notes, as to these issues, his underlying assertion that counsel's failure to call Rose, Michael Jeffcoat, other unnamed individuals who were in his witness list or others to address the claims was ineffective must fail by a lack of proof. This is because Applicant did not present any witness, including Rose Heath, to testify at the PCR hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court has no basis to determine what Rose Heath would have testified to or any of the other witnesses named and unnamed would have testified to. This burden was upon the Applicant to prove, not the State. This Court cannot be forced to speculate. The assertion must be denied.

In specification 2/B, the Applicant cites to Tr.p. 749, l. 7 – p. 750, l. 16 when counsel discussed with the trial court that they did not have a motion for a new trial to make at that time and that they may file a motion for a new trial within the 10 day period. In his pleading, he complains that counsel did not file the motion and claimed his reasoning was whether it would stop the sentencing. In his PCR hearing, Applicant asserted that counsel never filed a motion for a new trial nor briefs supporting a new trial. Applicant testified that counsel Floyd told Applicant after the trial when he came to see him that he was not going to do a motion and would put in for a direct appeal. PCR 191.

The Court must conclude that the Applicant had failed in his burden of proof related to a motion for a new trial. The record shows that counsel and the Applicant were advised by the trial court of the time frame to file the additional motion. The Applicant's own testimony reveals that it was discussed after the trial, and the Applicant was aware that counsel was filing a direct appeal notice rather than a motion for new trial. Further, the Applicant has made no showing of prejudice from this decision related to a motion for new trial. He failed to present evidence or proof that had a motion been made that there is a reasonable probability that the result of the proceeding would have been different. This Court will not and cannot speculate on what the grounds for the motion would be. In his testimony, the Applicant stated that "there was a lot of issues in there that he could have probably got a new trial." PCR 191, l. 10-13. This is conclusory and speculative without any basis of support. He further failed to present any argument that a motion for a new trial was required to be made to preserve a matter for the direct appeal that had been preserved and ruled upon by the trial judge during the trial nor any other matter that would support such a motion. *See State v. Groome*, 274 S.C. 189, 192, 262 S.E.2d 31, 32 (1980) ("Failure to contemporaneously object to the questions now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial."); *McElveen v. Ferre*, 299 S.C. 377, 381, 385 S.E.2d 39, 41 (Ct.App.1989) (upholding the trial court's denial of a motion for a new trial where the error was not preserved); *see also Idaho v. Higgins*, 122 Idaho 590, 836 P.2d 536, 550 (1992) (holding the trial court had no basis to grant a uew trial where the issue was not properly preserved during the trial); *Louisiana v. Marcotte*, 817 So.2d 1245, 1250 (La.Ct.App.2002) ("In our opinion, a motion for new trial does not preserve or revive an issue not properly and timely raised by objection. This is true because, by the time a new trial motion is made, the trial court has lost its best opportunity to correct the error at issue."); *Schacher v. Dunne*, 109 Or.App. 607, 820 P.2d 865, 867 (1991) ("An error that is not preserved cannot properly form the basis for a motion for a new trial."); *Carlson Mining Co. v. Titan Coal Co.*, 343 Pa.Super. 364, 494 A.2d 1127 (1985) (noting a trial court may only award a new trial on questions that are preserved); 66 C.J.S. New Trial § 17 (1998) ("Although there is some authority to the contrary, generally matters not properly pleaded, or put in issue, or preserved, may not be raised on a motion for a new trial."). The allegation is denied.

Resentencing Proceeding Issues

In his next specification in 2/B, the Applicant cites to Resentencing Transcript of

September 29, 2022, Tr.p. p. 4, l. 3-7 when trial counsel had been replaced by Sarah Mauldin of the Public Defender's office after defense counsel Spangler had been removed at an earlier proceeding. At the outset of the remanded resentencing proceeding, Judge Walton J. McLeod requested the State, through Deputy Solicitor Mayes to make an uncontested procedural history concerning the case. In the challenged portion, Mayes stated that the State had presented evidence that the crimes began when Victim was "six or seven" and continued on through her being 17 years and ended when the crime was reported to law enforcement when she was 17. In his pleading, Applicant contended or objected that the victim was not six when the crimes started and complained the State does not get the ages right.

This Court finds that counsel Mauldin was not deficient in objecting to the Solicitor comment about the age of the victim when the assaults began. The trial record shows evidence from the victim at one point that she was not sure when, but it might have been six or seven when the incidents started. Tr.p. 336, l. 2-4. However, the bulk of the trial testimony was that it started when she was "seven" or "seven or eight." Tr.p. 231, 235, 373. This Court finds that the Solicitor's reference that the victim was "six or seven" was not unsupported by the trial evidence but recognizes that the majority of the testimony from victim suggested "seven or eight." However, the Applicant has failed to show how the verdict and sentence on the relevant indictment was impacted because it still presented that Victim was under the age of eleven at the time of the incident. During the proceeding Solicitor Mayes noted that the incidents were from "7 to 17." Resentencing Tr.p. 20, l. 14-18. The Applicant has failed to show a reasonable probability that the result of the proceeding would have been different.

In the next sentencing specification, the Applicant cites to Tr.p. 4, l. 22 - p. 5, l. 1. when the solicitor asserts that on the sentencing sheet that began in 2004 and ran through 2007 the statute at that time carried zero to 30 years and she noted that it was amended in 2006 to increase to 25 to life. The Applicant in his pleading notes that this is another issue as to that indictment. At the hearing, the Applicant is complaining that everything brought up had nothing to do with 2004-2007 but was mostly about April 26, 2015.

This Court finds that Applicant has failed to show either deficient performance or prejudice because the resentencing was only based upon the one indictment. In the order of remand, the Court of Appeals addressed the issue in the following manner:

> III. Sentencing
>
> Heath argues the first-degree CSC with a minor statute was amended to increase the maximum penalty from thirty years' imprisonment to life imprisonment in the middle of the date range alleged in the indictment and the trial court therefore erred in sentencing him to life imprisonment. We agree.
>
> "In the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced, unless it is greater than the punishment provided for when the offense was committed." *State v. Varner*, 310 S.C. 264, 265, 423 S.E.2d 133, 133 (1992). **The legislature amended the first-degree CSC statute in 2006**; prior to this amendment, the maximum sentence for first-degree CSC was thirty years' imprisonment. See S.C. Code Ann. § 16-3-655 (Supp. 2005), amended by S.C. Code Ann. § 16-3-655 (2015). The legislature amended the statute to provide that a person convicted of first-degree CSC be imprisoned for "twenty-five years, no part of which may be suspended or probation granted or must be imprisoned for life." S.C. Code Ann. § 16-3-655 (Supp. 2006), amended by S.C. Code Ann. § 16-3-655 (2015).
>
> **The indictment alleged Heath committed first-degree CSC with a date range of September 16, 2004, to September 15, 2007. Victim testified she was first sexually assaulted when she was six or seven years old and based on Victim's age at the time of trial, such assaults would have occurred between 2004 and 2006.** Although the date range of the indictment fell under both the pre-amendment and post-amendment statutes, the majority of Victim's testimony regarding when Heath assaulted addressed conduct that occurred prior to the statutory amendment at issue. Without a factual finding as to when the abuse occurred, the trial court should have sentenced Heath within the pre-amendment maximum of thirty years' imprisonment. Accordingly, we vacate Heath's life sentence.

State v. Heath, 433 S.C. 506, 518–19, 860 S.E.2d 673, 679 (Ct. App. 2021) (emphasis added).

The Applicant failed to show how the challenged comments by the solicitor were incorrect or something that counsel Mauldin should have challenged. He failed to show a reasonable probability that the result of the proceeding would have been different.

In the next specification he cites to Sentencing Tr.p. 6, l. 14-20 when the prosecutor summarized the witnesses who testified including the delayed reporting in child abuse case expert, the SANE nurse, compelling evidence from a SLED DNA analyst, and Mike Phipps who did the phone extraction of an iPad that had incriminating evidence about the assault. In his pleading, the Applicant complains that this was a Fourth Amendment violation because law enforcement took his phone without a warrant which he claimed had not been an issue because no evidence was presented about it at the trial. He claims counsel Mauldin was unprepared to make an objection.

This assertion is frivolous. The presentation by the State is being misread by the Applicant because the statement only related to the extraction from the iPad, "a device similar to a phone." Counsel was not ineffective in failing to object when the comment did not concern the Applicant's phone, only his iPad.

In his next resentencing specification, Applicant refers to Tr.p. 7, l. 11- p. 16, l. 11. In this portion of the proceeding Solicitor Mayes summarizes the State's evidence in the entire trial from initial indictments to the incident on April 26, 2015 and the reporting of the event that night which led law enforcement to go to the scene, and she gave them information about it occurring back to when she was 6 or 7 years old. An excerpt of the victim's trial testimony was read to the court, the information from the iPad extraction, serology results, the cutting from the underwear and the DNA results are presented. As to the extraction, the testimony from Sgt. Phipps concerning the watermarks and websites were presented to the sentencing judge and the timing of creation of the particular images and the victim's confirmation of the use of the iPad and viewing of pornography during the assault. In addition, the Applicant's criminal history was provided to the sentencing judge.

In his pleading, Applicant complains that counsel did not object to the State using evidence that he claims was unrelated to the 2004-2007 time period and allowed the use of evidence outside of the date range. PCR 193-195.

This Court finds his assertion frivolous because the evidence of the Applicant's criminal history, which includes his sexual assault convictions outside of the range is relevant information in sentencing. Circumstances of the crime and character of the Defendant are always relevant in sentencing in South Carolina. In a sentencing proceeding, evidentiary rules are inapplicable. *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949) (a sentencing judge need not follow the rules of evidence when determining the appropriate punishment for a convicted Defendant); *State v. Franklin*, 267 S.C. 240, 226 S.E.2d 896 (1976); *State v. Cantrell*, 250 S.C. 376, 158 S.E.2d 189 (1967); see also Arthur W. Campbell, Law of Sentencing § 10.1 (2d ed.1991); Thomas W. Hutchison, et al., Federal Sentencing and Practice at 649 (2d ed.1994); 24 C.J.S., Criminal Law § 1494 (1989); *State v. Gulledge*, 326 S.C. 220, 228–29, 487 S.E.2d 590, 594 (1997). A trial judge generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come. *U.S. v. Magliano*, 336 F.2d 817 (4th Cir. 1964); *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). *State v. Franklin*, 267 S.C. 240, 246, 226

S.E.2d 896, 898 (1976). "Likewise whether multiple sentences should run consecutively or concurrently is a matter left to the sound discretion of the trial judge." *State v. Barton*, 325 S.C. 522, 532, 481 S.E.2d 439, 444 (Ct. App. 1997). Moreover, absent "partiality, prejudice, oppression or corrupt motive, this Court lacks jurisdiction to disturb a sentence that is within the limit prescribed by statute." Id.; *accord Stockton v. Leeke*, 269 S.C. 459, 462, 237 S.E.2d 896, 897 (1997); *Franklin*, 267 S.C. at 246, 226 S.E.2d at 898.

This Court finds that counsel was not deficient in failing to object to evidence summarizing event outside of the 2004-2007 range. Further, since those matters as well as his other criminal record were relevant to sentencing, he has failed to prove a reasonable probability that the result of the proceeding would have been different.

In the next resentencing specification, Applicant refers to Tr.p. 8, l. 2-5 during which Solicitor Mayes refers to the victim's aunt Margie Branham sitting in the back of the courtroom. In his pleading, the Applicant contends that Ms. Branham was not in the courtroom and claimed that he has SCDC officers that can back that up. During the PCR, the Applicant testified that she was not there. PCR 194.

This Court finds that evidence was presented through Heather Clamp of an extensive statement Margie Branham made. Resentencing Tr.p. 19-20. This Court is not aware whether Ms. Branham was in the courtroom or not for a part or all of the proceeding. However, the Applicant failed in his burden in proving to this Court that she was not there at all. However, it is clear that the result of the proceeding would not have been different whether she was there or not because her victim impact statement was properly read to the court. He failed to show information that undermines confidence in the sentence. A new sentencing hearing is not required.

In his next specification Applicant refers to resentencing transcript p. 9, l. 18-21 when Victim testified at trial about being threatened and one of the threats was to shave off her hair and the solicitor commented that victim had long beautiful red hair. In his pleading, the Applicant asserts that he wanted counsel Mauldin to object but she did not do so because he contends that the victim had short hair, not long hair and thinks it suggests some personal knowledge on the solicitor's part.

This Court finds that counsel's failure to object to the solicitor's comment about the victim having long red hair, rather than shorter hair as Applicant suggests, does not create 6th Amendment prejudice by creating a reasonable probability that the result of the sentencing proceeding would have been different.

In the next resentencing specification, he refers to Tr.p. 10, l. 17-23 when the solicitor is reviewing the victim's testimony and that the date of the call to law enforcement was April 26, 2015 and the solicitor indicated the call was approximately at 11:20 PM that night. The Applicant complains that this is a Confrontation Clause issue because Rose Heath, who he contends made the call, did not testify. He therefore contends it was uncorroborated.

For purposes of the sentencing proceeding, evidence that the call was made at 11:20 PM was admissible consideration by the sentencing court since hearsay is admissible. Further Sgt. Black testified at trial the call came in at 11:20 that night. Tr.p. 497, l. 25. The Applicant failed to show either deficiency or prejudice by the presentation of this collateral fact.

The next sentencing specification is Tr.p. 12, l. 6-12 when the solicitor describes that as a result of the extraction the name of the account is Bill Heath and his username is BillHeath1 and a twitter account also to show that the iPad was his. The Applicant claims that counsel should have objected because this information was not presented at trial.

This assertion is frivolous. During the trial, Det. Phipps testified about the user account page that came from the extraction of the iPad. He testified related to State Exhibit 32, the user account page that there was an account named BillHeath1 as a Twitter account and Bill Heath on a Facebook account. Tr.p. 606-607. He has proven neither deficient performance nor prejudice.

In the next specification concerning resentencing he cites Tr.p. 12, l. 19-p. 13, l. 6 during which the solicitor describes the watermarks on the image related to IncestTV.com and Sgt. Phipps's knowledge of that website and the solicitor described that based upon their research, the website was specific to acts of incest and displayed the Court Exhibit, State Exhibit 38 to the judge. In his pleading, the Applicant contends that his sentencing counsel should have objected to the solicitor displaying the image to the sentencing judge and describing the website. He claims this was inadmissible under Rule 404, 403 and was not part of the evidence on the 2004-2007 indictment. At the PCR hearing, the Applicant testified that the images from the trial were shown to the judge, which he wanted to make sure were still objected to.

This Court finds that since the exhibits were introduced at the trial, counsel was not deficient in failing to object to their consideration by the sentencing judge. He has similarly failed to prove prejudice when the evidence was consistent with the trial testimony and evidence.

In the next sentencing specification, Applicant refers to Tr.p. 13, l. 7-17 in which Victim described the image on the iPad on December 1, 2014. The Applicant makes the same assertion that the image was inflammatory and showed not have been shown. For the same reason as above, it is not subject to an objection by reasonable counsel because it was evidence that had been admitted at the trial.

In the next sentencing specification, Applicant refers to Tr.p. 13, l. 24-p. 14, l. 7 the solicitor summarized her question to Sgt. Phipps about when the image was created on the iPad and Phipps stated it was April 26, 2015, at 9:39 PM. At that point, Solicitor Mayes indicated that this time frame corroborated the period that victim reported to family members about the abuse. In his pleading, the Applicant complains about who Phipps's testimony corroborates because no one established the time except the SANE nurse.

This Court finds that sentencing counsel was not deficient in failing to object. The trial record shows that Margie Branham testified that she had been at a support group meeting that she attends every Sunday from 7:30 to 9:00 PM and thought she got the first text from the victim before 9 PM. Tr.p. 495-496. The SANE nurse testified that victim told her the assault occurred between 9:30 PM and 11 PM. Tr.p. 465, l. 17-19. Law enforcement testified that they received a call at 11:20 PM. Tr.p. 497. The victim testified that she communicated with her aunt and texted her about what was going on when she had gone into her bedroom after the assault. Tr.p. 355-356, 375-376. The solicitor's comment is a reasonable inference from the trial record where the victim had indicated that Applicant was using his iPad during that assault. Tr.p. 364.

Further, Sixth Amendment prejudice had not been shown by the failure to object to the solicitor's inference at the sentencing. The Applicant had already been convicted and sentenced for that crime. There is no reasonable probability that the result on the sentencing related to the 2004-2007 indictment would have been different. The allegation must be denied.

In his next sentencing specification, the Applicant refers to Tr.p. 14, l. 8-23 where the solicitor summarized the image with the watermark *daughterdestruction.com* and Phipp's testimony that the website had hardcore pornographic videos and that another image had been recovered from the iPad on April 26 at 10:39 PM. This portion also asserted that the victim had described Applicant, during the assault, was watching pornography showing a young girl being assaulted. The Applicant in his pleading complained that the image and description of the website in the watermark should not have been shown to the sentencing judge because it was inflammatory. PCR 195-196.[137]

This was addressed above in a similar issue concerning the other image and website. This Court finds that since the exhibits were introduced at the trial, counsel Mauldin was not deficient in failing to object to their consideration by the sentencing judge. Applicant has similarly failed to prove prejudice when the evidence was consistent with the trial testimony and evidence.

In his next specification, he cites to Tr.p. 15, l. 2-10 where the solicitor sets out the Applicant's prior criminal conviction history. In his pleading the Applicant complains that his counsel failed to object because he complains that these convictions were not used in his original sentence in 2018 and complains about how the solicitor had described the charge related to the 2004 ABHAN sentencing law.

This Court finds that this assertion is frivolous because there was no basis for the Applicant to object to the sentencing court's consideration of his prior conviction record. Similarly, Sixth Amendment prejudice was not proven.

In the next specification, the Applicant refers to Tr.p. 16, l. 20 - p. 17, l. 21 when the solicitor refered to victim impact evidence and Heather Clamp appearing on behalf of victim's aunt, Margie Branham. The solicitor indicated that the victim was not present and had moved forward with her life and her preface was for the Applicant to remain incarcerated for the remainder of her life. The solicitor further indicated that her aunt took custody the night of the April 2015 incident and there were concerns about her mother's ability and willingness to protect her. This included information

[137] At the PCR hearing, the Applicant denied that he had ever been on the cited websites. PCR 216-217

that her mother was charged with intimidation of a witness after evidence was recovered that she was not supportive of her daughter.[138] Solicitor Mayes stated that the victim graduated from high school early after living with her aunt.

In his pleading, the Applicant indicates that the information was all lies and that the aunt did not take custody of her that night and complained that it revealed his wife was charged with something she did not do and was vouching for the victim. He complained that counsel was not prepared for the hearing and failed to object. In his PCR testimony, the Applicant claimed that it was not true that the victim lived with her aunt during that time. PCR 197-198.

During the trial, the victim testified that in her last year of high school she lived with her aunt for a bit. Tr.p. 345-346. She testified that at the time of the trial she was living with her aunt. Tr.p. 358.

As to this specification, the Court finds that the Applicant has failed in his burden of proof to show prejudice by counsel's failure to object to the solicitor's comments about where the victim was living after the April 2015 assault with either the aunt or her mother as the Applicant suggests. There is no reasonable probability that the result of the Applicant's sentence would have been different if it was presented that the victim had been living with the mother rather than the aunt. This claim must be denied.

In the next specification related to resentencing, the Applicant cites Tr.p. 17, l. 21-23 in which the solicitor indicated that Margie Branham requested Heather Clamp[139] to read Branham's victim

[138] During the pretrial hearings, the intimidation of a witness charge was described by Judge McMahon as follows: "When analyzing the record that's been handed up to me, as to the consolidation, intimidation of a witness has certain dates, April 27th, 2015, July 1st, 2015, jail calls, the Defendant was urging the victim's mother to speak with the victim to dismiss charges. On one occasion, he is placed on the speakerphone and tells the victim on a speakerphone, "I just want to get out of here so bad." Tr.p. 42, l. 14-21.

[139] Heather Clamp is the Victim's Services Provider (victim advocate) in the Solicitor's Office of the Eleventh Circuit.

impact letter. In his pleading, the Applicant complains that Branham was not in the courtroom and speculates that Branham did not write the letter. He suggests that the letter was not authenticated and was a hearsay statement.

This Court finds that the Applicant's speculation about the author of the must fail because he did not meet his burden in proving that the letter was a forged document. Further, his complaint that Ms. Branham was there or not was not relevant to the State's decision to allow Ms. Clamp, the victim advocate, to read the letter from a family member and witness. The relationship of trusts between the victim and her was well established during the trial. This Court finds that had counsel objected to the reading, Applicant failed to show a reasonable probability that it would have been excluded and further that the result of the sentence would have been different. As noted previously, hearsay is admissible in sentencing proceedings and matters for consideration are left to the discretion of the sentencing judge. This claim must be denied.

In the next specification on resentencing, the Applicant cites Tr.p. 17, l. 24 - p. 19, l. 2 which is the solicitor's victim advocate, Ms. Clamp stating on behalf of Ms. Branham that she had learned from Branham that due to attempted contact with the victim from the Department of Corrections the office had contacted SCDC related to the attempts.

In his pleading, the Applicant complains that this is only information about Ms. Branham stating what she did which was hearsay. However, he admits that he has written letters to the victim in the interim since he was incarcerated. He further restates his disagreement with the history of the alleged living arrangements of the victim. He asserts that counsel should have objected.[140]

[140] This Court notes that the Applicant did not give a statement during the resentencing proceeding to challenge the statements. It was stated to the sentencing judge by counsel Mauldin that since this PCR was pending at that time and that she had asked the Applicant not to discuss what did not did not happen. Sentencing Tr.p. 25, l. 3-7.

This Court finds, as with the earlier assertions that assuming *arguendo* that counsel should have objected, the Applicant failed to show a reasonable probability that that the result of the sentencing proceeding would have been different, particularly because these matters were collateral and subsequent to the incident and defense counsel indicated that Applicant had a clean disciplinary record in the Department of Corrections. Tr.p. 26, l. 23-25.

In his next specification, on sentencing, he cites Tr.p. 19, l. 3-13 which is a portion of Ms. Branham's victim impact letter relating that due to the Applicant's actions, the victim did not have a chance to experience a childhood or have a safe home or a loving father and described the Applicant as a monster who chose to harm his child over years. The Applicant asserts in his pleading that his counsel should have objected to the hearsay and lack of authentication of the letter. He raised the same concerns at the PCR hearing. PCR 194, l. 7-21.

This Court finds that although the description of the Applicant as a "monster" would have been objectionable, the remainder of the comments in this portion had been proven beyond a reasonable doubt in the convictions that the Applicant had already received. As noted before, hearsay may be admitted in sentencing proceedings. This Court finds that the Applicant failed to prove 6th Amendment prejudice from the failure to object to the comments.

In his next specification, the Applicant cites to Tr.p. 22, l. 12-18 which are comments from Lt. Lint in aggravation of sentence and reflects that the victim had been tortured by the situation and had a lack of support from her mother and suggested that she was willing to lie in court about it to protect Applicant over her daughter. In his pleading, the Applicant contends that counsel should have been better prepared because these facts were not part of the trial record.

The Applicant confirmed this at the sentencing proceeding that with the PCR pending, it would not be good to argue about some matters. Sentencing Tr.p. 30, l. 5-6.

This Court finds that the Applicant failed to prove 6th Amendment prejudice, assuming *arguendo* that counsel should have objected. The bulk of his comments concerning the Applicant's action toward the victim were proven in court by the jury's verdicts. His comments about lack of support from the victim's mother and willingness to lie arose from the matter she was charged with. These go to the mother's support of the victim, but she is not being sentenced in this proceeding. Further, the Applicant failed to present her as a witness in this proceeding, so he failed in his burden additionally to prove that she was a supportive mother, in contrast to the victim's trial testimony. The Applicant s failed to prove to a reasonable probability that had the officer's comments about the mother been stricken that the result of the proceeding would have been different. It must be denied.

In the next specification, the Applicant cites to Tr.p. 24, l. 21- p. 25, l. 2 during defense counsel's initial portion of the plea in mitigation in which she stated the truth that the new sentencing judge was at a disadvantage because he was not the trial judge and viewed the actual witness as opposed to hearing the aunt's characterization of the victim's opinion and the effect the crime had on her. The Applicant contends that these comments are a cover-up for a state witness not being in the courtroom.

This Court must find that the Applicant's assertion about counsel's statement is frivolous and does not prove deficient performance. The claim must be denied. Counsel was presenting a reasonable attack on the State's presentation as well as the difficulty for Judge McLeod to sentence in a case when he was not the trial judge. It must be denied as a Sixth Amendment claim.

In his next specification, he cites to Tr.p. 27, l. 12 – p. 28, l.1 when defense counsel argued in mitigation that the Applicant was "on the cusp" of being transferred to Allendale C.I. as part of a character-based program reserved for people with good behavior and it will aid his future re-entry into society. In his pleading, the Applicant attacks counsel's comment as untruthful and as representing a lack of preparation because he has remained in a CB2 since 2019.

This Court finds the Applicant failed to prove deficient performance or prejudice by these favorable comments given to the sentencing judge. This Court questions the credibility of the Applicant's suggestion that counsel Mauldin made up this assertion relating to the possible transfer. Although hope or expectation may not have materialized within the Department of Corrections, this Court finds that Applicant has failed to show that had this information as stated about an application to the program was false. Further, he has not proven a reasonable probability that had counsel acted differently related to this issue that the result of the proceeding would have been different and resulted in a lesser sentence. It must be denied.

In his next specification, the Applicant cites to Tr.p. 30, 12-15 where counsel Mauldin presented the sentencing judge with a copy of a sentencing memorandum for his consideration. In his pleading, the Applicant contends that counsel Mauldin should not have provided it to the sentencing judge because it had been written by prior counsel Spangler who Applicant had removed as his lawyer and opines that this is a conflict of interest and that counsel should have self-reported.

This assertion is frivolous and fails to show that sentencing counsel was deficient in providing the memo to the court. The claim fails to also prove 6th Amendment prejudice. It must be denied.

In his next specification, the Applicant cites to Tr.p. 31, l. 3-7 where Judge McLeod stated that this matter was sent back to him for resentencing due to a procedural sentencing error. Judge McLeod acknowledged that he had a short conference with counsel because it was very confusing on what is still there and what is not. A recess was noted from 3:03 PM to 3:11 PM. Tr.p. 30, l. 22. In his pleading, the Applicant asserts that when the conference occurred that they had the Applicant's iPad with them and that counsel showed the trial court something that was on the iPad and asserted that it would have been something that was inadmissible in court. He further complained that the iPad was not related to the 2004-2007 indictment which he was being resentenced on. He contended that this was misconduct on the part of the trial judge and both counsel.

This Court finds that the Applicant's speculation, in contrast to the sentencing court's comments about the meeting, do not satisfy his burden of proof and this Court finds that they are not credible. In light of that finding, the Applicant has failed in the burden of proof to show either deficient performance or prejudice. It must be dismissed.

In the remaining assertion, Applicant cites Tr.p. 1-32 and claims that the transcript was inaccurate and requested that the entire resentencing hearing be played during the PCR proceeding. This Court finds as a fact that during the PCR hearing it was not requested by PCR counsel to be played. Further although there are portions of the transcript which reflect "indiscernible" (Tr.pp. 22, l. 1, p 30, l. 16, 20), the Applicant failed to show how this impacted on the rest of this proceeding. The request is denied.

CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice; and
2. The Applicant is returned to the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 12th **day of** July, 2024.

PERRY H. GRAVELY
Presiding Judge
Eleventh Judicial Circuit

Pickens, South Carolina