

Volume II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Georgetown County

Steven H. John, Circuit Court Judge

ORIGINAL

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S.C. Supreme Court

PATRICK P. BRYANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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INDEX

INDEX	i
TRIAL TRANSCRIPT	1
FINAL BRIEF OF APPELLANT	573
<i>STATE V. BRYANT</i> , UNPUBLISHED OP. NO. 2010-UP-006 (JANUARY 21, 2010)	583
<i>STATE V. BRYANT</i> , REMITTITUR DATED FEBRUARY 8, 2010	585
APPLICATION FOR POST-CONVICTION RELIEF	586
RETURN	606
POST-CONVICTION RELIEF HEARING TRANSCRIPT	610
ORDER DENYING POST-CONVICTION RELIEF	665
INDICTMENT	663

1 more perfect or credible just by definition of being a police
2 officer than any other witness.

3 So, there were other things that Ms. Shanks testified in
4 court that she made no mention of. By themselves fairly
5 small, you know, she makes a point of, "Oh, you know, he gave
6 me a ride to work." I'll talk about that in a few minutes,
7 "And he tried to give me his phone number, Mr. Bryant did,
8 and I crumpled it up and threw it back at him." Well, I
9 admit that's a fairly small thing, but she again, if you
10 believe the State's version she's been so careful and so
11 detailed and she's believable because she is so detailed but
12 still there are these things that didn't get into her
13 statement to the police, crumpled piece of paper, the sweaty
14 bodies, the condition of her fingernails.

15 The Judge will tell you that with regard to the criminal
16 sexual conduct with a minor charge, that's the one based on
17 Ms. Shanks's age in 2005. She has testified, "I was 15 years
18 old," and the Judge will instruct you that because of that,
19 because of her age, consent is not an issue but he will also
20 tell you that mistake of age is a defense.

21 They tried to, the State tried to bring in evidence that
22 Mr. Bryant could not reasonably have thought that this girl
23 was anything other than the age that she was, and they did
24 that by saying, "Well, the families knew each other. So, he
25 must have known," but no evidence that he was in school with

1 Ms. Shanks, that he knew where she went to school, some of his
2 nieces and nephews apparently played with some of her brothers
3 and sisters or were classmates but no evidence that he had
4 knowledge of that, no evidence that, other than someone maybe
5 saying, "She's too young," no indicating that she ever told
6 him old she was and no indication that anyone let him know,
7 "She is 15." I would submit to you that being too young is a
8 relative term. I guarantee you, I'm 42 years old and I think
9 just about anyone would tell me if I started chasing after a
10 20 year old, "Mr. Fox, you better watch it. She is too young
11 for you," but that person would be of age. It might not be
12 the greatest thing in the world but too young is a very
13 indefinite term to apply and to say that you were told someone
14 is too young for you and therefore you must know in addition
15 that person is 15 and too young to give consent to a sexual
16 act I think is a stretch and it calls for you to guess and
17 speculate and that's exactly what the burden of proof is
18 designed to prevent. You are not here to guess or speculate.
19 You are here to make your decision based on what you know and
20 you do not know. There has been no evidence that Mr. Bryant
21 was directly informed of this person's age. Should he have
22 been chasing around a person much younger than him, that's a
23 moral decision, probably not, but that does not mean that he
24 knew her age, and he has testified, and in fact, Ms. Shanks
25 admitted that she has been out at nightclubs and places where

1 alcohol is served, where you've got to, at least the law is,
2 be 18 or older to get in. Now, you know, I remember being a
3 teenager and in college and going to places, and you know,
4 getting in either with a fake ID or lying or maybe they just
5 didn't really pay close attention to who was coming through
6 the door, but I don't think it's unreasonable to assume if
7 you're out at one of these places and you see the people
8 around you to assume that the people that are there in the
9 club who've come in, their own free will, are old enough to be
10 there. So, she is out there representing that she is older
11 than she is. I think it is also a reasonable, based on the
12 evidence that you have, interpretation, Mr. Bryant has told
13 you that they had a previous relationship, maybe not, you
14 know, romantic relationship, but there was a previous
15 relationship, that this was a consensual act this day, for
16 whatever reason perhaps. You know, I told you at the
17 beginning back on Tuesday I don't know why someone would make
18 a false accusation. I can't possibly guess what their
19 motivation might be or the reasons that they would do that. I
20 only know sometimes it happens. You all will determine in
21 this case, and we, of course, have absolutely no burden of
22 proof as to that issue, but I don't think it's at all far-
23 fetched to imagine a scenario where people who are engaged in
24 a consensual act would leave their skin under another's
25 fingernails and perhaps in the heat of the moment clothes are

1 torn. I don't think that is a stretch at all and that is what
2 Mr. Bryant has told you happened, that this was a consensual
3 act, that they had a history, and as far as he knew based on
4 her behavior and what he knew of her from the community that
5 she was, in fact, old enough to give that consent, even if
6 that ended up being incorrect. The Judge will tell you just
7 like with any case, on any case in South Carolina whether it's
8 criminal sexual conduct case like we have this week or a
9 robbery or anything else, a victim who comes into court it is
10 not a requirement that there be other evidence to substantiate
11 their allegation. If you believe that person, just like any
12 witness, you believe them then that can be sufficient to
13 return a verdict of guilty. I mean, if you believe that by the
14 testimony of the victim alone that the State has met its
15 burden of proof beyond a reasonable doubt then you can
16 convict. There's no requirement in the law in any case that
17 there be some kind of extrinsic or other evidence, but you
18 certainly, as with any witness, whether it's the Defendant
19 testifying or Ms. Shanks or any other witness you certainly
20 can look and say, "You know, I don't know. I would like to
21 see what else there may be to back that up." One of the
22 elements of criminal sexual conduct in the first degree is the
23 use of aggravated force. The Judge will define that for you,
24 what aggravated force is. There is no evidence of that in
25 physical evidence. The nurse who testified, they called said

1 they had that -- those initials, BRATS, bruising, redness,
2 abrasions, tearing, swelling, right, they look for those
3 things on a person who is an alleged victim of sexual assault.
4 There was no bruising. There was no swelling. There was no
5 redness, and again, that got back to the sweaty bodies, see
6 that? Sweaty bodies was a nice explanation because it
7 explained two things. The sweaty bodies explained why there
8 were no scratches on Mr. Bryant, but it also explained why
9 maybe there weren't any -- any of the BRATS indicators on Ms.
10 Shanks because if you remember the nurse testified, ``Well,
11 you know, moisture of any kind, even a sweaty body might be
12 enough to not show these things, the bruising, redness,
13 abrasions, tearing and swelling.'' Now, she -- when I asked
14 her I showed her her own form where she made, you know, any,
15 what, you know, where she could indicate those things, and she
16 said, ``Well, you know, you're right. I didn't actually note
17 any, any bruising but that was just a mistake.'' Now, she
18 had herself, they were -- she didn't have herself. She was
19 qualified as an expert doing the sexual trauma nursing, you
20 know, that she described to you, but again, that allows her to
21 give her opinion, it doesn't make her a super woman and she
22 admits, ``Oh, I just forgot to put that in there that she did,
23 in fact, have maybe a bruise on the face on some other,'' but
24 there's nothing else in the record. There was no doctor who
25 examined her, didn't come in and testify about anything like

1 that, and when she had a chance to write it down she did not
2 put anything like that and admitted that she did not in her
3 own report, and in fact, she simply indicated there was a
4 small scratch to the right wrist and nothing else, nothing
5 about any kind of bruising or even redness or swelling or
6 anything at all to the face. So, I think you can then -- well
7 -- Ms. Shanks testified, ``Absolutely no way was I smoking
8 marijuana on the day this happened.'' Heather Dailey from SLED
9 was here yesterday to tell you that two years after the event
10 blood that had been taken from Ms. Shanks in June of 2005, two
11 years later was finally sent to SLED and she did toxicology
12 tests on that looking for specifically alcohol and marijuana,
13 and she, if I recall her testimony, said that's done -- what
14 they look for they have kind of their standard things they
15 look for, but also, you know, at the request or in the
16 indication from law enforcement, you know, ``These are the
17 things. Please look for these things.'' I wonder why with
18 Ms. Shanks's convictions in the past for possession of crack
19 cocaine why they didn't request that but they didn't. Then
20 there's no evidence that she would have been under the
21 influence of anything other than possibly marijuana and Ms.
22 Dailey from SLED testified she found evidence of marijuana,
23 you know, the THC. I cannot pronounce, cannabis. She used
24 another word, but you know, the THC, the element in marijuana
25 was there and she could, although not pinpoint when the person

1 had smoked marijuana, that it was in the range of between
2 three and I think she said either 48 or 50, 48 hours prior.
3 So, the blood was drawn, testimony was, at about three a.m. on
4 June 6th, about 12 hours after this alleged assault. That's
5 well within the range and up to 48 hours. So, that's well
6 within the range and Mr. Bryant said, ``When Ms. Shanks came
7 to my house I smelled marijuana," and that is consistent with
8 what, now, Ms. Shanks denied that, but that is absolutely
9 consistent, what he said, is backed up by the evidence from
10 Heather Dailey, don't know for sure, maybe she smoked it way
11 before and that was her way of answering, you know, ``I wasn't
12 high then," but it certainly is consistent. That is within
13 the window that Ms. Dailey testified to.

14 I will close by simply urging you to again consider some
15 of these things and make your determination not based on --
16 the Judge will tell you you have no enemies to punish here or
17 friends to reward. If you live up to your oath and duly
18 consider this evidence and deliberate, whatever your verdict
19 is, no one will have a quarrel with that, but you have
20 justice, sometimes it's argued by the State, you know, come
21 back and do justice and what they mean is come back and
22 convict, and sometimes that is justice, but not automatically.
23 Justice is a correct verdict, and if you live up to your oath
24 and consider all the evidence and don't take into account
25 rewarding or punishing anyone based on what you perceive to be

1 their character then and make your deliberation and your
2 determination based on the evidence and the law, not emotion,
3 which is the oath that you swore, then no one will have a
4 problem with your verdict, no one will have any quarrel, and I
5 believe if you do that, that if you truly think about this and
6 set aside the emotion and ignore some of the red herrings and
7 there are others I haven't gone into, some of those about
8 Crystal Smith and some others, some things about Mr. Bryant's
9 past. I'd be remiss as his attorney if I didn't address this.
10 He does have a history. He has not been a good boy. He's not,
11 you know, a nice person in society in that regard. He's got a
12 history. You've heard him on these tapes, but you swore an
13 oath to follow the law and the law says with regard and this
14 applies to Ms. Shanks as well, with regard to a prior criminal
15 history it is relevant for a very specific purpose and that is
16 for you to assess the credibility of the witness. You may say
17 a person with a record, "I'm not going to believe what they
18 say," or you may say, which I think would be very reasonable,
19 "I'm going to be aware of the record, but I'm going to listen
20 to the evidence and I'm going to listen to the person
21 testify." What it is not proper for and what you are not to
22 consider any prior record for is to somehow in your mind say,
23 "Well, he's done something before, he must have done it
24 again." It's very clear that that would be an improper
25 analysis; and so, I think some of those things, it's there,

Closing Argument by State

501

1 it's admissible evidence, it's there for impeachment purposes,
2 but I, again, urgently stress to you that the fact that he has
3 a criminal history is not relevant to whether or not he
4 committed this offense. It's a factor for you to consider in
5 judging his credibility to be sure, just as Ms. Shanks's
6 criminal history is an element for you to consider with regard
7 to her, but I would urge you again to keep your eye on the law
8 and apply it as the Judge gives it to you and return a just
9 verdict. Thank you.

10 THE COURT: And for the State, closing argument.

11 MR. MODICA: Now, now we know, now we know why or at
12 least we have a decent understanding why victims of rape don't
13 come forward. From time to time it must have seemed like to
14 you that the trial was of the victim and not of the Defendant.
15 It wasn't enough, it wasn't bad enough that this horrible
16 grotesque, disgusting horrible sexual act was perpetrated on
17 her. It wasn't bad enough that she had to come say these
18 things in front of 14 strangers. It got worse. When she
19 listened to the Defendant get up there and say those
20 absolutely horrible things about what happened that day, those
21 incredible lies, and believe it or not it is happening right
22 now to her while she awaits your verdict, while she hopes for
23 justice in this case, and we wonder why victims don't tell.
24 Not anymore.

25 There's a few other whys that I think are relevant in

1 this case and one of them would be why is it for a young girl
2 or a woman in this situation for no not to mean what it says,
3 "No, I don't want you. No, don't touch me. I have a
4 boyfriend." No does mean no, not to the Defendant.

5 Another why would be why in the world would Natalie
6 Shanks come in here and say this happened and go through this
7 ordeal if it wasn't true. In any time in these two years
8 decide, you know, "I don't want to be involved. No, it
9 didn't really happen that way. It was consensual," and all
10 this would be behind her and all this that you've -- that
11 she's had to relive wouldn't have happened and I find it
12 interesting that Mr. Fox wants you not to guess and speculate
13 and whim, but when it comes to this he wants to steer you away
14 from it and he talks about red herrings and really his whole
15 summation was a bunch of red herrings. It wasn't focusing on
16 the facts. He was -- smoking -- about, "Oh, she, maybe she
17 smoked marijuana." Well, for example, who cares if she
18 smoked marijuana? Why we should care if she smoked marijuana?
19 I tell you why we should care. The reason why that question
20 is permissible and relevant in this case is that if she smoked
21 marijuana or was drinking during the period of time during
22 when this incident happened, then that would be relevant to
23 show that maybe because she was under the influence of alcohol
24 or drugs her memory about the events and how the events
25 occurred is impaired. That's why it's relevant. Well, we

1 know that there was no alcohol on board, number one, which the
2 Defendant said quite to the contrary. He said that she was
3 drinking, and all she -- all the -- Heather Dailey can tell
4 you is that there was some consumption, it could -- might have
5 been even 48 hours afterwards. Although she can't tell you
6 the effect and how much marijuana affects a person, she tells
7 you that the THC level, the active ingredient in marijuana
8 peaks within 15 minutes of use. So, it's not something lasts
9 for hours and hours and hours and hours, but that's a big old
10 -- that's the red herring. That's what Mr. Fox wants you to
11 focus on.

12 So, why, why in the world would she say that it happened?
13 When you decide this case you have to use your common sense
14 about things. There isn't one iota of proof to show that she
15 has any motivation. If as the Defendant claimed they had a
16 relationship, whether the relationship was for real or was
17 just for sex, according to him she wasn't complaining about
18 it. So, all of a sudden on this day out of nowhere for no
19 reason she cries rape against that man. Does that make any
20 sense whatsoever? You know it doesn't. I thought that the
21 Defense would argue, "Oh, she had to come up with an excuse
22 for being late for work." Well, according to his testimony
23 he dropped her off and she came back out and went back to
24 work. So, there was no problem with work, no evidence that
25 she was in trouble with her mom. According to the Defendant

1 they were having a blue moon fling. Well, why mess that up by
2 crying rape? It wouldn't make any sense. Why would you
3 subject yourself to all of this that I have spoken about in
4 great detail unless it was true? Well, why, why then would
5 the Defendant lie about it? You know why? If you believe him
6 he has got absolutely everything in the world to gain, and if
7 you don't, on the other hand, he has everything to lose. What
8 greater motivation to lie than that? There is none.

9 Now, I want to take a moment to talk about the charges.
10 There's criminal sexual conduct in the first-degree and
11 there's criminal sexual, criminal sexual assault with a minor.
12 There are two separate, distinct charges. You can find the
13 Defendant guilty of both because one is based upon age and one
14 is based upon aggravated force and other elements that the
15 Judge will define for you. You can find him guilty of both,
16 and I find it extremely interesting that the Defense in this
17 case is, "Well, we had consensual sex. Oh, and by the way, I
18 didn't know her age. So, let me walk." Criminal sexual
19 conduct with a minor exists, that charge exists obviously to
20 protect minor children, children less than 16. That's
21 obvious. That's why that law is there. The Judge is going to
22 tell you that there is a Defense of a mistake of age, but that
23 must be tempered with the reasonableness of it, and I will
24 tell you why. In any case in which an older person had sex
25 with somebody less than 16 years of age, they could walk into

1 court, get on that witness stand and say, ``Oh, I thought she
2 was older than 16," and if that happened it would be what I
3 would call a perfect defense, meaning anybody who claimed that
4 would never, ever, ever be found guilty of criminal sexual
5 conduct with a minor. Well, that can't possibly be the case
6 can it? Of course not. So, what you have to do is you have
7 to use your common sense and reason to determine under the
8 facts and circumstances as you heard them whether or not the
9 Defendant knew or should have known the age of the victim.

10 Now, one of the things the Judge is going to tell you is
11 about criminal intent, the Defendant's mind and I think he's
12 going to use this comparison, you can't pop open a person's
13 brain and pull out a tape and see what they're thinking.
14 Well, I can't do that. I can't prove to you, there is no way
15 I can prove to you that he, you know, his mind, he was
16 thinking in his mind on that day that she's less than 16. I
17 can't do that because I can't pop open his brain. However, I
18 can prove based upon all the facts and circumstances
19 surrounding this event that he knew or should have known her
20 age, God bless, and how is that? These families knew each
21 other. They had known each other for years. Her mother and
22 his brother were friends. They worked out together. She --
23 they had known him for years, two, two and a half years before
24 that when he worked at Food Lion. He knew. He knew. He knew
25 -- now, she was 15 when this happened. If it's two, two and a

1 half years before, she's either 12 or 13. You're going to
2 tell me that that guy, the Defendant didn't have a clue how
3 old she was? Then, and then he had the arrogance while he was
4 on the witness stand when I asked him about what grade level
5 his niece was in to say, ``Well, I don't know.'' He lives
6 right by all his brothers and sisters and he doesn't how old
7 his niece is. Well, you know, that's a boldfaced lie. You
8 knew he wouldn't go down that road because that road would
9 show that he knew how old she was. You heard Natalie testify
10 that she was a grade older or a grade above her younger sister
11 and the Defendant's niece. You use your common sense. He
12 knew or should have known. It is absolutely positively
13 reasonable under those circumstances to prove, for you to be
14 convinced beyond a reasonable doubt that he is, in fact,
15 guilty of that charge.

16 I just want to talk a moment about reasonable doubt. I
17 remember the Defense attorney saying in his opening that
18 reasonable doubt is beyond all doubt. Oh, no, it ain't.
19 There isn't a way in the world that I could prove that and
20 there isn't a prosecutor in this country that has to prove
21 guilt beyond all doubt. It's impossible. Nobody would be
22 convicted. It's reasonable doubt, and the Judge will define
23 that for you, but if you are firmly convinced as to the
24 Defendant's guilt then you must convict.

25 Now, this whole concept of reasonable doubt is kind of

1 difficult to grasp because on the one hand the Judge is
2 telling you that the Defendant has the presumption of
3 innocence, that no matter how -- even if you, you know, you
4 can't even think no matter how much proof I have proved, you
5 can't even think before you go back there after the Judge's
6 instructions that he may be guilty. You know why? Because he
7 has that presumption of guilt [sic], okay. Well, that kind of
8 confuses you when it comes to reasonable doubt. Well, if he's
9 got this presumption how can I go down that road of reasonable
10 doubt? There's already built in reasonable doubt because he
11 just told me he's presumed to be innocent. Well, you got to,
12 you know, use your common sense, listen to the Judge's
13 instructions. Reasonable doubt means that when you think
14 about all the stuff that happened in this case, really, are
15 you firmly convinced as to the Defendant's guilt. Now, I was
16 just thinking, some time has passed, that's a digital watch,
17 when will this end, as she sat there in that room being raped
18 by the Defendant. When will this end because minutes seemed
19 like hours. Every day at 3:47 p.m. when she looks at a
20 digital clock or a watch she gets to remember the horrible
21 things that the Defendant did.

22 Getting back to reasonable doubt, you know there are two
23 versions of the events. The Defendant is claiming one way.
24 The victim is claiming the other. Well, you can walk out of
25 there and say, "Well, there's two different versions of

1 events. That's reasonable doubt." Throw up your hands.
2 "That's it. Okay, not guilty." Doesn't work that way. Your
3 oath requires you to find the truth of the matter. You are
4 the fact finders in this case. You must determine who is
5 telling the truth and who is lying, you know, a horrible
6 burden to place upon anybody. It's a horrible burden to place
7 upon a jury, but that is your obligation. You must determine
8 who of these two people are telling the truth. Who has
9 motivation, who doesn't have motivation? Who gains and who
10 will lose?

11 The other thing I would say about verdicts is that you
12 theoretically could find him guilty of one and not the other
13 but I ask you this, don't compromise on your verdicts. Don't
14 do that and this is the reason why. If he didn't do these
15 things and you believe him, then he doesn't need you to do
16 that, but on the other hand if he did these horrible, horrible
17 things to this 15 year old girl, he certainly doesn't deserve
18 it. He didn't compromise with her when he had her on the
19 ground, on the bed, no compromise there. "I got a boyfriend.
20 Please, no," no compromise there.

21 In regard to the Defendant's credibility, I don't want to
22 beat a dead horse, and I'm not going to go over everything
23 that he said, but you know, it was funny that, you know, it
24 was, it was, it was everything. There wasn't anything that he
25 was willing to admit to. I mean, even the smallest things,

1 said there was an air-conditioning. There was no air-
2 conditioning. He said his brother was living there. There's
3 no way to prove that his brother was living there. He kept
4 saying these things. He told the police that he lived alone
5 but then he testified that his brother lived there. He said
6 that in regard to criminal domestic violence of a high and a
7 aggravated nature that Crystal Smith wasn't the victim. She
8 is the victim. We know that.

9 He spoke about the way the interview went, that
10 Investigator Digsby mixed up the two, and you know that
11 doesn't make any sense to mix up criminal domestic violence
12 with the other charge that we have here. That makes no sense
13 whatsoever. This whole thing about Crystal Smith being his
14 steady girlfriend, that's a lie. The whole thing about making
15 the phone calls, he implied as if that he made the phone calls
16 because he was, you know, was trying to work out the
17 relationship, when the fact of the matter he was trying to
18 convince her not to go forward with the charges. I mean, it
19 just piles up. The lies just kept coming and coming and
20 coming. I gave him every opportunity prior to playing the
21 jail calls, gave him every opportunity to admit those things
22 and he wouldn't, and when I would play them he still wouldn't.
23 Is that somebody you want to trust and believe saying horrible
24 things about the victim for no good reason. When he -- I
25 asked him, ``Did you say horrible things about her?'' ``No, I

1 didn't say horrible things.'" The truth of the matter he did.
2 Take a moment to talk about the fact that there was a
3 lack of injuries on the victim. Well, there's some injuries
4 but there certainly isn't a lot, and you know, rape doesn't
5 happen in a clinical setting. Each one is separate and unique
6 and she described as to what was going on in the rape and I
7 think it was fairly obvious to you now that they were, in
8 fact, perspiring. Well, if he's in close contact with her and
9 he's pushing her down and he's using basically his body weight
10 to get on her and she didn't testify that he ever struck her,
11 slapped her, punched her, that you wouldn't necessarily expect
12 to find bruising, but if you did slap her or punch her or kick
13 her you would expect to find those bruises. If he's on top of
14 her wrestling you're not going to get those kind of injuries
15 where you have grab marks. You're not going to get those kind
16 of injuries because there's fluidity going on. There's
17 movement going around as she described. Every time he tried
18 to put in and he got it in, she, she moved out of the way. It
19 would be -- well, I don't want to use too strong of words. It
20 would be incredible for a jury to acquit a Defendant because
21 the victim of a rape case has a lack of injuries, and I don't
22 think I need to say any more about that, and you know, this
23 whole thing about the nails and sweatiness and how hot it was,
24 I think that's a red herring. The Defendant was confronted,
25 he knew that before he went there, although that was plenty,

1 too, he knew before he was going there that there were
2 allegations of rape. When he walked in there he chose to lie
3 and say, "I never had nothing, no how." When, if it was
4 consensual and he didn't know her age, all he had to do say,
5 "Yeah, we had sex. We've been having sex for a while. You
6 know, I can tell you, you know, people we've been with who
7 know, who have seen us at the club together." None of that
8 is there. In fact, I didn't hear him mention one name of
9 anybody during his testimony that would corroborate them being
10 together when they're supposedly hanging out in clubs, not
11 person one, not name one. You should find that very
12 interesting, but you know, this whole idea about, you know,
13 the scratching, well, first of all, one of the things is that
14 his reason for the lack of -- for the scratching was that they
15 were making love and like at some point she was scratching
16 him. I mean, you know, it was kind of like an afterthought.
17 Well, we know that from Tom Digsby that he alerted to that.
18 She said to the police that he -- she scratched him a lot, and
19 you know, first of all she is in close contact, sweating. So,
20 you're not going to be able to dig in, and then secondly, he's
21 a police officer, a detective, nosy, looking around trying to
22 corroborate things. You don't think for a moment that he
23 looked at her nails, to look at them and go, "Hey, you know,
24 hey, gee, why didn't you? Why aren't there any visible marks?
25 Why didn't she scratch him?" And by the way, if she's going,

1 if she's going to lie about the events, why would you -- why
2 would you go to great detail to say that you scratched him all
3 over the place? Why would you do, why would you do that? I
4 mean, she was there. She would know whether or not she had
5 scratched him. She would know if she had drawn blood. Why
6 attract attention to something that's not true unless it is?
7 Right?

8 You remember that her testimony was consistent with what
9 she told Detective Digsby and it was consistent with what she
10 told you. The best the defense attorney could do, the best
11 really arguably he could in regard to cross examining her was
12 this crumpled piece of paper. Well, I don't mean to be
13 belittling but that's pretty darn pathetic to say that you
14 should find her [sic] guilty because she said she crumpled the
15 piece of paper. It's not in her statement. She didn't need
16 to say that she scratched him all over the place and claim
17 rape. Wouldn't need to do that, but what is interesting about
18 her statement when I asked her specifically to go over a
19 portion of her statement she said, ``So, I started scratching
20 him because I figured that if he really tried to hurt me or
21 kill me the police would know he did it because I know they
22 would check under my fingernails.'' Can you imagine being
23 raped and think that you might die because this person knows
24 you and you scratch him to leave behind a note, a death note
25 about what happened and who did this to me? Can you imagine

Closing Argument by State

513

1 that horror? And then he tried to cross examine her about the
2 beer, that she didn't tell the police the beer. In fact she
3 did tell the police there was beer.

4 I have been talking about for about 25 minutes and 28
5 seconds, which is about the time that these horrible things
6 are happening to her. Can you imagine? 3:47, the nightmare
7 of 3:47. It is time to end her nightmare.

8 THE COURT: Ladies and gentlemen, what we are going
9 to do at this time, as I'd said to you earlier, we're going to
10 take a brief break, probably about ten minutes duration, come
11 back for the charge on the law. Again, please don't discuss
12 the case among yourselves. Enjoy your break. If someone
13 wishes to go outside to take a break we will make that
14 available to you. Let's everyone else remain where they are
15 while our jury departs to the jury room.

16 (Whereupon, the following takes place outside the
17 presence of the jury.)

18 THE COURT: Counsel, let me get you to come up to side
19 bar if you will and let's just talk a moment up here. Court
20 will now be in recess ten minutes.

21 (Whereupon, a bench conference was held.)

22 *****OFF THE RECORD*****

23 (On the record.)

24 (Whereupon, the following takes place outside the
25 presence of the jury.)

1 THE COURT: All right, thank you. Please be seated,
2 ladies and gentlemen.

3 MR. MODICA: Your Honor, may I approach with Mr. Fox?

4 THE COURT: You may.

5 MR. MODICA: And I'll show him this. May we
6 approach, sir?

7 THE COURT: I said yes, that's fine.

8 (Whereupon, a bench conference was held.)

9 THE COURT: All right, court will come to order,
10 please, and counsel and staff, let me just tell you, I think
11 my charge is probably 20 minutes, if that much, maybe not,
12 and rather than discuss lunch with the jury on the front end,
13 I thought we'd send them back, let them begin deliberations
14 probably around a quarter or ten till 12. If we don't hear
15 something by 12:15, and not that we would expect to, but if
16 we don't we'll just set that benchmark as our time that we'll
17 go to the jury at that time, tell them that it takes an hour
18 to get lunch if they want it, do they want us to order it and
19 I'll give either side an opportunity to comment if you have
20 some problem with that. What says the State?

21 MR. MODICA: No problem, Your Honor.

22 THE COURT: All right, Defense?

23 MR. FOX: No problem with that, Your Honor.

24 THE COURT: All right, then we'll proceed in that
25 fashion.

Charge

515

1 All right, then ladies and gentlemen, I believe we're
2 ready for the jury. Please bring in the jury.

3 (Whereupon, the following takes place in the presence of
4 the jury.)

5 All right, ladies and gentlemen, welcome back to the
6 courtroom, and I trust you had a good break. I want to make
7 sure before I began to speak with you that you can hear me.
8 Can everyone hear me there on the back of the jury box?

9 (All indicate affirmatively.)

10 THE COURT: All right, if at some point in this
11 proceeding you can't or you have some difficulty let me know
12 that and I will respond appropriately to that. We're now at
13 the point in the case where I give you the charge on the law,
14 which as I discussed with you you would hear from me before
15 you retire to deliberate, and the first thing I want to tell
16 you as I begin these comments to you is that I sit
17 logistically here in the courtroom where I can look beyond a
18 witness or beyond counsel and observe the jury. I've done
19 that throughout this trial. I try not to do that too much. I
20 don't want you to be nervous and feel that I'm staring at you
21 over here, but I do look to make sure that you're comfortable
22 and just what your position is here within the courtroom and
23 every time I've done that in this case I've looked up and
24 I've seen that you've sat there with close, what I would call
25 rapt attention and close focus and I appreciate that. You

1 may recall we discussed Monday that I'm well aware that each
2 of you brought a busy life here to the courtroom on Monday
3 and that you still have a busy life here on Thursday. You've
4 set aside those life emergencies or focus or whatever you
5 wish to call that because life can be quite busy to focus on
6 this case and I appreciate the level of focus you have given
7 because in a few moments when you retire to deliberate you're
8 going to be in a position to do that, to determine the facts
9 because you've listened closely, you've given both sides your
10 full focus and I appreciate that level of commitment to our
11 justice system, to this court and to this case in particular.

12 Now, as you are aware, the State has charged the
13 Defendant, Mr. Patrick Bryant, seated at the table furthest
14 from you, the State is seated at the table closest to you
15 because they have the burden of proof, with two different
16 charges that arise out of the same occurrence and these are
17 criminal sexual conduct in the first degree and criminal
18 sexual conduct with a minor in the second degree, and you
19 will have the indictments -- well, you've heard me refer to
20 the indictments throughout the course of this trial and the
21 cases are based on the indictments. Now, please understand
22 and you heard it here in the courtroom the Defendant pled not
23 guilty to those charges, and by that plea denies the
24 allegations contained in the indictments and that's what the
25 indictments are. They're simply a set of allegations.

Charge

517

1 They're not evidence. They're not to be accepted as the
2 truth because the indictments are just the paper by which
3 this prosecution is commenced. The evidence in the case that
4 you are to consider is the testimony of the various
5 witnesses and the exhibits that have been introduced into the
6 record during the trial which you'll have in the jury room
7 with you, and that's why as I told you during the trial we
8 try to pay close focus on what is in evidence and what is not
9 because what is goes with you, what is not does not go back
10 to the jury room with you.

11 Now, please understand, as I said, you heard the
12 Defendant plead not guilty but even if the Defendant had
13 entered no plea, the Defendant is clothed with a presumption
14 of innocence, is presumed innocent of these charges and this
15 presumption of innocence continues with the Defendant
16 throughout this case and entitles the Defendant to a verdict
17 of not guilty unless and until that presumption of innocence
18 is dispelled by evidence that satisfies you, the jury, beyond
19 a reasonable doubt and that's the standard, we'll talk about
20 that in just a moment, that the Defendant is guilty of either
21 or both of the offenses charged and the State has proved each
22 and every element of that particular offense beyond a
23 reasonable doubt. That's a high standard, ladies and
24 gentlemen.

25 Now, as I said to you when we began, you're the judges

1 of the facts and I'm not the judge of the facts, no one else,
2 the lawyers, no parties, they're not the judge of the facts.
3 You are the judges of the facts and I discussed with you some
4 things that you may wish to look to to determine credibility
5 and believability. I'll not do that again for -- to avoid
6 duplicity or duplication, excuse me, but -- unless you need
7 for me to do that, but I would simply say to you again as I
8 said when we began, you use what criteria you believe every
9 day and you use every day in determining credibility and
10 believability with everybody that you deal with. I will say
11 though that in determining the facts of the case, you may
12 believe part of a witness's testimony and completely
13 disbelieve the rest. You may believe one witness against a
14 whole group of witnesses or you may do just the opposite.
15 You may believe as much or as little of any witness's
16 testimony that you think proper. I will also say to you the
17 fact that testimony has come into the record may not be
18 directly controverted doesn't mean you have to accept it as
19 true and undisputed. You must still gauge the credibility
20 and believability of the witness through which it comes to
21 determine the believability of the facts offered through that
22 particular testimony. Now, keep in mind throughout the
23 process of determining the facts and weighing credibility and
24 believability, you have one objective and that's to seek the
25 truth here regardless of from which witness or from which

Charge

519

1 side of the case that may come.

2 Now, there are two types of evidence in cases such as
3 these. I want to discuss those with you. There's direct
4 evidence and there's circumstantial evidence. Direct
5 evidence is the testimony of a person who asserts or claims
6 to have actual knowledge of a fact. That would be something
7 like an eyewitness who testifies about what they saw or heard
8 or did. That's direct evidence.

9 Circumstantial evidence is indirect evidence.
10 Circumstantial evidence is proof of a set or chain of facts
11 that indicate the existence of yet another fact. Again,
12 that's indirect evidence. I tell you the law makes no
13 distinction between the weight or value to be given either
14 direct or circumstantial evidence, nor is a greater degree of
15 certainty required of one than of the other. You should
16 weigh all the evidence in the case, both direct and
17 circumstantial, and after weighing all the evidence if you're
18 not convinced of the guilt of the Defendant beyond a
19 reasonable doubt as to the particular charge which you were
20 considering at the time, you must find the Defendant not
21 guilty of that charge.

22 Now, I talked to you a moment about weighing the
23 evidence and I -- and I, a moment ago about that, and I've
24 been in your jury room before, not while you've been back
25 there, but there's not some set of scales to go in there and

1 weigh the evidence on, and I'm sure that you've noticed that
2 and that's because weighing the evidence is entirely a mental
3 process, and I would say to you that evidence which weighs
4 with you is evidence that convinces you of its truth, again
5 regardless of from which witness or from which side of the
6 case it may come.

7 Now, the same constitution that makes you the judges of
8 the facts makes me the judge of the law, and I want to tell
9 you that you must accept the law as I give it to you in this
10 charge. There's a lot of talk on the street about what the
11 law is and most of that is incorrect, and you may come into
12 the courtroom with some presumption about what you believe
13 the law is or should be on a particular subject. I ask you
14 to set all that aside and please accept the law as I give it
15 to you in this proceeding, apply it to the facts as you find
16 them in this case, and from that you will reach a verdict
17 which is just and true, and just think about that with me for
18 a moment if in some way I'm giving you the file incorrectly,
19 which I am not doing because I reviewed it, and counsel has
20 reviewed it, and it is a correct statement of the law, but if
21 somehow I do give you an incorrect statement of the law,
22 well, there's a record being made here. That error would be
23 preserved. There would be another day and another time when
24 that could be resolved if necessary, but I tell you, I am not
25 doing that, and again, I ask you today accept the law as I

Charge

521

1 give it to you, apply it to the facts as you find them and
2 reach a verdict which is just and true.

3 Now, in a criminal prosecution of this type as I've
4 already stated to you the State, that's the Prosecution, has
5 the burden of proof. I have said it a dozen times. The
6 Defense has no burden of proof, and is, in fact, presumed
7 innocent, and in this state according to our constitution the
8 Prosecution must prove its case to the standard of proof we
9 call beyond a reasonable doubt before a finding of guilt may
10 occur on any charges before this Court. If the State fails
11 to meet this high burden the Defendant is entitled to
12 acquittal. So, you say, "All right, well, then what is a
13 reasonable doubt?" And I'm going to start by telling you
14 what it's not. It's not an imaginary or a fanciful doubt.
15 It's not a weak doubt. It's a doubt that the words imply, a
16 doubt for which you can give or assign a reason based on the
17 testimony and evidence in the case. A reasonable doubt is
18 not any sort of a doubt that you and I know from everyday
19 experience. We may have any sort of a doubt about any matter
20 no matter how trivial, such as what pair of shoes to wear to
21 an event or what tie to wear to some event. That's not a
22 reasonable doubt. A reasonable doubt is a doubt that makes
23 an honest, sincere and conscientious juror in search of the
24 truth hesitate to act. Proof beyond a reasonable doubt is
25 proof that leaves you firmly convinced of the Defendant's

1 guilt. If you have a doubt for which you can give or assign
2 a reason based on the evidence in the case then the Defendant
3 is entitled to a verdict of not guilty on that particular
4 charge. Reasonable doubt may arise from the evidence that's
5 in the case or from the lack or absence of evidence in the
6 case, and you the jury must make the determination of whether
7 reasonable doubt exists as to the guilt of the Defendant with
8 regard to these two charges. I will tell you though the very
9 fact that the jury engages in a full and free discussion on
10 the issue of guilt or non-guilt back in the jury room with a
11 conversational ebb and flow on those issues doesn't mean
12 that reasonable doubt automatically exists in this case or
13 any other case for that matter.

14 Now, I further charge you that criminal intent is a
15 necessary element of each crime that must be proved by the
16 State beyond a reasonable doubt. Criminal intent is always a
17 matter that must be determined by the jury from the
18 circumstances that surround a situation. You and I know that
19 we can't prove intent to some mathematical certainty and
20 there is no way that medical science allows us to dissect a
21 person's brain or open a person's brain and determine what a
22 person had in their mind at the particular point in time.
23 So, the law states that criminal intent may be inferred from
24 the circumstances shown to have existed both before and after
25 the fact. This is how you the jury make a determination of

Charge

523

1 whether or not the element requiring criminal intent is
2 present. Criminal intent is a state of mind that operates
3 jointly with an act or omission in the commission of a crime.
4 Criminal intent is a mental state of consciousness
5 wrongdoing. So, it's up to you the jury to determine what
6 the Defendant intended to do based on the circumstances shown
7 to have existed and I tell you the State must prove criminal
8 intent beyond a reasonable doubt just as the State must prove
9 every element beyond a reasonable doubt as I have previously
10 explained to you.

11 All right, now, I want to define for you first degree
12 criminal sexual conduct. The Defendant is charged with
13 criminal sexual conduct in the first degree. The first
14 element that the State must prove beyond a reasonable doubt
15 in order to prove this charge is that the Defendant engaged
16 in a sexual battery with the victim. A sexual battery is
17 sexual intercourse, cunnilingus, fellatio, anal intercourse
18 or any intrusion, however slight, of any part of a person's
19 body or of any object into the genital or anal openings of
20 another person's body except when that intrusion is done or
21 accomplished for some medically recognized treatment or
22 diagnostic purpose. If you find that the State has not shown
23 beyond a reasonable doubt that a sexual battery occurred,
24 then you would stop deliberating and your verdict would have
25 to be not guilty at that point.

1 Now, if you find that a sexual battery did occur, as I
2 have just defined it for you, then you must decide whether
3 the State has proven beyond a reasonable doubt that one of
4 the following aggravating factors also occurred. Number one,
5 that the Defendant used aggravated force to accomplish that
6 sexual battery, and aggravated force means the use of
7 physical force or physical violence of a high and aggravated
8 nature to overcome the victim. That was number one, or
9 number two, that the -- and it's or, not and, but or, number
10 two, the victim submitted to sexual battery while the victim
11 was also the victim of forcible confinement, kidnapping,
12 robbery, burglary, housebreaking or any other similar act or
13 offense. I will tell you that the offense of kidnapping
14 commences when one is wrongfully and unlawfully deprived of
15 his or her freedom and continues until that freedom is
16 restored.

17 Now, if you find that the State has proven each and
18 every one of the elements beyond a reasonable doubt, as well
19 as the existence of at least one of the mentioned aggravating
20 factors that I just gave you, then your verdict should be
21 guilty of the charge of criminal conduct in the first degree.

22 Now, the Defendant is also charged with criminal sexual
23 conduct with a minor second degree. Now, I want to make sure
24 you understand that the second degree doesn't mean it's a
25 second offense. Second degree simply means that's the level

Charge

525

1 of the charge. The first degree just, which is not
2 applicable here, has to do with children that are younger
3 than the age of 14, and the third degree has to do with
4 children that are older than the age of 16. The second
5 degree has to do with the level where the Defendant is
6 charged in this particular charge, again, not second offense,
7 second degree.

8 Now, I want to talk with you and define the charge of
9 criminal sexual conduct with a minor in the second degree
10 with which the Defendant is charged, and again, the State
11 must prove beyond a reasonable doubt that the Defendant
12 engaged in a sexual battery with the victim. I just defined
13 sexual battery for you with regard to the other charge. The
14 definition is the same.

15 Now, the State must then prove beyond a reasonable doubt
16 that the victim was less than 16 years of age, but at least
17 14 years of age, and that the Defendant was either in a
18 position of familial, custodial or official authority to
19 coerce the victim to submit or that the Defendant was older
20 than the victim, and I charge you that consent, willingness,
21 indifference or ignorance on the part of the minor, if any,
22 as to what was taking place does not in any way effect the
23 charge of criminal sexual conduct with a minor because an
24 unmarried woman under the age of 16 cannot legally consent to
25 sexual intercourse. All right, those are the definitions of

1 the two charges that are brought against the Defendant in
2 this proceeding.

3 Now, I want to further charge you that during the course
4 of this trial, the Defendant has testified, took the stand
5 right here. You've observed that and made certain
6 explanations, but I also charge you that it's not incumbent
7 upon the Defendant to prove his explanations or anything
8 else. As I've said consistently throughout this trial, the
9 Defendant's plea of not guilty places the burden on the State
10 to prove his guilt beyond a reasonable doubt before you can
11 find the Defendant guilty. You must gauge credibility and
12 believability of the Defendant as you would any other
13 witness.

14 Now, I further charge you that the Defendant has raised
15 the defense of consent on the charge of criminal sexual
16 conduct in the first-degree, which is the first charge that I
17 defined for you, and I further charge you that the consent of
18 the victim to that particular charge is a complete defense,
19 that is with regard to the charge of criminal sexual conduct
20 in the first degree the consent of the victim is a complete
21 defense to that. The burden of proof is on the State with
22 regard to that charge to prove beyond a reasonable doubt that
23 the Defendant committed a sexual battery upon the alleged
24 victim using aggravated force and/or that the victim
25 submitted to that sexual battery while also being the victim

Charge

527

1 of forcible confinement, kidnapping or any other similar
2 offense or act, and thus, there was a lack of consent. If
3 the State fails to meet this burden, the Defendant is
4 entitled to an acquittal on that charge. Now, I further
5 charge you that the defense of consent on the part of the
6 alleged victim does not apply, it is not applicable to the
7 charge of criminal sexual conduct with a minor in the second
8 degree because, again, an unmarried woman under the age of 16
9 cannot legally consent to sexual intercourse, and thus, that
10 is not a defense to the charge of criminal sexual conduct
11 with a minor in the second degree. To this charge, however,
12 the Defendant has raised the defense of mistake of age. Now,
13 with regard to this issue the burden of proof is on the State
14 to prove beyond a reasonable doubt that the Defendant knew or
15 reasonably should have known the alleged victim's age. If
16 the State fails to meet this burden of proof then the
17 Defendant is entitled to an acquittal on this charge.

18 Now, I further charge you that in South Carolina in
19 prosecutions for criminal sexual conduct as in any other case
20 the testimony of the alleged victim need not be corroborated.
21 Now, ladies and gentlemen, of course I should say you should
22 always gauge the credibility and believability of any witness
23 that appears before you as you would do that for any witness
24 that appears.

25 All right, now, ladies and gentlemen, in just a moment

1 you're going to retire to begin your deliberations, and I
2 wish to express to you the hope that each of you will be
3 mindful of the importance of your responsibility. I know you
4 are. We've already discussed this a little bit how much
5 focus you have given to this case. You're not called upon
6 often to serve as jurors. You may recall we discussed on
7 Monday that you have a three-year exclusion as an exemption
8 in the same court. You can't be called within a three-year
9 period and there's a reason for that, and the reason for that
10 is because this is a difficult duty. It's a high calling
11 and it requires you to reach the utmost of putting all
12 outside influences out of your mind because you and I are
13 acting for the community in seeing to it here that every
14 verdict is just and that every trial is fair.

15 Now, you've probably observed that throughout this trial
16 the presiding officer of the Court, which is me, is referred
17 to as Your Honor, and I know you know that's not some title
18 that's given to me individually. It's a title that's
19 assigned to the position that I'm privileged to hold and
20 that's because this Court is entrusted with the honor of this
21 county and this community and this state and indeed this
22 nation in seeing to it that every person tried here receives
23 fair and impartial justice.

24 Now, in just a few moments you're going to take the
25 Preservation of the honor of this community, county, state

Charge

529

1 and nation into the jury room with you when you retire to
2 deliberate. Now, when I say that please understand, I'm not
3 telling you how I think you should decide this case. That's
4 not appropriate. That's not my providence. That's not my
5 intention. I'm simply saying this, as the presiding officer
6 in this court I'm vitally concerned that whatever verdict you
7 reach will be the result of you going back into the jury
8 room, confining your considerations to the evidence put forth
9 in this courtroom, weighing that evidence fairly and
10 impartially, applying it to the law that I give you and have
11 given you here in this charge in reaching a verdict which is
12 just and true. I have every confidence that that's what
13 you're going to do. I will tell you that everyone in this
14 case is entitled to justice, both the State and the
15 Defendant. All are entitled to justice, nothing more and
16 nothing less. We owe no support to any party. We owe no
17 sympathy to any party, and this Court is of the confirmed
18 opinion that whatever verdict you reach will represent truth
19 and justice for all the parties involved in this case.

20 Now, Ms. D'amato, thank you again for your service as
21 foreperson. I have in my hands a verdict form. You can't
22 read it from here, but you'll have it with you in the jury
23 room, and it basically has two questions upon it and there
24 are two, because there are two charges here and I'm just
25 going to read the first question. It simply says as to

1 indictment Number 06-267, first degree criminal sexual
2 conduct, we, the jury unanimously find the Defendant, Patrick
3 Bryant, and then there are two choices. Now, let me just say
4 this to you, when I have two choices to give you on a piece
5 of paper I can't give them both at the same time. One has to
6 come in front of the other, but not because there's some
7 preference or priority. It's simply on the paper one is
8 listed in front of the other. Your first choice is not
9 guilty. Your second choice is guilty. Whatever the
10 unanimous decision of the verdict is, of the jury is, please
11 mark your verdict accordingly using an X in the appropriate
12 line and then move to the next question, and when you get to
13 the bottom of this, the last sentence on this page says, "I
14 certify this is the decision," "I certify this decision,"
15 it's a typographical error and I'm going to fix that right
16 now, "I certify this decision is the unanimous decision of
17 the jury." So, when you sign now you're telling me that
18 this is the unanimous decision of the jury with regard to
19 both of the verdicts found on this page.

20 Now, I will say to you that when you're deliberating the
21 room is a little bit close in where somebody may be standing
22 up over by the wall, away from the table. Just please make
23 sure that everyone who wishes to be heard on a particular
24 point has that opportunity as you facilitate the discussions
25 amongst the jurors so that the verdict you reach can be just,

Charge

531

1 true and unanimous.

2 All right, now, this is what I'm going to ask you to do,
3 in just a moment I'm going to ask you to go back to your jury
4 room but not begin your deliberations because I need to talk
5 to the lawyers about one or two things. I need to make sure
6 the evidence is in the appropriate -- that's what's in
7 evidence is in the appropriate form and then taken into you.
8 Before you go back though I want to say something to you in
9 your colleagues' presence. You have two alternate jurors
10 with you, Mr. Coker and Mr. Edwards, and I want to thank you
11 for your service in this case. I'm going to let you go back
12 with the jurors and say your goodbyes to them. I suspect the
13 12 are going to hold their health here for the next two or
14 three minutes and won't have to leave, and thus, you won't be
15 seated as one of the 12 deliberating jurors, but I want you
16 to understand and I think sometimes alternate jurors say,
17 "Well, my goodness, I wasted my time," but you have not
18 because under our system we must have 12 deliberating jurors,
19 and if for some reason the two of you were not here and if
20 for some reason even now at the close of this case someone
21 got sick, had an emergency, had to leave and I was left with
22 11 jurors this case would have to be mistried, it would have
23 to be tried again and all that you've seen the last four days
24 gone through again at some future time. Your presence here
25 has avoided that had it happened, but it hasn't, but I want

1 to thank you for your service, and when we send in the
2 evidence and the verdict forms I'm going to ask you to come
3 back out the two of you while our jury begins deliberating
4 and I'll speak with you further for just a moment or two
5 before you're allowed to depart if you wish to, but I thank
6 you for your service again in the presence of your
7 colleagues.

8 All right, ladies and gentlemen, let's all remain where
9 we are while the jury reports to the jury room. Again,
10 please do not begin deliberations and we'll be with you
11 momentarily.

12 (Whereupon, the following takes place outside the
13 presence of the jury.)

14 THE COURT: All right, any objection to the charge or
15 exception to it as given by the Court from the State?

16 MR. MODICA: Your Honor, I have a request for an
17 addition that I should have realized and I apologize that I
18 didn't. The Defendant and the victim, the Defendant has
19 criminal convictions. The victim has juvenile adjudications,
20 and in your credibility it didn't mention that, how that
21 factors in, and especially in light of the fact that Mr. Fox
22 mentioned it on his -- during his summation, although I don't
23 want to -- I'm not trying to call attention to that, but I
24 think to protect the record that it needs to be dealt with.

25 THE COURT: What would you propose the charge be?

Charge

533

1 MR. MODICA: I don't have the charge in front of me
2 but basically it's you're aware that there has been an
3 indication that there has been a criminal record and criminal
4 adjudications in regard to certain witnesses in this case,
5 that that factor is not to be considered whether the person
6 is -- it's only to be considered in regard to the credibility
7 of the individual testifying and for no other purpose.

8 THE COURT: What says the Defense?

9 MR. FOX: I would request a charge along that lines
10 also, Your Honor. I missed that also and I did comment on it
11 in my closing argument at some length, and I would request
12 that charge as well.

13 THE COURT: All right, counsel, this is why I meet
14 with -- this is why I give you the charge in advance and meet
15 with you in advance to attempt to avoid the Court overlooking
16 something and ---

17 MR. MODICA: And I apologize for that.

18 THE COURT: That's all right.

19 MR. MODICA: I missed it.

20 MR. FOX: And I did as well, Your Honor, make no

21 ----

22 THE COURT: All right, I'll give that charge.
23 Anything else from the State?

24 MR. MODICA: No, Your Honor, no, sir.

25 THE COURT: Anything from Defense?

1 MR. FOX: Just one other, Your Honor, on page 12 of
2 your charge in defining, I believe that was criminal sexual
3 conduct first degree on the second paragraph where it says
4 the victim submitted to sexual battery while the victim was
5 also the victim of forcible confinement you then, or
6 kidnapping, you then defined kidnapping, but no other in our
7 charge conference and now I would object to defining
8 kidnapping but not defining any of the other possible
9 aggravating circumstances. I think that perhaps draws
10 attention to that element as opposed to others and perhaps is
11 a comment on the facts.

12 THE COURT: All right, and ---

13 MR. FOX: And we had discussed also perhaps doing,
14 defining -- forcible confinement or kidnapping, no matter how
15 brief or extended and my understanding was that would be the
16 Court's charge rather than a more complete defining of
17 kidnapping.

18 THE COURT: Mr. Fox, maybe I completely missed
19 something but did you not object to that at the beginning
20 when we were putting these things on the record?

21 MR. FOX: I did, Your Honor, I did and I understood
22 and we discussed the language with Mr. Modica that the
23 compromise would be that you would, I understood it to be,
24 that the quote, the victim was also the victim of forcible
25 confinement or kidnapping, no matter how brief or extended

Charge

535

1 and then the remaining and not define kidnapping in full. I
2 may have misunderstood your decision on that, but ---

3 THE COURT: Well, but my -- well, no, that was my
4 decision, but my understanding of your comments here in the
5 courtroom, and maybe I misperceived them, was that this was
6 the result of a compromise, that you were not comfortable
7 with it, and I thought you posed an objection to it which is
8 why I asked for the book to be brought up and just went ahead
9 and put the full language in because I perceived you had an
10 objection to what I had crafted as a, as a proposed
11 alteration. So, I'll note that for the record. I don't
12 believe there's anything that can be done, but I also believe
13 that if -- I don't think there's any harm or error there, but
14 if so it would be harmless at best.

15 MR. FOX: I understand.

16 THE COURT: Anything else, Mr. Fox?

17 MR. FOX: No, Your Honor.

18 THE COURT: All right, let me also put on the record
19 in case there's some question about it later, the Court went
20 into a discussion about consent and lack of consent, which is
21 not part of the standard charge but something that the Court
22 had crafted and let counsel look at beforehand and I did that
23 because really this issue of consent permeates these cases
24 and it's a different standard. The State chose to prosecute
25 these two cases together which is certainly their choice.

1 The Court did not require an election but that then put us in
2 the position of having one charge to which consent is a
3 defense and another to which it's not and the Court felt
4 there should be some clear, as best as the Court can make it
5 clear, explanation to the jury of how these defenses impact
6 the issues. This is the reason that additional language was
7 added to the charge.

8 All right, then the Court would ask that you bring the
9 jury back in, but before we do that let's make sure the
10 exhibits are all together. Come up, please and look at that
11 so when we send them out they all go.

12 (Whereupon, exhibits reviewed by counsel for the State and
13 counsel for the Defense and approved.)

14 THE COURT: All right, evidence all agreed to or what
15 says the State?

16 MR. MODICA: Yes, sir.

17 THE COURT: And Defense?

18 MR. FOX: Yes, Your Honor.

19 THE COURT: All right, please bring back in the jury.
20 Let's bring all of our jurors.

21 Counsel, you want to go ahead and discuss lunch with
22 them at this juncture?

23 MR. MODICA: Yes, sir.

24 MR. FOX: That's fine, Your Honor.

25 THE COURT: All right.

Charge

537

1 (Whereupon, the following takes place in the presence of
2 the jury.)

3 THE COURT: All right, ladies and gentlemen, welcome
4 back. I asked that you come back, although that really was
5 not within my explanation a moment ago as you were leaving, I
6 asked you to come because there's two things that I want to
7 discuss with you, both of which are important. One has to do
8 with an issue in the case and the second has to do with your
9 lunch, which you may have some concern about. So, I want to
10 discuss these two issues with you.

11 First of all, I failed to tell you in the charge and
12 should have noted there were, when certain witnesses
13 appeared, there were questions raised and evidence submitted
14 that they had a prior criminal charge. That evidence comes
15 in before you only on the issue of whether that particular
16 witness is believable and credible, and with regard to the
17 Defendant specifically those -- that evidence is not in any
18 way used to indicate guilt or prove guilt on the charges for
19 which the Defendant is facing trial and should not be used by
20 you for that purpose. That evidence only comes in on whether
21 or not the witness is a believable and credible witness and
22 should be given whatever weight you deem that evidence to be
23 entitled to and thank you for that understanding. I failed
24 to tell you that earlier and I think that's important.

25 Now, it takes us about 45 minutes, really more likely an

1 hour when we order lunch to get your lunch here and what we
2 do when we're working with a jury and the jury is
3 deliberating is we order the lunch, and then when the lunch
4 comes we ask you to stop deliberating and just serve you
5 there in the jury room, and then after you're finished we
6 take away lunch, and then you all go back to your
7 deliberations. We normally either order pizza or perhaps a
8 sub from Tony's or perhaps Kentucky Fried Chicken, whatever
9 the choice is going to be we all have to go, it's all from
10 the same place. We can't go to different places for
11 different people, but we would make that decision, but what
12 I'm going to ask you to do is to begin your deliberations,
13 and please understand that you've waited on us all week and
14 now we wait on you and we're glad to do that. You're under
15 no time constraint in your deliberations but I thought I
16 would give you the opportunity to go back and talk amongst
17 yourselves and decide whether you want to see how
18 deliberations go or whether you want to immediately order
19 lunch.

20 Now, I would suggest to you because that's a procedural
21 decision you may wish to do that on a majority basis as
22 opposed to the substantive decision of guilt or innocence on
23 a particular charge which, of course, is by unanimous
24 decision. You may have problems getting a unanimous decision
25 on the lunch, but what I'd ask you to do is go back and talk

Charge

539

1 about that among yourselves, and if you decide you want us to
2 order lunch, lunch would be provided by the County for you,
3 then knock on the door, please, send us that message and
4 we'll come in with whatever order forms are necessary and get
5 that process underway and then you can resume your
6 deliberations. If you don't think you need to order lunch,
7 well, just don't knock, just keep going and we'll stand by
8 for whatever communications we have with you.

9 Of course, when you reach your verdict in the case if
10 you'll knock on the door and let us know that then we'll be
11 prepared to receive the verdict whenever that time may be.

12 All right, now, what I'm going to ask you is I'm going
13 to let the jury go back and we've already gone through the
14 evidence and we're going to take the exhibits in right behind
15 you to let you begin your deliberations. I'm going to ask
16 our two alternate jurors to remain with us when the jury
17 departs this time, and I'll talk with you a little bit
18 further, and let's every one else remain where we are while
19 our 12 jurors return to the jury room.

20 (Whereupon, the following takes place outside the
21 presence of the jury.)

22 (Whereupon, deliberations begin at 12:05 p.m.)

23 THE COURT: All right, and gentlemen, I'll be with
24 you in just one moment. You all be comfortable where you
25 are. Counsel, come to the side if you will, please. Let's

1 come to the side and discuss.

2 (Whereupon, a bench conference was held.)

3 THE COURT: All right, Madam Clerk or Mr. Clerk, and
4 our two alternate jurors, this is what we're going to do. We
5 never know in deliberations if someone may get sick, have an
6 emergency and I'm going to ask one of you to remain with us.
7 The way we're going to choose, the way we use in the criminal
8 courts is we're going to put both your names in a -- on
9 pieces of paper, put them in some type of cup somewhere where
10 it can't be seen and our clerk is going to make what I call a
11 blind draw and whoever name is drawn will remain and the
12 other is free to go. Now, let me say to you that if you both
13 wish to stay one of you who will be our alternate that would
14 be on call to go into the jury, the other who would just be
15 remaining to see what the verdict is, as a courtesy to you we
16 would provide your lunch. It may be that the one who's
17 released to go just is ready to go and if that's the case
18 I'll give you a telephone number for Mr. Moore that you can
19 call back tomorrow and determine what the verdict is if you
20 wish to leave. So, once we make that decision I'll be back
21 to you then with a further inquiry about whether the other
22 wishes to remain or to stay.

23 All right, and please, Mr. Moore, if you'd look away and
24 pull the name then go right ahead.

25 All right, and tell us which name you have.

State v. Bryant

541

1 MR. MOORE: Mr. Harry Coker.

2 THE COURT: All right, then, Mr. Coker, we'll let you
3 remain with us and Mr. Edwards, you're free to leave. Now,
4 I'm going to give you the choice, Mr. Edwards, do you want to
5 remain and have lunch if the jury orders lunch, which again
6 will be about an hour and would you like to stay for the
7 verdict? You're welcome to do so.

8 MR. EDWARDS: I have things I really need to do, Your
9 Honor, but it's been a pleasure.

10 THE COURT: Well, thank you.

11 (Alternate juror released by Court.)

12 (Court and Bailiff confer.)

13 THE COURT: Very good, well, let's make sure Mr.
14 Coker has a chance to order lunch, whatever he wishes and Mr.
15 Coker, I don't want to -- for you to feel like you're being
16 mistreated, but we're actually going to sequester you in
17 another area. We'll be here in the courtroom working. I
18 don't want someone to say something that's outside of the
19 trial record that may somehow influence your decision if you
20 become a sitting juror. So, we're going to find a place
21 where you'll be comfortable and I'll have a chance to talk
22 with you later on and we will order whatever you wish to have
23 from Tony's, okay. I don't know if you like to read, we're
24 going to put you in the law library which will -- is full of
25 law books. So, help yourself, but I'd ask you to not read

1 anything about this particular case or any of the issues in
2 the case but if you want to review some of the literature in
3 there, enjoy, and I -- while we have the chance I'm going to
4 step down, also, and thank you for your service. I will talk
5 with you before you leave, but I appreciate your willingness
6 to serve, Mr. Coker. I have enjoyed working with you.

7 (Alternate juror exits courtroom.)

8 THE COURT: And this Court is now going to stand down
9 awaiting call of the jury.

10 *****OFF THE RECORD*****

11 (Question from jury at 12:48 p.m. Answered at 12:55 p.m. by
12 written note)

13 (On the record.)

14 (Verdict reached at 1:10 p.m.)

15 (Whereupon, the following takes place outside the
16 presence of the jury.)

17 THE COURT: All right, Mr. Bryant, welcome back to
18 the courtroom. We're waiting on some others to return.
19 We're advised that the jury has reached a verdict and we'll
20 wait until others return and then take the verdict.

21 All right, we're waiting on our alternate juror to come
22 in who'll join us momentarily.

23 (Alternate juror enters courtroom.)

24 THE COURT: Mr. Coker, welcome back to the courtroom,
25 sir.

Verdict

543

1 MR. COKER: Thank you, sir.

2 THE COURT: All right, I wanted to tell you that,
3 first of all, your sandwich will be arriving momentarily, but
4 secondly, the jury has advised us that they have reached a
5 verdict, which means that technically you're free to go.
6 Now, you're welcome to remain here. We're going to receive
7 the verdict and then respond in whatever follow up way we may
8 need to but if you wish to walk out the door at any time
9 you're welcome to do so, sir. All right, very good.

10 All right, is there anything from the State before we
11 bring in the jury?

12 MR. MODICA: No, sir.

13 THE COURT: Anything from the Defendant?

14 MR. FOX: No, sir.

15 THE COURT: All right, please bring in the jury.

16 (Whereupon, the following takes place in the presence of
17 the jury.)

18 THE COURT: All right, ladies and gentlemen, welcome
19 back to the courtroom. Let me tell you before we receive
20 your verdict and on any official business we expect that your
21 lunch will arrive momentarily and we'll give you the option
22 if you wish after we receive the verdict and you're free to
23 go to either have it in the jury room if you wish or take it
24 outside, take it home with you, however you wish to do it.
25 It will be packaged in that way that you're free to do that.

1 We won't hold you any longer here than is necessary to
2 complete your official business, then it's your decision how
3 you wish to proceed.

4 Now, Ms. D'amato, Madam Forelady, am I correct that the
5 jury has reached a verdict?

6 FORELADY: Yes, Your Honor.

7 THE COURT: All right, would you please give your
8 verdict form to Ms. Owens?

9 (Complies with request.)

10 THE COURT: Thank you.

11 All right, let's let the record reflect that the verdict
12 form is appropriately filled out. It is signed by the
13 foreperson and, the Defendant, please, rise. Mr. Clerk,
14 please publish the verdict.

15 THE CLERK: The State of South Carolina versus
16 Patrick Percival Bryant, as to Indictment Number 2006-GS-22-
17 267, first degree criminal sexual conduct, we, the jury,
18 unanimously find the Defendant, Patrick Bryant, not guilty.

19 As to Indictment Number 2007-GS-22-667, second degree
20 criminal sexual conduct with a minor, we, the jury,
21 unanimously find the Defendant, Patrick Bryant, guilty.

22 Ladies and gentlemen of the jury, if this is your
23 verdict of each of you please raise your right hand.

24 (All jurors raise right hand.)

25 THE CLERK: Thank you.

Verdict

545

1 THE COURT: All right, thank you, ladies and
2 gentlemen of the jury. Let's let the record reflect that all
3 of our jurors have raised their right hand in compliance
4 with the Clerk's request.

5 All right, now, Mr. Bryant, you may be seated. Mr.
6 Bryant, you may be seated.

7 (Complies with request.)

8 THE COURT: Now, while we are in the presence of the
9 jury, are there any motions for which a jury response would
10 be necessary from the Defendant?

11 MR. FOX: No, Your Honor.

12 THE COURT: From the State?

13 MR. MODICA: No, Your Honor.

14 THE COURT: All right, now, ladies and gentlemen,
15 then this concludes your involvement in the case and your
16 role as jurors in the case. Now, what the Court is going to
17 do now is we're going to have a sentencing proceeding. I'm
18 going to give you the opportunity, though, because you're not
19 required to remain here for that and certainly not required
20 to remain here sitting in the jury box. I'm going to come
21 down and express my gratitude to you in just a moment. I'm
22 going to release you from your jury service and let you, if
23 you wish, depart by leaving out of the door or just take a
24 left turn there and be seated to watch and observe the
25 sentencing proceeding. You're not required to do that, but

1 obviously, that's a part of this case. I will tell you that
2 under our system of justice in South Carolina and you should
3 be aware the jury should have -- has no responsibility in
4 sentencing other than in a capital case. This is not a
5 capital case, but the jury does perform sentencing in a
6 capital case, but in all other cases it's the providence of
7 the Court. The reason for that is the juries are not in the
8 courts every day, not familiar with the ranges of sentences
9 that are available, don't have the experience and perhaps the
10 comfort level to assume a responsibility of that nature. I
11 say that to say this, you're the judges of the facts. You
12 made a decision on the facts and returned a verdict and bear
13 no responsibility for whatever sentence, whether you perceive
14 it to be good, bad or appropriate, it's handed down by the
15 Court.

16 Now, in a few days the county is going to send you a
17 check which is going to be the county's expression of
18 appreciation for your service, your most capable service here
19 as jurors this week and that's not going to be a large check,
20 but it's going to be the county's token of gratitude. I'm
21 going to come down as you leave the jury box and I'm going to
22 express my gratitude by shaking your hand and thanking you
23 for your service. Now, when you leave and I don't think --
24 are our sandwiches here yet?

25 BAILIFF: Not yet.

Motions

547

1 THE COURT: Well, they're close, but if -- when you
2 leave if you wish to take a seat back on the side that way
3 you're free to go at any time then you may do so or if you
4 wish to just go on out the door and forget about your
5 sandwich and go home you're welcome to do that, or if you
6 just want to go back to the jury room and wait on your lunch
7 it will be here monetarily, but again, ladies and gentlemen,
8 I thank you for your service, for your verdict which has been
9 just and true as you determine justice in this case to be and
10 I enjoyed the opportunity to work with you and you are free
11 to go. If you wish to be seated just go around to the side
12 and be seated in the back.

13 (Jury exits jury box.)

14 THE COURT: All right, our jury now has been
15 dismissed, some have remained in the room, but are there any
16 motions that would be taken outside of the jury's presence
17 now for which a jury response is not necessary? First from
18 the State?

19 MR. MODICA: No.

20 THE COURT: Any motions from the State? Now from
21 the Defense?

22 MR. FOX: Yes, Your Honor, at this time as to
23 indictment 07-667, criminal sexual conduct with a minor
24 second degree, we would renew our motions for a directed
25 verdict as being against the clear weight of all of the

1 evidence that was presented, including the defense, for the
2 reasons previously stated at the conclusion of the State's
3 case and also in light of evidence presented by the defense.

4 THE COURT: All right, Mr. Fox, I'm going to deny
5 your motion, sir. There was ample evidence in this record
6 from which a jury could and did make a finding of guilt as to
7 the criminal sexual conduct with a minor in the second degree
8 charge, and the Court finds the jury's decision appropriate
9 based on the evidence in this record, and certainly, there is
10 substantial evidence that supports that verdict. For these
11 reasons your motion is denied. Anything further now with
12 regard to post-trial motions?

13 MR. FOX: No, Your Honor.

14 THE COURT: All right, then, Mr. Modica, I'll be glad
15 to hear from you with regard to sentencing, but before you
16 do, let me speak to Ms. Shanks if I may, Ms. Natalie Shanks,
17 ma'am. As a victim of crime in South Carolina you have
18 significant rights in this process. You obviously have been
19 aware of these because you've been present for the trial,
20 which is one of your rights, and also testified, which is yet
21 another. In a moment in this sentencing proceeding if you
22 have something you wish to say, I will give you that
23 opportunity. You're not required to speak, ma'am, but you
24 certainly will have that opportunity and I wanted you to be
25 aware of that in advance. I realize that this week has been

1 extremely difficult for you, that it has brought back
2 memories, emotions that are difficult. I appreciate the
3 courage with which you've come in here and testified and the
4 way that you have conducted yourself in this trial. I wish
5 you well, ma'am, regardless of what happens here. All right.

6 MS. SHANKS: Thank you.

7 THE COURT: All right, you may be seated. We'll be
8 back to you momentarily and, Mr. Modica, I'll be glad to hear
9 from you, sir.

10 MR. MODICA: Your Honor, to begin with, do I need to
11 make an argument to the Court relative to Section 17-25-45,
12 17-25-45 regarding the appropriate sentence for this
13 Defendant?

14 THE COURT: All right, I would ask you to state on
15 the record again. We have some of our jurors present who
16 would not be familiar with the statute. If you would give us
17 the basis under which you make that claim, and I would ask
18 you to proceed. Go ahead.

19 MR. MODICA: Yes, sir.

20 To begin with, Your Honor, in regard to the Defendant's
21 criminal record so that it's complete, in 1987 he has a
22 conviction for petit larceny. In 1989 he has a conviction
23 for shoplifting. 1989 he has a conviction for driving under
24 suspension more than first, a General Sessions level event,
25 offense. In April of 1991 he has a conviction of -- for

1 grand larceny. He has a conviction in March of 1992 for
2 criminal domestic abuse. He has a conviction for armed
3 robbery, July 14th of 1994; and then, of course, he has the
4 conviction, I think it's in evidence, regarding the criminal
5 domestic violence of a high and aggravated nature. I've
6 forgotten the conviction date, but it stems from an incident
7 on March 3rd of 2005.

8 THE COURT: All right, let me stop you there, Mr.
9 Modica, and explain to some members of the jury who are with
10 us, you've heard some prior record on the part of the
11 Defendant that was not admitted into evidence. The rules of
12 criminal procedure allow that a charge may be admitted on the
13 issue of credibility and believability only if it is within
14 the last ten years and for those reasons certain of the
15 charges that you heard were not admitted into evidence in
16 this matter. The reason behind that rule is that there is a
17 general belief that people who may make a mistake can change
18 their lives, turn over a leaf and go forward, and something
19 from 30 years ago or actually more than ten years ago should
20 not hold them back. Thus, it's a ten-year cut off, the 1989
21 charges, the 1991 charge, none of which was admissible on the
22 issue of credibility and believability because of the
23 provisions of that rule, and go ahead, Mr. Modica.

24 MR. MODICA: Your Honor, as the Court is aware the
25 Defendant is eligible for and arguably is mandated for

Sentencing

551

1 imprisonment for life without parole on the basis that, in
2 fact, he is a second most serious offense offender. I would
3 indicate to the Court and I have with me if the Court
4 requires them to be marked as Court Exhibits the Defendant's
5 certified copy of his conviction regarding the armed robbery,
6 which would be the first most serious offense, showing them
7 to counsel.

8 THE COURT: Counsel, I would ask you to mark that as
9 a Court's Exhibit so our record would be clear.

10 MR. MODICA: Following up, Your Honor, under 17-25-45
11 it lists most serious offenses, and under most serious
12 offenses is listed 16-3-655, criminal sexual conduct with a
13 minor.

14 THE COURT: All right, just a moment.

15 Mr. Modica, did you notify the Defendant of the
16 Solicitor's intention to seek life without parole in the
17 event of conviction here?

18 MR. MODICA: Yes, Your Honor, that should be contained
19 within the Court's file.

20 THE COURT: All right, and do you, do your records
21 indicate on what date you so notified the Defendant?

22 MR. MODICA: Well, we've notified him on a few
23 occasions, but the one relative to the last one, including
24 the criminal sexual conduct with a minor second degree, was
25 accomplished on the 3rd day of July of 2007. I have a copy

1 of an affidavit by a member of Evans Correctional Institute
2 that served the Defendant with that notice. Would you like
3 me to mark that as a Court Exhibit as well?

4 THE COURT: Yes, sir.

5 MR. MODICA: Showing it to counsel.

6 THE COURT: That can be part of the prior exhibit.

7 MR. MODICA: Your Honor, as you're aware the Defendant
8 received a ten-year sentence on the criminal domestic
9 violence of a high and aggravated nature regarding Crystal
10 Smith. I can tell you that I prosecuted that case. That was
11 a trial. The Defendant at that time was acquitted of the
12 more serious charge of burglary in the first degree, which
13 would have warranted, once again, life without parole. I'm
14 not bringing that up for that fact, but I want to bring to
15 the Court's attention that during the course of those events
16 as testified under oath during the trial it was indicated
17 that not only was Crystal Smith struck but her then ten year
18 old son was struck as well. He received a cut across his
19 chest, a scratch mark, a significant scratch mark across his
20 chest. He was present when his mother was being assaulted by
21 the Defendant and I would also tell you that the evidence
22 established that also during the course of events when the
23 Defendant was striking and threatening and abusing Crystal
24 Smith, he had picked up a puppy and had snapped the puppy's
25 neck and threw it back on the ground.

Sentencing

553

1 MR. FOX: There was -- wait, wait, wait, Judge,
2 first of all I am going to jump up here. I think he's
3 confusing another case. I don't recall any testimony or
4 anything about a puppy, and second of all he's -- his
5 argument is that the only possible sentence for Mr. Bryant is
6 life, and I don't think we -- but I absolutely disagree, and
7 in fact, with regards to the child, that was a mistake I made
8 yesterday. That was the one that Mr. Bryant was found not
9 guilty of.

10 THE COURT: All right.

11 MR. FOX: I confused it in terms of Ms. Smith and
12 her son yesterday at trial, but in fact, he was found not
13 guilty of harming the child, and I believe because there was
14 another case, the puppy, that truly I don't think had any
15 involvement in this case.

16 THE COURT: All right, your objection is noted. Mr.
17 Modica, let me ---

18 MR. MODICA: Your Honor, actually ---

19 THE COURT: Let me just simply, Mr. Modica, let me
20 just simply ask you this, what is your position as to whether
21 the Court has any discretion in imposing sentence in this
22 case?

23 MR. MODICA: Well, absent, according to the statute
24 you making a specific finding otherwise, I would say that you
25 don't have discretion.

1 THE COURT: All right, and for the Court's knowledge,
2 what plea negotiations, if any, went on before this trial and
3 what offer was made to the Defendant, if any, to resolve
4 these matters short of this trial?

5 MR. MODICA: Yes, Your Honor, prior to my filing the
6 notice to seek life without the possibility of parole on the
7 criminal sexual conduct with a minor in the second degree,
8 the Defendant was brought before the Court, and I offered him
9 a plea to that charge which carried up to 20 years which
10 would have been a violent, most serious to which the
11 Defendant would have to serve 85 percent of the sentence, and
12 my recollection is that I offered him between 15 and 20
13 years. Before the Court he rejected that offer. He went
14 back to Evans Correctional Facility where he's serving that
15 10 year sentence, and subsequently I filed the notice and he
16 was served with that notice.

17 THE COURT: All right, very good.

18 Ms. Shanks, ma'am, you are not required to speak but if
19 you have something you want to say just from where you are,
20 and please remember you are under oath still, but if you have
21 something you wish to say, the Court would be glad to hear
22 from you.

23 MS. SHANKS: No, sir.

24 THE COURT: All right, ma'am, again, I thank you for
25 your courage displayed here. I wish you well in the years to

Sentencing

555

1 come.

2 MS. SHANKS: Thank you.

3 THE COURT: Good luck to you. Thank you.

4 MR. MODICA: Your Honor, I'm sorry, the only thing I

5 did want to add is that I think that what we heard on the

6 taped conversation between the Defendant and Crystal Smith in

7 which though he claimed that he was doing that to continue

8 his relationship, actually he was pressing very, Crystal

9 Smith very hard to drop those charges because, among other

10 things, he was hoping that if those were dropped he might

11 make bond on this criminal sexual conduct charge, and I think

12 the fact that when Crystal Smith says, ``You abuse women,"

13 and the Defendant says, ``I know," that speaks volumes for

14 what the Defendant is all about. I don't -- I didn't take

15 charging the Defendant with criminal sexual conduct with a

16 minor second degree lightly. I didn't take filing the charge

17 of criminal sexual conduct first degree lightly. I did it

18 after very serious and careful contemplation of what the

19 potential sentence was, and I gauged it based upon the other

20 case involving Crystal Smith and the intelligence that I

21 learned about the Defendant through the phone calls and my

22 many hours speaking to Crystal Smith as to what kind of

23 person Patrick Bryant was, and it's on all of those -- for

24 all of those reasons that the State elected to file both of

25 those charges and to seek notice of life without the

Sentencing

556

1 possibility of parole.

2 THE COURT: All right, thank you, Mr. Modica. Mr.
3 Fox, I'll be glad to hear from you, sir.

4 MR. FOX: Thank you, Your Honor.

5 Your Honor, I would argue, I mean, I don't think -- the
6 argument is clear from the statute, 17-25-45 that, in fact,
7 the imposition of a life sentence is not mandatory, is not
8 automatic in this situation. It certainly is under the list
9 of most serious offenses and certainly there's no question
10 Mr. Bryant has a previous most serious conviction for the
11 armed robbery, but the statute does say that criminal sexual
12 conduct with minors would be a most serious offense, which
13 would be his second strike and life without parole, except
14 where evidence is presented at the criminal proceeding, and
15 I'm going to break this up, that the offense resulted from
16 consensual sexual conduct. Well, there's certainly some
17 evidence. Again, I understand that's in dispute. Ms. Shanks
18 testified it was not consensual. Mr. Bryant testified it
19 was, but there is then some evidence, and of course, the
20 Court would have to make a specific finding, that after
21 conviction the Court makes a specific finding on the record
22 the conviction obtained for this offense resulted from
23 consensual sexual conduct, and I believe not only is there --
24 there certainly has been evidence presented in that regard,
25 but when you take in conjunction with that the result on the

Sentencing

557

1 other charge, criminal sexual conduct in the first degree,
2 and the defense was not it did not happen, the defense from
3 the evidence presented and from the argument of myself was,
4 yes, there was a sexual encounter but it was consensual and I
5 think ---

6 THE COURT: Well, now, counsel, wasn't the initial
7 defense though to the police that it did not happen? Isn't
8 that where we began ---

9 MR. FOX: Well, Your Honor ---

10 THE COURT: --- until the evidence was adduced that
11 directly controverted that position?

12 MR. FOX: Your Honor, I don't think any Defendant
13 should be bound by -- I'm not defending his -- you know, he
14 clearly and admittedly he lied to the police, but I don't
15 think any person in any criminal proceeding is ever bound in
16 the actual legal -- in a trial by a position they previously
17 take. That would take away their constitutional right to
18 present a defense. If you, for instance, gave a confession
19 and later said, ``Look, I really recant that. I have a
20 reason why I did that or I have an explanation for that," if
21 we accepted that theory then you could -- you would later be
22 barred from asserting your right to a trial.

23 THE COURT: I agree. Sir, I do not disagree at all.
24 I'm simply pointing out in your argument to me you were
25 saying what the defense was, and I just wanted to stop and

1 point out to you that where this all began ---

2 MR. FOX: No question, Your Honor.

3 THE COURT: --- though was with Mr. Bryant denying
4 any knowledge or complicity whatsoever in this event.

5 MR. FOX: No question, but I'm simply referring
6 that at trial the defense and the evidence presented, there
7 was evidence that it was consensual. I realize there was
8 some that it was not, but this doesn't -- the statute doesn't
9 reflect whether it has to be -- it simply says where evidence
10 is presented. It doesn't say the overwhelming weight of the
11 evidence, the preponderance of evidence or anything else. It
12 simply says evidence is presented, and again, I think when
13 you take in context the jury's verdict and the criminal
14 sexual conduct in the first degree, and the fact that there
15 was no defense at trial that it did not happen or that it was
16 not me, that if the sexual encounter did not happen, that I
17 think the only conclusion the Court can draw is that they
18 must have found that it was consensual because if they
19 believed that it was not consensual there was no denying at
20 trial that there was sex; and so, if they did not accept the
21 defense of consent on the criminal sexual conduct with the
22 first degree, then he had admitted from his own testimony
23 that it may have been criminal sexual conduct. So, I think
24 in combination there is evidence presented that it was
25 consensual; and that therefore, the Court can and I would

Sentencing

559

1 think -- not think, I would submit that, in fact, there
2 should be such a finding, then he would have still be, have
3 been found guilty of criminal sexual conduct with a minor
4 which carries, I believe, up to 20 years, and of course,
5 would be sentenced accordingly.

6 THE COURT: And Mr. Fox, tell me exactly what
7 provision, what subsection of the provision do you rely upon
8 for the language that you just gave the Court?

9 MR. FOX: That's 17-25-45 and that is under C-1
10 where it lists the most serious offenses and about halfway
11 down, at least and I'm not looking at the actual statute.
12 I've got a book, but where it addresses 16-316 -- 655.

13 THE COURT: All right, anything further from you, Mr.
14 Fox?

15 MR. FOX: No, Your Honor.

16 MR. MODICA: Your Honor, may I be heard briefly on
17 that argument?

18 THE COURT: Well, I'll let you come back. Mr.
19 Bryant, do you have anything you want to say, sir?

20 MR. BRYANT: No, sir.

21 THE COURT: Mr. Modica.

22 MR. MODICA: Your Honor, the record should reflect
23 what -- well, the statute is the statute. With all due
24 respect to counsel, I think he quoted it out of sequence, but
25 the fact that it does not say within the statute, and again,

1 with all due respect to our jury's verdict, it does not say
2 in the statute that you are bound by the jury's verdict. It
3 is saying that you independent of any other action by a jury
4 must make a specific finding that there was, in fact,
5 consent, and in spite of the jury's verdict I think you can
6 find that there was not -- well, without you finding that
7 there wasn't consent you have to give him life.

8 THE COURT: Exactly.

9 MR. MODICA: So, in a sense you specifically have to
10 make a finding yourself independent of the jury, I would
11 submit yourself independent of the jury that there was, in
12 fact, consent. Thank you, Your Honor.

13 THE COURT: Thank you.

14 All right, I'm going to publish from the statute so that
15 we'll all be aware. Criminal sexual conduct, this is under
16 the definition of most serious offense and under South
17 Carolina law if you have two most serious offenses then those
18 are the two, of course, most serious offenses are the highest
19 classification of a crime, in other words, the greatest
20 classification of a crime that can be committed, most serious
21 offense, it defines for criminal sexual conduct in the
22 following way: ``Criminal sexual conduct with minors is a
23 most serious offense except where evidence is presented at
24 the criminal proceeding and the Court after conviction makes
25 a specific finding on the record that the conviction obtained

1 for this offense resulted from consensual sexual conduct
2 where the victim was younger than the actor," and I would
3 tell you that if both parties had come in and said that this
4 was a consensual act then the Court would make that finding,
5 but this is a disputed issue in this case. The victim, of
6 course, has taken the position clearly that it was not. The
7 Defendant has taken the position that it was. This Court
8 does not necessarily accept the jury's finding that of not
9 guilty on the criminal sexual conduct first as a repudiation
10 of the victim's position. We were not in the jury room, are
11 not aware of what factors may have led to that decision, but
12 clearly before me, this is a contested issue and this Court
13 is not, does not believe it appropriate to make that specific
14 finding when one party vehemently disagrees with that
15 position. For that reason, I fail to make the finding.

16 Mr. Bryant, respectfully, sir, you had an opportunity to
17 avoid this imposition of a life without parole sentence,
18 which I realize that you did not wish to do and did not do,
19 but based upon the evidence before me and based upon the
20 decision of the jury in finding you guilty of criminal sexual
21 conduct in the second degree with a minor, I follow the
22 statute 17-25-45 and find it appropriate to sentence you to
23 life in prison without parole, and that is the sentence of
24 the Court, sir.

25 Good luck to you, sir.

4 To the Shanks family I know this has been difficult for
5 you. Again, I admire your courage. Good luck to you in the
6 future.

(Adjourned.)

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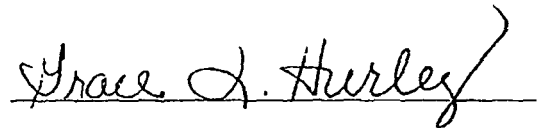
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I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of The State versus Patrick Percival Bryant, held in the Court of General Sessions for Georgetown County, Georgetown County Courthouse, Georgetown, South Carolina, on July 23, 2007 through July 26, 2007.

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

A handwritten signature in cursive script that reads "Grace L. Hurley". The signature is written in dark ink and is positioned above a horizontal line.

Grace L. Hurley, CVR-CM

Official Reporter

November 19, 2007.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County

Michael J. Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PATRICK PERCIVAL BRYANT,

APPELLANT

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT.

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUES ON APPEAL.....	3
STATEMENT OF THE CASE.....	4
ARGUMENT.....	9
CONCLUSION.....	10

TABLE OF AUTHORITIES

Cases

<u>State v. Brock</u> , 130 S.C. 252, 126 S.E. 28 (1925).....	7
<u>State v. Corn</u> , 215 S.C. 166, 54 S.E.2d 559 (1949)	6
<u>State v. Gregg</u> , 230 S.C. 222, 95 S.E.2d 255 (1956)	6
<u>State v. Joseph</u> , 328 S.C. 352, 491 S.E.2d 275 (1997).....	6, 8
<u>State v. Young</u> , 378 S.C. 101, 661 S.E.2d 387 (2008).....	6

STATEMENT OF ISSUES ON APPEAL

1. Did the judge err in allowing the State to question appellant, over objection, about details of a prior conviction for criminal domestic violence of a high and aggravated nature?
2. Did the judge err in admitting in evidence, over objection, appellant's indictment for criminal domestic violence of a high and aggravated nature when the appellant was on trial for criminal sexual conduct first degree and criminal sexual conduct with a minor second degree?

STATEMENT OF THE CASE

In 2006, the Georgetown County Grand Jury indicted Bryant for criminal sexual conduct first degree, indictment #06-GS-22-267. In July of 2007, the Georgetown County Grand Jury indicted Bryant for criminal sexual conduct with a minor, second degree, indictment #07-GS-22-667. On July 23, 2007, Bryant proceeded to jury trial before the Honorable J. Michael Baxley. The jury returned a verdict of not guilty of criminal sexual conduct first degree and guilty of criminal sexual conduct with a minor, second degree. Judge Baxley sentenced Bryant to life without parole pursuant to S.C. Code §17-25-45. A timely notice of intent to appeal was filed on July 31, 2007. This appeal follows.

ARGUMENT

1. The judge erred in allowing the State to question appellant, over objection, about details of a prior conviction for criminal domestic violence of a high and aggravated nature?

At trial Bryant asserted a defense of consent for the criminal sexual conduct first degree charge and a defense of mistake of age for the criminal sexual conduct with a minor second degree charge. The jury found Bryant not guilty of criminal sexual conduct first degree. Bryant admitted that he lied to his girlfriend, Crystal Smith, about his consensual relationship with the minor victim because he did not want to jeopardize his relationship with Smith. (R. p. 42, lines 17 – p. 43, lines 1-7; p. 58, lines 20- p. 59, lines 1-11). During re-cross examination the State asked, “Was she [Crystal Smith] not the victim in a case that you got convicted on criminal domestic violence of a high and aggravated nature? Wasn’t she the victim?” (R. p. 61, lines 16-18). Bryant objected. (R. p. 61, lines 20-22). The State responded that, “Well based upon his answers and based on what he brought out, that he would be lying in an effort to save his relationship with this woman when she had charges pending against him and he got convicted.” (R. p. 61, lines 25 – p. 62, lines 1-3). The judge overruled Bryant’s objection. (R. p. 62, lines 4-9). The judge erred in allowing the State to ask about the details of the prior conviction for criminal domestic violence of a high and aggravated nature.

Prior to presenting a defense, counsel for Bryant sought to resolve the issue of Bryant’s prior record. Counsel stated, “We agree that he has a conviction within 10 years for a criminal domestic violence of a high and aggravated nature. And that would be admissible for impeachment purposes.” (R. p. 36, lines 20-23). Rule 609, SCRE, provides

that for the purpose of attacking the credibility of a witness, evidence that an accused has been convicted of a crime punishable by death or imprisonment in excess of one year is admissible if the court determines that the probative value outweighs the prejudicial effect. “However, the details of the crime of which the witness has been convicted, whether the details could be considered mitigating or aggravating, are not admissible; the witness has ‘already been afforded [the] opportunity to defend himself against that charge and his [conviction] is conclusive.’” State v. Joseph, 328 S.C. 352, 361, 491 S.E.2d 275, 280 (1997) citing State v. Gregg, 230 S.C. 222, 225, 95 S.E.2d 255, 257 (1956) accord State v. Corn, 215 S.C. 166, 172-73, 54 S.E.2d 559, 561 (1949). While evidence of the prior conviction may have been admissible,¹ the details of the prior conviction were not. The judge erred in allowing the State to question appellant about the details, specifically, the identity of the victim from the prior conviction for criminal domestic violence of a high and aggravated nature.

The present case is distinguished from those cases in which the defendant opened the door in such a way as to allow the State to ask about specific details of a prior conviction. Bryant’s admission that he lied to his girlfriend about his relationship with the minor victim does not open the door to allow the State to ask about the details of the prior conviction. See State v. Young, 378 S.C. 101, 661 S.E.2d 387 (2008) (Appellant’s testimony that he hated to see a woman cry did not open door for the admission of prior convictions).

The State did not need details of the prior conviction for criminal domestic violence of a high and aggravated nature to demonstrate that, at the time Bryant admittedly lied to Smith, the relationship was over. The State called Smith as a reply witness and she testified that at

¹ Trial counsel did not argue that the prejudicial effect outweighed the probative value as outlined in Rule

the time of phone calls when Bryant denied having a relationship with the minor victim, their relationship was over. (R. pp. 66-73). The State's questioning about the details of the prior conviction was not proper impeachment but rather propensity evidence in violation of Rule 404(a)(1), SCRE.

2. The judge erred in admitting in evidence, over objection, appellant's indictment for criminal domestic violence of a high and aggravated nature when the appellant was on trial for criminal sexual conduct first degree and criminal sexual conduct with a minor second degree.

After the judge overruled the initial objection, Bryant again objected. (R. p. 62, lines 12-14). The judge then instructed Bryant to answer the question, whether Smith was the victim. Bryant testified that Smith was not the victim. (R. p. 62, lines 21-22). The State then sought to introduce an indictment against Bryant for criminal domestic violence of a high and aggravated nature in which Smith was the named victim. (R. p. 63, lines 16-19). Bryant objected. (R. p. 63, lines 20-23). The indictment was admitted in evidence and the sentencing sheet was made a court's exhibit. (R. p. 64, lines 25 – p. 65, lines 1-15). The judge erred in admitting the indictment.

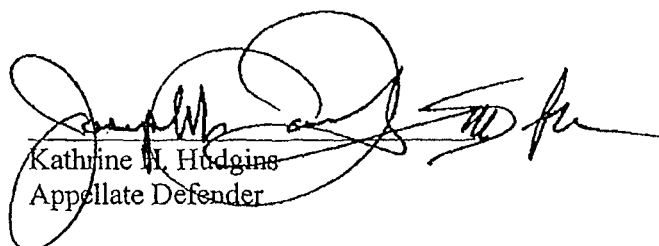
The State admitted the indictment to rebut Bryant's testimony that Smith was not the victim of the criminal domestic violence conviction. If the initial question about the identity of the victim from the prior conviction had been a proper question, the State would have been entitled to offer the indictment as rebuttal evidence. The State's question, however, related to a collateral matter. Impeachment on a collateral matter is not permitted. State v. Brock, 130 S.C. 252, 126 S.E. 28 (1925). Additionally, as discussed in issue one, the initial question was improper. The State, by introducing the indictment, improperly introduced

further details of the prior conviction. State v. Joseph, 328 S.C. 352, 361, 491 S.E.2d 275, 280 (1997).

CONCLUSION

Based on the above arguments, Bryant's sentence and conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine M. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

This 2nd day of March, 2009.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Patrick Percival Bryant,

Appellant.

Appeal From Georgetown County
Michael J. Baxley, Circuit Court Judge

Unpublished Opinion No. 2010-UP-006
Submitted January 4, 2010 – Filed January 21, 2010

AFFIRMED

Appellate Defender Katherine H. Hudgins, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W. Elliott,
Assistant Attorney General William M. Blich, Jr. all

of Columbia; and Solicitor J. Gregory Hembree, of Conway, for Respondent.

PER CURIAM: Patrick Percival Bryant was convicted of criminal sexual conduct (CSC) with a minor in the second degree and sentenced to life in prison without parole. Bryant appeals, arguing the trial court erred in (1) allowing the State to question him about details regarding a prior conviction for criminal domestic violence of a high and aggravated nature (CDVHAN) and (2) admitting into evidence his indictment for the CDVHAN charge. We affirm pursuant to Rule 220(b), SCACR and the following authorities: **ISSUE I:** State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) (stating one may not complain about the admission of evidence where he opened the door to that evidence); State v. White, 361 S.C. 407, 415-16, 605 S.E.2d 540, 544 (2004) (noting evidence which may otherwise be inadmissible may be properly admitted when the door is opened to that evidence by the complaining party); Beam, 336 S.C. at 52, 518 S.E.2d at 301 (holding when a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would be incompetent or irrelevant had it been offered initially); State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (providing the admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (stating that any error in admission of evidence cumulative to other unobjected-to evidence is harmless); **ISSUE II:** State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (holding, for an issue to be properly preserved for review, it must be raised to and ruled upon by the trial court, and issues not so raised and ruled upon will not be considered on appeal; a party may not argue one ground at trial and another ground on appeal; while a party need not use the exact name of a legal doctrine in order to preserve an argument, it must be clear that the argument has been presented on that ground).¹

AFFIRMED.

HUFF, A.C.J., GEATHERS, J., and CURETON, A.J., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.



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The South Carolina Court of Appeals

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February 8, 2010

REMITTITUR

The Honorable Alma Y. White
715 Prince Street Rm 221
PO Drawer 421270
Georgetown, SC 29442-1270

Re: The State v. Bryant, Patrick Percival
2007-GS-22-00667

Dear Ms. White:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,

V. Claire Allen

V. Claire Allen
Deputy Clerk of Court

VCA/lf

cc: Appellate Defender Kathrine H. Hudgins
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Assistant Attorney General William M. Blitch, Jr.
John Gregory Hembree, Esquire

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of Georgetown)

2010-CP-22-00127

Patrick Percival Bryant)

Full name and prison number, if any, of applicant.)

v.)

State of South Carolina)

Name of Respondent)

APPLICATION FOR

POST-CONVICTION RELIEF

ALMA J. WHITE
CLERK OF COURT

2010 MAY -4 AM 9:52

FILED
GEORGETOWN COUNTYINSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Perry Correctional Institute
2. Name and location of Court which imposed sentence Georgetown General Sessions
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 07-65-22-667 Criminal Sexual Conduct w/minor
 - (b) 2nd degree
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 7-26-07 Life without Parole
 - (b) _____
 - (c) _____

5. Check whether a finding of guilty was made
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
6. Did you appeal from the judgment of conviction or the imposition of sentence? yes _____
7. If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed:
- i. S.C. Court of APPEALS _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Conviction Affirmed, January 21, 2010 _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpublished Opinion No: 2010-UP-006 _____
- ii. _____
- iii. _____
8. If you answered "no" to (6), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Trial Counsel _____
- (b) Conflict of Interest _____
- (c) Failure to investigate _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) See Attached memorandum of law

(b) _____

(c) _____

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law?

NO

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

NO

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) NO

(d) any other petitions, motions or applications in this or any other Court?

NO

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

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

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

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

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

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

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

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

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a) Because this is my first PCR and these

(b) grounds can only be raised in PCR

(c) _____

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

(a) your arraignment and plea? _____

(b) your trial, if any? ✓

(c) your sentencing? ✓

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence?

✓
(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? _____

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. J. Eric Fox 210 Elm Street Suite 5, Conway S.C.
- ii. Kathrin Hodgins S.C. Indigent Defense
- iii. _____

(b) the proceedings at which each such attorney represented you:

- i. Jury Trial
- ii. Direct Appeal
- iii. _____

18. State clearly the relief you seek in filing this application.

Sentence Vacated

19. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

COUNTY OF Georgetown)

VERIFICATION

I, Patrick Percival Bryant, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

x Patrick Bryant

Sworn to and subscribed before me

This 13th day of April, 2010.

Cheryl L. Gorman L.S.

Notary Public for South Carolina

My Commission Expires May 17th 2014

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Patrick Percival Bryant, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

x Patrick Bryant
Applicant

Sworn to and subscribed before me

This 13th day of April, 2010.

Cheryl L. Gorman L.S.

Notary Public for South Carolina

My Commission Expires May 17th 2014

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 ADMIRALTY
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 BEN JESSOP
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 LIFE
 OBEY
 YOUR OBLIGATIONS
 RECHARD

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Patrick Bryant,
S.C.D.C. No. 215212,
Applicant,

vs.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 2010-CP-22-00727

STATEMENT OF CASE

In 2006, the Georgetown County Grand Jury indicted Bryant for criminal sexual conduct first degree, indictment #06-GS-22-267. In July 2007, the Georgetown County Grand Jury indicted Bryant for criminal sexual conduct with a minor, second degree, indictment #07-GS-22-667. On July 23, 2007, Bryant proceeded to trial before the Honorable J. Michael Baxley. The jury returned a verdict for not guilty for first degree criminal sexual conduct and a guilty verdict for second degree with a minor. Judge Baxley sentenced Bryant to life without parole pursuant to §17-25-45. This PCR is as follows:

FILED
GEORGETOWN COUNTY, SC
2010 MAY -4 AM 9:52
ALMA V. WHITE
CLERK OF COURT

2010-CP-22-00727

FAILURE TO OBJECT TO STATE'S WITNESS TESTIMONY

Applicant (hereinafter Bryant) contends that his trial counsel was ineffective for failing to object to the State's witness Crystal Smith (hereinafter Smith) testimony in his CSC2nd trial.

Trial counsel (hereinafter Eric Fox) knew that Smith was the victim in Bryant's first trial for (CDVHAN) and he also knew that Bryant and Smith lived together as common law husband and wife.

In Jackson v. Heath, 1 Bailey 355 S.C. 1830, it is held that: a wife is a competent witness to testify against the interest of her husband in a case between 3rd persons if the husband does not object.

Eric Fox was ineffective for failing to object to Smith testifying in Bryant's 2nd trial to her being the victim of the (CDVHAN) which Bryant was convicted and sentenced to 10 years in prison.

FILED
GEORGETOWN COUNTY
2010 MAY -4 AM 9:53
ALMA J. WHITE
CLERK OF COURT

2010-CP-22-00727

FAILURE TO INVESTIGATE AND OBJECT TO IMPROPER TESTIMONY

Bryant contends that his trial counsel J. Eric Fox was ineffective for failing to investigate and object to testimony that had a devastating impact and inflamed the minds of the jury.

Crystal Smith, the victim from Bryant's (CDVHAN) conviction in October 2005, was present as a potential witness for the state during his CSC2nd trial that had nothing to do with her or the (CDVHAN) case in which Bryant was convicted and sentenced to (10) ten years in prison.

When Crystal Smith entered the courtroom for Bryant's CSC trial, Bryant asked his attorney, J. Eric Fox "what is she doing here"? J. Eric Fox answered "I have no idea".

All attorneys in criminal cases are required to investigate the State's potential witness's. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

Crystal Smith the victim in the (CDVHAN) case testified as a reply witness in Bryant's CSC2nd trial. The State ask her: "Were you the victim of (CDVHAN) that has been discussed in this Court"? She replied "Yes, Sir."

The cumulative effect of that testimony enhanced the devastating impact of improper corroboration, because this testimony inflamed the minds of the jury. See Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001).

In Bryant's case when his trial attorney failed to investigate and object to Crystal Smith's testimony that had to have a devastating impact on the jury. He should be deemed ineffective.

Bryant has proven both prongs of the Strickland standard, See Strickland, Supra and Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996).

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GEORGETOWN DEPT. OF CORRECTIONS
2010 MAY -4 AM 9:53
CLERK OF COURT

CONFLICT OF INTEREST

Applicant (hereinafter "Bryant") contends that his trial counsel (hereinafter "Fox"), actively represented conflicting interest and was ineffective and showed a deficient performance by failing to bring to the trial courts attention of a possible conflict of interest from past representation of Bryant.

Defense counsel has an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the trial or before trial. ABA Code of Professional Responsibility, ECS-15; DRS-105; Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 LEd 2d 333 (1980).

In Bryant's case the conflict he is alleging should have been brought to the trial court's attention before trial.

The Conflict is as follows:

Bryant's attorney Fox represented him in 2005 on a (CDVHAN) charge which he was found guilty, indictment # 2005-GS-22-0754. The trial court sentenced him to the maximum possible penalty of 10 years in the Department of Corrections.

Bryant filed for Post-Conviction Relief on May 27, 2009, on February 11, 2010, Bryant was granted relief based on ineffective assistance of trial counsel for failing to investigate that Bryant was tried and convicted under wrong law pertaining to (CDVHAN).

On June 5, 2005, Bryant was arrested for CSC2nd. He was appointed J. Eric Fox for this case also.

J. Eric should have brought to the trial court's attention of this possible conflict.

Bryant contends that an Actual Conflict of Interest materialized into a realized conflict adversely affecting counsel's performance when he appointed to represent him in the CSC2nd trial. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768,793 (1998) (citing Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 LEd2d 333 (1980)).

Here Bryant has shown a conflict of interest actually affected the adequacy of his attorney's representation and need not demonstrate prejudice in order to gain relief. U.S.C.A. Const. Amend. 6,14. Cuyler v. Sullivan, Supra.

FILED
2010 MAY -4 AM 9:53
CLERK OF COURT

I. 2010 CP 32-00727

INEFFECTIVE ASSISTANCE OF
TRIAL COUNSELRECEIVED
CLERK OF COURT
2010 MAY -4 PM 5:53
ALCOA COUNTY

[Standard of Review]

When ineffective assistance of counsel is alleged ground for relief in a PCR action, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Courts use a two pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

In interpreting the prejudice prong, our State Supreme Court in State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (S.C. 2000), held "consistent with existing federal precedent, that a

defendant must show either deliberate prosecutorial misconduct or prejudice to make out a violation of the Sixth Amendment, but not both." Id. 527 S.E.2d at 109. The court determined that "deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice." Id. 527 S.E.2d at 109.

Moreover, claims alleging that trial counsel was ineffective for failing to object to trial court errors are cognizable in a PCR proceeding. This includes failure to object to: inadmissible evidence, Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001)(failure to object to hearsay); improper arguments by the prosecution, Matthews v. State, 2001 WL 1887491 (S.C. Sup. Ct., decided June 17, 2002); erroneous jury instructions, Plyer v. State, 309 S.C. 408, 424 S.E.2d 477 (1992)(counsel deficient for failing to object to improper charge on malice, which improperly shifted burden of proof from the state to defendant); or any other matter that could otherwise be reviewed on direct appeal, if not for counsel's failure to properly preserve the issue.

Accordingly, a claim alleging that trial counsel was ineffective for failing to object to an indictment obtained through acts of perjury and gross prosecutorial misconduct, can be raised in a PCR proceeding pursuant to the Strickland standards of review.

[Perjury and Gross Prosecutorial Misconduct]

Here, Applicant argues that trial counsel provided

ineffective assistance by allowing the State, without objection, to charge, convict, and sentence him under an indictment obtained through willful acts of perjury and prosecutorial misconduct.

Therefore, Applicant would show this PCR Court the following:

Applicant's bill of indictment prints that, "At a Court of General Sessions, convened on July 18, 2007, the Grand Jurors of Georgetown County present upon their oath." (see Exhibit 1, Indictment). Furthermore, the indictment is affixed with a true bill stamp, and signed by Hembree Solicitor, (see Exhibit 1, Indictment), who was the State Judicial Official assigned the responsibility of preparing and processing the document.

However, the evidence conclusively establishes that the information published in the document regarding a July 18, 2007 convened Court of General Sessions, is in fact false. The attached, certified true copy of the Judicial Department's calendar of Circuit Court terms shows that on July 18, 2007 "NO" General Sessions Court had been open in Georgetown County for the Grand Jurors to present anything upon their oath, much less that a crime had taken place. (see Exhibit 1, Indictment in comparison with Exhibit 2, Calendar of Convened Courts). Thus false information is contained in the State indictment, prepared and processed by Hembree Solicitor.

South Carolina law is very specific concerning matters of false information in a State document. It is an Offense Against Public Justice to willfully give false information in a State document. S.C. Code Ann. §16-9-10, "Perjury and Subornation of Perjury" states in pertinent part:

A(2). It is unlawful for a person to willfully give false, misleading, or incomplete information on a document, record or report or form required by the law of this State.

B(2). A person who violates the provisions of subsection A(2) is guilty of a misdemeanor, and upon conviction must be imprisoned not more than 6 months, or fined not less than one hundred dollars or both.

C. A person may be convicted under this section ... if he commits perjury by his own act, consent or agreement.

FIRST; it should be noted that a criminal indictment is a document required by the law of this State. In State v. Gentry, 363 S.C. 96, 610 S.E.2d 494 (2005), our Supreme Court held that an indictment is a "notice document" required by both our State Constitution, and statutory law. see S.C. Const. Art. I. §11, and Art. V. §22. see also S.C. Code Ann. §17-19-10 (2003)("[n]o person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury....," except in specified instances).

Therefore, for purposes of establishing an offense of perjury against public justice, a State indictment would satisfy the document requirements specified under subsection A(2), S.C. Code Ann. §16-9-10.

SECOND; it should also be noted that a County Prosecutor, (~~1924~~) Hembree is required to know the laws of this State, and has special responsibilities to see that justice is done, and is held to the highest standards of professional ethics. see Appellate Court Rules, Rule 407, Rules of Professional Conduct, Rule 3.8 Comment. Also see Quattlebaum. In fact, the prosecutor hold a quasi-judicial position. see State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975); State v. King, 222 S.C. 108, 71 S.E.2d 793, 798 (1952) ("...He [prosecutor] must see that no conviction takes place except in strict conformity with the law, and that the accused is not deprived of any constitutional right or privilege." [insert added]).

However, instead of discharging his responsibilities in conformity with the laws of this State, Hembree Solicitor knowingly and willfully caused false information to be printed and published in Applicant's indictments, thereby violating the provisions of §16-9-10. Thus, Hembree is guilty of committing an act of perjury against public justice, and which would by necessity also constitute gross professional misconduct. see Rules of Professional Conduct, Rule 407, SCACR; Rule 8.4(b)(it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(d)(it is professional misconduct for a lawyer to engage in dishonesty, fraud deceit, or misrepresentation); and Rule 8.4(e)(it is professional misconduct for a lawyer to engage in

conduct that is prejudicial to the administration of justice).

Accordingly both perjury and gross prosecutorial misconduct are established in this case. Therefore, Applicant would show this Court the following ineffective assistance of trial counsel for not challenging the false indictment information*:

[Counsels Deficient Performance]

In Strickland, the Court explained that "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Id. 466 U.S. at 685, 104 S.Ct., at 2063 (quoting Adams v. United States ex rel, McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942)), "Counsel ... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. 466 at 689, 104 S.Ct. at 2065.

A criminal attorney is constitutionally required to conduct pretrial investigation and discovery, and file any necessary

Take out. { (*) For quite some time now it has been common knowledge in this State's judicial circle that the County Solicitors are utilizing an irregular and improper indictment process which allows true billed indictments to be returned at such an astronomical rate of return that it precludes any meaningful avoidance review, or consideration by the grand jury. (see Exhibit 3, newspaper articles concerning States irregular process).

motions to suppress. see e.g. Kimmelman v. Morrison, 477 U.S. 365, 335 (1986). It was conclusively shown above that false information is contained in Applicant's true billed State indictment(s). That the false information is on the face of the indictment(s), and easily discoverable through an examination of the document. Under these circumstances, "any competent" trial attorney would have not hesitated to enter an objection, and/or move to suppress Applicant's defective indictment(s), especially given the certainty of prevailing on such a motion.

All attorney's licensed to practice criminal law in South Carolina are required to know and understand this States statutory law and rules related to the lawful return of true bill indictment(s). Therefore it would be an untenable position for trial counsel to now claim ignorance of the law.

South Carolina criminal law sets forth clear provisions for challenging defects in the indictment. see S.C. Code Ann. §17-19-90, ("Every objection to an indictment for any defect apparent on the face thereof, shall be taken by demurrer or motion to squash such indictment before the jury shall be sworn and not afterwards). Unquestionably, trial counsel should have utilized §17-19-90, to challenge Applicant's true bill indictment(s).

In summary, the false information is apparent on the face of the indictment, and easily discoverable through an examination of the document. Accordingly, trial counsel provided a deficient performance in not entering an Objection to Applicant's defective indictment(s), or moving to squash.

[Prejudice]

In interpreting the prejudice prong under a defendant's sixth amendment right to counsel, our State Supreme Court identified a narrow category of cases in which prejudice is presumed. In Quattlebaum, the Supreme Court concluded, consistent with existing federal precedent, "... that a defendant must show either deliberate prosecutorial misconduct or prejudice to make out a violation of the Sixth Amendment, but not both. Deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice." Id. 527 S.E.2d at 109. Our Supreme Court further determined that the focus must be on the misconduct because the Court bears the ultimate responsibility for maintaining judicial integrity and high standards of professional conduct among the members of the bar, and for protecting and defending the constitutional rights of the accused. see e.g. Quattlebaum, 527 S.E.2d at 109.

Above, prima facie evidence was presented showing that the Prosecutor violated the provisions of §16-9-10, and thereby committed an act of perjury against public justice by willfully giving false General Sessions Court information in Applicant's true billed indictment(s). Moreover, it was further established that the Prosecutor's act of perjury against public justice, would by its very nature also constitute a violation of the Rules of Professional Conduct, specifically, Rules 8.4(b); 8.4(d); and 8.4(e)], and thereby establish gross prosecutorial

misconduct. Thus Quattlabaum is controlling in this case, and an "irrebuttable presumption of prejudice" has been established. see Quattlabaum, 527 S.E.2d at 109.

Conclusion

Under the circumstances found in this case, Applicant's conviction and sentence cannot be allowed to stand because to do so, the State would have to now become a knowing party to the Prosecutor's acts of perjury and gross misconduct, and maintain Applicant's indictment in it's records, thereby representing those acts to the public.

Above, Applicant established a claim of ineffective assistance of trial counsel by his showing that (1), counsel's performance was deficient in failing to Object to the defective indictment, and (2), because prejudice is presumed due to the Prosecutor's acts of perjury and gross misconduct.

Accordingly, and based on the forgoing, Applicant's conviction and sentence should be overturned.

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2010-CP-22-00727

Patrick P. Bryant, # 215212,

Applicant,

v.

State of South Carolina,

Respondent.

RETURN
(Attorney Appointment Requested)

Respondent, making its Return to the Application for post-conviction relief filed May 4, 2010, by Patrick P. Bryant, would respectfully show this Court:

I. – Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Georgetown County. The Applicant was indicted in March 2006 for criminal sexual conduct ("CSC") in the first degree (2006-GS-22-267). The Applicant was later indicted in July 2007 for CSC with a minor in the second degree (2007-GS-22-667). Both indictments dealt with the same incident, but the first-degree CSC indictment alleged aggravated force, while the CSC with a minor indictment relied upon the victim's age at the time (age 15). J. Eric Fox, Esquire, represented the Applicant on these charges. On July 23-26, 2007, the Applicant was tried before the Honorable J. Michael Baxley.¹ The jury found him guilty of second-degree CSC with a minor, and not guilty of first-degree CSC. Judge Baxley sentenced the Applicant to life without parole ("LWOP") pursuant to S.C. Code Ann. § 17-25-45.² A notice of appeal was timely filed, and an appeal was perfected on the Applicant's behalf by Kathrine H. Hudgins, Esquire. The

¹ Prior to trial, another indictment, 2005-GS-22-753 (first-degree CSC) was merged into the 2006 CSC indictment.

² The predicate "most serious" offense for LWOP was an armed robbery charge from 1994. CSC with a minor (any degree) is a most serious offense pursuant to S.C. Code Ann. § 17-25-45 (c)(1).

South Carolina Court of Appeals affirmed the conviction on January 21, 2010 (2010-UP-006), and the case was remitted to the circuit court on February 8, 2010.

Incorporated herein by reference are the records of the Georgetown County Clerk of Court regarding the conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II. – Allegations and Relief Sought

In his Application, Mr. Bryant alleges that his custody is unlawful for the following reasons:

- (1) Ineffective assistance of trial counsel:
 - a. Failure to investigate and object to improper testimony of Crystal Smith regarding a prior CDVHAN conviction;
 - b. failure to timely object to the indictment where the State obtained the indictment through perjury and prosecutorial misconduct (no general sessions term convened on the date of the indictment); and
- (2) Conflict of interest: counsel previously represented the Applicant in 2005 on a charge of CDVHAN; the CDVHAN conviction was overturned in February 2010 pursuant to a PCR filed in May 2009.

III. – Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the applicant bears the burden of proving his allegations by a preponderance of the evidence. Stalk v. State, 375 S.C. 289, 297, 652 S.E.2d 402, 405 (Ct. App. 2007) (citations omitted); Rule 71.1(e), SCRCP. "Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that 'counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.'" Dalton v. State, 654 S.E.2d 870, 873 (Ct. App. 2007) (citing Strickland v. Washington, 466 U.S. 668, 669 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985)). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id.

A two-pronged test is used to evaluate allegations of ineffective assistance of counsel. Dalton v. State, 654 S.E.2d 870, 873 (Ct. App. 2007). “In order to prove that counsel was ineffective, a PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.” Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 527-28 (2007) (citations omitted). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Id. (citations omitted). “Furthermore, when a defendant's conviction is challenged, ‘the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. Id. (citations omitted). “There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Id. (citations omitted). The applicant must overcome this strong presumption in order to obtain relief. Stalk, supra (citation omitted).

Respondent submits that the Applicant will not be able to prove ineffective assistance of counsel or resulting prejudice. However, because the allegations may raise questions of fact that the record does not conclusively refute, Respondent requests an evidentiary hearing to fully resolve the ineffective assistance of counsel issues. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV. – Conflict of Interest

The Applicant also claims his attorney was under a conflict of interest because he represented the Applicant previously on an unrelated charge in 2005, and this unrelated charge was later overturned in 2010. In order to be granted post-conviction relief on the grounds of a conflict of interest, an applicant must show that an actual conflict of interest existing at the time detrimentally affected his attorney's performance. See Fuller v. State, 347 S.C. 630, 633, 557 S.E.2d 664, 665 (2001) (citations omitted). An actual conflict of interest occurs when an attorney owes a duty to a party whose interests are adverse to those of the defendant. See Lomax v. State,

379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). In this case, counsel's previous representation of the Applicant on another charge did not create a conflict of interest, even though the other charge was later overturned due to ineffective assistance of counsel.

V.

Each and every allegation, claim, or statement contained within the Application not expressly admitted, qualified, or explained is DENIED.

VI.

WHEREFORE, having made its Return, the Respondent requests that counsel be appointed and an evidentiary hearing held regarding the ineffective assistance of counsel allegations.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J. CATOE
Assistant Attorney General



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June 21, 2010

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS NON-JURY
 2 COUNTY OF GEORGETOWN) (10-CP-22-00727)
 3)
 4 PATRICK PERCIVAL BRYANT)
 5)
 6 VERSUS) TRANSCRIPT OF RECORD
 7)
 8 STATE OF SOUTH CAROLINA) November 16, 2010
 9) Georgetown, South Carolina
 10)
 11)

12 B E F O R E:

13 HONORABLE STEVEN H. JOHN, Judge
 14

15 A P P E A R A N C E S:

16 PAUL ARCHER, ESQ.
 17 ATTORNEY FOR PLAINTIFF
 18

19 CHRISTINA CATOE, ESQ.
 20 ATTORNEY FOR STATE OF SOUTH CAROLINA
 21

22 DIXIE COX EUBANK
 23 CIRCUIT COURT REPORTER
 24 FIFTEENTH JUDICIAL CIRCUIT
 25

I N D E XWITNESSESDIRECTCROSSRDRC

PATRICK PERCIVAL BRYANT

MR. ARCHER

3

20

MS. CATOE

16

ERIC FOX

MS. CATOE

23

39

MR. ARCHER

33

APPLICANT'S SUMMATION (ARCHER)

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STATE'S SUMMATION (CATOE)

41

COURT'S RULING

41

(THE FOLLOWING TAKES PLACE ON NOVEMBER 16, 2010.)

THE COURT: All right. This is (2010-CP-22-00727), application of Patrick Percival Bryant versus the State of South Carolina.

All right, Mr. Archer, are you ready to proceed?

MR. ARCHER: Yes sir.

THE COURT: Very good, sir.

PATRICK PERCIVAL BRYANT, being first duly sworn, testifies as follows:

DIRECT-EXAMINATION BY MR. ARCHER:

MR. ARCHER: Your Honor, at this time, if I may, I would just like to hand up a brief -- the statute that we will be talking about. It's Criminal Sexual Conduct with a Minor under Sixteen.

THE COURT: All right. Very good. Thank you, sir.

Q. Mr. Bryant, you are serving a life without parole sentence; is that correct?

A. Yes sir.

Q. And that's because of the strike laws; is that right?

A. Yes sir.

Q. All right. And you were charged with, and found guilty of a Criminal Domestic Violence; is that correct?

A. Yes sir, that's correct.

Q. And you are serving a prison sentence for that?

A. Yes sir.

PATRICK PERCIVAL BRYANT - DIRECT BY ARCHER

4

1 Q. And you filed a Post-Conviction Relief on that, where I
2 represented you in that a couple of terms ago, correct?

3 A. Yes sir.

4 Q. And that sentence was vacated; is that correct?

5 A. Yes sir, it was.

6 Q. All right. So now you have this -- you went to trial
7 on a Criminal Sexual Conduct First with a Minor; is that
8 correct?

9 A. Yes sir, that's correct.

10 Q. And that's why we are here today?

11 A. Yes sir.

12 Q. All right. The Criminal Sexual Conduct with a Minor,
13 there were two elements to that. One was whether or not there
14 was consensual sex or not, and one is, using a layman's term,
15 whether you raped her or not.

16 A. Yes sir.

17 Q. The jury came ---

18 THE COURT: Before we go any further, let me just ask a
19 question, Mr. Archer, since you brought up the previous
20 matter, and Ms. Catoe may know this, or you may know this.
21 You had a Post-Conviction Relief Application on the previous
22 matter and it was granted; is that correct?

23 MR. ARCHER: It was granted.

24 THE COURT: All right. Now, has the State appealed
25 that decision of the Trial Court?

1 **MS. CATOE:** No, Your Honor. What happened in that case
2 was, the Judge gave the wrong charge to the jury. He provided
3 the old law to the jury, and it was just completely the wrong
4 law, and so we did not appeal that.

5 **THE COURT:** All right. And so we have no information
6 on the intention then of the State as to retry Mr. Bryant on
7 that or not? Do we know about that?

8 **MS. CATOE:** As far as I know it would still be a
9 pending charge. Mr. Bryant may have more information on that,
10 whether he's been brought back or had a hearing on it or ---

11 **THE COURT:** Do you know anything about that, Mr.
12 Archer?

13 **MR. ARCHER:** No sir.

14 **THE COURT:** All right. Very -- go ahead. Continue on.
15 I'm sorry.

16 **Q.** All right. On the trial you were represented by Mr.
17 Fox; is that correct?

18 **A.** Yes sir, that's correct.

19 **Q.** And the jury found you not guilty of the Criminal
20 Sexual Conduct First, which means they believed your story
21 that it was consensual sex; correct?

22 **A.** Yes sir, that's correct.

23 **Q.** In other words, you didn't rape her?

24 **A.** No sir.

25 **Q.** All right. And the jury did find you guilty though

PATRICK PERCIVAL BRYANT - DIRECT BY ARCHER

6

1 under the section which is having sex with a -- somebody who
2 was under sixteen; is that correct?

3 A. Yes sir, that's correct.

4 Q. And actually the State introduced evidence that she was
5 fifteen years old.

6 A. Yes sir.

7 Q. All right. And you are here today because you believe
8 that there should have been more done to show that you did not
9 know she was fifteen years old; is that correct?

10 A. Yes sir, that's correct.

11 Q. And that would have been a defense to the age element
12 of that -- of that charge.

13 A. Yes sir.

14 Q. All right. So tell the Court -- first of all, tell the
15 Court how you knew the victim, and just get into the
16 background of it, and how you believe that when you were
17 having consensual sex with her that you didn't violate this
18 statute where she was only fifteen years old.

19 A. I met her in Club Isis one night. It was approximately
20 about one-thirty in the morning. That's a club where you have
21 to present an I.D., an I.D. that shows at least -- you are at
22 least twenty-one years of age. When I go to that club I have
23 to present an I.D., so by me going there, and meeting her at
24 that particular club, which is Club Isis in Pawleys Island, my
25 idea -- my thing was, she was at least twenty-one years of

PATRICK PERCIVAL BRYANT - DIRECT BY ARCHER

7

1 age, so to get in that club you have to be that age.

2 Myself and the victim we were actually dating for -- you
3 know, seeing each other for about a year, you know. She had
4 stayed to my mother's house. I've been to her mother's house
5 on numerous occasions. Her mother know I was there several
6 times. She never said anything about -- about her daughter
7 being fifteen or sixteen, so my thing was, you know, she's --
8 she's in the club, you know, she's buying beer. You know,
9 like I said before, to even get into a club like that you have
10 to present an I.D., and you have to be the age of twenty-one
11 in order to get in that club, so I took the indication that
12 she was at least twenty-one years of age, so she was old
13 enough.

14 Q. Question. At your trial did Mr. Fox bring any
15 witnesses from the Isis -- what is it, the Isis Club to show
16 that you had to be twenty-one to get in, or what did he do to
17 try to prove that she was -- that you thought, anyway, or
18 other people thought that she was an adult?

19 A. Well, he didn't -- he didn't bring anyone in. He
20 didn't bring anyone in, and to prove that she was of age of
21 anything like that. What happened was, Crystal Smith was
22 brought in as a potential witness, and when she came in I
23 asked him then, you know, what was she doing here, you know,
24 because she didn't have anything to do with this trial. By
25 her being a potential witness in my CSC Second I felt that had

PATRICK PERCIVAL BRYANT - DIRECT BY ARCHER

3

1 a devastation impact on my trial because the jury was then
2 able to hear the questions that they had asked Crystal Smith,
3 you know. She didn't have anything to do with the CSC, why
4 was she here. At that time he said he didn't -- he didn't
5 know why she was here, so, you know, her testimony, you know,
6 just, you know, gave the jury the decentive (SIC) that, okay,
7 well, maybe he is -- he is guilty of this, you know, and I
8 felt if they didn't have any -- if they didn't have to hear
9 from her when they asked her was I -- was she the victim of a
10 Criminal Domestic Violence of a High and Aggravated Nature
11 that myself, Bryant, was convicted and received ten years,
12 which I was, but then later on I filed a Post-Conviction
13 Relief May of -- May the 27th of '09, and later came back in
14 February of 2010, and they vacate the sentence, so ---

15 Q. Did he object to that, or was there a -- the point is,
16 this is ineffective assistance of counsel; this is really what
17 Mr. Fox did wrong.

18 A. Yes sir, it's ineffective assistance of counsel.

19 Q. So you feel that he should have strongly objected and
20 maybe appealed that, or you don't feel like he did a proper
21 job in excluding her as a witness? Is that what you are
22 saying?

23 A. Yes sir. That's what I'm saying, he didn't do a proper
24 job. He should have objected to it.

25 Q. All right. Let's go to the age thing, because again,

PATRICK PERCIVAL BRYANT - DIRECT BY ARCHER

9

1 this is ineffective assistance of counsel. What -- were you
2 having sex with her for a whole year, or what ---

3 A. Yes sir.

4 Q. Just tell the Court what you were doing with her.

5 A. Well, we had been being intimate with each other
6 approximately a whole year, you know. I would go to her house
7 and be there with her. She would come to my house. My mother
8 came home -- she stayed to my house one Saturday, one Saturday
9 -- Saturday night, and my mother came home Sunday morning and
10 she was like, you know, if y'all are going to be together, you
11 know, y'all are going to be, you know, intimate, whatever, she
12 said, I've got a house that's next door, you know, you need to
13 have your lights turned on, water and stuff like that, and you
14 know, y'all can see each other over there, you know what I'm
15 saying, and so that's what I've done. I done just that. And
16 you know, like I said, we had been -- we had been seeing each
17 other for about a year, you know, having sex, you know.

18 Q. During that time did you ever go to a club with her
19 where she had to get in, to be twenty-one, or -- let's talk
20 about the age.

21 A. Yes. We went ---

22 Q. That's the whole purpose we are here today.

23 A. Yes. We went to -- like I said, when I met her at Club
24 Isis she was there in the club already, the night I met her
25 there, when she was there, so my thing was, okay, she's old

PATRICK PERCIVAL BRYANT - DIRECT BY ARCHER

10.

1 enough to be here; she's at least twenty-one years of age,
2 when I met her there.

3 You know, you go to the club and, you know, you see
4 girls in the club and stuff like that, and that's how I met
5 her, not knowing her.

6 Q. Was there any other indication? Did she ever say that,
7 hey, we better not do this, I'm only fifteen years old?

8 A. No sir, I was never -- that was never brought up to my
9 attention.

10 Q. All right. How old were you at the time?

11 A. Probably about -- maybe thirty-eight. I probably was -
12 --

13 Q. How old are you now?

14 A. I'm forty-four now.

15 Q. You don't look it.

16 A. So I probably was about -- probably thirty-seven,
17 thirty-eight.

18 Q. Okay. So you are thirty-seven and she's fifteen when
19 you went with friends, etcetera. Did anybody ever say, what
20 are you doing with a fifteen year old? Was there any
21 indication from anybody that she was fifteen years old at the
22 time? I mean, she was your girlfriend, or this was just
23 casual sex?

24 A. No. She was -- no, she was a girlfriend.

25 Q. She was a girlfriend.

PATRICK PERCIVAL BRYANT - DIRECT BY ARCHER

11

1 A. Yes sir. She was a girlfriend.

2 Q. Apparently you went to a lot of places with her; is
3 that correct?

4 A. Yes sir, I did.

5 Q. Was there any indication that she may have been fifteen
6 years old at the time?

7 A. No sir, none at all. And I -- you know, being in
8 Pawleys Island -- it's a very, you know, popular area, you
9 know, people know people, you know, everybody basically know
10 everybody, and me being there no one ever said, hey, Patrick,
11 you know, she's fifteen or she's sixteen. No one ever even
12 said that to me, you know, that never even came up at any
13 time, in the club or times when we went out to restaurants and
14 movies, it never even came up at no time, so my thing was,
15 again, that, okay, she's of age because you know, nobody -- no
16 one is saying anything negative, you know, that she's not --
17 she's fifteen or anything like that, so ---

18 Q. Let me ask you this. The jury found you not guilty of
19 Criminal Sexual Conduct First, which would be non-consensual
20 sex, forcible sex. Why do you think she did this?

21 A. Well, ---

22 Q. Why did she go to the police?

23 A. Well, I know she -- she -- at some point in time she
24 was -- she was in trouble for some things that had happened,
25 and her mother had told her had she got into any trouble or

PATRICK PERCIVAL BRYANT - DIRECT BY ARCHER

12

1 not to, you know, go to work like she was suppose to, that she
2 was going to have her locked back up, you know, and stuff like
3 that right there, so I believe she more or less got scared,
4 you know, from her mother telling her that, so that's what
5 made her probably screamed about the rape part, which, you
6 know, it's clearly -- it's -- it's no rape, and like I said
7 before, I had the understanding from, you know, meeting her in
8 the club at 1:30 in the morning that she was at least twenty-
9 one years of age.

10 Q. This is not a legal question, but it's sort of a
11 question that is in my mind. Do you think it's kind of fair
12 that you should be serving a life without the possibility of
13 parole for having consensual sex with a girlfriend over a
14 year?

15 A. No sir. I don't -- I don't think I should. I don't
16 felt that I was treated fairly. No sir, I don't.

17 Q. I mean, there are murderers that don't get life without
18 parole, correct.

19 A. I understand. Yes sir, you are correct.

20 Q. Is there anything else you would like to tell the Court
21 regarding -- again, this is ineffective assistance of counsel,
22 and -- regarding the facts of your case?

23 A. Well, I want to stress this, is that, you know, you
24 bring someone into a -- into -- we say, a trial or something
25 that's seriously, and you bring someone into a trial that

PATRICK PERCIVAL BRYANT - DIRECT BY ARCHER

13

1 really doesn't have anything to -- to do with it, you know,
2 like I said, if Mr. Fox had done a proper investigation, or
3 had he objected to, you know, Crystal Smith being a potential
4 witness, I mean, you know, that really, you know, had a
5 devastation impact to the trial, to the jury, you know, led
6 the jury to believing that -- that I was aware of her age when
7 I wasn't. I clearly did not know she was fifteen. The
8 indications that I had, like I said before, that she was
9 twenty-one years of age, you know, because of her being in the
10 club at 1:30 in the morning. I mean, she's not home at 1:30
11 in the morning, I mean, you know, where is her mother. I
12 mean, should be some sort of concern there, a fifteen year old
13 is not home at 1:30 in the morning, you know, where is she,
14 you know, so, you know -- and that didn't -- evidently that
15 didn't play a part in it, so, you know, clearly her mother
16 never said anything to me that she was fifteen, and I've been
17 to the house, like I said, several -- numerous times, so, you
18 know ---

19 Q. You had sex in her and her mother's house?

20 A. Yes sir.

21 Q. And her mother knew about it?

22 A. She -- she had to know.

23 Q. And she never said to you, what are you doing to my
24 fifteen year old daughter?

25 A. She never said -- no sir, she never said anything like

PATRICK PERCIVAL BRYANT - DIRECT BY ARCHER

14

1 that.

2 Q. Did she drink? Did she smoke? How did she look?

3 A. The victim?

4 Q. Yes. Did she look fifteen or did she look like she's
5 eighteen?

6 A. No sir. She didn't look fifteen. She looked like she
7 was at least eighteen to twenty-one. You know, she drunk.

8 Q. Did she smoke? Did she drink?

9 A. Yes sir. She smoked weed, she drunk, you know. I
10 mean, that's something I don't do. I don't even smoke weed,
11 never smoked weed, you know.

12 Q. All right. Is there anything else you want to tell the
13 Court? This is your opportunity.

14 A. Well, yes, I would like to speak on this. I believe a
15 conflict of interest on Mr. Eric Fox. He represented me at
16 one trial before. I believe it is his duty for him to have
17 said something to the Solicitor or the Judge about had
18 represent me one time before, and it possibly being a conflict
19 of interest of him representing me for both trials.

20 Q. What would that conflict be? Do you think he thought
21 you were guilty?

22 A. Yes, I believe so, and I believe that's why he didn't
23 say anything to the -- to the Solicitor about representing me
24 on this -- at the second trial.

25 Q. Did you express this to Mr. Fox, that you didn't think

PATRICK PERCIVAL BRYANT · DIRECT BY ARCHER

15

1 he should represent you?

2 A. No sir, I didn't -- I didn't say anything to him at the
3 time because, you know, I wasn't sure of it myself, so, you
4 know, I went and, you know, done some studying and, you know,
5 reading over some law cases and stuff like that, and that's
6 how I kind of got a general idea of the conflict of interest.

7 Q. All right. Is there anything else?

8 A. I believe -- I believe that's it.

9 Q. All right. So what you are asking Judge John is to
10 vacate your sentence and have a new trial, and you could show
11 that you did not know she was fifteen years old?

12 A. Yes sir, I am.

13 Q. Possibly bring some witnesses from Isis and some other
14 proof.

15 A. Yes sir, I would -- we are suppose to have some witness
16 here this afternoon. I talked to my mother last night and she
17 said she was going to found them up and they were suppose to
18 be here today, but I don't see them out there so either she
19 did not get in touch with them for whatever reason, she being
20 of age, but yes, I would love to have it vacated, you know,
21 maybe, you know, a chance for a new trial so I can bring my
22 witnesses in and where they can take the stand and they can
23 witness for themselves.

24 Q. Okay.

25 MR. ARCHER: Answer any questions the Attorney General

1 might have.

2 A. Thank you, sir.

3 THE COURT: Cross-examination.

4 CROSS-EXAMINATION BY MS. CATOE:

5 Q. Good morning, Mr. Bryant. I just have a few questions
6 for you.

7 A. Good morning.

8 Q. You did testify that you had to be twenty-one to get in
9 the club; is that right?

10 A. Yes Ma'am, I did.

11 Q. All right. But at trial you said eighteen; is that
12 right?

13 A. Yes. From eighteen to twenty-one.

14 Q. All right. Also at trial you testified for a lengthy
15 period of time, and in fact you gave four different ranges of
16 ages for the victim. Do you recall that?

17 A. I ---

18 Q. For example, at one time you said she thought she was -
19 - you thought that the victim was the same age of your
20 girlfriend, who was thirty-four or thirty-five. Then later
21 you referred to her as a young female. Then you said she
22 looked twenty-one or twenty-two, and then you said she looked
23 twenty-five, so which is it?

24 A. I mean, all those numbers are right there together when
25 you are talking about twenty-one to twenty-five.

PATRICK PERCIVAL BRYANT - CROSS BY CATOE

17

1 Q. Well, what about thirty-five?

2 A. Okay. Well, thirty-five, it's -- it's -- it's a little
3 more of -- of number, but to look at a female it doesn't make
4 a greater difference, if you was to look at a thirty-five or a
5 twenty-one years old. You've got females out there that take
6 care of themselves. They are in the gym, you know, so they
7 take care of themselves, so you wouldn't really know their
8 age. I'm forty-four years old, I mean, I'm not being
9 disrespectful but I'm forty-four, and I don't believe I look
10 forty-four, just -- just to give you a general idea on the
11 questions and numbers of age that you just brought forth.

12 Q. All right. And you said you dated the victim for a
13 year. During this time you never knew she had to go to school
14 or do homework, or go home to her mother? You never knew any
15 of that for a whole year? You never had -- and you knew her
16 family, and you knew -- and she went to school with your
17 family members and you never knew any of that?

18 A. Well, not to say -- I know of her family. At this time
19 I just shortly came home myself, so to know whether she was in
20 school, I wasn't there in Pawleys so I wouldn't have any idea
21 that she was in school or things of that age, because I --
22 like I said before, I just had came home so ---

23 Q. All right. Now, you just said she was your girlfriend
24 for a year, but at trial you said that she was a "blue-moon"
25 thing, and that Crystal Smith was your girlfriend, and that

1 you hoped to get back with Crystal Smith; isn't that right?

2 A. Okay. Just something was said during trial, but of
3 course, yes, she was a girlfriend.

4 Q. Who?

5 A. Natalie.

6 Q. And what was Crystal Smith?

7 A. Crystal Smith was a -- I mean, you -- you could
8 probably say a girlfriend.

9 Q. You said that at trial numerous times, did you not?

10 A. Yes. I prob -- I probably did, yes.

11 Q. Well, how did you coincide the two of them together
12 like that?

13 A. Well, how do you coincide -- okay. It's -- it's a
14 girlfriend and it's a -- it's a more of a friend.

15 Q. All right. And if she was your girlfriend for a year,
16 and you thought she was over twenty-one, then why did you deny
17 that you knew her at all to -- in your first statement to the
18 police?

19 A. Okay. You know, you being scared, you know, and so you
20 ---

21 Q. Why would you be scared?

22 A. I mean ---

23 Q. If you knew her, and you had been dating her for a
24 year, she was your steady girlfriend, over twenty-one, why
25 would you be scared?

PATRICK PERCIVAL BRYANT - CROSS BY CATOE

19

1 A. At this time, when I was arrested for that particular
2 charge, I knew her, but to know whether -- like I said before,
3 whether she was in school or -- or her ---

4 Q. But you suspected that she might be a child?

5 A. No, never -- it never even crossed my mind. If you
6 look at a female, and like I said before, you know, she's
7 presenting -- you are going to the store and she's buying beer
8 out the store, I mean, she has to be old enough to buy beer.
9 Now we have been together, you know, and went to the store and
10 she had bought beer, so I don't have to suspect anything, I --
11 you know, I mean, you know, I -- she's got to be at least
12 twenty-one years of age to buy beer, or any type of alcohol,
13 so ---

14 Q. All right. And you -- you told Mr. Archer some reasons
15 you thought she might have made up this story about you, but
16 you have nothing to, in fact, substantiate your beliefs on
17 that; is that correct?

18 A. What do you -- I don't -- I don't understand that.

19 Q. Why she might have -- why the victim might have made up
20 this lie about you.

21 A. Well, like I said before, you know, her mother has told
22 her before, you know, if she -- well, she, you know, get into
23 any trouble, or not to go to work like she was suppose to be
24 going to work, you know -- you know, that she was going to
25 possibly have her locked back up, or -- or something of that

1 nature, so ---

2 Q. All right. And these are your beliefs and your
3 speculations about it; is that right?

4 A. Yes, it is.

5 MS. CATOE: Thank you. Nothing further.

6 THE COURT: Any redirect?

7 MR. ARCHER: Just briefly, Your Honor.

8 REDIRECT-EXAMINATION BY MR. ARCHER:

9 Q. As far as her age, you know, looking twenty-five,
10 thirty-five, etcetera, she looked -- she looked more than
11 fifteen, correct?

12 A. Yes sir, she did.

13 Q. All right. And she looked actually more than sixteen -
14 --

15 A. Yes.

16 Q. ---So it doesn't matter what she says, twenty-five,
17 twenty-six, whatever, it's ---

18 A. Yes. That's correct.

19 Q. ---Okay. And the other thing, as far as being scared,
20 you were charged with actually forcing her in a rape charge,
21 and you knew you didn't do that because you knew it was sexual
22 con -- it was consensual, correct?

23 A. Yes sir, and that's -- that had something to do with me
24 being scared, rape, something I know I didn't do, you know,
25 and ---

1 Q. So when they charged you they charged you with Criminal
2 Sexual Conduct First, is what they charged you with ---

3 A. Yes sir. That was my init ---

4 Q. ---Which means that you forced her to have sex.

5 A. Yes sir, they did.

6 Q. All right. And you knew you didn't do that?

7 A. Yes sir, I did.

8 MR. ARCHER: All right. Thank you.

9 THE COURT: All right, sir, you may step down.

10 A. Thank you, sir.

11 THE COURT: Thank you.

12 Anything further from the Applicant?

13 MR. ARCHER: No sir.

14 THE COURT: Can -- can I ask y'all a question? In the
15 Court's examination of the record -- and sometimes it's hard
16 to look at the S.C.D.C. records and decipher those, but there
17 is also attached in the record the various sentencing sheets,
18 and there's a sentence sheet from Judge Maring of July 14th,
19 1994, where the Defendant pled guilty to armed robbery, which
20 obviously would classify under the Two-Strike Three-Strike
21 Law; then there is a sentencing sheet for Criminal Domestic
22 Violence of a High and Aggravated Nature by Judge Breeden on
23 October 5, 2005, which is set forth as violent, and then he
24 has now a Criminal Sexual Conduct of a Minor, Second, which
25 he's here about today, which was violent, and on that Judge

1 Baxley, as indicated by the Transcript of Record, sentenced
2 Mr. Bryant to life in prison without the possibility of
3 parole, pursuant to 17-25-45, I'm assuming because he had
4 accumulated three -- at least three violent charges. Now, you
5 told me that the Criminal Domestic Violence High and
6 Aggravated Nature charge has been declared null and void by
7 the Court; is that correct?

8 MS. CATOE: Yes, Your Honor, but the CDV had nothing to
9 do with the elevation to -- it was actually two most serious
10 offenses, one being armed robbery and the second being this
11 CSC conviction.

12 THE COURT: All right. Where is -- okay, is it in the
13 Transcript of Record -- and I might have skipped over it --
14 Judge Baxley made a finding that the offense did not result
15 from consensual sexual conduct where the victim was younger
16 than the actor.

17 MS. CATOE: Yes, Your Honor. I believe it's page five
18 sixty-one.

19 THE COURT: All right. I just -- I had looked for it
20 and I didn't see it maybe.

21 All right. I just didn't see that. All right. Thank
22 you.

23 Do you want to -- presentation from the State, please.

24 MS. CATOE: Yes, Your Honor. The State would call Eric
25 Fox to the stand.

ERIC FOX - DIRECT BY CATOE

23

1 THE COURT: All right. Please come around and be
2 sworn.

3 ERIC FOX, being first duly sworn,
4 testifies as follows:

5 DIRECT-EXAMINATION BY MS. CATOE:

6 MS. CATOE: May it please the Court.

7 THE COURT: Yes Ma'am, please.

8 Q. Good morning, Mr. Fox. Can you first tell us how long
9 you've been practicing Criminal Law?

10 A. I've been a licensed attorney for twenty years this
11 month, and have focused almost exclusively on Criminal Law for
12 -- it will be seventeen years this coming January.

13 Q. All right. And can you tell us, how did you become
14 involved in Mr. Bryant's case?

15 A. I was appointed to represent Mr. Bryant in this case
16 that we are discussing in court this morning, as well as a
17 previous -- it was a first degree burglary charge and ABHAN
18 and criminal domestic violence, aggravated, so that -- I think
19 I was appointed at the same time on both cases, or shortly.

20 Q. And did they go to trial around the same time?

21 A. Fairly close. They tried -- the State focused on the
22 First Degree Burglary, Domestic Violence situation, and went
23 to try first on that. I think in time of incident this case
24 actually occurred first, but their focus -- the Solicitor's
25 focus was on that burglary and CDV charge. We went to trial

1 on that -- Mr. -- and he was -- and Mr. Bryant was served with
2 notice of intention to seek life because of his prior armed
3 robbery conviction. We had a not guilty verdict on the first
4 degree burglary, not guilty on ABHAN, and guilty, as you've
5 heard, on the CDV HAN, which was subsequently overturned on
6 the PCR.

7 Q. All right, and you were present in February, 2010, when
8 that overturned?

9 A. Yes. I was here for a hearing on that case.

10 Q. All right. But in 2007 the CDV HAN conviction was
11 still a valid conviction; is that right?

12 A. Yes.

13 Q. All right. And that would be at the time of this
14 particular trial?

15 A. Yes.

16 Q. Okay. And did you meet with Mr. Bryant to discuss his
17 version of the facts?

18 A. Yes. Because both of these were pending -- and they
19 are very close in time -- and because when Mr. Bryant -- when
20 the police interviewed Mr. Bryant about the other charge they
21 also talked to him about this one, this Criminal Sexual
22 Conduct case. They were, although separate trials and
23 separate incidents they were very intertwined. But yes, I met
24 with Mr. Bryant. So whenever I would meet with Mr. Bryant we
25 tended to discuss both, but I did meet with Mr. Bryant several

ERIC FOX - DIRECT BY CATOE

25

1 times about this case.

2 Q. And what did he tell you about his side of the story?

3 A. Well, almost exactly like -- pretty much like he has
4 testified her to this morning, that he had know -- Natalie
5 Shanks was the young lady's name -- that he had known her from
6 around. My notes reflect that he had known her even before
7 seeing her at this Club Isis, that -- you know, in the Pawleys
8 area they have -- he had relatives that went to -- actually
9 went to school, but he had seen her around other places, not
10 just at the club, but that he did see her at the club, based
11 on that he felt she must be at least twenty-one or more, had
12 seen her drinking, they did have an ongoing relationship.

13 Q. All right. And did you discuss the elements of each
14 individual charge? There were two charges, First Degree
15 Criminal Sexual Conduct and Criminal Sexual Conduct Second
16 Degree with a Minor. Did you discuss the elements of those
17 separately?

18 A. I did.

19 Q. All right. And did you discuss possible defenses to
20 the first degree CSC?

21 A. We did, because in that -- on that charge consent is an
22 issue, and he maintained that they did have a consensual, both
23 on the day in question, and again, going back a number of
24 months, if not longer, so I indicated to him consent would
25 definitely be an issue in that case.

1 Q. All right. And he was acquitted for that charge?

2 A. And he was -- that's correct.

3 Q. All right. And what about defenses to the Second
4 Degree CSC with a minor?

5 A. Well, again, we discuss that, because of the age of Ms.
6 Shanks that consent would not be an issue with regard to that
7 charge, however, the defense of mistake of -- the defense of
8 him being mistaken as to Ms. Shanks' age would be an issue.

9 Q. All right. And was that something that was
10 specifically provided in that year's particular status that
11 has since gone away?

12 A. It was. Mr. Bryant fit into a little -- he got in
13 under the wire, so to speak, where that was still an available
14 defense.

15 Q. All right. And did you discuss with Mr. Bryant the
16 ways that you might, essentially, prove his defenses?

17 A. I did. We discussed the -- particularly with his --
18 obviously it's his knowledge. We discussed the fact that the
19 jury could not read his mind, in the context that he would
20 probably need to testify. Of course I explained he had an
21 absolute right not to, but we also discussed other people
22 themselves -- who might be able to testify about that. He gave
23 me a name of one witness, Dwayne Grate, who was someone that
24 he said would have seen Ms. Shanks at Club Isis specifically.

25 Q. All right. And did you look into -- did you

1 investigate that witness?

2 A. I did, and I actually spoke to Mr. Grate, although I
3 don't have a note on the date, but my trial notes and my
4 pretrial notes both reflect I've gotten -- based on my
5 interview with Mr. Bryant he gave me Mr. Grate's name. Mr.
6 Bryant then gave me his -- a family member, I believe his
7 brother, to try and contact Mr. Grate. I didn't actually --
8 took a lot to get him to respond, phone calls and things. He
9 did not appear very eager to do so, and when I did speak to
10 Mr. Grate there was lots of -- my notes reflect there was lots
11 of, I don't remember, I'm not sure, I don't know. He really
12 provided next to no information.

13 And then my trial notes -- I was still exploring whether
14 to subpoena him, even right up through the trial. My notes
15 reflect that he was wobbly, uncooperative, very unsure what he
16 would come and say on the witness stand, whether he would help
17 or hurt. I mean, he had given me nothing concrete to think
18 that he was going to testify in a way that would help Mr.
19 Bryant, and I was concerned that he might come in and actually
20 hurt Mr. Bryant, so I did not subpoena Mr. Grate.

21 Q. All right. And was that the only witness name that Mr.
22 Bryant provided you as a potential helpful witness?

23 A. Yes. At least on that -- yes.

24 Q. All right. Did you learn of any other witnesses that
25 might be helpful to the defense?

1 A. No.

2 Q. All right. And did you discuss how you would deal with
3 the DNA evidence that was under the victim's nails?

4 A. We discussed this. They did, you know, a rape kit at
5 the hospital, and although they -- I recollect they did find
6 semen but they could not match that to Mr. Bryant, so the only
7 physical evidence was, in fact, that DNA evidence under the
8 nails, and the way he described it, and I believe the way I
9 argued to the jury, was that that may have been something that
10 happened in the heat of passion.

11 Q. All right. And do you recall any plea offers in this
12 case?

13 A. I think at two different occasions. They offered first
14 a negotiated fifteen years. That was done when we had the
15 *Schmerber* hearing to get the DNA swabs, and then later, prior
16 to trial, they offered a range of fifteen to twenty.

17 Q. All right. And did you fully discuss those offers with
18 Mr. Bryant?

19 A. We did.

20 Q. Did you discuss that he would not receive life without
21 parole if he accepted those offers?

22 A. We did.

23 Q. All right. Do you know -- did he tell you why he was
24 rejecting them?

25 A. Well, his position was exactly with me, first the first

ERIC FOX - DIRECT BY CATOE

29

1 time I spoke to him, right up through both trials, and through
2 today, was that it was a consensual sexual relationship with
3 Mr. Shanks, and that he did not know her true age.

4 Q. All right. And was Mr. Bryant fully informed that if
5 he did elect to proceed to trial that the State would seek
6 life without parole?

7 A. Yes. They served notice of that, both in this case and
8 in his previous trial.

9 Q. All right. And did the victim, in fact, testify at
10 trial?

11 A. She did.

12 Q. And so the jury -- the jury was able to look at her and
13 judge her age?

14 A. Yes.

15 Q. And did the victim admit going to clubs and using a
16 fake I.D., or her sister's I.D.?

17 A. She did.

18 Q. Did she admit that she went out with an older crowd?

19 A. I believe she did, yes.

20 Q. And did she also admit to some prior convictions
21 involving shoplifting and crack cocaine?

22 A. She did. And in fact, if I recollect, she had a
23 juvenile record that -- I can't remember if it's in addition
24 to those you just mentioned or others, but I became aware that
25 she had a juvenile record, and I actually made a motion in

ERIC FOX - DIRECT BY CATOE

30

1 front of Judge Abbott in Family Court to be able to see those
2 records, to see if there was any material that might be
3 impeachable, or to see whether I could request a competency
4 evaluation, and Judge Abbott did, in fact, obtain those
5 records, review them incamera, and he did deny my motion, but
6 we explored even her juvenile record.

7 Q. All right. And at trial you called a witness,
8 Investigator Tom Digsby. Do you recall why you called him as
9 a witness?

10 A. I know that he was -- did the -- I believe wrote the
11 Incident Report. I'm looking through my notes. There were
12 things that he didn't do regarding the photo line-up,
13 photographs. There was a co-worker of Ms. Shanks that he had
14 attempted to locate, could not find. I don't know what she --
15 a Ms. Yolanda Ortega, who would have been working with Ms.
16 Shanks.

17 What happened was -- the allegation was, Ms. Shanks says
18 I was raped, I went on to work. Ms. Ortega would have been
19 there, but there was no statement ever taken from her, and
20 they had been unable to find her. So I basically called Mr.
21 Digsby to be able to put that information in front of the --
22 also the fact that Mr. Bryant had no marks on him. The claim
23 was that he had been scratched and there had been a struggle,
24 and somewhere I believe in the Incident Report Investigator
25 Digsby had indicated that there were no visible marks on the

ERIC FOX - DIRECT BY CATOE

31

1 Defendant, so I called him to point out these things to the
2 jury.

3 Q. All right. And of course you also called the
4 Defendant. Prior to his testimony did you discuss,
5 essentially his testimony, discuss his prior record that might
6 come out? Did you discuss all those things with Mr. Bryant?

7 A. We did, and that was an ongoing discussion. Of course
8 he had been through a trial just a few months before where he
9 actually chose not to testify, in part because of his prior
10 record, and in part because he had given a recorded statement
11 that the State introduced in his trial, and was able to get
12 his version of events. So anyway, we had discussed that on
13 numerous occasions with Mr. Bryant.

14 Q. All right. And did you discuss eliciting testimony
15 regarding his two prior statements to police?

16 A. We did. I know we discussed his prior because
17 initially he denied having sex, and any knowledge of this
18 young lady, and then in a short period of time, at the same
19 interview -- I think it was within thirty -- less than an hour
20 later, as part of the same interview, he then did another
21 written statement where he acknowledged at least having a
22 consensual relationship. So we pointed out that was going to
23 be in the jury -- in front of the jury, that was an
24 inconsistency we were going to have to have an explanation
25 for.

1 Q. All right. Now Crystal Smith, who would be Mr.
2 Bryant's former girlfriend, and the victim in the CDV HAN
3 case, she was not called as a witness in the State's case in
4 chief; is that right?

5 A. That's correct.

6 Q. And in your examination of Mr. Bryant do you recall
7 bringing out testimony regarding phone calls that he made to
8 Crystal Smith?

9 A. I don't recall it being the -- I know they were made,
10 they had recordings, and we had listened to those recordings
11 with Mr. Bryant, you know, from the jail. In fact, Ms. Smith
12 took phone calls from Mr. Bryant, and I think she testified
13 to, for the express purpose of trying to get him to confess to
14 this charge with Ms. -- the CSC charge, so we did -- we were
15 aware of that, and did discuss that with
16 Mr. Bryant.

17 Q. All right. And did you, in fact, object when the State
18 attempted to bring out the details of the CDV HAN conviction
19 on cross-examination?

20 A. I did.

21 Q. All right. And did you then object when the State
22 asked to play the tape of the phone calls from Crystal Smith,
23 or to Crystal Smith?

24 A. Yes.

25 Q. All right. And again, Crystal Smith was called in

ERIC FOX - CROSS BY ARCHER

33

1 rebuttal; is that right?

2 A. She was. And I think speci -- again, the transcript
3 would reflect exactly what she -- I know one issue was,
4 Defendant had denied smoking marijuana and Ms. Smith testified
5 that she had observed Mr. Bryant smoke marijuana on two
6 different occasions. I know that was one specific issue.

7 Q. All right. And were you aware of the life without
8 parole statutes, provisions that would allow the Judge to not
9 give Mr. Bryant life without parole?

10 A. Yes.

11 Q. And did you argue that to the Judge in an attempt to
12 have Judge Baxley make a finding that there was, in fact,
13 consent?

14 A. I did, based on the verdict, on the evidence that was
15 presented from Mr. Bryant, as well as the jury's verdict in
16 the case, and Ms. -- and again, I think the record reflects,
17 as my notes say, Judge Baxley declined to make that finding
18 because the issue was, in fact, contested at trial, and he
19 made the finding that it did fit under the life without parole
20 statute.

21 MS. CATOE: All right. I don't have any further --
22 anything further.

23 THE COURT: All right. Cross-examination.

24 CROSS-EXAMINATION BY MR. ARCHER:

25 Q. Good morning, Mr. Fox.

ERIC FOX - CROSS BY ARCHER

34

1 A. Good morning.

2 Q. I just have a couple of quick questions. On the
3 seeking life without parole, do you have an personal knowledge
4 of why they were doing that?

5 A. Well, the Solicitor involved -- again, the thing that
6 you always keep in mind is, there were two cases close in
7 time. There was this other case involving Crystal Smith, the
8 CDV HAN case and burglary first. In my conversations with the
9 Solicitor they felt was, I don't want to say more serious, but
10 that they felt was a stronger case, was -- they were more
11 focused, and that went to trial first, even though it was
12 second in time. I think they were absolutely determined to
13 get Mr. Bryant behind bars for life. They had, between the
14 two trials, three different charges that could have gotten him
15 a life without parole sentence. Two of them he got not
16 guilty. So anyway, they were taking as many bites of the
17 apple as they could get, and they made clear that was their
18 goal, was to put him behind bars for life.

19 Q. All right. And that was what, Mr. Modica, was the
20 Solicitor?

21 A. Yes sir.

22 Q. When you -- when you had a plea offer that did not
23 include, obviously, life without parole; is that correct?

24 A. Yes.

25 Q. And when you spoke to him did you explain to him the

ERIC FOX - CROSS BY ARCHER

35

1 severity of what could possibly happen if he went to trial and
2 lost?

3 A. Yes, absolutely.

4 Q. All right. And what was his reasons? Was it more of
5 the age, or more that he didn't -- it was -- was it consensual
6 or non-consensual? What did you focus more on, more on that
7 he didn't rape her?

8 A. More -- no, it was more on the age. I mean, he --
9 because we discussed that consent for one charge was an issue
10 for the criminal sexual conduct first degree, consent is an
11 issue in a defense, which he maintained all along, but I felt
12 the bigger problem was -- was the age, because she was, in
13 fact, very young. Whatever he may have thought the jury can't
14 read his mind, so they would be guessing somewhat as to what
15 he thought, and my own opinion in seeing her probably two
16 years after the incident happened was, when she came to court,
17 that she still looked very young, and that was my opinion. I
18 didn't get it in front of the jury, but I thought that was a
19 problem.

20 Q. So as far as the -- your efforts are concerned, you put
21 as much effort into both of them, or did you put more effort
22 into the fact that it was consensual sex?

23 A. Well, I don't know that I put more on one or the other,
24 because either one of them were going to give him life without
25 parole. They had to -- it wasn't going to do us any good if

ERIC FOX - CROSS BY ARCHER

36

1 they felt it was a forcible rape than the age, you know, still
2 going to be a problem, so I don't know that I made any real
3 distinction about that in preparing.

4 Q. Could there -- could there have been -- on the ten day
5 motion to reconsider would that apply to something like this,
6 or is that just the disparity of the sentence?

7 A. I don't know that it wouldn't apply. I did not file
8 any motion like that.

9 Q. To reconsider life without parole ---

10 A. Right.

11 Q. ---Within ten days. You did not file?

12 A. I did not. No.

13 Q. And ---

14 A. Did file Notice of Appeal at Mr. Bryant's instruction.

15 Q. Let me -- looking back at it, do you believe you should
16 have filed that motion?

17 A. It could not have hurt anything. I don't know that it
18 would have made that argument at -- tried to prevent it in the
19 first place, that I felt -- I made that argument to Judge
20 Baxley after the verdict that the jury had clearly found that
21 it was a consensual sexual relationship, and found him not
22 guilty of that charge, the victim had admitted that she had
23 misrepresented her age in public by going to this club,
24 getting into -- using her sister's I.D., getting into a bar
25 when she was far too young to be there, drinking at the bar.

ERIC FOX - CROSS BY ARCHER

37

1 Mr. Bryant had testified about that. I felt there was a
2 strong basis for that, but Judge, the record reflects,
3 declined to do that. I don't have any reason to think the
4 Judge was inclined to change his mind, I'll put it to you that
5 way.

6 Q. Well, but it would have been a good idea to file that
7 motion, correct?

8 A. It wouldn't have -- it certainly couldn't have hurt Mr.
9 Bryant.

10 Q. All right. Let's go a little bit about the Club Isis.
11 There are bouncers there, I assume, that -- that look at
12 everybody's I.D.s, correct?

13 A. I'm sure.

14 Q. Did you make any effort to contact any of those
15 bouncers to see whether or not she was a patron there every --
16 every weekend or whatever?

17 A. No.

18 Q. All right. Let's talk a little bit about the conflict
19 of interest. He brought that up. Did you feel you should
20 step down in this case for some reason?

21 A. No. I didn't see any conflict. I have -- frequently
22 have clients that have multiple charges. You know they are
23 going to -- not just on the same -- not the same incident, but
24 -- excuse me -- separate incidents that end up being separate
25 trials.

ERIC FOX - CROSS BY ARCHER

38

1 Q. Did you feel that he was -- he was listening to you
2 when you advised him to take the plea, you are liable to get
3 life without parole? Did you get along with him?

4 A. Mr. Bryant was very involved. Yes. Yes. Short answer
5 to that, as much as you ever do. I think I got along with Mr.
6 Bryant. He listened to my advice. He seemed to truly
7 consider it. He offered relevant points in his own defense
8 and asked relevant questions. I share his belief he was --
9 persecuted might be a strong word, but I did not understand
10 why, on the facts of these cases, this man was looking at
11 three different possibilities of getting life without parole.
12 The facts, in neither case to me, seemed to support that kind
13 of prosecution, but I don't control that decision.

14 Q. Well, did you feel that maybe another attorney could do
15 -- talk him into that, taking that life -- taking that chance
16 of life without parole? So you had no problem with him at
17 all?

18 A. No. I mean, I'm not sure you -- we have every -- no, I
19 do not believe another attorney could have convinced him to
20 take that plea.

21 Q. I mean, we -- we do this criminal -- sometimes you just
22 can't get it across to your client. You didn't feel that he
23 was one of those; is that right?

24 A. No. I think his decision was based on, I didn't do it,
25 I mean, I did have sex but I didn't rape the girl, and I truly

1 did not understand how old she was, and he was consistent with
2 that from the first time I talked to him.

3 Q. In retrospect, is there anything you think you could
4 have done better than you did?

5 A. I'm sure there is something. I don't want to sound
6 like some politicians. I can't think of anything, but I'm
7 sure I could -- if I did it over again I would think of some
8 way to do better.

9 MR. ARCHER: All right. Thank you.

10 THE COURT: Any redirect?

11 MS. CATOE: Briefly, Your Honor.

12 REDIRECT-EXAMINATION BY M. CATOE:

13 Q. Mr. Fox, do you recall that the victim admitted that
14 she never told Mr. Bryant her age, and did you argue that
15 point in your closing argument?

16 A. Yes.

17 Q. And did you see any need to call a bouncer when the
18 victim admitted going to clubs?

19 A. No. I did feel the evidence was there, yet the victim
20 admitting it. You had Mr. Bryant also testifying about it.
21 So the evidence -- the issue and the evidence was in front of
22 the jury in my mind.

23 Q. All right. And did you have any new information with
24 which to use to file a motion to reconsider the sentence for
25 Judge Baxley?

APPLICANT'S SUMMATION (ARCHER)

40

1 A. No. Nothing had changed in those ten days.

2 Q. All right. And did you, in fact, make your argument,
3 your full argument to Judge Baxley regarding not applying the
4 life without parole?

5 A. Yes.

6 MS. CATOE: Thank you. Nothing further.

7 THE COURT: All right, sir, you may step down. Thank
8 you very much.

9 Further presentation by the State.

10 MS. CATOE: No, Your Honor. The State would rest.

11 THE COURT: All right. Arguments on behalf of the
12 Applicant.

13 MR. ARCHER: Your Honor, I know what the law is, and I
14 know I have to prove ineffective assistance of counsel, but
15 there is such a thing I know -- and I don't have the case in
16 front of me but there is such a thing is, granting a post-
17 conviction relief just in the interest of justice. I think
18 it's a Virginia case. I'm not sure. I've used it a few
19 times, and one time I was successful with it. I don't think
20 he knew how old she was, but I think my main point is, is
21 that, again, there are murderers that kill people and don't
22 get life without the possibility of parole.

23 In this case it's clear that the woman was a lot --
24 again, she went to all the wrong places. She smoked, she
25 drank, she did all the wrong things. He didn't kill her. He

STATE'S SUMMATION (CATOE)
COURT'S RULING

41

1 actually didn't even rape her, and he's winding up serving a
2 life without the possibility of parole.

3 My only argument would be that, I just don't think
4 that's fair in this situation. I'm not standing here with a
5 murderer. As far as how this case went, with Mr. Fox, I guess
6 he could have done other things. I think he could have
7 brought in the bouncer. I think he could have brought in more
8 witnesses. I -- I am aware that I should bring in those
9 witnesses. I tried today, but it's very difficult for these
10 people to cooperate. In any event, that would be -- that
11 would be my argument.

12 **THE COURT:** All right, sir. Thank you.

13 Yes, Ms. Catoe.

14 **MS. CATOE:** Just briefly, Your Honor. I would just
15 submit that the Applicant has presented some issues, but has
16 not met any burden of proof in a Post-Conviction Relief
17 matter. It sounds like Mr. Archer, and I guess Mr. Bryant,
18 have a problem with the Legislature's ELWOP statute, but
19 obviously PCR is not the forum to correct that.

20 Thank you, Your Honor.

21 **THE COURT:** All right. Thank you.

22 In this particular matter where allegations of
23 ineffective assistance of counsel are made the question
24 becomes whether counsel's conduct so undermined the proper
25 functioning of the adversarial process that the trial cannot

STATE'S SUMMATION (CATOE)
COURT'S RULING

42

1 be relied on as having produced a just result. The Court
2 applies a two-prong test when considering a claim of
3 ineffective assistance of counsel in the trial, the first
4 being, the Applicant must show that counsel's performance fell
5 below an objective standard of reasonableness, and two, but
6 for counsel's error there is a reasonable probability the
7 result at trial would have been different. A reasonable
8 probability is a probability sufficient to undermine
9 competence in the outcome of the trial.

10 Regarding this particular matter, and applying this
11 particular test, the Court specifically finds that counsel's
12 performance did not fall below an objective standard of
13 reasonableness. Based upon the matters presented it appears
14 that Mr. Fox did everything that could have been expected of
15 him, and an examination of the Transcript of Record reveals
16 that he did as well as anyone might expect with the facts and
17 circumstances presented. He achieved a favorable result on
18 the most serious charge against the Defendant, was not
19 successful on the second charge, but it's clearly -- there is
20 no evidence that his performance fell below the objective
21 standard of reasonableness. Even with that, looking at the
22 Transcript of Record and the matters presented, there is no
23 reasonable probability that the result the trial would have
24 been different even if he had -- the Court would find that he
25 committed some error. All the issues were before the jury.

STATE'S SUMMATION (CATOE)
COURT'S RULING

43

1 It was an issue of credibility and believability. The victim
2 testified, the Defendant testified, other parties testified,
3 all the matters were before the jury, and certainly Mr. Fox
4 brought out a number of matters that could call into question
5 the victim's credibility and believability. It was for the
6 jury to decide those, and they did, and in this circumstance
7 did not decide those favorably -- in favor of the Defendant on
8 the charge he was convicted of.

9 As to the issue of the life without parole sentence, the
10 issue was properly presented before Judge Baxley. Whether I
11 would have done the same under the same circumstances faced by
12 Judge Baxley is not the issue. The matters were properly
13 presented before the Court. The Court, from all indication
14 and evidence in the record, properly ruled on the matter, and
15 that issue has been decided.

16 In this particular matter therefore the Court finds that
17 the Defendant has failed to carry it's burden of proof, and
18 denies the Post-Conviction Relief Application of Mr. Bryant.

19 Ms. Catoe and -- I'm sorry, Ms. Catoe, if you would,
20 please Ma'am, if you will produce an order to that effect
21 within seven days of today's date.

22 Thank you, Ma'am.

23 MS. CATOE: Yes, Your Honor.

24 Also I wanted to make clear, there were three counts --
25 and I want this also added. There were three issues in his

STATE'S SUMMATION (CATOE)
COURT'S RULING

44

1 Post-Conviction Relief Application, ineffective assistance of
2 counsel. We talked about that. There was a second one, in
3 One (B), failure to timely object to the indictment where the
4 State obtained the indictment through perjury and
5 prosecutorial misconduct, says no General Sessions term
6 convened on the date of the indictment. Nothing was presented
7 on that. That matter is waived. Number two, the conflict of
8 interest. It says, counsel previously represented the
9 Applicant in 2005 on a CDV HAN change, the CDV HAN conviction
10 was overturned in February, 2010 pursuant to the -- a PCR
11 filed in May, 2009. There is no evidence of any conflict of
12 interest. If anything the -- the prior representation of Mr.
13 Bryant by Mr. Fox helped the Defendant by establishing a
14 relationship beforehand. The issue was never raised, and the
15 Court specifically finds there was no conflict of interest, no
16 evidence presented of it. There's nothing -- there is no
17 issue regarding that particular matter.

18 Thank you very much.

19 -----END OF REQUESTED TRANSCRIPT OF RECORD-----
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CERTIFICATE OF COURT REPORTER

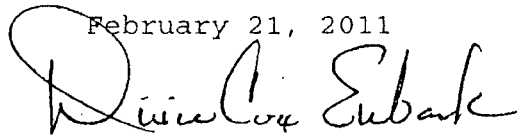
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C E R T I F I C A T E

I, the undersigned, DIXIE COX EUBANK, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the POST-CONVICTION RELIEF HEARING of the captioned case, relative to appeal, in the COURT OF COMMON PLEAS NON-JURY in the COURT OF COMMON PLEAS NON-JURY for GEORGETOWN COUNTY, SOUTH CAROLINA, on the 16th day of November, 2010.

I DO FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.

February 21, 2011



DIXIE COX EUBANK

CIRCUIT COURT REPORTER

FIFTEENTH JUDICIAL CIRCUIT

parole ("LWOP") pursuant to S.C. Code Ann. § 17-25-45.² A notice of appeal was timely filed, and an appeal was perfected on the Applicant's behalf by Kathrine H. Hudgins, Esquire. The South Carolina Court of Appeals affirmed the conviction on January 21, 2010 (2010-UP-006), and the case was remitted to the Circuit Court on February 8, 2010.

STANDARD OF REVIEW

In a post-conviction relief proceeding, the applicant bears the burden of proving his or her allegations by a preponderance of the evidence. Caprood v. State, 338 S.C. 103, 109-110, 525 S.E.2d 514, 517 (2000); Rule 71.1(c). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The correct measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, supra. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." Caprood, supra, at 109, 525 S.E.2d at 517 (citations omitted). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that,

² The predicate "most serious" offense for LWOP was a prior armed robbery conviction. CSC with a minor (any degree) is classified as a "most serious" offense pursuant to S.C. Code Ann. § 17-25-45 (c)(1).

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. When a defendant challenges his conviction after a trial, the proper consideration is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt. Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 527-28 (2007). (citations omitted). In order to receive relief, an applicant must prove both ineffective assistance and resulting prejudice. See, e.g., Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

Allegations

In his Application, Mr. Bryant alleged that his custody was unlawful for the following reasons:

- (1) Ineffective assistance of trial counsel;
- (2) Conflict of interest; and
- (3) Failure to investigate.

Set forth below are the relevant findings of fact and conclusions of law, as required by S.C. Code Ann. § 17-27-80 (2003):

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In considering the Applicant's case, this Court had before it the Applicant's PCR file, including all pleadings filed, the records of the Georgetown County Clerk of Court regarding the conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the direct appeal records. Both the Applicant and his former trial attorney, J. Eric Fox, Esquire, testified at the hearing. This Court carefully listened to all of the testimony and weighed the same according to credibility. This Court found the Applicant's testimony to be lacking in credibility with respect to his description of his beliefs regarding the victim's age. This Court found Mr. Fox's testimony to be highly credible in all respects.

The Applicant made several allegations of ineffective assistance of counsel. First, he contended that counsel should have done more to show that he was not aware that the victim was a minor. He asserted that counsel could have called other witnesses to corroborate that the victim visited a local nightclub where patrons must be either 18 or 21 years of age to enter. However, the Applicant did not present any such witnesses at the PCR hearing. Accordingly, this Court cannot evaluate prejudice to the Applicant and cannot conclude that he is entitled to relief based upon counsel's failure to call any such witnesses. See, e.g., Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) (mere speculation of a witness's testimony is insufficient); Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (a PCR applicant cannot show he was prejudiced by counsel's failure to call a witness at trial if that witness does not later testify at the PCR hearing). In any event, Mr. Fox testified that the Applicant provided the name of only one possible witness who might have seen the victim at the nightclub. Mr. Fox contacted this witness but was not satisfied that he would be a stable or helpful defense witness. Therefore, Mr. Fox made a conscious and strategic decision not to further pursue this witness's testimony. Mr. Fox stated that he did not learn of any other potentially helpful defense witnesses.

Furthermore, this Court finds that, where the victim admitted to going to that particular nightclub, admitting to hanging out with an older crowd, and admitted to having a prior record, the issue of the victim presenting herself as an older person was sufficiently before the jury. Counsel emphasized these things to the jury repeatedly throughout trial and in his closing argument. He also pointed out that the victim expressly admitted that she never actually told the Applicant her age. In any event, the "mistake of age" defense was dependent upon whether

the jury found the Applicant's *own* testimony to be credible.³ Therefore, counsel did advise the Applicant to testify at trial, which gave the Applicant the opportunity to fully explain to the jury his beliefs about the victim's age and the reasons for his beliefs. It was within the jury's province to evaluate the Applicant's testimony in light of the jury's own observations about the victim's appearance and the other evidence presented at trial. For all of these reasons, this Court concludes that the Applicant failed to prove any ineffective assistance of counsel with respect to the presentation of the "mistake of age" defense.

The Applicant also contended that counsel should have objected to the testimony of Crystal Smith, his former girlfriend. He testified at the PCR hearing that he believed that Smith's testimony had a "devastating impact" on his trial. Prior to trial, Attorney Fox made a motion to exclude Smith's testimony from the State's case-in-chief. (See Trial Transcript, pages 80-81). Ultimately, Smith was not called in the State's case-in-chief, but was only called in rebuttal to refute certain statements made by the Applicant in his trial testimony. (See Trial Transcript, pages 463-68). Her testimony was very brief and took up only five pages in the transcript. She refuted the Applicant's previous assertion in his own testimony that she was not the victim in a prior CDVHAN case. She also refuted the Applicant's testimony that he did not smoke marijuana. On cross-examination, Mr. Fox properly brought out the fact that Smith was biased against the Applicant since the relationship ended. Notably, counsel did object to the details of the prior CDVHAN conviction (which involved Crystal Smith) being brought out in the Applicant's testimony, and he also objected to the solicitor being allowed to play a recording of portions of the Applicant's telephone calls to Ms. Smith from the jail. However, the trial judge ruled that the Applicant had opened the door to these matters through his testimony. In

³ "Mistake of age" was specifically set forth as a permissible defense in the 2007 CSC with a minor statute. That part of the statute has since been repealed. See S.C. Code Ann. § 16-3-655.

any event, the information brought out during Smith's reply testimony was limited and was merely cumulative to the details already brought out during the Applicant's testimony. Accordingly, this Court concludes that the Applicant failed to prove that counsel had any basis for moving to exclude Smith's reply testimony, and failed to prove specific prejudice from this testimony.

The Applicant also alleged that counsel had a conflict of interest based upon counsel's previous representation of him on a previous CDVHAN charge which was later overturned in February 2010. Counsel testified that he did not believe that his prior representation of the Applicant constituted a conflict of interest. This Court finds that the Applicant failed to prove any conflict of interest on this basis. See Fuller v. State, 347 S.C. 630, 633-34, 557 S.E.2d 664, 665 (2001) ("To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance. An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction.") (citations omitted). If anything, counsel's previous representation of the Applicant on another matter strengthened the attorney-client relationship. Furthermore, the fact that the CDVHAN conviction was subsequently overturned - three years later - cannot retroactively create a conflict of interest at the time of trial.

In his PCR Application, the Applicant alleged that his indictments were obtained through perjury and prosecutorial misconduct. This Court finds that no evidence was presented in support of these allegations at the PCR hearing. Accordingly, such allegations were waived and are hereby denied and dismissed.

Finally, the Applicant's PCR counsel asserted that a sentence of life without parole was unfair considering the nature of the Applicant's offense. He further asserted that post-conviction relief should be granted "in the interests of justice." This Court first finds that the issue of the application of the LWOP statute for this particular crime was fully presented to the trial judge. Trial counsel argued that under the statute, the judge should conclude, based upon the jury's verdict of "not guilty" on the first-degree CSC charge, that the sexual encounter was consensual and that the LWOP statute did not therefore apply. See S.C. Code Ann. § 17-25-45(C)(1). However, the trial judge refused to make a finding that the encounter was consensual since it was a hotly disputed issue at trial. (See Trial Transcript, pages 556-61). Accordingly, the judge properly applied the statute and imposed a sentence of life without parole. The fairness of the statute in general is not a matter properly before this Court. Further, this Court was presented with no authority for granting post-conviction relief "in the interests of justice," and this Court declines to do so.

CONCLUSION

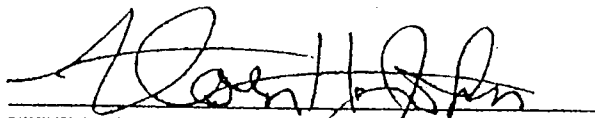
In conclusion, based upon the entire record, this Court finds and concludes that the Applicant failed to meet his burden of proof as to any of his allegations. The Applicant failed to prove that counsel's performance fell below the standard of reasonable professional norms, and the Applicant did not show prejudice as to the outcome. Based upon the foregoing, the Application for post-conviction relief must be denied and dismissed with prejudice for failure to meet the burden of proof under Strickland v. Washington, 466 U.S. 668 (1984), and Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Counsel's attention is directed to Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), and Rule 59(e), SCRPC, regarding the filing of a Motion to Alter or Amend should counsel

believe this Order fails to adequately address all issues raised as required by S.C. Code Ann. § 17-27-80 (2003). This Court further advises that if Applicant desires to secure appellate review of this Order, a notice of appeal must be filed and served **within thirty (30) days** of the service of this Order. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed. Therefore, it is

ORDERED that the Application for post-conviction relief is **DENIED** and **DISMISSED** with **PREJUDICE**. It is further

ORDERED that the Applicant must remain in the custody of the State for completion of his sentence.



THE HONORABLE STEVEN H. JOHN
Resident Judge
Fifteenth Judicial Circuit

12/21, 2010
Georgetown, South Carolina

WITNESSES:

GEORGETOWN SHERIFFS DEPARTMENT
ARREST WARRANT/TICKET NUMBER:

H-929590

2390 16-25-0065, 17-25-0030

SID: SC00573724

DOI: 3-3-05

D/L

ACTION OF GRAND JURY

*True Bill**July 13, 2005*

Date

Richard L. Baker

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

DOCKET NO. 05-GS22-755 ✓

The State of South
Carolina,

County of Georgetown

20648 001 MJM
COURT OF GENERAL
SESSIONS

July TERM 2005

THE STATE

vs.

PATRICK PERCIVAL BRYANT

J. GREGORY HEMBREE,
SOLICITOR

INDICTMENT FOR

Criminal Domestic Violence of a High
and Aggravated Nature

STATE OF SOUTH CAROLINA)

INDICTMENT FOR

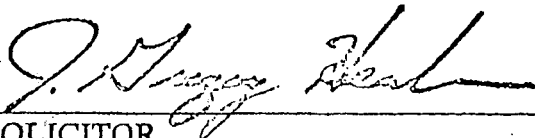
COUNTY OF GEORGETOWN)

Criminal Domestic Violence of a High
and Aggravated Nature

At a Court of General Sessions, convened on July 13, 2005 the Grand Jurors of Georgetown County present upon their oath:

That Patrick Percival Bryant did in Georgetown County on or about March 3, 2005, cause physical harm or injury to his own household member, Crystal Smith, under circumstances of aggravation, including but not limited to: punching the victim in the jaw leaving a visible bruise, being a great disparity in size, in violation of Section 16-25-65, S.C. Code of Laws, 1976, as amended.

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


SOLICITOR

