

LAW OFFICE OF
TRICIA A. BLANCHETTE

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JAN 17 2018

S.C. SUPREME COURT

January 17, 2018
VIA HAND DELIVERY

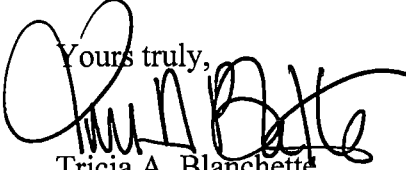
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: David Meggett v. State

Dear Sir:

For filing, attached please find a Notice of Appeal, Certificate of Service and copy of the Orders from the underlying PCR Application. I have not been retained to assist Mr. Meggett with this Appeal. By copy of this letter, I am providing these documents to the Office of Appellate Defense, along with a completed Affidavit of Indigency.

Thank you for your assistance with this matter. Please contact me if any additional information is needed.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Charleston County Clerk of Court (without Orders)
Office of Appellate Defense
William Edgar Salter, II, Office of the Attorney General
David Meggett

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 17 2018

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2013-CP-02-02859

David Meggett, 343610,

Petitioner,

vs.

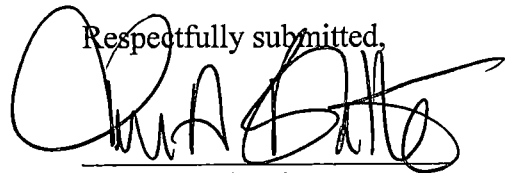
State of South Carolina

Respondent.

NOTICE OF APPEAL

David Meggett, Petitioner, appeals the Order of Dismissal issued by the Honorable G. Thomas Cooper, Jr. on September 18, 2017, which was filed on September 26, 2017. Petitioner also appeals the Order Denying Applicant's Motion to Alter or Amend the Judgment issued by the Honorable G. Thomas Cooper, Jr. on December 12, 2017, which was filed on December 14, 2017. Petitioner, through counsel, received notice of the entry of the Order from the Charleston County Clerk of Court January 2, 2018. Counsel was unable to locate a copy of the Order on the Clerk's website. After requesting a copy of the Order from the Office of the Attorney General, counsel received a copy of the Order on January 10, 2018.

Respectfully submitted,



Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

January 17, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post Conviction Relief

JAN 17 2018

S.C. SUPREME COURT

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2013-CP-02-02859

David Megett, 343610,

Petitioner,

vs.

State of South Carolina

Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney at Law, hereby certify that I hand delivered this 17th day of January 2018 a Notice of Appeal to William Edgar Salter, II, of the Attorney General's Office, at:

Office of the Attorney General
Att: William Edgar Salter, III
Senior Assistant Attorney General
1000 Assembly Street, 5th Floor
Columbia, SC 29201



Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

January 17, 2018

cc
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Judge Corp

RECEIVED

JAN 17 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

David Lee Meggett, #343610,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-3740

ORDER OF DISMISSAL

FILED
2017 SEP 26 PM 12:19
JULIE A. HARRIS
CLERK OF COURT

This matter is before the Court by way of a Post-Conviction Relief (PCR) Application filed on June 25, 2013, and an Amended Application filed on December 17, 2015. Respondent made its Return on December 5, 2013. The Court held an evidentiary hearing into the matter on December 7, 2016, at the Charleston County Courthouse. Applicant was present at the hearing and Tricia Blanchette, Esquire, represented him. Assistant Attorney General Alicia A. Olive represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. He also presented testimony from trial counsel, Beattie Butler, Esquire, his appellate counsel, Breen Stevens, Esquire, and Bernard Kelly. The State presented Assistant Ninth Circuit Solicitor Chad Simpson, Esquire. The Court had before it a copy of the trial transcript; the records of the Charleston County Clerk of Court regarding Applicant's convictions; Applicant's South Carolina Department of Corrections (SCDC) records; the appellate records; and the pleadings and the exhibits introduced at the evidentiary hearing. The Court now denies relief and makes the following findings:

I. PROCEDURAL HISTORY

Applicant is presently confined in the Lieber Correctional Institution of SCDC, as the result of his Charleston County convictions and sentence. The Charleston County Grand Jury indicted him in June 2009 for burglary in the first degree (2009-GS-10-4829) and criminal sexual conduct in the first degree (2009-GS-10-4830). Beattie Butler, Esquire, ("Counsel") represented him on both charges. Applicant received a jury trial before the Honorable Kristi L. Harrington on November 8-10, 2010. The jury convicted him as charged, and Judge Harrington imposed concurrent sentences of thirty years imprisonment for each charge.

Applicant timely served and filed a notice of appeal. Assistant Appellate Defender Breen Richard Stevens represented him on appeal. Mr. Stevens briefed the following issues before the South Carolina Court of Appeals:

1. The trial court erred by refusing Meggett's request for time to have a comforter examined for DNA, upon which he asserts a prior consensual encounter occurred between him and the complaining witness, and which, if positive, would have discredited the complaining witness's testimony regarding their relationship and prior sexual encounters.
2. The State's reference during closing argument to a lack of evidence supporting the interpretation of the defense's theory impermissibly shifted the burden upon Meggett as an indirect comment on the defendant's right to remain silent.
3. The trial court should have directed a verdict of not guilty for the offense of first degree burglary based upon the lack of evidence regarding Meggett's intent to commit a crime at the time he entered the dwelling.

On June 27, 2012, the South Carolina Court of Appeals affirmed his convictions and sentence in a published opinion. *State v. Meggett*, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012). It sent the Remittitur to the Charleston County Clerk of Court on July 13, 2012.

II. ALLEGATIONS

Applicant alleged the following grounds for relief in his Amended Application:

1. Ineffective assistance of trial counsel for failing to properly prepare and conduct a reasonable investigation into Applicant's case prior to going to trial.
2. Ineffective assistance of trial counsel for failing to communicate with Applicant adequately and timely prior to trial regarding the State's case, specifically the DNA evidence, which resulted in counsel's failure to obtain a DNA expert and the denial of a continuance motion for the testing of "critical" evidence.
3. Ineffective assistance of trial counsel for failing to consult with Applicant on and articulate a clear defense strategy prior to and during trial. Ineffective assistance for providing the jury with the following alternate and incomplete defense theories that lead to confusion and prejudice to Applicant: 1) Applicant engaged in consensual sex with the victim, and 2) the DNA and physical evidence does not establish that sexual intercourse took place between Applicant and victim on the date in question.
4. Ineffective assistance of trial counsel for informing the court that Applicant would testify to prior sexual encounters and informing the jury during opening and closing argument that Applicant engaged in a consensual sexual encounter with victim, yet advising Applicant to not take the stand at trial to testify to such.
5. Ineffective assistance of trial counsel for failing to question victim about her knowledge of Applicant's prior profession and possible motive for the allegations.
6. Ineffective assistance of trial counsel for failing to make a reasonable argument for a directed verdict on the burglary charge.
7. Ineffective assistance of trial counsel for failing to put up a defense through witnesses and evidence.
8. Ineffective assistance of trial counsel for failing make the arguments made on direct appeal regarding the State's closing argument; thus, failing to properly preserve the issues for appeal.
9. Ineffective assistance of trial counsel for arguments made to the jury during opening and closing arguments that interjected consensual sex into the trial, help support the State's theory of the case and provided the jury with two conflicting defense theories.
10. Ineffective assistance of appellate counsel for failing to argue that Applicant had consent to be in the dwelling he was charged with burglarizing.



11. Pursuant to Rule 15(b), SCRPC, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

Applicant also raised an allegation that counsel was ineffective for failing to make a *Batson* motion¹ at the hearing. The State objected to and moved to dismiss this amendment. The Court denied the State's motion and allowed Applicant to proceed on the allegation. *PCR Tr. pp. 9-11.*

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. Evidence Adduced at Trial

In August of 2005, Stacy Hooper ("the victim") moved to Charleston to attend school at the College of Charleston. *Tr. pp. 137-38.* In 2007, she moved into a house on Grimke Street in North Charleston, where she lived with her girlfriend, Sky. *Tr. pp. 138; 167.* Sky introduced the victim to a man who called himself "Mike" in April of 2008. *Tr. pp. 138-39.* "Mike" initially came over to their house several times a week to hang out with Sky. *Tr. p. 140.* However, Sky and the victim ended their relationship in May of 2008, and Sky moved out. *Tr. pp. 138; 141.*

The victim only saw "Mike" every few months after Sky left. *Tr. p. 141.* "Mike" loaned her \$200.00 on one occasion, to help with the payment of her power bill. *Tr. pp. 141; 168.* On

¹ See *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986).

other occasions, he drove her around to help her find work, he once attempted to fix her car, and he loaned her a rented truck. *Tr. pp. 141; 168-70.* The victim had consensual sex with "Mike" on one occasion, in August 2008, while she was intoxicated.² *Tr. pp. 140; 154-55; 175; 193.* The sexual encounter was very brief and ended when she asked him to stop. *Tr. pp. 140-41; 155; 159.*

The victim briefly went home to Greer, South Carolina, at the end of 2008. She returned to Charleston in January of 2009 to get ready for her next semester of school. *Tr. pp. 145-46.* On the day after she returned to Charleston, she prepared for school by scheduling her classes and arranging for financial aid. *Tr. pp. 146.* She returned home around 6:00 p.m., changed into her pajamas, and accidentally fell asleep on her bed. *Tr. p. 146.* However, she forgot to lock the door to her house before falling asleep. *Tr. p. 171.*

She awoke around 12:45 a.m., and saw "Mike" sitting on the edge of her bed. *Tr. p. 146.* She was scared and confused because she did not know why he was there. *Tr. p. 147.* She had not spoken with "Mike" in a month, he did not have permission to be in her home, and she had not invited him. *Tr. p. 147; p. 156.* Frightened, the victim asked "Mike" what he was doing there. *Tr. p. 147.* "Mike" "stared off for a minute" and then asked her about the money she had borrowed from him. *Tr. p. 147.* She told him that she would pay him when she received her financial aid money at the end of the week. *Tr. p. 147.* "Mike" then moved towards the victim and told her that he was going to take a down payment at that time. *Tr. pp. 147-48.*

Suddenly, "Mike" pulled the victim's covers away, grabbed her by the neck, held her against the wall and bed, straddled her, and attempted to forcibly remove her pants. The victim

² The victim testified that this earlier sexual encounter occurred in a different bed with a different comforter than the bed that she was in during the sexual assault that resulted in the charges against Applicant. *Tr. pp. 159-60.*

struggled with him, called him an asshole, and yelled for him to stop. *Tr. p. 148.* "Mike" responded by increasing pressure on her neck, removing her pants, and forcing her legs apart. *Tr. p. 148.* "Mike" then penetrated her vagina with his penis. *Tr. pp. 149; 154.*

When the victim asked "Mike" to stop, he pulled her arm behind her back, told her that friends don't call friends assholes, and ordered her to apologize to him. She apologized when he began choking her harder. He then released her arm and "finished." The victim was unsure if he had ejaculated during the assault. *Tr. p. 149.* After the sexual assault was over, he asked for a towel, took one, and left. *Tr. p. 150.*

Scared and uncertain about what to do, the victim locked the windows and doors and called her mother. *Tr. p. 150.* In the early morning hours of January 13, 2009, April Rice was at her home in Greer when she received a phone call from her daughter, the victim. The victim was crying and upset (*Tr. pp. 205-06*) and she told her mother that she had been raped. *Tr. p. 206.* While the victim was on the phone with her mother, "Mike" knocked on her window, admitted he was wrong, and told her not to worry about the debt she owed him. *Tr. p. 154; p. 186.* Ms. Rice instructed the victim to immediately go to the hospital, and she quickly drove herself there. *Tr. pp. 150-151; p. 207.*

Dr. Joseph Bianco, an expert in emergency medicine, attended to the victim at the hospital. *Tr. pp. 285-86; 287.*³ She told him that she had been sexually assaulted, and she complained of pain in her arm and jaw. *Tr. p. 286.* Upon examination, Dr. Bianco discovered

³ At the time Dr. Bianco treated her, the victim was 5'7" tall and weighed approximately 115 pounds. *Tr. p. 345.*



bruising and tenderness in those areas.⁴ *Tr. pp. 287-88; 295.* He opined that her injuries were consistent with having been grabbed or squeezed in the face or neck. *Tr. p. 288.* Based on her statements, the police were contacted and alerted of the reported sexual assault. *Tr. pp. 100; 125; 155; 165.*

Officer Robert Gooding and Sergeant Eric Jourdan, of the North Charleston Police Department, were dispatched to the hospital and they met with the victim in her hospital room. *Tr. pp. 155; 165-66.* She was sad and upset, and she reported the details of the assault to the officers. *Tr. p. 212.* She then began receiving incoming calls on her phone, and she identified the caller as "Mike," the person who raped her. She told "Mike" that she was at the hospital. He apologized and said that he wanted to visit her there. *Tr. pp. 151-52; 213; 215; 222-23.* He repeatedly encouraged her to leave the hospital and he asked if she was going to tell the doctors what had happened. *Tr. pp. 152-53.*

Following instructions from one of the officers, the victim asked "Mike" to come to the hospital, and "Mike" said he would come visit her there. *Tr. pp. 153; 214; 233.* The officers set up surveillance and waited for the caller to arrive. *Tr. p. 168.* Shortly thereafter, Applicant arrived at the hospital and said that he was there to see the victim. Officer Gooding detained him and took possession of his identification. *Tr. p. 216.* When Officer Gooding thereafter showed Applicant's identification to the victim, she identified Applicant as "Mike," her rapist, without any hesitation. *Tr. pp. 153; 217.* However, she told the officers that she did not know Applicant by the name listed on his identification. *Tr. p. 153.* Police then arrested Applicant. *Tr. p. 217.*

⁴ Detective Randy Gray, an officer with the North Charleston Police Department, met with the victim one day after the incident. *Tr. p. 253.* Detective Gray testified that her neck injuries were significantly more visible, with prominent dark bruising visible around her neck. *Tr. pp. 253-54.*



The victim was taken to the MUSC Women's Center for a sexual assault examination later that morning (*Tr. pp. 153; 321-22*) and Faye LeBoeuf, a nurse and expert in sexual assault examinations, performed a pelvic exam on her. *Tr. pp. 319-22*. Ms. LeBoeuf discovered a small abrasion in the victim's vagina that was consistent with a forced sexual assault. *Tr. pp. 322-23*. Ms. LeBoeuf determined that the abrasion likely occurred within the preceding twenty-four to seventy-two hours. *Tr. p. 324*.

However, she noted that the victim's injuries could also have potentially been consistent with consensual sex or other causes. *Tr. p. 328*. Ms. LeBoeuf did not find any evidence of bruising or contusions on the victim's thighs. She also did not find any redness, swelling, lacerations, or tears on the victim's inner thighs. *Tr. p. 331*. However, she explained that injuries were not always present in sexual assaults. *Tr. p. 337*.

Meanwhile, officers went to the victim's residence and they collected a comforter and blanket from her bed. *Tr. pp. 225-26; 232*. Officers also secured a DNA sample from Applicant and his phone records. *Tr. pp. 242-43; 249-50*. His phone records confirmed that he had placed five calls to the victim on the night of the incident, while she was at the hospital with the officers present. *Tr. pp. 252-53*.

Jennifer Clayton, a SLED DNA analyst, subsequently examined the evidence gathered in the case. *Tr. p. 291*. Specifically, she examined three samples taken from the victim's comforter and found the presence of semen in all three samples. *Tr. pp. 295-96*. After comparing the DNA profiles from the samples with known DNA profiles of the victim and Applicant, she opined that Applicant was the major DNA contributor in two of the comforter samples and the only DNA contributor in the other sample. *Tr. pp. 297-98*. Ms. Clayton further determined that the victim was excluded as a contributor in the samples and she found the presence of an unknown minor



contributor in the second sample tested. *Tr. pp. 297-98; p. 304.*⁵ She concluded that the odds of a person randomly matching Applicant's DNA profile were one-in-eleven-quintillion. *Tr. p. 298.*

When Ms. Clayton tested a vaginal sample collected from the victim during the sexual assault examination, she found that semen was "indicated because the P30 enzyme found in semen was present. *Tr. p. 302; pp. 314-15.* However, she was unable to develop a DNA profile from the sample, and she could not identify the sample as coming from Applicant. *Tr. p. 302-17.*

B. Ineffective Assistance of Trial Counsel

In a PCR action, the applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must make a twofold showing. First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689, 104 S.Ct. at 2065. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (Citation omitted).⁶

⁵ Ms. Clayton also located a hair from an unknown male on the comforter. *Tr. p. 304.* Furthermore, Clayton found no D.N.A. from Applicant under Victim's fingernails. *Tr. p. 303.*

⁶ The Court in *Harrington* explained that:



Even if an inmate proves deficient performance, he must also prove that he was prejudiced by his attorneys' ineffectiveness because "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. To show prejudice, he must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. It is insufficient to prove "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693, 104 S.Ct. at 2067. Instead, "[c]ounsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Harrington*, 562 U.S. at 104, 131 S.Ct. at 787-88 (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052).

"Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Harrington, 562 U.S. at 105, 131 S.Ct. at 788.

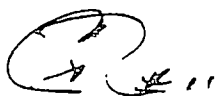
Applying this standard to the claims raised by Applicant, the Court finds that he has not met his burden of proof.

1. Counsel's failure to properly investigate Applicant's case.

The Court finds that Applicant has not proven that trial counsel failed to properly and adequately investigate Applicant's case. Specifically, he claims that counsel was ineffective for failing to locate and present the testimony of Bernard Kelly, the victim's cell phone records, and three individuals who were not called as witnesses but who were regularly present in the victim's home. The men were identified only by the name of "Jonathon," "Spider," and "Pirate."

Applicant testified at the PCR hearing that he remained in jail following his arrest in this case. Counsel only met with him twice between his arrest and the date of the trial. Their first meeting was when counsel came to see him "a couple weeks after I was in there." Their second meeting was on the Saturday before the trial on the following Monday. Counsel told him at that meeting that the trial started on Monday. *PCR Tr. pp. 98-99.*

During counsel's representation of him, he asked counsel to obtain the victim's cell phone records because those records were not included in the prosecution's evidence that counsel reviewed with him and those records would demonstrate the victim's calls to him. He felt that this was important in defending the burglary charge because the victim had invited him to her residence after her recent return from the Upstate, and the records would have demonstrated how he knew that she was back in Charleston. Applicant also asked counsel to interview Bernard Kelly because Kelly had seen Applicant and the victim together "on several different occasions," whereas the victim had testified that they never went anywhere together and were only together "that one time." Counsel never explained to him why Kelly was not called as a witness. *PCR Tr. pp. 99-101.* Applicant likewise gave counsel the names of Jonathan, "Spider,"



and "Pirate," as potential witnesses because these three men "regularly visited the residence and regularly saw me at that residence." He explained that the men would alternate staying at the victim's residence for brief periods of time. However, he admitted that he did not provide counsel with either the last name or the address of any of these men. PCR counsel had also not been able to locate any of these men. *PCR Tr. pp. 101-02.* Applicant also admitted that he did not have the victim's phone records. *PCR Tr. pp. 126-27.*

Bernard Kelly testified that he and Applicant had been friends for most of their lives. Kelly became aware that Applicant had been charged with criminal sexual conduct and burglary of the victim's residence when he saw it on the news. Kelly thought that this was "strange" because he "assum[ed] that she basically stated like she didn't know [Applicant] or anything like that." However, Kelly previously seen Applicant and the victim together once at a pawn shop on Rivers Avenue, and Applicant introduced the victim to Kelly as a "friend."⁷ *PCR Tr. pp. 15-18; 21.* Kelly would have been willing to testify at Applicant's trial but he was never contacted by trial counsel or an investigator. *PCR Tr. p. 18.*

Trial counsel, Mr. Butler, testified that he had practiced law for twenty years at the time of the PCR hearing and that he had spent eighteen of those years as a public defender in three different counties. Counsel recalled representing Applicant, but he could not specifically recall the number of times that they had met to discuss the case before the trial. While counsel's notes reflected that he had "a concern that we needed to get phone records," he did not know whether the defense ever got the phone records or not and counsel did not utilize the phone records at trial. Those records would have shown communication between Applicant and the victim and that they knew each other. However, he pointed out that the victim admitted that she and

⁷ Kelly thought her taking a vacuum cleaner to the pawn shop was strange. *PCR Tr. p. 16.*

Applicant knew one another. Counsel did not recall the name of Bernard Kelly and his notes did not show that Applicant provided him with Kelly's name. Counsel did not believe that he attempted to locate Jonathan, "Spider," or "Pirate" before trial and he could not recall why he did not. Counsel was attempting to establish that the victim was "somewhat of a squatter and living with other squatters." Although he did not find any witnesses to confirm this, the victim never denied it. *PCR Tr. pp. 22-25.*

Counsel testified that, based upon his conversations with Applicant, his theory on how to handle the victim as a witness was to show "she had slept with him in the past, which I believe she admitted, and that he had loaned her money. Now, I don't believe that she said it was a money-for-sex exchange, but that was the inference that I wanted to be drawn." *PCR Tr. p. 26.*

The Court in *Strickland* gave the following explanation of the deference reviewing courts owe to counsel's strategic judgments in terms of the adequacy of the investigations supporting those judgments:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, *counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.*

Strickland, 466 U.S. at 690-91, 104 S.Ct. at 2066. (Emphasis added). Moreover, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* 466 U.S. at 691, 104 S.Ct. at 2066.

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The Court finds that counsel's testimony on this allegation is credible and gives it great weight. On the other hand, the Court finds that Applicant's testimony was not credible. While counsel did not recall whether the defense ever obtained the victim's telephone records,⁸ the Court in *Strickland* admonished that "[t]he object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. It is unnecessary for this Court to address whether counsel's failure to obtain the phone records was deficient, since there is absolute no prejudice as discussed, *infra*.⁹ Based upon counsel's testimony that his records do not reflect Applicant mentioning Kelly to him and that he did not recall Applicant mentioning Kelly to him, the Court finds that the credible evidence is that Applicant did not make counsel aware of Kelly. Likewise, the Court finds that counsel's failure to attempt to locate the three men whom Applicant only identified by nickname or very common first names was not deficient performance, since Applicant did not provide counsel with the surname, address or any further identifying information for any of these men. As with counsel's failure to locate Kelly, counsel was entitled to base his investigation - and his failure to further investigate - upon the information provided to him by Applicant. *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066; *United States v. Roane*, 378 F.3d 382, 406-07 (4th Cir. 2004) (counsel not ineffective for failing to call witnesses where there

⁸ Counsel's inability to recall some of the details of his representation of Applicant is understandable, since the trial was over five years before the date of the PCR hearing, and counsel did not have an opportunity to review his file until the morning of the PCR hearing. *PCR Tr. pp. 28; 74.*

⁹ The Court does not find that there was deficient performance, only that it need not address the deficiency prong. The Court would note that counsel's notes reflected that her phone records were a matter of concern to counsel and that Applicant did not present any evidence that, in fact, counsel failed to attempt to obtain her phone records.



was no evidence that defendant told counsel what information they could provide); *DeCastro v. Branker*, 642 F.3d 442, 456 (4th Cir. 2011) ("the state court did not act unreasonably in refusing Petitioner's attempt to upend his conviction and sentence based on the information that he failed to timely provide to counsel").¹⁰

The Court further finds that Applicant did not meet his burden of showing that he was prejudiced by counsel's failure to obtain and utilize the victim's phone records at trial or by counsel's failure to investigate and present any of the witnesses at issue. First, the only witness who testified was Kelly. Kelly's PCR testimony only established that Applicant and the victim knew each other as friends and that he saw them together on one occasion, at a pawnshop. The Court finds that Kelly's testimony would be merely cumulative to the victim's testimony and that it would not establish anything not already presented to the jury. The victim never denied that she knew Applicant. Instead, she admitted that she had known him for some time. Although she denied that they socialized, she also admitted that they had consensual sex on one occasion, in August 2008, while she was intoxicated. She likewise admitted that he had previously loaned her money and done other things to help her.

Additionally, Applicant did not present Jonathan, "Spider," or "Pirate" as witnesses and he did not introduce the victim's phone records at the PCR hearing or present anyone from her cellular service provider at the time. Thus, the Court is left to speculate as to what, if anything her cell phone records or these other witnesses might establish and he cannot show prejudice

¹⁰ While Applicant claims that counsel only meet with him twice, "there is no established 'minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel.'" *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005) (citing *United States v. Olson*, 846 F.2d 1103 (7th Cir. 1988)). The Court further finds that the credible evidence presented at the PCR hearing is that counsel reviewed the State's evidence with Applicant, and they discussed his version of the incident, as well as his prior involvement with the victim, his decision of whether or not to testify and other important matters.

from counsel's alleged error. See *Dempsey v. State*, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence") (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). See also *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result"). The Court would further note that the victim admitted that Jonathan, "Spider," and "Pirate" lived with her in the house and helped her pay rent. *Tr. pp. 166-67*. Finally, there was overwhelming evidence of Applicant's guilt, as set forth in the "Statement of Facts," *supra*. In light of this evidence of guilt, Applicant cannot prove that he was prejudiced by counsel's alleged errors. See *Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069 ("... a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"). See also *id.* at 700, 104 S.Ct. at 2071.

2. Counsel's failure to adequately argue motion for a continuance and failure to hire a DNA expert.

The Court further finds that Applicant is not entitled to relief based upon counsel's supposed failure to adequately argue his motion for a continuance or counsel's failure to hire a DNA expert. The Court finds that counsel's performance was constitutionally adequate and that Applicant has not proven any prejudice from counsel's performance.

Counsel moved pretrial for a continuance "because of developments within the last 30 minutes." He explained that the victim and Applicant knew each other and that they agreed that they had consensual intercourse on at least one prior occasion. Applicant claimed that they had

sex several times. Counsel and co-counsel had met with Applicant and extensively reviewed the State's DNA evidence with him on the previous Saturday. On the morning of the trial, counsel again met with Applicant. In that meeting Applicant "raised the issue of whether we could test ... for DNA on a comforter in his sister's house on his nephew's bed where he is adamant that he and the complainant had consensual sex in the months leading up to the incident. Counsel asserted that this evidence "would be critical to the defense because this really is for all practical purposes a he said[,] she said case." And, counsel noted that the prior consensual sex was admissible under state law to show that the sex on the date of the incident was consensual, despite the Rape Shield Statute. *Tr. pp. 3-5.*

Counsel explained that the case had previously been set for a tentative trial date several months earlier. When counsel reviewed the State's evidence at that time, "there was no probative DNA evidence at all ... from the rape protocol kit." He argued that the Assistant Solicitor had sent the comforter found in the victim's bedroom to be tested for DNA, which delayed the trial. While Applicant was otherwise ready for trial and was not needlessly seeking delay, he asserted that he was merely asking for permission to do the same thing that the State had done. Counsel had spoken to Applicant's sister, who told him that the comforter was in storage and that she could get it. So, he requested a continuance to get this comforter tested. In response to questioning by the trial judge, counsel stated that the testing would take weeks, whether done privately or by SLED. *Tr. pp. 5-6.*

The Assistant Solicitor opposed the motion. He asserted that nearly two years had elapsed since the alleged incident, that Applicant had notice the trial was to be scheduled since late May or early June, and that Applicant had failed to raise the issue until the morning of trial. He also explained that the case was not on the trial docket when the State had sent evidence for

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additional testing. Based on the speculative nature of the evidence and the fact it was not involved with the incident itself, the Assistant Solicitor argued the motion should be denied. *Tr. pp. 7-8.*

After hearing further argument by trial counsel, the trial judge denied the continuance motion. She found that the case had been on the trial docket; that the incident occurred in January of 2009; that whether there may be something on the comforter was speculative; that the comforter had no direct connection to the case, other than to show the victim and Applicant's prior sexual relationship; and that the parties agreed that the victim admits that she had sex with Applicant on a previous occasion. *Tr. p. 9.*

The trial judge's ruling was the first issue raised on direct appeal. The Court of Appeals held that the trial judge had not abused her discretion in denying the motion, as follows:

The denial of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in prejudice. *State v. Smith*, 387 S.C. 619, 622, 693 S.E.2d 415, 417 (Ct.App.2010). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *State v. Geer*, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct.App.2010) (internal quotation marks omitted).

We do not believe the trial court abused its discretion in denying Meggett's motion for a continuance.

When a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by the trial court has rarely been disturbed on appeal. It is axiomatic that determination of such motions must depend upon the particular facts and circumstances of each case.

State v. Babb, 299 S.C. 451, 454-55, 385 S.E.2d 827, 829 (1989) (quoting *State v. Motley*, 251 S.C. 568, 572, 164 S.E.2d 569, 570 (1968)). "Further, a party cannot complain of an error which his own conduct has induced." *Id.* at 455, 385 S.E.2d at 829 (citing *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984)). Here, nearly two years after he was arrested and seven months after he was notified the case would be placed on the trial docket, Meggett moved for a continuance to test the comforter. Meggett had a significant period of time to

obtain the testing and his failure to do so was a result of his own inaction and not a lack of preparation time.

Furthermore, Meggett failed to offer any evidence or testimony to support his claim that probative evidence might be on the comforter. Meggett failed to offer any evidence to prove the comforter was put in storage shortly after he slept on it. Additionally, there was no evidence presented to show the comforter was not washed or cleaned in the two years prior to trial or that it was not used by anyone else. Accordingly, based on Meggett's inaction in attempting to obtain the comforter prior to requesting a continuance and the lack of evidence supporting Meggett's contention that the comforter still contained important evidence, we find the trial court did not abuse its discretion in denying Meggett's continuance motion.

Meggett, 398 S.C. at 523-24, 728 S.E.2d at 496.

Applicant testified at the PCR hearing that he found a discrepancy in the DNA evidence, as counsel was reviewing the State's evidence with him on the Saturday before the trial. He informed counsel that there were two comforters with potential DNA evidence of prior sexual intercourse with victim. While counsel informed the trial judge that he knew where the comforter was located and argued that it could be tested, Applicant complained because counsel did not do anything to secure it or preserve it after the trial judge refused to grant a continuance. He testified that he asked PCR counsel to locate the comforter without success. *PCR Tr. pp. 105-07.*

Counsel explained that he thought the trial judge would grant a continuance because he had previously agreed to the case being continued at the State's request, and that he was surprised when the trial judge denied his motion. He testified that he had told Applicant's family to secure the comforter and that he told Applicant of the need to find it for a hearing on a motion for new trial on after-discovered evidence. However, he did not know whether it was secured or ever tested. Counsel acknowledged that the trial judge premised her ruling, in part, on the fact the parties agreed that the victim would admit to having consensual sex with Applicant in the past, but counsel correctly observed that her finding was necessarily based upon the State's

evidence, since she did not know what Applicant had told counsel. *PCR Tr. pp. 34-38*. Counsel explained that he had not previously “looked into” getting a DNA expert because the prosecution’s evidence was consistent with his defense and the State was merely picking and choosing the evidence that it wanted the jury to hear. As a result, he did not feel that he needed one. *PCR Tr. pp. 56-57*.

The Court finds that counsel’s performance was not deficient. First, the Court notes that it is not precisely clear from Applicant’s testimony why he believes that counsel was ineffective in handling the motion for continuance. Rather, this appears to be merely a conclusory allegation that does not support a grant of relief. *See Gustave v. United States*, 627 F.2d 901, 904 (9th Cir. 1980) (“[m]ere criticism of a tactic or strategy is not in itself sufficient to support a charge of inadequate representation”); *State v. Galvan*, 222 Neb. 104, 382 N.W.2d 337, 339 (1986) (“Allegations which are conclusory are not grounds for post conviction relief, nor do they require the court to grant an evidentiary hearing”); *Nickerson v. Lee*, 971 F.2d 1125, 1136 (4th Cir. 1992) (“Unsupported conclusory allegations do not entitle a habeas petitioner to an evidentiary hearing”), *abrogated on other grounds, Trest v. Cain*, 522 U.S. 87, 118 S.Ct. 478 (1997); *cf. People v. Diallo*, 132 A.D.3d 1010, 2015 WL 6488692 (2d Dep’t 2015) (defendant was not entitled to hearing on motion to vacate judgment of conviction, where defendant’s claims were either based on unsubstantiated conclusory allegations, on speculation, or on self-serving statements that were not borne out by the record).

Moreover, Applicant’s claim is not that counsel utterly failed to move for a continuance or attack the State’s presentation of DNA evidence. Any such argument would fail because counsel did, in fact, move for a continuance and attack the State’s presentation of DNA evidence. Rather, his claim essentially comes down to a matter of degrees. Did counsel argue the motion

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well enough? The Court finds that this type of question is less susceptible to judicial second-guessing. *Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999); *Dowthitt v. Johnson*, 230 F.3d 733, 743 (5th Cir. 2000). Further, the Court finds that counsel reasonably moved for a continuance to have the alleged second comforter tested as quickly as possible once Applicant disclosed the existence of the second comforter possibly having the victim's DNA on it and alerted counsel to where it could be found. Applicant testified that counsel only met with him twice before the date of the trial. Assuming without finding that this is true, the Court finds that he nevertheless could have alerted counsel to the existence of this comforter well in advance of the trial, so as to obviate the need for requesting a continuance. Obviously, if his claim that he had sex with the victim in his sister's residence on a prior occasion was true, he was well aware of this "fact" and he could have affirmatively brought the existence of the comforter to counsel's attention earlier than he did. Because "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant," the Court finds that counsel was not deficient under *Strickland*. See 466 U.S. at 691, 104 S.Ct. at 2066; *Hedrick v True*, 443 F.3d 342, 349-52 (4th Cir. 2006) (counsel was not deficient for inadequately developed childhood mitigation evidence where counsel was provided no information that warranted further investigation); *United States v. Pellerito*, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so That is not the sort of 'ineffectiveness' for which relief can be granted").

Additionally, the Court finds that it was objectively reasonable for counsel to rely upon his ability to cross-examine the prosecution's experts and not retain the services of an independent DNA analyst, until Applicant disclosed the alleged existence of a second comforter. "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for



every prosecution expert an equal and opposite expert from the defense.” *Harrington*, 562 U.S. 86, 111, 131 S. Ct. 770, 791 (2011). To the contrary, *Harrington* makes clear that for an inmate to prevail on a claim related to the failure to retain and present an independent expert, the inmate must show that it is indisputable that *Strickland* required reliance on an expert rather than cross examination to discredit witnesses. Despite the present allegation, the Court finds that counsel was able to fully cross-examine the State’s DNA analyst regarding her findings and that he skillfully, albeit unsuccessfully, attacked the prosecution’s evidence in his closing, by suggesting that the State’s presentation of evidence was “an artist’s rendition of what happened. It’s an edit. It’s a cut and a paste and a splice.” *See Tr. p. 386; 381-408. See also Smith v. Angelone*, 111 F.3d 1126, 1132-33 (4th Cir. 1997) (trial counsel reasonably chose to rely upon cross-examination of the State’s own witnesses to establish his case, rather than hire independent expert); *People v. Bradley*, 25 P.3d 1271, 1276 (Colo.App. 2001) (tactical decision not to call an expert witness is within the discretion of trial counsel).¹¹

At the PCR hearing, Applicant complained because counsel did not secure the comforter, so that it could be tested for the presence of DNA at a later date. The Court finds that *Strickland* does not impose an affirmative duty upon counsel to take measures to preserve an item of evidence that counsel has not seen, is not in counsel’s possession (or that of law enforcement), and the alleged existence of the evidence is not brought to counsel’s attention by the client until the eve of trial. The Court further finds that the credible evidence is that counsel alerted

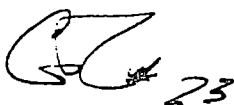
¹¹ Further, the Court rejects Applicant’s suggestion that counsel’s successful motion to suppress the towels seized from Applicant’s vehicle was somehow inconsistent with the handling of the continuance motion or somehow shows deficient performance in connection with this allegation. Applicant’s contrary position ignores that the towels seized in his car did not have the victim’s DNA but someone else’s on them. Counsel could reasonably view that evidence as prejudicial to Applicant.



Applicant's family of the need to preserve the comforter and he told Applicant that Applicant needed to find it for a hearing on a new trial motion. This satisfied any possible obligation counsel may have had under *Strickland*. Assuming both that this second comforter existed and that it possibly had relevant DNA on it, it was incumbent upon Applicant, and not his trial attorney, to see that it was preserved for further testing.

More importantly, the Court finds that Applicant cannot show any prejudice from either counsel's failure to retain an independent analyst or his handling of the continuance motion. To establish prejudice on this claim, he must prove not only that his motion for continuance would have been granted if it had been supported with further evidence and argument. He must also establish a reasonable probability that he would have been acquitted of criminal sexual conduct if the motion had been granted and further testing was performed. *See McFadden v. Cabana*, 851 F.2d 784, 787-88 (5th Cir. 1988). He did not meet this burden. First, he did not present the comforter at the hearing. He also did not present any family member(s) to testify as to its whereabouts or its destruction. Likewise, he did not present any expert testimony regarding DNA testing of this second comforter. Therefore, the Court is left to speculate about whether this second comforter actually exists and, if it does exist, what, if anything, further DNA analysis by an expert might reveal. *See Dempsey*, 363 S.C. at 369, 610 S.E.2d at 814 ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence") (citing *Glover*, 318 S.C. at 498, 458 S.E.2d at 540). *See also Bannister*, 333 S.C. at 303, 509 S.E.2d at 809; *Moorehead*, 329 S.C. at 334, 496 S.E.2d at 417.

Further, the Court notes that there was overwhelming evidence of Applicant's guilt. In light of this evidence of guilt, the Court finds that he was not prejudiced by counsel's

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performance. *See Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069. *See also Franklin v. Catoe*, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied*, 535 U.S. 1114, 122 S.Ct. 2332 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial).

3-4, 9. Counsel's advice that Applicant not testify after telling the trial judge in *in camera* proceedings that Applicant would testify to prior consensual sexual encounters with the victim and informing the jury in opening statement that Applicant and the victim had consensual sex. Also, counsel's presentation of supposedly "alternative and incomplete" theories of defense.

The Court further finds that Applicant is not entitled to relief on his claims that counsel was ineffective because he advised Applicant not to testify after counsel had told the trial judge in *in camera* proceedings that Applicant would testify to prior consensual sexual encounters with the victim and because he informed the jury in opening statement that Applicant's sex with the victim was consensual and that Applicant would testify that he and the victim had prior consensual sexual encounters. The Court finds that he is also not entitled to relief based on the claim that trial counsel presented the jury with supposedly "alternative and incomplete" theories of defense.¹²

In connection with the State's pretrial motion dealing with the admissibility of evidence of prior instances of intercourse between Applicant and the victim under the Rape Shield Statute, S.C. Code Ann. § 16-3-659.1(1) (2003),¹³ counsel informed the trial judge that the victim and Applicant had consensual sex several times before the incident giving rise to the charges. While

¹² In this portion of the Order of Dismissal, the Court addresses Allegations 3, 4 and 9 of the Amended Application.

¹³ "[T]he Rape Shield Statute d[oes] not bar evidence of a victim's sexual conduct if the evidence [i]s offered for a purpose other than to attack the victim's morality." *State v. Grovenstein*, 340 S.C. 210, 216, 530 S.E.2d 406, 409 (Ct.App.2000) (quoting *State v. Lang*, 304 S.C. 300, 301, 403 S.E.2d 677, 678 (Ct.App.1991)).

the State had told counsel that the victim only admitted to one instance of consensual intercourse, counsel stated that Applicant would testify he and the victim "had consensual sex six to eight times before in the months leading up to this incident, at the incident location several times, at his home in Summerville, and his sister's home in North Charleston." Counsel assured the trial judge that this information would come from Applicant and that he would not elicit evidence regarding the victim having sex with other witnesses on cross-examination of those witnesses. *Tr. pp. 95-101.*

In opening statement, counsel told jurors that Applicant was at the victim's residence on the night of the alleged crimes, that he had been there many times before, and that he and the victim knew each other well. Also, counsel conceded that the victim was upset with Applicant because he had hurt her. However, counsel denied that Applicant had burglarized the home or that he had raped her. *Tr. p. 131.* Thereafter, counsel informed jurors that after the victim had difficulty paying bills after her girlfriend had left her and that the victim would call Applicant, who loaned her money and helped her pay bills. *Tr. pp. 131-33.* Counsel added that:

And at some point, [the victim] and [Applicant] struck a sort of less than desirable but informal arrangement. They began to sleep together, and [Applicant] would forgive her debt, and it had happened more than once. [The victim] would later tell authorities that it happened only once, but it happened more than once. And the one time she's talking about is not the night of the incident.

Tr. p. 133.

Counsel urged jurors that when Applicant had sex with the victim on the night of the assault, this was simply a continuation of their arrangement. "[Applicant asked] could he see [her] about the money. And when she didn't have the money, they went back to their old ways and their old arrangement, and they had ... consensual sex." *Tr. pp. 133-34.* Counsel observed that the State did not find Applicant's DNA inside the victim because he had changed his mind

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and he did not finish. After noting problems in the State's case and reiterating Applicant's innocence of the crimes charged, counsel summarized the defense's position as follows: "They had sex, and [the victim] thought that squared their debt, and [Applicant] didn't, and that's it. That's what happened." *Tr. pp. 134-36.*

The trial judge conducted an on-the-record waiver of Applicant's right to testify (*Tr. pp. 265-67; 368-73*) and, ultimately, Applicant did not testify. In light of his decision not to testify, the State moved to prohibit counsel from arguing the factual assertions that counsel made in his opening statement. The trial judge did not expressly rule on this motion and she advised the Assistant Solicitor to object to any argument he thought was improper. *Tr. pp. 380-81.* In closing argument, counsel attacked the State's DNA and the inability of the State to establish lack of the victim's consent. However, he did not urge jurors to consider some of the specifics that he had referenced in his opening statement. *Tr. pp. 383-408.*

Applicant testified at the PCR hearing that he wanted to dispute the prosecution's evidence against him at trial, and he admitted that counsel had discussed with him that counsel could argue he and the victim had consensual sex. However, he contended that he did not feel that he had made an "informed decision" when they discussed counsel's planned trial strategy because counsel had not told him the rape protocol kit did not contain his DNA. If he had known this, he would have wanted to challenge the State's failure of proof through the absence of DNA connecting him to the offense. He claimed that he was not in a position to challenge the defense chosen by counsel. He also complained that counsel's challenge to the lack of consent and the lack of DNA was not a "solid strategy." *PCR Tr. pp. 109-11.* His complaint was less that he disagreed with counsel's actions than it was that counsel had failed to discuss it with him. *PCR Tr. p. 116.*

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He claimed that he would not have wanted counsel to admit in opening that he and the victim had consensual sex, if he had known that counsel would argue in closing that the State lacked DNA evidence to establish that they had intercourse. *PCR Tr. pp. 117*. On the other hand, he admitted that he had told counsel that he and the victim had consensual sex on the night of the charged offenses. Also, he admittedly provided counsel with information that he and the victim had consensual sex on a number of prior occasions, which counsel relied upon in the motion discussed above. Although he claimed that counsel had not told him how the trial judge had ruled on counsel's motion, he testified that he had originally intended to and was prepared to testify at trial that - contrary to the victim's testimony - he and the victim had consensual sex on a number of occasions. *PCR Tr. pp. 111-13*.

Applicant likewise testified to his version of the facts surrounding the crimes for which he was convicted at the PCR hearing, and this account reflected consensual sex with the victim. He testified that he had relayed this same version to trial counsel. *PCR Tr. pp. 118-22*. He gave the following explanation of his decision not to testify:

[T]he State had basically, I guess, you would say, [finished] their case And Mr. Butler and I had discussions as far as whether I was going to testify. And it was discussions not just between [counsel] and myself, it was discussion between him, and he had probably like three to four law clerks. And he had his assistant ... counsel that was there with him. He had -- also there was a private detective, one private detective that he uses.

So we all, during the break, I'm not sure when it was, but during the break, we -- and my sister was there also. And during the break, we went into this room. I'm not sure which room it was. And we had discussions about whether I was going to testify or not, how strong the State's case was against me or not, and how strong ... the complainant's testimony was against me. And throughout those discussions, we had -- it may have been probably a total of seven to eight people inside the room. And we did, I guess, raise some hands as far as should I testify or as far as shouldn't I testify. And it had to have been an odd number, because [a] majority of the people that was deciding whether I was going to testify or not decided -- you know, it was [a] majority that the case that the State put on wasn't as strong and that Mr. Butler did an excellent job. That's what they were saying,

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Mr. Butler did a very good job, and I [didn't] need to get on the stand. Then Mr. Butler ... told me that he would advise not to take the stand, but leaving the choice completely up to me. And I decided not to take the stand.

*PCR Tr. pp. 113-14. See also PCR Tr. pp. 129-30.*¹⁴

Applicant testified that his decision not to testify was not based solely upon trial counsel's advice, but was "based upon the room, the better minds than mine. These are guys that worked in his office, that interned in his office with him. And then you had his co-counsel and a private detective. And the majority ruled." *PCR Tr. pp. 114-15.* He also admitted that counsel felt that he was "agitated at that time." *PCR Tr. pp. 129-30.* Applicant claimed that no one pointed out to him that counsel had referenced facts in the opening statement that were not then supported by evidence, and that he would have testified if someone had pointed this out to him. *PCR Tr. p. 115.*

Trial counsel testified that he had based part of his theory of how to best defend Applicant on the understanding that Applicant was going to testify at trial and that Applicant had agreed to testify. *PCR Tr. pp. 45; 68.* This is why he made the comments in opening statement with which Applicant now takes issue. Counsel would not have made those remarks if Applicant had not intended to testify. Counsel thought that Applicant's version of events was credible, counsel's interactions with him had all been pleasant, and counsel thought that he would have been a good witness. A woman in counsel's office had likewise met with Applicant, and she agreed with counsel's assessment of him. *PCR Tr. pp. 44-47.* Counsel had prepared Applicant to testify and he thought that Applicant would have to err badly before the prosecution could impeach him with any prior offenses. *PCR Tr. pp. 70-71.* He testified that Applicant had planned

¹⁴ On cross-examination, Applicant reiterated that while counsel advised him not to testify counsel told him that the "[u]ltimate decision" was his and that he had decided not to testify when questioned by the trial judge. *PCR Tr. pp. 130-31.*

to testify about prior consensual sexual encounters. Thus, when asked about the pretrial motion relating to the admissibility of other instances of consensual sex between Applicant and the victim, he testified that he had told the trial judge that the only issue was whether Applicant's sex with the victim was consensual or not because he had planned on Applicant testifying about earlier instances of consensual sex with the victim. *PCR Tr. pp. 29-30.*

When the trial judge initially broached whether Applicant would testify at trial, counsel asked for and was given more time for Applicant to think about the decision. (See *Tr. pp. 265-67*). Later, the trial judge again addressed the issue and counsel had wanted more time for Applicant to make his decision before the judge questioned him formally. He therefore asked the trial judge to allow Applicant to have overnight to decide. This would not have delayed the trial if she had granted his request. However, the trial judge surprised counsel by only giving him a ten minute recess to further discuss the matter. *Tr. pp. 368-73; PCR Tr. pp. 30-31.*

Although counsel had originally advised Applicant to testify, his advice changed during the course of the trial. *PCR Tr. pp. 31-32.* He explained that:

Something happened during the course of the trial, and I can't pinpoint anything specific, but David's demeanor started to change. And I don't always pay close attention to my client when I am involved in a trial, but I do remember a few times looking over and noticed that he had this very angry look on his face, and it concerned me. I don't know whether I addressed that with him at that time or not. But his whole demeanor changed once we got in there. And I don't think that he intended to do it. It just happened.

PCR Tr. p. 67; see also PCR Tr. p. 69.

Counsel worried that Applicant might not be a good witness because of his agitated demeanor. *PCR Tr. p. 69.* Also, counsel thought that the trial was going well for Applicant because the victim had not "come across very well," in light of her admission that she had consensual sex with Applicant at least once in the past, and because counsel had been successful

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in suppressing the towels in Applicant's car that had mixtures of his DNA and DNA from someone other than the victim. *PCR Tr. pp. 47; 49; 69-70.*

Counsel explained that:

We then met with him in the visitation room up here. I was there. The lawyer who was sitting with me was there. And several of our law clerks were there. And I wanted them to go through it one more time. And he just couldn't focus. And I felt bad for him, because I thought that his account was the truth. And he just, for whatever reason, being in here and listening to it all again, it affected him.

And I remember his answer to one question was that when he came in, that the girl touched his penis. And one of our female law clerks just looked at me and said, no. It just didn't come across like it did when he told it to us. And we had one particularly bright law clerk, and I remember David asked the guy -- I don't remember his name -- what do you think? Dave asked him, what do you think? And he said, you need to just let him, me, do his thing. And David said, yeah. I think he actually said, you are too good, we should just go with just what you are saying.

And I think it ... turns out we were wrong. But I think at the time it was the right decision.

PCR Tr. p. 48. See also PCR Tr. p. 70. Counsel did advise Applicant not to testify, but he explained that the decision was ultimately made by Applicant. *PCR Tr. pp. 68-69.*

Counsel acknowledged that he could have handled the *in camera* continuance motion without informing the trial judge that Applicant would testify. However, the request for permission to introduce prior instances of consensual sex clearly would have required Applicant to testify before the jury because the trial judge's ruling did not allow counsel to examine other witnesses about whether they had sex with the victim. *PCR Tr. pp. 37-41.* Counsel did not believe that a defense of consent and a lack of DNA in the rape protocol kit were mutually exclusive defenses. He also did not perceive a "shift" in defenses closing argument, even though Applicant did not testify. *PCR Tr. pp. 32-34.* In closing, counsel argued the State's inability to prove that the sex was not consensual, but he did not argue any points he had mentioned in his

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opening statement for which no evidence had been introduced because of Applicant's failure to testify. He added, "Now, if [Applicant] had testified, I would have hit those points harder, but I don't see -- and it might be because I know in my head what I intended. It's fair to say somebody could interpret it differently, but I don't see that I abandoned the consent defense." *PCR Tr. pp. 49-51. See also PCR Tr. pp. 57-58; 60.*

In connection with the motion for a continuance and the State's pretrial motion dealing with the admissibility of evidence of prior instances of intercourse between Applicant and the victim, the Court finds that Applicant cannot prove that counsel was deficient under *Strickland* for advising the trial judge that Applicant planned to testify. The Court finds that the comforter which was the subject of the continuance motion would be irrelevant, in the absence of counsel's representation that Applicant would give testimony establishing its relevancy, and counsel could not have possibly prevailed on the motion. Likewise, Applicant's testimony was a necessary predicate for counsel to present evidence that Applicant and the victim had consensual sex on previous occasions, since there was no evidence of more than one prior instance of consensual sex, absent his testimony. Further, counsel has an ethical duty not to make frivolous motions and to be candid with the tribunal. *See* Rule 407, SCACR, Rules of Prof. Conduct, Rule 3.1 (a lawyer shall assert only meritorious claims and contentions); Rule 3.3 (a lawyer shall demonstrate candor toward the tribunal). Although "a lawyer's violation of ethical norms does not make the lawyer *per se* ineffective," *Burt v. Titlow*, 134 S.Ct. 10, 18 (2013), the Court finds that counsel's representations, which were in accord with these Rules, did not constitute deficient performance under *Strickland*. *See Nix v. Whiteside*, 475 U.S. 157, 175, 106 S.Ct. 988, 998 (1986) ("Since there has been no breach of any recognized professional duty, it follows that there can be no deprivation of the right to assistance of counsel under the *Strickland* standard"); *United States v.*

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Swint, No. CIV. 98-5788, 2000 WL 987861, at *14 (E.D. Pa., July 17, 2000) (“Petitioner’s trial counsel cannot be deemed to have been ineffective for complying with his ethical obligations”). Moreover, the Court finds that Applicant was not prejudiced by counsel’s disclosure of these matters to the trial judge because she was not the trier of fact and did not determine his factual guilt or innocence.

Nor was counsel deficient for advising Applicant not to testify after informing the jury in his opening statement that Applicant had consensual sex with the victim before the night of the crime and that they had entered into a “less than desirable” agreement of sex in exchange for payment of money the victim owed him. *Tr. pp. 133-34*. The Court finds that counsel’s testimony is credible. Thus, the Court finds that counsel’s opening statement was based upon a reasonable belief that Applicant would testify at trial that the sex was consensual; that he had consensual sex with the victim in the past; and that they had entered into the relationship described in counsel’s opening. The Court is unwilling to second-guess, in hindsight, counsel’s decision to mention evidence in opening statement that would only be admitted if Applicant testified because counsel could reasonably conclude that it was best to inform the jury of the defense’s position that the sex was consensual at the outset of the trial because counsel reasonably anticipated that his client would testify. *See Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

The Court further finds that the initial decision to have Applicant testify was, itself, a reasonable trial strategy. Counsel only made this decision after Applicant and counsel had fully discussed both his right to testify and his version of the events for which he was on trial, and only after counsel and a co-worker came to the conclusion that Applicant would be a good witness. *See Strickland*, 466 U.S. at 690-91, 104 S.Ct. at 2066. Also, it is clear that Applicant

agreed with this strategy. While "a defendant's consent to trial strategy in itself, [does not vitiate] all claims of ineffective assistance of counsel ... [his consent is] probative of the reasonableness of the chosen strategy and of trial counsel's performance." *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995). *See also Young v. Catoe*, 205 F.3d 750, 760 n. 8 (4th Cir. 2000).

However, counsel subsequently advised Applicant not to testify, Applicant heeded counsel's advice, and he did not testify. As a result, some specific evidence that counsel referenced in opening was not introduced at trial and counsel could not argue it in closing. This was not deficient performance. The Court finds that the course of a trial can affect and alter an original defense strategy, and it may lead to reasonable decisions not to call witnesses or offer evidence mentioned in counsel's opening statement. *See, e.g., Williams v. Bowersox*, 340 F.3d 667, 671-72 (8th Cir. 2003). It is not deficient performance *per se* for counsel to promise something in opening statement, but fail to deliver on that promise during the defense's case. *Turner v. Williams*, 35 F.3d 872, 903-04 (4th Cir. 1994), *overruled on other grds., O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996), *aff'd*, 521 U.S. 151, 117 S.Ct. 1969 (1997); *People v. Burnett*, 110 Cal.App.4th 868, 885 (Cal.App. 2003) ("Making promises about the defense evidence in opening statement and then failing to deliver does not constitute ineffective assistance *per se*"); *see also United States v. McGill*, 11 F.3d 223, 227-28 (1st Cir. 1993) (failure to deliver on opening promise to put on expert witness was not ineffective assistance);¹⁵ *see also People v. Goodloe*, 263 Ill.App.3d 1060, 1076, 636 N.E.2d 1041, 1052, 201 Ill.Dec. 609, 620

¹⁵ The First Circuit Court of Appeals concluded in *McGill*, that, "although a failure to produce a promised witness may under some circumstances be deemed ineffective assistance, *see, e.g., Anderson v. Butler*, 858 F.2d 16, 19 (1st Cir. 1988), the determination of inefficacy is necessarily fact based. '[N]o particular set of rules can be established to define effective assistance, as hard-and-fast rules would inevitably restrict the independence and latitude counsel must have in making tactical and strategic decisions' " *McGill*, 11 F.3d at 227 (quoting *United States v. Natanel*, 938 F.2d 302, 310 (1st Cir. 1991), *cert. denied*, 502 U.S. 1079, 112 S.Ct. 986 (1992)).

(Ill.App. 1994); *People v. Olivares*, 2003 WL 22183876, *7-8 (Cal.App., Sept. 23, 2003). Determining whether the failure to call a promised witness is ineffective assistance of counsel is necessarily fact-based. *McGill*, 11 F.3d at 227. As the Court explained in *Turner*, however, “assuming that counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is ‘virtually unchallengeable.’ Were we to adopt [the defendant’s] position, we would effectively be instructing defense counsel to continue to pursue a trial strategy even after they conclude that the original strategy was mistaken or that the client may be better served by a different strategy.” *Turner*, 35 F.3d at 904 (quoting *Strickland*, 466 U.S. at 688-89, 104 S.Ct. at 2065). *See also Schlager v. Washington*, 887 F.Supp. 1019, 1026-27 (D. Ill. 1995), *aff’d*, 113 F.3d 763 (7th Cir.1997) (strategic decision not to introduce witnesses promised in opening statement was not ineffective assistance).

The Court finds that trial counsel’s subsequent change in trial strategy and advice, as well as Applicant’s failure to testify, were based upon events that occurred during the trial but which were unforeseen at the time of counsel’s opening statement. The Court further finds that counsel’s ultimate advice for Applicant not to testify was reasonable under *Strickland*, despite counsel’s comments in opening statement that were in anticipation of Applicant testifying. Counsel was concerned that Applicant had become angry or agitated during the trial, and that it might now be damaging to his defense if he testified and the jury could assess his demeanor. The State could not comment on his nontestimonial demeanor, *State v. Bellamy*, 293 S.C. 103, 106, 359 S.E.2d 63, 65 (1987) (“It is best for the solicitor not to comment on the defendant’s nontestimonial behavior”), but the State could comment upon and the jury could consider his testimonial demeanor. *See Tr. p. 430* (jury instruction on witness credibility). Thus, the Court

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finds that counsel could reasonably decide that Applicant's agitated or angry demeanor may undermine a defense of consent in a case of criminal sexual conduct in the first degree. Similarly, the Court finds that counsel could reasonably conclude that there was a possibility that Applicant might lose his temper if he was subjected to rigorous cross-examination, since he was already agitated when seated at counsel table.

The Court finds that counsel's discussion of Applicant's decision of whether or not to testify, in the manner described by counsel, was reasonable. In their discussion, both co-counsel and all other members of the Public Defender's Office agreed with counsel's advice that he should not testify. However, counsel told him that the ultimate decision was his. At the conclusion of this meeting, Applicant agreed with this advice. Thereafter, *he* made a voluntary, knowing and intelligent decision not to testify.¹⁶ The Court finds that Applicant's agreement with counsel's advice supports the conclusion that the advice was reasonable, as does co-counsel's agreement that this was the correct course of action. *See Bell*, 72 F.3d at 429.

Although counsel had referenced evidence in his opening statement that could only be introduced through Applicant's testimony and was never heard because of this change in strategy, counsel's performance was not deficient. Initially, the Court notes that a review of counsel's opening statement reflects that counsel never informed the jury that Applicant was going to testify. *See Tr. pp. 131-36. See Mann v. Ryan*, 828 F.3d 1143, 1154 (9th Cir. 2016) (En banc); *Com. v. Carney*, 34 Mass.App. 922, 922, 610 N.E.2d 975, 975-76 (Mass.App. 1993). Also, the Court in *Strickland* explained that "[t]here are countless ways to provide effective assistance

¹⁶ The Court finds that most of Applicant's testimony concerning the present issue is not credible because it is either internally inconsistent, self-serving, or both. However, his testimony concerning the meeting in which he reached his ultimate decision not to testify is generally consistent with counsel's testimony, and the Court finds that it is credible to the extent it is consistent with counsel's testimony.

in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” See *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. See also *Harrington*, 562 U.S. at 106, 131 S.Ct. at 789 (“Rare are the situations in which the ‘wide latitude counsel must have in making tactical decisions’ will be limited to any one technique or approach”). See also *Bobby v. Van Hook*, 558 U.S. 4, 9, 130 S.Ct. 13, 17 (2009) (*Strickland* only requires that “counsel make objectively reasonable choices”). Because the Court finds that each of counsel’s choices discussed above was reasonable, Applicant cannot show deficient performance simply because another attorney might have handled the matter differently. *Id.*

Further, a number of courts from other jurisdictions have found that counsel’s performance was not deficient under similar circumstances, where events occurring at trial resulted in counsel’s change of trial strategy and withholding testimony or evidence referenced in opening. In addition to *Mann*, this Court notes that in *Turner*, trial counsel had intended, at the outset of the sentencing proceeding, to introduce mitigating evidence. As a result, he told the jury in his opening statement that he would produce certain mitigating testimony and other evidence. However, he rested without putting in that evidence. *Turner*, 35 F.3d at 903. The Fourth Circuit Court of Appeals rejected the petitioner’s claim that his attorney’s failure to present the evidence described in the opening statement, in and of itself, was ineffective assistance. The Court found that counsel had “changed his trial strategy because he thought the Commonwealth rested prematurely and because the court indicated that the scope of rebuttal would be quite broad.” *Id.* at 904. The Court in *Turner* held that “his strategic decision to withhold evidence promised in the opening statement was not unreasonable. Nor was it unreasonable for him to mention mitigating evidence in his opening statement. This, again, was a strategic decision; had [counsel] not



described mitigating evidence in the opening statement, we suspect that [petitioner] would have challenged that omission." *Id.*

In *People v. Hill*, 257 Mich.App. 126, 667 N.W.2d 78 (Mich.App. 2003), the Court found that trial counsel was not deficient for failing to present a witness after telling the jury in opening statement that witness would testify on the defendant's behalf. The Court noted that counsel had subpoenaed the witness, the witness appeared at trial and was initially prepared to testify. However, police announced after the trial began that the witness would be the subject of a criminal investigation. As a result, the witness exercised his right to not testify. *Id.* at 138, 667 N.W.2d at 85-86. The Michigan Court of Appeals concluded that "it is difficult to argue that counsel should not have mentioned the witness during his opening statement. At that point in time, it appeared that the witness was going to testify. In hindsight, counsel should not have referred to the witness in his opening statement, but hindsight cannot form the grounds of a claim of ineffective assistance of counsel." *Id.* at 139, 667 N.W.2d at 86.

The Court in *Commonwealth v. Nardone*, 406 Mass. 123, 127, 546 N.E.2d 359, 363 (1989), found that trial counsel's "failure to call a ballistics expert, as promised, was clearly a decision forced upon him by events over which he had no control," and thus not ineffective assistance. *See also Bowersox*, 340 F.3d at 672 (upholding the state court's finding that counsel did not render ineffective assistance in failing to call two witnesses who were identified during opening statement); *Yancey v. Hall*, 237 F.Supp.2d 128, 135 (D. Mass. 2002) (concluding it was not ineffective assistance for petitioner's attorney to promise that petitioner would testify and that the evidence would show petitioner was not the person who committed the crime, even though petitioner ultimately did not testify and his counsel rested without adducing all of the promised evidence); *Edwards v. United States*, 767 A.2d 241, 247 51 (D.C. Cir. 2001). *Cf. Howard v.*

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Davis, 815 F.2d 1429, 1432-33 (11th Cir. 1987) (holding that a change of strategy in the midst of a trial did not constitute ineffective assistance, even where defense counsel asserted an "insanity defense initially, knowing that he might withdraw the defense at a later time"). Contrary to Applicant's position, *Strickland* does not require trial counsel "to continue to pursue a trial strategy even after [he] conclude[s] that the original strategy was mistaken or that the client may be better served by a different strategy." See *Turner*, 35 F.3d at 904.

Accordingly, the Court finds that cases where other courts have found counsel ineffective because there was no change in circumstances between the opening and the defendant's failure to testify are inapposite. See *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 258 (7th Cir. 2003) (counsel's performance was objectively unreasonable where counsel told the jury in his opening statement that the defendant would testify about the circumstances of the alleged offense, but then declined to call the defendant to the witness stand for reasons that were apparent at the time he made his opening statement); *Ouber v. Guarino*, 293 F.3d 19, 22, 28-30 (1st Cir. 2002) (trial counsel's trial performance was deficient where counsel failed to put the defendant on the stand after telling the jury four times in his opening statement that the defendant would testify).

The Court further finds that Applicant was not prejudiced by counsel's performance. "Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel." *Bell*, 72 F.3d at 429. Again, counsel had not promised jurors in his opening statement that Applicant would testify. See *Mann*, 828 F.3d at 1154. Further, counsel did not abandon the defense that Applicant and the victim had consensual sex. The Court rejects Applicant's contention that counsel had "shifted" his defense of Applicant because of Applicant's failure to testify. Even though counsel could not address any points raised in opening

that were not supported by evidence, he argued that the State could not prove that there was no consent.

To support this position, he focused on the victim's perceived lack of credibility and he urged jurors that she was trying to paint a false picture of what happened, much like the remainder of the State's case against Applicant. Counsel observed that: (1) the State's evidence was she did not have any serious physical injuries, even though she allegedly experienced the violent assault that she had described; (2) she did not tell the first officer on the scene or anyone else that Applicant said he was there to get a down payment, until the following day; (3) she did not mention that Applicant was supposedly trying to get her to leave the hospital in her statement to police, and her testimony was inconsistent with the officers testimony that they only heard him repeatedly apologizing; (4) rapists do not apologize and they do not ask for condoms, as the victim testified that Applicant had done; (5) rapists do not go to the hospital and ask to sit with the victim, as Applicant had; (6) she was having financial problems and she only reluctantly admitted that her electricity was off at the time of the crime; (7) "[s]he was living desperately and not making good choices;" (8) when counsel initially questioned her about each of the ways that Applicant had helped her financially, she repeatedly denied that he had done so, only to reluctantly admit on each occasion that he had assisted her after counsel further pressed her; (9) she had admitted to having consensual sex with Applicant in the past; (10) Applicant stopped having sex with her when she asked him to stop, as he had in the past, but rapists do not stop; (11) Applicant's DNA was not found under her fingernails; (12) she did not immediately call 911 or the police; (13) the physical evidence recovered from her bedroom did not support that she had sex with Applicant; (14) the swabs and smears from the rape protocol kit only resulted in a finding that enzyme present in semen was found but the enzyme which could be "present in



other things;" (15) she had already been prescribed Xanax and her primary care physician was a psychiatric facility; (16) she returned to the emergency room three months after the crime, complaining of arm pain and, while x-rays and an MRI were normal, she was placed on two additional medications; (17) on her discharge from the hospital on the latter occasion, doctors believed that a significant portion of health problems were caused by anxiety; and (18) the only evidence supporting the sexual assault and burglary was the victim's claim about what happened. *Tr. pp. 383-408.*

The Court's finding that Applicant was not prejudiced by counsel's performance is buttressed by the trial judge's instructions. In her opening comments to the jury, the trial judge charged jurors that the opening statements of counsel were not to be considered as evidence and that "[t]he evidence in this case will be presented to you by the testimony of sworn witnesses from the witness stand as well as any exhibits that may be introduced into evidence." *Tr. p. 79.* She later gave an instruction before the parties' closing arguments that the closing arguments were not evidence. *Tr. p. 382.* In her jury charge, she instructed jurors on the presumption of innocence, the State's burden of proof and Applicant's right to not testify or present any evidence. She also charged jurors at the outset of her instructions that, in arriving at their verdict, they were "to consider only the testimony which has been presented from the witness stand, any exhibits which have been made part of the record of this case, as well as the stipulations of counsel." *Tr. pp. 422-39.* Because "[It is] the almost invariable assumption of the law that jurors follow their instructions," *United States v. Olano*, 507 U.S. 725, 740, 113 S.Ct. 1770, 1781 (1993) (citing *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S.Ct. 1702, 1707 (1987)); *see also Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068 ("a court should presume ... that the judge or jury acted according to law"), the Court finds that the jury did not consider Applicant's failure to



testify or offer evidence in reaching its verdict. Finally, there was overwhelming evidence of Applicant's guilt. *See Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069. For these reasons Applicant cannot prove that he was prejudiced by counsel's performance.

5. Counsel's failure to inquire of victim's knowledge of Applicant's NFL career as evidence of motive.

The Court further finds that Applicant has not established either deficient performance or Sixth Amendment prejudice from counsel's failure to inquire of victim's knowledge of Applicant's NFL career, as possible evidence of motive. At trial, counsel moved as follows:

And this is one we haven't discussed, and I think that we're probably in agreement on it anyway, but we've made some effort to prevent some of Mr. Meggett's history from being aired. Consistent with all of our interest in this case being able to proceed smoothly, we would move to exclude from evidence any reference to Mr. Meggett's NFL history, his status as a professional athlete, his history with any of several NFL football teams. I don't think it would be relevant. I think it's prejudicial; And I also don't think that there's anybody that could testify to it for the state anyway, that as far as I can tell from the discovery the complainant in the case didn't even know about it. So we would move to keep that evidence out should it be coming in.

Tr. pp. 92-93. The Assistant Solicitor indicated that he did not plan to present such evidence in the State's case-in-chief and that he would notify the trial judge before introducing such evidence. *Tr. p. 93.*

Applicant testified at the PCR hearing that he had played in the NFL for ten years before retiring in 2000.¹⁷ He had played in two Super Bowls and was twice selected to the Pro Bowl. While Applicant did not know whether the victim was aware of his accomplishments, he claimed that she was aware of his NFL career because other people had mentioned it when they went places together. Applicant told counsel that he felt that the victim may have a financial motive

¹⁷ He played for the New York Football Giants, the New England Patriots and the New York Jets.

for making the charges against him based upon his career in professional football. Counsel had not told him that counsel's strategy was to prevent the jury from learning he had played in the NFL until the morning his trial began. At that point, counsel told Applicant that "it wouldn't have been good in my favor" he was a popular NFL player and the victim was "young and not as popular." *PCR Tr. pp. 102-05.*

Counsel testified that he did not recall his pretrial motion or the reason for making it. However, he explained that he did not want jurors researching Applicant's history because Applicant had other charges at the time that were similar to those in this case and counsel did not want jurors to learn about those charges.¹⁸ Counsel could not recall whether Applicant suggested that the victim's knowledge of his NFL career provided a possible financial motive. Also, counsel did not know whether or not the victim knew of Applicant's career because she knew Applicant as "Mike." *PCR Tr. pp. 26-27.*

The Court finds that Applicant has failed to prove deficient performance because the Court finds that counsel's decision to bar any mention of Applicant playing professional football was objectively reasonable, whether it was because – as Applicant claimed – counsel did not want the jury to sympathize with a young victim who had not had the popularity and advantages

¹⁸ On cross-examination, counsel made it clear that he was not concerned that Applicant could be impeached with these allegations if Applicant had testified. It appears that at the time of Applicant's trial, he was on probation for a 2006 conviction for sexual battery, stemming from a charge that he had sexually assaulted his former girlfriend. He was also on the sex offender registry for that offense at the time of his trial. *See Tr. p. 457; <http://www.espn.com/nfl/news/story?id=5789655>. Also, he had been arrested in Charleston for sexually assaulting several other women, going back nine years before the crimes for which he stood trial. *See G. Hanlon, "The Sordid End of David Meggett," <https://www.sbnation.com/longform/2014/1/21/5320000/david-meggett-criminal-history-profile>.**

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of playing professional football,¹⁹ or it was because of the fear that an unsequestered juror(s) might research a famous athlete and discover evidence of the other alleged sexual misconduct by Applicant. Also, counsel's alleged failure to inform Applicant of this strategic decision does not render counsel's performance deficient. "Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval." *Taylor v. Illinois*, 484 U.S. 400, 417-18, 108 S.Ct. 646, 657 (1988). Unlike Applicant's decision on whether or he would testify, this was not a matter that required Applicant's consent. *Id.* See also *Florida v. Nixon*, 543 U.S. 175, 187, 125 S.Ct. 551, 560 (2004); *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987 (1983) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal").

More importantly, the Court finds that Applicant has failed to prove that he was prejudiced by the strategy counsel selected. First, the Court finds that he cannot prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," see *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, because counsel had presented Applicant's jury with evidence of a pecuniary motive. Specifically, the jury had heard evidence that Applicant had previously loaned the victim \$200.00 on one occasion, "to help with the payment of her power bill (*Tr. pp. 141; 168*), that on other occasions, "Mike" drove her around to help her find work and he loaned her a rented truck. *Tr. pp. 141; 168-70.*

¹⁹ See "Pro Football is Still America's Favorite Sport," The Harris Poll (Jan. 26, 2016), http://www.theharrispoll.com/sports/Americas_Fav_Sport_2016.html.

Indeed, his jury had also heard the victim's admission that on the night Applicant attacked her, she owed him money, which she told him she would repay at the end of the week. *Tr. p. 147*. The Court finds that counsel astutely argued these points in closing argument and suggested that the victim was "desperate" for money (*Tr. pp. 385-97*), but the jury declined to draw the inference that there was an arrangement of sex for money. Because the jury had heard and rejected this evidence, the Court does not find that additional evidence of a possible pecuniary motive creates a reasonable probability of a different result. *Id.*

Secondly, the Court finds that Applicant has not presented any credible evidence that the victim was aware of his past involvement in the NFL. The Court specifically rejects Applicant's PCR testimony to the contrary as not credible. He did not present testimony by the victim that she was aware of his NFL past, and he did not present as witnesses before this Court any of the people whom he claimed had supposedly mentioned his career in her presence. Thus, the Court finds that counsel correctly understood that the victim only knew Applicant by the alias of "Mike," and the Court finds that she did not learn his true identity until after his arrest.

6. Counsel's failure to adequately argue the motion for directed verdict on the charge of burglary in the first degree.

The Court finds that Applicant has failed to prove either deficient performance or resulting prejudice based upon counsel's failure to argue that the victim consented to Applicant's presence in her residence in his motion for a directed verdict on the charge of burglary in the first degree.²⁰

²⁰ S.C. Code Ann. § 16-11-311(A) (2003) defines burglary in the first degree as follows: "A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling," if one or more enumerated aggravating circumstances is also present. As relevant to this case, the aggravating circumstances include entering or remaining in the dwelling at night and causing physical injury to a person not participating in the crime. *See* § 16-11-311(A)(1)(b) & (3).

The record reflects that counsel moved for a directed verdict "pursuant to [Rule 19, SCRCrim.P.]." Counsel added, "I do think that ... there's a decent argument to be made for the burglary. The victim testifies that when he comes in he's asking for the money that ... she owes him." *Tr. p. 365*. After listening to the State's arguments against the motion (*Tr. pp. 365-67*), the trial judge denied a directed verdict on both indictments. As to the charge of burglary in the first degree, she found that Applicant "entered a dwelling without the consent of Ms. Hooper with the intent to commit a crime therein." *Tr. pp. 367-68*.

The trial judge's denial of a directed verdict on the burglary charge was the third issue raised on direct appeal because, Applicant asserted, there was no evidence that he intended to commit a crime at the time he entered the victim's home. The Court of Appeals affirmed the trial judge's ruling because it found that "[s]ubstantial evidence was presented from which the jury could reasonably conclude Meggett possessed the intent to commit a crime at the time he entered Victim's home." *Meggett*, 398 S.C. at 526-27, 728 S.E.2d at 497-98.

Applicant alleged in his Amended PCR Application that trial counsel's handling of the directed verdict motion was ineffective because counsel failed to argue that Applicant had the victim's consent to enter her residence. Trial counsel testified that although the victim had not invited Applicant to her residence on the night of the incident, "the fact that [Applicant] had come and gone as he pleased on prior occasions and did so again, to me, was evidence that he had implicit consent, I guess, if not explicit." Counsel felt that his standard Rule 19 motion "covered everything." When counsel was asked whether he had a reason for not arguing that Applicant had the victim's consent to enter, he "assume[d] she testified that he didn't have consent," and he added "If I'm wrong about that, then I should have." *PCR Tr. pp. 62-64*.

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This Court finds that Applicant cannot show either deficient performance or resulting prejudice for several reasons. First, an inmate cannot show deficient performance from counsel's failure to argue a futile or meritless motion. *See Palacio v. State*, 333 S.C. 506, 514-15, 511 S.E.2d 62, 66-67 (1999). *See also, e.g., Werts v. Vaughn*, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); *United States v. Sanders*, 404 F.3d 980, 986 (6th Cir. 2005); *Denson v. United States*, 804 F.3d 1339, 1342 (11th Cir. 2015) ("Failing to make a meritless objection does not constitute deficient performance"), *cert. denied*, 136 S.Ct. 1214 (2016). *Accord United States v. Cronin*, 466 U.S. 648, 657 n. 19, 104 S.Ct. 2039, 2046 n. 19 (1984) ("Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical").

South Carolina law is clear: " 'In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury.' *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998)." *Meggett*, 398 S.C. at 526, 728 S.E.2d at 497. The victim testified at trial that Applicant did not have her permission to be in her residence that night and that she had not invited him. *Tr. p. 147; p. 156*. Thus, it would have been futile for counsel to argue that Applicant had the victim's consent to enter her residence and Applicant cannot show either deficient performance or, more importantly, prejudice resulting from counsel's failure to make the argument that Applicant had her consent.

7. Counsel's failure "to put up a defense through witnesses and evidence."

The Court denies relief on this claim for the reasons stated in connection with the preceding allegations.

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8. Counsel's failure to adequately object to the State's closing argument.

Nor is Applicant entitled to relief based upon trial counsel's failure to adequately object to the prosecution's closing argument. In closing argument, trial counsel asserted that the victim was living in poor conditions and stated that "desperate times call for desperate measures."²¹ *Tr. p. 396*. During the State's closing argument, the Assistant Solicitor made the following remarks:

In case after case involving CSC, there is one singular tactic that is employed by the defense, and I don't fault [defense counsel] for – [defense counsel] for doing it, but recognize it, and that is attack the victim. Attack the victim, call into question – and it's fine that [defense counsel] stands up here and goes I don't mean to say anything. He – that's precisely what he means. Her history of medication, the fact that she's poor, the fact that she lives in a house that doesn't really look like a middle class home. Calls her unstable, calls her a liar. In opening statement he implied, although there's no evidence of this, that somehow she's a prostitute, smear –

Tr. p. 419. Trial counsel objected and argued that the Assistant Solicitor's comments were burden shifting while referring to *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976). *Tr. p. 419*. The trial judge agreed to hear argument on the objection at the appropriate time. *Tr. pp. 419-20*. The Assistant Solicitor then proceeded with his closing argument. *Tr. pp. 420-24*.

After the jury began deliberating, the trial judge allowed counsel to further argue his objection to the State's closing argument. *Tr. p. 442*. Counsel argued that he did not use the word "prostitute" to describe the victim and that the State's comment on the defense's lack of presenting evidence was burden shifting. *Tr. pp. 442-43*. Counsel moved for a mistrial. He also moved for a curative instruction, while simultaneously objecting to any curative instruction given. *Tr. p. 443*.

²¹ The State had the right to present the last closing argument because Appellant introduced evidence during trial. *Tr. pp. 160-62; 260-61; 381*.



In response, the Assistant Solicitor argued that his argument had properly attacked the credibility of the defense that the victim was involved in a sex-for-money arrangement, and that his comments did not shift the burden of proof. He further noted that the jury instructions following closing arguments clarified which party carried the burden of proof for the jury. *Tr. pp. 443-44*. Counsel then reiterated that his objection was solely to the comment that the defense had presented no evidence of something. *Tr. p. 444*.

The trial judge denied counsel's mistrial motion and request for a curative instruction. She found that the Assistant Solicitor's comments did not shift the burden of proof and that the jury had been twice instructed the statements of counsel during arguments were not to be considered as evidence.²² *Tr. p. 444*.

The second issue raised by appellate counsel on direct appeal was "[w]hether the State's reference during closing argument to a lack of evidence supporting its interpretation of the defense's theory impermissibly shifted the burden upon Meggett as an indirect comment on the defendant's right to remain silent?" The Court of Appeals rejected his claim, reasoning as follows:

We find the trial court did not abuse its discretion in denying Meggett's mistrial motion. The solicitor's statement that there was no evidence Victim was a prostitute was a comment on the evidence, or lack thereof, presented during trial. The solicitor's comment did not improperly shift the burden of proof or suggest that Meggett's guilt could be inferred from his failure to testify or present a defense. The comment was made in reply to allegations defense counsel made in his opening and closing arguments that Meggett and Victim were involved in a sex-for-money arrangement. During opening arguments, defense counsel argued to the jury that "[V]ictim and [Meggett] struck a sort of less than desirable but informal arrangement. They began to sleep together, and [Meggett] would forgive her debt, and it happened more than once." In his closing argument, defense counsel asserted Victim was living in poor conditions and stated "desperate times call for desperate measures."

²² See *Tr. pp. 79; 382*.

The solicitor did not state that Meggett failed to present *any* evidence or a defense. Furthermore, the solicitor did not suggest to the jury that an adverse inference should be drawn against Meggett based on his failure to present evidence or testify. The solicitor only commented on the lack of evidence presented to support the inference that Victim was a prostitute. The solicitor's remark was not improper as it was made to urge the jury to avoid drawing an inference not supported by the record. *See State v. Liberte*, 336 S.C. 648, 653, 521 S.E.2d 744, 746 (Ct.App.1999) (holding a solicitor is entitled to call into question the credibility of a defense). Additionally, because we find the solicitor's comment was not improper, we further find the trial court did not err in denying Meggett's motion for a curative instruction.

Meggett also argues on appeal that the solicitor's closing statement was improper because it injected extraneous facts and opinions into the case and appealed to the jury's emotions. Because Meggett failed to raise these arguments to the trial court, they are not preserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (holding an issue must have been raised to and ruled upon by the trial judge to be preserved for appellate review).

State v. Meggett, 398 S.C. 516, 525-26, 728 S.E.2d 492, 497 (Ct. App. 2012)

Applicant contended at the PCR hearing that trial counsel was ineffective for not making the arguments that appellate counsel advanced for the first time on direct appeal: *i.e.*, that the State's closing statement improperly injected extraneous facts and opinions into the case and appealed to the jury's emotions. Mr. Stevens testified at the PCR hearing that although the Court of Appeals was able to address the merits of the claim that the State's closing argument violated *Doyle*, it could not address the claims that the State's closing improperly injected extraneous facts and opinions into the case and appealed to the jury's emotions because trial counsel had not raised these claims at trial. *PCR Tr. pp. 91-92. See State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (an issue must be both presented to and passed upon by the trial court to be preserved for appellate review); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (a party may not argue one ground in support of motion at trial and then argue different ground on appeal). He thought that the State's argument violated *Doyle* but admitted that the State had the

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right to respond to arguments by defense counsel and that trial counsel may have “opened the door” to the challenged comments. *PCR Tr. pp. 92-94.*

Trial counsel testified that while he still adhered to the defense that Applicant’s sex with the victim was consensual in his closing argument, he did not hit the “points harder” that he made in opening statement²³ because Applicant had not testified and there was no evidence to support a defense argument thereon. *PCR Tr. pp. 49-51.* Asked why he did not object when the Assistant Solicitor addressed those points in closing, counsel replied, “I don’t know. I think that they can bring out that I make promises in opening that I don’t fulfill. I think there’s case law on that.” In his estimation, it was a question of whether or not he had “opened the door” to the Assistant Solicitor’s remarks. *PCR Tr. p. 61.*²⁴ Later, he clarified that although he did not object when the Assistant Solicitor first made the challenged remark, he did object on the second occasion. He did not have an explanation for not raising “proper arguments” in support of his objection. *PCR Tr. p. 67.*

The United States Supreme Court has made clear that “...it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of

²³ See Allegations 3-4, *supra*.

²⁴ The Court does not give weight to counsel’s testimony that, in hindsight, he should have objected (*PCR Tr. p. 61*) because this is contrary to *Strickland*’s admonition that there must be a contemporary assessment of counsel’s performance: *i.e.*, counsel’s acts are to be judged as of the time counsel’s representation. *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. Following *Strickland*, the Court has consistently applied the rule of contemporary assessment of counsel’s conduct. *E.g.*, *Maryland v. Kulbicki*, 136 S.Ct. 2, 3 (2015); *Rompilla v. Beard*, 545 U.S. 374, 381, 125 S.Ct. 2456, 2462 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 2536 (2003). The South Carolina Supreme Court also applies this standard. *E.g.*, *Patterson v. State*, 359 S.C. 115, 118, 597 S.E.2d 150, 151 (2004); *Gilmore v. State*, 314 S.C. 453, 445 S.E.2d 454 (1994), *overruled on other grds.*, *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993); *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992).

one another.” *United States v. Robinson*, 485 U.S. 25, 33, 108 S.Ct. 864, 869 (1988). Therefore, a criminal defendant is not entitled to relief based upon the closing argument of a prosecutor, unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974). See also *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (“Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument”); *State v. Brisbon*, 323 S.C. 324, 474 S.E.2d 433 (1996) (The test of granting a new trial for alleged improper closing argument of counsel is whether the defendant was prejudiced to the extent that he was denied a fair trial).

The standard in *Donnelly* is a very high standard for a defendant to meet. “ ‘[I]t is not enough that the remarks were undesirable or even universally condemned.’ ” *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). See also *Parker v. Matthews*, 132 S.Ct. 2148, 2155 (2012); *State v. Tubbs*, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). “In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor’s remarks, but must also take into account defense counsel’s opening salvo.” *United States v. Young*, 470 U.S. 1, 12, 105 S.Ct. 1038 (1985).²⁵

Applying this standard to the challenged comments, the Court finds that Applicant cannot show either deficient performance or prejudice under *Strickland* because he has not proven that

²⁵ As the Court explained in *Robinson*, 485 U.S. at 33 n. 5, 108 S.Ct. at 869 n. 5: “[i]n *United States v. Young* and *Darden v. Wainwright*, we concluded that statements by the prosecutor which inflamed the jury, vouched for the credibility of witnesses, or offered the prosecutor’s personal opinion as to the defendant’s guilt were improper, but we held that, in context, those statements did not necessitate reversal.” Rather, in both cases, the Court held that the accused must prove that the remarks deprived him of due process. *Robinson*, 485 U.S. at 33 n. 5, 108 S.Ct. at 869 n. 5.

the challenged remarks were so prejudicial that they deprived him of a fair trial under *Donnelly*. See 416 U.S. at 637, 94 S.Ct. at 1868; *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166. The Court rejects Applicant's contention that the challenged portion of the State's closing argument improperly injected extraneous facts and opinions into the case and appealed to the jury's emotions. In rejecting Applicant's claim, the Court is mindful that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly*, 416 U.S. at 647, 94 S.Ct. at 1873. This was not a "Golden Rule" argument, such as those found improper in *State v. Reese*, 370 S.C. 31, 37-39 633 S.E.2d 898, 901 (2006), *overruled on other grds.*, *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), and *Von Dohlen v. State*, 360 S.C. 598, 608-12, 602 S.E.2d 738, 743-46 (2004), *cert. denied*, 544 U.S. 943, 125 S.Ct. 1645 (2005). The Assistant Solicitor did not "urge[] jurors ... to place themselves in the position of ... [the] victim ... and decide the case from that perspective." *Contra id.* at 609, 602 S.E.2d at 744.

Additionally, the Assistant Solicitor's remarks were confined to the record and its reasonable inferences, and they did not involve either a direct or indirect comment on Applicant's exercise of his right to not present any evidence or his right not to testify. Rather, as the Court of Appeals found, the Assistant Solicitor's argument "was not improper as it was made to urge the jury to avoid drawing an inference not supported by the record," and it was a fair response to the opening statement and closing argument of trial counsel. See *Meggett*, 398 S.C. at 525, 728 S.E.2d at 497. This Court finds that it was appropriate for the Assistant Solicitor to address the absence of evidence suggesting that the victim exchanged sex for money, where the record, viewed most favorably to the State, was that no such arrangement existed but trial

counsel had elicited testimony from which a contrary inference could be drawn. See *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587, 590 (1975) (“ ‘So long as he stays within the record and its reasonable inferences, the prosecuting attorney ... argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider’ ”); *Liberte*, 336 S.C. at 653, 521 S.E.2d at 746 (the State is entitled to call into question the credibility of a defense).

Moreover, the Court finds there could not be any conceivable prejudice to Applicant resulting from the challenged comments. In addition to the previously-stated reasons, the Court finds that there was overwhelming evidence of Applicant’s guilt. Also, the trial judge instructed jurors immediately before the parties made their closing arguments that “Ladies and gentlemen, just as I instructed you that opening statements are not to be considered evidence in this case, neither are closing arguments.” *Tr. p. 382*.²⁶ Subsequently, she instructed the jury on the presumption of innocence, the State’s burden of proof and Applicant’s right to not testify or present any evidence. She also charged jurors at the outset of her instructions that, in arriving at their verdict, they were “to consider only the testimony which has been presented from the witness stand, any exhibits which have been made part of the record of this case, as well as the stipulations of counsel.” *Tr. pp. 422-39*. Because “[It is] the almost invariable assumption of the law that jurors follow their instructions,” *Olano*, 507 U.S. at 740, 113 S.Ct. at 1781 (citing *Richardson*, 481 U.S. at 206, 107 S.Ct. at 1707); *see also Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, the Court finds that the jury (1) did not consider the State’s closing argument as evidence and (2) did not consider Applicant’s failure to testify or offer evidence in reaching its

²⁶ See also *Tr. p. 79* (instruction prior to opening statements).



verdict. Therefore, the Court finds that Applicant has failed to meet his burden of proof on the current allegation.

9. Counsel's comments in opening that the sex was consensual.

The Court rejects this claim for the reasons stated in connection with Allegations 3 and 4, *supra*.

10. Counsel's failure to make a *Batson* motion.

The Court finds that Applicant has failed to prove either deficient performance or resulting prejudice from counsel's failure to make a motion pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). "Under *Batson* ... and later decisions applying *Batson*, parties are constitutionally prohibited from exercising peremptory challenges to exclude jurors based on race, ethnicity, or sex." *Rivera v. Illinois*, 556 U.S. 148, 148, 129 S. Ct. 1446, 1447 (2009). *See also Snyder v. Louisiana*, 552 U.S. 472, 128 S.Ct. 1203 (2008); *United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989).

In the present case, the jury selection sheet and the trial transcript reflect that the prosecution exercised four of its five peremptory strikes to remove African-American veniremen and that trial counsel did not make a *Batson* motion contesting the prosecutor's use of its strikes, after six African-Americans were seated as petit jurors.²⁷ *Tr. pp. 2-H; 51-71*. Counsel testified at the PCR hearing that he had made *Batson* motions in some cases tried both before and after Applicant's trial, and he had not made *Batson* motions in other cases. Although he could not remember why he did not make a motion in this case, he would have made the motion if he had thought that the State's use of its strikes was an issue. He also conceded that the fact the racial

²⁷ Four of these jurors were women and two were men. *Tr. pp. 2-H; 51-71*.

composition of the jury “was 50/50” “likely could” have impacted his decision not to make a *Batson* motion. *PCR Tr. pp. 28; 71-74.*

Assistant Ninth Circuit Solicitor Chad Simpson, Esquire, testified that he and Assistant Solicitor Culver Kidd prosecuted Applicant. Both men were involved in the voir dire and jury selection, and they collaborated on jury selection. *PCR Tr. pp. 132-34.* Mr. Simpson did not independently recall the reasons he struck the four African-American veniremen at issue, even after reviewing the trial transcript. Before testifying, he had pulled and reviewed his entire case file. However, “[t]here is no information in there involving jury selection.” He had also to run “rap sheets” on the four jurors using their first and last names, gender and race, but he discovered that “the names were too common.” *PCR Tr. pp. 132-33.*²⁸

Further, the in-house juror information sheets of the Ninth Circuit Solicitor’s Office only went back to January 2011 and Applicant was tried in November 2010. Likewise, the Charleston County Clerk of Court’s Office purges its records after three years. So, he was unable to obtain any information concerning jury selection in this case. *PCR Tr. pp. 135-36.* However, he testified that he takes the concerns of *Batson* “very seriously, almost to a fault” and that he felt the ultimate composition of Applicant’s jury reflected that. *PCR Tr. p. 134.* Finally, he would have had a race neutral reason for his use of his strikes if counsel had made a *Batson* motion. He simply could not recall those reasons six years after the trial. *PCR Tr. pp. 135-36.*

Applicant’s appellate counsel, Mr. Stevens, testified that he saw that the State had exercised four of its five peremptory challenges on African-American veniremen in the course of reviewing the transcript on appeal. He speculated that he might have been able to show that an

²⁸ He explained that the case files in the Solicitor’s office typically have only jurors’ names, addresses and criminal history. *PCR Tr. p. 133.*

explanation given by the State was possibly pretext if an argument on this basis had been made at trial. However, the Court finds that his testimony does not support this claim because he candidly admitted that he only had a cold record and that he did not know why the State struck any juror, since the State was not required to explain its strikes at trial. *PCR Tr. pp. 84-87.*

Based upon the current record, the Court finds that Applicant has failed to prove either deficient performance or prejudice under *Strickland* as the result of trial counsel's failure to make a *Batson* motion. The current record simply does not support the conclusion that there was a racial animus for any of the strikes used by the prosecution. Although the State's first challenge was used to strike juror 134, an African-American female, the Court notes that the very first juror seated, juror 184, was African-American female. Also, two more African Americans were seated as jurors before the State struck juror 214, an African-American female. Further, a total of six African Americans served on the petit jury. *Tr. p. 2-H.*

The Court finds that the testimony of trial counsel and Mr. Simpson was credible. Thus, the Court finds that the State exercised its preemptory challenges with both an awareness of and sensitivity to the requirements of *Batson*. The Court further finds that counsel, who was a very experienced public defender, would have made a *Batson* motion if he felt that one was appropriate. See *Howell v. Trammell*, 728 F.3d 1202, 1227 (10th Cir. 2013) ("Because Howell has not shown any *Batson* violations, he cannot show counsel erred in failing to object. Thus, he is not entitled to habeas relief"); *Chanh Minh Dang v. Giurbino*, 589 F. App'x 385, 386-87 (9th Cir. 2015), *cert. denied*, 135 S.Ct. 2864 (2015); *Com. v. Dennis*, 552 Pa. 331, 343, 715 A.2d 404, 409 (1998) ("Appellant offers no evidence that the prosecutor exhibited racial animus in striking African-American venirepersons. Indeed, the impaneled jury included four African-American jurors and one African-American alternate, which indicates a lack of racial animus. Trial counsel

was not ineffective for failing to raise a plainly baseless *Batson* claim”). As a result, the Court finds that Applicant has not overcome *Strickland*’s strong presumption that “under the circumstances, the [failure to make a *Batson* motion] ‘might be considered sound trial strategy.’” *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 (citation omitted). See *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. See also *Burt v. Titlow*, 134 S.Ct. 10, 17 (2013) (“It should go without saying that the absence of evidence cannot overcome the ‘strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance’”) (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052) *Harrington*, 562 U.S. at 105, 131 S.Ct. at 787 (quoting *Strickland*).

11. A cumulative error analysis is not proper under *Strickland*.

Finally, the Court rejects Applicant’s claim that he is entitled to relief based upon the cumulative effect of trial counsel’s alleged errors. This Court finds that a cumulative error or cumulative prejudice analysis is improper under *Strickland*, since it would obviate the necessity of demonstrating that an applicant was actually prejudiced by any specific error. *Contra Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

The South Carolina Supreme Court has declined to hold that separate and unrelated ineffectiveness claims can be aggregated, so as to find that counsel’s representation was prejudicial under *Strickland*, when there is no Sixth Amendment prejudice on any individual claim. See *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324-25 (2002) (expressly declining to address the novel question of whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel’s alleged errors); *Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (same); *Lorenzen v. State*, 376 S.C. 521, 527, 657 S.E.2d 771, 775 (2008) (finding that PCR judge erred by relying upon *Nance v. Frederick*, 358

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S.C. 480, 596 S.E.2d 62 (2004) and concluding that “[w]hile no individual failure alone would be a ground for granting this PCR, the cumulative neglect is severe”). This Court finds that such an analysis is not constitutionally required and should not be employed.

“The Supreme Court has not held that distinct constitutional claims can be cumulated to grant [collateral] relief.” *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002). This Court finds that several decisions of federal circuit courts of appeals rejecting a cumulate error or cumulative prejudice analysis are legally correct. *See id.*; *United States v. Stewart*, 20 F.3d 911, 917-18 (8th Cir. 1994); *Meuller v. Angelone*, 181 F.3d 557, 586 n. 22 (4th Cir. 1999); *Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998) (“Having just determined that none of counsel's actions could be considered constitutional error, ... it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of this Court individually to assess claims under *Strickland*”).

To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction, a conclusion that is manifestly contrary to the analysis set forth in *Strickland* and would permit an inmate to circumvent his burden of proof. *See Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064 (“Unless a defendant makes both showings [- i.e., both deficient performance and prejudice -] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable”). *See also Cronin*, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046 (1984) (“... the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated”); *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005) (“we have held that, post-AEDPA, not even constitutional



errors that would not individually support habeas relief can be cumulated to support habeas relief"); *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996).²⁹

Further, the Court finds that Applicant has failed to meet his burden of proof, even under a cumulative error analysis. This Court has not found that counsel's performance was deficient, in any respect. Although the Court did not address *Strickland's* first prong in connection with counsel's efforts to locate the victim's telephone records, the Court did not find that his performance was deficient. Even assuming *arguendo* that the Court had found counsel performed deficiently in those efforts, there are no other errors with which to aggregate that supposed error. Therefore this allegation lacks merit.

C. Ineffective Assistance of Appellate Counsel

Appellate counsel's failure to argue that Applicant had victim's consent to enter her residence.

Applicant's final claim is that appellate counsel was ineffective for not arguing on appeal that Applicant had the victim's consent to enter her residence in connection with the trial judge's denial of a directed verdict on the charge of burglary in the first degree. The Court finds that he has not met his burden of proving either deficient performance or resulting prejudice.

Appellate counsel, Mr. Stevens, articulated two reasons for not presenting this argument

²⁹ It is perfectly logical to consider the cumulative effect of failing to disclose evidence under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), since the determination to be made is whether non-disclosure of evidence deprived the defendant of due process. See *Kyles v. Wheatly*, 514 U.S. 419, 115 S.Ct. 1555 (1985). However, the same is not true when addressing ineffective assistance of trial counsel claims. Alleged errors, which are not unconstitutional, individually, simply cannot be added together to create a constitutional violation. Following a cumulative error or cumulative prejudice analysis would result in a PCR applicant obtaining relief, even though no one alleged constitutional violation was prejudicial to her, simply by raising a large number of allegations, such as Applicant has done in the present case. Obviously, this is a ludicrous result that is not mandated by *Strickland* or any other decision of the South Carolina Supreme Court or the United States Supreme Court. See *Hunt v. Smith*, 856 F.Supp. 251, 258 (D.

on direct appeal. First, it was procedurally barred because it had not been raised in the trial court. Second, he observed that a defendant is not entitled to a directed verdict if there is “any direct evidence or substantial circumstantial evidence,” and the evidence is viewed in the light most favorable to the State. *PCR Tr. pp. 94-95*.


The right to effective assistance of appellate counsel, and the *Strickland* standard for evaluating such a claim, was extended to appellate proceedings in *Evitts v. Lucey*, 469 U.S. 387, 396-98, 105 S.Ct. 830, 836-37 (1985), and further clarified in *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746 (2000). As the Fourth Circuit Court of Appeals stated in *United States v. Mason*, 774 F.3d 824, 828-29 (4th Cir. 2014):

The “right to effective assistance of counsel extends to require such assistance on direct appeal” as well as at trial. *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir.2000) (en banc) (applying the *Strickland* standard to claims of ineffective assistance of counsel during appellate proceeding). We likewise presume that appellate counsel “decided which issues were most likely to afford relief on appeal.” *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir.1993). Effective assistance of appellate counsel “does not require the presentation of all issues on appeal that may have merit.” *Lawrence v. Branker*, 517 F.3d 700, 709 (4th Cir.2008). As a general matter, “ ‘only when ignored issues are clearly stronger than those presented’ ” should we find ineffective assistance for failure to pursue claims on appeal. *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir.1986)).

See also Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009).

Applying this standard to Applicant’s case, the Court finds that he cannot prove deficient performance. Appellate counsel presented the Court of Appeals with the same argument that trial counsel had raised at trial. *Contra Stone v. State*, 419 S.C. 370, 389-90, 798 S.E.2d 561, 571-72 (2017). Also, the argument that Applicant alleges he should have made is not “clearly stronger” than the arguments he did present because it was procedurally barred on appeal since it was not

Md. 1994) (“The fact that many claims of counsel error are pressed does not alter fundamental math - a string of zeros still adds up to zero”).




raised in the trial court. *See Hoffman*, 312 S.C. at 393, 440 S.E.2d at 873 (an issue must be both presented to and passed upon by the trial court to be preserved for appellate review); *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584 (a party may not argue one ground in support of motion at trial and then argue different ground on appeal). And, as discussed in connection with Applicant's sixth claim, "[i]n reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." *Meggett*, 398 S.C. at 526, 728 S.E.2d at 497 (citation omitted). The victim testified at trial that Applicant did not have her permission to be in her residence that night and that she had not invited him. *Tr. p. 147; p. 156*. Accordingly, even if the Court of Appeals could have reached the claim that he was entitled to a directed verdict on the burglary charge because he had the victim's consent to enter the residence, this Court finds that there was absolutely no possibility of prevailing on the argument. Therefore, the current allegation is without merit.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR Application is denied and dismissed with prejudice.

The Court notes that Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek

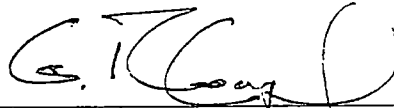


appellate review, PCR counsel must serve and file a notice of appeal on his behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 18th day of September, 2017.



G. THOMAS COOPER
Presiding Circuit Court Judge

Cherokee, South Carolina