The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: chasgrose@gmail.com
Web: GroseLawFirm.com

January 19, 2018

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: *Jospeh Richard Graddick v. State of South Carolina*
Case No. 2014-CP-10-03018

Dear Mr. Shearouse:

Enclosed please find Ms. Graddick's Notice of Appeal in the post-conviction relief case, along with a certificate of service. Also enclosed are the orders of the Honorable G. Thomas Cooper, Jr filed on November 15, 2017 and January 8, 2018.

Please be advised that the transcript of the evidentiary hearing has already been produced. I understand the petition for writ of *certiorari* will be due on March 9, 2018.

Thank you for your attention to this matter. If you have any questions or require additional information, please do not hesitate to contact me.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: Mr. Joseph Richard Graddick
Donald J. Zelenka, Esquire
Clerk of Court, Charleston County

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
FEB 09 2018
S.C. SUPREME COURT

APPEAL FROM Charleston COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2014-CP-10-03018

Joseph Richard Graddick, ... Petitioner,

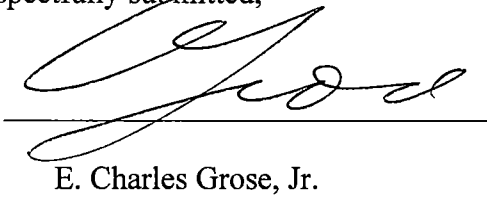
v.

State of South Carolina, ... Respondent.

Notice of Appeal

The petitioner, Joseph Richard Graddick, appeals the order of the Honorable G. Thomas Cooper, Jr., dated, November 7, 2017, dismissing his application for post-conviction relief. This appeal is taken from the order of Judge Cooper filed on January 8, 2018, denying Mr. Graddick's Rule 59(e), SCRCP motion.

Respectfully submitted,

By 

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Petitioner

February 7, 2018
Greenwood, South Carolina

Other Counsel of Record:

Donald J. Zelenka, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 09 2018

S.C. SUPREME COURT

APPEAL FROM Charleston COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2014-CP-10-03018

Joseph Richard Graddick, ... Petitioner,

v.

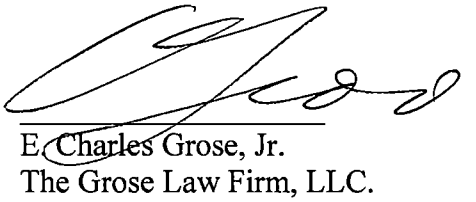
State of South Carolina, ... Respondent.

Certificate of Service

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Donald J. Zelenka, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

February 7, 2018



E. Charles Grose, Jr.
The Grose Law Firm, LLC.
404 Main Street
Greenwood, SC 29646
(864) 538-4466

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C/A No. 2014-CP-10-3018
	)	
JOSEPH RICHARD GRADDICK	)	
	)	
	)	
Applicant,	)	**ORDER DENYING APPLICANT'S MOTION TO ALTER OR AMEND THE JUDGMENT**
	)	
v.	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	
Respondent.	)	
	)	

After careful consideration of the Applicant's Motion and the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES Applicant's Motion pursuant to Rule 59(e) SCRCP to Alter or Amend Judgment of this Court's Order entered on or about November 15, 2017. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Presiding Judge

January 5, 2018

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	
	2014-CP-10-3018
Joseph Richard Graddick, #262619,	
Applicant,	ORDER OF DISMISSAL
v.	
State of South Carolina,	
Respondent.	

FILED
2017 NOV 15 AM 10:01
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before this Court by an application for post-conviction relief dated May 9, 2014 and filed May 12, 2014 by Applicant Joseph R. Graddick, through his attorney, E. Charles Grose of the Greenwood County Bar. The Respondent, through Assistant Attorney General Ashleigh R. Wilson, made a Return dated April 22, 2015. On December 6, 2016, an evidentiary hearing was held before the Honorable G. Thomas Cooper, presiding judge. Applicant was present and represented by Counsel Charles Grose. The Respondent was represented by Assistant Attorney General Alicia Olive. Testimony was received from Counsel Beattie Butler, Applicant, Leroy Graddick, and Susan Hackett. This matter was taken under advisement and the Court requested counsel to provide proposed orders. This Order of Dismissal follows:

I. Prior Procedural History.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was indicted at the April 2010 and May 2011 terms of the Charleston County Grand Jury for kidnapping (2011-GS-10-2295), burglary- first degree (2011-GS-10-3096), and criminal sexual conduct- first degree (2011-GS-10-3100). Applicant was represented by Beattie Butler, Esquire.

On July 11-13, 2011, Applicant proceeded to trial and was found guilty. Applicant was sentenced by the Honorable Deadra L. Jefferson to confinement for a period of seventeen years on all charges. Applicant's convictions are to be served concurrently.

Applicant filed a timely Notice of Appeal. His appeal was perfected by Susan Hackett, Esquire, of the Office of Appellate Defense. Appellate counsel Hackett filed an Anders Brief of Appellant requesting leave to be relieved and asserted as the sole arguable ground the following:

> By sustaining the prosecutor's objection and ordering the jury to disregard a portion of Appellant's closing argument, did the trial judge violate Appellant's right to due process when Appellant properly argued the high burden of proof to the jury and the facts in evidence?

Anders Brief of Appellant, p. 3. Applicant's convictions and sentences were dismissed, pursuant to review Anders v. California, 386 U.S. 738 (1967), by the Court of Appeals on May 29, 2013. State v. Graddick, Ct. App. Unpublished Op. No. 2013-UP-228 (filed May 29, 2013). The Remittitur was issued on June 20, 2013.

II. Allegations before this Court.

In his Application, Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
    a. Failure to investigate.
    b. Failure to object to improper character evidence.
    c. Failure to object to inadmissible hearsay.
    d. Failure to present available evidence and witnesses.
    e. Failure to object to improper jury instruction.
2. Ineffective assistance of appellate counsel.
    a. Failed to brief improper admission of testimony by police officer George Van Tine.
    b. Should not have filed an *Anders* brief.

At the hearing and his post-hearing pleading, Applicant, through counsel, asserted the following grounds:

1. Ineffective Assistance of Counsel:
    a. Trial counsel Beattie Butler was ineffective in failing to adequately object to the trial court's instruction pursuant to S.C. Code § 16-3-657, which provides, "[t]he testimony of the victim need not be corroborated in prosecutions" for criminal sexual conduct when counsel did not renew his initial objection after the charge was given.
    b. Trial counsel failed to object to the comments which suggested the role of the jury to "seek the truth":
        i. The trial judge stated in the beginning of the trial:
            1. "So that at the end of the testimony, after the arguments of the attorneys and the charge or instruction on the law as given by the Court, you will then be in a position to determine what the true facts are, and to apply the law to those facts, and the render a true and just verdict in this case." Tr. 40, lines 6-11.
        ii. During opening statement, the prosecution asked the jurors to "come back with a verdict that speaks the truth. The truth about what happened to LaVanda Joyner on that evening." Tr. 49, lines 12-14.
        iii. During the charge on the law, the trial judge instructed the jurors, "You have but one objective, ladies and gentlemen, to seek the truth regardless of its source." Tr. 288, lines 19-21.

c. Trial counsel was ineffective in failing to object to testimony by Fulvia Kandie Dunham and Detective Forsythe about Applicant's pre-trial incarceration as implying guilt and improper character evidence.

d. Trial counsel was ineffective in failing to object to testimony of Officer Van Tine as hearsay and a violation of the Confrontation Clause about Ms. Dunham.

e. Trial counsel was ineffective in failing to interview and present as a witness Applicant's brother, Leroy Graddick, concerning whether Applicant knew the victim prior to the incident to corroborate Applicant's testimony.

f. Appellate counsel was ineffective:

   i. in failing to brief as a merit ground in the appeal the initial objection to the intent to instruct the jury on § 16-3-657 which was preserved and;

   ii. In failing to brief a merit argument on the propriety of the defense closing rather than as an Anders issue.

g. The errors are cumulative errors entitling Applicant to a new trial.

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.

Ineffective Assistance of Trial Counsel

In a PCR action, 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, 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).[1]

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[1] The Court in *Harrington* explained that:

> "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.

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).

Ineffective Assistance of Appellate Counsel

Applicant also alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. *Southerland v. State,* 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." *Thrift v. State,* 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) *citing* Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial

counsel. *See Southerland v. State,* 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether applicant was prejudiced by appellate counsel's deficient performance. *Bennett v. State,* 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, Applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Grounds for relief

1. S.C. Code § 16-3-657 issue.

a. Trial Counsel.

In his initial allegation, he contends that counsel was ineffective in failing to adequately object to the court's instruction pursuant to S.C. Code § 16-3-657. This Court finds that Applicant has failed to prove either deficient performance or prejudice.

The South Carolina "Rape Shield Law" S.C. Code Ann. § 16-3-657 (2016) states that "[t]he testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658." Subsequent to the July 13, 2011 conviction, in *State v. Stukes*, Op. No. 27633, 416 S.C. 493, 787 S.E.2d 480 (S.C. Sup. Ct. filed May 4, 2016), the Supreme Court of South Carolina concluded the charge was unconstitutional. *See also State v. McBride*, 416 S.C. 379, 393, 786 S.E.2d 435, 442 (Ct. App. 2016), cert. denied (June 16, 2017) (harmless error found under the circumstances); *State v. Witherspoon*, 418 S.C. 641, 795 S.E.2d 685 (2016), reh'g denied (Feb. 9, 2017) (erroneous jury instruction providing that victim's testimony was not required to be corroborated was "prejudicial error" in sexual assault and burglary prosecution, where issue of victim's credibility was central to the case, and other evidence of defendant's guilt was not overwhelming). Applicant urges this Court to find that counsel was ineffective in failing to

preserve and adequately argue the issues found successful in the 2016 opinion in *Stukes*. This Court concludes that counsel was neither deficient nor prejudicial under *Strickland.*

How the instruction issue was raised at trial.

During an initial charge conference, Counsel Butler stated:

MR; BUTLER: And I will object to the, I know it's the standard charge, but the victim's testimony in a CSC case may not be corroborated.

THE COURT; Actually its statutory. Take it up with the legislature. It's required to be instructed. But it isn't required to be corroborated. The legislature has spoken and I merely do what they direct.

MR. BUTLER: Yes, ma'am. I just note my objection.

ROA 252, l. 12-21. Tr. 251.

During the subsequent charge conference, Judge Jefferson stated the following:

> I will instruct 16-3-657 which is the testimony of the victim need not be corroborated, and that is supported by State versus Rayfield, which is a 2006 Supreme Court decision which states that it is still appropriate and applicable case law and should be instructed.

ROA 286, l. 13-18. Tr.p. 285. A review of the exceptions at the charge conference reveals that Counsel Butler made no objection. ROA 288- 296. Tr. p. 287-88. During the actual jury instructions, Judge Jefferson charged the following:

> I instruct you, ladies and gentlemen, that South Carolina code section 16-3-657 provides that the testimony of the victim in a criminal sexual conduct prosecution need not be corroborated, pursuant to 16-3-652 through 16-3-658.

ROA 350, l. 17-23. A review of the exceptions to the instructions reveals that counsel made no objections to this instruction. ROA 357-363. The trial judge subsequently gave additional instructions after a jury note was received. ROA 365-366. No objection was presented by defense counsel to the intent to re-instruct on the earlier instructions, including criminal sexual conduct.

ROA 366. This instruction again included the portion of the charge related to § 16-3-657. ROA 373, l. 18-21. ("Pursuant to South Carolina Code section 16-3-657, the testimony of a victim need not be corroborated in prosecutions for criminal sexual conduct.") . No objection was made subsequent to the instruction. ROA 376, l. 8. Tr. 375.

Relevant PCR Testimony

Counsel Beattie Butler testified that he had objected to the instruction, but was surprised in hindsight that he did not set forth the reason why he thought the instruction was objectionable. PCR 21-22. See also PCR 44-45. He suggested that this may have been based upon his history of dealing with Judge Jefferson. He admitted that he thought this instruction was a hot issue at the time and thought he had been objecting to the instruction for a significant period of time, including in briefs and articles, since 2000. PCR 22-23, 26. Butler opined it was his thought that the statutory instruction was dangerous because it invited the State to say that they don't have to have corroboration and leave an impression that a sexual assault is different and the standard of proof is lower. PCR 23. Butler acknowledged he was familiar with *State v. Rayfield*, 369 S.C. 106, 118, 631 S.E.2d 244, 250 (2006). He confirmed Justice Pleicones' dissent in that case gave caution to the bench and bar about the instruction. Butler asserted that the instruction after *Rayfield* was not a mandatory instruction. PCR 26-27.

Appellate counsel Susan Hackett was questioned about her failure to raise an issue in the direct appeal about the 16-3-657 instruction. PCR 75-81. She acknowledged the instruction had been a hot topic for years. PCR 76. She confirmed that her office had recently been successful in *State v. Stukes*, 416 S.C. 493, 499-500, 787 S.E.2d 480, 483 (2016), which held the instruction should not be given. She stated that after *Rayfield* in 2006, objections were routinely made. She also opined that in *Rayfield*, the Court concluded the instructions were not mandatory. PCR 77.

Appellate counsel Hackett opined the objection made by Butler at trial was adequate to preserve the issue for an appeal. PCR 78, l. 6. She stated that, normally, the instruction made at a charge conference is sufficient to preserve the issue on appeal. She stated she would have argued on appeal, if she had chosen to raise the issue, that it was preserved, but would have expected a response from the State that it is not preserved because it was not objected to when it was re-charged. PCR 78. [2] She admitted the reasoning in the objection at the charge conference could have been in more detail because of the fact that they had later held in *Stukes*, a "he said she said" case, on whether there was consent. She felt it could have been a better objection if it had been clearer on the issue of prejudice. PCR 78. Counsel Hackett stated she did not raise the issue on appeal because she did not think *Rayfield* would get reversed. PCR 79. She admitted there were other cases out there at the time of Graddick's appeal in addition to *Rayfield*. PCR 79. [3] She confirmed *Rayfield* stood for the proposition that the giving of the instruction did not constitute reversible error.[4] Hackett noted the second time it was charged it did not include a companion

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[2] The *Anders* Brief of Appellant was filed on August 28, 2012.

[3] Applicant's counsel made reference to *State v. Hill*. This is an apparent reference to *State v. Hill*, 394 S.C. 280, 299, 715 S.E.2d 368, 379 (Ct. App. 2011) where the Court of Appeals held the single instruction on "no corroboration," was not unduly emphasized, and the charge as a whole comported with the law, such that there was no reversible error in the "no corroboration" charge" in compliance with *Rayfield*. However, prior to Stukes, the appellate courts had rejected similar arguments. See also, *State v. Orozco*, 392 S.C. 212, 224, 708 S.E.2d 227, 234 (Ct. App. 2011) ("We further believe Rayfield II is controlling on the issue of the corroboration charge."); *State v. Seifer*, No. 2011-UP-168, 2011 WL 11733655, at *1 (S.C. Ct. App. Apr. 18, 2011) ("As to whether the trial court unduly emphasized section 16–3–657 in answering the jury's question, we find that it did not, citing *Rayfield*); *State v. Bagley*, No. 2012-UP-446, 2012 WL 10862456, at *1 (S.C. Ct. App. July 18, 2012) (same *citing Rayfield*); *State v. Brandeberry*, No. 2015-UP-015, 2015 WL 164186, at *1 (S.C. Ct. App. Jan. 14, 2015) (same citing *Rayfield* and *Orozco*).

[4] In *Rayfield*, the Court held:

> It is not always necessary, of course, to charge the contents of a current statute. Section 16–3–657 prevents trial or appellate courts from finding a lack of sufficient evidence to support a conviction simply because the alleged victim's

charge about the credibility of the witnesses. PCR 80, citing ROA 366 (Tr.p. 365). There was no objection to the re-charge. Hackett stated she had not briefed this instruction issue prior to her representation of *Graddick*. PCR 81. She acknowledged it was subsequently raised in both *Stukes* and *Witherspoon*. PCR 81. *See State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) (Katherine Hudgins – appellate counsel); *State v. Witherspoon*, 418 S.C. 641, 642, 795 S.E.2d 685, 686 (2016), reh'g denied (Feb. 9, 2017) (Robert Dudek appellate counsel).

Hackett stated, prior to her filing of the *Anders* brief, she had reviewed issues that appeared preserved for appellate review and made a determination that they did not have merit in terms of reversible error. PCR 82. She opined the only arguable issue was the closing argument issue, but the argument was limited. She confirmed she had read every word of the transcript. She opined the argument issue was arguable, but not reversible. PCR 84-85.

> testimony is not corroborated. However, § 16–3–657 does much more. In enacting this statute, the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence identifying a particular perpetrator. The Legislature has decided it is reasonable and appropriate in criminal sexual conduct cases to make abundantly clear- not only to the judge but also to the jury—that a defendant may be convicted solely on the basis of a victim's testimony.
>
> A trial judge is not required to charge § 16–3–657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law. The jury in this case was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses. The trial judge in this case, as shown in the above portions of the charge, fully and properly instructed the jury on these principles.

State v. Rayfield, 369 S.C. 106, 117–18, 631 S.E.2d 244, 250 (2006) ***abrogated by State v. Stukes***, 416 S.C. 493, 787 S.E.2d 480 (2016).

This Court concludes trial counsel was not deficient in 2011 in his objection to the trial court's instruction pursuant to § 16-3-657 and *Rayfield*. The defense counsel's objection (or request that it not be charged) was timely and rejected by the trial court, noting the defense counsel's objection "as noted." ROA 251 (Tr. 250). At the time of the trial, *Rayfield* was the law and binding opinion of the South Carolina Supreme Court upon the trial court. The trial judge acknowledged as much. See ROA 286, l. 13-18. (Tr. 285). This general objection at the outset of the jury charge conference was based upon the binding precedent of *Rayfield*. Applicant now suggests Counsel Butler had a duty to request the trial court overrule its existing (and recent) precedent in *Rayfield*, based upon the dissent of Justice Pleicones in *Rayfield*. While some counsel may have been raising Pleicones' dissent claim in other cases, the Sixth Amendment did not require defense counsel in 2011 to do so.

The Court needs to be highly deferential in scrutinizing counsel's performance and must filter from its analysis the distorting effects of hindsight. *Strickland*, 466 U.S. at 688–689; *Bunch v. Thompson*, 949 F.2d 1354 (4th Cir. 1991). Indeed, Courts must afford a strong presumption that counsel's performance was within the wide range of professionally competent assistance.

> *Strickland* instructs us to review counsel's representation "on the facts of the particular case, viewed as of the time of counsel's conduct." (Citation omitted). Furthermore, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Citation omitted).

Hunt v. Nuth, 57 F.3d 1327, 1332 (4th Cir. 1995). Because no applicable precedent supported making an objection, the Court finds trial counsel's decision not to further object and request *Rayfield*, based upon its dissent, be overruled was reasonable. *See Winkler v. State*, 418 S.C. 643, 651, 795 S.E.2d 686, 691 (2016), reh'g denied (Feb. 9, 2017), cert. denied, No. 16-9613, 2017 WL 2654706 (U.S.S.C. Oct. 2, 2017); *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004)

(stating trial counsel was not deficient in not objecting when there was "no statutory law or judicial precedent in this State" on which to base an objection). "An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction." *Id.; see also Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993) (stating, "This Court has never required an attorney to anticipate or discover changes in the law," and citing cases to illustrate the point).

"*Strickland* does not mandate prescience, only objectively reasonable advice under prevailing professional norms." *Sophanthavong v. Palmateer*, 378 F.3d 859, 870 (9th Cir.2004) (holding attorney was not required to accurately predict how courts would resolve question regarding sufficiency of evidence for conviction). Thus, a court reviewing an ineffective assistance of counsel claim cannot require that an attorney anticipate a decision in a later case. *Lowiy v. Lewis*, 21 F.3d 344, 346 (9th Cir.1994) (petitioner's criminal attorney not ineffective for failing to anticipate court ruling in the petitioner's subsequent civil action). See, e.g., *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir.1995) ("[T]he case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law."); *see also Johnson v. Armontrout*, 923 F.2d 107, 108 (8th Cir.1991) (stating that "counsel's failure to anticipate a change in existing law is not ineffective assistance of counsel").

Additionally, "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.... Judicial scrutiny of counsel's performance must be highly deferential." *Strickland,* 466 U.S. at 687-88, 689, 104 S.Ct. at 2064, 2065. Finally, we presume that counsel's assistance was effective and in accord with reasonable professional norms. *Id.* at 690, 104 S.Ct. at 2066. Nevertheless, the case law is clear that an attorney's assistance is not rendered ineffective

because he failed to anticipate a new rule of law. *See Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) (counsel not ineffective in failing to anticipate change of law when *Skipper v. S.C.* was on certiorari in the U.S. Supreme Court).[5] *See Honeycutt v. Mahoney*, 698 F.2d 213, 217 (4th Cir.1983); *see also Walker v. Jones*, 10 F.3d 1569, 1573 (11th Cir.) (holding that trial counsel's performance under a similar situation was reasonable "[b]ecause Alabama courts had rejected similar claims and the Supreme Court had not yet decided *Cage [v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990)], trial counsel had no basis for objecting to the trial court's instruction on reasonable doubt"), cert. denied, --- U.S. ----, 114 S.Ct. 2111, 128 L.Ed.2d 671 (1994); *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir.1991) (ruling that trial counsel was not ineffective by failing to raise Batson challenge two days before Batson was decided), cert. denied, 504 U.S. 920, 112 S.Ct. 1967, 118 L.Ed.2d 568 (1992); *Johnson v. Armontrout*, 923 F.2d 107, 108 (8th Cir.) (stating that "counsel's failure to anticipate a change in existing law is not ineffective assistance of counsel."), cert. denied, 502 U.S. 831, 112 S.Ct. 106, 116 L.Ed.2d 75 (1991); *Honeycutt v. Mahoney*, 698 F.2d 213, 216-17 (4th Cir.1983) (deciding that trial counsel was not ineffective for failing to object to subsequently-overruled, but then long-standing, North Carolina law where such objection would have been based on a recent, non-binding First Circuit decision).

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[5] In *Kornahrens*, the Fourth Circuit examined whether Kornahrens' trial counsel was constitutionally ineffective for failing to preserve an issue at trial based merely on the Supreme Court's grant of certiorari in a case which raised the issue. Specifically, at the time of Kornahrens' trial, South Carolina law prohibited the proffering of expert evidence of future adaptability. The Supreme Court had granted certiorari in *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58, cert. granted, 474 U.S. 900, 106 S.Ct. 270, 88 L.Ed.2d 225 (1985), to review the constitutionality of this practice. The Supreme Court eventually overturned the South Carolina law prohibiting admission of this evidence. *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Kornahrens asserted his trial counsel was ineffective for failing to preserve the admissibility issue in light of the grant of certiorari in *Skipper*. The Fourth Circuit rejected Kornahrens' arguments and held that an attorney's failure to anticipate a new rule of law even when the rule is under attack in the United States Supreme Court was not constitutionally deficient. Kornahrens, 66 F.3d at 1360.

Based on this precedent, this Court cannot say that, under the facts of this case, Butler's trial performance was constitutionally deficient because he failed to argue to overrule the precedent of the Court in *Rayfield.*

Applicant also asserts the objection was insufficient to preserve his argument against the precedent of *Rayfield.* Where a party requests a jury charge and, after an opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request or to object to the failure to give the charge at the conclusion of the jury instructions. *Keaton v. Greenville Hosp. Sys.*, 334 S.C. 488, 514 S.E.2d 570 (1999); *State v. Johnson*, 333 S.C. 62, 508 S.E.2d 29 (1998), *clarifying State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683, cert. denied 519 U.S. 1045, 117 S.Ct. 618, 136 L.Ed.2d 541 (1996). Unlike *Whipple,* Applicant's request to not charge the no-corroboration instruction was denied on-the-record based upon *Rayfield* after an opportunity for discussion. *See also, State v. Frazier*, 401 S.C. 224, 233, 736 S.E.2d 301, 305 (Ct. App. 2013) (arguments have been raised to and ruled upon by the trial court, and they are preserved for review). This Court does not find counsel was deficient based upon the earlier request.

Applicant further suggests counsel was deficient in failing to object to the second instruction because it was not surrounded by the general instructions on credibility of the witnesses. He suggests this caused it to be in violation of the mandates of *Rayfield.* However, this Court must disagree. The charge must not be considered in isolation. Like *Rayfield*, it was not unduly emphasized in the second instruction but given along with a series of instructions on the elements of the crimes as requested. However, the re-instruction was not a correction to the earlier instruction, but given again based upon the request. Arguments have been raised and ruled upon by the trial court, and they are preserved for review *See Brown v. Stewart*, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Ct.App.2001) (It is not error to refuse a request to charge when the substance of

the request is included in the general instructions.); *State v. Barksdale*, 311 S.C. 210, 216, 428 S.E.2d 498, 502 (Ct.App.1993) (When a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury's request.). This Court reviewed the entire jury instructions to determine whether they, as a whole, adequately communicate the law in light of the issues and evidence presented at trial consistent with *Rayfield,* the binding precedent at the time of the trial. In reviewing jury charges, this Court considers the trial court's jury charge as a whole. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). *State v. Hicks*, 305 S.C. 277, 407 S.E.2d 907 (Ct.App.1991) (in reviewing challenged jury charge, judge's instructions must be considered as a whole; Court of Appeals will not find error based upon isolated excerpts which, standing alone, might be misleading). Here, the fact that the second instruction was not followed by the added instructions on credibility and reasonable doubt when it was included in the first instruction did not fall outside of the mandates of *Rayfield. State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) ("[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions [that] may be misleading do not constitute reversible error."). The jury in this case was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses in the initial instructions. The statutory instruction was not unduly emphasized, consistent with *Rayfield.*

2. Appellate Counsel.

This Court also concludes that appellate counsel Hackett was not ineffective in her representation on appeal by failing to brief on the merits an issue seeking to overrule the opinion in *Rayfield.* Counsel Hackett's testimony was credible that she did not brief the *Rayfield* claim as a merit claim because of the existing precedent. Under *Kornahrens* and *Winkler*, the existing precedent at the time of her briefing in August 2012 was *Rayfield.* Reasonable counsel in 2012

was not required to anticipate that the Supreme Court would overrule its precedent in *Rayfield* based upon the adoption of the rejected dissent and the mere fact that some other lawyers were raising the issue based upon the dissent. As noted above, the Sixth Amendment does not require reasonable counsel to predict the future. Although counsel was of the opinion that the objection preserved the issue, and was aware of *Rayfield* and the trial court's reliance upon it, appellate counsel cannot be required to raise issues seeking the precedent be overruled whenever there is a dissent. This Court concludes the Petitioner has failed to prove the appellate counsel was deficient. This ground must also be dismissed.

3. §17-27-45 Assertion

Applicant also has asserted he is entitled to relief as a free-standing claim under the exception to the statute of limitations. This states an application is allowed:

> (B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

S.C. Code Ann. § 17-27-45(B). However, the opinion in *Stukes* plainly rejected this free-standing argument. Therein, it stated in footnote 5 of the opinion:

> . . . Therefore, our ruling is effective in this case and those which are pending on direct review or are not yet final, but not in post-conviction relief.

State v. Stukes, 416 S.C. 493, 500 n. 5, 787 S.E.2d 480, 483, n 5. Applicant's suggestions otherwise are without merit. This Court is bound by that precedent in *Stukes*.

B. "Seek the Truth"

This Court finds Applicant failed to satisfy his burden of proof under Strickland that counsel was ineffective in failing to object to the trial court's opening remarks related to "true and just verdict, " prosecution comments for a verdict that "speaks the truth," and the trial court's later instruction including language to "seek the truth." Upon review of the record and counsel's testimony, this Court finds counsel was not deficient and Sixth Amendment prejudice was not proven.

Applicant points to the following portions of the record in this ground for relief. At the beginning of the trial, the trial judge informed the jurors in the preliminary remarks about the conduct of the trial:

> So that at the end of the testimony, after the arguments of the attorneys and the charge or instruction on the law as given by the Court, you will then be in a position to determine what the true facts are, and to apply the law to those facts, and the render a true and just verdict in this case.

ROA p. 41; Tr. 40, lines 6-11. No objection was made to the comments. ROA 43; Tr.p. 42, l. 14-17.

During the prosecution opening statement by Assistant Solicitor Deborah Herring-Lash, the prosecution asked the jurors to "come back with a verdict that speaks the truth. The truth about what happened to LaVanda Joyner on that evening." ROA 50; Tr. 49, lines 12-14. No objection was made to these comments. ROA 54; Tr.p. 53.

During the final charge on the law, the trial judge instructed the jurors, "You have but one objective, ladies and gentlemen, to seek the truth regardless of its source." ROA 289; Tr. 288, lines 19-21. No objection was made to these comments. ROA 357-364; Tr.p. 356-363.

During the PCR hearing before this Court, Counsel Butler testified he did not object to each of these comments by the prosecutor or the trial judge. PCR 27-28. He stated it never occurred to him that the trial court's statements had the possibility of lowering the state's burden of proof.

Counsel Butler confirmed that the comment in isolation should be coupled with the burden of proof which is beyond a reasonable doubt. PCR 28-29. Counsel Butler guessed in hindsight that "regardless of the source" language could expand beyond the record. PCR 29. [6] Counsel Butler confirmed he made an objection to the circumstantial evidence instruction. Counsel confirmed he did not feel that the instructions about the truth were objectionable and confirmed they are standard instructions typically given in a trial. PCR 44-45.

This Court finds counsel was not deficient in 2011 in failing to object to the instructions cited above concerning "seeking the truth," "true facts" and "true verdict." Counsel contends these isolated instructions at the opening and end of the trial would have allowed the jury to concentrate on evaluating the quality of the evidence in a search for the truth rather than thinking in terms of their actual task of determining whether the state had proved its case beyond a reasonable doubt. Applicant relies upon cases subsequent to Applicant's 2011 trial, particularly *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012) to support his argument as to why counsel was deficient. Applicant also relies upon *State v. Beaty,* Op. No. 27693, 2016 Westlaw 7474479 (S.C.Sup. Ct. filed December 29, 2016). (rehearing pending at time of filing). In *Beaty,* the Court found that the trial judge's preliminary remarks to the jury, that jury's role was to "search for the truth," determine

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[6] However, the trial record reveals preliminary instructions, Judge Jefferson stated: "you are to determine the facts from the testimony you hear. And other evidence that will be introduced during the course of the trial." ROA 35; Tr.p. 34, l. 3-4. Judge Jefferson further charged: "It is essential that you consider only the things that you hear in the courtroom by way of sworn testimony and the other evidence that is introduced. And you must not consider anything that you may have read or heard about this case outside the courtroom, whether before or during the course of this trial." ROA 37; Tr.p. 36, l. 8-13. In the final instructions, Judge Jefferson instructed : "you are to consider only the testimony which has been presented from the witness stand, together with the exhibits that have been made a part of the record ..." ROA 337; Tr.p. 336. In light of these ameliorating instructions, this Court concludes that no reasonable juror would have concluded it could or should seek a source beyond the record to determine the case. Counsel was not deficient in failing to object.

"true facts," and render a "just verdict," were improper based upon *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000). Importantly, and similarly applicable here, the *Beaty* court concluded: "[A]lthough there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal," *citing State v. Coggins,* 210 S.C. 242, 42 S.E.2d 240 (1947) (trial court's choice of words and comments, while not "happy," did not require reversal). *See State v. Beaty*, No. 2015-000718, 2016 WL 7474479, at *2 (S.C. Dec. 29, 2016). However, defense counsel in 2011 could not be guided by these later decisions.

This Court finds Sixth Amendment prejudice has not been shown. Applicant suggests the instruction lessened the burden of proof. Viewing the instructions as a whole, the use of "search for the truth" language, viewed with the opening instructions as a whole, did not dilute the jury's ultimate sense of responsibility where the jury was specifically told in the opening instructions that the instructions were only intended to serve as an introduction to the trial of the case and that the remarks were not a charge on the law which would be instructed at the close of the trial before the jury retires to consider the verdict. ROA 33, l. 15 -22; Tr.p. 32.

Further, the Petitioner's claim is ameliorated by the language stated by Judge Jefferson that "the defendant has pled not guilty to this indictment. The state therefore has a burden of proving each of the elements of the indictment beyond a reasonable doubt." ROA .p. 34; Tr.p. 33. Furthermore, when viewed with the closing instructions to the jury where the burden of proof was fully and properly charged, the Petitioner's claim that the brief mention of seeking the truth in the opening charge did not minimize the jury's responsibility to determine if the State met its burden of proof under the instructions as a whole. Sixth Amendment prejudice has not been shown because Applicant has failed to show that there is a reasonable probability that if counsel had made the

objections, the result of the proceeding would have been different. *See State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) ("[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.").

The Supreme Court of South Carolina recently cautioned trial judges to avoid using language that instructs the jury to "seek the truth" due to the risk that such language could potentially shift the burden of proof to the defendant in an unconstitutional manner. *State v. Beaty, supra.; State v. Aleksey*, 343 S.C. 20, 27-28, 538 S.E.2d 248, 251 (2000). *See also* State v. Daniels, 401 S.C. 251, 258, 737 S.E.2d 473, 477 (2012) (Toal, C.J., concurring for the majority). However, the Court has specifically declined to hold any mere mention of "the truth" in jury charges is unconstitutional or require a new trial. *See Aleksey*, 343 S.C. at 28, n. 2, 538 S.E.2d at 252 ("Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of 'the truth' in jury charges is unconstitutional."). *See State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998).

In Graddick's case, like *Beaty,* the "truth" language in the court's remarks were not given in conjunction with other "confusing or burden shifting language." *Cf. Needs, supra.* ("seek the truth" language is also troublesome when given in conjunction with other confusing or burden shifting language such as a reasonable doubt "is a doubt for which you can give a real reason"). The majority in *Daniels,* like the Court in *Aleksey*, found that there was not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt. *State v. Daniels*, 401 S.C. 251, 258, 737 S.E.2d 473, 477 (2012)(Toal, C.J., concurring for the majority). Similarly in *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251-253 (2000), the Court held there was no reasonable likelihood the jury applied trial court's

instructions in an unconstitutional way when an instruction related to witness credibility contained truth seeking language but was "prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof").

More importantly, his speculation about burden-shifting evaporates when viewed with the actual instructions on the law at the conclusion of the case. The jury was advised to assess the credibility of the witnesses (ROA 338-339); the fact that the defendant had pled not guilty which "casts the burden on the state to prove the defendant guilty," the presumption of innocence and the state's burden of proving the defendant guilty beyond a reasonable doubt. ROA 342-345; Tr.p. 341-344. As each element was described by the trial court, the state's burden of proof was stated. ROA 344-353; Tr.p. 343-352.

The trial judge thoroughly and repeatedly explained to the jury that Petitioner was presumed to be innocent and the State had the burden of proving Petitioner's guilt beyond a reasonable doubt for every element of the indicted offenses before he could be convicted. At no point in her jury instructions did the trial judge suggest to the jury that it was required to "seek" some reasonable explanation of Petitioner's innocence. *See State v. Raffaldt*, 318 S.C. 110, 115-116, 456 S.E.2d 390, 393 (1995)(finding a jury charge instructing the jury to "seek some reasonable explanation other than the guilt of the accused" was erroneously burden-shifting but determining any error with that instruction was harmless because the charge as a whole properly explained the State had the burden of establishing Raffaldt's guilt beyond a reasonable doubt). Accordingly, because the trial judge's opening remarks and jury instructions thoroughly explained the State's burden of proof and Petitioner's presumed innocence, the jury charge as a whole was not erroneous and does not warrant a new trial. *See State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d

411, 415 (1994)("Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.").

In conclusion, this Court concludes counsel was not deficient in failing to object to either of the challenged comments. Further, Applicant, for the reasons stated above, failed to prove prejudice under the *Strickland* standard. This specification of ineffective assistance of counsel must be dismissed.

C. Alleged Evidence of Incarceration

This Court finds Applicant's claim that counsel was ineffective under the Sixth Amendment in failing to object to testimony that suggested that Applicant was incarcerated must be denied. This Court finds counsel was not deficient in failing to object. This Court further finds Sixth Amendment prejudice has not been shown in light of the evidence presented at trial and the limiting instruction that Judge Jefferson gave at the conclusion of the case.

Applicant contends testimony from Detective Forsythe and Fulvia Kandie Dunham revealed Applicant's pre-trial custody. He contends this suggested his guilt and was therefore improper character evidence. In his pleadings and hearing, Applicant referred to the following testimony by Fulvia Kandie Dunham, Applicant's girlfriend:

> Q: Did you ever see Mr. Graddick again at that apartment [complex in North Charleston]?
>
> A: No.
>
> Q: Did he ever come back to that apartment after that day?
>
> A: No because we got evicted.
>
> Q: And have you seen him since then?
>
> A: When he came to Charleston County.

ROA 124-126; Tr. 122-24.

On cross-examination of Ms. Dunham, trial counsel clarified:

> Q: And you testified that after the day at the Subway you didn't see him again until he was arrested; is that right?
>
> A: Right.
>
> Q: Do you recall seeing and being with [Joseph] at his uncle's house after the Subway incident?
>
> A: You know what, I did.
>
> Q: You did?
>
> A: I did see Joseph once. I really did. I totally forgot about that because it was short....

ROA 125; Tr. 124.

On re-direct, the prosecutor asked Ms. Dunham if Joseph had seen the children since the Subway incident. After Ms. Dunham stated Mr. Graddick had seen the children since the Subway incident, the following exchange took place:

> Q: Where?
>
> A: In Charleston County?
>
> Q: What do you mean by Charleston County?
>
> A: At the jailhouse.

ROA 128-129; Tr. 126-27. Trial counsel did not object.

Jason Forsythe, a detective with the North Charleston Police Department, testified about collecting a DNA sample from Mr. Graddick. During his direct testimony about the chain of custody, the following exchange took place:

> A: I obtained a buccal swab at the Charleston County Detention Center.
>
> Q: And the date that you obtained that?

A: 11/12/2009, 12:10 p.m., sir.

Q: And does that – do you know if that corresponds to an arrest date?

A: No, sir.

Q: Okay, do you know when the subject was arrested in this case?

A: I know that he was incarcerated at the time. I do not, sir.

ROA 219; Tr. 218. No objection was made.

Further, when Applicant testified at trial, he testified that he did not see his girlfriend again until after he was arrested after the time he saw her at the uncle's house four days after the incident. ROA 266, m l. 8-9. [7]

During the PCR hearing, Counsel Butler testified that he represented Graddick on the criminal sexual conduct – first degree, kidnapping and burglary first degree charge. He indicated he understood that Applicant, at the time, had a pending charge of strong arm robbery. PCR 6-7. Butler confirmed Graddick was arrested in Atlanta and brought back to South Carolina and was not placed on bond. PCR 10-11. Upon reviewing Ms. Dunham's testimony quoted above, he confirmed "Charleston County" was a vague reference to him being in jail, but is sometime the language lawyers or people in the criminal justice system use. PCR 11. He confirmed during his questioning of Applicant, Counsel stated he used the phrase "you didn't see him until he was arrested." Counsel confirmed that everybody that is arrested goes to pre-trial detention. PCR 14. Butler further confirmed that after his comment on cross-examination, the prosecutor inquired on re-direct about whether Applicant had seen his children since June 2008 and Ms. Dunham declared

[7] Applicant also testified that around October 2009, he came back to South Carolina when "I got arrested in Georgia and Georgia extradited me back to South Carolina. ROA 278, l. 11-22; Tr.p. 277.

he had seen them in "Charleston County" and, when asked where, clarified "at the jailhouse." PCR 13. Counsel confirmed that this reference by the witness was to actually being in custody. PCR 13.

Counsel Butler further confirmed Officer Forsythe testified about taking a DNA sample from Applicant, referring to an unknown arrest date. Office Forsythe also testified he took a DNA swab from Applicant at the Detention Center. PCR 14, See ROA 219; Tr.p. 218. Butler stated he does not always try to avoid the fact of pretrial detention of clients before the jury. PCR 14. He confirmed he seeks to have chains removed when defendants appear in the courtroom to avoid showing prejudice. He confirmed they would rather have the jury not know they were incarcerated. PCR 16.

Counsel Butler testified the initial reference to Charleston County would not have let the jurors know the reference was to the detention center. PCR 43. However, when it was made explicit through the testimony, he cannot recall any strategic reason why he did not object. PCR 43. He confirmed that at the time he must have considered it not objectionable because he did not object. PCR 43. Counsel further confirmed the reference to the Detention Center about the DNA swab could have been handled better with witness preparation and he had no strategic reason for not objecting.

This Court finds Applicant has failed to defeat the presumption that counsel performed effectively in his challenge to the passing comments about Applicant's custody. He equates these references to being improper under SCRE Rule 404(a)[8] and that "evidence introduced for the sole

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[8] Rule 404(a) states:

> (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

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purpose of implying a defendant has a record as being improper" *citing Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 345 (1991) (citing *State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986)); *Deck v. Missouri*, 544 U.S. 622 (2005) and *Estelle v. Williams*, 425 U.S. 501 (1976). He complains the references suggested a long-term incarceration rather than a short term bond matter.

In *Geter v. State*, 305 S.C. 365, 409 S.E.2d 344 (1991), the Supreme Court held, although counsel's failure to object to repeated reference to petitioner's prior incarceration or to request curative instruction was deficient representation, petitioner did not establish ineffective assistance of counsel, absent showing that result of trial would have been different but for counsel's errors. *Geter* is distinguishable for many reasons. First, counsel cannot be deemed deficient in failing to object to the initial reference to Charleston County during Ms. Dunham's testimony. The reference would not be construed as a reference to incarceration or the character of Applicant. The second reference specifically made to "arrest" was in defense counsel's own question, not the state's, and it was not presented in a non-responsive answer. ROA 125; Tr. 124. The follow-up by the prosecution clarified the location responsive to the other inquiries. The defense may have "opened the door" in his questioning by his reference to the arrest, therefore making the later evidence not subject to an objection.

The brief reference to the date of the DNA swab and location could have been avoided, but did not indicate, in context with Applicant's counsel's prior question, that he was incarcerated for another crime, nor was it improper character evidence. None of these matters were introduced as evidence of "character" or to show propensity.

The brief references to Applicant being in the Detention Center do not compare to the

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restraint issue addressed in *Deck*. In *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), the Supreme Court stated that "the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is justified by an essential state interest-such as the interest in courtroom security-specific to the defendant on trial." *Deck*, 544 U.S. at 624 (internal quotation marks omitted). S*ee State v. Moore,* 257 S.C. 147, 184 S.E.2d 546 (1971)(mistrial motion when jury viewed defendants shackled and in chains; sight of detained prisoners is common place around a courthouse, and officers charged with custody of prisoners have right to handcuff or shackle prisoners during transit between jail and courthouse; generally a defendant is entitled to be tried free of shackles or bonds; an exception to that general rule rests in the sound discretion of the trial judge as do all other matters concerning the conduct of the trial; record need not show restraints were warranted before and after defendant's courtroom appearance). *See Estelle v. Williams*, 425 U.S. 501, 507 (1976) (in a jail attire case, the Court stated "No prejudice can result from seeing that which is already known." (*quoting United States ex rel. Stahl v. Henderson*, 472 F.2d 556, 557 (5th Cir. 1973))). There was nothing presented, as in the shackling cases, to suggest to the jury that Applicant was a dangerous person, only that he had been arrested at some point and DNA was taken.

Unlike *Geter*, the evidence was not introduced to show petitioner was previously jailed on other unspecified charges nor for impeachment. See State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990). Further, the evidence was not introduced for the sole purpose of implying a defendant has a prior criminal record, which is improper. *Cf. State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986*); see also People v. Bennett*, 413 Ill. 601, 110 N.E.2d 175 (1954) (mere proof a party has been arrested is inadmissible).

Further, there was a limiting instruction given in the case which addressed the concerns

that Applicant is asserting as prejudice from the evidence.

> I instruct you now that the fact that the defendant was arrested, charged and indicted is not evidence in this case, and cannot be considered by you as evidence of guilt in this case. Nor does it create any presumption or inference of guilt.

ROA 341, l. 16-20; Tr.p. 340. Here, unlike in *Geter*, a limiting instruction was given

As stated above, the Court has found counsel was not deficient in failing to object to the brief reference to the Detention Center when he presented in his questioning the fact of the timing of the arrest. No reference or argument was made about the extent of the detention by the prosecution nor was it used in an improper manner or suggest any prior bad acts of Applicant. This Court finds Sixth Amendment prejudice was not shown when the limited references combined with the limiting instruction would have been properly limited in its consideration by the jury. Applicant has failed to show there is a reasonable probability that had counsel objected that the result of the proceeding would have been different.

D. Hearsay and Confrontation Clause concerns.

This Court finds Applicant has failed to show counsel was ineffective in failing to object to testimony by Officer Van Tine about Ms. Dunham's statements to him following the subway encounter as hearsay under Rule 802 and a violation of the Confrontation Clause. He contends the evidence about Ms. Dunham being uncooperative and initially denying knowing the suspect was objectionable as hearsay and a Confrontation Clause violation.

How the issue was presented at trial.

Officer George Van Tine with the North Charleston Police Department testified that on June 19, 2008, he responded to the Subway. ROA 156 (Tr.p. 154). He stated he was responding to a call from the victim, who indicated the suspect that had raped her was inside the Subway and gave a description. After arriving, the police could not locate the person at the Subway and advised

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the victim. The officer testified they went with the victim back to the apartment area after he received information from the victim that somebody had alerted the suspect that the suspect was in the Subway. ROA 158. He went with the victim to an apartment and, while approaching, observed the suspect. When the victim yelled: "that's the guy" and screamed, the suspect took off running and was chased. ROA 159.

Officer Van Tine went to the apartment complex and interviewed Ms. Dunham as "the female that possibly alerted him" in the Subway. Over trial counsel's objection on "hearsay, confrontation clause" Officer Van Tine testified, "[A]fter talking to her for quite a few minutes, she eventually said that his name was Joseph Graddick." Tr. 156-59.

THE COURT: It's information gained in the course of an investigation with foundation and basis for the investigation, therefore it comes under the hearsay exception of the rule.

MR. BUTLER: Note my objection.

THE COURT: And the witness has been available for those purposes, overruled.

MR. BUTLER: Yes, ma'am.

ROA 161, l. 6-13; Tr.p. 159.

Later on, the following transpired:

> Q: (By Mr. Finch) When you spoke with Ms. Dunham, was she cooperative?
>
> A: No, she was not. Not at first.
>
> Q: And you said not at first, how did your interaction go?
>
> A: At first she – when I first made contact with her she was extremely uncooperative. She actually flat out denied knowing the suspect.
>
> Mr. Butler: I have to object to hearsay.

The Court: Overruled.

A: She basically said that his –

The Court: Sustained.
Sir, you cannot say what she said. You can say what you did as a result of the conversation.

Q. (By Mr. Finch) At first she was uncooperative and then eventually you got some information?

A. Correct.

ROA 164, l. 23- p. 167, l. 14; Tr.p. 164-165. Applicant complains that in making the objection, trial counsel did not point out that Ms. Dunham has not been asked about these statements during her testimony.

Counsel Butler testified at the PCR hearing his objections at trial to hearsay and Confrontation Clause adequately preserved the issue for appeal. PCR 18. He opined the objections were proper and adequate because the testimony could be viewed as evidence of guilt that the girlfriend was alerting Graddick to the presence of the police and her consciousness of guilt. PCR 18-19. He stated it was frustrating to him to have to continue to make the same objections until she finally sustained one. PCR 19. He admitted he did not request a curative instruction. He complained that to assert that the evidence comes in as a part of the investigation without citing a case violated the rules of evidence.

This Court finds counsel was not deficient concerning the testimony of Officer Van Tine concerning his testimony about his conversation with Ms. Dunham and whether she was cooperative with his request. First, the record reflects that counsel made timely objections to hearsay and the Confrontation Clause. Second, the evidence by Officer Van Dine that Dunham was "not cooperative" is not hearsay because it is not reporting an out of court statement of

Dunham as the truth of the matter she asserted under SCRE Rule 801. Further, where a statement is introduced to prove the matter asserted is false, such as whether she knew the suspect, is not hearsay and is admissible. *U.S. v. Costa*, 31 F.3d. 1073 (11th Cir. 1994) (By showing, through the introduction of other evidence, that Costa lied to his interrogators, the government sought to create an inference of Costa's guilt); *United States v. Williams*, 865 F.3d 1328 (11th Cir. 2017) (statement is not hearsay when it is entered into evidence in order to show its falsity). When statements are offered to prove the falsity of the matter asserted, there is no need to assess the credibility of the declarant. Since there is no need to assess the credibility of the declarant of a false statement, we know of no purpose which would be served by extending the definition of hearsay to cover statements offered for the falsity of the matter asserted. We therefore join those courts which have concluded that statements offered to prove the falsity of the matter asserted are not hearsay. *See United States v. Wellington*, 754 F.2d 1457, 1464 (9th Cir.) (false representation made to an investor not hearsay because probative value was independent of truth), cert. denied, 474 U.S. 1032, 106 S.Ct. 592, 593, 88 L.Ed.2d 573 (1985); *United States v. Adkins*, 741 F.2d 744, 746 (5th Cir.1984) (holding that statements introduced to prove falsity of matter asserted not hearsay), cert. denied, 471 U.S. 1053, 105 S.Ct. 2113, 85 L.Ed.2d 478 (1985).

Similarly, the evidence that Dunham indicated she did not know the suspect was introduced, not to show the truth of the matter asserted, but its falsity. Therefore, it did not appear that counsel was deficient where he did object and his objection was without merit.

Similarly, Applicant contends the Confrontation Clause objection should have been more fully presented concerning Ms. Dunham's statements through Officer Van Dine. Applicant admits Dunham had been present at trial and already testified. ROA 121-130. Tr.p 119-128.

The Court finds the decision in *State v. Stokes,* 381 S.C. 390, 400–02, 673 S.E.2d 434,

439–40 (2009) requires rejection of Applicant's underlying federal constitutional claim where Dunham was present and testified:

> In *Crawford [v. Washington,]*, the USSC held that the admission of testimonial hearsay statements against an accused violates the Confrontation Clause if: (1) the declarant is unavailable to testify at trial, and (2) the accused has had no prior opportunity to cross-examine the declarant. Id. at 54, 124 S.Ct. 1354. Statements taken by police officers in the course of interrogations are considered testimonial. Id. at 52–53, 124 S.Ct. 1354. The USSC noted, however, "that when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." Id. at 59 n. 9, 124 S.Ct. 1354 (emphasis added). The Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." Id.
>
> In our opinion, *Crawford* clearly establishes there is no Confrontation Clause violation in the instant case because Brown was available at trial and subject to cross-examination. The trial court even offered to allow Brown to be recalled to the stand in light of its decision to admit the statement under Rule 613(b), SCRE. Appellant maintains the trial court's offer improperly shifted the burden of addressing the substance of the prior statement away from the State. He also contends it would have been ineffective for trial counsel to introduce the substance of the statement through cross-examination. Appellant, however, misses the point of what is constitutionally guaranteed by the Confrontation Clause.
>
> Furthermore, as to cross-examination specifically, the Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *United States v. Owens*, 484 U.S. 554, 559, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988) (internal **440 quotation marks and citations omitted; emphasis in original). Indeed, the opponent's opportunity for cross-examination has been deemed the "main and essential purpose of confrontation." Delaware v. Fensterer, 474 U.S. 15, 19–20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985) (internal quotation marks and citation omitted); see also *Kentucky v. Stincer*, 482 U.S. 730, 739, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) (describing the Confrontation Clause's "functional purpose" as "ensuring a defendant an opportunity for cross-examination").
>
> Cross-examination allows the accused the opportunity:
>
> > [N]ot only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.
>
> *Douglas v. Alabama*, 380 U.S. 415, 419, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); (*quoting Mattox v. United States*, 156 U.S. 237, 242, 15 S.Ct. 337, 39 L.Ed. 409

(1895))

> Thus, it is the opportunity to cross-examine that is constitutionally protected. In the instant case, appellant had that opportunity. It is undisputed Brown appeared at trial, was available for cross-examination, and could have been recalled after the statement was admitted.

State v. Stokes, 381 S.C. 390, 400–02, 673 S.E.2d 434, 439–40 (2009).

Here, like in *Stokes*, the defense had the opportunity to cross-examine Dunham or to recall her at the trial. This Court concludes counsel was not deficient because he did object based upon the Confrontation Clause.

Applicant also contends the basis for the admission as indicating the purposes for which they investigated does not bypass the requirements of the hearsay rule. He contends the trial court misapplied the rule of *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994). In Brown the Court held that an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken, citing *United States v. Love*, 767 F.2d 1052 (1985). In *Brown,* the statements were not entered for their truth but rather to explain why the officers began their surveillance. The Court found the statements are not hearsay and, therefore, the trial judge committed no error in allowing these statements into evidence. *see also Caprood v. State*, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000) (stating "officers' statements ... were similar to those in Brown in that ... the officers were explaining their actions ... and the statements were not offered for their truth"). Here, the reference was not to Applicant but to witness Dunham and the inquiry they had as they were trying to locate the suspect. It was relevant and admissible in the setting that it was occurring. Her bias that she was his girlfriend at the time was already evident.

Further, Applicant asserts counsel should have objected under Rule 613, SCRE because she was not advised of the substance of her statements in the earlier testimony. Ms. Dunham

confirmed she had an encounter with the police and talked to the police. ROA 123, 126-128; Tr.p. 121, 124-126. She was not specifically asked about her level of cooperation with the police or whether in that encounter she denied knowing Applicant, her boyfriend. Id. She had testified that Applicant was her boyfriend so the false statement was not consistent with her testimony and was therefore an inconsistent statement under Rule 613. See *State v. Bixby,* 388 S.C. 528, 551–52, 698 S.E.2d 572, 584–85 (2010) (finding State laid proper foundation under Rule 613(b) for introduction of recorded conversation after witness was excused because witness admitted having conversation at issue but denied making the statements); *State v. McLeod*, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004) (stating that under Rule 613(b), extrinsic evidence of the statement is not admissible unless witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made); *State v. Barnes*, 804 S.E.2d 301, 307 (S.C. Ct. App. 2017).

The Court finds Applicant has failed to show prejudice to the Rule 613 portion of the claim. Had an objection been made, there has been no showing the result of the proceeding would have been different on whether she stated she had denied knowing Applicant, who was her former boyfriend. ROA 122; Tr.p. 120. Applicant failed to show confidence in the outcome was undermined.

Similarly as to all specifications in this ground, the Court concludes that Strickland prejudice has not been proven. It is uncontested that Applicant admitted at the outset of the case that he had sexual relations with the victim. ROA 50, Tr.p. 51 ("I'm telling you right now, it was Joseph Graddick" – defense opening statement). These assertions go to whether Applicant was the person the victim was identifying as the person she had relations with that time. Further, even if proper objections had been made (or more fully made), the Court concludes *Strickland* prejudice

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has not been proven. The entire allegation is denied.

E. Leroy Graddick investigation and presentation.

In his next specification of ineffective assistance, Applicant contends counsel was ineffective in failing to interview and call Applicant's brother Leroy Graddick as a witness to corroborate his brother's testimony that Applicant knew the victim prior to the incident. Upon review of the record of the testimony of Leroy Graddick, Applicant and counsel Butler, this Court concludes Applicant failed in his burden of proof to show either deficient performance or prejudice.

During the PCR hearing, no questions were asked of counsel Butler about whether he had investigated and considered calling Leroy Graddick, Applicant's brother, concerning whether Applicant knew the victim before the incident. There was general testimony from Butler that he could not specifically recall the names of any witnesses he received from Applicant and, if Applicant had given him names, his investigator would have reached out to them. PCR 40-42. Applicant could not recall if he had ever told his counsel about his brother as a potential witness, but had told him about witnesses. PCR 59-60. Applicant testified at the hearing that his girlfriend Kandie was upset with him about seeing other women. PCR 57. He claimed he and his brother Leroy had seen the victim inside another apartment. PCR 56-57. Applicant claimed the victim came in when he was with other females, said some profane accusing words to Applicant, and then left. He stated when he went to his car, the victim was waiting and they had a physical confrontation and he then got in the car and left. PCR 57. He claimed this was over a month before the incident.[9]

[9] The victim testified at trial that she had lived in the apartment in May and the incident happened on June 15.

Leroy Graddick testified Applicant was his big brother. PCR 62. He denied that he had a criminal record. He claimed after his sister's death (or while she was in the hospital), he used her car to drive to college at South Carolina State University. He recalled a woman coming to an apartment and "flipping out" because he and Applicant were seeing different women. "You know he was probably seeing her prior to it, but just a big altercation and just got physical." PCR 64. He claimed at the apartment there was an altercation, curse words and pushing. He stated it resumed in the parking lot for a little while, then they left. PCR 64. Leroy Graddick claimed that he had seen her a couple of times, but that he did not know her, but had seen her. PCR 64. He claimed that "flashbacks always come in my head from the incident." PCR 64.

On cross-examination, Leroy Graddick stated he had seen the victim a couple of times with his brother.

This Court concludes counsel was not ineffective in failing to locate and discuss the potential of calling Applicant's brother about the prior incidents. This Court finds the testimony of Applicant and Leroy Graddick lack credibility. First, at trial, Applicant never indicated the victim had a physical altercation with him a month or more before the incident as they now suggest. To the contrary, at that time, he stated she had just moved there about a month prior to the incident (ROA 277; Tr.p. 276) and also declared that he went to see the victim that day was because "sister had just passed." ROA 259. Applicant's brother has not declared with any credibility how he knew that the victim was the same person in the incident he described which occurred a month and a half before the incident. .

The only credible statement from Applicant on this issue is that he did not tell his lawyer about this alleged confrontation with the victim. Under *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Court held that "[I]nquiry into counsel's

conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions." As with any claim of ineffective assistance, the reasonableness of counsel's investigation is assessed in light of all relevant circumstances. One relevant circumstance is the information that the defendant has provided trial counsel. As the Supreme Court noted in *Strickland,* "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions," 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. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

466 U.S. at 691.

The information the defendant provides to counsel is, however, not dispositive. Strickland did not create a rule that defense counsel's duty to investigate begins and ends with information gleaned from the defendant. That kind of inflexible rule is inconsistent with *Strickland*'s requirement for case-by-case consideration. A lawyer's decisions on whether and what to investigate must be reasonable in light of all the relevant circumstances:

> [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.

Id. at 690–91; *see also Rompilla v. Beard*, 545 U.S. 374, 383 (2005)("[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.").

This Court concludes Applicant failed in his burden of proof to show counsel's investigation of Leroy Graddick was deficient. First, he failed to prove he gave his counsel a basis to investigate the alleged physical altercation that allegedly occurred one month and a half before the incident that he was charged. Second, he failed to prove he gave the name of Applicant's brother as a possible witness to a pre-existing relationship with the victim. The allegation is dismissed.

F. Ineffective Assistance of Appellate Counsel

In his remaining claim, Applicant claims counsel Hackett was ineffective in the appeal in failing to brief the issue concerning S.C. Code Section 16-3-657. The Court previously addressed this issue above which is incorporated herein by reference.

The Court further concludes that appellate counsel was not ineffective in failing to brief on the merits that trial counsel's closing argument was a proper argument. This issue was raised in the *Anders* brief by Hackett rather than as a merit brief.

During closing argument, counsel asserted the very high burden of proof that the state must prove in criminal matters. Counsel explained that in civil cases, if the jury finds the plaintiff proved the allegations by a preponderance of the evidence, then the jury renders a verdict in favor of the plaintiff. Appellant further explained that in order to change custody of a child, a person must prove the case by clear and convincing evidence. Criminal cases involved the highest burden of

proof - beyond a reasonable doubt - because such cases involve the "loss of freedom, loss of liberty." Tr. 319, 11. 1 12.

Following this theme, Counsel Butler argued:

> If you've ever read bedtime stories to children, walked on the beach and felt the cool surf between your toes and the warm sand, they don't want him to feel those things anymore. They want to take them away from him. That's why it's proof beyond a reasonable doubt. Because all of those things will be gone. Children's first steps, a child's first love. Graduation.

Tr. 319, 1. 19 - Tr. 320, 1.1. Without stating a basis, the state objected. Tr. 320, 1. 2. The trial judge sustained the objection, stating, "It is improper to argue punishment, Mr. Butler. Ladies and gentlemen, you are to disregard Mr. Butler's last comment. You are to give it absolutely no consideration in your deliberations." Tr. 320, 11. 4-7.

The Court concludes Applicant has failed to prove that counsel was ineffective in failing to brief this argument on the merits as opposed to an *Anders* brief. Defense counsel was, in effect, arguing the impact of a conviction on Applicant by the punishment he would receive of incarceration. Although Applicant attempted to square the argument with references to admitted evidence from the defendant about his life prior to his arrest, the impact of the argument was the impact if he was convicted.

This is in line with what the United States Supreme Court has held with regard to federal criminal trials. "When a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.' " *Shannon v. United States*, 512 U.S. 573, 579, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994) (*quoting Rogers v. United States*, 422 U.S. 35, 40, 95 S.Ct. 2091, 45 L.Ed 2d 1 (1975)) (footnote omitted). "Information regarding the consequences of a verdict is therefore irrelevant to the jury's task." *Shannon*, 512 U.S. at 579, 114 S.Ct. 2419. This argument was plainly about the consequences of the verdict. The trial court was

correct to sustain the objection and cure the error that punishment was not an appropriate concern. Applicant has not shown appellate counsel was deficient in failing to brief the matter on the merits. Applicant has failed to satisfy his burden of proving 1) appellate counsel's performance was deficient, and 2) Applicant was prejudiced by appellate counsel's deficient performance. *Bennett v. State,* 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, Applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. *Anderson v. State,* 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). The Court concludes that he has failed in this burden.

G. **Cumulative Prejudice.**

In his final assertion, Applicant claims he is entitled to post-conviction relief based upon his assertion of cumulative prejudice. However, this is not the accepted test. Applicant has failed to prove any ground of ineffective assistance of counsel. The failure of the Court to find errors defeats his request for cumulative prejudice. *See Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (recognizing "the threshold to asking the cumulative prejudicial question is to first find multiple errors"). .*See Fisher v. Angelone*, 163 F.3d 835, 852 53 (4th Cir.1998) ("ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively."). *See, e.g., Hoots v. Allsbrook*, 785 F.2d 1214, 1219 (4th Cir.1986) (considering ineffective assistance claims individually rather than considering their cumulative impact); *Arnold v. Evatt*, 113 F.3d 1352 (4th Cir.1997), cert. denied, 522 U.S. 1058, 118 S.Ct. 715, 139 L.Ed.2d 655 (1998). Simply stated: "The fact that many claims of counsel error are pressed does not alter fundamental math - a string of zeros still adds up to zero." Hunt v. *Smith*, 856 F.Supp. 251, 258 (D. Md. 1994)..

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

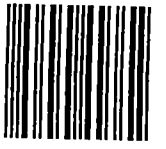
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 7TH day of NOVEMBER, 2017.

G. THOMAS COOPER
Presiding Circuit Court Judge

CAMDEN, South Carolina

Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646



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The Honorable Daniel E. Shearouse
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P.O. Box 11330
Columbia, SC 29211