

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

S.C. SUPREME COURT

Case No. 2014-CP-10-03018

Joseph Richard Graddick, ... Petitioner,

v.

State of South Carolina, ... Respondent.

Appendix Volume II of II

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1 or ask an officer, did you talk to witness X, and based on
2 that, what did you do? Based on that, I went to location B.
3 You can do that without getting into the substance of the
4 statements, right?

5 A. Right.

6 Q. Okay. And it was either *Brown* or *German*, one of
7 them, the evidence was allowed because it didn't go -- it was
8 a report of general drug activity or something in an area,
9 but it didn't identify specific defendant or go to the
10 defendant's character, right?

11 A. That's right. I believe that was *Brown*, or I
12 believe you are right, it may have been *German* stating why
13 law enforcement had set up surveillance where they had set it
14 up.

15 Q. All right. But where the problem arises is when you
16 get to talking about the character of the defendant, correct?

17 A. That's certainly one of the problems that can
18 arise.

19 Q. And how about the specific statements that a witness
20 might have made that could be damaging to a defendant?

21 A. Right. Those could be outside the scope of what
22 would sometimes call investigative hearsay or for
23 investigative purposes for it exceeds a certain amount. And
24 I believe that was one of the things that the judge had
25 warned about in making her ruling.

1 Q. Okay. And they did go a little bit beyond just
2 investigative hearsay, didn't they?

3 A. I did think that the testimony by the officer
4 exceeded what was necessary for investigative purposes.

5 Q. Okay. But the problem as I understand it, and I
6 want to you correct me if I am wrong, but the problem I
7 understand is from an appellate standpoint. You don't feel
8 like the ruling by the judge was sufficient?

9 A. Well, as to confrontation clause, I didn't think I
10 had a ruling on that aspect. And then taking it to a
11 different level with the hearsay objection, I thought I had a
12 harmless error problem.

13 Q. Okay. And why is that?

14 A. Because the defense was consent. And so there
15 really wasn't any type of identification problem as far as
16 the defense saw it. And it appeared to me that both of those
17 areas of hearsay went more to identification than whether or
18 not the contact was consensual.

19 Q. If you had a ruling on the confrontation clause
20 issue, would you have appealed that?

21 A. I certainly would have looked at it more closely and
22 examined it in light of additional Sixth Amendment cases.
23 But I can't say for certain that I would have raised it.
24 Because the same harmless error analysis may apply,
25 additionally, because both of those witnesses were called to

1 testify, they just were called prior to the police officer
2 testifying. So there might have been a motive trial
3 situation involved as well.

4 Q. And do you know if Ms. Dunham had been asked about
5 her conversations and what she had told officer Vantine?

6 A. I am not sure if Ms. Dunham did. I can go back and
7 review the transcript. I remember her being asked if she had
8 gone to Subway, and that she had been confronted by law
9 enforcement on the same day that she had been to Subway with
10 Mr. Graddick.

11 Q. If you could look at the transcript, and I'm using
12 transcript numbers around 121 and 122.

13 A. Yes, sir, I am there.

14 Q. Okay. It did talk about her being at the Subway and
15 talking to the police, but does it ever go into any of the
16 information that she gave?

17 A. No. They asked her if she had talked to the police,
18 and she said yes. And did they do a search warrant on her,
19 and she said yes.

20 Q. And before you can use -- even though she was
21 available to testify, before you can use somebody else's
22 prior statements, you have to ask them questions about it
23 first, right?

24 A. Right. If they were going to try to introduce it as
25 a prior inconsistent statement, they would have to show an

1 inconsistent statement, or if it were a prior consistent
2 statement, under Rule 613, you have to lay the proper
3 foundation.

4 Q. Now, as I understand it, you filed an *Anders*
5 brief?

6 A. Yes, sir.

7 Q. And in that brief, you did brief one potential
8 issue, right?

9 A. Yes, sir, about the closing argument.

10 Q. Could you just summarize what that argument was?

11 A. Yes. In closing, Mr. Butler started telling the
12 jury that the State was trying to take away from Mr. Graddick
13 things such as bedtime stories with children. I believe
14 graduation was mentioned. I want to say beach, a beach scene
15 was painted. And the State objected. And the judge said, I
16 sustain the objection. And was -- I believe she actually
17 struck that part of the closing and directed the jury not to
18 consider it.

19 Q. Okay. Do you think that that ruling was correct by
20 the judge?

21 A. I thought the closing was on the line. There is
22 case law in South Carolina about punishment not to be
23 considered by the jury. And I cited, I believe, two cases in
24 the brief and tried to distinguish those. But I did think
25 that the argument presented by Mr. Butler was probably on the

1 line of whether that was actually getting to punishment or if
2 that was a matter that the jury could consider. I did try to
3 be persuasive in my brief and talk about how it was really
4 just facts that were in evidence, because Mr. Graddick had
5 testified and had testified about enjoying certain of these
6 things, like reading his children bedtime stories and
7 watching cartoons with them.

8 Q. Right. And there was also testimony that the
9 complaining witness had called Mr. Graddick on June 18th and
10 told him, "You are going to jail for rape?" Right?

11 A. That was Mr. Graddick's testimony, yes, sir.

12 Q. And so there was a way to link Mr. Butler's closing
13 argument to the victim having wanted Mr. Graddick to go to
14 jail?

15 A. There was. And I did not do that in the brief.

16 Q. And maybe this isn't entirely fair to you, but I
17 will try to go into it easily. We have added an allegation
18 today, a ground regarding the no-corroboration instruction,
19 regarding not briefing that on appeal. If you could turn to
20 page 251 of the transcript --

21 A. Yes, sir, I'm there.

22 Q. At line 12 to 22, Mr. Butler does make an objection
23 there, doesn't he?

24 A. He does.

25 Q. Do you recall from your view of the transcript that

1 the no-corroboration charge was actually instructed twice?

2 A. It was instructed, yes, sir.

3 Q. And there was no objection after either time it was
4 instructed, was there?

5 A. I don't recall there being additional objections
6 during the instructions themselves.

7 Q. Okay. This is -- this instruction is an issue
8 that's been kind of a hot topic for a long time, hasn't it?

9 A. Yes, sir, it has.

10 Q. In fact, you were involved, I think, in one of the
11 cases recently where we finally have put this issue to rest?

12 A. My colleague, Kat Hudgins, won Melvin Stuke's case
13 where the Supreme Court ruled that that instruction is not to
14 be given to juries.

15 Q. Didn't you have one right after that too?

16 A. I don't believe I've had that opportunity yet. I
17 have something pending on appeal with that very issue,
18 though.

19 Q. This is -- do you recall how long this instruction
20 has been discussed as a problem?

21 A. I don't recall exactly, but I believe *Rayfield* was
22 decided in 2009. And that was one of the Supreme Court cases
23 in which this instruction was discussed. So I would assume
24 at least since 2009.

25 Q. All right. If I told you that *Rayfield* was 2006,

1 would that make sense?

2 A. Yes, sir. I apologize for getting that date wrong.
3 That was just off the top of my head.

4 Q. That's all right. Of course, there was a dissent in
5 *Rayfield*, wasn't there?

6 A. Right. Chief Justice, then-Justice Pleicones, and I
7 believe an acting justice, Steven Bartlett maybe.

8 Q. That's right. And there were -- I mean, there was
9 discussion about that case at seminars, wasn't there?

10 A. Yes, sir, there was.

11 Q. And people were routinely making an objection based
12 on the chief justice's dissent, now chief justice.

13 MS. OLIVE: Objection to leading.

14 THE COURT: Overruled. Go ahead.

15 BY MR. GROSE:

16 Q. He said you can answer the question. I don't know
17 if you can hear everything going on here.

18 A. I'm sorry. I couldn't hear Judge Cooper. Yes,
19 there were routinely objections to the statutory
20 no-corroboration jury charge.

21 Q. In fact, in *Rayfield*, even the majority said that
22 instruction is not required, didn't they?

23 A. The majority did say that.

24 Q. And they tried to caution the bench and bar as to --
25 where you could kind of get in trouble if you are not careful

1 in instructing -- giving that instruction?

2 A. Yes, sir.

3 Q. My question, I guess is, do you think that
4 Mr. Butler's objection at 251, lines 15 to 22, adequately
5 preserved this issue for appeal?

6 A. My answer is yes. But, unfortunately, the
7 preservation rules are pretty draconian in South Carolina.
8 Normally, when the objection occurs during a charge
9 conference, that is sufficient to preserve the objection.
10 And I would have argued on appeal, had I chosen to raise that
11 issue, that it is, indeed, preserved here. However, I would
12 not have been surprised to get a response from the State that
13 said it's not preserved because it wasn't objected to
14 particularly when it was recharged to the jury.

15 So I would certainly argue that it was preserved
16 based on the objection made during the charge conference.

17 Q. Okay. And could the objection in the charge
18 conference have been more detailed, explained the reasoning
19 more?

20 A. It certainly could have been, particularly because
21 of what truly I think won the *Stukes* case, is when it's a he
22 said/she said case as to whether it's consent or not consent.
23 And so I think that if the objection had been more clear as
24 to what prejudice would result to Mr. Graddick as a result of
25 the charge, it would have been a better objection.

1 Q. Okay. And, of course, in Mr. Graddick's case, it
2 was I was he said/she said situation, wasn't it?

3 A. That's right.

4 Q. And credibility was one of the central issues for
5 the jury to decide?

6 A. Yes, sir.

7 Q. Okay. Is there a reason why you didn't raise that
8 issue in this case?

9 A. I did not think that *Rayfield* would get reversed. I
10 did not foresee *Stukes* happening. While I'm certainly glad
11 of it, I did not see how we would convince the court that
12 charging that statute wouldn't be improper.

13 Q. *Rayfield* is not the only case out there, is it?

14 A. No, it's not.

15 Q. And one of the cases, I believe, is *Hill* also?

16 A. I am not certain about *Hill*. I know *Rayfield* is not
17 the only one. It's just the one that comes to my mind when I
18 frequently think about this issue.

19 Q. All right. And in *Rayfield*, if the judge gives the
20 instruction, they say giving the instruction does not
21 constitute reversible error when the single instruction is
22 not unduly emphasized and the charge as a whole comports with
23 the law, right?

24 A. Yes, sir.

25 Q. Okay. And when it was -- I think we've already

1 established that it was actually charged twice here?

2 A. That's my recollection.

3 Q. And the second time that it was charged, was it
4 charged in connection with how the jurors should view
5 credibility of witnesses, in general?

6 A. I'm sorry. I don't remember that specific part. I
7 was trying to check my notes to see where it was indeed
8 charged to the jurors. I did remember it coming up twice.

9 Q. It came up a second time. Well, if you go to page
10 365 of the transcript --

11 A. Yes, sir, I'm there.

12 Q. That's where the judge had gotten a note about
13 recharging the substantive offenses..

14 A. Yes, sir.

15 Q. And said that she was going to do that, correct?

16 A. Yes, sir.

17 Q. And then at 372, it appears again; is that correct?

18 A. I see it. Yes, sir.

19 Q. Okay. And so in the recharge, and take time and
20 look through it, I could be wrong, but I don't think that
21 credibility of witnesses was charged again?

22 A. I do not see it being charged again.

23 Q. Okay. And so at the point when, you know, this
24 instruction is given the second time, it's being emphasized
25 to the jurors. Would you agree with that?

1 A. Yes, sir.

2 Q. Okay. And that was one of the dangers that was
3 warned about by the *Rayfield* case?

4 A. Yes, sir, it was.

5 Q. Okay. And I think we also established that there
6 was no objection at that point?

7 A. No, sir, there was no objection at the recharge.

8 Q. Okay. Who had the *Witherspoon* case that came out on
9 November 2nd out of your office?

10 A. I believe that's David Alexander, but without
11 looking it up, I could not be 100 percent certain. It may be
12 Robert Dudek.

13 Q. Have you briefed this issue in other cases?

14 A. Not prior to representing Mr. Graddick, but
15 subsequently, I have. I have not raised it prior to *Stukes*,
16 however. I've only raised it post *Stukes*.

17 Q. Okay. But there was at least Ms. Hudgins that was
18 raising it in *Stukes* and whoever had *Witherspoon* was raising
19 it?

20 A. Yes, sir.

21 MR. GROSE: Okay. I beg the Court's indulgence.

22 That is all the questions I have at this time.

23 Thank you.

24 THE COURT: Ms. Olive.

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CROSS-EXAMINATION

BY MS. OLIVE:

Q. Thank you, Your Honor. May it please the Court.

Can you see me, Susan?

A. I can. Thank you, Ms. Olive.

Q. Thank you. Ms. Hackett, can you just sort of -- you testified that you wrote an *Anders* brief in this case.

A. Yes, ma'am, I did.

Q. Do you recall why you made the decision to file this as an *Anders* brief?

A. I reviewed the issues that appeared to be preserved for review and made a determination that they did not have merit in terms of reversible error and determined that the best course of action would be an *Anders* brief.

Q. Are you limited to raising preserved issues in an *Anders* brief?

A. I don't believe that the *Anders* case limits us to only preserved issues. I think we can raise the -- I believe the case says that we have to argue an arguable issue. But sometimes you get a case and there's nothing preserved at all, but I'm still obligated to write a brief. So I generally try to write the best brief I can.

Q. And in reviewing this case at the time, the only arguably issue you thought you had was related to the closing statement?

1 A. Yes, ma'am, that seemed to be a good issue in terms
2 of his argument being limited. As I mentioned previously, I
3 did think that the argument was on the line in terms of what
4 defense counsel could argue to the jury. But I did not
5 believe that he had crossed that line. And I certainly
6 didn't think that the objection should have been sustained or
7 the argument stricken. It seemed to me that perhaps a
8 caution could have been given, but he really wasn't arguing
9 about punishment.

10 Q. Ms. Hackett, just in general, can you walk me
11 briefly through the determination about how you are going
12 to -- or about what -- I mean, what sort of things do you
13 consider when you decide that you are going to brief the case
14 as an *Anders* brief?

15 A. Well, I always read every word of the transcript,
16 look at all the information that we can obtain, if we can get
17 the pleadings, if we can get the exhibits. I look at all of
18 that information. I make notes as to what issues are
19 preserved. And then I begin researching those issues. There
20 are some issues that I don't necessarily research because I
21 may have already experienced that issue and know what the law
22 says, or it may be that the objection is something like
23 leading, and it gets overruled when, in fact, it was leading,
24 but that's not going to result in reversible error typically.

25 So I usually look at all the issues that appear to

1 be preserved for review. And I conduct research and
2 determine which of those are likely to result in a reversal.

3 MS. OLIVE: Thank you, Ms. Hackett. That's all the
4 questions I have.

5 THE WITNESS: Thank you, Ms. Olive.

6 THE COURT: Mr. Grose.

7 REDIRECT EXAMINATION

8 BY MR. GROSE:

9 Q. If you can go to 319 and 320 of the transcript.

10 A. Yes, sir, I am there.

11 Q. Okay. And, of course, 319 is where Mr. Butler is
12 making his argument, and then the prosecution objects at the
13 top of 320.

14 A. Yes, sir.

15 Q. And that is where the judge instructs the jury not
16 to consider that. And then Mr. Butler's argument ends on the
17 next page. You said it was on the line, but you didn't think
18 it crossed the line; is that right?

19 A. Yes, sir.

20 Q. Okay. And you referred to it as you thought it was
21 a good issue?

22 A. I thought it was the best that I had in terms of
23 under the Anders standard of arguable. I did not see that it
24 was necessarily reversible error. That's why I sent an
25 Anders brief, but did appear to be one where his argument had

1 been curtailed. So he wasn't being allowed to present his
2 full and fair defense. And I did think that his argument
3 only went up to the line and did not cross that line.

4 Q. All right. And, of course, Mr. Butler's objection
5 at 320 -- well, not his objection, but his response to the
6 prosecution and the judge's ruling is: Note my objection to
7 represent the defense due process.

8 A. Yes, sir.

9 Q. And, of course, there is a due process right to
10 present a defense?

11 A. Yes, sir.

12 Q. And we have had lots of case law on that, like *Bobby*
13 *Lee Holmes*, for example, out of the United States Supreme
14 Court?

15 A. Yes, sir.

16 Q. Okay. Would you have been able to argue this
17 objection or this issue better if Mr. Butler had put more on
18 the record about what he wanted to argue?

19 A. Certainly. The more detailed an objection can be,
20 generally, the easier it is to present that issue on
21 appeal.

22 Q. Okay. For example, if he had said something about
23 how that could connect to the victim, would that have
24 helped?

25 A. Yes, sir, or how any of that argument was just a

1 product of the evidence that had been presented.

2 Q. Okay. And if he had gone into explaining what he
3 needed to do to represent the defense or the defendant,
4 Mr. Graddick, that would have helped?

5 A. Yes, sir.

6 Q. And would you have been able to more forcibly argue
7 that?

8 A. Yes, sir.

9 Q. When you write an *Anders* brief, you are basically
10 telling the Court to dismiss the appeal, aren't you?

11 A. Well, I believe we are telling the Court that we
12 have not been able to find any errors that warrant relief.

13 Q. All right. And that could be because of
14 preservation as one of the reasons, right?

15 A. Oh, certainly, yes, sir. If we often have a very
16 good issue, if it's not preserved, it's going to end up in an
17 *Anders* brief many times.

18 MR. GROSE: Beg the Court's indulgence. That's all
19 I have, Your Honor.

20 THE COURT: Anything further?

21 MS. OLIVE: No, Your Honor.

22 THE COURT: All right. Ms. Hackett, thank you very
23 much.

24 THE WITNESS: Thank you, Judge Cooper. I appreciate
25 the opportunity to appear by Skype.

1 THE COURT: We don't do it very often, only special
2 people.

3 THE WITNESS: Thank you, Judge. I appreciate it.

4 THE COURT: All right. Let's move on.

5 MR. GROSE: I don't have any more witnesses.

6 THE COURT: The State?

7 MS. OLIVE: Nothing from the State, Your Honor.

8 THE COURT: All right. 30 days for an order?

9 MR. GROSE: Yes, sir. I do have a memorandum I can
10 give you now. And I probably -- are you wanting orders from
11 both sides?

12 THE COURT: Yeah.

13 MR. GROSE: And I would probably want to elaborate,
14 now that we've had the hearing, on some of the stuff.

15 THE COURT: I wanted to ask you, did you want to
16 make some final remarks here now?

17 MR. GROSE: I don't know that I necessarily do,
18 because of the memorandum. I mean, I think the memorandum
19 covers a lot of it.

20 THE COURT: The question I have, and I may be able
21 to answer it myself, you could identify, and it may be in the
22 brief, the issues as to -- separate the issues as to trial
23 counsel and appellate counsel. Could you do that?

24 MR. GROSE: Yes. That's separated in the brief.
25 And if I could just have a moment. And there is some overlap

1 to those issues, Your Honor.

2 With regards to trial counsel, there was the
3 character evidence issue had to do with two witnesses, Candy
4 Dunham, and Jason Forsyth, the police officer. Both of them
5 talking about Mr. Graddick being in jail without any
6 objection.

7 The hearsay confrontation clause violation --

8 THE COURT: That's trial counsel?

9 MR. GROSE: Well, that's actually raised as both,
10 because there's a question as to whether or not Mr. Beattie
11 Butler had preserved it well enough. I tend to think that he
12 did. And some of the language the judge used denying the
13 instruction did incorporate confrontation clause language
14 about availability and that sort of thing. But to the extent
15 that it wasn't preserved well enough, it's a trial counsel
16 issue and an appellate counsel issue if it was preserved.

17 Then there's the two instructions, two jury
18 instruction issues. Both of those are raised as trial
19 counsel issues. The no-corroboration instruction is raised
20 as an appellate issue.

21 And the only other issue on appeal would have been
22 more forcibly arguing the limitation on the closing argument.
23 That was the third appellate issue. Did that answer your
24 question?

25 THE COURT: Yes. How does *Stukes* affect this case?

1 MR. GROSE: Honestly, I don't know that it does,
2 because if you look at *Rayfield*, and there's another case, I
3 believe it's *Hill*, that is not cited in the brief, but is the
4 sort of the way some of this came out. I want to put it in
5 the order. When you look at *Rayfield*, *Rayfield* specifically
6 says it's not a required instruction. And if the judge
7 chooses to give it, you have to be careful not to give it in
8 isolation and not to over emphasize it.

9 And so here the judge, I think the trial judge, was
10 mistaken that she had to give it, because when you look at
11 the -- when it was first raised in the charge conference, she
12 thought it was mandatory.

13 When it's given in the -- you know, Mr. Butler has
14 known these issues and raised the objection for a long time.
15 When it's given in the first charge, he should have objected
16 to it again, in my opinion. But then when the jury comes
17 back and says, we have questions about the substantive law.
18 And it's not just the three offenses that Mr. Graddick
19 received convictions for, there was two lesser-included
20 offenses that they also wanted jury instructions on. And
21 some of the -- resolving some of the factual dispute could
22 have gone to some of those lesser-includeds, particularly if
23 you look at how some of that was discussed during the charge
24 conference, particularly regarding nighttime and weapon and
25 burglary first, burglary second.

1 So, anyway, when it's given -- when the jury is
2 having some issues about, you know, the substantive offenses,
3 and then the judge gives that instruction again in isolation,
4 without explaining the rest of what you have to explain about
5 credibility of issues, and I think you begin to run afoul of
6 what you have, the concerns raised by *Rayfield* and *Hill*, I
7 believe, is the other case. And I will supply that cite when
8 we do a proposed order.

9 THE COURT: Well, that answers my question.

10 MR. GROSE: Obviously, I raise this issue without
11 the benefit of *Stukes*. Where I had missed was that it had
12 been talked about in the charge conference. But this was in
13 our application that was filed, you know, in 2013, I guess.
14 So, I mean -- and I raised it because this is something that
15 has been percolating out there.

16 THE COURT: Yeah, I have done it myself.
17 Legislature enacted it. Defense counsel -- I mean, the State
18 requested it. I have done it myself.

19 MR. GROSE: And you probably have had objections to
20 it sometimes too.

21 THE COURT: All right. 30 days?

22 MR. GROSE: 30 days. Thank you.

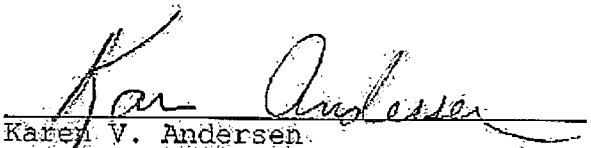
23 MS. OLIVE: Thank you, Your Honor.

24 (Whereupon, a recess transpired.)
25

CERTIFICATE OF REPORTER

I, Karen V. Andersen, Registered Merit Reporter,
Certified Realtime Reporter for the State of South Carolina
at Large, do hereby certify that the foregoing transcript is
a true, accurate and complete Transcript of Record of the
proceedings.

I further certify that I am neither related to nor
counsel for any party to the cause pending or interested in
the events thereof.


Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter

THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Joseph Richard Graddick,

Applicant,

vs.

State of South Carolina,

Respondent

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2014-CP-10-3018

**Memorandum in Support of Application for
Post-Conviction Relief**

FILED
2016 DEC -5 AM 8:43
JULIE J. ARMSTRONG
CLERK OF COURT

The applicant, Joseph Graddick, submits the following memorandum in support of his application for post-conviction relief ("PCR").

I. Introduction.

LaVanda Alicia Joyner alleged an unknown intruder attacked her insider her apartment. Mr. Graddick testified that he and Ms. Joyner knew each other prior to the date of the alleged attack and the sex was consensual. Credibility was the central issue for the jurors to resolve. Mr. Graddick was denied a fair trial because of the failure to investigate and present favorable evidence, admission of prejudicial testimony, and erroneous jury instructions.

II. Procedural History.

For an incident occurring on June 15, 2008, the State charged Mr. Graddick with burglary, kidnapping, and first-degree criminal sexual conduct. Law enforcement arrested Mr. Graddick on October 13, 2009. The Charleston County Grand Jury indicted Mr. Graddick at the April and May 2011 terms of court. From July 11-13, 2011, the State tried Mr. Graddick before the Honorable Deadra L. Jefferson and a jury. Timothy Finch and Deborah Herring-Lash prosecuted Mr. Graddick. Beattie I. Butler defended Mr. Graddick. The jurors convicted Mr. Graddick as charged. Judge Jefferson sentenced him to seventeen years imprisonment for each

charge. The sentences are concurrent.

Mr. Graddick appealed the convictions and sentences. Susan Hackett of the South Carolina Commission on Indigent Defense, Appellate Division represented Mr. Graddick and filed an *Anders* brief.¹ The Court of Appeals affirmed the convictions and sentences. *State v. Graddick*, Ct. App. Unpublished Op. No. 2013-UP-228 (filed May 29, 2013). The Remittitur issued on June 20, 2013.

On May 12, 2014, Mr. Graddick filed an application for post-conviction relief. On April 22, 2015, the State served its return.

III. Factual Background.

A. Evidence Presented at Trial.

Ms. Joyner lived in an apartment complex in North Charleston, South Carolina. On June 15-16, 2008, after her boyfriend left her apartment, Ms. Joyner ensured that both doors were locked and went to sleep on her couch. She claimed someone with socks over his hands awoke her by covering her mouth and making it difficult for her to breathe. During a struggle, she fell off the couch and landed on her knees facing the intruder. The intruder allegedly placed a sharp object to the back of her neck, “pulled down [her] shorts and began to have intercourse.” She further testified the intruder wore a distinctive watch with a “large gold face.” Ms. Joyner claimed the intruder held her hands behind her back, walked her up a staircase, put her inside a bathroom at the top of the staircase, and attempted to lock her inside but the bathroom door locks from the inside. The intruder turned loose of the door and ran down the stairs. She chased the intruder down the stairs, followed him outside, and screamed for help, but no one heard the screams. She knocked on a neighbor’s door, and the neighbor gave her a blanket to cover

¹ *Anders v. California*, 386 U.S. 738 (1967).

herself, as she was wearing only her t-shirt, and accompanied back inside while she called the police. Tr. 55-72.

Faye LeBoeuf, a certified nurse midwife and certified sexual assault nurse examiner at the Medical University of South Carolina, performed a sexual assault examination. The medical exam was normal and did not reveal any signs of trauma. Tr. 73-74; 104; 171-97.

On June 19, 2008, Ms. Joyner, while driving to a hair store, saw Mr. Graddick "standing in front of a Subway." She recognized him as her neighbor. She drove back around to get a closer look and recognized Mr. Graddick's watch as the distinctive watch worn by the alleged attacker. She called the police. When the police arrived, Mr. Graddick took off running. Tr. 74-76.

Mr. Graddick testified and denied burglarizing Ms. Joyner's apartment, kidnapping her, and raping her. On June 15, 2016, Ms. Joyner called Mr. Graddick and told him to come to her apartment and enter through the back door which would be unlocked. Around 8:00 p.m., he returned to the apartment complex and took the back way to Ms. Joyner's apartment. He had been to Ms. Joyner's apartment at least four times before that night. Ms. Joyner was asleep on the couch. She woke up when Mr. Graddick laid down next to her. They talked, kissed, and had consensual sex. After sex, Mr. Graddick told Ms. Joyner that he did not want to continue seeing her. There was a push-and-shove match. Mr. Graddick pushed her down and left. Tr. 253-62.

On June 18, 2008, Ms. Joyner called Mr. Graddick and told him, "You are going to jail for rape." Tr. 263, lines 1-18. When he saw Ms. Joyner at the Subway the next day with the police, Mr. Graddick ran back to Ms. Dunham's apartment. He wanted to "get away and find out what was really going on." Mr. Graddick also wanted to figure out how he would afford a lawyer. Tr. 262-65.

B. Direct Appeal.

The Appellate Defense Division filed an *Anders* brief. The only issue addressed in the brief pertained to the trial judge limiting Mr. Graddick's closing argument.

IV. Argument.

Under the first prong of *Strickland v. Washington*, the defendant “must show that counsel’s representation fell below an objective standard of reasonableness,” which must be judged under “prevailing professional norms.” 466 U.S. 668, 688 (1984). “The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). “If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy.” *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). The second prong of *Strickland*, requires a defendant establish that this deficiency prejudiced him. “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Due process requires a defendant receive effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under *Strickland*. *Smith v. Robbins*, 528 U.S. 259 (2000). Appellate counsel is ineffective for not raising a meritorious issue entitling an appellant to relief. *See, e.g., Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002).

A. Ineffective Assistance of Trial Counsel.

1. Failure to Investigate and Call Witnesses.

Mr. Graddick will present evidence demonstrating he knew Ms. Joyner prior to the alleged crimes. Such evidence corroborates Mr. Graddick's trial testimony and undermines Ms. Joyner's claim of being attacked by a stranger.

2. Improper Character Evidence.

In June 2008, Fulvia Kandie Dunham was Mr. Graddick's girlfriend. Ms. Dunahm lived in the apartment across from Ms. Joyner, and Mr. Graddick sometimes stayed there. She was with Mr. Graddick at the Subway when the police chased him. On direct examination, Ms. Dunham testified she hadn't seen Mr. Graddick since the Subway incident until "[w]hen he came to Charleston County." On cross-examination, Ms. Dunahm recalled seeing Mr. Graddick at his uncle's house on Dorchester Road. On re-direct, the prosecutor asked, "What do you mean Charleston County?" Ms. Dunham responded, "At the jailhouse." Trial counsel did not object. Tr. 119-127.

Jason Forsythe was a detective with the North Charleston Police Department. On November 12, 2009, he served a search warrant to obtain a buccal swab from Mr. Graddick. The prosecutor asked Detective Forsythe where he obtained the buccal swab. Detective Forsythe responded, "I obtained the buccal swab at the Charleston County Detention Center." Trial counsel did not object. Tr. 215-218.

This testimony implied Mr. Graddick's guilt and was improper character evidence. Rule 404(a), SCRE. "[E]vidence introduced for the sole purpose of implying a defendant has a prior criminal record is improper." *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)). See also *Dec v. Missouri*, 544 U.S.

3. Improper Hearsay and Confrontation Clause Violation.

The prosecutor asked Ms. Dunham about being at the Subway with Mr. Graddick, talking to the police, and having a search warrant served at her apartment. The prosecution never asked Ms. Dunham about the substance of any of the statements she made during the police interview. Tr. 119-127.

In June 2008, George Van Tine was a Master Patrol Officer with the North Charleston Police Department. On June 19, 2008, he responded to the Subway. Over trial counsel's objection, based on hearsay and a violation of the Confrontation Clause, Officer Van Tine testified that Ms. Joyner gave him "some information that somebody had alerted the suspect." Tr. 153-56.

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, 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. 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 trial judge then sustained the objection and prohibited further testimony about what Mr. Dunham told Officer Van Tine. Tr. 164-65.

In making the objection, trial counsel did not point out that Ms. Dunham has not been asked about these statements during her testimony. Officer Van Tine's testimony, therefore, should have been excluded as hearsay, Rule 802, SCRE, and as a violation of the confrontation clause, *Crawford v. Washington*, 541 U.S. 36 (2004). Although Ms. Dunham was available to testify about these matters, the prosecution did not lay the proper foundation for the admission of her statements, assuming she even made the statements. The State was required to give Ms. Dunham an opportunity to admit, deny, or explain the statement before presenting extrinsic evidence of the statement. Rule 613, SCRE. *E.g. State v. Bixby*, 388 S.C. 528, 698 S.E.2d 572 (2010) (witness "was apprised of the substance of the statement at issue and therefore Appellant's argument is without merit"). Officer Van Tine's testimony was extremely prejudicial because it implied that Ms. Dunham was helping Mr. Graddick flee from justice.

Additionally, the trial judge's explanation for admitting the statements was not correct. After pointing out Ms. Dunham's "statement is made in the course of the investigation," the trial judge ruled, "He is merely indicating the purposes for which they investigated. It's not offered for the truth." Tr. 155-56. Although police officers are sometimes allowed to explain the purpose for investigation, that testimony should not be hearsay about a specific defendant. Compare *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994) with *German v. State*, 325 S.C. 25, 478 S.E.2d 687 (1996).

4. Improper Jury Instructions.

Without objection, the trial judge gave two erroneous jury instructions. These erroneous instructions are discussed below.

a. S.C. Code § 16-3-657.

The trial judge instructed the jurors:

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.

Tr. 349, lines 19-23. The jury asked to be re-instructed on the elements of the crimes. Tr. 365, lines 2-6. When defining criminal sexual conduct, the trial judge once again charged § 16-3-657. Tr. 372, lines 18-21.

Our Supreme Court cautioned about the danger of instructing § 16-3-657:

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.

State v. Rayfield, 369 S.C. 106, 118, 631 S.E.2d 244, 250 (2006). Justice Pleicones, joined by Acting Justice Bartlett, dissented because this instruction “might cause confusion when read with the general charge on witness credibility,” “carries a strong possibility of biasing the jury against the defendant,” and is an improper comment on the facts in violation of S.C. Const. Art. V, § 15. Justice Pleicones also noted, “Separately instructing the jury that it may believe one witness against many or many against one does not ameliorate or remove the favorable emphasis on the alleged victim's testimony.” *Id.* at 120-21, 251-252.

In *State v. Stukes*, 416 S.C. 493, 499-500, 787 S.E.2d 480, 483 (2016) our Supreme Court held:

We are persuaded by the dissent in *Rayfield* and conclude this charge is confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case. *See* S.C. Const. art. V, § 21 (“Judges shall not charge juries in respect to matters of fact, but shall declare the law.”). Accordingly, it is not within the province of the court to express an

opinion to the jury on its view of the facts. By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak. Moreover, it is inescapable that this charge *500 confused the jury. Specifying this qualification applies to one witness creates the inference the same is not true for the others.

See also State v. Witherspoon, Shearouse Adv. Sheet No. 42, p. 25 (S.C.S.Ct. Op. No. 27675) (filed Nov. 2, 2016). *Stukes* further held, “[W]e do not believe this case is amenable to a harmless error analysis. Our review of the record indicates this case hinged on credibility. Victim said it was rape; he said it was consensual.” 416 S.C. at 500, 787 S.E.2d at 483.

b. Rendering a “Just” Verdict and Seeking the Truth Regardless of Its Source.

At the beginning of the trial, the trial judge instructed the jurors:

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. 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. 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.

Our Supreme Court long ago disfavored instructions like the one involved in this case. In *State v. Manning*, the trial court instructed:

Beyond a reasonable doubt, in telling you that that is the degree of proof by which the State must prove, that phrase means exactly what it states in the English language, and *that is a doubt for which you can give a real reason*. That excludes a whimsical doubt, fanciful doubt. You could doubt any proposition if you wanted to.

A reasonable doubt is a substantial doubt for which honest people, such as you, when searching for the truth can give a real reason. So it's to that degree of proof that the State is required to establish the elements of a charge.

305 S.C. 413, 415, 409 S.E.2d 372, 374 (1991) (emphasis supplied by the court). Our Supreme Court, accordingly, prohibited trial judges from telling jurors “to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant.” *Id.*, 305 S.C. at 416, 409 S.E.2d at 374. “Rather than conveying to the jury the principle that the State must affirmatively establish appellant's guilt by probative evidence beyond a reasonable doubt, this charge could mislead a reasonable juror to focus exclusively on appellant's explanation of the evidence to determine the existence of reasonable doubt.” *Id.* 305 S.C. at 417, 409 S.E.2d at 374-75. Our Supreme Court reaffirmed this analysis in *State v. Raffaldt*, 318 S.C. 110, 115-16, 456 S.E.2d 390, 393 (1995).²

In *State v. Needs*, the trial judge charged the jurors, “[Y]ou, the jury, must seek some other rational or logical explanation other than the guilt of the accused.” And, a “reasonable doubt is a doubt which makes an honest, sincere, conscientious juror in search of the truth in the case hesitate to act.” 333 S.C. 134, 151-52, 508 S.E.2d 857, 866 (1998). Our Supreme Court “strongly urge[d] the trial courts to avoid using” this language when instructing jurors about circumstantial evidence and reasonable doubt. 333 S.C. at 155, 508 S.E.2d at 867. In *Aleksey*, our Supreme Court again reminded, “Jury instructions on reasonable doubt which charge the jury to “seek the truth” are disfavored because they “[run] the risk of unconstitutionally shifting the burden of proof to a defendant.” 343 S.C. at 26-27, 538 S.E.2d at 251 (citing *Needs*). More recently, in *State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012), our Supreme Court

² In *Raffaldt*, the trial judge instructed, “So in the consideration of circumstantial evidence, you must seek some reasonable explanation other than the guilt of the accused and if such reasonable explanation can be found, then you cannot convict upon circumstantial evidence alone.” 318 S.C. at 115, 456 S.E.2d at 393.

instructed trial judges to remove similar instructions from charge books. “Such a charge could effectively alter the jury’s perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State’s burden to prove the defendant’s guilt beyond a reasonable doubt.” *Id.*

c. Prejudice.

Because credibility was the central issue for the jurors to determine, these instructions prejudiced Mr. Graddick. *See e.g. State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) (prejudice found when case turned solely on credibility and there was “no physical evidence of sexual abuse”); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (prejudice found when “credibility was the most critical determination of this case”); *State v. Berry*, 332 S.C. 214, 503 S.E.2d 770 (1998) (“These credibility questions and inconsistencies in the witnesses’ testimony make it impossible for this Court to conclude that, without reference to the Polite incident, the evidence of Berry’s guilt is overwhelming or that Berry’s guilt is the only rational conclusion that could be reached from the evidence presented.”).

B. Ineffective Assistance of Appellate Counsel.

1. Improper Testimony by Officer George Van Tine.

As seen in Section IV(A)(C) above, trial counsel objected Officer Van Tine testifying about statements made by Ms. Dunham. If this Court concluded that trial counsel’s objections properly preserved this issue for appeal, then appellate counsel was ineffective for not briefing this issue on appeal. *Patrick, supra*.

2. Anders Brief.

Appellate counsel could have argued this issue on the merits. Trial counsel’s argument also suggested that the victim had a motive to take Mr. Graddick away from his family.

C. Cumulative Error.

This Court must also apply a cumulative prejudice analysis. *Kyles*, 514 U.S. 419, 436 (1995) (the prejudice must be “considered collectively, not item-by-item”). The United States Supreme Court’s opinion in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), reveals that the Court considered “the entire postconviction record . . . as a whole and cumulative of mitigation evidence presented originally” in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence. “[A]s a whole” implies a cumulative analysis. Likewise, in *Strickland*, the Court stated, “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional *errors*, the result of the proceeding would have been different.” 466 U.S. at 694 (emphasis added). If the Court did not intend a cumulative analysis it would have discussed the prejudice analysis in terms of “individual error” or error-by-error evaluation instead of formulating the prejudice test in light of counsel’s “errors.”³

(conclusion on next page)

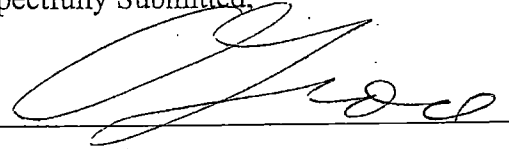
³ Numerous courts, relying on *Strickland*, have held that a cumulative prejudice analysis is appropriate. See, e.g., *Pavel v. Hollins*, 261 F.3d 210 (2nd Cir. 2001); *Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009); *Goodman v. Bertrand*, 467 F.3d 1022 (6th Cir. 2006); *Martin v. Grosshans*, 424 F.3d 588 (7th Cir. 2005); *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998); *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003); *Steidl v. Walls*, 267 F. Supp. 2d 919 (C.D. Ill. 2003); *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002); *Espinal v. Bennett*, 588 F. Supp. 2d 388 (E.D.N.Y. 2008); *Saranchak v. Beard*, 538 F. Supp. 2d 847 (M.D. Pa. 2008); *In re Gay*, 968 P.2d 476 (Cal. 1998); *McIntosh v. State*, 941 So. 2d 1 (Fla. Dist. Ct. App. 2006); *People v. Briones*, 816 N.E.2d 1120 (Ill. App. Ct. 2004); *State v. Taylor*, 968 S.W.2d 900 (Tenn. Crim. App. 1997); *Mata v. State*, 141 S.W.3d 858 (Tex. Ct. App. 2004); *State ex rel. Humphries v. McBride*, 647 S.E.2d 798 (W. Va. 2007); *State v. Thiel*, 665 N.W.2d 305 (Wis. 2003).

V. Conclusion.

For the foregoing reasons, the Court should grant Mr. Graddick's application for post-conviction relief and order a new trial.

Respectfully Submitted,

By



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Attorney for the Applicant Joseph Graddick

December 4, 2016
Greenwood, South Carolina

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STATE OF SOUTH CAROLINA)
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COUNTY OF CHARLESTON)
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Joseph Richard Graddick, #262619,)
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Applicant,)
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v.)
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State of South Carolina,)
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Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

2014-CP-10-3018

ORDER OF DISMISSAL

FILED
2017 NOV 15 AM 10:01
JULIE J. STRONG
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.

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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

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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

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

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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, 1. 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

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, 1. 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).

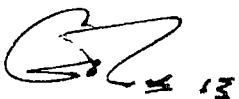
Hunt v. Nuth, 57 F.3d 1327, 1332 (4th Cir. 1995). Because no applicable precedent supported making an objection, the Court finds trial counsel's decision not to further object and request *Rayfield*, based upon its dissent, be overruled was reasonable. See *Winkler v. State*, 418 S.C. 643, 651, 795 S.E.2d 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)

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(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).

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

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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.

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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

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

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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?

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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.

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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

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;

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

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). See *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

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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

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,

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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

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

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

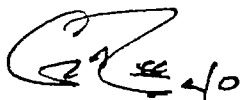
Following this theme, Counsel Butler argued:

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), SCRCR, 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

CANDEN, South Carolina



State of South Carolina
The Circuit Court of the Fifth Judicial Circuit

G. Thomas Cooper, Jr.
Active/Retired Judge

Post Office Box 1557
1121 Broad Street, Room 313
Camden, SC 29021
Phone: (803) 425-7182
gcooperj@sccourts.org

November 7, 2017

The Honorable Julie J. Armstrong
100 Broad St., Suite 106
Charleston, SC 29401

RE: Joseph Richard Graddick, #262619 v. State of South Carolina
Case No.: 2016-CP-10-03018

Ms. Armstrong:

Enclosed please find the Order of Dismissal in regards to the aforementioned case signed and dated by Judge G. Thomas Cooper. Please file this copy with the court. Feel free to contact me if you have any questions or concerns.

Thank you,

Jamie Rutkoski
Law Clerk to the Honorable G. Thomas Cooper, Jr.

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: charles@groselawfirm.com

Web: GroseLawFirm.com

November 27, 2017

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2210

Re: *Joseph Richard Graddick v. State of South Carolina*
Case Number: 2014-CP-10-03018

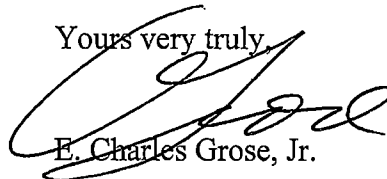
Dear Ms. Armstrong:

Enclosed for filing, please find Mr. Graddick's Rule 59(e), SCRCP motion.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: The Honorable G. Thomas Cooper (via email and US Mail)
Donald L. Zelenka, Esquire (via email and US Mail)
Megan Jameson, Esquire (via email and US Mail)

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

Joseph Richard Graddick

Plaintiff,

vs.

State of South Carolina

Defendant.

IN THE COURT OF COMMON PLEAS

9th JUDICIAL CIRCUIT

CASE NO.: 2014-CP-10-03018

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

Charles Grose, Bar No. 66063

Address:

404 Main Street, Greenwood, SC 20646

Phone: 864-538-4466 Fax 864-538-4405

E-mail: charles@groselawfirm.com Other: _____

Defendant's Attorney:

Donald Zelenka, Bar No. _____

Address:

SC Attorney General's Office

Phone: _____ Fax _____

E-mail: _____ Other: _____

☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Rule 59(e), SCRCP

Estimated Time Needed: 15

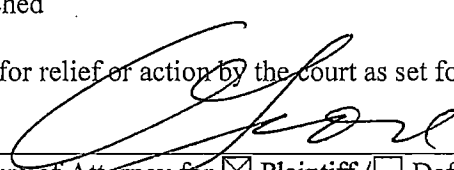
Court Reporter Needed: ☒ **YES** / ☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

Nov. 27, 2017

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT: \$ _____

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☒ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Joseph Richard Graddick,

Applicant,

vs.

State of South Carolina,

Respondent

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2014-CP-10-3018

**Rule 59(e), SCRCP Motion
and Proffer of Mr. Graddick's Proposed
Order Granting Post-Conviction Relief**

To: The Honorable G. Thomas Cooper, Presiding Judge, Ninth Judicial Circuit

Pursuant to Rule 59(e), SCRCP, Joseph Graddick moves the Court for an order altering and amending the order of dismissal dated November 7, 2017, filed November 15, 2017, and received by undersigned counsel on November 20, 2017, dismissing his application for post-conviction relief (PCR). This Court should withdraw the order of dismissal and enter an order granting post-conviction relief.¹ The following grounds support this motion.

A. S.C. Code § 16-3-657.

1. Trial Counsel.

State v. Rayfield held, "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." 369 S.C. 106, 117-18, 631 S.E.2d 244, 250 (2006) (emphasis added), *abrogated by State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016). A trial judge instructing § 16-3-657, accordingly, was objectionable, under certain circumstances, even prior to *Stukes*. In fact, Mr. Graddick's PCR application, dated

¹ A copy of Mr. Graddick's proposed order granting his PCR application is attached and incorporated by reference.

May 7, 2014 (two years before *Stukes*), at ¶ 11(a)(5)(a), alleged ineffective assistance of trial counsel under the “facts of this case” regarding the § 16-3-657 instruction. The order of dismissal, at p. 12, states, “At the time of the trial, *Rayfield* was the law and bidding on opinion of the South Carolina Supreme Court upon the trial court.” Under *Rayfield*, the trial judge was prohibited from “unduly emphasiz[ing]” § 16-3-657. Mr. Graddick’s proposed order, Section III(A), explains why “the trial judge unduly emphasized § 16-3-657.” This Court erred by viewing *Rayfield* as requiring that a trial judge to instruct § 16-3-657.

Trial counsel, additionally, should have renewed the objection when the trial judge re-instructed § 16-3-657. The order of dismissal, at p. 12, also states, “Because no applicable precedent supported making the objection, the Court finds trial counsel’s decision not to further object and request *Rayfield*, based on its dissent, be overruled was reasonable.” *Rayfield*, however, was applicable precedent at the time of Mr. Graddick’s trial that required trial counsel to object when the trial judge “unduly emphasized” § 16-3-657, which occurred when the trial judge re-instructed the jurors.

The order of dismissal, at p. 9, observes:

Counsel Beattie Butler testified that he had objected to this 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.

The PCR record reveals, when asked whether there was tension between Mr. Butler and Mr. Graddick’s trial judge, Mr. Butler responded, “I have to make my words count, because I don’t always get to say as many things as I would like.” Trial counsel’s “history” with the trial judge is not a valid strategic reason for not placing the grounds of an objection on the record. *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015) (“If the State contends the alleged

deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy.”). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). This testimony, accordingly, supports a finding of deficient performance.

Because credibility was the central issue for the jurors to determine, this instruction prejudiced Mr. Graddick. *See e.g. State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) (prejudice found when case turned solely on credibility and there was “no physical evidence of sexual abuse”); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (prejudice found when “credibility was the most critical determination of this case”); *State v. Berry*, 332 S.C. 214, 503 S.E.2d 770 (1998) (“These credibility questions and inconsistencies in the witnesses’ testimony make it impossible for this Court to conclude that, without reference to the Polite incident, the evidence of Berry’s guilt is overwhelming or that Berry’s guilt is the only rational conclusion that could be reached from the evidence presented.”).

2. Appellate Counsel.

The order of dismissal, at p. 12, states, “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).” The order of dismissal later states, “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*.” This Court, once again, overlooks that *Rayfield* established grounds for when it was appropriate to object to the trial judge instructing § 16-3-657. Mr. Graddick’s proposed order, Section III(F), explains why appellate counsel should have briefed this issue on appeal. Prejudice is established because credibility was the central issue for the jurors to determine. *Anderson, Jennings, and Berry, supra*. Had appellate

counsel briefed this issue, then the appellate court would have ordered a new trial. *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002).

B. “Seek the Truth.”

The order of dismissal, at pp. 17-23, concludes trial counsel was not ineffective for failing to object to the “seek the truth regardless of its source” instruction because *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012) and *State v. Beaty*, S.C.Ct. Op. No. 27693 (filed December 29, 2016) (re-hearing pending) were decided after Mr. Graddick’s trial. As set forth in Mr. Graddick’s proposed order, Section II(B), this jury instruction was objectionable long before Mr. Graddick’s jury trial. Additionally, *Cage v. Louisiana*, 498 U.S. 39 (1990) and *In Re Winship*, 397 U.S. 358 (1970) placed trial counsel on notice to object to any jury instruction that reduces the State’s burden of proof. Prejudice is established because credibility was the central issue for the jurors to determine. *Anderson, Jennings, and Berry, supra*.

C. Evidence of Incarceration.

The order of dismissal, at p. 27, finds that trial counsel “may have ‘opened the door’ in his questioning by reference to the arrest, therefore making the later evidence not subject to an objection.”² And, “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 a prior crime, nor was it improper character evidence.” As explained in Mr. Graddick’s proposed order, Section III(C), this testimony implied Mr. Graddick’s long-term incarceration, and trial counsel did not advance a strategic reason for not objecting. Prejudice is

² Mr. Graddick disputes the conclusion that reference to “arrest,” which is a predicate to any prosecution and does not inherently imply long-term incarceration, opened the door to the prosecution highlighting Mr. Graddick’s long-term pre-trial incarceration.

established because credibility was the central issue for the jurors to determine. *Anderson, Jennings, and Berry, supra.*

D. Hearsay & Confrontation Clause.

1. Trial counsel.

The order of dismissal, at p. 30, acknowledges the trial judge admitted Officer Van Tine's testimony by ruling, "It's information gained in the course of an investigation with foundation and basis for the investigation, therefore it comes under the hearsay exception rule." Yet, the order of dismissal, at pp. 31-32, concludes the challenged testimony is not hearsay. On November, 8, 2017,³ undersigned counsel wrote this Court and counsel, a copy of which is attached, to provide the following supplemental citation:

Please allow me to all the Court's attention to *State v. King*, No. 2015-001278, 2017 WL 4800004, at *10 (S.C. Oct. 25, 2017) applying a traditional "straightforward hearsay analysis" to exclude so-called "investigative information." I believe this case is relevant to the hearsay/confrontation clause issue in Mr. Graddick's case.

Although our Supreme Court decided *King* after Mr. Graddick's jury trial, the Court applied a traditional, "straightforward hearsay analysis," just as Mr. Graddick asks this Court to do in his proposed order of dismissal, Section III(D). Although police officers are sometimes allowed to explain the purpose for investigation, such testimony should not be hearsay about a specific defendant. Compare *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994) with *German v. State*, 325 S.C. 25, 478 S.E.2d 687 (1996). The Court's order, at p. 34, makes the same error as the trial judge regarding the overuse of the "so-called investigation information" exception to hearsay.

³ Although this Court signed the order of dismissal on November 7, 2017, undersigned counsel was not aware of this fact.

Because the testimony was inadmissible hearsay, it is not necessary to reach the Confrontation Clause issue. This Court, however, dismisses that claim because Mr. Graddick “had the opportunity to cross-examine Dunham or to recall her at trial.” Counsel is not required to be clairvoyant and anticipate the prosecutor’s questions. Additionally, the ability to recall a witness is not a ground for admitting inadmissible hearsay. *Crawford v. Washington*, 541 U.S. 36, 59 fn. 9, (2004) recognized, “[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements,” but the cases cited in footnote 9 complied with the applicable rules of evidence. Our state has a procedure, Rule 613, SCRE, for admitting prior statements of witnesses. This Court’s order, at pp. 34-35, seemingly acknowledges the prosecution’s failure to comply with this rule but finds Mr. Graddick failed to establish prejudice. Prejudice is established because credibility was the central issue for the jurors to determine. *Anderson, Jennings, and Berry, supra*. Without this inadmissible testimony, the jurors would have resolved the credibility issues differently.

2. Appellate Counsel.

The order of dismissal, at p. 31, concludes, “[T]he record reflects that counsel made timely objections to hearsay and the Confrontation Clause.” Mr. Graddick’s PCR application at ¶¶ 10(b) and 11(b)(1) alleges ineffective assistance of appellate counsel for not briefing this issue. This Court’s order, however, does not address this claim *at all*. The Court’s finding that trial counsel made timely hearsay and Confrontation Clause objections establishes deficient performance by appellate counsel. As argued in Mr. Graddick’s memorandum in support of granting his PCR application, Section IV(B)(1), “If this Court concluded that trial counsel’s objections properly preserved this issue for appeal, then appellate counsel was ineffective for not briefing this issue on

appeal.” *And see Patrick, supra. And see Anderson, Jennings, and Berry, supra.* Had appellate counsel briefed this issue, the appellate court would have ordered a new trial, just as it did in *King*.

E. Failure to Investigate and Present Leroy Graddick’s Testimony.

Trial counsel has a duty to conduct a reasonable investigation. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). This duty includes interviewing the client and obtaining “the names of individuals or other sources that counsel can contact to verify the information provided by the client.” S.C. Commission on Indigent Defense Performance Standards for Public Defenders and Assigned Counsel, Standard 2.2(b)(2)(F). As set forth in Mr. Graddick’s proposed order, Section III(E), trial counsel was ineffective for failing to investigate and present the testimony of his brother, Leroy Graddick. Prejudice is established because credibility was the central issue for the jurors to determine. *Anderson, Jennings, and Berry, supra.*

F. Ineffective Assistance of Appellate Counsel.

Mr. Graddick raised three issues of ineffective assistance of appellate counsel. The failure to brief trial counsel’s objection to § 16-3-657 is addressed in Section A(2) above. The failure to brief trial counsel’s hearsay and Confrontation Clause objections are addressed in Section D(2) above.

This Court’s order, at 39-40, concluded appellate counsel was not ineffective for filing an *Anders* brief regarding the prosecution’s sustained objection to trial counsel’s closing argument. The Court’s conclusion seems to be based on its conclusion that trial counsel’s closing argument addressed punishment rather than responding to the complaining witness’ motive of depriving Mr. Graddick of his freedom. As set forth in Mr. Graddick’s proposed order, Section III(F), this closing argument was not improper, and appellate counsel should have briefed it on appeal. Had appellate

counsel properly briefed this issue, the appellate court would have ordered a new trial. *See Patrick, supra. And see Anderson, Jennings, and Berry, supra.*

G. Cumulative Prejudice.

This Court's conclusion regarding cumulative prejudice, order of dismissal at p. 41, is controlled by its belief that Mr. Graddick "has failed to prove any ground of ineffective assistance of counsel." As set forth in Sections A-F above, Mr. Graddick has established multiple grounds of ineffective assistance of counsel. As set forth in Mr. Graddick's propose order, Section III(G), the cumulative effect of trial counsel's ineffectiveness prejudiced Mr. Graddick.

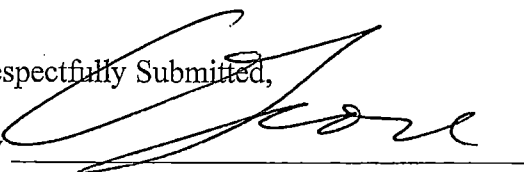
Finally, Mr. Grddick notes our Supreme Court in *King* considered the improper admission of hearsay testimony in combination with an erroneous jury instruction. Here, credibility was the central issue for the jurors to determine. The cumulative effect of trial counsel's ineffectiveness led the jurors to resolve the credibility issues in favor of the prosecution and against Mr. Graddick.

CONCLUSION

This Court should withdraw the order of dismissal and enter an order granting post-conviction relief.

Respectfully Submitted,

By



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Attorney for the Applicant Joseph Graddick

November 27, 2017
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Joseph Richard Graddick,

Applicant,

vs.

State of South Carolina,

Respondent

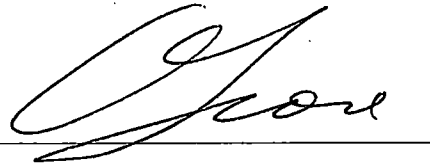
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2014-CP-10-3018

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

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November 27, 2017
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Joseph Richard Graddick,)
Applicant,)
vs.)
State of South Carolina,)
Respondent)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2014-CP-10-3018

PROPOSED
Order Granting Post-Conviction Relief

This matter came before the Court on Joseph Richard Graddick's Application for post-conviction relief ("PCR").

I. PROCEDURAL HISTORY.

For an incident occurring on June 15, 2008, the State charged Mr. Graddick with burglary, kidnapping, and first-degree criminal sexual conduct. Law enforcement arrested Mr. Graddick on October 13, 2009. The Charleston County Grand Jury indicted Mr. Graddick at the April and May 2011 terms of court. From July 11-13, 2011, the State tried Mr. Graddick before the Honorable Deadra L. Jefferson and a jury. Timothy Finch and Deborah Herring-Lash prosecuted Mr. Graddick. Beattie I. Butler defended Mr. Graddick. The jurors convicted Mr. Graddick as charged. Judge Jefferson sentenced him to seventeen years' imprisonment for each charge. The sentences are concurrent.

Mr. Graddick appealed the convictions and sentences. Susan Hackett of the South Carolina Commission on Indigent Defense, Appellate Division, represented Mr. Graddick and filed an *Anders* brief.¹ The Court of Appeals affirmed the convictions and sentences. *State v. Graddick*, Ct. App. Unpublished Op. No. 2013-UP-228 (filed May 29, 2013). The Remittitur

¹ *Anders v. California*, 386 U.S. 738 (1967).

issued on June 20, 2013.

On May 12, 2014, Mr. Graddick filed an application for post-conviction relief. On April 22, 2015, the State served its return.

On December 5, 2016, this Court convened an evidentiary hearing. At the call of the case, Mr. Graddick orally amended his PCR application to add paragraph 11(b)(3) alleging, "If trial counsel preserved the jury instruction stating that the testimony of an alleged victim in a criminal sexual conduct case need not be corroborated, the appellate counsel was ineffective for not briefing this issue on appeal." PCR Tr. at 2-5. During the evidentiary hearing, the Court heard the testimony of Beattie Butler, Joseph Graddick, Leroy Graddick, and Susan Hackett. At the conclusion of the hearing, Mr. Graddick provided the Court with a memorandum in support of his PCR application.

III. FINDINGS OF FACT.

A. Evidence Presented at Trial.

LaVanda Alicia Joyner lived in an apartment complex in North Charleston, South Carolina. The following is a summary of Ms. Joyner's testimony during Mr. Graddick's jury trial. On June 15-16, 2008, after her boyfriend left her apartment, Ms. Joyner ensured that both doors were locked and went to sleep on her couch. She claimed someone with socks over his hands awoke her by covering her mouth and making it difficult for her to breathe. During a struggle, she fell off the couch and landed on her knees facing the intruder. The intruder allegedly placed a sharp object to the back of her neck, "pulled down [her] shorts and began to have intercourse." She further testified the intruder wore a distinctive watch with a "large gold face." Ms. Joyner claimed the intruder held her hands behind her back, walked her up a staircase, put her inside a bathroom at the top of the staircase, and attempted to lock her inside

but the bathroom door locks from the inside. The intruder turned loose of the door and ran down the stairs. She chased the intruder down the stairs, followed him outside, and screamed for help, but no one heard the screams. She knocked on a neighbor's door, and the neighbor gave her a blanket to cover herself, as she was wearing only her t-shirt, and accompanied back inside while she called the police. Tr. 55-72.

Faye LeBoeuf, a certified nurse midwife and certified sexual assault nurse examiner at the Medical University of South Carolina, performed a sexual assault examination. The medical exam was normal and did not reveal any signs of trauma. Tr. 73-74; 104; 171-97.

On June 19, 2008, Ms. Joyner, while driving to a hair store, saw Mr. Graddick "standing in front of a Subway." She recognized him as her neighbor. She drove back around to get a closer look and recognized Mr. Graddick's watch as the distinctive watch worn by the alleged attacker. She called the police. When the police arrived, Mr. Graddick took off running. Tr. 74-76.

Following questioning about the Subway incident, the following exchanged took place between the prosecutor and Fulvia Kandie Dunham, Mr. Graddick's girlfriend at the time the allegations arose:

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.

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....

Tr. 124.

On re-direct, the prosecutor asked Ms. Dunham if Joseph had seen the children since the Subway incident. After Ms. Dunham stated that 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.

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, 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.

Tr. 218. Trial counsel did not object.

The prosecutor asked Ms. Dunham about being at the Subway with Mr. Graddick, talking to the police, and having a search warrant served at her apartment. The prosecution never asked Ms. Dunham about the substance of any of the statements she made during the police interview. Tr. 119-127.

In June 2008, George Van Tine was a Master Patrol Officer with the North Charleston Police Department. On June 19, 2008, he responded to the Subway. Over trial counsel's objection, based on hearsay and a violation of the Confrontation Clause, Officer Van Tine testified that Ms. Joyner gave him "some information that somebody had alerted the suspect." Tr. 153-56.

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, 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. 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 trial judge then sustained the objection and prohibited further testimony about what Mr. Dunham told Officer Van Tine. Tr. 164-65. In making the objection, trial counsel did not point out that Ms. Dunham has not been asked about these statements during her testimony.

Mr. Graddick testified and denied burglarizing Ms. Joyner's apartment, kidnapping her, and raping her. On June 15, 2016, Ms. Joyner called Mr. Graddick and told him to come to her apartment and enter through the back door which would be unlocked. Around 8:00 p.m., he returned to the apartment complex and took the back way to Ms. Joyner's apartment. He had been to Ms. Joyner's apartment at least four times before that night. Ms. Joyner was asleep on the couch. She woke up when Mr. Graddick laid down next to her. They talked, kissed, and had consensual sex. After sex, Mr. Graddick told Ms. Joyner that he did not want to continue seeing her. There was a push-and-shove match. Mr. Graddick pushed her down and left. Tr. 253-62.

On June 18, 2008, Ms. Joyner called Mr. Graddick and told him, "You are going to jail for rape." Tr. 263, lines 1-18. When he saw Ms. Joyner at the Subway the next day with the police, Mr. Graddick ran back to Ms. Dunham's apartment. He wanted to "get away and find out what was really going on." Mr. Graddick also wanted to figure out how he would afford a lawyer. Tr. 262-65.

B. Direct Appeal.

The Appellate Defense Division filed an *Anders* brief. The only issue addressed in the

brief pertained to the trial judge limiting Mr. Graddick's closing argument.

C. Evidence Presented at the PCR Hearing.

Beattie Butler, Mr. Graddick's trial counsel, testified at the evidentiary hearing. He testified that this case hinged on the credibility of Mr. Graddick and Ms. Joyner. Ms. Joyner claimed Mr. Graddick, a stranger, broke into her apartment, restrained her, and raped her. Mr. Graddick, however, always maintained he knew Ms. Joyner prior to this incident where they had consensual sex. During his closing argument, Mr. Butler was able to argue inferences from the physical evidence that were favorable to Mr. Graddick. The DNA evidence could not establish consent or lack of consent. The photographs of Ms. Joyner's apartment did not reflect a crime scene involving forcible rape. Ms. Joyner claimed that she had screamed, but no one in the apartment complex heard her scream. According to Mr. Butler, credibility was the central issue for the jurors to determine, and the prosecution did not have overwhelming evidence of Mr. Graddick's guilt. PCR Tr. 7-9; 47-50; 52-53.

Mr. Butler testified he was aware of our Supreme Court's decision in *State v. Rayfield*, 369 S.C. 106, 118, 631 S.E.2d 244, 250 (2006). *Rayfield* was a three-to-two decision with a strong dissent from then Justice Pleicones. Mr. Butler testified the § 16-3-657 instruction is a comment on the facts of the case and unduly emphasizes the testimony of the complaining witness in a criminal sexual conduct case. Mr. Butler further testified that the objectionable nature of the § 16-3-657 instruction was discussed at seminars and amongst criminal defense attorneys. At the time of Mr. Graddick's trial, Mr. Butler's ordinary practice was to object to this instruction based on the dissent in *Rayfield*. The trial transcript reflects that Mr. Butler objected to the § 16-3-657 instruction during the charge conference but did not elaborate the reasoning under *Rayfield*. When asked whether there was tension between Mr. Butler and Mr.

Graddick's trial judge, Mr. Butler responded, "I have to make my words count, because I don't always get to say as many things as I would like." Mr. Butler believed appellate counsel should have briefed this issue on direct appeal. PCR Tr. 21-27.

Mr. Butler testified about the trial judge's opening remarks that the jurors should "render a true and just verdict in this case" and final instruction on the law that the jurors had "one objective . . . to seek the truth regardless of its source." Mr. Butler testified that he had never considered objecting to such an instruction. He testified he is not familiar with *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000). During questioning, he acknowledged that such instructions could dilute the burden of proof and require the jurors to search for explanations of the evidence. Mr. Butler did not offer a strategic reason for not objecting to these instructions. PCR Tr. 27-30; 52.

Mr. Butler testified that Mr. Graddick had a pending charge for common law robbery when he was arrested for the allegations involving Ms. Joyner. Mr. Butler testified about Ms. Dunham and Detective Forsythe testifying about Mr. Graddick's pre-trial incarceration. Through better witness preparation, Mr. Butler believed the prosecution could have presented Detective Forsythe without eliciting testimony about Mr. Graddick's pre-trial incarceration. Mr. Butler did not offer a strategic reason for not objecting to this testimony. PCR Tr. 6-7; 10-16; 50-51.

Mr. Butler testified about Officer Van Tine's testimony about Ms. Dunham's statements to him following the Subway encounter. Mr. Butler believed his objections based on hearsay and the Confrontation Clause preserved this issue for appeal. Mr. Butler was concerned that the testimony about Ms. Dunham's statement could be viewed as "her consciousness of" Mr. Graddick's guilt. Mr. Butler further believed that appellate counsel should have briefed this

issue on direct appeal. Tr. 16-21; 54.

Mr. Butler testified about the State's objection during his closing argument, which was sustained by the trial court judge. Mr. Butler believed his argument was proper. He recalled presenting evidence in the case that Ms. Joyner wanted to take away Mr. Graddick's freedom. He never told the jurors that a conviction would lead to imprisonment for a specific number of years. Mr. Butler further believed that appellate counsel should have briefed this issue on appeal on the merits. Tr. 30-32.

Susan Hackett, Mr. Graddick's appellate counsel, testified during the evidentiary hearing. Ms. Hackett was aware that the majority of our Supreme Court in *Rayfield* held the no corroboration instruction found in S.C. Code § 16-3-657 is not required. She testified that trial counsel's objection to the § 16-3-657 instruction during the charge conference preserved the issue for appeal, although she anticipated that the Attorney General's Office would contend the objection was not sufficient. Ms. Hackett further testified that a more detailed objection during the charge conference and more specific objections after the charge on the law and recharge on the definition of first degree criminal sexual conduct would have been helpful for the appeal. Although other appellate defenders were challenging the § 16-3-657 instruction, Ms. Hackett did not believe our Supreme Court would overrule *Rayfield*. Ms. Hackett testified she was not aware of *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011). PCR Tr. 75-81.

Regarding Officer Van Tine's testimony about Ms. Dunham's statements during the investigation, Ms. Hackett testified trial counsel's objection was not sufficient to preserve this issue for appeal as a Confrontation Clause violation. She understood the trial judge ruled only on the hearsay objection and not the Confrontation Clause objection. PCR Tr. 68-74.

Regarding the State's closing argument objection, Ms. Hackett believed that trial

counsel's argument was not objectionable because it was "on the line of whether that actually was getting to punishment or if it was a matter the jury could consider." Mr. Graddick had presented evidence of Ms. Joyner wanting to take his freedom. Ms. Hackett, however, did not cite to that testimony in her brief. PCR Tr. 74-75

Mr. Graddick testified during the evidentiary hearing about an incident where he and his brother, Leroy Graddick, were visiting women at another apartment at the same apartment complex on North Charleston. According to Mr. Graddick, he and his brother left the apartment together and returned to their respective cars that were parked adjacent to each other in the parking lot of the apartment complex. Ms. Joyner appeared, confronted Joseph Graddick about seeing other women, and an argument ensued. PCR Tr. 54-59.

Leroy Graddick testified at the evidentiary hearing and confirmed his brother's account of the parking lot incident. He further testified no one interviewed him as a potential witness. PCR Tr. 62-64.

III. CONCLUSIONS OF LAW.

Under the first prong of *Strickland v. Washington*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." 466 U.S. 668, 688 (1984). "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v.*

State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). The second prong of *Strickland*, requires a defendant establish that this deficiency prejudiced him. “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Due process requires a defendant receive effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under *Strickland*. *Smith v. Robbins*, 528 U.S. 259 (2000). Appellate counsel is ineffective for not raising a meritorious issue entitling an appellant to relief. *See, e.g., Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002).

A. S.C. Code § 16-3-657.

S.C. Code § 16-3-657 provides, “The testimony of the victim need not be corroborated in prosecutions” for criminal sexual conduct. During the charge conference, trial counsel objected to this instruction. During the charge on the law, the trial judge provided the jurors this instruction. Tr. 349, lines 19-23. Trial counsel did not renew the objection. During deliberations, the jurors asked for the definitions of “first degree burglary, second degree burglary, kidnapping, first degree criminal sexual conduct, [and] assault and battery.” Tr. 365, lines 2-6. When providing these definitions, the trial judge again instructed S.C. Code § 16-3-657. Tr. 372, lines 18-21. Trial counsel did not object.

After Mr. Graddick’s jury trial, in *State v. Stukes*, 416 S.C. 493, 499-500, 787 S.E.2d 480, 483 (2016), our Supreme Court held:

We are persuaded by the dissent in *Rayfield* and conclude this charge is confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case. *See* S.C. Const. art. V, § 21 (“Judges shall not charge juries

in respect to matters of fact, but shall declare the law.”). Accordingly, it is not within the province of the court to express an opinion to the jury on its view of the facts. By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak. Moreover, it is inescapable that this charge confused the jury. Specifying this qualification applies to one witness creates the inference the same is not true for the others.

See also State v. Witherspoon, Shearouse Adv. Sheet No. 42, p. 25 (S.C.S.Ct. Op. No. 27675) (filed Nov. 2, 2016). *Stukes* further held, “[W]e do not believe this case is amenable to a harmless error analysis. Our review of the record indicates this case hinged on credibility. Victim said it was rape; he said it was consensual.” 416 S.C. at 500, 787 S.E.2d at 483.

Prior to Mr. Graddick’s jury trial, our Supreme Court cautioned about the danger of instructing § 16-3-657:

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.

State v. Rayfield, 369 S.C. 106, 118, 631 S.E.2d 244, 250 (2006). Justice Pleicones, joined by Acting Justice Bartlett, dissented because this instruction “might cause confusion when read with the general charge on witness credibility,” “carries a strong possibility of biasing the jury against the defendant,” and is an improper comment on the facts in violation of S.C. Const. Art. V, § 15. Justice Pleicones also noted, “Separately instructing the jury that it may believe one witness against many or many against one does not ameliorate or remove the favorable emphasis on the alleged victim's testimony.” *Id.* at 120-21, 251-252.

This Court concludes that trial counsel was aware of the opinion and dissent in *Rayfield*. This Court further concludes that trial counsel’s ordinary practice was to object to this instruction

based on the dissent in *Rayfield*. Counsel's general objection preserved Mr. Graddick's objection to the trial judge instructing § 16-3-657. *Keaton v. Greenville Hospital System*, 334 S.C. 488, 514 S.E.2d 570 (1999); *State v. Johnson*, 333 S.C. 62, 64 n. 1, 508 S.E.2d 29, 30 n. 1 (1998).

Once the trial judge instructed § 16-3-657, *Rayfield* required trial counsel to further object if the trial judge unduly emphasized § 16-3-657. After reviewing the instruction as a whole, this Court finds that the trial judge unduly emphasized § 16-3-657. Although decided a couple of weeks after Mr. Graddick's jury trial, *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011) provides some guidance for applying *Rayfield*. Our Court of Appeals observed, "Notably, the judge immediately followed [the § 16-3-657 instruction] with, 'Necessarily you must determine the credibility of witnesses who have testified in this case.'" *Id.* at 299, 379. The trial judge in Mr. Graddick's case did not follow the § 16-3-657 instruction with a similar admonition, and trial counsel did not object. Additionally, when the jurors asked for a clarification of the definitions of first degree criminal sexual conduct and assault and battery, the trial judge instructed § 16-3-657 in isolation, and trial counsel did not object. This Court therefore finds that trial counsel was ineffective for not objecting to the § 16-3-657, pursuant to *Rayfield*, because the trial court unduly emphasized this instruction.

Because credibility was the central issue for the jurors to determine, this instruction prejudiced Mr. Graddick. See e.g. *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) (prejudice found when case turned solely on credibility and there was "no physical evidence of sexual abuse"); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (prejudice found when "credibility was the most critical determination of this case"); *State v. Berry*, 332 S.C. 214, 503 S.E.2d 770 (1998) ("These credibility questions and inconsistencies in the witnesses' testimony

make it impossible for this Court to conclude that, without reference to the Polite incident, the evidence of Berry's guilt is overwhelming or that Berry's guilt is the only rational conclusion that could be reached from the evidence presented.”).

B. “Seek the Truth Regardless of Its Source.”

At the beginning of the trial, the trial judge informed the jurors:

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. 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. 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. Trial counsel did not object.

Our Supreme Court long ago disfavored instructions like the one involved in this case. In *State v. Manning*, the trial court instructed:

Beyond a reasonable doubt, in telling you that that is the degree of proof by which the State must prove, that phrase means exactly what it states in the English language, and *that is a doubt for which you can give a real reason*. That excludes a whimsical doubt, fanciful doubt. You could doubt any proposition if you wanted to. *A reasonable doubt is a substantial doubt for which honest people, such as you, when searching for the truth can give a real reason*. So it's to that degree of proof that the State is required to establish the elements of a charge.

305 S.C. 413, 415, 409 S.E.2d 372, 374 (1991) (emphasis supplied by the court). Our Supreme Court, accordingly, prohibited trial judges from telling jurors “to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant.” *Id*, 305 S.C. at 416, 409 S.E.2d at 374. “Rather than conveying to the jury the principle that the State must

affirmatively establish appellant's guilt by probative evidence beyond a reasonable doubt, this charge could mislead a reasonable juror to focus exclusively on appellant's explanation of the evidence to determine the existence of reasonable doubt.” *Id.* 305 S.C. at 417, 409 S.E.2d at 374-75. Our Supreme Court reaffirmed this analysis in *State v. Raffaldt*, 318 S.C. 110, 115-16, 456 S.E.2d 390, 393 (1995).²

In *State v. Needs*, the trial judge charged the jurors, “[Y]ou, the jury, must seek some other rational or logical explanation other than the guilt of the accused.” And, a “reasonable doubt is a doubt which makes an honest, sincere, conscientious juror in search of the truth in the case hesitate to act.” 333 S.C. 134, 151-52, 508 S.E.2d 857, 866 (1998). Our Supreme Court “strongly urge[d] the trial courts to avoid using” this language when instructing jurors about circumstantial evidence and reasonable doubt. 333 S.C. at 155, 508 S.E.2d at 867. In *Aleksey*, our Supreme Court again reminded, “Jury instructions on reasonable doubt which charge the jury to “seek the truth” are disfavored because they “[run] the risk of unconstitutionally shifting the burden of proof to a defendant.” 343 S.C. at 26-27, 538 S.E.2d at 251 (citing *Needs*). More recently, in *State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012), our Supreme Court instructed trial judges to remove similar instructions from charge books. “Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt.” *Id.*

Although *Daniels* was decided after Mr. Graddick's trial, *Manning*, *Needs*, *Raffaldt*, and *Aleksey* placed trial counsel on notice to object to this jury instruction. Additionally, in *Cage v.*

² In *Raffaldt*, the trial judge instructed, “So in the consideration of circumstantial evidence, you must seek some reasonable explanation other than the guilt of the accused and if such reasonable explanation can be found, then you cannot convict upon circumstantial evidence alone.” 318 S.C. at 115, 456 S.E.2d at 393.

Louisiana, 498 U.S. 39 (1990), a unanimous United States Supreme Court held that the jury instruction in that case was contrary to the “beyond a reasonable doubt” requirement articulated in *In Re Winship*, 397 U.S. 358 (1970) (holding that the accused is protected against conviction under the Fourteenth Amendment except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged). The words “substantial” and “grave” suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements were taken in conjunction with the court’s reference to a “moral” rather than evidentiary certainty, a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

In South Carolina, as elsewhere, “[i]t is error to give instructions which may confuse or mislead the jury. The test is what a reasonable juror would understand the charge to mean.” *State v. Rothell*, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990) (citations omitted). “In order to make this determination, the challenged instruction must be examined in the context of the trial court’s entire charge to the jury and not in isolation.” *Lowry v. State*, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008). “Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity.” *Id.*, 376 S.C. at 506, 657 S.E.2d at 64 (quoting *Francis v. Franklin*, 471 U.S. 307, 322 (1965)). “Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge.” *State v. Buckner*, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000). “A jury charge is no place for purposeful ambiguity.” *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009).

Trial counsel, therefore, was ineffective for not objecting the trial judge’s opening

remarks and final instruction on the law. The trial judge's final instruction that the jurors had "one objective . . . to seek the truth regardless of its source" rendered the entire instruction invalid. The Court further concludes that Mr. Graddick was prejudiced. The State emphasized the trial judge's opening remarks during its opening statement. As already discussed, this case hinged on the credibility of Mr. Graddick and Ms. Joyner. Reasonable jurors could have concluded they had to determine which account was the "truth," rather than applying the burden of proof.

C. Evidence of Incarceration.

Trial counsel was ineffective for not objecting to the testimony by Ms. Dunham and Detective Forsythe about Mr. Graddick's pre-trial incarceration. This testimony implied Mr. Graddick's guilt and was improper character evidence. Rule 404(a), SCRE. "[E]vidence introduced for the sole purpose of implying a defendant has a prior criminal record is improper." *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)). *See also Deck v. Missouri*, 544 U.S. 622 (2005); *Estelle v. Williams*, 425 U.S. 501 (1976). The reference to "Charleston County," although understood by criminal law practitioners to mean incarceration in the country jail, likely was not sufficient to inform the jurors about Mr. Graddick's incarceration. Additional questioning by the prosecution, however, clarified that Mr. Graddick was incarcerated when Ms. Dunham and the children visited him and Detective Forsythe obtained the DNA sample. The nature of the questioning implied long term incarceration, rather than short term incarceration until bond could be posted. Mr. Graddick, in fact, also was incarcerated on bench warrant for unrelated charges. Trial counsel was ineffective for not objecting to this testimony. Trial counsel did not have a strategic reason for not objecting. Because this case hinged on credibility, Mr. Graddick was prejudiced. Reasonable

jurors might have decided Mr. Graddick was less credible because of his unspecified long-term incarceration.

D. Hearsay and Confrontation Clause Violation.

Officer Van Tine's testimony should have been excluded as hearsay, Rule 802, SCRE, and as a violation of the confrontation clause, *Crawford v. Washington*, 541 U.S. 36 (2004). Although Ms. Dunham was available to testify about these matters, the prosecution did not lay the proper foundation for the admission of her statements, assuming she even made the statements. The State was required to give Ms. Dunham an opportunity to admit, deny, or explain the statement before presenting extrinsic evidence of the statement. Rule 613, SCRE. *E.g. State v. Bixby*, 388 S.C. 528, 698 S.E.2d 572 (2010) (witness "was apprised of the substance of the statement at issue and therefore Appellant's argument is without merit"). Officer Van Tine's testimony was extremely prejudicial because it implied that Ms. Dunham was helping Mr. Graddick flee from justice. Also, credibility was the central issue for the jurors to determine. *See Berry, supra*.

Additionally, the trial judge's explanation for admitting the statements was not correct. After pointing out Ms. Dunham's "statement is made in the course of the investigation," the trial judge ruled, "He is merely indicating the purposes for which they investigated. It's not offered for the truth." Tr. 155-56. Although police officers are sometimes allowed to explain the purpose for investigation, such testimony should not be hearsay about a specific defendant. Compare *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994) with *German v. State*, 325 S.C. 25, 478 S.E.2d 687 (1996).

E. Failure to Investigate and Call a Favorable Witness.

Trial counsel was ineffective for failing to interview and call Leroy Graddick as a

witness. Leroy Graddick's testimony corroborated his brother's testimony that he knew Ms. Joyner prior to the incident giving rise to the charges. *E.g. Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998) (trial counsel was ineffective for failing to call as defense witness triage nurse whose notes indicated that victim stated that her vagina was not penetrated). Prejudice resulted from the failure to call these witnesses because credibility was the central issue for the jurors to decide. *See Berry, supra*.

F. Ineffective Assistance of Appellate Counsel.

In Section III(A) above, this Court found that trial counsel's initial objection to the § 16-3-657 preserved that issue for appellate review, although more specific objections under *Rayfield* were not preserved for review. Under *Rayfield*, instructing § 16-3-657 was not required. *Hill* provided a blueprint for challenging the § 16-3-657 instruction under the circumstances that transpired in this case. Appellate counsel, however, was not aware of *Hill*. Appellate counsel was ineffective for not raising this issue. The propriety of the § 16-3-657 instruction had been discussed at criminal defense seminars. Other appellate defenders were raising this issue. For the reasons previously discussed, Mr. Graddick was prejudiced.

This Court further concludes that trial counsel's closing argument was *not* improper. Although trial counsel argued that the prosecution wanted to take away Mr. Graddick's freedom, he did not argue the nature of the punishment. It is general knowledge that a criminal defendant could lose his liberty if convicted. In this case, Mr. Graddick testified about Ms. Joyner's motive. He further testified Ms. Joyner called him and threatened, "You are going to jail for rape." Tr. 263, lines 1-18. Trial counsel's argument, therefore, was relevant and should have been allowed. The *Anders* brief did not point out the relevance of trial counsel's argument based on Mr. Graddick's testimony. Appellate counsel was ineffective for not briefing this issue on the

merits. Because this case hinged on credibility, Mr. Graddick was prejudiced. Had appellate counsel adequately briefed this issue, the result on appeal would have been different. *See e.g., Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002)

This Court notes that this is not a case where appellate counsel decided not to brief certain issues in favor of briefing more meritorious issues. Appellate counsel filed an *Anders* brief, essentially telling the Court of Appeals Mr. Graddick did not have any meritorious issues for appeal.

G. Cumulative Error.

Having found specific allegations of ineffective assistance of counsel warranting a new trial, it is not necessary to apply the cumulative error analysis. Out of an abundance of caution, however, this Court will apply a cumulative prejudice analysis. *Kyles*, 514 U.S. 419, 436 (1995) (the prejudice must be “considered collectively, not item-by-item”). The United States Supreme Court’s opinion in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), reveals that the Court considered “the entire postconviction record . . . as a whole and cumulative of mitigation evidence presented originally” in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence. “[A]s a whole” implies a cumulative analysis. Likewise, in *Strickland*, the Court stated, “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional *errors*, the result of the proceeding would have been different.” 466 U.S. at 694 (emphasis added). If the Court did not intend a cumulative analysis it would have discussed the prejudice analysis in terms of “individual error” or error-by-error evaluation instead of formulating the prejudice test in light of counsel’s “errors.”³ This Court finds and concluded that the cumulative effect of trial counsel’s

³ Numerous courts, relying on *Strickland*, have held that a cumulative prejudice analysis

ineffectiveness prejudiced Mr. Graddick.

IV. CONCLUSION.

For the foregoing reasons, this Court grants Mr. Graddick's application for post-conviction relief and orders he receive a new trial.

IT IS SO ORDERED.

G. Thomas Cooper
Presiding Judge, Ninth Judicial Circuit

_____, 2017
Columbia, South Carolina

is appropriate. *See, e.g., Pavel v. Hollins*, 261 F.3d 210 (2nd Cir. 2001); *Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009); *Goodman v. Bertrand*, 467 F.3d 1022 (6th Cir. 2006); *Martin v. Grosshans*, 424 F.3d 588 (7th Cir. 2005); *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998); *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003); *Steidl v. Walls*, 267 F. Supp. 2d 919 (C.D. Ill. 2003); *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002); *Espinal v. Bennett*, 588 F. Supp. 2d 388 (E.D.N.Y. 2008); *Saranchak v. Beard*, 538 F. Supp. 2d 847 (M.D. Pa. 2008); *In re Gay*, 968 P.2d 476 (Cal. 1998); *McIntosh v. State*, 941 So. 2d 1 (Fla. Dist. Ct. App. 2006); *People v. Briones*, 816 N.E.2d 1120 (Ill. App. Ct. 2004); *State v. Taylor*, 968 S.W.2d 900 (Tenn. Crim. App. 1997); *Mata v. State*, 141 S.W.3d 858 (Tex. Ct. App. 2004); *State ex rel. Humphries v. McBride*, 647 S.E.2d 798 (W. Va. 2007); *State v. Thiel*, 665 N.W.2d 305 (Wis. 2003).



Charles Grose <chasgrose@gmail.com>

RE: Pending 9th Circuit PCR Orders from December 6, 2016 Term - Joseph Graddick - 2014-CP-10-3018

Charles Grose <chasgrose@gmail.com>

Wed, Nov 8, 2017 at 1:21 PM

To: Don Zelenka <DZelenka@scag.gov>

Cc: Megan Jameson <MJJameson@scag.gov>, "Cooper, G. Thomas Law Clerk (Lauren E. Patterson) (GCooperLC@sccourts.org)" <GCooperLC@sccourts.org>

Please allow me to all the Court's attention to *State v. King*, No. 2015-001278, 2017 WL 4800004, at *10 (S.C. Oct. 25, 2017) applying a traditional "straightforward hearsay analysis" to exclude so-called "investigative information." I believe this case is relevant to the hearsay/confrontation clause issue in Mr. Graddick's case.

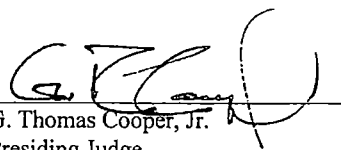
Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

Best,
Charles
[Quoted text hidden]

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
v.	)	THE JUDGMENT
	)	
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) SCRPC 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 3, 2018

FILED
 2018 JAN -8 PM 4:20
 JUDGE J. A. COOPER
 CLERK OF COURT
 BY _____