

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

Appellate Case No.: 2018-000065

David Lee Meggett,

Petitioner,

vs.

State of South Carolina,

Respondent.

APPENDIX
VOLUME II OF II

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID LEE MEGGETT,

APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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

STATEMENT OF THE CASE

David Lee Meggett was indicted by the Charleston County Grand Jury on June 2, 2009, for the offenses of burglary, first degree, and criminal sexual conduct, first degree. Meggett proceeded to trial before The Honorable Kristi Lea Harrington and a jury on November 8, 2010 through November 10, 2010. Meggett was represented by Beattie Butler; the State was represented by Assistant Solicitors Culver Kidd and Chad Simpson. The jury returned a verdict of guilt for both offenses. Meggett was sentenced to concurrent terms of thirty (30) years imprisonment for each offense.

STATEMENT OF THE FACTS

David Meggett and Stacey Hooper were acquaintances, if not friends. (R.p. 125, ln. 15-17). They met in April 2008 through their mutual friend, Sky, who was Hooper's live-in girlfriend until May 2008. (R.p. 87, ln. 14-18; R.p. 88, ln. 16-25). Meggett was known as Mike to Hooper. (R.p. 88, ln. 3-4).

After Sky's departure, Hooper needed help to find work and pay her bills. (R.p. 87, ln. 17-18). Although it is not clear whether Hooper knew of Meggett's current or prior vocations, Meggett often helped Hooper by driving her to job interviews. (R.p. 90, ln. 10-15; R.p. 117, ln. 21 – p. 118, ln. 4). He also helped Hooper by trying to fix her car for her when it broke down, by renting, loading and driving a U-Haul truck to salvage scrap metal for her, and by loaning her \$200 to help cover her bills during the summer of 2008. (R.p. 90, ln. 4-23; R.p. 117, ln. 11-14; p. 118, ln. 5-20; R.p. 119, ln. 7-24). As Hooper agreed, she could count on Meggett if she needed him, and he indeed helped her. (R.p. 120, ln. 7-10).

On at least one occasion, Meggett also showed Hooper her where his sister lived. (R.p. 122, ln. 13-19). Additionally, despite Hooper's proclivities, she knew Meggett well enough to have had at least one previous consensual sexual encounter with Meggett in August 2008. (R.p. 89, ln. 12-18; R.p. 103, ln. 21 – p. 104, ln. 3; R.p. 124, ln. 8-11). Thus, between May 2008 and January 2009, Meggett was a person familiar with and helpful to Hooper.

Meggett was also familiar with Hooper's house and roommates. He frequently visited the house before Sky's departure, and continued to visit afterward, although less regularly. (R.p. 89, ln. 7-9; R.p. 90, ln. 2-4). Furthermore, Meggett knew Hooper's roommates, Jonathan, Spider, and Pirate, as well as her neighbor, Eric. (R.p. 116, ln. 10-

20). He would sometimes stay there and watch movies together with everyone at the house. (R.p. 116, ln. 1-3, 18-23).

Hooper left Charleston in December 2008 and returned in January 2009. (R.p. 90, ln. 24 – p. 91, ln. 5; R.p. 94, ln. 4-12; R.p. 121, ln. 14-17; R.p. 122, ln. 4-6). On the evening of the incident, Meggett arrived at Hooper's house sometime between 6:00 pm on Monday, January 12, 2009 and 12:45 am on Tuesday, January 13, 2009, during Hooper's nap. (R.p. 95, ln. 10-20). Hooper did not lock the doors or windows to her house, and there were no signs that Meggett forced his way into the home. (R.p. 120, ln. 16-22; R.p. 171, ln. 6-9; R.p. 183, ln. 19-20). When Hooper finally awoke from her nap, Meggett was sitting on the edge of the foot of her bed. (R.p. 95, ln. 18-19; R.p. 98, ln. 24).

Upon Hooper's inquiry of why he was there, Meggett answered by asking Hooper whether she had the money that she previously borrowed in June 2008 to cover her bills. (R.p. 96, ln. 11-15; R.p. 125, ln. 5-7). Hooper responded she would get her financial aid funds by Friday of that week, and would pay him then. (R.p. 96, ln. 16-17). After purportedly saying he was going to take a down payment, a sexual encounter occurred. (R.p. 96, ln. 25 — p. 97, ln. 1).

As in their prior sexual encounter, Meggett sought to use a condom, but one was not available this time. (R.p. 98, ln. 6-7; R.p. 134, ln. 23-25). The sexual encounter took approximately fifteen minutes, during which Hooper later claimed she was fighting Meggett. (R.p. 64, ln. 1; R.p. 134, ln. 10-14).

Meggett later called Hooper's cellular phone, and learned she was at the hospital. (R.p. 100, ln. 13-17). After hearing she was in pain, Meggett apologized and later asked if he could be there with her. (R.p. 101, ln. 3-4, 10; R.p. 130, ln. 13-15, 20-22). Upon arrival

in the hospital lobby, Meggett was stopped by a uniformed officer, and placed under arrest shortly after. (R.p. 160, ln. 8-17; R.p. 216117, ln. 10-14). No visible marks or injuries were seen on Meggett. (R.p. 162, ln. 5-15; R.p. 200, ln. 16-23).

Hooper's physical complaints to the emergency room doctor included pain in her jaw and arm. (R.p. 286, ln. 15 – p. 287, ln. 7). Hooper's diagnosed injuries included tenderness in her jaw, and an abrasion visible under 3.75 times magnification in her posterior forchette area. (R.p. 287, ln. 1-7; p. 276, ln. 23-25; R.p. 280, ln. 13 – p. 281, ln. 7). Hooper did not complain of any pain regarding the latter diagnosis. (R.p. 281, ln. 5-6). Two and one-half months later, she had pain in her right shoulder. (R.p. 302, ln. 18-22). Finally, Meggett's DNA was not found under the fingernails of Hooper. (R.p. 247, ln. 4-12).

On the day of trial, Meggett's counsel was informed that a comforter existed upon which Meggett asserted he had another prior sexual encounter with Hooper while at his sister's home in the Charleston area. (R.p. 11, ln. 8-9; R.p. 12, ln. 4-14). The comforter was in storage. (R.p. 13, ln. 3-4; R.p. 14, ln. 11-15). Quick research for a DNA lab that could process the request revealed a private lab was available in Atlanta, or alternatively the State Law Enforcement Division (SLED) lab. (R.p. 13, ln. 4-5; R.p. 14, ln. 16-25). Meggett sought a continuance to acquire the comforter from storage and send it to a forensic lab for DNA testing, just as the State previously exercised its authority to move the trial date in order to test a blanket from Hooper's bed for DNA. (R.p. 13, ln. 7 – p. 14, ln. 2; p. 15, ln. 15-24). The trial court denied the motion, and the comforter was not tested to verify Hooper's DNA on it from another consensual sexual encounter with Meggett. (R.p. 17, ln. 7-21).

Meggett's defense at trial was not refutation of a sexual encounter; rather, his defense was that a sexual encounter indeed occurred, and it was consensual. (R.p. 11, ln. 11-25 – p. 12, ln. 3). Although Meggett did not testify, his counsel clearly stated this position and the circumstances under which the encounter occurred in his opening statement to the jury, without objection. (R.p. 84, ln. 17-20). During closing arguments, the State referred to a lack of evidence supporting what it interpreted to be Meggett's defense by making the following comment:

In case after case involving CSC, there is one singular tactic employed by the defense, and I don't fault Mr. Beattie for—Mr. Butler for doing it, but recognize it; and that is, attack the victim.

Attack the victim, call into question—and it's fine that Mr. Butler stands up here and goes I don't mean to say anything. He—that's precisely what he means. Her history of medication, the fact that she's poor, the fact that she lives in a house that doesn't really look like a middle class home. Calls her unstable, calls her a liar. In opening statement he implied, although there's no evidence of this, that somehow she's a prostitute, smear—

whereupon Meggett objected. (R.p. 363, ln. 9-21). The trial court later heard argument on the issue after the jury was already charged and retired; Meggett's objection was and his motions for curative instruction and mistrial denied. (R.p. 386, ln. 12 – p. 388, ln. 22).

The jury found Meggett guilty of both first degree burglary, and first degree criminal sexual conduct (CSC 1st). (R.p. 393, ln. 22-25; p. 394 ln. 6-7). The trial court sentenced Meggett to concurrent terms of 30 years imprisonment for each offense. (R.p. 406, ln. 13-18). This appeal follows.

ARGUMENT

- I. **The trial court erred by refusing Meggett's request for time to have a comforter examined for DNA, upon which he asserts a prior consensual sexual encounter occurred between him and the complaining witness, and which, if positive, would have discredited the complaining witness's testimony regarding their relationship and prior sexual encounters.**

The trial court abused its discretion when it denied Meggett's motion for continuance, which sought time to obtain and test newly discovered evidence which likely would have been material to Meggett's defense.

In State v. Tanner, 299 S.C. 459, 462, 385 S.E.2d 832, 834 (1989), our Supreme Court not only reiterated the standard of review governing motions for continuance,¹ but also restated the two primary factors considered when determining whether a motion for continuance is proper: (1) whether there was a showing of any other evidence on behalf of the defendant that could have been produced; and (2) whether any other points on his behalf could have been raised had more time been granted for the purpose of preparing the case for trial. Id. (quoting State v. Squires, 248 S.C. 239, 244, 149 S.E.2d 601, 603 (1966)). Therefore, if the defendant shows that any other evidence or points could have been produced or raised on his behalf if he had more time to prepare his case for trial, then a motion for continuance be granted.

Meggett readily met the first prong of analysis by showing other evidence could have been produced on his behalf to support his defense. On the morning of trial, Meggett's counsel moved for a continuance in order to test a comforter from Meggett's sister's home

¹ See State v. Tanner, 299 S.C. 459, 462, 385 S.E.2d 832, 834 (1989) ("A motion for continuance is addressed to the sound discretion of the trial court and its ruling on such motion will not be reversed without a clear showing of abuse of discretion.").

for Hooper's DNA. (R.p. 13, ln. 7 – p. 14, ln. 2; p. 15, ln. 15-24). Counsel learned of the comforter that same morning, and Meggett explained he and Hooper had a prior consensual sexual encounter upon it. (R.p. 11, ln. 8-9; R.p. 12, ln. 4-14). The bedding was in storage in the Charleston area. (R.p. 13, ln. 3-4; R.p. 14, ln. 11-15). Much as the State previously extended the time bringing the case to trial so it could test bedding from Hooper's room for DNA, Meggett's counsel sought time to acquire the newly discovered comforter and send it for testing either to an independent private lab in Atlanta, or to SLED. (R.p. 13, ln. 7 – p. 14, ln. 2; p. 15, ln. 15-24). Thus, evidence could have been produced on Meggett's behalf had more time been granted.

Meggett also met the second prong of analysis in that more points could have been raised on his behalf if more time was granted for the purpose of preparing the case for trial. Hooper's testimony was that she and Meggett had one—and only one—prior sexual encounter, and it was consensual. (R.p. 89, ln. 15 – p. 90, ln. 1; R.p. 103 ln. 20 – p. 104, ln. 15). Meggett's counsel contended the relationship between Hooper and Meggett included more than merely one prior sexual encounter, and sought to prove that point with the comforter in question. Meggett asserted the other prior consensual sexual encounter occurred with Hooper on a comforter in his nephew's room at his sister's house—the same house that Hooper reluctantly admitted Meggett showed her on at least one prior occasion. (R.p. 12, ln. 11-14; R.p. 122, ln. 13-19). Such evidence is expressly permitted in CSC 1st cases. See S.C. Code § 16-3-659.1(1) (West, Westlaw current through 2010); see also State v. Lang, 304 S.C. 300, 301, 403 S.E.2d 677, 678 (Ct. App. 1991) (holding the Rape Shield Statute has no application where the accused offers evidence impeaching the complaining witness's credibility). If the DNA tests came back

as Meggett fully expected, they would have revealed he and Hooper had a prior sexual encounter other than the one begrudgingly admitted to by Hooper in her testimony. In short, use of such evidence on cross-examination would have crippled Hooper's credibility, as she steadfastly denied any other sexual encounter with Meggett ever occurred. (R.p. 89, ln. 15-18; R.p. 142, ln. 23-25). Thus, a crucial argument could have been raised on Meggett's behalf if more time was granted for the purpose of testing the comforter.

Additionally, the evidence here was more than just evidence of a prior sexual relationship; rather, it was material evidence critical to the defense in a case hinging upon the credibility of one witness: Hooper. Therefore, Meggett was prejudiced by the trial court's denial of his motion for continuance. Accordingly, Meggett requests reversal of his convictions and remand for a new trial.

II. The State's reference during closing argument to a lack of evidence supporting its interpretation of the defense's theory impermissibly shifted the burden upon Meggett as an indirect comment on the defendant's right to remain silent.

During closing arguments, the State referred to "case after case involving CSC" to introduce what it said was the defendant's strategy in the present trial; the State accused Meggett's counsel of attacking the victim. (R.p. 363, ln. 9-19). Moreover, the State continued to further insinuate the defense strategy was to cast Hooper as a prostitute, and indicated Meggett failed to produce evidence of such a theory, when it maintained that Meggett's counsel "implied, although there's no evidence of this, that somehow she's a prostitute" (R.p. 363, ln. 18-21). In so doing, the State's comments violated Meggett's due process rights as an indirect comment on his right to remain silent, a comment likely to arouse the jurors' emotions, passions, or prejudices, and an imputation of his reliance on the reasonable doubt standard of proof. Therefore, the trial court abused its discretion when, after hearing Meggett's grounds for objection, it denied Meggett's motions for mistrial and curative instruction. (R.p. 386, ln. 6 -p. 388, ln. 22).²

The State's closing argument constituted an indirect comment on Meggett's right to remain silent. McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000) (citing Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976) (holding an accused's exercise of his right to remain silent cannot be used against him)). Generally, "the State may not comment on a defendant's exercise of a constitutional right." Id. (citing Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000)). Doyle violations in particular extend not only to direct comments by the State on a defendant's exercise of his right to remain silent, but also to

² State v. Liberte, 336 S.C. 648, 652-53, 521 S.E.2d 744, 746 (Ct. App. 1999) (indicating the abuse of discretion standard is proper for errors occurring in the solicitor's closing argument).

other indirect comments touching upon the same right. “Specifically, the solicitor must not comment, either directly or indirectly, on a defendant’s silence, failure to testify, or failure to present a defense.” Id. (emphasis added).

Here, the State indirectly commented on precisely what it was forbidden to address: Meggett’s failure to present a defense. At no time did Meggett present any testimony or evidence that Hooper was a prostitute; yet, the State indicated not only that Meggett’s defense was founded on that premise, but also that Meggett failed to produce evidence to support such an accusation. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (“The State’s closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.”). This trial tactic by the State was an impermissible comment indirectly addressing the defense’s failure to present a defense and failure to testify, as only Meggett’s testimony could have supplied the information necessary to rebut the State’s straw man argument. See McFadden, 342 S.C. at 640, 539 S.E.2d 391, 393.

Moreover, Meggett was prejudiced by the State’s impermissible comments. Four factors are considered whether a Doyle violation was harmless: (1) whether the reference to the defendant’s right to remain silent and not testify was singular or repeated; (2) whether the State tied the defendant’s silence directly to an exculpatory story; (3) whether the exculpatory story was totally implausible; and (4) whether the evidence of guilt was overwhelming. McFadden, 342 S.C. at 641, 539 S.E.2d 391, 393.

In the instant case, as in McFadden, the majority of factors readily show Meggett was prejudiced. Although the reference was only stated once,³ it was directly and inexorably tied to an exculpatory story: it was the State-supplied theory behind Meggett's defense of consent. Also, the story, if taken as Meggett's story explaining his defense of consent, was not totally implausible: Hooper borrowed money from Meggett to meet her bills; she struggled to meet her basic bills despite subletting to male roommates that failed to pay; she had another unknown source of DNA and male hair samples in addition to Meggett's on her bedroom blanket; and, despite her stated proclivities, she admitted to a previous consensual sexual encounter with Meggett at her house. (R.p. 90, ln. 4-23; R.p. 121, ln. 8 – p. 122, ln. 9; R.p. 248, ln. 2-13; R.p. 89, ln. 12-18; R.p. 103, ln. 21 – p. 104, ln. 3; R.p. 124, ln. 8-11). Finally, the evidence of guilt in the case was far from overwhelming: evidence that the sexual encounter was nonconsensual consisted of testimony from Hooper, tenderness to her neck and shoulder, and a microscopic abrasion that occurs equally as often in consensual encounters; as such, the case was essentially distilled to a question of one witness's credibility: Hooper. (R.p. 287, ln. 1-7; p. 266, ln. 23-25; R.p. 270, ln. 13 – p. 271, ln. 7; R.p. 272, ln. 4 – p. 273, ln. 2-4).

Further, no specific instruction was given to the jury to correct the tainted comments. See McFadden, 342 S.C. at 642, 539 S.E.2d 394 (“[T]he trial judge’s general charge to the jury on the right to remain silent did not cure the error.”); Pickens, 320 S.C. at 531, 466 S.E.2d at 366 (holding the trial court’s failure to give a curative instruction was not harmless error when there was not overwhelming evidence of guilt). Therefore, under the

³ See also State v. Pickens, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996) (reversing due to the State’s lone reference in its closing argument to the defendant’s failure to present evidence because the “exculpatory story of self-defense was not totally implausible and the evidence of guilt was not overwhelming.”).

circumstances of this case, a comment that Meggett failed to present evidence that Hooper consented—regardless of the reason for consent—constituted an indirect, impermissible comment on Meggett’s silence and failure to testify in a way “that so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Liberte, 336 S.C. at 658, 521 S.E.2d at 749.

Additionally, the State’s comments regarding trial strategies utilized in other CSC cases to “attack the victim” was likewise improper. See, e.g., State v. McAlister, 133 S.C. 99, 130 S.E. 511 (1925) (holding it is improper in closing argument for the State to refer to and comment about facts of other cases to indicate or suggest the same results). Such comments inappropriately injected fact and opinion to the jury not arising from testimony or other evidence presented in the current trial. See Vaughn, 362 S.C. at 169, 607 S.E.2d at 75 (“The State’s closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.”).

Finally, the “attack the victim” comments also constituted an improper appeal to the jury’s emotions and attempt to induce the jury to identify with Hooper, the key witness for the State in the trial. See, e.g., Liberte, 336 S.C. at 654 n.2, 521 S.E.2d at 747 n.2 (Ct. App. 1999) (noting a closing argument by the solicitor improperly appealed to the jury’s emotions and attempted to induce the jury to identify with the law enforcement officers in the case). As previously indicated, the evidence was less than overwhelming in this case which, at bottom, was founded upon the credibility of Hooper. Whether the State intended to inflame the jury’s passions or prejudices by its comments is irrelevant. Id. 336 S.C. at 657, 521 S.E.2d at 749. What is relevant is that the incendiary comments encouraged the jury to believe that Meggett’s defense—one based upon the foundational principles of testing the

State's evidence through the crucible of cross-examination, and holding the State to prove its evidence beyond a reasonable doubt—was not a credible defense to CSC. Succinctly stated, (1) Meggett “had a right to put the State to its proof,” and (2) “[i]t is impermissible for the State to argue in favor of guilt or punishment based upon the accused’s assertion of a constitutional right.” State v. Brown, 289 S.C. 581, 589-90, 347 S.E.2d 882, 887 (1986) (internal quotations omitted) (internal quotations omitted). The State’s inflammatory comments in closing argument trammelled over these principles.

Moreover, the trial court’s general charge to the jury did not likely cure the error; at a minimum, a specific curative instruction should have been given immediately as the evidence in the case was less than overwhelming. See, e.g. Id.; McFadden, 342 S.C. at 642, 539 S.E.2d 394; State v. Sweet, 342 S.C. 342, 536 S.E.2d 91, 95 (Ct. App. 2000) (holding the trial court’s general jury charge on defendant’s right not to testify was insufficient to cure the error when the evidence in the case was less than overwhelming). Thus, the State’s “attack the victim” argument prejudiced Meggett by “so infect[ing] the trial with unfairness as to make the resulting conviction a denial of due process.” Liberte, 336 S.C. at 658, 521 S.E.2d at 749.

The State attempted to justify its comments under Liberte as a legitimate attack on the credibility of a defense. (R.p. 387, ln. 10-15). However, Liberte was actually a case recognizing the principle that boundaries governing proper closing argument do exist and are to be enforced. Liberte, 336 S.C. 648, 653, 521 S.E.2d 744, 747 (“In this case, however, the prosecutor’s argument went far beyond the outer boundaries of proper closing argument.”). Indeed, Liberte forbids the type of closing argument advanced by the State in this case. Id. 336 S.C. at 654 n.2, 521 S.E.2d at 747 n.2.

The State further attempted to justify its comments regarding prostitution by characterizing the defense as a “sex for money type of arrangement.” (R.p. 387, ln. 15-18). Although Meggett mentioned in opening argument that he loaned Hooper funds to help her pay her bills, and that when they slept together he would forgive her debt, at no time did Meggett hurl inflammatory accusations of outright prostitution. (R.p. 82, ln. 7-10). Regardless, even if the State was attempting to respond to this statement of the defense made two days prior to closing arguments, the idea and doctrine of an invited response is not an excuse to improper comments; rather, the doctrine—if applicable—only determines the effect of improper comments on the trial as a whole. Vaughn, 362 S.C. at 169, 607 S.E.2d at 75.

The test to determine whether a defendant’s rights were violated is again whether the State’s comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id. 362 S.C. at 170, 607 S.E.2d at 75. The three factors considered are (1) whether the comment was an invited response to defense counsel’s argument, (2) whether the evidence against the defendant is overwhelming, and (3) whether the trial court cured the error by giving sufficient curative instructions to the jury. Id.

Even assuming without conceding that the comment by the State was an invited response, the evidence in the case, as previously discussed above, was far from overwhelming. Also, the trial court here refused to give a curative instruction, and instead relied upon the standard jury charge after closing arguments to cure any defects. This was inadequate to address the specific threat posed to a fair trial by the State’s improper comments. See, e.g. McFadden, 342 S.C. at 642, 539 S.E.2d 394; Pickens, 320 S.C. at 531, 466 S.E.2d at 366; Sweet, 342 S.C. at 536 S.E.2d at 95. Simply stated, the trial court failed

to address the particular dangers likely aroused by the State's comments in closing argument. Therefore, even if Meggett's statement invited some response, the State's response was unfair and ultimately prejudiced him in light of the lack of overwhelming evidence regarding the charges. Vaughn, 362 S.C. at 170, 607 S.E.2d at 75-76.

Accordingly, under the particular circumstances of this case, the trial court abused its discretion by refusing to grant a mistrial or even give a specific curative instruction. Meggett therefore requests reversal of his convictions, and remand for a new trial.

III. The trial court should have directed a verdict of not guilty for the offense of first degree burglary based upon a lack of evidence regarding Meggett's intent to commit a crime at the time he entered the dwelling.

Although inferences of a defendant's intent may be made from conduct, such inferences should only be made "in the absence of inconsistent circumstances." State v. Haney, 257 S.C. 89, 92, 184 S.E.2d 344, 345 (1971). In Meggett's case, inconsistent circumstances regarding his intent are readily present after his entry and before the sexual encounter; thus, the inference of intent based on the later encounter should not be permitted. In essence, in light of glaring inconsistent circumstances, the later sexual encounter was evidence that merely raised a suspicion of Meggett's guilt; by denying his directed verdict motion, the trial court wrongly permitted the jury to consider an implied belief or opinion of guilt as to first degree burglary based upon facts and circumstances not amounting to proof. See, e.g., State v. Bostick, Op. No. 26961 (S.C. Sup. Ct. Filed Apr. 11, 2011) (Shearouse Adv. Sh. No. 13 at 41; State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001).

Although inferences of a defendant's intent may be made from conduct, such inferences should only be made "in the absence of inconsistent circumstances." State v. Haney, 257 S.C. 89, 92, 184 S.E.2d 344, 345 (1971). In Meggett's case, inconsistent circumstances regarding his intent are readily present after his entry and before the sexual encounter; thus, the inference of intent based on the later encounter should not be permitted. In essence, in light of glaring inconsistent circumstances, the later sexual encounter was evidence that merely raised a suspicion of Meggett's guilt; by denying his directed verdict motion, the trial court wrongly permitted the jury to consider an implying a belief or opinion

of guilt as to first degree burglary based upon facts and circumstances which do not amount to proof. See, e.g., State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001).

“A defendant is entitled to a directed verdict when the state fails to produce evidence on a material element of the offense charged.” State v. Evans, 376 S.C. 421, 424, 656 S.E.2d 782, 783 (Ct. App. 2008) (citing State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004)). In circumstantial evidence cases, the trial court is required to submit the case to the jury “if there is ‘any substantial evidence’ which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.” State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) (emphasis in original) (quoting State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000)). However, the trial court “should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty.” Id. (affirming the Court of Appeals ruling that defendant was entitled to directed verdict); see also State v. Bostick, Op. No. 26961 (S.C. Sup. Ct. Filed Apr. 11, 2011) (Shearouse Adv. Sh. No. 13 at 41) (“Under settled principles, the trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt.”) Moreover, suspicion “implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” Lollis, 343 S.C. at 584, 541 S.E.2d at 256.

Accordingly, if the State’s circumstantial evidence of Meggett’s intent to commit a crime at the moment he entered Hooper’s house amounted to only to an implication of belief or opinion as to guilt, then it is mere suspicion not amounting to proof: it is not “substantial evidence” reasonably tending to prove his guilt, and thus fails as evidence of a material element of the offense. Under these circumstances, Meggett is entitled to a directed verdict.

To prove the offense of first degree burglary, the State must show that Meggett (1) entered Hooper's dwelling house, (2) without her consent, (3) with the intent to commit a crime therein, and (4) accompanied by at least one additional circumstance, including that the entry occurred at night. S.C. Code 16-11-311 (West, Westlaw current through 2010). Focusing on third element, the controlling moment is the time Meggett crossed the threshold. State v. Peterson, 336 S.C. 6, 7, 518 S.E.2d 277, 278 (Ct. App. 1999) (internal quotations omitted) (citing 12A C.J.S. Burglary § 41, at 239 (1980)). It is irrelevant if Meggett formed an intention to commit a crime once inside; the focal point of analysis is and must be at the time Meggett entered the dwelling, for it is at that moment precise the crime of first degree burglary is consummated. Id.

Absent admission by the defendant, "proof of intent rests on inference from conduct." State v. Haney, 257 S.C. 89, 91, 184 S.E.2d 344, 345 (1977). For example, in Haney, the Supreme Court stated that the inference permitted by an unexplained breaking and entry occurring at night is itself evidence of intent to commit larceny. Id. 257 S.C. at 92, S.E.2d at 345. However, such inferences are only allowed "in the absence of inconsistent circumstances." Id. This is because "the inference is grounded in human experience which justifies the assumption that the unlawful entry was not purposeless, and, in the absence of other proof, indicates theft as the most likely purpose." Id. Therefore, the inference is only allowed when other proof indicating a different motive or intent for entering is present.

Similarly, the defendant's actions after entry can equally form the basis of an inference regarding the defendant's intent at the moment of entry. State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). For example, in Pinckney, a defendant violently

broke into the victim's home, smashed objects inside—including an oil lamp—while barricading himself in a bathroom, and threatened to harm the responding officers and “to light the place up.” Id. 339 S.C. at 348, 529 S.E.2d at 527 (internal quotations omitted). Although Pinckney ostensibly claimed he entered the house because he believed people were chasing him, such a circumstance was actually consistent with his subsequent actions of malicious injury to property, arson, and assault: he barricaded himself inside and attempted to keep away those whom he believed were chasing him. Id. Accordingly, these actions occurring immediately after Pinckney's entry permitted an inference to show his intent to commit a crime at the time of entry. Id. 339 S.C. at 349, 529 S.E.2d at 527.

The facts in State v. Peterson likewise adhered to the same principle. Id. 336 S.C. at 8, 518 S.E.2d 277 (1999). There, the State was permitted to use the defendant's actions occurring immediately after his entry into the victim's home to infer his intent at the time of entry. Id.

What is noticeably absent from both Pinckney and Peterson is the presence of inconsistent circumstances indicating a different motive or intent for entering other than that inferred from the defendants' immediately subsequent crime. This understanding even applies to the hypothetical example provided in Pinckney, which indicated an inference of intent may be made if a defendant enters a house and commits criminal sexual conduct, even though no specific evidence was presented that he intended to commit the act at the time of entry. Id. 339 S.C. at 349, 529 S.E.2d at 527. Under this scenario, as in the actual facts of Pinckney and Peterson, the act occurs in the absence of inconsistent circumstances (i.e.—there is no specific evidence to the contrary). Therefore, the inference of intent is permissible under the circumstances.

Yet, permissible inferences based on the defendant's actions can and should logically survive only "in the absence of inconsistent circumstances." Haney, at 92, 345. This interpretation is wholly consistent with the directed verdict standard of review, which deems circumstantial evidence that merely raises suspicion of guilt as insufficient to pass muster as "substantial evidence," and warranting judgment in favor of the defendant as a matter of law. Mitchell, 341 S.C. at 409, 535 S.E.2d at 127; Lollis, 343 S.C. at 584, 541 S.E.2d at 256.

In the present case, the evidence against Meggett regarding the specific element of intent for the charge of first degree burglary is entirely circumstantial: it is solely based on the inference that he intended to commit CSC 1st at whatever undetermined moment he entered Hooper's house. Importantly, the inferential event occurs only after inconsistent circumstances were decidedly present: (1) Meggett arrived at Hooper's house at an unknown time between 6:00 p.m. and 12:45 am; (2) he entered the unlocked house of his friend; (3) he waited for an undetermined amount of time for Hooper to wake up; and (4) the first thing that happens after Hooper awakes is not a rape, but a conversation about her paying the money she owed Meggett since June, and that she still owed before she left town for a month. These specific circumstances are inconsistent with an inference that Meggett intended to commit the crime of CSC 1st at the moment he crossed Hooper's threshold. Therefore, this inference should not be permitted. Cf. Haney.

Moreover, to permit this inference to satisfy the requisite element of intent for first degree burglary is to permit guilt based upon facts or circumstances not amounting to proof, which in itself is impermissible. Mitchell, 341 S.C. at 409, 535 S.E.2d at 127; Lollis, 343 S.C. at 584, 541 S.E.2d at 256. Thus, submission of the first degree burglary charge to the

jury was error. Further, Meggett was clearly prejudiced by this error: the jury found him guilty of first degree burglary when a material element of the offense was based upon circumstantial evidence not amounting to proof. Accordingly, a directed verdict should have been granted. Meggett therefore requests a directed verdict of acquittal on the charge of first degree burglary.

CONCLUSION

For the forgoing reasons, Meggett respectfully requests a new trial on both convictions (Issues I and II), and a directed verdict of acquittal on the charge of first degree burglary (Issue III).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen R. Stevens", written over a horizontal line.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of November, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

A handwritten signature in black ink, appearing to read "Breen R. Stevens", with a long horizontal flourish extending to the right.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

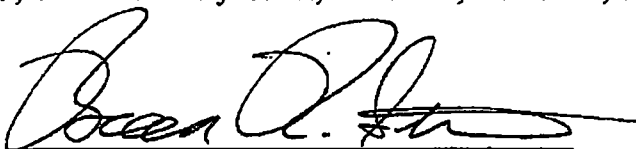
V.

DAVID LEE MEGGETT,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 14th day of November, 2011.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of November, 2011.


(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Kristi Lea Harrington, Circuit Court Judge

THE STATE,

Respondent,

vs.

DAVID LEE MEGGETT,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge did not abuse her broad discretion in denying Appellant's continuance motion raised for the first time on the morning of trial because Appellant did not exercise due diligence in attempting to obtain the desired evidence prior to trial and the existence of the evidence was highly speculative.

II.

The trial judge did not abuse her discretion in denying Appellant's motion for a mistrial and request for a curative instruction based on the solicitor's allegedly improper closing argument because the solicitor's remarks were not improper, did not constitute a comment on Appellant's constitutional rights, and resulted in no prejudice to Appellant.

III.

The trial judge properly denied Appellant's directed verdict motion as to the first-degree burglary charge because substantial evidence was presented establishing Appellant's guilt for each element of the offense, including that Appellant possessed an intent to commit a crime at the time he unlawfully entered the victim's home.

STATEMENT OF THE CASE

In January of 2009, Appellant David Lee Meggett was arrested after visiting the victim of a reported sexual assault in the hospital. In June of 2009, the Charleston County grand jury indicted Appellant for one count each of first-degree burglary and first-degree criminal sexual conduct. On November 8, 2010, a jury trial was commenced in the Charleston County court of general sessions with the Honorable Kristi Lea Harrington, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. The trial judge sentenced Appellant to concurrent terms of imprisonment of thirty years for each offense. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

In August of 2005, Stacy Hooper ("Victim") moved to Charleston to attend school at the College of Charleston. (R. pp. 86-87). In 2007, she moved into a house on Grimke Street in North Charleston and lived there with her girlfriend, Sky. (R. p. 87; p. 116). Through Sky, Victim met a man who called himself "Mike" in April of 2008. (R. pp. 87-88). Initially, "Mike" came over to their house several times a week to hang out with Sky. (R. p. 140). However, in May of 2008, Sky and Victim ended their relationship, and Sky moved out. (R. p. 87; p. 90). After Sky left, Victim began to see "Mike" only occasionally every few months. (R. p. 90). On one occasion, "Mike" loaned Victim \$200 to help with the payment of her power bill. (R. p. 90; p. 117). On other occasions, "Mike" drove Victim around to help her find work, attempted to fix her car once, and loaned her a rented truck. (R. p. 90; pp. 117-119). In August of 2008, Victim had consensual sex with "Mike" while she was intoxicated.¹ (R. p. 89; pp. 103-104; p. 124; p. 142). The sexual encounter was very brief and ended when she asked "Mike" to stop. (R. pp. 89-90; p. 104; p. 108).

At the end of 2008, Victim briefly went home to Greer, South Carolina. (R. p. 94). She returned to Charleston in January of 2009 to get ready for her next semester of school. (R. pp. 94-95). On the day after she returned to Charleston, Victim prepared for school by scheduling her classes and arranging for financial aid. (R. p. 95). She returned home around 6:00 p.m., changed into her pajamas, and accidentally fell asleep on her bed. (R. p. 95). However, Victim failed to lock the door to her house before falling asleep. (R. p. 120).

¹ Victim testified this earlier sexual encounter occurred in a different bed with a different comforter than the bed Victim was in during the sexual assault that resulted in the charges against Appellant. (R. pp. 108-109).

Around 12:45 a.m., Victim woke up to find "Mike" sitting on the edge of her bed. (R. p. 95). Victim was scared and confused because she did not know why "Mike" was there. (R. p. 96). Victim had not spoken with "Mike" in a month, and "Mike" did not have permission to be in Victim's home and was not invited over. (R. p. 96; p. 105). Frightened, Victim asked "Mike" what he was doing there. (R. p. 96). "Mike" "stared off for a minute" and then asked her about the money she borrowed from him. (R. p. 96). Victim informed "Mike" she would pay him when she received her financial aid money at the end of the week. (R. p. 96). "Mike" then moved towards Victim and told her he was going to take a down payment at that time. (R. pp. 96-97).

Suddenly, "Mike" pulled Victim's covers away, grabbed her by the neck, held her against the wall and bed, straddled her, and attempted to forcibly remove her pants. (R. p. 97). Victim struggled with "Mike," called him an asshole, and yelled for him to stop. (R. p. 97). "Mike" responded by increasing pressure on Victim's neck, removing her pants, and forcing her legs apart. (R. p. 97). "Mike" then penetrated Victim's vagina with his penis. (R. p. 98; p. 103). Victim asked "Mike" to stop, but he pulled her arm behind her back, told her friends don't call friends assholes, and ordered her to apologize to him. (R. p. 98). Victim apologized when "Mike" began choking her harder. (R. p. 98). "Mike" then released Victim's arm and "finished." (R. p. 98). Victim was unsure if "Mike" ejaculated during the assault. (R. p. 98). After the sexual assault was over, "Mike" asked for a towel, took one, and left. (R. p. 99).

Scared and unsure what to do, Victim locked the windows and doors and called her mother. (R. p. 99). In the early morning hours of January 13, 2009, April Rice was at her home in Greer when she received a phone call from her daughter, Victim, who was crying and upset. (R. pp. 149-150). Victim told her mother she was raped. (R. p. 150).

While Victim was on the phone with her mother, "Mike" knocked on Victim's window, admitted he was wrong, and told her not to worry about the debt she owed him. (R. p. 103; p. 135). Rice instructed Victim to immediately go to the hospital, and Victim quickly drove herself there. (R. pp. 99-100; p. 151).

After Victim arrived at the hospital, Dr. Joseph Bianco, an expert in emergency medicine, attended to her.² (R. pp. 285-286; p. 287). Victim informed the doctor she was sexually-assaulted and complained of pain in her arm and jaw. (R. p. 286). Upon examination, Dr. Bianco discovered bruising and tenderness in those areas.³ (R. pp. 287-288; p. 295). He believed Victim's injuries were consistent with Victim being grabbed or squeezed in the face or neck. (R. p. 288). Based on Victim's statements, the police were contacted and alerted of the reported sexual assault. (R. p. 100; p. 125; p. 155; p. 165).

In response, Officer Robert Gooding and Sergeant Eric Jourdan of the North Charleston Police Department were dispatched to the hospital and met with Victim in her hospital room. (R. p. 155; pp. 165-166). Victim was sad and upset, and she reported the details of the assault to the officers. (Tr. p. 212). Victim then began receiving incoming calls on her phone, and she identified the caller as "Mike," the person who raped her. (R. pp. 100-101; p. 157; p. 166). Victim told "Mike" she was at the hospital, and "Mike" apologized and said he wanted to visit her there. (R. pp. 100-101; p. 159; p. 167). "Mike" repeatedly encouraged Victim to leave the hospital and inquired if she was going to reveal what happened to the doctors. (R. pp. 101-102). One of the officers instructed Victim to ask the caller to come to the hospital, and "Mike" said he would come visit

² At the time he treated her, Dr. Bianco reported Victim was 5'7" tall and weighed approximately 115 pounds. (R. p. 289).

³ Detective Randy Gray, an officer with the North Charleston Police Department, met with Victim one day after the incident. (R. p. 197). Detective Gray testified Victim's injuries to her neck were significantly more visible that day, with prominent dark bruising visible around her neck. (R. pp. 197-198).

Victim there. (R. p. 102; p. 158; p. 177). The officers then set up surveillance and waited for the caller to arrive. (R. p. 168).

Shortly thereafter, Appellant David Lee Meggett arrived at the hospital and stated he was there to see Victim. (R. p. 160). Officer Gooding detained Appellant and took possession of his identification. (R. p. 160). He then showed Appellant's identification to Victim, and she identified Appellant as "Mike," the rapist, without any hesitation. (R. p. 102; p. 161). However, Victim informed the officers she did not know Appellant by the name listed on his identification. (R. p. 102). Appellant was then placed under arrest. (R. p. 161).

Later that morning, Victim was taken to the M.U.S.C. Women's Center for a sexual assault examination. (R. p. 102; pp. 265-266). Faye LeBoeuf, a nurse and expert in sexual assault examinations, performed a pelvic exam on Victim following the incident. (R. pp. 263-264; p. 266). LeBoeuf discovered a small abrasion in Victim's vagina consistent with a forced sexual assault. (R. pp. 266-267). She determined the abrasion likely occurred within the preceding twenty-four to seventy-two hours. (R. p. 268). However, she noted Victim's injuries could also have potentially been consistent with consensual sex or other causes. (R. p. 272). LeBoeuf further found no evidence of bruising or contusions on Victim's thighs and no redness, swelling, lacerations, or tears. (R. p. 275). However, LeBoeuf noted injuries were not always present in sexual assaults. (R. p. 281).

Meanwhile, officers went to the incident location and collected a comforter and blanket from Victim's bed. (R. pp. 169-170; p. 176). Furthermore, officers secured a D.N.A. sample from Appellant along with Appellant's phone records. (R. pp. 186-187; pp. 193-194). Appellant's phone records confirmed Appellant placed five calls to Victim

on the night of the incident while she was at the hospital with officers present. (R. pp. 196-197).

Subsequently, Jennifer Clayton, an expert in D.N.A. analysis with S.L.E.D., analyzed the evidence gathered in the case. (R. p. 235). Clayton examined three samples taken from Victim's comforter and discovered the presence of semen in all three samples. (R. pp. 239-240). After comparing the D.N.A. profiles from the samples with D.N.A. profiles of Victim and Appellant, Clayton discovered Appellant was the major D.N.A. contributor in two of the comforter samples and the only D.N.A. contributor in the other sample. (R. pp. 241-242). Clayton further determined Victim was excluded as a contributor in the samples and found the presence of an unknown minor contributor in the second sample tested. (R. pp. 241-242; p. 248). Clayton also located a hair from an unknown male on the comforter. (R. p. 248). She concluded the odds of a person randomly matching Appellant's D.N.A. profile were one-in-eleven-quintillion. (R. p. 242). Additionally, Clayton tested a vaginal sample collected from Victim during the sexual assault examination and discovered the presence of semen. (R. p. 246; pp. 258-259). However, she was unable to develop a D.N.A. profile from the sample and could not identify the sample as from Appellant. (R. p. 246; pp. 258-259). Furthermore, Clayton found no D.N.A. from Appellant under Victim's fingernails. (R. p. 247).

At the conclusion of the investigation, Appellant was indicted for first-degree burglary and first-degree criminal sexual conduct, and he proceeded to trial. (R. pp. 20-21; pp. 409-412). At the outset of trial, defense counsel moved for a continuance "because of developments within the last 30 minutes[.]" (R. p. 11). Defense counsel stated the parties agreed Victim and Appellant had consensual sex on one prior occasion but noted Appellant and Victim disagreed as to whether the consensual encounter was a

single isolated incident or a repeated event. (R. pp. 11-12). Defense counsel asserted he had his first detailed discussion with Appellant about the D.N.A. evidence in the State's possession on the Saturday before trial.⁴ (R. p. 12). Subsequently, on the morning of trial, defense counsel stated Appellant raised the issue of having a comforter from his nephew's bed in his sister's house tested for D.N.A. evidence based on Appellant's claim he had consensual sex with Victim in the bed in the months leading up to the incident. (R. p. 12). Defense counsel asserted the comforter was in storage and would be critical to the credibility of Victim if the evidence was there. (R. pp. 12-13). Defense counsel then stated: "For what it's worth, I think [Appellant] really thinks that the evidence would be there, so I feel like I have to ask for a continuance." (R. p. 14).

In rebuttal, the solicitor asserted nearly two years had elapsed since the alleged incident occurred, Appellant had notice the trial was to be scheduled since late May or early June, and Appellant had failed to raise the issue until the morning of trial. (R. pp. 15-16). Based on the speculative nature of the evidence and the fact it was not involved with the incident itself, the solicitor argued the motion should be denied. (R. p. 16).

After considering the arguments from counsel, the trial judge denied Appellant's continuance motion. (R. p. 17). In support of the ruling, the trial judge identified the following relevant considerations: (1) the case had been on the trial docket; (2) the incident occurred in January of 2009; (3) it was speculative as to whether there may be something on the comforter; and (4) the comforter had no direct connection to the case other than to Victim and Appellant's prior sexual relationship. (R. p. 17).

Subsequently, after all of the pre-trial matters were addressed, the parties made their opening statements to the jury. (R. pp. 76-86). During Appellant's opening

⁴ The trial began on Monday, November 8, 2010. (R. p. 11).

statement, defense counsel argued to the jury that “[Victim] and [Appellant] struck a sort of less than desirable but informal arrangement. They began to sleep together, and [Appellant] would forgive her debt, and it had happened more than once.” (R. p. 82).

Defense counsel further claimed:

[W]hen [Victim] didn’t have the money, they went back to their old ways and their old arrangement, and they had sex, consensual sex. It didn’t last long. [Appellant] soon into it realized that this arrangement wasn’t working for him and that he wanted the money that he was owed, and he stopped. He said I don’t want to do this anymore, I want the money that you owe me. [Victim] said she no longer owed him any money because they slept together. They didn’t agree whether the debt still was outstanding or whether it had been paid. She said, well, I slept with you, I don’t owe you anything. He says, well, you really didn’t.

(R. pp. 82-83). As the argument continued, defense counsel reiterated: “They had sex, and [Victim] thought that squared their debt, and [Appellant] didn’t, and that’s it. That’s what happened.” (R. p. 84).

As the trial continued, Victim and the other witnesses testified about the sexual assault and the resulting law enforcement investigation. At the close of the State’s case, Appellant moved for a directed verdict, with defense counsel asserting “there’s a decent argument to be made for the burglary.” (R. p. 309). Defense counsel argued: “The victim testifies that when he comes in he’s asking for the money that he owes her – she owes him. That would be all I have to say in that respect.” (R. p. 309). The trial judge denied the directed verdict motion, finding evidence had been presented as to each element of the indicted offenses. (R. pp. 311-312). Following the trial judge’s ruling, Appellant did not testify in his own defense, did not offer any other testimony or evidence, and rested his case. (R. pp. 314-315).

Subsequently, during Appellant’s closing argument, defense counsel asserted Victim was living in poor conditions and stated “desperate times call for desperate

measures.”⁵ (R. p. 340). During the State’s closing argument, the solicitor made the following statements:

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

(R. p. 363). Defense counsel then objected and argued the solicitor’s statements were burden shifting while referring to Doyle v. Ohio. (R. p. 363). The trial judge agreed to hear argument on the objection at the appropriate time. (R. pp. 363-364). The solicitor then proceeded with his closing argument. (R. pp. 364-368).

Following the closing arguments, the trial judge charged the jury on the law. (R. pp. 368-384). During the jury charge, the trial judge instructed the jury a defendant is not required to prove his innocence, the State has the burden of proving guilt beyond a reasonable doubt, and the fact Appellant did not testify cannot be used against him. (R. pp. 371-372; pp. 375-376). Furthermore, the trial judge repeated the instruction that Appellant’s silence could not be used against him for emphasis. (R. pp. 375-376). Subsequently, after the jury began deliberating, defense counsel further explained his objection to the solicitor’s closing argument. (R. p. 386). Defense counsel asserted he did not use the word “prostitute” to describe Victim and claimed the solicitor’s comment on the defense’s lack of presenting evidence was burden shifting. (R. pp. 386-387).

Defense counsel then moved for a mistrial, moved for a curative instruction, and objected

⁵ The State had the right to present the last closing argument because Appellant introduced evidence during trial. (R. pp. 109-111; pp. 204-205; p. 325).

to any curative instruction given. (R. p. 387). In rebuttal, the solicitor argued he properly attacked the credibility of the defense, which was that Victim was involved in a sex-for-money arrangement, and his comments did not rise to the level of shifting the burden of proof. (R. p. 387). The solicitor further noted the jury instructions following closing arguments clarified which party carried the burden of proof for the jury. (R. pp. 387-388). Defense counsel then reiterated his objection was solely to the solicitor's comment the defense had presented no evidence of something. (R. p. 388).

After considering the arguments of counsel, the trial judge denied Appellant's mistrial motion and request for a curative instruction. (R. p. 388). The trial judge determined the solicitor's comments did not shift the burden of proof and the jury had been twice instructed the statements of counsel during arguments were not to be considered as evidence.⁶ (R. p. 388). Subsequently, the jury convicted Appellant as indicted. (R. pp. 393-394). The trial judge then sentenced Appellant to an aggregate term of imprisonment of thirty years. (R. p. 406; pp. 413-414).

⁶ Before counsel presented their opening and closing arguments, the trial judge instructed the jury that the parties' statements were not to be considered as evidence. (R. p. 28; p. 326).

ARGUMENT

I.

The trial judge did not abuse her broad discretion in denying Appellant's continuance motion raised for the first time on the morning of trial because Appellant did not exercise due diligence in attempting to obtain the desired evidence prior to trial and the existence of the evidence was highly speculative.

Appellant argues the trial judge erred in denying his request for a continuance. Although he admittedly waited until the morning of trial to make the request, Appellant maintains he could have produced critical evidence that may have damaged the victim's credibility if his motion had been granted and he had been provided more time. The trial judge did not abuse her discretion in denying Appellant's continuance motion. Appellant failed to make any efforts to obtain the allegedly critical evidence prior to trial and merely speculated as to whether probative evidence might actually be found. Appellant did not present sufficient grounds justifying the grant of a continuance directly before his trial was set to begin. Appellant's conviction should be affirmed.

A decision on whether to grant or deny a motion for continuance rests in the sound discretion of the trial court. State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). Appellate courts in South Carolina typically show great deference to the trial judge regarding these decisions. State v. Colden, 372 S.C. 428, 435, 641 S.E.2d 912, 916 (Ct. App. 2007). The denial of a motion for continuance will not be disturbed on appeal absent a clear abuse of discretion. State v. Ravenell, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010). "The granting or refusal of a motion for continuance is within the discretion of the trial judge and his disposition of such a motion will not be reversed on appeal unless it is shown that there was an abuse of discretion to the prejudice of appellant. . . . [R]eversals of refusal of continuance are about as rare as

the proverbial hens' teeth." State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957) (emphasis added).

In the case sub judice, the trial judge did not abuse her broad discretion in denying Appellant's belated motion for a continuance. Nearly two years after Appellant was arrested and approximately seven months after he had been notified his case would be placed on the trial docket, Appellant moved for a continuance to obtain testing on a comforter he allegedly had sexual intercourse with the victim on several months before his arrest. Notably though, Appellant did not mention this allegedly "vital" evidence to his trial counsel until thirty minutes before the trial was scheduled to begin.

Although Appellant had a significant period of time to obtain any testing on his nephew's comforter that he believed might be necessary or critical to his defense, he elected not to avail himself of this opportunity. Instead, he waited until the morning of trial to first notify his counsel of this allegedly key information. See Colden, 372 S.C. at 439, 641 S.E.2d at 918-919 ("It is paramount that the party asking for the continuance show due diligence was used in trying to procure the absent witness."). Appellant's failure to obtain the allegedly favorable evidence prior to trial was attributable solely to his own inaction and lack of diligence and not to a lack of opportunity or preparation time. Cf. State v. Register, 323 S.C. 471, 482, 476 S.E.2d 153, 160 (1996) ("The parties knew in September that this case was set for trial in January and full discovery had been afforded to Register from September forward. The fact that Register's counsel waited until the middle of December to investigate the evidence does not warrant a continuance."). Therefore, the trial judge did not abuse her discretion in denying Appellant's continuance motion raised for the first time on the eve of trial without excuse or justification for the belatedness of the request. See Yarborough, 363 S.C. at 266, 609

S.E.2d at 595 ("The party asking for the continuance must show due diligence was used in trying to procure the testimony of an absent witness as well as set forth what the party believes the absent witness will testify to and the grounds for that belief." (emphasis added)); see also State v. Babb, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989) ("The record in this case clearly establishes any shortage of time to prepare a defense was not the fault of the trial judge or the State, but rather the fault of Babb in failing to act. We find that the trial judge did not abuse his discretion in denying the motion for a continuance."); State v. Homewood, 241 S.C. 231, 241, 128 S.E.2d 98, 102 (1962) (finding no abuse of discretion in the trial judge's denial of a motion for continuance when the defendant made no effort to obtain the information sought during the months the trial was pending).

Furthermore, notwithstanding Appellant's unjustified and unexplained delay in attempting to obtain the evidence prior to trial, the evidence Appellant sought was simply too speculative to support the granting of a continuance. Appellant claimed he had sexual intercourse with the victim once on his nephew's comforter some months before his arrest. At some point during the next two years, his nephew's comforter was allegedly placed into storage. Although Appellant "really thought" important evidence might be on the comforter, there was no evidence or testimony presented to support this belief. Appellant did not offer any evidence to prove the comforter was placed into storage shortly after he slept on it, did not offer any evidence to suggest other people had not used the comforter, and did not present any evidence to show the comforter was not washed or cleaned at some point in the two years prior to trial. Based on the information provided by Appellant, there was no reliable reason to believe any probative evidence would be located on the comforter other than Appellant's speculative belief it might be

there.⁷ See, e.g., State v. Files, 5 S.C.L. (3 Brev.) 304 (S.C. Const. Ct. App. 1812)

(“[T]he only ground insisted on, was, the refusal of the [circuit court], to postpone the trial, on affidavits which stated the absence of material witnesses for the prisoner, who were beyond the limits of this state. If trials for capital offences should be postponed, on affidavits of this sort, very few cases would ever be tried at all[.]”). For this reason coupled with Appellant’s unjustifiable inaction in attempting to obtain the evidence prior to requesting the continuance, the trial judge did not abuse her discretion in denying Appellant’s continuance motion. See State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996) (“The trial court’s refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion.”). Appellant’s conviction should be affirmed.

⁷ Notably, demonstrating the difficulty in finding D.N.A. evidence on a comforter, testing did not reveal the presence of the victim’s D.N.A. on her own comforter taken off her own bed even though officers secured the comforter shortly after the victim reported the crime. (R. pp. 169-170; p. 176; pp. 241-242; p. 248).

II.

The trial judge did not abuse her discretion in denying Appellant's motion for a mistrial and request for a curative instruction based on the solicitor's allegedly improper closing argument because the solicitor's remarks were not improper, did not constitute a comment on Appellant's constitutional rights, and resulted in no prejudice to Appellant.

Appellant asserts the trial judge abused her discretion in denying his mistrial motion and request for a curative instruction based upon allegedly improper comments by the solicitor during his closing argument. Appellant maintains the solicitor's remarks referring to the fact no evidence was presented to suggest the victim was a prostitute violated his Fifth Amendment rights by constituting an indirect comment on his failure to present a defense and failure to testify. To the contrary, the solicitor's remarks during his argument were a proper comment on the evidence presented and not presented during the trial and did not implicate Appellant's constitutional rights. Additionally, the solicitor's comments were properly made in reply to unsupported and inappropriate allegations raised by defense counsel during his opening argument that were subsequently not supported by any evidence or testimony during trial. Furthermore, Appellant suffered no prejudice as a result of the solicitor's remarks because they were only directed towards allegations the jury could not appropriately consider and because the jury was properly instructed on the burden of proof and Appellant's right to remain silent. Appellant's trial was not rendered fundamentally unfair by the solicitor's closing argument, and Appellant failed to establish sufficient grounds to warrant the extreme measure of the declaration of a mistrial. Therefore, Appellant's conviction should be affirmed.

Under the United States and South Carolina Constitutions, criminal defendants have a constitutional right not to be compelled to incriminate themselves during trial. See U.S. Const. amend. V (prohibiting a criminal defendant from being "compelled in

any criminal case to be a witness against himself[.]”); S.C. Const. art. I, § 12 (“[N]or shall any person be compelled in any criminal case to be a witness against himself.”). Accordingly, this right forbids both comments by the prosecution on a defendant’s silence and instructions by the trial judge indicating a defendant’s silence constitutes evidence of guilt. Griffin v. California, 380 U.S. 609, 615 (1965). “As a corollary of this right, a prosecutorial comment, whether direct or indirect, upon a defendant’s failure to testify at trial is constitutionally impermissible.” State v. Weaver, 361 S.C. 73, 88-89, 602 S.E.2d 786, 794 (Ct. App. 2004).

“Specifically, the solicitor must not comment, either directly or indirectly, on a defendant’s silence, failure to testify, or failure to present a defense.” McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000). In determining whether a solicitor’s remarks constitute a comment on a defendant’s failure to testify, courts generally ask: “Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?” United States v. Anderson, 481 F.2d 685, 701 (4th Cir. 1973). In considering this issue, the solicitor’s remarks must be evaluated in the context in which they were made. See Weaver, 361 S.C. at 89, 602 S.E.2d at 794 (“In making this determination, we must examine the alleged impropriety in the context of the entire record.”).

In reviewing the propriety of the solicitor’s remarks to the jury, it is a well-settled principle that the trial court has wide discretion in ruling on the appropriateness of a closing argument. State v. Raffaldt, 318 S.C. 110, 114-115, 456 S.E.2d 390, 393 (1995); see State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (“The trial court has broad discretion when dealing with the propriety of the solicitor’s argument.”). Appellate courts will not disturb the trial court’s ruling regarding a closing argument

unless there is a clear abuse of discretion. State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003). "It is sometimes difficult to draw the line between proper and improper argument, but counsel's remarks must be confined within the record. However, some latitude must necessarily be allowed and it must, to a large extent, be left to the wide discretion of the Circuit Judge." State v. Edgeworth, 239 S.C. 10, 14, 121 S.E.2d 248, 250 (1961).

Appellate courts will review the alleged impropriety of an opening or closing argument in the context of the entire record and must determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of the defendant's due process rights. Rudd, 355 S.C. at 550, 586 S.E.2d at 157. The appellant has the burden of proving the allegedly improper argument rendered the trial fundamentally unfair. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). "[I]t is not enough that the remarks were undesirable or even universally condemned." Darden v. Wainwright, 477 U.S. 168, 181 (1999). Appellate courts should be "careful and critical" in finding allegedly improper statements of counsel to be reversible error, and "[e]very case must necessarily depend upon its own particular circumstances." State v. Gilstrap, 205 S.C. 412, 415, 32 S.E.2d 163, 164 (1944).

In Appellant's case, at several points during defense counsel's opening argument to the jury, defense counsel informed the jury that Appellant and the victim had entered into an arrangement, which was allegedly carried out on multiple occasions, where the victim would engage in consensual sex with Appellant and Appellant would forgive the

debts she owed him. Then, during his closing argument, defense counsel alluded to these remarks by referring to the victim's living conditions and asserting "desperate times call for desperate measures." Subsequently, during the State's closing argument, the solicitor commented: "In opening statement [defense counsel] implied, although there's no evidence of this, that somehow [Victim]'s a prostitute[.]" Following these comments, Appellant objected to the propriety of the solicitor's argument. However, the solicitor's remarks were not improper and did not constitute a direct or indirect comment on Appellant's Fifth Amendment right against self-incrimination.

Initially, the solicitor's statement that there was no evidence the victim was a prostitute was simply a comment on the evidence presented during trial and not a comment on Appellant's constitutional right to remain silent and not present a defense. Unquestionably, the solicitor was permitted to comment on the evidence adduced during trial and the inferences to be drawn from it. See State v. Pitts, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971) ("The solicitor had a perfect right to state his version of the testimony and to comment on the weight that should be given to such."). Looking to the context in which the remarks were made, the solicitor did not state Appellant failed to present any evidence, did not claim Appellant did not present a defense, and did not suggest to the jury an adverse inference should be drawn against Appellant based on his failure to present evidence or failure to testify. See Johnson v. State, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) ("In context, the comment was simply a statement of the evidence which was before the jury, rather than a comment on Johnson's failure to testify. As such, it is distinguishable from the typical 'comment' in which the clear implication is that the defendant has failed to explain the circumstances of the crime or has shown no remorse.").

Instead, the solicitor merely commented on the evidence presented along with the lack of evidence supporting an improper inference the victim was a prostitute. See State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (“ ‘[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.’ ” (citations omitted)); State v. Liberte, 336 S.C. 648, 653, 521 S.E.2d 744, 746 (Ct. App. 1999) (“Certainly, a prosecutor is entitled to call into question the credibility of a defense.”). The solicitor’s remarks were not improper and were merely designed to urge the jury to avoid drawing an inference not supported by the evidence. Therefore, in the context the statements were made, the solicitor’s closing argument did not violate Appellant’s constitutional right against self-incrimination.

The underlying purpose behind the prohibition against comments on a defendant’s exercise of his constitutional right to remain silent and right to hold the State to its burden of proof is to prevent the jury from inferring a defendant is guilty simply because he chose to exercise his constitutional rights by offering no evidence or testimony. See Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000) (“The obvious purpose is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions.”). However, the solicitor in this case did not comment on Appellant’s exercise of a constitutional right or suggest Appellant was guilty based on his failure to testify or offer evidence, and those improper inferences could not reasonably and naturally be drawn from the solicitor’s remarks. See Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) (“[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from

the plethora of less damaging interpretations.”). Critically, the solicitor’s statements were not intended to be a comment on the defendant’s exercise of his right to remain silent and would not naturally or necessarily be construed as such by any reasonable juror. See, e.g., United States v. Francis, 82 F.3d 77, 79 (4th Cir. 1996) (“In stark contrast, the comments in this case in no way invited the jury to draw an ‘inference of guilt’ against the defendants.”).

Viewed in the proper context, the solicitor’s remarks were designed to comment on the evidence presented along with absence of evidence suggesting the victim was a prostitute and did not improperly shift the burden of proof or suggest Appellant’s guilt could be inferred from his failure to testify or present a defense. See State v. Shuler, 353 S.C. 176, 187, 577 S.E.2d 438, 443-444 (2003) (“In any event, the solicitor’s statement did not refer to appellant’s decision to remain silent. Instead, the statement was a comment on the evidence which had been presented[.]”). The remarks merely clarified for the jury what they should and should not properly consider during their deliberations. Therefore, viewing the remarks in the appropriate context consistent with the natural inferences to be drawn from them, the solicitor’s closing argument did not infringe upon Appellant’s constitutional rights or render his trial fundamentally unfair.

Furthermore, the solicitor’s remarks during his closing argument properly responded to defense counsel’s improper remarks during his opening argument regarding the victim. Undeniably, defense counsel’s opening remarks were designed to convey to the jury the victim participated in an arrangement where she engaged in sexual intercourse with Appellant in exchange for debt forgiveness.⁸ However, as Appellant

⁸ Tellingly, although defense counsel asserted he never used the word “prostitute,” he expressly stated he did not object to the solicitor’s closing argument on the ground it mischaracterized his statements. (R. p. 386; p. 388).

concedes on appeal, no evidence was ever presented during trial to suggest the victim was a prostitute. (App. Br. p. 14). Therefore, defense counsel's unsubstantiated and unsupported comments regarding the victim were wholly inappropriate and could not properly be considered by the jury in deciding the case. See, e.g., Commonwealth v. McCoy, 456 Mass. 838, 851, 926 N.E.2d 1143, 1158 (Mass. 2010) ("No evidence was presented at trial that the victim was a prostitute or that she and the defendant had any discussion about sex for a fee; in fact, the victim testified she was not a prostitute. Defense counsel's implication to the contrary was improper. Counsel may not argue inferences unsupported by the evidence, and the judge should have instructed the jury to disregard the statement.").

Because defense counsel's opening statement injected extraneous and improper considerations into the case, the solicitor was fully permitted to comment on the lack of evidence to support the improper allegations. See Gilstrap, 205 S.C. at 418, 32 S.E.2d at 165 ("[W]here counsel for the defense first injects extraneous argument into the case, the defendant is not in a position ordinarily to complain of the argument in reply."); see also State v. Ellenberg, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006) ("Once the defendant opens the door, the solicitor's invited response is appropriate so long as it does not unfairly prejudice the defendant."). In Appellant's case, Appellant suggested to the jury the victim was involved in a sex-for-money arrangement with him while offering no evidence or testimony of any kind to support the allegation. Cf. Patterson, 324 S.C. at 17, 482 S.E.2d at 766 (finding solicitor's closing argument comments were an invited response and did not render the trial fundamentally unfair). Therefore, the solicitor was properly permitted to call the jury's attention to the absence of evidence to support Appellant's claims. See State v. McClure, 342 S.C. 403, 408, 537 S.E.2d 273, 275

(2000) (“Although here defense counsel did invite some comment on the remorse issue, the solicitor could have fairly responded by referring to the lack of evidence showing remorse without specifically commenting on the failure of appellant to take the stand and apologize.”); see, e.g., Barlatier v. State, 26 So. 3d 29, 33 (Fla. Dist. Ct. App. 2009) (“The State’s comment on the lack of evidence to show that the girlfriend might have placed the gun under the seat was an invited response and a fair comment on the evidence, not violative of the rule prohibiting comment on the defendant’s failure to testify.”); State v. Vincent, 978 So. 2d 967, 976 (La. Ct. App. 2007) (“The prosecutor’s argument in rebuttal, that no evidence was presented to show why the victims would have lied, was proper because it was in response to [defense counsel’s] remarks. The State did not shift the burden of proof; rather, it just pointed out that the victims told the truth.”).

Appellant was fully permitted to use his opening statement to inform the jury of the general nature of the case and what defenses he intended to raise. See State v. Brown, 277 S.C. 203, 204, 284 S.E.2d 777, 778 (1981) (“An opening statement serves to inform the jury of the general nature of the action and defenses involved in a case so they will be better prepared to understand the evidence presented.”). However, Appellant was not permitted to use his opening argument to present inflammatory allegations to the jury that were not subsequently supported at trial, and the solicitor’s reply to Appellant’s unsubstantiated allegations was not improper under the circumstances. See, e.g., State v. Harris, 338 N.C. 211, 229, 449 S.E.2d 462, 471 (N.C. 1994) (“Since the evidence did not support the facts contained in defendant’s opening statement, it was not improper for the district attorney to highlight that absence of evidence. Moreover, the district attorney’s question focused on the defendant’s failure to present evidence generally and in no way implicated the defendant’s failure to testify.”); State v. Anderson, 200 N.C. App. 216,

224, 684 S.E.2d 450, 456 (N.C. Ct. App. 2009) (“When defendant forecasts evidence in the opening statement, the State is permitted to comment upon the lack of evidence supporting such a forecast in the closing argument. . . . The State’s argument highlighted the total lack of evidence at trial supporting the forecast of evidence by defense counsel in the opening statement and was not a comment of the failure of the accused to testify.”).

In this case, defense counsel used his opening argument to discredit Victim’s credibility by making factual allegations ultimately not supported during trial while effectively presenting Appellant’s story and testimony without Appellant ever being required to take the stand himself. Thereafter, although defense counsel’s allegations were wholly unsupported by any evidence presented during trial, he attempted to shield those improper allegations from challenge by arguing the solicitor could not comment on them without infringing upon Appellant’s Fifth Amendment rights. This result simply cannot be permitted. Otherwise, if the solicitor’s responsive comments under these circumstances were construed as a violation of Appellant’s constitutional right to remain silent, the State would have no way to respond to a defendant’s introduction of unsubstantiated claims and improper allegations and no way to expose the weaknesses in the defense’s case. See, e.g., United States v. Jones, 471 F.3d 535, 543 (4th Cir. 2006) (“A comment on the weaknesses of the defense’s case is not necessarily, or even ordinarily, a comment upon the defendant’s failure to testify. . . . To view such general comments on the inadequacies of an opponent’s case as improper is to strike at the heart of the adversary system. Adversaries are supposed to expose the weakness of each other’s evidence, and the prosecution committed no error in doing just that.” (citations omitted)). Accordingly, the solicitor’s responsive comments were not improper under the circumstances and in no way constituted a violation of Appellant’s constitutional rights.

See, e.g., United States v. Robinson, 485 U.S. 25, 32 (1988) ("Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, Griffin holds that the privilege against compulsory self-incrimination is violated. But where as in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege.")

Finally, even if the solicitor's remarks during closing argument were somehow improper, Appellant did not suffer any prejudice and his trial was not rendered fundamentally unfair by the comments. See Weaver, 361 S.C. at 89, 602 S.E.2d at 794 ("[A]lthough it is improper for the solicitor to indirectly comment on a defendant's failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one."). The solicitor's remarks during closing argument informed the jury no evidence had been presented to support the allegations raised in defense counsel's opening argument that the victim was somehow a prostitute by participating in a sex-for-money arrangement. Accordingly, the only prejudice Appellant could have suffered from the solicitor's remarks was through the jury ignoring the improper and unsubstantiated allegations raised by defense counsel. As the allegations were not proper for the jury to consider since no evidence supporting them was presented during trial, Appellant suffered no prejudice from the solicitor's statements to the jury to ignore those particular contentions regarding the victim.

Furthermore and critically, based on the fact the solicitor's comments were directed solely towards the allegations regarding the victim and not towards what Appellant did or did not do in his defense, they were not intended to be and would not naturally and necessarily be taken as a comment on Appellant's exercise of his

constitutional rights. And, even if the remarks somehow could be viewed in such a way, the trial judge subsequently clarified and emphasized to the jury through her jury instructions that Appellant's silence could not be used against him while the burden of proof rested solely on the State. See Johnson, 325 S.C. at 188, 480 S.E.2d at 735-736 ("[E]ven assuming arguendo the comment was improper, we find the trial court's instruction to the jury that it could not consider Johnson's failure to testify in any way and could not use it against him sufficient to cure any potential error."). Viewing the solicitor's isolated remarks in the context of his argument as a whole, the comments, even if improper, did not render Appellant's trial fundamentally unfair. See State v. Lunsford, 318 S.C. 241, 247, 456 S.E.2d 918, 922 (Ct. App. 1995) ("Further, Lunsford failed to demonstrate as he was required to do, that the result of the solicitor's comment was to materially prejudice his right 'to obtain a fair and impartial trial.' " (citations omitted)).

The solicitor's closing argument properly commented on the evidence and the lack of evidence presented during trial without implicating Appellant's invocation of his constitutional rights either directly or indirectly. Additionally, the solicitor's remarks properly responded to unsupported allegations defense counsel raised during his opening argument. Furthermore, even if the argument was somehow improper, Appellant suffered no prejudice as a result of the solicitor's closing argument based on the nature and context of the remarks. Accordingly, the trial judge did not abuse her discretion in denying Appellant's motion for a mistrial or request for a curative instruction.⁹ See State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) ("The granting of a motion for mistrial is an extreme measure which should be taken only where an incident is so

⁹ Notably, after Appellant objected to the solicitor's closing argument, he first requested a curative instruction after the jury was already thoroughly instructed by the trial judge not to consider his silence as evidence of guilt. (R. pp. 371-372; pp. 375-376; p. 387). For this reason, no curative instruction could have been necessary at the time one was requested.

grievous that prejudicial effect can be removed in no other way."'). Appellant's conviction should be affirmed.¹⁰

¹⁰ In addition to Appellant's claim the solicitor's statements during the closing argument constituted an improper comment on his right to remain silent, Appellant also argues on appeal the solicitor's closing argument was improper because it injected extraneous facts and opinions into the case and because it was an improper appeal to the jury's emotions. (App. Br. pp. 16-17). However, these arguments were never raised to the trial judge and are, accordingly, not preserved for appellate review. See State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970) ("It is well settled that an issue which has not been presented to or passed upon by the trial judge will not be considered on appeal."). During trial, defense counsel objected to the solicitor's closing argument on the grounds the solicitor's comments shifted the burden of proof. (R. pp. 386-387). Defense counsel later clarified his objection was solely to the solicitor's comment that the defense had presented no evidence and was not a contention his argument had been mischaracterized. (R. p. 388). On appeal, Appellant was limited solely to the grounds defense counsel raised in support of the objection during trial. See Patterson, 324 S.C. at 19, 482 S.E.2d at 767 ("Appellant is limited to the grounds raised at trial."). Therefore, the new grounds Appellant has raised on appeal in support of his objection to the closing argument cannot be considered for the first time by an appellate court. See Shuler, 353 S.C. at 187, 577 S.E.2d at 443 ("At trial, appellant claimed the solicitor's comment improperly shifted the burden of proof; he now claims the comment improperly referred to his right to remain silent. Accordingly, whether the solicitor's comment improperly referred to appellant's right to remain silent is not preserved for review."); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal."). Furthermore, even if the arguments were properly preserved, the solicitor's closing argument was not improper on either newly-asserted basis. Initially, the solicitor's statements regarding the typical defense strategy of attacking the victim in sexual assault cases did not inject any outside facts, evidence, or testimony from other cases into Appellant's trial and were, instead, a reference to matters within common knowledge. See State v. McAlister, 133 S.C. 99, 102, 130 S.E. 511, 512 (1925) ("The argument by illustration or analogy, involving reference to matters of common knowledge, the facts of history, and current events of common and public notoriety, is ordinarily well within the bounds of legitimate forensic effort at the bar."). Likewise, unlike other cases where closing arguments were found to be improper, the solicitor's closing argument in Appellant's case could not have improperly inflamed the jurors' passion or emotions and in no way invited the jury to identify with the victim or to place themselves in the victim's position. Compare with Liberte, 336 S.C. at 652-653, 521 S.E.2d at 746-747 (holding the solicitor's closing argument improperly appealed to the jurors' personal biases and emotions where the solicitor asked the jury to consider whether reasonable doubt was being used as a sword to attack people trying to keep drugs off the streets) and State v. McDaniel, 320 S.C. 33, 37-38, 462 S.E.2d 882, 883 (Ct. App. 1995) (finding the solicitor's closing argument was improper where the solicitor used the word "you" roughly forty-five times in asking the jury to put themselves in the victim's position).

III.

The trial judge properly denied Appellant's directed verdict motion as to the first-degree burglary charge because substantial evidence was presented establishing Appellant's guilt for each element of the offense, including that Appellant possessed an intent to commit a crime at the time he unlawfully entered the victim's home.

Appellant contends the trial judge erred in denying his motion for a directed verdict on the charge of first-degree burglary. Appellant maintains no evidence was presented establishing he possessed the requisite intent to commit a crime in the victim's dwelling at the time he entered her home. To the contrary, the trial judge committed no error in denying Appellant's directed verdict motion because substantial evidence was presented from which the jury could reasonably conclude Appellant possessed the intent to commit a crime in Victim's home at the time he entered. Therefore, the trial judge was required to deny the directed verdict motion and submit the case to the jury for proper resolution. Appellant's conviction should be affirmed.

When presented with a motion for a directed verdict, the trial judge is concerned with the existence or non-existence of evidence and not its weight. State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997). The trial judge should deny a directed verdict motion and submit the case to the jury if there is any substantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be fairly or logically deduced. State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 319 (1992). On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-594, 606

S.E.2d 475, 478 (2004). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) (emphasis added).

In order to support a conviction for first-degree burglary, the State must prove the defendant: (1) entered the dwelling of another; (2) without consent; (3) with the intent to commit a crime therein; (4) with at least one aggravating circumstance present. State v. Cross, 323 S.C. 41, 43, 448 S.E.2d 569, 570 (Ct. App. 1994). Aggravating circumstances include entering or remaining in the dwelling at night and causing physical injury to a person not participating in the crime. S.C. Code Ann. § 16-11-311. Regarding the intent element, "[t]he only requirement is that there be intent to commit any crime at the time of entry." Pinckney v. State, 368 S.C. 502, 505, 629 S.E.2d 367, 369 (2006).

In State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971), the South Carolina Supreme Court examined criminal intent:

The question of criminal intent with which an act is done is one of fact and **is ordinarily for jury determination except in extreme cases** where there is no evidence thereon. The intent with which an act is done denotes a state of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred.

(emphasis added) (citations omitted). Thus, the issue of whether a defendant possessed the requisite intent at the time a crime was committed is typically a question for jury determination because, without a statement of intent by an actor, proof of intent must be

determined by inferences from conduct. State v. Haney, 257 S.C. 89, 91, 184 S.E.2d 344, 345 (1971).

In determining whether a defendant possessed the necessary criminal intent in a burglary case, a defendant's actions after he entered a dwelling can constitute evidence of his intent at the time of his unlawful entry. State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). In explaining this principle, our Supreme Court instructed: "For example, if a defendant entered a house and committed criminal sexual conduct (CSC), the jury could find him guilty of burglary even though there may not have been any specific evidence that at the time he entered the house he intended to commit CSC. His actions after entering the house (i.e. the commission of the CSC) would be evidence of his reason for entering the house and would at least support the denial of a directed verdict." Id. at 349, 529 S.E.2d at 527-528.

In the case at bar, the evidence presented clearly established Appellant possessed the requisite criminal intent to commit a crime in Victim's home when he entered. Viewing the evidence in a light most favorable to the State as required, Appellant entered the victim's home at night without any prior permission from the victim to come inside. After entering the home, Appellant went into Victim's bedroom, approached the sleeping victim in her bed, and sat down next to her. Victim then woke up and demanded to know what Appellant was doing in her bedroom in the middle of the night without invitation. Appellant hesitated for a minute before asking her about a debt she owed him. Then, after exchanging only a few words, Appellant overpowered Victim and sexually-assaulted her. Logically, based on his conduct, Appellant's actions after entering Victim's home supported a reasonable inference Appellant possessed the intent to commit a crime at the time of his unlawful entry.

On appeal, Appellant seeks to negate the natural and logical inferences to be drawn from his conduct by arguing the circumstances preceding the assault were inconsistent with him possessing criminal intent at the time he entered the home. However, the fact Appellant brought up the issue of Victim's debt after pausing for a few moments when Victim asked him what he was doing in her home did not foreclose further examination of his subsequent conduct when attempting to determine what Appellant's intent was at the time he entered the home. Appellant entered the victim's home in the middle of the night without permission or prior invitation. See McMillian v. State, 383 S.C. 480, 488, 680 S.E.2d 905, 909 (2009) ("A reasonable mind recognizes that people do not usually break into and enter the building of another under the shroud of darkness with innocent intent[.]" (citing Mirich v. State, 593 P.2d 590, 593 (Wyo. 1979))). He then went into Victim's bedroom and approached her while she was asleep. These actions do not solely support an inference he intended to innocently inquire about the status of money owed to him. Instead, when coupled with the fact Appellant raped Victim shortly after startling her awake, these actions are consistent with an inference that Appellant entered the victim's house with the intent to sexually-assault Victim and that his comments to the victim about her debt were merely an attempt to justify his unexplained presence in the home before the assault.¹¹

¹¹ Furthermore, even if Appellant's actions somehow did not support an inference he specifically intended to commit the crime of criminal sexual conduct, his entry into Victim's home in the middle of the night without prior invitation supported an inference he possessed the intent to commit the crime of trespassing at the time of entry. See McMillian, 383 S.C. at 486-487, 680 S.E.2d at 907-908 (noting our Supreme Court has previously recognized the crime of trespass as sufficient to satisfy the element of intent to commit a crime required for the offense of housebreaking and finding defense counsel was not ineffective for advising McMillian that intent to commit a crime could be inferred from a trespass). The closed door to Victim's house put Appellant on notice he was not permitted to enter Victim's home. See, e.g., State v. Christensen, 194 S.C. 131, 141, 9 S.E.2d 555, 560 (1940) (holding an instruction to the jury that the presence of closed doors and locked windows was notice to the world entry is forbidden constituted a correct statement of the law). Therefore, Appellant's entry into the home through Victim's closed door without consent to enter established Appellant's intent to commit the crime of trespass, which supported

Without an entirely truthful statement of intent by Appellant, Appellant's intent at the time of his entry into Victim's home could only properly be determined by looking to his actions and conduct after entry. See State v. Johnson, 84 S.C. 45, 47, 65 S.E. 1023, 1024 (1909) ("The intent with which an act is done denotes a state of mind, and it can be proved only from expressions, or conduct, or both, considered in light of the given circumstances."). Moments after waking Victim up in the middle of the night, Appellant briefly spoke with her about an outstanding debt and then sexually-assaulted her. These actions clearly support an inference Appellant possessed criminal intent at the time he entered Victim's home. Based on the fact intent typically can only be ascertained by examining an actor's conduct, the trial judge properly submitted the case to the jury for them to decide whether or not Appellant possessed the requisite criminal intent based on his conduct. See Tuckness, 257 S.C. at 299, 185 S.E.2d at 608 ("The question of criminal intent with which an act is done is one of fact and is **ordinarily for jury determination except in extreme cases[.]**"). Thereafter, the jury was left to properly decide whether Appellant's brief intervening actions demonstrated a lack of intent at the time of entry or were merely a pretext to conceal his original intent after his unauthorized presence was discovered by the victim. See McMillian, 383 S.C. at 487, 680 S.E.2d at 908 ("Certainly, a jury would have been free to disbelieve McMillian's version of events and find that he had the intent to commit a crime based on his conduct at the time of this offense."). Based on the evidence presented, the trial judge properly denied Appellant's directed verdict motion. Appellant's conviction should be affirmed.

the denial of Appellant's directed verdict motion even if his intent to sexually-assault Victim could somehow not be inferred from his conduct. See McMillian, 383 S.C. at 487, 680 S.E.2d at 908 ("In its general sense, to 'trespass' is 'to make an unwarranted or uninvited incursion' onto the property of another." (citations omitted)).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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Attorney General

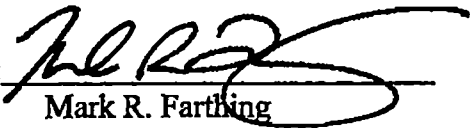
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ATTORNEYS FOR RESPONDENT

October 25, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Kristi Lea Harrington, Circuit Court Judge

THE STATE,

Respondent,

vs.

DAVID LEE MEGGETT,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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Attorney General

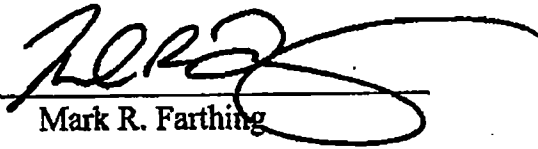
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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 25th day of October, 2011.


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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

David Lee Meggett, Appellant.

Appellate Case No. 2010-178446

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 4994
Heard June 5, 2012 – Filed June 27, 2012

AFFIRMED

Appellate Defender Breen R. Stevens, of Columbia, for
Appellant.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Salley W. Elliott, and Assistant
Attorney General Mark R. Farthing, all of Columbia;
Solicitor Scarlett Anne Wilson of Charleston, for
Respondent.

LOCKEMY, J.: David Meggett appeals his convictions of first-degree burglary and first-degree criminal sexual conduct (CSC). Meggett argues the trial court erred in (1) denying his motion for a continuance; (2) denying his motion for a mistrial and request for a curative instruction; and (3) denying his motion for a directed verdict as to the first-degree burglary charge. We affirm.

FACTS/PROCEDURAL BACKGROUND

Meggett and the Victim met in Charleston County in 2008. The two saw each other every few months. Meggett loaned Victim \$200 to pay her bills and gave her rides to job interviews. Victim and Meggett had consensual sex in August 2008. Victim left Charleston in 2008 and returned in January 2009 to attend school. According to Victim, in the early morning hours of January 13, 2009, she woke up and saw Meggett sitting on the edge of her bed. Victim had not spoken to Meggett in a month and, according to Victim, he did not have permission to be in her home. The doors to Victim's home were not locked. According to Victim, Meggett asked her about the \$200 she borrowed and Victim told him she would pay him at the end of the week. Meggett then moved towards the Victim and told her he was going to "take the down payment now." According to Victim, Meggett then grabbed her neck, held her against the wall, and attempted to remove her pants. Victim claimed she and Meggett struggled and she yelled for him to stop. Victim claimed Meggett choked her and then sexually assaulted her.

After Meggett left Victim's home, Victim drove herself to the hospital. Victim informed emergency room physician Dr. Joseph Bianco that she had been sexually assaulted and complained of pain in her arm and jaw. Dr. Bianco noted bruises on Victim's arm and jaw.¹ The North Charleston Police Department was notified and two officers were dispatched to the hospital. Officer Robert Gooding and Sergeant Eric Jourdan met with Victim and she reported the details of the assault. While speaking with the officers, Victim received a phone call from Meggett. According to Victim, Meggett tried to convince her to leave the hospital and asked her if she was going to tell the doctors what happened. Meggett then asked if he could come to the hospital to see Victim and she agreed. Upon his arrival, Meggett was arrested by Officer Gooding.

Victim was subsequently taken to MUSC Women's Center for a sexual assault examination. Nurse Faye LeBoeuf performed a pelvic exam and discovered a small abrasion in Victim's vagina which likely had occurred within twenty-four to seventy-two hours of the exam. According to LeBoeuf, Victim's injury could have resulted from either consensual or non-consensual intercourse. LeBoeuf found no other bruising, redness, swelling, lacerations, or tears on Victim.

¹ North Charleston Police Detective Randy Gray met with Victim the day after the incident and observed "prominent dark bruising" on Victim's neck.

Officers retrieved a comforter and blanket from Victim's bed, as well as a DNA sample from Meggett. South Carolina Law Enforcement Division (SLED) DNA analyst Jennifer Clayton examined the Victim's comforter and determined Meggett was the major DNA contributor in two of the comforter samples and the only DNA contributor in the third sample. Clayton also determined Victim was excluded as a contributor in the samples and found the presence of an unknown contributor in the second sample. Additionally, Clayton analyzed the semen from Victim's vaginal sample and was unable to develop a DNA profile from Meggett in that sample.

Meggett was indicted by the Charleston County grand jury for first-degree burglary and first-degree CSC. A jury trial was held November 8-10, 2010. At the outset of trial, Meggett moved for a continuance. Defense counsel stated the parties agreed Meggett and Victim had consensual sex on one prior occasion but they disagreed as to whether the consensual sex was a single incident or a repeated event. Defense counsel asserted Meggett, on the morning of trial, raised the issue of having a comforter from his nephew's bed in his sister's home tested for DNA evidence based on Meggett's claim he had consensual sex with Victim in the bed in the months leading up to the incident. Defense counsel asserted the comforter was in storage and would be critical to the credibility of Victim if the evidence was there. In rebuttal, the State argued the motion should be denied because (1) two years had elapsed since the incident; (2) Meggett had notice of the trial; and (3) Meggett failed to raise the issue until the morning of trial. The trial court denied the continuance motion, finding (1) the case was on the trial docket; (2) the incident occurred in January 2009; (3) it was speculative as to whether there may be something on the comforter; and (4) the comforter had no direct connection to the case other than to Victim and Meggett's prior sexual relationship.

During opening arguments, defense counsel argued to the jury that "[V]ictim and [Meggett] struck a sort of less than desirable but informal arrangement. They began to sleep together, and [Meggett] would forgive her debt, and it happened more than once." Defense counsel stated "[Victim and Meggett] had sex, and [Victim] thought that squared their debt, and [Meggett] didn't, and that's it." Defense counsel told jurors Meggett "shoved" and "pushed" Victim and his behavior was "wrong." As the trial continued, Victim and other witnesses testified about the sexual assault and resulting law enforcement investigation.

At the close of the State's case, Meggett moved for a directed verdict. Defense counsel asserted "there's a decent argument to be made for the burglary," and further argued "[t]he Victim testifies that when he comes in he's asking for the money that . . . she owes him. That would be all I have to say in that respect." The

trial court denied Meggett's directed verdict motion, finding evidence had been presented as to each element of the indicted offenses. Following the trial court's ruling, Meggett did not testify, did not offer any other testimony, and rested his case.

Subsequently, during closing arguments, defense counsel asserted Victim was living in poor conditions and "desperate times call[ed] for desperate measures." During the State's closing argument, the solicitor stated

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

Defense counsel objected and argued the solicitor's statement amounted to burden shifting. Following closing arguments and the jury charge², the trial court heard defense counsel's objection. Defense counsel argued he did not use the word "prostitute" to describe Victim and claimed the solicitor's comment on the defense's failure to present evidence was burden shifting. Defense counsel then moved for a mistrial, moved for a curative instruction, and objected to the curative instruction given.³ The trial court denied Meggett's mistrial motion and request for a curative instruction. The trial court determined the State's comments did not shift the burden of proof and the jury had twice been instructed that the statements of counsel during arguments were not to be considered as evidence. Subsequently, the jury found Meggett guilty of first-degree burglary and first-degree CSC.

² In its charge to the jury, the trial court instructed the jury a defendant is not required to prove his innocence; the State has the burden of proving guilt beyond a reasonable doubt; and Meggett's decision not to testify cannot be used against him.

³ It appears defense counsel considered the trial court's jury charge to be a curative instruction.

Meggett was sentenced to concurrent terms of thirty years imprisonment for each offense. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in denying Meggett's motion for a continuance?
2. Did the trial court err in denying Meggett's motion for a mistrial and request for a curative instruction?
3. Did the trial court err in denying Meggett's motion for a directed verdict as to the first-degree burglary charge?

LAW/ANALYSIS

Motion for Continuance

Meggett argues the trial court erred in denying his motion for a continuance. Specifically, Meggett maintains if he had been allowed time to have the comforter from his sister's home tested for Victim's DNA he could have produced critical evidence to discredit Victim's testimony regarding their relationship and prior sexual encounters. We disagree.

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

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

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

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

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

Motion for Mistrial

Meggett argues the trial court erred in denying his motion for a mistrial and request for a curative instruction. We disagree.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Bantan*, 387 S.C. 412, 417, 692 S.E.2d 201, 203 (Ct. App. 2010). "The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way." *Id.* "A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial." *Id.*

Meggett contends the solicitor improperly commented on his right to remain silent in his closing argument. As previously noted, during the State's closing argument, the solicitor stated

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

Citing *Doyle v. Ohio*, 426 U.S. 610 (1976), Meggett argues the solicitor's comment violated the principle that the accused has the right to remain silent and the exercise of that right cannot be used against him. Meggett also contends the solicitor improperly commented on Meggett's failure to present a defense. See *McFadden v. State*, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000) (holding a solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense).

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

The solicitor did not state that Meggett failed to present *any* evidence or a defense. Furthermore, the solicitor did not suggest to the jury that an adverse inference should be drawn against Meggett based on his failure to present evidence or testify. The solicitor only commented on the lack of evidence presented to support the inference that Victim was a prostitute. The solicitor's remark was not improper as

it was made to urge the jury to avoid drawing an inference not supported by the record. *See State v. Liberte*, 336 S.C. 648, 653, 521 S.E.2d 744, 746 (Ct. App. 1999) (holding a solicitor is entitled to call into question the credibility of a defense). Additionally, because we find the solicitor's comment was not improper, we further find the trial court did not err in denying Meggett's motion for a curative instruction.

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

Motion for Directed Verdict

Meggett argues the trial court erred in denying his motion for a directed verdict as to the first-degree burglary charge. Specifically, Meggett contends there was no evidence he intended to commit a crime at the time he entered Victim's home. We disagree.

"In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

First-degree burglary is a statutory offense in South Carolina that is defined as follows: "A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling," and any one of several enumerated aggravating circumstances exists. S.C. Code Ann. § 16-11-311(A) (2003). Aggravating circumstances include entering or remaining in the dwelling at night and causing physical injury to a person not participating in the crime. S.C. Code Ann. § 16-11-311(A)(1)(b), (3) (2003).

Citing *State v. Haney*, 257 S.C. 89, 92, 184 S.E.2d 344, 345 (1971), Meggett argues "inconsistent circumstances" indicating he had a different intent or motive for entering Victim's home other than that inferred from the crime committed are present after his entry into Victim's home. Meggett contends the inconsistent circumstances include: (1) he arrived at Victim's home at an unknown time

between 6:00 p.m. and 12:45 a.m.; (2) he entered the unlocked doors of the house of his friend; (3) he waited for an undetermined amount of time for Victim to wake up; and (4) the first thing that happened after Victim woke up was not a rape but a conversation about the money Victim owed Meggett. According to Meggett, these specific circumstances are inconsistent with an inference that he intended to commit CSC the moment he crossed the threshold of Victim's home.

We find the trial court did not err in denying Meggett's motion for a directed verdict as to the burglary charge. Substantial evidence was presented from which the jury could reasonably conclude Meggett possessed the intent to commit a crime at the time he entered Victim's home. Our supreme court has examined criminal intent:

The question of the intent with which an act is done is one of fact and is ordinarily for jury determination except in extreme cases where there is no evidence thereon. The intent with which an act is done denotes a state of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred.

State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971) (citing *State v. Johnson*, 84 S.C. 45, 65 S.E. 1023 (1909)). Thus, whether a defendant possessed the requisite intent at the time the crime was committed is typically a question for jury determination because, without a statement of intent by the defendant, proof of intent must be determined by inferences from conduct. See *Haney*, 257 S.C. at 91, 184 S.E.2d at 345. In determining whether a defendant possessed the necessary criminal intent in a burglary case, a defendant's actions after he entered a dwelling can constitute evidence of his intent at the time of his unlawful entry. *State v. Pinckney*, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). In *Pinckney*, our supreme court explained this principle:

For example, if a defendant entered a house and committed criminal sexual conduct (CSC), the jury could find him guilty of burglary even though there may not have been any specific evidence that at the time he entered the house he intended to commit CSC. His

actions after entering the house (i.e. the commission of the CSC) would be evidence of his reason for entering the house and would at least support the denial of a directed verdict motion. *See e.g. State v. Faircloth*, 297 N.C. 388, 255 S.E.2d 366 (1979) (citing *State v. Tippet*, 270 N.C. 588, 155 S.E.2d 269 (1967) ("The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the house.")).

Pinckney, 339 S.C. at 349-50, 529 S.E.2d at 527-28.

Here, Meggett entered Victim's home at night without permission. Moments after Victim woke up Meggett briefly brought up the outstanding debt and then sexually assaulted her. Viewing the evidence in the light most favorable to the State, we believe Meggett's actions after entering Victim's home supported a reasonable inference that Meggett possessed the intent to commit a crime at the time of entry. Accordingly, the question of Meggett's criminal intent was for the jury to decide, and therefore, we affirm the trial court's denial of Meggett's motion for a directed verdict.

CONCLUSION

Based on the foregoing, the trial court's decision is

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Charleston)

David Lee Meggett, #343610)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

2013-CP-10-3740

IN THE COURT OF COMMON PLEAS

FILED
2013 JUN 25 AM 10:11
JULIE J. ARMSTRONG
CLERK OF COURT

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lieber Correctional Institution
2. Name and location of Court which imposed sentence Court of General Sessions for Charleston County
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2009-GS-10-4829 First-degree burglary
 - (b) 2009-GS-10-4830 First-degree criminal sexual conduct
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) November 10, 2010 thirty year imprisonment
 - (b) November 10, 2010 thirty years imprisonment concurrent

Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty **X** _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. **The South Carolina Court of Appeals** _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. **Affirmed** _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. **June 27, 2012** _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. **Opinion Number 4994** _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) **N/A** _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

Revised 3/2003

- (a) Ineffective assistance of trial counsel
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Please see attachment at 11(a)-(c).
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. N/A
- ii. _____
- iii. _____

Revised 3/2003

- iv. _____
- (d) the date of each such disposition:
- i. **N/A** _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. **N/A** _____
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- NO** _____
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. **N/A** _____
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. **N/A** _____
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) **This Application for Post-Conviction Relief is the proper way to raise all grounds contained herein.** _____
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:

Revised 3/2003

- (a) your arraignment and plea? Yes
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Beattie Butler, Charleston County Public Defender
- ii. Breen Richard Stevens, PO Box 11589 Columbia, SC 29211
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. 17(a)-(c)
- ii. 17(d), (e)
- iii. _____
19. State clearly the relief you seek in filing this application:
For convictions and sentences to be vacated, to be released from custody or a new trial ordered.
20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA)

VERIFICATION

County of **Dorchester**)

David Lee Meggett, #343610

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

David Lee Meggett

SWORN to and subscribed before me this 19th
day of June, 2013.

Luchean Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

Revised 3/2003

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

David Lee Meggett, #343610

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

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



Applicant

SWORN or affirmed to and subscribed before me this
_____ day of _____, 2_____.

Notary Public

My Commission Expires: _____

Revised 3/2003

-
- 11(a) Trial counsel was ineffective and Applicant was prejudiced and denied a fair trial through counsel's failure to invest time to be properly and adequately prepared for trial.
- (b) Trial counsel was ineffective and Applicant was prejudiced and denied a fair trial through counsel's failure to be prepared to offer evidence or testimony to support the motion for a continuance.
- (c) Trial counsel was ineffective and Applicant was prejudiced and denied a fair trial through counsel's failure to take time prior to trial to properly and adequately instruct Applicant of his right to testify and the circumstances of his trial testimony.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
	)	2013-CP-10-3740
	)	
David Meggett, #343610,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post-conviction relief (PCR) filed June 25, 2013, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the June 2009 term of the Charleston County Grand Jury for burglary-first degree (2009-GS-10-4829) and criminal sexual conduct- first degree (2009-GS-10-4830). The Applicant was represented by Beattie Butler, Esquire.

The Applicant proceeded to trial and was found guilty of all charges. On November 10, 2010, the Applicant was sentenced by the Honorable Kristi L. Harrington to confinement for a period of thirty (30) years on both charges. The sentences are to be served concurrently.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Breen Stevens, Esquire, of the Office of Appellate Defense. The Applicant's convictions and sentences

were affirmed by the Court of Appeals. State v. Meggett, No. 4994 (S.C. Ct. App. filed June 27, 2012). The Remittitur was issued July 13, 2012.

Attached herewith and incorporated herein are the records of the Charleston County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective assistance of counsel.
 - a. Failure to invest time to be properly and adequately prepared for trial.
 - b. Failure to be prepared to offer evidence or testimony to support the motion for continuance.
 - c. Failure to take time prior to trial to properly and adequately instruct the Applicant of his right to testify and the circumstances of his trial testimony.

III.

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation contained within the application not herein before either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

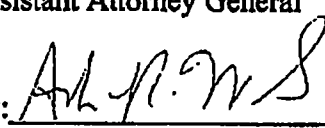
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

Dec. 5, 20 13.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

DAVID MEGGETT, #343610

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

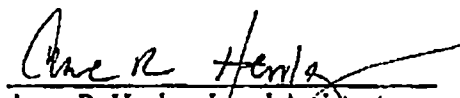
2013-CP-10-3740

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Christopher L. Murphy
125 Wappoo Creek Road
Charleston, SC 29412

DATED this 6th day of December, 2013


Anne R. Henley, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
David Meggett, #343610,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2013-CP-10-3740

MOTION FOR DISCOVERY

BY

JULIE A. BINGHAM
CLERK OF COURT

2014 SEP -8 PM 1:05

FILED

COMES NOW Applicant, by and through his undersigned attorney, and requests
that this Court enter an Order for Production of Discovery pursuant to S.C. Code Ann.
§17-27-150(a) (2008).

This matter comes before the Court by way of an Application for Post Conviction
Relief filed on June 25, 2013.

At the beginning of Applicant's trial, counsel requested a continuance for time to
retain a DNA expert. In preparation of the instant action, undersigned counsel has
consulted with a DNA expert (Ron Ostrowski), and he has provided her with a list of case
records/items that are necessary for him to work on Applicant's case. It is also necessary
for counsel to review all evidence maintained by the investigative agency and the
evidence admitted at trial to determine if there is any evidence of value to the DNA
expert. Counsel would request that a representative of the State be present during such
review.

Additionally, Applicant also does not have a complete copy of his file from trial
counsel, which is needed to properly prepare his case for an evidentiary hearing.
Applicant would ask for the opportunity to issue subpoenas to the appropriate offices or
agencies for the production and/or review of the following case documents and/or items
pursuant to S.C. Code Ann. §17-27-150(a) (2008):

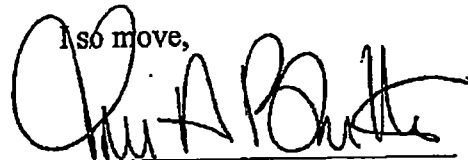
1. A complete copy of the State Law Enforcement Agency (SLED) file, including all records made by the laboratory in connection the case and all photographs (if any were taken). Additionally, verification as to the current location of the DNA evidence. Specifically, Applicant is requesting the following items needed by the DNA expert:
 - a. Hard copies of all electropherograms. These results must be of the same quality and resolution as those possessed by the State.
 - b. Software: A list of all commercial software programs used in the DNA testing in this case, including name of the software program, manufacturer and version used in this case.
 - c. STR Frequency Tables: Copies of any allelic frequency tables relied upon in making statistical estimates in this case. If the laboratory relied upon published or publicly available data, this request can be satisfied by providing a specific reference source.
 - d. Copies of all laboratory bench notes.
 - e. Chain of Custody and Current Disposition of Evidence: Copies of all records that document collection, treatment, and handling of biological evidence in this case, from the initial point of collection to the current disposition. This information should include documentation that indicates where and how materials were stored (temperature and type of container), the amount of evidence which was consumed in testing, the amount of material that remains, and where and how the remaining evidence is stored (temperature and type of container).
 - f. Copy of the unexpected results log
 - g. Instances of Unintended DNA Transfer or Sample Contamination: Copies of all records maintained in the laboratory that document instances of unintended transfer of DNA or sample contamination, such as instances of negative controls that demonstrated the presence of DNA or the detection of unexpected extra alleles in the control or reference samples, and any corrective measures taken.
 - h. Copies of all work done toward internal laboratory validation of DNA testing and analysis. This should contain records and results including, but not limited to, acceptable heterozygous peak ratios, stutter frequency, mixed sample studies, etc.
 - i. Accreditation: Copies of all licenses or other certificates of accreditation held by the DNA testing laboratory relative to capillary gel electrophoresis DNA analysis.
 - j. Laboratory Personnel: Background information about each person involved in sample collection and conducting or reviewing DNA testing in this case, including:
 - i. Current resume
 - ii. Job description
 - iii. A summary of proficiency test results
 - k. Detailed proficiency testing for all laboratory personnel involve in DNA testing through capillary gel electrophoresis.

2. A complete copy of Applicant's file from the Charleston County Public Defender's Office.
3. The opportunity to review the evidence maintained by the investigative agency and the evidence introduced in court.

The Applicant, through undersigned counsel, submits that the above listed documents and case materials are necessary for counsel and the DNA expert to properly prepare his case and to present his claims. Furthermore, the Applicant, through counsel, submits that this request is not being made as a fishing expedition, but it is only being submitted to the Court due to the importance of the requested materials in Applicant obtaining "one full bite of the apple."

THEREFORE, based upon the foregoing the Applicant respectfully requests that this Court hold a hearing and/or enter an Order for Discovery that allows counsel to issue subpoenas to the appropriate parties, for the above requested case materials that are necessary for the presentation of Applicant's case.

September 8, 2014
Columbia, SC

Also move,


Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
Attorney for Applicant

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

David Meggett, #343610,)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

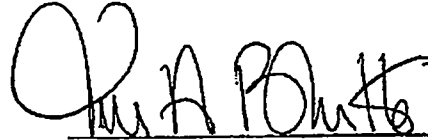
IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2013-CP-10-3740

CERTIFICATE OF SERVICE

FILED
2014 SEP - 8 PM 1:06
CLERK OF COURT

I, Tricia A. Blanchette, hereby certified that I hand delivered a copy of a Motion for Discovery to Ashleigh R. Wilson, Assistant Attorney General at the Charleston County Courthouse.



Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008

September 8, 2014

STATE OF SOUTH CAROLINA)
County of ☒ Charleston ☐ Berkeley)
DAVID MEGGETT)
Applicant / Petitioner)
vs.)
State of South Carolina,)
Respondent.)

COURT OF COMMON PLEAS
Case No. 2013-CP-10-3740

FILED
2014 SEP -9 PM 4:29
JULIE J. ARMSTRONG
CLERK OF COURT
ORDER BY

This post-conviction relief case came before the court for a hearing. Having now heard this matter, the court orders as indicated herein.

1. The application for post-conviction relief is hereby: _____ denied _____ granted _____ under advisement; a formal order will be filed (see below - No.6)

2. Motion(s) was/were heard in this case and the court orders:
The motion to dismiss and/or for summary judgment is hereby _____ granted _____ denied _____ under advisement, based upon the _____ statute of limitations and/or _____ the successive nature of the application or _____ other reason as follows:
MOTION FOR DISCOVERY GRANTED. FORMAL ORDER TO FOLLOW.

3. A conditional order of dismissal was previously filed in this case. Upon review of the matter, the court finds:

_____ Good cause as to why the case should not be dismissed has been shown in response to the order of dismissal; therefore, a hearing on the merits of the application shall be scheduled.

_____ The court has considered the response to the conditional order of dismissal and finds that good cause has not been shown or _____ no response has been filed to the conditional order of dismissal; therefore, the application is hereby dismissed.

4. The application was freely, voluntarily, and intelligently withdrawn as indicated on the record; therefore, this case is dismissed _____ with prejudice _____ without prejudice.

5. Other: _____

6. The court further orders:

_____ The _____ Attorney General _____ Applicant's counsel is directed to submit to the court a proposed order and to serve the order on opposing counsel within _____ days.

_____ Both sides are directed to submit proposed orders to the court and to serve the orders on each other within _____ days.

_____ The court does not request proposed orders.

IT IS SO ORDERED.

Date: 9 / 8 / 14
Charleston, S.C.

G. Mc
Presiding Judge

Court Reporter: Joyce Rueger
Attorney for Plaintiff: Tricia A. Blanchette
Attorney for Defendant: Ashleigh R. Wilson

Revised 12/10/04

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
David Meggett, #343610,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

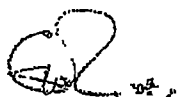
2013-CP-10-3740

**ORDER SUBSTITUTING COUNSEL
AND AUTHORIZING DISCOVERY
IN POST CONVICTION RELIEF**

This matter comes before the Court by way of an Application for Post Conviction Relief filed on June 25, 2013. Respondent filed a Return on December 11, 2013.

On September 8, 2014, a motion hearing was held in front of the Honorable G. Thomas Cooper, Jr., at the Charleston County Courthouse. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Ashleigh R. Wilson, Assistant Attorney General. Tricia A. Blanchette, Esquire, moved for substitution of counsel in place of Christopher L. Murphy, Esquire, and she also moved for discovery pursuant to the Motion, which was filed on September 8, 2014.

By way of the written Motion and at the hearing, Tricia A. Blanchette, Esquire, explained that she had been recently retained and had spoken with trial counsel, but she had not had the opportunity to obtain a copy of Applicant's file from the Charleston County Public Defender's Office. She further explained that had reviewed the trial transcript, which began with trial counsel requesting a continuance for time to retain a DNA expert. She explained that she had consulted with a DNA expert (Ron Ostrowski), and he had provided her with a list of case records/items that are necessary for him to work on Applicant's case. She explained that it is also necessary to review all evidence maintained by the investigative agency and the evidence admitted at trial to determine if



there is any evidence of value to the DNA expert.¹ She requested that a representative of the State be present during such review.

Respondent did not oppose counsel's request for substitution, but did oppose the request for discovery. Respondent requested that the right of the non-party entities be reserved to allow those entities the opportunity to assert privilege or protection from production of the requested discovery materials.

As a threshold matter, this Court substitutes Tricia A. Blanchette, Esquire, in as counsel in place of Christopher L. Murphy, Esquire.

Pursuant to S.C. Code Ann. §17-27-150(a) (2008), this Court finds that Applicant's discovery request shall be granted to ensure that Applicant, through counsel, can properly prepare his Application for Post Conviction Relief for an evidentiary hearing. As was requested by the State, any parties in receipt of a subpoena pursuant to this Order may file a timely objection, which will be addressed by this Court.

Therefore, Applicant shall be allowed to issue subpoenas to the following offices or agencies for production of Applicant's file, as follows:

1. A complete copy of the State Law Enforcement Agency (SLED) file, including all records made by the laboratory in connection the case and all photographs (if any were taken). Additionally, verification as to the current location of the DNA evidence. Specifically, the following items shall be provided:
 - a. Hard copies of all electropherograms. These results must be of the same quality and resolution as those possessed by the State.
 - b. Software: A list of all commercial software programs used in the DNA testing in this case, including name of the software program, manufacturer and version used in this case.
 - c. STR Frequency Tables: Copies of any allelic frequency tables relied upon in making statistical estimates in this case. If the laboratory relied upon

¹ When asked by the Court, Attorney Blanchette stated that she was unable to clarify who served as the investigative agency since she did not have a copy of Applicant's file.



published or publicly available date, this request can be satisfied by providing a specific reference source.

- d. Copies of all laboratory bench notes.
 - e. Chain of Custody and Current Disposition of Evidence: Copies of all records that document collection, treatment, and handling of biological evidence in this case, from the initial point of collection to the current disposition. This information should include documentation that indicates where and how materials were stored (temperature and type of container), the amount of evidence which was consumed in testing, the amount of material that remains, and where and how the remaining evidence is stored (temperature and type of container).
 - f. Copy of the unexpected results logs.
 - g. Instances of Unintended DNA Transfer or Sample Contamination: Copies of all records maintained in the laboratory that document instances of unintended transfer of DNA or sample contamination, such as instances of negative controls that demonstrated the presence of DNA or the detection of unexpected extra alleles in the control or reference samples, and any corrective measures taken.
 - h. Copies of all work done toward internal laboratory validation of DNA testing and analysis. This should contain records and results including, but not limited to, acceptable heterozygous peak ratios, shutter frequency, mixed sample studies, etc.
 - i. Accreditation: Copies of all licenses or other certificates of accreditation held by the DNA testing laboratory relative to capillary gel electrophoresis DNA analysis.
 - j. Laboratory Personnel: Background information about each person involved in sample collection and conducting or reviewing DNA testing in this case, including:
 - i. Current resume
 - ii. Job description
 - iii. A summary of proficiency test results
 - k. Detailed proficiency testing for all laboratory personnel involve in DNA testing through capillary gel electrophoresis.
2. A complete copy of Applicant's file from the Charleston County Public Defender's Office.

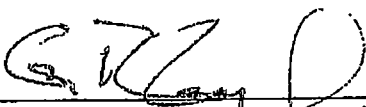
3. The opportunity to review the evidence maintained by the investigative agency and the evidence introduced in court.

IT IS THEREFORE ORDERED:

1. That Tricia A. Blanchette, Esquire, is substituted in as counsel in place of Christopher L. Murphy, Esquire.
2. That Counsel for Applicant is permitted to serve a subpoena and/or submit a written request, along with a copy of this Order, upon the above listed agencies or entities for the production of the above listed files
3. That any parties in receipt of a subpoena pursuant to this Order may file a timely objection, which will be addressed by this Court.

AND, IT IS SO ORDERED this 29 day of September, 2014.

Columbia, South Carolina



Honorable G. Thomas Copper, Jr.
Circuit Court Judge

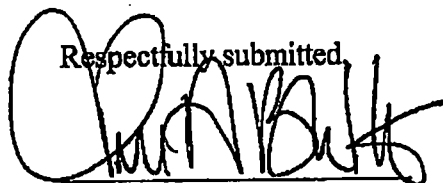
STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
David Meggett, #343610,)	2013-CP-10-3740
Applicant,)	
v.)	
State of South Carolina,)	AMENDMENT TO APPLICATION
Respondent.)	FOR POST CONVICTION RELIEF

This matter comes before the Court by way of an Application for Post Conviction Relief filed on June 25, 2013. The State submitted a Return on December 11, 2013. Applicant would amend his original Application by adding the following specific allegations to his original claim of ineffective assistance of trial counsel and by adding the claim of ineffective assistance of appellate counsel:

1. Ineffective assistance of trial counsel for failing to properly prepare and conduct a reasonable investigation into Applicant's case prior to going to trial.
2. Ineffective assistance of trial counsel for failing to communicate with Applicant adequately and timely prior to trial regarding the State's case, specifically the DNA evidence, which resulted in counsel's failure to obtain a DNA expert and the denial of a continuance motion for the testing of "critical" evidence.
3. Ineffective assistance of trial counsel for failing to consult with Applicant on and articulate a clear defense strategy prior to and during trial. Ineffective assistance for providing the jury with the following alternate and incomplete defense theories that lead to confusion and prejudice to Applicant: 1) Applicant engaged in consensual sex with the victim, and 2) the DNA and physical evidence does not establish that sexual intercourse took place between Applicant and victim on the date in question.
4. Ineffective assistance of trial counsel for informing the court that Applicant would testify to prior sexual encounters and informing the jury during opening and closing argument that Applicant engaged in a consensual sexual encounter with victim, yet advising Applicant to not take the stand at trial to testify to such.

5. Ineffective assistance of trial counsel for failing to question victim about her knowledge of Applicant's prior profession and possible motive for the allegations.
6. Ineffective assistance of trial counsel for failing to make a reasonable argument for a directed verdict on the burglary charge.
7. Ineffective assistance of trial counsel for failing to put up a defense through witnesses and evidence.
8. Ineffective assistance of trial counsel for failing make the arguments made on direct appeal regarding the State's closing argument; thus, failing to properly preserve the issues for appeal.
9. Ineffective assistance of trial counsel for arguments made to the jury during opening and closing arguments that interjected consensual sex into the trial, help support the State's theory of the case and provided the jury with two conflicting defense theories.
10. Ineffective assistance of appellate counsel for failing to argue that Applicant had consent to be in the dwelling he was charged with burglarizing.
11. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

Respectfully submitted,



Tricia A. Blanchette
Attorney for Applicant
Post Office Box 12725

December 17, 2015
Columbia, SC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

David Meggett, #343610,)
Applicant,)

2013-CP-10-3740

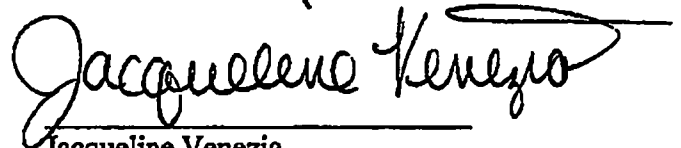
v.)

CERTIFICATE OF SERVICE

State of South Carolina,)
Respondent.)

I, Jacqueline Venezia, Law Clerk, hereby certify that I placed in the mail this 17th day of December, 2015, a copy of an Amendment to Application for Post Conviction Relief, to Rutledge Johnson of the Attorney General's Office, at:

Office of the Attorney General
ATTN: Rutledge Johnson
1000 Assembly Street, 5th Floor
Columbia, SC 29201



Jacqueline Venezia
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Law Clerk

December 17, 2015

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
David Meggett, #343610,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2013-CP-10-3740

MOTION FOR INDIGENT FUNDS

FILED
2016 APR - 1 PM 12:23
JULIE J. HARRIS
CLERK OF COURT

COMES NOW Applicant, by and through his undersigned attorney, and requests that this Court enter an Order for Authorization of Payment of Expert Fees pursuant to S.C. Code Ann. §17-30-50(b) (2008) and Reeves v. State, Op. No. 5359 (S.C. Ct. App. filed November 12, 2015) (Shearouse Adv. Sh. No. 44 at 47).

This matter comes before the Court by way of an Application for Post Conviction Relief filed on June 25, 2013. The State submitted a Return on December 11, 2013. On September 8, 2014, Tricia A. Blanchette filed a Motion for Discovery and Motion for Substitution of Counsel, which was heard by the Honorable G. Thomas Cooper, Jr., on that same date at the Charleston County Courthouse. On September 29, 2014, the Honorable G. Thomas Cooper, Jr., issued an Order Substituting Counsel and Authorizing Discovery in Post Conviction Relief.

By way of the discovery motion and at the hearing, counsel explained that she had consulted a DNA expert (Ronald Ostrowski) since Applicant's trial began with a request for a continuance to address matters related to DNA.¹ Counsel explained that Mr. Ostrowski had provided her with a list of case records/items that were necessary for him to work on Applicant's case. As a result of the Order Authorizing Discovery, Applicant was granted the opportunity to obtain the discovery requested by Mr. Ostrowski. In

¹ A copy of Mr. Ostrowski's curriculum vitae is attached.

March of 2015, Mr. Ostrowski was retained by payment of \$2,000.00 and the records were provided for his review. Thereafter, Mr. Ostrowski met with counsel and spent several hours thoroughly reviewing the case and sharing his initial findings. He also explained to counsel how his expertise could have been utilized at the trial stage and how his expertise could be utilized in preparation for and at the evidentiary hearing. As a result, Applicant, through counsel, filed an Amendment to Application for Post Conviction Relief making several allegations involving the DNA evidence and lack of DNA expert prior to and at trial.

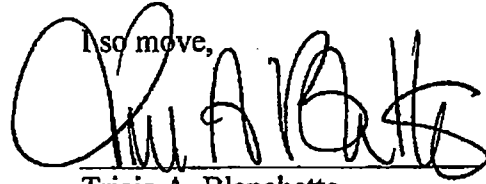
At this time, undersigned retained counsel has not received her full retainer fee due to medical issues of the contracted responsible party and the indigent status of Applicant.² Counsel has also been unable to provide Mr. Ostrowski the second portion of his fee to prepare for and testify at an evidentiary hearing.

Recently, in Reeves v. State, Op. No. 5359 (S.C. Ct. App. filed November 12, 2015) (Shearouse Adv. Sh. No. 44 at 47), the South Carolina Court of Appeals found counsel was ineffective for failing to utilize an expert to refute the State's experts called at trial. Applicant submits that his claims of ineffective assistance are directly in line with Reeves. Furthermore, upon review of Reeves, undersigned counsel is concerned that she has a duty to request indigent funding for the payment of Mr. Ostrowski's fee since she has consulted with him and is cognizant of the fact that his services are necessary to properly present Applicant at an evidentiary hearing.

Therefore, Applicant, through counsel, respectfully requests that this Court authorize payment to not exceed the amount of Five Thousand Dollars for the expert

² Applicant will submit a completed Affidavit of Indigency at the motion hearing scheduled for April 18, 2016.

services and/or testimony of Mr. Ostrowski, to be payable at the approved rate of \$220.00 an hour for working time and \$110.00 for travel time.

Iso move,


Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
Attorney for Applicant

March 30 2016
Columbia, SC

CURRICULUM VITAE 2016

Ronald S. Ostrowski

EDUCATION:

Wright Junior College, Chicago, Illinois A.A. 1964
Northern Illinois University, DeKalb, Illinois B.S. 1966
Northern Illinois University, DeKalb, Illinois M.S. (Population Genetics) 1968
Graduate Teaching Assistantship 1967-68
University of Notre Dame, Notre Dame, Indiana Ph.D. (Developmental/Molecular Genetics) 1971
Graduate Teaching Assistantship 1968-69
Graduate Research Assistant 1969-70
NASA Fellowship 1970-71

PERSONAL:

Date of Birth: Place of Birth:

PROFESSIONAL EXPERIENCE:

Academic

University of North Carolina at Charlotte
Assistant Professor of Biology 1971-1977
Associate Professor of Biology 1977-2005 (retired)
Editor and Publisher, NC Medical Genetics Newsletter 1983-2000
Roosevelt University, Chicago, IL
Visiting Professor 1988-1990
Davidson College, Davidson, NC
Visiting Professor 1993-1994

Administrative:

Acting Chairman of Biology Department 1975
(During Chairman's extended leave of absence)
Assistant to the Vice Chancellor for Academic Affairs, 1976-1980
Director of the Evening Program 1976-1980
Acting Director of the Graduate Studies Program
(During Director's extended absence) 1977, 1979
Deputy Director/Geneticist, Association for Sickle Cell Disease, (ASCD), Charlotte, NC 1980-82
Director of ASCD Hemoglobinopathies Laboratory 1980-1991
Director of the Honors Research Program, 1994 - 1997
NC Academy of Science, Board of Directors, 1995 - 1997
Association for Sickle Cell Disease, Board of Directors, 2002-2005

Consulting Activities

March of Dimes 1975-1977
Planned Parenthood Board of Directors 1974-1981
Charlotte Police Department 1973
Association for Sickle Cell Disease 1974-1991
American Society for Psycho-Prophylaxis in Obstetrics 1975-1979
Wheat, First Securities, Inc., Charlotte, NC 1978
Barber Scotia College Genetics Program 1981
Boone, Young, and Associates, Inc., New York, New York 1980-1981
International Sister Cities Program. Traveled to Port-Au-Prince, Haiti and did a needs assessment for a Sickle Cell Anemia Program. 1980.
Charlotte Discovery Place 1980-1988
Oral/Facial/Cranial Genetics Team, Charlotte Rehabilitation Hospital 1984-1988
Physician Education in Hemoglobinopathies Conference Planning Committee (Duke University) 1984
Muscular Dystrophy Clinic, Charlotte Rehabilitation Hospital 1984-1988
Genetics Clinic CMC 1975-1995
Forensic DNA Profiling 1993-present

EXPERT WITNESS / CONSULTANT:

MURDER

NC v. Fisher, 1992
NC v. White, 1992
NC v. Howell, 1993
NC v. Torres, 1993
NC v. Brickhouse, 1993
NC v. Richardson, 1993
U.S. v. Salameh et al., 1994
SC v. Molleda, 1994
MO v. Link, 1994
OH v. McGuire, 1994
NC v. Hartsell, 1994
NC v. Wallace, 1994
NC v. Wallace, 1994
IL v. Reinbold, 1994
NC v. Dickens, 1995
NC v. Trull, 1995
VA v. Barnabei, 1995
Kreutzer v. MO, 1995
SC v. Rosemond, 1995
SC v. J. Simmons, 1995
NC v. Parker, 1996
NC v. Abercrombie, 1996
NC v. Hamilton, 1996
KY v. Kriegeaum, 1996
KY v. McKinney, 1996
IL v. Bull, 1996
SC v. Wright, 1996
KY v. Mullins, 1996
VA v. R.R. Jones, 1996
U.S. v. Duke, 1996
SC v. Duke, 1996
MO v. Morrow, 1996
SC v. Anderson, 1996
SC v. Kinloch, 1996
VA v. Brown, 1996
IL v. Taylor, 1996
SC v. Wright, 1996
MO v. Taylor, 1996
KY v. Coffey, 1996
SC v. Brewer, 1996
PA v. Dillon, 1996
KY v. Dalton, 1996
Franklin v. Moore (SC), 1996
Holmes v. Moore (SC), 1997
FL v. Olsen, 1997
FL v. Ortiz, 1997
KY v. Foley, 1997
NC v. Underwood, 1997
KY v. Aucott, 1997
VA v. King, 1997
SC v. Gay, 1997
Cronell v. SC, 1998
U.S. v. Childs, 1998
MO v. J. Thomas, 1998
MO v. Davis, 1999
SC v. T. Wright, 1999
OK v. Welch, 1999
FL v. Schumaker, 1999
KY v. Graham, 1999
NC v. Crabtree, 1999
NC v. Clowers, 1999
NC v. J.L. Smith, 1999
MA v. Bly, 1999
MO v. Daniels, 1999
SC v. Laux, 1999
SC v. Ramsey, 1999
SC v. Frederick, 1999
SC v. Bridental, 1999
NC v. May, 1999
FL v. Morris, 1999
SC v. Robertson, 1999
MA v. Perkins, 1999
SC v. Irick, 1999
SC v. Simmons, 1999
NC v. Machins, 1999
SC v. Gourdine, 1999
GA v. Burris, 1999
VA v. Bryant, 1999
NC v. Lippard, 2000
SC v. Quattlebaum, 2000
MA v. Page, 2000
MA v. Stallings, 2000
FL v. Chavers, 2000
NC v. Bennett, 2000
NC v. Rogers, 2000
SC v. Hollis, 2000
SC v. Miller, 2000
NC v. Temoney, 2000
SC v. Ervin, 2000
FL v. McPherson, 2000
MO v. Hendrix, 2000
SC v. Simmons, 2000
GA v. Adams, 2001
Reed v. Catoe (SC), 2001
U.S. v. Arce Montes, 2001
NC v. Talib, 2001
NC v. R.A. Jackson, 2001
MO v. Bess, 2001
MO v. Barnes, 2001
U.S. v. Jackson, 2001
NC v. Lippard, 2001
SC v. Holmes, 2001
SC v. Pringle, 2001
Mann v. TN, 2001
GA v. Tye, 2002
SC v. Pollen, 2002
SC v. Walden, 2002
MO v. Farris, 2002
SC v. Bowman, 2002
MO v. Mayes, 2002
NC v. Graham, 2002
MA v. Dagley, 2002
SC v. Walden, 2002
MO v. Farris, 2002
U.S. v. Coleman, 2002
SC v. Bowman, 2002
MO v. Clark, 2003
Reid v. SC, 2003
NC v. Duke, 2003
GA v. McQuarter, 2003
NC v. Edwards, 2004
NC v. T. White, 2004
NC v. McHone, 2004
KY v. Meeks, 2004
NC v. McLean, 2004
GA v. Denny, 2004
NC v. Mote, 2004
U.S. v. Fulks, 2004
OK v. Anderson, 2004
NC v. Goode, 2004
SC v. Hixon, 2004
SC v. Sanders, 2004
SC v. Cope, 2004
SC v. Ervins, 2004
GA v. Quedens, 2004
SC v. Brown, 2004
NC v. Hyatt, 2005
NC v. Hamilton, 2005
NC v. Street, 2005
FL v. Frederick, 2005
SC v. Allan, 2005
NC v. Hyatt, 2005
OK v. Anderson, 2005
OK v. Kidwell, 2005
NC v. McLean, 2005
NC v. Granger, 2005
SC v. Williams, 2005
SC v. Radwell, 2006
FL v. Eaglin, 2006
Brisbon v. SC, 2006
SC v. Goodwin, 2006
SC v. Hickson, 2006
NC v. Lane, 2006
SC v. Evins, 2006
SC v. Brown, 2006
SC v. Goodwin, 2006
NC v. Hill, 2006
Chapman v. NC, 2006
NC v. Tadesse, 2006
SC v. Vick, 2006
FL v. Lugo, 2007
SC v. G.K. Johnson, 2007
SC v. J. Davis, 2007
FL v. Twilegar, 2007
SC v. W. Bell, 2007
NC v. Fagan, 2007
SC v. Starnes, 2007

MURDER (cont.)

NC v. Bryson, 2007
 SC v. McCormick, 2008
 SC v. Beard, 2008
 SC v. Gagnon, 2008
 NC v. Lockett, 2008
 NC v. Delgado, 2008
 NC v. Critterton, 2008
 SC v. Torres, 2008
 SC v. Redwine, 2008
 VA v. Valentin-Morales, 2008
 NC v. Valvere-Liborio, 2008
 NC v. Bassett, 2008
 NC v. Bowling, 2008
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 SC v. Wilson, 2008
 NC v. Jessup, 2008
 SC v. Moses, 2009
 NC v. Banks, 2009
 SC v. Hernandez-Tolentino, 2009
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 NC v. Munn, 2010
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 NC v. McMillan, 2010
 NC v. Laurean, 2010
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 SC v. Rand, 2010
 NC v. Marcus, 2010
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 NC v. Castaneda, 2010
 NC v. Thorp, 2010
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 NC v. Whitloch, 2011
 FL v. Deleon, 2011
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 NC v. McCoy, 2011
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NC v. Watson, 2011
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- SC v. Dycus, 1998
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 NC v. Brooks, 2009
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 NC v. Harris, 2011
 SC v. Linton, 2011
 GA v. Powell, 2011
 NC v. Davis, 2011
 NC v. Daniels, 2011
 NC v. Neveron, 2011
 SC v. Fleming, 2011
 SC v. Taylor, 2011
 GA v. Taylor, 2011
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 NC v. Ashley, 2011
 SC v. Mann, 2011
 NC v. Carmichael, 2011
 NC v. Yankuba, 2011
 SC v. Aiken, 2011
 SC v. Brown, 2011
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 NC v. Watkins, 2012
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 GA v. Alford, 2012
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 SC v. Dingle, 2012
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 NC v. Evans, 2012
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 NC v. D. Martin, 2015
 NC v. J. Taylor, 2015
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 SC v. J. James, 2015
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NC v. Whitley, 2015
 SC v. Dervin, 2015
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 NC v. Rameriz, 2016

CRIMINAL SEXUAL CONDUCT

SC v. Gilyard, 2015

CHILD MOLESTATION

GA v. McRuder, 2014

INDECENT LIBERTIES W/CHILD

SC v. A. Kennedy, 2013

INCEST

NC v. Page, 2006
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 VA v. Richardson, 2011

PATERNITY

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KIDNAPPING

U.S. v. Washington, 2006
 SC v. Fryar, 2015

LARCENY

VA v. Fountain, 1996
 SC v. Washington, 1996
 MO v. Witte, 1998
 MA v. Redding, 1999
 FL v. Arnold, 2000
 MA v. Redding, 2000

ASSAULT

MO v. Hills, 1997
 PA v. Osborne, 1997
 SC v. Taylor, 2000
 SC v. Canty, 2006
 SC v. Caldwell, 2007
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AGGRAVATED ASSAULT

U.S. v. Brown, 2015

ASSAULT & BATTERY

SC v. Mitchell, 2015

ASSAULT w/DEADLY WEAPON

NC v. Yates, 2007
 NC v. Biggs, 2008
 NC v. Harris, 2010
 NC v. Moore, 2011
 U.S. v. Moore, 2011

ASSAULT w/INTENT TO KILL

SC v. Drumming, 2009
SC v. Dunbar, 2010

HIT & RUN INVOLVING DEATH

SC v. Hendrix, 2010

ATTEMPTED MURDER

FL v. Leslie, 1998
FL v. Bruce, 2004
NC v. Harris, 2012
SC v. Gilbert, 2012
SC v. Weldon, 2012
SC v. Ransom, 2012
NC v. Luckey, 2013
SC v. Ayer, 2015

DISHONEST CONDUCT

FL Bar V. Senton, 2003

BURGLARY

FL v. Fisher, 2001
SC v. Reed, 2005
SC v. Heyward, 2006
SC v. Parsons, 2006
SC v. Jenkins, 2006
SC v. Fields, 2006
SC v. Artis, 2006
SC v. Ashe, 2007
SC v. McClure, 2008
VA v. Carter, 2010
VA v. Horsley, 2010
SC v. Brice, 2010
NC v. Matthews, 2010
GA v. Lakes, 2011
VA v. Brooks, 2011
NC v. Leach, 2011
SC v. Robinson, 2013
SC v. Prevatte, 2015
SC v. Spann, 2015
SC v. Kinloch, 2015
SC v. Figueredo-Torres, 2016

BREAKING & ENTERING

SC v. Berry, 2009

HOME INVASION

SC v. McNeil, 2012

ATTEMPTED ROBBERY

VA v. Mayfield, 2005

CARJACKING

SC v. Shepard, 2009
U.S. v. Saintfleur, 2010

GUN POSSESSION

U.S. v. Weaver, 2007
U.S. v. McGowan, 2007
U.S. v. Brown, 2008
U.S. v. Blakeney, 2009
U.S. v. Hall, 2009
VA v. Allen, 2010
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VA v. Pounds, 2011
U.S. v. Ingram, 2011
U.S. v. Pritchard, 2011
NC v. Hooper, 2011
U.S. v. Rollerson, 2012
U.S. v. Stacks, 2012
NC v. M. Robinson, 2013
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DRUG TRAFFICING

FL v. Gordon, 2003

COCAINE POSSESSION

NC v. Stanley, 2009

CONTROLLED SUBSTANCES

NC v. Tavares, 2012

ROBBERY

FL v. Roberts, 2001
U.S. v. Mays, 2002
SC v. Doyle, 2002
FL v. Gibson, 2002
SC v. S. Coleman, 2002
FL v. M. Lamb, 2003
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NC v. McFarland, 2007

IL v. Garfield, 2007

NC v. Coleman, 2007

VA v. Miller, 2008

VA v. Fortune, 2008

VA v. Davis, 2008

NC v. Todman, 2010

NC v. El Moori, 2012

NC v. McCauley, 2013

ARMED ROBBERY

NC v. Hooker, 2008
NC v. Scott, 2008
NC v. Jones, 2009
NC v. Ellis, 2009
SC v. Portee, 2009
NC v. Patton, 2009
NC v. Santos, 2009
NC v. Coulbourne, 2009
NC v. Bettes, 2009
NC v. Shine, 2010
NC v. Jones, 2010
SC v. Moore, 2011
SC v. Criswell, 2011
SC v. Mathis, 2011
SC v. Shuler, 2011
SC v. Belk, 2012
NC v. B. Carter, 2013
SC v. Graddick, 2014
SC v. M. Brown, 2014
NC v. McNeill, 2015
NC v. Moore, 2015
SC v. J. Smith, 2015
U.S. v. McDaniel, 2015

BANK ROBBERY

U.S. v. Miller, 2005
U.S. v. Whitaker, 2005
U.S. v. Perkins, 2005
U.S. v. Palmer, 2005
U.S. v. Green, 2005
U.S. v. Williams, 2008
U.S. v. Moss, 2009
U.S. v. Jones, 2009
SC v. Boyd, 2011

CONTINUING EDUCATION COURSES TAUGHT:

"Forensic DNA Evidence", Advanced Criminal Practice II, Kennesaw State Continuing Education. Atlanta, Georgia. 1994.
"Basics of DNA Profiling", Board of Continuing Education of the N.C. State Bar Association. Wrightsville Beach, NC. 1995.
"Medical Applications of DNA Technology", Southeastern Regional Genetics Group. Charlotte, NC. 1995.
"DNA Profiling", Organized Program for Future Workshops, Missouri Public Defenders. St. Louis, MO. 1996.
"DNA", 7th Annual Defense Investigators Conference, Institute of Government, UNC Chapel Hill, NC. 1996.
"DNA Evidence", Cook County Public Defender, Chicago, IL. 1996.
"DNA for Dummies", SC Public Defender Conference, Cherry Gove, NC. 1996.
"DNA Workshop Series", MO Public Defenders System, Kansas City, MO. 1996.
"Skillfully Handling Scientific Evidence and Expert Witnesses at Trial", National Legal Aid and Defender Assoc., Orlando, FL. 1997.
"Forensic DNA Profiling", Association of Genetic Technologists, Charlotte, N.C. 1997

"New Developments in DNA Technologies", SC Public Defenders Conference, Folly Beach, SC 1998
 "DNA Profiling: Yesterday, Today and Tomorrow", Missouri Public Defenders, Lake of the Ozarks, MO 2000
 "Developments in DNA Technologies", SC Public Defenders Conference, Litchfield Beach, SC 2000
 "DNA: Science and Technology", Missouri Public Defenders, Lake of the Ozarks, MO, 2001.
 "DNA in 30 Minutes", South Carolina Bar, Columbia, SC, 2001.
 "Visualizing DNA," NC Public Defenders Conference, Wilmington, NC 2003.
 "BioInformatics: Paternity Indices," Forensic BioInformatics Services Annual Meeting, Dayton, OH 2003.
 "Understanding Forensic DNA Profiling"—Academy of Trial Lawyers, Raleigh, NC, 2004.
 "Making DNA Understandable To Jurors"—Forensic Bioinformatics Conference, Dayton, OH, 2004.
 "Educating the Jury"—Ninth Annual Federal Public Defenders' Meeting, Key Largo, FL, 2006.
 "Forensic DNA Profiling"—Public Defender Conference, Charleston, SC, 2006.
 "DNA Primer"—2009 Public Defenders Conference & CLE Training, Charlotte, NC 2009.
 "Forensic DNA Profiling"—North Carolina Advocates for Justice, Raleigh, NC 2010.

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- Perez, R., R. S. Ostrowski 2003. Determination of the minimal number of nuclei needed using fluorescence in situ hybridization (FISH) to detect amplified human epidermal growth factor receptor-2 (HER-2) in breast tumor cells. *Journal of North Carolina Academy of Science*. 119, #2:81.

PAPERS PRESENTED

- "Competition of the White Locus Alleles w^+ and w^a of *Drosophila melanogaster* in a Homozygous Background." A.I.B.S. annual meeting, 1968. University of Wisconsin, Madison, Wisconsin.
- "Nucleic Acid Synthesis in a Duplicated Chromosomal Region of *Drosophila melanogaster*". Midwest Regional Developmental Biology Conference. 1971. Elmhurst College, Elmhurst, Illinois.
- Chairman and discussion leader of the Cytogenetics section. Fifteenth *Drosophila* Research Conference, 1973. North Illinois University, Dekalb, Illinois.
- "DNA synthesis in salivary gland chromosomes of *Coelopa frigida*". Forty-fifth annual meeting of the Genetics Society of America, 1976. University of Utah, Salt Lake City, Utah.
- "Cellular Development *Coelopa frigida* (Diptera): A Study using Liquid Scintillation Techniques". Fortieth Annual Meeting of the Association of Southeastern Biologists, 1979. University of Tennessee - Chattanooga, Chattanooga, Tennessee.
- "Model State Genetic Disease Program", National Sickle Cell Management Workshop, 1980. Charlotte, North Carolina
- "Genetic Counseling with Emphasis on Non-Paternity Situations". (Workshop). National Conference Comprehensive Sickle Cell Centers and Screening and Education Clinics. 1980. Pittsburgh, Pennsylvania.

- "Genetic Independence of Hemoglobin and Haptoglobin in a Black Population: An Electrophoretic Study" - National Conference Comprehensive Sickle Cell Centers and Screening and Education Clinics - Hilton Head Island, SC. 1981.
- "Genetic Engineering" - North Carolina Cytologist's Annual Meeting - Charlotte, NC. 1982.
- "Genetic Independence of Hemoglobin and Haptoglobin in a Black Population: An Electrophoretic Study". (Talley, E.S.) North Carolina Academy of Science Annual Meeting 1982. UNC-Wilmington.
- "A Study of the Mitotic Indices in Peripheral Blood Lymphocytes of Pregnant and Nonpregnant Women. (Johnson, D.L.) North Carolina Academy of Science Annual Meeting. 1983. UNC-Chapel Hill.
- "A Search for a Correlation Between Mothers with Elevated Hemoglobin A₁ levels and the Birth of Small for gestational Age Babies. (Floyd, R.A.) North Carolina Academy of Science Annual Meeting. 1983. UNC-Chapel Hill.
- Hemoglobinopathies: "old and new techniques". Grand rounds. Charlotte Memorial Hospital, Charlotte, NC. 1985.
- "An investigation of overlapping chromosomes in cultured white blood cells" (Bahr, K.L.) North Carolina Academy of Science Annual meeting. 1986 E.C.U. Greenville, NC.
- "An investigation of overlapping chromosomes in cultured WBC's from retinoblastoma patients" (Bundy, S.A.) North Carolina Academy of Science Annual meeting. 1987. N. C. State University.
- "An investigation of the Fragile-X site as it relates to chromosome overlap in cultured human white blood cells (Grass, F.S. and Lovett-Jellema, J.) American Cytogenetics Conference. 1993 Port Ludlow, WA.
- "Evaluation of X chromosomal mosaicism by fluorescent in situ hybridization in women who have recurrent spontaneous pregnancy losses." (Grass F., Norton J., Kishna, R. and Steger M.) American Society of Human Genetics Annual meeting. 1993. New Orleans, LA.
- "Studies in Fragile X." (Panther, R.) Annual Research Conference. OB/GYN, Carolinas Medical Center. 1993.
- "Evaluation of X chromosomal mosaicism by Fluorescence in situ hybridization in women who have recurrent spontaneous pregnancy losses." (Grass, F.) Pediatrics, Carolinas Medical Center. 1993.
- "Investigation of maternal nondisjunction in spontaneous aborters using fluorescence in situ hybridization." (Steger, S.M.) North Carolina Academy of Science Annual Meeting. 1994. Davidson College, Davidson NC.
- "Mosaicism for X chromosomal aneuploidy in women who experience recurrent pregnancy loss evaluated by fluorescence in situ hybridization." (Grass F., Norton J., Krishna R., Jenkins S., and Steger M.) American Cytogenetics Conference. 1994. Wintergreen Resort, VA.
- "Forensic DNA Profiling: An Impact on Health Care Delivery." UNCC Academy of Health Issues, Dilemmas in Health Care Lecture Series. 1994. University of North Carolina Charlotte, Charlotte, NC.
- "DNA sequencing: computer simulation as a compliment to laboratory techniques." (Jenkins S. and Steck T.) North Carolina Academy of Science Annual meeting. 1994. Davidson College, Davidson, NC.
- "A Search for Chromosome 15 Deletion (Prader-Willi Syndrome) in the General Population Using High Resolution Chromosomes and Fluorescent In Situ Hybridization." (C. Dunbar) Merck Lecture Series, 1994. Davidson College, Davidson, NC.
- "Interphase cytogenic analysis of low-level X chromosome aneuploidy in recurrent spontaneous abortion." (F.S. Grass) American Society of Human Genetics Annual Meeting. 1996. San Francisco, CA.
- "Possible Forensic Implications for a Turner Syndrome female possessing a ring chromosome composed of both X and Y derived material." (F.S. Grass, C.A. Brown and S.P. Nakano) Cambridge Healthtech Institutes 2nd annual conference. DNA Forensics Science, Evidence, and Future Prospects. 1997. McLean, VA.
- "Associations of known gene variations in the alpha adducin and beta-2 adrenergic receptor genes with essential hypertension using polymerase chain reaction oligonucleotide ligation allele detection." (J. Pliner, C. Brown and K. McKinney). North Carolina Academy of Science Annual Meeting. 2000. NC State University, Raleigh, NC.
- "Mosaic triploidy in CVS and amniocentesis with normal outcome." (F. S. Grass, C. Dickerson, T. Loeb and J. Phipps) 36th American Cytogenetics Conference. 2000 Galveston, TX.
- "Triploid mosaicism in CVS and amniocyte cultures with normal postnatal outcome." (F.S. Grass, T. Loeb, C. Dickerson, J. Phipps, and R.S. Ostrowski), Third European Cytogenetics Conference. 2001. Paris, France.
- "Determination of the minimal number of nuclei needed using fluorescence in situ hybridization (FISH) to detect amplified human epidermal growth factor receptor-2 (HER-2) in breast tumor cells." (R. Perez, R. S. Ostrowski). North Carolina Academy of Science Annual Meeting. 2003. UNC Wilmington, Wilmington, NC.
- "Not Guilty Verdicts in Two DNA Trials" (R.S. Ostrowski) Chicago conference/21st Century. 2004. Chicago, Illinois. Present

UNIVERSITY RESEARCH ACTIVITY

Collaboration with Carolinas Medical Center. Techniques include Polymerase Chain Reaction (PCR), Southern Blotting, DNA sequencing and profiling, and Fluorescent In Situ Hybridization

FUNDED RESEARCH:

Dosage Compensation: A Study of X Chromosome Hyperactivity in *Drosophila melanogaster*. UNCC Foundation. 1973.
Cytological and Developmental Studies of the Salivary Gland Chromosomes in the Kelp Fly *Coelopa frigida*. UNCC Foundation. 1975.
A Search for an Asynchronously Replicating Chromosomes in *Coelopa frigida*: An Autoradiographic Study. North Carolina Science and Technology Committee. 1975-77.
Comparison of Hemoglobin-Haptoglobin Types as They Relate to Stress. Urban Institute Grant. 1980.
Frequency of Chromosomal Association in Down's Syndrome and Families. (Levine, M.) John Yarborough Memorial Grant. 1981.
A Search for a Correlation Between Haptoglobin and Hemoglobin Genotypes: An Electrophoretic Study (Talley, E.) John Yarborough Memorial Grant. 1981.
Genetic Independence of Hemoglobin and Haptoglobin in a Black Population. UNCC Foundation. 1982.
Supernumerary Chromosomes: A Scanning Electron Microscope Study. UNCC Foundation. 1984.
"Breast Stimulation to Augment labor: An Investigation of Oxytocin and Prostaglandin F₂ alpha levels in Ten Women Receiving Breast Stimulation". UNC School of Medicine. 1984.
Improved Molecular Diagnosis of FRA-X disease. Charlotte-Mecklenburg Health Services Foundation, Inc., 1992.
Investigation of Parental Nondisjunction on Spontaneous Aborters Using Fluorescence in Situ Hybridization. UNCC Foundation, 1992.
Evaluation of X-chromosomal mosaicism by Fluorescent in situ hybridization in women who have recurrent pregnancy losses. Charlotte-Mecklenburg Health Services Foundation, 1993.
A Search for Chromosome 15 Deletion (Prader-Willi Syndrome) in the General Population Using High Resolution Chromosomes and Fluorescent In Situ Hybridization. Merck Scholar Research Grant, 1994.
Introduction of Hands On Biotechnology Across the Undergraduate Curriculum. NC Biotechnology Center, 1994.
Evaluation of X-chromosomal mosaicism by Fluorescent in situ hybridization in women who have recurrent pregnancy losses. Charlotte-Mecklenburg Health Services Foundation, 1994.
Associations of gene variations with essential hypertension using polymerase chain reaction oligonucleotide ligation technique. Beta Beta Beta Biological Society. (J. Pliner) 1999.

HONORS AND AWARDS:

Outstanding Educators in America 1975
American Men and Women in Science 1976
Who's Who in the South and Southwest 1977
International Who's Who in Education 1977
Readers Digest National Foundation Technical Assistance Award (received for Port-au Prince, Haiti program) 1981
Certificate of Appreciation-City of Charlotte for Haiti Sister City Program 1981
John Bowley Derieux Research Award (Talley, E.) 1982
Directory of Distinguished Americans 1982
Who's Who in Frontiers of Science and Technology 1982
Men of Achievement 1983
John Bowley Derieux Research Award (Johnson, D.L.) 1983
John Bowley Derieux Research Award (Floyd, R.A.) 1983
Certification, Hemoglobinopathies laboratory detection techniques, (C.D.C., Atlanta, GA) 1983
John Bowley Derieux Research Award (Bahr, K.L.) 1986
John Bowley Derieux Research Award (Bundy, S.A.) 1987
John Bowley Derieux Research Award (Steger, S.M.) 1994
Sigma Xi Research Award (Steger S.M.) 1994
Honorary member, Golden Key National Honor Society, 1995
Tri Beta, Faculty Member of the Year, 1996
Finalist, NationsBank Award for Excellence in Teaching, 1997
John Bowley Derieux Award (Pliner, J.) 2000
John Bowley Derieux Award (Perez, R.) 2003
Health Services Research Academy Best Student Paper Undergraduate (Perez, R.) 2003

PROFESSIONAL AFFILIATIONS:

American Society for Human Genetics
American Academy of Forensic Science
North Carolina Academy of Science
North Carolina Medical Genetics Association
Editor and Publisher NCMGA Newsletter
Chairman, Professional Liaison and Education Committee
Genetics Society of America
Sigma Xi
Smithsonian Institute
Audubon Society
American Society for Psycho-Prophylaxis in Obstetrics
American Association for the Advancement of Science
Association of Southeastern Biologists
National Sickle Cell Federation - Board of Science Advisor

CURRICULUM DEVELOPMENT

Courses Developed and Taught

Cytogenetics
Developmental Genetics Seminar
Behavioral Genetics Seminar
Medical Genetics
Genetic Engineering
CURRICULUM DEVELOPMENT (cont.)

Additional Courses Taught

Principles of Genetics (lecture and laboratory)
Introduction to Biology (lecture and laboratory)
Anatomy and Physiology Laboratory
Animal Biology Laboratory
Cellular/Molecular Biology (lecture and laboratory)

Courses Developed and Taught (cont.)

Population Genetics
Human Heredity and Diversity
Graduate Genetics Seminar
Developmental Biology
Human Genetics
Cell and Molecular Biology
DNA Profiling

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

David Meggett, #343610,)
Applicant,)

2013-CP-10-3740

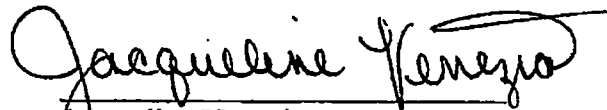
v.)

CERTIFICATE OF SERVICE

State of South Carolina,)
Respondent.)

I, Jacqueline Venezia, Law Clerk to Tricia A. Blanchette, Esq., hereby certify that I placed in the mail this 30th day of March, 2016, a copy of Motion for Indigent Funds, to Rutledge Johnson of the Attorney General's Office, at:

Office of the Attorney General
ATTN: Rutledge Johnson
1000 Assembly Street, 5th Floor
Columbia, SC 29201



Jacqueline Venezia
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Law Clerk

March 30, 2016

FILED
2016 APR -1 PM 12:22
JACQUELINE VENEZIA
CLERK OF COURT

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT
2013-CP-10-3740

DAVID MEGGETT,)
APPLICANT,)
VS.)
THE STATE OF SOUTH)
CAROLINA,)
RESPONDENT.)
APRIL 18, 2016
CHARLESTON, SC

B E F O R E:

HONORABLE DOYET A. EARLY

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

J. RUTLEDGE JOHNSON, ESQUIRE
Attorney for the Respondent

TRICIA BLANCHETTE, ESQUIRE
Attorney for the Applicant

* * * * *

Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit

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1 (The following proceedings were held
2 April 18, 2016, Charleston County, South Carolina,
3 @ 9:56 a.m.)

4 THE COURT: Do you have a package there
5 on Meggett?

6 MR. JOHNSON: No, sir. This is just a
7 motions hearing so I didn't think it was necessary.

8 MS. BLANCHETTE: Your Honor, may I
9 approach? I have a copy of the motion.

10 THE COURT: Good morning. How are you?

11 MS. BLANCHETTE: Good.

12 THE COURT: Mr. Meggett, good morning.
13 How are you?

14 THE APPLICANT: Good morning.

15 THE COURT: Everything going good?

16 THE APPLICANT: Yes, sir.

17 THE COURT: This is a motion for funds.

18 MS. BLANCHETTE: That is correct, Your
19 Honor.

20 THE COURT: Be glad to hear from you.

21 MS. BLANCHETTE: Your Honor, Tricia
22 Blanchette here on behalf of David Meggett. I
23 filed a motion that I handed to the Court this
24 morning back on April 1st of 2016. At that time
25 just because of some issues with getting it signed

1 in the institution I didn't have a copy of an
2 affidavit of indigency completed by Mr. Meggett. I
3 do have that now and ask to be able to mark that as
4 an exhibit at this time. I have a copy for the
5 Court.

6 THE COURT: If you will have the court
7 reporter mark it please, ma'am.

8 (APPLICANT'S EXH. 1 marked for
9 identification.)

10 THE COURT: Okay. Thank you.

11 MS. BLANCHETTE: Your Honor, just
12 briefly, the PCR procedural history on this case.
13 This application was filed back on June 25th of
14 2013. The State submitted a return on
15 December 11th of 2013. And on September 8th of
16 2014 I filed a motion and was subsequently
17 substituted in as counsel in place of appointed
18 counsel Christopher Murphy.

19 We then appeared in front of the
20 Honorable G. Thomas Cooper, Jr. on the same day in
21 the Charleston courthouse on my motion for
22 substitution and for authorization of discovery.

23 On September 29th, 2014, the Honorable
24 G. Thomas Cooper, Jr. issued an order substituting
25 and authorizing the discovery. At the discovery

1 motion hearing and by way of the written motion I
2 explained that I had consulted with the DNA expert
3 Ronald Ostrowski since the applicant's trial
4 essentially began with a request for a continuance
5 to get a DNA expert. As a result of that being
6 kind of the primary basis of our ineffective
7 assistance in this case, I had asked for discovery
8 for Mr. Ostrowski to review and that was granted by
9 Judge Cooper. I explained that Mr. Ostrowski had
10 provided me with a list of items that he needed and
11 we were able to obtain those.

12 Mr. Meggett provided him with a \$2,000
13 payment. Mr. Ostrowski reviewed all those records,
14 came and met with me for a full day in my office in
15 Columbia and shared with me all of his findings.
16 He explained to me that his expertise could have
17 been used at the trial stage in preparing for trial
18 and through the trial itself. As a result I shared
19 those findings with my client and we filed an
20 amendment to his application for post-conviction
21 relief and in that amendment there are five issues
22 specifically dealing with the DNA issues and the
23 preliminary findings of Mr. Ostrowski.

24 Unfortunately, at this time I had been
25 retained by a friend of Mr. Meggett, a third party,

1 and that was all done through a retainer agreement.
2 She ran into some medical problems and only had
3 been able to make one payment on my fee all of last
4 year.

5 I have not been paid in full at this
6 time. And I had recently reviewed the case of
7 Reeves v. State and I have a copy for Your Honor.

8 THE COURT: Well, how much was your
9 fee?

10 MS. BLANCHETTE: My total fee was
11 \$15,000.

12 THE COURT: How much were you paid?

13 MS. BLANCHETTE: I have been paid to
14 date -- just one second, Your Honor, I want to make
15 sure I am completely accurate. I charge a \$750
16 review fee which I applied, and at this time there
17 is a balance of \$2,600.

18 THE COURT: So you have been paid how
19 much?

20 MS. BLANCHETTE: At this point I have
21 been paid approximately 12,000 of the fee, no
22 expenses. In the original 2,000 that was actually
23 for Mr. Ostrowski, I covered that fee and then it
24 was refunded back to me. So I paid that from my
25 original retainer fee so that we could get him on

1 board. He has requested an additional \$5,000 to do
2 a report and to appear here in Charleston to
3 testify. At this time my client has been unable,
4 like I said, to pay my fee.

5 THE COURT: But he has paid over
6 \$12,000.

7 MS. BLANCHETTE: He has over the last
8 two years, Your Honor. I was --

9 THE COURT: I'm not cutting you off,
10 but I just had the same issue arise in Aiken. And
11 we had indigent defense involved with it and they
12 look very suspect on people who retain -- who
13 receive retainers and then ask for indigent defense
14 to help them with their experts. Normally what I
15 do, I give indigent defense an opportunity to be
16 here since they are paying it since their budget is
17 so tight. So I'm not going to hear or rule on this
18 without them being present. I don't know if
19 anybody is here from indigent defense.

20 MR. JOHNSON: Yes, sir. Mr. Hugh Ryan
21 who is the head.

22 THE COURT: You know the one I was
23 talking about other day.

24 MR. RYAN: Yes, sir. I got a subpoena.
25 I'm here, sir.

1 THE COURT: Sorry. I didn't see you
2 back there. But he is a wonderful steward of the
3 state's money.

4 MS. BLANCHETTE: He is, Your Honor.

5 THE COURT: Tough to deal with. But we
6 all appreciate what you're trying to do. We
7 appreciate the situation you're in. By the same
8 token, we appreciate indigent defense and providing
9 funds for indigents. So I will not cut you off in
10 your argument, particularly since they are
11 represented here today. I will hear you in full,
12 then I assume you are going to call him.

13 MR. JOHNSON: Yes, sir.

14 MS. BLANCHETTE: Your Honor, just
15 speaking to that point, I tried to contact Hugh
16 Ryan last week because I only one time in my now
17 going on 12 year career have asked for indigent
18 funds on a retained case. I regularly get
19 appointed out of Richland County. I have been
20 appointed to a number of appeals so I have worked
21 with Hugh on a number of cases and chipped in and
22 paid for the staples from time to time.

23 THE COURT: I'm not fussing at you. I
24 am not criticizing or fussing at you. It's just
25 the reality of the situation and let's hear you and

1 see what we can do.

2 MS. BLANCHETTE: Your Honor, I do have
3 a copy of Reeves v. State if Your Honor would like
4 that.

5 THE COURT: That's about the DNA and
6 the need of it for --

7 MS. BLANCHETTE: Well, in Reeves, I
8 will hand this up, Your Honor. Attorney Jeremy
9 Compton handled that case and he regularly handles
10 a lot of PCR cases and the State actually brought
11 this to my attention. In Reeves he was a retained
12 defense counsel and he essentially in that decision
13 has been found ineffective for not consulting with
14 and retaining an expert when his privately retained
15 client informed him he did not have the money to do
16 so.

17 So in reading that case I felt that I
18 had an obligation since I'm not defense counsel,
19 I'm PCR counsel, since I have consulted with Mr.
20 Ostrowski, he has indicated to me how he could be
21 used and given me his initial findings, I felt that
22 I had a duty to my client under the reasoning in
23 this case to make this request of the Court that we
24 get the additional funding for Mr. Ostrowski.

25 THE COURT: As I said a while ago, I'm

1 certainly not faulting you for doing so. I am just
2 telling you what the reality may be, but you make
3 your record.

4 MS. BLANCHETTE: And, Your Honor, just
5 to reference quickly the affidavit of indigency, my
6 client does receive funds from the NFL retirement
7 fund. That all goes direct to child support as is
8 indicated on his affidavit of indigency. He has
9 also indicated on there that the funds that were
10 paid for myself and Mr. Ostrowski were a gift that
11 has been through a third party that has signed his
12 retainer agreement as well.

13 As I already indicated, unfortunately
14 she ran into some medical difficulties and has only
15 -- the last payment I got was in December of last
16 year. Prior to that I had not received one for a
17 majority of the year.

18 THE COURT: Well, looking at his
19 affidavit he receives 22,000 and change. Is that
20 per month or is that per annual?

21 MS. BLANCHETTE: That is annually. I
22 believe it's on the first page, Your Honor, there
23 that all then goes directly to support his
24 daughter. That is paid directly to child support.
25 So he does not see any of those funds.

1 THE COURT: On question three where he
2 talks about pensions and annuities, I assume that's
3 the 22,798 a year that he gets from the -- is that
4 a pension that he's getting?

5 MS. BLANCHETTE: Yes, Your Honor. And
6 I may have incorrectly called it a retirement fund.
7 But's a pension fund from his career in the NFL.

8 THE COURT: Then he says he has gifts
9 or inheritance. What is that?

10 MS. BLANCHETTE: I told him he needed
11 to disclose the attorney fee that was paid by the
12 third party, Mr. Ostrowski's fee that was paid by
13 the third party.

14 THE COURT: Does he have any other
15 assets other than the pension that he's receiving
16 from the NFL?

17 MS. BLANCHETTE: Would you like for him
18 to answer, Your Honor? I am not aware of any.

19 THE COURT: Mr. Meggett, raise your
20 right hand, please.

21 (Applicant sworn.)

22 THE COURT: What other assets do you
23 have?

24 THE APPLICANT: None at all, Your
25 Honor.

1 THE COURT: Do you have any land, any
2 savings accounts, stocks, bonds?

3 THE APPLICANT: No, sir.

4 THE COURT: Any other retirement
5 account other than the NFL?

6 THE APPLICANT: No, sir, NFL, that's
7 it.

8 THE COURT: That is for life? How long
9 does that 22,000 a year come to you?

10 THE APPLICANT: That's until I am
11 62 years old.

12 THE COURT: Until you are 62?

13 THE APPLICANT: Yes.

14 THE COURT: That's a long time for you.

15 THE APPLICANT: Thank you.

16 THE COURT: How old is your daughter?

17 THE APPLICANT: She's 14.

18 THE COURT: So she's got four more
19 years on the Court ordered child support?

20 THE APPLICANT: Yes, sir.

21 THE COURT: So you will have that
22 22,000 available to you in four years? Is that
23 child support terminated at age 18?

24 THE APPLICANT: Yes, it is.

25 THE COURT: Ma'am, you may continue.

1 MS. BLANCHETTE: Your Honor, I may have
2 already pointed it out already, but he was
3 originally represented by the Charleston public
4 defender's office in this trial and that he
5 qualified for appointed counsel, Mr. Murphy, prior
6 to myself being retained in this case. Your Honor
7 has a copy of our motion. I have provided the
8 affidavit and Reeves. I don't have anything
9 further to add unless the Court has questions of
10 me.

11 THE COURT: No, ma'am, I do not. Thank
12 you very much. Anything you want to ask her about
13 the motion or you just want to call the witness?

14 MR. JOHNSON: I just want to call Mr.
15 Ryan since the State is not the keeper of those
16 funds as far as the Attorney General's Office. So
17 I don't really have a leg to stand on, but Mr. Ryan
18 does.

19 THE COURT: You don't have a dog in the
20 fight.

21 MR. JOHNSON: Correct.

22 THE COURT: Mr. Ryan's got a big dog in
23 the fight. That's where the funds come from, from
24 him. He's got a big checkbook.

25 Mr. Ryan, come on up. And let me say

1 for the record I have been on the bench 12 years.
2 How long have you been indigent defense?

3 THE WITNESS: 2007, Your Honor.

4 THE COURT: And I have had an
5 opportunity to talk to Mr. Ryan on a number of
6 occasions just trying to get answers to questions
7 dealing with indigent funds and for the record I
8 want to state that he does an absolute excellent
9 job. He is fair to the indigents, he's fair to the
10 state and tries to do what is absolutely right. I
11 appreciate everything you have done up there. Big
12 responsibility with a small pot to grab from.

13 THE WITNESS: We are working hard this
14 week.

15 THE COURT: If it's okay with you,
16 ma'am, I need to talk to you about five minutes on
17 these new minors who got life in prison without
18 parole. I have got three now, just got another one
19 last week and where we go with those, okay?

20 HUGH RYAN

21 who, after being first duly sworn, testified as
22 follows:

23 THE CLERK: Please state your name and
24 spell your last name for the record.

25 THE WITNESS: My name is Hugh Ryan,

1 H-U-G-H, R-Y-A-N, and I'm the deputy director and
2 general counsel for the South Carolina Commission
3 on Indigent Defense.

4 THE COURT: Before you start, Mr. Ryan,
5 Ms. Blanchette, your application or your motion
6 said not to exceed 5,000. Has he given you a
7 guesstimate of what it would be and exactly what
8 you are asking from him?

9 MS. BLANCHETTE: Your Honor, just
10 depends on how long we have him here in court in
11 Charleston the day that he comes for PCR court. He
12 told me that it could likely be around \$3,500. I
13 will do my best to keep it low.

14 THE COURT: Where is he from?

15 MS. BLANCHETTE: He comes from North
16 Carolina. So we don't have to pay for flight or
17 anything like that, but if we start first thing in
18 the morning we will have to pay for his hotel
19 costs.

20 THE COURT: Where would it be -- one
21 way to maybe work it out would be to do a de bene
22 esse deposition of him without him having to
23 appear.

24 MS. BLANCHETTE: Yes, Your Honor.

25 THE COURT: Like we do with medical

1 doctors in medical malpractice cases. That would
2 be a more efficient way of doing it perhaps.

3 MS. BLANCHETTE: Yes, Your Honor. I
4 would be happy to work with the State and Mr. Ryan
5 to be able to cut cost.

6 THE COURT: Certainly cut it down some,
7 shouldn't it?

8 MS. BLANCHETTE: Hopefully so, Your
9 Honor. His travel isn't too much. We don't have
10 to fly him in or anything like that with some other
11 experts that I have dealt with.

12 THE COURT: When you say a night in
13 Charleston, it can get kind of pricey.

14 MS. BLANCHETTE: It can, Your Honor.
15 He did indicate to me he's an early riser so he
16 wouldn't mind driving in because he has his
17 understanding, he has worked with appellate defense
18 and Mr. Ryan before. So he is familiar with the
19 practice.

20 THE COURT: Where is he from?

21 MS. BLANCHETTE: The specific place in
22 North Carolina? I did attach his curriculum vitae.

23 THE COURT: He is from Charlotte looks
24 like? No.

25 MS. BLANCHETTE: It's a smaller town in

1 North Carolina. We spent a lot of time talking
2 about the fact that we both grew up in Chicago so I
3 apologize.

4 THE COURT: Where?

5 MS. BLANCHETTE: On the south side of
6 Chicago.

7 THE COURT: You sound like you are from
8 Georgetown, South Carolina.

9 MS. BLANCHETTE: I try to fit in the
10 best I can, Your Honor.

11 THE COURT: That's okay. Go ahead.

12 EXAMINATION

13 BY MR. JOHNSON:

14 Q. Mr. Ryan, just -- I don't really have
15 any formal direct or cross-examination questions.
16 If I could just get your stance on the situation in
17 this case if Your Honor may allow him to speak
18 freely.

19 THE COURT: What we have, Mr. Ryan,
20 obviously you know, and I had have this before, we
21 have a retained person who now is asking indigent
22 defense to help him with expert witness fees. As I
23 said on the record a while ago, we just had one
24 that came up in Aiken that you and I discussed and
25 talked about. In that case I denied it. But tell

1 me what's going on with this one. Have you worked
2 with this expert before and what's the fairest way
3 for everybody involved to try to resolve this.

4 THE WITNESS: I have seen Ostrowski
5 before. Your Honor, it's kind of like we discussed
6 recently in that case. We kind of just try to keep
7 the same position whether it is Oconee County or
8 Aiken or Charleston. We've got to be consistent.

9 So we try -- our position on these, I
10 will say and I have said to you before, I have said
11 to Ms. Blanchette before also, is that any time
12 private funds are involved we are very concerned
13 because obviously we can't have the State paying
14 the burden while the attorney is getting his full
15 fee. That wouldn't be -- people would not be very
16 happy in Columbia about that.

17 THE COURT: Well, when you say the
18 people, obviously the legislature who is -- they go
19 to great lengths to help indigent funds or defense,
20 but there again the pot from which we're grabbing
21 everything out of gets smaller and has to go a long
22 way with a lot of people.

23 THE WITNESS: Yes, sir. In this case
24 obviously we considered, as you see the \$12,000 fee
25 which is to us a pretty significant fee for a PCR

1 case. Just our analysis of this case there's no
2 per se rule. There is a per say rule under 602 if
3 you receive retainer fees you can then not receive
4 attorneys fees from the fund. But it is a rare
5 situation. I'm not going to say it's never
6 happened.

7 THE COURT: Are you aware of it ever
8 happening?

9 THE WITNESS: In a very few instances
10 in the last seven or eight years I could -- less
11 than a handful I would say. Obviously the judge
12 has the final discretion on this. The problem --
13 the concern is something like for example in this
14 case. You consult the expert, you pay him the
15 \$2,000 retainer fee. Well, when you -- what if
16 they say they are going to need -- you consult
17 them, but what was the plan as far as if you needed
18 to actually retain him and he didn't testify at
19 trial? My concern is somebody -- and I'm not
20 saying Ms. Blanchette is doing this, again this is
21 just how we look at it across the state in any
22 situation. Is if an expert -- you get your foot in
23 the door with an expert and say well, I had an
24 initial consultation with him, now I need him to
25 testify at trial, you know, the judge denies it.

1 Well, then you may have an appeal issue.

2 So I mean our concern is that's why we
3 are so cautious about one where private funds are
4 involved. We don't want to become an insurance
5 company for a bad fee agreement or something like
6 that. So --

7 THE COURT: Fee agreement doesn't cover
8 that.

9 THE WITNESS: Right. That's kind of
10 how we look at it. I mean the final analysis as we
11 talked about before, an expert or other services,
12 is it reasonable and necessary for the
13 representation of the Defendant. I will say one
14 thing about the Reeves case. There was -- that
15 case that was more the attorney didn't even discuss
16 the issue with the client. And it was a situation
17 where they said that he didn't even discuss it so
18 he didn't know he could potentially challenge the
19 evidence more. There was never any finding of
20 indigency or anything in that case. So I don't
21 think it wasn't like an overall analysis of the
22 exact circumstances we are here today. It
23 basically said, you know, lawyer, you're deficient
24 for not even looking at the issue which I
25 completely understand why Ms. Blanchette is

1 pursuing the issue because of that case, but that's
2 the basis of it. There has been, you know, a fee
3 retained in this case. It is not an insubstantial
4 amount of money. She received \$12,000. That's
5 pretty much we where stand on it.

6 THE COURT: Anything you want to ask
7 him, ma'am?

8 MS. BLANCHETTE: No, Your Honor. But
9 if I could just have the opportunity to respond
10 very briefly to the Court.

11 THE COURT: Thank you. Anything else?

12 MR. JOHNSON: Nothing from the State,
13 Your Honor.

14 THE COURT: Thank you, Mr. Ryan. I
15 will give you a call toward the end of the week.
16 I'm going to be in and out of Charleston. It's
17 just that same thing that Justice Pleicones sent
18 that order on. It was right on.

19 THE WITNESS: We had a meeting.

20 THE COURT: What was happening we are
21 getting before they file a motion for resentencing
22 they are getting lawyers who want to be appointed
23 to do the filing for the motion for rehearing.
24 Sort of putting the horse before the cart. Doesn't
25 comply with the chief justice's order.

1 THE WITNESS: We had a meeting a couple
2 weeks ago with some private counsel with different
3 groups involved.

4 THE COURT: Love to talk to you about
5 it.

6 THE WITNESS: We can share some
7 information.

8 THE COURT: I'll call you.

9 Yes, ma'am.

10 MS. BLANCHETTE: Very briefly, Your
11 Honor.

12 THE COURT: Take all the time you need.

13 MS. BLANCHETTE: Just for the record,
14 my fee agreement does cover and it said if the
15 client can't afford an expert we will go forward
16 with the case without their services. So I do have
17 that addressed in my retainer. That's what I had
18 advised Mr. Meggett.

19 But upon reading the Reeves decision
20 and consulting like I said with Jeremy Compton who
21 handled the case, I felt that I had an obligation
22 and a duty since I knew that an expert could be
23 helpful to the case to ask the Court for funding or
24 authorization of the funding.

25 Also, as I may have already mentioned,

1 I have only done this once prior in my career.

2 THE COURT: Nobody is claiming that you
3 have abused the system.

4 MS. BLANCHETTE: Your Honor asked if he
5 was aware of any time that it had happened before.
6 I had a York County case where I was given funding
7 there for an expert kind of in the area of CSI and
8 a private investigator in a murder case where my
9 fee has also not been paid in full. And I know
10 that my fee may seem substantial, but I have been
11 to Charleston on a number of times already on this
12 case and I don't charge any fees or expenses and I
13 am traveling from Columbia for each of those times.
14 He is also incarcerated at Leiber and I won't bore
15 Your Honor with the number of times that I have
16 gone to Leiber to meet with him. So I would just
17 like for Your Honor to know that I have been
18 diligently working with him.

19 THE COURT: I don't doubt that and I'm
20 not saying that your fee is outlandish. I think
21 it's probably on the low side. But I'm not being
22 critical of that. I am just discussing with you
23 the reality of the situation.

24 MS. BLANCHETTE: Which I am very aware,
25 Your Honor. Like I said, I handle appointed cases

1 myself and I know, I went through the era when the
2 funds were suspended and all of that so I
3 understand that completely. I just felt in the
4 best interest of my client I needed to petition the
5 Court.

6 THE COURT: And, Mr. Meggett, you
7 certainly got somebody that's looking out for your
8 best interest. She's doing all she can to help
9 you. I will take it under advisement and get you
10 an order out.

11 MS. BLANCHETTE: Thank you, Your Honor.
12 I appreciate your time.

13 THE COURT: Anything else you need,
14 sir?

15 THE APPLICANT: No, sir.

16 THE COURT: Have a wonderful day.

17 (These proceedings were concluded at
18 10:10 a.m., April 18, 2016, Charleston County,
19 South Carolina.)
20
21
22
23
24
25

CERTIFICATE OF REPORTER

I, Ruth C. Weese, Registered Diplomat
Reporter for the State of South Carolina at Large,
do hereby certify that the foregoing transcript is
a true, accurate, and complete record.

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

Witness my hand, I have hereunto affixed my
official seal this 16th day of March, 2018 at
Charleston, Charleston County, South Carolina.

Ruth C. Weese

Ruth C. Weese
Registered Diplomat
Reporter

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

AFFIDAVIT OF INDIGENCY

Case Name David Meggett v. State of South Carolina

PCR
Criminal Case No. 2013-CP-10-3740

DEFENDANT'S
EXHIBIT

Current Address: PO Box 205, Ridgerville, SC 29412

1 Row

Are you incarcerated? X Yes (If "Yes") Where? Lieber
No

What were you convicted of? CSC, 1st : Burglary, 1st (2009-GS-10-4829, 30)

What was your sentence? 30 years

Are you appealing from N/A

X a trial, _____ a guilty plea _____ a post-conviction relief hearing?

In what county was this trial/hearing/guilty plea held? Charleston

Presiding Judge's name? Judge Harrington

Date of trial/guilty plea or post-conviction relief hearing Nov. 10, 2010

Were you represented by

_____ a court-appointed attorney X public defender or _____ retained counsel?

Name of attorney/public defender? Beattie Butler

If retained, how much did you pay for attorney fees? \$ _____

If you still owe money to your attorney, how much? \$ _____

1. Are you presently employed? Yes _____ No ✓

a. If "yes," state the amount of your salary or wages per month, and give the name and address of your employer. _____

b. If "no," state the name and address of last employment, date of termination of employment, and amount of your salary or wages per month. _____

2. List by name, age and relationship to you, any persons who are dependent upon you for support. Indicate beside each how much you contribute toward their support.

\$1,899.90 w AGE 14 - DAUGHTER

3. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment?

Yes _____ No ☒

b. Rent payments, interest or dividends?

Yes _____ No ☒

c. Pensions, annuities or life insurance payments?

Yes ☒ No _____

d. Gifts or inheritance?

Yes ☒ No _____

e. Any other sources?

Yes _____ No ☒

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. National Football League Bert Bell Second career savings ~~Plan~~ Plan - 12 Month total = \$22,798.80
Gift: Including money paid to attorneys \$14,000

4. Do you own cash, or do you have any money in a checking or savings account?

Yes _____ No ☒

If the answer is "yes," state the total amount of the cash owned. \$ _____

5. Do you own any real estate, stocks, bonds, notes or other valuable property (excluding ordinary household furnishings and clothing)? Yes _____ No ☒

If the answer is "yes," describe the property and state the appropriate value of the items owned. _____

6. What kind of motor vehicle do you own? NONE

Is it paid for? Yes _____ No _____

If not, what are the monthly payments? \$ _____

7. How much do you owe (on liens, mortgages, other encumbrances or debts)? NONE

I do solemnly swear that the account by me delivered into this Court does contain a true and full account of all my real and personal estate, debts, credits and effects whatsoever without exception, which I, or any person in trust for me, have or at the time of my possession had, or am, or was, in respect, entitled to, in possession, remainder or reversion and that I have not at any time since charges were made against me or before, directly or time since charges were made against me or before, directly or indirectly sold, leased, assigned or otherwise disposed of or made over, in trust for myself or otherwise, other than is mentioned herein.

I understand that the State shall file a claim against me in an amount equal to the cost for representation, but that such claim shall not constitute a lien against my property, unless, the claim is reduced to judgment by the Order of the Court after giving me at least thirty days' notice.

Under penalty of perjury, I certify that the information give by me on this affidavit is true and correct, and I understand that I will be subject to civil and/or criminal penalties if I knowingly furnish false information.

I am financially unable to employ counsel.

This 8 day of April, 2016

x David Meggett
Defendant

I understand that I am entitled to at least thirty days' notice before a claim against me may be reduced to judgment, and I do hereby waive the right to such notice.

This 8 day of April, 2016

x David Meggett
Defendant

SUBSCRIBED AND SWORN to before
me this 8th day of April, 2016.

Quichea Bryant
NOTARY PUBLIC FOR SOUTH CAROLINA

My commission Expires: May 26, 2020

CC
AG
AT

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

David Meggett, #343610,

2013-CP-10-3740

Applicant,

v.

ORDER DENYING
ADDITIONAL FUNDING

State of South Carolina,

Respondent.

FILED
2016 DEC - 7 AM 11:48
CLERK OF COURT
JUDICIAL CIRCUIT
NINTH

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed June 25, 2013. The Respondent (the State) made its Return and Motion to Dismiss on December 5, 2013. Applicant, through PCR counsel Tricia A. Blanchette, Esquire, filed "AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF" on December 17, 2015. Applicant, through counsel, then filed "MOTION FOR INDIGENT FUNDS" on March 30, 2016. A hearing into this matter was convened on April 18, 2016 at the Charleston County Courthouse. Applicant was present and represented by Ms. Blanchette. Respondent was represented by Assistant Deputy Attorney General J. Rutledge Johnson, Esquire. Also in attendance was James Hugh Ryan, III, Esquire of the S.C. Commission on Indigent Defense.

Applicant, through counsel, moved for indigent funding to pay an expert in Applicant's PCR case. Counsel stated that even though Applicant receives around \$22,000 per year for pension from the National Football League, this money goes towards paying child support. Counsel also, very candidly, explained that most of her retainer fee had been paid in the estimated amount of \$12,000.

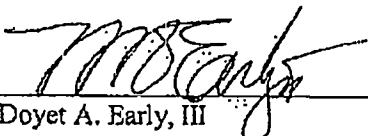
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Hugh Ryan testified that he is in charge of indigent funding in South Carolina. Mr. Ryan explained that it is a rare instance for a retained attorney to request indigent funds. He also explained that he was not interested in starting a trend of awarding additional funds to retained counsel.

This Court finds Mr. Ryan's testimony compelling and believes, in its discretion, that there is a public policy interest to deny indigent funding to Applicant based on the facts of this case.

IT IS THEREFORE ORDERED that Applicant's Motion for Indigent Funds is DENIED.

AND IT IS SO ORDERED this 30th day of November, 2016.



Doyet A. Early, III
Presiding Judge
Ninth Judicial Circuit

Bamberg, South Carolina.

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF CHARLESTON) Court of Common Pleas
3 _____) Case No. 2013-CP-10-3740
4 DAVID MEGGETT,)
5 Applicant,)
6 vs.) Transcript of Record
7 STATE OF SOUTH CAROLINA,)
8 Respondent.) DATE: December 7, 2016
9 _____)

10 B E F O R E:

11 THE HONORABLE G. THOMAS COOPER

13 A P P E A R A N C E:

14 TRICIA A. BLANCHETTE
15 Attorney for the Applicant

16 ALICIA A. OLIVE
17 Attorney for the Respondent

18 Karen V. Andersen, RMR, CRR
19 Circuit Court Reporter

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EXHIBITS

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1 THE COURT: Let's proceed with Mr. Meggett. All
2 right. Madam Attorney, you may proceed.

3 MS. OLIVE: Thank you, Your Honor. This is David
4 Meggett, 2013-CP-10-3740. Mr. Meggett was indicted June 2009
5 for burglary, first degree, criminal sexual conduct, first
6 degree. And he was represented by Beattie Butler.

7 Your Honor, beg the Court's indulgence a moment. He
8 proceeded to trial where he was found guilty of all charges.
9 That was November 8th, 9th and 10th of 2010.

10 Judge Harrington sentenced him to confinement for 30
11 years on both charges. Sentences were to be served
12 concurrently. He filed timely notice of appeal. The appeal
13 was perfected by Breen Stevens with the Office of Appellate
14 Defense. His convictions and sentences were affirmed by the
15 Court of Appeals. The remittitur was returned on July 13th,
16 2012.

17 He filed this application for post-conviction relief
18 on June 25th, 2013. His attorney, Ms. Tricia Blanchette,
19 filed an amendment to the application dated December 15th,
20 2015, in which she raises several allegations of ineffective
21 assistance of counsel, as well as an allegation of
22 ineffective assistance of appellate counsel.

23 - Your Honor, Mr. Meggett is present in the courtroom
24 today. And he's represented by Ms. Blanchette. I will turn
25 it over to her at this time. And I would ask that she

1 outline the -- I believe she has an additional allegation she
2 wishes to raise this morning as well.

3 MS. BLANCHETTE: Thank you, Your Honor. May it
4 please the Court. Tricia Blanchette here on behalf of David
5 Meggett. The State did provide the procedural history, but
6 there is one matter that I need to address regarding
7 procedural history, and make sure I properly renew a motion
8 that I had made to preserve it for appellate purposes.

9 Back on April 1st of 2016, I filed a motion asking
10 for indigent funds. And I have a copy of that if Your Honor
11 does not. We had a hearing with Judge Early in April the
12 2016. Subsequent to that hearing, he sent out an e-mail
13 indicating he was denying my request for a funds for a DNA
14 expert to assist me in preparing for the PCR here today and
15 to call as a witness at the PCR hearing today.

16 At that time, it's my understanding that Rutledge
17 Johnson prepared a proposed order and sent that to Judge
18 Early. I do have an unsigned copy of that order in my
19 possession. When Ms. Olive took over the case and we were
20 discussing the scheduling, I made sure that she was aware
21 that it was my understanding that Judge Early still had not
22 signed that order.

23 THE COURT: Denied it from the bench?

24 MS. BLANCHETTE: He denied it via e-mail. He took
25 it under advisement from the bench.

1 MR. JOHNSON: Your Honor, I supplied that e-mail.
2 However, I have left the office. I'm now a specialty
3 assistant attorney general. I have no access to that e-mail
4 anymore. So my office would have it, but I do not have
5 physical possession of that e-mail.

6 MS. OLIVE: Your Honor, I did -- I believe Ms.
7 Blanchette would agree with me. I re-sent the order to Judge
8 Early. He was on vacation when he received it, indicated he
9 would return it. This was around the Thanksgiving holiday, I
10 believe. He indicated he would sign it and return it.

11 THE COURT: What does it say?

12 MS. BLANCHETTE: I have the order, Your Honor.

13 THE COURT: You have it?

14 MS. BLANCHETTE: I have the unsigned order, which I
15 received via e-mail.

16 THE COURT: Make sure that's what she sent to him.

17 MS. OLIVE: And, Your Honor, I apologize for
18 interrupting, but before we proceed, it has escaped my notice
19 the last couple of days, but I would ask that you give your
20 admonishment that you've given the past couple of days about
21 my prior employment with Your Honor.

22 THE COURT: I wish I had done it earlier. Just for
23 the record, Ms. Blanchette, the attorney general, Ms. Olive,
24 was at one time employed as my law clerk several years ago.
25 I've had very limited amount of contact with her. Frankly,

1 haven't been in Columbia very much lately. I have no social
2 relationship with her or other type of relationship. But I
3 need to make that disclosure just for the record. If there's
4 any concern, I will certainly take it up with you.

5 MS. BLANCHETTE: Absolutely not, no concern on my
6 part. I was aware that Ms. Olive was your prior law clerk.
7 And I discussed it with my client. And there's no concern on
8 either of our parts.

9 THE COURT: Okay. Let's proceed.

10 MS. BLANCHETTE: Your Honor --

11 THE COURT: You want to follow up with this?

12 MS. BLANCHETTE: Yes. I was going to keep going
13 with that, if that's okay. Since it's currently unsigned, I
14 just want to be clear for the record, I don't believe I had a
15 basis to take any type of interlocutory appeal or take this
16 issue up. I think the proper way for me to preserve the
17 issue is renew it here today so it can be addressed once it's
18 signed in conjunction with the appeal of any matters that are
19 raised today.

20 Just to make sure that I preserve the issue, I would
21 indicate to this Court that I'm renewing all the grounds
22 raised in my written motion. And in that written motion, I
23 explain that I had consulted with DNA expert, Mr. Ostrowski,
24 prior to the hearing Your Honor held back in September of
25 2014.

1 On the basis of that consultation, he provided me a
2 list of discovery items he needed from SLED. Your Honor,
3 issued an order granting that discovery. And, thereafter, he
4 was retained, as is explained in the motion, for \$2,000. The
5 discovery was turned over to him. He did a consult at my
6 office, explained how his expertise could have been used
7 before and during trial and before and during this PCR.

8 I made the current amended PCR application based
9 upon that consultation. So utilizing his services was
10 factored in to the allegations contained in the amendment.
11 We are not abandoning any of those claims, but I cannot fully
12 develop those claims today, since I cannot call him as an
13 expert, since my client did not have the finances to further
14 retain him and my request for indigent funds were turned
15 down.

16 In the motion that I have argued, *Reeves v. State*,
17 and cited to that, I would also want to add citation *Winkler*
18 *v. State*, which is 2014-000904. It was an opinion issued on
19 November 23rd, 2016, by the South Carolina Supreme Court,
20 Opinion No. 27685. And that is a death penalty PCR case
21 dealing with a judge denying a request for a continuance.

22 I am not requesting a continuance here today,
23 because this case is a 2013 case and I don't want to delay it
24 further waiting on the signature of this order. But I would
25 say that *Winkler* further supports my request for indigent

1 funds in this case.

2 THE COURT: Do you have a case that supports your
3 request for indigent funds in a PCR action?

4 MS. BLANCHETTE: I've utilized *Reeves v. State*, Your
5 Honor. It was decided in the Court of Appeals and currently
6 is up on tertiary in the Supreme Court. And the language in
7 that case, I believe, does support my position and in a case
8 where such as I am retained counsel in asking for indigent
9 funds, because that was the scenario in *Reeves*.

10 And if Your Honor would like a copy, I do have extra
11 copies of that case.

12 THE COURT: I would like to see it, but at this
13 point, I can't reverse Judge Early's indication by e-mail
14 that he would deny the motion for indigent funds, being a
15 situation a judge overruling another, which you know I can't
16 do.

17 MS. BLANCHETTE: Yes, Your Honor. I understand one
18 circuit court judge can't overrule another circuit judge. I
19 just want to make sure, especially after reading *Winkler*,
20 which talks about preservation, that I want to make sure I
21 properly preserve the issue today.

22 I do have a copy of *Winkler* and *Reeves* for Your
23 Honor, if I can approach.

24 THE COURT: Certainly.

25 MS. BLANCHETTE: And a copy for the State, if it's

1 needed.

2 MR. JOHNSON: Yes. For Your Honor's reference, the
3 *Enoree Baptist Church v. Fletcher* case is 287 S.C. 602.
4 That's 1986, Your Honor.

5 THE COURT: All right.

6 MS. BLANCHETTE: Your Honor, it may not be my day.
7 We had a huge accident on 26. And then, as you know, I got
8 into a car accident. That was to be my witness, but I will
9 address another housekeeping matter. And during the break,
10 see if Mr. Kelly is ready to take the stand.

11 Your Honor, one other matter that I needed to
12 address before calling witnesses, is yesterday, I had the
13 opportunity to talk with Breen Stevens. He was the appellate
14 defender at the time, B-r-e-e-n, Stevens. He was the
15 appellate defender that handled Mr. Meggett's appeal. In
16 that conversation, he pointed out to me that he intended to
17 testify today that he noticed in the transcript that four of
18 the five strikes were used for African-American individuals.
19 And he had questioned why Mr. Butler did not raise a Batson
20 motion.

21 Knowing that that was going to be his testimony
22 today, I would like to amend to include that issue, that
23 counsel was ineffective for not making a Batson motion. I
24 did, as I was on the phone with Breen, even e-mailed Ms.
25 Olive to get her as much as notice as I had about that issue.

1 And I had put in my amendment that pursuant to 15B, South
2 Carolina Rules of Civil Procedure, we move to amend to
3 conform to the evidence and testimony presented at the
4 evidentiary hearing.

5 It is my position that under Rule 15B without even
6 bringing it to the Court's attention, that I would be covered
7 in eliciting that testimony and having that issue considered
8 by the Court. But I did at this time want to move to
9 verbally amended our allegations to include that.

10 THE COURT: What's the State's position?

11 MS. OLIVE: Your Honor, the State would move to
12 dismiss the claim of -- that the ineffective -- excuse me,
13 would move to dismiss the claim that counsel was ineffective
14 for failing to make a Batson challenge.

15 First, Your Honor, the application for PCR was filed
16 in 2013. And we are at the end of 2016 right now. I was not
17 made aware of this challenge until yesterday.

18 Your Honor, it's the State's position that 15B also
19 allows us to object to this claim being raised at this point,
20 because we are prejudiced at this point. I do -- I notified
21 the solicitor who handled this case.

22 THE COURT: Who was that?

23 MS. OLIVE: Chad Simpson, Mr. Simpson. And Your
24 Honor, he has been, thus far, unable to obtain the records
25 that he would need to be able to adequately defend his

1 position. However, he is -- he was going to attempt to pull
2 the rap sheets of these two individuals. I think two of them
3 can be explained by the record.

4 But it's still our position that this late in the
5 game, we are prejudiced by bringing this claim. And,
6 further, Mr. Butler has not been able to access his defense
7 file. He does have that here today, but I'm not sure he's
8 able to testify as to his recollection either. And I have
9 not been able to discuss that with him adequately.

10 THE COURT: Well, I will allow the amendment. If
11 you wish to move for a continuance, I would consider that,
12 but I'm going to allow the amendment. Motion is granted.

13 MS. OLIVE: Your Honor, I do not wish to ask for a
14 continuance, however, I would like to provide Mr. Simpson
15 with some time to obtain -- I think he said it would take
16 about 15 minutes to pull those records, the rap sheets on
17 these individuals.

18 THE COURT: All we've got is time. Do you want to
19 do that now?

20 MS. OLIVE: Your Honor, I prefer to do that before
21 we proceed any further.

22 THE COURT: All right.

23 MS. OLIVE: Thank you. Let's do this then. This is
24 obviously going past the lunch hour. How much time do you
25 need, Mr. Simpson?

1 MR. SIMPSON: Judge, I would guess maybe 20
2 minutes.

3 THE COURT: Do you know where these files would be
4 located?

5 MR. SIMPSON: To clarify for the Court, I am purely
6 speculating at this point that a rap sheet would have been
7 one of my frequent reasons for striking any juror. So I just
8 wanted to use the names from the record and see if, in fact,
9 there was a rap sheet.

10 THE COURT: Let me inquire of Ms. Blanchette. What
11 was this charge? It was 5 and 5?

12 MS. BLANCHETTE: What was that? I'm sorry.

13 THE COURT: It was five and five strikes.

14 MS. BLANCHETTE: I believe it was. No, 10 and 5,
15 I'm sorry.

16 THE COURT: And you say the State struck 4 out of 5
17 African Americans.

18 MS. BLANCHETTE: That's correct.

19 THE COURT: And you have evidence of that?

20 MS. BLANCHETTE: Yes. It's in the transcript, page
21 2H. It lists their names, their race, the sex and the
22 strikes.

23 THE COURT: So you've got something to go by?

24 MR. SIMPSON: I have names, race and gender, which
25 I'm going to use to run a rap sheet. Our jury ended up being

1 6 African Americans and 6 Caucasians.

2 THE COURT: You are not seeking anything other
3 than -- well, the rap sheets would maybe be definitive. But
4 you are not seeking anything else in terms of solicitor's
5 notes, things of that nature?

6 MS. BLANCHETTE: No, Your Honor. I just intended --
7 I know it was going to come up in Mr. Stevens's testimony, so
8 I intended to ask Mr. Butler --

9 THE COURT: Well, let's ask Mr. Butler. Are you
10 aware of this challenge?

11 MR. BUTLER: More specifically, was I aware they
12 were going to raise this today? I found out moments ago.

13 THE COURT: Okay. Would you be prepared to, from
14 your notes --

15 MR. BUTLER: I know you've heard me say this a lot
16 out of the last couple of days, I have no independent
17 recollection of why I didn't raise Batson. I'm familiar with
18 Batson. I've raised it in other cases. I would be
19 speculating. But the fact that we ended up with a racially
20 divided jury may have been a reason why I didn't raise
21 Batson.

22 THE COURT: Which is frequent consideration.

23 MR. BUTLER: Yes. I've also had many cases with
24 Mr. Simpson and tend to trust him. And if he had raised
25 neutral reasons for striking somebody, I would defer to

1 those.

2 THE COURT: All right. Do you have other witnesses
3 that you can call while Mr. Simpson --

4 MS. BLANCHETTE: Yes. Mr. Kelly, who was just
5 ushered out of the courtroom, I can see if he's capable of
6 returning.

7 THE COURT: Let's see if we can do that.

8 MS. BLANCHETTE: And he's a brief witness, so we can
9 get that accomplished, absolutely.

10 THE COURT: Mr. Simpson.

11 MR. SIMPSON: I will be back as soon as I can, Your
12 Honor. Thank you.

13 MS. BLANCHETTE: Your Honor, I would call Bernard
14 Kelly to the stand.

15 BERNARD KELLY,
16 having been duly sworn, testifies as follows:

17 THE CLERK: Please state your first and last name,
18 and spell your last loudly and clearly into the microphone.

19 THE WITNESS: Bernard Kelly, K-e-l-l-y.

20 MS. BLANCHETTE: Your Honor, may we approach?

21 (Whereupon, a bench conference takes place.)

22 DIRECT EXAMINATION

23 BY MS. BLANCHETTE:

24 Q. I'm sorry, sir. Did you already state your name for
25 the record?

1 A. Yes, Bernard Kelly.

2 Q. And we are here today on the application of David
3 Meggett. How is it that you know David Meggett?

4 A. We are friends.

5 Q. You've known him most of your life?

6 A. Yes, ma'am.

7 Q. We are specifically here today regarding his
8 conviction as a result of allegations stemming from the
9 incident date of January 13th, 2009. Do you recall or do you
10 remember when your friend David received these charges?

11 A. Yes.

12 Q. And how did you become aware of it?

13 A. On the news.

14 Q. And what did you see on the news?

15 A. What was being stated as far as the --

16 THE COURT: Speak up a little bit.

17 A. Oh, what was being stated as far as the charges,
18 just remember what I saw on the news.

19 THE COURT: Sir, you have to get closer to that.
20 You have a tendency to speak softly and I need to hear what
21 you are saying.

22 A. I just remember what I saw on the news as far as
23 charges or whatever.

24 Q. Okay. And when you saw that he was being charged
25 with criminal sexual conduct and burglarizing the dwelling of

1 an individual named Stacey Hooper, what was your reaction to
2 that?

3 A. I just thought it was strange. I remember seeing
4 them two together. And he had actually introduced me to her.
5 And I've seen him on other occasions previously. I saw him
6 and her together.

7 Q. And you, like me, use hand gestures. So when you
8 use your hands too, it kind of makes the noise a little bit
9 harder to hear as well. So just speak up.

10 Now, you said you had seen Mr. Meggett and the
11 victim, which I'm going to refer to her today as, together
12 previously. And that struck you when you saw the information
13 on the news?

14 A. Exactly.

15 Q. And he actually introduced you to her?

16 A. Yes, ma'am.

17 Q. Do you recall any memory of those times when you had
18 previously seen her?

19 A. In passing, like the one time I remember him
20 introducing me to her, they were actually at a location on
21 Rivers Avenue. And I pulled up over there. And, you know,
22 because usually see them in town, so I pulled over there and
23 shook hands or whatever, and that is when he introduced me to
24 her. And I was like, okay.

25 Q. Do you remember what that location was, what type of

1 store that was?

2 A. It was located on Rivers Avenue, which was a
3 pawnshop.

4 Q. And is there anything particular about that day that
5 made you remember? Was there anything that stuck out to you?

6 A. Actually, she went into the pawnshop. And I saw her
7 when she came back out. And it was just, yeah, they pulled a
8 vacuum cleaner out of the car or whatever, thinking she must
9 have told them something as far as when she went into the
10 place --

11 MS. OLIVE: Objection to hearsay.

12 THE COURT: Overruled. Go ahead.

13 Q. You can keep answering.

14 A. I thought that was pretty strange, looked at it as
15 being odd.

16 Q. What part was strange to you?

17 A. As far as taking her into the pawnshop to sell.

18 Q. Okay. And what was that item again?

19 A. A vacuum cleaner.

20 Q. So that sticks in your memory?

21 A. Yes.

22 Q. Do you remember seeing them on another occasion?

23 A. Just in passing.

24 Q. Okay. Now, you said you saw it on TV and you had
25 some concerns and questions. What was the basis of that?

1 A. I'm assuming that she basically stated like she
2 didn't know him or anything like that. And I said, I saw him
3 with her, definitely saw them at the pawnshop pawning
4 something in there.

5 Q. Did you take it as though they were in a
6 relationship?

7 A. Basically, yeah, at least a friend, good friend or
8 whatever.

9 Q. Okay. And were you ever contacted by an
10 investigator or a defense attorney or the public defender's
11 office on behalf of Mr. Meggett prior to his trial?

12 A. No, other than talking to you.

13 Q. Okay. I was the first person you've talked to?

14 A. Yes.

15 Q. And if someone would have reached out to you prior
16 to trial, would you have been willing to explain to them what
17 you knew and about the times you've seen them together?

18 A. Oh, yeah.

19 Q. At that time, do you think your memory would have
20 been even better?

21 A. Yes, pretty much.

22 Q. And if you had been given a subpoena to testify at
23 his trial, would you have been willing to testify to the
24 times that you saw them together?

25 A. Yes.

1 Q. Okay. And you are here today on your own will? You
2 don't have a subpoena; is that correct?

3 A. No, exactly, that's correct.

4 Q. And the first thing you told us is you've been a
5 life-long friend of Mr. Meggett. With that said, you are not
6 here in any way to show bias or lie on his behalf?

7 A. No, no.

8 MS. BLANCHETTE: Your Honor, if I could beg the
9 Court's indulgence one moment.

10 Q. Mr. Kelly, I was just handed by the State a copy of
11 your criminal history, or your rap sheet as some people call
12 it. Do you recall back in 1996 getting an arrest charge and
13 a court charge for giving false information?

14 A. No.

15 Q. You don't recall that?

16 A. No.

17 MS. BLANCHETTE: Your Honor, may I approach the
18 witness?

19 THE COURT: Check the date of birth and driver's
20 license that's on there.

21 BY MS. BLANCHETTE:

22 Q. Do you recall that charge now that you've reviewed
23 what is on this sheet that was provided?

24 A. Yes.

25 Q. And you did receive that charge?

1 A. Yes.

2 Q. Okay.

3 MS. BLANCHETTE: Your Honor, if I could beg the
4 Court's indulgence one moment. Your Honor, I have no further
5 questions of this witness.

6 THE COURT: Anything for this witness?

7 MS. OLIVE: Briefly, Your Honor.

8 CROSS-EXAMINATION

9 BY MS. OLIVE:

10 Q. You were actually convicted of that charge, correct?

11 A. Convicted of that charge? I think it came up, I'm
12 assuming, yeah.

13 Q. So you were convicted?

14 A. Assuming.

15 Q. Of giving false information?

16 A. Yes. I think it was basically, at the time, I
17 transported myself back and forth to work. I think I was
18 pulled over by an officer. And he asked me a question, turn
19 in the license or whatever, and told him it wasn't me, or
20 whatever. So that's basically what it was.

21 Q. So you were convicted of giving false information to
22 police?

23 A. I'm assuming, yeah, it took place, assuming that. I
24 pleaded to it, whatever it was.

25 Q. Okay. So you said you saw these -- you saw

1 Mr. Meggett with the victim and you thought that they were
2 friends?

3 A. At least that's what I was introduced to her as, a
4 friend.

5 Q. And that's the only instance that you particularly
6 remember?

7 A. Seeing them in passing, yes.

8 MS. OLIVE: Okay. That's the only questions I have.
9 Thank you.

10 MS. BLANCHETTE: Nothing further, Your Honor.

11 THE COURT: All right, sir. Thank you very much.
12 You are free to go.

13 Next witness.

14 MS. BLANCHETTE: Your Honor, my next witness would
15 be Beattie Butler. I don't know if I can proceed at this
16 time.

17 THE COURT: He said he's prepared to go forward.

18 MS. BLANCHETTE: All right. Your Honor, then I
19 would call Beattie Butler to the stand.

20 BEATTIE BUTLER,

21 having been duly sworn, testifies as follows:

22 THE CLERK: Please state your first and last name,
23 and spell your last loudly and clearly into the microphone.

24 THE WITNESS: Beattie Butler, B-u-t-l-e-r.

25 MS. BLANCHETTE: Your Honor, may I approach the

1 witness with a copy of the transcript?

2 THE COURT: Yes.

3 DIRECT EXAMINATION

4 BY MS. BLANCHETTE:

5 Q. Mr. Butler, what is your current profession?

6 A. I'm a lawyer.

7 Q. And how long have you been a lawyer?

8 A. 20 years.

9 Q. And during your 20 years, what did you do in your
10 career?

11 A. 18 years of it I was a public defender in three
12 different South Carolina counties.

13 Q. Okay. And during that time, did you represent
14 Mr. Meggett?

15 A. I did.

16 Q. And do you have a specific recollection of your
17 representation of him?

18 A. I do.

19 Q. I'm just going to ask you some questions regarding
20 the representation leading up to trial first. Do you recall
21 approximately how many times you met with him leading up to
22 trial?

23 A. I don't.

24 Q. Do you recall any request that he made for you to
25 look into things, like phone records or speaking to witnesses

1 or anything of that nature?

2 A. I saw in my notes that I had a concern that we
3 needed to get phone records. I couldn't tell whether we
4 requested them or not. And I think those would have been
5 phone records showing communication between Mr. Meggett and
6 the complainant in the case.

7 Q. And how would that request that he made of you, how
8 would that have factored into the defense in this case?

9 A. Shown that the two knew each other. However, I
10 should say, I'm sure it's going to come up, she admitted that
11 they knew each other.

12 Q. And you don't know the outcome of that request to
13 obtain her phone records?

14 A. I do not.

15 Q. And would you agree those were not utilized at
16 trial?

17 A. They were not.

18 Q. And you heard Bernard Kelly testify just a couple
19 moments ago?

20 A. I was reading through parts of the transcript, but I
21 knew he was testifying. I heard bits and pieces.

22 Q. Do you recall hearing the name Bernard Kelly or
23 trying to locate him prior to trial?

24 A. I do not.

25 Q. Did you have any specific reason why you did not

1 locate him or utilize him at trial?

2 A. I did not see in my notes that Mr. Meggett gave me
3 Mr. Kelly's name. That's not to say that he didn't, but I
4 don't recall his giving me the name. And I couldn't find it.
5 He may have and I didn't document it. I'm not sure.

6 Q. And, Your Honor and Mr. Butler, I apologize, but I'm
7 going to give a number of transcript cites from here on out.
8 So if I go too quickly, please let me know. I know what's
9 coming and you don't. So if you need a chance to catch up,
10 let me know.

11 I first direct your attention to page 173, and
12 specifically line 10. So that is 173, line 10.

13 A. In the cross of Ms. Hooper?

14 Q. Yes, that's correct.

15 A. I see it.

16 Q. Line 10, do you see where you are asking her where
17 she essentially went with him?

18 A. Yes.

19 Q. And what does she admit as far as where she
20 previously went with him?

21 A. She went with him on a ride one time.

22 Q. Okay. And Mr. Kelly's testimony today was that he
23 saw them on two separate instances, and one time was
24 introduced to her. Would that have potentially impeached or
25 refuted this testimony of the victim?

1 A. It would have.

2 Q. And do you have any specific reason why you chose
3 not to utilize his testimony?

4 A. Only that I may not have known about it.

5 Q. Okay. If you could turn to page 166 through 167,
6 beginning on line 11, you begin asking her about individuals
7 that go by the names, and that would be first names only, of
8 Jonathan, Spider, also known as Stewart, and Pirate?

9 A. Yes.

10 Q. And you are asking her about those individuals. Did
11 you try to locate those individuals before trial?

12 A. I don't believe so.

13 Q. And I can give you a chance to look over it, but do
14 you recall why you were asking her about those individuals?

15 A. I do not.

16 Q. And do you have any specific reason why you did not
17 locate and call those individuals at the trial?

18 A. I don't.

19 Q. Now, were you trying to establish in this case that
20 she was somewhat of a squatter and living with other
21 squatters?

22 A. Yes.

23 Q. And were you able to locate any witnesses to confirm
24 that?

25 A. No, but I don't think she denied it.

1 Q. And if she would have, in fact, been a squatter and
2 not had a right to be at that residence, could that have
3 factored into your defense?

4 A. No, not so much that she didn't have a right to be
5 there, it was that she needed money.

6 Q. So you were trying to show that she needed money?

7 A. Yeah. My theory of her as a witness was that she
8 had -- and this is basically on conversations I had with
9 Mr. Meggett -- that she had slept with him in the past, which
10 I believe she admitted, and that he had loaned her money.
11 Now, I don't believe that she said it was a money-for-sex
12 exchange, but that was the inference that I wanted to be
13 drawn.

14 Q. And that's what you told the jury in opening; is
15 that correct?

16 A. It is.

17 Q. And something that kind of factors along those lines
18 when we are talking about money, there was an agreement made
19 on pages 92 and 93 that there be no mention made that
20 Mr. Meggett had had a successful NFL career prior to this
21 incident. Do you recall discussing that decision to not
22 include his prior status as an NFL player?

23 A. I do not.

24 Q. Do you recall why you made that decision to preclude
25 that from the jury's information that they would receive?

1 A. I don't independently recall, but I could hazard a
2 guess. And that would be that I did not want them
3 researching Mr. Meggett. Because, unfortunately, he had past
4 allegations against him, no convictions, I believe, but other
5 accusations that were similar to this. And I did not want
6 the jury to know about them.

7 Q. And was it your understanding that she did know
8 about his prior NFL status?

9 A. I don't know whether she did or not, because she
10 knew him as Mike, I believe.

11 Q. Okay. Do you recall discussing with Mr. Meggett
12 that that could be part of her motive, a financial motive in
13 bringing these allegations against him?

14 A. I don't, but I wouldn't dispute it either.

15 Q. On page 76, line 1, I will read it, she said: I
16 didn't know his age at all. He never told me anything he
17 did, how old he was, his last name, nothing about himself.

18 A. Okay.

19 Q. If you could have established that she did know
20 about the NFL, could that have further impeached or refuted
21 her testimony?

22 A. Yes.

23 Q. But because of the agreement that you made early on
24 in the trial, that was not a question that you could ask her?

25 A. Yes.

1 Q. Now, you've heard us discuss at the beginning of the
2 hearing today that I orally amended to include that you were
3 ineffective in failing to make a Batson motion.

4 A. Yes.

5 Q. I provided you your file just this morning from the
6 public defender's office. And it appears on page 2H of the
7 transcript that I have that four of the State's five strikes
8 that were exercised were used to strike either black females
9 or black males. Do you have any independent recollection as
10 to why you did not make a Batson motion in this case?

11 A. No.

12 Q. Is that a motion that you would typically make in a
13 case?

14 A. I've made them and I have declined to make them.

15 MS. BLANCHETTE: Your Honor, can I beg the Court's
16 indulgence one moment?

17 THE COURT: Yes, ma'am.

18 BY MS. BLANCHETTE:

19 Q. All right. Mr. Butler, I'm going to focus the
20 remainder of our time essentially for just a little bit
21 talking about how the trial ended, about the DNA evidence in
22 this case, and the issue of whether or not the sexual
23 intercourse was consensual.

24 A. Okay.

25 Q. So what I'm going to do, I think it will be easier

1 for all of us, I will go in the order in the transcript. I
2 will give you page cites and ask you questions as we go
3 along. If you will first turn to page 3 and look at line 17
4 through 19. At this time, you were making a motion for a
5 continuance in the case?

6 A. Okay.

7 Q. Lines 17 through 19, what is it that you state to
8 the court is the only issue in this case?

9 A. On page 17?

10 Q. I'm sorry, page 3, line 17 through 19.

11 A. Okay. Hold on. Is whether the sex that occurred
12 was consensual or by force.

13 Q. So on page 3, the very first page of the trial, you
14 are telling the judge, that's essentially the only issue in
15 this case, is whether the sex was consensual or not?

16 A. Yes.

17 Q. Also, on page 3, line 20, there you speak about a
18 motion that you filed because you want to bring in testimony
19 regarding sex on several prior occasions. And you tell the
20 court that will be introduced through your client.

21 A. Yes.

22 Q. So at this point, you had intended for Mr. Meggett
23 to testify, or had you all decided that yet?

24 A. No, I intended him to testify.

25 Q. Okay. And you intended to have him testify about

1 these prior consensual sexual encounters?

2 A. Yes.

3 MS. BLANCHETTE: Your Honor, if I could beg the
4 Court's indulgence one moment.

5 BY MS. BLANCHETTE:

6 Q. I am going to jump -- I apologize. I said I would
7 take it in order. If you would move to page 265 for me.

8 A. My copy is not the clearest, but I think I'm with
9 you.

10 Q. I'm sorry. I had pointed out to the State, because
11 I had one of those copies, is your last number is missing?

12 A. Yes.

13 Q. And she was kind enough to give us another copy
14 today for you. But it's 265 on Line 14, do you see where it
15 says "the Court"?

16 A. Yes.

17 Q. Okay. And there the Court explains to Mr. Meggett
18 that she's going to give you all the opportunity to talk over
19 lunch to decide if he's going to testify or not. Do you
20 recall that happening at that point in the trial?

21 A. Yes.

22 Q. And then I assume y'all had the lunch hour and you
23 discussed it; is that what happened?

24 A. I know we discussed it. I don't remember if it was
25 over lunch, but I know we discussed it.

1 Q. Okay. And then if we jump all the way to 368
2 through 370, beginning on Line 14, you explain to the court
3 that your time to discuss it was cut short. And so he still
4 hasn't made a decision whether he will testify or not.

5 A. Right. I remember wanting more time. And I
6 remember saying something to the judge like -- I thought we
7 were at the end of the day and I wanted to go see him at the
8 jail. And I remember saying, well, if I talk to him tonight
9 and he changes his mind or he decides to testify, surely, I
10 could tell you that in the morning. And she surprised me and
11 said no., That she wanted to know now.

12 Q. So y'all had to make a much quicker decision than
13 you anticipated?

14 A. Yes. And I think the reason I do recall that is
15 because I remember being surprised that the judge wouldn't
16 give me more time, because we were finished anyway. It
17 wasn't going to delay anything.

18 Q. When you are saying these things on page 3 that he's
19 going to testify, that you had planned he would testify, but
20 then you guys were taking time to discuss it and he
21 ultimately doesn't testify?

22 A. Right.

23 Q. So was that decision actually made at trial that he
24 wouldn't testify?

25 A. Further past mid-trial, I mean, I think towards the

1 end.

2 Q. Okay. But you would agree that at the motion, you
3 are going forward as if he would testify?

4 A. On page 3?

5 Q. Yes.

6 A. Yes.

7 Q. Now, if you could jump back to page 4 with me, and
8 on lines 1 through 3, you tell the Court that it's your
9 understanding from the State that the victim will only
10 testify to one prior consensual sexual encounter with your
11 client. So in order to go down this road of consensual sex,
12 you needed Mr. Meggett, essentially, to testify, is that
13 correct, to the several other prior encounters?

14 A. I did not recall that. But let me make sure I
15 understand you correctly. Is it our -- our position was that
16 they had sex more than once. And the complainant was only
17 willing to admit to one prior consensual encounter. Is that
18 right?

19 Q. Yeah, that's what I took from what you say on the
20 record.

21 A. I don't independently recall that, but if that's
22 what the record shows, that's what it shows. And, yes, if
23 she was only going to admit to one, that, yes, Mr. Meggett
24 could have testified to more than one.

25 Q. And I probably should have started with this. Going

1 in, what was your defense strategy? Looking at your opening
2 argument, I would say it was consensual sex. Was that the
3 strategy?

4 A. It was. And I know you and I have discussed this.
5 And the one thing that I wanted to look at was my closing.
6 And I am not suggesting that someone couldn't take issue with
7 some of what I said. But I don't think that I changed to --
8 I don't think that I shifted from it being consensual to the
9 sex didn't happen. I think it stayed that, if anything,
10 happened, it was consensual. Because we decided not to put
11 Mr. Meggett up, I couldn't develop it as fully as I wanted
12 to. But I don't think I abandoned that, at least it was not
13 my intent to abandon it.

14 Q. I would take you through the transcript just to
15 build the record and to make sure that we are thorough here
16 today, since this is Mr. Meggett's one opportunity here in
17 court.

18 A. Of course.

19 Q. But you would agree, from reviewing the transcript,
20 that you appeared to be presenting two possible defenses. It
21 started with consensual sex. And you give very detailed
22 facts to your opening in the jury. And then you potentially
23 shift towards the lack of DNA evidence, which is what you
24 conclude with in your closing argument.

25 A. I would agree that that's true. I don't know if I

1 would say that in my mind I saw that as a change in strategy
2 or a shift, but it's certainly possible it could be
3 interpreted that way.

4 Q. Let's go back to page 4. I want to ask you a little
5 bit more about this motion for continuance that you made. On
6 page 4, looking at line 9, you begin explaining, and I'm
7 sorry it's actually up on Line 7, that you had the first
8 thorough discussions about the DNA with your client the
9 Saturday prior to trial?

10 A. That's correct.

11 Q. Then you all discussed it again that Monday. And he
12 informed you that there was a comforter that existed that
13 should be tested and evidence could potentially be derived
14 from it that would show -- confirm these prior sexual
15 encounters which she was refuting?

16 A. Right.

17 Q. Do you recall that?

18 A. Yes.

19 Q. And that would show all mostly there on page 4 and
20 then into page 5. On page 5, specifically looking at line 7
21 through 20, you go through a little bit of the case history.
22 And even though you said you reviewed the evidence for the
23 first time on Saturday with Mr. Meggett, you say beginning on
24 line 11: I reviewed all of the evidence and there was no
25 probative DNA evidence at all at that point from the rape

1 protocol kit. The rape protocol kit that contained the
2 vaginal smears and swabs from the plaintiff had no DNA from
3 my client.

4 Prior to your meeting with Mr. Meggett on that
5 Saturday, you were aware that there was no DNA that linked
6 Mr. Meggett from the protocol kit, correct?

7 A. Yes.

8 Q. Did you discuss that with him prior? And if not,
9 why?

10 A. I don't recall. From what this shows, is that I
11 hadn't had any thorough discussions about the DNA until
12 Saturday. And I would assume, and it is an assumption, that
13 because he admitted having sex with her, that the DNA,
14 whether it was positive or negative, was really of no
15 consequence, that the defense was going to be consent.

16 Q. But couldn't the defense have been the State cannot
17 prove their case if you did not interject the consensual sex?

18 A. I don't think that those are mutually exclusive.
19 But, yes, that's true. I could have sold harder -- if by
20 case, you mean they didn't prove that the sex, in fact,
21 happened, yes, I could have sold that harder, I guess.

22 Q. Okay. Now, throughout your argument, like I said,
23 beginning on page 4, you guys go to about page 8 making
24 argument back and forth, where you are trying to get the case
25 continued so you could get the comforter tested, you say to

1 the court repeatedly, the DNA evidence is critical. Did you
2 anticipate that you would be able to get that continuance and
3 to get that comforter tested?

4 A. I thought I would get the continuance, because I had
5 agreed to continue the case once before. So I kind of
6 thought that the judge would agree, but she didn't. I didn't
7 know how -- I only had what Mr. Meggett was telling me about
8 the comforter. I don't know how confident I was that we
9 would find it.

10 Q. Okay. And with that said, I will direct to you page
11 6. And looking at lines 13 through 15, and that may refresh
12 your memory a little bit about the comforter. That is page
13 6, line 13 through 15.

14 A. I spoke to the sister about it. It's in storage. I
15 know where to get it. Okay. I did not recall that until
16 now.

17 Q. And to be fair, I'm going to point that out to you.
18 It appears from the record you did know or you are telling
19 the Court you knew exactly where to get it?

20 A. Yes.

21 Q. Now, ultimately, the judge denies that motion. And
22 I will get to that in a second. Is there any reason once
23 that motion was denied that you didn't see to it that that
24 comforter was secured and kept for potential later testing?

25 A. I told some of his family members to secure it, but

1 it was after the conviction. I remember having a discussion
2 with him saying, you need to find that for a motion for a new
3 trial based on after-discovered evidence.

4 Q. And as far as you know, was that comforter ever
5 available to be tested?

6 A. I don't know the answer to that.

7 Q. Would it have taken expert services or the use of a
8 lab to be able to test the comforter?

9 A. Yes.

10 Q. So that's not something that a defense attorney or
11 PCR attorney can just do themselves? You need funding for
12 that; is that correct?

13 A. Yes.

14 Q. Now, the court denied your motion for continuance.
15 If you turn to page 9 and look at lines 9 through 22.

16 A. All right.

17 Q. And there, it appears part of her reasoning may be,
18 based upon her statements as I interpret them, that this
19 testimony is going to come out. So, essentially, the laying
20 of the case and the testing of the comforter isn't necessary
21 if this issue is going to be addressed with the witnesses.

22 A. Right.

23 Q. But when you didn't call Mr. Meggett, the prior
24 consensual sex wasn't addressed; is that correct?

25 A. Unless I got it from Ms. Hooper, the complainant.

1 The trial court said the State, and reading from line 19 on
2 page 9, the State has indicated -- the State has indicated,
3 and Mr. Butler agrees, that the testimony will come in and
4 that she admits to having sex on a prior time.

5 The State wouldn't have known what Mr. Meggett told
6 me. So I read this as saying the State knows that the
7 complainant was going to admit that she had prior consensual
8 sex with Mr. Meggett.

9 Q. You told the judge just a couple of minutes at that
10 time prior that he's going to testify to six or seven prior
11 instances?

12 A. Did I? I don't remember that, but I don't dispute
13 that.

14 Q. You informed her he's going to testify. You both
15 agree she's going to testify. If you had informed the
16 Court -- or do you think you should have informed the Court,
17 we don't know if Mr. Meggett will testify, so that makes this
18 comforter even more critical to our case?

19 A. I guess I could have put it that way, yes.

20 Q. And do you agree with what you stated, that that
21 evidence was critical to your case?

22 A. It would have helped. I wouldn't say critical, but
23 it would have helped.

24 Q. Let's jump forward to page 95. That's where you
25 start with your motion to introduce evidence regarding the

1 instances of prior consensual sex. And if you can flip over
2 to page 96 and look at line 7 through 12.

3 A. Okay.

4 Q. And there you -- how many times do you tell the
5 court he's going to testify to?

6 A. Six or eight times.

7 Q. So you are essentially making this motion because
8 you want to bring in his testimony about this prior
9 consensual sex; is that correct?

10 A. Yes.

11 Q. Now, from my reading of the transcript, and if you
12 need time to review it, please let me know, but beginning
13 there on page 96, 97, 98, 99; all the way through 101, you
14 and the State go back and forth with argument. There's
15 discussion of a proffer and how this should be handled, but,
16 essentially, on page 101, line 7, the judge says, you agree
17 to not do any cross-examination of any of the witnesses prior
18 to your client taking the stand or inquire other than the six
19 to eight times, and you say yes. So at that point, she
20 hadn't truly made a ruling?

21 A. Let me look at this one second. Well, what I'm
22 saying -- I'm having trouble making that jive with what the
23 judge says. What I'm saying is that it will all come from my
24 client, every bit of it from my client. I say that on page
25 100, line 9. And the Court, on page 101, line 7, says: You

1 agree you will not, during any cross-examination of any of
2 the witnesses prior to your client taking the stand, inquire
3 other than the six to eight times. Makes me think she's
4 saying I can ask as long as I limit it to the six to eight
5 times.

6 Q. I was confused by that. But would you agree that
7 she's saying it's an issue you are going to revisit before
8 your client takes the stand?

9 A. Well, if I want to ask more than the six or eight
10 times, then I would have to then revisit it. The way I read
11 that, and I don't have an independent recollection of that,
12 but the way I read it is, she's saying you can ask -- I don't
13 know that the State would have any basis to object to prior
14 sex between the defendant and the complainant. I don't have
15 the rules in front of me. Haven't had to look at them in a
16 while. But I thought that was an extension to rape shield,
17 that prior acts between the same parties, you could ask
18 about.

19 Q. I take that that was your argument here?

20 A. Right. So I couldn't put up that she had sex with
21 Spider, for example, or Pirate. And I don't have any reason
22 to think I'm just using those names, because they came up. I
23 couldn't ask about those. But all consensual encounters with
24 Mr. Meggett, I could ask about it, and seems to me she's
25 agreeing with me.

1 Q. If you could look back to page 100, that's the only
2 other time she kind of speaks at the conclusion of this
3 hearing, lines 3 through 8, do you see where she indicates
4 any type of ruling, clear ruling to you?

5 A. Where you've referenced, it's again confusing:
6 Mr. Butler, the offer of proof -- emphasis, my emphasis --
7 other than the six to eight times, that, I believe, that the
8 statute requires. What testimony can you present as to the
9 offer of proof regarding those six or eight times? And I say
10 it will all come from my client.

11 Q. But does it appear from the record, just in reading
12 it and what you recall, that she has ruled that you can
13 introduce his testimony regarding those six to eight prior
14 times?

15 A. Yes.

16 Q. So it's your understanding, based upon her
17 statements, that that was going to be admissible?

18 A. Right, that he could testify to those.

19 Q. Now, another motion that you made is found on page
20 101. You don't need to turn there. I've kind of termed it
21 the towel motion. You made a motion to suppress towels found
22 in his vehicle when he went to the hospital where the victim
23 was located after the incident.

24 A. I remember that. Only thing I'm going to ask you
25 is, you said page 101?

1 Q. Yes. I believe y'all go straight into the motion.

2 A. Oh, right. I -- somebody calls the officer. Okay.
3 Yes, I recall that.

4 Q. If you could flip to 117 through 118, which is where
5 you were making your argument.

6 A. Okay.

7 Q. And at line 10, you are arguing that it would be
8 prejudicial for it to come in because the DNA that was found
9 was a mixture from of your client and someone else's client.
10 There's no DNA of the victim?

11 A. And I'm talking about the DNA at that point from --

12 Q. The towels that you were moving to suppress.

13 A. Okay.

14 Q. And if you could jump down to line 20, you give your
15 reason that you tell the Court why you really care about
16 these towels. And you say: This is the reason I really care
17 about them. It's mixed with his DNA and someone else's. And
18 I don't want the jury to speculate as to what that could be.
19 It's not hers.

20 A. Right.

21 Q. Do you recall making that argument?

22 A. I don't. But I don't dispute it. It is in the
23 transcript obviously. I remember making the argument about
24 the towels. And I remember that the towels were suppressed
25 because the search was illegal.

1 Q. Correct.

2 A. I can interpret what I'm saying here is, his DNA is
3 on the towel, but it's mixed with somebody other than him --
4 I mean, other than hers. I'm sorry. The DNA is
5 Mr. Meggett's and someone not the complainant in this case.
6 So it would be irrelevant, because it shows, arguably,
7 Mr. Meggett's sex with somebody else.

8 Q. If you could jump to page 395, it's your closing
9 argument, and look at line 19. You may need to look further
10 for some reference, but 395, line 19.

11 A. Right.

12 Q. It's my understanding there you are talking about
13 the spot or the DNA that was extracted from the comforter
14 that was allegedly taken from the victim's bed. And what are
15 you arguing to the jury there regarding that DNA?

16 A. That David Meggett had been in that residence before
17 and had sex with someone other than the claimant in that same
18 residence.

19 Q. So you are essentially arguing to the jury that all
20 that DNA evidence shows, that the State just utilized, is
21 that he had sex with someone else on that comforter, not the
22 victim?

23 A. Right.

24 Q. Isn't that the basis that you used as to why the
25 towels themselves were so prejudicial, the different piece of

1 evidence?

2 A. No, because those were in the trunk of his car and
3 not in the bedroom, the same -- if I'm recalling correctly, I
4 could be wrong, but in the same bedroom on the same bed where
5 she says sex -- that he raped her.

6 Q. And so you don't see a conflict between your
7 argument with the judge as to why the towels were prejudicial
8 versus your argument to the jury regarding the comforter that
9 was admitted?

10 A. I could see how somebody could make that argument,
11 but to me, the reason I didn't want the others to come in is
12 because they were in the trunk of his car.

13 Q. Let's flip forward to your opening argument that we
14 referenced, specifically page 133. And I would like to give
15 you some time to review, and just let me know when you are
16 done, 133, line 7 through 134, line 7.

17 A. Okay. Okay.

18 Q. Now, in that opening, you would agree that you
19 informed the jury that they had consensual sex?

20 A. Yes.

21 Q. And you go into a very detailed account of what
22 actually happened that night?

23 A. Yes.

24 Q. And you explained to the jury that they had some
25 type of less than desirable agreement of sex for money to pay

1 off a debt?

2 A. Yes.

3 Q. And later on in the trial, Mr. Meggett doesn't take
4 the stand, or doesn't testify to any of those facts. Why did
5 you make the decision to get into these detailed facts
6 concerning consensual sex without knowing for certain that
7 your client would take the stand?

8 A. At that point, I thought I did know for certain that
9 he was going to testify. My plan and our plan was that he
10 would testify.

11 Q. And but you would agree that you go into all of the
12 details that would have ultimately only come in through David
13 Meggett's testimony?

14 A. Yes. If I thought he might not testify, I wouldn't
15 have gone into those details.

16 Q. What type of opening argument would you have given
17 then?

18 A. I never just wave the flag. I can't stand that. I
19 would have given something more than that. But I would not
20 have spelled out those specific things that could only come
21 from David. I expected, and I think we both expected him to
22 testify.

23 Q. And if you could look on page 135, line 11, you tell
24 the jury also: And none of David's DNA was inside her. The
25 reason for that is because David didn't finish.

1 A. Yes.

2 Q. You supply them as that being the reason that the
3 evidence is lacking, that the State plans to introduce?

4 A. Right.

5 Q. Could you not have got with your argument down that
6 vein and said the State cannot prove their case versus David
7 Meggett had sex with her, but the lack of evidence just shows
8 he didn't finish?

9 A. You are going to ask me that again.

10 Q. I'm sorry. I ask very long questions. And I've
11 been in your position, so let me know if they are confusing.

12 You say on Line 7 through 19 that the lack of DNA
13 evidence inside of her, the evidence from the rape protocol
14 kit, lines up with his story that it was consensual and he
15 didn't finish?

16 A. Right. He changed his mind in the middle of the
17 act.

18 Q. Could not your opening have been about just the
19 weakness of the evidence and that they did not have any
20 evidence that sexual intercourse had occurred?

21 A. Yes, it could have been that way.

22 Q. And why did you choose to not go down that road?

23 A. Because I planned for David to testify. And I
24 thought, and still think, that his account of what happened
25 was credible and believable. I intended for him to testify

1 to it.

2 Q. So with that said, why didn't he testify?

3 A. David's account to me had always been believable.

4 And I thought he was going to make a good witness. My
5 meetings with him were always pleasant. I recall thinking I
6 can in no way see this person committing the crime for which
7 he's accused. I thought he would make a good witness. And
8 in my line of work, that doesn't happen often. And I had a
9 woman in my office meet with him as well. And we agreed that
10 David would make a good witness.

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

20 And when it came time for him to testify, I also
21 thought that we had done a very good job with the complainant
22 in this case. And I thought the fact that she admitted that
23 they had had consensual sex prior to this occasion was good.
24 And I started to question whether or not David should
25 testify.

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

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

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

20 Q. And right before he ultimately makes that
21 decision -- and I am not going to go into great detail, Your
22 Honor. If I may note for the record, I intended to use a DNA
23 expert and had planned to question Mr. Butler more
24 thoroughly. But I am not qualified to do that.

25 But you do a very thorough cross-examine of Jennifer

1 Clayton, who was the SLED analyst. You got her to say
2 clearly that there was none of the victim's DNA in this
3 classic wet spot that was found. And that a mixture,
4 essentially, to show intercourse, would be a mixture of the
5 two individuals who had the sexual intercourse. So you fully
6 fleshed that out, for lack of a better word, before him
7 making that decision. So were you feeling confident based
8 upon that cross-examination of the SLED expert?

9 A. I can't tell you where it came from. It may have
10 been that. My recollection is that I didn't think that Ms.
11 Hooper came across particularly good. I can't tell you
12 whether it was because of her direct or because of her cross.

13 We also -- I am not sure why I thought this, but at
14 the time, thought that keeping the towels out was a
15 significant victory. I remember that Mr. Simpson in
16 particular was upset at that ruling and that he thought, he
17 thought, that the towels from his trunk were critical. I
18 didn't share that opinion, but the fact that the State saw
19 that as important and as a setback to their case, may have
20 also played a role.

21 I guess what I'm trying to say is, by the time the
22 State was finished, I was pretty confident.

23 Q. At that point, though, did you recall that you
24 already told the jury they were going to hear from your
25 client about the specific events of that night, and you told

1 them that there had been consensual sex that night?

2 A. I can't say -- I don't think I would have forgotten
3 it, but I don't read my closing as having abandoned that.
4 And I specifically saw that I argued what consent, that the
5 burden is on the State to disprove consent. And I got the
6 judge to charge consent as a defense and that the State must
7 disprove consent beyond a reasonable doubt.

8 Now, if David had testified, I would have hit those
9 points harder, but I don't see -- and it might be because I
10 know in my head what I intended. It's fair to say somebody
11 could interpret it differently, but I don't see that I
12 abandoned the consent defense.

13 Q. If you don't mind turning to page 3, there it
14 appears the State is making some type of motion, though, to
15 limit you from being able to go into what you did in your
16 opening since you did not put up any evidence or testimony to
17 support it.

18 A. Right.

19 Q. You can look at 380 and 381.

20 A. I see that.

21 Q. Okay. So the State actually moves successfully to
22 preclude you from going into the testimony, and I would say
23 the defense that you established in opening, in your closing?

24 A. Well, even had they not moved to do that, I wouldn't
25 have done it. What I read Mr. Simpson as moving to preclude

1 me to getting into is this money-for-sex arrangement that I
2 testified or spoke about in opening statement. At this
3 point, because I had presented no evidence of that, I would
4 hurt my own credibility if I were to argue that in closing.

5 So, yes, Mr. Simpson is moving to preclude me from
6 doing that. The Court really doesn't give a ruling. She's
7 just saying, I'm assuming Mr. Butler, who has been practicing
8 a long time, will follow the rules of evidence. And she
9 tells Mr. Simpson to feel free to object. I wasn't going to
10 go into that anyway, because he didn't testify.

11 Q. You would agree, though, that the facts that you
12 gave the jury in opening, you then did not put him on the
13 stand and give the jury those facts, so you could not present
14 those in closing?

15 A. That's true, yes.

16 Q. Let me take you back to the victim's testimony. Do
17 you recall -- and it's talked about all throughout the
18 transcript -- that you had actively been in a lesbian
19 relationship leading up to this incident?

20 A. I did when I looked back at my closing.

21 Q. And did that factor enter into your decision about
22 her testimony and how to approach her testimony in this case,
23 your cross-examination?

24 A. If it did, I don't recall it now. And I can't think
25 of a way that it would have. But if you see something, you

1 can point it out to me. But off the top of my head, the
2 answer would be no.

3 Q. As a juror, though, don't you agree that they would
4 be sitting there and thinking it's more implausible that she
5 had consensual sex with Mr. Meggett if she's talked and
6 testified about how she's typically in lesbian relationships?

7 MS. OLIVE: I would object to speculation.

8 THE COURT: Overruled.

9 THE WITNESS: Yes, except she admitted having sex
10 with him on a prior occasion.

11 BY MS. BLANCHETTE:

12 Q. Okay. Let's look at that admission. If you can
13 turn to page 140, and on Line 18, she makes that admission
14 that you've been talking about. She said: I had sex with
15 him one time.

16 And then looking at line 20, she's asked: Why did
17 you do that?

18 What's her explanation there?

19 A. This is in her direct testimony. She says: I had
20 sex with him one time.

21 The prosecutor asks: And why did you do that?

22 And she says: At that time, it was about a month
23 after Skyler left and I was -- I had been drinking a lot.
24 And it was a bad decision. And it started, and before it
25 could even get fully started, I got nauseous and told him to

1 get off of me.

2 Q. So she doesn't testify positively about this prior
3 sexual encounter, does she?

4 A. Oh, I didn't understand exactly what you meant by
5 positively. She admits it happened, but, no, sounds like it
6 was not -- she didn't depict it as an enjoyable experience,
7 if that's what you mean.

8 Q. Did she depict it as something she planned to do or
9 ever planned to do again?

10 A. No.

11 Q. And I believe it's in her cross, looking at page
12 159 -- I'm sorry. This is still in her direct. She's being
13 asked some more specific questions beginning on Line 15 about
14 that prior encounter.

15 A. Right.

16 Q. And at the bottom of the page, the solicitor says:
17 Was that green plaid comforter on that bed?

18 And she cuts him off and says no.

19 So they do establish that the prior sexual encounter
20 was in a different location. So any DNA evidence found on
21 that comforter wouldn't be from the prior sexual encounter.
22 Would you agree with that?

23 A. Yes.

24 Q. And then if you look at the redirect on page 193,
25 line 23, her testimony ends with one question: How many

1 times did you and Mike have consensual sex?

2 And she says one time.

3 A. Right.

4 Q. So the very last word the jury hears from the victim
5 defeats your theory regarding prior sexual encounters and
6 this less-than-desirable sex for money deal that they had
7 struck; is that correct?

8 A. Yes.

9 Q. Jumping back to the issue you were talking about,
10 the six to eight times and the judge's ruling on that, my law
11 clerk graciously reviewed your opening statements. It
12 appears from the record, and I would let the record speak for
13 itself, that if you didn't state six to eight times. You
14 would agree with what the record states; is that correct?

15 A. Yes.

16 Q. Okay. I think we thoroughly discussed the issue of
17 Mr. Meggett not taking the stand and where that comes up in
18 the transcript. But if you can turn to page 459, line 3,
19 it's where you are giving your mitigation at the guilty plea.

20 A. Right.

21 Q. You say, beginning on Line 4: I've never been able
22 to figure out a way to give mitigation after I defended
23 somebody who I think was, if not innocent, not guilty. I
24 respect the jury's verdict, of course. I know it was a
25 difficult decision and they put the time in. But I'm always

1 at loss to what to say. I also have to always advise my
2 clients at this stage not to speak, because there's always
3 the chance of an appeal. And that's no disrespect at all to
4 the Court, but that's always my advice.

5 A. Yes.

6 Q. I take that, as you say there, to mean that you
7 seriously believed that Mr. Meggett was either innocent or
8 not guilty. And you had advised him to not even speak at
9 sentencing; is that correct?

10 A. Yes.

11 Q. What was your reasoning behind that if it was more
12 than what's there on the page?

13 A. Well, there are two things going on there. I'm kind
14 of saying, it's hard for me to talk out of both sides of my
15 mouth. I sat here and believed that he was not guilty. And
16 then now to try to mitigate it is difficult.

17 The second part of that is a different point, which
18 is just a matter of, I guess, looking forward and protecting
19 him legally. For example, not that he would have said it,
20 but let's imagine that a person who's been convicted wants to
21 mitigate sentence or an appeal for some form of leniency,
22 apologizes to the victim, and that's taken as some sort of
23 admission of guilt. So to prevent that from happening, I
24 usually tell clients that it's best after conviction to
25 remain silent.

1 Q. Jumping back to your closing argument, on page 393,
2 I can read it for you, line 20, it says: I don't have a DNA
3 analyst. I don't have a DNA lab.

4 I assume you are relating back to the motion for
5 continuance that you had made?

6 A. Where are you, 393?

7 Q. Line 20: I don't have a DNA analyst. I don't have
8 a DNA lab.

9 A. Right.

10 Q. Now, in your motions pretrial, though, you tell the
11 Court that you were well aware of the DNA evidence prior to
12 just meeting with David that Saturday. It was just that
13 Saturday that y'all had discussed it?

14 A. Right.

15 Q. So my question to you is this. Why did you not look
16 into getting a DNA analyst or DNA expert prior to your
17 meeting on Saturday with David?

18 A. Because I didn't need one. What I'm saying, taken
19 out of context, maybe even if you read the whole thing, maybe
20 it wouldn't make sense, but what I'm saying here is, the
21 whole sort of theme in my closing is that the State was
22 picking and choosing what facts and what evidence that they
23 wanted to emphasize and in a way that was creative. And when
24 I say I don't have a DNA analyst, when I said it, I think the
25 evidence was on "I". I don't have a DNA analyst. I don't

1 have a DNA lab. And if you read what I said before that,
2 this is a good example of their being creative. It's their
3 DNA analyst. So what I'm saying is, their own evidence is
4 consistent with my defense.

5 Q. You talk about an artist that splices and cuts and
6 makes the most beautiful picture they can make?

7 A. Right.

8 Q. Why didn't you go with that strategy in your
9 opening?

10 A. Well, opening is not the same as closing. Only
11 thing I can tell you is to account for any perceived
12 differences. I don't see them as that different. I expected
13 that David would testify. I expected to recommend to him
14 that he testify. And I changed my mind.

15 Q. And you stated earlier, and I've been going through
16 this for a while, so please correct me if I am wrong, that
17 essentially in your closing, you didn't put an emphasis on
18 the lack of DNA evidence to establish intercourse. But if
19 you turn and look at page 394, line 1, there you say: No
20 DNA, none of Mr. Meggett's DNA inside of her or on her.

21 So that is, in fact, what you are arguing to them in
22 closing?

23 A. That's right.

24 Q. But you've already told them that they had
25 consensual sex?

1 A. Yeah. I don't see those being mutually exclusive.
2 You can have consensual sex without DNA. You can have
3 forcible rape without DNA. If he stopped before he finished,
4 then you could have DNA if there was DNA in a pre-ejaculate.
5 But I wouldn't typically expect that.

6 So, to me, the lack of DNA is not inconsistent with
7 a consent defense. Just as the lack of physical injuries are
8 not at odds with a consent defense.

9 Q. But wasn't the fact that you didn't put up any
10 testimony to support what you argued to the jury in close
11 inconsistent with a consent defense?

12 A. Say that again. I'm sorry.

13 Q. Wasn't the fact, or would you agree that the fact
14 that you didn't put up any testimony or evidence to establish
15 the facts of this consensual sex during the defense's case,
16 wasn't that inconsistent with the consensual sex defense?

17 A. It's inconsistent with -- no. You can tell me if
18 I'm saying what you are saying. I did not shore up what I
19 said in opening. That specific defense, I did not present,
20 because Mr. Meggett didn't testify. That's correct.

21 Q. And you know what, I will turn to the State's
22 closing argument, because I think they make the point in
23 closing that I'm trying to make right now. If you could look
24 at page 416, lines 20 through 22. And there they say: The
25 important part about what's been found on that comforter was

1 David Meggett's sperm. And in the opening statement,
2 Mr. Butler told you, yeah, they had sex on that bed. That's
3 been consented to.

4 So is the State putting out there in their closing
5 that you were the one who had said that they had sex on that
6 bed, that you essentially have consented to that fact in this
7 case?

8 A. Yes.

9 Q. And other than you, the only other testimony to
10 establish that fact would have been the victim?

11 A. Right.

12 Q. So your opening, essentially, corroborated a portion
13 of the victim's testimony?

14 A. Meaning that they had consensual sex one time
15 before?

16 Q. No, regarding having sex that evening on that bed.

17 A. Yeah, I guess so.

18 Q. If you could look at page 418, lines 20 through 24,
19 what's the State's opinion of the consensual sex that stopped
20 midway through, essentially the defense that you put up in
21 opening?

22 A. Well, they add a part to it that's not in my
23 opening, I don't think it is, where they said: What the
24 prosecutor argues in his closing, he says, the defense in
25 their opening gave a story that completely defies all common

1 sense, that, oh, they had consensual -- then he corrects
2 himself, consensual sex on the bed. He stops midway through,
3 and then assaults her. Defies common sense.

4 I would agree that to assault someone after
5 consensual sex would defy common sense, but I don't
6 believe -- I don't believe that I said in opening that he
7 assaulted her.

8 Q. But if it is in the record that he had potentially
9 pinned back her arm or hurt her in some way, in your opening,
10 you would defer to the record, is that correct?

11 A. I will defer to the record.

12 Q. But here, I take it as they are saying this defense
13 defies common sense. And I guess that's my question to you,
14 is how does it not defy common sense when you've given them a
15 story in opening, you do not put up Mr. Meggett, and then you
16 are arguing to them in closing that the DNA evidence doesn't
17 establish sexual intercourse, but you've already told them
18 that your client had sexual intercourse in your opening?

19 A. I don't think that -- I don't think that my
20 appealing to the lack of DNA is to say that they didn't have
21 sex. Usually that would be the use that a defense lawyer
22 would make of the lack of DNA. I don't believe that
23 that's -- I mean, best I can put myself back in that place
24 whenever this trial happened, I don't believe for me that was
25 the import of that evidence.

1 Q. You said based upon your failure to put up any
2 evidence or testimony to establish the facts from your
3 opening, you cannot specifically go into those facts in
4 closing? You understood that?

5 A. Right.

6 Q. Why did you not object when the solicitor did?

7 A. I don't know. As I'm reading it now, I think I
8 should have objected. I think they could have said -- I
9 think that they can bring out that I make promises in opening
10 that I don't fulfill. I think there's case law on that. I
11 could be wrong. But I think I should have objected when he
12 says what he says here.

13 Q. Do you think you in any way opened the door to those
14 comments?

15 A. Well, that's the question, did I or did I not.
16 Either I opened the door and I couldn't object or I didn't
17 and I should have objected.

18 MS. BLANCHETTE: Can I beg the Court's indulgence
19 one moment? Your Honor, may I approach?

20 THE COURT: Yes.

21 BY MS. BLANCHETTE:

22 Q. Mr. Butler, you will probably be relieved that I
23 want to ask you a couple of questions about the other charge,
24 the burglary charge in this case?

25 A. Okay.

1 Q. The Court, when he gives or when she, I'm sorry,
2 gives her charge, she explains that the first element is
3 entering a dwelling without consent. Now, it's on page 94,
4 is where it appears. You ask the Court if you could go into
5 the intent to commit a crime inside a dwelling in your
6 opening argument, even though that's an argument on the law,
7 and that's discussed. Is there any reason why you didn't ask
8 to also go into the first prong of entering a dwelling
9 without consent and argue that he had consent to be there?

10 A. Okay. I have to look at this. Where on page 94?

11 Q. Page 94 is where you make the request, lines 19
12 through 22.

13 A. Okay. Now, what's your question?

14 Q. The judge instructed them in the law, first element
15 is entering a dwelling without consent.

16 A. Right.

17 Q. Why did you also not focus on that first prong of,
18 he had consent; I mean, the opposite of the statute?

19 A. I can't tell you why I didn't.

20 Q. And in your opening on page 133, lines 21 through
21 23, you tell the jury that he had walked in as many times
22 before because the door was unlocked.

23 A. Right.

24 Q. Do you recall if it was your position that he had
25 consent to be there?

1 A. Yes. I mean, it wasn't as if she had invited him
2 there, but the fact that he had come and gone as he pleased
3 on prior occasions and did so again, to me, was evidence that
4 he had implicit consent, I guess, if not explicit.

5 Q. And I apologize here, if I could beg the Court's
6 indulgence one moment.

7 If you could look at page 365 at your directed
8 verdict argument, and it's lines 15 through 23.

9 A. Okay.

10 Q. You stated, there is at least some argument that's
11 to be made for a burglary. The victim testified that when he
12 comes in, he's asking for money that he owes her, she owes
13 him, that would be all I have to say in that respect.

14 Can you interpret that further for me, what you were
15 attempting to argue to the court?

16 A. I cannot.

17 Q. And do you see where you went into the issue of
18 consent in your directed verdict?

19 A. No. You will have to point me to that one.

20 Q. That's all I have on your directed verdict, is lines
21 15 through 23.

22 A. Oh, no. I mean, standard Rule 19 covers everything.
23 I mean, if I thought I had -- she testified that it wasn't
24 consensual. I don't think that I had a specific argument to
25 make that I was entitled to directed verdict on the CSC

1 charge.

2 Q. But I was asking about -- I'm sorry, the consent to
3 be in the dwelling, not the consensual sex. I'm sorry. I
4 can see where you are confused.

5 A. Yes.

6 Q. Is there a reason you didn't argue the first prong
7 of the burglary charge, being in a dwelling without consent?

8 A. No. I assume she testified that he didn't have
9 consent. If I'm wrong about that, then I should have.

10 Q. Okay. And were you aware that the directed verdict
11 was an issue raised on appeal?

12 A. Yes.

13 Q. And were you aware that the Court actually cited the
14 exact argument that you gave in their opinion?

15 A. I was not aware of that.

16 Q. And you do agree that you did not argue here that he
17 had consent to be in that dwelling?

18 A. Well, implicitly, Rule 19 basically would say --
19 would cover all bases. But, no, I did not make a specific
20 argument to the court that he had consent.

21 MS. BLANCHETTE: Your Honor, I'm sorry I'm slowing
22 down here, but I would beg the Court's indulgence one more
23 time.

24 BY MS. BLANCHETTE:

25 Q. All right. Mr. Butler, if you are turn to page 446,

1 I believe it is -- I apologize, it's 445. You've been at
2 recess. The jury has been out, and two jury notes are
3 brought in.

4 A. Okay.

5 Q. Do you recall when those jury notes that were marked
6 at Court's Exhibit 3 and 4 were introduced?

7 A. I do not. I can assume from what she says later
8 about an Allen charge that they must have indicated that they
9 were unable to reach a verdict.

10 Q. Okay. And upon reading this, oftentimes a judge
11 will read the jury note into the record. Here he does not.

12 A. Right.

13 Q. So I had conferred with the attorney general and
14 asked the clerk's office to provide us with, actually, for a
15 certified copy of those exhibits so we wouldn't have to
16 speculate.

17 MS. BLANCHETTE: Your Honor, may I approach the
18 witness at this time.

19 THE COURT: Sure.

20 BY MS. BLANCHETTE:

21 Q. Mr. Butler, can you review these and tell me what
22 they appear to be?

23 A. "May we have the definitions of each degree?"

24 MS. OLIVE: Your Honor, I'm not going to object for
25 the relevance of the notes. I understand they are part of

1 the Court's record. But if we are getting into what the jury
2 was hung up on, I don't think that -- we would object on the
3 basis of relevance in regards to hearsay. And I don't know
4 if Mr. Butler can speculate as to what those notes would --

5 THE COURT: Well, Mr. Butler, I assume, was privy to
6 those notes. And she can ask him what she wants to know,
7 what the interpretation of them are. I overrule the
8 objection.

9 MS. OLIVE: Thank you, Your Honor.

10 THE WITNESS: The other one says: We have reached a
11 verdict on the criminal sexual conduct charge. We cannot
12 agree on the burglary charge.

13 BY MS. BLANCHETTE:

14 Q. Okay. Do you recall that the jury was essentially,
15 for lack of a better word, hung up on the burglary charge and
16 then an Allen charge was given?

17 A. I did not independently recall that, but that would
18 be what those notes suggest.

19 MS. BLANCHETTE: Your Honor, at this time, I would
20 move these in as Applicant's No. 1 and 2. I believe they are
21 part of the record of this case. I asked that they come
22 directly from the clerk's office. I did he receive them from
23 your law clerk this morning. If I need to lay a foundation
24 as to why I want to admit them, I'm happy to do that.

25 THE COURT: I think I understand why you want them.

1 Over the State's objection, admitted.

2 (Court's Exh. 1, Jury note asking for definition,
3 was marked for identification.)

4 (Court's Exh. 2, Jury note indicating they reached
5 a verdict on CSC but not burglary charge, was marked for
6 identification.)

7 BY MS. BLANCHETTE:

8 Q. Mr. Butler, were you aware that issue two on the
9 brief was as follows on the appeal: The State's reference
10 during closing argument to lack of evidence supporting its
11 interpretation of the defense's theory impermissibly shifted
12 the burden upon Meggett as an indirect comment on the
13 defendant's right to remain silent?

14 A. I was not.

15 Q. Okay. And I think we've already discussed this and
16 you have conceded that you should have potentially objected
17 to comments made by the solicitor?

18 A. Yes, but I did see that I did object. I didn't
19 object the first time, but I did the second time.

20 Q. And if any issues were found as unpreserved or that
21 the proper arguments were not made, did you have a reason for
22 not making further objections in the closing argument?

23 A. No, that would be on me.

24 MS. BLANCHETTE: Your Honor, if I could beg the
25 Court's indulgence one moment.

1 A. I don't remember specifically. I think I told him I
2 didn't think that he should, but like I always tell my
3 clients, the ultimate decision is theirs. But it's a
4 decision that I think they should make with my advice.

5 Q. And you stated before that he had become
6 increasingly agitated during the trial?

7 A. That was my perception. And I say that only in
8 contrast to the way he had been with me at the jail. I don't
9 know if anybody else would have noticed it, because I had
10 interacted with him for some time and seen him not that way.
11 It struck me as different.

12 Q. Based on that behavior, did you feel that he was
13 going to be a good witness for himself at that time?

14 A. I worried that he might not be. And in light of how
15 I felt the trial had proceeded, I thought it best that he not
16 testify.

17 Q. And you said in light of how the trial had
18 proceeded, what specifically about the trial made you feel
19 that way?

20 A. I didn't think that the victim had come across very
21 well. I can't tell you now why that was. I haven't gone
22 back and looked at her testimony. I think I said on direct I
23 think that the State thought that our successfully
24 suppressing the evidence from the trial was an obstacle for
25 them. I'm not sure I can say more than that. Just my

1 general sense of things were that I thought they were going
2 well.

3 Q. Did you have any other concerns about him
4 testifying?

5 A. Like I said, what I recall is revisiting the
6 decision. And there were a lot of courtroom observers. I
7 think there were a lot of interns. I used the term clerk
8 earlier. Some of them in might have been interns, but there
9 were a lot of courtroom observers from my office. And we
10 went into the visitation booth, the one that's adjacent to
11 the courtroom. And I had to go over it again in front of
12 people who had not heard him before. And I remember his
13 answer to one question caused one woman to look at me and
14 shake her head no.

15 And then Mr. Meggett asked one of the interns, I
16 can't remember his name, what do you think? And the intern
17 said, I think you should let me, Mr. Butler, do -- take it
18 from here. Because all that was left to do was, if he didn't
19 testify, was closing. And David said okay.

20 Q. And this was while you were going through what he
21 had -- let me back up.

22 Did you prepare him to testify?

23 A. Yeah. This is when we were going back over his
24 testimony.

25 Q. Was there any possibility that any of the prior

1 allegations against him might come in through this
2 testimony?

3 A. No. I mean, he would have to really mess up. And I
4 would like to think I'm competent enough that I could have
5 prepared him in such a way that he wouldn't have said
6 anything that would have opened the door to it.

7 Q. You testified that you did not make a Batson motion
8 in this case?

9 A. That's right.

10 Q. Do you recall any specific reason as to why you did
11 not make a Batson motion?

12 A. I do not.

13 Q. Do you recall what the racial makeup of the jury
14 was?

15 A. I don't, but I know from looking at the transcript
16 today that I think it was 50/50.

17 Q. Would that have had an impact on your decision
18 whether to make a Batson motion?

19 A. It likely could.

20 Q. And, Mr. Butler, I'm going to refer you to a couple
21 of pages in the transcript, specifically regarding the
22 jury -- well, let me ask you this actually. If a juror
23 answers one of the questions in the voir dire -- beg the
24 Court's indulgence a moment.

25 Mr. Butler, are you and the solicitor privy to these

1 conversations that happened at the bench when there's an
2 issue that comes up in voir dire where a juror has to
3 disclose something?

4 A. Yes.

5 Q. For example, if a member of their family was
6 incarcerated?

7 A. Yes.

8 Q. Or had been convicted of a crime. Specifically, I'm
9 going the refer to you page 47 of the transcript.

10 A. I don't have the transcript, but if you just read it
11 to me, I could probably follow along. I gave it back to
12 whomever gave it to me.

13 MS. OLIVE: May I approach the witness, Your Honor?
14 And I apologize, I thought it was still here.

15 BY MS. OLIVE:

16 Q. Okay. So 47 of the transcript, there's a discussion
17 with Juror No. 134.

18 A. Okay.

19 Q. And specifically line 22.

20 A. Right.

21 Q. Okay. And then you have a strike sheet in that
22 transcript as well. It's just before page 3 of the
23 transcript, page 2H.

24 A. Okay.

25 Q. Okay. And one of the jurors that was struck by the

1 State was Juror No. 134.

2 A. Right.

3 Q. Black female?

4 A. Right.

5 Q. Is that the same juror that indicated her father was
6 in prison?

7 A. No, that's 214.

8 Q. Oh, I'm sorry.

9 A. But she is a black female and the State struck
10 her.

11 Q. Okay. And Juror 214, if you continue on to page
12 49 -- excuse me, 48, the top of the page there --

13 A. Hold on. I'm trying to do too many things at once.
14 I'm sorry, where? I'm a little bit confused because Juror
15 214, there's a bench conference on the record, and then the
16 person says -- is identified on the transcript as Ms. Pusci
17 Jenkins. And if you look to the strike sheet, the clerk's
18 strike sheet, 214 -- oh, Elizabeth Jenkins. Okay. Sorry.
19 Elizabeth and Pusci must be the same person.

20 Q. I apologize. I, unfortunately, lost the sheet of
21 paper where I had this information written down. Okay.

22 So Juror No. 214 did have a family member that was
23 incarcerated in South Carolina?

24 A. Right.

25 Q. Mr. Butler, have you reviewed your file prior to

1 today?

2 A. I skimmed through it some this morning.

3 Q. Okay. And just for the record, have you had access
4 to your file prior to today?

5 A. No.

6 Q. Is there any juror information contained in that
7 file that would shed light on this Batson issue that you've
8 reviewed for today?

9 A. I don't believe so.

10 Q. Okay. So you don't specifically recall why you
11 didn't make a Batson motion?

12 A. I do not specifically recall why I didn't make a
13 Batson motion.

14 Q. If you felt -- in general, in a trial where this
15 happens, would you have made a Batson motion?

16 A. Yes. I've made them in the past and made them after
17 this one.

18 Q. Okay. So if you had seen an issue, would you have
19 made a Batson motion?

20 A. Yes.

21 Q. Now, there was discussion during your direct
22 examination that there was no evidence of -- there was no
23 evidence that sexual intercourse had occurred?

24 A. Well, I wouldn't agree with that. She testified to
25 it.

1 Q. Okay. I wouldn't agree with that either. There was
2 also -- was there some indication of a small abrasion to the
3 victim's vaginal area? Do you recall that?

4 A. I don't. I do remember or did see my
5 cross-examination -- no, I will tell you what I saw. I saw
6 in my closing argument a reference to a cross-examination of
7 the same nurse where I pointed out a scholarly article that
8 said such injuries were equally consistent with consensual
9 and nonconsensual sex. So I can assume from that, that that
10 testimony did occur.

11 Q. Okay. And would that have been consistent with your
12 defense of consent?

13 A. It would have been consistent with both of them.
14 That's kind of the point. It would be consistent with both
15 consensual sex or nonconsensual.

16 Q. Okay. Thank you. And do you recall -- we discussed
17 that there was no DNA evidence that sexual intercourse
18 occurred, but in terms of the vaginal swab, there was -- none
19 of Mr. Meggett's DNA contained from the vaginal swab.

20 A. There was none of Mr. Meggett's DNA from the rape
21 kit.

22 Q. However, was there semen indicated from the rape
23 kit?

24 A. I do not recall that.

25 Q. I'm going to refer you to Jennifer Clayton's

1 testimony, specifically pages -- excuse me, page 317, lines
2 21 through 25. Well, I guess specifically starting at line
3 10 through 25.

4 A. On recross?

5 Q. Yes.

6 A. Okay.

7 Q. There's some discussion about the presence of semen.

8 A. Yes.

9 Q. And you make an argument concerning the P-90 test.

10 A. P-30.

11 Q. I'm sorry, P-30.

12 A. Right. But what I'm pointing out is that, now that
13 I've read this, is that semen is indicated but not
14 identified.

15 Q. Right.

16 A. Indicating means that they have done a presumptive
17 test, which just finds the presence of a protein that is
18 found in semen, but in other biological materials as well.
19 So they were not able to confirm that it was semen.

20 Q. Mr. Butler, you testified that you were able to
21 successfully suppress the towels that were found in
22 Mr. Meggett's car?

23 A. Yes.

24 Q. What impact would those have had on trial had those
25 not been excluded?

1 MS. BLANCHETTE: Your Honor, I object.
2 Speculation.

3 THE COURT: I will allow it. Go ahead.

4 THE WITNESS: I probably could have told you better
5 then than I can now. My recollection is -- well, from
6 looking at the transcript, it appears that it was -- on the
7 towels were Mr. Meggett's semen mixed with somebody else's
8 that was not the complainant.

9 Q. Let me ask you this. You said that -- beg the
10 Court's indulgence. You said that you did not want those to
11 come in because they were in the trunk. Why does that
12 matter?

13 A. That's why it's different than the semen that was on
14 the comforter, because that was in a bed where we all agreed
15 that he had been. In the trunk would sort of give the
16 impression that he took the towel from the house because it
17 was evidence and he was trying to hide it. I think that's
18 what the State wanted that evidence to mean. I am not so
19 convinced that it is, because it was Mr. Meggett's semen
20 mixed with someone else's. I mean, mixed with someone not
21 the complainant. And I only know that from reading my
22 argument earlier today on direct. I don't independently
23 recall that.

24 But what I was arguing to the judge that it should
25 be kept out, was it doesn't show that he was trying to hide

1 evidence. Because the complainant's DNA is not mixed with
2 his. It's his mixed with someone else. If it was just his,
3 then I could see how they could argue that it was evidence
4 from this particular incident. But his mixed with someone
5 else's said to me that it was -- more likely explanation was
6 that that was from a sexual encounter with someone not the
7 complainant. But I think the State wanted it in to show that
8 he took that from the house and was trying to get rid of
9 evidence.

10 Q. Did that have any connection to the victim's
11 testimony about what happened?

12 A. I think she said he used a towel to clean up. I
13 can't say whether she identified the towels in his trunk as
14 being the towel.

15 Q. And, again, I think this was asked of you on direct,
16 but are you aware that this comforter that was in storage was
17 ever found?

18 A. I don't have any first-hand knowledge of that one
19 way or the other.

20 Q. Do you have any idea how long it was supposed to
21 have been between that encounter, that encounter and the
22 trial?

23 A. I do not.

24 Q. Would it have been recent; do you think?

25 A. Well, couldn't have been any longer than he had been

1 in jail.

2 Q. And how long had he been in jail?

3 A. I don't know the answer to that, but almost
4 certainly longer than a year and probably longer than that.

5 MS. OLIVE: Thank you. That's all the questions I
6 have.

7 MR. BLANCHETTE: Very briefly, Your Honor.

8 THE COURT: You may proceed.

9 REDIRECT EXAMINATION

10 BY MS. BLANCHETTE:

11 Q. Mr. Butler, I believe the State was asking you about
12 the black female jurors that were struck.

13 A. Yes.

14 Q. As far as I see on the transcript on page 45, Juror
15 No. 134 gave an explanation that her daughter was in prison.
16 And Juror No. 214, another black female, page 47, gave an
17 explanation that her father was in prison.

18 But if you could look at page 39, there are
19 discussions being had with Juror 274, who was a white female
20 who was on the jury.

21 A. Okay.

22 Q. And if you could just read through some of the
23 explanations she gave as to why she raised her hand or stood
24 up there on page 39.

25 A. You want me to read them out loud?

1 Q. No, just review for yourself, and then I will ask
2 you a question. And it goes through page 40.

3 A. Well, I've read all the way through it. And I can't
4 tell whether she was -- if the Court kept her or not. Maybe
5 I'm missing it.

6 Q. Okay. Well, on page 39, Juror No. 24, Ms.
7 Truesdale, gives multiple responses to the court.

8 A. Right.

9 Q. And does she indicate there that she has a sister in
10 jail and a son-in-law who just got off probation?

11 A. Right.

12 Q. And if you look at page 2H that we've been referring
13 to, Juror No. 274, Rebecca Truesdale, a white female, does it
14 appear that she was seated on the jury?

15 A. It does appear she was seated.

16 Q. Immediately after she's seated, does it appear the
17 State uses a strike on No. 183, Andrew Meyers, a black male?

18 A. Yes.

19 Q. I understand that Batson, essentially, is argued in
20 three phases. Would that have given you a viable argument
21 for the three-phase Batson --

22 A. Yes. It would have given me an argument that any
23 race-neutral reason would have been pretextual because
24 somebody similarly situated -- now, I'm making an assumption
25 here. I'm going to assume that the race-neutral reason for

1 the two African-American jurors were that they had relatives
2 in prison and that this white juror had similarly situated
3 family situations and she was not struck. So if the reason
4 given by the State would have been that they had family
5 members in prison, I think I could have appealed to this last
6 Juror, 274, to say that the argument, the race-neutral reason
7 given was pretextual.

8 Q. And you did not make a Batson objection; is that
9 correct?

10 A. That's correct.

11 MS. BLANCHETTE: Your Honor, I have no further
12 questions of this witness.

13 MS. OLIVE: Your Honor, I do briefly have a
14 question.

15 RECROSS-EXAMINATION

16 BY MS. OLIVE:

17 Q. Mr. Butler, you reviewed your file for today. Do
18 you have, to your knowledge, and I can bring it to you if it
19 would be helpful, but is there anything contained in there
20 that would have more information about these jurors other
21 than what we have in the record?

22 A. If you bring me my file, my notes from jury
23 selection are in there and I can look and see. But I will
24 look. I doubt I would have said -- written down: I am not
25 making a Batson motion and here's the reason. But I will

1 gladly look.

2 Q. Okay.

3 A. I have my notes from jury selection. Is there
4 anything specific that you are wanting me to look to see?

5 Q. Is there anything contained in those notes that
6 would have given you a reason not to make a Batson motion?

7 A. No, there's nothing in my notes. The reason would
8 be what I said earlier. I could have gotten a worse juror.
9 Okay? I can't tell you that I went through the thought
10 process of noticing that the State had used four or five
11 strikes on African-Americans and, therefore, I could make a
12 Batson motion, but chose not to, because I liked the jury. I
13 can't say that I did that. But that could be a reason why I
14 might not have.

15 MS. OLIVE: Thank you.

16 THE COURT: All right. You may come down. Thank
17 you very much.

18 MS. BLANCHETTE: Your Honor, I would call Attorney
19 Breen Stevens to the stand.

20 BREEN STEVENS,
21 having been duly sworn, testifies as follows:

22 THE CLERK: Please state your first and last name,
23 and spell your last loudly and clearly into the microphone.

24 THE WITNESS: For the record, if you will please
25 state your name, spelling your last name.

1 THE WITNESS: Breen Richard Stevens,
2 S-t-e-v-e-n-s.

3 DIRECT EXAMINATION

4 BY MS. BLANCHETTE:

5 Q. Mr. Stevens, how were you involved in the case?

6 A. I was the appellate defender who handled the direct
7 appeal for Mr. David Meggett.

8 Q. In this case that are resubmitted, there was an oral
9 argument on June 5th of 2012, and the addition decision was
10 filed very shortly thereafter on June 12th, 2012. Were you
11 with Appellate Defense at that whole time?

12 A. Yes, ma'am.

13 Q. Now, Mr. Stevens, how long had you been an appellate
14 defense? Do you recall when you handled this case?

15 A. I think I started working for Appellate Defense
16 in -- I believe it was February 16th, 2011.

17 Q. Okay. And you briefed three issues in this case; is
18 that correct?

19 A. Correct.

20 Q. Can you take me through the process that you
21 utilized in determining what issues to brief on direct
22 appeal?

23 A. Certainly. Any time I get a new case, after
24 everything is prepared for the file and we have a full copy
25 of the transcripts, and sometimes multiple things, depending

1 how many hearings we had, as well as any exhibits that we
2 might want to utilize and go through that might be relevant,
3 I literally just process the record, which is a lot of
4 reading involved. And basically it's just issue spotting
5 from the very beginning. We start with page 1. Go through
6 it all. Go through pretrial motions. Go through jury
7 selection. Go through opening statements, all the way to
8 closing arguments and any post-trial motions.

9 And then there might be a number of issues present,
10 but what we try to do is really focus in on the issues which
11 might make a difference in the case. I believe Chief Judge
12 Sanders who famously quoted, whatever doesn't make a
13 difference doesn't matter. So we take that to heart. And we
14 really try to focus our time and resources and limited space
15 we have in the briefs to issues that we believe are present
16 that could make a difference for the client's case and
17 possibly get him a new trial.

18 Q. Is one of the first issues that you found an issue,
19 check spot for, a potential Batson issue?

20 A. Yes, ma'am.

21 Q. Okay. And in reviewing the transcript in this case,
22 did you notice any type of issue that you thought could have
23 been raised as to Batson?

24 A. Yes, ma'am. Is it okay if I refer to the
25 transcript?

1 Q. Please do, sir.

2 A. This is the trial transcript, not the record. It's
3 more expansive than the record itself.

4 When you look at page 2H, as in "hotel", if it's
5 possible to try to make sure we get a jury strike list.
6 Sometimes you have to specifically request for the clerk's
7 office in advance, because it's not always included when you
8 first get the transcript. But we did get it. And it looked
9 to me as if four out of the five strikes utilized by the
10 State were upon African-Americans.

11 So with that in mind, you want to pay more -- sharp
12 focus to what's going on with either basis or reasons that
13 may have been fleshed out. And, of course, you really want
14 to look and see if there was an objection on the basis of
15 either race or gender, because you can raise it as well, made
16 by the defense.

17 When I was a public defender, I really did like
18 Batson issues, because if it's there, and if it's a good
19 issue, it's something that has the possibility of getting a
20 case reversed without having to delve into the facts and
21 issues of the case, which might not be good for your client.
22 So I like to get a Batson issue if and when it was present,
23 because it was not always present.

24 In this instance, I don't know what basis or grounds
25 were or would have been used to justify the Government's

1 strikes, because there was no Batson hearing in-camera.
2 Certainly, there was some conversation out of the jury's
3 presence. They didn't hear what was going on with several
4 jurors, some of whom were stricken by the State, as well as
5 some of whom were not stricken by the State, specifically
6 Jurors 134 and 214. They were stricken by the State. And
7 they actually did come forward and gave their explanations.

8 And Juror 274 as well as Juror 72, they both gave
9 their reasons on the record as well. If that's the only
10 basis they had, got it. That would have been, like
11 Mr. Butler previously testified to, would have been a good
12 way to show mere pretext, what was going on. I'm not
13 suggesting any of the prosecutors, the Charleston Solicitor's
14 Office, are racist in any way. Sometimes when it comes out,
15 you look at a good Batson issue, that would be a good way to
16 go about proving it and trying to get your client a new
17 trial.

18 Q. If looking at the jurors selection here, the
19 information that we do have, if Mr. Butler had made a Batson
20 motion, do you feel there was a viable argument you could
21 have made on appeal?

22 A. Yes, ma'am. If, if the bases were -- for example, I
23 believe one of the questions was, you know, something to this
24 effect by the Court was, you know, do you have a family
25 member or, you know, personal friend or relative, something

1 to that effect, which is incarcerated or has been
2 incarcerated? And that's where jurors, I believe, 134 and
3 214 indicated yes. I believe 134 said she had a daughter in
4 prison. I think that was for, like, a felony DUI issue or
5 DUI with injury.

6 Juror 214 indicated her father was in prison.

7 But then we scroll on down, and both of those are
8 black females. Scroll on down, and pages 39 and 40, there's
9 Ms. Rebecca Truesdale, Juror 274, she had a sister-in-law in
10 jail, as well as a son-in-law who was incarcerated, came out
11 on probation.

12 And I think there was Juror 72 was Nanette Edwards,
13 she indicated that she had a friend and co-worker who was in
14 jail. Ms. Nanette Edwards, N-a-n-e-t-t-e, Juror No. 72, and
15 she indicated that she had a friend as well as a co-worker
16 that were incarcerated, or allegedly heard at the office.

17 So if those were some of the bases to which the
18 State would try to resort, then I believe that there could
19 have been a basis to try to raise a Batson motion and show
20 that the third prong that would be necessarily shown would
21 have to be pretext.

22 Q. Mr. Stevens, let's move on to the issues you did
23 raise in your brief.

24 A. Yes. Is it okay if I look at my brief?

25 Q. Yes, unless you are asking the Court. I'm sorry.

1 And just to be clear for the record, there was a published
2 opinion following your oral argument in this case; is that
3 correct?

4 A. I believe there was. I've got to go back and look.
5 I don't have that as part of my file here. But I can look at
6 it real quick, if you would like.

7 MS. BLANCHETTE: Your Honor, may I approach the
8 witness and provide him with a copy of the appellate
9 decision?

10 THE WITNESS: Thank you. Yes, ma'am.

11 BY MS. BLANCHETTE:

12 Q. And does it appear from that that there was a
13 published opinion issued after your oral argument in this
14 case?

15 A. Yes, ma'am. The opinion was filed June 27th, 2012.
16 I don't specifically recall the date that I had oral argument
17 in the case.

18 Q. I believe it's on the front.

19 A. Well, there it is, yep.

20 Q. Okay. The first issue that you raised, and the
21 court does address in their opinion, is very lengthy. But I
22 will summarize it as the court's failure to grant the
23 continuance regarding the DNA testing, utilization of an
24 expert in that capacity in this case.

25 A. Yes, ma'am.

1 Q. In preparing that argument, what were -- Mr. Butler
2 had argued that this DNA testing was critical. Did you also
3 reach that same conclusion and make that argument to the
4 court?

5 A. Yes, I did. I believe -- one of the things I try to
6 do is utilize the language that was advanced at trial in that
7 section of what I brief. And then turn around and leverage
8 that also in the argument section. And I believe that was
9 language utilized by trial counsel in the case. And that's
10 how I was able to turn around and try to leverage the exact
11 same language in the brief to advocate that this was
12 absolutely necessary to have. As the defense counsel
13 indicated, it's critical to presentation of the defense.

14 Q. And did you argue to the court that Mr. Meggett was
15 prejudiced by not being able to get that testing done?

16 A. Yes, I did. Any time you have an appellate issue, I
17 shouldn't say any time but, generally speaking, you don't
18 have to show that there's an area, you have to show
19 prejudice. And so, yeah, I always make a prejudice argument
20 right afterward as well.

21 Q. And in reviewing the entire transcript and preparing
22 the brief and preparing for oral argument in this case, did
23 you find a conflict between Mr. Butler's opening argument
24 where he details consensual sexual encounter, and then his
25 arguments regarding the DNA evidence and the lack thereof in

1 this case?

2 A. It appeared that there was at least a look in some
3 shift.-- I am not certain shift is the right word, but almost
4 a broader attempt to include everything, a broader embrace of
5 what he tried to argue to the jury. I mean, any time you
6 have a CSC-type of case regarding consent and it's he
7 said/she said, there's going to be some challenges. I got
8 it. And if the jury believes your client, great. If not ...
9 So there's risks. So I think it's an exceptionally daunting
10 task in a CDs case when you are arguing consent. And the
11 victim is a devout lesbian.

12 Again, your arguing consent, I think it's a bold
13 defense strategy. And especially when the client doesn't
14 testify. And I don't know how, when or why that decision was
15 made. And I think it made it perhaps challenging. But by
16 the same token, looking to close where I understand where
17 Mr. Butler is coming from, where he thought it was all part
18 of the consent argument, but my understanding of the mantra
19 that was repeated utilized was, it didn't happen, it didn't
20 happen, it didn't happen.

21 So at that point, I mean, which theories are you
22 really going with? And it's really hard to embrace both for
23 a reasonable trial strategy on that.

24 Q. Did that also inhibit you as an appellate defender
25 preparing your arguments in this case?

1 A. Yeah. I mean, when it comes to the motion for
2 continuance, not really. I think it's overall easier
3 whenever there's a clear trial strategy going forward.
4 There's always risk when you try to shift on the fly; you are
5 trying to embrace something broader or a little different.
6 And that challenge is just going to go throughout the case.
7 Once it's imbedded in the case, it's going to ride throughout
8 the life of the case.

9 Q. Mr. Stevens, how are you presently employed?

10 A. I'm currently public defender in Orangeburg County
11 Public Defender's Office.

12 Q. So you are speaking from personal experience; is
13 that correct?

14 A. Oh, yes.

15 Q. Now, you touched on issue one a little bit. But
16 issue two is where you argue about the State impermissibly
17 shifting the burden upon Meggett in their closing argument.

18 A. Yes.

19 Q. Can you take me through that argument a little bit,
20 what your primary basis was in that argument?

21 A. Well, the issue raised in closing argument was
22 premised on *Doyle vs. Ohio*, which is essentially saying that
23 he can't -- you can't comment on the defendant's silence if
24 they didn't testify, which clearly he did not in this case.
25 And so that's one basis right there. Then, of course, you

1 try to link that to say it's a burden shift and lower the
2 burden from the jury.

3 There are other arguments to make in support as well
4 of that overall theory. One of the challenges as an
5 appellate defender is that -- well, to put bluntly, you are
6 not allowed to raise an issue and argue one basis at trial
7 and argue a different basis on appeal. So we were kind of
8 hamstrung to say, well, this is what was raised at trial,
9 this is what was argued at trial, this is what we have to go
10 on. At least trying to -- trying to throw a couple of other
11 bases or rational on why the motion should have been granted.

12 And if memory serves, I think the Court of Appeals
13 said no, those bases were not preserved.

14 Q. You attempted to raise additional arguments that
15 counsel failed to preserve on appeal; is that correct?

16 A. Yes, different arguments in support of that issue.

17 Q. And in the State's closing argument, I asked
18 Mr. Butler about it, the State recounts on page 418,
19 essentially, his argument in opening, and says that it defies
20 all common sense. If he would have objected to that, is that
21 something you would have raised on appeal?

22 A. Court's indulgence.

23 Q. And that's 418, lines 20 through 24.

24 A. I see. Well, I mean, technically speaking, I think
25 you are allowed to argue, in essence, you are to apply the

1 common sense. That's why they are there. And so when it
2 comes to -- the problem is that -- I think, the problem is
3 when it's their opening story. Okay? They give -- and the
4 story essentially defies all common sense that they had
5 consensual sex.

6 The reply is kind of touchy. Part of that might
7 have been open for them to mention at least some of the
8 things. The problem I think is when they really started
9 digging a little deeper into what Mr. Butler had actually
10 said or did not say. For example, I believe there was
11 mention about assault or something like that, him basically
12 conceding assault in the opening, which is -- not only facts
13 not in evidence, I don't believe it was actually said so, in
14 the opening statement. If it was, I mean, the record should
15 speak for itself, I will gladly look at that.

16 And I believe Mr. Butler did mention that ABHAN was
17 a possibility for the jury to consider in his close. If
18 anything, it would be ABHAN. And that's just, I believe,
19 something for the jury to consider lesser-included offense.

20 Q. So based upon your review of the record and
21 preparing the arguments that you did for appeal, did it
22 appear to you that Mr. Butler may have opened the door with
23 his opening argument with statements about what had occurred
24 that night to these comments by the State in closing?

25 A. Yes. I think that was a danger zone that he

1 entered, especially when this client ended up not testifying.
2 From my analysis, it's a claptrap whenever you promise
3 something that can only be delivered by the testimony from
4 your client, the danger is it doesn't come into evidence. If
5 it happens, you've got a big problem.

6 Q. And let's move to the third issue. And Mr. Meggett
7 has alleged that you were ineffective for not addressing the
8 first prong or the consent portion of the burglary, as I call
9 it. What is your -- if you can just take me through how you
10 prepared your argument on this and why you may have -- if you
11 remember why you omitted that as not a strong basis in your
12 argument?

13 A. Sure. Again, my understanding of preservation law
14 is that I am not allowed to argue or not supposed to argue a
15 basis that's different than that which was advanced at trial.
16 So from that respect, even if I did try to do that, I think I
17 would probably have a problem when it comes to preservation.

18 Number two, and more importantly, the standard that
19 is applied at trial in the directed verdict phase is the any
20 evidence standard. Essentially, if there's any direct
21 evidence or substantial circumstantial evidence, all of which
22 is taken in the light most favorable to the Government,
23 supporting each element of the offense, then, by law, it must
24 go to the jury.

25 Now, if there's a gap in that evidence under the any

1 evidence standard, that's when it must be a directed verdict
2 acquittal as a matter of law.

3 My understanding after reading through the
4 transcript was that there was direct testimony from the
5 complaining witness in this case, Ms. Hooper, indicating that
6 Mr. Meggett did not have consent to be there. She did not
7 invite him over, that there weren't any other roommates
8 living there at the time. And so given those in conjunction
9 with each other, from what I could spot in the record in the
10 transcript, I don't think there would have been a viable
11 basis for that argument on appeal.

12 Q. And were you aware that the two jury notes dealt
13 with the burglary charge in this case?

14 A. Let me see here. I don't think I had those as part
15 of the record. I would have to actually have my overall file
16 to see what Court's exhibits were pulled. My common practice
17 was to go through the very beginning of a trial transcript
18 and look through all of the exhibits, whether State's exhibit
19 or defense exhibits or court exhibits. And this is
20 immediately upon opening the file. As soon as I'm appointed
21 the case, I would send out a request to the clerk of court
22 for anything and everything that they are allowed to send me
23 out there. And that would have been -- court's exhibit, it
24 would have been paper, and I would have requested a copy of
25 that.

1 Now, does it indicate that they actually had -- was
2 there an Allen charge? Yes, there was. So, obviously, they
3 were hung at least on something. It doesn't look like there
4 was a second Allen charge. So that issue was out.

5 That's pretty much how I was trying to look and
6 utilize the information from the jury notes.

7 Q. Mr. Stevens, I appreciate you coming today. I
8 appreciate you reviewing your file. Is there anything else
9 further that you would like to inform the Court or testify to
10 regarding the issues that you raised or chose not to raise in
11 this case?

12 A. To my knowledge, that's all I can think of at this
13 time.

14 MS. BLANCHETTE: Your Honor, I have no further
15 questions of this witness.

16 THE COURT: Ms. Olive.

17 MS. OLIVE: I have no questions, Your Honor.

18 THE COURT: You may come down, sir. Thank you very
19 much.

20 MS. BLANCHETTE: Your Honor, I would call David
21 Meggett to the stand.

22 THE COURT: Mr. Stevens, you are free to go.

23 DAVID MEGGETT,
24 having been duly sworn, testifies as follows:

25 THE CLERK: Please state your first and last name,

1 and spell your last loudly and clearly into the microphone.

2 THE WITNESS: David Meggett, M-e-g-g-e-t-t.

3 MS. BLANCHETTE: Your Honor, may I approach the
4 witness with his copy of the transcript?

5 THE COURT: Sure.

6 DIRECT EXAMINATION

7 BY MS. BLANCHETTE:

8 Q. Mr. Meggett, you filed a PCR application that we are
9 here about today in Charleston County; is that correct?

10 A. Yes, ma'am.

11 Q. Okay. And just to be abundantly clear for the
12 record, that would be docketed at 2013-CP-10-3740; is that
13 correct?

14 A. Yes, ma'am.

15 Q. And by way of that application and subsequent
16 amendment, you have made 10 allegations that you are asking
17 the Court to consider today?

18 A. Yes, ma'am.

19 Q. And we have made a verbal amendment to include
20 ineffective counsel for failure to make a Batson motion at
21 the beginning on your trial; is it correct?

22 A. Yes, ma'am.

23 Q. Mr. Meggett, we have been meeting together for a
24 couple of years. I've gone over the risk of PCR with you on
25 numerous occasions. You understand that if this Court does

1 see fit to grant you a new trial, that would put you back in
2 the position you were prior to being convicted with no
3 guarantee of less time. Knowing that, do you want to go
4 forward and ask this Court to give you a new trial today?

5 A. Yes, I would.

6 Q. Okay. Mr. Meggett, do you recall that you were
7 represented by Attorney Beattie Butler and then Attorney
8 Breen Stevens in this case?

9 A. Yes, I had.

10 Q. You've been in courtroom today and heard their
11 testimony, correct?

12 A. Yeah, ma'am.

13 Q. After you were arrested, did you make bond or did
14 you remain in the county jail?

15 A. I remained in the county jail.

16 Q. While you were in the county jail, do you remember
17 how many opportunities you had to meet with Mr. Beattie
18 Butler?

19 A. No more -- probable a couple of times, couple being
20 two.

21 Q. Do you recall what took place during those meetings?

22 A. The first was initial meeting when he first came to
23 county jail a couple weeks after I was in there. And the
24 second meeting was the meeting that alerted me that -- it was
25 a Saturday and alerted me that I was going to trial on

1 Monday.

2 Q. And we will talk more about that second meeting in a
3 moment. But during the course of his representation, did you
4 request that he obtain -- Stacey Hooper, who was the victim
5 in this case. Did you request that he attempt to obtain her
6 phone records?

7 A. Could you repeat that?

8 Q. Did you ask Mr. Butler during the course of his
9 representation before your trial to try to obtain the
10 victim's phone records?

11 A. Yes, ma'am.

12 Q. Why did you ask him to do that?

13 A. Because when he go out to the transcripts to me
14 about what the complainant was going to say and I read over
15 it and looked at it, and it didn't have -- it was all the
16 things that I was doing. It didn't have anything that Ms.
17 Hooper was doing, especially, like, example, the phone bills.
18 Didn't have -- it had mine in there. So it was going to --
19 the State was going to try to show the calls I made to her,
20 but didn't have hers in there to show the defendant, myself,
21 could show the calls that the complainant made to me.

22 Q. Why did you want to show calls that were made to
23 you?

24 A. Because I think it would have been important as far
25 as the burglary charge, the invitation, because they never

1 really asked -- Mr. Butler never asked why were you over
2 there? It never got brought why was he over there. All the
3 questions was he was here. You know, did you give him
4 permission to be here, nobody asked me or asked -- you know,
5 Mr. Butler never asked me, you know, how did I know that she
6 was going to be there on that particular day? So that's why
7 I thought that the phone records would have been very
8 important.

9 Q. And what did you tell him you thought the phone
10 records would show, was there a specific call or specific
11 reason you wanted those?

12 A. Yes, sir, I mean, yes, ma'am. I wanted those to
13 show Mr. Butler that she called me to invite me over to her
14 house, and to see that there was a pattern of calls, because
15 of the fact that it was mentioned by her that our
16 communications was just sparingly, once every few months.
17 And on the contrary, it was five, six times more than that.

18 Q. Did you also ask him to speak to potential witnesses
19 that would have been present at that house or would have seen
20 you all together?

21 A. Yeah, ma'am.

22 Q. And is Bernard Kelly one of the individuals that you
23 mentioned to him?

24 A. Yes, ma'am.

25 Q. And what did you tell him about Bernard Kelly?

1 A. That he had seen or witnessed -- he had seen and
2 witnessed us on several different occasions.

3 Q. And why was that an important piece to you? Why do
4 you think that needed to be looked into?

5 A. Because the complainant mentioned that her and I
6 never went anywhere and we were together just that one time.
7 So I thought it was important that, you know, Mr. Butler get
8 in contact with someone that actually had seen us on multiple
9 occasions.

10 Q. Would you have wanted Mr. Kelly utilized at your
11 trial?

12 A. Yeah, ma'am.

13 Q. Were you ever given any reason why he was not?

14 A. No, ma'am.

15 Q. And I appointed out in the transcript to Mr. Butler,
16 but on pages 166 through 167, he asks the victim about
17 individuals named Jonathan, Spider and Pirate?

18 A. Yes, ma'am. I am there.

19 Q. Were those also names you had given him?

20 A. Yes, ma'am.

21 Q. Why did you give him those names?

22 A. Because those were potential witnesses.

23 Q. And how were they potential witnesses? What did you
24 tell him?

25 A. Those are the guys that regularly visited the

1 residence and regularly saw me at that residence.

2 Q. Okay. And did you know any of their last names or
3 identifying information?

4 A. No, ma'am.

5 Q. What did you generally know about them?

6 A. That they stayed -- they come and stayed at the
7 complainant house at short periods of time. And they would
8 alternate, you know, you have a guy stay a few days and then
9 they alternate, they will leave.

10 Q. Okay. And those witnesses also were not located for
11 your trial; is that correct?

12 A. That's correct.

13 Q. Did you ask me to try to locate those witnesses for
14 your PCR?

15 A. Yes, ma'am.

16 Q. Due to the lack of time and lack of information, was
17 I able to locate those witnesses for you?

18 A. No, ma'am.

19 Q. Now, let's talk a little bit about the issue that
20 wasn't discussed at your trial, the National Football League,
21 on pages 92 through 93, the parties agree it won't be
22 referenced at your trial. Mr. Meggett, what was your
23 occupation at one point?

24 A. I played in the National Football League.

25 Q. And how long did you play in the National Football

1 League?

2 A. 10 years.

3 Q. And what teams did you play with?

4 A. The New York Football Giants, New England Patriots
5 and New York Jets.

6 Q. Were you given accolades or honors that would have
7 made your name possibly known to the general public?

8 A. Yes, ma'am.

9 Q. Okay. And what would those have been?

10 A. I guess I was fortunate to play on some very good
11 teams. Played in two Super Bowls, went to the Pro Bowl, was
12 selected to the Pro Bowl twice. And when I retired in 2000,
13 I left leading the league and actually the history of the NFL
14 in certain amount of categories, statistical categories.

15 Q. Did you ever discuss that with Ms. Hooper?

16 A. Yes, at some point, yes, ma'am.

17 Q. Okay. And was she aware of your career and
18 accomplishments in the NFL?

19 A. I'm not sure she was aware of the accomplishments,
20 because I never really didn't tell anybody the things that
21 I've done, like I played on Super Bowl teams and things of
22 that nature. But she was aware that I played because, couple
23 other places that we went, it was brought out that as far
24 as -- you know, are you still in the league, and, what are
25 you doing now, and have you seen your old team do this, and

1 had you seen your old team do that? And she was aware for
2 some of those conversation. And I never broke it down as far
3 as telling her the accolades, because I really don't talk
4 about those type things.

5 Q. And Mr. Butler in his examination today indicated
6 that there potentially was money motive in all of this?

7 A. Yes.

8 Q. Is that something you discussed with him as it
9 related to your career in the NFL?

10 A. Can you repeat that, please?

11 Q. I will just make it simpler. Did you ever tell
12 Mr. Butler that you may be concerned that there was some type
13 of financial motive because of your career in the NFL?

14 A. Yes, ma'am.

15 Q. And what did you discuss with him about that?

16 A. I just let him know that that may have been a
17 motive. Because, you know, when you are sitting around and
18 thinking about things and try to play things throughout your
19 head, you think of different things of why this may have
20 happened. And that definitely could have been -- it was a
21 motive. It definitely was a motive.

22 Q. And that was a concern to you that you raised to
23 Mr. Butler?

24 A. Yes, ma'am.

25 Q. Did he discuss with you that he was going to agree

1 with the State to keep the NFL out of the trial or any
2 reference to the NFL?

3 A. He did. Yes, ma'am, he did.

4 Q. Okay.

5 A. He did.

6 Q. And what did he discuss with you about that?

7 A. He told me that that morning, I believe it was that
8 Monday morning -- because what he does, he writes these notes
9 down, I guess, the night before or whatever. It's before
10 court. He writes his notes down on a yellow pad. And he was
11 going over his pad. And he was just discussing with me, I
12 believe it was Monday, sitting next to me, he said he didn't
13 want to really bring up the NFL because it would have
14 probably showed that -- it wouldn't have been good in my
15 favor, because of the fact that I was so popular and she was
16 young and not as popular as experience.

17 Q. And he proceeded with that strategy; is that
18 correct?

19 A. Yes, ma'am.

20 Q. Let me ask you about two issues that we've discussed
21 a lot today, the DNA evidence and the matter of a strategy of
22 arguing that this was a case involving consensual sex. In
23 the transcript, and as you've already referenced, Mr. Butler
24 tells the Court, in asking for a continuance, that you all
25 had just met the Saturday before to thoroughly review the DNA

1 evidence, that you told him about a comforter that you wanted
2 tested, and he was asking for more time to get that tested.

3 Were you surprised that Mr. Butler was just coming
4 to you with all of this information the Saturday before
5 trial?

6 A. Yes, ma'am.

7 Q. And what kind of occurred once he told you about
8 that? How did it come that you informed him about the
9 comforter?

10 A. We were just going over things. He brought the
11 transcript over to me. Because, again, we haven't really
12 been in communication. You know, he never came to the county
13 jail to visit me or to go over anything. And he came back
14 that one Saturday. And it was told to me that we were
15 scheduled for court that upcoming Monday.

16 And it kind of threw me for a loop, because of the
17 fact that we hadn't seen each other or talked to each other.
18 And now, all of a sudden, I'm getting ready to go to trial.

19 And we were discussing -- we were discussing the
20 evidence that the State had and some of the things that he
21 was going over and some of the things that the complainant
22 was saying. And when I saw something that was a discrepancy,
23 I alerted him to it. And one of the things was the DNA. To
24 counter the situation, and one of the things was the amount
25 of times that me and the complainant had consensual sex.

1 Q. And did you tell him there was a comforter that you
2 thought could establish or have evidence on it to establish
3 what you were saying about the prior instances?

4 A. Actually, they were two. They were two comforters
5 that could have established that, yes, ma'am.

6 Q. And he tells the Court that he had spoken to your
7 sister, he knows where those comforters are, and he can go
8 and get them.

9 A. Yes, ma'am.

10 Q. After that motion was denied, did Mr. Butler make
11 sure that that evidence was preserved for you for any future
12 proceedings such as today?

13 A. No, ma'am.

14 Q. And did you ask me to try to locate those
15 comforters?

16 A. Yes, ma'am.

17 Q. And were we able to do that at this time?

18 A. No, ma'am.

19 Q. Now, Mr. Butler says in his closing argument that he
20 didn't have a DNA analyst. He didn't have a DNA lab. If you
21 would have known about this DNA evidence prior to that
22 Saturday before, and if you would had known, as he told the
23 jury, that he knew there was no DNA in the rape protocol kit
24 prior to your trial, would you have wanted him to utilize a
25 DNA analyst to review the SLED DNA evidence and/or get a lab

1 to do testing?

2 A. Yes, ma'am.

3 Q. Did you ask me to obtain a DNA expert as part of
4 your PCR case?

5 A. Yes, ma'am.

6 Q. And did we initially retain Ron Ostrowski on your
7 case as a DNA expert?

8 A. Yes, we did.

9 Q. And we had a motion hearing here in front of Judge
10 Early, but you were unable to continue to pay for his
11 services; is that correct?

12 A. Yes, ma'am.

13 Q. And as a result, I made a motion asking for funding.
14 And you filled out an affidavit of indigency providing all
15 your financial information; is that correct?

16 A. Yes.

17 Q. Did you want a DNA expert, Mr. Ostrowski, to be able
18 to help prepare your PCR and to be here to testify today?

19 A. Yes, ma'am.

20 Q. And would you have also wanted that at the time of
21 your trial?

22 A. Absolutely, yes, ma'am.

23 Q. Now, I referenced this, but Mr. Butler tells the
24 court in his beginning motion that he's known and reviewed
25 all of the evidence, that there was no probative DNA evidence

1 at all from the rape protocol kit. Is that something he
2 communicated to you prior to trial?

3 A. No, ma'am.

4 Q. Is that something you would have wanted him to
5 communicate to you prior to trial?

6 A. Yes, ma'am. And looking at the transcript, you
7 know, over the course of time, I saw that he -- the State
8 said that he had that in his possession for quite some time.
9 And I would have loved for him to have shared that
10 information with me.

11 Q. How would that have factored into your discussions
12 with him about your possible defense in this case? What
13 would you have wanted the defense to be?

14 A. I would have wanted the defense -- the strategy to
15 be somewhat as far as what the evidence that the State had
16 against me. I wanted to dispute the evidence that the State
17 had against me.

18 Q. When Mr. Butler informed you -- let me ask you this
19 first. Did he inform you that his strategy was going to be
20 consensual sex?

21 A. No, he did not.

22 Q. Did he discuss with you the facts of the case and
23 the possibility that he could argue that it was consensual
24 sex?

25 A. Yes, ma'am.

1 Q. Okay. When you were all having that discussion, did
2 he ever bring up the DNA evidence that he references here and
3 that you were just referencing, the lack of DNA evidence?

4 A. No, ma'am.

5 Q. Okay. Do you feel like you had made an informed
6 decision when you all were talking about which way Mr. Butler
7 was going to go with the trial in your defense?

8 A. No, ma'am, absolutely not.

9 Q. And just to be clear, if you had known everything
10 that's in the record about the DNA evidence, would you have
11 wanted him to proceed with the defense that the State could
12 not establish the case based upon the DNA evidence?

13 A. Absolutely, yes, ma'am.

14 Q. And you have reviewed this transcript multiple
15 times. I've asked you to review specific sections here
16 today. And you sat through the course of this trial. Did it
17 appear to you that Mr. Butler started with one defense,
18 giving facts of this consensual sexual encounter in his
19 opening, and then shifted to a secondary defense?

20 MS. OLIVE: Objection. Counsel is testifying.

21 THE COURT: Overruled.

22 BY MS. BLANCHETTE:

23 Q. You can go ahead and answer.

24 A. Yes, ma'am. It wasn't a solid strategy. It wasn't
25 solid at all.

1 Q. Were you confused by the strategy?

2 A. Yes, ma'am, very much so.

3 Q. And is that a concern that you raised to him
4 throughout the course of your trial, or is it something that
5 you've had the opportunity to see now that you can see the
6 transcript in its entirety?

7 A. Now that I've seen the transcript in its entirety.

8 Q. And were you in a position in the course of your
9 trial to question his strategy or the defense that he was
10 presenting?

11 A. No, ma'am.

12 MS. BLANCHETTE: Beg the Court's indulgence.

13 Q. Now, you've reviewed the transcript and we discussed
14 it here today. Mr. Butler made a motion to be able to elicit
15 testimony. I believe it was just simply testimony about six
16 to eight prior consensual sexual encounters between yourself
17 and the victim?

18 A. Yes, ma'am.

19 Q. Were you the one that had told him about those
20 encounters?

21 A. Yeah, ma'am.

22 Q. Was it your understanding that you were going to
23 take the stand to testify about those prior sexual
24 encounters?

25 A. Yes, Ma'am.

1 Q. Were you prepared to do that?

2 A. Yes, ma'am.

3 Q. And here today in court, you affirm that you would
4 have testified in oath in your trial about six to eight prior
5 consensual encounters with Stacey Hooper?

6 A. Yes, ma'am.

7 Q. Now, did he ever tell you that courts ruled one way
8 or other regarding whether or not you would be able to
9 testify to those prior consensual sexual encounters?

10 A. Excuse me.

11 Q. Did Mr. Butler ever tell you what Judge Harrington
12 ruled, whether you will be able to testify about those six to
13 eight instances, or not?

14 A. No, ma'am.

15 Q. When the decision was made whether or not you would
16 testify, did you know if you were going to be able to go into
17 those six to eight prior instances?

18 A. Yes.

19 Q. And what was your understanding?

20 A. That I was going to advise that the sex was -- we
21 had multiple sex, as opposed to just having sex the one time
22 that the complainant testified to.

23 Q. So it was your understanding that if you took the
24 stand, you were going to be able to testify about those prior
25 instances?

1 A. Yes, ma'am.

2 Q. And as the record reflects, the victim testified,
3 and her testimony ends with her saying that you only had sex
4 one prior time; is that correct?

5 A. Yes.

6 Q. Is that correct what the record reflects?

7 A. Yes, what the record, yes, ma'am.

8 Q. Do you agree with her testimony?

9 A. No, ma'am.

10 Q. And Mr. Butler was aware of that?

11 A. Yes, ma'am.

12 Q. Let's talk about the decision to not put you on the
13 stand. Take me through your memory of how that was discussed
14 with your attorney and how y'all reached the ultimate
15 conclusion for you not to take the stand?

16 A. Sure. It was the -- the State had basically, I
17 guess, you would say, threw their case out. And Mr. Butler
18 and I had discussions as far as whether I was going to
19 testify. And it was discussions not just between himself and
20 myself, it was discussion between him, and he had probably
21 like three to four law clerks. And he had his assistant that
22 was -- assistant counsel that was there with him. He had --
23 also there was a private detective, one private detective
24 that he uses.

25 So we all, during the break, I'm not sure when it

1 was, but during the break, we -- and my sister was there
2 also. And during the break, we went into this room. I'm not
3 sure which room it was. And we had discussions about whether
4 I was going to testify or not, how strong the State's case
5 was against me or not, and how strong Ms. Hooper, the
6 complainant's testimony was against me. And throughout those
7 discussions, we had -- it may have been probably a total of
8 seven to eight people inside the room. And we did, I guess,
9 raise some hands as far as should I testify or as far as
10 shouldn't I testify. And it had to have been an odd number,
11 because majority of the people that was deciding whether I
12 was going to testify or not decided -- you know, it was
13 majority that the case that the State put on wasn't as strong
14 and that Mr. Butler did an excellent job. That's what they
15 were saying, Mr. Butler did a very good job, and I don't need
16 to get on the stand.

17 Q. And then what decision did you reach?

18 A. Then Mr. Butler, he said -- he told me that he would
19 advise not to take the stand, but leaving the choice
20 completely up to me. And I decided not to take the stand.

21 Q. Was that based purely upon his advice?

22 A. No, ma'am. That was based upon the room, the better
23 minds than mine. These are guys that worked in his office,
24 that interned in his office with him. And then you had his
25 co-counsel and a private detective. And the majority ruled.

1 And all of these guys kind of convinced me not to testify.

2 Q. Do you remember at any point during that meeting
3 somebody saying, hey, wait, we have a problem here, Beattie
4 Butler already told the jury what David Meggett is going to
5 say, and if we don't put him on the stand, they are going to
6 really question the overall defense in this case? Was that
7 issue ever raised to you when you were deciding whether or
8 not to take the stand?

9 A. No, ma'am.

10 Q. If someone would have pointed out to you that he put
11 facts in his opening argument that y'all had failed to prove
12 up to that point, would that have factored into your decision
13 to take the stand?

14 A. Yeah, ma'am.

15 Q. How would that have factored into your decision to
16 take the stand?

17 A. I would have taken the stand. I would have
18 testified.

19 Q. And, Mr. Meggett, on pages -- I believe it's -- let
20 me ask you this first. I'm paraphrasing. We've gone over
21 today. I've given the cites, but, essentially, in their
22 closing, the State says, defense attorney already conceded
23 they've had sex. I don't know why he's arguing about this
24 now. This argument defies all common sense.

25 At that moment, were you somewhat agreeing with the

1 State, that it didn't make sense?

2 A. No.

3 Q. Were you confused by how your attorney had argued
4 one thing in his opening and was arguing something else in
5 his closing?

6 A. Yes, ma'am.

7 Q. Okay. And you may not have understood my question
8 before then. When the State was saying, essentially didn't
9 make sense --

10 A. Okay, yes, ma'am.

11 Q. Were you somewhat in agreement with what the State
12 was saying?

13 A. No, ma'am.

14 Q. And when you say, no, ma'am, what do you mean by
15 that?

16 A. Just I wasn't in agreement with what they were
17 saying because of the fact that my attorney, from the start
18 to finish, was really Mr. Butler was -- he was more giving
19 information that basically, him and I wasn't -- not we
20 weren't in agreement with, but him and I didn't have any
21 discussions with.

22 Q. On pages -- let me reference you here to his opening
23 argument. If you could start looking at page 133. It may go
24 through 135. So just let me know when you've read over that
25 portion of his opening argument.

1 A. What lines do you want me --

2 Q. Start looking at page 133, line 7 and through to
3 line 19 on 134.

4 A. Yes, ma'am.

5 Q. And then I will read for you a question on page 135,
6 lines 11 through 15. He's continuing on with his argument.
7 And he said: And none of David's DNA was inside her. And
8 the reason for that is because David didn't finish. He was
9 quick to change his mind. And the reason for so few
10 injuries, unlike what you would expect, is because it just
11 didn't happen. What happened? They had sex.

12 So there in the opening, your attorney goes through
13 and gives his version of the facts of what happened and then
14 states that y'all had sex.

15 If you would have known, as he then goes on to argue
16 at later points in the transcript in his closing, that the
17 State lacked any DNA evidence to establish sexual
18 intercourse, would you have wanted him to make these
19 statements in his opening?

20 A. No, ma'am.

21 Q. Mr. Meggett, you did not take the stand. And I had
22 advised you that to meet our burden of proof today, I feel
23 that you do have to attest to the facts of what you told
24 Mr. Beattie occurred. Are you prepared to testify to those
25 facts of what you told Mr. Beattie?

1 A. Yes, ma'am.

2 Q. Okay. Will you please take us through what you told
3 Mr. Beattie occurred that night?

4 A. On January 13th.

5 Q. Yes. Will you please let us know what you told
6 Mr. Beattie prior to him making these statements in court?

7 A. Yes, ma'am. I told him that I was called over to
8 her house. And I was forced to be over there earlier. I
9 forgot what particular time. That's why the phone records
10 would have been, you know, very -- the phone records would
11 have been beneficial. And I went into the house. And the
12 door was always opened. And I walked in, like I always do.
13 And I start yelling her name when I got inside. And I didn't
14 hear any answer. Knock, knock, knock, and I close the door.
15 I went inside and called her name. Didn't hear any answer.

16 Then I peeped around, because when you first -- the
17 entrance that I use, you enter into the kitchen. So I walked
18 through the kitchen. And then I went to like a small
19 hallway. And at the very first door, there's a bedroom. And
20 I yelled. And I saw her inside the bedroom. So I went
21 inside and yelled -- I yelled her name. And she didn't wake
22 up.

23 And then I went inside the bedroom. And I pushed
24 her, pushed her, hey, Stacey, what's going on, and I woke her
25 up. And we started talking. And we was just talking about

1 what she was doing and what she was going to do as far as a
2 job was concerned and as far as school was concerned. So we
3 just had basic small conversations. And we started -- like,
4 then I sat down. And I started rubbing her hair and rubbing
5 her face and, you know, down, started rubbing her breasts.
6 And, you know, one thing led to another. We started having,
7 you know, intercourse.

8 And when we started having intercourse, as soon as
9 we started, you know, I was just asking her, you know, I
10 thought you said you weren't going to do this no more because
11 it was brought up in court that she was a lesbian. And she
12 used to go back and forth between being a lesbian and between
13 being heterosexual. So I just asked her a question.

14 And she, you know, she got mad, I guess, because she
15 was embarrassed to be, I guess, sleeping with me again. And
16 she said, you know what, she told me to get the hell off her.
17 So no problem, you know, I did. I got up. I pushed, braced
18 her. I used her body to brace myself up. Put my pants on
19 and I left.

20 Q. And after you left, did you have communication with
21 her?

22 A. Yes, I did.

23 Q. Okay. And what type of communication was that?

24 A. Over cell phone, I just called and asked her, you
25 know, what happened, because we've never had that problem

1 before. We never argued before, period. We've always been,
2 you know, cordial to each other. We've always been friends.
3 We've always been very good friends. And we never had
4 arguments before. And I just wanted to know what happened,
5 why that attitude? What happened?

6 Q. During the course of those conversations, did you
7 come to understand that she had gone to the hospital?

8 A. Yes, I did.

9 Q. And when you were given that information, what did
10 you do?

11 A. I went to the hospital to check on her, because my
12 thought process was, like, why was she there? That was the
13 first thing I thought about, why are you at the hospital?
14 And she said that you hurt me. And I said, oh, okay. How?
15 And she never explained. And I said, Stacey, are you really
16 at the hospital? And she said yes. And I said, okay, I'm
17 going to come down and check on you and see exactly what I
18 did to you.

19 Q. And when you got to the hospital, who or what did
20 you encounter?

21 A. When I got to the hospital, I was pulling up, I
22 saw -- before I got there, probably about 100 yards, when I
23 bend the corner to go to the hospital, I saw two police cars.
24 I saw one parked in the front -- I mean, like on the side,
25 and I saw a police car parked in the back. And I just drove

1 up to the front and took some things out of my car, like cell
2 phones and personal items, and went inside the hospital.

3 Q. Okay. And when you got in the hospital, what
4 happened?

5 A. I was arrested.

6 Q. And when law enforcement approached you, did you
7 run, or did you talk with them, or what happened?

8 A. Oh, no, ma'am. No, ma'am. I didn't run. I saw
9 them. I saw them coming. I saw them leave. When I came in
10 the parking lot, like I said, there were two cars in the
11 parking lot. There was one parked in the front and there was
12 one parked on the side. And the guy -- the two of them --
13 the officer that was parked on the side, he had a meeting
14 with officer that came -- that one was in the hospital. Then
15 the guy, one officer that was parked on the side, he went in
16 his car and he left. And this was while I was getting my
17 personal items out of the car to go sit and see what was
18 wrong with Ms. Hooper.

19 Q. And then when you encountered the officer, did he
20 ask for identification? What happened?

21 A. Uh-huh, yes, ma'am. He asked for my ID. And I told
22 him it was in my car. And he told me I was under arrest. He
23 asked me, what's my name? And I told him my name. And he
24 said, you are under arrest.

25 Q. And then were you under arrest from that point

1 forward?

2 A. Yes, ma'am.

3 Q. And you conveyed those facts to Mr. Butler during
4 your meeting or meetings?

5 A. Yes, ma'am.

6 Q. And those were the facts you were prepared to
7 testify to in court?

8 A. Yes, ma'am.

9 Q. Okay. We talked about the DNA evidence and the
10 issue of consensual sex. You were also prepared to testify
11 to the prior instances of consensual sex with the victim; is
12 that correct?

13 A. Yes, ma'am.

14 Q. And one other component of your testimony, you were
15 prepared and you referenced it to testify that you had been
16 invited over to the residence that night; is that correct?

17 A. That's correct.

18 Q. And had you explained that thoroughly to Mr. Butler,
19 that you were an invited guest there that night?

20 A. And previous nights and previous days. Yes, ma'am,
21 I explained that to him.

22 Q. Did you have him go over the burglary charge as a
23 result of that?

24 A. Yeah, ma'am. Yes, ma'am. I was scratching my head.

25 Q. Explain that for us.

1 A. Because of the fact that I was -- me and -- by me
2 mentioned in her earlier in the transcript, about several
3 guys that were mentioned, Spider and Jonathan and those guys,
4 it was like a squatters type of situation, squatters type of
5 place and everything. Everybody would come and go freely.
6 And I was always coming and going. And that's why, you know,
7 that particular situation, that night now is -- a burglary
8 charge, because her and I had an argument, and now it's a
9 burglary charge, with that, I didn't understand. How did I
10 burglarize the house because the door was open, like I always
11 is, I walk in like I always do. And it was pleasant. We
12 were pleasant until I asked her a question. And she really
13 didn't like what I was asking her.

14 Q. Mr. Butler argues in his opening that you had been
15 asked to be over there. But as far as you reviewed the
16 transcript, was there any evidence ever presented or
17 testimony that you were an invited guest there that night and
18 had permission to be in the dwelling?

19 A. No, ma'am.

20 Q. And is that an issue you would have wanted included
21 in the record in your case?

22 A. Yeah, ma'am, because I brought it up during our
23 trial.

24 Q. And how did you bring it up during the trial?

25 A. It was when the solicitors, they were saying that I

1 wasn't invited. And Ms. Hooper was on the stand. The
2 complainant was on the stand saying I wasn't invited. And I
3 told Mr. Butler, I whispered into his ear, we should have had
4 the phone records, because she invited me over there.
5 Granted, now the record shows that the transcript she was
6 gone for, like, two months, like a month and a half, two
7 months over Christmas break. And she was -- she had just
8 came back that day. Everything is in here. She had just
9 came back that day.

10 So I told Mr. Butler, I said, Mr. Butler, that's the
11 only reason I know she was there, after had been gone for two
12 months or month and a half. Only reason I know she was
13 there, because she told me that she was going to be there.
14 That's the only reason I know she was going to be there. So
15 that's why I was there that night, because she told me she
16 was going to be there through phone conversations.

17 Q. Without the phone records or your testimony, that
18 issue was only presented through Mr. Butler's opening
19 argument; is that correct?

20 A. Yes, ma'am.

21 Q. Mr. Meggett, just to make sure I'm thorough, we've
22 made the amendment that was submitted in writing and filed
23 with the court back on December 21st of 2015, setting forth
24 10 allegations, specific allegations, including a cite to
25 Rule 15B asking to be able to supplement to conform to any

1 evidence or testimony that was presented today. We've asked
2 and the Court has granted the ability to go forward on the
3 Batson issue today.

4 Is there anything else that I have failed to ask you
5 about or that you would like to present to the Court today?

6 A. No, ma'am.

7 Q. And just to be sure, you have no further testimony
8 regarding these issues?

9 A. No, ma'am.

10 Q. Let me just ask you this then. Would you have
11 wanted your attorney to make all possible objections and make
12 all possible motions on your behalf?

13 A. Yes, ma'am.

14 Q. And you are, in fact, asking the Court to find that
15 either your trial attorney or your appellate attorney was
16 ineffective and grant you a new trial; is that correct?

17 A. Yeah, ma'am.

18 MS. BLANCHETTE: Your Honor, I have no further
19 questions.

20 THE COURT: All right. Ms. Olive.

21 MS. OLIVE: Thank you, Your Honor. May it please
22 the Court.

23

24 CROSS-EXAMINATION

25 BY MS. OLIVE:

1 Q. Good afternoon, Mr. Meggett.

2 A. Good afternoon, ma'am.

3 Q. You do recall that in addition to the victim's
4 testimony, there was also some DNA evidence that was found on
5 a comforter that was taken from her bedroom?

6 A. Yes, ma'am.

7 Q. Okay. And that did match your DNA profile?

8 A. Me and someone else's, yes, ma'am, besides the
9 complainant, yes, ma'am.

10 Q. On the DNA that was on the comforter, taken from the
11 comforter?

12 A. Yes, ma'am. It was -- it's in the transcript, yes,
13 ma'am. It was my DNA and someone else's, mixed with someone
14 else's, not the complaint.

15 MS. BLANCHETTE: If I may briefly, it's my
16 understanding the applicant may need some water.

17 THE COURT: Do you need a drink?

18 THE WITNESS: Yeah, ma'am.

19 Q. In addition, do you recall Dr. Joseph Bianca
20 testifying at your trial that the victim also appeared to
21 have injuries to her jaw and her arm?

22 A. Yes, ma'am, I recall.

23 Q. Okay. And these phone records that we are talking
24 about, we have those here today?

25 A. Excuse me?

1 Q. Excuse me. Those phone records that we are talking
2 about, do we have those here today?

3 A. Not to my knowledge.

4 Q. Did you discuss that with Mr. Butler?

5 A. Yes, ma'am.

6 Q. To your knowledge, did he ever try to obtain those
7 records?

8 A. Oh, no, ma'am, not to my knowledge.

9 Q. He never tried?

10 A. Did I ever try?

11 Q. Are you sure he didn't try?

12 A. Oh, I'm not sure. Not to my knowledge, he never
13 mentioned it, no, ma'am.

14 Q. So it could be that they simply didn't exist?

15 A. Oh, I'm not sure. I'm not sure.

16 Q. You just don't know?

17 A. No, ma'am.

18 Q. And we, again, don't have them here today. And the
19 victim, she admitted at trial that y'all -- although she said
20 you only had sex once, she admitted that y'all were
21 acquaintances, if not friends, right?

22 A. Yes, ma'am.

23 Q. And you heard Mr. Kelly's testimony earlier today,
24 right?

25 A. Yes, ma'am.

1 Q. Okay. And all he's testified to was that he met her
2 one time in front of a pawnshop?

3 A. Yeah, he met her one time. But he's seen her --
4 he's seen us together on several occasions, yes, ma'am.

5 Q. He could only recall one time, that's what he
6 testified to today, right?

7 A. One time meeting, yes, ma'am. He did say that, yes,
8 ma'am, one time meeting.

9 Q. And he said y'all appeared to be friends?

10 A. Yes, ma'am.

11 Q. And Mr. Butler did question her about whether she
12 had borrowed money from you on occasions before?

13 A. Yes, ma'am.

14 Q. And so you told Beattie -- excuse me. You told
15 Mr. Butler about the existence of a comforter?

16 A. Yes, ma'am.

17 Q. Now you are saying there were two comforters?

18 A. Yeah, ma'am.

19 Q. Which is it?

20 A. Oh, I let him know that there was two comforters. I
21 told Mr. Butler from the very start there were two
22 comforters. I told him there was a comforter in Summerville
23 and there was a comforter in North Charleston. There were
24 two comforters, yes, ma'am.

25 Q. And how long had these comforters been in storage by

1 that point?

2 A. Oh, let's see. At that point, probably eight to
3 nine months, probably eight to nine months. I'm not sure of
4 the date, but I would say -- wait. Hold. Excuse me. Excuse
5 me. Excuse me. Probably eight to nine, I'm not sure because
6 my sister put those into storage. So I'm not sure when
7 she -- what exact date she put them in there.

8 Q. But, again, we don't have those here today?

9 A. No, ma'am. Mr. Butler didn't reserve those.

10 Q. Didn't you hear him testify he told your family they
11 might want to secure those for appeal?

12 A. That kind of, to me, is hearsay because we don't
13 have my family here to negate that, to conflict what he told
14 them.

15 Q. We also don't have the comforters, do we?

16 A. No, ma'am.

17 Q. Now, regarding your decision not to testify, what
18 was Mr. Butler's advice to you?

19 A. That not to testify. His final advice or his final
20 decision he said to me or what he was --

21 Q. When y'all had this discussion and you were talking
22 about your decision to testify, he told you it was up to you
23 ultimately?

24 A. At the very end, yes, ma'am.

25 Q. And you were upset at this point? I mean, before

1 going into this discussion, you were agitated from the trial?

2 A. Mr. Butler -- that was Mr. Butler's observation that
3 I was agitated at that time.

4 Q. Okay. And he explained to you that was his
5 observation?

6 A. Oh, no, ma'am. He never explained to me, no,
7 ma'am.

8 Q. What was his reason then for telling you -- so he
9 ultimately left it up to you to decide. That he advised you
10 not to testify, why?

11 A. We came to -- when we met in that room, I'm just
12 going to say a little conference room, we went into a little
13 conference room somewhere in here, and he -- we decided that
14 it was a majority vote whether we were going to -- whether I
15 was going to take the stand or not.

16 Q. But this was your decision?

17 A. Yes, it was, but I was influenced, yes.

18 Q. Nobody decided for you?

19 A. Ultimate decision he said it was mine, correct; he
20 said it was mine.

21 Q. And how were you planning to explain that your DNA
22 was on the comforter, the victim's comforter?

23 A. Because I had sex there with someone else. That's
24 why it was a mixture of me and someone else's DNA and not me
25 and the complainant.

1 Q. But that someone else wasn't going to be at trial,
2 right?

3 A. No, they weren't there, no, ma'am.

4 Q. Do you recall the judge reviewing with you your
5 right to testify?

6 A. Vaguely.

7 Q. Okay. But you recall she did?

8 A. No, ma'am, vaguely.

9 Q. Would you agree with me that she went over your
10 right to testify with you?

11 A. Yes, ma'am, I would.

12 Q. Would that have been after your discussion with
13 Mr. Butler in the conference room where all those other
14 individuals were as well?

15 A. Yes, ma'am.

16 Q. So you still had an opportunity after that point to
17 change your mind and decide you want to testify?

18 A. After the meeting, yes, ma'am.

19 MS. OLIVE: Thank you. That's all the questions I
20 have.

21 MS. BLANCHETTE: Nothing, Your Honor.

22 THE COURT: All right. You may come down. Thank
23 you very much.

24 MS. BLANCHETTE: Your Honor, I have no further
25 witnesses. I have brief argument on a couple of cases, but

1 that would be the applicant's case.

2 THE COURT: The State's case.

3 MS. OLIVE: Your Honor, the State would call Chad
4 Simpson.

5 CHAD SIMPSON,

6 having been duly sworn, testifies as follows:

7 THE CLERK: Please state your first and last name,
8 and spell your last loudly and clearly into the microphone.

9 THE WITNESS: Benjamin Chad Simpson,
10 S-i-m-p-s-o-n.

11 DIRECT EXAMINATION

12 BY MS. OLIVE:

13 Q. Good afternoon, Mr. Simpson. Thank you for being
14 here today.

15 A. Thank you.

16 Q. What was your involvement in this case?

17 A. I was one of two assistant solicitors who prosecuted
18 this case.

19 Q. And were you involved in the voir dire and jury
20 selection?

21 A. I was, myself and Assistant Solicitor Culver Kidd.

22 Q. Do you recall striking Jurors 134, 214, 246 and 183?

23 A. I do not. I have reviewed the record of the
24 transcripts today and would refer to the record, but I do not
25 have a personal recollection of the jury selection.

1 Q. Have you attempted to obtain information from your
2 office, the files in your office concerning the jury
3 selection in this case?

4 A. I have. I pulled my entire case file. There is no
5 information in there involving jury selection. Typically,
6 what we would have is both the -- just a list of jurors'
7 names and addresses and jurors' criminal history, which I
8 know from my practice would be the most frequent basis for a
9 strike, would be a juror's interaction with police from the
10 past. But all of my answers to jury selection would be based
11 on my typical process and not specific recollection from this
12 case.

13 To answer your question, I did; then was provided
14 from the transcripts first names, last names, gender and
15 race. I attempted this morning to pull rap sheets,
16 especially on the two questions or four question jurors and
17 found that the names were too common. I saw from dates of
18 birth people that I suspected might have been the jurors in
19 question. However, not to any degree of certainty that I
20 would be certainly comfortable testifying on the record.

21 Q. Do you know whether, since you were working with
22 Mr. Kidd as well, whether y'all would have made strike
23 decisions together, or was it you making the decisions of who
24 to strike?

25 A. It definitely would have been a collaborative

1 effort. But as you know, it would have been a quick process
2 as well. We would not have been afforded the opportunity to
3 have long in-depth conversation about each juror.

4 Q. What sort of information would you have considered
5 about a juror in a decision of whether to strike or not?

6 A. Like I said, certainly the most frequent is prior
7 contact with law enforcement, you know, that could
8 potentially -- doesn't always, but you are often going on
9 these sort of guesses that could potentially indicate bias.
10 Of course, are certain class of convicted person would be
11 excluded from jury service, but you have a whole wide range
12 of people who have, you know, minor contacts, arrests and not
13 conviction. That's often something we would consider.
14 Demeanor of the person, are they attentive? Do they look
15 like they are interested in being there? Do they look
16 like they can't wait to get out of there? Any number of
17 factors to consider to keeping a strike in a jury.

18 Of course, Batson concerns are something that we are
19 taught and consistently trained on. It's something that I
20 personally take very seriously, almost to a fault. I think
21 the ultimate indication of the jury reflects that as well.

22 Going back to some of the reasons that were
23 mentioned on the record today, I am not even sure that those
24 would have been the bases for sure the two jurors that we
25 struck. Based on, I think, maybe having a really close

1 relative in prison, being a son, I believe that was
2 mentioned, might have been. Something like an inlaw or
3 something, I doubt would have been a basis for me to exercise
4 a strike.

5 Q. Do you recall, would you have had access to the
6 juror's educational background or professional -- what their
7 occupation is?

8 A. We all, as practice, attend jury qualifications
9 where they give answers to very basic set of questions, which
10 include their occupation, their spouse's occupation. Again,
11 you asked the question could -- that could be another factor
12 that would play a role whether to seat or strike a juror.

13 Q. If Mr. Butler had made a Batson motion at trial,
14 would you have been prepared to defend that motion?

15 A. I would have, certainly. It's just difficult. We
16 are six years from this trial now. All of my answers
17 regarding Batson comes from my general practice. I have no
18 recollection whatsoever of the basis in my mind at that time
19 for striking the jury.

20 I inquired also of the clerk's office to get more
21 information that might help me in that regard. They purge
22 records after three years. Our records go back -- and I
23 can't believe how close in time this is, but our in-house
24 juror information sheets go back to January of 2011. And I
25 believe this was a November of 2010 trial. So having been

1 inform of this Batson issue this morning, it was too late for
2 me to go back and get information from either the clerk's
3 office or digital in-house files which keeps the juror
4 information from every term of court.

5 Q. Do you know whether -- or based on your general
6 practice as a solicitor, would you have had a race-neutral
7 reason for striking these jurors?

8 A. Yes, absolutely.

9 MS. OLIVE: Thank you. That's all the questions I
10 have.

11 MS. BLANCHETTE: Nothing, Your Honor.

12 THE COURT: All right. You may come down.

13 THE WITNESS: Thank you.

14 MS. OLIVE: Nothing further from the State, Your
15 Honor.

16 THE COURT: All right. Ms. Blanchette.

17 MS. BLANCHETTE: Your Honor, I do concede that I did
18 spring this Batson issue upon everybody with late notice. So
19 I'm not opposed to if the State needs to request for anything
20 additional to supplement. I'm always interested in acting
21 fairly. So I want to make sure that I note that for the
22 record, that I did just give her that information last night.
23 I did not have very definitive information at that time. So
24 I just wanted to make sure that, you know, the record is
25 complete as possible on that.

1 THE COURT: They haven't requested anything in that
2 regard, so--

3 MS. BLANCHETTE: That's correct, Your Honor. I just
4 wanted to make sure since I did raise that issue this
5 morning, which is not my usual practice, that I did make that
6 offer myself, actually.

7 The second thing is just going into an argument. I
8 do want the Court to consider this Batson issue. I think the
9 testimony today has been very interesting. I think the
10 record is very interesting on it. I made that offer if the
11 State needs to supplement, because I don't think they were
12 able to refute the issue that we did address today. And so
13 that's why I'm making that offer in the interest of making
14 this fair, is because I do think we have a viable issue there
15 that I'm asking the Court to consider.

16 THE COURT: I will consider it, but I will also
17 consider Mr. Butler's testimony in that regard, that the
18 reason he didn't make the motion because he now believes he
19 was satisfied with the make-up of the jury and felt it was
20 not necessary to make a Batson motion. And he pointed out
21 that if he did, he may get a worse jury than he got the first
22 time. So I take that testimony very seriously too.

23 MS. BLANCHETTE: Yes, Your Honor. But I do, just
24 myself as it developed today, I would present to the Court
25 that I think it is a viable issue to take into account.

1 The second issue that I would break out separately
2 is the issue regarding the burglary charge and his failure to
3 really address the first prong and develop a record there to
4 be raised on appeal. I know that we have alleged that
5 appellate counsel was ineffective. I'm not conceding that.
6 But I'm aware of the record that we've developed here today.
7 And I think that that would be that Mr. Butler simply did not
8 argue that first prong of the burglary first, that first
9 element.

10 And then, Your Honor, unless you would like me to
11 break them each out, I will say this just boils down to a
12 matter of was the performance here of counsel reasonable?
13 Was it based upon a minimal investigation as required? I
14 will be handing up *Lounds* and *Ard v. Catoe*. I will submit
15 that we presented testimony today that there was a witness,
16 Mr. Kelly, that we called that could have testified at trial.
17 And I think the record is absent as to their being an
18 investigation looking into the independent facts and
19 conducting an investigation in this case.

20 Without having done a proper investigation, then he
21 proceeded to trial and told the jury facts of what
22 Mr. Meggett was going to take the stand and say. And then
23 what is unreasonably absent is Mr. Meggett saying it. So
24 what we have here is an opening where he promises the jury
25 something, and then closing argument by the State essentially

1 mocking him for failing to do that. I believe that is
2 unreasonable trial strategy. And so that's why I say that
3 all the other issues essentially boil down to this Court has
4 to consider if that's reasonable on his part. If it was
5 unreasonable and ineffective assistance to present a clear
6 strategy, specifics facts and open argument.

7 Appears to me, and I'm just offering my opinion
8 here, that through the course of trial, he realizes and the
9 people around him that are advising Mr. Meggett not to take
10 the stand that this is going good for us. The State doesn't
11 have any evidence to establish sexual intercourse. But what
12 everybody forgot is Mr. Butler had already told them what
13 happened. And then he didn't put up any evidence to
14 establish what he said in opening. Not only did it not make
15 sense, for lack of better word, he lost faith, he lost
16 credibility with the jury at that point.

17 This was a hung jury. They got an Allen
18 instruction. The reason why I got the note is I wanted to
19 see how it was charged. It appears it wasn't on the CSC.
20 But, still, there was serious deliberations in this case. It
21 wasn't an open-and-shut case.

22 And it is our position that if you lump all the
23 issues together, dealing with opening, closing, the testimony
24 he elicited, the testimony he failed to elicit, the
25 objections he did and didn't make, and I'm kind of summing

1 them all up, we would submit that his performance was
2 unreasonable. And based upon the basic Strickland standard,
3 this is ineffective assistance.

4 Like I said, I do have a couple of cases to hand up.
5 I already handed up *Reeves* and *Winkler*, which was the
6 reasonable decision, I have *Lounds v. State* to hand up and
7 *Ard v. Catoe*. Unfortunately, since we weren't able to
8 utilize the expert, I won't be handing up anything regarding
9 his failure to use an expert in this case.

10 If the Court has any questions, I will be happy to
11 answer them, but I appreciate your patience and time today.

12 THE COURT: All right.

13 MS. OLIVE: Your Honor, I would like to --

14 THE COURT: Does the State have a position?

15 MS. OLIVE: I would like an opportunity to offer an
16 argument as well, Your Honor. It's our position that
17 Mr. Meggett has failed to satisfy his burden of proving
18 ineffective of counsel. As Your Honor knows, he has to show
19 both deficiency and prejudice as to each one of these claims
20 And he cannot culminate all of them together, but we don't
21 have that standard here in South Carolina.

22 Your Honor, the basis of PCR is that it has to be
23 presumed that all significant decisions were made and
24 exercised with reasonable professional judgment. It's our
25 position, first with regard to any allegations concerning

1 this comforter, that there's been no deficiency shown.
2 Mr. Butler did request a continuance on that. That issue was
3 raised on appeal. The Court of Appeals found that the court
4 did not abuse its discretion in denying the motion for a
5 continuance in order to obtain that DNA analysis. And it's
6 complete speculation at this point as to what, if anything,
7 one or both comforters would have shown.

8 Today is the first day I heard that there had been
9 two. But in that regard, it's our position that he's shown
10 definitely -- well, first no deficiency, and second, no
11 prejudice, because Your Honor has to speculate as to what
12 that comforter shown.

13 With regard to Mr. Kelly's testimony, he had a prior
14 conviction for providing false information to police. He
15 would have been impeached on that at trial if he had
16 testified. Mr. Butler testified that he did not recall
17 Mr. Meggett ever providing him any information, let alone the
18 name of Mr. Kelly. Again, this is six years after the trial.
19 Mr. Butler is going by his recollection and what he can
20 gather from his file.

21 Mr. Kelly simply testified that he had met the
22 victim on one occasion with Mr. Meggett and that they
23 appeared to be friends. He did not testify as to any sexual
24 relationship between the two of them. And he did not provide
25 any testimony that would have assisted in the defense at

1 trial. Therefore, there's no deficiency or prejudice. It
2 would have been essentially cumulative to the victim's
3 testimony. She admitted that they were associated, that
4 Mr. Meggett had helped her on occasion both financially and
5 with her car. So Mr. Kelly's testimony would have had no
6 impact on trial.

7 Your Honor, with respect had to the allegation that
8 Mr. Butler engaged in that unreasonable trial strategy, it's
9 our position there's been absolutely no showing of that. He
10 has testified, yes, he went in to trial believing that
11 Mr. Meggett was going to testify. And then he said, when it
12 came down to it, he did not believe he was going to be a good
13 witness for himself, and he advised him not to testify.
14 Mr. Meggett acknowledged himself that it was ultimately his
15 decision not to testify.

16 So, yes, counsel had to adjust a little bit, but he
17 still testify enter believe those defenses were inconsistent
18 with one another. It still was requiring the State to be
19 held to its burden of proving that something actually
20 occurred.

21 In addition, the fact that the jury was having
22 trouble reaching a decision, Your Honor, it's our position
23 that that really shows nothing. It doesn't go in the way of
24 proving anything.

25 So, Your Honor, it would be our position that

1 there's no deficiency and no prejudice.

2 And with regard to the fact that Mr. Butler did not
3 address the first prong of the burglary, I believe both him
4 and Mr. Stevens acknowledged that there was -- the only
5 testimony -- that there was direct testimony that Mr. Meggett
6 did not have consent and that standard on directed verdict
7 motion is any evidence. So he would not have been successful
8 in that argument. And it did not preclude Mr. Stevens from
9 raising an argument as to the burglary on appeal.

10 So it would be our position there's no deficiency
11 and no prejudice in that regard. And that would be the
12 State's argument. Thank you.

13 THE COURT: All right.

14 MS. BLANCHETTE: May I just clarify one point? I
15 was not asking you to make a cumulative error analysis. I
16 think the issue raised stand on their own. And also, it's
17 our understanding that our appellate courts haven't found
18 that it's not recognized. They have just chosen not to
19 recognize it up to this point.

20 THE COURT: All right. Hand up whatever. I will
21 glad to take whatever you have to hand up. And I will expect
22 proposed orders in 30 days.

23 MS. BLANCHETTE: Thank you, Your Honor.

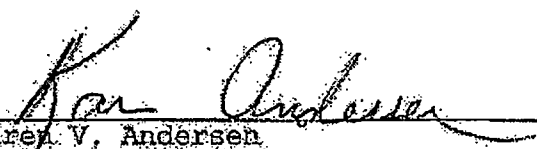
24 MS. OLIVE: Yes.

25 (Whereupon, proceedings are adjourned.)

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

May we have the definitions of each degree?

Yes a. *[Signature]*

COURT'S
EXHIBIT NO. 3
IDENTIFICATION/EVIDENCE
DKT. #
DATE: 11-18-10 *B*

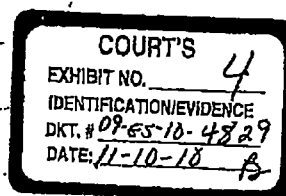
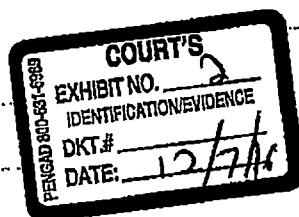
COURT'S 142
EXHIBIT NO. 1
IDENTIFICATION/EVIDENCE
DKT. #
DATE: 12/2/10

PENGAD 800-531-6939

we have reached a verdict on the
criminal sexual conduct charge.

We can not agree on the burglary
charge.

Sony a. D. J.



cc
AG
AT
ES
Sgt.
Judge Cam

RECEIVED

JAN 17 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

David Lee Meggett, #343610,)
Applicant,)

Case No. 2013-CP-10-3740

v.)

ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

FILED
2017 SEP 26 PM 12:19
CLERK OF COURT

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

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

I. PROCEDURAL HISTORY

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

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

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

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

II. ALLEGATIONS

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

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

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

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

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

A. Evidence Adduced at Trial

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

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

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

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

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

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

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

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

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

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

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

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

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

EL 6

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

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

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

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

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

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

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

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

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

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

B. Ineffective Assistance of Trial Counsel

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

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

⁶ The Court in *Harrington* explained that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

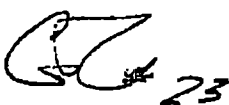
¹¹ Further, the Court rejects Applicant’s suggestion that counsel’s successful motion to suppress the towels seized from Applicant’s vehicle was somehow inconsistent with the handling of the continuance motion or somehow shows deficient performance in connection with this allegation. Applicant’s contrary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

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

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

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

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

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

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

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

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

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

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

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

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

Tr. p. 133.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Counsel explained that:

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

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

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

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

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

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

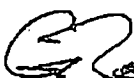
In connection with the motion for a continuance and the State's pretrial motion dealing with the admissibility of evidence of prior instances of intercourse between Applicant and the victim, the Court finds that Applicant cannot prove that counsel was deficient under *Strickland* for advising the trial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

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

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

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

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

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

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

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(Ill.App. 1994); *People v. Olivares*, 2003 WL 22183876, *7-8 (Cal.App., Sept. 23, 2003).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²² See *Tr. pp. 79; 382*.

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

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

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

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

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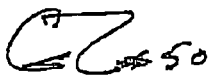
right to respond to arguments by defense counsel and that trial counsel may have "opened the door" to the challenged comments. *PCR Tr. pp. 92-94.*

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

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

²³ See Allegations 3-4, *supra*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Ineffective Assistance of Appellate Counsel

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

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

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

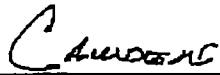
IT IS THEREFORE ORDERED THAT:

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

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



G. THOMAS COOPER
Presiding Circuit Court Judge



, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

David Meggett, #343610,)
Applicant,)

2013-CP-10-3740

v.)

State of South Carolina,)
Respondent.)

MOTION PURSUANT TO
59(a) & (e), SCRPC

FILED
2017 OCT 10 AM 11:56
CLERK OF COURT

Pursuant to Rule 59(a) and (e) of the South Carolina Rules of Civil Procedure,

Applicant would move before this Court for relief as follows.

PROCEDURAL HISTORY

A. Post Conviction Relief

This matter comes before the Court by way of an Application for Post Conviction Relief filed on June 25, 2013. The State submitted a Return on December 11, 2013. On September 8, 2014, Tricia A. Blanchette filed a Motion for Discovery and Motion for Substitution of Counsel, which was heard by the Honorable G. Thomas Cooper, Jr., on that same date at the Charleston County Courthouse. On September 29, 2014, the Court issued an Order Substituting Counsel and Authorizing Discovery in Post Conviction Relief.

On December 21, 2015, Applicant, through counsel, amended his original Application by adding the following specific allegations to his original claim of ineffective assistance of trial counsel and added the claim of ineffective assistance of appellate counsel:

1. Ineffective assistance of trial counsel for failing to properly prepare and conduct a reasonable investigation into Applicant's case prior to going to trial.

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

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

On April 1, 2016, Applicant filed a Motion for Indigent Funds. A hearing was held at the Charleston County Courthouse in front of the Honorable Doyet A. Early on April 18, 2016. Applicant was present and represented by Tricia A. Blanchette, Esquire. The State was represented by J. Rutledge Johnson, Assistant Attorney General. At the conclusion of the hearing, Judge Early took the matter under advisement. Thereafter, Judge Early informed both parties that he intended to deny the motion and requested that the State submit a proposed Order. As was addressed on the record at the evidentiary hearing, a signed Order was not issued until November 30, 2016 and was filed on December 7, 2016.

On December 7, 2016, an evidentiary hearing was conducted at the Charleston county Courthouse in front of the Honorable G. Thomas, Cooper, Jr. Applicant was present and represented by Tricia A. Blanchette, Esquire. The State was represented by Alicia Olive, Assistant Attorney General.

At the start of the evidentiary hearing, Applicant's counsel made a motion to verbally amend the Application to include a claim of ineffective assistance of counsel for failure to make a Batson challenge at trial. The State objected but did not request a continuance. After hearing from both parties and inquiring of defense counsel, the motion was granted.

During the evidentiary hearing, Applicant took the stand and called the following witnesses: Bernard Kelly, Beattie Butler, Esquire, and Breen Stevens, Esquire. The State called Chad Simpson, Esquire.

At the close of the hearing, the Court requested proposed Orders from both parties. Applicant's counsel submitted a proposed Order on March 2, 2017. After several requests for extensions and obtaining the transcript the State submitted a proposed Order, which was signed by the Honorable G. Thomas Cooper, Jr. on September 18, 2017. The Order of Dismissal was filed on September 26, 2017, and it was received by counsel on October 2, 2017.

B. General Sessions

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. Applicant was indicted during the June 2009 term of the Charleston Grand Jury for Burglary, First Degree (2009-GS-10-4829) and Criminal Sexual Conduct, First Degree (2009-GS-10-4830).

On November 8, 2010, Applicant proceeded to trial in front the Honorable Kristi L. Harrington and a jury. Applicant was represented by Beattie Butler, Esquire. On November 10, 2010, Applicant was found guilty as indicted and sentenced to a term of thirty (30) years concurrently on both charges.

Applicant timely filed a Notice of Appeal, and his appeal was perfected by Breen Stevens, Esquire (formerly with the Office of Appellate Defense). The following issues were briefed on behalf of Applicant:

1. The trial court erred by refusing Meggett's request for time to have a comforter examined for DNA, upon which he asserts a prior consensual encounter occurred between him and the complaining witness, and which, if positive, would have discredited the complaining witness's testimony regarding their relationship and prior sexual encounters.

2. The State's reference during closing argument to a lack of evidence supporting the interpretation of the defense's theory impermissibly shifted the burden upon Meggett as an indirect comment on the defendant's right to remain silent.
3. The trial court should have directed a verdict of not guilty for the offense of first degree burglary based upon the lack of evidence regarding Meggett's intent to commit a crime at the time he entered the dwelling.

On June 5, 2012, an oral argument was conducted. An Opinion affirming Applicant's convictions and sentences was handed down on June 27, 2012. State v. Meggett, Op. No. 4994 (S.C. Ct. App. June 27, 2012). The remittitur was issued on July 13, 2012.

ARGUMENT

In Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), the South Carolina Supreme Court made it clear that a post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. See also S.C. Code Ann. § 17-27-80. Therefore, Applicant would respectfully request that this Court ensure that specific findings of fact and conclusions of law are entered and that the arguments and testimony of each witness is properly addressed.

Additionally, Applicant would urge the Court to thoroughly review the evidentiary hearing transcript in conjunction with each issue raised and reconsider the reasoning used to deny each issue. Applicant would also respectfully request that the Court reconsider the Order submitted granting relief and rescind the standing Order of Dismissal.

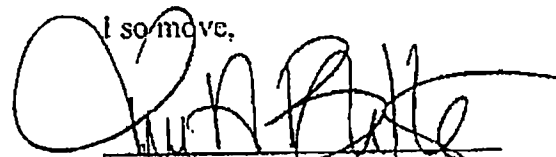
As a threshold matter, the standing Order fails to address the denial of the request for expert funds and the renewal of said request for preservation purposes at the evidentiary hearing. Evidentiary Hearing Transcript pp. 4-8.

Upon review of the standing Order, it appears the Order misconstrues the testimony offered regarding the discussions Applicant had with counsel and his understanding of the defense strategy. Order p. 26. It further appears the Order does not address defense counsel's failure to explain to Applicant that he had already told the jury what the Applicant would testify to and the implications his failure to testify would have on making any further argument regarding those facts during the meeting where it was decided if the Applicant should testify at trial.

It must be noted that the standing Order also appears to acknowledge that counsel did make a strategy or defense shift, yet seems to undertake a very lengthy discussion to diffuse the deficiency in this regard on the part of defense counsel. Unfortunately, the standing Order also includes several findings of overwhelming evidence of guilt apparently used to further excuse the deficient performance of counsel. Order pp. 16, 23, 33. Applicant would ask the Court to reconsider making such findings as the State failed to produce overwhelming evidence of guilt and the most damaging evidence of guilt was deduced from defense counsel's arguments to the jury.

In conclusion, Applicant would respectfully ask that this Court review the evidentiary hearing transcript to ensure completeness, reconsider Applicant's proposed Order and the standing Order of Dismissal, and/or rehear Applicant's case pursuant to Rule 59(a) and (e), SCRPC.

October 6 2017
Lexington, SC

I so move,


Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
Attorney for Applicant

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
DAVID MEGGETT, 343610 ,)
) Applicant,)
) v.)
)
STATE OF SOUTH CAROLINA,)
) Respondent,)
)
_____)

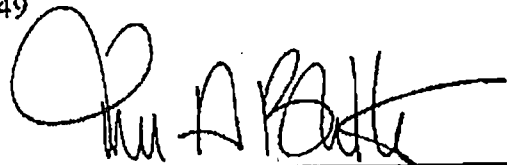
IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2013-CP-10-3740

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed in the United States Mail this 6th day of October 2017, a copy of a Rule 59, SCRPC, Motion, to Megan Harrigan Jameson of the Attorney General's Office, at:

Office of the Attorney General
Att: Megan Harrigan Jameson, Sr. Ast. Deputy AG
P.O. Box 11549
Columbia, SC 29211-1549



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

October 6 2017

2017 OCT 10 AM 11:56
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

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

2013-CP-10-3740

RESPONSE OPPOSING MOTION
PURSUANT TO RULES 59(a) & (e), SCRCF

FILED
2017 OCT 26 AM 11:08
JULIE A. JONES
CLERK OF COURT

This matter comes before the Court by way of the Applicant's Motion Pursuant to Rule 59(e), SCRCF, in which he asks the Court to alter or amend its Order dismissing his Application for post-conviction relief (PCR). Respondent (the State) submits that the Court should deny his motion for the following reasons:

1. Applicant's renewed request for indigent funding.

Applicant, who has been represented by retained counsel at all relevant times, first asserts that the Court failed to address counsel's renewed request for "indigent funding" for a DNA expert in the Order of Dismissal, even though the Court denied his request at the outset of the PCR hearing. *Tr. p. 8*. Respondent submits that the Court should again deny his request.

Applicant originally filed a "Motion for Indigent Funds," through counsel, on March 30, 2016. The Honorable Doyet A. Early, III, heard his motion on April 18, 2016, at the Charleston County Courthouse. Applicant was present at this hearing and Tricia A. Blanchette, Esquire represented him. Assistant Deputy Attorney General J. Rutledge Johnson represented the State. James Hugh Ryan, III, Esquire, Executive Director of the South Carolina Commission on Indigent Defense, was also present.

Following this hearing, Judge Early signed An “Order Denying Additional Funding” on November 30, 2016. Judge Early’s Order was filed on December 7, 2016.

This Court also held Applicant’s PCR hearing on December 7, 2016. Applicant’s counsel renewed the funding request before the Court heard testimony on the issues in his Amended Application. Counsel argued that she could not fully develop certain claims in the Amended Application without providing additional payment to her previously-retained DNA expert. *Tr. pp. 4-7.*

In support of the funding request, counsel relied upon *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015) (trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) for not interviewing and presenting a medical expert to challenge the State’s gynecological evidence, in prosecution of defendant for criminal sexual conduct with a minor), *reh’g den.* (Mar 24, 2016), *cert. den.* (Mar 27, 2017) and *Winkler v. State*, 418 S.C. 643, 663, 795 S.E.2d 686, 697 (2016) (finding that the PCR court abused its discretion in denying capital PCR applicant’s second motion for a continuance because “[t]his ruling left PCR counsel in a position from which they could not present evidence to support the claim that trial counsel was ineffective for failing to investigate Winkler’s brain damage”), *reh’g denied* (Feb. 9, 2017), *cert. den.*, No. 16-9613, 2017 WL 2654706 (U.S.S.C. Oct. 2, 2017). Counsel made clear, however, that she was not requesting a continuance. *PCR Tr. pp. 7-9.* The Court denied the motion because it lacked the authority to reverse Judge Early’s previous ruling. *PCR Tr. p. 8.*

Respondent submits that this Court’s ruling at the hearing was correct. “Generally, one circuit court judge may not reverse or modify the order of another circuit court judge.” *Binkley v. Burry*, 352 S.C. 286, 295, 573 S.E.2d 838, 843 (Ct. App. 2002). *See also Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 340 S.E.2d 546 (1986); *State ex rel. Medlock v. Love Shop, Ltd.*, 286

S.C. 486, 334 S.E.2d 528 (Ct.App.1985). Accordingly, the Court did not have the authority to reverse Judge Early's previous ruling.

In the alternative, the State submits that Applicant did not present the Court with sufficient reason to grant funding. Judge Early's denial of funding was based upon representations made to him by Mr. Ryan. Applicant did not present Mr. Ryan in support of the funding request and he did not indicate to this Court that Mr. Ryan's opinion had changed. Also, this is not a capital PCR and Applicant expressly stated that he was not asking the Court for a continuance. Accordingly, *Winkler* is distinguishable.

Also, Applicant retained counsel to represent him. Respondent submits that the Court of Appeals' decision in *Reeves* does not require a PCR judge to direct the Commission on Indigent Defense to provide funds to non-indigent applicants in non-capital PCR cases. Further, Judge Early's Order reflects that counsel indicated at the April 18, 2016 hearing that Applicant had paid her most of \$12,000.00 retainer. Obviously, some of this retainer could have been applied to pay the DNA expert.

Finally, Respondent notes that the Court subsequently heard testimony and rejected Applicant's claims that counsel was ineffective for failing to adequately argue his motion for a continuance and failing to hire a DNA expert. Contrary to Applicant's claims, the Court found that counsel's performance was constitutionally adequate and that Applicant had not proven any prejudice from counsel's performance. See Order of Dismissal, pp. 16-24. Therefore, the Court should deny the renewed request for indigent funding.

2. The Court's analysis of Applicant's testimony.

Respondent also submits that there is no merit to Applicant's contention that "the Order misconstrues the testimony offered regarding the discussions Applicant had with counsel and his

understanding of the defense strategy. Order p. 26.” Initially, Respondent notes that Applicant has failed to specify precisely how the Court allegedly misconstrued his testimony concerning the discussions he had with counsel and “his understanding of the defense strategy.” Furthermore, the Court finds that PCR transcript page citations referenced on page 26 of the Order of Dismissal support the Court’s findings as to his testimony on that page.

3. Counsel’s failure to explain to Applicant that his decision not to testify meant that, in closing argument, counsel would not be able to address certain facts mentioned in opening based upon the plan that Applicant would testify.

Applicant maintains that the Order of Dismissal “does not address defense counsel’s failure to explain to Applicant that he had already told the jury what the Applicant would testify to and the implications his failure to testify would have on making any further argument regarding those facts during the meeting where it was decided if the Applicant should testify at trial.” However, he did not raise this as a specific claim in either his original Application or in his Amended Application. Also, PCR counsel did not question trial counsel as to whether or not counsel explained this to Applicant (*see PCR Tr. pp. 21-61; 79-81*),¹ and he did not address this claim in his proposed “Order Granting Application for Post Conviction Relief.” *See* Order Granting Application for Post Conviction Relief, pp. 17-22. As a result, Respondent submits that his claim is not properly before it. *See Mangal v. State*, Op. No. 27726, 2017 WL 4583310, at *3

¹ PCR counsel questioned trial counsel at length about how Applicant’s failure to testify prevented counsel, in closing argument, from discussing facts mentioned in opening. However, PCR counsel did not question counsel as to whether he had informed Applicant of the impact that Applicant’s decision to not testify could have on counsel’s closing argument. Thus, Respondent submits that this is a distinct claim that is not properly before the Court. The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to “reconsider matters properly encompassed in a decision on the merits.” *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200 (1988) (citing *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451 (1982)). Therefore, Applicant’s claim does not properly present this new claim to the Court. *Mangal*, 2017 WL 4583310, at *3; *Arnold v. State*, 309 S.C. 157, 172–73, 420 S.E.2d 834, 842 (1992).

(S.C. S.Ct., July 19, 2017) (“We find the PCR court acted within its discretion in refusing to address the issue. First, the written application makes no mention of a claim based on improper bolstering, and no amendment to the written application was ever made. Second, PCR counsel began the hearing without mentioning there would be any additional claims for ineffective counsel beyond those listed in the original application. Third, even when PCR counsel questioned trial counsel on why he did not object to Dr. Henderson's testimony, he did not inform the PCR court he would make a claim for ineffectiveness based on the failure to make an objection”).

Even assuming *arguendo* that Applicant's present claim was properly before the Court, Respondent submits that it is without merit. Because he did not elicit any evidence concerning what counsel may have imparted to him concerning the impact that Applicant's failure to testify would have upon counsel's ability to argue consensual sex in closing, the Court finds that he cannot overcome *Strickland*'s “strong presumption” of reasonable performance. *See Strickland*, 466 U.S. at 689 (“[b]ecause 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’ ”) (citation omitted). Since 1984, the Court has reiterated this “strong presumption” and has clearly held that it cannot be overcome by a silent record. *See Burt v. Tillow*, 134 S.Ct. 10, 17 (2013) (“It should go without saying that the absence of evidence cannot overcome the ‘strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance’ ”) (citing

Strickland, 466 U.S. at 689, 104 S.Ct. 2052); *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*).²

4. The Court's findings as to evidence of Applicant's guilt.

Applicant also seeks relief based upon the Court's findings related to evidence of his guilt. However, Respondent submits that the Court has properly addressed both prongs under *Strickland*, including its findings related to evidence establishing Applicant's guilt.

WHEREFORE, having made its Return to the motion, the State requests that Court deny his motion.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

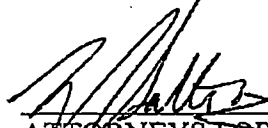
MELODY J. BROWN
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III

² After counsel had testified at the PCR hearing, Applicant testified that he was unaware that counsel would be unable to argue certain facts in closing that counsel mentioned in opening statement and that he would have testified if he had been told this information. *PCR Tr. pp. 114-15*. Respondent submits that this testimony illustrates why the Court found in the Order of Dismissal that "most of Applicant's testimony concerning the present issue is not credible because it is either internally inconsistent, self-serving, or both," and that his testimony was consistent only "to the extent it is consistent with counsel's testimony." Order of Dismissal, p. 35 n. 16. In contrast to this testimony, he testified minutes earlier that he was aware the victim had only admitted to having consensual sex with him once and that he had originally planned to testify that they had had consensual sex on a number of other occasions. He also testified that counsel told him that the decision of whether he would testify was his and that *he* had made the decision not to testify *PCR Tr. pp. 111-15*. See also *PCR Tr. pp. 130-31*; *Order of Dismissal, pp. 24-41*. Therefore, it is axiomatic that he made his decision with the knowledge that the jury would not hear testimony of consensual sexual encounters that only he claimed had occurred and to only which he could testify.

Senior Assistant Attorney General

BY:



~~ATTORNEYS FOR RESPONDENT~~

Office of the Attorney General

P.O. Box 11549

Columbia, SC 29211

(803) 734-3737

October 24, 2017.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

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

2013-CP-10-3740

CERTIFICATE OF SERVICE

FILED
2017 OCT 26 AM 11:38
CLERK OF COURT

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within *Response Opposing Motion Pursuant to Rules 59(a) & (e), SCRCP*, by depositing one copy of the same via U.S. mail, first class, postage prepaid to his attorney of record, Tricia A. Blanchette, Esq., Law Office of Tricia A. Blanchette, LLC, Post Office Box 2147, Leesville, South Carolina 29070.

I further certify that all parties required by Rule to be served have been served.

This 24th day of October, 2017.



WILLIAM EDGAR SALTER, III
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
David Meggett, #343610,)
)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

C/A No. 2013-CP-10-03740

ORDER DENYING APPLICANT'S
MOTION TO ALTER OR AMEND
THE JUDGMENT

FILED
2017 DEC 14 PM 2:55
JULIE J. BISHOP
CLERK OF COURT

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(a) & (e) SCRCF to Alter or Amend Judgment of this Court's Order entered on or about November 9, 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

December 12, 2017

BCS20090100295

WITNESSES

GRAY

North Charleston Police Department

AGENCY CASE NUMBER

2009001699

ARREST WARRANT NUMBER

I103000

DATE OF ARREST

January 13, 2009

ACTION OF GRAND JURY

TRUE BILL

W. Russell
Foreperson of Grand Jury
Date:

JUN 02 2009

VERDICT

GUILTY

Foreperson of Petit Jury

11 in 10
Date:

INDICT

DOCKET NO. 2009GS1004829

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

June Term 2009

THE STATE

Vs.

DAVID LEE MEGGETT

DOB: 1966

B/M

Indictment for

Criminal Sexual Conduct
1st Degree

FILED

2009 JUN -8 PM 12:42

J. CHRISTOPHER
CLERK OF COURT

BY _____

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

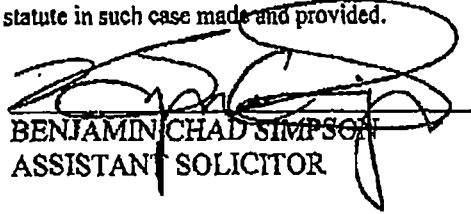
INDICTMENT

At a Court of General Sessions convened on June 1, 2009, the Grand Jurors of Charleston County present upon their oath:

Criminal Sexual Conduct
1st Degree

That in Charleston County, South Carolina, on or about January 13, 2009, the Defendant DAVID LEE MEGGETT did commit a sexual battery upon the victim Stacey Hooper without her consent and with the use of aggravated force, to wit: Defendant did make entry into the residence without the consent of the victim who was inside asleep and did pin down the victim to commit the crime; all in violation of Section 16-3-652 of the Code of Laws of South Carolina (1976) as amended.

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


BENJAMIN CHAD SIMPSON
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Charleston

VS.

DAVID LEE MEGGETT

AKA:

Race:

B

Sex: M

Age:

44

DOB:

1966

SS#:

Address:

City, State, Zip:

DL#:

SUN#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Criminal Sexual Conduct - 1st Degree

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2009GS1004829

A/W#: 1103000

Date of Offense: 1/13/2009

S.C. Code § : 16-03-0652

CDR Code #: 0160

SENTENCE SHEET

0-30 years

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0652

of the S.C. Code of Laws, bearing CDR Code #

0160

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS(CSC
w/minor 1st or Lewd Act)☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Simpson, Benjamin Chad

7057

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2009-05-10-4830
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 133.90

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (06/2010)

PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other:

See offender registry.

☐ Condition Discharge, § 44-53-450(C) requires
\$350 be paid to the Clerk prior to case disposition☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code:

Sentence Date:

BCS20090100295

WITNESSES

GRAY

North Charleston Police Department

AGENCY CASE NUMBER

2009001699

ARREST WARRANT NUMBER

1103001

DATE OF ARREST

January 13, 2009

ACTION OF GRAND JURY

TRUE BILL

W. Daniel
Foreperson of Grand Jury

Date:

JUN 02 2009

VERDICT

CURRY

11/10/10

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2009GS1004830

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

June Term 2009

09 02:44(02)
THE STATE

Vs.

DAVID LEE MEGGETT

DOB: 1966

B/M

Indictment for

Burglary
1st Degree

FILED

2009 JUN -8 PM 12:42

CLERK OF COURT
JULIA STRONG

BY

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

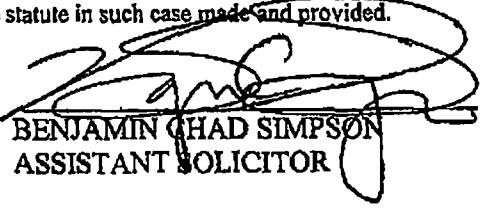
INDICTMENT

At a Court of General Sessions convened on June 1, 2009, the Grand Jurors of Charleston County present upon their oath:

Burglary
1st Degree

That in Charleston County, South Carolina, on or about January 13, 2009, the Defendant DAVID LEE MEGGETT did, during the nighttime, enter the dwelling of Stacey Hooper located at [REDACTED], North Charleston, South Carolina, without consent and with the intent to commit a crime therein; in violation of Section 16-11-311 of the South Carolina Code of Laws (1976) as amended.

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


BENJAMIN CHAD SIMPSON
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Charleston
 STATE VS.
DAVID LEE MEGGETT

AKA:

Race: B Sex: M Age: 44DOB: 1966 SS#:

Address:

City, State, Zip: DL#: *CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Burglary, 1st degree

INDICTMENT/CASE# 2009GS1004830A/W#: 1103001Date of Offense: 1/13/2009S.C. Code §: 16-11-0311CDR Code #: 0079

SENTENCE SHEET

15-life

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-11-0311 of the S.C. Code of Laws, bearing CDR Code # 0079

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Simpson, Benjamin Chad

71257

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed years
 and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
 of \$; plus costs and assessments as applicable; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2009-GS-10-4829
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$ <u></u>
§ 56-5-2995 (DUI Assessment)	\$12	\$ <u></u>
§ 56-1-286 (DUI Breath Test)	\$25	\$ <u></u>
Proviso 47.9 (Public Def/Prob)	\$500	\$ <u></u>
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ <u></u>
§ 50-21-114(BUI Breath Test Fee)	\$50	\$ <u></u>
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ca	\$ <u></u>
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
§ 44-53-450(C) (Conditional Discharge)	\$350	\$ <u></u>
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL	\$	\$ <u>133.90</u>

Clerk of Court/ Deputy Clerk

Court Reporter: Brenda Cooley

SCCA/217 (06/2010)

PTUP days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning \$ paid to Public Defender FundOther:

☐ Condition Discharge, § 44-53-450(C) requires
 \$350 be paid to the Clerk prior to case disposition

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Presiding Judge Christina SmithJudge Code: 2153Sentence Date: 1/10/10