

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Charleston County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
The Honorable Doyet A. Early, Circuit Court Judge
Appellate Case No. 2018-000065

DAVID LEE MEGGETT,

Petitioner,

vs.

THE STATE,

Respondent.

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S.C. SUPREME COURT

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT.

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PETITIONER'S STATEMENT OF ISSUES ON APPEAL

- I. The lower court erred in finding that counsel was not deficient nor was there resulting prejudice when counsel failed enter a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986).
- II. The lower court erred by failing to find counsel's trial strategy amounted to ineffective assistance of counsel when he argued two conflicting defense theories at trial and told the jury about Petitioner's version of events, in support of one theory, that was not offered through Petitioner's testimony during trial.
- III. The lower court committed an abuse of discretion in denying Petitioner's request for expert funding.

COUNTER-STATEMENT OF ISSUES PRESENTED

- I. Whether this Court must deny certiorari because evidence of probative value supports the PCR judge's finding that Petitioner failed to prove either deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), from counsel's failure to argue a *Batson* motion? Also, whether Petitioner's argument that the PCR judge's "findings fail to address the testimony offered and the evidence available in the transcript regarding the jurors that were struck and sat on the jury" is not properly before this Court because Petitioner did not present it to the PCR judge, it was not argued in his proposed order, and he did not include this argument in his Rule 59(e), SCRCF, motion?
- II. Whether this Court must deny certiorari because the record supports the PCR judge's factual findings and his decision denying Petitioner's claim that counsel was ineffective for advising Petitioner not testify, after telling the trial judge (in camera) that Petitioner would testify to prior consensual sexual encounters with the victim and informing the jury in opening statement that he and the victim had consensual sex was not controlled by an error of law? Was relief likewise properly denied on Petitioner's claim that counsel presented supposedly "alternative and incomplete" theories of defense?
- III. Did Judge Early abuse his discretion by denying the non-indigent Petitioner's request for additional expert funding, where PCR counsel could have paid any addition monies charged by the expert from the approximately \$12,000 paid towards her retainer. Also, the PCR judge correctly found that he lacked the authority to reverse that ruling?

STATEMENT OF THE CASE

Respondent accepts Petitioner's "Procedural History," Petition, pp. 1-4.

STATEMENT OF FACTS

Respondent accepts the PCR judge's discussion of the facts for purposes of this Return.

App. 773-78.

STANDARD OF REVIEW

This Court must deny certiorari if any evidence of probative value supports the PCR judge's findings, *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007); *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989), and it will only reverse the PCR judge's decision when there is no probative evidence to support his findings or the decision is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). The Court should deny certiorari on each of Petitioner's claims because he has not met this burden of proof.

ARGUMENTS

I. The Court must deny certiorari because evidence of probative value supports the PCR judge's finding that Petitioner failed to prove either deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), from counsel's failure to argue a *Batson*¹ motion. Also, Petitioner's argument that the PCR judge's "findings fail to address the testimony offered and the evidence available in the transcript regarding the jurors that were struck and sat on the jury" is not properly before this Court because Petitioner did not present it to the PCR judge, it was not argued in his proposed order, and he did not include this argument in his Rule 59(e), SCRPC, motion.

Respondent submits that this Court must deny certiorari because evidence of probative value supports the PCR judge's finding that Petitioner failed to prove either deficient performance or prejudice under *Strickland* from counsel's failure to argue a *Batson* motion. *See App. 823-26.* Also, Petitioner's contention that the PCR judge's "findings fail to address the testimony offered and the evidence available in the transcript regarding the jurors that were struck and sat on the jury" is not properly before this Court because Petitioner did not present it

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

to the PCR judge, either in his proposed order or his Rule 59(e), SCRPC, motion.

In a PCR action, the petitioner 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 petitioner must make a twofold showing. First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. "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).

Even if an inmate proves deficient performance, he must also prove that he was prejudiced by his attorneys' ineffectiveness. This requires proof "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 v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 687).

As this Court explained in *State v. Rayfield*, 369 S.C. 106, 112, 631 S.E.2d 244, 247

(2006):

“The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender.” *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). “The purposes of *Batson* and its progeny are to protect the defendant’s right to a fair trial by a jury of the defendant’s peers, protect each venireperson’s right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process.” *State v. Haigler*, 334 S.C. 623, 628-29, 515 S.E.2d 88, 90 (1999). Both the State and defendants are prohibited from discriminatorily exercising a peremptory challenge of a prospective juror. *Georgia v. McCollum*, 505 U.S. 42, 58, 112 S.Ct. 2348, 2358-59, 120 L.Ed.2d 33 (1992).

We set forth the proper procedure for a *Batson* hearing in *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996) (citing *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)). After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation. This explanation is not required to be persuasive or even plausible. Once the proponent states a reason that is race-neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment. *Adams*, 322 S.C. at 123-24, 470 S.E.2d at 371-72; *Haigler*, 334 S.C. at 629-30, 515 S.E.2d at 90-91.

See also Rice v. Collins, 546 U.S. 333, 338-39 (2006).

“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 (2009). *See also Snyder v. Louisiana*, 552 U.S. 472 (2008); *United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989). Both the jury selection sheet and the trial transcript here reflect that the prosecution exercised four of its five peremptory strikes to remove African-American veniremen and that counsel did not make a *Batson* motion contesting the prosecutor's use of its strikes, after six African-Americans were seated as petit

jurors.²

Counsel testified at the PCR hearing that he had made *Batson* motions in some cases tried both before and after Petitioner's trial, and that he had not made *Batson* motions in other cases. He could not remember why he did not make a motion in this case, but he testified that 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 "50/50" racial composition of the jury "likely could" have impacted his decision not to make a *Batson* motion. *App. 651; 694-97.*

Assistant Ninth Circuit Solicitor Chad Simpson, Esquire, testified that he and Assistant Solicitor Culver Kidd prosecuted Petitioner. They were both involved in the voir dire and jury selection, and they collaborated on jury selection. *App. 755-57.* He did not independently recall the reasons for striking the four African-American veniremen at issue, even after he had reviewed the trial transcript. Before his testimony, he had pulled and reviewed his entire case file. However, "[t]here is no information in there involving jury selection."³ He had also 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." *App. 755-56.* However, he testified that he takes the concerns of *Batson* "very seriously, almost to a fault" and he felt that the ultimate composition of Petitioner's jury reflected this. *App. 758.* While he would have had a race neutral reason for his use of his strikes if counsel had made a *Batson* motion, he was unable to recall those reasons six years after

² Four of these seated jurors were women and two were men. *App. 2-H; 51-71.*

³ He explained that the case files in the Solicitor's office typically have only jurors' names, addresses and criminal history. *App. 756.* Additionally, the in-house juror information sheets of the Ninth Circuit Solicitor's Office only went back to January 2011 and Petitioner's trial was 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. *App. 758-59.*

the trial. *PCR Tr. pp. 758-59.*

Petitioner's appellate attorney, Breen Stevens, Esquire, testified that he saw where the State had exercised four of its five peremptory challenges on African-American veniremen in the course of reviewing the transcript on appeal.⁴ He speculated that he might have been able to show that an explanation given by the State was possibly pretext if an argument on this basis had been made at trial. *App. 706-10.* However, the record supports the PCR judge's finding (*App. 825*) that his testimony does not support the present 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." *See App. 708-09.*

In denying relief on this claim, the PCR judge found that:

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

⁴ The Court Reporter's header for Mr. Stevens' testimony incorrectly reflects it is the direct examination of trial counsel, Mr. Butler, but it is actually Mr. Stevens' testimony. *See App. 706.*

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); [*Richter*,] 562 U.S. at 105, 131 S.Ct. at 787 (quoting *Strickland*).

App. 825-26.

Again, “[a]n appellate court must give deference to the PCR court’s factual findings, and must uphold them if there is any evidence of probative value to support them.” *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). See also *State v. Blackwell*, 420 S.C. 127, 143 n. 12, 801 S.E.2d 713, 722 n. 12 (2017) (“The dissent agrees there is evidence to support the trial court’s conclusion; however, it finds the decision is against the preponderance of the evidence. In reaching this conclusion, the dissent disregards our deferential standard of review and effectively acts as a trial court rather than an appellate court”), *cert. denied*, 138 S.Ct. 985 (2018). The PCR judge’s finding that the record did not “support the conclusion that there was a racial animus for any of the strikes used by the prosecution” is supported by the testimony of both trial counsel and Mr. Simpson. Likewise, counsel’s testimony supports the finding that, as an experienced attorney, he “would have made a *Batson* motion if he felt that one was appropriate.”

Further, the PCR judge’s reliance on *Strickland*’s “strong presumption” of competent representation was not clearly erroneous. See *Strickland*, 466 U.S. at 689. Since its decision in *Strickland*, the Supreme Court has reiterated this “strong presumption” and has clearly held that it cannot be overcome by a silent record. See *Burt v. Titlow*, 571 U.S. 12, 23 (2013) (citing

Strickland, 466 U.S. at 689) *Richter*, 562 U.S. at 104 (quoting *Strickland*). See also *Maryland v. Kulbicki*, 136 S.Ct. 2, 3 (2015); *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). Moreover, the record supports application of this presumption to this claim.

Petitioner asserts for the first time on appeal that the PCR judge’s “findings fail to address the testimony offered and the evidence available in the transcript regarding the jurors that were struck and sat on the jury.” Respondent submits that this argument is not preserved for appellate review because Petitioner did not present it to the PCR judge, either in his proposed order or his Rule 59(e), SCRPC, motion. *App. 832-37. Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (“Because [applicant] did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review, and the Court of Appeals erred in addressing the merits of the issues and remanding the matter to the PCR judge”); *Burgess v. State*, 402 S.C. 92, 95, 738 S.E.2d 264, 265-66 (Ct. App. 2013).

Moreover, none of the evidence that Petitioner claims the PCR judge failed to address, in itself, demonstrates racial animus. Indeed, as appellate counsel noted the record did not demonstrate racial animus. Also, counsel did not attribute any racial animus to the strikes, and the prosecutor could not recall the reasons he struck various jurors because of the passage of time and the absence of any manner to refresh his recollection. Therefore, the record supports the PCR judge’s conclusion that Petitioner failed to overcome *Strickland’s* presumption of competent representation.

II. This Court must deny certiorari because the record supports the PCR judge’s factual findings and his decision denying Petitioner’s claim that counsel was ineffective for advising Petitioner not testify, after telling the trial judge (in camera) that Petitioner would testify to prior consensual sexual encounters with the victim and informing the jury in opening statement that he and the victim had consensual sex was not controlled by an error

of law. Likewise, relief was properly denied on Petitioner's claim that counsel presented supposedly "alternative and incomplete" theories of defense.

Petitioner claims that counsel was ineffective for advising Petitioner not testify, after telling the trial judge (in camera) that Petitioner would testify to prior consensual sexual encounters with the victim and informing the jury in opening statement that he and the victim had consensual sex. He further claims that counsel presented supposedly "alternative and incomplete" theories of defense. The PCR judge's rejection of both claims is found on *App. 793-810*. Respondent submits that the record supports the PCR judge's factual findings and that denial of relief was not controlled by an error of law.

While the PCR judge's Order adequately addresses these claims and certiorari should be denied for the reasons found by the PCR judge, Respondent would address several matters. First, the record supports the finding that counsel's investigation was constitutionally adequate under *Strickland*. See *Strickland*, 466 U.S. at 691.⁵ See also *App. 780-85*. And, Petitioner does not challenge the adequacy of counsel's investigation, separate from this claim. 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. *App. 645-48*. Also, based upon counsel's conversations with Petitioner, counsel's 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." *App. 649*.

⁵ "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* The Court made clear that "[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.

Respondent does not dispute that, before ultimately advising Petitioner not to testify, counsel told the trial judge during in camera hearings on his motion for continuance (*App. 3-6*)⁶ and his motion to introduce evidence of prior consensual encounters (*App. 95-101*) that Petitioner would testify to prior consensual sexual encounters with the victim. Counsel also informed the jury in opening statement that Petitioner's sex with the victim was consensual and that the alleged sexual assault was merely a continuation of their "informal arrangement" where the victim would have sex with Petitioner, who would then excuse the debt she had for money he loaned to her. *See App. 131-35*. The PCR judge found that counsel's testimony was reasonable (*App. 801*), and Petitioner cannot show deficient performance or prejudice from the in camera comments for the reasons found by the PCR judge because those findings are supported by counsel's testimony. *See App. 800-01*.

Counsel's comments in opening were likewise reasonable under *Strickland* because they were based on counsel's reasonable belief that Petitioner would testify which he only arrived at after his pretrial conversations with and his preparation of Petitioner to testify, as well as his belief that Petitioner would be a good witness. And, Petitioner agreed with this strategy. *See App. 667-70; 691; 693-94*. See also *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) ("a defendant's consent to trial strategy in itself, [does not vitiate] all claims of ineffective assistance of counsel ... [but his consent is] probative of the reasonableness of the chosen strategy and of trial counsel's performance"). Counsel explained that his advice to testify changed because "[s]omething happened during the course of the trial, and ... [Petitioner's] demeanor started to change." Counsel "remember[ed] a

⁶ Petitioner is not entitled to relief based on counsel's handling of the continuance motion for the reasons found by the PCR judge on pages 16-24 of his Order, *App. 785-93*.

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.” Counsel was then concerned that Petitioner not be a good witness because of his agitated demeanor. *App. 690; 692.*⁷ Counsel, his co-counsel, and “several of our law clerks” met with Petitioner before he had to decide whether to testify. Petitioner tried to tell his version of events, but “he just couldn’t focus.” Counsel advised him not to testify, as did others in the room, and Petitioner agreed with this advice. *App. 671; 691-93.*

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 Petitioner did not testify. *App. 655-57.* 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 Petitioner’s failure to testify. He added, “Now, if [Petitioner] 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.” *App. 672-74. See also App. 680-81; 683.*

As correctly found by the PCR judge, counsel’s subsequent change of advice on whether Petitioner should testify was not deficient even though “some specific evidence that counsel referenced in opening was not introduced at trial and counsel could not argue it in closing.” This

⁷ Also, counsel thought that the trial was going well for Petitioner because the victim had not “come across very well,” in light of her admission that she had consensual sex with him at least once in the past, and because counsel had been successful in suppressing the towels in Petitioner’s car that had mixtures of his DNA and DNA from someone other than the victim. *App. 670; 672; 692-93.*

is because “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[...] (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).”⁸ *App. 802*. Here, the “change in trial strategy and advice, as well as [Petitioner’s] failure to testify, were based upon events that occurred during the trial but which were [reasonably] unforeseen at the time of counsel’s opening statement.” *App. p. 803*. “[T]he ultimate advice for [[Petitioner] not to testify was reasonable under *Strickland*, despite counsel’s comments in opening statement that were in anticipation of [Petitioner] testifying.” Counsel had a reasonable concern that Petitioner had become angry or agitated during the trial, and that it might now damage 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

⁸ 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, ... 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)).

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 App. 430* (jury instruction on witness credibility). *See App. 803-04*. Further, the PCR court’s finding that Petitioner agreed with the change in strategy is not clearly erroneous, and his “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. *App. 804*. Indeed, counsel informed Petitioner that the decision of whether or not to testify was his and he made the knowing and intelligent decision not to testify. *See App. 804*. *See also App. 368-71* (trial judge’s on-the-record colloquy).⁹

Petitioner maintains that the Order of Dismissal “does not address that counsel failed to adequately advise Petitioner regarding the two conflicting defenses (consensual sex and no DNA evidence to establish intercourse) before pursuing the defenses at trial and counsel's failure to advise Petitioner regarding the implications of not taking the stand.” However, he did not raise this as a specific claim in either his original Application or in his Amended Application, PCR counsel did not question trial counsel as to whether or not counsel explained this to Petitioner (*see App. 644-84; 702-04*),¹⁰ 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 this is a distinct claim that is not

⁹ Petitioner’s PCR testimony (*App. 736-37; 752-53*) also supports the PCR judge’s findings with respect to the reasonableness of the manner counsel’s discussions on whether to testify. *See App. 804 & n. 16*.

¹⁰ PCR counsel questioned trial counsel at length about how Petitioner’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 Petitioner of the impact that his decision to not testify could have on counsel’s closing argument.

preserved for appellate review. The purpose of Rule 59(e), SCRPC, motion 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, this claim was not properly presented to the PCR judge. *See Mangal v. State*, 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017) (The PCR court acted within its discretion in refusing to address an issue, where “the written application makes no mention of a claim;” “no amendment to the written application was ever made;” “PCR counsel began the hearing without mentioning there would be any additional claims for ineffective counsel beyond those listed in the original application;” and “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”); *Arnold v. State*, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992).¹¹

Nor was counsel’s performance deficient because he referenced “evidence in his opening statement that could only be introduced through [Petitioner’s] testimony and was never heard because of this change in strategy.” *App. 804*. As correctly found by the PCR judge,

a review of counsel’s opening statement reflects that counsel never informed the jury that [Petitioner] was going to testify. *See [App.] 131-36. See Mann v. Ryan*, 828 F.3d 1143, 1154 (9th Cir. 2016) (En banc); *Com. v. Carney*, 34 Mass.App.

¹¹ Even assuming *arguendo* that Petitioner’s present claim is properly before this 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 his failure to testify would have upon counsel’s ability to argue consensual sex in closing, he cannot overcome *Strickland*’s “strong presumption” of reasonable performance. *See Strickland*, 466 U.S. at 689; see also *Burt*, 571 U.S. at 23 (“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); *Richter*, 562 U.S. at 105, 131 S.Ct. at 787 (quoting *Strickland*).

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 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 [*Richter*], 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.*

App. 804-05. As further correctly found by the PCR judge: “Contrary to [Petitioner’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.” *App. 807.*

Additionally, it was not an error of law for the PCR judge to find that “a number of courts in 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.” *App. 805.* Rather, the various cases cited and correctly analyzed by him on pages 36-38 of his Order support this conclusion and the finding that Petitioner did not prove deficient performance or prejudice. See *App. 805-07.*

Finally, Petitioner failed to prove prejudice from counsel’s performance. As found by the PCR judge on pages 38-41 of the Order:

... [Petitioner] 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 [Petitioner] would testify. See *Mann*, 828 F.3d at 1154. Further, counsel did not abandon the defense that [Petitioner] and the victim had consensual sex. The Court rejects [Petitioner’s] contention that counsel had “shifted” his defense of [Petitioner] because of [Petitioner’s] failure to testify. Even though counsel could not address any points

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

To support this position, he focused on the victim's perceived lack of credibility and he urged jurors that she was trying to paint a false picture of what happened, much like the remainder of the State's case against [Petitioner]. 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 [Petitioner] said he was there to get a down payment, until the following day; (3) she did not mention that [Petitioner] 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 [Petitioner] had done; (5) rapists do not go to the hospital and ask to sit with the victim, as [Petitioner] 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 [Petitioner] 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 [Petitioner] in the past; (10) [Petitioner] stopped having sex with her when she asked him to stop, as he had in the past, but rapists do not stop; (11) [Petitioner'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 [Petitioner]; (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 [Petitioner] 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 [Petitioner's] right to not testify or present any evidence. She also charged jurors at the outset of her instructions that, in arriving at their verdict, they were "to consider only the testimony which has been presented from the witness stand, any exhibits which have been made part of the record of this case, as well as the stipulations of counsel." *Tr. pp.* 422-39. Because "[It is] the almost invariable assumption of the law that jurors follow their instructions," *United States v. Olano*, 507 U.S. 725, 740, 113 S.Ct. 1770, 1781 (1993) (citing *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S.Ct. 1702, 1707 (1987)); *see also Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068 ("a court should presume ... that the judge or jury acted according to law"), the Court finds that the jury did not consider Applicant's failure to testify or offer evidence in reaching its verdict. Finally, there was overwhelming evidence of [Petitioner's] guilt. *See Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069. For these reasons [Petitioner] cannot prove that he was prejudiced by counsel's performance.

App. 807-10.¹² Therefore, based on the current record, the trial judge's ruling must be affirmed.

¹² See the Statement of Facts for a discussion of the evidence against Petitioner. See *App.* 773-78. Contrary to Petitioner's contention, there was overwhelming evidence of guilt and this evidence is discussed at length in the Order of Dismissal. Also, unlike other PCR cases where this Court has criticized the PCR judges' findings of no prejudice because of overwhelming evidence of guilt, here the overall strength of the properly admitted evidence of Petitioner's guilt overcomes the individual impact of each instance of counsel's allegedly deficient performance. *Contra Thompson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018), *reh'g denied* (June 12, 2018) ("As we explain below, the overall strength of the properly admitted evidence of Petitioner's guilt does not overcome the individual impact of each instance of trial counsel's deficient performance"); *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018), *reh'g denied* (Mar. 29, 2018). In addition to the victim's testimony concerning the events leading up to the assault and the assault itself, her testimony that Petitioner had forcefully pulled her arm behind her back and choked her during the attack was circumstantially corroborated by Dr. Joseph Bianco, an expert in emergency medicine, attended to the victim at the hospital. He testified that she told him that she had been sexually assaulted, and she complained of pain in her arm and jaw. *App.* 286. Upon examination, he discovered bruising and tenderness in those areas and he opined that her injuries were consistent with having been grabbed or squeezed in the face or neck. *App.* 287-88; 295. Likewise, Detective Randy Gray, an officer with the North Charleston Police Department, met with the victim one day after the incident, testified that her neck injuries were significantly more visible, with prominent dark bruising visible around her neck. *App.* 253-54.

Further, while the victim was still at the hospital, she spoke to Officer Robert Gooding and Sergeant Eric Jourdan, of the North Charleston Police Department. *App.* 155; 165-66, 212. While she was reporting what had occurred, she 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

III. This Court must deny certiorari because Judge Early did not abuse his discretion by denying the non-indigent Petitioner's request for additional expert funding, where PCR counsel could have paid any addition monies charged by the expert from the approximately \$12,000 paid towards her retainer. Also, the PCR judge correctly found that he lacked the authority to reverse the earlier ruling.

Petitioner's final claim is that Judge Early erred by denying his request for additional expert funding and that the PCR judge erroneously failed to reverse the earlier ruling. Respondent submits that this Court must deny certiorari because Judge Early did not abuse his discretion by denying the non-indigent Petitioner's request where PCR counsel could have paid

at the hospital. He apologized and said that he wanted to visit her there. *App. 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. *App. 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. *App. 153; 214; 233*.

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

Faye LeBoeuf, a nurse and expert in sexual assault examinations, subsequently performed a pelvic exam on her at the MUSC Women's Center. Ms. LeBoeuf discovered a small abrasion in the victim's vagina that was consistent with a forced sexual assault. *App. 322-23*. Further, the abrasion likely occurred within the preceding twenty-four to seventy-two hours. *App. 324*. Ms. LeBoeuf admitted that the victim's injuries could have potentially been consistent with consensual sex or other causes (*App. 328*) and there was no evidence of bruising or contusions on the victim's thighs or any redness, swelling, lacerations, or tears on the victim's inner thighs. *App. 331*. However, she explained that injuries were not always present in sexual assaults. *App. 337*. Jennifer Clayton, a SLED DNA analyst, subsequently examined the evidence gathered in the case. *App. 291*. 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. App. 302; 314-15. However, she was unable to develop a DNA profile from the sample, and could not identify the sample as coming from Petitioner. *App. 302-17*.

any addition monies charged by the expert from the approximately \$12,000 paid towards her retainer. Also, the PCR judge correctly found that he lacked the authority to reverse the earlier ruling.

Petitioner's PCR attorney, Tricia A. Blanchette, Esquire, originally filed a "Motion for Indigent Funds" on March 30, 2016. Specifically, she sought additional funding from the South Carolina office of Indigent Defense, in an amount not to exceed \$5,000, in order to pay her previously retained DNA expert. *App. 579-93*. The Honorable Doyet A. Early, III, heard this motion on April 18, 2016, at the Charleston County Courthouse. Petitioner was present at this hearing and Ms. Blanchette 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. At the hearing, counsel stated that Petitioner had "provided [the DNA expert] with a \$2,000 payment." **App. 598.**

Counsel provided an affidavit of Petitioner's indigence at the hearing, *App. 596-97*. She also explained that a third party, a friend of Petitioner, had subsequently retained her but did not pay the entire retainer. Nevertheless, counsel had been paid "approximately 12,000 of the fee, no expenses. In the original 2,000 that was actually for [the expert], I covered that fee and then it was refunded back to me." *App. 598-99*.

Judge Early stated that:

... I just had the same issue arise in Aiken. And we had indigent defense involved with it and they look very suspect on people ... who receive retainers and then ask for indigent defense to help them with their experts. Normally ... I give indigent defense an opportunity to be here since they are paying it since their budget is so tight.

App. 600.

Mr. Ryan thereafter testified that his position was the same as in the Aiken County case

to which the judge had referred. “We kind of just try to keep the same position whether it is Oconee County or Aiken or Charleston. So[,] ... our position ... is that any time private funds are involved we are very concerned because obviously we can't have the State paying the burden while the attorney is getting his full fee. ... [P]eople [the Legislature] would not be very happy in Columbia about that.” *App. 611*. He added, “In this case obviously we considered ... the \$12,000 fee which is to us a pretty significant fee for a PCR case.” While there was no *per se* prohibition of payment where counsel is retained and the matter is left to the judge’s discretion, “it is a rare situation.” *App. 611-12*. A major concern is “We don’t want to become an insurance company for a bad fee agreement or something like that.” The question he asks in each case is whether “it [is] reasonable and necessary for the representation of the Defendant.” *App. 612-13*. In light of the 12,000 retainer here, he did not think so. *App. 613-14*.

Following this hearing, Judge Early filed An “Order Denying Additional Funding” on December 7, 2016. He noted that counsel had received “most of her retainer fee ... in the estimated amount of \$12,000.” He then found “Mr. Ryan’s testimony compelling in its discretion, that there is a public policy interest to deny indigent funding to Applicant based on the facts of this case.” *App. 622-23*.

Counsel renewed the funding request before the PCR judge heard testimony at the hearing. Counsel claimed that she could not fully develop certain claims in the Amended Application without providing additional payment to her previously-retained DNA expert. *App. 627-30*. Counsel made clear, however, that she was not requesting a continuance. *App. 630-32*. The PCR judge denied the motion because he lacked the authority to reverse Judge Early’s previous ruling. *App. 631*. Petitioner raised the Order of Dismissal’s failure to address this claim in his rule 59(e), SCRCF, motion (*App. 836*), but the PCR judge denied the motion *App. 847*.

Respondent submits that the lower courts did not abuse their discretion. Respondent does not dispute that counsel for *indigent* PCR applicants may apply to the South Carolina Office of Indigent Defense for funding to pay for reasonable expert services on behalf of their clients. However, PCR counsel was retained and had received approximately \$12,000 of her agreed upon retainer. This is far greater than the flat fee of \$800 that appointed counsel under Rule 608, SCACR, receives from Indigent Defense for his or her services. See [https://sccid.sc.gov/resources/docs/608%20Contract/608%20Contract%20\(PCR%20and%20SV\)\(sample\).pdf](https://sccid.sc.gov/resources/docs/608%20Contract/608%20Contract%20(PCR%20and%20SV)(sample).pdf) (sample).pdf. (Section III).

Moreover, Mr. Ryan's testimony supports Judge Early's ruling because Indigent Defense consistently takes the position that funds from that agency should not be made available to retained counsel unless absolute necessary for the applicant to receive a fair hearing. In support of the funding request, Petitioner has relied upon *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015) (trial counsel was ineffective under *Strickland* 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.*, 138 S.Ct. 166 (2017). Yet, neither case supports his funding request. 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. Also, this is not a capital PCR and Petitioner

expressly stated that he was not asking the PCR judge for a continuance. Accordingly, *Winkler* is distinguishable.

Likewise, the PCR 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 PCR judge did not have the authority to reverse Judge Early’s previous ruling.

Finally, the PCR judge subsequently heard testimony and rejected Petitioner’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 these claims, the PCR judge found that counsel’s performance was constitutionally adequate and that Petitioner had not proven any prejudice from counsel’s performance. *See Order of Dismissal, App. 785-93*. Therefore, the renewed request for indigent funding was properly denied.

CONCLUSION

Respondent submits that certiorari should be denied for the foregoing reasons.

Respectfully submitted,


ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

S.C. Bar # 4806
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: 
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

September 24, 2018.

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Charleston County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
The Honorable Doyet A. Early, Circuit Court Judge
Appellate Case No. 2018-000065

DAVID LEE MEGGETT,

Petitioner,

vs.

THE STATE,

Respondent.

RECEIVED

SEP 24 2018

S.C. SUPREME COURT

PROOF OF SERVICE

I, William Edgar Salter, III., counsel for the Respondent, certify that I have served the Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Tricia A. Blanchette, Esq., P.O. Box 2147, Leesville, South Carolina 29070-0147.

I further certify that all parties required by Rule to be served have been served.

This 24th day of September, 2018.



WILLIAM EDGAR SALTER, III
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT



RECEIVED

SEP 24 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

September 24, 2018

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

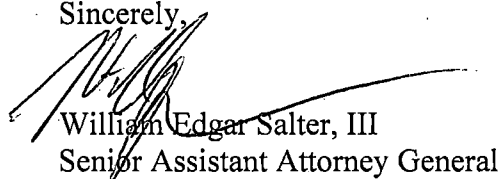
Re: *David Lee Meggett vs. The State*
Appeal from Charleston County
Appellate Case No. 2018-000065

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Respondent's Return to Petition for Writ of Certiorari and Proof of Service in the above-referenced matter.

Thank you for your assistance in this matter.

Sincerely,



William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures

cc: Tricia Blanchette, Esq. (w/two 2 copies of encls.)
The Honorable Scarlett Wilson, Solicitor, Ninth Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)