THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No. 2018-000193

Joseph Richard Graddick, ... Petitioner,

v.

State of South Carolina, ... Respondent.

Petition for Writ of *Certiorari*

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QUESTIONS PRESENTED

Question I

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Question V

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Question VI

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Question VII

Appellate counsel rendered prejudicial, ineffective assistance of counsel by failing to brief on the merits the trial judge limiting trial counsel's closing argument.

Question VIII

Joseph Graddick is entitled to a new trial based on the Cumulative Error Doctrine.

STATEMENT OF THE CASE

For an incident occurring on June 15, 2008, the State charged Joseph Graddick with first-degree burglary, kidnapping, and first-degree criminal sexual conduct. Law enforcement arrested Mr. Graddick on October 13, 2009. From July 11-13, 2011, the State tired Mr. Graddick before the Honorable Deadra L. Jefferson and a jury. Timothy Finch and Deborah Herring-Lash prosecuted Mr. Graddick. Beattie I. Butler defended Mr. Graddick. The jurors convicted Mr. Graddick as charged. Judge Jefferson sentenced him to concurrent terms of seventeen years imprisonment for each charge. A. 393-401.

Mr. Graddcik appealed the convictions and sentences. Susan Hackett of the South Carolina Commission on Indigent Defense, Appellate Division, represented Mr. Graddick and filed an *Anders* brief,[1] briefing this sole issue:

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

A. 402-13. The Court of Appeals affirmed the convictions and sentences. *State v. Graddick*, Ct. App. Unpublished Op. No. 2013-UP-228 (filed May 29, 2013). A. 414-15.

On May 12, 2014, Mr. Graddick filed an application for post-conviction relief. A. 419-24. On April 22, 2015, the State served its return. A. 425-30. On December 5,

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

2016, the Honorable G. Thomas Cooper, Jr. convened an evidentiary hearing. At the conclusion of the hearing, Mr. Graddick provided the Court with a memorandum in support of his PCR application. A. 522-34. Judge Cooper requested the parties submit proposed orders.[2] By order dated November 7, 2017, Judge Cooper dismissed Mr. Graddick's PCR application. A. 535-76. On November 27, 2017, Mr. Graddick served a Rule 59(e), SCRCP motion. A. 580-610. On January 3, 2018, Judge Cooper denied Mr. Graddick's Rule 59(e) motion. A. 611. This petition for a writ of *certiorari* follows.

STATEMENT OF FACTS

A. Evidence Presented at Trial.

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

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[2] The PCR court singed the State's proposed order. Mr. Graddick's proposed order is attached to his Rule 59(e), SCRCP motion. A. 589-609.

she was wearing only her t-shirt, and accompanied her back inside while she called the police. A. 56-73.

Faye LeBoeuf, a certified nurse midwife and certified sexual assault nurse examiner at the Medical University of South Carolina, performed a sexual assault examination. The medical exam was normal and did not reveal any signs of trauma. A. 74-75; 105; 173-99.

On June 19, 2008, while driving to a hair store, Ms. Joyner saw Mr. Graddick "standing in front of a Subway" restaurant. She recognized him as her neighbor. She drove back around to get a closer look and recognized Mr. Graddick's watch as the distinctive watch worn by the alleged attacker. She called the police. When the police arrived, Mr. Graddick took off running. A. 77-77.

After the prosecution questioned Fulvia Kandie Dunham, Mr. Graddick's girlfriend at the time the allegations arose, about witnessing the Subway encounter, the Solicitor asked, "Did you ever see Mr. Graddick again at that apartment [complex]?" Ms. Dunham responded, "No because we got evicted." The Solicitor followed up, "And have you seen him since then?" Ms. Dunham replied, "When he came to Charleston County." On cross-examination of Ms. Dunham, trial counsel clarified the Ms. Dunham also had seen Mr. Graddick "at his uncle's house after the Subway incident." On re-direct, the prosecutor asked Ms. Dunham if Mr. Graddick had seen the children since the Subway incident. After Ms. Dunham stated that Mr. Graddick had seen the children after the Subway incident "[i]n Charleston County." The prosecutor asked, "What do you mean by Charleston County?" Ms. Dunham explained, "At the jailhouse." Trial counsel did not object. A. 123-29.

Jason Forsythe, a detective with the North Charleston Police Department, testified he "obtained a buccal swab [from Mr. Graddick] at the Charleston County Detention Center" on November 12, 2009. He was not able to testify how close in time he obtained the buccal swab in relationship to Mr. Graddick's arrest but reiterated Mr. Graddick "was incarcerated at the time." Trial counsel did not object. A. 218-19

On June 19, 2008, North Charleston Master Patrolman George Van Tine responded to the Subway. Over trial counsel's objection, based on hearsay and a violation of the Confrontation Clause, Officer Van Tine testified that Ms. Joyner gave him "some information that somebody had alerted the suspect." Officer Van Tine went to the apartment complex and interviewed Ms. Dunham as "the female that possibly alerted him" in the Subway. Over trial counsel's objection, Officer Van Tine testified, "[A]fter talking to her for quite a few minutes, she eventually said that his name was Joseph Graddick." A. 155-61. Officer Van Tine testified Ms. Dunham was not cooperative at first. The Solicitor then asked, "And you said not at first, how did your interaction go?" Officer Van Tine responded, "[W]hen I first made contact with her she was extremely uncooperative. She actually flat out denied knowing the suspect." Trial counsel objected based on hearsay. The trial judge overruled the objection. When Officer Van Tine testified, "She basically said that his–" the trial judge finally sustained the objection and prohibited further testimony about what Mr. Dunham told Officer Van Tine. A. 166-65. During Ms. Dunham's earlier testimony, the Sate never asked her about the substance of any of the statements she made during the police interview. A. 121-29.

Mr. Graddick testified and denied burglarizing Ms. Joyner's apartment, kidnapping her, and raping her. On June 15, 2016, Ms. Joyner called Mr. Graddick and told him to come to her apartment and enter though the back door which would be unlocked. Around 8:00 p.m., he returned to the apartment complex and took the back way to Ms. Joyner's apartment. He had been to Ms. Joyner's apartment at least four times before that night. Ms. Joyner was asleep on the couch. She woke up when Mr. Graddick laid down next to her. They talked, kissed, and had consensual sex. After sex, Mr. Graddick told Ms. Joyner that he did not want to continue seeing her. There was a push-and-shove match. Mr. Graddick pushed her down and left. A. 254-63.

On June 18, 2008, Ms. Joyner called Mr. Graddick and told him, "You are going to jail for rape." A. 264, lines 1-18. When he saw Ms. Joyner at the Subway the next day with the police, Mr. Graddick ran back to Ms. Dunham's apartment. He wanted to "get away and find out what was really going on." Mr. Graddick also wanted to figure out how he would afford a lawyer. A. 263-66.

During closing arguments, trial counsel argued:

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

The trial judge sustained the Solicitor's unspecified objection because "[i]t is improper to argue punishment" and instructed the jurors to "disregard" the argument. Trial counsel took exception to the ruling and objected to the curative instruction based on Mr. Graddick's right to present a defense and "due process." A. 320-21.

B. Evidence Presented at the PCR Hearing.

Beattie Butler, Mr. Graddick's trial counsel, testified that this case hinged on the credibility of Mr. Graddick and Ms. Joyner. Ms. Joyner claimed Mr. Graddick, a stranger, broke into her apartment, restrained her, and raped her. Mr. Graddick, however, always maintained he knew Ms. Joyner prior to this incident where they had consensual sex. During his closing argument, Mr. Butler was able to argue inferences from the physical evidence that were favorable to Mr. Graddick. The DNA evidence could not establish consent or lack of consent. The photographs of Ms. Joyner's apartment did not reflect a crime scene involving forcible rape. Ms. Joyner claimed that she had screamed, but no one in the apartment complex heard her scream. Mr. Butler testified the prosecution did not have overwhelming evidence of Mr. Graddick's guilt. A. 437-39, 477-80, 482-83.

Mr. Butler testified about this Court's three-to-two decision in *State v. Rayfield*, 369 S.C. 106, 118, 631 S.E.2d 244, 250 (2006). Mr. Butler testified the § 16-3-657 instruction is a comment on the facts of the case and unduly emphasizes the testimony of the complaining witness in a criminal sexual conduct case. Mr. Butler further testified that the objectionable nature of the § 16-3-657 instruction was discussed at seminars and amongst criminal defense attorneys. At the time of Mr. Graddick's trial, Mr. Butler's ordinary practice was to object to this instruction based on *Rayfield*. The trial transcript reflects that Mr. Butler objected to the § 16-3-657 instruction during the charge conference but did not elaborate the reasoning under *Rayfield*. When asked whether there was tension between Mr. Butler and Mr. Graddick's trial judge, Mr. Butler responded, "I have to make my words count, because I don't always get to say as many things as I

would like." Mr. Butler believed appellate counsel should have briefed this issue on direct appeal. A. 252, lines 2-22, 286, lines 13-18, 451-57.

Mr. Butler testified about the trial judge's opening remarks that the jurors should "render a true and just verdict in this case" and final instruction on the law that the jurors had "one objective . . . to seek the truth regardless of its source." Mr. Butler testified he had never considered objecting to such an instruction. He was not familiar with *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000). During questioning, he acknowledged that such instructions could dilute the burden of proof and require the jurors to search for explanations of the evidence. Mr. Butler did not offer a strategic reason for not objecting to these instructions. A. 457-60, 482.

Mr. Butler testified that Mr. Graddick had a pending charge for common law robbery when he was arrested for the allegations involving Ms. Joyner. Through better witness preparation of Ms. Dunham and Detective Forsythe, Mr. Butler believed the prosecution could have presented their testimony without calling attention to Mr. Graddick's pre-trial incarceration. Mr. Butler did not offer a strategic reason for not objecting to this testimony. A. 436-37. 440-46, 480-81.

Mr. Butler believed his objections, based on hearsay and the Confrontation Clause, preserved for appeal Officer Van Tine's testimony about Ms. Dunham's statements to him following the Subway encounter. Mr. Butler was concerned that the testimony about Ms. Dunham's statement could be viewed as "her consciousness of" Mr. Graddick's guilt. Mr. Butler further believed that appellate counsel should have briefed this issue on direct appeal. A. 446-51, 484.

Mr. Butler testified about the State's objection during his closing argument, which was sustained by the trial court judge. Mr. Butler believed his argument was proper. He had presented evidence that Ms. Joyner wanted to take away Mr. Graddick's freedom. He never told the jurors that a conviction would lead to imprisonment for a specific term of incarceration. Mr. Butler further believed that appellate counsel should have briefed this issue on appeal on the merits. A. 460-62.

Susan Hackett, Mr. Graddick's appellate counsel, was aware this Court's opinion in *Rayfield* held the S.C. Code § 16-3-657 instruction is not required. She acknowledged at trial counsel's objection to the § 16-3-657 instruction during the charge conference preserved the issue for appeal, although she anticipated that the Attorney General's Office would contend the objection was not sufficient. Ms. Hackett further testified that a more detailed objection during the charge conference and more specific objections after the charge on the law and recharge on the definition of first degree criminal sexual conduct would have been helpful for the appeal. Ms. Hackett testified she was not aware of *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011). A. 505-11.

Regarding Officer Van Tine's testimony about Ms. Dunham's statements during the investigation, Ms. Hackett testified trial counsel's objection was not sufficient to preserve this issue for appeal as a Confrontation Clause violation. She understood the trial judge ruled only on the hearsay objection and not the Confrontation Clause objection. A. 498-504.

Regarding the State's closing argument objection, Ms. Hackett believed that trial counsel's argument was not objectionable because it was "on the line of whether that actually was getting to punishment or if it was a matter the jury could consider." Mr.

Graddick had presented evidence of Ms. Joyner wanting to take his freedom. Ms. Hackett, however, did not cite to that testimony in her brief. A. 504-05.

Mr. Graddick testified during the evidentiary hearing about an incident where he and his brother, Leroy Graddick, were visiting women at another apartment at the same apartment complex in North Charleston. According to Mr. Graddick, he and his brother left the apartment together and returned to their respective cars that were parked adjacent to each other in the parking lot of the apartment complex. Ms. Joyner appeared, confronted Joseph Graddick about seeing other women, and an argument ensued. A. 484-89. Leroy Graddick testified at the evidentiary hearing and confirmed his brother's account of the parking lot incident. He further testified no one interviewed him as a potential witness. A. 492-94.

STANDARD OF REVIEW

Under the first prong of *Strickland v. Washington*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." 466 U.S. 668, 688 (1984). "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402

(2002). "Decisions made in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014).

The second prong of *Strickland*, requires a defendant establish that this deficiency prejudiced him. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). "In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." *Id.* (citing *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case ...," and "we must consider the totality of the evidence before the jury.")). "In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Id.* "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Id.* 422 S.C. at 189, 810 S.E.2d at 844. "[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong

that the *Strickland* standard of 'a reasonable probability ... the factfinder would have had a reasonable doubt' cannot possibly be met." *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

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

On appeal, this Court "defer[s] to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017). "Questions of law are reviewed *de novo*, and [this Court] will reverse the PCR court's decision when it is controlled by an error of law." *Id.*

ARGUMENTS

Question I

Appellate counsel rendered ineffective assistance of counsel by failing to appeal the trial judge instructing the jurors on S.C. Code § 16-3-657, when such instruction did not comply with *State v. Rayfield,* 369 S.C. 106, 631 S.E.2d 244, (2006), and the credibility of the witnesses was the central issue for the jurors to determine.[3]

S.C. Code § 16-3-657 provides, "The testimony of the victim need not be corroborated in prosecutions" involving criminal sexual conduct. *State v. Rayfield* recognized this jury instruction to be objectionable under certain circumstances:

[3] At the beginning of the PCR hearing, Mr. Graddick orally amended his PCR application to add paragraph 11(b)(3) alleging, "If trial counsel preserved the jury instruction stating that the testimony of an alleged victim in a criminal sexual conduct case need not be corroborated, then appellate counsel was ineffective for not briefing this issue on appeal." A. 433-34.

> A trial judge is not required to charge § 16–3–657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law.

369 S.C. at 118, 631 S.E.2d at 250.[4] Over trial counsel's objection during the charge conference, the trial judge instructed § 16-3-657. A. 252, lines 2-22, 286, lines 13-18, 350, lines 19-23. During deliberations, the jurors asked for the definitions of "first degree burglary, second degree burglary, kidnapping, first degree criminal sexual conduct, [and] assault and battery." A. 366, lines 2-6. The trial judge once again instructed S.C. Code § 16-3-657. A. 373, lines 18-21.

Trial counsel's objection during the charge conference preserved this issue for appeal. *Keaton v. Greenville Hospital System*, 334 S.C. 488, 514 S.E.2d 570 (1999); *State v. Johnson,* 333 S.C. 62, 64 n. 1, 508 S.E.2d 29, 30 n. 1 (1998). *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011) provides guidance for applying *Rayfield.* Our Court of Appeals observed, "Notably, the judge immediately followed [the § 16-3-657 instruction] with, 'Necessarily you must determine the credibility of witnesses who have testified in this case.'" *Id.* at 299, 379. The trial judge in Mr. Graddick's case did not follow the § 16-3-657 instruction with a similar admonition. Mr. Graddick's trial judge further emphasized § 16-3-657 by repeating it in response to the jurors' questions. *See*

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

also State v. Orozco, 392 S.C. 212, 224, 708 S.E.2d 227, 233 (Ct. App. 2011) (noting reversal not required because "this single instruction was not unduly emphasized").[5]

"It is error to give instructions which may confuse or mislead the jury. The test is what a reasonable juror would understand the charge to mean." *State v. Rothell*, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990) (citations omitted). "In order to make this determination, the challenged instruction must be examined in the context of the trial court's entire charge to the jury and not in isolation." *Lowry v. State*, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008). "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Id.*, 376 S.C. at 506, 657 S.E.2d at 64 (quoting *Francis v. Franklin,* 471 U.S. 307, 322 (1965)). "Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge." *State v. Buckner*, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000). "A jury charge is no place for purposeful ambiguity." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). Reviewing the instruction as a whole, the trial judge unduly emphasized and repeated § 16-3-657. Appellate counsel admitted she was not familiar with *Hill*, which provided the

[5] *Hill* and *Orozco* are discussed in this petition because these cases provide guidance for applying *Rayfield. Orozco* was decided prior to Mr. Graddick's jury trial and, therefore, available to trial counsel. *Hill* was decided a couple of weeks after Mr. Graddick's jury trial. Both *Orozco* and *Hill* were available to appellate counsel. This Court overruled *Hill* and *Orozco* in *State v. Stukes*, 416 S.C. 493, 499-500, 787 S.E.2d 480, 483 (2016) ("We are persuaded by the dissent in *Rayfield* and conclude this charge is confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case. *See* S.C. Const. art. V, § 21."). *Stukes* further held, "Our review of the record indicates this case hinged on credibility. Victim said it was rape; he said it was consensual." *Id. See also State v. Witherspoon*, 418 S.C. 641, 795 S.E.2d 685 (2016) (erroneous jury instruction providing that victim's testimony was not required to be corroborated was prejudicial error). Mr. Graddick suffered the same prejudice as the appellants in *Stukes* and *Witherspoon.*

"blueprint" for challenging the § 16-3-657 instruction, pursuant to *Rayfield*, in specific cases. *See Weik, supra.*

The State's case against Mr. Graddick was not overwhelming. *See Smalls, supra.* Because credibility was the central issue for the jurors to determine, instructing § 16-3-657 prejudiced Mr. Graddick. *See e.g. State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) (prejudice found when case turned solely on credibility and there was "no physical evidence of sexual abuse"); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (prejudice found when "credibility was the most critical determination of this case"); *State v. Berry*, 332 S.C. 214, 503 S.E.2d 770 (1998) ("These credibility questions and inconsistencies in the witnesses' testimony make it impossible for this Court to conclude that, without reference to the Polite incident, the evidence of Berry's guilt is overwhelming or that Berry's guilt is the only rational conclusion that could be reached from the evidence presented."). Thus, the appellate court would have ordered a new trial for Mr. Graddick if appellate counsel had raised this issue on appeal. This Court should grant the writ, consider the issue, and order a new trial.

Question II

In the alternative to Question I, trial counsel rendered ineffective assistance of counsel when he failed to renew the objection to the trial judge instructing the jurors on S.C. Code § 16-3-657, when such instruction did not comply with *State v. Rayfield,* 369 S.C. 106, 631 S.E.2d 244 (2006), and the credibility of the witnesses was the central issue for the jurors to determine.

Trial counsel objected to the instruction during the charge conference. A. 252, lines 2-22, 286, lines 13-18. Once the trial judge instructed § 16-3-657, *Rayfield* required trial counsel to further object if the trial judge unduly emphasized § 16-3-657. *See also Hill* and *Orozco, supra.* Trial counsel did not renew the objection. Additionally, when

the jurors asked for a clarification of the definitions of first degree criminal sexual conduct and assault and battery, the trial judge once again instructed § 16-3-657, in isolation, and trial counsel did not object. Reviewing the trial judge's instruction on the law—and re-instruction on the law—as a whole, the trial judge unduly emphasized and repeated § 16-3-657 in violation of *Rayfield, Orozco*, and *Hill.*

If this Court concludes trial counsel's failure to renew the objection at the end of the jury instruction and following the re-instruction did not preserve the § 16-3-657 issue for appellate review, then trial counsel was ineffective. *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016) (failure of defense counsel to object to improper instruction was ineffective assistance of counsel); *Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008) (trial counsel's failure to object to the trial court's supplemental jury instruction on malice murder, which impermissibly shifted the burden of proof for malice from the State to defendant, constituted ineffective assistance of counsel). Because the State's case against Mr. Graddick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Graddick. This Court should grant the writ, consider the issue, and order a new trial.

Question III

Trial counsel rendered ineffective assistance of counsel when he failed to object to the trial judge instructing the jurors "to seek the truth regardless of its source" and "to determine what the true facts are, and to apply the law to those facts, and the render a true and just verdict in this case" when these instructions violated *Cage v. Louisiana*, 498 U.S. 39 (1990), *State v. Aleksey,* 343 S.C. 20, 538 S.E.2d 248 (2000), and other longstanding precedent in this state, resulting in prejudice because the credibility of the witnesses was the central issue for the jurors to determine.

During opening remarks, the trial judge informed the jurors "at the end of the testimony" they would "be in a position to determine what the true facts are, and to apply the law to those facts, and the render a true and just verdict in this case." A. 41, lines 6-11. During opening statement, the prosecution asked the jurors to "come back with a verdict that speaks the truth. The truth about what happened to LaVanda Joyner on that evening." A. 50, lines 11-14. During the charge on the law, the trial judge instructed the jurors, "You have but one objective, ladies and gentlemen, to seek the truth regardless of its source." A. 338, lines 19-21. Trial counsel did not object. A. 357-63.

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

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

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

Raffaldt, 318 S.C. 110, 115-16, 456 S.E.2d 390, 393 (1995)[6] and *State v. Cherry*, 361 S.C. 588, 596, 606 S.E.2d 475, 479 (2004) (In *Manning* "we held that a circumstantial evidence charge which requires the jury to seek some reasonable explanation other than the defendant's guilt 'turns the State's burden of proof on its head by requiring the jury to find a 'reasonable explanation' of the evidence inconsistent with appellant's guilt before it can find him not guilty.'").

In *State v. Needs*, the trial judge charged the jurors, "[Y]ou, the jury, must seek some other rational or logical explanation other than the guilt of the accused." And, a "reasonable doubt is a doubt which makes an honest, sincere, conscientious juror in search of the truth in the case hesitate to act." 333 S.C. 134, 151-52, 508 S.E.2d 857, 866 (1998). This Court "strongly urge[d] the trial courts to avoid using" this language when instructing jurors about circumstantial evidence and reasonable doubt. 333 S.C. at 155, 508 S.E.2d at 867. In *Aleksey*, this Court again reminded, "Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'" 343 S.C. at 26-27, 538 S.E.2d at 251 (citing *Needs*). More recently, in *State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012), this Court instructed trial judges to remove similar instructions from charge books. "Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt." *Id.* *See also State v. Beaty*, No. 2015-000718, 2018 WL 1938544 (S.C. Apr. 25,

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

2018) (trial judge's preliminary remarks to the jury, that jury's role was to "search for the truth," determine "true facts," and render a "just verdict," were improper).

Although decided after Mr. Graddick's trial, *Daniels* and *Beaty* did not articlulate a new rule of law. *Cherry*, *Manning*, *Needs*, *Raffaldt*, and *Aleksey* placed trial counsel on notice to object to this jury instruction, but trial counsel was not aware of this line of cases. *See Weik*, *supra*. Additionally, in *Cage v. Louisiana*, 498 U.S. 39 (1990), a unanimous United States Supreme Court held that the jury instruction in that case was contrary to the "beyond a reasonable doubt" requirement articulated in *In Re Winship*, 397 U.S. 358 (1970) (holding that the accused is protected against conviction under the Fourteenth Amendment except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged). The words "substantial" and "grave" suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements were taken in conjunction with the court's reference to a "moral" rather than evidentiary certainty, a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

As seen above, "[i]t is error to give instructions which may confuse or mislead the jury. The test is what a reasonable juror would understand the charge to mean." *Rothell*, 301 S.C. at 169-70, 391 S.E.2d at 229 (citations omitted). "In order to make this determination, the challenged instruction must be examined in the context of the trial court's entire charge to the jury and not in isolation." *Lowry*, 376 S.C. at 505, 657 S.E.2d at 763. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Id.* 376 S.C. at 506, 657

S.E.2d at 64 (quoting *Francis v. Franklin,* 471 U.S. 307, 322 (1965)). "Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge." *Buckner*, 341 S.C. at 247, 534 S.E.2d at 18. "A jury charge is no place for purposeful ambiguity." *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809.

Trial counsel, therefore, was ineffective for not objecting the trial judge's opening remarks and final instruction on the law. *See Gibson* and *Lowry, supra.* The trial judge's final instruction that the jurors had "one objective . . . to seek the truth regardless of its source" rendered the entire instruction invalid. *See Beaty, Daniles,* and *Aleksey, supra.* These instructions prejudiced Mr. Graddick. The State emphasized the trial judge's opening remarks during its opening statement.

Reasonable jurors could have concluded they had to determine which account was the "truth," rather than applying the burden of proof. Because the State's case against Mr. Graddick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Graddick. This Court should grant the writ, consider the issue, and order a new trial.

Question IV

Trial counsel rendered ineffective assistance of counsel by failing to object to testimony about Joseph Graddick's pre-trial incarceration when such testimony constituted improper character evidence and prejudiced Mr. Graddick by reducing his credibility in the eyes of the jurors in a case where credibility of the witnesses was the central issue for the jurors to determine.

Trial counsel was ineffective for not objecting to the testimony by Ms. Dunham and Detective Forsythe about Mr. Graddick's pre-trial incarceration. This testimony

implied Mr. Graddick's guilt and was improper character evidence pursuant to Rule 404(a), SCRE. "[E]vidence introduced for the sole purpose of implying a defendant has a prior criminal record is improper." *Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 345 (1991) (citing *State v. Tate,* 288 S.C. 104, 341 S.E.2d 380 (1986)). *See also Deck v. Missouri*, 544 U.S. 622 (2005); *Estelle v. Williams*, 425 U.S. 501 (1976).

The reference to "Charleston County," although understood by criminal law practitioners to mean incarceration in the country jail, likely was not sufficient to inform the jurors about Mr. Graddick's incarceration. Additional—and unnecessary—questioning by the prosecution, however, clarified that Mr. Graddick was incarcerated when Ms. Dunham and the children visited him and Detective Forsythe obtained the DNA sample. The nature of the questioning implied long-term incarceration, rather than short term incarceration until bond could be posted. Mr. Graddick, in fact, also was incarcerated on bench warrant for unrelated charges. Trial counsel was ineffective for not objecting to this improper character evidence. *See, e.g., Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989) (failure to object to improper character evidence was prejudicial ineffective assistance of counsel warranting a new trial). Trial counsel did not have a strategic reason for not objecting. *See Ingle* and *Freiburger, supra.* Reasonable jurors would view Mr. Graddick as less credible because of his unspecified long-term incarceration. Because the State's case against Mr. Graddick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Graddick. This Court should grant the writ, consider the issue, and order a new trial.

Question V

Appellate counsel rendered prejudicial, ineffective assistance of counsel by failing to brief on appeal testimony by Officer George Van Tine about statements made by Ms. Dunham that were impermissible hearsay and violated the Confrontation Clause.

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

Additionally, the trial judge's explanation for admitting the statements was not correct. After pointing out Ms. Dunham's "statement is made in the course of the investigation," the trial judge ruled, "He is merely indicating the purposes for which they investigated. It's not offered for the truth." A. 157-58, 161. Although police officers are sometimes allowed to explain the purpose for investigation, such testimony should not be hearsay about a specific defendant. Compare *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994) with *German v. State*, 325 S.C. 25, 478 S.E.2d 687 (1996). This Court recently "caution[ed] against the use and admission of 'investigative information.' While it may be couched in terms of explaining an officer's conduct during an investigation, it

may not be used to offer the substance of an out-of-court statement that would otherwise violate our state's rules against hearsay." *State v. King*, 422 S.C. 47, 68, 810 S.E.2d 18, 29 (2017).[7]

Because the State's case against Mr. Graddick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, appellate counsel's ineffectiveness prejudiced Mr. Graddick. This Court should grant the writ, consider the issue, and order a new trial.

Question VI

Trial counsel rendered prejudicial, ineffective assistance of counsel by failing to call Leroy Graddick to corroborate Joseph Graddick's testimony that he knew the complaining witness prior to the incident giving rise to the underlying charges.

Trial counsel was ineffective for failing to interview and call Leroy Graddick as a witness. Leroy Graddick's testimony corroborated his brother's testimony that he knew Ms. Joyner prior to the incident giving rise to the charges. Testimony that corroborates an accused's testimony is always relevant. *Washington v. Texas*, 388 U.S. 14, 22 (1967) ("Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court."). Trial counsel's failure to investigate and present Leroy Graddick's testimony amounts to ineffective assisatnve of counsel. *See, e.g. Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998) (trial counsel was ineffective for failing to call as defense witness triage nurse whose notes indicated that victim stated that her vagina was not penetrated). *And see Wiggins v. Smith*, 539

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[7] Although decided after Mr. Graddick's jury trial, *King* applied a "straightforward hearsay analysis," *King*, 422 S.C. at 66, 810 S.E.2d at 28, and did not announce a new rule of law. Mr. Graddick called the PCR court's attention to *King* in an email dated November 8, 2017. A. 610. Assuming appellate counsel was correct that the trial judge did not rule on the Confrontation Clause objection, *King* illustrates a "straight forward hearsay analysis" would have resulted in appellate relief for Mr. Graddick.

U.S. 510, 521 (2003) ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary").

Because the State's case against Mr. Graddick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Graddick. This Court should grant the writ, consider the issue, and order a new trial.

Question VII

Appellate counsel rendered prejudicial, ineffective assistance of counsel by failing to brief on the merits the trial judge limiting trial counsel's closing argument.

Trial counsel's closing argument was ***not*** improper. Although trial counsel argued the prosecution wanted to take away Mr. Graddick's freedom, he did not argue the nature of the punishment. It is general knowledge that a criminal defendant could lose his liberty if convicted. In this case, Mr. Graddick testified about Ms. Joyner's motive. He further testified Ms. Joyner called him and threatened, "You are going to jail for rape." A. 264, lines 1-18. Trial counsel's argument, therefore, was relevant and should have been allowed. The *Anders* brief did not point out the relevance of trial counsel's argument based on Mr. Graddick's testimony. Appellate counsel was ineffective for not briefing this issue on the merits. Because this case hinged on credibility, Mr. Graddick was prejudiced. Had appellate counsel adequately briefed this issue on the merits, the result on appeal would have been different. *See, e.g., Patrick, supra.*

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

Because the State's case against Mr. Graddick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, appellate counsel's ineffectiveness prejudiced Mr. Graddick. This Court should grant the writ, consider the issue, and order a new trial.

Question VIII

Joseph Graddick is entitled to a new trial based on the Cumulative Error Doctrine.

This Court must also apply a cumulative prejudice analysis. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (the prejudice must be "considered collectively, not item-by-item"). The "cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). *And see State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002).

CONCLUSION

For the foregoing reasons, this Court should grant the writ, consider the issues, and order a new trial.

Respectfully Submitted,

By ______________________

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

Attorney for Petitioner Joseph Graddick

June 7, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUN 08 2018
S.C. SUPREME COURT

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

Appellate Case No. 2018-000193

Joseph Richard Graddick, ... Petitioner,

v.

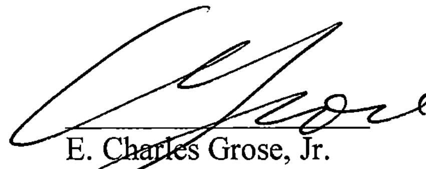
State of South Carolina, ... Respondent.

Certificate of Service

I certify that I have served a copy of Mr. Graddick's Petition for Writ of *Certiorari* and Appendix on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Megan Harrigan Jameson, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

June 7, 2018



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June 7, 2018

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

RECEIVED
JUN 08 2018
S.C. SUPREME COURT

Re: *Joseph Richard Graddick v. State of South Carolina*
Appellate Case No. 2018-000193

Dear Mr. Shearouse:

Enclosed please find the original and six copies of Ms. Graddick's Petition for Writ of *Certiorari* and two copies of the Appendix, one of which is bound and one of which is unbound, along with a certificate of service.

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

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: Mr. Joseph Graddick
Megan Harrigan Jameson, Esquire