THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2019-CP-39-1044

Aaron Van Hendrix #366876

Appellant,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Aaron Van Hendrix appeals the order of the Honorable R. Scott Sprouse dated August 8, 2022. Appellant received written notice of entry of this order on August 15, 2022.

August 17, 2022

Don A. Thompson
2131 Woodruff Road
Suite 2100, #292
Greenville, S.C. 29607
(864) 270-2831
Attorney for Appellant

Other Counsel of Record:
Lillian L. Meadows
Assistant Attorney General
S.C. Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211-1549
(803) 734-1173
Attorney for Respondent

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	)	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
Aaron Van Hendrix, SCDC #366877, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2019-CP-39-1044 **ORDER OF DISMISSAL**

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CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

I. INTRODUCTION

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Aaron Van Hendrix (Applicant) on August 14, 2019, alleging he is entitled to post-conviction relief based on constitutionally ineffective assistance of counsel. The State requested an evidentiary hearing through its return and motion for a more definite statement on January 22, 2020. A hearing into the matter convened before the undersigned on January 26, 2022, via Cisco WebEx Meetings. Applicant was present at the hearing and represented by Don A. Thompson. Assistant Attorney General Lillian L. Meadows represented the State. Applicant testified on his own behalf at the hearing, as did his trial counsel, Richard H. Warder. In addition to the pleadings in this action, this Court had before it a copy of the Pickens County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; and the records of the current PCR action.

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish

any constitutional violations or deprivations entitling him to post-conviction relief. For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

II. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. In May of 2014, Applicant was arrested following an investigation into allegations that he and his girlfriend, Stacy Carol Riden, sexually abused Riden's three minor children. During its June 2015 term, the Pickens County Grand Jury indicted Applicant for two counts of first-degree criminal sexual conduct with a minor (2015-GS-39-0227, -0229) and one count of third-degree criminal sexual conduct with a minor (2015-GS-39-0228).

On January 25, 2016, Applicant and Riden[1] proceeded to a joint jury trial before the Honorable Perry H. Gravely. Richard H. Warder (Counsel) represented Applicant and Assistant Solicitor Christopher Jones of the Thirteenth Circuit Solicitor's Office prosecuted the case.

A. Summary of Evidence Adduced at Trial

On December 29, 2013, Deputy Adam McJunkin of the Pickens County Sheriff's Office travelled to the residence of Mark and Lisa Riden ("Grandfather" and "Grandmother") in response to allegations the couple's three minor grandchildren had been sexually abused by Stacy Carol Riden ("Riden"), who was the children's biological mother, and Aaron Van Hendrix,

[1] Riden was indicted for two counts of first-degree criminal sexual conduct with a minor, one count of third-degree criminal sexual conduct with a minor, and one count of unlawful conduct towards a child, and Riden, who was not initially present for trial, was tried together with Applicant. Caroline Horlbeck of the Greenville County Public Defender's Office represented Riden.

who was Riden's former live-in boyfriend.[2] (R. 143–145; 169–70;174; 197; 202; 207–208; 240; 384). At that time, the children—a seven-year-old boy ("Victim 1"), the boy's seven-year-old twin sister ("Victim 2"), and the twins' three-year-old younger sister ("Victim 3")—had been living with their grandparents' for approximately eight or nine months, but they had previously resided with Applicant and Riden at a mobile home located in Easley, South Carolina. (R. 142–144; 154–155; 169; 175; 177; 195–96; 201–03; 211; 261; 383; 392; 396; 460).

After the allegations arose, Investigator Marvin Nix of the Pickens County Sheriff's Office began an investigation into the reported sexual abuse and referred the children to the Julie Valentine Center, a child abuse and sexual assault recovery center, for forensic interviews. (R. 237–38; 240–41; 255; 260; 298). Following the referral, Shauna Galloway-Williams, the executive director of the Julie Valentine Center, interviewed Victim 2 in February of 2014. (R. 50; 301). During the interview, Victim 2 indicated she previously lived with Applicant and Riden and asserted Riden physically abused her and did other "bad stuff" during that time. (State's Ex. # 1 (Victim 2's First Interview Recording)). Specifically regarding the other "bad stuff," Victim 2 recounted Riden held her down by her hair while Applicant rubbed and digitally penetrated her vagina over her clothing in front of Victim 1 and Victim 3. (State's Ex. # 1). Additionally, Victim 2 stated Applicant and Riden regularly talked about sex in front of them, watched pornographic movies, engaged in sex acts in front of her, took a lot of pills and "medicine," and pulled her into the shower on one occasion while they were using it together. (State's Ex. # 1). Furthermore, she indicated Riden told her not to reveal the abuse, and she noted Applicant sometimes wore Riden's clothing and used her nail polish. (State's Ex. # 1).

[2] Grandmother was the children's step-grandmother while Grandfather was the children's maternal grandfather. (R. 239; 459).

Thereafter, in March of 2014, Galloway-Williams interviewed Victim 1 and Victim 3. (R. 50; 201). During Victim 1's interview, Victim 1 stated Applicant and Riden did bad things to him and his siblings. (State's Ex. # 3 (Victim 1's First Interview Recording)). Specifically, Victim 1 recounted Applicant rubbed and poked his "privates," touched him underneath his clothing, and tried to make him touch his "privates" on multiple occasions, and he indicated Riden rubbed and poked his privates as well. (State's Ex. # 3). He also stated Riden held both him and Victim 2 down while Applicant sexually abused them, and he indicated his father observed the abuse once. (State's Ex. # 3). Additionally, he recounted Riden was physically abusive towards him along with Applicant, and he indicated Riden sometimes forced them to watch a pornographic movie. (State's Ex. # 3). Furthermore, Victim 1 indicated Applicant and Riden threatened to kill them if they revealed the sexual abuse. (State's Ex. # 3). Similarly, during Victim 3's interview, Victim 3 recounted Applicant touched her "down there" and made her touch him "down there" in Riden's presence. (State's Ex. # 5 (Victim 3's Interview Recording)). Additionally, she vacillated somewhat on whether Riden inappropriately touched her but indicated she thought she did. (State's Ex. # 5). Victim 3 also stated she observed Riden hold Victim 1 down so Applicant could touch his groin area. (State's Ex. # 5).

Following the interviews, Dr. Mary Croswell, a medical doctor and an expert in child abuse pediatrics, conducted a physical examination of each of the children. (R. 269–71; 279–80). In examining Victim 1 and Victim 2, Dr. Croswell found nothing abnormal. (R. 274–78; 281; 293). However, in examining Victim 3, Dr. Croswell found labial adhesions in Victim 3's vaginal

area, which potentially could have resulted from non-accidental trauma but also could have resulted from accidental trauma or other causes.[3] (R. 284–85).

Thereafter, Galloway-Williams again conducted a forensic interview of Victim 1. (R. 307). During the second interview, Victim 1 stated Applicant and Riden touched his and his siblings' "privates," sucked on them, licked them, and made them do reciprocal acts, and he recounted he witnessed the sexual abuse being committed upon Victim 2 and Victim 3. (State's Ex. # 4 (Victim 1's Second Interview Recording)). He further indicated Applicant and Riden put their fingers into his buttocks. (State's Ex. # 4). Additionally, he recounted he observed Applicant and Riden injecting themselves with needles, stated he observed bleeding from his siblings' "privates" after they were digitally penetrated, and again confirmed Applicant and Riden threatened to kill them if they revealed the abuse. (State's Ex. # 4). He also stated his father observed the abuse occur on some occasions but did nothing to stop it. (State's Ex. # 4). Furthermore, as to why he did not reveal all the details of the abuse during the first interview, Victim 1 indicated he failed to do so because he was scared. (State's Ex. # 4).

Likewise, Galloway-Williams also conducted a second interview of Victim 2. (R. 307). During that interview, Victim 2 recounted Applicant and Riden performed oral sex on her and her siblings and forced her and her siblings to perform oral sex on them. (State's Ex. # 2 (Victim 2's Second Interview Recording)). Additionally, Victim 2 indicated she and her younger sister bled from their vaginas after they were digitally penetrated, and she stated Applicant and Riden showed them pornographic movies. (State's Ex. # 2). Victim 2 further revealed her father witnessed the sexual abuse without intervening, and she indicated her father and one of

[3] During the examination of Victim 3, Dr. Croswell also found evidence of cavities and more dental breakdown than expected for someone Victim 3's age. (R. 282–84; 291).

Applicant's sisters inappropriately touched her on one occasion. (State's Ex. # 2). Furthermore, Victim 2 stated she did not fully reveal the abuse during the first interview because she was scared and nervous. (State's Ex. # 2).

Meanwhile, Investigator Nix met with both Applicant and Riden, and he interviewed each of them in regard to the allegations of sexual abuse. (R. 242; 244; 246–47). During the interview with Riden, Riden denied the allegations and indicated she was surprised by them. (R. 244–45). However, she confirmed Applicant had lived with her and her children for a period of time and also noted the children's father had stayed with them sometimes. (R. 245–46). Similarly, during the interview with Applicant, Applicant did not make any admissions regarding the sexual abuse. (R. 247–50). However, Applicant acknowledged he wore Riden's clothing on one occasion while he was residing with her and her children for a period of time. (R.247–48; 250; 260). He further indicated the children's father stayed with them sometimes, and he stated one of Riden's sisters took her clothes off at the residence on one occasion. (R. 248–49). At the conclusion of the investigation into the sexual abuse allegations, Investigator Nix arrested both Applicant and Riden. (R. 250–51; 259).

At trial, all three children testified about the sexual abuse they suffered at the hands of Applicant and Riden. (R. 142–206). During his testimony, Victim 1 recounted Applicant and Riden inappropriately touched his and his sisters' "privates" and forced him to perform oral sex on them, and he indicated they threatened to kill him if he revealed the abuse. (R. 144–47; 150). Additionally, Victim 1 recounted that his father was sometimes present at the home he lived in during the time period in which the abuse was occurring, but Victim 1 specifically indicated he did not believe his father was actually present when the abuse occurred and was not there laughing when the abuse was happening. (R. 164–65). Similarly, Victim 2 recounted Applicant

and Riden touching her "privates," making her touch their "privates," and making her perform oral sex on them. (R. 169–70). She further indicated she saw Applicant and Riden touch her siblings' "privates," and she stated she did not reveal the abuse because Applicant and Riden threatened her. (R. 170–73). Furthermore, she indicated that her father was sometimes present at the home she lived in at the time of the sexual abuse but never actually witnessed the sexual abuse occur. (R. 173–74). Likewise, Victim 3 recounted she was inappropriately touched on a "bad place" by Applicant and Riden. (R. 197–98).

Following the children's testimony, the law enforcement officers who responded when the sexual abuse was disclosed testified about the details of their investigation and about the statements made by both Applicant and Riden.[4] (R. 207–11; 237–66). Additionally, Dr. Croswell testified about her findings during her physical examinations of the children, and she noted it was "[q]uite rare" for physical findings to be made in child sexual abuse cases. (R. 269–86; 291–93). Furthermore, Galloway-Williams informed the jury she conducted forensic interviews of the children, and the recordings of the four interviews of Victim 1 and Victim 2 were admitted into evidence over objection and played for the jury with redactions. (R. 298–304; 306–07; 310).

Thereafter, the solicitor continued forward with the State's case and called Christine Carlberg to the witness stand. (R. 318). During her testimony, Carlberg—who had no contact with the victims, had not seen any recordings of the victims' statements, and had not read any statements from the victims—was qualified as an expert in child abuse dynamics. (R. 328–29; 331–32). Upon being qualified as an expert, Carlberg generally discussed delays in disclosure of

[4] During Investigator Nix's testimony, he specifically noted no one—including the victims' father and Riden's sisters—other than Applicant and Riden was arrested and charged in connection to the abuse of the victims. (R. 259–20).

sexual abuse and explained general concepts related to the disclosure process, grooming, and coaching for the jury. (R. 330–62). At the conclusion of Carlberg's testimony, the State rested. (R. 365–66).

Riden then testified in her own defense. (R. 365–66; 380). During her testimony, Riden denied the allegations in total, stated she never touched or rubbed her children's genitals in an inappropriate manner, claimed she would never perform digital penetration or oral sex on her children, and indicated she did not know why the allegations were being made or if the children were coached. (R. 380–83; 391; 395–96). Additionally, she indicated she never observed anyone else, including Applicant, engage in inappropriate interactions with the children, stated she would have killed Applicant if she discovered he was abusing her children, and denied Applicant ever sexually abused the children. (R. 383; 385–86; 396; 419). Following Riden's testimony, Riden rested her case. (R. 441).

Applicant also elected to testify in his own defense. (R. 421; 442). During his testimony, Applicant—like Riden—completely denied the allegations and claimed the children were not sexually assaulted. (R. 445–46; 448). However, Applicant conceded he had no idea what happened in the home after he moved out in December of 2012. (R. 444; 447–48).

In addition to Applicant's testimony, Mark Lusk, who was the children's biological father, testified as a part of Applicant's defense.[5] (R. 424; 452). During Lusk's testimony, Lusk indicated he never saw anything inappropriate occurring at Riden's residence when Applicant and the children were living there. (R. 426; 429). He also specifically denied he ever sexually abused the children or witnessed anyone sexually abusing the children. (R. 436–37; 441).

[5] Luanne Queen, who was Applicant's mother, also testified in Applicant's defense, indicated she interacted several times with Applicant and the children, and noted the children always seemed happy and free of signs of physical abuse or injury. (R. 452–56).

Furthermore, Lusk denied ever getting into a bed with Applicant, and he unsubtly implied he would have killed anyone he saw hurt or do anything inappropriate to his children. (R. 429; 436).

Thereafter, Applicant rested his case, and the State called Grandfather in reply. (R. 457; 459). During his testimony, Grandfather confirmed Lusk asked him to come and get the children because there was no food in Riden's house, people were coming and going from that location, and Lusk was afraid the children would starve or be hurt if they were not removed from the home. (R. 461). He further stated he spoke with Riden after she was arrested, and she denied the charges. (R. 461–62). However, Grandfather indicated Riden stated she was influenced by drugs if she had anything to do with the allegations and expressed remorse about missing warning signs regarding Applicant. (R. 462; 464).

Following the presentation of that evidence and testimony, the parties presented their closing arguments to the jury, the trial judge instructed the jury on the law, and the case was submitted to the jury. (R. 472–545).

B. Verdict & Subsequent Proceedings

Following the four-day trial, the jury convicted Applicant as indicted. Judge Gravely sentenced Applicant to concurrent terms of twenty-five years' imprisonment for each count of first-degree criminal sexual conduct with a minor and a consecutive term of twelve years' imprisonment for third-degree criminal sexual conduct with a minor.[6]

Applicant filed a timely notice of appeal. Appellate Defender David Alexander perfected Applicant's appeal by filing a brief with the Court of Appeals on the following issue:

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[6] Riden was also convicted as indicted. Judge Gravely sentenced her to concurrent terms of twenty-five years' imprisonment for each count of first-degree criminal sexual conduct with a minor and fifteen years for third-degree criminal sexual conduct with a minor along with a consecutive term of imprisonment of ten years for unlawful conduct towards a minor.

> Whether the trial court erred in granting the State's request, over [Applicant]'s objection, to redact portions of the children's forensic interviews where they alleged their father and his girlfriend were present during sexual abuse, participated in the sexual abuse, and were told about the sexual abuse where this evidence was relevant as it tended to disprove the children's claims because the father testified in [Applicant]'s case that if he had known about any abuse, the defendants "would not be here. They would be dead" and its removal violated the rule of completeness?

Following briefing and oral argument, the Court of Appeals affirmed Applicant's convictions. *State v. Van Hendrix*, Op. No. 2019-UP-022 (S.C. Ct. App. filed Jan. 9, 2019). The case was remitted back to the circuit court on January 25, 2019.

III. CURRENT APPLICATION

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following (verbatim):

1. Ineffective Assistance of Counsel
   a. "A hearing problem during trial;"
   b. "I was not advised of the severety[*sic*] of the charges against me nor the amount of time they carry;" [and]
   c. "I provided council [*sic*] with the picture that [Victim 2] drew and wrote, 'I love you Aaron' on; she testified to having not drawn it so it certainly could have been used in trial in my favor"

At the outset of the evidentiary hearing, PCR counsel confirmed Applicant would be proceeding only on the claims raised in the original application.

IV. STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[7] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

[7] S.C. Code Ann. §§ 17-27-10 to -160.

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

2. That the court was without jurisdiction to impose sentence;

3. That the sentence exceeds the maximum authorized by law;

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington,* 466 U.S. 668, 685 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a prima facie violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of

the proceeding would have been different but for counsel's deficient performance. *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland*, 466 U.S. 668). The applicant bears the heavy burden of establishing both prongs of the *Strickland* standard, and failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)). Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" demanded of attorneys in criminal cases. *Id.*

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 816 (1985). "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.' " *Dunn v. Reeves*,

594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen*." *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding").

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The reviewing court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). Further, "even if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

Review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at

689. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Id.* at 688–89; *cf. id.* at 691 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." *Dunn*, 594 U.S. ___, 141 S. Ct. at 2410 (quoting *Harrington*, 562 U.S. at 106–07). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." *Id.* (quoting *Harrington*, 562 U.S. at 108).

Thus, a fair assessment of attorney performance requires 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. *Strickland*, 466 U.S. at 689; *see Mazzell v. Evatt*, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial"). The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland*'s deferential standard.

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. 466 U.S. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see id.* at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

When evaluating this probability, the reviewing court must "consider the specific impact counsel's error had on the outcome of the trial" coupled with "the strength of the State's case in light of . . . the [totality of the] evidence presented to the jury." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018); *Strickland*, 466 U.S. at 695–96. It is not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the defendant of a fair trial.*" *Strickland*, 466 U.S. at 687 (emphasis added). 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." *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843 (citing *Strickland*, 466 U.S. at 696) (stating "a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"). Accordingly, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. The applicant's burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. *Id.* at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Id.* at 686; *cf. United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

V. FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claims of ineffective assistance of counsel articulated at the start of the hearing and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

1. *Hearing problem during trial*

Applicant first contends trial counsel was ineffective because Counsel, at some point during trial, allegedly could not hear the judge due to a hearing impairment. When asked about this allegation at the PCR hearing, Applicant testified that at some point during trial, Judge Gravely was speaking and Counsel had to ask the judge to repeat himself because he did not hear

him. Applicant stated merely that he is not sure what Counsel missed. When asked to identify where in the transcript or on what day of his trial this occurred, Applicant stated he could not remember. Rather, he testified that Counsel had a hearing aid and speculated that maybe Counsel could not hear anything that morning. Counsel testified that he does recall any point during the trial where he was unable to hear or understand what the judge was saying. However, had that happened, he would have spoken up immediately.

This Court finds Applicant failed to overcome *Strickland*'s strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment in his representation of Applicant at all stages of the trial. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Counsel's credible testimony indicates he would have immediately notified the judge if he could not hear the judge—or anyone else for that matter—at any point during the trial. This Court further finds Applicant wholly failed to present any evidence or testimony specifying what, when, or where in the record he believes Counsel was having trouble hearing. *See Strickland*, 466 U.S. at 690 ("A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment."). Applicant's belief that Counsel may have missed something at some point during his trial is nothing more than speculation. *See Simpson v. Moore*, 367 S.C. 587 n.2, 598, 627 S.E.2d 701, 707 n.2 (2006) (noting that a PCR applicant "may not simply posit suppositions and speculations in an attempt to establish that counsel was ineffective"), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836; *United States v. Basham*, 789 F.3d 358, 375 (4th Cir. 2015) (emphasizing that *Strickland*'s "prejudice requirement [cannot be satisfied] through 'rank speculation, defying calculation of a reasonable probability'" (citation omitted)). Because Applicant failed to establish deficient performance or any resulting prejudice,

Applicant's claim pertaining to Counsel's purported inability to hear the judge during trial is **DENIED.**

2. ***Failure to advise Applicant on the severity of the charges and potential sentence***

Applicant next contends Counsel provided ineffective assistance by failing to advise him of the severity of the charges he was facing and potential sentence he could receive if convicted. At the PCR hearing, Applicant first testified Counsel never discussed with him the seriousness of the charges or potential sentence he could receive. Applicant then testified that, he had known about the potential sentence he could receive, it would have given him "something to think about." Specifically, Applicant testified he would have talked about it with his family, who maybe could have convinced him to plead guilty. Applicant recalled the State making him a twelve-year offer and fifteen-year offer. When asked why Applicant rejected those offers, he stated that he was innocent and did not think he would be convicted.

Counsel confirmed that the State made at least one plea offer although he could not recall the specific terms. However, Counsel testified he was confident that he informed Applicant of the severity of the charges against him and the potential sentence he was facing because it is his general practice to discuss these matters when consulting with a client about a plea offer. In fact, Counsel stated that he would never advise a client about a plea offer with a client without thoroughly discussing and comparing the sentences he or she could receive. He further recalled explaining to Applicant the advantages and disadvantages of pleading guilty versus going to trial. Nonetheless, Counsel stated, Applicant rejected the offer because he did not think he would be convicted at trial.

This Court finds Applicant failed meet his burden under *Strickland* regarding his allegation he did not understand or was never informed of the sentence he was facing if

convicted at trial or the seriousness of the charges against him as a result of ineffective assistance of counsel. Counsel's credible testimony demonstrates that, despite advising Applicant of the risks of trial and the benefits of accepting the plea offer, Applicant chose to go to trial because of his insistence that he was innocent and would not be convicted of these offenses. Applicant, on the other hand, presented inconsistent testimony regarding his understanding of the plea offers and what Counsel told him. Considering Counsel's recollection of his discussions with Applicant regarding the plea offers, coupled with his testimony regarding his established practice, this Court finds Applicant failed to demonstrate Counsel's representation "fell below an objective standard of reasonableness" as measured by "prevailing professional norms" in this regard. *Strickland*, 466 U.S. at 688.

Applicant further failed to demonstrate a reasonable probability that he would have accepted the plea offer even if Counsel was somehow deficient in this regard based on Applicant's own testimony that he did not accept any plea offer because he was innocent. *See Hill*, 474 U.S. at 59 ("In the context of plea negotiations, the prejudice element turns on whether counsel's performance affected the defendant's final decision to accept or reject a plea offer). Rather, Applicant's only claim of prejudice is that he would have talked about it with his family—who maybe could have convinced him to plead guilty—had Counsel properly advised him of the severity of the charges and the sentence he was facing. Applicant therefore failed to demonstrate a reasonable probability that the result of the proceeding would have been different absent Counsel's alleged errors. *Strickland*, 466 U.S. at 689, 694. Accordingly, Applicant's request for relief by way of this claim is **DENIED.**

3. ***Failure to impeach Victim 2 with drawings***

Finally, Applicant contends Counsel was ineffective for failing to impeach Victim 2's credibility with a drawing Victim 2 gave Applicant. At the PCR hearing, Applicant testified he gave Counsel several drawings Victim 2 gave him when they were living together in Riden's home. Specifically, he stated Victim 2 wrote "I love you" or "you're my best friend" on one of the drawings. He recalled Riden's lawyer questioning Victim 2 about the drawing at trial in the following portion of her cross-examination:

> RIDEN'S COUNSEL: Do you remember drawing some things for Mr. Hendri[x], or Aaron?
>
> VICTIM 2: I don't remember.
>
> RIDEN'S COUNSEL: Did you ever draw him anything that said, "You're my best friend"?
>
> VICTIM 2: No, ma'am, I didn't.
>
> RIDEN'S COUNSEL: You don't think you did that?
>
> VICTIM 2: No, ma'am, I didn't.

(R. 179). However, no drawing was admitted into evidence nor shown to Victim 2.

Applicant stated that Counsel never did anything with the drawings or asked Victim 2 about them. He believes Counsel should have used one of the drawings at trial although in Applicant's opinion, the drawing by itself "does not show much." However, he testified that, "put together with all of [his] other issues," Counsel could have shown the drawing to Victim 2 to impeach her credibility during his cross-examination. He further stated that Victim 2's credibility was crucial at trial. Applicant stated he could not remember if he was there or saw Victim 2 making the drawing; however, he testified he could recognize her drawing and handwriting.

At the PCR hearing, Counsel produced the three drawings or notes he received from Applicant that allegedly came from Victim 2. (*See* State's Exhibit #1–3). Counsel described the first drawing as a picture with the sky drawn in blue with two little girls standing next to a house that looks like a penis. (State's Exhibit #1). Victim 2's name is written on the back. The remaining two drawings are valentines. Counsel described the first valentine as a piece of paper with a badly drawn heart with, "I love you Aaron" written at the top. (State's Exhibit #2). More hearts are drawn on the back and "From [Victim 2] to Aaron." The other valentine is a printed Hello Kitty card with the text "To: Aaron" on one side and "from: [Victim 2]" on the other. (State's Exhibit #3).

Counsel was asked if he considered using any of these drawings at trial. He testified that he considered it but decided they would not be helpful. Counsel stated he still believes they would be more harmful than helpful. In Counsel's opinion, it is best to stay away from anything involving the word "love" when representing a defendant charged with CSC with a minor. Counsel additionally confirmed that Riden's counsel never showed any drawings during her cross-examination of Victim 2 and that no drawings were used at all at trial. On cross-examination, Counsel stated that he believes Victim 2 denied drawing the pictures. When asked whether the case was based on the credibility of the children, Counsel agreed that, in his opinion, the jury had to believe the children to return the guilty verdicts. He stated there were no eyewitnesses other than the children and the credibility of the children was paramount.

This Court finds Applicant failed to establish Counsel's decision not to impeach Victim 2 with the drawings fell below an objective standard of reasonableness under the highly deferential review required by *Strickland*. *See Strickland*, 466 U.S. at 689 (explaining that review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-

guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable"). No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Id.* at 688–89; *cf. id.* at 691 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). Accordingly, when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Underwood v. State*, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); *see Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) ("Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel (citing *Goodson v. United States*, 564 F.2d 1071 (4th Cir.1977)).

Here, Counsel articulated a strategic decision to forego impeaching the seven-year-old child with her drawings indicating she loved Applicant because Counsel believed doing so could RSS harmful be more than helpful. *See Gustave v. United States*, 627 F.2d 901, 906 (9th Cir. 1980) (explaining that, like the manner and scope of cross-examination generally, "[i]mpeachment tactics are generally held to be matters of trial strategy which are to be afforded deference"). Because Victim 2 was undoubtedly a sympathetic witness, an attempt to impeach her could risk alienating the jurors who might view it as an unfair attack on a young child. Further, none of the drawings Applicant provided to Counsel say, "you're my best friend," which is what Riden's counsel specifically asked Victim 2 about. The impeachment value of the drawings in Counsel's possession was therefore minimal, and in fact one of them depicts, in Counsel's opinion, a house

shaped like a penis. Given the totality of the circumstances, this Court finds Applicant failed to demonstrate that Counsel's decision not to use these drawings at trial fell below an objective standard of reasonableness.

Even assuming Counsel was deficient in this regard, Applicant failed to demonstrate a reasonable probability that, but for Counsel's failure to impeach Victim 2 with the drawings, the jury "would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695; *see Dell v. Straub*, 194 F. Supp. 2d 629, 651 (E.D. Mich. 2002) ("Impeachment strategy is a matter of trial tactics, and tactical decisions are not ineffective assistance of counsel simply because in retrospect better tactics may have been available."). A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In light of the aforementioned fact that none of the drawings provided to Counsel contradicted Victim 2's testimony that she never gave Applicant "you're my best friend" drawing, Counsel's failure to impeach her with these drawings is hardly "sufficient to undermine confidence in the outcome" of Applicant's trial. *Strickland*, 466 U.S. at 694. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

VIII. ALL OTHER ALLEGATIONS

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

IX. CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has the right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

2022 AUG 15 A 8:50
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
RECEIVED
AUG 22 2022
S.C. SUPREME COURT

AND IT IS SO ORDERED this 8 day of August, 2022.

R. SCOTT SPROUSE
Presiding Circuit Court Judge
Thirteenth Judicial Circuit

Walhalla, South Carolina