

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF DORCHESTER
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2017CP1801925

Herbert Holmes		South Carolina State Of	
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

CERTIFIED COPY
 2022 SEP 20 11:4:25
 Clerk of Court
 DORCHESTER COUNTY

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:
ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Robert Bonds	2770	9/20/2022
Circuit Court Judge	Judge Code	Date

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S.C. SUPREME COURT

For Clerk of Court Office Use Only

This judgment was entered on 9/20/2022, and a copy mailed first class or placed in the appropriate attorney's box on 9/20/2022, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

Cheryl Graham - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

) IN THE COURT OF COMMON PLEAS
) CERTIFIED COPY FOR THE FIRST JUDICIAL CIRCUIT

Herbert Leroy Holmes, SCDC #139850, 2022 SEP 20 PM 1:25 Case No. 2017-CP-18-01925

Applicant,

Cheryl B. Adams
CLERK OF COURT
DORCHESTER COUNTY

v.

State of South Carolina,

Respondent.

**ORDER DENYING POST-CONVICTION
RELIEF BUT GRANTING BELATED
APPELLATE REVIEW PURSUANT
TO *WHITE V. STATE***

This matter comes before this Court by way of post-conviction relief action commenced by Applicant Herbert Leroy Holmes on November 21, 2017. An evidentiary hearing into the matter convened before the undersigned on May 19, 2022. Applicant was present and represented by Christopher R. Geel, Esquire. Assistant Attorney General Samantha J. Weidauer represented the State. Applicant testified on his own behalf at the hearing. Trial counsel, Mitchell Farley, Esquire, also testified.

In addition to the pleadings in this action, this Court had before it a copy of the Dorchester County Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the records from Applicant's direct appeal, and the pleadings and records in this post-conviction relief action.

After a full review of the record before the Court, and after observing the testimony presented, this Court finds Counsel was not ineffective and Applicant's allegations regarding ineffective assistance of counsel at trial are without merit. However, this Court finds Applicant is entitled to a belated appeal pursuant to *White v. State*¹.

¹ *White v. State*, 263 S.C. 110, 208 S.E.2d 35, (1974).

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. During its May 2011 term, the Dorchester County Grand Jury indicted Applicant for criminal sexual conduct – first degree (2011-GS-18-0257) and kidnapping (2011-GS-18-0256). On April 22-25, 2013, Applicant proceeded to a jury trial before the Honorable Diane S. Goodstein. Mitchell Farley and Ash Chisholm, Esquires, represented Applicant. Glenn Justis and Phil Giese of the First Circuit Solicitor's Office prosecuted the case. At the conclusion of trial, the jury found Applicant guilty as indicted. Following the verdict, Judge Goodstein sentenced Applicant to concurrent terms of life imprisonment for the kidnapping charge and thirty years for the criminal sexual conduct charge².

Applicant filed a timely notice of appeal. On June 10, 2013, the Court of Appeals improperly dismissed Applicant's appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR, for failure to provide a sufficient showing. *State v. Holmes*, (S.C. Ct. App. filed June 10, 2013). The case was remitted back to the circuit court on June 27, 2013.

Following the filing of the remittitur, Applicant wrote a letter to the Court of Appeals, received by the Court on October 16, 2017. In this letter, Applicant states his appeal did not arise from a guilty plea - rather, from a trial. Applicant contended the Court of Appeals improperly processed his direct appeal. By letter dated January 10, 2018, the Court of Appeals Clerk of Court replied, informing Applicant the sending of the remittitur ended the Court's jurisdiction over the appeal and therefore, the Court could take no further action. Applicant commenced this PCR action on November 21, 2017.

² These sentences were to run consecutively to the life sentence Applicant was already serving on unrelated charges.

II. Factual Summary

On October 25, 1984, Ms. Pamela Riden was working by herself at a local bookstore in Summerville called The Bookbag when a young black male walked in and asked her where the mystery section was. (Tr. pp. 83-85). She pointed him to it, he went and looked around, and then headed to the cash register. (Tr. pp. 84-85). He walked behind the register, pulled a gun on Ms. Riden, and told her to empty the cash register, which she did. Tr. pp. (85-86). When she was done with that, he pointed her to a back room in the same store. (Tr. p. 86). He then demanded she take her clothes off and he forced her to perform oral sex on him, then anally and vaginally raped her. Tr. pp. 87-88. He asked her to take her wedding ring off, he took it then fled the scene. (Tr. p. 88). Paramedics were eventually called, and Ms. Riden was taken to the hospital where evidence was taken from her clothing and from her body. (Tr. pp. 89-90). Detectives Burt Salvely and James Knight went to the hospital and took the victim's statement. (Tr. p. 137). Ms. Riden was able to describe the assailant, but she was not able to identify anyone in a photo lineup. (Tr. pp. 84-85, 92, 150).

Evidence was submitted to SLED in 1985, and Kenneth Bogan performed a visual examination of the clothing evidence and chemical analysis of the body fluid stains. (Tr. p. 308). Bogan prepared a report of his findings for the Dorchester's Sheriff's Office which stated he was able to identify male reproductive cells from the vaginal wash evidence. (Tr. p. 308). Bogan also identified semen on the skirt of the victim, but the vaginal swab analysis was inconclusive. (Tr. p. 309). Bogan testified at trial that he was unsuccessful in finding any blood or semen on the rest of the clothing. (Tr. p. 309). Bogan then repackaged and resealed the evidence and sent it back to the Sherriff's Office. (Tr. p. 310). In 1988, the Sherriff's Office resubmitted the evidence because it identified a person of interest, Barry Daniels, but SLED was not capable of performing a DNA

analysis at that time. (Tr. pp. 165, 310-316). It was then resealed and returned back to the Sherriff's Office. (Tr. p. 314, 316).

After years of an unsuccessful investigation, Lieutenant Asbell went back to this case and decided to send the evidence back to SLED for DNA analysis in 2009. (Tr. p. 203, 317). Bogan extracted DNA from the vaginal wash and swabs but was only able to get a partial profile. (Tr. p. 321). However, this time he was also able to get DNA from the victim's panties and skirt. (Tr. p. 321). From those items, Bogan obtained a DNA mixture of at least two individuals and a partial profile from a major contributor. (Tr. p. 322). The profile from the major contributor on the panties was from a male individual, and the profile from the major contributor on the skirt came from the victim. (Tr. p. 322). The minor contributor on the panties came from the victim. (Tr. p. 322). Bogan received a reference sample of Applicant's DNA, developed a profile, and compared it to the DNA extracted from the victim's clothing and body. (Tr. p. 324).

SLED then requested secondary DNA samples from Applicant. (Tr. pp. 216-17). Following that request, Detective Parker became involved in the case, contacted Applicant, and obtained a search warrant for his DNA. (Tr. p. 217). Bogan testified at trial that Applicant's DNA was found on the victim's panties. (Tr. pp. 271, 330-331).

III. Issues Before This Court

In his original application for post-conviction relief, filed May 27, 2017, Applicant alleges he is being held in custody unlawfully based on:

1. Ineffective assistance of counsel
 - a. "Counsel failed to call critical witnesses";
 - b. "Trial counsel failed to adequately investigate";
2. Ineffective assistance of appellate counsel
 - a. "Appellant counsel improperly processed appeal";
3. "Denial of direct appeal"; and
4. "Violation of my 14th amendment due process rights".

Pursuant to Rule 71.1, SCRPC, on May 24, 2022, Applicant, through PCR counsel, filed an amendment to his application to include the following allegations (verbatim):

1. The Applicant is entitled to a belated direct appeal, pursuant to White v. State, 263 S.C. 110 (1974). Applicant never received a direct appeal, and Applicant never knowingly and intelligently waived this right.
2. Trial counsel was constitutionally ineffective in failing to call critical witnesses on behalf of the defense at trial.
3. Trial counsel was constitutionally ineffective in failing to adequately investigate the case and failing to challenge the chain of custody adequately.
4. Trial counsel was constitutionally ineffective in failing to adequately cross examine the victim regarding her version of events.
5. Trial counsel (and the public defender office) had a material conflict of interest in this case.

To the extent the allegations set forth in Applicant's application can be construed as separate grounds for relief from the grounds stated at the PCR hearing, the 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.

IV. Relevant Testimony Presented at Evidentiary Hearing

Applicant Herbert Leroy Holmes' Testimony

By way of background, Applicant testified he is fifty-seven years old and completed the 9th grade; Applicant further testified he had family issues and left home and school during his 10th grade year. Applicant stated he has previously worked as an electrician, as a carpet installer, a flagpole and sign installer, in brick masonry, and in janitorial work. Regarding the subject crimes, Applicant testified he discovered he had been charged with them after learning the South Carolina Department of Corrections (SCDC) had a hold on his account when he was up for parole. Applicant testified that though he was eligible for parole, he was never released on bond. Rather, Applicant stated he was transferred from SCDC to the St. George Detention Center to await trial on the

instant indictments.

Applicant testified Mitchell Farley (Counsel) was appointed to his case in 2013. When asked how many times he met with Counsel, Applicant testified they met approximately six times. Applicant testified Counsel reviewed discovery with him and informed him of the elements of the crimes he was indicted for. Applicant further testified Counsel discussed possible defenses for trial with him. Specifically, testifying to one defense – getting the trial court to quash the evidence due to an improper chain of custody. Applicant further testified he believed SLED had mislabeled his evidence.

Regarding Applicant's allegation he is entitled to a belated direct appeal, Applicant testified it was always his intention to appeal his case and believed Counsel had properly appealed the matter on his behalf. Applicant testified he received the Order of Dismissal from the Court of Appeals in 2013 and did not file his application for post-conviction relief until 2017; however, Applicant further testified he continued to want an appeal from his convictions from 2013 to 2017.

Regarding Applicant's allegation Counsel was ineffective for failing to call a critical witness on his behalf at trial, Applicant testified that neither the 911 operator nor the 911 caller were called to testify at his trial. Applicant posited no testimony was elicited at trial regarding the state of the victim when she entered the shop next door seeking help. Applicant testified he believed the caller's testimony would have helped his case because the caller could have testified to what she observed at the scene. On cross-examination, the State further inquired regarding Applicant's allegation. Applicant testified he did not recall a witness testifying to victim's appearance following the incident. Applicant further testified he did not recall testimony from Rick Campbell³, a witness from the office next door, who testified at trial to Applicant's state following

³ Mr. Campbell testified he worked at a State Farm Insurance agency located next to The Bookbag, the store where the incident occurred. Mr. Campbell testified: "I was in the office at the time and my receptionist

the incident. Applicant further testified he believed the 911 caller's testimony would have differed. Applicant stated he did not have a discussion with his attorney regarding not calling witnesses.

Applicant further alleged Counsel was ineffective for failing to investigate and challenge the chain of evidence. Applicant testified he believed the evidence in this matter had been mislabeled and asserted there were detectives involved in the chain of evidence who were deceased and who could no longer be called to testify. Applicant asserted he brought this alleged issue to Counsel's attention positing, there was no discussion at trial regarding any chain of evidence issue. Applicant testified he believed Counsel should have investigated how the evidence in this case was collected, who the evidence was passed to and from, and who tested the evidence.

Regarding Applicant's allegation Counsel was ineffective for failing to adequately cross-examine the victim, Applicant testified Counsel did not question the victim regarding the identity of the assailant. Applicant testified he learned from discovery there was a white suspect and a black suspect in this matter. Applicant further testified SLED received information on both him and the white suspect. Applicant asserted Counsel failed to look into both suspects law enforcement had in this case. Applicant testified Counsel did not question the victim regarding the identity of the assailant, specifically, whether the assailant was an African American. When asked whether Applicant remembered victim testifying, at trial, that the assailant was a black male, Applicant testified he did not remember.

Additionally, Applicant testified he was concerned with Counsel's performance because Counsel failed to question victim regarding her panties, as panties were sent to SLED for testing in this case. Applicant suggested that because victim testified, at trial, she did not have panties on

screamed and I ran up front and – twenty-nine years so I do remember [victim], she had come out of the front door and she was holding her clothes up around her and my receptionist was comforting her. (Tr. 96-97).

at some point during her attack, the panties that were tested could not have been hers⁴. Applicant contends that if victim was not wearing panties at the time of the offense, there should not have been any panties in evidence to test.

Regarding Applicant's allegation trial counsel and the public defender's office had a material conflict in this case, Applicant testified attorney John Loy, who had previously prosecuted Applicant in a separate matter, was Counsel's superior at the time of trial. Applicant testified Counsel discussed with him Mr. Loy's involvement in Applicant's prior case and informed him Mr. Loy may sit in on his hearing; however, Applicant contended he never saw Mr. Loy. Applicant testified he did not learn of the potential conflict until his second meeting with Counsel. Applicant testified Counsel did not say anything further to him about the alleged conflict and again confirmed he never saw Mr. Loy at trial, nor spoke with him.

Trial Counsel Mitchell Farley's (Counsel) Testimony

Counsel testified he has been practicing law since 2007 and that 99% of his practice since that time has been criminal law. Counsel testified Applicant's file was opened in 2011 and this matter was tried in 2013. When asked how many times Counsel met with Applicant, Counsel testified it is his practice to meet with clients at least once a month; Counsel further stated he does not independently recall how many times he met with Applicant, but believes it was between six and ten times. Counsel testified during those meetings he reviewed discovery with Applicant and discussed the indictments with Applicant. Counsel testified Applicant did not receive any plea offers from the State. Counsel further testified he believed trying the case was Applicant's best option as Applicant was facing life without parole (LWOP).

⁴ At trial, the solicitor questioned victim witness as follows: "Okay. After he forced you to have oral sex with him, what happened then?" Victim responded: "He told me I had to bend over and I didn't have any underwear on and he performed anal sex on me." (Tr. 87).

Regarding Applicant's allegation he is entitled to a belated direct appeal, Counsel testified Applicant asked him to file a direct appeal on his behalf. Counsel testified he submitted a letter with the notice of appeal on the date trial concluded. Counsel testified he believes his paralegal drafted the notice of appeal on his behalf, conceding he did not properly review the notice of appeal prior to filing. Counsel testified he did not realize he had incorrectly filed Applicant's notice of appeal and cited to the incorrect standard (the guilty plea standard) until after the order dismissing the appeal was returned to him. Counsel stated he did not intend to withdraw Applicant's appeal on his behalf. Additionally, Applicant's counsel and the State stipulated to an affidavit from Chief Appellate Defender, Robert M. Dudek, regarding his understanding as to why Applicant's matter was not reviewed by Appellate Defense prior to the Court's dismissal⁵. (See Applicant's Exhibit #1 – Affidavit of Robert M. Dudek).

Regarding Applicant's allegation Counsel was ineffective for failing to call critical witnesses at trial, Counsel testified he does not recall Applicant ever asking about a 911 caller, nor does he remember seeing a 911 call that would have been admissible at trial. Counsel testified he did not believe there were any rebuttal witnesses regarding the state of victim following the incident, nor did Applicant produce any witnesses to Counsel for him to investigate.

Applicant further alleged Counsel was ineffective for failing to investigate and challenge the chain of evidence. Counsel testified his main defense in this matter involved the chain of

⁵ In Mr. Dudek's affidavit, he states that within the notice of intent to appeal, Counsel wrote: "This appeal is filed at the request of defendant Herbert Holmes, SCDC#00139850. However, counsel is not aware of any exceptions to Rule 203." (Applicant's Exhibit #1 – Affidavit of Robert M. Dudek). Mr. Dudek further states the Court sent a letter to Counsel instructing him to forward his guilty plea explanation to Applicant and to instruct Applicant to inform the Court of Appeals on any arguable basis for there being a legal issue preserved for appeal. (*Id.*) Mr. Dudek further stated that the Division of Appellate Defense does not open a file in guilty pleas unless and until the Court of Appeals informs Appellate Defense that the plea appeal is going forward and therefore would not have opened a file in Applicant's matter as they had no notice the appeal was not from a guilty plea. (*Id.*)

custody; Counsel further testified he believed the State had a very serious chain of custody issue. Specifically, Counsel stated the chain of custody was not well documented – the offices where the evidence in this matter had been kept had moved, SLED had tested some of the evidence more than once, and there was a deceased person in the chain of evidence. Additionally, Counsel added there was very little by way of chain of custody produced from the sheriff's office.

Counsel testified that prior to trial he thoroughly prepped and investigated each part of the chain of custody, mapping it out. Counsel further testified he made a motion to exclude the DNA evidence because of chain of custody issues and believed Applicant had a fighting chance to get the evidence excluded⁶. Counsel testified the trial court ultimately denied the motion to exclude – ruling the evidence was admissible but that the parties could argue the weight of the evidence. Counsel testified the chain of custody was the most integral part of his trial defense strategy and that most of the trial revolved issue with the chain of custody, not what happened the night of the incident.

Regarding Applicant's allegation Counsel was ineffective for failing to adequately cross-examine the victim, Counsel testified the victim in this case was brutally raped. Counsel further testified victim was very emotional during her testimony and as such, he did not want to appear to batter her regarding the incident more than was necessary. Counsel testified he did not believe asking about victim's panties would have helped Applicant's case when their main defense was to tear down the chain of custody. Counsel testified he remember noting at trial that victim testified she did not have on panties during the attack; however, despite testifying he believed he may have had reason to not bring that point up during closing, Counsel could not recall why he did not argue

⁶ Counsel moved to exclude the evidence on the basis the chain had not been produced as well as on the basis the evidence had possibly been contaminated. (Tr. 274). Following Counsel's lengthy argument in support of his motion to exclude the DNA evidence, the trial court denied Applicant's motion to exclude, noting Applicant's concerns went to the weight of the evidence rather than to the admissibility (Tr. 298).

victim's inconsistent testimony to the jury.

Furthermore, Counsel agreed with Applicant's counsel when asked whether it was important to ensure the panties were the same pair of panties the entire time. However, Counsel did not recall challenging the chain of custody on that specific ground. Counsel testified that though victim testified she had no panties on when the assault occurred, she later stated in her testimony she put her clothes back on after the assault.

Regarding Applicant's allegation trial counsel and the public defender's office had a material conflict in this case, Counsel testified he did inform Applicant about John Loy's employment with the Public Defender's Office. However, Counsel further testified he did not believe there was a conflict. Counsel testified Mr. Loy had no involvement in the case whatsoever and confirmed Mr. Loy gave him no direction regarding the case. Counsel testified he does not recall Mr. Loy asking to sit in on Applicant's case.

V. Standard of Review

An applicant may seek PCR upon the following types of allegations:

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).

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).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRPC. 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) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *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)).

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*, 286 S.C. at 445, 334 S.E.2d at 816. “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).

“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 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). “[E]ven 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. *Strickland*, 466 U.S. at 688–89; *see 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 106–107). "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. 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. *Id.* 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*, 300 S.C. at 117–18, 386 S.E.2d at 625. 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”).

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. 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.*” *Id.* at 687 (emphasis added). “An 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.” *Id.* 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). A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

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. 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. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). 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. 466 U.S. 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; 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"); 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.").

VI. 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 made by counsel and Applicant, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claims raised and finds all to be without merit except Applicant's allegation pursuant to *White v. State*. Therefore, 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.

Allegation Counsel Failed to File a Direct Appeal

Applicant alleged Counsel failed to file an appeal from his trial after Applicant requested Counsel to do so. Applicant testified it was his intention to appeal and believed Counsel had properly filed an appeal on his behalf. Additionally, Counsel testified Applicant asked him to file a direct appeal on his behalf. Counsel testified he attempted to file an appeal, but incorrectly cited the guilty plea standard; Counsel further stated he did not realize he had cited the incorrect appeal

standard until after the order dismissing the appeal was returned to him. Therefore, based on the foregoing, this Court finds Applicant is entitled to a belated direct appeal pursuant to *White v. State*, and **GRANTS** relief in the form of a belated appeal only.

Allegation Counsel was Ineffective for Failing to Call Critical Witness

Applicant claims Counsel was ineffective for failing to call the 911 operator and/or the 911 caller to testify at trial. At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard. v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or their testimony must otherwise be presented, consistent with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).

“In most PCR cases in which the applicant seeks relief for trial counsel’s failure to call witnesses, the PCR court’s analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks.” *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). Counsel’s performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. *See e.g. Smith v. State*, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State*, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew

the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was not deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial). Further, to demonstrate prejudice, Applicant was required to present the evidence or witnesses he alleges Counsel did not properly investigate. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

Though Applicant testified no testimony was elicited at trial regarding the state of the victim following the incident, this Court finds the record shows a witness did testify to the victim's state and appearance following the incident. Applicant further alleged at the evidentiary hearing he believed the 911 caller's and/ or 911 operator's testimony would have been different than that of the other witness following the incident; however, Applicant failed to address how the 911 caller or 911 operator's testimony would have differed or been helpful to his defense. Moreover, this Court finds Counsel credibly testified Applicant did not produce any witnesses for him to investigate and he did not review a 911 call in this case that would have been admissible at trial. Additionally, this Court finds Counsel is only required to act reasonably in this regard and his

failure to call these witnesses almost thirty years after the crime was committed was not deficient as they would not made a difference at trial.

Moreover, Applicant failed to call any witnesses at the evidentiary hearing to meet his burden of proof regarding the prejudice prong on the *Strickland* analysis. Accordingly, Applicant fails on both prongs of the *Strickland* analysis concerning this allegation and, thus, his claim of failure to investigate and call witnesses must be rejected. Accordingly, this Court finds this allegation must be **DENIED**.

Allegation Counsel was Ineffective for Failing to Investigate & Challenge Chain of Custody

Applicant contends Counsel was ineffective for failing to adequately investigate the case and failing to properly challenge the chain of custody. Counsel credibly testified prior to trial he investigated each aspect of the chain of custody. Counsel further testified he believed the State had a serious issue regarding the chain of custody in this case and that attacking the chain of custody was the most integral part of Applicant's defense. Counsel testified he believed there was a strong chance the DNA evidence would be excluded due to the State's chain of custody issues.

The record shows Counsel moved to exclude the DNA evidence asserting the chain of evidence had not been produced and asserting the evidence had possibly been contaminated. (Tr. 274). Specifically, Counsel argued: the victim testified the incident occurred on the 24th when all other documentation states the incident occurred on the 25th; neither of the nurses who collected and/or labeled the evidence were able to confirm they were present during the examination; and Deputy Knight could not confirm whether he brought the rape kit into the hospital or if the nurse kit was provided by the hospital. (Tr. 275-276). Additionally, Counsel argued the SLED records were not clear and that SLED did not follow their own protocols at the time of the incident; therefore, he posited the results are not trustworthy. (Tr. 276-287). Counsel entered into lengthy

argument and explanation to the trial court regarding each piece of the chain whereafter Judge Goodstein denied Counsel's motion stating the trial court believed Applicant's concerns regarding the chain of evidence went to the weight of the evidence rather to the admissibility of the evidence. (Tr. 295). Furthermore, Counsel moved to renew his motion for a directed verdict and all other motions made throughout Applicant's trial. (Tr. 370). The trial court denied Counsel's motions and noted Counsel's objections. (Tr. 371).

Therefore, this Court finds Applicant has failed to present any evidence Counsel was ineffective in failing to investigate the chain of custody and/ or was ineffective in his handling of Applicant's chain of custody argument. In *State v. Hatcher*, our Supreme Court analyzed cases in other jurisdictions where "[c]ourts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts." 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011). The Court ultimately held that "the State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable." *Id.* at 95, 708 S.E.2d at 755. This Court finds that Counsel credibly testified he thoroughly investigated the chain of custody, as well as testified challenging the chain of custody was the most integral part of the defense. Moreover, because Counsel did in fact move to exclude the DNA evidence and vehemently argued his basis for his motion to the trial court, this Court finds no deficiency.

This Court further finds Applicant has failed to establish any resulting prejudice from Counsel's alleged deficiency. Specifically, this Court agrees with the trial court and finds a sufficient chain of custody was established at trial. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional

ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice. Accordingly, this allegation is **DENIED**.

Allegation Counsel was Ineffective for Failing to Challenge Witness's Testimony

Applicant also alleges trial counsel was ineffective for failing to effectively cross-examine victim at trial regarding her version of the events. This Court finds Applicant has failed to meet his burden and finds no deficiency on the part of Counsel nor prejudice therefrom for this allegation.

The manner and extent of cross-examination should not be second-guessed: *See Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978) (*Marzullo* is not intended to promote judicial second guessing on questions of strategy as basic as handling of a witness); *United States v. Nersesian*, 824 F.2d 1294, 3121 (2d Cir. 1987) (“decisions whether to engage in cross-examination and if so to what extent and in what manner, are . . . strategic in nature” and will not support an ineffective assistance claim); *Gustave v. United States*, 627 F.2d 901, 906 (9th Cir. 1980). *Strickland* requires that trial counsel must be given leeway to make reasonable strategic decisions. 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. *Strickland*, 466 U.S. at 688-689.

This Court finds Counsel credibly testified the victim in this case was brutally raped and extremely emotional during her testimony. Additionally, Counsel testified he did not want to appear to the jury as though he was battering the victim regarding the incident more than was necessary for his defense. Though Counsel failed to ask victim about inconsistencies in her testimony regarding whether she was wearing her panties during the rape, Counsel credibly testified that he did not believe further inquiry regarding the victim’s panties would have helped

Applicant's case. As Counsel testified, his main strategy in this case was to tear down the chain of custody. Additionally, Counsel noted that despite victim's testimony she had no panties on when the rape occurred, she later testified she put her clothes back on. Therefore, this Court finds Counsel was not deficient. Additionally, this Court finds Applicant was not prejudiced by any alleged deficiency as Counsel articulated strategic reasonings for failing to vigorously cross-examine and require the emotional rape victim to recount the incident. Specifically, this Court finds Counsel was reasonable in his decision not to further 'batter' the victim in front of the jury when Applicant's main defense strategy was to emphasize the weaknesses in the State's chain of custody. Accordingly, this Court finds this allegation must be **DENIED**.

Allegation Regarding Conflict of Interest by the Public Defender's Office

Applicant claims he is entitled to relief because Counsel allegedly had a conflict of interest because his supervisor at the First Circuit Public Defender's Office, John Loy, previously prosecuted Applicant for a prior offense. "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." *Thomas v. State*, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (citing *Jackson v. State*, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998)). An actual conflict of interest occurs where counsel owes a duty to a party whose interests are adverse to the applicant's. *Fuller v. State*, 347 S.C. 630, 633-34, 557 S.E.2d 664, 665 (2001). Where an applicant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance, prejudice is presumed. *Gonzales v. State*, 419 S.C. 2, 10, 795 S.E.2d 835, 839 (2017) (citing *Strickland*, 466 U.S. at 692) (emphasis added). However, "[t]he mere possibility of a conflict of interest is insufficient to impugn a criminal conviction." *Fuller*, 347

S.C. at 634, 557 S.E.2d at 665.

“The Sixth Amendment right to conflict-free representation, like the right to counsel itself, may be the subject of a waiver.” *United States v. Swartz*, 975 F.2d 1042, 1048 (4th Cir. 1992).

“The state can establish a waiver only by proving an intentional relinquishment or abandonment of the right.” *Hoffman v. Leeke*, 903 F.2d 280, 288 (4th Cir. 1990). “To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently.”

Thomas v. State, 346 S.C. 140, 144, 551 S.E.2d 254, 256 (2001) (citing *Swartz* at 1048-49).

“Whether there has been a waiver depends on the particular facts of each case and the court must make as thorough and long an inquiry as necessary to determine whether the accused is voluntarily, knowingly[,] and intelligently waiving his right.” *Hoffman*, 903 F.2d at 288.

This Court finds that Applicant is not entitled to relief based upon a conflict of interest. First, Applicant seemingly was aware that Counsel’s supervisor had previously prosecuted him for a prior offense. This is borne out by his testimony that Counsel informed him of such during their second meeting. Applicant further testified he did not see or meet with Mr. Loy during this case. Additionally, Counsel credibly testified he informed Applicant about Mr. Loy’s employment with the Public Defender’s Office but not believe a conflict existed. Counsel additionally testified Mr. Loy had no involvement in Applicant’s case and gave Counsel no direction in Applicant’s case.

Even if this potential conflict was not waived, Applicant has failed to show any prejudicial effect of the potential conflict. There has been no showing that the potential conflict impacted Counsel’s performance or strategic decisions. Applicant has merely acknowledged a possibility of a conflict existing, which does not warrant relief. Accordingly, this allegation is **DENIED**.

VII. Conclusion

Based on all the foregoing, this Court finds Applicant did not knowingly and intelligently


waive his right to a direct appeal and, as such, he may petition the Supreme Court of South Carolina pursuant to *White v. State*. See generally Rule 243(i), SCACR; *Davis*, 388 S.C. 390, 342 S.E.2d 60 (setting forth procedures for a *White* appeal, prohibiting other forms of relief on this basis). This Court further finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application on the remaining issues.

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. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRPC, 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.

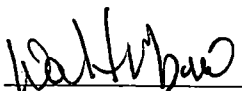
IT IS THEREFORE ORDERED:

1. Applicant is granted belated appellate review of direct appeal issues pursuant to *White v. State*;
2. All other allegations for post-conviction relief are denied and dismissed with prejudice;
3. Applicant shall be remanded to the custody of the State.

AND IT IS SO ORDERED this 19 day of Sept, 2022.



ROBERT J. BONDS
Presiding Judge
First Judicial Circuit


_____, South Carolina