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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Hon. H. Steven DeBerry, Circuit Court Judge

Case No. 2020-CP-26-6198

Scott Rowan, #375994, Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Scott Rowan, Petitioner, appeals the Order of Dismissal issued by the Honorable H. Steven DeBerry on March 14, 2023. Petitioner, through counsel, received notice of the entry of the Order on March 16, 2023.

Date: March 16, 2023

Christopher R. Geel
Geel Law Firm, LLC
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Attorney for Petitioner

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Scott Rowan, #375994, Applicant, v. State of South Carolina, Respondent.	Case No.: 2020-CP-26-6198 **ORDER OF DISMISSAL**

This matter comes before this Court by way of Applicant's post-conviction relief application filed October 28, 2020. Respondent made its return on March 3, 2021, requesting an evidentiary hearing be convened. An evidentiary hearing was held on November 30, 2022, at the Horry County Courthouse. Christopher R. Geel, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Sara Brinson and Prosecutors George Martin and Mary-Ellen Walter, Esquires also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted for criminal sexual conduct with a minor, second degree and criminal sexual conduct with a minor, third degree by the Horry County Grand Jury at its February 2016 term. John M. Hilliard, Esquire, and Sara Brinson, Esquire, represented Applicant and Assistant Solicitors Mary Ellen Water, Esquire, and George Henry Martin, Esquire, of the Fifteenth Circuit Solicitor's Office prosecuted the case. On April 9, 2018, Applicant proceeded to a jury trial

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before the Honorable Larry B. Hyman, Jr. The jury found Applicant guilty as indicted and Judge Hyman sentenced him to fifteen years on each charge, to be served concurrently.

Applicant filed a notice of appeal and David Alexander, Esquire, perfected the appeal. William M. Blitch, represented Respondent. On March 4, 2019, Applicant's counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), and requested to be relieved as counsel. Applicant presented the following issues:

1. Whether the trial judge erred in refusing to admit an email sent by the complainants' mother's divorce attorney that wrongfully accused appellant of giving Complainant 1 and her mother a sexually transmitted disease?

Applicant filed a *pro se* response to the *Anders* brief, stating that his name was improperly stated on the record, that the trial judge continually cut off his lawyer's midsentence, that the judge improperly denied a request to set aside the conviction because the witnesses against him were lying under oath, and that the judge improperly excluded expert testimony regarding Applicant's transmission of sexually transmitted diseases to one of his victims. Applicant's appeal was dismissed without oral arguments via unpublished opinion. Op. No. 2020-UP-142 (S.C. Ct. App. filed May 20, 2020). The remittitur was sent on July 8, 2020.

Summary of Relevant Facts

Applicant's stepdaughters testified at trial that he would watch them undress when they were young children. (App. 181-82, 344-45). Applicant began groping his stepdaughters and giving them drugs. (App. 186-87, 348-51). Resistance led to punishments, threats, and physical abuse. (App. 187, 351-52). The sexual abuse progressed to forced oral sex, masturbation, and vaginal penetration. (App. 188). At times Applicant would withhold food from his stepdaughters after violently raping them. (App. 191-92). Applicant infected one of his stepdaughters with a sexually transmitted disease. (App. 200).

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Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Lawyer did not call expert detective to stand.
    a. Lawyer did not call expert to testify about STD.
2. Lawyer did not call witnesses for rebuttal.
3. Lawyer did not challenge testimony inconsistencies.
    a. Did not call detective to question about police report and testimony made.
4. Lawyer did not call all witnesses. dr. who examed (victim) Detective who investigate and took statements. Lawyer did not use all evidence available. Text messages and pictures taken by detective.
    a. Lawyer did not call expert after STD information was entered into record.

At the PCR hearing, Applicant proceeded forward on the following allegations, as outlined in his amended application filed November 30, 2022:

1. Ineffective assistance of counsel:
    a. Failure to object to improper "search for truth" jury instructions.
    b. Failure to object to improper "golden rule" argument by the prosecution.
    c. Failure to object to the presentation of Complainant 1's "runaway letters", written statements that Complainant 1 made 6-7 months before running away from home. These letters were admitted as substantive exhibits at trial (State's Ex.'s 1-3) with no objection from trial counsel.
    d. Failure to object to improper vouching/bolstering testimony.
    e. Failure to object to improper bad-character evidence, and evidence of prior bad acts by defendant that were not admissible under Rule 404(b).

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Brinson Testimony

Counsel Brinson testified that her experience in criminal defense was very limited, and she primarily practiced family law and served as in-house counsel. She testified that she thought the jury instructions using "search for the truth" language was admissible and she could not think of a reason to object. She stated that she and Counsel Hilliard did not object to the golden rule

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argument made during the State's opening argument because they thought they would be given greater leeway themselves. She stated that they wanted the letters to be admitted because they were helpful impeachment material because of their inconsistencies. She stated she did not think any improper bolstering occurred at trial. She stated she thought they did not object to bad character evidence because they wanted to paint Applicant as a disciplinarian. She stated they wanted to argue the girls fabricated the allegations because they were upset about him being a disciplinarian. She stated she could not think of a basis for not objecting to self-mutilation testimony, beyond using it to establish her mental instability. She stated she had no opinion on admissibility of physical abuse, and she was unsure if it was related to the allegations. She stated that they could have objected to physical abuse for relevance, but thought it was useful to the defense.

Walter Testimony

Prosecutor Walter stated that she did not think the "search for the truth" language made a difference at trial. She stated she did not do the opening argument but did not think it swayed the jury. She stated that the letters entered were admissible and helpful to the defense. She stated she never entered notes likes these before at trial. She stated that she did not think there was any improper bolstering or vouching, but if there was it did not change the result at trial. She stated that Counsel Hilliard opened the door to testimony about physical abuse because it fit in line with his chosen defense. She stated that she did not want the STD evidence entered. She stated that Dr. Rahter testified in line with how she generally testifies.

Martin Testimony

Prosecutor Martin testified that he did not think the search for the truth language, when viewed in the context of the jury instructions as a whole, did not present an issue. He stated that

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he would not use the same opening argument today, but that he did not think it impacted the outcome at trial. He stated that the letters were admissible. He stated that there was no improper bolstering or vouching. He stated that some of the questions that were identified by Applicant as bolstering were raised by Counsels. He stated it would be impractical for Counsel to object to his own questions. He stated that Counsel Hilliard opened the door to questions about physical abuse.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Horry County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v.*

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Washington.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011)

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(quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; 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. 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.

Failure to Object – Search for the Truth

Applicant claims Counsel was ineffective for failure to object to "search for the truth" language used in the jury instructions. Whether failure to object constitutes deficient performance generally hinges on whether or not a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). Our Supreme Court has cautioned trial courts against including language in jury instructions that may have the effect of lessening the State's burden of proof. The Court has discouraged instructions which urge the jury to "seek the truth," *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000), or "return to verdict that is 'just' or 'fair' to all parties." *State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012). However, the Court has not reversed convictions in any of those cases.

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In similar cases dealing with "seek for the truth" language, the Supreme Court has made clear that context matters. In *Aleksey*, the Court emphasized that the trial court's charge that the jury should "seek the truth" occurred during his instructions regarding witness credibility. It noted the charge was "prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof." *State v. Aleksey*, 343 S.C. 20, 29, 538 S.E.2d 248, 253 (2000). It concluded there was "not a reasonable likelihood the jury applied the judge's instructions to convict appellant on less than proof beyond a reasonable doubt." *Id.*

In *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018), the Court considered a challenge to a trial judge's comments that a trial is "a search for the truth," that the jury took an oath to "reach a fair and just verdict," and to find the "true facts." The Court stated that the trial judge should "refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict." *Beaty*, 423 S.C. at 34, 813 S.E.2d at 506. However, the Court did not reverse and, instead, found: "our review of the entirety of the judge's opening comments and the entire trial record convinces us that Appellant has not shown prejudice from this error sufficient to warrant reversal." *Beaty*, 423 S.C. at 34, 813 S.E.2d at 506. Again, the Court emphasized that the comments "were not linked to either the reasonable doubt or the circumstantial evidence charges as was condemned in *Aleksey*." *Beaty*, 423 S.C. at 34, 813 S.E.2d at 506. *See also State v. Patterson*, 425 S.C. 500, 511, 823 S.E.2d 217, 224 (Ct. App. 2019), *reh'g denied* (Feb. 21, 2019), *cert. denied* (June 28, 2019) (finding trial court's remarks that the jury should "search for the truth" did not warrant reversal); *State v. Needs*, 333 S.C. 134, 154, 508 S.E.2d 857, 867 (1998) (affirming conviction despite trial court's erroneous instruction for "jurors to seek a reasonable explanation other than

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the guilt of the accused" because other portions of the charge correctly emphasized the State's burden of proof beyond a reasonable doubt); *State v. Pradubsri*, 420 S.C. 629, 641, 803 S.E.2d 724, 730 (Ct. App. 2017) (affirming conviction despite use of phrase "search of the truth" during reasonable doubt instruction because "review of the record and the entire charge reveals no prejudice sufficient to warrant reversal").

Counsel Brinson and the prosecutors all credibly testified that they did not think any language used had an impact at trial. Thus, Applicant has failed to establish prejudice and relief is denied accordingly.

Failure to Object – Golden Rule

Applicant claims Counsel was ineffective for failure to object to the State's opening statement on the grounds that the arguments implicated the golden rule argument. To find whether a prosecutor's comments in closing argument violated a defendant's due process rights, the Court must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. *Fortune v. State*, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019).

"It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence." *United States v. Francisco*, 35 F.3d 116, 120 (4th Cir. 1994); *see also State v. New*, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony."). A prosecutor should "prosecute with earnestness and vigor" and "may strike hard blows, [but] is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). "If a Solicitor's closing argument remains within the record evidence and the reasonable

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inferences therefrom, no error occurs." *New*, 338 S.C. at 319, 526 S.E.2d at 240. "On the other hand, a closing argument may be held improper where it appeals to personal bias or arouses the jury's passions or prejudice." *Id.* "[I]mproper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger* at 88.

"Improper comments do not automatically require reversal if they are not prejudicial to the defendant." *Id.*, 428 S.C. at 550, 837 S.E.2d at 40 (quoting *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). A PCR court must view the alleged impropriety of the prosecutor's argument in the context of the entire record, and the applicant has the burden of proving he did not receive a fair trial because of the alleged improper argument. *Id.*

Golden Rule arguments made in closing are generally not permissible because they generally ask the juror to depart from neutrality and to decide based upon personal bias, not the evidence itself. *See e.g. Brown v. State*, 383 S.C. 506, 516-17, 680 S.E.2d 909, 915 (2009)(finding that Counsel was deficient for failure to object to the prosecutor asking the jury to "speak up" for the three-year-old victim).

Applicant has not met his burden of proof concerning this allegation. This Court finds that none of the highlighted portions were so crucial as to undermine the results of the proceedings. Accordingly, relief is denied on this ground.

Failure to Object – Runaway Letters

Applicant claims Counsel was ineffective for failure to object to the victim's "runaway letters." Even if these letters were objectionable, this Court concurs with Prosecutor Walter and Counsel Brinson in their assertions that these letters presented inconsistencies that were helpful to the defense in providing impeachment material to use against the victim. Accordingly,

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Counsel's decision not to object was reasonable. Additionally, this Court finds that even if Counsels did object and that objection was sustained, the outcome at trial would not have changed. Accordingly, relief is denied.

Failure to Object – Improper Bolstering

Applicant claims Counsel was ineffective for failure to object to improper bolstering. "Improper bolstering is 'testimony that indicates the witness believes the victim, but does not serve some other valid purpose.'" *Chappell v. State*, 429 S.C. 68, 75, 837 S.E.2d 496, 499-500 (Ct. App. 2019) (quoting *Briggs v. State*, 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017)). "Improper bolstering also occurs when a witness testifies for the purpose of informing the jury that the witness believes the victim, or when there is no other way to interpret the testimony other than to mean the witness believes the victim is telling the truth." *Id.* "However, an expert's testimony is not improper bolstering 'when the expert witness gives no indication about the victim's veracity[.]" *Id.* (quoting *State v. Perry*, 420 S.C. 643, 663, 803 S.E.2d 899, 910 (Ct. App. 2017)).

"In an ineffective assistance case, 'trial counsel's failure to object to [improper bolstering] testimony does not remove a [] [PCR] applicant's burden to prove prejudice." *Chappell*, 429 S.C. at 80, 837 S.E.2d at 502 (quoting *Thompson*, 423 S.C. at 246, 814 S.E.2d at 492). "The determination of whether a bolstering error is harmless depends on whether the case turns on the credibility of the victim." *State v. Chavis*, 412 S.C. 101, 110, 771 S.E.2d 336, 341 (2015). "The outcome of a trial turns on the credibility of the victim when the State presents no physical evidence or 'relie[s] solely upon the victim's testimony to establish the details of the crime . . . .'" *Chappell*, 429 S.C. at 80, 837 S.E.2d at 502 (quoting *Thompson*, 423 S.C. at 248, 814 S.E.2d at 494).

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Applicant has not met his burden of proof concerning this allegation. Both Prosecutors credibly testified that they did not think the passages highlighted constituted improper bolstering. Additionally, as Prosecutor Martin highlighted, some of the questions highlighted were asked by Counsel Hilliard. It would be unreasonable for Counsel to object to his own questions. However, even if this was improper bolstering, this Court finds that it would not have impacted the outcome at trial. Accordingly, because Applicant has not met either prong of the *Strickland* analysis, relief is denied on this ground.

Failure to Object – Bad Character Evidence

Applicant claims Counsel was ineffective for failure to object to bad character evidence. However, Counsel Brinson credibly testified that the defense used this testimony to their advantage. Specifically, their chosen defense at trial was to paint Applicant as a disciplinarian that the victims were seeking revenge against by fabricating sexual assault allegations. This was a reasonable trial strategy. Additionally, this Court finds that had this evidence been excluded, it would not have impacted the results of the proceedings. Accordingly, relief is denied.

Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR

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counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

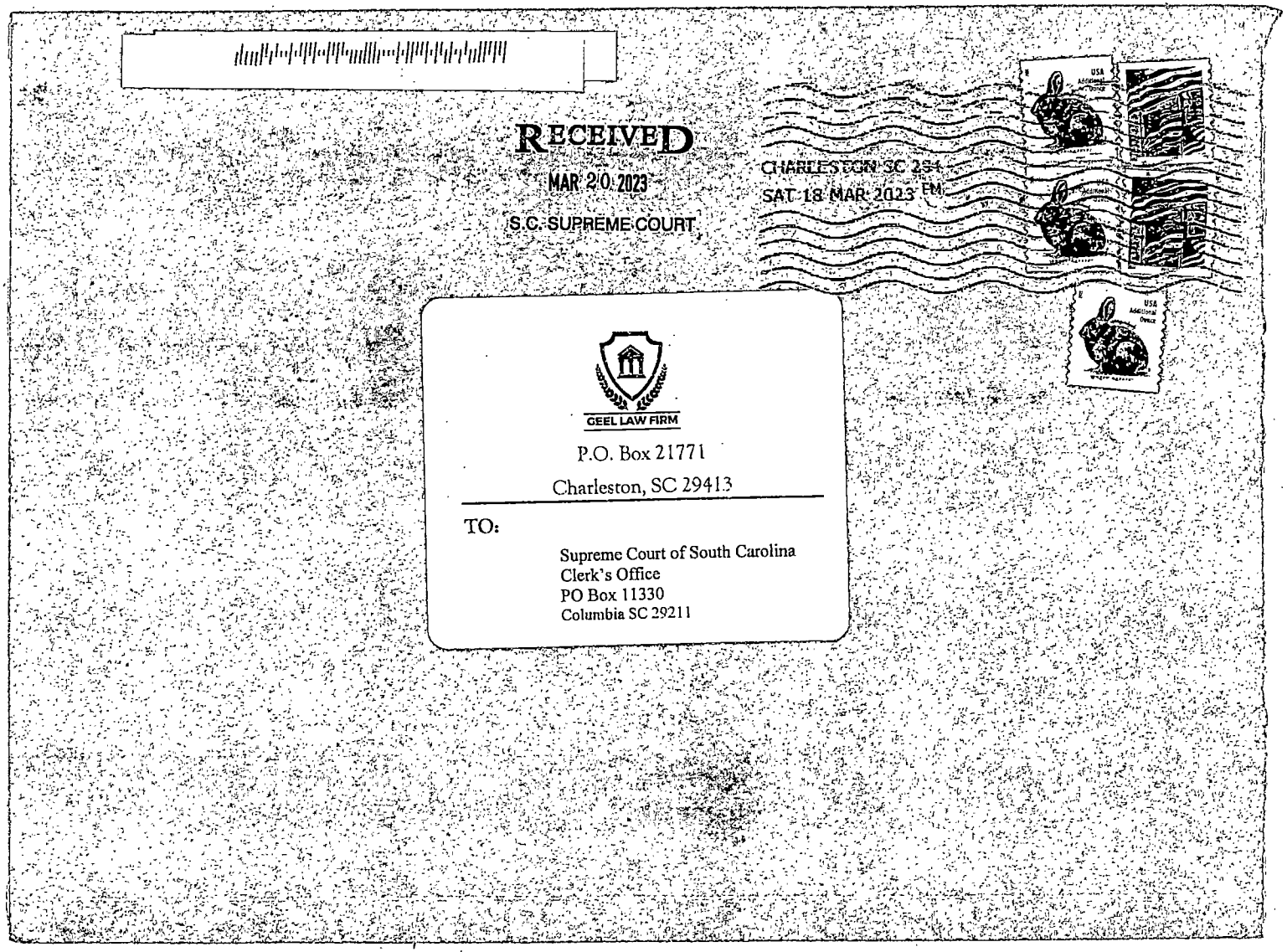
IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 7th day of MARCH, 2023.

H. STEVEN DEBERRY, IV
Presiding Judge
Fifteenth Judicial Circuit

Florence, South Carolina.



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