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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Walton J. McLeod, IV, Circuit Court Judge

2018-CP-46-02206

Orlando Coleman, # 363390,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Orlando Coleman, # 363390, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed November 21, 2023, issued by the Honorable Walton J. McLeod, IV, Presiding Judge, Sixteenth Judicial Circuit.

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STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
Orlando Coleman, #363390 Applicant, v. State of South Carolina, Respondent.	Case No.: 2018-CP-46-2206 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed by Orlando Coleman ("Applicant") on July 31, 2018, and amended on September 7, 2022. The Court convened an evidentiary hearing into the matter on December 7, 2022, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by Jonathan D. Waller, Esquire. Assistant Attorney General Zachary W. Jones, of the South Carolina Attorney General's Office, represented Respondent.

After reviewing all records and evidence before the 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. The Court finds as follows:

PROCEDURAL HISTORY

Applicant was indicted by the York Grand Jury in December of 2014 for first degree criminal sexual conduct with a minor (2014-GS-46-3857; 2014-GS-46-3858). In February of 2015, the York County Grand Jury issued amended indictments, again charging Applicant with two counts of first degree criminal sexual conduct with a minor. Ashley Stopinski, Esquire (Ashley Anderson at the time of trial), and Melissa Inzerillo, Esquire, represented Applicant. Assistant Solicitor Sharon J. O'Hayon of the Sixteenth Circuit Solicitor's Office prosecuted the case. On March 16, 2015, Applicant proceeded to a jury trial before the Honorable Roger L.

Couch. The jury convicted Applicant, and on March 18, 2015, Judge Couch sentenced Applicant to concurrent terms of imprisonment for twenty-five years on each count of first degree criminal sexual conduct with a minor, along with credit for time served of 527 days.

Applicant filed a timely notice of appeal. Appellate Defenders Jessica Birt and Robert Dudek of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. *State v. Coleman*, Op. No. 2018-UP-090 (S.C. Ct. App. filed Feb. 21, 2018). The remittitur was sent on March 13, 2018.

FACTUAL HISTORY

In September of 2013, Delissa Patterson (Mother), the mother of an eight-year-old girl (Victim), contacted law enforcement officers with the Rock Hill Police Department and alerted them Victim had disclosed she was sexually assaulted by Applicant at Paces River Apartments, an apartment complex located in Rock Hill, South Carolina, when Victim and her family had lived there a few years earlier. In response, Detective Ryan Thomas began an investigation into the reported sexual abuse.

As part of his investigation, Detective Thomas referred Victim to a child advocacy center for a forensic interview, and an interview was conducted on September 24, 2013. During that interview, Victim again disclosed she was sexually abused and described an incident occurring on a staircase and another incident occurring at a tennis court. However, Victim was unsure when the incidents occurred and was unable to provide a specific time frame for the sexual abuse.

Thereafter, on the following day, Detective Thomas contacted Applicant, who was twenty years old at the time, and briefly spoke with him about the allegations at his residence. During their conversation, Applicant acknowledged he knew Victim and indicated he remembered she

sometimes wore revealing clothing. However, he denied ever touching Victim and claimed he had never done anything inappropriate to any children.

A few weeks later, Detective Thomas arrested Applicant for sexually assaulting Victim. Following the arrest, Detective Thomas informed Applicant of his rights and again spoke with him about the allegations. During that interview, Applicant acknowledged he frequently hung out with Victim's brother. However, once again, he insisted he did not do anything improper to Victim and claimed he pushed her off every time she tried to get into his lap.

Subsequently, Applicant was indicted for two counts of first-degree criminal sexual conduct with a minor, and he proceeded to trial. At the outset of trial, defense counsel moved to quash the second of the two indictments issued in Applicant's case while also moving to restrict any witnesses from offering testimony that might bolster or vouch for Victim's credibility. In support of the motion to quash the second indictment, defense counsel cited to the decision in *State v. Baker*, 411 S.C. 583, 769 S.E.2d 860 (2015), and argued the indictment and information provided to her did not provide sufficient notice for Applicant to adequately and effectively defend against the allegations raised in his case. Furthermore, defense counsel asserted the time frame in which the alleged incidents occurred had shifted and, while conceding it is frequently difficult for a victim to pinpoint the specific date on which an incident occurred, contended she could not pinpoint a date for a potential alibi defense in the event such a defense was available. In rebuttal, the solicitor noted Victim was nine years old at the time of trial and was unable to remember the dates on which the incidents occurred. Based on that fact, the solicitor indicated she could not pinpoint the dates of the incidents with more specificity or certainty than the time frames provided in the indictments. The trial judge then took the matter under advisement.

Thereafter, following a recess, the trial judge confirmed he reviewed the indictments issued in Applicant's case along with the decision in *Baker* and asked the solicitor to discuss the manner in which the indictment process proceeded. In response, the solicitor recounted Applicant was originally indicted for two counts of first-degree criminal sexual conduct with a minor in relation to an incident on a staircase and another incident at a tennis court after Applicant rejected an offer that would have permitted him to plead guilty to a single charge. Initially, the solicitor noted the indictments alleged a time frame for the incidents extending from 2010 to 2012, but she indicated she was able to narrow the time frame down further after she ascertained when Applicant moved to Paces River Apartments, the apartment complex where the incidents occurred, following an unsuccessful attempt to take the case to trial in January of 2015.[1] At that point, the solicitor stated she advised defense counsel she intended to amend the indictments to narrow the time frame and obtained the amended indictments in February of 2015.[2] However, the solicitor indicated she had been unable to limit the time frame of the incidents any further based on the information provided by Victim.

Following the solicitor's remarks, defense counsel asserted Applicant was initially arrested on an arrest warrant alleging a single incident that occurred on September 1, 2011, and she noted

[1] Originally, the indictments issued by the York County Grand Jury stated: "That on or about and between August 24, 2010 and June 15, 2012 in York County, South Carolina, the Defendant, Orlando Coleman, did commit the criminal offense of Criminal Sexual Conduct with a Minor in the First Degree, in that the Defendant, Orlando Coleman, did engage in a sexual battery with a minor victim who was less than eleven (11) years of age at the time of the incident, to wit: the Defendant Orlando Coleman . . . did commit the sexual battery upon and with victim, [Victim], by digitally penetrating her vagina with his finger. All in violation of Section 16-3-655(A)(1), South Carolina Code of Laws (1976, as amended)." (R. pp. 253-256).

[2] Following the amendments, the indictments issued by the York County Grand Jury stated: "That on or about and between May 13, 2011, and June 15, 2012, in York County, South Carolina, the Defendant, Orlando Martinez Coleman, did commit the criminal offenses of Criminal Sexual Conduct with a Minor in the First Degree, in that the Defendant, Orlando Coleman, did engage in a sexual battery with a minor victim who was less than eleven (11) years of age at the time of the incident, to wit: the Defendant, Orlando Coleman . . . did commit the sexual battery upon and with victim, [Victim], by digitally penetrating her vagina with his finger. All in violation of 16-03-0655(A)(1), *South Carolina Code of Laws* (1976, as amended). Against the peace and dignity of the State, and contrary to the statute in such case made and provided." (R. pp. 257-260).

she was provided in October or November of 2013 with an incident report that referenced two separate incidents – one on a staircase and one at a tennis court – that were alleged to have occurred in the summer of 2011. Defense counsel further noted she was provided with a recording of Victim's forensic interview in which Victim did not reference the time frame of the incidents. Based on that information, defense counsel stated she began investigating the case under the assumption the incidents occurred in the summer of 2011 and obtained the lease contract for Applicant's family from Paces River Apartments. After that, defense counsel asserted she was provided with information in September of 2014 from the solicitor indicating the incidents might have occurred between January and June of 2012, and she further noted the solicitor subsequently provided additional information in January of 2015 indicating the incidents might have occurred while Victim was in first grade between 2011 and 2012. Because she initially believed the incidents were alleged to have occurred in 2011, defense counsel argued the defense had been put "in a different position" in regard to defending against an allegation alleged to have occurred when Applicant was not residing at Paces River Apartments. However, defense counsel conceded Victim never identified a specific date of the incidents and efforts had been made to try to identify the pertinent dates. Thereafter, in reply, the solicitor noted the information provided by defense counsel was largely accurate but reiterated the State had consistently alleged from the outset of the case the time frame of the incidents extended into 2012.

After considering the arguments of counsel and the *Baker* decision, the trial judge found the time frame alleged in the indictments was reasonable under the circumstances while also finding the solicitor made a good faith effort to narrow the time frame as much as possible under the circumstances. Furthermore, the trial judge found the indictments were sufficient given the nature of the alleged offenses to allow Applicant to respond to the charges against him. As a result,

the trial judge denied Applicant's motion to quash the second indictment. However, the trial judge indicated he would amend the indictments to reflect one related to an incident alleged to have occurred on a staircase while the other related to an incident alleged to have occurred at a tennis court.[3] The judge then handwrote "(Staircase incident.)" on Indictment No. 2014-GS-46-3857 and "(Tennis Court Indictment)" on Indictment No. 2014-GS-46-3858.

As the trial continued, Victim, who was nine years old at the time, testified about the abuse she suffered at Applicant's hands when she was younger. Specifically, she stated Applicant did things to her that made her "feel uncomfortable" on two occasions when she lived at Paces River Apartments. Regarding the first incident, Victim stated she was with her brother and cousins on a staircase, they eventually left, and Applicant asked her to sit on his lap when they were gone. After that, she indicated Applicant put his hand in her pants, touched her vagina underneath her underwear, and digitally penetrated her until her brother and cousins returned. Similarly, regarding the second incident, Victim stated she was with her cousins at a tennis court when Applicant approached. After that, she testified Applicant again put his hand underneath her underwear and digitally penetrated her vagina. Subsequently, Victim indicated she did not see Applicant again until her family moved to a new apartment complex. Once there, she stated she disclosed the abuse to her mother, and she noted she was unable to remember when the abuse occurred other than that it occurred when she was in first grade in 2011 and 2012.

In addition to Victim's testimony, Detective Thomas testified about his investigation into the allegations of abuse, which culminated in Applicant's arrest, and an assistant manager from Paces River Apartments confirmed Applicant and his mother lived at the apartment complex from May 13, 2011, to November 14, 2011. Also, Puja Amin, the forensic interviewer who interviewed

[3] No objections were raised to the trial judge's amendments to the indictments. (R. p. 24; p. 216).

Victim during the investigation, recounted Victim disclosed she was sexually abused on two occasions but was unable to provide a specific time frame for the abuse. Additionally, Victim's brother confirmed he frequently hung out with Applicant, who was older, at the apartment complex, and he noted he saw Applicant at the apartment complex even after Applicant moved away. Victim's brother further noted Victim reacted badly when Applicant visited with him after they moved to a new apartment complex shortly before the abuse was disclosed. Similarly, Mother recounted she lived at Paces River Apartments with Victim, her other children, her sister, and her sister's children from 2010 to 2012, and she indicated Victim began playing outside at the apartment complex in May of 2011. Mother further testified Victim's behavior changed once they moved to a new apartment complex in 2013, and she indicated Victim cried whenever Applicant was around. After that, Mother indicated Victim reported she was sexually abused, and she stated she quickly reported the allegations to the authorities once they were disclosed to her.

CURRENT POST-CONVICTION RELIEF APPLICATION

In his original application for post-conviction relief, Applicant did not state or allege why he is being held in custody unlawfully. Respondent made its return and moved to dismiss the application for failure to state a claim. A hearing was held before the Honorable Edward W. Miller, circuit court judge, on August 29, 2022, on Respondent's motion to dismiss. Judge Miller indicated he would grant the motion to dismiss unless Applicant filed an amended application within fourteen days.

Subsequently, on September 7, 2022, Applicant filed, through counsel, an amended application raising the following grounds for relief:

1. Ineffective Assistance of trial counsel Ashley Anderson and Melissa Inzerillo:
    a. "Counsel were ineffective for failing to object to the trial judge's amendment of the indictments";

b. "Counsel were ineffective for failing to object to the 'amended' indictments being provided to, or viewed by, the jury prior to or during deliberations";
c. "Counsel were ineffective for failing to object to the trial judge's instruction to the State to confer with a witness, under oath and in the middle of her testimony, during a break in the proceedings."

2. Ineffective assistance of appellate counsel Jessica L. Birt:
   a. "Counsel was ineffective for failing to consult, involve, and advise Applicant in the preparation of his appeal and during the appeal process";
   b. "Counsel was ineffective for failing to raise the meritorious issue of the indictments being 'amended' by the trial judge and submitted to the jury."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, and weighed the testimony accordingly. Before the Court are Applicant's records from the South Carolina Department of Corrections, the transcript of Applicant's trial, the records of the York County Clerk of Court regarding the subject convictions, Applicant's appellate records, and the original and amended applications for post-conviction relief. This Court has reviewed the records submitted to it by the parties, the legal arguments made by the attorneys, and the pleadings. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

I. Ineffective Assistance of Counsel, Generally

Applicant's allegations of ineffective assistance of trial counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "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.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "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."). Second, counsel's deficient performance must have prejudiced 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. "This does not require a showing that counsel's actions 'more likely

the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington*, 562 U.S. at 111–12 (quoting *Strickland*, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371–72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

II. Failure to Object to Trial Judge's Amendment of the Indictments

The Court finds Applicant has failed to satisfy either prong of the *Strickland* test as to this allegation. The trial judge's amendment of the indictments was limited to labeling them, respectively, as the "staircase incident" and the "tennis court incident." Counsel Inzerillo testified at the evidentiary hearing that, in her view, the amendments were not objectionable:

> [W]e were aware of the two specific incidences. There was a tennis court incident and I can't remember what the other one was, but we knew that from our conversations with the State. We had talked to Orlando about that and so, you know, all of us went into trial

> understanding those were the context of the two indictments . . . we viewed [the amendments] as a clarification, not that [the judge] was commenting on anything or swaying the jury one way or another. It was just a clarification of the two incidences.

(PCR Tr. p.27, lines 5–17). Similarly, Counsel Stopinski testified that "there were always two incidents alleged, the staircase incident and the tennis court incident [,] and that had been consistent throughout the course of the case. . . . I viewed [the amendments] just as a clarification to make sure the jury was putting their verdict down on what they intended to." (PCR Tr. p.30, line24–p.31, line 22).

This Court finds that the trial court's minor amendments merely made necessary clarifications and distinguished the otherwise identical indictments, and did not result in any surprise to Applicant (who knew from the outset that the Victim was alleging the abuse occurred at those two locations), and did not alter the nature or any elements of the charged offense. *See* S.C. Code Ann. § 17-19-100 (providing a court may amend an indictment provided the amendment does not change the nature of the offense charged). Moreover, the amendments were made in response to Applicant's own complaint that the indictments failed to identify the charged offenses with sufficient specificity.

Applicant has alleged only two grounds on which he claims Trial Counsel should have objected to the amendment of the indictments. First, he argues that the omission of the incident locations from the indictments was not merely a scrivener's error. This argument has no relevance because the trial court's authority to amend indictments under section 17-19-100 is not limited to the correction of scrivener's errors; rather, the trial court may amend an indictment to address "any defect in form" or "any variance between the allegations of the indictment and the evidence offered in proof thereof." Applicant also claims that the information added by the trial court was not presented to the grand jury; however, this claim is purely speculative, since the grand jury is often

presented with evidence beyond what appears on the face of the indictment. Moreover, Applicant has provided no explanation as to how his defense was prejudiced by the amendments.

Accordingly, the Court finds Applicant has failed to prove either that Counsel was deficient for failing to object to the amendment of the indictments or that he was prejudiced thereby. This allegation is, therefore, denied and dismissed with prejudice.

III. Failure to Object to Amended Indictments Being Presented to the Jury

Similarly, the Court finds Applicant's allegation that Counsel should have objected to the amended indictments being presented to the jury is meritless. Applicant has not explained why the indictments should not have been presented to the jury. Applicant has also failed to explain how he was prejudiced by the presentation of the indictments, especially where the trial court properly instructed the jury that the indictments were merely charging instruments, not evidence. (R. pp. 31–32). The Court finds that just as there was no error in amending the indictments, there was likewise no objectionable error in presenting the indictments to the jury. *See* S.C. Code Ann. § 17-19-100 ("After such amendment the trial shall proceed in all respects and with the same consequences as if the indictment had originally been returned as so amended . . . ."). Accordingly, Applicant has failed to prove either deficiency or prejudice as to this allegation.

IV. Failure to Object to Trial Court's Instructing State to Confer with a Witness

Applicant argues Counsel should have objected when the trial court instructed the State to confer with Delissa Patterson, one of the State's witnesses, during a break in the proceedings. At one point during direct examination, the solicitor asked Patterson if she ever figured out "what was going on" with Victim's change in behavior. Counsel Inzerillo objected, and the jury was excused from the courtroom. Counsel explained she was objecting on the ground that the question invited Patterson to repeat Victim's account of her sexual abuse at the hands of Applicant. Counsel argued

it would be improper for Patterson to testify regarding what Victim said, so Counsel wanted to make her objection known "before . . . that bell had been rung." The solicitor agreed to withdraw the question and rephrase it to elicit merely that Victim had made a disclosure and that Patterson had called the police. The trial court agreed that Patterson would not be permitted to testify regarding what Victim actually said. The court warned that an improper response by Patterson could possibly result in a mistrial and instructed the solicitor to talk to Patterson during a brief recess so that her testimony would not go beyond what was proper. After the recess, the jury was bought back into the courtroom, and the solicitor withdrew the last question and asked Patterson whether she called the police in 2013. Patterson answered that she called the police to report a sexual assault. Patterson did not repeat anything Victim said, except that the assault occurred when she lived at Pace's River during the summer of 2011. (Trial Tr. pp.284–288).

At the PCR evidentiary hearing, Counsel Inzerillo confirmed that the trial court's instructions to the solicitor to speak with Patterson while the court was in recess were given in response to Counsel's objection that Patterson's testimony seemed to be approaching inadmissible hearsay:

> [W]hen [Patterson] took the stand, it appeared to me that her testimony was going down the path of violating the time and place rule under hearsay for—that's applicable to CSC cases and so to head that off, I made an objection. . . . Ms. O'Hayon, who was the prosecutor, acknowledged that the questioning had been a bit clumsy and that did appear to be where they were headed. The court also tended to agree and so I made that objection to, basically, avoid a bigger issue and stop it from being testified to.

(PCR Tr. p.23, line 17–p.24, line 1). Counsel further testified that she had no reason to object to the trial court's instruction "because it was going to achieve my objective, avoiding a mistrial and anything that could have happened had [Patterson] continued on the path that I saw us going down." (PCR Tr. p.28, line 23–p.29, line 1).

The Court finds that Counsel has articulated a valid strategic reason for not objecting to the trial court's conduct in this regard. The trial court's instruction was plainly motivated by a desire to prevent Patterson from giving inadmissible hearsay testimony that could have been prejudicial to Applicant. As a result of the trial court's instruction, the solicitor withdrew the question to which Counsel had objected and asked a more limited series of questions. Patterson's response was appropriately limited to time and place in accordance with Rule 801(d)(1)(D), SCRE ("A statement is not hearsay if . . . [it is] consistent with the declarant's testimony in a criminal sexual conduct case . . . where the declarant is the alleged victim and the statement is limited to the time and place of the incident."). Applicant complains that Counsel was not a party to the solicitor's off-the-record discussion with Patterson and, therefore, was not able to tell what was said or to preserve any potential issues for appellate review. However, there is no evidence that the solicitor said anything improper to Patterson; on the contrary, the record reflects that the solicitor's questions following the brief recess were much more limited in scope and tailored to stay within the hearsay rule. Far from being prejudicial, this result was likely favorable to Applicant, as it arguably prevented the jury from hearing Patterson reiterate Victim's account.

Accordingly, the Court finds Applicant has failed to prove either deficiency or prejudice as to this issue. This claim is, therefore, denied and dismissed with prejudice.

V. Failure to Involve Applicant in Preparation of his Appeal

Applicant next argues Appellate Counsel failed to adequately consult with him during the preparation of his appeal. Appellate Counsel Jessica Birt testified at the PCR hearing that she communicated with Applicant during the preparation of his appeal by telephone and written correspondence; she also spoke to members of Applicant's family over the phone during that time. (PCR Tr. p.35, line 24–p.36, line 8). She recalled that Applicant and his family wanted to raise

factual issues, so she had to explain to them that the ability to challenge the jury's factual findings on appeal was limited and she was going to narrow the issues to those most likely to succeed on appeal. (PCR Tr. p.39, lines 2–19).

The Court finds Appellate Counsel adequately consulted with Applicant during the preparation of his appeal. Appellate Counsel credibly testified that she communicated with Applicant directly and with his family about the appeal and understood the issues he wanted her to raise, although ultimately, she focused on the legal issues she thought were most likely to succeed. Therefore, the Court finds Applicant has not proved Counsel was deficient as to this allegation.

In addition, Applicant has not explained what additional grounds for appeal might have been raised had appellate counsel consulted with him more frequently during the appellate process or how the outcome of his appeal would have been different. Therefore, the Court also finds Applicant has failed to prove prejudice. Because Applicant has not met his burden of proving either deficiency or prejudice as to this allegation, the Court finds it must be denied and dismissed with prejudice.

VI. Failure to Raise Issue of Trial Court's Amendment of the Indictments

Finally, Applicant contends Appellate Counsel was ineffective for failing to raise the issue of the trial court's amendment of the indictments on appeal. As discussed above, Applicant has failed to establish that the trial court's amendment of the indictments in this case was improper or prejudicial. In addition, because trial counsel did not object to the trial court's amendment of the indictments, the issue was not preserved for appeal. *See, e.g., State v. Jones*, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021) (holding a contemporaneous objection must be made to preserve an issue for appeal). Finally, even if the issue were both preserved and potentially meritorious,

appellate counsel does not have a duty to raise every non-frivolous issue on appeal but may pick and choose issues to maximize the likelihood of a favorable outcome. *See Bennet v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). The Court finds Applicant has failed to prove either deficiency or prejudice as to this allegation; therefore, this allegation is denied and dismissed with prejudice.

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 application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. 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's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice; and

2. The Applicant be remanded to the custody of the South Carolina Department of Corrections.

IT IS SO ORDERED.

WALTON J. MCLEOD, IV
Presiding Judge
Sixteenth Judicial Circuit

Lexington, South Carolina