STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT
Vance Ross, #297223, Applicant, v. State of South Carolina, Respondent.	CASE NO. 2020–CP–21–3015 **ORDER OF DISMISSAL WITH PREJUDICE**

Presiding Judge:	Hon. Debra R. McCaslin
Applicant's Attorney:	Steven W. Fowler, Esq.
Respondent's Attorney:	D. Russell Barlow, II, Esq.
Trial Counsel:	Thurmond Brooker, Esq.
Date of Hearing:	June 12, 2023
Court Reporter:	Julie A. Kevish

This matter comes before the Court by way of Vance Ross' (Applicant) application for post-conviction relief (PCR) filed on December 29, 2020. Respondent, the State of South Carolina, filed its Return on April 20, 2021, requesting an evidentiary hearing to resolve the claims as set forth in the application.

On June 12, 2023, an evidentiary hearing was held at the Florence County Courthouse before the Honorable Debra R. McCaslin. Applicant was present and represented by Steven W. Fowler, Esquire. Assistant Attorney General D. Russell Barlow, II, represented Respondent. Applicant proceeded forward on the claims set forth in his original PCR application. In support of these claims, Applicant testified on his own behalf, and Respondent presented testimony from Thurmond Booker, Esquire (Trial Counsel).

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

any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections (SCDC). In January 2016, the Florence County Grand Jury indicted Applicant and issued a nine-count indictment charging Applicant with eight counts of first-degree criminal sexual conduct with a minor and one count of third-degree criminal sexual conduct with a minor. Applicant was represented by Thurmond Brooker, Esquire. Twelfth Circuit Assistant Solicitor David Richardson prosecuted the case.

On April 17, 2017, a jury trial was commenced on seven counts of first-degree criminal sexual conduct with a minor in the Florence County Court of General Sessions, with the Honorable D. Craig Brown presiding. At the conclusion of the three-day trial, the jury convicted Applicant of six counts of first-degree criminal sexual conduct with a minor and acquitted him of the remaining count. Following the verdict, the trial judge sentenced Applicant to concurrent terms of imprisonment of life without parole for each of the convictions.

Applicant filed a timely notice of appeal. Appellate Defender Katherine Hudgins perfected Applicant's appeal, arguing the following:

> 1. The trial judge erred in refusing to quash as unconstitutionally overbroad and vague an indictment alleging seven counts of criminal sexual conduct with a minor between February 1, 2013, and July 31, 2014, because the lack of specificity within the time frame failed to provide sufficient notice and the time frame was not narrowed as much as possible.
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> 2. The trial judge erred in refusing to grant a directed verdict of acquittal on one of the two counts of criminal sexual conduct involving oral sex with Minor #1 when the State failed to present any evidence that there was more than one instance of oral sex involving Minor #1

The South Carolina Court of Appeals dismissed the appeal in an unpublished decision. State v. Ross, Op. No. 2020-UP-038 (S.C. Ct. App. filed Feb. 12, 2020). Thereafter, Ross petitioned the Court of Appeals for rehearing, and the petition was denied. Ross then filed a petition for a writ of certiorari in the South Carolina Supreme Court. On November 25, 2020, the Supreme Court, by written order, denied certiorari. The Remittitur was returned to the lower court on December 1, 2020.

FACTS GIVING RISE TO THE CONVICTION

One day in the summer of 2014, Esther Lewis ("Mother") got into an argument with Applicant, who was the father of her two daughters and two sons, after he accused her of not wanting to spend time or engage in "sexual activities" with him. (R. pp. 58-59; p. 184; pp. 188-189; pp. 191-192; pp. 201-203). Following the argument, Mother returned to her parents' home in Florence, South Carolina.[1] (R. p. 176; p. 183; p. 185; p. 190). Upon arriving, Mother spoke with her mother, who was the children's grandmother, in the kitchen, informed her of the nature of the argument with Applicant, and remarked Applicant was fixated on oral sex. (R. pp. 189-190). During that discussion, Mother's eight-year-old daughter ("Victim 1") overheard what Mother was saying, came into the kitchen, and revealed Applicant liked to perform oral sex on her, too. (R. p. 72; p. 190). Shocked by the revelation, Mother immediately called the police to notify them of the sexual abuse, and officers quickly responded to the home to take a report. (R. pp. 190-191).

[1] At that time, Mother was residing at her parents' home along with her mother, her father, her children, her sister, and her sister's children. (R. p. 185). Before doing so, Mother lived in her own house with Applicant and their children. (R. pp. 184-185). However, in 2013, Mother lost the house and was forced to move in with her parents. (R. p. 185). Meanwhile, during that time period, Applicant alternated between staying at a shelter and various hotels. (R. pp. 185- 186).

Thereafter, Victim 1's eight-year-old twin sister ("Victim 2") also disclosed she had been sexually abused to Mother. (R. p. 130; p. 191).

A few weeks later, the Florence County Sheriff's County assumed responsibility for the investigation into the sexual abuse, and Investigator Jennifer Floyd was assigned to handle the matter.[2] (R. pp. 58-60; pp. 173-174). Upon taking over the case, Investigator Floyd referred the victims for medical examinations and forensic interviews. During the interviews, both Victim 1 and Victim 2 disclosed Applicant sexually abused them by committing acts of oral, anal, and vaginal penetration at several different locations throughout Florence County.[3] (R. pp. 174-176; pp. 207-208; p. 229; pp. 232-234; p. 235; p. 242). Ultimately, through her investigative work, Investigator Floyd was able to develop a general time frame of when the abuse occurred based on where the victims lived at different times and their reported ages during the incidents of abuse. (R. p. 177).

At the conclusion of the investigation, Applicant was arrested and indicted for a number of different offenses through a nine-count indictment. (R. pp. 6-7; pp. 364-367). Specifically, amongst the counts in the indictment, Applicant was charged with four counts of first-degree criminal sexual conduct with a minor involving Victim 1 that were alleged to have occurred in Florence County between the dates of February 1, 2013, and July 31, 2014, with two different counts alleging Applicant put his penis inside her mouth, one count alleging he put his penis inside

[2] Based on the testimony presented during trial, it appears the Florence County Sheriff's Office became involved in the investigation due to potential jurisdictional issues for the Florence Police Department. (R. pp. 200-202).

[3] Although both victims disclosed a number of different instances of sexual abuse committed by Applicant during the forensic interviews, the eight-year-old girls' statements were occasionally contradictory, inconsistent, or lacking in detail in regard to when and where the different assaults occurred, how many times the assaults took place, and what specifically took place during each of the incidents. (State's Ex. # 6 (Recording of Forensic Interviews)).

both her vagina and mouth, and one count alleging he put his penis inside her vagina, anus, and mouth. (R. pp. 364-367). Similarly, Applicant was charged with three counts of first degree criminal sexual conduct with a minor involving Victim 2 that were alleged to have occurred in Florence County between the dates of February 1, 2013, and July 31, 2014, with one count alleging Applicant put his penis inside her mouth and two different counts alleging he put his penis inside her vagina. (R. pp. 364-367).

Subsequently, Applicant proceeded to trial on the seven counts of first-degree criminal sexual conduct with a minor alleged to have been committed between February of 2013 and July of 2014, and, at the outset of the trial, Trial Counsel moved to quash the multi-count indictment based on the South Carolina Supreme Court's decision in State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015).[4] (R. pp. 6-7; p. 9). In support of that motion, Trial Counsel asserted the counts all involved a one-and-a-half-year time span but contained "absolutely no distinguishing language whatsoever." (R. pp. 15-17). Additionally, Trial Counsel asserted the counts were inadequate because they did not contain sufficient information for the court to ascertain what Applicant had been acquitted of if he was found not guilty of some of them. (R. p. 18).

Furthermore, Trial Counsel asserted the time span alleged in the counts was overly broad, unspecific, and unparticular since Applicant was the victims' father and, therefore, "was regularly in the life of" the victims and "probably saw them a thousand times over that period of time." (R. pp. 25-26; pp. 29-30). However, Trial Counsel acknowledged he had reviewed the victims' forensic interviews in preparation for trial and conceded the victims used "broad" and "confusing" language during the interviews that would effectively prevent anyone from being able to determine

[4] Although Applicant was indicted for two additional charges through the multi-count indictment, the solicitor elected not to proceed forward on those charges based on the fact they alleged significantly broader time spans for the abuse. (R. p. 37; pp. 364-367).

how many times the abuse occurred precisely or to distinguish between the different instances of abuse clearly. (R. pp. 17-18). Nonetheless, Trial Counsel maintained the multi-count indictment was improper because Applicant purportedly could not narrow the scope of the charges or raise any defense other than a denial based on the information contained in the different counts. (R. pp. 25-26).

In rebuttal, the Solicitor contended that each count was sufficiently distinguished from the others by identifying the particular victim involved and the specific type of sexual battery involved in the individual counts. (R. pp. 26-27). Additionally, the Solicitor asserted Applicant had been on notice of the counts in the indictment for well over a year and, thus, was not surprised by the charges he was facing as the defendant in Baker had been. (R. pp. 27-28). Furthermore, the Solicitor noted that the eighteen-month time span involved in Applicant's case was shorter than either the six-year time span involved in Baker or the two-year and three-year time spans involved in other cases in which the indictments were found not to be overly broad. (R. pp. 28-29). For those reasons, the Solicitor argued the counts in the indictment were sufficiently specific, distinguishable, and not overly broad such that the motion to quash should be denied. (R. p. 29).

After considering the matter and reviewing the relevant appellate decisions, the trial judge denied the motion to quash. (R. pp. 31-38). In denying the motion, the trial judge noted each of the counts in the indictment specifically identified the particular minor victim involved and identified the specific type of sexual battery that was alleged to have been committed while the time span identified in each of the counts covered a period of only eighteen months. (R. pp.37-38). The trial judge further noted Applicant had a long period of notice regarding the charged offenses in light of the fact that he had been indicted over fifteen months earlier. (R. p. 38). Based

on those factors, the trial judge concluded that the time span alleged in the indictment was not overbroad, and there was no proper basis for quashing the indictment. (R. p. 38).

Following the trial judge's ruling, the trial proceeded forward, and Victim 1, who was eleven years old at the time of trial, testified Applicant sexually abused her and her sister multiple times at various locations when she was around seven or eight years old. (R. pp. 71-127). More specifically, Victim 1 indicated Applicant touched her and her sister's buttocks and vagina on one occasion while inside a parked vehicle at their grandmother's house, put his penis in her vagina on at least one occasion while inside a parked vehicle at the same location, put his penis in her vagina at the Thunderbird Inn hotel, touched her "[i]n [her] mouth" on yet another occasion near a bus stop, and put his penis in her vagina at a park once. (R. pp. 79-84; p. 96; pp. 110-111; pp. 115-120). Additionally, Victim 1 revealed Applicant put his penis in her mouth at the Thunderbird Inn hotel on one occasion, but she then quickly offered inconsistent testimony and asserted Applicant did not actually get "it" into her mouth during that incident. (R. p. 95). Likewise, Victim 1 alternately claimed Applicant did and did not put his penis in her anus on multiple occasions, and she asserted he did put his penis inside her mouth and vagina between five and ten times in total.[5] (R. pp. 100-101; pp. 105-106). Furthermore, Victim 1 stated she saw Applicant put his penis inside Victim 2's mouth on one occasion. (R. pp. 98-99).

Similarly, Victim 2, who was also eleven years old at the time of trial, testified about the numerous instances of sexual abuse involving her and her sister that occurred around the time she was seven or eight years old. (R. pp. 130-171). Specifically, during her testimony, Victim 2

[5] Regarding a potential cause of or contributing factor to the inconsistencies in Victim 1's testimony, Victim 1 revealed she was "frightened" and "intimidated" about testifying and was "shy." (R. p. 103; p. 106; p. 127). Furthermore, according to Mother, Victim 1 was assigned to "resource" classes in school while her sister was assigned to "regular" classes. (R. p. 188).

recounted Applicant put his penis in her mouth at the Thunderbird Inn hotel on one occasion, put his penis in her vagina between one and five times at that location, put his penis in her anus one time at that location, put his penis in her anus one time at a different hotel, and put his penis in her mouth and vagina on multiple occasions while inside a vehicle parked at her grandmother's house.[6] (R. pp. 134-138; pp. 140-141; pp. 144-146). Likewise, Victim 2 indicated she observed Applicant put his penis in her sister's anus at one of the hotels and saw Applicant put his penis in her sister's mouth once and vagina on multiple occasions while they were inside a vehicle parked outside their grandmother's house. (R. pp. 140-141; pp. 144-146). Moreover, Victim 2 stated she saw Applicant unsuccessfully attempt to put his penis in Victim 1's vagina and mouth at the Thunderbird Inn motel, but she acknowledged she had previously indicated during the forensic interview she observed Applicant put his penis in Victim 1's mouth while the two were showering together at that location. (R. p. 138; p. 158).

Furthermore, in addition to the victim's testimony, Mother offered testimony confirming Applicant regularly was with the victims for long periods of time at hotels, at the park, and in a vehicle parked outside of her parent's house while she was working during the time period of the abuse. (R. pp. 185-187; p. 198). Moreover, she discussed Victim 1's initial disclosure of the abuse, and she noted the victims began exhibiting behavioral changes, such as bed-wetting and issues in school, that began to manifest during the period of time in which the abuse was alleged to have occurred.[7] (R. pp. 188-194).

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[6] In recounting the sexual abuse, Victim 2 indicated Applicant's penis had a scar on it. (R. p. 168). Notably, Mother later testified Applicant's penis was, in fact, scarred as the result of a surgical procedure. (R. p. 188).

[7] Specifically, regarding the initial disclosure, Mother indicated Victim 1 revealed the abuse to her while she was speaking with her own mother about Applicant's sexual preferences she called the police in response, and then Victim 2 revealed the abuse to her after the police had taken a report. (R. pp. 189-191). However, during the victims' testimony, Victim 1 alternately stated she revealed

Beyond that testimony, the officers involved in the investigation into the allegations discussed the steps in the investigation that culminated in Applicant being charged with numerous instances of sexual abuse.[8] (R. pp. 58-61; pp. 173-177). Likewise, Dr. Anne Abel, a pediatrician and expert in child abuse who participated in the medical examinations of the victims, discussed the results of the examinations, noted Victim 2 had no signs of injury, and indicated Victim 1 had two mounds on her hymen that could potentially have been caused naturally or by sexual abuse. (R. p. 235; pp. 242-243; p. 257). However, Dr. Abel's specifically noted an absence of injuries did not rule out the possibility of sexual abuse due to the fact injuries resulting from acts such as vaginal or anal penetration tended to heal very rapidly. (R. pp. 235-238; pp. 240-242).

Thereafter, at the conclusion of the evidentiary phase of the trial, Trial Counsel moved for a directed verdict on all seven counts of first-degree criminal sexual conduct with a minor. (R. pp. 262-263; pp. 286-287). In support of that motion, Trial Counsel argued no testimony had been presented to establish more than one count of oral penetration occurred involving Victim 1, while two of the counts solely alleged acts of oral penetration involving that particular victim. (R. pp. 264-265). Furthermore, regarding the remainder of the counts, Trial Counsel contended the testimony was so contradictory and convoluted that the jury would be forced to speculate to reach a verdict. (R. pp. 265-267). In rebuttal, the Solicitor argued sufficient evidence had been presented for the case to be submitted to the jury while noting it would be up to the jury to resolve the

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the abuse to Mother, and her sister revealed the abuse to Mother, and Victim 2 indicated she revealed the abuse to Mother before the police were contacted. (R. pp. 82-83; p. 109; pp. 148-150).

[8] Sally Williamson, the forensic interviewer who conducted the interviews of the victims, also testified during the trial in a hearing conducted outside the presence of the jury in order to establish the admissibility of the recording of the forensic interviews. (R. pp. 207-226). Ultimately, though, the recording was not admitted into evidence because the solicitor was unable to effectively redact certain inadmissible portions of the interviews. (R. pp. 227-228).

credibility issues raised by the evidence. (R. p. 269). Moreover, the Solicitor noted the testimony left some confusion as to the exact number of incidents of sexual abuse, but contended testimony had been presented from both girls regarding a variety of different incidents such that the directed verdict motion should be denied. (R. pp. 267-269).

After considering the matter overnight and meticulously reviewing his trial notes, the trial judge denied the directed verdict motion. (R. p. 269; pp. 277-279; p. 287). In denying the motion, the trial judge found the testimony presented by both victims established Applicant anally penetrated Victim 1 three times in total, vaginally penetrated her one time at her grandmother's house, and orally penetrated her once at her grandmother's house and once at the Thunderbird Inn hotel. (R. pp. 278-279). Likewise, the trial judge found that the testimony presented established Applicant vaginally penetrated Victim 2 at both her grandmother's house and the Thunderbird Inn hotel, orally penetrated her at the same hotel, and put his penis in her "private part" at least five times. (R. p. 279). Based on that evidence, the trial judge concluded all of the charges should be submitted to the jury. (R. p. 279; p. 287).

Following the trial judge's ruling, the parties presented their closing arguments to the jury. (R. pp. 287-322). During Trial Counsel's closing argument, Trial Counsel focused on inconsistencies in the victim's testimony he characterized as "voluminous," "huge," and "major" in arguing the State failed to prove Applicant's guilt beyond a reasonable doubt. (R. pp. 302-305; pp. 307-311; pp. 316-317).

After the parties finished their closing arguments, the trial judge instructed the jury on the applicable law. (R. pp. 324-340). As part of his jury instructions, the trial judge explained the State had the burden of proving Applicant's guilt beyond a reasonable doubt for each of the charges, thoroughly explained reasonable doubt to the jury, instructed the jury on assessing witness

credibility, identified the elements of first-degree criminal sexual conduct with a minor, indicated each of the counts had to be considered separately, and specifically advised the jurors their verdict must be unanimous. (R. pp. 325-327; pp. 330-332; pp. 335-338).

Subsequently, at the conclusion of trial, the jury convicted Applicant of three counts of first-degree criminal sexual conduct with a minor involving Victim 1 and three counts of first-degree criminal sexual conduct with a minor involving Victim 2. (R. pp. 348-349). Meanwhile, the jury acquitted Applicant of the single count of first-degree criminal sexual conduct with a minor alleging oral, vaginal, and anal penetration of Victim 1. (R. pp. 348-349). Following the verdict, the trial judge imposed an aggregate sentence of life without parole upon Applicant. (R. p. 361).

CURRENT ACTION BEFORE THIS COURT

Applicant timely commenced this PCR action on December 29, 2020. Applicant asserted he was being held in custody unlawfully, alleging:

> 1. "The Court should grant the petition for writ of certiorari because the question presents a substantial constitutional issue dealing with an overbroad and vague indictment time frame that was not narrowed as much as possible and lacks specificity within the time frame that filed to provide sufficient notice depriving me of procedural due process."
> 2. "Did the Court of Appeals err in finding no err in the trial judge refusing to quash as unconstitutionally overbroad and vague indictment alleging seven counts of criminal sexual conduct with a minor between Feb. 1, 2014 and July 31, 2014, because the lack of specificity within the time frame failed to provide sufficient notice of the time frame was not narrowed as much as possible."

Applicant requests relief in the form of "based on the above argument the Court presented in issue one, this Court should reverse the convictions and sentences. Based on the argument in issue two, this Court should reverse and remand for acquittal on either count [sic] of the indictment."

Before this Court are the Florence County Clerk of Court records regarding the subject's convictions and sentences, Applicant's SCDC records, the trial transcript, the appellate records (including the record on appeal), and the records of this PCR action.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[9] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

> 1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
> 2. That the court was without jurisdiction to impose sentence;
> 3. That the sentence exceeds the maximum authorized by law;
> 4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> 5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
> 6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). 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

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

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—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). 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; accord. 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)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384

(1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be

substantial, not just conceivable." Richter, 562 U.S.at 112.

Finally, 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.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW[10]

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary

[10] This Court notes that Applicant was court ordered to amend his application with allegations cognizable under the PCR Act. As of the date of the evidentiary hearing, Applicant had failed to amend his PCR application. Thus, this Court addresses each allegation as it was presented for the first time at the evidentiary hearing.

hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

As a matter of general impression, this Court finds Trial Counsel's testimony at the evidentiary hearing **credible** and **persuasive**, where he presented well-recollected testimony of relevant background, facts, and discussions leading up to and during the trial. This Court finds Applicant's testimony at the evidentiary hearing generally **not credible**. This Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant he rendered adequate assistance and exercised reasonable professional judgment in his representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made.

Strickland, 466 U.S. at 689, 104 S.Ct. 2052; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ON THE MERITS

Applicant did not allege any cognizable claims of ineffective assistance of counsel in his PCR application. At the call of the case, PCR Counsel indicated they had allegations of ineffective assistance of counsel, and Respondent indicated they were ready to proceed. (PCR Tr. p. 5). At the hearing, Applicant proceeded on the following allegations:

Allegation 1: Failure To Call Certain Witnesses

Applicant alleges Trial Counsel was constitutionally ineffective for failing to call certain witnesses. Specifically, Applicant averred Trial Counsel failed to call a school staff member and a urologist who would have allegedly testified in Applicant's favor. This Court finds this allegation is without merit.

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 in 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).

At the evidentiary hearing on direct examination, Applicant testified that Trial Counsel should have called school staff, but Applicant could not remember the name of the school staff. Applicant testified that the school staff "knew about the situation with [his] baby's mother, her ways of acting around the children, because [he] spent more time with them eating with them,

going to school, which she didn't, and one time they had to get her off the premises." (PCR Tr. p. 8).

Applicant testified that Trial Counsel should have called Dr. Peter O'Kelly, Urologist, Carolina Hospital System, because he could have testified that his scrotum was injured and he would not have been able to perform sexual acts during the times alleged.[11] (PCR Tr. pp. 9-10).

Applicant testified that Trial Counsel should have called Janice King, his fiancé, because there was a delay on the third day of trial, where the trial court began proceedings without Applicant present. (PCR Tr. pp. 10-12).

Applicant testified that Trial Counsel should have called his twin brother, Victor Ross, because his representation of Applicant was a conflict of interest. (PCR Tr. p. 13).

On direct examination, Trial Counsel testified to the following regarding witnesses:

> Q. I'm going to go jump right into the allegations. So there is an allegation of not calling certain witnesses, and the first one would be not calling school witnesses. Do you recall him asking you to subpoena school witnesses?
>
> A. No. We talked about, I think specifically had mentioned his physician, and then, also, I think he mentioned the school official, and normally what we do is at the time in which he mentioned these witnesses, and I'll start off with the school physician, we talked about whether or not the school physician, whether or not the physician could provide any information that would be assistance in connection with his defense. I think it was his position that, hey, I couldn't have sex, so therefore -- and that's what I believe he had told me: Well, I can't have sex, therefore, that would be a complete bar to these particular charges, which it would not, because it was my understanding is is that, and of course, we talked about this, that there was nothing in his records in which his physician said, or at least that he was aware of where his physician said that he could not have sex. In addition to that, if you would look in the transcript during the testimony of his trial, I think the mother of his kids saying that they had

[11] At trial, Esther Lewis, the mother of Applicant's children, testified that Applicant had surgery on his scrotum, but he was still able to sexually perform. (Trial Tr. p. 219-220).

sex regularly, and I think she even said that one of the reasons why she broke up with him is because his incessant demand for sex, specifically oral sex.

. . . .

A. And so we talked about whether or not that physician could offer anything, because unless the physician can get up there and say medically that it is impossible for you to have sex, that physician is not going to be, you know, basically, a defense to him allegedly committing these offenses. So we had a conversation around about the physician and what the physician could offer and what the physician could not offer and whether or not that would be beneficial to them because if we put the physician on the stand, and of course, there is testimony that he is having sex and there is no testimony coming from the physician that he is incapable of doing that, then of course, it would probably injure him more than it would help him. With respect to the school officials, and I'm a little bit confused about the school officials, the thing about the school officials, and I think I was keeping notes while he was testifying, I think he said something like that the school officials could testify to the fact that his -- the mother of his girlfriend came up and was erratic and had to be removed from the school, but again, that has absolutely nothing to do whether or not he had committed these offenses. I don't know whether or not he thought that we could somehow say that the mother of his children was a bad mother, therefore, somehow that was a defense to the allegations that is he was accused of by his daughters, and it was not, and that is one of the things that we talked with him about is, is that if you are going to bring witnesses there you have to have witnesses that's going to offer something to his defense, and of course the only thing that we were aware of is maybe she could say, you know, that these children's mother was a bad mother, which again doesn't help him in the allegation that he sexually assaulted these kids.

Q. How about with regard to Ms. Janice King, his wife?

A. And I'm a little bit confused by that, and I'm not quite sure what he was saying that Ms. King would offer, but Mr. Ross was in jail, I think, to my memory, just about the entire time. So I met Ms. King on numerous occasions, she would come to my office often, and mostly would just talk about the case, but I'm not quite -- and I'm a little bit confused by that, I'm not quite sure what he thinks that Ms. King could have offered, because certainly if she had information that the jury

> might find useful in trying to determine whether or not he had committed these offenses, we would have called Ms. King. I think when he was testifying he said something like, Ms. King said that we started the trial on the third day without them, and that's not true, and I don't know if you probably know anything about Judge Brown, but Judge Brown is probably one of the most procedural regimented judges there is and is a stickler to the rules. We never start a trial and stop that trial at any point in time without him being present in the courtroom.

(PCR Tr. pp. 28-31).

This Court finds Applicant failed to meet his burden under Strickland because he did not present any evidence or testimony from any of these witnesses at the PCR hearing. Our 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 prevail on this type of claim. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); see, e.g., Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (holding that "pure conjecture" as to what a witness' testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different); Glover v. State, 318 S.C. 496, 498– 99, 458 S.E.2d 538, 540 (1995) (mere speculation as to un-presented witness' testimony does not satisfy PCR applicant's burden).

Based on the foregoing, this Court finds no deficiency in Trial Counsel's failure to call certain witnesses, nor any resulting prejudice. Accordingly, Applicant's request for relief by way of these allegations is **DENIED** and **DISMISSED**.

Allegation 2: Conflict Of Interest

Applicant alleges Trial Counsel's representation was constitutionally ineffective because Trial Counsel had a conflict of interest from representing Applicant's brother in the past. This Court finds this allegation is without merit.

The Sixth Amendment guarantees criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland, 466 U.S. at 685. "Representation of a criminal defendant entails certain basic duties[, including] a duty of loyalty [and] a duty to avoid conflicts of interest." Id. at 688 (citing Cuyler v. Sullivan, 446 U.S. 335, 346 (1980)). In Cuyler v. Sullivan, the United States Supreme Court held that "[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 350; accord Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007).

The Court later clarified in Mickens v. Taylor, that an "actual conflict," for Sixth Amendment purposes, is a "conflict that [adversely] affected counsel's performance—as opposed to a mere theoretical division of loyalties." 535 U.S. 162, 171 (2002); see United States v. Gantt, 140 F.3d 249, 254 (D.C. Cir. 1998) (internal quotations marks and citations omitted) (explaining that the "adverse effect" element of the Cuyler test requires the defendant "to demonstrate that the conflict had some negative effect upon his defense (defined as an actual lapse in representation)"). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction," State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005), and an actual conflict of interest does not arise from an irrelevant or "hypothetical conflict having no effect on trial counsel's representation . . ." United States v. Taylor, 139 F.3d 924, 931 (D.C. Cir. 1998). The two requirements—an *actual conflict* of interest resulting in an *adverse effect* on counsel's performance—"are often intertwined, making the factual analyses of them overlap." United States v. Tatum, 943 F.2d 370, 375–76 (4th Cir. 1991).

Here, this Court finds that Applicant failed to demonstrate—"as a threshold matter"—that Trial Counsel was ever "required to make a choice advancing his own or [Applicant's brother's] interests to the detriment of [Applicant's] interests." United States v. Bruce, 89 F.3d 886, 893 (D.C. Cir. 1996) (citation omitted); see id. ("It is the competition between these interests, rather than some independent failure of the attorney, that gives rise to the 'conflict.'"). There is no evidence of any apparent diverging interests that could have prejudiced Applicant.

Accordingly, Applicant's claim that there was a conflict of interest in Trial Counsel's representation of him is **DENIED** and **DISMISSED**.

Allegation 3: Failure to Ask for a Continuance

Applicant alleges Trial Counsel was constitutionally ineffective for failing to request a continuance when the trial was scheduled two weeks earlier than expected. Applicant also asserts that Trial Counsel should have requested a continuance because he felt Judge Brown was biased because he denied his bond, and Applicant rejected a plea offer in front of Judge Brown. This Court finds these allegations are without merit.

On direct examination, Trial Counsel **credibly** testified that he had no knowledge of the trial being moved up two weeks earlier than the date he provided Applicant. (PCR Tr. p. 32). Trial Counsel **credibly** testified that he met with him the prior day to trial because the Solicitor made an offer, and he wanted to convey the offer to Applicant. (PCR Tr. pp. 32-33).

Applicant testified that a plea offer was brought in on the record at his bond hearing. (PCR Tr. p. 16).

On cross-examination, Trial Counsel **credibly** testified that he had no recollection of the trial being placed on the docket two weeks earlier than planned. (PCR Tr. p. 40). Trial Counsel **credibly** testified that he had no concerns about Judge Brown presiding over Applicant's case and

did not think Judge Brown needed to recuse himself. (PCR Tr. pp. 40-42). Trial Counsel **credibly** testified that he discussed Judge Brown with Applicant regarding his conservative position on bonds, but that Judge Brown was a "stickler for the law and procedure," which made Trial Counsel comfortable with him presiding over the case. Id.

Trial counsel **credibly** testified that he did not recall a plea offer being made on the record before Judge Brown during Applicant's bond hearing. (PCR Tr. p. 42). Trial Counsel testified that it is his common practice to always consult with his client when given a plea offer, and that it is common for him to receive plea offers around the date of the trial and after bond hearings. (PCR Tr. pp. 33, 42). Trial Counsel **credibly** testified that he did not think the presence of a plea offer on the record at the bond hearing would be prejudicial at trial. (PCR Tr. p. 42).

This Court finds Applicant has failed to prove Trial Counsel was deficient or failed to render reasonably effective assistance under prevailing professional norms in regards to requesting a continuance. This Court finds **credible** Trial Counsel's explanation that the trial was not moved up two weeks earlier than planned and that he had no basis to ask Judge Brown to recuse himself. "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel

articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy).

This Court finds Applicant has failed to establish any deficiency by Trial Counsel for failing to request a continuance and Applicant has failed to establish any prejudice flowing therefrom. Accordingly, Applicant's request for relief by way of these allegations is **DENIED** and **DISMISSED**.

Allegation 4: Failure To Utilize Exculpatory Evidence

Applicant alleges Trial Counsel was constitutionally ineffective for failing to investigate and utilize the alleged letter written by the victim. This Court finds this allegation is without merit.

On direct examination, Applicant testified that he and his fiancé[12] gave Trial Counsel a letter written by the victim that stated she would drop the charges if Applicant ended his relationship with his fiancé. (PCR Tr. p. 18). Applicant testified that this letter could have proven his innocence that the victim's mother was going after him because of his relationship with his fiancé. (PCR Tr. p. 19).

In a colloquy with the Court, Applicant testified that the letter was because of a vendetta and that his lawyer should have presented it to the trial court.

On cross-examination, Trial Counsel **credibly** testified that there was no letter provided to him written by the victim that discussed her willingness to drop the charges if Applicant would start dating her mother again. (PCR Tr. p. 43). Trial Counsel **credibly** testified that if given such evidence, he would have used it as his first line of attack at Applicant's trial. Id. Trial Counsel

[12] Applicant referred to his fiancé as his wife throughout the hearing.

credibly testified that had such a letter existed, he would have been obligated to turn it over to the prosecution. Id.

This Court finds Applicant's testimony **not credible** and **not persuasive**. Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland). Additionally, this Court finds Applicant has failed to meet his burden proving Trial Counsel's alleged deficiency prejudiced him. Whether the evidence Applicant contends should have been more readily presented would have changed the outcome of Applicant's trial is mere speculation. Consequently, speculation cannot satisfy Applicant's burden of proving prejudice. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 5: Court Proceeded Without Applicant Present

Applicant alleges Trial Counsel permitted proceedings to occur on the third day of the jury trial without Applicant present. This Court finds that this allegation is without merit.

As an initial matter, the record wholly refutes Applicant's allegation that the third day of court began without him present. The record reflects Applicant was physically present on the third day of the trial, April 19, 2017, when the proceedings began at 9:59 in the morning. (Trial Tr. pp. 301-303). The trial court began with a ruling on the motion for a directed verdict and directly went into a colloquy with Applicant about his right to testify with no interruptions noted in the record. Id.

This Court finds Applicant's testimony on this matter **not credible**. Further, this Court finds Trial Counsel's testimony **credible,** and Applicant has failed to prove any deficiency in Trial Counsel's performance nor any prejudice flowing therefrom.

Accordingly, Applicant's allegation that Trial Counsel permitted proceedings to occur without Applicant present is **DENIED** and **DISMISSED**.

Allegation 6: Trial Counsel Was Sleeping During Applicant's Trial

Applicant alleges Trial Counsel was constitutionally ineffective for sleeping and snoring during the first day of the jury trial. The Court finds that this allegation is without merit.

Trial Counsel credibly testified that not only did he not fall asleep at trial but that Applicant had never mentioned anything to him or asked him about that alleged occurrence before. (PCR Tr. p. 44). Furthermore, the record is devoid of any evidence that Trial Counsel was sleeping during the trial.

This Court finds Applicant has failed to prove Trial Counsel was deficient or failed to render reasonably effective assistance under prevailing professional norms in his representation of Applicant. This Court finds **credible** Trial Counsel's testimony that he did not sleep or snore during Applicant's trial. Applicant has failed to prove any deficiency in Trial Counsel's performance nor any prejudice flowing therefrom.

Accordingly, Applicant's allegation that Trial Counsel was sleeping during the first day of the jury trial is **DENIED** and **DISMISSED**.

|CONCLUSION PAGE FOLLOWS|

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.**

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), an Applicant has a right to an appellate counsel's assistance in seeking a review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

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

FILED
2023 NOV 13 PM 3:20
DORIS PAULOS O'HARA
CCP & GS
FLORENCE COUNTY, SC

AND IT IS SO ORDERED this 1 **day of** Nov, **2023.**

THE HONORABLE DEBRA MCCASLIN
Presiding Judge
Twelfth Judicial Circuit

Florence, South Carolina