

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER **2021CP1800875**

FILED-RECORDED

Samuel Jolly 2024 MAY -6 PM 5: 05 South Carolina State of
CHERYL GRAHAM
CLERK OF COURT

PLAINTIFF(S) DEFENDANT(S)
Submitted by: Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

George M. McFaddin, Jr.
Circuit Court Judge

2759
Judge Code

5/6/2024
Date

For Clerk of Court Office Use Only

This judgment was entered on 05/06/2024, and a copy mailed first class or placed in the appropriate attorney's box on 05/06/2024, to attorneys of record or to parties (when appearing pro se) as follows:

Samuel Jolly #375455
Perry Correctional Inst.
430 Oaklawn Road
Pelzer, SC 29669

Bryan T. Hall
PO Box 11549
Columbia, SC 29211

Ashley B. Cornwell
1470 Ben Sawyer Blvd., Suite 14
Mount Pleasant, SC 29464

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Cheryl Graham - Clerk of Court

Court Reporter

Court Reporter:

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

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

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

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
)
Samuel Jolly, SCDC #375455,)
)
Applicant,)
v.)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2021-CP-18-00875

ORDER OF DISMISSAL

FILED - DORCHESTER COUNTY
2023 MAY - 6 PM 5:01
CLERK OF COURT
JENNIFER G. GRAHAM

This matter is before the Court pursuant to an application for post-conviction relief (“PCR”) filed by Samuel Jolly (“Applicant”) on May 14, 2021. On September 6, 2023, an evidentiary hearing convened before the Honorable George M. McFaddin, Jr. Applicant was present and represented by Ashley B. Cornwell, Esquire. Assistant Attorney General Bryan T. Hall represented Respondent. At the hearing, Applicant testified on his own behalf and called as witnesses Michael R. Hubrich and Lara M. Caudy. Respondent called as a witness John T. Komegay. Following a thorough review of the trial transcript and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

In February 2013, the Dorchester County Grand Jury indicted Applicant for criminal sexual conduct with a minor first degree – victim under eleven (11) years of age (2013-GS-18-00416). In February 2014, the Dorchester County Grand Jury indicted Applicant for committing or attempting to commit a lewd act upon a child under the age of sixteen (16) (2014-GS-18-00126). The indictments arose from an incident Applicant’s stepdaughter disclosed in 1997 that Applicant sexually molested her. On February 12-14, 2018, Applicant proceeded to a jury trial before the Honorable Edgar W. Dickson. Assistant Solicitors Ryan D. Templeton and Michael T. Spears

prosecuted the case. Michelle Williams (now Hubrich), Esquire, and John Kornegay, Esquire, represented Applicant. The jury found Applicant guilty as indicted. Judge Dickson sentenced Applicant to a concurrent sentence of thirty (30) years for criminal sexual conduct with a minor - first degree and fifteen (15) years for lewd act upon a child.

On February 20, 2018, a notice of appeal was filed on Applicant's behalf by Michelle Hubrich. On appeal, Applicant was represented by Appellate Defender Lara Mary Caudy ("appellate counsel"), who raised the following issues:

1. Did the trial judge err by refusing to quash the indictments for first degree criminal sexual conduct with a minor and lewd act upon a child as vague and overbroad when the indictments, which covered over a year period, failed to state the offense with sufficient certainty and particularity to enable Appellant to know what he was called upon to answer and whether he could plead an acquittal, particularly given the surrounding circumstances, namely that the alleged conduct occurred over twenty years before trial and almost all of the documentation and records related to the investigation, including the videotape of the forensic interview, were lost or destroyed?
2. Did the trial judge abuse his discretion by refusing to exclude evidence of prior bad acts pursuant to Rule 404(b), SCRE, and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), where the state, by procuring vague and overbroad indictments, was permitted to admit unlimited evidence of alleged sexual misconduct committed by Appellant over a thirteen month period without meeting any of the exceptions contained within Rule 404(b), SCRE, or proving the alleged conduct by clear and convincing evidence?
3. Did the trial judge abuse his discretion by permitting a medical doctor to give opinion testimony, specifically that Minor allegedly had an interruption of hymen, which required special knowledge, skill, experience, and training, without qualifying the witness as an expert in violation of Rules 701 and 702, SCRE?
4. Did the trial judge abuse his discretion by refusing to exclude expert testimony from Dr. Elizabeth Baker in violation of Appellant's constitutional rights under the Confrontation Clause and pursuant to Rule 705, SCRE, where the underlying facts, data, and evidence relied upon by the witness had been lost or destroyed, thereby preventing Appellant from effectively cross-examining the witness and retaining his own expert to challenge the witness's opinion testimony concerning her physical examination of the minor child?

After oral arguments, the South Carolina Court of Appeals affirmed Applicant's convictions. *State v. Jolly*, 2020-UP-327 (S.C. Ct. App. Filed December 2, 2020). The Remittitur was sent on December 31, 2020.

CURRENT APPLICATION

Applicant timely commenced this PCR action on May 14, 2021, alleging he is being held in custody unlawfully for the following reasons:

- 1) Ineffective Assistance of Trial Counsel
 - a. Failure to adequately investigate the alleged crime scene or allegations.
 - b. Failure to fully prepare Applicant to testify at trial.
 - c. Failure to provide a proper defense for trial.
 - d. Failure to request a jury charge on the meaning and significance of expert testimony.
 - e. Failure to effectively challenge and cross-examine the victim (AS).
 - f. Failure to effectively challenge and cross-examine the testimony of State witness Yvonna Brown.
 - g. Failure to challenge and effectively cross-examine Dr. Elizabeth Baker's testimony about her method of documenting and conducting the physical examination on the victim.
 - h. Failure to request a preliminary hearing.
 - i. Failure to object to improper bolstering of the victim's credibility during closing arguments.
- 2) Ineffective Assistance of Appellate Counsel
- 3) Newly Discovered Evidence and Fraud upon the Court for Failure of the Great Seal Attached to the 1993 Act.
- 4) Lack of Subject Matter Jurisdiction

On August 26, 2021, Respondent filed a return and moved to dismiss Applicant's allegations of newly discovered evidence, fraud upon the court, and lack of subject matter jurisdiction. Before this Court are the Dorchester County Clerk of Court records of the subject conviction; Applicant's records from SCDC; the appellate records; the trial transcript; and the records of the current PCR action.



TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant

At the evidentiary hearing, Applicant testified he left the state around 1996-1997 after speaking to a DSS caseworker about the incident. Applicant averred he did not hear about the allegations against him until 2013 and was still in contact with his wife during his absence from the state. Applicant testified he was previously represented by another attorney, Lincoln Felder, whom he retained.

Applicant testified he was later represented by Michelle Hubrich (“Hubrich”). Applicant testified he met with Hubrich approximately three (3) times or more times and met with John Kornegay (“Kornegay”) once. Applicant averred trial counsel should have requested a preliminary hearing, in which Applicant could have been better prepared. Applicant testified he reviewed with trial counsel the discovery, evidence, and the charges against him. Applicant testified he discussed with trial counsel a plea offer before trial but rejected to plea, maintaining his innocence. Applicant testified he met with trial counsel to prepare for trial, and trial counsel explained to Applicant how trial would work. Applicant testified trial counsel told Applicant she would put him on the stand but to remain calm.

On cross-examination, Applicant testified he asked trial counsel to investigate the victim’s background. Applicant averred trial counsel failed to effectively cross-examine the victim for bias, alleging the victim fabricated her story to get back at Applicant for punishing her for cussing. Applicant averred to blatant improper bolstering of the victim at trial. Applicant averred trial counsel failed to investigate missing pieces of evidence and believed trial counsel should have gotten an expert witness to testify to the missing pieces. Applicant averred the missing evidence included DSS records, law enforcement reports, and forensic reports. Applicant averred trial



counsel failed to adequately challenge the DSS witness, Yvonna Brown, and did not understand why the witness could testify twenty (20) years later. Applicant averred trial counsel failed to challenge the State's expert, Dr. Elizabeth Baker, regarding lost pictures and failed to call an independent expert witness to rebut Dr. Baker's testimony. Applicant averred trial counsel failed to request a charge on the meaning and significance of expert testimony.

Regarding appellate counsel, Applicant testified he never met her in person and only spoke on the phone maybe twice, during which appellate counsel reviewed issues she would raise. Applicant further averred the trial court lacked subject matter jurisdiction for the Great Seal not being affixed to the Acts under which Applicant was convicted.

Trial Counsel¹

Michelle Hubrich ("Hubrich") testified she met with Applicant fifteen (15) times and reviewed the case file, elements of the crimes, and defenses. Hubrich testified Applicant did not have a legal defense except denial of the allegations. Regarding a preliminary hearing, Hubrich testified that if she said "no" to a preliminary hearing it was because Applicant had already been indicted. Hubrich testified she made several objections regarding missing evidence such as forensic investigator reports, law enforcement reports, and Dr. Baker's report. Hubrich testified she requested a spoliation charge but unsure whether trial jury gave the charge. Hubrich testified the delay in prosecution was because Applicant fled the state, and there was no crime scene given the length of time between the initial reporting by the victim and Applicant's arrest. Hubrich testified she believed the law enforcement report had been destroyed and only notes from the investigator remained. Hubrich testified the State's evidence included the victim's allegations, Dr. Baker's report showing tearing, DSS file containing notes that included a partial admission by

¹ Hubrich and Komegay hereafter referred to collectively as "trial counsel."

Applicant. Hubrich testified she made a motion to quash the indictment, which the trial court denied. Hubrich testified she moved to exclude Dr. Baker from testifying because there were no supplemental materials. Hubrich testified she did not retain an expert witness because she believed Dr. Baker's testimony helped Applicant's case, and Hubrich believed they successfully excluded Dr. Baker's expert opinion as the trial judge allowed Dr. Baker to testify to her observations but not as an expert. Hubrich testified she cross-examined Dr. Baker on inconsistencies in her report. Regarding a jury charge on expert testimony, Hubrich testified the jury charge would have hurt Applicant since no expert testified at trial. Hubrich testified he moved pre-trial to exclude evidence of flight and moved for a *Jackson v. Denno* hearing for Applicant's admission to DSS.

Regarding investigations, Hubrich testified she investigated the credibility of the victim by subpoenaing school records and did not find anything that could substantiate Applicant's defense or be admissible in court. Hubrich testified Applicant asked her to speak to his wife, the victim's mother, and Applicant's wife was not helpful. Regarding cross-examinations, Hubrich testified that there were lots of inconsistencies in the various reports, which she challenged during cross-examination of the victim.

Regarding improper bolstering, Hubrich testified this was not a delayed reporting case and the cases involving bolstering dealt with delayed reporting. Hubrich testified she did not believe the State's arguments in closing constituted improper bolstering and still believes it does not. Hubrich testified that she objected to the DSS caseworker's (Yvonna Brown) testimony for improper bolstering and cross-examined Brown on her memory and perception.

John Kornegay ("Kornegay") testified he assisted Hubrich as co-counsel. Kornegay testified he reviewed evidence with Hubrich and Applicant. Kornegay testified he cross-examined Dr. Baker and her trial testimony was limited to observations. Kornegay testified if the defense

had the missing evidence, they could have hired an expert. Kornegay testified that trial counsel did not want Baker to be a star witness. Kornegay testified he did not want Dr. Baker's testimony to get into causation of the victim's genital trauma.

Appellate Counsel

Laura Caudy ("appellate counsel") testified she discussed the case with Applicant and sent the trial transcript and a letter explaining the appellate process. Appellate counsel testified she spoke to Applicant several times on the phone but did not think she discussed issues with Applicant before filing the brief. Appellate counsel testified she raised four issues for appeal and raised the issues she believed had the most merit. Appellate counsel testified that her review process includes reading transcript, listing motions and objection, and does research to determine which issues to raise on appeal. Regarding spoliation charge, appellate counsel testified the issue was not raised in the PCR application, but appellate counsel did not raise the issue because she did not believe it had merit since there was no evidence the State lost evidence in bad faith as is required for spoliation.

Regarding improper bolstering, appellate counsel testified she did not believe Dr. Baker's testimony constituted improper bolstering. Regarding the State's evidence of flight, appellate counsel testified the issue was not raised due to Applicant's wife's trial testimony that Applicant knew law enforcement was looking for him. Appellate counsel further testified she did not raise flight as an issue because she raised issues concerning missing evidence, and Applicant's disappearance for sixteen (16) years was the cause of the missing evidence. Appellate counsel testified that she believed raising the flight issue could have undermined the evidence issue raised on appeal. Appellate counsel testified she did not raise the issue of a directed verdict because she believed it did not have merit as the victim's testimony alone was sufficient evidence to support



the conviction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the trial transcript in its entirety and has heard the testimony at the PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony. After a careful review based on the *Strickland* standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Trial Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, 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. *Strickland*, 466 U.S. at 687-88; *Cherry*,

300 S.C. at 117–18, 386 S.E.2d at 625. Applicant must prove prejudice by showing “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.

Failure to Investigate

This Court finds Applicant failed to prove trial counsel was ineffective for failing to investigate. The scope of a reasonable investigation depends on a number of issues, but at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007). Counsel’s duty to investigate is limited to reasonable investigations. *Id.* at 331, 642 S.E.2d at 597. This Court finds **credible** Hubrich’s testimony that the lack of evidence, lack of a crime scene, and delay in prosecution was due to Applicant’s absence in the state for a number of years. This Court finds **credible** Hubrich’s testimony that she conducted investigations into the victim’s disciplinary background and interviewed the victim’s mother, which proved unhelpful. This Court finds trial counsel’s investigations reasonable under prevailing professional norms. Further, this Court finds Applicant did prove prejudice by producing any evidence at the PCR hearing of what further investigations would have uncovered. *Cf. Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (providing an applicant must prove he was prejudiced by showing the results of an investigation would have resulted in a different outcome). Thus, Applicant did not meet his burden.

Failed to Provide a Proper Defense

This Court finds Applicant has failed to prove trial counsel was ineffective for failing to provide a proper defense. To prevail on a claim that counsel did not adequately prepare or present a defense, an applicant must present evidence of what counsel could have discovered or what other

defenses applicant could have requested counsel develop. *Jackson v. State*, 329 S.C. 345, 352-53, 495 S.E.2d 768, 771-72 (1998). This Court finds **credible** trial counsels' testimonies that they met with Applicant several times and discussed the charges, evidence, defenses, and developed strategies. This Court finds counsel's preparation of the case and a defense strategy was reasonable under prevailing professional norms, and thus, was not deficient. Further, this Court finds Applicant failed to prove prejudice by presenting evidence of what other defenses counsel could have developed if counsel had more fully prepared. Thus, Applicant did not meet his burden.

***Failure to Effectively Cross-Examine the Victim, Yvonnia Brown,
and Dr. Elizabeth Baker***

This Court finds Applicant failed to prove Counsel was ineffective for failing to effectively challenge and cross-examine the victim, Yvonnia Brown, and Dr. Elizabeth Baker. *Strickland* requires that trial counsel be given leeway to make reasonable strategic decisions, and judicial scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 688-89. This Court finds **credible** Hubrich's testimony that she challenged the victim by cross-examining her on the inconsistencies contained in various reports. This Court finds Hubrich's cross-examination of the victim reasonable under prevailing professional norms. (Tr. 101-08, Feb. 13, 2018).

This Court finds **credible** Hubrich's testimony that she cross-examined DSS investigator Yvonnia Brown on her memory and perception. This Court also finds Hurbich's cross-examination of Brown reasonable under prevailing professional norms. (Tr. 134-35, Feb. 13, 2018) This Court finds **credible** Hubrich's testimony that she objected to a portion of Brown's testimony that Hubrich believed constituted improper bolstering. This Court finds Hubrich's challenging of Brown's testimony reasonable under prevailing professional norms. (Tr. 125-28, Feb. 13, 2018).

This Court finds **credible** Hubrich and Kornegay's testimonies that they believe they successfully excluded Dr. Baker's expert testimony and limited her testimony to observations. This



Court finds **credible** Hubrich's testimony that she believed she effectively cross-examined Dr. Baker. This Court finds Hubrich's cross-examination of Dr. Baker reasonable under prevailing professional norms. (Tr. 39-41, Feb. 14, 2018). Thus, Applicant did not meet his burden.

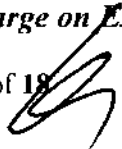
Failure to Call an Independent Expert

This Court finds Applicant failed to prove Counsel was ineffective for failing to call an independent expert to testify to the injury to the victim's genital area. To prevail on a claim that counsel failed to interview or call witnesses, an applicant must prove counsel's inaction resulted in prejudice by producing witnesses at the PCR hearing to show a reasonable probability the result of the trial would have been different based on the witness's testimony. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). An applicant's mere speculation as to what a witness' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.

Id.

.....
This Court finds Counsel articulated a reasonable strategic ground for failing to call an independent expert to testify. This Court finds **credible** Hubric's testimony that although she could have called an expert to testify that an injury to victim's genital area did not necessarily mean sexual assault, she believed a contra-expert was not needed and believed an expert would have hurt Applicant's case more than help. This Court finds trial counsels' decision not to call an independent expert was reasonable under prevailing professional norms. *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008) (holding trial counsel rendered ineffective assistance when she called an expert witness whose testimony undermined the defense). Further, this Court finds Applicant failed to prove prejudice by calling an expert witness at the PCR hearing to show a reasonable probability the result of trial would have been different with an independent expert's testimony. Thus, Applicant did not meet his burden.

Failure to Request a Jury Charge on Expert Testimony



This Court finds Applicant failed to prove Counsel was ineffective for failing to request a jury charge on expert testimony. The law to be charged must be determined from the evidence presented at trial. *See State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). This Court finds **credible** Hubrich's testimony that the jury charge would have hurt Applicant since no expert testified at trial. Further, this Court finds there was no expert testimony presented at trial that would have supported trial counsel's request for the charge. Thus, Applicant did not meet his burden.

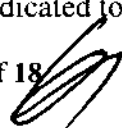
Failure to Request a Jury Charge on Spoilation

Although not directly raised by Applicant in his Application, there was testimony elicited at the PCR hearing on the issue of a jury charge on spoilation. This Court finds Applicant failed to prove Counsel was ineffective for failing to request a jury charge on spoilation of evidence. This Court finds **credible** appellate counsel's testimony that there was no evidence the State lost evidence in bad faith, which is a requirement for spoilation. This Court finds any missing or incomplete evidence resulted from Applicant's disappearance from the state for several years after being notified of the pending investigation against him. This Court further finds the evidence presented at trial did not support a charge on spoilation. Thus, Applicant did not meet his burden.

Failure to Prepare Applicant to Testify at Trial

This Court finds Applicant failed to prove trial counsel was ineffective for failing to prepare him to testify at trial. The record reflects that prior to Applicant testifying, the trial judge informed Applicant of his Fifth Amendment right to testify or remain silent. (Tr. 61, Feb. 14, 2018). The trial judge informed Applicant that the right to testify was solely his and could only be waived by him. (Tr. 61, Feb. 14, 2018). Applicant indicated that he understood what the trial judge explained. (Tr. 61, Feb. 14, 2018).

This Court finds trial counsel's preparation of Applicant to testify at trial reasonable under prevailing professional norms. At trial, Applicant indicated to the trial judge that he had discussed



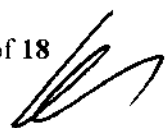
with trial counsel whether he should or should not testify. (Tr. 62, Feb. 14, 2018). Applicant further indicated that he did not wish to talk to his lawyers anymore and wished to testify. (Tr. 62, Feb. 14, 2018). At the PCR hearing, Applicant testified he spoke to Hubrich, who told him to remain calm on the stand. This Court finds the record supports a finding that Applicant was prepared to testify at trial after being informed of his rights and having discussions with trial counsel. Thus, Applicant did not meet his burden.

Failure to Request a Preliminary Hearing

This Court finds Applicant failed to prove trial counsel was ineffective for failing to request a preliminary hearing. In South Carolina, a criminal defendant does not have a constitutionally protected right to a preliminary hearing. *State v. Keenan*, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982). A preliminary hearing is not held if the defendant is indicted by a grand jury or waives presentment before the preliminary hearing occurs. Rule 2(b), SCRCrimP. This Court finds **credible** Hubrich's testimony that Applicant was not entitled to a preliminary hearing because he was indicted, and this Court agrees. Thus, Applicant did not meet his burden.

Failure to Object to the Solicitor's Closing Arguments for Improper Bolstering

This Court finds Applicant failed to prove trial counsel was ineffective for failing to object to the solicitor's closing arguments. Failing to object does not automatically constitute ineffective assistance of counsel. *See Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800-01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to object). A prosecutor's argument during closing argument that the jury should believe a particular witness is well within her proper role as a zealous advocate on behalf of the State, so long as the argument is based on evidence admitted during trial. *State v. Busse*, 439 S.C. 104, 886 S.E.2d 208 (2023) (holding although a solicitor should not have used first person language in closing arguments in a CSC minor trial, the solicitor's statement that "what was



compelling to me” was how the victim obtained her knowledge of defendant’s impotence, did not constitute improper vouching). “[A] prosecutor is expected to comment on the credibility of witnesses when making a closing argument” and may argue the importance of facts in evidence to the jury’s determination of the victim’s credibility. *Id.* at 111, 886 S.E.2d at 212.

During closing arguments, the solicitor in Applicant’s trial stated the following:

Next we heard from Mr. Jolly, and you’ve gotta [sic] judge the credibility of witnesses. That’s part of your job in this case. Who do you believe?

He told you how adorable [victim] was, how good of friends they were. That’s not what [victim] said.

He testified he was home with [victim] alone a lot. He had the opportunity to do this and he did. Of course he denied all of these allegations.

...
But you’ve got to think: who has a reason to lie in this case? And that’s Mr. Jolly.

...
[Victim] does not have any reason to lie about these [events] at this point, but Mr. Jolly has every reason to lie about these things.

(Tr. 106:10-107:14).

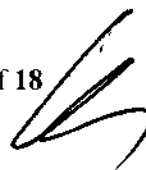
This Court finds the solicitor’s comments in Applicant’s trial did not constitute improper bolstering. This Court finds the solicitor’s comments were supported by the evidence presented at trial through the testimonies of Applicant and the victim. Further, this Court finds the solicitor’s comments were tied to the jury’s determinations in assessing the victim’s credibility, and thus, were proper. *Busse*, 439 S.C. at 111, 886 S.E.2d at 212 (“we find nothing improper in the deputy solicitor’s...effort to stress the importance of a piece of evidence and thus convince the jury to believe the victim’s testimony”). Additionally, this Court finds **credible** Hubrich’s testimony that she did not object to the solicitor’s arguments because she did not believe they constituted improper bolstering. This Court finds Applicant failed to prove trial counsel was deficient for not objecting to the comments. Thus, Applicant did not meet his burden.

Ineffective Assistance of Appellate Counsel

This Court finds Applicant failed to prove appellate counsel was ineffective. In analyzing ineffective assistance of appellate counsel, the court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) (providing applicant must prove appellate counsel's performance was deficient and must prove prejudice by showing a reasonable probability the result of the proceeding would have been different but for counsel's errors). This Court finds **credible** appellate counsel's testimony that her review process includes reading transcript, listing motions and objection, and conducting research to determine which issues to raise on appeal. This Court finds **credible** appellate counsel's testimony that she raised on appeal the four (4) issues that she believed had the most merit. This Court finds **credible** appellate counsel's testimony that she did not raise the issue of spoliation of evidence because she did not believe it had merit as there was no evidence presented at trial that the state lost evidence in bad faith. This Court finds **credible** appellate counsel's testimony that she did not raise the issue of flight because she believed there was evidence of flight presented at trial, and the flight issue would have undermined the evidence issue counsel intended to raise. This Court finds appellate counsel articulated reasonable strategic grounds for not raising the issues Applicant alleges she should have raised on appeal. This Court finds appellate counsel's preparation and assessment of the issues reasonable under prevailing professional norms, and thus, was not deficient. Thus, Applicant did not meet his burden.

**Great Seal, Newly Discovered Evidence, Fraud Upon the Court, and
Lack of Subject Matter Jurisdiction**

This Court interprets Applicant's allegations of Great Seal, newly discovered evidence, fraud upon the court, and subject matter jurisdiction as being related to and arising from the same set of facts. This Court addresses these issues together and finds no genuine issue of material fact regarding these allegations. Accordingly, this Court grants Respondent's motion to dismiss these



allegations as set forth in the Respondent's Return to the PCR Application. (Respondent's Return 15-18).

Summary dismissal of an application [or claim] is permitted and appropriate when (1) it is apparent on the face of the application that there is no need for a hearing to develop facts, and (2) the applicant is not entitled to post-conviction relief. S.C. Code Ann. § 17-27-70(b)-(c) (2014); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494 (2005). When considering the state's motion to dismiss, the court must assume the facts presented are true and view the facts in the light most favorable to applicant. *Leamon*, 363 S.C. at 434, 611 S.E.2d at 494.

Great Seal

Applicant avers the acts under which he was convicted (1993 Act No. 184, 1995 Act No. 7) are unconstitutional for failure of the Great Seal being attached. This Court finds the Acts under which Applicant was convicted were lawfully codified, and thus, any constitutional defect was cured. The South Carolina Constitution states no bill or joint resolution shall have the force of law until it has had the Great Seal of the State affixed to it. S.C. Const. Art. III, § 18. The South Carolina Supreme Court has held that absolute literal compliance is not essential to validate legislation, substantial compliance with a constitutional provision is sufficient. *See Smith v. Jennings*, 67 S.C. 324, 45 S.E. 821 (1903). Proper codification of an act will cure a constitutional defect and is part of the general statutory law of the state. *See S.C. Tax Comm'n v. York Elec. Co-Op., Inc.*, 275 S.C. 326, 270 S.E.2d 626 (1980). Thus, any constitutional defects were cured when the Acts were properly codified. Accordingly, this Court dismisses this allegation because there is no genuine issue of material fact, and Applicant is not entitled to relief as a matter of law.

Newly Discovered Evidence



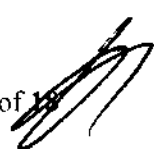
Applicant avers the Great Seal allegations constitute newly discovered evidence. This Court finds the Great Seal not being affixed does not constitute newly discovered evidence. Newly discovered evidence is evidence that is material to the accused's guilt or innocence and concerns the substance of the State's case or the accused defense. *See McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 627 (2013). Applicant's Great Seal allegation is neither material to his guilt or innocence nor concerns the substance of the State's case or his defense. Thus, Applicant's Great Seal allegation does not constitute newly discovered evidence. Accordingly, this Court dismisses this allegation because there is no genuine issue of material fact, and Applicant is not entitled to relief as a matter of law.

Fraud upon the Court

Applicant avers the Great Seal not being affixed constitutes fraud upon the court. This Court finds the Great Seal not being affixed does not constitute fraud upon the court. Fraud upon the court, as a ground for relief from judgment, "is a narrow and invidious species of fraud that subverts the integrity of the court itself, or is fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudicating cases." *Sanders v. Smith*, 431 S.C. 605, 613, 848 S.E.2d 604, 608 (2020). The Great Seal not being affixed is not an act perpetrated by officers of the court and does not affect the judicial machinery, integrity, or impartiality of the court itself. Thus, the Great Seal allegation does not constitute fraud upon the court. Accordingly, this Court dismisses this allegation because there is no genuine issue of material fact, and Applicant is not entitled to relief as a matter of law.

Lack of Subject Matter Jurisdiction

Applicant avers the Great Seal not being affixed deprived the circuit court of subject matter jurisdiction. This Court finds the Great Seal not being affixed did not deprive the court of subject



matter jurisdiction. "Circuit courts obviously have subject matter jurisdiction to try criminal matters." *State v. Gentry*, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). The circuit court had subject matter jurisdiction to try Applicant's case, irrespective of the Great Seal. Thus, this Court dismisses this allegation because there is no genuine issue of material fact, and Applicant is not entitled to relief as a matter of law.

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.


Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty (30) days of receipt by counsel of written notice of entry of judgment. *See* Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCPC. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 24th day of April, 2024.

Sumter, South Carolina



GEORGE M. MCFADDIN, JR.
Presiding Judge
First Judicial Circuit