NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A

POST CONVICTION RELIEF

RECEIVED

Mar 21 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM KERSHAW COUNTY

Court of Common Pleas

Daniel Coble., Circuit Court Judge

Case No. 2021-CP-28-00014

The State,.....Respondent,

Nakia K. Johnson,.....Appellant,

Notice of Appeal

Nakia K. Johnson appeals the order of the Honorable Daniel Coble, dated January 14, 2025, which denied his application for Post-Conviction Relief with prejudice. Appellant received written notice of the order on February 28, 2025.

Ola Johnson

PO Box 549

Lexington, South Carolina 29071

(803) 360-8692

Other Counsel of Record:
D. Russell Barlow, II
Post Office Box 11549
Columbia, SC 29211

(803)734-3737

STATE OF SOUTH CAROLINA COUNTY KERSHAW	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Nakia K. Johnson, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2021-CP-28-00014 **ORDER OF DISMISSAL**

Presiding Judge:	Hon. Daniel Coble
Applicant's Attorney:	Ola A. Johnson, Esq.
Respondent's Attorney:	D. Russell Barlow, II, Esq.
Plea Counsel:	Virgin Johnson, Jr., Esquire.
Date of Hearing:	September 12, 2023
Court Reporter:	Elizabeth B. Harris

This matter comes before the Court by way of Nakia K. Johnson's (Applicant) Application for Post-conviction Relief (PCR), filed on January 11, 2021. On January 27, 2021, Applicant filed a Memorandum in Support of Applicant's Application for Post Conviction Relief. On September 19, 2022, Applicant filed an Amended Post Conviction Relief Application. On January 3, 2023, Applicant filed a Second Amended Post Conviction Relief Application.

On September 12, 2023, an evidentiary hearing was held at the Richland County Courthouse before the Honorable Daniel Coble. Senior Assistant Deputy Attorney General D. Russell Barlow, II, represented Respondent. Applicant was present and represented by Ola A. Johnson, Esquire. At the hearing, Applicant proceeded *solely* on the allegations related to his affirmed conviction for Lewd Act with a Minor (2014-GS-28-0910).[1] In support of these claims,

[1] Applicant's CSC, 2nd Degree conviction was remanded for a new trial, and is currently pending as of January 8, 2025. State v. Johnson, No. 2015-001436, 2018 WL 1315136 (S.C. Ct. App. Mar. 14, 2018).

Applicant testified on his own behalf, and presented testimony from Louise Pinkney. Respondent presented testimony from Virgin Johnson, Jr., 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

Applicant is not presently confined in the South Carolina Department of Corrections (SCDC). During the August 2014 term of the Richland County Grand Jury, Applicant was indicted for First Degree Criminal Sexual Conduct with A Minor (2014-GS-28-0419), Second Degree Criminal Sexual Conduct with a Minor (2014-GS-28-0420), and Lewd Act with a Minor (2014-GS-28-0910).[2] Applicant was represented by Virgin Johnson, Jr., Esquire, and Korey L. Williams, Esquire. Fifth Circuit Assistant Solicitors Nicole Simpson and Kathryn Cavanaugh prosecuted the case.

On June 22-26, 2015, a jury trial commenced before the Honorable Doyet A. Early, III. At the conclusion of trial, the jury convicted Applicant of Second-Degree Criminal Sexual Conduct with a Minor and Lewd Act with a Minor. The jury acquitted Applicant of First Degree Criminal Sexual Conduct with a Minor. Judge Early sentenced Applicant to serve concurrent terms of twenty (20) years for Second Degree Criminal Sexual Conduct with a Minor and fifteen (15) years for Lewd Act with a Minor.

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[2] During the March 2012 term, the Lee County Grand Jury indicted Applicant for Criminal Sexual Conduct with a Minor—2nd Degree (2012-GS-31-55). Applicant was represented by Tony Desaussure, Esquire. On October 24, 2011, Applicant appeared for a bond hearing and waived jurisdiction to Lee County in Kershaw County. That charge was dismissed with leave to restore pending the outcome of his Kershaw County cases.

Applicant filed a timely Notice of Appeal. E. Charles Grose, Jr., Esquire (Counsel Grose), perfected Applicant's appeal to the Court of Appeals, presenting the following issues:

> I. Should the trial court judge have granted a mistrial when the State's expert witness, Dr. Allison Foster, testified that the "most painful dynamics in child sexual abuse cases involving family members is that mothers [and other adults]... [questioning] how could I not have seen something was going on" when the State presented testimony of the child's mother and other family members not being aware of the alleged child abuse and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?
>
> II. Should the trial judge have granted a mistrial when David Kellin, a child advocacy interviewer, testified he instructed the child to "tell the truth during the interview process," when that testimony is prohibited by State v. Kromah and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?
>
> III. Should this Court grant a new trial based on cumulative error doctrine?

Following briefing and oral argument, the Court of Appeals affirmed Applicant's conviction for a Lewd Act with a Minor, reversed his conviction for Second Degree Criminal Sexual Conduct with a Minor, and remanded for a new trial solely on his vacated conviction for Second Degree Criminal Sexual Conduct with a Minor. State v. Johnson, Op. No. 2018 -UP- 109 (S.C. Ct. App. filed March 14, 2018).

On March 29, 2018, Applicant filed a Petition for a Rehearing. On April 10, 2018, the State filed a Petition for a Rehearing. The Court of Appeals denied the Petitions by order on June 21, 2018.

On July 23, 2018, Applicant filed his Petition for Writ of Certiorari to the South Carolina Supreme Court, raising the following issues:

> I. I. Should the trial court judge have granted a mistrial when the State's expert witness, Dr. Allison Foster, testified that the "most painful dynamics in child sexual abuse cases

involving family members is that mothers [and other adults]... [questioning] how could I not have seen something was going on" when the State presented testimony of the child's mother and other family members not being aware of the alleged child abuse and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

II. Should the trial judge have granted a mistrial when David Kellin, a child advocacy interviewer, testified he instructed the child to "tell the truth during the interview process," when that testimony is prohibited by State v. Kromah and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

On July 26, 2018, Respondent filed its Petition for Writ of Certiorari. On October 19, 2018, the Supreme Court denied the State's Petition, and granted Applicant's Petition as to question I. Following briefing and oral argument, the South Carolina Supreme Court dismissed the appeal as improvidently granted. State v. Johnson, Op. No. 2020-MO-002 (S.C. Sup. Ct. filed January 22, 2020). The Remittitur was returned to the circuit court on the same day.

CURRENT ACTION BEFORE THIS COURT

Applicant timely commenced his PCR action and alleged he was being held in custody unlawfully due to ineffective assistance of Trial Counsel for the following reasons:

1. "I was not in the county where these charges originated."
   a. Video of myself and alleged victim in Lee County Presented at Trial
2. My attorney did not raise a defense.
   a. Officer testimony at preliminary hearing states I was in Lee County

On September 19, 2022, Applicant filed his first amended PCR application and alleged the following allegations of ineffective assistance of Trial Counsel:

3. Failed to challenge the admissibility and voluntariness of the Applicant's statement.

4. Failed to properly investigate the case or discuss the evidence with Applicant.
5. Failed to object to prior bad acts introduced by the state.
6. Failed to meet with Applicant a sufficient number of times.
7. Failed to put a defense for Applicant.
8. Failed to call Dr. James Ruffing as a defense expert witness.
9. Failed to object to the testimony of Pamela Hall regarding a domestic violence and infidelity by Applicant.
10. Failed to challenge the jurisdiction of the court based on the evidence of the state's allegation taking place in another county.
11. Failed to call Nikki Chisolm, Louis Pinckney, Rhonda Johnson as witnesses for the defense.
12. Failed to call the private investigator, retained by Applicant, to testify.
13. Failed to sufficiently argue a directed verdict motion at trial.

On January 3, 2023, Applicant filed his second amended PCR Application and alleged additional allegations of ineffective assistance of Trial Counsel as follows:

14. Failed to move to quash the indictment as to the 4-year period covered in the indictments as unconstitutional.
15. Failed to preserve the defendant's directed verdict motion.
16. Failed to present evidence pursuant to SCRCP Rule 19.
17. Failed to object to the jurisdiction defect in the state's case.
18. Failed to argue appropriate case law to object to evidence of prior bad acts presented by the state.

Before this Court are Kershaw County Clerk of Court records regarding the subject's conviction and sentences, Applicant's records from the South Carolina Department of Corrections, Applicant's Trial transcript, Applicant's Appellate records, Applicant's PCR transcript, and the records of Applicant's current PCR action.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[3] (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 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).

[3] S.C. Code Ann. §§ 17-27-10 *et seq.*

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

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 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

This Court 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 her 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; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS

Allegation 1:	**Trial Counsel failed to challenge jurisdiction where the video of [Applicant] and Victim in a store was in Lee County.**
Allegation 2:	**Trial Counsel failed to raise a defense where an officer testified in a preliminary hearing that Applicant was in Lee County.**
Allegation 10:	**Trial Counsel failed to challenge the jurisdiction of the court based on the evidence of the State's allegations taking place in another county.**
Allegation 17:	**Trial Counsel failed to object to the jurisdiction defect in the State's case.**

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to challenge the jurisdiction of the trial court.

The allegations presented to this Court and the testimony taken at the evidentiary hearing on these allegations seemingly conflate subject matter jurisdiction, venue, and the admission of prior bad acts evidence. Out of an abundance of caution, the Court will address subject matter jurisdiction and venue here and will address the prior bad acts evidence at allegation numbers five (5) and eighteen (18), *infra*.

Subject Matter Jurisdiction

"Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Pierce v. State, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000). "The circuit court has original jurisdiction in all criminal matters except those where an inferior court is given exclusive jurisdiction." State v. Dudley, 364 S.C. 578, 582, 614 S.E.2d 623, 625 (2005); S.C. Const. Art. V, § 11 (Supp. 2004). "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). In general, the requirements of subject matter jurisdiction are satisfied when appropriate charges are filed in a competent court. State v. Dudley, 354 S.C. 514,

523, 581 S.E.2d 171, 176 (Ct.App.2003), aff'd as modified, 364 S.C. 578, 614 S.E.2d 623. Thus, the Applicant must present evidence that his case is of some class over which the circuit court has no authority to preside.

Here, Applicant's conviction involved a criminal charge in the Court of General Sessions. This Court finds the circuit court had subject matter jurisdiction, and Applicant has failed to present any facts or evidence that the conviction he challenges in this application is in a class over which the circuit court does not have the authority to preside.

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

Venue

The South Carolina Supreme Court in Evans held that "although an accused has a right to be tried in the county in which the offense is alleged to have been committed, we hold this right is not jurisdictional." State v. Evans, 307 S.C. 477, 480, 415 S.E.2d 816, 818 (1992), overruled in part by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)). "The right to be tried in the county in which the offense is alleged to have been committed, then, is a matter of venue." State v. Crocker, 366 S.C. 394, 403-404, 621 S.E.2d 890, 895 (Ct. App. 2005).

Because the trial court had jurisdiction over Applicant, the issue is whether venue was properly laid in Kershaw County. "The standard for establishing venue is not a stringent one, for 'venue, like jurisdiction, in a criminal case need not be affirmatively proved, and circumstantial evidence of venue, though slight, is sufficient. . . . " Id. at 404 (quoting State v. Williams, 321 S.C. 327, 334, 468 S.E.2d 626, 630 (1996)). Importantly, "where some acts material to the offense ... occur in one county, and some in another, venue is proper in either county." Id. "[A]ny

objection to improper venue is waived if not raised by a timely objection." 21 Am.Jur.2d Criminal Law, § 364 (1981); 1 Charles E. Torcia Wharton's Criminal Procedure, § 34 (13th ed. 1989).

Here, Trial Counsel did not challenge the venue before the jury was sworn; therefore, any objection to improper venue was waived.

This Court now turns to whether Trial Counsel's failure to object to improper venue was deficient and whether the alleged deficiency prejudiced Applicant. This Court finds Applicant 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, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. From the record, this Court finds that there was testimony presented to the jury that Applicant committed acts on the Victim while in Kershaw County. Evidence, even if circumstantial and slight, is sufficient to support venue in Kershaw County. See Crocker, *supra*. Based on this finding, any objection by Trial Counsel would have been overruled and Trial Counsel cannot be deficient for failing to raise a futile objection. See State v. Hutchinson, 215 W. Va. 313, 323, 599 S.E.2d 736, 746 (2004) (citing Clark v. Collins, 19 F.3d 959, 966 (5th Cir.1994) ("Failure to raise meritless objections is not ineffective lawyering; it is the very opposite."); Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or

omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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 3: Failed to challenge the admissibility and voluntariness of Applicant's statements.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to challenge the admissibility and voluntariness of Applicant's statements. This Court finds this allegation is without merit.

"The process for determining whether a statement is voluntary, and thus admissible, is bifurcated; it involves determinations by both the judge and the jury. First, the trial judge must conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence." State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007), quoting Jackson v. Denno, 378 U.S. 368, 376 (1964). "Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007). "A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his or her rights under." Arrowood, 375 S.C. at 366, 652 S.E.2d at 442. Volunteered statements of any kind are not barred by the Fifth Amendment. Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Rhodes, 779 F.2d 1019, 1032 (4th Cir.1985) ("Miranda does not protect an accused 'from a spontaneous admission made under circumstances not induced by the investigating officers or during a conversation not initiated by the officers.'").

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not explain that he abandoned his challenge to voluntariness of Applicant's statement at the Jackson v. Denno hearing. (PCR Tr. p. 12). Applicant testified that at trial, the state offered a videotaped interview where they used his statements against him, alleging that he made an admission about a phone call to the Victim's mother that tied into their theory of the case. (PCR Tr. p. 12).

On cross-examination, Applicant testified, "I don't really care about that as much because I didn't – for one, all I said was the phone call. I have no problem with the phone call. My biggest problem was with bad acts that never happened for one." (PCR Tr. p. 21). Applicant testified, "Two, it was just to the point where a lot of stuff that was being said were -- was not true totally." Id. Applicant testified, "We have proof because [the Victim] did two forensic interviews where [the Victim] stated one thing and then stated something totally different." Id. Applicant testified he was under the impression the Victim's inconsistent stories would be enough to dismiss on its own. (PCR Tr. p. 22). Applicant testified he never got the opportunity for Trial Counsel to explain that to him. Id.

On direct examination, Trial Counsel testified that the night Applicant was arrested, his statements to law enforcement were recorded on video and audio after Applicant was Mirandized, and Applicant signed a Miranda waiver. (PCR Tr. p. 34). Trial Counsel testified that one of the two officers testified at the in-camera hearing. Id. Trial Counsel testified there "wasn't a need for voluntariness when you've got a signed Miranda form." Id. Trial Counsel testified, "You're a police officer. You've got the signed Miranda, you got audio, video, and one of the officers that were in the room testified." Id. Trial Counsel testified, "I don't think we needed to call the other officer, and that's how I think where they got...an issue about voluntariness." Id. Trial Counsel

testified there was enough evidence to prove voluntariness. Id. Trial Counsel testified the decision not to challenge the admissibility and voluntariness of Applicant's statement was "a lot more strategic." Id. Trial Counsel testified, "Everything factors in where we were and what we were doing." (PCR Tr. p. 35). Trial Counsel testified the jury heard it once and admitted the signed Miranda form, in addition to audio and video. Id. Trial Counsel testified he did not want the jury to hear them go through the same thing over and over. Id.

On cross-examination, Trial Counsel testified there was nothing more he could have done to establish his objection to the statements as involuntary. (PCR Tr. p. 43). Trial Counsel testified two officers took the statement that night from a police officer. (PCR Tr. p. 44). Trial Counsel testified "number one" [Applicant] voluntarily signed a Miranda form. Id. Trial Counsel testified "number two" there was an audio, and "number three" he thinks there was a video. Id. Trial counsel testified he cross-examined the first officer along with the other information at the in-camera hearing and the second officer would testify to the same thing. Id. Trial Counsel testified it would not have mattered if he went on to question the second officer and pursued more questioning during the Denno hearing. Id.

Findings

This Court finds Applicant 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, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Trial Counsel articulated a reasonable reason for withdrawing the challenge to the voluntariness of Applicant's statements to law enforcement. Trial Counsel **credibly** testified that Applicant, a former police

officer, signed a Miranda waiver, and the officers that took Applicant's statement testified at the Jackson v. Denno hearing. Trial Counsel **credibly** testified that his decision not to challenge the admission of Applicant's statement was strategic, and the jury heard the statement once and he did not want them to hear it again. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). This Court further finds that even if Trial Counsel challenged the admission of Applicant's statement, it would have been futile considering the evidence that Applicant's statement was given voluntarily. Applicant cannot show that the result of his trial would have been different when the argued matter would have been admitted over any objection. See State v. Hutchinson, 215 W. Va. 313, 323, 599 S.E.2d 736, 746 (2004) (citing Clark v. Collins, 19 F.3d 959, 966 (5th Cir.1994) ("Failure to raise meritless objections is not ineffective lawyering; it is the very opposite."); Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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 4: Failed to properly investigate the case or discuss the evidence with Applicant.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to properly investigate the case or discuss the evidence with Applicant. This Court finds this allegation is without merit.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a

different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

PCR Evidentiary Hearing

On direct examination, Applicant testified he spoke to Trial Counsel on several occasions. (PCR Tr. p. 13). Applicant testified he paid for an investigator and an expert named Dr. Ruffing, who never showed up for trial. Id. Applicant testified Trial Counsel never explained to him why Dr. Ruffing did not show up for trial. Id. Applicant testified Trial Counsel never had those conversations with him. Id.

On cross-examination, Applicant testified he's already spoken about the bank statements and timeframe. (PCR Tr. p. 22). Applicant testified he "never knew" about the "camera, the photo, the recording of the VHS camera" until the day of court. Id. Applicant testified he should have known that information the moment the State had it. Id. Applicant testified he was locked up in Richland County when the investigator came to see him. (PCR Tr. p. 23). Applicant testified he met with the investigator once, who stated, "They didn't have anything on me; those was his exact words." Id.

On direct examination, Trial Counsel testified he sent the investigator to Kershaw County and Lee County to speak to Applicant, and the investigator was there when Applicant and he spoke at the office. (PCR Tr. p. 35). Trial Counsel testified he spoke to Applicant many times about the case and could not count the number of times. Id. Trial Counsel testified that Applicant knew a lot because of his profession in law enforcement. Id.

On cross-examination, Trial Counsel testified that Applicant received indictments from Kershaw County and Lee County. (PCR Tr. p. 46). Trial Counsel testified that he did not speak with the Victim in this case, and he was not sure if he had the investigator speak with the mother of the Victim. Id.

Findings

As an intial matter, this Court finds Trial Counsel's testimony on this matter **credible** and **persuasive** and Applicant's testimony **not credible** or **persuasive**. This Court finds Applicant 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, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds that Applicant has failed to produce evidence of what Trial Counsel could have discovered had Trial Counsel investigated his case further. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial.).

This Court finds Trial Counsel **credibly** testified that he and Applicant discussed his case numerous times and he reviewed the evidence with Applicant. While Applicant testified to items that may have been helpful in his trial, Applicant produced none of those items to this Court. Rather, Applicant merely presented his testimony which this Court finds **not credible** or **persuasive**. Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)); see also Moorehead v. State, 329, 496

S.E.2d 415 (1998) (failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result). Applicant has failed in his burden of showing what evidence Trial Counsel and he could have further reviewed that would have changed the outcome of his trial.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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: **Failed to object to prior bad acts introduced by the State.**

Allegation 18: **Failed to argue appropriate case law to object to the evidence of prior bad acts presented by the State.**

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to object to prior bad acts introduced by the State and for failing to argue appropriate case law to object to the evidence of prior bad acts presented by the State. This Court finds these allegations are without merit.

An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable'

action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, "[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.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland

standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." See Rule 404(b), SCRE. "A close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception." State v. Cheeseboro, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001), cert. denied, 122 S. Ct. 1310 (U.S. 2002). "[W]here the defendant's own actions link two crimes together, evidence of one crime is admissible as proof of the other under the common scheme or plan exception." Cheeseboro, 346 S.C. at 546, 552 S.E.2d at 311, citing State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990).

Trial

At trial, the following occurred on Applicant's motion to exclude prior bad acts:

[Trial Counsel]:	Your Honor, mine are rather quick. Number one is -- one motion I handed up is the motion for an in-camera hearing to determine the admissibility of any 404(b) evidence, Your Honor.
The Court:	What do you anticipate?
[Trial Counsel]:	The discussions of other acts like this that were done in other counties that, in my opinion, should not be admissible because they go to his character.
The Court:	Which one of you ladies want to address that?
Ms. Cavanaugh:	Your Honor, I will.
The Court:	Ms. Cavanaugh.
Ms. Cavanaugh:	As far as --
The Court:	What he's talking about, there's been some allegations that something may have taken place in Fairfax and the beach and Bishopville. I forget what --

Ms. Cavanaugh: Yes, sir, Your Honor. There were allegations -- first of all, you had the opportunity to view the victim's statement to David Kellin, which he indicated these acts had been going on for a period of three years. As she indicated in the video, they lived in different areas of the state and these acts occurred in those different areas. We believe, under the 404(b), common scheme or plan, that those acts that occurred outside of Kershaw County come in under 404(b), as well as the res gestae theory, Your Honor. We have at least three cases on point --

The Court: If you would give me those cases so I can review them tonight and I'll make a ruling in the morning before we start.

Ms. Cavanaugh: Yes, sir, Your Honor.

The Court: And also please give it to Mr. Virgin Johnson. And I keep saying Mr. Virgin Johnson because the defendant's last name is Johnson as well.

[Trial Counsel]: Your Honor, and, of course, the next logical step, if the Court rules that it come in, I'm going to move to the more prejudicial than probative --

The Court: You want a 403 analysis.

[Trial Counsel]: Yes, sir.

The Court: All right. Let me -- I know what you're talking about; the other alleged events that took place that was testified to by the alleged victim. Let me look at these cases tonight. I'll make a ruling on that in the morning, and then I'll also do -- if I decide to let them in, then I'll let you make a 403 argument on prejudicial versus probative. Fair enough?

[Trial Counsel]: Yes, sir.

Ms. Cavanaugh: Your Honor, I am handing up State v. Weaverling, State v. Martucci, and State v. Mathis.

. . . .

The Court: . . . As to the other alleged incidents that occurred outside of this jurisdiction, I have reviewed the cases as presented by the State, including State vs. Weaverling, State vs.

> Martucci, and State vs. Mathis, and I find that -- obviously we're all familiar with Rule 404 and State v. Lyle. And I made an analysis under that, and I find that there had been a number of cases that have a common factual pattern of this case which have allowed the other acts to be brought into the case as an exemption to Lyle under the common scheme or plan. I find in this case there's a close degree of similarity or connection between the other bad acts and the crime in which the defendant is on trial, and I find that their probative value outweighs the prejudicial value under 403 and I'll allow that testimony.

(Trial Tr. pp. 101–103; 116–117).

PCR Evidentiary Hearing

On direct examination, Applicant testified Trial Counsel did not do a sufficient job arguing the case law on prior bad acts. (PCR Tr. p. 20).

On cross-examination, Applicant testified he did not recall Trial Counsel objecting to the admission of prior bad acts. (PCR Tr. p. 23). Applicant testified that in State v. Nelson, State v. Baker, and State v. Tutton there was more evidence against the defendant's in those cases where they were charged with lewd act than was presented against him. (PCR Tr. p. 28). Applicant testified that in his case it was his word against the Victims. (PCR Tr. p. 28). Applicant testified that the Victim's mother, aunt, and the forensic interviewer bolstered the Victim's testimony. Id.

On direct examination, Trial Counsel testified that "[He] was hoping that the Judge would kick that, which would mean [he] wouldn't have to deal with the lewd act at all." (PCR Tr. p. 36). Trial Counsel testified that he requested the trial court conduct a 403 analysis. Id. After the 403 analysis, Trial Counsel testified, "Well, look then let's do the 401 because it may be more prejudicial than probative," but Judge Early denied Trial Counsel's request and let it in Id. Trial Counsel further testified after reviewing some case law, both he and the solicitor handed the Judge

cases, and the Judge took all of that with him that night and ultimately ruled he would admit testimony on prior bad acts. Id. Trial Counsel testified he could only cross-examine and fight it, which is what he did. Id.

On cross-examination, Trial Counsel testified that he did not recall if State v. Tutton was the case he brought up, but it was two or three cases he brought to the trial court's attention. (PCR Tr. p. 47). Trial Counsel testified that the Victim testified at trial. (PCR TR. p. 48). Trial counsel testified his reasoning for not objecting to the Victim's testimony about events in Fairfax was, "All of that was part of what I asked the Judge not to put out – not to let in." Id. Trial Counsel testified, "Once [trial judge] said it was in, only thing I could do now is cross-examine, so I dealt with it the best I could. Id. Trial Counsel testified, "If I didn't, I should have done it," when asked why he did not make an objection to preserve his pre-trial motion. (PCR Tr. pp. 48–49).

Findings

From the record, this Court finds that Trial Counsel made appropriate pretrial objections to the prior bad act evidence, and the trial court appropriately assessed the objection and overruled Trial Counsel. However, Trial Counsel did not contemporaneously object during trial and failed to preserve the matter for appellate review. For this reason, this Court finds Trial Counsel's performance on this matter deficient when he failed to contemporaneously object and preserve the matter for appeal.

Turning to prejudice, after a review of this record, this Court finds the trial court's ruling on the prior bad acts based on Martucci[4], Mathis[5], and Weaverling[6] was correct, and Applicant's prior bad acts were admissible and would not have been reversed on appeal. This Court finds

[4] State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008).
[5] State v. Mathis, 359 S.C. 450, 597 S.E.2d 872 (Ct. App. 2004).
[6] State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Cr. App. 1999).

Applicant cannot show prejudice because the evidence was admissible, and the trial court's ruling would not have been reversed on appeal. Therefore, while Trial Counsel's failure to contemporaneously object was deficient, Applicant has failed to overcome his burden in proving prejudice flowing from Trial Counsel's representation. See Butler, *supra*.

Based on the foregoing, this Court finds Trial Counsel's performance was deficient for failing to contemporaneously object to the prior bad acts evidence; however, Applicant has failed to show any resulting prejudice from Trial Counsel's deficient performance.

Turning to Applicant's assertion that Trial Counsel did not argue the correct case law. Applicant represented in the PCR evidentiary hearing State v. Baker[7] and State v. Tutton[8] as supporting case law that Trial Counsel should have argued to keep the prior bad act evidence out. After a review of the case law presented, this Court does not agree and finds Applicant's assertion unfounded.

In Baker, the indictments stretched over a six-year period with two separate victims. Baker was not apprised of the amended indictments until two weeks before trial, and his employment records were destroyed, which he contended would have provided an alibi defense. Applicant's case is distinguishable from the Baker case in that Applicant was indicted on 2014-GS-28-0910 for a lewd act with a minor child on August 20, 2014, and his trial began nearly a year later on June 22, 2015. Applicant was not given a mere two weeks to prepare his defense. Additionally, there was only one victim in this case, and Applicant never presented an alibi defense. This Court is not convinced that this case would have made any difference if raised at trial.

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[7] State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015).
[8] State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003).

In Tutton, there were separate victims with multiple differences in the alleged acts. Applicant's case is distinguishable in that there was only one victim here and the record provides a pattern of behavior of a longstanding history of continuous abuse between the same parties. Again, this Court cannot find that if Trial Counsel had provided this case, then his objection would have been sustained.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, these allegations must be **DENIED** and **DISMISSED.**

Allegation 6: Failed to meet with Applicant a sufficient number of times.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to meet with Applicant a sufficient number of times. This Court finds allegation is without merit.

Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. Campbell v. Polk, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency); United States v. Olson, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte). "Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with

his client twice before trial as long as counsel devoted sufficient time to insure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared.).

South Carolina case law has established that even if Counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter) (finding "Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation."), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Additionally, "brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating "how additional preparation or communication would have resulted in a different outcome." Id.; see Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); Skeen v. State, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel met with him maybe "ten times in the four-year span." (PCR Tr. p. 14).

On direct examination, Trial Counsel testified in his opinion he met with Applicant "plenty of times." (PCR Tr. p. 36). Trial Counsel testified that he spoke to Applicant over the phone and

met in person numerous times. Id. Trial Counsel testified that Applicant is family, so he invested "more effort" in his case because he did not want him convicted. (PCR Tr. p. 37).

On cross-examination, Trial Counsel testified that he believed he met with Applicant a sufficient number of times. (PCR Tr. p. 49).

Findings

As an initial matter, this Court finds Trial Counsel's testimony **credible** and Applicant's testimony on this matter **not credible**. This Court finds Applicant 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, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Trial Counsel **credibly** testified that he met with Applicant a sufficient number of times. Trial Counsel **credibly** testified he would discuss the case with Applicant over the phone, in person, any chance he would get. Furthermore, Applicant failed to present any additional evidence on how additional time spent in consultation with Applicant would have resulted in a different outcome.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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 7:	**Failed to put up a defense.**
Allegation 8:	**Failed to call Dr. James Ruffing as a defense expert witness.**
Allegation 11:	**Failed to call Nikki Chisolm, Louise Pinkney, and Rhonda Johnson as witnesses for the defense.**
Allegation 12:	**Failed to call the private investigator retained by Applicant to testify.**

Applicant alleged Trial Counsel was constitutionally ineffective for failing to call Dr. James Ruffing, Nikki Chisolm, Louise Pinkney, Rhonda Johnson, and a private investigator to testify in his defense. This Court finds these allegations are 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 not deficient by failing to call alibi witnesses when two witnesses who testified at PCR hearing 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 have corroborated or bolstered defendant's 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).

PCR Evidentiary Hearing

On direct examination, Louise Pinkney (Pinkney) testified that in the past, Pamela Hall (Hall), the mother of the Victim, lied about her children. (PCR Tr. p. 7). Pinkney testified that she received a call when she and Applicant were en route to Atlanta, claiming one of the children was sick with a fever and having seizures; however, the child was not ill. (PCR Tr. p. 9). Pinkney testified that Hall also called her and told her that "if [Hall] could not be with [Applicant], that

nobody would be with him. [Hall] would put him in a place that nobody could have him." Id. Pinkney testified that she sat outside the courtroom during Applicant's trial but was never called to testify. (PCR Tr. p. 10).

On direct examination, Applicant testified Dr. Ruffing told him he would testify at his trial but was not called to testify. (PCR Tr. p. 13). Applicant testified Trial Counsel did not put a sufficient defense for him. (PCR Tr. p. 15). Applicant testified, "No, he never brought the witnesses that I – that I asked him to, nor did he put up a defense at all. I mean, I was totally shocked when he rest." Id. Applicant testified, "And, you know, everybody was talking about my appearance toward what I – what I should've been doing while in front of the jury instead of listening to what I was at least trying to bring forth to their attention so they could put that on the record." Id.

Applicant testified that he was on the phone with Nikki Chisolm, and the phone records would have shown that. (PCR Tr. p. 17). Applicant testified that his sister could have been a character witness and could have "vouch[ed] for the, the - - [him] being more so in Allendale County, more so in another country, and also not able to really - - because being - - have any contact with the victim during those timeframes." Id. Applicant testified that "[t]hose were the things that I wanted those witnesses to do." Id.

On cross-examination, Applicant testified Trial Counsel should have "At least not rest after [he] went through two or three days of them saying everything that they thought they had on me." (PCR Tr. p. 24). Applicant testified Trial Counsel should have "At least bring up my witnesses." Id. Applicant testified Trial Counsel should have "At least bring in someone that can, can validate that I was in Kershaw County during those timeframes." Id. Applicant testified that Dr. Ruffing

told him that "there was a whole lot of leading questions" in the forensic interview of the Victim. (PCR Tr. p. 25).

On direct examination, Trial Counsel testified Nakia is "very fact-oriented." (PCR Tr. p. 33). Trial Counsel testified Applicant is a police officer and his cousin. Id. Trial Counsel testified his defense strategy consisted of "calling all those people [Applicant] talked about calling. Id. Trial Counsel testified some of it was repetitive, and at the end of the trial, they got to cross-examine most issues Applicant had a problem with. Id. Trial Counsel testified a decision was made not to put anybody up and to have the last argument before the jury due to the seriousness of the charges. (PCR Tr. p. 33). Trial Counsel testified it was a "very strategic decision." (PCR Tr. p. 33).

Trial Counsel testified that you have to pay the expert to be present at the trial. (PCR Tr. p. 37). Trial Counsel testified that he decided not to call Rhonda or Nikki because he would have lost the last argument. (PCR Tr. p. 39). Trial Counsel testified that the only thing the private investigator could have testified to is that he went to the dirt road in Kershaw County where the Victim claimed Applicant would take her and that there, in fact, was a dirt road there. (PCR Tr. p. 40).

On cross-examination, Trial Counsel testified that Dr. Ruffing would have testified in opposition to the State's experts, but he did not know what Dr. Ruffing would have testified to. (PCR Tr. pp. 50–51). Trial Counsel testified that he and Applicant discussed putting witnesses up for defense but decided they wanted the last argument. (PCR Tr. p. 54). Trial Counsel testified that he did not send the investigator to interview the State's experts because he interviewed them himself. (PCR Tr. p. 55).

Findings

This Court finds that 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, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Notably, the only witness Applicant called was Pinckney, and this Court finds her testimony to be **not credible**, and her testimony would not have changed the outcome of Applicant's trial. Applicant did not provide the testimony of any of the other witnesses he claimed Trial Counsel was ineffective for not calling. Thus, Applicant has failed to carry his burden of proof, and Trial Counsel cannot be found deficient, nor can any prejudice be shown from the alleged deficiency for failing to call the witnesses he listed. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (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).

Additionally, Trial Counsel **credibly** testified that Applicant decided not to call anyone in his defense so that they would not lose the last argument. Where Trial Counsel articulates a valid strategic reason for his action or inaction, Trial Counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has

failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation 9: Failure to object to the testimony of Pamela Hall regarding domestic violence and infidelity by Applicant.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to object to the testimony of Pamela Hall regarding domestic violence and infidelity by Applicant. This Court finds this allegation is without merit.

An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, "[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.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

Trial

On direct examination of Pamela Hill (Hill), Hill testified to the following:

> So he pulled his gun on me that night. And he got a call -- I think it was on Cameron Church Road [phonetic]. So I rode with him to the call, and when we got there – I think it was Lieutenant Liam Blakely and Darlene Dillinger. I ended up, I think, right there by -- no, I think I rode back with Darlene. We got into an altercation then because I had braids in my hair and he pulled a few of my braids out that night.

(Trial Tr. pp. 229–230). Later, on direct examination, the following colloquy occurred:

> Q. Were y'all still cordial? Like, did y'all get along in your relationship well enough? Was your relationship still intimate?
> A. We got along, we was still intimate, but we still had our arguments here and there.
> Q. Okay. And what were those arguments generally over?
> A. Mostly we would argue about him cheating with other people.
> Q. Okay. Cheating with other women and --
> A. Yes, ma'am.

(Trial Tr. p. 238).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not object to Hall's testimony about cheating and domestic violence. (PCR Tr. p. 16).

On cross-examination, Applicant testified that if Trial Counsel had objected to Hall's testimony, then the result of his trial would have been different. (PCR Tr. pp. 25–26).

On direct examination, Trial Counsel testified to the following:

> Q. And we'll move on to allegation number 7. You failed to object to the testimony regarding domestic violence and fidelity during the testimony of Pamela Hall. Do you recall that?
> A. I don't recall it, but I can probably tell you why I did it. I can probably tell you that. All right, this whole thing started because Nakia took his stepdaughter with him to, to the store. Happened so they lived in Kershaw County. The store was in Lee County. How this whole thing started was allegedly that the child's mother heard something over the phone. Well, here's what -- it's bad enough that I'm dealing with there are allegations of having sexual conduct with a child, but Ms. Louise Pinkney, who is a wonderful person back there, who was his -- I think I would say his fiancee -- he was on the phone with her. There was another girl by the name of Chisholm. I think it got -- there was a phone cross up. If the mother heard it, I think that how the mother heard it, and he had just left the other woman. So, at some point in time, I just didn't want to highlight -- I just didn't want to

highlight there were so many women, and I was trying to just -- it was said. I just wanted to kind of get by it. I just didn't want to highlight the fact here is another woman in this situation that already -- we got three women in the situation and a child. At some point in time, I was just trying to cut it off.

Q. Was that a strategic reason?

A. Yes, it was on my part. Yes, it was, and, and, and Nakia sat right by me and another attorney sat on the other side of him. There was nothing, just out of our closeness, there's nothing that went on we didn't discuss. So, we discussed it.

(PCR Tr. pp. 37–38).

On cross-examination, the following colloquy occurred with Trial Counsel:

Q. Do you recall not objecting to Ms. Hall's testimony ---

A. Yes.

Q. --- as she went into a discussion of a domestic violence allegation against my client and infidelity?

A. Yes. The, the more I think about it, I don't think I object. And I think I was sitting at the table trying to figure out should I object or, or should I not because also in the back of my mind, I'm dealing with how much I was going to object to her because she drew a pistol on him, and I was trying to make a argument as to why she drew the pistol on him and they didn't charge her. So, so, strategically I just -- probably just thought at the moment it was – just wasn't the best thing to do. But, but no, I didn't.

Q. Do you -- so, you didn't object. You also did not make a motion for mistrial at that time.

A. No.

(PCR Tr. p. 52).

Findings

This Court finds that 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, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Trial Counsel

provided a reasonable strategy for not objecting to the testimony as he did not want to highlight that testimony to the jury. Where Trial Counsel articulates a valid strategic reason for his action or inaction, Trial Counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992); see also Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial").

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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 13:	**Failed to sufficiently argue a directed verdict motion at trial.**
Allegation 15:	**Failed to preserve Applicant's directed verdict motion.**
Allegation 16:	**Failed to present evidence pursuant to Rule 16, SCRCrimP.**

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to sufficiently argue a directed verdict motion at trial, for failing to preserve Applicant's directed verdict motion, and for failing to present evidence pursuant to Rule 16, SCRCrimP. This Court finds these allegations are without merit.

When considering a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Larmand, 415 S.C. 23, 30, 780 S.E.2d 892, 895 (2015) (citing Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). The role of the trial court is only to determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). If there is any direct or circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). "In deciding motions for a directed verdict. . . the evidence and all reasonable inferences which may be drawn from it must be viewed in the light most favorable to the non-moving party. If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury." Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 611, 518 S.E.2d 591, 597 (1999).

"[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict . . . must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) (citing State v. Fogle, 256 S.C. 149, 181 S.E.2d 483 (1971)). The trial court should grant a directed verdict

when the evidence merely raises a suspicion that the accused is guilty. A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

Trial

At trial, the following colloquy occurred on Applicant's motion for a directed verdict:

The Court:	Mr. Johnson -- well, first of all, any motions by the State?
Ms. Simpson:	No, Your Honor.
The Court:	By the Defendant?
[Trial Counsel]:	Your Honor, looking at all of the evidence in the light most favorable to the State, I move at this time, Your Honor, on the charge of criminal sexual conduct first degree, that there was no evidence put in the record in Kershaw County that -- there was no evidence in the record that he had any contact, sexual penetration, physical contact --
The Court:	How about in the computer room? Wasn't that house in Kershaw County?
[Trial Counsel]:	That wasn't -- my understanding, that wasn't before 11. When I read the transcript, she said everything started at 11.
The Court:	She said it started three years ago.
[Trial Counsel]:	No. That was Fairfax stuff, which is another county.
The Court:	Go ahead. What else?
[Trial Counsel]:	Just the standard motion on the other two charges. I mean, honestly, looking at the evidence, I guess it is evidence that would go to the jury. But on that one, I was paying close attention to that one all through the trial just to make sure.
The Court:	All right. Ms. Simpson, what evidence do we have in the record that it happened in Kershaw County?
Ms. Simpson:	With respect to the Kershaw County incidents themselves, we do have the computer room. And Defense counsel's motion relies only on the forensic interview where Mr. Kellin was interviewing and the

victim initially said, yeah, it started when I was 11. But, in reality, we have the timeframe dating back to 2007 –

The Court: On a number of occasions. There was a good bit of testimony saying -- about going back several years.

Ms. Simpson: Yes, Your Honor. And during that time -- and part of the reason we put up both Melissa Hall and Stacey Hall, which you have that information on the record, the computer room was actually at Melissa Hall's residence, and that's the 927 Hasty Road in Cassatt. You also have her living with Aunt Stacey at 3046 Stevens Road, which is in Kershaw County. And while it didn't happen at the house, what he would do is when he would visit, he'd take her to a dirt road, which is also located in Kershaw, one that she was actually able to remember that we didn't put on the record. As far as timeframes, we have them prior to -- her date of birth is October 16th, 1999. During the time of this disclosure, she was actually 11; however, even with the defendant's statement, he was present, she would have been in Kershaw County at times or at least enough to go to jury prior to ten in which penetration was occurring, sexual batteries were occurring, be it oral or vaginal, because she stated that while, yes, it began in Fairfax, that is also where the sexual batteries, beyond just touching and fondling and things of that nature, began. And once it began, it continued. This is a case of chronic abuse, so of course dates and times. I think there's clearly enough on the record from the testimony of all these witnesses in their totality to include Ms. Hall that would present enough evidence for the CSC first to be presented to the jury, and that point they can give it any weight that they so need.

The Court: Mr. Johnson?

[Trial Counsel]: : Your Honor, suppose they did – I went through the interview and I listened to the testimony. And there was -- both of her forensic interviews said it happened at 11, and on her testimony in the trial, she never

said it happened before 11. Now, I think we can make the assumption that maybe it happened, what time it happened at the aunt's house. But we don't know when it happened. But none of the testimony in the record says it happened before 11. And, Your Honor, it's so jumbled because of the charges from 2007 to now. But if you look specifically at Kershaw County, there's no testimony that it happened in Kershaw County. There may be testimony it happened in some of the other counties, but none in Kershaw.

Ms. Simpson: Your Honor, I believe Mr. Johnson actually just kind of made the point. He said that there had been no testimony. But with respect to the victim's actual direct testimony, she said that while it started in Fairfax, at some point they moved back to her grandmother's property. And, again, she actually said it had been going on for a period of years. It's when she would have been back at her grandmother's property, which is Stevens Road here in Kershaw County. And the -- he was clearly -- the testimony has always been that he always visited, of course from the children and the aunt, and when he did, that would be on occasions that he would either send her mom to the store or take her down the dirt road. And so -- and that is based on her direct testimony. The second forensic interview and transcript he's relying on, of course, is not in evidence. So we're left with her testimony that was presented on the stand which is before the jury. And I believe there is more than enough to go to the jury as the rule requires the existence.

The Court: All right. Mr. Johnson, I'm going to respectfully deny your motion. I think there's sufficient evidence in the record that, if the jury believes it and they believe it's been proven to them beyond a reasonable doubt, would support a verdict for criminal sexual conduct both in the first and in the second degree and/or lewd act. So I'm going to respectfully deny your motion.

(Trial Tr. pp. 536–541).

PCR Evidentiary Hearing

On direct examination, Applicant testified that he did not feel Trial Counsel did a sufficient job arguing the directed verdict motion. (PCR Tr. pp. 17–18). Applicant testified that Trial Counsel did not say directed verdict and did not get into the details. (PCR Tr. p. 18). Applicant testified that the directed verdict motion was sparse. (PCR Tr. p. 19).

On direct examination, Trial Counsel testified that he argued the directed verdict motion on the CSC-1st and the other two charges. (PCR Tr. p. 40).

On cross-examination, the following colloquy occurred:

> Q. And I believe you already testified yourself. When it comes to lewd act, do not get into detail. You kind of said go with standard motion, but you did not get into the details under why it should be a directed verdict, why these issues prevent these out-of-county incidents from being testified to, or why they would not be sufficient to support a conviction. You didn't go into detail.
>
> A. I didn't go into detail on those, but if you look, I went into a ton of detail on the CSC first. That was the one that I thought I should win. I did win it at trial. What I did was put -- through everything I did was protect the record to make sure the record was protected because I thought honestly we were going to win on appeal. And on appeal, if you look at the court, the case, the only reason that we didn't get both the lewd act and the criminal sexual conduct overturned on appeal was the mother's testimony hearing over the phone. The court said that was collaboration. The court said there was no collaboration for the criminal sexual conduct because I showed that in my cross-examination. On the lewd act, the court said look. Since she said she heard the phone – I think it was the phone – that was enough collaboration. That's the only reason that he got convicted on that.

(PCR Tr. pp. 56–57).

Findings

This Court finds that 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, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Applicant has failed to present what argument Trial Counsel should have made that would have resulted in a different outcome. Rather, Applicant only testified that Trial Counsel did not sufficiently argue the directed verdict motion. Such speculation and conjectural allegations do not demonstrate that Trial Counsel's performance was not reasonable or affirmatively prove that Applicant was prejudiced. "It is not enough for the [Applicant] to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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

Allegation 14: Failed to move to quash the indictment as to the 4-year period covered in the indictments as unconstitutional.

Applicant alleges that Trial Counsel's representation was constitutionally ineffective for failing to move to quash the indictments as to the 4-year period covered in the indictments as unconstitutional. This Court finds this allegation is without merit.

When a timely objection to the sufficiency of an indictment is made, the circuit court should evaluate the indictment by determining: (1) whether the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called on to answer and how to plea; and (2) whether it apprises the defendant of the elements of the charged offense. State v. Tumbleston, 376 S.C. 90, 96-97, 654 S.E.2d 851, 852 (Ct. App. 2007) (citing State v. Gentry, 363 S.C. 90, 102-103, 654 S.E.2d 494, 500 (2005)). Whether the indictment could be more definite or certain is irrelevant. Tumbleston, 376 S.C. at 97, 654 S.E.2d at 853 (citing Gentry, 363 S.C. at 102-103, 654 S.E.2d at 500). An indictment is legally sufficient when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly the nature of the charged offense is easily understood. Tumbleston, 376 S.C. at 97, 654 S.E.2d at 853.

If an indictment is challenged on the ground that it encompasses a purportedly overbroad time period, the circuit court should determine whether time is a material element of the offense and whether the time period covered by the indictment occurred prior to the grand jury's return of the indictment. Id. at 98–99, 654 S.E.2d at 853-854. If time is not a material element of the

charged offense, the exact date the offense was committed need not be alleged. Id. at 99, 654 S.E.2d at 854.

Findings

This Court finds that 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, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds that after a review of the record, Applicant's indictment sufficiently apprised him of the charges against him and put him on notice of what he had to defend at trial were sufficient. Nevertheless, this Court further finds Applicant's allegation fails as a matter of law.

Notably, time is not a material element of lewd act on a minor. Tumbleston, 376 S.C. at 101, 654 S.E.2d at 855; see also State v. Wingo, 304 S.C. 173, 403 S.E.2d 322, 323 (Ct. App. 1991). Thus, the State is not required to include the precise day, or even year, of the accused's conduct, and sex crime indictments alleging offenses occurring during a specified time period are sufficient when the circumstances of the case warrant considering an extended time frame. Tumbleston, 376 S.C. at 101, 654 S.E.2d at 855. A young child victim cannot reasonably be expected to recall the exact dates of sexual abuse. Id. Furthermore, even if Trial Counsel would have challenged the indictment, his challenge would have been futile. see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Notably, State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015), was decided just prior to Applicant's trial. The Court in Baker found Baker was prejudiced by the State amending his indictments to cover a six-year time frame just two weeks before trial by "significantly limiting [] [Baker's] ability to combat the charges against him." Baker, 411 S.C. at 590, 769 S.E.2d at 864. This Court, as previously found *supra*, again finds Baker distinguishable from Applicant's case and not applicable. See Allegation 18, ***Findings***, *supra* at p.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

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.**

|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 with PREJUDICE.**

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that 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.

AND IT IS SO ORDERED this 14 **day of** June **, 2025.**

DANIEL COBLE
Presiding Judge
Fifth Judicial Circuit

Richland, South Carolina