STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Leslie Davis, #378750, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2022-CP-26-06094 **ORDER OF DISMISSAL WITH PREJUDICE**

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Steven W. Fowler, Esq.
Respondent's Attorney:	Shayla Joan Flores, Esq.
Trial Counsel:	Kia T. Wilson, Esq.
Date of Hearing:	July 31, 2024

This matter comes before the Court by way of Leslie Davis' (Applicant) application for post-conviction relief (PCR) filed on September 26, 2022. Respondent, the State of South Carolina, filed its Return and Motion for a More Definite Statement on June 19, 2023.

On July 31, 2024, an evidentiary hearing was held at the Horry County Courthouse before the Honorable Deadra L. Jefferson. Assistant Attorney General Shayla Joan Flores represented Respondent. Applicant was present and represented by Steven W. Fowler, Esquire (PCR Counsel). At the hearing, Applicant proceeded on the claims in his amended application, and raised multiple new allegations of ineffective assistance of trial and appellate counsel. In support of these claims, Applicant testified on his own behalf, and Respondent presented testimony from Assistant Public Defender Kia T. Wilson (Trial Counsel).

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

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

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections (SCDC). In July 2016, Horry County Grand Jury indicted Applicant for criminal sexual conduct with a minor first degree (Indictment 2016-GS-26-03323).[1] Horry County Public Defender Kia T. Wilson represented Applicant. Fifteenth Circuit Assistant Solicitors C. Leigh Andrew and Mary-Ellen Walter prosecuted the case. On January 7-10, 2019, Applicant proceeded to a jury trial before the Honorable Benjamin H. Culbertson, circuit court judge. The jury found Applicant guilty as indicated. Judge Culbertson sentenced Applicant to thirty (30) years' imprisonment.

On January 17, 2019, Applicant filed a timely Notice of Appeal. Adam S. Ruffin, Esquire, perfected Applicant's appeal by filing a Merits brief to the court of appeals presenting the following issue:

> 1. Whether the court erred in admitting [Applicant]'s prior "rape in the first degree" conviction in his criminal sexual conduct with a minor first degree trial where [Applicant] offered to stipulate to this element of the offense and the State refused to accept the stipulation and therefore [Applicant] was substantially and unfairly prejudiced in violation of Rule 403, SCRE?

In its published opinion No. 5919, the Court of Appeals affirmed Applicant's conviction. State v. Davis, 437 S.C. 93, 876 S.E.2d 321 (Ct. App. 2022). The Court of Appeals found that the probative value of Applicant's prior rape conviction was not substantially and unfairly outweighed by its prejudicial effect, and the trial court could not have remedied any prejudicial effect by

[1] The offense of criminal sexual conduct with a minor – first degree (victim aged 11 to 14 years) is a violent, most serious felony punishable by imprisonment for not more than twenty years in the discretion of the court. *See* S.C. CODE ANN. § 16–3–655 (2015); S.C. CODE ANN. § 16–1–60 (2015); S.C. CODE ANN. § 17–25–45 (2014).

requiring the State to stipulate to its existence. However, the Court of Appeals court concluded that Applicant should have sought to bifurcate his trial similar to the circumstances of State v. Cross, 427 S.C. 465, 832 S.E.2d. 281 (2019), as opposed to seeking to force the State to stipulate to his prior conviction in an attempt to thwart the State's ability to present his prior conviction to the jury.[2]

On or about August 3, 2017, Appellate Defender filed a Petition for Rehearing on behalf of Applicant on its harmless error holding. On September 21, 2017, the Petition for Rehearing was denied. On November 13, 2017, Appellate Defender subsequently filed Applicant's Petition for Writ of Certiorari. On December 12, 2017, Respondent filed its return for Petition for Writ of Certiorari. The Remittitur was returned on March 7, 2018.

FACTS GIVING RISE TO THE CONVICTION

At the time of the allegations in this case, Minor lived with Applicant, her biological father, in a mobile home park in Conway, S.C. (Tr. 188:22-189:6). Minor was eight years old. (Tr. 166:1-2). Melesa Brooke Squires, the granddaughter of the couple who owned the mobile home park, babysat Minor at times and began staying at Applicant's house. (Tr. 190:2-191:4). Squires described herself as a heroin addict with an unstable life during this time period. (Tr. 189:7-15). Minor recalled Squires' use of drugs by witnessing Squires sticking a needle in her arm. (Tr. 181:19-182:15).

Squires claimed that Minor was exhibiting strange behavior, stating: "[S]he always wanted clothes on, you know, she wanted to be fully dressed." (Tr. 191:15-24). Squires then recalled that she saw Minor in her bed sick one morning without clothes on and she "knew something was

[2] The Court of Appeals noted in its holding that Cross had not yet been decided at the time of Applicant's trial.

wrong there that moment." (Tr. 191:25-192:3). She further claimed that a few days prior she found bloody underwear in Minor's room, which she threw away after Minor told her it was from a cut. (Tr. 192:4-8).

Squires recalled that when she found Minor in bed with no clothes, she was throwing up, so Squires decided to keep Minor home from school. (Tr. 192:19-193:8). Squires then stated: "I went shopping with my friend, me, Minor and Britney, a friend of mine went shopping that day, and, and I had a very good time with her." (Tr. 193:9-12). After they got home from shopping, Squires claimed that Minor told her "she was being messed with." (Tr. 193:12-22). That day, March 14, 2016, Squires called 911 and two officers and an ambulance responded and took Minor to the hospital. (Tr. 197:16-198:19; Tr. 221:22-222:8).

When Minor arrived at the hospital, she was examined by a nurse, Janet Moore, who stated that Minor's labia majora was reddened but "there were no bruises or cuts or rashes or anything like that." (Tr. 260:14-20). Moore admitted that her notes did not reflect the presence of blood anywhere on Minor and if she had seen blood, she would have made a note of it. (Tr. 266:5-11). Moore collected a vaginal and rectal swab from Minor for DNA testing. (Tr. 260: 24-25; Tr. 265 13-19). Minor also received a physical medical exam by Dr. Carol Rahter who said "[s]he had a totally normal exam." (Tr. 337: 19-340:4).

Sara Goodman, who was qualified as an expert in DNA analysis and was employed with SLED, tested the vaginal and rectal swabs taken from Minor and determined that only Minor's DNA was present in the samples. (Tr. 328:19- 329:10). Goodman admitted that Applicant's DNA was not present in the samples collected from Minor. (Tr. 332:19-24). Minor was referred to the Children's Recovery Center in Myrtle Beach, S.C. and interviewed by Dianne Nordeen. (Tr. 352:4-

11). The interview of Minor was videotaped and in it, Minor claimed to have been sexually assaulted by Applicant from January until March of 2016. (State's Ex. 17).

CURRENT ACTION BEFORE THIS COURT

In his application for post-conviction relief, Applicant alleged he was being held in custody unlawfully for the following reasons:

> Ineffective Assistance of Counsel:
> a) Counsel was ineffective by not motioning to the Court that he wanted to protect his client's rights to a fair trial by bifurcation.
> b) Counsel was ineffective by stipulating prior convictions, instead of seek[ing] to bifurcate the trial.

During his evidentiary hearing on July 31, 2024, Applicant amended his application to include the following additional allegations:

> Ineffective Assistance of Trial Counsel:
> a) Failure to present character witnesses.
> b) Failure to investigate whether Applicant was properly issued his Miranda[3] warnings.
> c) Failure to submit Applicant to a competency evaluation.
>
> Ineffective Assistance of Appellate Counsel.

Before this Court is the Horry County Clerk of Court records regarding the subject's convictions and sentences, Applicant's records from the South Carolina Department of Corrections, Applicant's trial transcript, the records of Applicant's issues on appeal, and the records of the current PCR action.

[3] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[4] (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).

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

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

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

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

INITIAL FINDINGS

As a matter of general impression, this Court finds Trial Counsel's testimony at the evidentiary hearing **credible** and **persuasive,** where she presented well-recollected testimony of relevant background, facts, and discussions leading up to and during the trial. This Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant she 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, 104 S.Ct. 2052; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS ON THE MERITS

Allegation 1: **Counsel was ineffective by not motioning to the Court that he wanted to protect his client's rights to a fair trial by bifurcation.**

Allegation 2: Counsel was ineffective by stipulating prior convictions, instead of seek[ing] to bifurcate the trial.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to bifurcate his trial. At the evidentiary hearing, Applicant specifically testified as to Trial Counsel's failure to protect his rights to a fair trial by not motioning to bifurcate his trial instead of requesting the State stipulate his prior convictions. This Court finds this allegation is without merit.

It is clear from the record that Applicant's allegations regarding bifurcation stem from the holding of the Court of Appeals in his case on appeal wherein the court stated as follows:

> ...[E]ven if this court were to force the State to accept Davis's offered stipulation, such an agreement would not dampen the prejudicial effect of the prior conviction like bifurcation of the trial. The prior sex crime element under section 16-3-655(A)(2) does not involve generic prior convictions; it requires a specific conviction listed under section 23-3-430(C). Even if forced to accept Davis's stipulation that he was convicted of a specific sex crime, the State could not have proven Davis guilty of CSCM under section 16-3-655(A)(2) using general language about his prior offense. The jury would have known Davis was guilty of prior sex crime when the trial court instructed them as to the elements of CSCM...

State v. Davis, 437 S.C. 93, 876 S.E.2d 321 (Ct. App. 2022).

The court's holding in this matter depended heavily on its comparison of the issues raised in Applicant's appeal to those raised in State v. Cross, 427 S.C. 465, 832 S.E.2d. 281 (2019). In Cross, the Supreme Court of South Carolina was presented with the question of whether a trial court should bifurcate a trial for CSCM 1st under subsection (A)(2) on motion of the defendant. The Court held that it should. However, Applicant's allegation fails to consider that Cross was not yet the governing authority at the time of Applicant's trial, which the court explicitly stated in its order affirming the holding of the lower court.

Applicant's trial took place on January 7-10, 2019. The opinion in Cross was not filed until July 24, 2019. In deciding PCR claims, the court must "determine whether counsel was ineffective

at the time of the alleged error." Pantovich v. State, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019). Meaning that the court must consider the law as it existed at the time of trial as opposed to the way "it has evolved today ...." Id. at 564, 832 S.E.2d at 601. Trial Counsel, therefore, cannot be found deficient for failing "to be clairvoyant or anticipate changes in the law ...." Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

Trial Counsel **credibly** testified to meeting with Applicant in person nine (9) to ten (10) times, and it is clear from the record that she was a zealous advocate. As to the allegation that Trial Counsel was ineffective for requesting the State stipulate to Applicant's prior convictions, the record indicates Trial Counsel made an impassioned argument regarding the issue, thus preserving it for appeal.[5] Trial Counsel **credibly** testified to her reasons for not reducing the argument to writing but continuing to render it with the hope that some new law would result therefrom. Counsel further testified that she made a strategic decision to make an oral motion and not to reduce the bifurcation motion to writing in advance of trial. Thus, the trial record wholly refutes Applicant's allegations. Accordingly, Applicant's allegation of ineffective assistance of Trial Counsel is **DENIED** and **DISMISSED**.

Allegation 3: Trial Counsel failed to investigate and present character witnesses

Applicant alleges Trial Counsel was constitutionally ineffective for failing to investigate and present character witnesses at his trial for the purposes of mitigation.. At the evidentiary hearing, Applicant specifically testified to the existence of a number of individuals who would have testified to his character. This Court finds this allegation is without merit.

[5] R. pp. 21, l. 20-26, l. 12.

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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)).

Applicant failed to call any witnesses during the evidentiary hearing or present any evidence, aside from his own testimony, as to what these witnesses would or would not have said in the event they had been called to testify at his trial. See Dalton v. State, 376 S.C. 130,654 S.E.2d 870 (Ct. App. 2007) (Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR); Dempsey v. State, 363 S.C. 365,610 S.E.2d 812 (2005) (a PCR applicant cannot show prejudice from counsel's failure to call a favorable witness to testify at trial if the witness does not testify at the PCR hearing or otherwise offer testimony within the rules of evidence).

The Court strongly presumes Trial Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment to adequately prepare and present witnesses on Applicant's behalf. Applicant's 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

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75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995). Trial counsel **credibly** testified that she had not been made aware of the witnesses Applicant now asserts would have testified on his behalf. Moreover, Counsel testified and the Court finds credible her assertion that this hearing is the first time the Applicant mentioned and she heard of character witnesses. She further testified that the Applicant never gave her the names of any potential witnesses and the Court finds this assertion credible. Accordingly, Applicant's allegation of ineffective Trial Counsel for failure to investigate and present character witnesses is **DENIED** and **DISMISSED**.

Allegation 4: Trial Counsel failed to investigate whether Applicant was properly Mirandized.[6]

Applicant alleges Trial Counsel was constitutionally ineffective for failing to investigate whether he was properly mirandized following his arrest. This Court finds this allegation is without merit.

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.,

[6] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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)).

At the evidentiary hearing, Applicant testified to having no recollection of being issued any Miranda warnings following his arrest. Applicant testified Trial Counsel was made aware of this and was ineffective for failing to investigate the issue further. Applicant testified to feeling as though he had been prejudiced by this alleged failure.

Trial Counsel **credibly** testified to having no recollection of Applicant raising any issue regarding the issuance of his Miranda Warnings, prior to his filing a complaint with the Office of Disciplinary Counsel[7] regarding her representation. Trial Counsel **credibly** testified to receiving an email from the office of Disciplinary Counsel dictating Applicant's allegations against her to include an allegation of failure to investigate issues surrounding his Mirandization and this being the first time she had been made aware of any issue. Trial Counsel **credibly** testified to replying to that email with a copy of a Miranda report containing Applicant's signed advisement of rights as well as a police report containing corroboration of Applicant having been properly issued his Miranda Warnings.

The Court strongly presumes Trial Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment to adequately prepare and investigate potential relevant issues on Applicant's behalf. Applicant's 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). The record reflects Trial Counsel had no good faith argument for which to challenge the constitutionality of Applicant's properly issued Mirandization, contrary to Applicant's

[7] Counsel testified she was not surprised to receive a grievance from ODC and in fact expects a grievance and a PCR in serious cases of this magnitude especially when a defendant is convicted and receives incarceration.

contentions. Accordingly, Applicant's claim Trial Counsel failed to challenge the validity of his Miranda warnings is **DENIED** and **DISMISSED**.

Allegation 5: Trial Counsel failed to submit Applicant to a competency evaluation

Applicant alleges Trial Counsel was constitutionally ineffective for failing to properly investigate Applicant's competency. This Court finds this allegation is without merit.

The law prohibits a criminal trial of an incompetent defendant, Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966). The test for competency is the same whether a defendant pleads guilty or goes to trial—namely, "whether the defendant has the present ability to consult with his attorney with a reasonable degree of rational understanding" and the requirement that the defendant "have a rational as well as a factual understanding of the proceedings against him." Sims v. State, 313 S.C. 420, 423–24, 438 S.E.2d 253, 254–55 (1993) (citing Godinez v. Moran, 509 U.S. 389, 398–401, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). (citing Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) (observing that a defendant is incompetent if he "lacks the capacity to understand the nature and object of the proceedings against him") (emphasis added).

To prove prejudice from counsel's failure, applicant must show there is a reasonable probability he would have been deemed incompetent at the time of his trial. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992). Counsel will not be found deficient where they reasonably relied on their perceptions of a defendant's competency in determining if an evaluation was necessary. Garren v. State, 423 S.C. 1, 813 S.E.2d 704 (2018); Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992) (finding counsel acted reasonably in relying on his own perceptions of a defendant's competency).

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At the evidentiary hearing, Applicant testified before and at trial Applicant had limited education. Applicant further testified to having a history of learning disabilities. Trial Counsel **credibly** testified Applicant never indicated he had difficulty understanding his legal proceedings. Trial Counsel **credibly** testified to having no question regarding the necessity of a mental evaluation at any point during her representation of Applicant. Trial Counsel **credibly** testified in her professional opinion she saw no reason to request Applicant be submitted to a competency evaluation. She further testified that if she had any concerns regarding his competency she would have submitted the Applicant to an evaluation. Moreover, counsel testified that the Applicant actively participated in his defense. She further testified that the decision to pursue a jury trial was the Applicant's and he was adamant in that desire.

This Court finds, based on the combination of Trial Counsel's credible testimony and the record that Applicant failed his burden of proving Trial Counsel's performance was deficient by failing to request that the Applicant be submitted to a competency evaluation. Trial counsel **credibly** testified based on her professional judgment, she did not feel a competency evaluation of Applicant was necessary. Trial Counsel will not be found deficient where they reasonably relied on their perceptions of a defendant's competency in determining if an evaluation was necessary. Garren v. State, 423 S.C. 1, 813 S.E.2d 704 (2018).

Further, there is no indication Applicant had trouble understanding or communicating with Trial Counsel, nor did he appear to have trouble understanding or communicating with this Court. Trial Counsel **credibly** testified she had no issues communicating with Applicant. Applicant rationally understood the nature and object of the proceeding and has failed to prove prejudice. Accordingly, Applicant's claim Trial Counsel was ineffective for failing to request that he be submitted to a competency evaluation is **DENIED** and **DISMISSED**.

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INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ALLEGATIONS ON THE MERITS

During his evidentiary hearing Applicant made general allegations that Appellate Counsel was ineffective. Applicant specifically testified that he believed Appellate Counsel could have better represented him. This Court finds this allegation is without merit.

Just as a defendant is entitled to effective representation during his general sessions proceeding, a defendant is also entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice as outlined above. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836; see also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

Although ineffective assistance of appellate counsel claims for failure to raise a particular issue on direct appeal can be successful, the United States Supreme Court has reiterated that it is "difficult to demonstrate that counsel was incompetent." Smith v. Robbins, 528 U.S. 259, 288 (2000). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745(1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and

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effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our South Carolina Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith, 528 U.S. at 288 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

The applicant has failed to make any allegations regarding Appellate Counsel's representation with specificity. Accordingly, this Court finds Applicant has failed to meet his burden proving Appellate Counsel's alleged deficiency prejudiced him. Whether Applicant would have succeeded on Appeal pursuant to his allegations is mere speculation. Consequently, speculation cannot satisfy Applicant's burden of proving prejudice. See Smith v. Robbins, 528 U.S. 259, 288 (2000) (concluding in order to meet their burden of proof, an applicant must establish a reasonable probability that, but for appellate counsel's failure to raise a specific issue on appeal, he would have prevailed on his appeal.).

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

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.**

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This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking a review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal. Applicant's attention is directed to South Carolina Appellate Court Rules 203, 206, and 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 7th **day of** March **, 2024.**

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HON. DEADRA L. JEFFERSON
Presiding Judge
Fifteenth Judicial Circuit

Charleston, South Carolina
At Chambers

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