NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A

POST CONVICTION RELIEF

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2020-CP-32-02225

The State,.....Respondent,

Bryan J. Ellis,.....Appellant,

Notice of Appeal

Bryan J. Ellis appeals the order of the Honorable Jocelyn Newman, dated March 18, 2025, which denied his application for Post-Conviction Relief with prejudice. Appellant received written notice of the order on April 1st, 2025.

Ola Johnson

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STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Bryan J. Ellis, SCDC #373122, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2020-CP-32-02225 **ORDER OF DISMISSAL WITH PREJUDICE**

Presiding Judge:	Hon. Jocelyn Newman
Applicant's Attorney:	Ola A. Johnson, Esq.
Respondent's Attorney:	Taylor Smith, Esq.
Trial Counsel:	David M. Mauldin, Esq.
Appellate Counsel:	Joanna K. Delany, Esq.
Solicitors:	Suzanne Mayes, Esq. Le'Jessica Stringfellow, Esq.
Date of Hearing:	June 8, 2022
Court Reporter:	Bethanie Creppon [Kelley Prim – transcript]

This matter comes before the Court by way of the application for post-conviction relief by Bryan Ellis filed on June 25, 2020. On November 23, 2020, Respondent State of South Carolina filed its Return and Partial Motion to Dismiss, requesting an evidentiary hearing to resolve the claims set forth in the application. The Court appointed Ola Johnson on October 20, 2020 to represent the Applicant. The Applicant, though counsel Johnson, made an amended application on May 25, 2022 and a second amended application on June 5, 2022.

On June 8, 2022, an evidentiary hearing was held at the Lexington County Courthouse before the Honorable Jocelyn Newman. Applicant was present and represented by Ola Johnson, Esquire. Assistant Attorney General Taylor Smith, Esquire represented Respondent. At the hearing, Applicant proceeded forward on allegations 3, 4, 7, 8, 9, and 11 within his original PCR

application and additionally the allegations in his first and second amended applications. In support of these claims, Applicant testified on his own behalf. Respondent presented the testimony of David Mauldin (Trial Counsel). This Court has before it the transcript of this PCR hearing.

Following a thorough review of the trial 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) pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was arrested on January 24, 2016, following an investigation into allegations of sexual abuse involving his stepdaughter. During its July 2017 term, the Lexington County Grand Jury indicted Applicant for first-degree criminal sexual conduct (CSC) with a minor (2017-GS-32-2303) and third-degree CSC with a minor (2017-GS-32-2305(A)). On July 10, 2017, Applicant proceeded to a jury trial before the Honorable R. Knox McMahon. Assistant Public Defender David Mauldin represented Applicant. Assistant Solicitors Suzanne Mayes and Le'Jessica Stringfellow prosecuted the case.

On June 12, 2017, the jury convicted Applicant as indicted. Judge McMahon sentenced Applicant to consecutive terms of life imprisonment for first-degree CSC with a minor and fifteen years' imprisonment for third-degree CSC with a minor.

Applicant filed a timely notice of appeal. Appellate Defender Joanna K. Delany (Appellate Counsel) perfected Applicant's appeal by filing a brief with the Court of Appeals on the following issue:

> Whether the trial court erred in denying the defense's motion to redact part of [Applicant]'s statement in which he admitted to Detective Rawl that he discussed masturbation with another minor child, prejudicing [Applicant] by injecting potential sexual misconduct with another child since [Applicant] was not charged with any offense regarding that child, particularly where the refusal to redact allowed the solicitor to argue in closing that [Applicant] was a sex offender who must be stopped?

The Respondent was represented in the appeal by Assistant Attorney General Scott Matthews. Following further briefing, the Court of Appeals affirmed Applicant's conviction and sentence. *State v. Ellis*, 2019-UP-166 (S.C. Ct. App. withdrawn, substituted, and refiled June 26, 2019).[1] The Remittitur was returned to the lower court on August 2, 2019.

FACTS GIVING RISE TO THE CONVICTION

The victim (Victim) in this case was born in 2008. (R. 237)[2]. Applicant and victim's mother (Mother) began dating in 2009 when Victim was one and a half years old. (R. 237). Applicant is not Victim's biological father, but Applicant and Mother did share one biological child together (Brother Two). (R. 237). Victim had another brother (Brother One) who was also not biologically related to Applicant. (R. 237). Applicant and Mother were married in 2010 and then lived together with Mother's parents (Grandma and Grandpa) for approximately the next six years. (R. 238). In March 2015, Applicant and Mother purchased a mobile home approximately fifty yards away from Mother's parent's home. (R. 239).

On January 23, 2016, Victim disclosed to Grandma that she was sexually assaulted by Applicant. (R. 225). Victim disclosed the same information to Mother the following day, January

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[1] The Court granted Applicant's petition for rehearing following the Court's original opinion, which was filed May 8, 2019.

[2] References to "R. _" are to the Record on Appeal. These page numbers are consistent with the pages in the trial transcript. References to "PCR Tr. p. _" are to the June 8, 2022 transcript of the PCR hearing before this Court.

24, 2016, before Mother went to work. (R. 227). Mother called out of work and sent a text to Applicant asking him to come home. (R. 246). Applicant returned home at approximately 3:30 PM at which time Mother asked Applicant: "Did you make [Victim] lick your pee-pee?" (R. 247, lines 14-15). Applicant responded in the affirmative saying: "Yes. It's all true." (R. 247, line 15). Mother then went to her parent's home where she called 911 at approximately 3:56 PM. (R. 248). Grandpa and his brother (Mother's Uncle) went to Applicant's home to wait with Applicant until law enforcement arrived. (R. 251). Grandpa asked Applicant whether he sexually assaulted Victim. Applicant responded in the affirmative. (R. 280).

Sergeant Miles Rawl of the Lexington County Sheriff's Department arrived at Applicant's residence and spoke with Applicant inside Rawl's police vehicle. (R. 313). Rawl advised Applicant of his Miranda rights and Applicant voluntarily spoke with Rawl. (R. 316). Applicant confessed verbally and in writing. (R. 318). One portion of Applicant's written confession reads as follows:

> I [Applicant] have changed my family by completing what should never have been done. It started mid to late November 2015. I had my daughter perform a hand job without ejaculation. Later in December, early January she had done the act again with flavored lubricant and an external vibrator in which she used on herself after seeing me use it on myself. I had asked if she would put her mouth on my penis and she did. I ejaculated on the floor and some in her mouth. Last was again using her mouth this past Thursday. I was going to put my mouth on her vagina but I became nauseated and did not proceed in doing so. I ejaculated in her mouth and on the floor.

(R. 326–27, lines 19-5, R. 494). At trial and in her forensic interview, Victim corroborated details of Applicant's confession, including details regarding Victim performing fellatio on Applicant, Applicant's subsequent ejaculation in Victim's mouth, and Victim's use of a vibrator on herself. (R. 174–77, 181, State's Exhibit #26).

Upon finishing his written confession, Applicant was arrested by Rawl. (R. 341). Law enforcement also seized Applicant's cell phone. Detective Michael Phipps performed an extraction of Applicant's phone that revealed a series of Google searches performed on the phone from the time Mother called 911 to the time Rawl arrived and began interviewing Applicant. Among the terms entered into the Google search engine on Applicant's phone during this time period were "help with addiction", "addiction", "beat addiction", and "beat sex addiction". (R. 373, line 19; R. 374, line 22, 24; R. 375, line 3).

While awaiting trial, Applicant wrote to Mother occasionally from the Lexington County Detention Center. (R. 252, State's Exhibit #20). In one such letter Applicant wrote to Mother: "I know I was wrong for what [Victim] and I did. That's why I confessed." (R. 421, State's Exhibit #20 p. 2). In the same letter, Applicant wrote "I know what [Victim] and I did was fucked up." (State's Exhibit #20, p. 1).

At a pre-trial hearing, the trial court declined to redact the question and answer regarding whether Mother knew Applicant had discussed masturbation with Victim and Brother One but instructed the State to redact any reference to Brother One. The redacted exhibit was entered into evidence read as follows:

> Q: Did your wife know that you had these conversations with [Victim]?
>
> A: No. I never thought to tell her.

(R. 130–32, R. 500, State's Exhibit #29). Prior to admitting the redacted copy of Applicant's confession into evidence, the trial judge gave the jury the following instruction:

> The State has introduced State's exhibit number 29. A copy instead of the original document which is Court's exhibit number 1 has been introduced because I have determined that portions of Court's exhibit number 1 is not admissible, therefore, I have ordered that to be redacted or removed from Court's exhibit number 1, therefore, it

> is now State's exhibit number 29. You will see some markings on there for items redacted or removed and the like. The fact that I have redacted portions of State's 29 or only allowed State's 29 into evidence should not be considered by you for any purpose whatsoever during your deliberations. I have ruled that it is not proper that those portions which have been redacted would be a part of the record in this case.

(R. 321–22, lines 13–2). The State made no mention of Applicant's conversation with Brother One at trial.

CURRENT ACTION BEFORE THIS COURT

In his original application for post-conviction relief, Applicant alleged he is being held in custody unlawfully based on the following (verbatim)[3]:

I. "Ineffective assistance of trial counsel"

~~1. "Introducing prejudicial character evidence of 'prior bad acts' of discipline. Tr. 188."~~

~~2. "Failed to raise impeachment of alleged victim when she stated a scientific improbability that she and her brothers were hanged by their shirts from a hook on the door."~~

3. "Failed to raise impeachment of alleged victim when forensic video shows interviewing expert witness leading questions and inconsistent statements during interview." (3)

4. "Failed to use pre-trial actions such as: motion to dismiss, motion for summary judgment, motion for speedy trial, motion(s) for depositions and/or interrogatories, motion to reduce bond, and (initially, until defendant request to relieve counsel) motion to suppress illegally obtained evidence. Violating procedural due process." (4)

~~5. "Failed to obtain expert witnesses to rebut prosecution's expert witness."~~

~~6. "Failed to object to having forensic interview be authenticated as an expert witness in violation of S.C. case law: State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013)."~~

7. "Failed to object to illegally obtained mobile phone data outside of search warrant criteria; to include

[3] The allegations in **bold** were raised at the hearing, the allegations that were ~~struck through~~ were specifically abandoned. PCR Tr.p. 5.

being too broad, introduced information too prejudicial compared to probative value, and expiration of warrant when executed." (7)

8. **"Failed to educate defendant of various pleas, such as nolo contendere, not guilty due to mental illness, or even appearing to obtain a plea—despite counsel's immediate superior boasting counsel's credential and enforcing that defendant would remain unheard." (8)**
9. **"Failed to educate defendant on meaning of '25 to life, life, parole, sexual battery,' etc. Even so far as stating 'you understand you just don't like it' during one of the less than eight attorney visits in a high value case during defendant's 18-month illegal detainment." (9)**
10. ~~"Showed bias, stating to defendant: 'I'm tired of talking about pee-pees and vaginas' and 'He gets paid the same whether he wins or loses' during visits to defendant in jail."~~
11. **"Failed to educate defendant about a 'bench trial.' (11).**
12. ~~"Failed to submit psycho-sexual psychiatrist, Dr. Tom Martin as an expert witness during trial, at sentencing, or even to the court for a pre-sentencing report."~~
13. ~~"Failed to verify defendant's competency to stand trial and/or mental state for lack of criminal intent."~~
14. ~~"Failed to request trial judge recuse himself (the judge) for bias, apparent in verbal tone, physical mannerisms, and one-sided interpretations of the law."~~
15. ~~"Failed to object to solicitor's allegation that there was 'no way' government witnesses could have known about defendant's involuntary statement, though the lead investigator all ready took the stand stating he talked to them directly after defendant's arrest; and the D.S.S. report states they received the statement prior to the forensic interviews."~~
16. ~~"Failed to impeach forensic interviewer for her prior inconsistent statements in forensic video and on stand, to include her disregard towards leading questions and suggestions, that she states she did not commit."~~
17. ~~"Failed to object to faulty indictments at trial for not having a valid witness."~~
18. ~~"Failed to object to indictment for CSC 3rd degree being faulty due to time paradox of grand jury convening and signing indictment the day of trial, where invalid witness seems to be in two places at once, even."~~

19. "Failed to have forensic interviews transcribed so that defendant could review them as allowed by due process for discovery."

20. "Failed to have mobile phone data available to defendant in hard copy format to review as allowed by due process for discovery."

21. "Failed to request to exclude expert testimony—for unreliability under S.C.R.E. 702 and Jamison v. Morris, 285 S.C. 215, 228, 684 S.E.2d 168, 175 (2009)."

22. "Failed to attach ruling of involuntary confession under F.R.E. 103(a)(1)(A) and S.C.R.E. 103(a)(1) when the courts parameters met after Officer Rawl stated he coached defendant to edit statement and initial (U.S. v. Bolick, 917 F.2d 135, 149 (4th Cir. 1990)."

23. "Failed to request charge for spoliation of non-preserved first interrogation."

24. "Failed to request charge for spoliation of non-preservation of video of interrogations."

25. "Failed to introduce Best Efforts Rule in presenting search warrant of home to home owner prior, or even after, its completion, though home owner defendant was passed by the officer, in his yard, being interrogated."

26. "Failed by allowing immaterial, prejudicial evidence of non-prosecuted allegations, therefore against the res gestae, by introducing an external vibrator to enhance the prosecution's case by inferring other criminal acts or to confuse the issues to the jury."

27. "Failed to request a limiting instruction against the introduction—of an external vibrator an act not prosecuted before or at trial. (State v. Timmons, 372 S.C. 48, 54–55, 488 S.E.2d); (Webb v. CSX Transp. Inc., 364 S.C. 639, 655, 625 S.E.2d 440, 449 (2005)."

28. "Failed by attempting to make generalization of objections contemporaneous as 'previous objections' (State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996)."

29. "Failed to secure a jury of defendant's peers: age, gender, education, military (nearly all-female jury)."

30. "Only decided to do a very limited defense when defendant requested counsel dismissal due to counsel's malpractice; bias; refusal to form a defense involving defendant in the process; not trying to obtain a plea offer; instructing that if counsel dismissed, defendant would not get new appointed counsel."

31. "Failed to allege double jeopardy as even prosecution admits elements of CSC 1st constitutes criteria for CSC 3rd Tr. 378."

II. "Malicious prosecution"

1. "Introduction of suicidal mental health issue by action similar to a 'talking objection' by questioning character of evidence with no foundation."
2. "Introduction of irrelevant, non material evidence, being procedurally illegal due to search warrant expiration, and being too broad, for defendant's mobile phone data."
3. "Unjustly and unfairly opined in opening and closing arguments multiple times, dehumanizing defendant and inciting the jury's passions by continually calling defendant 'sex offender,' 'predator;' suggesting multiple victims; bolstering and vouching, by religious oath, the alleged victim while demeaning defendant; and out right instructing the jury to 'find the defendant guilty' twice in the same instance and the court instructions cannot remove this taint of flagrant misconduct." U.S. v. Davis, 514 F.3d 596, 613–14 (6th Cir. 2008), Berger v. U.S., 295 U.S. 78, 88 (1935), U.S. v. Kennedy, 372 F.3d 686 (4th Cir. 2004), Boyd v. French, 147 F.3d 319, 328–29 (4th Cir. 1998)."
4. "Continually introduction of misstatement of facts throughout."
5. "Enforcing jury act as conscious for community."
6. "Failed to request a retrial because of denial of defendants right to due process and a fair trial."

III. "Judicial error"

1. "Abuse of discretion when choosing inferior Denno case law simply because he 'usually follows' it."
2. "Abuse of discretion when using involuntary statement to decide if coercion existed."
3. "Abuse of discretion when setting coercive parameters, stating defendant did not allege being told how and when to strike though and initial corrections, though defendant stated he did everything the investigator told him to do.
4. "Abuse of discretion when own coercive parameters met during jury portion, where investigator openly admits and without being lead the very exculpatory evidence the judge based his biased opinion on defendant's statement; refusing to grant defenses request for directed verdict and a new trial. Tr. 121, Tr. 327. 8–14."
5. "Abuse of discretion by authenticating a forensic interviewer as an expert witness against S.C. case law: State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013)."
6. "Abuse of discretion by not recusing himself from case due to prejudice."

7. "Abuse of discretion when continually badgering defense on stand during suppression hearing and in front of the jury's showing bias by vocal and physical demeanor in disallowing defense attorney to follow procedure, interrupting defense counsel during witness examination, telling defendant how to answer questions, even going so far as stretching over his podium into the witness stand while reproaching the defendant how to answer a non-question—in front of the jury."
8. "Showing bias when lunging out of podium toward his chamber door with a distinct hatred on his face, upon defendant's leaving the stand during suppression hearing."
9. "Abuse of discretion by imposition of cruel and unusual punishment for maximum sentencing, though defendant had no pre-sentencing evaluation, no prior arrests, and judge lost jurisdiction to hear case due to bias."
10. "Abuse of discretion at sentencing for using defendant's victimization as a child against him."
11. "Abuse of discretion when opined that maximum sentence be imposed because defendant enforced his constitutional rights to confrontation, due process, and a fair hearing."
12. "Abuse of discretion when suggesting the imposition of maximum sentence will deter others from committing convicted rimes as defendant is not authority to anyone but himself."
13. "Abuse of discretion when stating that recidivist nature of convictions and lack of rehabilitation from the state could cure the status offense of being a 'pedophile.'"
14. "Abuse of discretion when imposing cruel and unusual, dehumanizing, procedurally unreasonable maximum sentenced to run consecutively that is substantively unreasonable due to not just defenses counsel's failing to introduce mitigating circumstances via a "pre sentencing evaluation, but to the lack of criminal history (and thus, knowledge of the criminal justice system); defendant's mental health status, and his previously being victimized at a young age; and not affording defendant with restitution for solicitor's flamboyant misconduct(s)."
15. "Abuse of discretion by allowing a misstatement and mistake of law as a 'sexual battery' under 16-3-651(h)(2015) states: 'sexual intercourse of any intrusion, however slight, of any part of a person's body or any object into the genital or anal openings of another person's body;' there was no allegation that defendant

penetrated—the alleged victim's 'genital' nor 'anal openings.'"

16. "Stated 'indeterminate' life and 'indeterminate' 15 year sentencing, but writing determinate sentences of 'life' and '15-years,' with no pre trial incarceration good-time noted on sentencing sheets; meaning the judge explicitly sates a life sentence eligible for parole at the minimum 25 years and a 15-years sentence eligible for parole at the minimum zero (0) years—NOT life without possible parole and mandatory 15-years."
17. "Abuse of discretion by not allowing defense possible exculpatory evidence, requested through defense counsel, of Officer Rawl's disciplinary record, violating the FOIA (Freedom of Information Act)."
18. "Failed to ask defendant if appointed counsel was adequate, which defendant already notified court of previous disgruntlement."

IV. "Ineffective assistance of appellate counsel"

1. "Failure to adhere to the Sentencing Reform Act of 1984 for challenging inhumane sentences, though they are in-line with statute. Counsel did not allege judicial abuse of discretion. Only that a sentence given within the guidelines does not constitute justifiable imposition which actively applied."
2. "Failed to allege abuse of discretion of trial court cumulative to entire record."
3. "Failed to allege fault indictments with no valid witness."
4. "Failed to request grand jury proceeding transcripts in order to verify date, time, statements, and information other than jury privilege deliberation."
5. "Failed to allege prosecutorial misconduct cumulative to entire record."
6. "Failed to obtain and issue corrected transcripts; instead opting to tell defendant that his minimalist, misstated, typo'd, illegal transcripts are the record there is and will be."
7. "Failed to assert federal statute that requires verbatim recording of every court session to include side bars and audio/video evidence. (U.S. v. Winstead, 74 F.3.d 1313, 1321 (1996)."
8. "Failed for not arguing 16-3-655(D)(1), requiring the jury to make a distinction of their collective perception constituting sexual battery and intrusion."
9. "Failed to allege that case entirely based on involuntary confession with no direct evidence (prior to trial) and

lacking proof of all statutory—elements, thereby invalidating arrest and prosecution of allegations."

V. "Pre conviction violations"

1. "U.S. Constitution, Amendment Four violated–when Officer Smith entered defendant's home without an invitation, nor probable cause or extrinsic circumstances."
2. "Fourth Amendment violation when Officer Rawl entered defendant's home unannounced without invitation, extrinsic circumstances, probable cause or search warrant."
3. "Fifth Amendment violation when Officer Rawl kicked defendant from his home before obtaining a search warrant."
4. "Fifth Amendment violation when Officer Rawl pressured defendant to cooperate, be it through direct contact, verbal means, psychological means, suggestive means, or even subjective means that extent to being objectively unreasonable by use of intimidation."
5. "Fifth Amendment violation when Officer Rawl did not Mirandize defendant prior to first interrogation."
6. "Fifth Amendment and Brady violation when Officer Rawl failed to maintain his primary duty to preserve evidence of the first intimidated interrogation, constituting spoliation of exculpatory evidence."
7. "Fifth Amendment and Brady violations when Officer Rawl failed to maintain his primary duty to preserve evidence of the second intimidated interrogation, constituting spoliation of evidence."
8. "Sixth Amendment violation when Officer Rawl decided not to inform defendant of right to counsel prior to evicting defendant from his home."
9. "Sixth Amendment violation when Officer Rawl decided, in bad faith, not to inform defendant of right to counsel prior to first intimidated interrogation."
10. "Sixth Amendment violation when Officer Rawl decided not to allow defendant ample time and/or means to search for counsel, adding that defendant's phone was illegally seized."
11. "Fourth Amendment violation when Officer Laintz passed directly by defendant, but failed to present the defendant the search warrant in best efforts; entering defendant's home unlawfully."
12. "Fourth Amendment violation when Officer Rawl illegally seized defendant's mobile phone."

13. "Fourth Amendment violation when Officer Rawl did not inform defendant of his right not to consent to warrantless search."
14. "Fifth Amendment violation when Officer Rawl did not inform defendant of his right not to consent to warrantless search."
15. "First Amendment violation when Officer Rawl refused to allow defendant to remain silent upon asserting Fifth Amendment right against self incrimination."
16. "Defendant affectively kidnapped, illegally, by Thomas and Danny Havird, and aggravated coercion in nature."
17. "Officer Rawl admits to violating defendant's 5th and 6th Amendment rights by visiting defendant in jail without notifying defense counsel, proving his lack of care for defendant's constitutional guarantees. Also, wore body camera at this time. Tr. 346."
18. "Officer Rawl had no probable cause, prior to coercive interrogation, to request search warrant of defendant's home as no reason to believe in allegation truthfulness or reliability. U.S. v. Wilhelm, 80 F.3d 116 (4th Cir. 1996)."[4]

Applicant requested relief as follows:

> "convictions and sentences to be overturned/acquitted of with prejudice, monitary[*sic*] sanctions and relief to be decided at a later hearing for illegal prosecution and detainment; at the very least reverse and remand entire case"

In the first Amended Application filed May 25, 2022, the Applicant makes the following allegations (verbatim):

> 2(a). Applicant's counsel, David Mauldin, failed to meet with the application a sufficient number of times to properly review the evidence and discuss this case with applicant.
>
> 2(b). Applicant's counsel, David Mauldin, failed to properly investigate the facts of the case.
>
> 2(c). Applicant's counsel, David Mauldin, failed to make a motion to suppress and object to the evidence seized following a search of the Applicants residence.

[4] Applicant withdrew a number of the allegations from his initial application at the evidentiary hearing.

2(d). Applicant's counsel, David Mauldin "opened the door" to testimony from the victim regarding evidence against the applicant about the victim being assaulted by the Applicant in "Na Na's house". (P.187, Lines 22-25, p. 190-191, P. 193, Lines 21-25, P. 194, Lines 1-3).

2(e). Applicant's counsel, David Mauldin, failed to object to hearsay evidence "she comes over, and Zoey told her about what had happened". (P. 227, Lines 8-9).

2(f). Applicant's counsel, David Mauldin, failed to make a motion to suppress and object to letters allegedly written by the Applicant that were prejudicial to the defense and introduced by the state into evidence. (P. 254 and 282, States EX:22).

2(g). Applicant's counsel, David Mauldin, failed to make a motion to suppress and object to testimony Inv. Phipps and evidence regarding internet searches allegedly conducted by the Applicant regarding "help with addition" and "beat sex addiction" on a cellular phone that was presented into evidence by the state (P. 373,372 and P. 375).

2(h). Applicant's counsel, David Mauldin, failed to obtain a ruling from the court on his objections to the states closing and failed to move for a mistrial (P. 446 – 477).

In the second Amended Application, filed June 5, 2022, the Applicant makes the following allegations (verbatim):

3(a). Applicants counsel David Mauldin failed to object to the state describing the Applicant as a sex offender in arguments to the jury (p. 436, 437, 441, 456).

3(b). Applicant's counsel David Mauldin failed to explain to Applicant the option for filing a motion to reconsider the sentence following trial and sentencing.

Before this Court are the records of the Lexington County Clerk of Court regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript and briefs; and the records of the current PCR action.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[5] (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).

[5] 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. See, e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); Clemons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J.,

concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

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

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

INITIAL FINDINGS

As a matter of general impression, this Court finds Trial Counsel's testimony at the evidentiary hearing **credible** and **persuasive**, where he presented well-recollected testimony of relevant background, facts, and discussions leading up to and during the trial. This Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant, he rendered adequate assistance and exercised reasonable professional judgment in his representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate

the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689; 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(c): **"Failed to raise impeachment of alleged victim when forensic video shows interviewing expert witness leading questions and inconsistent statements during interview."**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to raise impeachment of the alleged victim when the forensic video shows interviewing expert witness leading questions and inconsistent statements during interview. This Court finds this allegation to be without merit.

PCR Evidentiary Hearing

On direct examination, Applicant testified that during the forensic video, the forensic interviewer led the victim into a statement. (PCR Tr. p. 6).

On direct examination, Trial Counsel Mauldin testified that he did not have many concerns about leading questions in the recording. (PCR Tr. p. 30). Trial counsel testified the trial court made findings on the record regarding the admissibility of the forensic interview and one of those findings was that that victim statement was not elicited by leading questions during the interview. (PCR Tr. p. 33). See Trial Counsel testified that he did not feel like there were any grounds for cross-examining the victim about any leading questions from the video he reviewed. (PCR Tr. p. 48). Trial Counsel testified that in his closing argument he argued there was inconsistencies in the child's statements between the video and what she testified to on that stand." (PCR Tr. p. 34).

Findings

This Court finds the combination of the record and Trial Counsel's credible testimony that Applicant has failed to meet his burden of proving Trial Counsel was deficient and that the alleged

deficiency prejudiced him. See Butler, *supra*. Trial Counsel **credibly** testified to his trial strategy and this Court finds that trial strategy reasonable under the prevailing professional norms. Additionally, the record reflects the trial court made a specific finding that "the statements both from testimony of the witness and from review of the Court of "child" (victim) is not elicited by leading questions." (R. p. 273).

Further, this Court finds cross-examination is a matter of trial strategy, and Applicant has failed to overcome the presumption that Trial Counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690). Trial Counsel was not ineffective for failing to cross-examine the victim on the inconsistencies and choosing to instead address it in his closing arguments. See Huggler v. State, 360 S.C. 627, 635, 602 S.E.2d 753, 757 (2004) (holding that trial counsel was not ineffective for failing to cross-examine child witnesses on inconsistencies between direct testimonies and written statements when counsel instead chose to highlight the inconsistencies in closing), *abrogated on other grounds by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

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 WITH PREJUDICE.

Allegation 1(d): **"Failed to use pre-trial actions such as: motion to dismiss, motion for summary judgment, motion for speedy trial, motions(s) for depositions and/or interrogatories, motion to reduce bond, and (initially, until defendant request to relieve counsel) motion to suppress illegally obtained evidence. Violating procedural due process."**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to use pre-trial motions. More specifically counsel failed to file a motion to dismiss, motion for summary judgment, motion for a speedy trial, motion(s) for depositions and or/interrogatories, motion to reduce bond, and a motion to suppress illegally obtained evidence allegedly violating procedural due process. This Court finds this allegation to be without merit.

PCR Evidentiary Hearing

On direct examination, Applicant alleges he never discussed any motions with him and refused to communicate with him until Applicant tried to fire him. (PCR Tr. p. 7). Applicant alleges he asked Trial Counsel to request a motion to reduce bond and Trial Counsel said they weren't going to reduce it and so they were going to trial. Id. Applicant alleges he never had a hearing to reduce bond. Id.

On direct examination, Trial Counsel Mauldin testified that he did not see any basis upon which he could have moved to dismiss the indictments. (PCR Tr. p. 26). Trial Counsel testified that he does not move for summary judgment in criminal cases, he would move for a directed verdict. (PCR Tr. p. 27). Trial Counsel testified he does not believe a discussion of any basis for a speedy trial motion came up at all. Id. Trial Counsel testified that Applicant was arrested in January of 2016 and went to trial in July of 2017 and that is fairly quick for South Carolina. Id. Trial Counsel testified he discussed bond motions with Applicant and the fact that he had no financial

resources or places to go, it was decided not to proceed. Id. Trial Counsel testified that he and Applicant talked, and the strategy was to wait in jail and be able to accrue some time served in case there was a favorable plea bargain, then he would have time served. Id. Trial Counsel testified he did move to suppress Applicant's statements at trial. Id.

Findings

This Court finds the combination of the record and Trial Counsel's credible testimony that Applicant has failed to meet his burden of proving Trial Counsel was deficient and that the alleged deficiency prejudiced him. See Butler, *supra.*

Motion for Summary Judgment; Motion for Depositions/ and or Interrogatories

A motion for summary judgment is filed by parties to a *civil* case, a motion for summary judgment does not exist in criminal law. (SCRCP 56). Affidavits and depositions are inadmissible in evidence in a criminal case. State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) (citing; State v. Hester, 137 S.C. 145, 134 S.E. 885; State v. Murphy, 48 S.Ct. 1, 25 S.E. 43). This Court finds that Applicant has failed to show any deficiency by Trial Counsel for failing to file *civil* motions in his criminal case or any prejudice flowing therefrom.

Motion for a Speedy Trial

Pursuant to both the United States Constitution and the South Carolina Constitution, an accused in a criminal prosecution has a constitutionally guaranteed right to a speedy trial. See U.S. Const, amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]"); S.C. Const. art. I, § 14 ("Any person charged with an offense shall enjoy the right to a speedy and public trial[.]"). That right is designed to protect against anxiety stemming from public accusations of a crime and to limit the possibility of a lengthy pre-trial delay impairing an accused's defense. State v. Langford, 400 S.C. 421, 440, 735 S.E.2d 471 , 481 (2012). However,

the right to a speedy trial is chiefly designed to prevent undue pre-trial impairment of liberty. United States v. Loud Hawk, 474 U.S. 302, 312 (1986). Critically, though, the criminal trial process is designed to move deliberately due to the many procedural safeguards involved, and, thus, the essential guarantee provided by the right to a speedy trial is the orderly expedition of a charge as opposed to mere speedy expedition. United States v. Ewell, 383 U.S. 116, 120 (1966); see Beavers v. Haubert, 198 U.S. 77, 87 (1905) ("The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures the rights of a defendant. It does not preclude the rights of public justice.").

In order to trigger a speedy trial analysis, a criminal defendant's trial must have been delayed for a period of time that is presumptively prejudicial, which is necessarily dependent on the particular circumstances of each case. Langford, 400 S.C. at 442, 735 S.E.2d at 482. Notably, "a simple prosecution for ordinary street crime may have a lower threshold for a presumptively prejudicial delay than a more complex conspiracy case." Id. In South Carolina, a delay of over two years has previously been found to be sufficient to trigger a speedy trial analysis. State v. Waites, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978). Likewise, the United States Supreme Court has suggested a delay of roughly one year could—in certain circumstances—be presumptively prejudicial. See Doggett v. United States, 505 U.S. 647, 652, n.l (1992) ("Depending on the nature of the charges, the lower courts have generally found post accusation delay 'presumptively prejudicial' at least as it approaches one year."). However, even where a delay that is presumptively prejudicial exists, a speedy trial determination "is not based on the passage of a specific period of time, " and delay alone is not singularly dispositive. State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007) (emphasis added).

Ultimately, once a speedy trial analysis has been triggered, the question of whether a defendant's speedy trial rights have been violated is necessarily dependent on the specific circumstances of the case. State v. Robinson, 335 S.C. 620, 625, 518 S.E.2d 269, 272 (Ct. App. 1999). When attempting to answer that question, several factors should be considered. State v. Kennedy, 339 S.C. 243, 249, 528 S.E.2d 700, 703-704 (Ct. App. 2000). Specifically, a court analyzing a speedy trial claim should consider: (1) the length of the delay; (2) the reason for the delay, (3) **the defendant's assertion of his right**; and (4) whether any prejudice was suffered by the defendant as a result of the delay. Barker v. Wingo, 407 U.S. 514, 530 (1972). Notably, though, none of the four factors is alone necessary or sufficient for a finding of a speedy trial violation. Id. at 533. Instead, "they are related factors and must be considered together with such other circumstances as may be relevant." Id. "In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." Id.

Trial counsel's assessment and strategy for not seeking a speedy trial were credible and reasonable. Trial Counsel did not believe a discussion of any basis for a speedy trial motion came up at all. Id. Trial Counsel testified that Applicant was arrested in January of 2016 and went to trial in July of 2017 and that is fairly quick for South Carolina. Id. Counsel was not deficient.

Further, Sixth Amendment prejudice was not shown. This Court finds that even assuming, *in arguendo*, the speedy trial analysis was triggered in this case, that Applicant has not established a reasonable probability that had counsel raised the issue that the court would have found a speedy trial violation from the facts of his case. The record shows Applicant was arrested in January of 2016 and proceeded to trial in July of 2017. Additionally, Trial Counsel testified that trial was not in Applicant's purview until June of 2017, when he decided to reject the plea offer. (PCR Tr. p. 49).

Therefore, this Court finds Applicant has failed to show any deficiency by Trial Counsel for failing to move for a speedy trial or any prejudice flowing therefrom.

Motion to Dismiss

Trial Counsel **credibly** testified that he did not see any basis upon which he could have moved for dismissal of the indictments. Applicant did not allege any grounds at the evidentiary hearing on which the indictments could have been dismissed. This Court finds Trial Counsel was not deficient in his performance with regard to this allegation because there was no meritorious motion Trial Counsel could have made. Applicant has the burden to prove every allegation in his application. See Butler, 286 S.C. at 441, 334 S.E.2d at 814. Therefore, this Court finds Applicant has failed to show any deficiency by Trial Counsel for failing to move to dismiss or any prejudice flowing therefrom.

Motion to Reduce Bond

Applicant testified that he requested that Trial Counsel file a motion to reduce bond and Trial Counsel said they weren't going to reduce it, so they were going to trial. (PCR Tr. p. 7).This Court finds Applicant's testimony on this matter **not credible** or **persuasive.** Trial Counsel **credibly** testified he discussed bond motions with Applicant and the fact that he had no financial resources or places to go, it was decided not to proceed with a bond motion. (PCR Tr. p. 27). Trial Counsel testified the strategy they discussed was for Applicant to wait in jail and be able to accrue some time served in case there was a favorable plea bargain, he would have time served. (PCR Tr. p. 27). Therefore, this Court finds Applicant has failed to show any deficiency by Trial Counsel for failing file a motion to reduce bond or prejudice flowing therefrom.

Motion to Suppress Illegally Obtained Evidence

The record directly refutes Applicant's allegation that Trial Counsel failed to file a motion to suppress illegally obtained evidence. This Court finds Applicant's testimony on this matter **not credible** or **persuasive**. The record reflects Trial Counsel did file a motion to suppress Applicant's statements at trial which resulted in a lengthy argument and Jackson v. Denno hearing. R. p. 47-121. Judge McMahon denied relief in that matter. R.p. 119-121.

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 WITH PREJUDICE.**

Allegation 1(g): **"Failed to object to illegally obtained mobile phone data outside of search warrant criteria; to include being too broad, introduced information too prejudicial compared to probative value, and expiration of warrant when executed."**

Allegation 2(g): **Applicant's counsel, David Mauldin, failed to make a motion to suppress and object to testimony Inv. Phipps and evidence regarding internet searches allegedly conducted by the Applicant regarding "help with addiction" and "beat sex addiction" on a cellular phone that was presented into evidence by the state (P. 373, 374 and P. 375).**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to illegally obtained mobile phone data outside of search warrant criteria. He claims more specifically to include being too broad, the State introduced information too prejudicial compared

to probative value, and the expiration of warrant when executed. Applicant alleges Trial Counsel was constitutionally ineffective for failing to object and failing to make a motion to suppress the internet searches shown on the cell phone. This Court finds these allegations to be without merit.

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").

Accordingly, when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Underwood v. State, 309 S.C. 560,425 S.E.2d 20 (I 992); see Whitehead v. State, 308 S.C. 119,417 S.E.2d 529 (1992) ("Courts must be

wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

PCR Evidentiary Hearing

On direct examination Applicant alleges the search warrant stated there is 10 days to sign the warrant from January 27th, 2016, however the warrant was said to be completed in August of 2016. (PCR Tr. p. 8). Applicant alleges that the fact that the warrant return says it was received on January 27th, 2016, and was executed it as follows on January 27th, 2017, should have been challenged by a defense. Id. On direct examination, Applicant testified that Trial Counsel did not explain why he failed to make a motion to suppress or object to testimony from investigator Phipps, and evidence regarding internet searches allegedly conducted by Applicant listed as "help with addiction" and "beat sex addiction" on a cellular phone that was presented in evidence. (PCR Tr. pp. 13-14).

On direct examination, Trial Counsel testified he did not see any legal basis to move to suppress the internet search evidence from the Applicant's phone. (PCR Tr. p. 35). Trial Counsel testified that the phone was already in evidence at the Sheriff's Office at the time of the search warrant. (PCR Tr. p. 36). Trial Counsel testified that there was an initial return done in 2016 and a subsequent one done in 2017 although that may have been a scrivener's error because he believes the officer testified at trial to get done some things in 2016. Id. Trial Counsel testified that Officer Michael Phipps wrote on the top of the first warrant return that he executed the warrant on January 27, 2016. Id. Trial Counsel testified that in his opinion, Applicant's statement was more damaging evidence at trial than the Google search results from his phone. Id.

On cross-examination, Trial Counsel testified that the cell phone data was a drop in the ocean. (PCR Tr. p.49). Trial Counsel testified that there would have possibly been some benefit to keeping that evidence out, but he did not make any attempt. Id.

On re-direct examination, Trial Counsel testified that what he meant by the cell phone data being a drop in the ocean was that the 7-page detailed confession that Applicant gave was the ocean, and that search, and the dildo corroborating both his statement and her statement, they weren't helpful, but it was his confession that sunk the ship. (PCR Tr. p. 59).

Findings

This Court finds the combination of the record and Trial Counsel's credible testimony that Applicant has failed to meet his burden of proving Trial Counsel was deficient and that the alleged deficiency prejudiced him. See Butler, *supra*.

This Court finds the warrant was properly executed within ten days after it was issued. S.C. Code Ann. § 17-13-140 (2014) ("Any warrant issued hereunder shall be executed and return made only within ten days after it is dated."). Further, the failure to observe the ten-day requirement for the execution and return of a warrant, a ministerial requirement, does not necessarily void the warrant. State v. Wise, 272 S.C. 384, 252 S.E.2d 294 (1979). The warrant will be invalidated only if the defendant can show he was prejudiced by the failure. Id.

Trial Counsel **credibly** testified he did not see any legal basis to move to suppress the evidence from the phone. The Applicant has failed to present any legal basis for excluding the evidence from the phone that reasonable counsel would have raised. Further, this Court finds the search warrant authorized the collection of all data, and the search warrant was executed on January 27, 2016. Officer Michael Phipps testified that on August 10, 2016, he examined the cell phone and made an extraction. (R. p. 366). A subsequent return was dated June of 2017, where a

CD containing data from the phone was delivered as discovery. Here, due to the intense nature and exhaustive amount of information that may be stored in the device seized and the necessary amount of time required to complete the search of the device, the search warrant authorized the result of any forensic analysis to be maintained by law enforcement for any subsequent legal proceeding. (Applicant's Exhibit 1). The record reflects that counsel did not object. Tr.p. 361-376. This Court finds the government's retention of the copies of the digital data lawfully extracted does not affect the reasonableness of any subsequent search of such data. Counsel was not deficient under Strickland for failing to object where no legal basis to object existed that would have excluded the evidence.

Further, this Court finds Applicant failed to present any evidence that he was prejudiced by Trial Counsel's failure to object to the mobile phone data. Assuming *arguendo* that the mobile phone data had been objected to and kept out of trial, Applicant gave an extensive and detailed confession corroborating the information discovered on the cell phone. Applicant therefore cannot show he was prejudiced by Trial Counsel's failure to object to the mobile phone data under Strickland.

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 WITH PREJUDICE.

Allegation 1(h): **"Failed to educate defendant of various pleas, such as nolo [contendere], not guilty due to mental illness, or even appearing to obtain a plea – despite counsel's immediate superior boasting counsel's credential and enforcing that defendant would remain unheard."**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to educate Applicant of various pleas, more specifically nolo contendere and not guilty due to mental illness. This Court finds this allegation to be without merit.

PCR Evidentiary Hearing

On direct examination, Applicant testified Trial Counsel never advised him of various types of plea options. (PCR Tr. p. 9).

On cross-examination, Applicant testified he did not want any plea deal. (PCR Tr. p. 16). Applicant testified he would not have taken a plea deal for the crimes of which he was convicted. Id. Applicant testified he did in fact turn down a plea deal on June 8, 2017. Id.

On direct examination, Trial Counsel testified that Applicant was originally charged with five counts of first-degree CSC, one count of third-degree, and three counts of dissemination involving showing pornographic videos to a child. (PCR Tr. p. 23). Trial Counsel testified the offer was to plead guilty to one count of CSC, first degree with a minor which was a mandatory minimum of 25 years and a maximum of life in prison. Id. Trial Counsel testified that Applicant did not make any statements to him that would lead counsel to believe Applicant had been guilty but mentally ill or not guilty by reason of insanity at the time of his crimes due to any mental illness. (PCR Tr. p. 29). Trial Counsel testified that Applicant was not going to take the plea offer presented to him, and so there was no use discussing no contest, or any alternate plea. It was

counsel's belief that the only alternative was trial. Id. Trial Counsel testified at that point of the offers; Applicant was still insisting that he was innocent. (PCR Tr. p. 30).

On cross-examination, Trial Counsel testified that no warning bells went off to lead to discussing (not) guilty but mentally ill. (PCR Tr. p. 49). Trial Counsel testified he got some records from the Army regarding Applicant, but they did not appear to have anything of significance. (PCR Tr. p. 50). Trial Counsel testified that Dr. Martin said he was competent as well. Id. Trial Counsel testified that there is no mention of him saying that he thought victim was an ice cream cone or something that was delusional or anything like that. Id.

Findings

This Court finds the combination of the record and Trial Counsel's credible testimony that Applicant has failed to meet his burden of proving Trial Counsel was deficient and that the alleged deficiency prejudiced him. See Butler, *supra*.

Nolo Contendere

Practically, a plea of *nolo contendere* "is a plea of guilty in so far as the consequences in the particular case in which it is pled." Kibler v. State, 267 S.C. 250, 254, 227 S.E.2d 199, 201 (1976). In South Carolina, *nolo contendere* pleas are only allowed in misdemeanor cases. See S.C. Code Ann. § 17-23-40 (2006); Kibler, 267 S.C. at 254, 227 S.E.2d at 201. Thus, because *nolo contendere* pleas are only permissible in misdemeanor cases, not felonies, Applicant was not entitled to enter such a plea in this case. Id. Consequently, this Court finds Applicant's allegation is without merit and fails as a matter of law.

Not Guilty Due to Mental Illness

"It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the

capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. S.C.Code Ann. § 17-24-10(A) (Supp.1992). However, a defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law. S.C.Code Ann. § 17-24-20(A) (Supp.1992)." State v. Poindexter, 314 S.C. 490, 493, 431 S.E.2d 254, 255 (1993). Applicant did not present any evidence to suggest he had any mental disease or illness that affected his ability to understand right from wrong. Further, Trial Counsel **credibly** testified that Applicant did not make any statements that would lead him to believe Applicant had been mentally ill or mentally insane at the time of his crimes. This Court finds that he has failed to show either deficient performance or prejudice on his mental illness claims.

Failed to Obtain a Plea

This Court finds the record directly refutes this allegation. Applicant testified he would not have taken a plea deal for the crimes he was convicted of. Further, the record reflects Trial Counsel communicated a plea deal to Applicant and he turned it down. Applicant, therefore, has failed to prove Trial Counsel was deficient for failing to obtain a plea, when the record shows that Applicant was presented a plea deal. Further, Applicant has failed to show any prejudice, as his testimony states he would not have taken a plea deal regardless.

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 WITH PREJUDICE.**

Allegation 1(i): **"Failed to educate defendant on meaning of '25 to life, life, parole, sexual battery,' etc. Even so far as stating 'you understand you just don't like it' during one of the less than eight attorney visits in a high value case during defendant's 18-month illegal detainment."**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to educate Applicant on the meaning of "25 to life, life, parole, and sexual battery." This Court finds this allegation to be without merit.

PCR Evidentiary Hearing

On direct examination, Applicant testified that he understood that 25 to life could have been anywhere from 25 to life, but did not understand parole, and did not understand "if it was 25 to life, or if it was life, or if it was 25". (PCR Tr. p. 9).

On direct examination, Trial Counsel testified that he did go over sexual battery with Applicant and the allegation in this case was fellatio, which he went over with Applicant. (PCR Tr. p. 24). Trial Counsel testified that he did tell him what "25 to life" meant, and did not know where somebody would be confused. Id. Trial Counsel testified that he let Applicant know that he believed he would be eligible for release after 85% of his sentence, that was if he got a number of years as opposed to a life sentence. Id. The Applicant received a sentence of life imprisonment. R.p. 485, R. 503.

On cross-examination, Trial Counsel testified that he did go over what sexual battery was, and as to the 25 to life, he failed to see how Applicant did not understand 25 to life as a range of a minimum of 25 and a maximum of life. (PCR Tr. p. 50).

Findings

As an initial matter, this Court finds Applicant's testimony **not credible**. This Court further 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*. Also, this Court 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 explained the alleged terms to Applicant. Notably, Applicant has presented no credible evidence to this Court that Trial Counsel did not discuss and explain Applicant's charges and sentencing range related to his charges. His suggestion otherwise is without credible support.

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 WITH PREJUDICE**.

Allegation 1(k): "Failed to educate defendant about a 'bench trial'"

Applicant alleges Trial Counsel was constitutionally ineffective for failing to educate Applicant about a bench trial. This Court finds this allegation to be without merit.

PCR Evidentiary Hearing

On direct examination Applicant testified that he never was advised on what a bench trial was. (PCR Tr. p. 10).

On direct examination, Trial Counsel testified that he did not discuss the difference between a bench trial and a jury trial with Applicant. (PCR Tr. p 24). Trial Counsel testified that Applicant did not say anything to him that would indicate at the time he was interested in a bench trial. Id. Trial Counsel testified he would not have recommended a bench trial from either Judge McMahon or Judge Keesley, the two main judges that were out there at the time. (PCR Tr. p. 25). Trial Counsel testified that in fact Judge McMahon gave the maximum sentences for both convictions. Id.

On cross-examination, Trial Counsel testified that someone does not have a right to a bench trial. (PCR Tr. p. 50). Trial Counsel testified that they have a right to request one and the state and the judge has to consent before a bench trial can proceed. Id. Trial Counsel testified that he does not recall explaining any of that to Applicant. Id.

Findings

There is no federally recognized right to a bench trial. Singer v. United States, 380 U.S. 24, 34, 85 S. Ct. 783, 790, 13 L. Ed. 2d 630 (1965). A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. Id. 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*. Also, this Court 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 was not deficient by failing to educate Applicant about a bench trial.

Under South Carolina Rule of Criminal Procedure, Rule 14, a defendant may waive a jury trial *only with the approval of the solicitor* and the trial judge. The Applicant has made no showing the solicitor would have approved a waiver their right to a jury trial under Rule 14. He has failed in his burden of proof that there was a Sixth Amendment duty/requirement upon counsel to advise him of a potential for a bench trial under the reasonable competence standard of Strickland.

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 WITH PREJUDICE.**

Allegation 2(a): Applicant's counsel, David Mauldin, failed to meet with the applicant a sufficient number of times to properly review the evidence and discuss the case with applicant.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to meet with Applicant a sufficient number of times to properly review the evidence and discuss the case with applicant. This Court finds this allegation to be 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 that 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 ensure 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.Ed.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 fewer than ten times. (PCR Tr. p. 11). Applicant testified that Trial Counsel gave him a physical copy of the evidence. Id. Applicant testified that Trial Counsel watched all of the audio and video with him. Id. On cross-examination, Applicant testified that he had between five and eight meetings with Trial Counsel. (PCR Tr. p. 15).

On direct examination, Trial Counsel testified that he had an initial visit with Applicant on February 18th, 2016. (PCR Tr. p. 20). Trial Counsel testified that he reviewed the discovery with him that he had gotten initially on May 24th, 2016, and had a preliminary hearing on May 27th, 2016. Id. Trial Counsel testified that he had Dr. Martin, a psychosexual evaluator, evaluate Applicant, and then discussed the findings with Applicant on September 1, 2016. Id. Trial Counsel testified that on February 6, 2017, the state offered his plea to one count of criminal sexual conduct first degree straight up and he went to relay that to him on June 7, 2017. Id. Trial Counsel testified that on June 8th, 2017, they had the plea rejection on the record. Id. Trial Counsel testified that on June 16th, 2017, they had a jail visit where they watched videos, reviewed new rule 5 discovery including about 100 pages of letters that Mr. Ellis had written to the family apologizing for what he had done. Id. Trial Counsel testified that on June 25th, 2017, there was more discovery that came in and so he reviewed that with Applicant and talked to him about trial procedures. Id. Trial Counsel testified that on July 3rd, 2017, he went and visited him and reviewed more evidence. Id. Trial Counsel testified that on July 5th, 2017, they reviewed Applicant's statements, letters, the statements he had given to the police. (PCR Tr. pp. 20-21). Trial Counsel testified that on July 7th,

2017, he reviewed some more discovery that had come in. (PCR Tr. p. 21). Trial Counsel testified he met with Applicant 13 times pretrial. Id. Trial Counsel testified that he communicated with Applicant additionally by the occasional phone call. (PCR Tr. p. 21). Trial Counsel testified he did not know how many times he talked to him on the phone. Id.

Findings

This Court finds 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*. Also, this Court finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from the alleged deficiency. See Butler, *supra*. At the evidentiary hearing on direct-examination, Trial Counsel **credibly** testified to meeting with Applicant thirteen times and thoroughly reviewing multiple waves of discovery as they became available with Applicant and discussing trial procedures. See Campbell, Olson, and Easter, *supra*. This Court has reviewed the records and finds Trial Counsel was fully prepared and additional meetings with Applicant would not have resulted in a different outcome at trial. The record reflects that Trial Counsel prepared Applicant by reviewing Applicant's statements with him and his testimony for trial. Specifically, Trial Counsel met with him and prepared him for impeachment and went through his direct examination line by line. Applicant has provided no evidence that any additional preparation would have impacted the 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 2(b): Applicant's counsel, David Mauldin, failed to properly investigate the facts of the case.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to properly investigate the facts of the case.

When asked at the evidentiary hearing, whether there was anything Trial Counsel failed to do to investigate the case, Applicant responded "not that I can think of". (PCR Tr. p. 12). Applicant failed to present any evidence, testimony, or legal authority regarding this allegation at the evidentiary hearing. "When a party provides no legal authority regarding a particular argument, the argument is abandoned, and the court will not address the merits of the issue." Palmer v. State, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019) (citing State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011). Therefore, this Court deems the allegation abandoned.

Allegation 2(c): Applicant's counsel, David Mauldin, failed to make a motion to suppress and object to the evidence seized following a search of the Applicant's residence.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to make a motion to suppress and object to the evidence seized following a search of the Applicant's residence. This Court finds this allegation to be without merit.

PCR Evidentiary Hearing

On direct examination, Applicant testified that he and Trial Counsel never spoke about suppression of evidence seized from Applicant's home. (PCR Tr. p. 12). Applicant testified that "it was actually illegal that a police officer as a third party couldn't get, under oath, a search warrant." Id.

On direct examination, Trial Counsel testified that the police obtained a search warrant, and according to police, Applicant was very compliant and said he would help them with whatever they wanted. (PCR Tr. p. 37). Trial Counsel testified that officers obtained a search warrant, even though, as they testified, Applicant had given consent to search the home. (PCR Tr. p. 37-38).

On cross-examination, Trial Counsel testified that he did not object to the vibrator seized from the residence coming into evidence. (PCR Tr. p. 51). Trial Counsel testified that he doubts that it is possible that if he objected, he could have kept the vibrator out of evidence. Id.

On re-direct, Trial Counsel testified that the vibrator was described in both Applicant's statement and at trial, some of the allegations said it was used during the grooming process and potentially be part of the Criminal Sexual Conduct third degree charge. (PCR Tr. p. 60).

Findings

As an initial matter, this Court finds Trial Counsel's testimony on this matter **credible** and Applicant's testimony **not credible** and **not persuasive**. The Applicant has failed to show that the search pursuant to the search warrant was invalid or that there was any basis concerning the breadth of the search to challenge the admission of the evidence.

The record at trial revealed that the Applicant, when initially confronted by police at his home, authorized a consensual search. However, law enforcement wisely chose to await the preparation and signing of the search warrant before they proceeded with the search of the home

and area. His conclusory allegation is without merit and a factual basis. R. p. 49, 51-52 68, 81-82, 115, 120, 226, 297-299, 309-314, 319, 342, 397.

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, Applicant provided no legal authority to support his allegations. This record reflects that there was a valid search warrant prior to the search of the residence, and additionally, that Applicant consented to the search. Further, this Court finds that any motion to suppress the evidence found inside Applicant's home would have been non-meritorious. 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).

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 2(d): **Applicant's counsel, David Mauldin "opened the door" to testimony from the victim regarding evidence against the applicant about the victim being assaulted by the Applicant in "Na Na's house". (P. 187, Lines 22-25, p. 190-191, P. 193, Lines 21-25, P.194, Lines 1-3).**

Applicant alleges trial Counsel was constitutionally ineffective for opening the door to testimony from the victim about the victim being assaulted by the Applicant in "Na Na's house". This Court finds this allegation to be without merit.

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not explain to him why during the trial, there was a finding that counsel had opened the door to testimony from the victim regarding evidence against Applicant concerning the victim being assaulted by Applicant in what was referred to as Nana's house. (PCR Tr. pp. 12-13).

On direct examination, Trial Counsel testified that when asking the victim about whether the things with Applicant started happening in the house she was living in, and her response was it started in her Nana's house. (PCR Tr. p. 39). See R.p. 187. Trial Counsel testified he did not ask any follow up questions on that. (PCR Tr. p. 40). Accord, 187. But see R.p. 192-193 (counsel's questions about who else lived in nana's house at that time). Trial Counsel testified that when he re-crossed the victim, he asked her if other people had lived at the grandmother's house. (PCR p. 41). Trial Counsel testified that he asked that question because sometimes you just do general questions, especially with children you kind of beat around the bush a lot before you get to the pointed questions just to make them feel comfortable talking. Id.

On cross-examination, Trial Counsel testified that based on his understanding of the evidence he had received from the state in the forensic interview and the discovery, it was his impression that it had started at the house they had moved into. (PCR Tr. p. 54). However, he

opined that the evidence about the grandmother's house was admissible under Evidence Rule 404 anyway. See R.p. 187, l. 22-25.[6]

Trial Counsel testified that he asked that question and it turned out she said it started somewhere else. Id. Trial Counsel testified that he thought he knew the answer to the question that he asked, but apparently, he did not. Id.

Findings

This Court, after a thorough evaluation, finds that the 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 the combination of the record and Trial Counsel's **credible** testimony that 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*. Trial Counsel's **credible** testimony indicates that his line of questioning was based off the discovery and the forensic interview of the victim. 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). Trial Counsel **credibly** testified there was no way at that time to anticipate that the victim would answer that Applicant's conduct began at a different home.

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[6] In redirect examination at trial, the State inquired of the victim that when it started it was at nana's house. The child confirmed that she lived a nana's house before she moved into the other house where they saw pictures from. She confirmed that it was where the victim was living when the Applicant started touching her. The child also confirmed that it happened to her there "more than one time." The child said that she kept it a secret because the Applicant told her not to tell anyone. R.p. 190-191. The State, at trial, put on the record that the evidence about the ongoing illicit conduct that counsel did on cross-examination allowed the State to follow-up with further questioning about the victim's statement that it began at nana's house. R.p. 193-194.

Turning to the Strickland prejudice prong, this Court finds Applicant has failed to prove any prejudice from whether Applicant's conduct began at her home, or prior when she lived at her grandmother's home. This Court finds the outcome of Applicant's trial did not hinge on this answer to Trial Counsel's question. The victim had already testified that the bad touching incidents incidents had occurred more than one time at the current house she had moved into after nana's house. R. p. 173-179. The State in its closing made no reference to the incidents at nana's house. R. p. 434 (comments about nana's house being safer that Bryan's house).. Furthermore, this Court finds that this testimony was not so crucial as to undermine the results of the proceedings.

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. The Applicant has failed to present information that reasonable counsel would have understood and expected this answer. However, there was no showing of anything before this Court to suggest that Applicant's counsel would have expected this response by the child. 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 by the evidence of the uncharged conduct.

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 2(e): **Applicant's counsel, David Mauldin, failed to object to hearsay evidence "she comes over, and Zoey told her about what had happened." (P. 227, Lines 8-9).**

Applicant alleges Trial Counsel was constitutionally deficient for failing to object to hearsay evidence that "she comes over, and Zoey told her about what had happened." This Court finds this allegation to be without merit.

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").

Accordingly, when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); see Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be

wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not explain why he failed to object to the hearsay evidence quote. (PCR Tr. p. 13).

On direct examination, Trial Counsel testified that the grandmother testified that the victim disclosed to the victim's mother. (PCR Tr. p. 41). Trial Counsel testified that the witness did not say what the victim said to her mother. (PCR Tr. p. 42). Trial Counsel testified that it was not a statement, it was just general about what had happened and not a quote from somebody. Id. Trial Counsel testified that Mr. Ellis was not disputing in trial that the victim had made allegations, just that the allegations were false. Id.

On cross-examination, Trial Counsel testified that he failed to see where that was a statement made by an out of court declarant for the truth of the matter asserted. (PCR Tr. p. 55).

Findings

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. S.C. R. Evid. 802. Here, the statement was "... and Zoey told her about what had happened." (R. p. 227).

This Court finds Trial Counsel was not deficient in failing to object to the testimony of Barbara Havird at trial. Trial Counsel **credibly** testified that he did not see a legal basis to the challenged testimony, as the testimony of the witness did not include the actual contents of the victim's statement and did not meet the definition of hearsay. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); see Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for

employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). The testimony Applicant challenges as improper character evidence explained the setting of Applicant's arrest, including the seizure of the murder weapon. Under *res gestae*, the testimony of the events and circumstances surrounding Applicant's arrest were integral to help the jury understand the time and place forming the basis of the charge against Applicant and do not constitute impermissible character evidence.

Additionally, as there was no meritorious basis for Trial Counsel to object to the challenged testimony, Applicant cannot establish prejudice from Trial Counsel's failure to object. 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).

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 2(f): **Applicant's counsel, David Mauldin, failed to make a motion to suppress and object to letters allegedly written by the Applicant that were prejudicial to the defense and introduced by the state into evidence. (P. 254 and 282, States EX:22).**

Applicant alleges Trial Counsel was constitutionally deficient for failing to make a motion to suppress and object to letters written by Applicant and introduced into evidence. This Court finds this allegation to be without merit.

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not explain or talk about why he did not object and move to suppress the letters written allegedly by Applicant that were of prejudicial nature and used by the state. (PCR Tr. p. 13).

On direct examination, Trial Counsel testified that he went through all of the letters with Applicant. (PCR Tr. p. 43). Trial Counsel testified that he had highlighted parts where Applicant specifically said he was sorry for everything. Id. Trial Counsel testified he went over everything where Applicant said anything negative involving sex or apologizing so they could address those at trial. Id. Trial Counsel testified that Applicant did not dispute that he wrote and sent those letters. (PCR Tr. p. 44). Trial Counsel testified that he did not see any legal basis upon which he could have opposed the admission of the letters. Id. Trial Counsel testified that the people said they had received those letters from jail, they said it was in Applicant's handwriting, and Applicant admitted to the letters as well. Id. Trial Counsel testified that he expected some of the letters to be entered into evidence at trial and that is why he reviewed them with Applicant, to make sure that if he testified, he would be able to provide some explanation for the letters. Id.

On cross-examination, Trial Counsel testified that he did not see any basis for a motion to suppress. (PCR Tr. p. 55). Trial Counsel testified that he thought that they had laid the foundation, and so he did not object. Id.

On re-direct, Trial Counsel testified that in regard to hearsay, the letters were both statements by a party opponent and statements against interest. (PCR Tr. p. 61). Trial Counsel

testified that he wouldn't stay everything the Defendant says is fair game, but a good chunk of it is. Id.

Findings

This Court 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, Applicant provided no legal authority to support his allegations. Further, this Court finds that any motion to suppress the letters written by Applicant would have been non-meritorious. 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).

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 2(h): **Applicant's counsel, David Mauldin, failed to obtain a ruling from the court on his objections to the state's closing and failed to move for a mistrial. (P.446 – 447).**

Applicant alleged Trial Counsel was constitutionally ineffective for failing to obtain a ruling from the court on his objections to the states closing and failed to move for a mistrial.

As stated in the next allegation, there were objections to two comments to the solicitor's closing argument. R.p. 446, l. 15-22 and R. p. 447, l. 4-11. However, there was no motion for a mistrial. Accor. PCR Tr. p 56-57.

> MS. MAYES: ...This is a sex offender and there's no other way around it. Let this be the last time that he hurts a child in this way. Let this be the last time he steals the innocence –
>
> MR. MAULDIN: Objection, Your Honor.
>
> MS. MAYES: -- of a child.
>
> MR. MAULDIN: Appealing to passion and prejudice.
>
> THE COURT: All right. Of course, ladies and gentlemen, your verdict will not be based on passion and prejudice, biased or any other motive not in evidence or emotion not in evidence in the case. It must be based on the facts and the reasonable inferences therefrom. Thank you, Mr. Mauldin. Thank you, Solicitor. You may continue.
>
> MS. MAYES: Yes, sir, Your Honor. I submit to you this must be the last time. The correct verdict in this case –
>
> MR. MAULDIN: Objection, Your Honor.
>
> THE COURT: Again, ladies and gentlemen, your verdict must be based on the evidence, the reasonable inferences drawn therefrom and the law as I tell you the law is.

R.p. 446, l. 15 – 447, l. 11.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court." State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). "The power of the trial court to declare a mistrial should be used with the greatest caution" and only "when absolutely necessary" and a defendant has to "show both error and resulting prejudice." Id. "The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous

that the prejudicial effect can be removed in no other way." Id. Washington v. State, 440 S.C. 550, 565, 891 S.E.2d 668, 676 (Ct. App. 2023), reh'g denied (Sept. 21, 2023)

When asked about the allegation on direct-examination at the PCR evidentiary hearing, Applicant testified "actually, I believe he did ask for a mistrial". (PCR Tr. p. 14). However, counsel clarified that he did not move for a mistrial after his objections. (PCR Tr.p. 56-57). The

Applicant failed to prove that counsel was deficient in failing to request a mistrial. It is unclear that, in this setting, a mistrial was appropriate with the trial court cautionary instructions to the jury. Upon review of the record , this Court must find that counsel was not deficient in failing to request a mistrial after the instructions to the brief comments by the prosecutor. Further Sixth Amendment prejudice was not shown. This Court finds that the Applicant has failed to prove that there is a reasonable probability that if counsel would have requested a mistrial based upon those comments the results would have been a mistrial. The comments were brief at the end of the closing argument and a cautionary instruction was given. A review of the argument and instruction does not show that a mistrial appropriate as, "an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." Sixth Amendment prejudice has not been shown.

Allegation 3(a): Applicant's counsel, David Mauldin, failed to object to the state describing the Applicant as a sex offender in arguments to the jury (p. 436, 437, 441, 456).

During the trial, the following argument was presented that he is currently challenging:

> . . . Here we have direct evidence from Zoey Dean as well as people who heard directly from his mouth what he did to that child and, in fact, direct evidence by his own hand every single word in that confession is true except the one thing he had to **do because that's how sex offenders operate**. Right there in that confession he's still trying to cast blame on that child. Seven years old. She had questions.

I had to ask what she liked and didn't like. What she liked? **That's how a sex offender thinks** and I submit to you it's something that can't be understood or rationalized by anybody in this courtroom but that is not the law. It is not our job to try to interpret what the twisted mind of a sex offender thinks or feels or how he operates. That's not the law. The way the law works is do we have the proof that he did it? By his own admission he did it and by that child's own sworn testimony he did it.

R. p. 436, l. 13-p 437, l. 5. (emphasis added).

He is everything he owns up to being right here in this confession. A sex offender is as bad as it gets.

R.p. 437, l. 18-19.

Well, all the coaching and encouragement, the grooming that he described is exactly what he has done to Zoey. He wanted to break down every barrier and inhibition that that child had to teach her from the youngest age possible that it was okay and that it was right so that she would do everything that he said and **I submit to you that is only how a sex offender would think and would act.** It's all about making her believe that it's okay and that it's their secret and not to tell because as long as he's got her doing whatever he wants her to do, he's going to keep doing it and it's going to keep escalating exactly like it did and ultimately with Zoey it only stopped because she told.

R.p. 441, l. 6-18.

This is **a sex offender** and there's no other way around it.

R.p. 446, l. 15-16.

There was no threats. No coercions. Just the attempts of **a manipulative sex offende**r trying to talk his way out of it with Sergeant Rawl the same way he took that stand and tried to talk his way out of it to everyone in this courtroom.

R.p. 456, l. 2-7.

Applicant alleges Trial Counsel failed to object to the state describing the Applicant as a sex offender in arguments to the jury. The Court finds this allegation to be without merit.

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").

Accordingly, when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); see Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did object to the state describing him as a sex offender, and the solicitor was "admonished and then continued to do so after." (PCR Tr. p. 14).

On direct examination, Trial Counsel testified that Applicant was charged with being a sex offender as the crime of his interaction with the child. (PCR Tr. p. 46). Trial Counsel testified that obviously the solicitor's position was that he was a sex offender, that she had proved he was a sex offender, and that was what she was arguing to the jury. Id. Trial Counsel testified that he did object to future dangers during the closing, and he got a curative instruction. (PCR Tr. p. 47).

On cross-examination, Trial Counsel testified that Applicant's seven-page confession was detailing how he molested a child, and so the fact that the solicitor called him a child molester "it's kind of a six, and one half a dozen of another." (PCR Tr. p. 57).[7]

Findings

Trial Counsel **credibly** testified that there was a seven-page confession detailing how Applicant molested a child and so the solicitor did not find the term to be objectionable. Trial Counsel articulated his reason for not objecting and therefore is found to not be deficient. See Underwood *supra*.

During closing argument, "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 531–32 (2007) (citation omitted) (quoting Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004)), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 181 n.2, 810 S.E.2d 836, 839 n.2 (2018). However, "[a] solicitor's closing argument must be carefully

[7] Evidence in the trial in addition to his confession revealed that he had admitted to another that he had "molested" the victim. R.p. 280, l. 5-7 (Thomas Havird).

tailored so as not to appeal to the personal biases of the jury. The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." Smith v. State, 375 S.C. at 522–23, 654 S.E.2d at 531. "In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine 'whether the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Tappeiner v. State, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016).

Further, Applicant provided no evidence to show that had Trial Counsel objected, the outcome of the trial would have been different. Applicant confessed to the allegations and there was a significant amount of evidence provided at trial confirming his confession and the interaction with the child. . There was no evidence presented by Applicant that specifically the State referring to him as a sex offender, had any impact on the outcome of the trial. Therefore, Applicant failed to show any resulting prejudice.

This Court finds that counsel was not deficient in failing to object to the State's use of the words "sex offender" in their argument. The majority of the prosecutor's closing argument was devoted to explaining how the evidence adduced at trial satisfied the elements of the offenses. The Court notes that the terms "sex offender," "molester," and "child molester," are descriptive labels that are inherently connected to sexual perpetrators and, although arguably used to stigmatize those labeled as such, were specific to the evidence presented at this trial. The Applicant attempts to suggest that the jury would have concluded that the Applicant was a registered sex offender and imply that he had a prior sexual offense conviction. PCR Tr.p. 57. However, the Court must find that suggestion is unlikely and does not find deficiency in counsel's performance.

In this case, the prosecutor's invocation of these descriptive labels were not excessive within the context of the closing argument as a whole and, further, did not purposely or otherwise

saturate the trial with emotion. Especially in this case, where there was abundant evidence of Applicant's guilt, including testimony from admissions, this Court does not find reasonable counsel was under a duty to object to the use of that term of art where the prosecutor's occasional use of the term "sex offender" did not render the trial fundamentally unfair.

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. This court does not find in this setting that there was a reasonable probability that had counsel objected the result of the proceeding would have been different.

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(b): Applicant's counsel, David Mauldin failed to explain to Applicant the option for filing a motion to reconsider the sentence following trial and sentencing.

Applicant alleges Trial Counsel failed to explain to Applicant the option for filing a motion to reconsider the sentence following trial and sentencing. The Court finds this allegation to be without merit.

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel never explained to him the option for filing a motion to reconsider the sentence. (PCR Tr. p. 14).

On direct examination, Trial Counsel testified that there was no way that Judge McMahon was going to reconsider. (PCR Tr. p. 47). Trial Counsel testified that there was no point filing for a motion to reconsider after Judge McMahon's speech he gave during sentencing. (PCR Tr. pp. 47-48).See R.p. 482-485. Trial Counsel testified that Applicant did not ask him to file a motion to reconsider. (PCR Tr. p. 48).

On cross-examination, Trial Counsel testified that if Judge McMahon could have found a way to give Applicant more time he probably would have. (PCR Tr. p. 57).

Findings

Based on a review of the record and the testimony presented at the PCR hearing, the Court finds this allegation to be without merit. Trial Counsel **credibly** testified that Applicant never asked him to file a motion to reconsider. Furthermore, there is no professional obligation to file a motion for reconsideration of a sentence absent a specific legal reason to do so. The sentence imposed on Applicant was not an illegal sentence, nor was there any allegation that the trial court acted with partiality, prejudice, oppression or corrupt motive when sentencing Applicant. *See Shraiar v. U.S.*, 736 F.2d 817, 818 (1st Cir. 1984) ("No court has held that failure to file a [motion to reduce sentence] automatically constitutes ineffective assistance of counsel."). Trial Counsel was not under any obligation to file a motion to reconsider Applicant's sentence and had no basis to do so. Therefore, Trial Counsel was not ineffective for failing to file a motion to reconsider Applicant's sentence.

Furthermore, Applicant fails to establish he was prejudiced by Trial Counsel's alleged failure to file a motion to reconsider Applicant's sentence. To establish prejudice under Strickland, Applicant must show a reasonable probability that, but for counsel's deficient performance, the results of the proceeding would have been different. 466 U.S. at 694. In the context of a motion

to reconsider sentence, Applicant must establish a reasonable probability his sentence would have been reduced if the motion had been filed. Applicant provided no testimony or evidence suggesting his sentence would have been reduced by way of a motion to reconsider. Trial Counsel testified that there was no way Trial Judge was going to reconsider and further that if there was a way to give Applicant more time he probably would have.

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

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.

3.

AND IT IS SO ORDERED this 18th **day of** March **, 2025.**

Jocelyn Newman

THE HONORABLE JOCELYN NEWMAN
Presiding Judge
Eleventh Judicial Circuit

Columbia, South Carolina