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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Deadra L. Jefferson, Circuit Court Judge

LESLIE DAVIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000587

APPENDIX

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ATTORNEYS FOR RESPONDENT

VOLUME II OF II

PAGES 501-541

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competency evaluation, did you?
A: I did not.
Q: Okay. And you felt -- you said, I think there was no need to evaluate. When did -- in retrospect, wouldn't it -- that been better to go ahead and have a competency evaluation so that it would be official either way? Either he did have some mental issues that he couldn't help you or he did not?
A: I mean, hindsight can be, I mean, more often than not 2020. I don't know that at the time that I felt that he wasn't able to assist me. And the function of DMH in a criminal case is, you know, when we get these evaluations done, is to determine if the client is able to assist counsel in their defense.

He was actually trying to guide the defense in a lot of ways. Some helpful, some not, but that's true of every client. There was nothing about my interaction with him that said that he could not understand what was happening, which would mean that the evaluation would've been unnecessary and a waste of time, and frivolous.
Q: Let me just wind up here. I want to touch on some topics that are -- that he brought up his direct examination, asked and was mentioned. As to the character witnesses, could that have helped in some way in terms of rehabbing his image or helping him as -- appear perhaps better than it was?
A: I doubt that it would've been helpful. Again, and I'm

going to restate what I said on direct. And well -- and before I even do that, let's be clear, and I am stating this unequivocally, he never gave any me any names of anyone he wanted call to trial. And the multiple times -- the many times that we discussed this case going to trial, his options, what the collateral consequences were and the penalties.

None of the -- at no point in time did he say, I want to bring my mom in to testify. None of that ever happened. But again, I don't think -- I don't know how it might've played out differently if it could have helped. I doubt it because again, the expression on the juror's faces, which was a moment I was dreading, but the expression on their faces when they heard the conviction, the prior conviction, and it came into the record. I mean, it's -- it's a moment I'm never going to forget.

Q: Why is that?

A: Because you could see the look of kind of like, you know, okay. Yeah. Now it's almost as if -- it's almost as if the other shoe has already dropped and you are just, you know, you're still at the outset of the case and your case is over. And that's what it felt like. Now I was still fighting the case and trying to win the case, but it was definitely an uphill battle if I was even moving at all.

Q: You were in the courtroom when the applicant testified about the Miranda warning, the Miranda rights reading; is that

correct?
A: I would --
Q: He said --
A: I heard what he said, yes.
Q: Okay. Did he bring that to your attention?
A: I don't remember specifically that. I can -- let me glance back through the notes and see if he brought it up beforehand. You mean prior to trial?
Q: Yeah, just prior to trial. Because I think he indicated here that he -- he felt certain that he was not properly given his Miranda rights.
A: All right. I don't see anything in the notes that say that we had a conversation or that he brought up something about not being Mirandized. But again, let me just take another second.
Q: Sure.
A: I don't see anything in my notes that suggested he asked or we had a conversation. Well, actually, let me go back one more second. All right.
Q: Go ahead. I'm sorry.
A: I don't see anything in my notes that says he mentioned it or brought it up beforehand. I -- other than the letter to ODC, that's the only place that I saw the allegation that he was concerned about his Miranda and I responded to it there.
Q: Do you unilaterally try to attack the Miranda warnings or

the Miranda readings if you don't have -- if the client doesn't tell you, is that kind of a standard thing that you say, were you Mirandized correctly? Or did you bring it up to him?

A: I don't think so. Specifically, I -- if there seems to be an issue about it, then yeah, of course I'm looking for any and everything sometimes to just see where I can make some, you know, kind of get some room or kind of get a foothold in the case. In this particular instance though, as I noted to ODC, and I'm basing my response to you off of it because that's what's in print and I don't remember anything else specifically.

It says that there is a report that discusses him being Mirandized and then there is a -- a signed Miranda form indicating that he was given those rights. He acknowledged that he was given them, and that's why his signature was on the form. And he didn't tell me specifically otherwise that he didn't until I got the ODC letter.

Q: Just a couple of final questions. He read into the record and it's on his application that counsel, and this is going back to the bifurcation, just to summarize that, finalize it. Counsel was ineffective by not -- by not mentioning to the Court about the bifurcation. And counsel was ineffective by stipulating prior convictions instead of the -- in trying to bifurcate the -- the charges. But you're

saying you did a motion to try to amend that; is that your --
A: It is in the record.
Q: Okay.
Q: I don't know what he means about stipulating. I didn't agree stipulate to anything. They brought someone from the county where the conviction was out of to testify and that person took the stand before the actual charge, the prior conviction was introduced, but I did not stipulate to anything. So I don't know what that part is where that's coming from.

MR. FOWLER: Just one moment, Your Honor, please.

THE COURT: Uh-huh. (Affirmative response)

BY MR. FOWLER:

Q: Did he ever, at any point in the trial or beforehand, indicate to you that he did not understand the law sufficiently to go to trial with this?
A: No. And I will tell you that my notes are replete with our conversation about what the statute is, how much time the sentence -- the sentence could carry, the mandatory minimum, and the collateral consequences. And then he had the opportunity to consider plea offers. So there is no question that prior to the trial, we had an additional conversation outside of just my informing my client about what the law says about his case. For him to understand what the law was.

He rejected a 15-year plea offer before this trial

because he was insistent as he had been from the outset on having the trial. I went over it again with him, and I asked the solicitor and she did, Leigh Andrew, brought him here in person.

So we didn't just have a conversation by phone. I wanted him sitting down in here again, face to face so that we could go over what the statute said, what he was looking at, his chances at trial, and the new -- well, I say new, but the plea offer that the State had extended. 15 years was on the table.

MR. FOWLER: Your Honor. Let me consult with my client briefly.

BY MR. FOWLER:

Q: And you said that the offer was 15 years; is that correct?

A: Yes.

Q: Was is it something else?

A: Let me double check. Yes. So he had a CSC third offer, 15 years with sex offender registry. He counter offered with a time served of almost three years on the A and B first. The solicitor rejected that request and again offered him a CSC third with 15 years with sex offender registry. Defendant again rejected the plea offer. Then he was told again that he was facing 25 to life. And that is in my notes from -- that was back in September of 2018. That's even before he came back to court for the final offer of the plea.

Q: So he was facing 25, but the offer presented officially was 15?
A: Yes.
MR. FOWLER: Just one -- one moment, Your Honor. Your Honor, after consultation with the applicant, no further questions.
THE COURT: Any redirect of the witness?
MS. FLORES: Just briefly, Your Honor.
THE COURT: You may proceed.

REDIRECT EXAMINATION OF KIA WILSON BY MS. FLORES:

Q: Ms. Wilson, I apologize, as I believe you have answered this question, but just for clarity now, you stated that there was a signed notice of the Mirandazation.
A: Yes.
Q: Did you have any questions about the authenticity of applicant's signature on that form?
A: No, I had no reason to question it.
Q: If you had had a reason to question it, what would you have done?
A: I probably would've gotten the officer on the stand and tried to ream him about it. I -- I did just -- there wasn't anything that suggested it wasn't really his signature.
MS. FLORES: No further questions, Your Honor. Thank you.
THE COURT: Any objection to the witness being excused,

from the State?

MS. FLORES: No objection, Your Honor.

THE COURT: From the applicant?

MR. FOWLER: No objection, Your Honor.

THE COURT: You're excused, Ms. Wilson.

THE WITNESS: Thank, Your Honor.

THE COURT: You're welcome. Any further witnesses from the State?

MS. FLORES: No one further, Your Honor.

THE COURT: Okay. I'll be glad to hear any closing statements. Oh, I assume there's no rebuttal testimony?

MR. FOWLER: No, Your Honor. There's no rebuttal testimony.

THE COURT: Okay. I'll be glad to hear closing argument.

MR. FOWLER: Your Honor, Mr. Davis has been professional to me, and we discussed these matters, and you've heard his testimony on the stand, Your Honor. And he has articulated his reasons for the ineffective assistance of counsel. He's indicated what the bifurcation was and that we've gone over that with the State's witness. And we just ask that the Court take all this into account and review this and to provide a decision in our favor, Your Honor.

THE COURT: Would the State like to have a closing argument?

MS. FLORES: Yes, Your Honor. Thank you.

THE COURT: You may proceed. You're welcome.

MS. FLORES: As Ms. Wilson stated on the stand, the issue of bifurcation comes before this Court under the argument that State v Cross indicating that bifurcation should have been --

THE COURT: Actually, Cross doesn't say that. It says one of many options and I went back and read it because I wanted to make sure my memory was accurate. Bifurcation is not mandatory. There lots of way to -- lots of ways to handle the introduction of previous offenses when they're the element of a statute. And -- and I'm thinking specifically of the Court's instructions when it deals with how the Supreme Court has advised the Circuit Court to handle previous offenses, for example, burglaries.

But the -- the language that actually, that the Cross court employs and that is reinforced in Mr. Davis's opinion is that while Cross does not hold that bifurcation is the only remedy, trial courts can employ to diminish the risk of unfair prejudice from the admission of a prior sex crime.

And then it really deals with about the State having to stipulate to prior offenses to avoid those offenses, actually the substance of those offenses actually being placed in the record.

So -- and I'll go back and -- and -- and read the Cross opinion again, but I think it says it's one of many options in the way of handling when the legislature has mandated that

prior offenses are an element statutorily of an offense.

And bear with me one second. Okay.

Yeah, it's kind of weird because in the Cross case, it says that in that case, the limiting instruction did not cure the overwhelming danger of unfair prejudice by introducing his 1992 convictions.

But then it says in Mr. Davis's case, it is not the only remedy. So I -- and then in the whole line of burglary cases, there is no case law that I'm aware of that says you're supposed to bifurcate, and they still hold that a curative instruction is appropriate. I don't know, who knows? Is this case -- is the Cross -- well, no, it was 2019? I don't know. We'll figure it out. I guess they'll give us some clarity.

MS. FLORES: Absolutely, Your Honor and the State occurs with your understanding of State v. Cross. And even further, State v. Cross, the opinion was filed on July 24th, 2019. Applicant's case was -- his trial took place between January 7th and January 10th, 2019. And as this Court is aware pursuant to Pantobich, P-A-N-T-O-B-I-C-H, v. State, in deciding PCR claims, the Court must determine whether counsel was ineffective at the time of the alleged error.

So even in understanding State v. Cross in a way that this Court has decidedly stated it does not, we could not hold Ms. Wilson ineffective for failing to be clairvoyant.

Again, a trial counsel therefore cannot be found to be

deficient for failing to be claimed clairvoyant or anticipate changes of law pursuant to Gilmore v. State, G-I-L-M-O-R-E.

Further, pertaining to the additional allegations that were raised today before the Court of ineffective assistance of counsel, applicant has failed to present any of the witnesses that he stated on the stand that would have testified to his character during his trial.

Mere speculation of what a witness's testimony may be is insufficient to satisfy the burden of showing prejudice for a petition for PCR. Pursuant to Dalton v. State, D-A-L-T-O-N, a PCR, applicant cannot show prejudice from counsel's failure to call a favorable witness to testify at trial if the witness does not testify at the PCR hearing or otherwise offer testimony within the rules of evidence, Dempsey v. State, D-E-M-P-S-E-Y.

Further, as Ms. Wilson testified to on the stand, she had no questions of applicant's ability to be competent or to understand their conversations leading up to trial, nor did she have any questions regarding the validity and authentication of the signature showing that applicant had been Mirandized prior to his discussions with police officers. For those reasons, the State would ask that this application for PCR be denied.

Thank you.

THE COURT: Anything -- you're welcome. Anything

further, Mr. Fowler?

MR. FOWLER: Nothing else, Your Honor.

THE COURT: And just for the record, though, your client has indicated that Ms. Wilson failed to call witnesses that he felt would be beneficial to him. The State is correct that this Court is not equipped to make a decision about that because you all did not call any of those witnesses. And for your protection and preservation of the record, did you make any attempt to contact any of these individuals and procure their appearance for today?

MR. FOWLER: I spoke with my client about this, Your Honor, and he indicated that they would not be available.

THE COURT: And -- and again, this is for your protection because I don't want him coming back later and saying that, you know, because it is required that you present those witnesses and that we hear their testimony. A simple assertion that they weren't called is not enough. So I wanted to make sure for your protection he didn't come back later and say you -- he told you about these witnesses and you made no attempt to contact them. So that's the only reason I've -- I've made that inquiry. And you've indicated that he told you they weren't available today.

MR. FOWLER: That's --

THE COURT: So I don't know that you're required to do anything more than -- than that.

MR. FOWLER: Thank you, Your Honor.

THE COURT: You're welcome. Okay. Bear with me just one moment.

(Off the record discussion)

THE COURT: Just in the interest of time, I think we all know what the case law is, so I'm not going to belabor that point.

Mr. Davis has raised several issues in his post-conviction relief action, and -- and I'm going in the opposite order. I can find no merit to the argument that Ms. Wilson failed to call witnesses. Even today in preparation of this hearing, he did not equip Mr. Fowler with the ability to have called those witnesses so we could know exactly what they would've -- would've said or even if they would've appeared.

So any allegations regarding that really are speculative at best and did not fall below her standard in terms of his representation.

The Court finds Ms. Wilson credible that she met with the defendant on multiple occasions as documented in her records, that she was a zealous advocate on his behalf. And there's absolutely no merit to his argument that she failed to bifurcate these proceedings.

The record is very clear that she made the argument. She of course cannot make the Court's decision for it. She preserved it. And I think that it is certainly from a

strategic standpoint, and you all have heard me make reference to this earlier today, which is, well, during this hearing, you know, civil court, you disclose everything. Criminal court is trial by ambush, except the rules. I mean, for whatever reason, attorneys make choices about strategy and what they're going to disclose, and appropriately so.

I mean, they're -- the rules provide for it, and they shouldn't be criticized for it. And she clearly articulated that she had a strategic reason for not reducing the motion to writing, but that she deliberately preserved it for the record for appellate review. She knew the Judge did not have the authority to make the decision that she was asking, but that some new law would come out of it. And that often happens. I mean, sometimes I make decisions where I know there's no clear-cut authority. I make a decision, and I often tell my secretary and my law clerk, it's a 50-50 chance. I don't know how this is going to turn out, but at least we'll have clarity on the issue. If I have to be the one to take the hit, so be it, at least we'll know how to handle it in the future.

So contrary to what people probably believe, Judges really don't take appeals personally. We recognize that we're at the front line and they’re often matters of first impression that just have never been dealt with.

And so I think that Ms. Wilson's testimony falls under that same umbrella, which is, you know, I really didn't know

what the Court was going to do. I had a cringe moment anticipating what I thought was going to happen, preparing myself for the brunt of this testimony coming in. But I preserved the record.

And I don't think she can be criticized for that. She made a complete record on the issue such that it was preserved for appeal, and the Court of Appeals did rule on that issue. So I don't think there can be a legitimate argument that she fell below the standard by preserving that issue.

He also made some other generalized thing -- claims regarding Miranda. Where there is a signed Miranda acknowledgement in a file that is referenced in a police report, there really is no good faith basis to challenge that advisement unless your client tells you, I was forced, I was denied certain things. I was with them for 14 hours, and they didn't let me go to the bathroom. I mean, you know, those are the myriad of -- of things that, you know, I was -- I was -- I had a mental break. I didn't know where I was. I was, you know, under the influence of drugs or alcohol. You know, I was not cognizant of where I was. I had no clue what I was signing.

You know, absent that being brought to their attention, I don't -- I don't know that there really could -- could be some reason to go behind what appears on its face to be a valid Miranda warning.

And I find her testimony credible that she had no notice of his claims regarding that until she received the complaint from ODC. And that was her first, you know, notice that he had some issue with that.

Again, she made the oral motion to bifurcate. It was strategic. The Court finds that was a valid strategic decision. I also find credible, her testimony that she had no reason to question her client's competency.

Although, it has become a knee-jerk reaction to have people evaluated. It is an incredible waste of the State's resources and time to have people evaluated who really don't need to be evaluated. It clogs the system for those folk who really need to be evaluated and restored.

We just had a seminar recently, and we have a judge who is in charge of basically keeping tabs on who has not been evaluated, how long it's taking. And he brought that to our attention.

He said, I really hope, and I'm -- and he said, I've presented to the public defenders and the solicitors that we really only evaluate people who legitimately need to be evaluated and who need to be restored. It should not be a knee-jerk reaction in anticipation of a collateral attack on a PCR. To have somebody evaluated who is cognizant, who is -- who has participated fully in their representation just to have an evaluation.

And I find her credible on -- and I've listened to him testify. And I don't believe for a moment that he is incompetent. He has a clear understanding of these proceedings. He has a clear understanding of how he has navigated a collateral attack via PCR. He has a clear understanding regarding bifurcating and the issue of bifurcation.

So I don't believe for a moment that she had any concerns about his ability to understand her, to understand his rights, the discovery, and to ably assist her in his defense. So I -- I don't find any merit that you know, that he should have been evaluated or at least in that assertion.

And I find her credible that in light of her testimony that she looks for things, whether her client's raised them or not, she looks for anything and everything. And I find her credible in her testimony that he never provided her with any names regarding witnesses.

So again, in the interest of time and brevity, I find that the applicant has failed to meet his burden of proof. The application is denied. I'm asking the Attorney General's Office to provide the Court with a written order making findings of fact and conclusions of law, including any references to page and line transcripts.

Again, I have not gone through that just in the interest of time because we've gone well beyond lunch and I need to

give my staff an appropriate break so that they can refresh themselves.

Make any other findings of fact and conclusions of law consistent with the record and send that to the Court in word format, after which -- and also copy opposing counsel on it at the same time that it is transmitted to the Court.

Thank you all for your patience and have a good day.

MR. FOWLER: Thank you, Your Honor.

THE COURT: You're welcome.

(COURT IS IN RECESS.)

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS 519
COUNTY OF HORRY)
) Case # 2022-CP-26-06094
Leslie Davis. SCDC#378750)
)
Applicant / Petitioner)
vs.) **ORDER**
)
State of South Carolina,)
)
Respondent.)

FILED
Horry County
2024 JUL 31 P 3:19
RELEASED FROM CIVIL
CLERK OF COURT
HORRY COUNTY, S.C.

This post-conviction relief case came before the court for a hearing. Having now heard this matter, the court orders as indicated herein.

✓ 1. The application for post-conviction relief is hereby: ✓ denied _____ granted _____ under advisement; a formal order will be filed (see below - No.6)

✓ 2. Motion(s) was/were heard in this case and the court orders:

_____ The motion to dismiss and/or for summary judgment is hereby _____ granted _____ denied _____ under advisement based upon the _____ statute of limitations and/or _____ the successive nature of the application or _____ other reason as follows:

_____

___ 3. A conditional order of dismissal was previously filed in this case. Upon review of the matter, the court finds:

_____ Good cause as to why the case should not be dismissed has been shown in response to the order of dismissal; therefore, a hearing on the merits of the application shall be scheduled.

_____ The court has considered the response to the conditional order of dismissal and finds that good cause has not been shown or _____ no response has been filed to the conditional order of dismissal; therefore, the application is hereby dismissed.

___ 4. The application was freely, voluntarily, and intelligently withdrawn as indicated on the record; therefore, this case is dismissed _____ with prejudice _____ without prejudice.

5. Other: _____

_____

✓ 6. The court further orders:

✓ The ✓ Attorney General _____ Applicant's counsel is directed to submit to the court a proposed order and to serve the order on opposing counsel within 5 days.

_____ Both sides are directed to submit proposed orders to the court and to serve the orders on each other within _____ days.

_____ The court does not request proposed orders.

IT IS SO ORDERED.

DR Todd 2128

Date: July ___, 2024 Presiding Judge

AA Conway
~~Horry~~, S.C.

Court Reporter: Sallie Beth Todd Rev 08/08/01

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

FILED
HORRY COUNTY
2025 MAR 17 P 3:52
RENEE H. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

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

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

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

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

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

PROCEDURAL HISTORY

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

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

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

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

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

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

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

FACTS GIVING RISE TO THE CONVICTION

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

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

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

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

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

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

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

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

CURRENT ACTION BEFORE THIS COURT

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

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

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

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

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

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

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[4] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

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

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

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

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome

the presumption of adequate representation).

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

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S.at 112.

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Finally, the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his

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

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

INITIAL FINDINGS

As a matter of general impression, this Court finds Trial Counsel's testimony at the evidentiary hearing **credible** and **persuasive,** where she presented well-recollected testimony of relevant background, facts, and discussions leading up to and during the trial. This Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant she rendered adequate assistance and exercised reasonable professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689, 104 S.Ct. 2052; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS ON THE MERITS

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

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

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

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

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

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

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

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

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

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

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

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

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

12.4.20

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

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

The Court strongly presumes Trial Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment to adequately prepare and present witnesses on Applicant's behalf. Applicant's mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at

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

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

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

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id.,

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

377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

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

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

The Court strongly presumes Trial Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment to adequately prepare and investigate potential relevant issues on Applicant's behalf. Applicant's mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995). The record reflects Trial Counsel had no good faith argument for which to challenge the constitutionality of Applicant's properly issued Mirandization, contrary to Applicant's

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

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

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

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

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

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

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

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

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

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INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ALLEGATIONS ON THE MERITS

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

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

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

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

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

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

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE.**

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

IT IS THEREFORE ORDERED:

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

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

AND IT IS SO ORDERED this 7th **day of** March **, 2024.**

D L Jefferson 2128

HON. DEADRA L. JEFFERSON
Presiding Judge
Fifteenth Judicial Circuit

Charleston, South Carolina
At Chambers

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WITNESSES

Frederick Rash Horry County Police Department

Hemingway

ARREST WARRANT NUMBER

2016A2610700336
CDR: 0385 16-03-0655(A)(1)
DOA: 3/16/2016

CERTIFIED COPY
RENEE N. ELVIS
CLERK OF COURT
HORRY CNTY. S.C.

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: JUL 21 2016

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2016-GS-26- 03323

The State of South Carolina

County of Horry

Martin D. Spratlin 16H01485

COURT OF GENERAL SESSIONS

JULY, 2016 TERM

THE STATE

VS.

Leslie Davis
W/M
[redacted]
SSN:

ATTORNEY: Kia T. Wilson

Indictment for

CRIMINAL SEXUAL CONDUCT WITH A MINOR, FIRST DEGREE

Jimmy A. Richardson, II, Solicitor

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on July 21, 2016, the Grand Jurors of Horry County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR
FIRST DEGREE

CDR: 0385 16-03-0655(A)(1)

That Leslie Davis did in Horry County, State of South Carolina, on or about March 11, 2016, willfully and unlawfully commit the crime of Criminal Sexual Conduct with a Minor in the First Degree by engaging in sexual battery with a minor who is less than sixteen years of age, to wit: MINOR whose date of birth is [redacted]/07 and the Defendant has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included on the sex offender registry pursuant to Section 23-3-430(D), all in violation of Section 16-3-655(A)(2), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

CERTIFIED COPY