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

JUDGMENT IN A CIVIL CASE

CASE NO. 2008 CP-37-1471

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JAN 17 AM 11 18

Clarence E. Crittendon, Jr., #266744

PLAINTIFF(S)

COPY

State of South Carolina

DEFENDANT(S)

Submitted by: Kaelon E. May

Attorney for : ☐ Plaintiff ☒ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

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

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

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

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

Circuit Court Judge

A TRUE COPY
JAN 17 2012
CLERK OF COURT - OCONEE COUNTY

2131
Judge Code

1/5/12
Date

For Clerk of Court Office Use Only

This judgment was entered on the 17th day of Jan. 2012 and a copy mailed first class or placed in the appropriate attorney's box on this 17th day of Jan. 2012 to attorneys of record or to parties (when appearing pro se) as follows.

R. Mills Ariail, Jr., Esquire

ATTORNEY(S) FOR THE PLAINTIFF(S)

Kaelon E. May
Attorney General's Office
PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. Whitfield
CLERK OF COURT

Court Reporter:

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JAN 17 AM 11 19

STATE OF SOUTH CAROLINA COUNTY OF OCONEE	)	IN THE COURT OF COMMON PLEAS Case No.: 2008-CP-37-1471
Clarence E. Crittendon, Jr., #266744, Applicant, v. State of South Carolina. Respondent.	)	**ORDER OF DISMISSAL**

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed December 17, 2008. Respondent made its Return on March 31, 2009. An evidentiary hearing into the matter was convened on October 3, 2011, at the Oconee County Courthouse. The Applicant was present at the hearing and was represented by R. Mills Ariail, Jr., Esquire. The Respondent was represented by Kaelon E. May of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf and offered the testimony of Tim Crittendon. The State offered the testimony of Bruce Byrholdt, Esquire (Mr. Byrholdt) Applicant's trial counsel. This Court also had before it the records of the Oconee County Clerk of Court, the transcript of the proceedings against the Applicant, records of Applicant's prior appeal proceedings, and the Applicant's records from the South Carolina Department of Corrections.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. Applicant was indicted at the March 2004 term of the Oconee County Grand Jury for lewd act upon a child under sixteen (2004-GS-37-0509) and criminal sexual conduct with minor-first degree (2006-GS-37-0927). Bruce Byrholdt,

Esquire, represented him. On December 12, 2006, Applicant underwent trial, pursuant to which he was found guilty as indicted. The Honorable Alexander S. Macaulay concurrently sentenced him to confinement for thirty (30) years for lewd act upon a child and fifteen (15) years for criminal sexual conduct with minor-first degree.

A timely Notice of Appeal was filed on Applicant's behalf. On October 6, 2008, the Court of Appeals issued an Order of Dismissal and Remittitur dismissing the appeal because Appellant withdrew the appeal.

In his current application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. Counsel failed to investigate applicant's claim the there was a violation of the Speedy Trial Act.
   b. Counsel failed to investigate whether or not he was set up.
   c. Counsel failed to object to re-indictment prior to trial.
   d. Counsel failed to call a medical expert.
   e. Counsel failed to object to prosecutor's improper comments made during closing arguments alluding to Applicant's right not to testify.
   f. Counsel failed to request a jury charge of the lesser-included offense of assault and battery of a high and aggravated nature.
2. Prosecutorial misconduct.
3. Lack of subject matter jurisdiction.

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

Applicant's Testimony

At the PCR hearing Applicant testified that he was initially appointed Gruber Sires, Esquire as his attorney, that Mr. Sires represented Applicant from June 2004 to June 2006, and that Mr. Byrholdt was appointed to represent Applicant in July 2006. Applicant testified that he was out on

bond from February 2004 to June 2006, that in June 2006 Applicant was stopped by a police officer because a bench warrant for Applicant's arrest had been issued. Applicant testified that he appeared before a judge for a bond revocation hearing, that Applicant's attorney dropped the ball, and that Applicant believed the case against him no longer existed. Applicant testified that in October 2004 he was stopped by a police officer and informed that a bench warrant for Applicant had been issued, but that this was a mistake. Applicant testified that the judge reinstated Applicant's bond, that the judge asked the state when the case would be ready for trial, and that the October 29, 2004 transcript reflects the discussion between the parties and the judge regarding trying to have Applicant's case heard in December of 2004. Applicant testified that he spoke with his trial counsel (Mr. Byrholdt) about a speedy trial motion, that Applicant's counsel informed Applicant the judge does not have the power to set a date for trial, and that there was a speedy trial issue but that Applicant was not aware of what the speedy trial act was.

Applicant testified that he requested Mr. Sires be relieved as his counsel, that during the two-year time period one of Applicant's witnesses (Applicant's step-mother) passed away and was not available to testify at trial. Applicant testified that he had been fighting with his step-daughter and the mother of the victim prior to the allegations, that it was alleged Applicant was cheating on his wife, and that Applicant's wife's daughter threatened Applicant. Applicant testified that he was given an ultimatum by his wife's children to leave his wife within thirty (30) days or else action would be taken against Applicant. Applicant testified that he discussed the prior dispute between him and his step-children with his attorney and that Applicant discussed three (3) witnesses testifying on his behalf with his attorney.

Applicant testified that his attorney wrote the names of the three witnesses down but that Applicant's counsel never followed up with the witnesses or Applicant. Applicant testified that he

did not testify at trial, that there was no defense presented at trial, and that Applicant and trial counsel discussed Applicant not testifying due to Applicant's prior record. Applicant testified that he recalled the judge informing him of his right to testify and not testify and that Applicant decided not to testify. Applicant testified that he informed his attorney that he wished to call the following three people to testify at trial in Applicant's defense: Tim Crittendon, Sarah C., and Tiffany Burch. Applicant testified that he did not discuss his wife's (Sarah C.) potential testimony with his counsel but that Applicant did informed his counsel what Mr. Crittendon and Ms. Burch's testimony would be. Applicant testified that he did not discuss using a medical expert with his attorney, that there was no physical evidence, and that the medical report reflected no evidence of abuse. Applicant testified that the victim's testimony changed two times prior to trial.

Applicant testified that subsequent to his trial he discovered that regarding his indictment issue that this must be addressed prior to the jury being sworn and that the indictment issue should have been looked into by his attorney. Applicant testified that regarding the speedy trial issue, this must be brought up before the jury is sworn in and that March of 2006 was the last appearance Applicant made until the day of his trial. Applicant testified that he was prejudiced by the length of delay in bringing his case to trial, that Applicant wrote the solicitor's office asking for the reason for the delay but received no answer, and that Applicant lost a key witness during this delay.

Tim Crittendon's Tesitmony

At the PCR hearing Tim Crittendon testified that he is the Applicant's brother, that he recalled the incident from 2003 regarding the threats made against Applicant. Tim Crittendon testified that Applicant's step-daughters kept telling Applicant to leave their mother alone, that the police were called, and that the mother of the victim was the person making the threats against Applicant.

Mr. Byrholdt's Testimony

At the PCR hearing counsel testified that he has been practicing law for thirty-one (31) years, that he took over Applicant's case in July of 2006, and that Applicant was charged with criminal sexual conduct 1st degree and lewd act upon a minor. Counsel testified that he was appointed to represent Applicant, that he met with the Applicant numerous times, and that he and Applicant discussed all aspects of the case together. Counsel testified that Tiffany Burch would not cooperate, that Applicant gave counsel his brother's name (Tim Crittendon) but that at the time of trial Tim Crittendon was incarcerated. Counsel testified that he tried to contact Tiffany Burch but that she refused to get involved. Counsel testified that he discussed Applicant's prior record with Applicant and that Applicant believed the victim would not testify at trial, however the victim did testify at trial. Counsel testified that Applicant's case went to trial four (4) months after counsel took over Applicant's case. Counsel testified that Applicant was re-indicted prior to trial and that counsel did not find any problems or issues regarding the indictments. Counsel testified that he filed a discovery motion, received the discovery materials from the state, and reviewed the discovery materials with the Applicant. Counsel testified that the investigating officers testified at trial, that the medical report reflected there was no physical evidence, and that counsel did not need to employ a medical expert for Applicant's case.

Counsel testified that Applicant gave a statement about his 'dream' to the police and through counsel's investigation he tried to interview Tiffany Burch but was unable to do so. Counsel testified that he did not have any grounds on which to base an objection on during the state's closing arguments. Counsel testified that he engaged in plea negotiations on the Applicant's behalf, that the Applicant was already on the sex offender registry, and that the state offered Applicant a seven (7) year plea deal. Counsel testified that he discussed all plea negotiations with the Applicant. Counsel

testified that he discussed the state's evidence with the Applicant, that the victim was a good witness, and that the victim had given a handwritten statement. Counsel testified that there were not any grounds to request a lesser-included offense charge. Counsel testified that there was a slight chance of a not-guilty verdict based on reasonable doubt and that counsel discussed this with Applicant. Counsel testified that there was no speedy trial issue, that Applicant's right to a speedy trial was never invoked, and that as a matter of trial strategy neither counsel nor Applicant wanted a speedy trial. Counsel testified that that he has only seen one (1) speedy trial motion in his thirty-one (31) year experience as an attorney and that the motion was denied. Counsel testified that at trial he brought out of the fact that Sarah C. was in bed during one of the alleged incidents claimed by the victim.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective

assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the exhibits introduced into evidence at the hearing, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

1. Ineffective Assistance of Counsel

a. Counsel failed to investigate Applicant's claim that there was a violation of the Speedy Trial Act

This Court finds that Applicant's allegation that trial counsel was ineffective for failing to investigate Applicant's claim that there was a violation of the Speedy Trial Act is without merit. Counsel testified and the record reflects that counsel was appointed to represent Applicant in July 2006 and that Applicant's case went to trial in December 2006. Counsel testified that he did not find a speedy trial issue in his review of the Applicant's case and that Applicant's right to a speedy trial

was never invoked. The Applicant asserts that on October 29, 2004, his right to a speedy trial was invoked. Specifically, Applicant points to the following statement made by the judge, "When do you think you all will be able to dispose of the case?" The state replied that they would attempt to have the case heard during the December 2004 term of court. (Tr. p.6-7). This Court finds that there was no violation of the speedy trial act. Applicant's trial took place four (4) months after counsel was appointed.

To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). The "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). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronic, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). Here, the Applicant could not point to any specific matters regarding the speedy trial act that counsel failed to discover which would have resulted in a different outcome for Applicant. This Court finds that Applicant offered no evidence at the PCR hearing that counsel could have found that would have been likely to have any outcome more favorable to the Applicant. The Applicant did not produce any witnesses or offer any other evidence from which this Court could conclude that the outcome of the case would likely have been different, had that evidence been developed.

Furthermore, a reviewing court should consider four factors when determining whether a defendant has been deprived of his or her right to a speedy trial: 1) length of the delay; 2) reason for the delay; 3) defendant's assertion of the right; and 4) prejudice to the defendant. *Barker v. Wingo,*

407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); see also *State v. Brazell*, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997). These four factors are related and must be considered together with any other relevant circumstances. *Barker*, 407 U.S. at 533, 92 S.Ct. 2182. "Accordingly, the determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." *Pittman*, 373 S.C. at 549, 647 S.E.2d at 155. Therefore, this Court finds that there has been no neglectful delay prejudicial to Applicant to any great degree other than the fact in and of itself there had been a delay. This allegation is denied and dismissed.

b. Counsel failed to investigate whether or not Applicant was set-up

This Court finds that Applicant's allegation that counsel was ineffective for failing to investigate whether Applicant was set-up is without merit. Applicant alleges that counsel failed to interview Sarah C., Tim Crittendon, and Tiffany Burch. Applicant also alleges that counsel failed to present the testimony of these three witnesses at trial. Applicant presented the testimony of Tim Crittendon at the PCR hearing and Mr. Crittendon's testimony concerned an incident that took place prior to the incident(s) for which Applicant was found guilty of at trial. Counsel testified that Tim Crittendon's testimony would not have been helpful at Applicant's trial. To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). The "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). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time

to prepare. United States v. Cronic, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). This Court finds the Applicant offered no evidence at the PCR hearing that counsel could have found that would have been likely to have any outcome more favorable to the Applicant. The Applicant did not produce any witnesses or offer any other evidence from which this Court could conclude that the outcome of the case would likely have been different, had that evidence been developed. Tim Crittendon's testimony does not provide any support to Applicant's assertion that he was set-up.

Furthermore, prejudice from counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief hearing. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). The Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witnesses' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Counsel testified that he tried to contact Tiffany Burch, but that she did not want to cooperate or get involved. Sarah C., Applicant's wife at the time of the incident, passed away prior to Applicant's trial, however counsel testified that he was able to bring out the issue that Applicant wanted Sarah C. to testify to at trial. While, Applicant presented Tim Crittendon's testimony at the PCR hearing, this Court finds that the testimony would have provided nothing more for the defense. Tiffany Burch was not presented for testimony at the PCR hearing by Applicant. This Court finds that Applicant has failed to show counsel's performance was deficient, and that the Applicant was prejudiced by counsel's alleged

deficiency. Therefore, this Court finds that these allegations are denied and dismissed.

c. Counsel failed to object to re-indictment prior to trial

This Court finds that Applicant's claim that counsel was ineffective for failing to object to the re-indictment prior to trial is without merit. Counsel testified that Applicant was re-indicted prior to trial and that based on counsel's review of the indictments he did not find any problems or issues with the indictments or the fact that Applicant was re-indicted. This Court finds that Applicant has failed to provide any basis on which counsel failed to object to the re-indictment. This Court has reviewed the indictments and finds no errors exist. Counsel testified that he reviewed the indictments and the elements of the charges with Applicant. This Court finds that Applicant has failed to show that counsel's performance was deficient and any resulting prejudice. Therefore, this Court finds that this allegation is denied and dismissed.

d. Counsel failed to call a medical expert

This Court finds that Applicant has failed to meet his burden of proof in showing that counsel was ineffective for failing to call a medical expert at Applicant's trial. Counsel testified that he filed a discovery motion, received the discovery materials, and reviewed the discovery materials with Applicant. Counsel testified that the investigating officers testified at trial and that the medical report reflected there was no physical evidence. Counsel testified that based on his experience with criminal sexual conduct cases, his review of the discovery, and his discussion with Applicant that counsel decided there was no need to employ a medical expert for Applicant's case. Prejudice from counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief hearing. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere

speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). The Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witnesses' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court finds that Applicant did not present any testimony from a medical expert at the PCR hearing. The Applicant has failed to show counsel's performance was deficient and that Applicant was prejudiced by counsel's alleged deficiency. Therefore, this Court finds that this allegation is denied and dismissed.

e. Counsel failed to object to prosecutor's improper comments made during closing arguments alluding to Applicant's right not to testify

The Applicant alleges that counsel was ineffective for failing to object to the prosecutor's improper comments made during closing arguments alluding to Applicant's right to testify. Specifically, Applicant directs this Court's attention to the following statement made by the solicitor in closing argument, "[t]he defense in this case has shown you what I like to call a smoke and mirrors act. There's a lot of smoke and a bunch of mirrors designed to get you away from what's really at issue. They want to get you away from [the victim], away from what really matters here." (Trial tr. p.136, lines 11-15). It is impermissible for the prosecution to comment directly or indirectly upon the defendant's decision not to testify at trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). However, even improper comments on a defendant's decision not to testify do not automatically require reversal if they are not prejudicial to the defendant. Id. The defendant bears the burden of demonstrating that improper comments on his decision not to testify deprived him of a fair

trial. This Court finds that the solicitor's closing arguments must be viewed in the context of the entire record. McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 341 (2003). While the State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence, State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); to be entitled to a new trial for improper closing arguments Applicant must show "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001).

After reviewing the entire record, this Court does not find that any comments by the solicitor so infected the trial that a new trial is warranted. This Court is not convinced that the solicitor's comments even reach the level of being improper, but certainly there is no evidence that Applicant was prejudiced. Additionally, this Court does not find that Mr. Byrholdt was ineffective for failing to object. He provided rational explanation as to why he did not object and this Court accepts Mr. Byrholdt's reasoning as to why he did not object. Therefore, this allegation is denied and dismissed.

f. Counsel failed to request a jury charge of the lesser-included offense of assault and battery of a high and aggravated nature

This Court finds that Applicant's allegation that counsel as ineffective for failing to request a jury charge of the lesser-included offense of assault and battery of a high and aggravated nature is without merit. Counsel testified that there were not any grounds on which to base a request for the lesser-included offense of assault and battery of a high and aggravated nature. For a defendant to be entitled to a jury instruction on a lesser-included offense, there must be some evidence in the record that would tend to show that the defendant is guilty of the lesser rather than the greater offense. State v. Fields, 356 S.C. 317, 589 S.E.2d 792 (Ct. App. 2003); State v. Funchess, 267 S.C. 427, 229

S.E.2d 331 (1976). The possibility that the jury might believe some of the State's case and not the rest is an insufficient argument for a lesser-included offense instruction. Funchess, 267 S.C. at 430, 229 S.E.2d at 332. Furthermore, the Applicant's defense was that he did not participate in the incident at all. In such circumstances, a lesser-included offense instruction would not be warranted. *See* Moultrie v. State, 354 S.C. 546, 583 S.E 2d 436 (2003) (where defendant's defense was that he never assaulted the victim at all, a lesser-included offense charge was not warranted). Applicant has failed to show that counsel's performance was deficient and any resulting prejudice. Therefore, this Court finds that this allegation is denied and dismissed.

2. Prosecutorial Misconduct

The Applicant alleges that the state committed prosecutorial misconduct by not notifying Applicant of intent to dismiss the original indictment with the intent to file a direct re-indictment and/or that the original indictment was never dismissed by the state. Applicant also alleges that comments made by the solicitor is closing argument alluded to Applicant's right not to testify constituted prosecutorial misconduct. This Court has already found that the solicitor's comments made in closing argument did not amount to commenting on Applicant's right not to testify and therefore were not improper, thus Applicant cannot prove prosecutorial misconduct. This Court finds that this allegation is denied and dismissed. As to Applicant's prosecutorial misconduct claim regarding the direct indictment, this Court finds that the Applicant has failed to meet his burden. It is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Applicant asserts the issue of vindictiveness in the form of prosecutorial retaliation through the re-indictment for criminal sexual conduct in the 1st degree. In order for the presumption of prosecutorial retaliation (or the '*Pearce*' presumption) to apply, [Applicant] must show there is a 'reasonable likelihood' that retaliation was motive behind the bringing the additional

charges. Patrick v. State, 349 S.C. 203, 562 S.E.2d 609 (2002). This Court finds that no additional charges were ever brought against Applicant. Applicant was indicted in 2004 for criminal sexual conduct 1st degree, but this charge was later dismissed and Applicant was re-indicted in 2006 for the same charge. This Court finds the Applicant was properly re-indicted and that Applicant cannot prove prosecutorial misconduct, therefore this allegation is denied and dismissed.

3. Lack of Subject Matter Jurisdiction

Applicant asserts that the Oconee County Court of general sessions did not have jurisdiction over the subject matter of direct indictment 2004-GS-37-509 because the indictment was not taken before the clerk of court for Oconee County and clock stamped and dated so as to be put upon the court docket to be disposed of as due process dictates. This Court finds that the indictments against the Applicant were all true-billed by the Oconee County Grand Jury. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363, S.C. 93, 610 S.E.2d 494 (2005). However, an Applicant may challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343. S.C. 342, 540 S.E.2d 846 (2001, *overruled in part by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, *supra*, 610 S.E.2d at 499; *See also* S.C. Const. Art. V, § 7. Thus, the Applicant must present evidence that his case is of some class over which the Circuit Court does not have the authority to preside. The Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the Circuit Court had subject matter jurisdiction. Therefore, this allegation is denied and dismissed.

V. CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post conviction relief. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

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

2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 5th day of January, 2012

J. Cordell Maddox, Jr.
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JAN 17 AM 11 18

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

CLARENCE E. CRITTENDON, #266744 Applicant,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Order of Dismissal has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

R. Mills Ariail, Jr., Esquire
11 North Irvine St., Ste. 11
Greenville, SC 29601

This 23rd Day of January, 2012.

Lena Pelishenko
Lena Pelishenko
Legal Assistant for Respondent

SWORN to before me this 23rd Day of January, 2012.

Lauren Meara
Notary Public for South Carolina.
My Commission Expires: 9/25/19