

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM SPARTANBURG COUNTY

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Court of Common Pleas

S.C. SUPREME COURT

HONORABLE BRIAN M. GIBBONS

2021-CP-42-03954

ANTHONY BRIGGS, SCDC# 342410

APPELLANT,

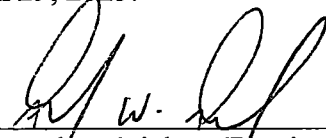
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Anthony Briggs appeals the denial of his Post-Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Brian M. Gibbons, Circuit Judge on October 18, 2022 an Order issued on March 21, 2023 and filed on March 29, 2023. The Appellant received notice of the judgment on March 29, 2023.



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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Anthony Briggs, #342410,)
Applicant,)

Case No.: 2021-CP-42-03954

v.)

ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

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S.C. SUPREME COURT

This matter comes before this Court by way of Applicant's post-conviction relief application filed November 23, 2021. Respondent made its return on February 22, 2022, requesting an evidentiary hearing be convened. An evidentiary hearing was held on October 18, 2022, at the Spartanburg County Courthouse. Rodney Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Jeremy Thompson also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. During its May 2009 term, the Spartanburg County Grand Jury indicted Applicant for first degree criminal sexual conduct with a minor (2009-GS-42-2627). During its August 2010 term, the Spartanburg County Grand Jury indicted Applicant for sex/lewd act committed/attempted upon a child under the age of sixteen (2010-GS-42-4657). The underlying facts include that Applicant was the victim's

mother's boyfriend and, some mornings when the two were alone, Applicant would sexually abuse her by putting his hands and mouth on her genitals. (Tr. 46-47).

Applicant was represented by Max B. Singleton, Esquire. Assistant Solicitors Susan S. Reese and Jennifer A.J. Jordan of the Seventh Circuit Solicitor's Office prosecuted the case. On August 23-26, 2010, Applicant proceeded to trial before the Honorable J. Derham Cole, circuit court judge, and a jury. Judge Cole sentenced Applicant to life imprisonment.

Applicant filed a timely notice of appeal that was perfected on by Elizabeth A. Franklin-Best Esquire, who made a brief on January 11, 2012, raising the following issue:

Did the trial court err when he denied appellant's motion for a directed verdict for criminal sexual conduct with a minor, 1st degree, when the accuser never testified that any penetration occurred?

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Briggs*, 2012-UP-323 (S.C. Ct. App. filed May 30, 2012). The remittitur was issued on June 19, 2012.

First PCR Action: (2012-CP-42-2674)

Applicant subsequently filed his first PCR application on June 26, 2012, alleging:

1. Ineffective assistance of trial counsel.
 - a. Failure to present a defense.
2. Ineffective assistance of appellate counsel.
 - a. Perjured testimony.
3. Prosecutorial misconduct.
 - a. Vindictive prosecution.
4. Lack of subject matter jurisdiction and personal jurisdiction.

Respondent made its return on June 26, 2013. Applicant amended his application, alleging twelve different allegations of ineffective assistance of trial counsel on October 30, 2013. An evidentiary hearing into the matter was convened on November 12, 2013, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by

Jeremy A. Thompson, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On February 1, 2014, the Honorable Robin B. Stilwell, circuit court judge, issued the order of dismissal granting Applicant's PCR application, finding:

1. Defense Counsel was ineffective for failing to object to testimony by the forensic interviewer which vouched for the credibility of the victim.
2. Defense Counsel was ineffective for failing to object to the trial court's failure to charge the jury regarding expert witnesses.

The State made a motion to alter or amend the order granting relief pursuant to Rule 59(e), which was denied by Judge Stilwell on February 28, 2014.

The State filed a notice of appeal on March 31, 2014. On January 29, 2015, Suzanne White, Esquire filed a petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Petitioner-Respondent, alleging:

1. The PCR court erred when it recognized the doctrine of cumulative error in the order granting relief, which the State of South Carolina has not found to be proper in post-conviction relief matters.
2. The PCR court erred when it found Counsel ineffective for failing to object to the qualification of Arroyo-Staggs as an expert witness, when she was qualified in the area of child abuse assessment, failing to object to improper vouching by Arroyo-Staggs, and for eliciting improper vouching testimony, when the finding was based upon improper consideration of the facts and an error of law.
3. The PCR court erred in granting Respondent's application where no evidence of probative value supports the PCR court's finding that Counsel was ineffective for failing to request a jury charge regarding expert testimony.

Respondent-Petitioner made its return to petition for writ of certiorari and its petition for writ of certiorari on June 1, 2015. Petitioner-Respondent filed their return to the petition for writ of certiorari on October 7, 2015. By order filed July 18, 2016, the Supreme Court of South Carolina granted State's petition for writ of certiorari concerning counts two and three and

denied concerning count one. Respondent-Petitioner's petition was denied. Briefing concluded March 20, 2017. On October 25, 2017, by written order the Supreme Court of South Carolina affirmed the circuit court's granting of relief. *Briggs v. State*, Op. No. 27745 (S.C. S. Ct. Oct. 25, 2017). The remittitur was issued on November 13, 2017.

Re-trial and Direct Appeal (2019-000632)

Applicant was re-tried on the same indictments. Applicant was represented by Jeremy A. Thompson, Esquire. Assistant Solicitors Wendy Hallford and Hope Coleman of the Seventh Circuit Solicitor's Office prosecuted the case. On March 25-27, 2019, Applicant proceeded to trial before the Honorable R. Keith Kelly, circuit court judge, and a jury. Applicant was found guilty on both charges Judge Kelly sentenced Applicant to life imprisonment for criminal sexual conduct and fifteen years' imprisonment for lewd act upon someone under sixteen years old, sentences running concurrently.

Applicant filed a timely notice of appeal on April 10, 2019, that was perfected by Robert Dudek, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Briggs*, 2021-UP-380 (S.C. Ct. App. filed Nov. 3, 2021). The remittitur was issued on November 24, 2021.

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Ineffective assistance of appellate counsel:
 - a. Failure to raise a new trial.
 - b. Failure to raise a directed verdict issue.
2. Ineffective assistance of counsel:
 - a. Failure to object to inadmissible hearsay, hearsay that exceeded the bounds of 801 SCR Cr. P.

- i. Failure to object to hearsay that improperly bolstered the victim's credibility.
- b. I was denied counsel at a critical stage.
- c. Counsel failed to subject the prosecution's case to meaningful adversarial testing.
- d. Numerous circumstances prevented counsel from affording effective representation.
- e. Failure to adequately investigate and prepare.
- f. Failure to object to sentencing.
- g. Failure to present a defense.

At the PCR hearing, Applicant proceeded forward on the following allegations:

- 1. Ineffective assistance of counsel.
 - a. Failure to object to the forensic interview video.
 - b. Counsel should have objected to the testimonies of Shauna Galloway-Williams and Nancy Henderson.
 - c. Failure to object to the State's closing concerning improper bolstering statements and reference to Galloway-Williams' testimony and mentions of their testimonies in the State's closing argument.
 - d. Failure to request a mistrial concerning a juror related to an officer.
 - e. Failure to request a *Jackson v. Denno* hearing.
 - f. Failure to object to burden-shifting.
 - g. Failure to challenge the indictments.
 - h. Failure to challenge the father's credibility.
 - i. Failure to object to jail calls being out of context.
 - j. Failure to object during the State's closing regarding potential benefit of making up a narrative.
 - k. Failure to pursue third party guilt defense.
 - l. Failure to properly cross-examine Judy Petty.
 - m. For telling Applicant not to testify.
 - n. Failure to object to questions regarding sexual experiences.
 - o. Failure to prepare a defense.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant testified he was incarcerated in SCDC for first degree criminal sexual conduct with a minor. He stated that he was represented by Counsel during his second trial. He stated that he was dating the victim's mother at the time of the incident and was not the child's father or stepfather. He stated that the allegations started with the victim's father. He stated that Counsel



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did not want the defense at trial to center around the father. He stated that a dynamic expert testified and that he wanted Counsel to object to her testimony, but he did not. He stated he wanted Counsel to object to mention of her testimony during the State's closing, but he did not. He stated that Counsel did not want to line up their expert witnesses to testify on the same thing. He stated that the victim testified. He stated he was told to stay in the waiting room during the forensic interviews. He stated that he wanted a report entered that would show the father was upset about having to pay child support. He stated that the father told the victim to make up the story because of a stressful divorce situation. He stated that the victim never said exactly what he did to her and that she could not remember a lot of what happened. He stated that the divorce should have been entered to address the father's credibility.

He stated that Counsel did not investigate or prepare a defense. He stated that Judy Petty committed perjury and he wanted Counsel to cross-examine her on her prior testimony. He stated that Counsel should have objected to the victim's forensic interview being entered into evidence. He stated that one of the jurors was related to an officer and that this was not addressed during qualifications but was discussed later instead. He stated that the indictments were faulty because the grand jury was not properly empaneled. He stated he gave a police statement and Counsel did not request a *Jackson v. Denno* hearing. He stated that Counsel did not want to question the victim about why he was in prison. He stated that was going to testify at trial, but Counsel told him that his police interview would be used against him if he did. He stated Counsel did not seek a motion to suppress concerning the statements.

Applicant stated that improper bolstering occurred when one of the witnesses was asked about their worst sexual experiences. He stated that Counsel should have pulled favorable jail calls and entered them into evidence at trial. He stated that Counsel should have objected to the

State's closing regarding the victim's reaction to Applicant being put away. He stated that there was a third-party guilt issue concerning what Amber said, but Counsel did not pursue this defense.

Counsel Testimony

Counsel testified he represented Applicant in his first PCR action, the PCR appeal, and at the re-trial. He stated he thought Galloway-Williams' testimony was admissible. He stated he would not object to mention of testimony during closing statements if he did not object during their testimonies. He stated that he did not pursue a *Jackson v. Denno* because one was pursued at the first trial and was denied. He stated that he thought the ruling could carry over to the second trial. He stated a mistrial was not appropriate because of the juror. He stated he could have questioned this but did not want to bring this type of attention to that juror. He stated that the victim's interview was played at both trials. He stated it was permitted by statute to be played and was admissible. He stated that the State's closing statement regarding jail calls was potentially burden shifting, but he stated that when Applicant enters evidence, it is fair to comment on not bringing something forward. He stated he did not think a Golden Rule argument was made at trial. Instead, he stated that the State commented on the victim's demeanor, which is admissible. He stated that he never received the tapes between Applicant and the father, despite trying to get them. He stated that he had a detective settle that the tapes did not exist. He stated that he did not talk to the father, but that the State did. He stated that Applicant wanted to use the father's statements at trial, but Counsel informed Applicant that that was not a viable defense strategy. He also stated that Applicant wanted to create a defense showing that the victim was abused by someone, but not Applicant. He stated that if these defenses were presented, the victim would have to testify to the fact that she did not speak to her father for years before the incident



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occurred, which would have been catastrophic to the defense at trial. He stated that Applicant was offered a twenty-five-year plea deal, but Applicant was only willing to plead to time served on an ABHAN charge. He stated that Applicant rejected the plea deal. He stated that he thought Applicant received a fair plea deal, but Applicant refused to serve any additional time. He stated he thought the indictments were proper and consider this argument to be "jailhouse lawyering." He stated he reviewed the Cantrell reports.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, prior PCR, PCR appeal, re-trial, and direct appeal records, and the current PCR application. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Buller v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984);

Buller, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v.*

Washington.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The court makes this determination based upon the totality of the evidence. *Id.* at 695.

Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011)

(quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Forensic Interview

Applicant claims Counsel was ineffective for failure to object to the forensic interview. Whether failure to object constitutes deficient performance generally hinges on whether a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

Counsel credibly testified that he did not object because it was admissible evidence. Counsel is not deficient for failure to launch a frivolous objection. Additionally, any attempts at objecting would have resulted in a quick denial and the statement would have been entered anyway. Accordingly, no prejudice was established, and relief is denied as a result.

Galloway-Williams and Henderson

Applicant claims Counsel was ineffective for failing to object to Galloway-Williams' and Henderson's testimonies and for failure to object to the State mentioning their testimonies at trial. Counsel credibly testified that these testimonies were admissible. *See e.g. State v. Jones*,

423 S.C. 631, 817 S.E.2d 268 (2018) (finding the court did not err in qualifying Galloway-Williams as an expert in child sex abuse dynamics); *Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017) (finding that the PCR Court acted within its discretion in finding ineffective assistance of counsel for failure to object to Nancy Henderson's testimony that allegedly constituted improper bolstering). Counsel is not deficient for failure to launch frivolous objections. Any objection to this testimony or the State's closing would have been unsuccessful. Thus, there is no prejudice. Accordingly, relief is denied.

Improper Bolstering

Applicant claims Counsel was ineffective for failure to object to improper bolstering. "Improper bolstering is 'testimony that indicates the witness believes the victim, but does not serve some other valid purpose.'" *Chappell v. State*, 429 S.C. 68, 75, 837 S.E.2d 496, 499-500 (Ct. App. 2019) (quoting *Briggs v. State*, 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017)). "Improper bolstering also occurs when a witness testifies for the purpose of informing the jury that the witness believes the victim, or when there is no other way to interpret the testimony other than to mean the witness believes the victim is telling the truth." *Id.* "However, an expert's testimony is not improper bolstering 'when the expert witness gives no indication about the victim's veracity[.]'" *Id.* (quoting *State v. Perry*, 420 S.C. 643, 663, 803 S.E.2d 899, 910 (Ct. App. 2017)).

"In an ineffective assistance case, 'trial counsel's failure to object to [improper bolstering] testimony does not remove a [] [PCR] applicant's burden to prove prejudice.'" *Chappell*, 429 S.C. at 80, 837 S.E.2d at 502 (quoting *Thompson*, 423 S.C. at 246, 814 S.E.2d at 492). "The determination of whether a bolstering error is harmless depends on whether the case turns on the credibility of the victim." *State v. Chavis*, 412 S.C. 101, 110, 771 S.E.2d 336, 341

(2015). "The outcome of a trial turns on the credibility of the victim when the State presents no physical evidence or 'relie[s] solely upon the victim's testimony to establish the details of the crime . . .'" *Chappell*, 429 S.C. at 80, 837 S.E.2d at 502 (quoting *Thompson*, 423 S.C. at 248, 814 S.E.2d at 494).

Applicant has not met his burden of proof concerning this allegation. Counsel credibly testified that they did not think the passages highlighted constituted improper bolstering. However, even if this was improper bolstering, this Court finds that it would not have impacted the outcome at trial. Accordingly, because Applicant has not met either prong of the *Strickland* analysis, relief is denied on this ground.

Mistrial

Applicant claims Counsel was ineffective for failure to move for a mistrial because a juror was related to an officer. Counsel credibly testified that this is not a proper basis for a mistrial and that one would not be granted on this basis. He stated he also did not want to bring the issue up because he thought the juror may be unaware of the connection and did not want to bring his attention to the connection. This is reasonable and Counsel is not deficient. Additionally, there has been no showing of prejudice. Relief is denied accordingly.

Jackson v. Denno

Applicant claims Counsel was ineffective for failure to seek out a *Jackson v. Denno* hearing. Counsel was reasonable in electing not to pursue this motion because nothing changed between the last trial and this trial and Counsel had no reason to believe that the Court's decision at Applicant's trial would be any different. Accordingly, no prejudice has been established and relief is denied as a result.

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Indictments

Applicant is alleging he is entitled to PCR relief because Counsel was ineffective for failing to challenge the indictments. Challenges to the indictment must be raised before a jury is sworn in. S.C. Code Ann. § 17-19-90 (2003). If non-jurisdictional defects apparent on the face of the document are not raised before then, they are waived. *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211, (2003), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *State v. Young*, 243 S.C. 187, 133 S.E.2d 210 (1963). Sufficiency of indictment is found when the offense is stated with enough specificity that the court knows what judgement to announce and the defendant knows what he has to answer to and whether he can plead acquittal or conviction upon it and whether it apprises defendant of offense that is intended to be charged. *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) *citing State v. Wilkes*, 353 S.C. 462, 465, 578 S.E.2d 717, 19 (2003).

Counsel credibly testified that he did not see anything wrong with the indictments and he did not think a challenge to the indictments would be successful. However, even if there was something faulty with the indictments, the right to challenge them has been waived. Accordingly, relief is denied on this ground.

Third-Party Guilt

Applicant claims Counsel was ineffective for failure to assert a third-party guilt defense. Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure to explore the decision was a strategic decision. *Strickland*, 466 U.S. at 680. If there is only one line of defense, counsel must conduct a "reasonably substantial investigation" into that line of defense. *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1252). However, if there are several lines of defense, counsel may still be effective even if every single line is not



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explored. *Id.* "[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." *Id.* at 681 *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1255). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Regarding failure to alert the Applicant of a defense specifically, Counsel will not be found ineffective if there was inadequate evidence to support the defense, if the defense did not exist at the time of trial, or another avenue of defense existed. See *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (stating that failure to state an entrapment defense was not ineffective when the applicant denied any wrongdoing); *Arnette v. State*, 306 S.C. 556, 413 S.E.2d 803 (1992) (stating that failing to inform of a defense was not ineffective when there was no evidence at trial that supported the defense); *Robinson v. State*, 308 S.C. 361, 417 S.E.2d 361, 417 S.E.2d 88 (1992) (stating that Counsel was not ineffective when failing to state a defense that was not recognized by the Court until six years later and was just recently acknowledged by the scientific community).

Counsel credibly testified that Applicant wanted Counsel to assert a third-party guilt defense at trial, but thought this defense was implausible. Counsel was reasonable in this conclusion. Additionally, this Court finds this defense would not have changed the outcome at trial. Accordingly, relief is denied.

Father's Credibility

Applicant claims Counsel was ineffective for failure to challenge the victim's father's



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credibility as part of the defense presented at trial. Counsel credibly testified that this was not a plausible defense and that raising this defense would be both unhelpful and would open the door to the victim testifying about how loose a connection she has to her birth father, which would only undermine Applicant even more. Counsel was reasonable in failing to use this defense and, even if it was chosen, it would not impact the results at trial. Accordingly, relief is denied.

Burden-Shifting

Applicant claims Counsel was ineffective for failure to object to burden-shifting. Even if Counsel objected, this Court declines to find that the comment highlighted did not impact the results of the proceedings. Accordingly, relief is denied.

Jail Calls

Applicant claims Counsel was ineffective for failure to object to the jail calls being entered out of context. This Court declines to find anything objectionable about the calls. Counsel is not deficient for failing to make frivolous objections. Any objection would have been overruled and the calls would have been admitted. Accordingly, relief is denied.

Decision to Testify

Applicant alleges Counsel told him not to testify. "The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. However, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." *Brown v. State*, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations." *Id.* "A defendant's decision to testify or not must be made with knowledge of the consequences of



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either choice." *Id.*

Applicant was engaged in a thorough colloquy about his right to testify. (Tr. 268-72). Thereafter, Applicant decided to take the stand. (Tr. 272-74). This decision was seemingly made voluntarily and intelligently, despite Counsel's advice. Accordingly, relief is denied on this ground.

State's Closing RE: Fabricating Story

Applicant claims Counsel was ineffective for failure to object to the State asking the jury in closing why the victim would fabricate the evidence. To find whether a prosecutor's comments in closing argument violated a defendant's due process rights, the Court must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. *Fortune v. State*, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019).

"It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence." *United States v. Francisco*, 35 F.3d 116, 120 (4th Cir. 1994); *see also State v. New*, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony."). A prosecutor should "prosecute with earnestness and vigor" and "may strike hard blows, [but] is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs." *New*, 338 S.C. at 319, 526 S.E.2d at 240. "On the other hand, a closing argument may be held improper where it appeals to personal bias or arouses the jury's passions or prejudice." *Id.* "[I]mproper suggestions, insinuations, and, especially,

assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger* at 88.

"Improper comments do not automatically require reversal if they are not prejudicial to the defendant." *Id.*, 428 S.C. at 550, 837 S.E.2d at 40 (quoting *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). A PCR court must view the alleged impropriety of the prosecutor's argument in the context of the entire record, and the applicant has the burden of proving he did not receive a fair trial because of the alleged improper argument. *Id.*

Golden Rule arguments made in closing are generally not permissible because they generally ask the juror to depart from neutrality and to decide based upon personal bias, not the evidence itself. See e.g. *Brown v. State*, 383 S.C. 506, 516-17, 680 S.E.2d 909, 915 (2009)(finding that Counsel was deficient for failure to object to the prosecutor asking the jury to "speak up" for the three-year-old victim).

Applicant has not met his burden of proof concerning this allegation. This Court concurs with Counsel in his assertion that he does not believe a Golden Rule argument was made. This Court concurs and finds the passage highlighted was not objectionable. Further, this Court finds that this portion of the closing was not so crucial as to undermine the results of the proceedings. Accordingly, because Applicant has not met either prong of the *Strickland* analysis, relief is denied on this ground.

Cross-Examine Judy Petty

Applicant claims Counsel was ineffective for failure to properly cross-examine Judy Petty. This Court finds Counsel's strategy on cross-examination reasonable and has not been presented with another approach that would have changed the results of the proceedings.

Accordingly, relief is denied.

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Sexual Experiences

Applicant claims Counsel was ineffective for failure to object to questions regarding Applicant's sexual experiences. This Court finds these questions were not objectionable. Counsel is not deficient for failure to make frivolous objections. Even if this was objectionable, this Court declines to find this line of questioning impacted the trial results. Accordingly, relief is denied.

Prepare a Defense

Applicant claims Counsel was ineffective for failure to prepare a trial defense. This Court finds Counsel's approach at trial was reasonable. Applicant failed to present an alternate defense that was not reasonably rejected by Counsel. Further, Applicant failed to present any possible defense that would have changed the result at trial. Accordingly, relief is denied.

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 PCR application must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure 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 the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

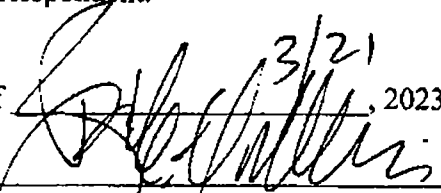
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IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this _____ day of March^{3/21}, 2023.



BRIAN M. GIBBONS
Presiding Judge
Seventh Judicial Circuit


_____, South Carolina.

CLERK OF COURT
JUDICIAL CIRCUIT
JULY 2023

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