STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OG CHARLESTON	)	**FIFTEENTH JUDICIAL CIRCUIT**
		Case No. 2011-CP-22--0195
SHANNON D. McGEE, #147120,	)	
Applicant,	)	
Vs.	)	**NOTICE OF INTENT TO APPEAL**
STATE OF SOUTH CAROLINA,	)	
RESPONDENT.	)	

TO THE Honorable Attorney General of the Sovereign State of South Carolina:

Please take Notice that the Applicant above named does hereby serve Notice of his Intention to Appeal the Decision of the Honorable Steven H. John signed January 23, 2014 denying him relief in the above-referenced matter which decision was received by Counsel for the Applicant on the 4th day of February, 2014 and the undersigned does hereby certify that the applicants Appeal has a meritorious issue for the Courts consideration.

Respectfully, Submitted,

William L. Runyon, Jr.
#3 Gamecock Avenue, Suite 303
Charleston, SC 29407
(843) 571-3515
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CASE NUMBER: 2011-CP-22-0195
	)	
SHANNON D. MCGEE, SCDC ID 147120	)	
Plaintiff,	)	**CONSENT ORDER** **SUBSTITUTING COUNSEL**
VS.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Defendant.	)	
	)	

FILED
GEORGETOWN COUNTY, S.C.
2013 APR -4 AM 10:53
ALMA Y. WHITE
CLERK OF COURT

IT APPEARING unto this Court that Ashley Ameika was substituted to represent Plaintiff/Applicant, Shannon D. McGee, in this post-conviction relief proceeding, however due to her current caseload, inability to put forth the time necessary for this matter, and by consent, the Plaintiff/Applicant's attorney will be substituted. It is hereby,

ORDERED, ADJUDGED AND DECREED that William L. Runyon, Jr., Esquire, be and is hereby substituted as counsel of record in the above captioned action for the Plaintiff/Applicant, Shannon D. McGee and Ashley Ameika, Esquire is hereby relieved of all duties and responsibilities of representation of the Plaintiff/Applicant, Shannon D. McGee, in the above captioned matter. This substitution of counsel will not cause a delay in the trial of this case.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Chief Administrative Judge
Fifteenth Judicial Circuit
Georgetown County Court of Common Pleas

This 21st day of March, 2013
~~Georgetown~~, South Carolina
Conway,

(Signatures on following page)

I SO MOVE:

Ashley Ameika, Esquire
7555 Northside Drive
North Charleston, SC 29420
843-820-9719 (office)
843-820-9720 (facsimile)

I CONSENT:

William L. Runyon, Jr., Esquire
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STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Shannon D. McGee, # 147120, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2011-CP-22-0195 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed February 14, 2011. Respondent made its Return on or about March 18, 2011. The Court convened an evidentiary hearing into the matter on December 15, 2013, at the Georgetown County Courthouse. Applicant was present at the hearing and represented by William L. Runyon, Jr., Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the PCR hearing. Mr. Mike Jones also testified on Applicant's behalf. Applicant's plea counsel, Stuart M. Axelrod, Esquire, testified. The Court had before it a copy of the plea transcript, the records of the Horry County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the return, the appellate records, and the exhibits introduced at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Georgetown County Clerk of Court. In June 2006, the

Georgetown County Grand Jury indicted Applicant for second-degree criminal sexual conduct ("CSC") with a minor (2006-GS-22-580), lewd act upon a minor (2006-GS-22-581), and assault with intent to commit CSC with a minor (2006-GS-22-582). Stuart M. Axelrod, Esquire, ("trial counsel") represented Applicant. On September 18-20, 2006, Applicant was tried before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted. Judge Couch sentenced Applicant to life without parole, pursuant to S.C. Code Ann. section 17-25-45, for second-degree CSC with a minor, twenty (20) years for assault with intent to commit CSC with a minor, and fifteen (15) years for lewd act upon a minor.

The day after trial ended, on September 21, 2006, trial counsel filed a motion for new trial. Judge Couch convened a hearing on the motion on September 22, 2006. Trial counsel contended Applicant was entitled to a new trial based upon a Brady[1] violation by the solicitor and upon evidence discovered after the trial. On November 9, 2006, Judge Couch issued an order denying the motion for new trial. Judge Couch found that, although the solicitor committed a Brady violation, Applicant was not prejudiced and still received a fair trial.

Applicant filed a timely notice of appeal, and Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal on Applicant's behalf. On appeal, Applicant argued Judge Couch should have granted a new trial based upon the Brady violation. On November 19, 2009, the South Carolina Court of Appeals affirmed the convictions. State v. McGee, Op. No. 2009-UP-539 (S.C. Ct. App. filed Nov. 19, 2009). The Court of Appeals denied Applicant's petition for rehearing on January 20, 2010. Applicant appealed to the South Carolina Supreme

[1] 373 U.S. 83 (1963)

Court, but the Supreme Court denied certiorari on January 20, 2011. The matter was remitted to the circuit court on February 7, 2011.

II. ALLEGATIONS

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

1. "Ineffective Assistance of Trial Counsel"
2. "Prosecutorial Misconduct"
3. "Violation of 5th; 6th; 14th Amendment U.S. Constitution"
4. "Ineffective Assistance Appellate Defender"

In an amendment filed March 7, 2011, Applicant further alleged the following grounds for relief:

1. Ineffective assistance of trial counsel for failing to object to the solicitor's closing argument that impermissibly bolstered and vouched for the credibility of the victim.
2. Ineffective assistance of trial counsel for failing to object to the solicitor's closing argument that violated the "golden rule."
3. Ineffective assistance of trial counsel for failing to conduct a pre-trial investigation.
4. Prosecutorial misconduct for failing to disclose evidence relating to the testimony of Aaron Kinloch.
5. Ineffective assistance of trial counsel for failing to object to jury instructions.
6. Ineffective assistance of appellate counsel for failing to present certain issues on appeal.
7. Ineffective assistance of trial counsel for failing to object to the solicitor's closing argument that commented on facts not in evidence.

At the PCR hearing, Applicant proceeded on the allegations in his amendment. He also proceeded on an allegation that the solicitor's calling of the case for trial violated the South Carolina Supreme Court's ruling in State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and

arguments presented at the PCR hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A. Summary of Testimony

Trial counsel testified he has been a practicing attorney since 1997. After being appointed on Applicant's case, he met with Applicant, investigated the case, and discussed the case with the solicitor. On cross-examination, trial counsel testified he met with Applicant on several occasions and discussed the State's response to trial counsel's discovery motions. He further testified he discussed with Applicant the elements of the charges, Applicant's maximum exposure, and Applicant's version of events. Trial counsel testified his defense theory was Applicant was innocent and the victim was lying to get back at Applicant.

Trial counsel further testified the solicitor's office, at the time of this trial, published a trial docket and emailed it to defense attorneys. Georgetown County had a single term of general sessions each month, and the solicitor's office distributed the list of cases that may be called to trial one (1) to two (2) weeks beforehand. Trial counsel admitted he received the roster including this case in advance of the term of court, but testified he was not notified the case would be called to trial until the Friday before the term began. Trial counsel testified he made a motion for continuance to allow more time to prepare for trial. However, trial counsel was not sure what further investigation he could have performed had the case been continued.

Trial counsel testified Aaron Kinloch ("Kinloch") was a jailhouse snitch who testified Applicant confessed to the crime. Trial counsel claimed he was not aware of the substance of

Kinloch's testimony until the day of trial. He further testified he was given a copy of Kinloch's criminal record, but the record was not accurate. Trial counsel discovered the day after trial Kinloch had a pending charge in Georgetown County that did not appear on the criminal record. Trial counsel also discovered Kinloch had written a letter to the solicitor which was not turned over in discovery. Trial counsel filed a motion for a new trial once he discovered the evidence. He testified he believed the pending charge and letter could have been used to further impeach Kinloch.

Michael Jones ("Jones") testified he was detained in the Georgetown County jail in 2006 with Applicant and Kinloch. Jones and Applicant were being prosecuted by the same solicitor. Jones testified the solicitor asked him if he had any information about Applicant. However, Jones admitted the solicitor never asked him to lie about Applicant. Jones informed Applicant the solicitor asked about him.

Applicant testified he never discussed his case with Kinloch and never confessed to the crime. He further testified the solicitor lied about Kinloch being a witness. Applicant also testified he was not aware the case would go to trial until the Friday before it began. On cross-examination, he admitted he met with trial counsel two (2) or three (3) times and reviewed the discovery response and his version of events. He testified he gave trial counsel leads to investigate, including the information regarding the solicitor looking for people to testify against him. Applicant asked trial counsel to call Jones as a witness, but he also recalled trial counsel advising Applicant to not testify.

Applicant also testified trial counsel was ineffective for failing to object to the solicitor telling the jury the witnesses were credible and believable. He alleged trial counsel should have

objected to the solicitor asking the jury to consider what they would have done if they were the victim. Applicant stated trial counsel did not adequately investigate the case because the case was called on short notice. He also accused the solicitor of committing misconduct by lying to Judge Couch about the nature of Kinloch's testimony. Applicant testified trial counsel should have objected to the Judge Couch's charges on direct evidence, the burden of proof, and the testimony of CSC victims. Applicant testified appellate counsel was ineffective for failing to argue Judge Couch erred in ruling on Applicant's motion for a continuance, for a directed verdict, and for a mistrial. He also stated trial counsel should not have allowed the solicitor to comment on facts not in evidence.

B. Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The

applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625. With respect to appellate counsel, the applicant must prove prejudice by showing "there is a reasonable probability he would have prevailed on appeal." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citations omitted).

1. Solicitor's Arguments

The Court finds Applicant failed to meet his burden of proving trial counsel ineffective for failing to object to various portions of the solicitor's opening and closing arguments. Applicant alleged the solicitor improperly vouched of the witnesses credibility when he stated they "were credible and believable [,] and they told the truth. (Trial Tr. 152:10-11). The court finds this statement does not rise to the level of improper vouching. A solicitor improperly vouches for a witness' credibility when he "places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity" or "by indicating information not presented to the jury supports the testimony." State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (citing State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001); 75A Am.Jur. Trial § 700 (1991)). Here, the solicitor did not make a personal assurance the witnesses were telling the

...ull nor did he indicate he had personal knowledge of the witnesses' truthfulness. Id. Rather, he indicated the manner in which the jurors testified lent credibility to their testimony. This argument is not improper because "[a] solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony." State v. Caldwell, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990) (citing State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976)), overruled on other grounds by State v. Evans, 371 S.C. 27, 637 S.E.2d 313 (2006). Therefore, trial counsel was not ineffective because the solicitor's statement was not objectionable.

Trial counsel was not ineffective for failing to object to the solicitor's statement urging the jury to "ask yourself, is it reasonable for her to do what she did, given who she is." (Trial Tr. 48:2-3). It is improper for a solicitor to ask jurors to abandon their impartiality and view the evidence from the victim's standpoint State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 902 (2006), overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). However, the solicitor's comments here do not ask the jurors to view the evidence from the victim's standpoint. Rather, the solicitor is asking the jurors to consider the victim's motives for testifying against Applicant. Again, this is permissible argument relating to the "credibility and common sense biases of the witness[.]" Caldwell, 300 S.C. at 505, 388 S.E.2d at 822. Because it is not objectionable argument, trial counsel was not required to object.[2]

Applicant's allegation trial counsel should have objected to the solicitor commenting on facts not in evidence is likewise without merit. Applicant challenges the following statement by the solicitor in referring to the State's expert:

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[2] The Court notes trial counsel did successfully object to the solicitor's closing argument to consider "if some of this stuff happened probably any of y'all – well, the first thing you would do is, well, hopefully report it ...to the law[.]" (Trial Tr. 148:22-25). Thus, trial counsel was clearly aware of the line which the solicitor was not allowed to cross.

> "I thought what she also testified to, as an expert, was even maybe as interesting, or more informative for you, which is delayed reporting. I think, what, ninety-nine percent of the time why it's – at least in Georgetown and Horry Counties – that's consistent with what happened here, recantation is part of the known cycle that goes on; it happens in a substantial number of cases."

(Trial Tr. 155:7-13). Applicant points out that the expert testified that recantation happens between twenty-five (25%) and seventy-five (75%) of the time. (Trial Tr. 125:6-9). However, a careful reading of the challenged argument indicates the solicitor is actually referring to delayed reporting by CSC victims. In fact, the expert did testify only two (2) of one hundred and eighty (180) CSC victims she interviewed the prior year did not exhibit delayed disclosure. (Trial Tr. 124:5-9). Therefore, the argument does not present facts not in evidence and was not objectionable.

Regardless, Applicant cannot show he was prejudice by any of the solicitor's opening or closing arguments. The propriety of a closing argument must be reviewed "in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 914-15 (2009) (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). Here, Judge Couch's charged the jury that the solicitor's arguments were not to be considered in determining Applicant's guilt. (Trial Tr. 41:7-24). Judge Couch also charged the jury it was ultimately tasked with determining witness credibility (Trial Tr. 180:7-181:8) and weighing the expert's testimony (Trial Tr. 185:1-17). Furthermore, the arguments Applicant challenges are not repeatedly made and are "limited in duration." Id., 680 S.E.2d at 915. Therefore, the Court finds Applicant has not proven prejudice because the solicitor's comments did not "so infect[] the trial with unfairness as to make the resulting

conviction a denial of due process." Id. (citing Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002); State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869 (1997)).

2. Jury Charges

The Court finds Applicant failed to meet his burden of proving trial counsel ineffective for failing to object to Judge Couch's jury instructions. Applicant challenges the charge that "[d]irect evidence is testimony from an individual, or a person who claims to have direct knowledge concerning some material fact in this case." (Trial Tr. 178:21-23). The Court fails to discern how this is not a proper charge on direct evidence. See State v. Salisbury, 343 S.C. 520 n.1, 524, 541 S.E.2d 247, 249 n.1 (2001) ("Direct evidence is evidence based on actual knowledge and proves a fact without inference or presumption. Direct evidence immediately establishes the main fact to be proved." (citations omitted)). The Court also cannot discern any objectionable material in the charge that "[t]he Defendant is not required to prove himself innocent of any charge" and that "[t]he burden of proof ... is upon the State to prove the Defendant guilty beyond a reasonable doubt." See State v. Hill, 382 S.C. 360, 370, 675 S.E.2d 764, 769 (S.C. Ct. App. 2009) (holding similarly worded charge cured any improper comments regarding defendant's exercise of his Fifth Amendment rights). Judge Couch's instruction that testimony of a CSC victim need not be corroborated was also not objectionable. See State v. Rayfield, 369 S.C. 106, 117, 631 S.E.2d 244, 250 (2006); State v. Orozco, 392 S.C. 212, 222, 708 S.E.2d 227, 232 (Ct. App. 2011); State v. Hill, 382 S.C. 360, 370, 675 S.E.2d 764, 769 (S.C. Ct. App. 2009). The Court also finds Applicant cannot show he was prejudiced by this instruction because it was not unduly emphasized and Judge Couch's charge as a whole

comports with the law. Rayfield, 369 S.C. at 118, 631 S.E.2d at 250. Therefore, trial counsel was not ineffective.

3. Pre-trial Investigation

The Court finds Applicant failed to meet his burden of proving trial counsel was ineffective in failing to conduct a pre-trial investigation. Regarding this allegation, the Court finds trial counsel's testimony to be credible, and Applicant's to be not credible. Specifically, the Court finds trial counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation. Furthermore, failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Applicant failed to articulate any information that could have been uncovered with a further investigation. The testimony revealed trial counsel interviewed witnesses and investigated the case to the extent Applicant provided leads to investigate. Trial counsel's trial notebook, entered into evidence as Applicant's Exhibit Number 1, shows trial counsel was thoroughly prepared for trial. Therefore, Applicant has not presented evidence trial counsel did not investigate the case or that further investigation "would have led to a different result." Id.

4. Appellate Counsel

The Court finds Applicant failed to meet his burden to show appellate counsel ineffective. Though Applicant argued appellate counsel should have briefed additional issues, he failed to present any testimony from appellate counsel on that issue. As such, the Court cannot speculate as to why certain issues were not briefed. Cf. Dempsey v. State, 363 S.C. 365, 370,

610 S.E.2d 812, 815 (2005) (finding that, without a witness's testimony, "any finding of prejudice is merely speculative").

Regardless, the Court finds the Applicant failed to demonstrate appellate counsel failed to exercise sound judgment in choosing which issues to present on appeal. See Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308 (1983) (holding appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on appeal). Applicant's allegation appellate counsel should have argued Judge Couch erred in denying the motion for a continuance is without merit. See Bozeman v. State, 307 S.C. 172, 175, 414 S.E.2d 144, 146 (1992) ("The denial of a motion for a continuance is within the sound discretion of the trial judge and his ruling will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the appellant." (citing State v. Babb, 299 S.C. 451, 385 S.E.2d 827 (1989); State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977))). The allegation appellate counsel should have raised a directed verdict issue on appeal is likewise without merit because there was direct evidence of Applicant's guilt in the form of the victim's testimony. See State v. Frazier, 386 S.C. 526, 531, 689 S.E.2d 610, 613 (2010) ("If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." (citing State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006))).

Finally, Applicant's allegation appellate counsel should have argued Judge Couch erred in denying the motion for a mistrial is also without merit. Trial counsel's mistrial motion was based on several grounds. The first ground was there was insufficient evidence to support a conviction. As discussed above, evidence in the record supports Judge Couch's decision to

submit the case to a jury. Frazier, 386 S.C. at 531, 689 S.E.2d at 613 (citing Weston, 367 S.C. at 292-93, 625 S.E.2d at 648). The second ground was Judge Couch erred in submitting the written charge to the jury. Submission of a written copy of the jury charge is left to the trial judge's discretion. State v. Turner, 373 S.C. 121, 129, 644 S.E.2d 693, 697 (2007) (citing Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000)). Here, Judge Couch did not abuse his discretion in submitting a written charge.[3] The third ground for mistrial was Judge Couch erred in not allowing trial counsel to impeach Kinloch with convictions older than ten (10) years because the "probative value would not outweigh its prejudicial effect." (Trial Tr. 92:22-25). The Court finds no error in Judge Couch's ruling that would have been a viable appellate issue. See State v. Black, 400 S.C. 10, 27, 732 S.E.2d 880, 889 (2012) (stating it is a heavy burden to demonstrate the prejudicial effect of a remote conviction is substantially outweighed by its probative value). Finally, trial counsel re-raised his objection to the case being called on short notice. Again, as discussed above, Judge Couch's decision on the continuance motion was not a viable appellate issue. Bozeman, 307 S.C. at 175, 414 S.E.2d at 146 (citing Babb, 299 S.C. at 451, 385 S.E.2d at 827; Pendergrass, 270 S.C. at 1, 239 S.E.2d at 750). Because Applicant's suggested appellate issues are not viable, he was not prejudiced by appellate counsel's decision to not brief them. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (no ineffective assistance of appellate counsel where applicant's alleged issues are not meritorious).

C. Prosecutorial Misconduct

[3] The Court notes trial counsel initially consented to submission of the written charge (Trial Tr. 200:12-16), so this issue was likely not preserved for appellate review. See State v. Stanko, 402 S.C. 252, 270, 741 S.E.2d 708, 717 (2013) ("Appellant cannot argue now on direct appeal that the trial court erred in acquiescing to his express and informed desire.").

The Court finds Applicant failed to meet his burden of proving prosecutorial misconduct from the solicitor's presentation of evidence relating to Kinloch. The Court finds this issue was raised and decided in Applicant's direct appeal. Applicant's amended application alleges the solicitor made false representations to Judge Couch about the solicitor's prior contact with Kinloch. This allegation is part and parcel of the Brady violation Applicant alleged at trial and on appeal based on the solicitor's failure to disclose a letter written by Kinloch. This allegation of a Brady violation was raised on appeal from Applicant's conviction. See State v. McGee, Op. No. 2009-UP-539 (S.C. Ct. App. filed Nov. 19, 2009) ("On appeal, he argues the trial court erred in denying his motion for a new trial based on the State's Brady v. Maryland violation."). Because the issue was ruled upon by the Court of Appeals, Applicant cannot now challenge it on collateral review. Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001) ("PCR is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal." (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993))).

Regardless, Applicant has not shown any conduct by the solicitor prejudiced his right to a fair trial. Riddle v. Ozmint, 369 S.C. 39, 45, 631 S.E.2d 70, 73 (2006). Trial counsel extensively attacked Kinloch's credibility. The jury was aware of Kinloch's prior conviction and pending charges. Because trial counsel effectively called Kinloch's credibility into question with his prior crimes, the impeachment evidence of Kinloch's desire to assist the State did not deprive Applicant of a fair trial. State v. Cheeseboro, 346 S.C. 526, 554, 552 S.E.2d 300, 314-15 (2001) ("Where there is an abundance of evidence detailing the witness's unabashed disrespect for the law, the nondisclosure of other impeaching evidence does not deprive the defendant of a fair trial." (citing State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993))). Therefore, the solicitor's

actions "do not rise to the level of bring[ing] the trustworthiness of the verdict into question[.]" (Order of Judge Couch at p. 5, Nov. 9, 2006).

D. State v. Langford

Applicant's final allegation is that the State's calling of his case for trial violates the South Carolina Constitution as outlined in the South Carolina Supreme Court's decision in State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012). This Court finds that Langford cannot be retroactively applied to Applicant's case, that the State complied with the law as it existed at the time of Applicant's trial, and that Applicant was not prejudiced by having his case called to trial.

Prior to the Supreme Court's decision in Langford, exclusive control of the criminal docket was vested in the circuit solicitor. See S.C. Code § 1-7-33.[4] The Supreme Court declared in Langford this exclusive control violated the separation of powers principle of Article 1, Section 8[5] of the South Carolina Constitution. Langford, 400 S.C. at 428-29, 735 S.E.2d at 475. There can be no doubt, and the testimony and arguments at this hearing demonstrate, that this decision announced a new rule of law that is a deviation from the existing practice in General Sessions courts across the state. See Talley v. State, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007) ("[A] case announces a new rule when it breaks new ground or imposes a new obligation

[4] Section 1-7-33 provides that:

> "The solicitors shall attend the courts of general sessions for their respective circuits. Preparation of the dockets for general sessions courts shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial. Provided, however, that no later than seven days prior to the beginning of each term of general sessions court, the solicitor in each circuit shall prepare and publish a docket setting forth the cases to be called for trial during the term."

[5] S.C. Const. art I, § 8 provides that:

on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." (citing Teague v. Lane, 489 U.S. 288 (1989))). This Court is thus required to determine if this new rule is to be applied retroactively on collateral review. "Generally, new procedural rules should be not applied retroactively to cases on collateral review[.]" Id. at 543, 640 S.E.2d at 882 (citing Teague, 489 U.S. at 305). A new rule should not be applied retroactively when it is "a clear break with the past[.]" United States v. Johnson, 457 U.S. 537, 549 (1982) (quoting Desist v. United States, 394 U.S. 244 (1969). Because Langford announced a new rule constituting a clear break from past procedure, the Court finds it cannot be applied retroactively on collateral review.[6]

The record is clear the solicitor complied with the law at the time of Applicant's trial. Trial counsel was provided a copy of the trial docket well in advance of trial and had the opportunity to make a motion for continuance when he felt the trial should not go forward. Thus, the State complied with section 1-7-33 in calling Applicant's case for trial.

Regardless, Applicant had not shown he was prejudiced by the solicitor exercising his authority under section 1-7-33. See Langford, 400 S.C.at 446, 735 S.E.2d at 484 (requiring the defendant to show he was prejudiced by the solicitor's exclusive docket control, and finding he was not prejudiced). Applicant's only argument for prejudice was counsel did not have adequate

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"In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."

[6] The Court also notes that, were Langford to apply retroactively, every conviction resulting from solicitor's exclusive docket control would be subject to collateral attack. See Teague, 489 U.S. at316 ("We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that *habeas corpus* cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all

time to prepare for trial. This argument is not supported by the record. As discussed above, trial counsel interviewed witnesses and investigated the case to the extent Applicant provided leads to investigate. Applicant's Exhibit Number 1, trial counsel's trial notebook, shows trial counsel was thoroughly prepared for trial despite the short notice. The trial transcript reveals trial counsel subjected the State's case to a "meaningful adversarial testing[.]" United States v. Cronic, 466 U.S. 648, 659 (1984). Furthermore, Applicant failed to articulate any information that could have been uncovered had a continuance been granted. Thus, the short notice did not render trial counsel's performance so lacking as to make the result of the trial unreliable. Id. (citing Davis v. Alaska, 415 U.S. 308 (1974)); see also Avery v. Alabama, 308 U.S. 444, 450 (1940) (finding no prejudice where counsel was appointed in a capital case only three days before trial and the trial court denied counsel's request for additional time to prepare). Because Applicant was zealously represented by trial counsel at his trial, the Court finds he was not prejudiced by the solicitor's exclusive control of the docket.

E. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present sufficient evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application.

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defendants on collateral review[.]"). Certainly such an extreme result was not intended by the Supreme Court in

Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal. It is therefore

ORDERED that the Application for Post-Conviction Relief is denied and dismissed with prejudice and Applicant is remanded to the custody of the Respondent.

THE HONORABLE STEVEN H. JOHN
Resident Judge
Fifteenth Judicial Circuit

January 22, 2014
~~Conway~~, South Carolina
Georgetown,

declaring section 1-7-33 unconstitutional.

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Attorney At Law

February 4, 2014

Daniel E. Shearouse
Clerk of The Supreme Court
P.O. Box 11330
Columbia, SC 29211

In Re: Shannon D. McGee vs. State of South Carolina
2011-CP-22-0195

Dear Mr. Shearouse:

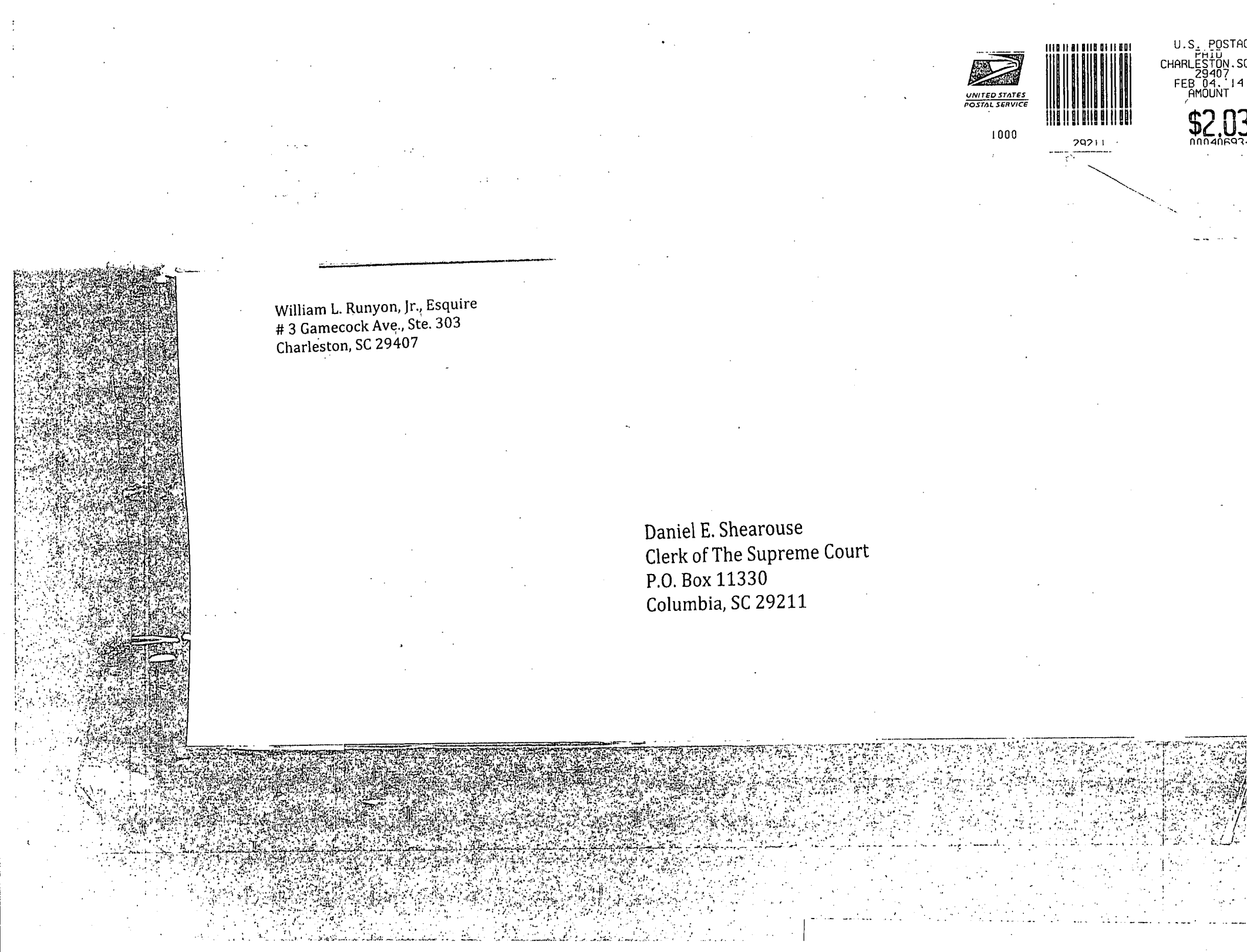
Enclosed please find original and three (3) copies of **Notice Of Intent To Appeal** in the above-named case. Also enclosed is a self-addressed stamped envelope for return of certified copes.

Thanking you, I remain

Sincerely,

William L. Runyon, Jr.

Enclosures: as stated above
WLRJr/paw.



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