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May 30, 2019

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

Re: Jerald D. Gaskins, Jr. #00362923. vs. The State of South Carolina,
Case No. 2017-CP-23-5901

Dear Hon. Shearouse:

I am enclosing herewith the original Notice of Appeal together with the original Affidavit of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/slt
Enclosure

cc Hon. Alex Kinlaw, Jr.
Clerk, Greenville County
Sherri ButterBaugh, Attorney General

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Alex Kinlaw, Jr. Circuit Court Judge

Lower Case № 2017-CP-23-5901

Jerald D. Gaskins, Jr. #00362923. ..... Petitioner,

vs.

State of South Carolina ..... Respondent.

NOTICE OF INTENT TO APPEAL

Jerald D. Gaskins, Jr. appeals the Order of Dismissal of the Honorable Alex Kinlaw, Jr. filed February 4, 2019, and the Order Denying Applicant's 59(e) Motion to Alter or Amend Judgment dated March 4, 2019. Petitioner received notice on May 30, 2019.

May 30th, 2019

C. Rauch Wise
Attorney at Law
305 Main Street
Greenwood, SC 29646
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Attorney for Appellant

OTHER COUNSEL OF RECORD

Sherri ButterBaugh
S.C. Attorney General's Office
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Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
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AFFIDAVIT OF SERVICE

Personally appeared before me Sandy Traynham, who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on May 30, 2019, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Notice of Appeal in the above case addressed to Sherri ButterBaugh, S.C. Attorney General's Office, PO Box 11549, Columbia, SC 29211.

Sandy Traynham

Sworn to and Subscribed
before me this 30th day
of May 2019.

Notary Public for South Carolina
My Commission Expires: 12/7/2019

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
Jerald D. Gaskins Jr., 362923 Applicant,	)	2017-CP-23-5901
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

'19 FEB 4 PM 12:00
Paul Wickensimer CCC GVL SC

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed on September 14, 2017 by Applicant. Respondent made its Return on January 17, 2018. An evidentiary hearing into the matter was convened on October 24, 2018, at the Greenville County Courthouse. Applicant was present and represented by C. Rauch Wise. Respondent was represented by DeShawn H. Mitchell and Sherrie Butterbaugh of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Trial counsel Randall L. Chambers and appellate counsel J. Falkner Wilkes also testified. Applicant also called Walter Mucienko to testify on his behalf at the hearing. Following a thorough review of the record in its entirety, and the testimony and evidence presented at the hearing, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In April of 2013, the

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Greenville County Grand Jury indicted Applicant for four counts of criminal sexual conduct with a minor second degree (2013-GS-23-3231, 3232, 3234, 3235) and two counts of lewd act upon a child (2013-GS-23-3233,3236). Randall L. Chambers represented Applicant. Applicant proceeded to trial on February 4, 2015, before the Honorable D. Garrison Hill and a jury. The jury found Applicant guilty as indicted to all charges. Judge Hill sentenced Applicant to concurrent twenty-year terms of imprisonment for each of the second-degree criminal sexual conduct with a minor convictions, a concurrent fifteen-year term of imprisonment for one of the lewd act convictions, and a consecutive five-year term of imprisonment for the remaining lewd act conviction.

Applicant filed a timely notice of appeal. J. Falkner Wilkes, Esquire perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's convictions on February 1, 2017. *State v. Gaskins*, Op. No. 2017-UP-166 (S.C. Ct. App. filed April 19, 2017). The remittitur was returned to the circuit court on May 5, 2017.

FACTUAL HISTORY

In the spring of 2011, Applicant and his wife at the time, Rachel Gaskins (Rachel), attended a horseshoe tournament at a home located in Travelers Rest. (Tr.p.54; pp.62-63; pp.82-83; pp.134-135). After the tournament, Applicant began regularly socializing with the family that lived at the home, including a thirteen-year-old girl (victim) who was a part of that family. (Tr.pp.64-66; pp.82-83; pp.135-36). Over the next few months, Applicant developed a close friendship with victim, and victim began to regularly visit with Applicant and his family. (Tr.pp.64-65; p.98; p.137; pp.139-40; pp.145-46; pp.150-51). However, victim's mother (mother) became uneasy when she found victim in possession of a phone covertly provided to her by Applicant and when Applicant eventually began to act controlling with victim, and she

ended victim's contact with Applicant as a result. (Tr.pp.73-75; p.227).

Subsequently, in November of 2012, Applicant's mother-in-law contacted mother and provided her with information that made her become even more concerned. (Tr.p.75; pp.87-88; pp.156-57). In response, mother and victim's father confronted victim, and victim initially denied anything inappropriate occurred between her and Applicant. (Tr.pp.75-76). However, as the conversation with her parents continued, victim began to cry before revealing she had been sexually abused by Applicant. (Tr.pp.76-77). Mother immediately reported the sexual abuse to the authorities, and Deputy Paul Floyd (Floyd) of the Greenville County Sheriff's Office responded to victim's home. (Tr.pp.53-54; pp.76-77; p.89). Floyd spoke with victim alone and victim disclosed she had been sexually abused by Applicant on multiple occasions over the course of more than a year. (Tr.pp.56-58).

Following victim's disclosure, Investigator Robert Perry (Perry) of the Greenville County Sheriff's Office began an investigation into the reported sexual abuse and spoke with victim at school. (Tr.pp.345-48; p.361). During their conversation, victim disclosed she was sexually abused by Applicant on multiple occasions at different places where he lived from the spring of 2011 until the fall of 2012. (Tr.pp.348-49). After speaking with victim, Perry attempted to gain access to victim's phone to examine her communications with Applicant, but could not because Applicant had taken the phone back from victim. (Tr.p.353). Perry repeatedly attempted to make contact with Applicant, who was thirty-years-old, but the attempts were unsuccessful. (Tr.p.347; pp.353-54). Thereafter, Perry obtained arrest warrants for Applicant based on the reported sexual abuse of victim. (Tr.p.354).

During trial, victim testified about the sexual abuse.[1] (Tr.p.192). Regarding the abuse,

[1] At the time of trial, victim was seventeen-years-old and Applicant was thirty-two years old.

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victim indicated she met Applicant at a horseshoe tournament in March of 2011 when she was a thirteen-year-old middle school student, and Applicant gave her his phone number. (Tr.pp.185-87). Shortly after that, victim stated she and Applicant began visiting each other's homes and hanging out on a regular basis, and she indicated she spent the night at Applicant's home occasionally. (Tr.p.185; pp.188-89). During one of the visits, Applicant asked victim if she was a virgin before informing her he would "spoil" her for the remainder of her life if he was the one who took her virginity. (Tr.pp.189-90). A few weeks later, victim indicated Applicant brought up the subject of her virginity again, and the two then engaged in sexual intercourse while Applicant's wife took a bath in another room. (Tr. pp. 190-193). Specifically, during that incident, victim testified Applicant removed their pants, began fondling and kissing her, and then quickly had sexual intercourse with her. (Tr.pp.193-94). Afterwards, victim testified the two pretended like nothing happened, and, from that point forward, Applicant provided her with phones and other gifts, gave her "a lot of attention,"[5] and promised to give her whatever she wanted. (Tr.pp.194-96; pp.213-14). As their relationship continued, victim indicated she and Applicant engaged in sexual intercourse on multiple occasions at different homes Applicant moved to over the course of the next year and a half, and she noted Applicant always wore a condom during the acts of sexual abuse. (Tr.pp.197-99). Victim further indicated Applicant performed oral sex on her during some of the incidents, and she recounted Applicant had sexual intercourse with her in a car on one occasion after driving her to an abandoned house while they were out to pick up food for other people in the home. (Tr.pp.200-02; pp.216-17). Additionally, victim stated she had sexual intercourse with Applicant on one occasion after they dropped his wife off at the hospital, she indicated the two had sexual intercourse on one occasion after

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(Tr.p.183; p.376).

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Applicant pretended he was going to take her to a country music concert, and she recounted an incident where Applicant's wife found him lying next to her on a couch, which led to a heated argument between Applicant and his wife. (Tr.pp.205-10; pp.224-25). Furthermore, victim testified Applicant convinced her they were going to get married, tried to talk her into getting legally emancipated from her parents, and tried to alienate her from her family. (Tr.pp.222-24). Subsequently, victim noted her relationship with Applicant continued until her mother found a phone Applicant had given her, and she eventually revealed the sexual abuse when confronted by her parents. (Tr.pp.227-29).

As victim's testimony continued, the solicitor asked victim about her friend who was present on the day victim met Applicant.[2] (Tr. pp. 234-235). The solicitor asked to address a matter outside of the presence of the jury, and the trial judge excused the jury from the courtroom. (Tr.pp.235-36). The solicitor indicated she intended to introduce the friend's testimony as prior bad act evidence while noting victim and friend were the same ages, were in the same grades in school, met Applicant in the same manner, engaged in the same types of acts with him, and were told the same things by Applicant during the course of their relationships with him. (Tr.pp.236-41). In response, defense counsel objected, contended the Supreme Court's decision in *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), was "bad law," and asserted the prior bad act evidence involving the friend was not admissible as evidence of a common scheme or plan because there was allegedly no evidence of a modus operandi. (Tr.pp.242-43).

The trial judge asked the solicitor to proffer the friend's testimony, and she was called to the witness stand. (Tr.pp.245-46). During her proffered testimony, the friend stated she met

[2] By the time of trial, the friend was eighteen and no longer a minor child. (Tr.p.246; p.306).

Applicant in the spring of 2011 just after she turned fourteen-years-old when she was visiting victim's home for a horseshoe tournament. (Tr.pp.246-48). Upon meeting Applicant, the victim's friend indicated he was immediately flirtatious with her, and the two exchanged telephone numbers. (Tr.p.248). After that, she testified she began hanging out with Applicant, and Applicant said "very nice things" to her. (Tr.p.249). A few weeks later, the victim's friend indicated the two began kissing and eventually began having sexual intercourse when she was alone with Applicant after he made her feel "very special." (Tr.pp.249-251). Regarding the sexual intercourse, the friend recounted it was quick, it always involved a condom, it always occurred when she was alone with Applicant, and only their pants were removed. (Tr.pp.251-54). Additionally, she stated Applicant made her feel like the "most special person in the world" and got her whatever she wanted. (Tr.p.252). As their relationship continued, the friend noted they had sex on a few more occasions, including on one occasion at an abandoned house. (Tr.pp.253-54). Eventually, the victim's friend indicated she ended the relationship with Applicant, and, when she did so, he informed her he was going to "make his next move" on the victim. (Tr.pp.255-56).

Following the friend's proffered testimony, defense counsel conceded it would "be stupid" to suggest no similarities existed between the acts involving the friend and the acts involving victim, but he contended the acts did not rise to the level of a common scheme or plan based on the fact the "whole series of events" allegedly occurred much differently for each of Applicant's victims. (Tr.p.259). Defense counsel further renewed his assertion the decision in *Wallace* was "bad law" while contending prior bad act evidence was the most prejudicial type of evidence that could be admitted. (Tr.p.260). In response, the solicitor asserted the prior bad act evidence was extremely probative in Applicant's case as evidence of the existence of a common

scheme or plan and contended the probative value of that evidence outweighed the potential for undue prejudice in light of the lack of physical evidence in the case. (Tr.pp.261-63). After considering the arguments of counsel, the trial judge found the similarities between the acts outweighed the dissimilarities due to the ages of the victims, the timing of the sexual abuse, the locations where the abuse occurred, the relationship between Applicant and his victims, the manner and type of sexual abuse, and the use of coercion or seduction on the victims. (Tr.p.264). Furthermore, the trial judge concluded the prior bad act evidence was not unfairly prejudicial in Applicant's case while offering to give a limited instruction if one was desired. (Tr.pp.265-67).

Following victim's testimony, her friend took the witness stand and testified about her relationship with Applicant before the jury. (Tr.p.306). It was similar to the in-camera hearing. (Tr.pp.306-17).

Additionally, mother testified about the details of how Applicant and victim began to regularly spend time together after meeting, and she noted victim's behavior began to change after she started associating with Applicant. (Tr.pp.62-67; pp.72-73). Mother further discussed victim's subsequent disclosure of the sexual abuse and their actions in response to that disclosure. (Tr.pp.75-78; p.89). Likewise, victim's older sister (sister) testified about her interactions with Applicant, and she indicated she believed something was going on between Applicant and victim based on the way Applicant treated her. (Tr.pp.97-99). Sister further noted she spoke with Appellant on the phone and exchanged text messages with him after they became friendly toward one another, and she stated Applicant informed her he loved victim most of all, while also referring to her as his "beautiful future wife" during their communications. (Tr.pp.100-01; pp.107-08; p.112). Furthermore, Dr. Mary-Fran Croswell, an expert in pediatric

medicine and child abuse pediatrics, testified about her examination of victim following the disclosure of the sexual abuse, indicated her examination of victim was normal, and noted a normal examination did not exclude the possibility of sexual abuse. (Tr.pp.332-38).

Applicant's former wife, Rachel, also testified for the prosecution.[3] (Tr.p.130). During her testimony, Rachel confirmed she and Applicant became friends with victim's family after meeting them at a horseshoe tournament in March of 2011, and she indicated victim began regularly visiting their home and sometimes spent the night there.[4] (Tr.pp.134-37; p.139). Rachel stated she became uncomfortable about the relationship and confronted Applicant, who reacted angrily. (Tr.p.138). Rachel further testified Applicant and victim were alone together numerous times during her visits, and she recounted on one occasion she found them lying on a couch together in the middle of the night with Applicant's leg draped over victim's legs. (Tr.p.148). After finding them in that position, Rachel confronted Applicant and he became very threatening. (Tr.p.149). Subsequently, Rachel indicated Applicant kicked her out of the home. (Tr.p.152). Rachel eventually revealed her concerns about Applicant and victim to victim's mother and Perry. (Tr.pp.157-59).

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[3] During trial, Rachel noted she obtained a divorce from Applicant at some point after the events involving victim occurred. (Tr.p.154; pp.172-73).

[4] At the outset of her testimony, Rachel indicated she met Applicant, who was twenty-six years old at the time, in September of 2008 when she was a seventeen-year-old high school student. (Tr.p.131). She further stated he convinced her to move in with him within two weeks of initially meeting her, and they got married less than a year later. (Tr.pp.132-34; pp.175-76). Rachel indicated Applicant was abusive and manipulative toward her, and she noted he forced her to make a false allegation of sexual abuse against her father that she subsequently recanted. (Tr.pp.143-44; pp.165-66; p.175; pp.178-79). Later during trial, Applicant confirmed he met Rachel when she was seventeen and he was twenty-six, acknowledged she moved in with him two weeks later, and indicated she married him a few months later before giving birth to their first child together not long after that. (Tr.pp.378-80; p.388). He asserted Rachel was violent and unfaithful towards him during the course of their relationship and claimed they both decided together for her to file a rape allegation against her stepfather. (Tr.pp.382-83).

At the conclusion of the State's case, Applicant elected to testify. (Tr. p. 362; p. 376). During his testimony, Applicant asserted he first met victim's family at a horseshoe tournament in 2011, but claimed he did not speak to either victim or her friend at that time.[5] (Tr.pp.394-95). Applicant testified he and Rachel began regularly visiting with victim's family while victim began visiting his home to babysit his daughter. (Tr.pp.394-96). After victim began visiting, Applicant acknowledged she spent the night at his home on some occasions, but he claimed she was never alone with him and simply played with his daughter, played video games, and used his "humongous" television.[6] (Tr.pp.398-99). Applicant stated he eventually stopped spending time with victim's family due to their alleged violent tendencies, and he denied victim visited him at one of the homes he moved to in Travelers Rest. (Tr.pp.408-10). Subsequently, in October of 2012, Applicant claimed he cut off all ties with victim's family after discovering victim's father had secretly added multiple vehicles to his insurance policy. (Tr. pp. 415-18). As Applicant's testimony continued, he insisted he only possibly saw victim in passing after cutting off ties with her family, and he denied the victim's friend had ever been to his home. (Tr.pp.418-19). Applicant further denied having an inappropriate relationship with either victim or her friend, and he insisted he had never heard about an abandoned house and had never discussed going to a country music concert with anyone. (Tr.pp.420-21).

On cross-examination, the solicitor asked Applicant if he sent a text message to victim's father in regard to his divorce from Rachel, and Applicant insisted he did not send the message

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[5] At the outset of his testimony, Applicant asserted he was disabled due to a diagnosis of attention deficit hyperactivity disorder and had been receiving disability benefits since the age of thirteen as a result. (Tr.p.377).

[6] Applicant further indicated he tried to keep witnesses around him all the time to verify his innocence because he had been accused of many things during his lifetime. (Tr.pp.400-01; p.440).

while contending someone else had been sending messages pretending to be him. (Tr.pp.424-25). Defense counsel objected to the questioning while asserting a foundation had not been established regarding the text messages the solicitor was attempting to have Applicant read, and the trial judge sustained the objection. (Tr.pp.425-26). Following the exchange, the solicitor asked Applicant if he sent a text message to victim's father asking if he was going to drop the charges, and Applicant denied he sent such a message. (Tr.p.426). Defense counsel again objected, and the trial judge sustained the objection before excusing the jury from the courtroom. (Tr.p.426).

Once the jury was excused, the solicitor noted it was permissible for her to question Applicant about statements he was alleged to have made, and she further asserted she could call a witness in rebuttal to establish a foundation if she moved to admit the actual text messages themselves into evidence. (Tr.p.427). In response, defense counsel asserted a foundation had to be established before the solicitor could ask questions regarding the messages, and the trial judge inquired of defense counsel why the solicitor could not ask Applicant if he made a particular statement. (Tr.pp.427-28). Defense counsel then replied: "I think she – well, she can ask if he makes a statement, Your Honor. But she was, actually, reading the text messages verbatim." (Tr.p.428). The trial judge and defense counsel then continued to discuss the matter, and defense counsel confirmed his concern was the solicitor's questions allegedly created the appearance she was publishing something that had not been admitted into evidence. (Tr.pp.428-429). After that discussion, the following exchange occurred:

> **[Defense Counsel]**: But my issue is not necessarily, Your Honor, that [the solicitor]'s asking [Appellant] that. That's fine. But she's, actually, walking up to him, laying these down in front of him as they were – as though they were a statement that he gave.
>
> **[Trial Judge]**: Yes, I know. That's why I sustained the objection

when you objected to that. But, I mean, I think she can ask about alleged previous statements the witness –

[Defense Counsel]: Well, I would agree with that.

[Trial Judge]: – who was a party, made.

[Defense Counsel]: Yeah, I would agree with that, Your Honor. I just – when she – she, at first, seemed as though she was, actually, going to have him read it. Then she's questioning him about it while it's laying up there in front of him. And I, clearly, believe that's improper.

[Trial Judge]: Well, I overrule the objection.

(Tr.p.429).

Thereafter, the solicitor resumed her cross-examination and asked Applicant if he sent a text message to victim's father about how they could go to Oklahoma and make money if he would drop the bogus charges, and Applicant denied sending such a message. (Tr.pp.432-33). The solicitor also asked Applicant if he sent a text message to sister about tickets for a country music concert, and Applicant denied doing so while insisting he never sent a text message to sister on any occasion. (Tr.pp.435-37). After that, the solicitor asked Applicant if he sent a text message to sister indicating victim was his favorite, and Applicant again insisted he never sent a text message to sister about anything. (Tr.pp.437-38). As her cross-examination of Applicant continued, the solicitor asked Applicant if he knew the victim's friend, and he responded he did not and had only met her on two occasions. (Tr.p.455). The solicitor then inquired if Appellant had sent a Facebook message to the victim's friend a few weeks earlier, and Applicant denied doing so while challenging the solicitor to prove it. (Tr.pp.454-55).

Subsequently, the defense rested its case, and the solicitor indicated she did not believe it was necessary for her to call any rebuttal witnesses. (Tr.p.463). The parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law.

(Tr.pp.465-506). At the conclusion of trial, the jury convicted Applicant as indicted. (Tr.pp.510-11). Following the verdict, the trial judge sentenced Applicant to an aggregate term of imprisonment of twenty-five years. (Tr.pp.516-17).

ALLEGATIONS

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

1. Prosecutorial Misconduct
2. Due Process violations
3. Ineffective assistance of counsel

Applicant amended his application on May 22, 2018, and October 25, 2018, alleging he is being held in custody unlawfully for the following reasons:

1. Trial counsel failed to object to improper questions by the prosecutor concerning text messages with Walt Mucienko and a minor and an alleged incident with another minor when there was no factual basis for the questions.
2. Trial counsel failed to interview and call several witnesses who could have refuted much of the testimony of the witnesses against me.
3. Trial counsel failed to investigate and obtain records from various sources that could have refuted much of the testimony against me.
4. Trial counsel failed to introduce family court records that would have established the ground for my divorce and therefore the cross examination by the state would have been proven to be inaccurate.
5. Trial counsel failed to object to the questions by the state as to alleged drug dealing which had no basis in fact.
6. Trial counsel failed to introduce the pleadings from the divorce which would impeach the testimony of my ex-wife.
7. Trial counsel failed to subpoena my medical doctor to prove I was allergic to latex.
8. Trial counsel failed to object to the improper testimony of Dr. Mary Fran Croswell.
9. Appellate counsel failed to perfect an appeal to the South Carolina Supreme Court on the issue of the admissibility of other bad act under 404b.
10. Trial counsel failed to object to the questions by the solicitor concerning an alleged charge pending against me that was brought by Angelina Campbell.
11. Trial Counsel failed to object to the hearsay testimony of Officer Robert Perry when he testified as the statements the minor child as to the details of the alleged sexual assault. The statements are hearsay and trial counsel should have objected.
12. Trial counsel failed to object to the testimony of Officer Robert Perry when he gave an opinion as an expert to the delayed disclosure of sexual abuse when he had not been qualified as an expert in this field.

13. During the direct examination of Officer Paul Floyd, the assistant solicitor elicited a response that minor child had identified myself as the alleged suspect. This hearsay testimony was not objected to my trial counsel.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Walter Mucienko's Testimony

At the start of the evidentiary hearing, Applicant called Walter Mucienko (Walter), the victim's father, to ask him about the text messages allegedly exchanged between himself and Applicant. Walter testified he never sent any text messages to Applicant about dropping the charges, further stated he did not use Verizon as his carrier as indicated on the messages and instead previously used Sprint, and stated he was threatened by Applicant and his friends. Walter ended his testimony by reiterating he never sent texts to Applicant and someone had falsified the messages.

Applicant's Testimony

Applicant testified he also never exchanged text messages with Walter, and specifically noted the messages had been forwarded, the phone number was not his, and the texts should not have been used at trial. Applicant stated trial counsel should have objected to the admission of the texts because he did not send them and they were very prejudicial to his defense. Applicant also addressed Facebook messages the solicitor asked him about at trial. The messages were sent by a man named Jay Fowler to a young girl. (Tr.pp.444-45; pp.454-55). Applicant testified counsel should have objected because the solicitor could not prove he sent the messages and he did not see the messages before trial. Further, Applicant stated counsel should have objected more strongly when the solicitor brought up a no contact order and pending charge involving his fiancée. (Tr.pp.445-47).

Applicant also testified there were other instances trial counsel should have objected,

including to hearsay statements by Perry when he testified the victim identified Applicant as her abuser and statements made when he was not qualified as an expert. Applicant testified counsel also should have objected to hearsay statements of Floyd who also testified the victim identified Applicant. Finally, Applicant testified he told counsel he was allergic to latex and could not have worn a condom as the victim stated he did, but counsel did not call his doctor to confirm the allergy. Applicant stated counsel's deficiency prejudiced him because he could have presented evidence to dispute the victim's claim.

Regarding the claim of ineffective assistance of appellate counsel, Applicant testified he was prejudiced because counsel did not continue with the appeal. After failing to prevail at the Court of Appeals, counsel advised Applicant by letter to file for PCR rather than petition for review in the Supreme Court. Applicant testified he was prejudiced by counsel's advice to proceed to PCR rather than continue with his appeal.

On cross-examination, Applicant testified he met with trial counsel twice and admitted he rejected a plea offer with a sentencing range of zero to twelve years. Applicant also stated he testified at trial despite a "mental condition" which caused him to become excited, angry, and speak fast so that he did not always understand the questions being asked of him. When confronted with specific cites to the trial transcript, Applicant acknowledged counsel objected to the text messages but not in the manner he wanted him to, and acknowledged counsel attempted to admit a note from his doctor about his latex allergy. Applicant also agreed he testified at trial about his divorce with Rachel to refute her testimony.

Trial Counsel's Testimony

Trial counsel testified he had been practicing criminal law in South Carolina since 1992. Counsel stated Applicant retained him, they met on numerous occasions, and he was well

prepared to handle the case. Counsel testified he shared discovery with Applicant who understood the process and helped him develop a trial strategy. Counsel indicated there were few fact witnesses to call to testify on Applicant's behalf at trial given it was a "he said/she said" situation. Counsel testified Applicant always maintained nothing happened between himself and the victim and their strategy was to attempt to convince the jury the whole thing was a false allegation concocted by Applicant's ex-wife Rachel and her friend to benefit Rachel during a "nasty divorce." Counsel stated he attempted to introduce documents from the Family Court divorce proceeding to rebut and impeach Rachel's testimony; however, the trial court denied his request. (Tr.pp.365-75). The record reflects Applicant was asked about the divorce and the reason why he filed for divorce which he asserted was adultery, even though Rachel denied it. (Tr.p.172; p.414).

Trial counsel testified he prepared Applicant to testify and discussed with him the pros and cons of doing so, and it was Applicant's decision to testify at trial. Counsel stated Applicant had a "volatile" personality and he knew the solicitor would try to "get under his skin," so he tried his best to prepare him for her questions. Counsel testified there was no physical evidence in the case, so Applicant's credibility was critical.

Turning to the other allegations of ineffective assistance of counsel, trial counsel testified he, in fact, objected to the use of text messages allegedly sent between Applicant and Walter and the trial court initially sustained the objection, before overruling him and allowing the solicitor to ask Applicant about the texts. (Tr.pp.425-30). Regarding the medical opinion offered by the doctor about the victim's normal examination, counsel testified she was qualified as an expert, her testimony was within the scope of her expertise so he did not believe he could object to it, and he felt he could best handle her opinion during cross-examination. Counsel stated the

testimony by Perry and Floyd in which they stated the victim identified Applicant as her abuser was technically hearsay, but he did not object to it. Counsel stated he did not believe it would have been beneficial to object because the information was going to come out anyway during the victim's testimony. Moreover, counsel testified, in his experience as a criminal defense attorney, their testimony was properly admitted based on their prior investigation into the case. As to the solicitor's questions about a pending charge and no contact order involving Applicant's fiancée, counsel testified he agreed it was prejudicial, but he objected to the questions which the trial court sustained, and Applicant refuted the information in front of the jury. On cross-examination, counsel acknowledged he did not object to the solicitor's limited questions about whether Applicant supplemented his income by "selling pills or pot" and acknowledged the solicitor told the trial court Applicant had no criminal history that could be used to impeach him when he testified. Counsel testified it was not his general practice to object during cross-examination of any of his clients unless the questions were unduly prejudicial.

Appellate Counsel's Testimony

Appellate counsel testified he had thirty years' experience as an attorney with focuses on criminal law and appellate practice. Counsel indicated he did research and kept up with case law to help identify issues on appeal. Counsel stated it was his advice not to petition to the Supreme Court following the adverse decision in the Court of Appeals in Applicant's appeal and it was in Applicant's best interests to move on to PCR. Counsel believed, based on his professional opinion, there was not a high probability the Court would overturn *Wallace*,[7] so he did not think the petition had a high chance of success.[8]

[7] *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).

[8] One of the issues raised in Applicant's appeal was whether the trial court erred in admitting

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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 at the post-conviction relief hearing. This Court further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony. As a matter of general impression, this Court finds trial counsel's testimony was credible and persuasive on all matters, while also finding applicant's testimony and assertions lack credibility. These credibility findings have been applied to the Court's findings set forth below. Pursuant to S.C. Code Ann. §17-27-80, the Court makes the following findings of facts and conclusions of law based on the probative evidence presented.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (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 [it] cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 686. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, an applicant must prove counsel's performance was deficient. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

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evidence of prior bad acts pursuant to *Wallace*. *See State v. Gaskins*, Op. No. 2017-UP-166 (S.C. Ct. App. filed Apr. 19, 2017). At the time Applicant's appeal was pending, a similar case was also awaiting a decision before the Supreme Court, *State v. Perez*, 423 S.C. 491, 816 S.E.2d 550 (2018).

Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have 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 to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. 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.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds applicant has failed to carry his burden of proof and has not established any ineffectiveness of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by applicant:

Ineffective Assistance of Counsel

Failure to Object
(Allegations 1, 5, 8, 10, 11, 12, and 13)

Applicant alleges trial counsel was ineffective in failing to object to the testimony of several witnesses, as well as improper questions about text messages, selling drugs, and a pending charge. This Court finds Applicant has failed to meet his burden on all of these claims as they are matters of trial strategy, and dismisses them with prejudice.

First, the record directly contradicts Applicant's allegation trial counsel did not object to

the questions regarding text messages or Facebook messages. During cross-examination at trial, the solicitor asked Applicant if he and the victim's father sent texts to each other. (Tr.pp.424-25). Counsel immediately objected to the lack of foundation, twice, and the trial court sustained the objection both times. (Tr.pp.425-26). However, following arguments outside the presence of the jury, the trial court overruled a subsequent objection. The solicitor continued her cross-examination which included questions about the texts and later about Facebook messages sent to the victim's friend. This Court finds counsel's performance at trial was reasonable. Counsel objected to questions about the messages twice, the objections were sustained, and counsel further argued against the questions outside of the jury's presence, which was ultimately overruled. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (citing *Strickland*, 466 U.S. at 690) ("Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."). It is unclear from the record what more counsel could have reasonably done to prevent further questions about the messages. Additionally, this Court finds it is pure conjecture to claim any further objection would have affected the outcome at trial.

Second, Applicant alleges trial counsel should have objected when the solicitor asked him whether he sold drugs, and about a no-contact order and pending charge involving his fiancée. Again, the record refutes the contention counsel did not object to the questions regarding a pending charge involving Applicant's fiancée. Counsel objected to the question, the trial court sustained the objection, and Applicant contradicted the solicitor about the charge in front of the jury. At the hearing before this Court, counsel acknowledged he did not object to the solicitor's limited questions about whether Applicant sold "pills or pot." However, counsel testified it was not his general practice to object during cross-examination of any of his clients

unless the questions were unduly prejudicial. While acknowledging the question was prejudicial, it was also limited and counsel did not believe it was so prejudicial to warrant an objection. Accordingly, the record is clear counsel exercised his professional judgment in determining when to object during cross-examination of Applicant and this Court will not second guess counsel's judgment, or his articulated trial strategy. Because counsel had a valid, strategic reason for objecting when he did during Applicant's cross-examination, his performance was reasonable. "When counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). Applicant cannot meet his burden on this claim.

Next, Applicant asserts trial counsel was ineffective in failing to object to the improper testimony of Dr. Mary-Fran Croswell (Croswell). The doctor testified the victim had a normal examination, but that "doesn't exclude sexual abuse." (Tr.pp.337-38). Counsel testified his strategy in dealing with an expert such as Croswell was to let her give her opinion on direct examination because he felt could best handle it during cross-examination. This Court finds counsel's strategy was reasonable. *See Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing *Goodson v. United States*, 564 F.2d 1071 (4th Cir. 1977)) (holding courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel). The record reflects counsel asked pointed questions of the doctor regarding her physical examination and tried to elicit inconsistencies for the jury. Applicant cannot demonstrate how a different strategy would have been more successful or how an objection would have changed the outcome at trial.

Finally, Applicant alleges trial counsel was ineffective in failing to object to the hearsay testimony of deputy Floyd and investigator Perry at trial who both testified the victim identified Applicant as her abuser. Floyd testified prior to the victim at trial, and Perry testified after she did. Counsel credibly testified that while he believed the testimony was technically hearsay, he did not object to it because the information was going to come out anyway during the victim's testimony, so he did not believe it would have been beneficial to object. Moreover, counsel testified, in his experience as a criminal defense attorney, their testimony was properly admitted based on their prior investigation into the case. This Court finds counsel's strategy was reasonable based on his experience as a criminal defense attorney. *See Edwards*, 392 S.C. at 456, 710 S.E.2d at 64 ("When counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel."). While counsel was correct the statement was technically hearsay, counsel was also drawing on his years of experience to know any objection would have been futile. At the time of Applicant's trial in February 2015, any objection would have been overruled because a law enforcement officer could testify for the limited purpose of explaining why an investigation was undertaken. It was not until 2017 when our Supreme Court cautioned against the use and admission of "investigative information" so as not to circumvent the rules against hearsay. *See State v. King*, 422 S.C. 47, 66-67, 810 S.E.2d 18, 28 (2017). Trial counsel cannot be deficient for failing to object to the testimony when no case law existed at the time of Applicant's trial cautioning against the use of similar testimony. Reasonable representation does not require counsel to foresee successful appellate challenges to novel questions of law. *See e.g.*, *Thornes v State*, 426 S.E.2d 764, 765 (S.C. 1993) (holding attorneys are not required to be clairvoyant, or to anticipate changes in the law, or facts which did not exist at the time of the trial). Regardless, the

statements by Floyd and Perry were not prejudicial to Applicant because they were cumulative to the victim's testimony. *See State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996) (explaining when "hearsay is merely cumulative to other evidence, its admission is harmless"). Accordingly, Applicant cannot meet his burden on this claim.

Therefore all of these allegations are denied and dismissed with prejudice.

Failure to Interview/Call Witnesses
(Allegations 2 and 7)

Next, Applicant alleges trial counsel was ineffective in failing to interview and call witnesses who could have refuted "much of the testimony of the witnesses against me" and to call his doctor to testify about a latex allergy which would have refuted the victim's testimony Applicant used a condom during the abuse. However, Applicant failed to present any of these witnesses at his evidentiary hearing or otherwise offer any evidence as to what their testimony would have been. Accordingly, any assertion that they would have provided favorable testimony or changed the outcome at trial is purely speculative.

This Court finds Applicant has failed to meet his requisite burden of proof as to this allegation. *See Smith v. State*, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (Ct. App. 2012) (finding an applicant failed to meet his burden of proof where he failed to present any testimony from the alleged character witnesses at the PCR hearing in order to establish prejudice from the lack of testimony of these witnesses at trial); *see also Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (noting our courts have "repeatedly held a PCR 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 witness' failure to testify at trial").

This Court notes trial counsel is an experienced criminal defense attorney who testified

he was well prepared to handle the case. This Court finds counsel's testimony more credible than Applicant's that counsel understood the case, reviewed discovery, and worked with Applicant to develop a trial strategy. Counsel also noted there were few fact witnesses to interview or call on Applicant's behalf because it was a "he said/she said" situation. *See Strickland*, 466 U.S. at 691 (stating counsel's actions are often based on information supplied by the defendant). Moreover, regarding testimony from Applicant's the doctor, the record directly refutes Applicant's allegation. The trial transcript demonstrates trial counsel told the trial court he wanted to have the doctor there to testify but it was "not possible" and attempted to submit a note from the doctor regarding a latex allergy. (Tr.p.5; pp.365-75). Applicant also admitted during his testimony before this Court counsel attempted to present evidence of his allergy. Accordingly, this Court finds applicant fails to prove either prong of *Strickland*. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (explaining an applicant bears the burden of proving the allegations in his or her application). Therefore, this allegation is denied and dismissed with prejudice.

Failure to Investigate
(Allegation 3)

Applicant asserts trial counsel failed to investigate and obtain certain documents, such as lease agreements and cell phone records, which could have been used to refute the victim's testimony. This Court finds Applicant has failed to present any credible evidence to support this allegation.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation," which includes making an independent investigation of the facts of the case. *Edwards v. State*, 392 S.C. at 456, 710 S.E.2d at 64. Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere

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speculation as to result. *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a decision not to investigate must be directly assessed for reasonableness, applying a heavy measure of deference to counsel's judgments. *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003).

Trial counsel testified he reviewed all discovery, discussed it with Applicant, conducted an independent investigation, and met with Applicant numerous times, and developed a trial strategy. This Court finds counsel's actions were reasonable. *See Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690) (holding under the deficiency prong, an attorney's performance is measured by its "reasonableness under prevailing professional norms"). This Court also finds counsel's testimony more credible than Applicant's on this issue, particularly where Applicant failed to produce to this Court any of the purported leases, cell phone agreements, or other documents he alleges would have refuted the victim's testimony. Consequently, any assertion the documents would have changed the outcome at trial is purely speculative and trial counsel cannot be ineffective. *See Porter*, 368 S.C. at 385-86, 629 S.E.2d at 357 (holding failure to investigate does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result). Accordingly, this Court finds Applicant has failed to meet his requisite burden of proof. This allegation is denied and dismissed with prejudice.

Failure to Introduce Records
(Applicant's Allegations 4 and 6)

Next, Applicant contends trial counsel was ineffective in failing to introduce Family Court records from his divorce to refute the testimony of his ex-wife, and impeach her testimony about the reason he filed for divorce. This Court finds the record directly refutes this allegation

as counsel attempted to introduce the Family Court pleadings, but the trial court denied the request. Further, Applicant has failed to demonstrate what introducing the documents would have brought out to the jury when he actually testified to the reason for his divorce. Accordingly, this claim is without merit.

Both trial counsel and Applicant testified about this issue at the evidentiary hearing. This Court finds counsel's testimony more credible than Applicant's. At trial, counsel cross-examined Rachel, Applicant's ex-wife, about the divorce. She testified Applicant sought the divorce based on a one-year separation and not adultery. (Tr.pp.172-73). The record demonstrates counsel tried to establish through his questioning of Rachel the stated trial strategy she and Applicant went through a "nasty divorce" and the alleged abuse was a "false allegation" made up by Rachel and her friend to benefit Rachel during the divorce. At the evidentiary hearing, counsel testified, and the trial transcript reflects, he tried to introduce the pleadings from the divorce proceedings to refute and impeach Rachel's testimony, given that she gave an incorrect answer about the reason Applicant filed for divorce. Counsel engaged in a lengthy argument before the trial court in an attempt to gain a favorable ruling, but the court ultimately ruled the Family Court records were not admissible. (Tr.pp.365-75). Applicant later testified at trial about why he sought the divorce and told the jury he filed alleging adultery. (Tr.p.414). Applicant also acknowledged during his testimony to this Court he himself refuted Rachel's testimony by telling the jury about his reasons for filing for divorce. Applicant has failed to demonstrate to this Court how counsel was ineffective. Counsel effectively cross-examined the witness in an attempt to discredit her before the jury and then attempted to introduce the records from the couple's divorce proceeding. The record reflects counsel made reasonable arguments before the trial court, but was ultimately unsuccessful. This Court will not second guess counsel's trial tactics, particularly where this

Court must make "every effort" to "eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. *Strickland*, 466 U.S. at 689. This Court finds counsel's efforts regarding the Family Court records were not deficient.

Because Applicant cannot demonstrate the first prong of *Strickland*, he also fails to prove he was prejudiced by trial counsel's failure to introduce the Family Court records. Particularly where there is nothing in the record to indicate the trial court would have made a different ruling regarding the admissibility of the documents had counsel used different language during his argument before the court. Accordingly, this Court finds this allegation must be denied and dismissed with prejudice.

Ineffective Assistance of Appellate Counsel
(Applicant's Allegation 9)

Applicant alleges appellate counsel was ineffective in failing to file a petition for writ of certiorari to the Supreme Court in his direct appeal. However, Applicant had no right to seek discretionary review, and therefore, no right to effective representation when seeking such review. *See Douglas v. State*, 369 S.C. 213, 216, 631 S.E.2d 542, 543-44 (2006) ("We find that the decision whether to pursue certiorari is a matter left solely to the appellant's attorney's professional discretion."); *see also Jones v. Barnes*, 463 U.S. 745 (1983) (explaining appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on direct appeal). Appellate counsel testified he did not seek certiorari because he did not think it was warranted based on his professional opinion, specifically he believed it was in Applicant's best interests to file for PCR rather than continue pursuing a direct appeal. Therefore, Applicant cannot establish any constitutional ineffectiveness in appellate counsel's decision not to seek certiorari in his case once the Court of Appeals affirmed his convictions, and this Court finds this allegation must be denied.

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CONCLUSION

Based on the foregoing, this Court finds applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief.

The Court notes the applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek review, PCR counsel must file a notice of appeal on the applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for further procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The PCR application is denied and dismissed with prejudice; and

2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 1st **day of** February**, 2019.**

THE HONORABLE ALEX KINLAW, JR.
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

Copy mailed to
Attorney general / Wilkes
on 2/4/19.

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Jerald D. Gaskins Jr., 362923 Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT 2017-CP-23-5901 **ORDER DENYING APPLICANT'S 59(e) MOTION TO ALTER OR AMEND JUDGMENT** ENTERED COMPUTER

'19 MAR 5 AM 10:12
Paul Wickensimer CGC GVL SC

This matter comes before the Court by way of Applicant's Rule 59(e) Motion to alter or amend its order of dismissal denying the application for post-conviction relief.

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. In April of 2013, the Greenville County Grand Jury indicted Applicant for four counts of criminal sexual conduct with a minor second degree (2013-GS-23-3231, 3232, 3234, 3235) and two counts of lewd act upon a child (2013-GS-23-3233, 3236). Randall L. Chambers represented Applicant. Applicant proceeded to trial on February 4, 2015, before the Honorable D. Garrison Hill and a jury. The jury found Applicant guilty of all charges. Judge Hill sentenced Applicant to concurrent twenty-year terms of imprisonment for each of the second-degree criminal sexual conduct with a minor convictions, a concurrent fifteen-year term of imprisonment for one of the lewd act convictions, and a consecutive five-year term of imprisonment for the remaining lewd act conviction.

Applicant filed a timely notice of appeal. J. Falkner Wilkes, Esquire perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's convictions on February 1,

MJ #1

2017. *State v. Gaskins*, Op. No. 2017-UP-166 (S.C. Ct. App. filed April 19, 2017). The remittitur was returned to the circuit court on May 5, 2017.

II. Current Post-Conviction Relief Action

On September 14, 2017, Applicant filed an application for post-conviction relief. An evidentiary hearing into the matter was convened on October 24, 2018, at the Greenville County Courthouse before the Honorable Alex Kinlaw, Jr. Applicant was present and represented by C. Rauch Wise. Respondent was represented by DeShawn H. Mitchell and Sherrie Butterbaugh of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf. Trial counsel Randall L. Chambers and appellate counsel J. Falkner Wilkes also testified. Applicant also called Walter Mucienko to testify on his behalf at the hearing.

By written order signed February 1, 2019, and filed February 4, 2019, Judge Kinlaw denied and dismissed the application with prejudice. Applicant subsequently filed a Motion to Alter or Amend the Judgment dated February 19, 2019. Respondent submitted a return on or about March 1, 2019.

III. Applicant's Motion to Alter or Amend is Denied

This Court finds its Order of Dismissal contains the required findings of fact and conclusions of law necessary to dispense with Applicant's allegations as required by S.C. Code Ann. § 17-27-80 and Rule 52(a), SCRCP; *see also McCray v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991). This Court further finds its Order of Dismissal addresses and disposes of all allegations properly raised. This Court finds there was insufficient evidence presented at the evidentiary hearing to raise new allegations not previously raised in the application for relief. *See* Rule 71.1(e), SCRCP (stating the burden of proof is on the applicant to prove the allegations

by a preponderance of the evidence). Having carefully reviewed the record in this matter and arguments presented, this Court finds there is no basis for altering or amending its prior ruling.[1] Therefore, this Court hereby denies Applicant's motion in its entirety, and affirms the previous order of dismissal.

This Court notes if Applicant wishes to seek appellate review of this order and the order of dismissal, a notice of appeal must be filed and served within thirty days of the service of this order. Applicant is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

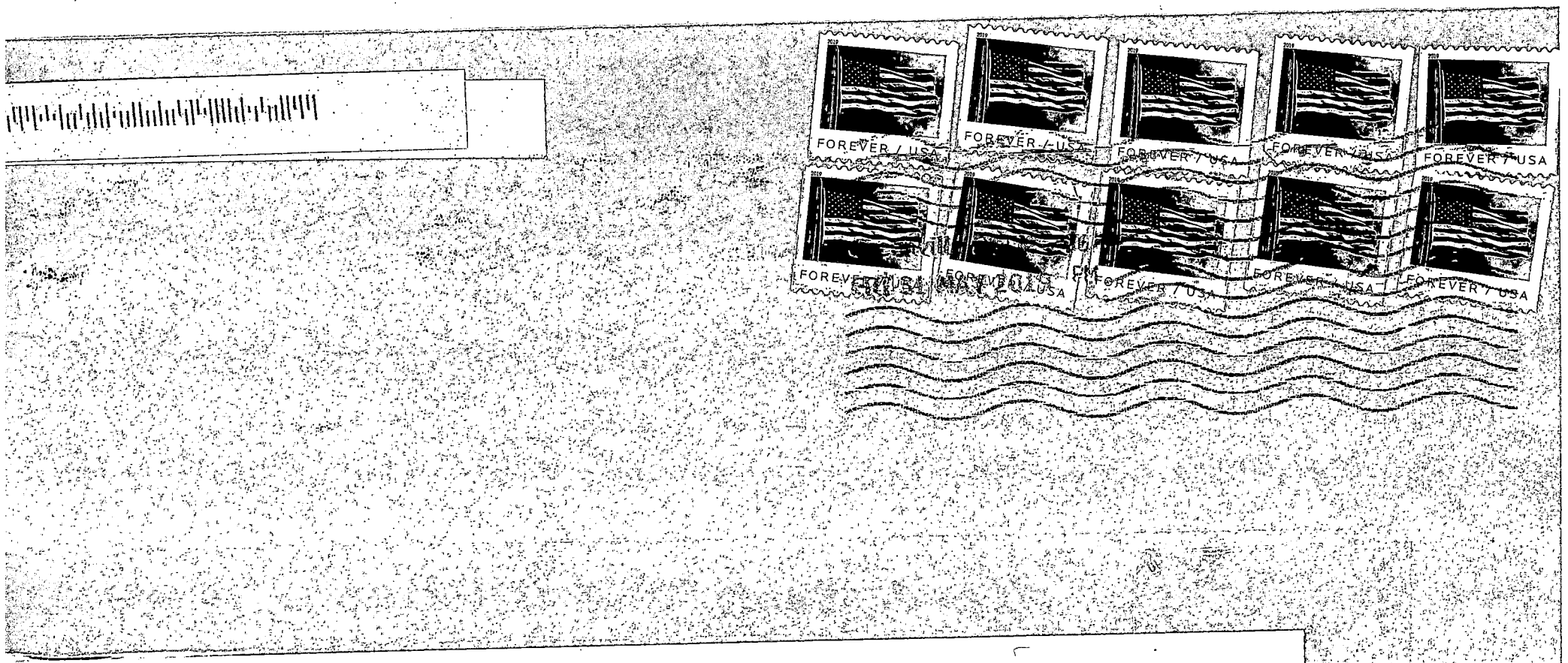
AND, IT IS SO ORDERED this 4th day of May, 2019.

THE HONORABLE ALEX KINLAW, JR.
Presiding Judge
Thirteenth Judicial Circuit

Gaffney, South Carolina

Copy mailed to
Attorney General / Rauch Wise
on May / 28 / 2019.

[1] The Court, in its discretion, has considered this matter based upon the motions submitted by the parties and the post-conviction relief file, since oral argument will not aid the Court in reaching its decision. *See* Rule 59(f), SCRCP.



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