

# Law Office of Leah B. Moody, LLC

Leah B. Moody  
lbmatty@comporium.net

235 East Main Street, Suite 115  
Post Office Box 1015 (29731)  
Rock Hill, South Carolina 29730  
Telephone (803) 327-4192  
Facsimile (803) 329-1344

RECEIVED

JUL 08 2019

S.C. SUPREME COURT

June 26, 2019

The Honorable Daniel E. Shearouse  
The Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29221

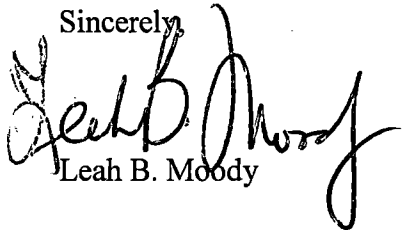
**RE: Stephen Douglas Berry, #188112 v. State of South Carolina**  
**C.A. No.: 2017-CP-44-0259**

Dear Mr. Shearouse:

The Union County Court of Common Pleas appointed my office to represent **Stephen Berry** in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal and Proof of Service in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope. Also enclosed is a copy of the Order Dismissing the Post-Conviction Relief Application.

Thank you for your assistance with this matter.

Sincerely,



Leah B. Moody

LBM/bd

Enclosures

cc Stephen Berry  
Janell H. Gregory, Esquire, SC Attorney General's Office  
The Honorable Melanie Lawson, Clerk of Court, Union County  
Sharon Graham, SCCID

**IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

**RECEIVED**

JUL 08 2019

S.C. SUPREME COURT

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**APPEAL FROM UNION COUNTY  
Court of Common Pleas**

**The Honorable Thomas A. Russo, Presiding in Union County**

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**Case No. 2017-CP-44-0259**

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**Stephen Douglas Berry, #188112, ..... Appellant,**

**v.**

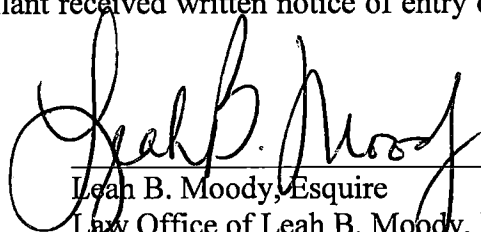
**State of South Carolina, ..... Respondent.**

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**NOTICE OF APPEAL**

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Stephen Berry appeals the order of the Honorable Thomas A. Russo, dated June 12, 2019, and mailed on June 20, 2019. Appellant received written notice of entry of the final order on June 25, 2019.

  
\_\_\_\_\_  
Leah B. Moody, Esquire  
Law Office of Leah B. Moody, LLC  
235 E. Main Street, Suite 115  
Post Office Box 1015  
Rock Hill, South Carolina 29731

Other Counsel of record:  
Janell H. Gregory, SC Attorney General's Office  
Attorney for Respondent  
Rembert C. Dennis Building  
Post Office Box 11549  
Columbia, South Carolina 29211-1549  
(803) 734-3970

IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

JUL 08 2019

APPEAL FROM UNION COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Thomas A. Russo, Presiding in Union County

Case No. 2017-CP-44-0259

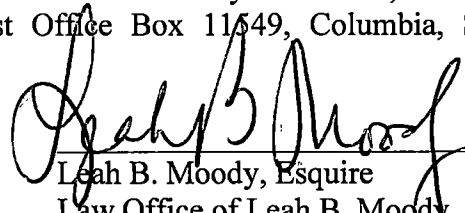
Stephen Douglas Berry, #188112, #367470, ..... Appellant,

v.

State of South Carolina, ..... Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Janell H. Gregory, Esquire, SC Attorney General's Office, by depositing a copy of it in the United States Mail, postage prepaid, on June 26, 2019, addressed to its attorney of record, Janell H. Gregory, SC Attorney General's Office, Post Office Box 11549, Columbia, South Carolina, 29211-1549.

  
Leah B. Moody, Esquire  
Law Office of Leah B. Moody, LLC  
235 E. Main Street, Suite 115  
Post Office Box 1015  
Rock Hill, South Carolina 29731

June 26, 2019

Cc Stephen Berry  
Janell H. Gregory, Esquire, SC Attorney General's Office  
The Honorable Melanie Lawson, Clerk of Court, Union County  
Sharon A. Graham, SCCID

STATE OF SOUTH CAROLINA )  
 COUNTY OF UNION )  
 )  
 Stephen Douglas Berry, #188112, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE SIXTEENTH JUDICIAL CIRCUIT

2017-CP-44-0259

RECEIVED

JUL 08 2019

ORDER OF DISMISSAL

S.C. SUPREME COURT

This matter comes before the Court by way of an application for post-conviction relief filed on June 30, 2017, by Stephen Berry (Applicant). The State (Respondent) filed a Return and Partial Motion to Dismiss on October 12, 2017, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on February 1, 2019, at the Moss Justice Center. Applicant was present at the hearing and represented by Leah Moody, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf. Assistant Public Defenders Erik Delaney (Delaney) and Melissa Inzerillo (Inzerillo) of the Sixteenth Circuit Public Defender's Office testified. League Creech, Esquire (Appellate Counsel) also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

**I. PROCEDURAL HISTORY**

The records before this Court establish Applicant is incarcerated within the South Carolina Department of Corrections pursuant to the Union County Clerk of Court's order of commitment. During its July 2012 term, the Union County Grand Jury indicted Applicant for criminal sexual conduct with a minor, second degree (2012-GS-44-0413). Delaney and Inzerillo represented

Applicant. The case was prosecuted by Deputy Solicitor John Anthony of the Sixteenth Circuit Solicitor's Office.

On July 17, 2012, Applicant proceeded to trial before the Honorable Edward Miller. The jury could not reach a unanimous verdict.

On February 5, 2013, Applicant proceeded to trial again before the Honorable John C. Hayes. On February 8, 2013, the jury returned a guilty verdict and Judge Hayes sentenced Applicant to imprisonment for fifteen years.

Applicant filed a timely notice of appeal. Appellate Counsel and Chief Appellate Defender Robert Dudek, Esquire, of the Office of Appellate Defense, perfected the appeal. In his brief to the South Carolina Court of Appeals, Applicant raised the following issues:

I. Did the trial court err in allowing the victim to testify regarding alleged other acts which exceeded the scope of the indictment and which were not criminal in nature?

II. Did the trial court err in failing to suppress inadmissible aspects of the State's expert's testimony?

Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction on July 15, 2015. State v. Berry, 413 S.C. 118, 775 S.E.2d 51 (Ct. App. 2015). Applicant filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on August 14, 2015. The State filed its Return to Petition for Rehearing on September 21, 2015. The South Carolina Court of Appeals denied the Petition for Rehearing by order dated November 20, 2015. Applicant subsequently filed a Petition for Writ of Certiorari on January 11, 2016. The State filed its Return to Petition for Writ of Certiorari to the South Carolina Supreme Court on February 9, 2016. On December 7, 2016, the Supreme Court affirmed the Court of Appeals' decision, as modified. State v. Berry, 418 S.C. 500, 795 S.E.2d 26 (2016). The Remittitur was returned on December 30, 2016.

## II. SUMMARY OF FACTS

Victim lived with her father and siblings after her parents divorced. She also spent time with her grandmother. (Trial Transcript 101-102). Victim began attending New Life Baptist Church. Applicant served as the youth pastor for the church. (Trial Transcript 102; 142). After Victim got to know Applicant, he and his daughter, with whom Victim had become good friends, moved to a home very close to Victim's father.

After church one Sunday in May 2010, Victim intended to ride home with Applicant. Instead, he took her to his previous residence telling her he had to pick up some items and make sure his daughter got everything. (Trial Transcript 107-108). Once inside, Victim went to Applicant's daughter's room and verified she got everything. (Trial Transcript 108- 109). Applicant then came up behind Victim, hugged her, and touched her behind. (Trial Transcript 109-110). After a brief conversation, Applicant again approached Victim, hugged her, and told her she was beautiful. He then began rubbing her legs and unbuttoned and unzipped her pants. Victim pushed him away, but he came right back and pulled her pants and underwear down. He then placed his finger inside her vagina. (Trial Transcript 110-111).

After briefly walking away, Applicant began walking toward Victim again while unbuttoning and unzipping his pants. Applicant turned Victim around and attempted to sodomize Victim. After Victim was able to prevent him from doing so on several occasions, Applicant went to another part of the room and masturbated until he ejaculated. (Trial Transcript 112-113).

On the second occasion, Applicant lured Victim to his new house under the guise of showing her where all the bedrooms would be and letting her see the newly refurbished house. Once inside, they sat on the floor to talk about the boy Victim liked. Applicant attempted to stick his finger inside Victim's vagina. She resisted several times and "eventually gave in because there was no use in even trying to stop it." (Trial Transcript 116-117).

Victim testified to several more incidents of sexual battery by Applicant at his house and at her house. (Trial Transcript 117-122). She testified the incidents would occur at least once a week during the 2010-2011 school year. She further testified the incidents occurred in her room at her father's house, or over at Applicant's house. (Trial Transcript 122-125). Victim then explained one incident went farther than Applicant putting his finger inside her vagina. She explained while lying on the floor watching a movie, Applicant came up behind her and put his penis inside her vagina. Later he told her that she "wasn't a virgin anymore." (Trial Transcript 129-131). After an in-camera hearing, Victim continued testifying and explained Applicant continued to put his finger in her vagina at various times after she turned sixteen. She explained the continuing incidents occurred at her house, in his house, or in his car. (Trial Transcript 141).

### **III. ALLEGATIONS RAISED**

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

1. "Ineffective assistance of trial, appeal counsel"
  - a. "Failure to protect and preserve issue for appeal"
  - b. "Did trial counsel for defendant failure to object to prejudicial remarks in the prosecutor's closing arguments, going into details about allege abuse amount to deficient performance?"
  - c. "Did trial counsel for defendant failure to object to the inconsistency in the testimony by alleged victim and counsel's failure to raise motion of insufficient evidence deprive defendant of constitutional guarantee to effective assistance of counsel at trial stage?"
2. "Abuse of judge discretion, error of law"
  - a. "Judge's ruling based on error of law."
  - b. "Did trial judge abuse his discretion by swearing witness in and then limit the witness's testimony to what [sic] see may say given her testimony Ms. Berry?"
  - c. "Did trial court [sic] error in allowing the victim to testify regarding alleged other acts which exceeded the scope of the indictment May 1, 2010 through November 22, 2010 which was not criminal in nature?"
  - d. "Did trial court [sic] error in failing to suppress two inadmissible aspects of

the State's expert witness's testimony by not distinguishing experts qualification field? Testimony exceeded field of expertise was not allowed to diagnose PTSD."

3. "Prosecutorial misconduct/failure to prove penetration"
  - a. "Prosecutor stated defendant was guilty"
  - b. "Did the opening argument of case the detailed sexual acts allegedly committed and to what each witness was going to testify [sic] too amount [sic] too hearsay and prosecutorial misconduct?"

On February 1, 2019, an evidentiary hearing was convened. Respondent renewed the motion to dismiss Applicant's allegations of trial court error under the doctrine of *res judicata* and S.C. Code Ann. § 17-27-20(b) (2018). Respondent also renewed the motion to dismiss Applicant's allegations regarding abuse of discretion and error of law as not cognizable claims under the Post-Conviction Relief Act, S. C. Code Ann. §17-27-10 to -160. Applicant proceeded with the hearing on the remaining allegations in his application.

#### IV. APPLICABLE LAW

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

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Id.* at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. *Id.* Under this prong, courts measure an attorney's performance 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, 300 S.C. 115.

#### **V. FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's appellate records, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

#### **Ineffective Assistance of Counsel**

This Court finds Applicant has failed to meet his burden of proving he is entitled to post-conviction relief on any of the allegations of ineffective assistance of counsel. Applicant has failed to prove both deficiency and any prejudice therefrom.

#### ***Failure to protect and preserve issue for appeal as it pertains to Inzerillo***

Applicant alleges Delaney and Inzerillo were ineffective for failing to preserve Kimberly Roseborough's (Roseborough) testimony for appeal. Applicant testified that Roseborough testified as a medical doctor and she was not a doctor. Applicant testified Roseborough's testimony made the jury believe he was guilty. Applicant testified Roseborough's testimony to

the jury was that Victim was acting out because of what he had done. Applicant testified his lawyers did not preserve this issue for appeal according to the South Carolina Supreme Court decision. Applicant testified had his lawyers preserved this issue for appeal, he would not be in prison.

Inzerillo testified Roseborough did not tell the jury she was a doctor. Based on the trial transcript, Roseborough testified she is a psychotherapist and a licensed, independent social worker. (Trial Tr. 444.) Inzerillo testified she objected to Roseborough's testimony pursuant to State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), which had just been decided about two weeks prior to Applicant's trial. Inzerillo testified she discussed the holding of Kromah with Judge Hayes and the State outside the presence of the jury. Inzerillo testified when direct examination of Roseborough resumed, she continued to object to Roseborough's testimony. Inzerillo testified there was another discussion with Judge Hayes and the State outside the presence of the jury and it was decided that Roseborough would use the word "typical" rather than "consistent" during her testimony. Inzerillo testified she continued to object to Roseborough's testimony that was outside of Kromah. Inzerillo testified she did cross-examine Roseborough during the trial. Inzerillo testified during the trial, some of her objections were sustained and she did not move to strike the testimony because she did not want to highlight the testimony for the jury. Inzerillo testified she believed her objections preserved the issues for appeal and even moved to renew her objections at the close of the State's case in an effort to ensure preservation.

The South Carolina Court of Appeals found Inzerillo did preserve this issue for appeal and did a full analysis of Roseborough's testimony. In their analysis, Roseborough's testimony did not violate Kromah and was admissible under Schumpert<sup>1</sup> and Weaverling<sup>2</sup>. The South Carolina

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<sup>1</sup> State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).

<sup>2</sup> State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999).

Court of Appeals held, “Roseborough’s testimony explained the common behaviors and characteristics of a child sexual trauma victim. . . . Roseborough’s testimony regarding behaviors she witnesses in the victim was proper because it was based on her personal observations.” State v. Berry, 413 S.C. 118, 775 S.E.2d 51 (Ct. App. 2015).

The South Carolina Supreme Court believed Roseborough’s testimony consisted of three distinct parts: (1) testimony regarding the victim’s demeanor witnessed by Roseborough during therapy; (2) testimony explaining and discussing delayed disclosure as part of the Child Sexual Abuse Accommodation Syndrome; and (3) testimony addressing trauma associated with sexual abuse and post-traumatic stress disorder (PTSD). State v. Berry, 418 S.C. 500, 795 S.E.2d 26 (2016). The Court held Roseborough’s testimony as it pertains to section one and two above was not preserved for appellate review, but the testimony regarding trauma associated with sexual abuse and PTSD was preserved for appellate review. As such, the Court vacated the South Carolina Court of Appeals analysis and affirmed Applicant’s conviction as modified.

The South Carolina Supreme Court had previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 (“Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam’s PCR claim.”) (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) (“When the defendant claims that counsel’s failure to articulate a Fourth Amendment claim was ineffective assistance, [the]

defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded.” (emphasis in McHam). Therefore, before a post-conviction relief court can find an applicant has prevailed on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial.

This Court finds Inzerillo’s testimony with respect to this allegation very credible, whereas Applicant’s testimony is not credible. This Court finds Applicant has failed to establish how Inzerillo was deficient as she attempted to preserve the issues regarding Roseborough’s testimony for appeal by objecting contemporaneously to Roseborough’s testimony and renewed her objections at the close of the State’s case. Inzerillo further provided a valid trial strategy for why she did not move to strike the objectionable testimony. During Inzerillo’s testimony, she testified she did not move to strike the witness’s testimony because she did not want to draw the jury’s attention to the comments.

Further, Applicant has failed to establish any resulting prejudice from the alleged deficiency. Although Applicant testified he believes the outcome of his case would have been different had Inzerillo preserved her objections for appellate review, Applicant has failed to show that the claim regarding Roseborough’s testimony was meritorious. The South Carolina Court of Appeals conducted a full analysis of Roseborough’s testimony and found it was admissible. Applicant has not provided this Court with any information or evidence to show that the South Carolina Supreme Court would have reached a different result had they believed the issue was preserved for appeal. Based on the forgoing, Applicant has failed to meet his burden and this allegation must be denied and dismissed with prejudice.

***Failure to protect and preserve issue for appeal as it pertains to Appellate Counsel***

Applicant alleges Appellate Counsel failed to address his actual innocence and did not state the facts in the appeal based on his point of view. Applicant testified Appellate Counsel was good to him during her representation.

Appellate Counsel testified she raised all of the meritorious issues she could on Applicant's behalf. Appellate Counsel testified she believed Inzerillo had preserved Roseborough's testimony for appellate review. Appellate Counsel testified she believed Inzerillo's grounds for objection were clear from the context of the transcript. Appellate Counsel testified the issues involving Kromah were the biggest appellate issues that stood out to her in Applicant's case.

This Court finds Appellant Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. This Court finds Applicant has failed to establish how Appellate Counsel was deficient, as she raised all of the meritorious grounds preserved for appeal on Applicant's behalf in her appellate brief.

Applicant has also failed to establish any resulting prejudice from Appellant Counsel's alleged deficiency. Applicant has failed to show this Court what more Appellant Counsel could have, or should have, done to challenge his conviction on appeal. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of appellant counsel and, therefore, this allegation is denied and dismissed with prejudice.

***Failure to object to prejudicial remarks in the prosecutor's closing arguments***

Applicant alleges Inzerillo and Delaney failed to object to prejudicial remarks the State made in its closing argument. Applicant testified he believed the State used hearsay in its closing argument. Applicant testified he pointed it out to Delaney, and Delaney did not do anything about

the remarks. Applicant testified Investigator Roxie Belue made statements during trial that the State brought back up during its closing and Inzerillo and Delaney did not object.

Delaney testified he would have objected to the State's closing argument if there any been any objectionable statements made by the State. Inzerillo testified she would have objected as well, but the State did not make any objectionable remarks during its closing argument.

This Court finds Delaney and Inzerillo's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. This Court finds Applicant has failed to establish how either attorney was deficient as they testified there were no grounds to object to the State's closing argument. Applicant's allegation that Inzerillo or Delaney should have objected because the State was reiterating testimony of a law enforcement witness during its closing argument is meritless. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (citing State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999)). "Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Smith v. State, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

Applicant has also failed to establish any resulting prejudice from Inzerillo or Delaney's alleged deficiency. Applicant has failed to show this Court how an objection during the State's closing argument would have changed the outcome of his trial. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of his either trial counsel and, therefore, this allegation is denied and dismissed with prejudice.

***Failure to object to the inconsistency in the testimony by alleged victim and counsel's failure to raise motion of insufficient evidence.***

Applicant alleges he informed Delaney and Inzerillo about inconsistencies in the statement of his daughter, Jadea Berry (Jadea). Applicant testified Jadea was not supposed to testify and her statement should not have been allowed to come in at trial. Applicant testified he wanted Delaney and Inzerillo to object to Jadea's inconsistent statements. Applicant testified there were inconsistencies in Victim's statement between the two trials. Applicant testified neither of his attorneys stressed the point that there was no overwhelming evidence against him during the directed verdict motion. Applicant testified there was no DNA evidence to corroborate Victim's testimony.

Delaney testified he discussed the strength of the State's case with Applicant and went through the evidence with him prior to trial. Delaney testified he met with Applicant more than ten times before trial. Delaney testified he was pushing for Applicant to take the plea offer of a probationary sentence and register as a sex offender, but Applicant refused the plea offer because he did not want to register as a sex offender. Delaney testified he did not object to the inconsistent testimony during the trial because they had an opportunity to cross-examine both Victim and Jadea. Delaney testified he brought up the inconsistent statements in his opening and he later impeached Jadea with her statements during trial. Delaney testified he is confident he had discussed their plan regarding testimony of Victim and Jadea with Applicant prior to trial.

Inzerillo testified she pointed out inconsistencies in Victim's testimony during cross-examination. Inzerillo testified during cross-examination she was able to show that Victim's statement to the police was different than her testimony at trial. Inzerillo testified she cross-examined Victim on her testimony from the previous trial, which was inconsistent with what she

was testifying to at trial. Inzerillo testified she moved for a directed verdict on Applicant's behalf at the close of the State's case.

This Court finds Delaney and Inzerillo's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. This Court finds Applicant has failed to establish how either attorney was deficient as they testified they cross-examined Jadea and Victim on their inconsistent statements during the trial. Additionally, Inzerillo testified she moved for a directed verdict on Applicant's behalf at the close of the State's case.

Applicant has also failed to establish any resulting prejudice from Inzerillo or Delaney's alleged deficiency. Applicant has failed to show this Court what either attorney could have, or should have, done that would have changed the outcome of his trial. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of his either trial counsel and, therefore, this allegation is denied and dismissed with prejudice.

***Failure to object to the State's opening argument of case where the State told the jury the defendant was guilty, detailed sexual acts allegedly committed, and told the jury what each witness was going to say during their testimony.***

As an initial matter, Applicant alleges this allegation under prosecutorial misconduct, however, Applicant framed the issue during his testimony at the post-conviction relief hearing as one of ineffective assistance of counsel for failing to object.

Applicant alleges Delaney and Inzerillo should have objected to the State's opening statement. Applicant alleges had they objected, the outcome of his trial would have been different.

Delaney testified the State did not make any objectionable statements during his opening. Delaney testified he would have objected if the State made any inappropriate comments during their opening statement.

Inzerillo testified she did not find any of the State's opening to be objectionable. Inzerillo

testified if the State had made objectionable remarks during its opening, she would have objected.

This Court finds Delaney and Inzerillo's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. This Court finds Applicant has failed to establish how either attorney was deficient as they testified there were no grounds to object to the State's opening statement. Applicant's allegation that Inzerillo or Delaney should have objected because the State said he was guilty or because it told the jury what the witnesses were going to say is meritless. "An opening statement serves to inform the jury of the general nature of the action and defenses involved in a case so they will be better prepared to understand the evidence presented." State v. Brown, 277 S.C. 203, 284 S.E.2d 777 (1981) (citing Smith v. Berry, 231 Ga. 39, 200 S.E.2d 95 (1973)).

Applicant has also failed to establish any resulting prejudice from Inzerillo or Delaney's alleged deficiency. Applicant has failed to show this Court how an objection during the State's opening statement would have changed the outcome of his trial. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of his either trial counsel and, therefore, this allegation is denied and dismissed with prejudice.

*Applicant's allegations regarding trial court err*

Applicant alleges the trial court erred by allowing Victim to testify regarding acts that exceeded the scope of his indictment. Applicant also alleges the trial court erred in failing to suppress two inadmissible aspects of the State's expert witness's testimony.

This Court finds the doctrine of *res judicata* bars Applicant's trial court err allegations. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992.) A final judgement on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co.,

311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993.) *Res judicata* also bars any issues that could have been raised in the former action. *Id.* Additionally, Applicant's due process claims are also barred by S.C. Code Ann. § 17-27-20(b) (2018), which states, "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of directed review of the sentence or conviction."

As both of these trial court err allegations raised by Applicant were already addressed and denied by the Court of Appeals and the South Carolina Supreme Court during Applicant's direct appeal, he is barred from raising them during his post-conviction relief proceedings. As such, Applicant's trial court err allegations are denied and dismissed with prejudice.

***Applicant's allegations regarding error of law and abuse of discretion***

Applicant alleges the trial judge abused his discretion when he limited testimony of a witness at trial. Applicant further alleges the trial judge's ruling was an error of law.

This Court finds these allegations fail to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

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

S.C. Code Ann. § 17-27-20.

“Abuse of discretion” and “error of law” are not claims cognizable under the Post-Conviction Procedure Act. Applicant is not collaterally attacking his conviction or sentence. Even if the facts alleged by Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. PCR relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). These issues are improper for post-conviction relief because they could have been raised on direct appeal and are procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised these issues at trial or on appeal. His failure to do so has waived this allegation as a ground for relief.

For these reasons and pursuant to Rule 12(b)(6), SCRPC, this Court finds these allegations are dismissed with prejudice for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

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

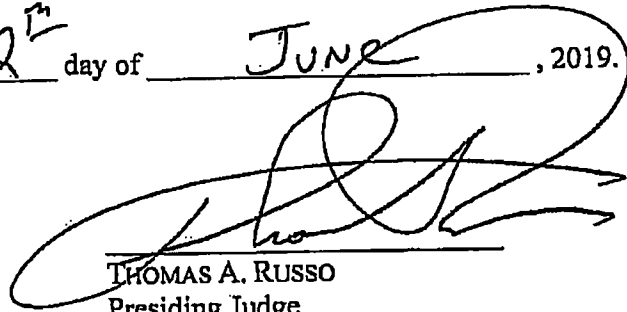
The Court notes Applicant must file and serve a notice of appeal within thirty days from post-conviction relief counsel’s receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant 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, post-conviction relief 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:**

1. The application for post-conviction relief 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 12<sup>th</sup> day of June, 2019.



THOMAS A. RUSSO  
Presiding Judge  
Sixteenth Judicial Circuit

Florence, South Carolina

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Janel H. Gregory, AAG  
South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

**Leah B. Moody, Esquire**  
Law Office of Leah B. Moody, LLC  
Post Office Box 1015  
Rock Hill, South Carolina 29730

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Law Office of Leah B. Moody, LLC  
Post Office Box 1015  
Rock Hill, South Carolina 29730

TO:

The Honorable Daniel E. Shearouse  
The Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina

29211