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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2018-CP-39-0576

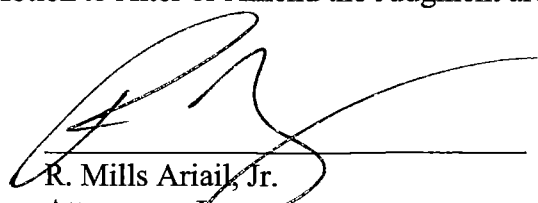
Jonathan Matthew Holder,..... Appellant,

v.

State of South Carolina ..... Respondent.

**NOTICE OF APPEAL**

Appellant appeals the Honorable Edward W. Miller's Order of Dismissal dismissing Appellant's application for post-conviction relief and Order Granting Respondent's Motion to Alter or Amend the Judgment. On July 16, 2020, the Honorable Edward W. Miller signed an Order of Dismissal in regards to Applicant's application for post-conviction relief. On July 23, 2020, Respondent filed a motion to alter or amend the judgment. On December 15, 2020, Applicant filed a return to Respondent's motion to alter or amend the judgment. On January 5, 2021, the Honorable Edward W. Miller granted Respondent's Motion to alter or amend the judgment and Appellant's attorney received the Order Granting Respondent's Motion to Alter or Amend the Judgment on January 11, 2021. A copy of the Honorable Edward W. Miller's Order of Dismissal and Order Granting Respondent's Motion to Alter or Amend the Judgment are attached.



R. Mills Ariail, Jr.  
Attorney at Law  
11 North Irvine St., Suite 11  
Greenville, SC 29601  
Telephone (864) 232-9390  
Facsimile (864) 232-9392  
Attorney for Jonathan M. Holder

Greenville, SC  
January 11, 2021

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF PICKENS )  
 )  
 Jonathan Matthew Holder, #364105, )  
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 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

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IN THE COURT OF COMMON PLEAS  
 FOR THE THIRTEENTH JUDICIAL CIRCUIT  
 Case No. 2018-CP-39-00576

**ORDER OF DISMISSAL**

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 PICKENS COUNTY  
 SOUTH CAROLINA

THIS MATTER comes before this Court by way of an application for post-conviction relief filed on May 15, 2018, by Jonathan Matthew Holder (“Applicant”). The State of South Carolina (“Respondent”) filed its return on October 15, 2018, in which it requested the convening of an evidentiary hearing in order to resolve the claims raised in the application. On October 25, 2019, an evidentiary hearing in this matter was convened before the undersigned at the Greenville County Courthouse. R. Mills Ariail, Jr., Esquire, represented Applicant, who was physically present. Assistant Attorney General Taylor Zane Smith of the South Carolina Attorney General’s Office represented Respondent. At the hearing, Applicant testified on his own behalf and called as a witness Appellate Defender David Alexander of the South Carolina Commission on Indigent Defense. Respondent called as a witness David D. Cantrell, Jr., Esquire. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has met his requisite burden of proof and is entitled to post-conviction relief.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Pickens County Clerk of Court. During its June 2013 term, the

Pickens County Grand Jury indicted Applicant for second-degree criminal sexual conduct with a minor (2013-GS-39-00957) and third-degree criminal sexual conduct with a minor (2013-GS-39-000958). In May of 2015, both indictments were amended so as to refer to different time frames. Applicant was represented by Cantrell ("trial counsel"), and Assistant Solicitor Samuel Barton Tooker of the Thirteenth Circuit Solicitor's Office prosecuted the case. On May 20, 2015, through May 21, 2015, Applicant proceeded to a jury trial with the Honorable John C. Hayes, III, presiding. At the conclusion of the second day of trial, the jury found Applicant guilty as indicted. Judge Hayes sentenced Applicant to imprisonment for ten years for each offenses, with both sentences to be served concurrently.

Trial counsel filed a timely notice of appeal. Alexander ("appellate counsel") represented Applicant on appeal, arguing Judge Hayes erred in denying trial counsel's motion for a mistrial after the State asked during its cross-examination of Applicant if he was gay and sexually interested in "young boys." Then-Assistant Attorney General Megan Harrigan Jameson represented Respondent on appeal. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Holder, Op. No. 2017-UP-239 (S.C. Ct. App. filed June 7, 2017) (per curiam). The remittitur was issued on June 27, 2017.

#### **CURRENT PROCEEDING**

On May 15, 2018, Applicant filed his application for post-conviction relief, in which he alleged that he was being held in custody unlawfully based on the following grounds:

1. Applicant received the constitutionally ineffective assistance of trial counsel because:
  - a. Trial counsel failed to use due diligence in trying to find and procure as witnesses at trial some who heard the victim state that Applicant did not commit the crime of which he was accused; and
  - b. Trial counsel did not conduct a reasonable investigation into Applicant's witnesses before trial; and

2. Applicant received the constitutionally ineffective assistance of appellate counsel because:
  - a. Appellate counsel failed to argue on appeal that Judge Hayes erred in denying trial counsel's motion for a continuance, arguing instead that Judge Hayes erred in denying Cantrell's motion for a mistrial, an issue not preserved for appellate review.

At the start of the evidentiary hearing before the undersigned on October 25, 2019, Respondent requested that Applicant specify for the record the claims upon which he would move forward. Applicant specified that he would be moving forward only upon the claims specifically articulated in the application for post-conviction relief and the additional claims that trial counsel was constitutionally ineffective (1) for failing to object to Judge Hayes' instruction to the jury that the victim's testimony did not need to be corroborated and (2) for failing to use the victim's medical records to impeach the victim at trial. This Court finds that all claims other than these have been waived by Applicant, and they will not be addressed in this order.

#### **Testimony at PCR Hearing**

Applicant testified on his own behalf at the PCR hearing. He testified trial counsel was appointed to represent him in the underlying criminal cases. He testified he was not taken to jail after his arrest and that he was released on a personal recognizance bond, returning to the police station two years later to be fingerprinted. He applied for a public defender's services because he was out of work at the time, and trial counsel was appointed a few months after his case began.

He testified trial counsel could not get discovery for a while and experienced difficulty in gaining access to evidence from Applicant's former employer. He did receive discovery later, but he testified he was not able to review it with trial counsel and that he did not understand it. He made it clear to trial counsel that he did not want to plead guilty or accept any plea deal.

He saw trial counsel at a restaurant before Easter and trial counsel told him that they would meet soon to discuss the case, giving him the impression that the case would resolve itself.

He testified he was in the hospital in early 2015 because he was having cancer removed. He met with trial counsel once but they did not watch any video recordings over go over testimony. He did not have a good meeting with trial counsel until a day or two before trial began. He was under the impression at the time that the trial would be continued so that the defense would be able to find more witnesses.

He and trial counsel did not discuss the elements of the crimes for which Applicant was charged or the potential punishments he could face if he were convicted. He testified he and trial counsel did go over statements from the witnesses and what the witnesses may say during their testimonies at trial after trial counsel received the statements from the police. He did not think he was adequately informed about the elements, offenses, penalties, and discovery in the case. He informed trial counsel that he did not understand. Trial counsel told him that the trial would be continued, and he thinks that both he and trial counsel were mistaken in believing that Judge Hayes would grant a continuance. During the almost-three years of trial counsel's representation of Applicant, trial counsel and Applicant met on only two or three occasions, with one of those being a quick meeting in the restaurant before Easter.

When Applicant and trial counsel met in April of 2015, they discussed discovery. This occurred approximately one month before trial. All of the statements given by Applicant's coworkers supported Applicant's defense. These witnesses were: Katrina Jones, Edward Simpson, Jamal Lattimer, James Tyler Scott, Jansen Aiken, and Tony Duncan. None of these potential witnesses testified at trial. Morene Rickard wrote a statement on Applicant's behalf. Applicant testified he gave the names of the aforementioned people to trial counsel, but did not know their addresses; he testified trial counsel knew where Applicant was employed, meaning that trial counsel could have gone there to find them. Applicant believed that these were "direct"

witnesses. Two caseworkers with the South Carolina Department of Social Services were mentioned at trial but were not called as witnesses. Applicant does not believe that trial counsel talked with any of the witnesses. Applicant testified trial counsel told him at the beginning of trial that trial counsel had gone to Applicant's employer a few days earlier with the solicitor. Applicant speculated that trial counsel was unable to speak to the witnesses because trial counsel attempted to speak to them so late.

Applicant testified he has been unable to find the witnesses since because he has been incarcerated and does not have access to resources. His wife has been in and out of the hospital with a kidney disease. She made contact with a few of those witnesses since Applicant's trial. Applicant testified one of the witnesses was a patient at the facility where Applicant was formerly employed and he admitted that the patient's credibility might be questionable as a consequence. Applicant also testified that Leanne Leslie, Katrina Jones, and Jamal Lattimer would have testified that he did not sexually abuse the victim. He extensively tried to track down people once he found out that trial was quickly approaching. He testified James Tyler Scott, who was the aforementioned patient, worked at a convenience store and that Applicant tracked down Moreen Rickard, a nurse. He thought that it would help him if the nurse testified that the victim lied about Applicant's actions. He testified the nurse did attend his trial but that trial counsel did not want to call her as a witness. He testified Joshua Hubbard and Megan Harvey took the victim to the hospital after he disclosed the sexual abuse.

When testifying about the State's questioning Applicant's sexual orientation at trial, he stated that the whole courtroom was upset at the solicitor for making the allegation. He testified trial counsel told him after the solicitor asked that particular question that they did not need to put up much of a defense because the solicitor had made a fool of himself, causing the case to be

a "slam dunk." He testified that trial counsel objected to that question at trial and that Judge Hayes gave a curative instruction to the jury. People in the courtroom screamed out when the solicitor asked the question. On cross-examination, Applicant testified that the reaction of the people in the courtroom indicated that the people thought that the solicitor's question was inappropriate.

He thinks trial counsel was constitutionally ineffective in moving for a continuance because the defense needed more time to get witnesses. He felt trial counsel did not emphasize strongly enough the importance of those witnesses to the defense and testified he was entitled to have the witnesses in order to receive a fair trial.

Applicant testified he did not meet appellate counsel, but spoke to him through letters. He wanted appellate counsel to amend his brief so as to raise other arguments on appeal. He outlined three issues that he wishes appellate counsel had raised on appeal.

Applicant testified that the victim's medical records were not turned over to the defense by the State in discovery, and that the State had those records at trial. He believes the victim's statements, as recorded in those records, show that the victim had changed his story when speaking to the medical professionals and that the victim was lying.

Applicant called appellate counsel as a witness at the PCR hearing. Appellate counsel testified he was appointed to represent Applicant on appeal. He reviewed the transcript in order to find issues. He does not believe that there is a single way to evaluate the merits of any particular issue. He takes into account whether an issue was preserved because the South Carolina Attorney General's Office will always argue that an issue was not preserved for appellate review if the defense did not properly object to it at trial.

As to Judge Hayes' denial of trial counsel's motion for a continuance, he thought that the issue did not have merit on appeal because the standard of review on the issue is very deferential to the trial court. Although he believed that there were other issues with the motion, he thought the State cured some of them by not objecting to hearsay elicited by the defense at trial. He did not argue the issue on appeal because he thought it was a losing issue for Applicant and he did not want to be in the position of having to make the argument before the appellate courts at oral argument. Appellate counsel did not see any merit in arguing that Judge Hayes erred in denying trial counsel's motion for a directed verdict.

He argued on appeal that Judge Hayes erred in denying trial counsel's motion for a mistrial because he thought the issue was winnable on appeal even though he thought there were preservation issues. He felt the State's question about Applicant's sexuality was inappropriate and that Judge Hayes had called down the solicitor for it at trial. He does not think he told Applicant that the issue was a "slam dunk" issue because he never uses that phrase. He noted that trial counsel argued to Judge Hayes that the prejudice caused by the State's comment could not be undone and that Judge Hayes gave a curative instruction sua sponte. He testified the Attorney General's Office did not argue on appeal that the issue was not preserved, but that the South Carolina Court of Appeals found that the issue was not preserved anyway.

Appellate counsel testified he has dealt with the corroboration jury instruction that was at issue in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). He testified Stukes was published between the conclusion of Applicant's trial and the appeal. He testified trial counsel did not object to Judge Hayes' instruction to the jury that the victim's testimony did not need to be corroborated. He testified he successfully argued in appeals following Stukes that the respective juries had been improperly instructed that the testimonies of victims did not need to be

corroborated, and that those opinions were unpublished. In response to questioning from this Court, appellate counsel testified that Stukes had not yet been published at the time of Applicant's trial but that he felt it was an arguable issue. On cross-examination, appellate counsel could not think of an appellate court opinion in this state in which it was held that Stukes applied retroactively to trials held before it was published. He testified he thinks a conviction would be reversed today if the jury were instructed that a victim's testimony did not need to be corroborated.

Respondent called trial counsel as a witness at the PCR hearing. He testified he has been practicing in the field of criminal law for forty-two years. He was appointed to represent Applicant in March of 2013, as he was working as the contract public defender in Pickens County. He testified cases do not come up for trial for a year or two after arrest in Pickens County. He met Applicant first in April or May of 2013, and testified as to the multiple meetings he had with Applicant. He testified he left multiple voicemails for Applicant during the course of his representation that were not returned.

He testified Applicant was employed at a juvenile psychiatric facility for children, at which the patients have significant psychological issues. He testified that two different male minors accused Applicant of sexually abusing them while Applicant worked at the facility. He testified that the State had as evidence against Applicant a statement from Applicant and video recordings from the security cameras at the facility. He and Applicant discussed the evidence and that it was harmful to the defense.

He did not start in-depth preparation until close to trial. Applicant told him that he had witnesses he wanted at trial, but trial counsel did not pursue them at the time because the trial date was far off into the future. He testified the State gives advance notice of upcoming trials in

Pickens County, and that he anticipated being able to gather all evidence in time for trial. He started writing letters to Applicant and attempting to contact Applicant by phone before trial without success. One of his letters was returned. He eventually found Applicant on Facebook and established contact through that website. He testified that, without his knowledge, Applicant had moved to Oconee County.

He issued subpoenas for around ten people for trial, and checked Facebook and the public index on the South Carolina Judicial Department's website to attempt to locate potential witnesses. He testified that the witnesses Applicant suggested were mostly character witnesses and that the defense did not need character witnesses for trial. He testified the best witnesses Applicant had did testify at trial.

He testified he does not know why he did not object to Judge Hayes' curative instruction after the State asked Applicant about his sexual orientation during trial and assumed that the curative instruction would be the best relief that Applicant could have hoped for. He thought that the State was trying to depict Applicant as a homosexual. He testified that the question and answer were the only statements of this type made at trial. He testified he thought the question was prejudicial to the defense.

He testified the video recordings from the facility at which Applicant worked did not directly show that Applicant inappropriately touched the victim but that they did show that Applicant had the opportunity to commit the touching and that Applicant was alone with the victim while looking around suspiciously. He did not have any evidence that the victim knew the location of the cameras' blind spots. He testified that he was able to get admitted into evidence at trial that the victim sometimes lied and was able to show that the victim may have been lying

about Applicant with the intent to gain his freedom from the psychiatric facility in which he was being housed and at which Applicant worked.

He testified he did not call the witnesses at trial that Applicant identified because some did not want to testify on Applicant's behalf and others did not have any personal knowledge that trial counsel thought would have been beneficial to Applicant's defense. He did not remember if any potential witnesses had heard the victim saying that his allegations were false. He talked to multiple witnesses named by Applicant at the PCR hearing, and testified that Katrina Jones indicated that she did not want to testify at trial, a fact which he made known to Applicant. He did not believe that he spoke to a single witness who would have, in his estimation, provided testimony favorable to the defense at trial. He also testified that some of the people may have indicated that they thought that the victim was a liar.

He did not find anything in the victim's medical records that he thought would have aided the defense at trial. He did discuss the medical records with Applicant, though.

He felt that the best he could do with Harvey, under the circumstances, was to indicate that she had told him something different in person than she was testifying to at trial.

In his February meeting with Applicant, the two discussed the case but did not discuss the identities of potential witnesses. He testified that there never was a point at which he thought the case was a "slam dunk" for Applicant.

He was not aware at the time of trial of the corroboration issue in Stukes.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses,

which allowed the Court to scrutinize their credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008); Strickland v. Washington, 466 U.S. 668 (1984). Applicant has the burden of proving the allegations in his post-conviction relief action, and, when alleging that trial counsel was constitutionally ineffective, he 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. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, at 117, 386 S.E.2d at 625 (quoting Strickland). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland). Applicant must overcome this presumption to receive relief. Cherry, at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced 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.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. Id. at 690.

Based on this standard set forth above, and the reasoning below, this Court finds Applicant has met his requisite burden of establishing the constitutional ineffectiveness of trial counsel. The specific claims as presented by Applicant are addressed fully below:

***Trial counsel was constitutionally ineffective for failing to use due diligence in trying to find and procure as witnesses at trial some who heard the victim state that Applicant did not commit the crime of which he was accused and for failing to conduct a reasonable investigation into Applicant's witnesses before trial.***

Applicant argues trial counsel was constitutionally ineffective for failing to conduct an adequate pre-trial investigation because, if he had done so, he would have found witnesses who would have provided testimony favorable for the defense at trial. Although Applicant presented these as distinct claims in his application, this Court will address both in together here as they are

primarily allegations concerning trial counsel's alleged failure to find favorable witnesses due to an inadequate investigation.

A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland, at 691. Thus, “[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). A defense attorney’s “[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.” Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). Moreover, counsel’s decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel’s judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” Id. at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (S.C. Ct. App. 2014). An “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.” Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)); see also Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005)

(holding that the PCR court's finding that Dempsey was prejudiced by trial counsel's failure to call an expert at trial to rebut the State's expert was merely speculative when Dempsey failed to have an expert testify at his PCR hearing), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

This Court finds that Applicant has failed to show that trial counsel's performance was deficient for failing to conduct an adequate pre-trial investigation. Applicant named potential witnesses that he would have liked to have at trial, but failed to offer any proof that trial counsel did not adequately investigate the matter. Trial counsel admitted that he did not begin attempting to contact the potential witnesses named for him by Applicant immediately upon being appointed, but waited until the trial date was nearer, stating that it can take years for cases to come up for trial in Pickens County. It was reasonable for trial counsel to pace his investigation and pre-trial preparation throughout the course of representation when he knew that Applicant likely would not face a trial for years. Trial counsel also explained that he did not believe that, based upon the information provided by Applicant, the potential witnesses would offer anything beneficial to the defense, serving instead only as character witnesses. And, despite, Applicant's desire to have the witnesses testify at his trial, trial counsel's testimony that he was not able to find a witness who would have provided favorable testimony and found one who did not want to testify on Applicant's behalf demonstrates that it was a reasonable and valid strategic choice for trial counsel not to call those witnesses at trial.

Applicant testified before this Court about the extensive efforts that he and his wife have taken since his trial to track down the potential witnesses he identified for trial counsel; by his own admission, their searching did not yield positive results. Trial counsel testified he was unable to find favorable defense witnesses for trial, and Applicant's testimony confirms the

difficulty in finding witnesses favorable to him. Applicant argues trial counsel's inability to produce favorable witnesses for Applicant at trial shows that trial counsel's performance was deficient; however, the inability of Applicant and his wife to find favorable witnesses undermines Applicant's own argument and supports trial counsel's testimony that he experienced difficulty in finding favorable defense witnesses. Overall, trial counsel's credible testimony about his efforts to find favorable defense witnesses and the reasonable and valid decisions he made about when to attempt to contact potential witnesses and whether certain potential witnesses would have helpful testimony show that his pre-trial investigation and attempt to find witnesses were adequate. Applicant has failed to meet his burden in showing otherwise.

This Court finds that Applicant has failed to show that there is a reasonable likelihood that the outcome of trial would have been different but for some deficiency in trial counsel's pre-trial investigation. Although Applicant testified at the PCR hearing that he wanted trial counsel to produce at trial certain witnesses and use the victim's medical records to cast doubt on the victim's allegations of suffering sexual abuse at Applicant's hands, Applicant has failed to produce these allegedly valuable pieces of evidence for this Court. Applicant did not call any of these witnesses at trial to show that they would have provided testimony favorable to his defense at trial. Applicant did not produce the victim's medical records to show its value for impeaching the victim. As such, Applicant merely has speculated that the outcome of his trial may have been different had trial counsel done more to secure witnesses for trial and used the victim's medical records, thereby failing to meet his burden of proof. Applicant's testimony at the PCR hearing with regard to at least one of the potential witnesses shows that even Applicant doubted whether the witness would have been credible and favorable to the defense.

This Court finds Applicant has failed to demonstrate that trial counsel was constitutionally ineffective for failing to conduct an adequate pre-trial investigation because Applicant has failed to show any deficiency in trial counsel's performance and any resulting prejudice. This claim is denied and dismissed with prejudice.

***Trial counsel was constitutionally ineffective for failing to object when Judge Hayes improperly instructed the jury that the victim's testimony did not need to be corroborated.***

When charging the jury, Judge Hayes instructed it that:

As to these two charges, the testimony of the victim need not be corroborated. Now, the State must prove before you can convict Mr. Holder as to either of these – those charges beyond a reasonable doubt.”

Transcript 348. Trial counsel did not object to that instruction and testified at the PCR hearing that, at the time of Applicant's trial, he was not aware of any issues with the instruction that would have made it objectionable. Applicant argues that it was improper for Judge Hayes to instruct the jury that the victim's testimony did not need to be corroborated and that trial counsel was constitutionally ineffective for not objecting to the instruction.

The South Carolina Supreme Court held in State v. Rayfield that a trial court did not err in charging the jury that the victim's testimony did not need to be corroborated by quoting South Carolina Code Section 16-3-675. 369 S.C. 106, 115-16, 631 S.E.2d 244, 249 (2006). Section 16-3-675 provides that “[t]he testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658 . . . ,” which includes the offenses for which Applicant was tried and convicted. The Supreme Court in Rayfield held that a trial court did not have to instruct the jury on the statute, but that a court that does so should not unduly emphasize the single charge and should ensure that the jury instructions as a whole comport with the law. Id. at 117-18, 631 S.E.2d at 250. The trial court in Rayfield instructed the jury that the jury was the sole judge of the facts of the case, that the court was prohibited from commenting upon the facts of

the case, and that the jury could “believe one witness as against several witnesses or several witnesses as against one witness . . . .” *Id.* at 118, 631 S.E.2d at 250. On May 4, 2016, the Supreme Court issued its opinion in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), and overruled Rayfield to the extent that it condoned the giving of the aforementioned jury instruction, found the trial court erred in instructing Stukes’ jury that the victim’s testimony did not need to be corroborated, found that the trial court’s error was not harmless, and remanded for a new trial. Stukes, at 500, 787 S.E.2d at 483.

This Court finds Applicant has shown that trial counsel’s performance was deficient due to his failure to object when Judge Hayes instructed the jury that the victim’s testimony did not need to be corroborated, an instruction that is prohibited under Stukes. Applicant has shown that he would have been successful on appeal if trial counsel had objected to that jury instruction because the State did not have direct evidence of Applicant’s guilt and relied upon the victim’s testimony. Applicant has demonstrated that trial counsel was constitutionally ineffective for failing to object to the jury instruction and is entitled to post-conviction relief.

***Trial counsel was constitutionally ineffective for failing to use the victim’s medical records to impeach him at trial.***

Applicant argues trial counsel was constitutionally ineffective for failing to use the victim’s medical records to impeach the victim at trial because they showed that the victim was lying when he accused Applicant of sexual abuse and because the State’s case was based upon the victim’s testimony.

This Court finds Applicant has failed to show trial counsel’s performance was deficient with respect to his decision not to seek the admission of the victim’s medical records at trial. Trial counsel testified he and Applicant reviewed the victim’s medical records for trial and that he did not find them to have any exculpatory value and would have provided no benefit for the

defense had they been admitted into evidence. Trial counsel credibly testified that he received the records in discovery and reviewed them with Applicant. Applicant has failed to overcome the presumption that trial counsel employed a valid and reasonable strategic judgment in not seeking to admit the records into evidence. Applicant has failed to show how the records would have had any impeachment value or that there was any deficiency in trial counsel's review of the records and in his assessment that they were of no aid to Applicant.

This Court finds Applicant has failed to show any prejudice resulting from trial counsel's failure to impeach the victim using his own medical records. To demonstrate that his defense attorney was constitutionally ineffective for failing to introduce evidence at trial, an applicant for post-conviction relief must have that evidence admitted at his PCR hearing. Cf. Bannister, at 303, 509 S.E.2d at 809 (requiring that an applicant "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.") (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)); Dempsey, at 370, 610 S.E.2d at 815 (holding that the PCR court's finding that Dempsey was prejudiced by trial counsel's failure to call an expert at trial to rebut the State's expert was merely speculative when Dempsey failed to have an expert testify at his PCR hearing), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Applicant has failed to produce the victim's medical records for this Court's consideration; thus, he is unable to demonstrate that there is a reasonable likelihood that the outcome of his trial would have been different had trial counsel offered them into evidence at trial.

This Court finds Applicant has failed to demonstrate that trial counsel was constitutionally ineffective for failing to introduce into evidence at trial the victim's medical

records because Applicant has failed to show any deficiency in trial counsel's performance and any resulting prejudice. This claim is denied and dismissed with prejudice.

***Trial counsel was constitutionally ineffective for failing to preserve for appellate review his objection to the State's questions about Applicant's sexuality and his motion for a mistrial.***

During its cross-examination of Applicant, the State following exchange occurred between Applicant and the solicitor:

Q: So are you gay?

A: No.

Q: Are you interested in young boys?

A: No.

Transcript 296-97. Trial counsel object to the questions, and that objection was sustained by Judge Hayes. Transcript 297. Trial counsel moved for a mistrial, arguing the questioning was irrelevant, highly prejudicial to Applicant, and without any foundation in the evidence admitted. Judge Hayes denied trial counsel's motion for a mistrial, but cautioned the State not to "have another episode like that," and issued a curative instruction to the jury sua sponte. Transcript 300-02. Trial counsel did not argue the issue any further or object to the sufficiency of the curative instruction. Trial counsel testified before this Court that he did not object further because he believed the curative instruction would be the best relief that Applicant could have reasonable expected. Appellate counsel argued on appeal that Judge Hayes erred in denying trial counsel's motion, and the Court of Appeals affirmed, finding that the issue had not been preserved for appellate review. State v. Holder, Op. No. 2017-UP-239 (S.C. Ct. App. filed June 7, 2017) (per curiam) (citing State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("No issue is preserved for appellate review if the objecting party accepts the [trial court's] ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial.")).

The solicitor's comments, when considered in their totality, show that Applicant was prejudiced by the exchange and that the result of the trial would have been different had trial counsel preserved the issue for appellate review. This Court finds Applicant has demonstrated that trial counsel was constitutionally ineffective for failing to preserve the issue for direct appellate review and that Applicant is entitled to post-conviction relief.

***Appellate counsel was constitutionally ineffective for failing to argue on appeal that Judge Hayes erred in denying trial counsel's motion for a continuance.***

Applicant argues appellate counsel was constitutionally ineffective because he argued on appeal that Judge Hayes erred in denying trial counsel's motion for a mistrial instead of arguing that Judge Hayes erred in denying trial counsel's motion for a continuance because trial counsel failed to preserve the mistrial issue for appellate review and because there is a reasonable likelihood Applicant would have been successful on appeal had he raised the continuance issue. Appellate counsel argued on appeal that Judge Hayes erred in denying trial counsel's motion for a mistrial after the State asked during its cross-examination of Applicant if Applicant was gay and sexually interested in "young boys." As previously noted in this order, the Court of Appeals affirmed, finding that the issue had not been preserved for appellate review.

Generally, in analyzing a claim of the ineffective assistance of appellate counsel, the reviewing court applies the Strickland test just as it would when analyzing a claim of the ineffective assistance of trial counsel. Southerland, at 616, 524 S.E.2d at 836. Thus, in this case, the reviewing court is to ask (1) whether appellate counsel's performance was deficient and (2) whether the applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, an applicant must show that, but for appellate counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Although an appellate attorney is required to provide his client with the effective assistance of counsel, “appellate counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .” Jones, at 754.

When questioned about his decision to argue that issue and not to argue that Judge Hayes erred in denying trial counsel’s motion for a continuance, appellate counsel indicated he did not believe that there was any merit to the continuance issue. Trial courts are afforded deference in rulings upon motions for a continuance. See Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006) (instructing that reversals of a trial court’s denial of a motion for a continuance are about as rare as the proverbial hens’ teeth) (quoting State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)). Appellate counsel’s testimony before this Court indicated he believed Applicant had a better chance of prevailing on appeal with the unpreserved mistrial issue than with the continuance issue. He came to this conclusion because he knew that our appellate courts rarely reverse a trial court’s denial of a party’s motion for a continuance and because he judged the State’s conduct in asking Applicant about his sexual orientation was seriously more detrimental to Applicant’s right to a fair trial. In light of our appellate courts’ deference to the circuit courts when reviewing for error in the denial of a continuance, this Court finds appellate counsel made a valid and reasonable strategic decision to argue the mistrial issue over the continuance issue. Applicant has failed to show that there was any deficiency in appellate counsel’s performance with respect to his selection of issues to argue on appeal.

**CONCLUSION**

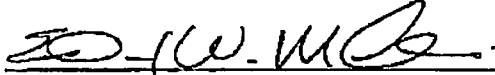
Based on all the foregoing, this Court finds Applicant has established that trial counsel was constitutionally ineffective for failing to object to the trial court's jury instruction that the victim's testimony did not need to be corroborated and failing to preserve for direct appellate review his objection to the State's questioning of Applicant about his sexuality and the trial court's subsequent denial of his motion for a mistrial. Applicant has failed to demonstrate that he is entitled to post-conviction relief based upon any other claim.

This Court notes the Parties must file and serve a Notice of Appeal within thirty (30) days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. This application for post-conviction relief is granted as to two appeals presented by Applicant and denied as to all others; and
2. Applicant shall be awarded a new trial.

**AND IT IS SO ORDERED** this 16 day of July, 2020.

  
The Honorable Edward W. Miller  
Presiding Judge  
Thirteenth Judicial Circuit

Greenville, South Carolina

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GREENVILLE COUNTY  
SOUTH CAROLINA  
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parties by the Pickens County Clerk of Court by email on July 21, 2020.

Respondent filed a timely motion to alter or amend the judgment on July 23, 2020. The parties again appeared before this Court by Webex on November 30, 2020, for a hearing on Respondent's motion. At the conclusion of that hearing, the parties submitted post-hearing briefs to this Court addressing the question of whether the doctrine of cumulative errors is applicable in this matter. On December 15, 2020, Applicant filed a return to Respondent's motion to alter or amend the judgment.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Respondent filed a motion to alter or amend the judgment on July 23, 2020. Respondent argued therein that this Court should alter or amend the judgment with regards to its finding that Applicant proved that his attorney had been constitutionally ineffective for failing to object to the jury instruction that the victim's testimony did not need to be corroborated because the jury instruction was acceptable at the time of Applicant's trial, trial counsel was not required to be clairvoyant by objecting to a jury instruction that would not be found to be improper by our appellate courts until after the conclusion of Applicant's trial, and Applicant did not offer prove that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel objected to the instruction. With regard to this Court's finding that Applicant proved that his trial attorney had been constitutionally ineffective for failing to preserve for appellate review his objection to and motion for a mistrial over the assistant solicitor's asking Applicant on cross-examination whether Applicant was gay and liked young boys, Respondent argued this Court should alter or amend the judgment because trial counsel made the reasonable and strategic decision not to object further, believing the curative instruction given by the trial court was the best relief Applicant could have expected, and Respondent failed to prove that there is a reasonable

likelihood that Applicant's convictions would have been reversed on appeal had the issue been preserved for appellate review.

***Applicant is not entitled to post-conviction relief with respect to his claim that trial counsel was constitutionally ineffective for not objecting to the jury instruction that the victim's testimony did not need to be corroborated.***

This Court finds Applicant is not entitled to post-conviction relief with respect to Applicant's claim that trial counsel was constitutionally ineffective for not objecting to the jury instruction that the victim's testimony did not need to be corroborated. This Court's previous finding that trial counsel's performance was deficient when trial counsel did not object to the instruction is in error because the Court failed properly to take into account that it is not a required component of constitutional effectiveness that a criminal defense attorney be the trailblazer in the courts' overturning of controlling precedent or predict future changes in the law. See *Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (explaining that the South Carolina Supreme Court "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

Section 16-3-675 of the South Carolina Code provides that "[t]he testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658," which includes the offenses for which Applicant was tried and convicted. Our appellate courts held repeatedly for more than two decades before Applicant's trial that it was not error for a trial court to instruct the jury, in accordance with the statute, that the testimony of a victim in a trial for the offense of criminal sexual conduct with a minor did not need to be corroborated. In *State v. Schumpert*, the South Carolina Supreme Court found that the trial court had not committed reversible error when it instructed the jury that the victim's testimony did not need to be corroborated according to state law because the defendant was being tried for criminal sexual conduct with a minor, and the Supreme Court noted that the trial court instructed the jury that:

[I]t could believe any single witness over several, it was the sole judge of the facts, [the court] had no opinion about those facts, and the State had the burden of proving the offense charged beyond a reasonable doubt.”

312 S.C. 502, 509, 435 S.E.2d 859, 863 (1993). In State v. Rayfield, the Supreme Court held that a trial court did not err in charging the jury that the victim’s testimony did not need to be corroborated, citing the aforementioned statute. 369 S.C. 106, 115-16, 631 S.E.2d 244, 249 (2006). In that case, the Supreme Court held that a trial court did not have to instruct the jury on the statute, but, if a court does so, it should instruct the jury without unduly emphasizing the single charge and should ensure that the jury instructions as a whole comport with the law. Id. at 117-18, 631 S.E.2d at 250. Rayfield’s trial court had instructed the jury that the jury was the sole judge of the facts of the case, that the court was prohibited from commenting upon the facts of the case, and that the jury could “believe one witness as against several witnesses or several witnesses as against one witness . . . .” Id. at 118, 631 S.E.2d at 250. The South Carolina Court of Appeals, following the Supreme Court’s lead, reaffirmed the propriety of the jury instruction approximately four years before Applicant’s trial, in State v. Orozco, when it found the trial court had properly instructed Orozco’s jury that the victim’s testimony did not need to be corroborated, the State had the burden of proof beyond a reasonable doubt, the jury had the duty to find facts and determine witness credibility, and the jury should disregard any indications from the trial court as to whether the court believed certain facts to be true or untrue. 392 S.C. 212, 223-25, 708 S.E.2d 227, 232-34 (S.C. Ct. App. 2011). That same year, the Court of Appeals again reaffirmed the propriety of the instruction in State v. Hill when it found that the trial court did not err by giving the instruction to Hill’s jury. 394 S.C. 280, 297-300, 715 S.E.2d 368, 378-79 (S.C. Ct. App. 2011). In January of 2015, about four months before Applicant’s trial, the South Carolina Court of Appeals issued an unpublished opinion finding the trial court had not committed reversible error in giving the jury instruction because the instruction had not been unduly emphasized and the jury instructions, as a whole,

complied with the law. State v. Stukes, Op. No. 2015-UP-014 (S.C. Ct. App. filed Jan. 14, 2015) (per curiam).

Then, on May 4, 2016, approximately one year after Applicant's trial, the Supreme Court issued its opinion in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), reversing the Court of Appeals and overruling the aforementioned cases to the extent that they condoned the giving of the corroboration jury instruction; the Supreme Court also found that the trial court erred in instructing the jury that the victim's testimony did not need to be corroborated, found that the trial court's error was not harmless, and remanded for a new trial. Stukes, at 500, 787 S.E.2d at 483.

When charging the jury during Applicant's criminal trial, the trial court instructed as follows:

As to these two charges, the testimony of the victim need not be corroborated. Now, the State must prove before you can convict Mr. Holder as to either of these – those charges beyond a reasonable doubt.”

Transcript 348. Trial counsel did not object to that instruction and testified at the PCR hearing before this Court that, at the time of Applicant's trial, he was not aware of any issues with the instruction that would have made it objectionable. Applicant was tried and convicted in May 2015. That was about twenty-two years after Schumpert, nine years after Rayfield, four years after Orozco and Hill, and about four months after the Court of Appeals' opinion in Stukes. Going by the applicable case law at the time of Applicant's trial, trial counsel was correct that the jury instruction given at trial was not improper.

This Court amends its Order of Dismissal to take into account the fact that the Supreme Court's holding in Stukes should not be used to gauge the proficiency of trial counsel's conduct when Stukes reversed a long-applied holding in this state. Not only was the corroboration instruction proper during Applicant's trial, according to the controlling case law at the time, but the Supreme Court did not grant Stukes' petition for a writ of certiorari to review the issue until

approximately two months after Applicant's trial.<sup>1</sup> Furthermore, the Supreme Court granted Stukes' petition because the Court of Appeals had affirmed Stukes' conviction, finding that the instruction had been properly given. At the time of Applicant's trial, trial counsel was acting within the scope of professional competence by not objecting to the trial court's corroboration instruction. Even Applicant admits on page two of his return to Respondent's motion to alter or amend the judgment that the jury instruction was a correct statement of law at the time of trial.<sup>2</sup> This Court's previous finding to the contrary effectively required trial counsel to be clairvoyant, anticipating that the instruction would be held to be improper in the future despite the fact that the appellate courts had explicitly held the instruction to be proper decades before Applicant's trial and had reaffirmed that holding shortly before Applicant's trial. Not only did that finding hold trial counsel to the standard of a clairvoyant, but it ran afoul of the Supreme Court's instruction that the new holding it articulated in Stukes was not to be effective in post-conviction relief actions. Stukes, at 500, 787 S.E.2d at 483, n.5 (providing that the Supreme Court's "ruling is effective in this case and those which are pending on direct review or are not yet final, but not in post-conviction

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<sup>1</sup> Applicant argues in his return to Respondent's motion to alter or amend the judgment that Respondent's reliance upon the Supreme Court's holding in Rayfield is misplaced because then-Justice Pleicones's dissent in that case became the basis of the Court's opinion in Stukes. It is never improper for a party to rely upon the Supreme Court's holding in a majority opinion. A dissenting opinion, of course, is not binding authority. "The majority opinion shows what is the law, and the dissenting opinion shows what is not the law." State v. Batson, 107 S.C. 460, 93 S.E. 135 (1917); see Bailey v. U.S. Fidelity & Guaranty Co., 185 S.C. 169, 193 S.E. 638, 640 (an opinion of a justice who concurred in the result only does not have binding force or effect).

<sup>2</sup> Applicant argues in his return to Respondent's motion to alter or amend the judgment that the instruction, though proper, could have confused or misled the jury. This is a new argument from Applicant that was not made in the pleadings, was not raised before this Court at the evidentiary hearing, and was not addressed in this Court's Order of Dismissal. A motion to alter or amend the judgment under Rule 59(e), SCRCP, should not be used to present an issue that was not presented to the trial court before it issued its judgment. Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (S.C. Ct. App. 1990) (citations omitted). Therefore, this Court will not consider that argument now.

relief.”). The Court’s finding that Applicant demonstrated that trial counsel’s performance was deficient when he failed to object to the corroboration charge did not take into account the fact that trial counsel was not required by the Sixth Amendment or the Supreme Court’s opinion in Stukes to object to the instruction at the time of Applicant’s trial. Now that this Court is taking that into account, its previous finding is now altered. This Court now finds that Applicant has failed to prove that trial counsel’s performance with respect to the jury instruction was deficient.

In addition, this Court reverses its finding that Applicant demonstrated that the outcome of his appeal would have been different had trial counsel objected to the jury instruction. Applicant offered no proof that he suffered prejudice from trial counsel’s not objecting to the instruction, and merely speculated that his convictions would have been reversed on appeal had the objection been made.

***Applicant is not entitled to post-conviction relief with respect to his claim that trial counsel was constitutionally ineffective for not preserving for appellate review his objection***

This Court finds Applicant is not entitled to post-conviction relief with respect to Applicant’s claim that trial counsel was constitutionally ineffective for not preserving for appellate review trial counsel’s objection to and motion for a mistrial over the assistant solicitor’s asking Applicant on cross-examination whether Applicant was gay and liked young boys. During his cross-examination of Applicant at trial, the following exchange occurred:

Q: So are you gay?  
A: No.  
Q: Are you interested in young boys?  
A: No.

Transcript 296-97. Trial counsel object to the questions, and that objection was sustained by the trial court. Transcript 297. Trial counsel moved for a mistrial, arguing the questions and answers were irrelevant, highly prejudicial to Applicant, and without any foundation in the

evidence admitted at trial. The trial court denied trial counsel's motion for a mistrial, but cautioned the assistant solicitor not to "have another episode like that," and issued a strongly worded curative instruction to the jury, which was as follows:

Members of the jury panel, shortly before you went out, the—[assistant solicitor] asked the witness whether or not he was gay. That was not an appropriate question. There is no evidence in this record to support that question. The question is not relevant—the question nor the answer.

So please disregard the fact that the question was asked. [Applicant] answered it no, so you can disregard that, too. But just disregard—that's not an issue in this case to any degree whatsoever. So disregard the fact that the question was asked.

Transcript 300-02. Trial counsel did not argue the issue any further or object to the sufficiency of the curative instruction. Trial counsel testified at the PCR hearing that he did not object further because he believed the curative instruction would be the best relief that Applicant could have reasonably expected. Appellate counsel argued on appeal that Judge Hayes erred in denying trial counsel's motion, and the Court of Appeals affirmed, finding that the issue had not been preserved for appellate review. State v. Holder, Op. No. 2017-UP-239 (S.C. Ct. App. filed June 7, 2017) (per curiam) (citing State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("No issue is preserved for appellate review if the objecting party accepts the [trial court's] ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial.")).

When an issue was unpreserved for direct appellate review, a PCR court is to examine whether the applicant suffered prejudice from the lack of preservation by analyzing the merits of the issue and considering whether the applicant has established that the outcome would have been different had the issue been preserved. See Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant's claim that counsel failed to preserve an issue for appellate review by viewing "the trial court's

ruling through the same lens that would be applied on appeal . . .”) (citation omitted); see also McHam v. State, 404 S.C. 465, 474-82, 746 S.E.2d 41, 46-50 (2013) (holding the PCR court erred in finding counsel was not deficient in failing to preserve an issue for appellate review but agreeing with the PCR court that McHam failed to establish prejudice because the Fourth Amendment claim failed on the merits), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that his convictions would have been reversed on appeal even if trial counsel had objected to the trial court’s curative instruction on the basis that the instruction was inadequate to cure the prejudicial effect of the assistant solicitor’s questions, thus preserving the issue for appellate review. In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Significantly, a decision as to whether to grant or deny a motion for mistrial rests within the sound discretion of the trial court, and a trial court’s ruling in regard to a mistrial motion will not be disturbed on appeal absent a prejudicial abuse of discretion. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000); see State v. Coaxum, 410 S.C. 320, 331, 764 S.E.2d 242, 247 (2014) (“[T]o receive a new trial, the defendant must show a prejudicial abuse of discretion.”); State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) (“A mistrial should not be granted unless absolutely necessary. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice.” (citations omitted)). Abuses of discretion occur where the trial court’s conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010). However, the “[g]ranteeing of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no

other way. Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error.” State v. Ferguson, 376 S.C. 615, 618–19, 658 S.E.2d 101, 103 (Ct. App. 2008) (citing State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct.App.2007)); see also State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009) (“The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way.” (citations omitted)).

The trial court’s curative instruction cured any error or potential prejudice from the assistant solicitor’s two, brief, successive questions. The trial court immediately issued a curative instruction once the jury returned to the courtroom, and told the jury to disregard the questions and answers altogether. There was no more mention of Applicant’s sexuality in the two-day trial. With the curative, Applicant was not entitled to a mistrial. Applicant has failed to show that the trial court abused its discretion in denying trial counsel’s motion for a mistrial and that the appellate courts would have reversed had they reviewed the issue.<sup>3</sup>

Having considered the prejudice prong of Strickland, this Court also finds that Applicant has failed to prove any deficiency in trial counsel’s performance with respect to his decision not to object to the issue further after the trial court gave the curative instruction. Trial counsel’s assessment was that there was no need to object further because to do so would have yielded no benefit to Applicant. That was a sound assessment in light of this Court’s findings that the issue would not have resulted in a reversal of Applicant’s convictions. It would have been merely an exercise in futility for trial counsel to press the issue, and such exercises are not required by the Sixth Amendment’s guarantee of the effective assistance of counsel.

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<sup>3</sup> Notably, Applicant believed that the assistant solicitor’s questions would have turned those in the courtroom against the State, not against Applicant himself, because everyone recognized that the questions were inappropriate.

*The theory of cumulative errors does not offer a basis upon which this Court's previous grant of post-conviction relief to Applicant should remain in effect.*

This Court finds that, as a threshold matter, Applicant is not allowed to argue now in response to Respondent's motion to alter or amend the judgment that the theory of cumulative errors is applicable. A motion to alter or amend the judgment under Rule 59(e), SCRPC, should not be used to present an issue that was not presented to the trial court before it issued its judgment. Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (S.C. Ct. App. 1990) (citations omitted). Applicant did not raise the doctrine in his argument at the evidentiary hearing. He is therefore barred from doing so now.

Applicant's failure to raise this argument earlier notwithstanding, the doctrine of cumulative errors is not a basis for salvaging the grant of post-conviction relief to Applicant. Our appellate courts have defined the doctrine through their application of it in the context of direct appeals. The doctrine affords relief to a party when a combination of errors that are insignificant by themselves prevents him from receiving a fair trial and "the cumulative effect of the errors affects the outcome of the trial." State v. Daise, 421 S.C. 442, 466, 807 S.E.2d 710, 722 (S.C. Ct. App. 2017) (quoting State v. Beenkman, 405 S.C. 225, 746 S.E.2d 483 (S.C. Ct. App. 2013)). In order to merit the reversal of his conviction based on the doctrine, an appellant must demonstrate "more than error." State v. McEachern, 399 S.C. 125, 149, 731 S.E.2d 604, 616 (S.C. Ct. App. 2012) (citing State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999)). The errors must adversely affect the appellant's right to a fair trial, not merely deprive him of a trial that is perfect. Id.

But our appellate courts have not recognized the doctrine in the context of evaluating post-conviction relief claims that a defense attorney rendered constitutionally ineffective assistance to his client. "When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice." Simpson v.

Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836. “Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina. Id.; Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (holding that it is unsettled whether individual errors that may not be prejudicial when considered independently may be prejudicial when considered cumulative, but recognizing that an applicant for post-conviction relief would have to show, as a threshold matter, that counsel committed errors). Claims that a defendant was afforded the ineffective assistance of counsel should be reviewed individually by post-conviction relief courts, not cumulatively. Smalls, at 194, 810 S.E.2d at 846 (“As we have explained, the strength of the evidence must be considered along with the specific impact of counsel’s errors.”).

Our courts are not alone in declining to recognize the doctrine. United States v. Thomas, 724 F.3d 632, 648 (5th Cir. 2013) (instructing that “there is no precedent supporting the idea that a series of ‘errors’ that fail to meet the standard of objectively unreasonable can somehow cumulate to meet the high burden set forth in Strickland v. Washington, 466 U.S. 668 (1984)],” and rejecting an argument that the post-conviction relief applicant was entitled to relief based upon the doctrine if, as the applicant argued, the other three alleged errors did not rise to the level of the ineffective assistance of counsel) (citing Strickland, at 689 (“[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . . The purpose is simply to ensure that criminal defendants receive a fair trial.”)); Kennedy v. Kemna, 666 F.3d 472 (8th Cir. 2012) (stating that precedent in the Eighth Circuit forecloses a claim that the cumulative effect of trial counsel’s errors should be considered when evaluating prejudice in post-conviction relief cases); Moore v. Parker, 425 F.3d 250, 256 (6th Cir. 2005) (rejecting the petitioner’s arguments that he was entitled to a writ of habeas corpus due to

cumulative trial errors, instructing that “not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief,” and expressly repudiating two of the Sixth Circuit’s own unpublished opinions that stated that a reviewing court may consider cumulative error in capital cases); Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) (in upholding the trial court’s denial of habeas relief, explicitly holding that claims of the ineffective assistance of counsel are not to be reviewed collectively); State v. Ball, -- So.3d --, 2020 WL 6883305 at \*8 (La. Nov. 24, 2020) (Memorandum) (finding that the claim of a post-conviction relief petitioner that cumulative error required reversal warranted little consideration because the court had never endorsed the theory of cumulative errors and restating the principle that the accumulation of errors that did not result in prejudice does not entitle a defendant to relief by repeating that “twenty times zero is zero.”) (citations omitted); Allen v. State, 261 So.3d 1255, 1272 (Fla. 2019) (finding the petitioner’s subclaim that the “cumulative impact of the alleged errors deprived her of her right to a fair trial” failed because the petitioner failed to prove error as to the other claims and each of the other claims was meritless or procedurally barred) (citations omitted). This Court finds the doctrine is not recognized in South Carolina and is therefore not applicable to this case.

Even if the doctrine is applicable, it offers no benefit to Applicant. This Court granted post-conviction relief to Applicant as to two claims. Because this Court agrees with Respondent’s argument and grants its motion to alter or amend the judgment, this Court finds that Applicant has failed to prove that there were errors to accumulate. As to the first claim upon which post-conviction relief was granted, this Court has found herein that Applicant has failed to prove that trial counsel was constitutionally ineffective for not objecting to the jury instruction that the victim’s testimony did not need to be corroborated. As to the second claim upon which post-

conviction relief was granted, this Court has found herein that Applicant failed to prove that trial counsel was constitutionally ineffective for not preserving for appellate review the issue of the assistant solicitor's asking Applicant on cross-examination whether he was gay and liked young boys. With regard to both of the claims, Applicant has failed to prove deficiency in trial counsel's performance and resulting prejudice.

Applicant has failed to prove, with regard to each of these claims, that trial counsel's performance fell below "an objective standard of reasonableness" and that there is a reasonable probability that, absent counsel's unprofessional errors, the outcome of trial would have been different. Harrington v. Richter, 562 U.S. 86, 104. There are, therefore, no errors to accumulate in order to find that the doctrine of cumulative error applies and is a basis upon which post-conviction relief should be awarded. This Court granted post-conviction relief to Applicant on two claims and two only. Since this Court agrees now with Respondent, and reverses course in its findings with regard to both of the claims, the doctrine cannot apply. In this case, the doctrine has no applicability because trial counsel was not deficient in a single respect, much less "pervasive[ly]" so. Simpson, at 604, 627 S.E.2d at 710. The doctrine, if recognized in South Carolina, would require trial counsel to have committed "several errors, which [were] independently found not to be prejudicial." Id. The doctrine requires that Applicant prove that trial counsel not only made some error, but that he did so multiple times. Two post-conviction relief claims that fail on both the deficiency and prejudice prongs of Strickland do not combine to equal one proven cumulative errors claim; there would have at least have to be at least two claims that succeed on the deficiency prong that, though they are not prejudicial when considered distinctly, are prejudicial when considered together. Applicant has not proven that such circumstances exist.

**CONCLUSION**

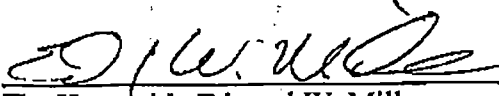
After having considered Respondent's motion to alter or amend the judgment, Applicant's return to the motion to alter or amend, the parties' arguments at the hearing on Respondent's motion to alter or amend, and the parties' post-hearing briefs, this Court finds Applicant has not proven any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. This Court previously denied the application for post-conviction relief with respect to all claims but two; now, this Court alters or amend its judgment so as to find that Applicant has failed to prove that he is entitled to post-conviction relief as to any of his claims because he has failed to prove that trial counsel was constitutionally ineffective.

**IT IS THEREFORE ORDERED:**

1. Applicant's motion to alter or amend the judgment, pursuant to Rule 59(e), SCRPC, is granted;
2. This Court's previous grant of post-conviction relief to Applicant with respect to two of Applicant's claims is vacated, and the findings of fact and conclusions of law presented herein are the basis for this Court's decision now that the application for post-conviction relief is denied and dismissed with prejudice with regard to all claims; and
3. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

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CLERK OF COURT  
SOUTH CAROLINA

AND IT IS SO ORDERED this 5 day of January, ~~2020~~ <sup>2021</sup>

  
The Honorable Edward W. Miller  
Presiding Judge

Greenville, South Carolina