STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
George M. McFaddin, Jr., Circuit Court Judge

2018-CP-21-00638

Tamarquis Wingate, # 315016,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Tamarquis Wingate, # 315016, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed October 20, 2021, issued by the Honorable George M. McFaddin, Jr., Presiding Judge, Twelfth Judicial Circuit.

Jonathan D. Waller

Waller Law Group
SC Bar No.: 76290
1821 Hampton Street
Columbia, SC 29201
803-520-7278 (phone)
jonathan@wallergroupsc.com
ATTORNEY FOR PETITIONER

November 10, 2021

Other Counsel of Record:
Michael D. Davidson, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

FORM 4

FILED

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2018CP2100638

Tamarquis Antwain Wingate	2021 OCT 20 PM 3:24 DORIS POULOS O'HARA CCCP & GS FLORENCE COUNTY, SC	**South Carolina State Of**	
PLAINTIFF(S)		**DEFENDANT(S)**	
Submitted by:		**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	**Judge Code**	10/20/2021 **Date**

For Clerk of Court Office Use Only

This judgment was entered on **October 20, 2021**, and a copy mailed first class or placed in the appropriate attorney's box on **October 21, 2021**, to attorneys of record or to parties (when appearing pro se) as follows:

CERTIFIED A TRUE COPY
Doris Poulos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Jonathan D Waller 1821 Hampton Street Columbia, SC 29201

Michael D. Davidson Rembert C. Dennis Building 1000 Assembly Street Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CERTIFIED: A TRUE COPY

Doris P. O'Hara

CLERK OF COURT C.P. & G.S.

FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	)	IN THE COURT OF COMMON PLEAS FOR THE TWELFTH JUDICIAL CIRCUIT
Tamarquis Wingate,, #315016, Applicant v. State of South Carolina, Respondent.	)	2018-CP-21-0638 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Applicant, Tamarquis Wingate, on March 5, 2018. Respondent made its Return, Motion for a More Definite Statement, and Partial Motion to Dismiss on June 6, 2018. An evidentiary hearing into the matter was convened on August 30, 2021 at the Florence County Courthouse. Applicant was present at the hearing and represented by Jonathan D. Waller, Esquire. Yasmeen E. Klein, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Respondent presented testimony from Robert M. Dudek and Daniel T. Jordan, Esquires. 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 failed to meet his requisite burden of proof, denies relief, and dismisses this application with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections. During the December 2014 term, the Florence County Grand Jury indicted Applicant for two counts of first degree criminal sexual conduct with a minor (2014-

GS-21-1378). Daniel T. Jordan, Esquire (Trial Counsel), represented Applicant. Assistant Solicitor David Richardson, Esquire, prosecuted the case. On December 9-10, 2014, Applicant proceeded to trial before the Honorable Donald B. Hocker and a jury. The jury found Applicant guilty as indicted on both counts. Judge Hocker then sentenced Applicant to concurrent terms of twenty years' imprisonment for each count.

Applicant filed a timely notice of appeal. On October, 23, 2015, Robert M. Dudek, Chief Appellate Defender (Appellate Counsel), of the South Carolina Commission on Indigent Defense perfected the appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967). Applicant subsequently filed multiple *pro se* responses. The South Carolina Court of Appeals affirmed Applicant's conviction on February 1, 2017. *State v. Wingate*, Op. No. 2017-UP-064 (S.C. Ct. App. filed February 1, 2017). Applicant filed a petition for rehearing, which was denied by order dated April 21, 2017. Applicant next filed a *pro se* petition for writ of certiorari in the Supreme Court, which was dismissed by order dated May 31, 2017. The remittitur was returned to the circuit court on July 26, 2017.

FACTS

In December of 2012, the Victim in this matter, along with his younger brother and sister, were left in the care of Applicant after their mother was sentenced to serve ten months in the Department of Corrections for a probation violation. (R. 39). Victim was fifteen years old at the time. Victim's mother had arranged for Applicant's mother, who was the family's next door neighbor, to care for the children while Victim's mother was incarcerated. (R. 52). However during the ten months the mother was away, Applicant, not his mother, stayed in the family home with the children. Applicant was on the sex-offender registry. Victim testified that during this time, Applicant asked Victim to perform anal sex on him nearly every evening for ten months. (R. 65).

Victim testified to the nature of the requests made by Applicant, and testified his younger brother had attempted to enter the room when these acts occurred, but that Applicant would yell at him to go back to his room. (R. 67-68). Victim testified that Applicant threatened to harm him if Victim told anyone about their relations. (R. 70). Once Victim's mother was released from incarceration, the family moved and Victim did not tell his mother what had happened because he was scared of Applicant's threat. (R. 71).

The next time Victim saw Applicant, he was sent to ask Applicant's wife for money to get cigarettes for his mother. (R. 72). Victim did not know Applicant would be home, and Applicant told Victim if Victim "didn't say hi to him, [Victim] wasn't getting the money." (R. 72). Victim was extremely upset and was crying when he got home and asked his mother not to send him to Applicant's wife's house because Applicant was there. (R. 72). Victim's mother asked Victim what was wrong, and when Victim could not tell her, she told Victim to speak with his stepfather. Victim then told his stepfather what happened between himself and Applicant while his mother was incarcerated. (R. 73). Victim's stepfather told Victim's mother they needed to call the police, and then took Victim to the Pamplico Police Station where he told officers and individuals from the Care House about the incidents with Applicant. (R. 74).

ISSUES RAISED

Applicant timely commenced this post-conviction relief action on March 5, 2018. In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel, in that:
   a. He was denied effective assistance of counsel in violation of the Sixth Amendment and the South Carolina constitution.
2. Ineffective Assistance of Appellate Counsel
   a. Appellate Counsel filed an *Anders* brief despite "the aid and assistance [Applicant] supplied through numerous correspondence, where he cited *State*

v. Stokes on various occasions."

3. Denial of Due Process and a Fair Trial, in that:
   a. The trial court "issued erroneous jury instructions regarding 'an alleged victim's testimony' which worked to bolster the credibility of the State's witness."
4. Newly Discovered Evidence
   a. Counsel failed to object to "new indictment being upgraded to third-degree CSC to first-degree CSC prior to trial."

At the evidentiary hearing, PCR counsel for Applicant proceeded the allegations as pled in his application.

SUMMARY OF RELEVANT TESTIMONY

Applicant's testimony

At the evidentiary hearing, Applicant testified he was originally arrested and charged with one count of second degree criminal sexual conduct with a minor and one count of third degree criminal sexual conduct with a minor. Applicant indicated both charges were true billed indictments and during his arraignment Trial Counsel was appointed to represent him. Applicant testified he was arrested in August of 2014 and went to trial December 9, 2014. Applicant alleged he only met Trial Counsel the day before trial, but had tried to send correspondence to Trial Counsel in an attempt to foster a useful attorney-client relationship but was unsuccessful. Applicant testified when he and Trial Counsel first met he was sitting in the jury booth. Applicant testified he believed he was in the courthouse because Investigator McKinsey told Applicant they were getting ready for trial. Applicant testified he provided the investigator with a list of witnesses including numbers and addresses to contact, and thought the investigator was helping him. Applicant claimed he learned the investigator did not contact the witnesses. Applicant testified he and Trial Counsel went into a conference room when Solicitor Richardson came in and told Applicant if he did not plead guilty, the State would charge Applicant with first degree criminal sexual conduct. Applicant testified he told the solicitor they could not do that, and looked to Trial

Counsel to repeat that the State could not charge him with first degree. Applicant testified the next day – the first day of trial – he was facing first degree criminal sexual conduct.

Applicant indicated he and Trial Counsel discussed Applicant pleading guilty but alleged Trial Counsel never asked Applicant for his version of what happened. Applicant acknowledged he received discovery some time prior to December 8, 2014. Applicant testified the discovery included the allegations and forensic interviews of Victim and that he had questions because the statements given by Victim were different during the interviews and at trial, which he believed was something Trial Counsel should have pointed out. Applicant testified this was an issue of credibility and that Trial Counsel should have attacked the credibility of Victim and his mother because Applicant believed the only reason the family raised the allegations against him was because Applicant was a registered sex offender. Applicant confirmed Victim was fifteen or sixteen at the time of trial. Applicant denied he and Trial Counsel discussed his constitutional rights including the right to remain silent or right to a jury trial. Applicant testified he was never interviewed by law enforcement. Applicant indicated he gave the investigator the information he wanted the public defender's office to investigate. Applicant testified he and the Victim's mother were friends when she went to prison and she asked Applicant to watch her kids for the ten months she was gone. He indicated there was a delay between her release and any reports, and that the allegations came out against him approximately six months after he stopped watching the children.

Applicant alleged other men were similarly accused by Victim which Applicant claims he found out through discovery. Applicant testified the physical discovery was delivered to him in jail, but indicated he was not able to speak to Trial Counsel about the other allegations. Applicant stated he did not speak to Trial Counsel until December 8th because Trial Counsel wanted Applicant to plead guilty. Applicant testified in the conference room Trial Counsel wanted

Applicant to take a plea deal of twelve years pursuant to *Alford*,[1] and Applicant told him it did not make sense and that he did not want to plead guilty to something he did not do. Applicant testified he and Trial Counsel did not speak about anything other than pleading guilty. Applicant alleged Trial Counsel was not running the show during the interaction, Solicitor Richardson was because he charged Applicant the next day.

Applicant testified the next morning Trial Counsel asked Applicant for a list of who Applicant wanted to testify at trial. Applicant indicated he gave Trial Counsel the same list of witnesses he provided to the investigator after the jury was picked and already in the court room. Applicant testified he realized he was indicted for first degree criminal sexual conduct during opening statements but he did not know how the indictments had been enhanced. Applicant testified he learned about the case of *State v. Stukes*[2] after he was convicted and serving his sentence. Applicant testified he believed God answered his prayers in the case and testified that *Stukes* was different from his circumstance but the court determined the language in the jury charge about not corroborating victim's testimony was unconstitutional. Applicant claimed he wrote to his appointed Appellate Counsel, sent a copy of the case to him, wrote the Attorney General's Office, and the clerk of court about the case.

Applicant testified he wrote and specifically asked Appellate Counsel to withdraw the previously submitted *Anders*[3] brief and file a merits brief or supplement the merits brief to argue *Stukes* and credibility. Applicant testified he never received a response from Appellate Counsel so he asked the Court if he could supplement his appeal, which was granted. Applicant testified he felt Trial Counsel failed to present personal information. Applicant claimed there were five other

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[1] *North Carolina v. Alford*, 400 U.S. 25 (1970)

[2] *Anders v. California*, 386 U.S. 738 (1967)

[3] *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016).

allegations made by Victim which he found out about through contacts in the neighborhood. Applicant testified he believes an adequate investigation by Trial Counsel would have uncovered these and revealed that the family was vindictive and chose to go after Applicant as a registered sex offender. Applicant additionally testified Trial Counsel knew the trial was about credibility and Counsel should have noted the statements given by Victim were different.

On cross-examination, Applicant confirmed Trial Counsel was appointed to represent him. Applicant testified he was arrested in April of 2014, was taken to Clarendon County before he was released in May, but did not make his initial appearance so the Court issued a bench warrant, which caused Applicant to be re-arrested on in August of 2014. Applicant testified he never had a single conversation with Trial Counsel between April and August. Applicant confirmed he received discovery which included forensic interviews, statements, interviews of another child, and a fifteen year plea offer. Applicant claimed he asked the investigator to tell Trial Counsel to contact him, and asked another individual, Emily Crayton, to speak to Trial Counsel. Applicant claimed he and Trial Counsel never spoke of trial strategy or defenses. Applicant testified the first time they met was in the conference room where Trial Counsel sat back and let the Solicitor "run the show." When asked to review the true billed indictment for first degree criminal sexual conduct, Applicant acknowledged the indictment was correct and the same one he received but not until after he was in prison. Applicant acknowledged the date on the indictment showed it was true billed by the grand jury on November 20, 2014, more than a week before December 8, 2014 – the date he alleges the Solicitor threatened to bring first degree charges against him. Applicant acknowledged that the re-indictment had already happened at that time.

Applicant claimed he did not give Trial Counsel a list of potential witnesses when they met the day before trial because the two had not talked about it, and Applicant did not ask Trial Counsel

if he had the list when they met. Applicant testified he had no alone time with Trial Counsel because the solicitor walked in within a few minutes, and after the solicitor left, the meeting only lasted an additional five minutes. Applicant testified at the meeting he told Trial Counsel he did not want to plead. Applicant testified his instructions for strategy and defense at trial was to not make any facial expressions or look at the jury. Applicant could not recall receiving any other instructions. Applicant testified he recalled reviewing the right to testify when the State rested its case, and that Trial Counsel told Applicant he had caught the state in so many lies he did not believe Applicant needed to testify. Applicant stated Trial Counsel told him the State had to prove Applicant was guilty, Applicant did not have to prove he was innocent.

Applicant indicated Trial Counsel did not cross examine every witness, and believes Trial Counsel should have cross examined witness Dangerfield who testified about the fact that Applicant was a registered sex offender. Applicant claims this testimony was not stipulated to and the judge only gave a jury instruction that it was stipulated to. Applicant acknowledged he was in fact on the sex offender registry at the time, and that Dangerfield's testimony to that fact was accurate. Applicant additionally acknowledged that the case of *Stukes* was not decided at the time of his trial, and that the jury charge at issue was valid law and proper. Applicant claimed that the ruling in *Stukes* suggests that any attorney who did not object prior to *Stukes* was not competent in their representation. Applicant alleged those criminal sexual conduct convictions were overturned, and that the charge put the burden of proof on the defense. Applicant testified Appellate Counsel should have objected and appealed this issue. Applicant acknowledged there was no objection at the time of trial, and the issue was not preserved for appeal. However, Applicant indicated he believed Appellate Counsel should have taken up the issue. Applicant testified he filed several *pro se* briefs in his appeal. Applicant claimed the South Carolina Court of Appeals did not read his

briefs, so he argued *Stukes* again in his petition for rehearing which was also denied. Applicant testified he then filed a petition for certiorari which was denied by the South Carolina Supreme Court. Applicant testified his allegations are against everyone involved and believes he was denied justice because he was a sex offender. Applicant testified he wanted Appellate Counsel to represent him as if Applicant were paying Appellate Counsel as a rich man.

Appellate Counsel's testimony

Appellate Counsel testified he assigned the case to himself as the Chief Appellate Defender at the South Carolina Office of Appellate Defense. Appellate Counsel testified his procedure for working a case includes sending a letter to the client explaining the processes, ordering all exhibits and preliminary hearing transcripts from the trial court, then reading through the proceeding transcript taking notes of witness testimony and marking all objections and motions made. Appellate Counsel testified he then reviews all preserved issues to see which are meritorious and does further research which sometimes involves speaking to other attorneys within the office. Appellate Counsel testified clients can call him collect. Appellate Counsel testified the office is given sixty days to file the initial brief of respondent, and in this case he submitted six extensions. Appellate Counsel testified if a particular case is relevant, the procedure is to write a letter and file it to bring the case to the Court's attention.

Appellate Counsel testified he filed an *Anders* brief in Applicant's mater because there were no meritorious issues for appeal. Appellate Counsel testified the matter of *Stukes* was not decided until after Applicant's trial, and so the jury charge was valid at the time it was given. Appellate Counsel testified his office had pushed the *Stukes* issue in the past, and he was very familiar with the argument against the jury instruction and the state trend to get rid of the jury instructions which commented on the quality of evidence which were indicative of guilt. Appellate

Counsel testified his office had lost on the issue numerous times, which was often the case. Appellate Counsel indicated in Applicant's case, there were no meritorious issues and additionally that the corroboration jury charge had not been preserved because the instruction was not objected to. Appellate Counsel testified he knew it was not preserved which is why he did not brief the issue. Appellate Counsel indicated South Carolina has very strict error preservation rules, and technically while an attorney could brief an issue not preserved and hope the Court would take it up, he was only aware of the Court doing so a handful of times. Appellate Counsel testified briefing a non-preserved issue in this case would have been a waste of time. Appellate Counsel testified the procedure of an *Anders* brief has the attorney brief the best issue they can, which signals to the reviewing Court that as an officer of court, the attorney does not find merit in the appeal.

On cross-examination, Appellate Counsel testified he had been at the Office of Appellate Defense for thirty one years, and in the role of Chief Appellate Defender for five to six years at the time he represented Applicant. Appellate Counsel testified in his professional opinion he briefed the strongest issue he could and put the best spin on the curative instruction he could have. Appellate Counsel indicated if the Court did not find his brief sufficient, they could deny his request to be relieved as counsel or send the brief back to be re-briefed on the same issue or briefed on a different issue the Court noticed. Appellate Counsel testified that did not happen in this case. Appellate Counsel testified he could not recall whether he ever had a client ask him to withdraw an *Anders* brief.

Trial Counsel's testimony

Trial Counsel testified he was employed full time for the public defender's office, but works reduced hours to allow him to take on private defense cases. Trial Counsel testified he was appointed to represent Applicant through his work at the public defender's office. Trial Counsel

indicated he received the file for Applicant's case when he first met with Applicant in September of 2014 at General Sessions court in the "old courthouse." Trial Counsel indicated the set up allowed him to move Applicant from the jury box to a conference room, where he reviewed the discovery with Applicant. Trial Counsel testified when he first received discovery, it did not include the full forensic interviews or statements from Victim. Trial Counsel testified he was given as much time as necessary to meet with defendants, and that he was aware after he met with Applicant that Investigator McKinsey met with Applicant and was given Applicant's list of witnesses. Trial Counsel testified he was not sure the exact date Applicant was arrested, but September 16, 2014 was the first day Trial Counsel met with Applicant. Trial Counsel indicated he reached out to the solicitor's office for the missing discovery materials, which he ultimately received. Trial Counsel additionally testified related to Applicant's claim of his failure to investigate, that Trial Counsel did in fact call the individuals Applicant asked them to, including Applicant's wife, the superintendent of school, the mother of Victim, and various other individuals. Trial Counsel testified he was aware Applicant believed a similar accusation had been made against other men by the family previously.

Trial Counsel testified Applicant's indictments changed from second and third degree criminal sexual conduct to two first degree charges because Applicant had a prior conviction and was on the sex offender registry. Trial Counsel stated he and Applicant discussed the charge changes five to six times before trial. Trial Counsel admitted Applicant's testimony about Solicitor Richardson having a conversation did happen, but that Solicitor Richardson told Applicant he would allow Applicant to plead guilty to the original second and third indictments, otherwise Applicant would have to proceed to trial on the first degree charges. Trial Counsel testified Applicant was very aware of the two first degree charges.

Trial Counsel testified Applicant always wanted a trial and he and Applicant spoke about how the fact Applicant was on the sex offender registry would be part of the elements required for first degree criminal sexual conduct. Trial Counsel testified he spoke to the solicitor about the facts and circumstances of how Applicant got on the sex offender registry and wanted to exclude that information from the record. Trial Counsel indicated the trial strategy was to make Applicant look better than Victim and Victim's mother. Trial Counsel testified they wanted to get ahead of the sex offender issue by making the jury aware of it before it could be used against Applicant. Trial Counsel indicated there was no specific strategic reason for not filing a motion to suppress or motion *in limine* to keep the facts and circumstances out of the trial. Trial Counsel testified the parties were provided the jury charges five minutes before the Court read the instructions and that the particular charges had been read in many of his cases before. Trial Counsel acknowledged he had been to public defender's conferences before and had heard Appellate Counsel speak.

Trial Counsel testified he received the first degree indictments November 21, 2014, after they were returned by the grand jury on November 20, 2014. Trial Counsel reiterated the strategy was to be up front with the jury about Applicant's status on the sex offender registry because Applicant will admit when he has done something wrong and in this case, maintained his innocence. Trial Counsel testified he did not move to strike statements made by Victim at trial because the facts and circumstances that led to Applicant being on the registry involved a similar circumstance to the alleged crime, and he did not want to bring attention to those facts and have the jury focus on the similarities since there were other ways to end up on the sex offender registry than criminal sexual conduct with a minor. Trial Counsel additionally testified he did not object to testimony from Victim's mother as hearsay because both the referenced police office and Applicant were available to testify.

On cross-examination, Trial Counsel testified at the time he represented Applicant, he had been practicing for eleven years exclusively in criminal law. Trial Counsel testified he and Applicant met at least five or six times prior to trial and spent the majority of their time together reviewing discovery, talking about the individuals Applicant wanted Trial Counsel to contact, and discussing plea negotiations. Trial Counsel testified these meetings were all in person and most took place in the courthouse. Trial Counsel testified Investigator McKinsey covers the part time public defenders. Trial Counsel acknowledged he was present for Applicant's testimony during the PCR hearing and refuted that the testimony reflected his representation of Applicant. Trial Counsel indicated he and Applicant discussed the crime and elements of the offense, and indicated Applicant seemed inclined to go trial. Trial Counsel stated he and Applicant reviewed the list of witnesses, reviewed the minimum and maximum time he was facing, collateral consequences including sexually violent predator issues and the existing plea offer of fifteen years concurrent. Trial Counsel testified he and Applicant discussed Applicant's constitutional rights including the right to a jury trial, remain silent, and confront the witnesses against him.

Trial Counsel reiterated the trial strategy was to present Applicant as a person who made a mistake in the past, admitted it, and paid the price but that it should not be held against Applicant now that other people are making allegations. Trial Counsel testified he believes the jury got the outcome wrong and stated he portrayed Applicant as honest and forthright and Victim and his family as lying and vindictive. Trial Counsel testified he looked into an alibi for Applicant and spoke to Applicant's mother and grandmother but no person could say Applicant was with them the entire evening. Trial Counsel testified every person he spoke to was in agreement that Applicant was with the children.

Trial Counsel testified he and Applicant discussed the right to testify and the strategy of trying to control how much of his prior conviction would get out. Trial Counsel indicated they did not have any fact witnesses and could only put up character witnesses which would have opened the door for the State to discuss his prior conviction in greater depth. Regarding the jury charge Trial Counsel stated the specific charge was presented in other cases of his and was extremely common practice. Trial Counsel testified he did not object to the charge at the time of trial because it was a lawful and valid jury charge, and he had cross examined the witnesses thoroughly. Trial Counsel indicated the judge reiterated the burden of proof on the state several times and felt, as a whole, the jury charge was a non-issue. On re-direct Trial Counsel testified he could not recall with specific certainty how the parties stipulated to the admitted element of Applicant being on the sex offender registry.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court further had the opportunity to observe the witnesses at the evidentiary hearing and evaluate their credibility, and the Court has weighed their testimony accordingly in its discussion below. This Court finds the combined record of the trial transcript and the testimony and evidence presented at the evidentiary hearing establishes Applicant received effective assistance of counsel. Accordingly, this Court denies relief and dismisses this application with prejudice. Set forth below are the relevant findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code.

Ineffective Assistance of Trial Counsel

Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule

71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (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. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his PCR action, and when alleging 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 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*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether 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*, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced 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.* 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 a rigid rule of representation. Rather, *Strickland* requires an 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. The function of the PCR 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. Although courts may not indulge "post hoc rationalization" for counsel's decision-making that contradicts the available evidence of counsel's actions, *Wiggins v. Smith*, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for actions. There is a "strong presumption" counsel's attention to certain issues to the exclusion of others reflects tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U. S. 1, 8 (2003).

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. *Harrington v. Richter*, 562 U.S. 86 (2011). "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland*

standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversarial process the right to counsel is meant to serve. *Strickland*, 466 U.S. at 689–690. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, opposing counsel, and the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.* at 689; *see also Bell v. Cone*, 535 U. S. 685, 702 (2002); *Lockhart v. Fretwell*, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S at 690.

In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. *Wong v. Belmontes*, 558 U.S. 15 (2009); *Strickland*, 466 U.S. at 693. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. *Id.* at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *Id.* at 693, 697. The likelihood of a different result must be substantial, not just conceivable. *Id.* at 693.

"In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96 (explaining the court must analyze how individual errors of counsel affect the important factual findings in a particular case)).

This Court finds Applicant has failed to meet his burden of proving he is entitled to post-conviction relief on his allegation of ineffective assistance of counsel. Applicant's testimony regarding Trial Counsel's representation is found to be wholly not credible. Applicant claimed he met with Trial Counsel only once before trial, and the meeting lasted approximately five minutes. This Court finds Applicant's testimony that he never discussed the facts of the case, elements of the crime, or trial strategy or defenses with Trial Counsel to be not credible. By contrast, this Court finds Trial Counsel's refute of Applicant's characterization of his representation to be credible. Trial Counsel credibly testified he met with Applicant for the first time September 16, 2014, at the courthouse, and that he and Applicant met in person approximately five or six additional times prior to trial. Trial Counsel additionally credibly testified he reviewed the available discovery with Applicant, pursued leads and called potential witnesses Applicant provided, and conducted his own investigation into possible strategies and defenses for Applicant including investigating the other possible accusations made by the Victim's family, and looking into an alibi defense.

Trial Counsel credibly testified his strategy was to get ahead of any prejudicial affect Applicant's prior record would have on Applicant's credibility, and to present Applicant as forthright and honest in contrast to the Victim's family. Trial Counsel additionally articulated a valid strategy for not objecting to statements made at trial regarding Applicant's prior sex offense, specifically, that the facts of that case were similar in nature to the trial charges, and Trial Counsel did not want the jury to focus on the facts as potentially prejudicial information. This Court also finds credible Trial Counsel's testimony that he did not object to other statements as hearsay because the parties were present and available to testify.

Further, this Court finds Trial Counsel's testimony he reviewed the change of the charges from second and third degree to first degree several times with Applicant to be credible.

Applicant's testimony that he was not aware he was facing first degree charges until the morning of trial, and that he only heard about the first degree charge when the Solicitor threatened him the day before trial, is wholly not credible. The first degree indictments were returned by the grand jury November 20, 2014, and Trial Counsel credibly testified he received a copy the very next day and discussed the change with Applicant. This Court additionally finds Trial Counsel's testimony that he did not object to the jury instruction regarding witness testimony corroboration because it was valid law at the time of the trial to be credible. The record reflects that the matter of *Stukes* was not decided until 2016, two years after Applicant's trial.

Trial Counsel credibly testified he saw no reason to object to the instruction as it was the correct law at the time, and the instruction had been read in several of his other cases. This Court is not swayed by Applicant's assertion that any attorney who failed to object to the instruction prior to the decision in *Stukes* was intrinsically ineffective. "This 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." *Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). Thus, Trial Counsel cannot be deemed ineffective for failing to be clairvoyant. This Court finds Applicant has failed in his burden to prove deficiency on the part of Trial Counsel, and any prejudice therefrom. Therefore, for the reasons stated above, the Court denies relief and dismisses the allegations with prejudice.

Ineffective Assistance of Appellate Counsel

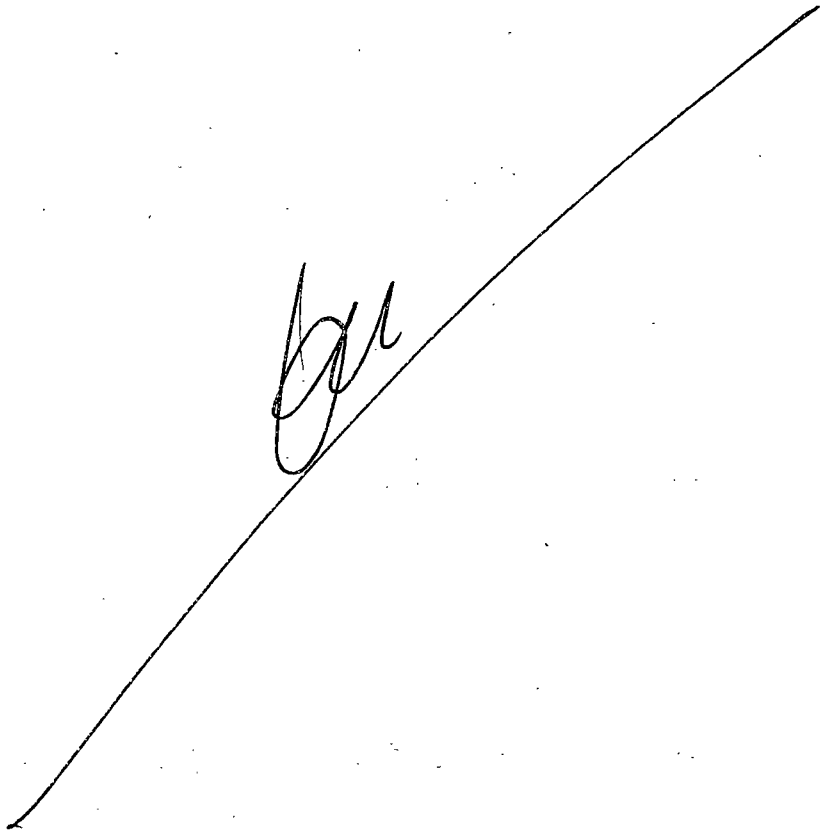
Similarly, a defendant is constitutionally entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985) (citing *Douglas v. California*, 372 U.S. 353 (1963)). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Rather,

appellate counsel has a professional duty to choose among potential issues according to their merit. *Jones v. Barnes*, 463 U.S. 745, 752-53 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. *Tisdale v. State*, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting *Jones v. Barnes*, 463 U.S. 745, 754 (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 . . . .")).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the courts apply the *Strickland* test just as they would when analyzing a claim of ineffective assistance of trial counsel. *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citing *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

This Court finds Applicant has additionally failed in his burden to prove ineffective assistance of Appellate Counsel. Appellate Counsel is not ineffective for failing to brief an issue that was not preserved for appellate review. As stated previously, the matter of *Stukes* was not decided until two years after Applicant's trial. This Court has found Trial Counsel was not ineffective for failing to object to something that was valid law at the time. Appellate Counsel has no duty to raise every colorable issue on appeal, and is certainly not expected to raise issues not properly preserved. Appellate Counsel credibly testified to his process for reviewing a case, and testified he briefed the most meritorious issue he could. Appellate Counsel testified he worked in the Office of Appellate Defense for thirty one years, and credibly testified that briefing an issue

not preserved for appeal would have been a waste of time. Applicant's testimony that had Appellate Counsel withdrawn his *Anders* brief and argued *Stukes*, Applicant would have prevailed on appeal is without merit. Moreover, Applicant filed several *pro se* briefs and petitions for rehearing arguing the *Stukes* issue for the Court, and was ultimately unsuccessful. Applicant has failed to prove deficiency on the part of Appellate Counsel and any prejudice therefrom. Therefore, for the reasons stated above, the Court denies relief and dismisses the allegations with prejudice.



CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. The Court finds Trial Counsel and Appellate Counsel's representation was neither deficient nor prejudicial. 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 PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. Post-conviction relief is denied and the application for post-conviction relief be dismissed with prejudice; and

2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 13 day of October, 2021.

GEORGE M. McFADDIN, JR.
Presiding Judge
Twelfth Judicial Circuit

FILED
2021 OCT 20 PM 3:16
BOBBIE ROGERS SHARP
CLERK C.P. & G.S.
FLORENCE COUNTY, SC

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