

NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A

POST CONVICTION RELIEF

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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**RECEIVED**

**JUN 02 2022**

**S.C. SUPREME COURT**

APPEAL FROM KERSHAW COUNTY

Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

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Case No. 2019-CP-28-00236

The State,.....Respondent,

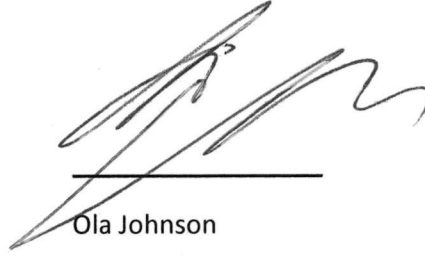
James Wayne Miller,.....Appellant,

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Notice of Appeal

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James Wayne Miller appeals the order of the Honorable Grace Gilchrist Knie, dated May 5, 2022, which denied his application for Post-Conviction Relief with prejudice. Appellant received written notice of the order on May 12, 2022.



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**RECEIVED**

**JUN 02 2022**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
COUNTY OF KERSHAW

JAMES WAYNE MILLER,  
Applicant,

v.

STATE OF SOUTH CAROLINA,  
Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2019-CP-28-00236

**ORDER OF DISMISSAL**

FILED FOR RECORD  
2022 MAY 10 PM 3:30  
JANET C. HADLEY  
CLERK OF COURT  
KERSHAW COUNTY, S.C.

**I. INTRODUCTION**

The matter before this Court is an action for post-conviction relief (PCR) commenced by James Wayne Miller (Applicant) on March 11, 2019. The State requested an evidentiary hearing through its Return, Motion for More Definite Statement, and Partial Motion to Dismiss on December 9, 2021. Applicant served and filed an Amendment to Application for Post Conviction Relief on March 18, 2022.

A hearing was held on Friday, April 1, 2022, in Richland County. Applicant was present and represented by Ola A. Johnson, Esquire. Respondent, the State, was represented by William M. Blitch, Jr., Esquire, of the South Carolina Attorney General's Office. Applicant testified on his own behalf and called two witnesses including Pamela Edwards and Michael Norwood. Also testifying were Applicant's trial counsel, Anna Good Browder, Esquire, and his appellate counsel, Susan B. Hackett, Esquire.

In addition to the pleadings in this action, this Court had before it a copy of the trial transcript of March 14-18, 2016; the Kershaw County Clerk of Court records regarding the convictions and sentences; the entire Appellate Record including briefs of the parties, record on appeal, opinion, petition for rehearing, petition for writ of certiorari,

**ATTEST: True, Correct & Certified  
Copy of Original on File in this  
Court**  
*Janet C. Hadley*  
Clerk of Court Kershaw County  
2019-CP-28-00236

writ of certiorari; and the records and exhibits admitted into evidence at the hearing in this PCR action.

After hearing the testimony at the PCR hearing and reviewing the record, this Court finds Applicant's allegations of ineffective assistance of trial counsel and ineffective assistance of appellate counsel are without merit. Therefore, for the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

## **II. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). In October 2012, the Kershaw County Grand Jury indicted Applicant for second-degree criminal sexual conduct (CSC) with a minor (2012-GS-28-1381) and incest (2012-GS-28-1382). Anna R. Good, now Anna Rawl Browder, Esquire, (trial counsel), represented Applicant. Assistant Solicitors Kathryn Cavanaugh and Karlen Senn prosecuted the case. On March 14-18, 2016, Applicant proceeded to a jury trial before the Honorable Tanya A. Gee and a jury. The jury convicted Applicant as indicted on both charges. Judge Gee sentenced Applicant to twenty years imprisonment for second-degree CSC with a minor and ten years imprisonment for incest, to be served consecutively.

Applicant was represented on appeal by Susan B. Hackett, Esquire (appellate counsel), of the Office of Indigent Defense, Division of Appellate Defense. Applicant raised the following issues on appeal:

1. The trial court erred in denying Applicant's request for a continuance where "good cause" existed in light of a serious medical condition which rendered him unable to assist counsel; and
2. The trial court erred in permitting Dr. Allison Foster to testify as an expert in child abuse assessment where her testimony improperly bolstered the complaining witness's

credibility and there was insufficient evidence of the reliability of the subject matter of her testimony.

The Court of Appeals affirmed Applicant's conviction. *State v. Miller*, 2018-UP-121 (Ct. App. filed March 21, 2018). Thereafter, Applicant timely petitioned for rehearing, and the Court of Appeals denied rehearing on May 24, 2018. Applicant petitioned the South Carolina Supreme Court for a writ of certiorari on July 5, 2018. Respondent filed its return to the petition on August 6, 2018. The Supreme Court denied certiorari by written order on September 21, 2018. The case was remitted back to the circuit court October 1, 2018.

### **III. STATEMENT OF FACTS FROM TRIAL**

Applicant was convicted of raping his sixteen-year-old daughter (Minor 1). Applicant consistently raped Minor 1 for over a year. Applicant threatened Minor 1 not to disclose the abuse and constantly carried a gun on his belt, even while raping Minor 1. During this timeframe, Applicant openly chose to sleep in Minor 1's bed instead of his wife's bed. Additionally, Applicant did not attempt to hide the fact that he slept in Minor 1's bed and was observed acting inappropriately with Minor 1. Applicant's neighbor twice reported to law enforcement her suspicions that Applicant was molesting Minor 1. Minor 1 eventually disclosed that Applicant inappropriately touched her to her mother. When law enforcement arrived at the home, Applicant openly stated to his wife in front of law enforcement "it's not all my fault." (Tr. 539).

In July 2011, Applicant, his wife (Mother), and their five children visited friends in Camden for the July 4th. (Tr. 169-70, 175). After spending time in Camden, Applicant decided to move his family from Summerville to Camden and found a two-story house to rent on Lake Wateree. (Tr. 175-76). The home needed some work before the family would be ready to move in, so Applicant and his sixteen-year-old daughter (Minor 1) stayed behind to fix up the home while the rest of the family, including Minor 1's twin sister (Minor 2), returned to Summerville to pack

up their home. (Tr. 177-78). Applicant, who worked in construction and as a day laborer, often had assistance from Minor 1 while working. (Tr. 173-77). Applicant and Minor 1 stayed in the family's camper while fixing up the home. (Tr. 177-78).

One evening, after a long day of work, Minor 1 went inside the camper to go to bed while Applicant remained outside by a bonfire, drinking and socializing with a friend. (Tr. 178-79). Minor 1 eventually fell asleep, but woke up to Applicant, her father, performing cunnilingus on her. (Tr. 179). Applicant had Minor 1's legs pulled apart and pinned down so she could not move. (Tr. 179). However, she was able to shove him off, and she ran to the bathroom. (Tr. 179-80). Applicant then apologized, claimed it was an accident, and promised Minor 1 it would not happen again. (Tr. 180-81). Applicant pleaded with her to exit the bathroom and go back to bed, promising he would remain on the couch. (Tr. 180-81). Minor 1 eventually acquiesced and returned to the bed, where she eventually fell back asleep. (Tr. 180-81).

However, Minor 1 again woke up to Applicant on top of her, pinning her down. (Tr. 181). Minor 1 tried to break free but was unable to escape this time. (Tr. 181-82). Applicant said he needed to finish what he started, and then forcibly raped Minor 1. (Tr. 181-82). When Applicant finished raping her, Minor 1 fled to the bathroom, where she remained for the rest of the night. (Tr. 182). Applicant fell asleep as if nothing had happened. (Tr. 182).

The next morning, Applicant threatened Minor 1 their family would be ruined if she told anyone about the abuse. (Tr. 182). He told her that he had taken a pill in addition to drinking and was unable to control himself. (Tr. 183). He threatened that she needed to keep the rape a secret while forcefully grabbing her arm. (Tr. 183-84). Minor 1, afraid of Applicant and fearing the potential consequences to the rest of her family, decided not to tell her family about the abuse. (Tr. 183, 187).

However, that night, Applicant again raped Minor 1, this time inside the family's new home. (Tr. 184). Minor 1 again tried to fight Applicant off, but he had pinned her down, and she was unable to break free. (Tr. 184-85). Applicant continued to rape Minor 1 several more times while the rest of the family was in Summerville. (Tr. 185). Each time, Minor 1 unsuccessfully tried to fight Applicant off. (Tr. 185). After each rape, Applicant threatened Minor 1 that their family would be ruined if she told anyone. (Tr. 185, 187).

Minor 1 hoped her father's sexual assaults would stop when the family moved into the new home, but he continued to rape her. (Tr. 187). Initially, Minor 1 and her twin sister, Minor 2, shared a room in the new house. (Tr. 187-88). While Minor 2 was asleep, Applicant would sneak into his daughters' bedroom, rape Minor 1, and then leave. (Tr. 188). After a few months, Applicant decided it would be good for Minor 1 to have her own bedroom due to on-going disputes between her and Minor 2. (Tr. 189, 191-92). However, as soon as Minor 1 had her own bedroom, Applicant began sleeping in Minor 1's room nightly. (Tr. 192, 280). This made Mother upset and confused. (Tr. 193-94, 281). Mother confronted Applicant about the inappropriate sleeping arrangement and demanded Applicant return to their marital bed. (Tr. 281). In response, Applicant accused Mother of having perverted thoughts and said she was jealous of Applicant's close relationship with Minor 1. (Tr. 281-82). Applicant refused to stop sleeping in Minor 1's bed. (Tr. 193, 282).

Applicant continued to constantly rape Minor 1 in the home. (Tr. 193). After a few months, Minor 1 stopped fighting back. (Tr. 193). Additionally, shortly after moving to Camden, Applicant began regularly carrying a gun, which he kept on a holster on his belt. (Tr. 193-94). Applicant routinely kept the gun attached to his pants while he was raping Minor 1. (Tr. 194-95). Applicant never carried a gun before he started raping Minor 1. (Tr. 194, 199, 285). In addition to assaulting Minor 1 at the family home, Applicant also raped Minor 1 when she accompanied him to jobsites

for work. (Tr. 195-99). Minor 1 no longer wanted to help Applicant with work, but she felt she did not have a choice because the family was financially dependent on Applicant, and he needed her help. (Tr. 195-96).

Applicant continued threatening Minor 1 to keep her from reporting the abuse. (Tr. 199-200). Minor 1 routinely had bruising on her body from Applicant pinning her down while raping her. (Tr. 204-06). In addition to vaginally penetrating Minor 1 with his penis, Applicant would also digitally penetrate her and fondle her breasts. (Tr. 206-07). Usually, when Applicant raped Minor 1, he would ejaculate on her or beside her; however, occasionally, he would wear condoms or just inseminate her. (Tr. 209-10).

By August 2012, Applicant had been raping Minor 1 for thirteen months. (Tr. 223). Minor 1 felt increasingly helpless and withdrew from the rest of her family. (Tr. 222, 224-25). She feared the abuse would never end. (Tr. 222). Victim finally disclosed to Mother that Applicant had been inappropriately touching her on August 11, 2012. (Tr. 223, 225-28, 299). Mother became hysterical and immediately called her sister (Aunt) to tell her about the abuse and request that Aunt call law enforcement. (Tr. 229, 299). However, Mother did not confront Applicant about the abuse, tell him she called Aunt, but made an excuse for why law enforcement was coming to the house. (Tr. 299-300).

A short time later, law enforcement officers arrived at the home. (Tr. 230). When Applicant saw law enforcement approaching, he told Minor 1 he wished she had warned him so he could say goodbye to the rest of the family. (Tr. 231). Applicant then instinctively turned towards the officers, unhooked his belt, emptied his pockets, and placed his hands behind his head. (Tr. 124, 146, 155). Law enforcement detained Applicant and walked him to a waiting patrol car. (Tr. 124).

When Applicant walked by his wife, he claimed it "wasn't all his fault" and asked for one last kiss from her. R. 236.

After being detained, Corporal Houser of the Kershaw County Sheriff's Office Mirandized Applicant and asked him if he wished to make a statement. (Tr. 125). Applicant responded he understood his rights, then stated, "Whatever she says, that's what happened. If she said it, it's not a lie." (Tr. 125, 147, 164). At this point, Applicant had not yet been informed of the allegations made against him or why he was being placed under arrest. (Tr. 147, 155).

Thereafter, Applicant was taken to the Kershaw County Sheriff's Office, where he met with the on-call investigator, Investigator Dill. (Tr. 124, 126, 163-64, 524-36). Applicant and Dill spoke in an interview room equipped with audio and visual recording devices which recorded their entire conversation. (Tr. 526-27). Dill re-Mirandized Applicant, and Applicant signed a waiver indicating he understood his rights and wished to speak. (Tr. 527-31, ROA. 595). Applicant did not deny the allegations and stressed he needed to make sure his story was "on the same page" as Minor 1's report because he did not want his statement to differ from hers. (Tr. 532). The interview ended shortly thereafter, and Applicant was taken to the detention center. (Tr. 533-34).

Upon arriving at the detention center, Applicant asked to speak to Dill again. (Tr. 534). Dill went to the detention center, asked Applicant if he wished to speak with him, and when Applicant answered affirmatively, Dill transported Applicant back to the sheriff's office for another interview. (Tr. 534-35). When they returned, Dill brought Applicant into the same interview room equipped with recording equipment, advised him of his rights, and Applicant again signed a waiver indicating he understood his rights and wished to speak with law enforcement. (Tr. 535-39, ROA. 596). In this second interview, Applicant admitted to placing his hand on the inside of Minor 1's leg while she slept and telling his wife that "this is not all my fault." (Tr. 539).

Mother testified she had known Applicant since third grade and had been married to him for twenty years. (Tr. 268-69). She testified she had five children with Applicant, including the twins, Minor 1 and Minor 2. (Tr. 268-69). She testified she and Applicant moved approximately thirty times throughout their marriage, including a final move to Camden in July 2011. (Tr. 271, 275). She testified she began noticing a change in Minor 1 when the family moved to Camden. (Tr. 274, 278-80). Additionally, she testified Applicant stopped sleeping in bed with her, and she would routinely find him sleeping in Minor 1's bed. (Tr. 280-81). She testified she tried to physically remove Applicant from Minor 1's bed and told him she thought he was behaving inappropriately. (Tr. 280-81). Applicant responded by telling her she was jealous of Minor 1 and how close they were. (Tr. 282). Additionally, she testified Applicant stopped regularly having sex with her when the family moved to Camden and only slept with her a couple of times during the thirteen-month period when he was raping Minor 1. (Tr. 284-85). She testified she tried to talk to Minor 1 about the changes in her behavior and whether Applicant was abusing her, but Minor 1 denied any abuse and refused to speak with her. (Tr. 286-87). She testified she also observed Applicant being inappropriate with Minor 1, including untying her swimsuit top, wrapping his legs around her, and feeling her breast. (Tr. 291-92). She testified Minor 1 eventually confided in her on August 11, 2012, that Applicant had been touching her and she immediately got law enforcement involved. (Tr. 296-300).

Minor 2, Minor 1's twin sister, also testified about inappropriate behavior she had observed between Applicant and Minor 1, including Applicant sharing a bed with Minor 1 nightly. (Tr. 340-41). She also testified Minor 1's behavior dramatically changed when the family moved to Camden. (Tr. 367). She testified Applicant began carrying a gun in a holster on his belt when the family moved, and he had not done this with prior to living in Camden. (Tr. 369).

The family's next-door neighbor, Martha Penrod, also testified regarding inappropriate behavior she observed between Applicant and Minor 1. She recalled times she saw them behaving oddly together in the water and seeing them snuggling on a hammock. (Tr. 444). Penrod further testified she had previously twice informed law enforcement of her concern that Applicant was molesting Minor 1. (Tr. 458).

The State presented testimony from Dr. Susan Luberoff, who treated Minor 1, and was admitted as an expert in child abuse pediatrics. (Tr. 340-56). Dr. Luberoff testified she examined Minor 1 on August 17, 2012. (Tr. 343-44). Dr. Luberoff testified she noticed notching at the seven o'clock position of Victim's hymen, which was consistent with penetrating trauma. (Tr. 348-56). The State also presented expert testimony on child abuse assessment from Dr. Allison Foster, a licensed clinical psychologist with extensive experience studying and treating child victims of sexual abuse, over Applicant's objections. (Tr. 467-522).

After closing arguments and jury instructions, the jury began deliberations. During deliberations, the jury sent out a note asking what happens if everybody cannot reach an agreement. (T.645). The trial court provided an explanation indicating she would have to declare a mistrial, the case would be retried, and twelve other people would be selected to sit as a jury to consider the case. She indicated:

And so I say that to tell you that I hope that you will continue to deliberate. I understand that some of you may be thinking that it may not be a unanimous verdict. I do want to let you know that you can't be forced into a unanimous verdict.

As I told you in your instructions, you are to remain with your convictions and that is okay. But I do want you to keep an open mind, to listen to each other and to continue to try. If y'all want to discuss that in the jury room before coming back out here to hear the remainder of the testimony, I'll allow you to do that. Otherwise, we can hear the remainder of the testimony. And let me just go ahead and tell you that I think that we need to break at about midnight. If y'all think you can have fruitful conversation still and that

deliberations are still working, then I would like us to come back tomorrow.

(T.646). The next day, the jury reconvened. The trial court received information a juror may have taken notes overnight. The juror indicated he did not do any outside research, but instead wrote down some of his own thoughts to share with the remainder of the jury. (T.651-655). After further deliberations, the jury reached its verdict finding Applicant guilty on all charges.

During sentencing, Pamela Edwards, one of Applicant's aunts, spoke on behalf of Applicant. She asserted the victim's mother had a history of claiming sexual abuse. She maintained Applicant was a "kind and generous man" and that he was an "over protective father." She also indicated that he was innocent, and she hired trial counsel to provide his defense. (T.667-668). Other witnesses including another aunt and a friend also provided testimony about Applicant being a good person and unable to commit the crimes for which he was accused. (T.668-669).

#### **IV. Issues Before This Court**

In Applicant's Application for Post-Conviction Relief filed on March 11, 2019, and Applicant's Amended Application for Post-Conviction Relief filed on March 21, 2022, Applicant asserts and alleges:

##### **1. Applicant's Claims of Unlawful Arrest/Police Brutality**

- a. I was arrested without probable cause, and due only to an accusation made by my angry and very upset 17 year old daughter, and the officers assuming that I was guilty because I surrendered voluntarily. There were 3 officers walking briskly toward me with their hands on their guns and my Daughter said to me that they were there for me. I had a holster on and I wanted to make sure they knew I was not armed. The officers said that I acted as if I knew why they were there. My wife had just told me that they were there so she could file a report on a gun that we had lost while horseback riding and that she would take care of it. She even went out with the gun box in her hand. I had no reason to think otherwise. She testified to this along with other statements that would have validated my actions if my counsel would have re-cross examined her and the

officers. I thought that I or we, were in trouble for the gun I lost since I, and those in my house were not allowed to have guns present. My wife purchased the guns.

- b. The RO put me in the back of the police car in August with the windows up and proceeded to turn the heat on and left me locked in. (He offered testimony without being ask, that the air was on). I had on long jeans and apparel suited for horseback riding. I still have the clothes in reserve. I asked my counsel repeatedly to get the dash cam video. The light was blinking. I also was not read my Miranda Rights in the car as the RO claimed.

## **2. Applicant's Claims of Ineffective Assistance of Counsel**

- a. My counsel failed to request specific instructions concerning my appearance in the courtroom. I was taken back into custody at the start of the trial without warning, even though I had not violated my probation for 3 years, with and without an ankle monitor. I was not given fresh clean clothes or grooming items for the entire duration of the trial. I wore the same dirty suit every day in court. The jail put me in the drunk bin with another man with only a metal or concrete bench. I slept in my wheelchair sitting up. I was not given a shower or any grooming items. I could not shower, shave, or brush my teeth for the entire week. My clothes and beard were unkempt and my hair was dirty. They also took the band that held my hair back causing it to randomly fall in wiry strings. It was as if they wanted me to look like a dirty man. I was dirty, tired, hungry, and in severe pain.
- b. My counsel failed to make sure that my basic needs be met in the courtroom. I was in severe pain from a recent back injury that occurred while I was hauling lumber and building a two story deck. I had a Doctor's note to excuse me from work and school that my attorney withheld from the judge. The judge ordered a shock belt to be put on my waist for no apparent reason, further intensifying my pain. I was already in a wheel chair and could not walk. I was given no breaks even though the judge said at the beginning that she would take frequent breaks in order for me to be more comfortable. No one followed through on this. When there were breaks, I sat in the courtroom alone (except for the guard) with no water, food, or bathroom breaks, causing me much discomfort and constipation, which further intensified my pain. My attorney ask if I was getting lunch on the first day and the judge said that it would have to come from the jail, but no one followed through. The last day after observing me, my aunt stayed in the courtroom while the others left. She loudly asks me if I had eaten anything. I discreetly shook my head fearing that I would get shocked. (I had only 2 small breakfasts at the jail for the entire week, no lunch, and no supper since it had already been served when I got back to the jail.) She then asks the officer why I was not getting food, for which he replied, "That he had no orders for food or breaks for me". She then demanded that it was my basic civil right to be provided food. He left and came back approx. 30 minutes later with a

brown paper bag containing 2 bologna sandwiches. I had started eating one when the judge entered and the court was in session, so I could not finish. Please check the courtroom video.

- c. My Counsel had a large file of pictures, social media posts, private messages, and letters from people (describing to me what was going on) that were presented to her from family and friends that would have called the victim's and her mother's credibility into question. These items would have contradicted many inconsistent statements that my accusers made while testifying, had she presented them. One example was that my accusers claimed that they were isolated and had no friends. They had many friends and were supervised, not isolated, which the many pictures would have revealed. She also withheld pictures, comments and private messages that would have raised doubt regarding the other testimonies of my accuser's. My counsel failed to investigate other concerns that she was made aware of through the years. I preserve other examples that were withheld in court to discuss with counsel.
- d. My counsel waited until the Friday before court was to begin to get the discovery. I had requested for her to release the discovery documents throughout the 3 years for my family and I to review in order to offer important information. She ignored my requests. There are many statements that I and others could have challenged if we had been given access to the discovery. From what I remember, the judge ruling at my bond hearing told the solicitor to have full discovery and DNA investigation available within 30 days. That was 3 years prior. My attorney never followed through on this order. In court it was clear that my attorney had not spent much time reviewing the discovery contents, or the other information that she was given in detail. My aunt received a copy several weeks after trial. I have still not seen the discovery.
- e. My counsel failed to seek records from DSS, Hospital Visits, or follow up exams.
- f. My attorney went to trial with no co-counsel. She had said before that she would have assistance. My aunt told her the first day (Monday) that she (attorney) was not prepared and needed help especially since there were 2 working for the prosecution and that they were prepared. She replied "it's okay; the jury will see the 2 solicitors as bullying since I am alone." This can be confirmed.
- g. My counsel had 3 years to prepare me for a defense. She waited until the Thursday before court to make a morning appointment even though we kept inquiring to meet with her over the years. That Thursday morning, I could not stand, walk or drive. My aunt sent repeated requests to give us another time to come so she could drive from Charlotte, N.C., to pick me up in Camden, and then drive me to Columbia. She (my aunt) also asks if she could come and consult with my attorney herself and have me on audio or video. She did not respond except to say that she had to pick up the discovery the next day (Friday).

- h. During the trial breaks, she (attorney) did not consult with me in preparation, ask questions, or review my files. Instead she was reading a book.
- i. My counsel would not contact or prepare any witnesses for my defense, this was requested along with a list of people, several times during the 3 years, and again on the first day of court. During the trial, there were people present, (family and friends) who were willing to testify on my behalf. The first day of court, my aunt told her that the prosecution was prepared and that she (attorney) was not, and that she needed to call witnesses. My aunt also mentioned that the social worker from DSS was not there and that she needed to be subpoenaed. She replied to something to the effect of, their case being weak and her strategy was to challenge her evidence. The state did not call DSS to testify. All of this can be confirmed.
- j. My attorney failed to subpoena Sally Williamson, the forensic interviewer. The statements that were made to her by both daughters were different than in the testimonies that they gave in court and could have brought such testimony into question. The state did not call Sally Williamson.
- k. My attorney failed to advise me, and schedule a polygraph and mental exam, even though she was requested to by my aunt. I also requested a polygraph several times while being held in detention after my arrest. The only witness the prosecution could find to testify against me was my next door neighbor who also hated my due to property disputes. There were several witnesses in court that loved me, and my family, that would have testified on my behalf.
- l. My counsel would not allow me to testify even though I made several requests to do so. She also told my supporters in the courtroom to convince me to not get on the stand due to my condition and because I was not prepared (this can be confirmed). She had just asked the judge to allow my pain meds due to my discomfort (pg. 555-556).
- m. The jury did not have the needed opportunity to hear me declare and argue for my innocence, where there was no evidence, only negative DNA, and where the circumstantial evidence was not overwhelming, and mainly based on opinions, hypothesis, and phenomenon. I preserve further details to discuss with counsel.
- n. My counsel allowed my police interrogation video to be presented as evidence even though I had requested an attorney, lawyer or counselor (counsel) several times in the interview while continuing to be interrogated. She also did not object to a redacted version of the interview to be shown to the jury, where as my request for help, a lawyer, attorney, and counselor was redacted.
- o. My counsel failed to re-cross examine witnesses after inaccuracies were made.

- p. My counsel failed to bring up comments made by the investigators in the case and discrepancies in their testimony and written statements
- q. My counsel failed to question diagnostic comments from the medical doctor, Dr. Susan Luberoff, or to seek other expert opinion in the matter.
- r. My counsel failed to ask Dr. Susan Luberoff very obvious questions as to this accusation and the physical exam or seek other expert opinions. She said she was saving the obvious questions to bring up in her closing statements, which she did not.
- s. My counsel failed to re-cross Dr. Susan Luberoff after she changed her statement (pg. 355, 356) from saying that her diagnosis was based on what she was told and not from the exam evidence itself. There are more matters concerning this exam that I would like to discuss with my counsel.
- t. My counsel failed to re-cross examine the police officers comments that they were based on assumptions, after the testimony of the accuser and her mother, that would have brought their credibility and actions into question. I would like to discuss this further with counsel.
- u. My counsel did not object to the prosecutor emphasizing to the jurors, in her closing statement that my accuser did not need to corroborate her story by additional evidence. I believe this statement took the burden to consider unreasonable doubt away from the jurors.
- v. My counsel did not object to my accuser's twin sister testifying in the presence of her mother in the courtroom. This twin daughter was initially in support of me. She was afraid of her mother finding out that she had called her aunt and my aunt to tell them what was happening. (These witnesses would have testified to such if they had been allowed). My attorney was aware of this due to an email and a phone conversation that was sent to her, (attorney) concerning this before my bond hearing, which my daughter attended. She also visited me in jail. I believe her testimony was a result of her being intimidated with her mother's presence in the courtroom. (The judge did allow the victim and her mother to be sequestered from each other's testimony).
- w. In closing argument, we had requested that my attorney add a very important question to her argument, for which she left out. After the closing argument, my aunt asks her why she left out the most obvious and important piece of the puzzle of the entire trial. She replied, "I forgot, but the jurors will figure it out." They didn't.
- x. My counsel seemed disinterested in my defense and treated me with disregard at trial. She frequently brought up questions while cross examining witnesses

and then just dropped the matter, and moved on without pause. She also failed to recognize the many contradictory statements that she could have revisited during cross or used in re-cross examinations had she sought them. At the beginning of trial, she commented to me that she and the solicitor were neighbors and played ball together. She, the solicitor and the judge were friends on social media. I believe this affected her performance in my defense and I (and others) viewed her actions as seeming to not want the judge or solicitors to be upset with her.

3. **Applicant's Claims of Judicial Bias**

- a. I believe that the judge was biased toward me from the beginning with regard to my treatment, my appearance, my basic needs, and comments made.
- b. The judge said that I could only have one of the 4 medications that my doctor had prescribed but the jail would not release it saying that they don't administer narcotics at the jail. It wasn't until the last day before deliberations began, that my attorney asks that I be allowed something for my pain. The judge replied that while she wasn't a doctor, she knew those meds should not be taken together (even though they were legally prescribed) and allowed me to take one of my prescribed meds before I left.
- c. I believe the jurors were pressured to save time and come to a verdict before going into weekend deliberations. To begin with the judge commenting on the jurors before deliberation "I do not anticipate this trial going beyond this week if anyone was concerned about it bleeding over into Monday, that's not any sort of anticipation. That's not the radar screen that would happen in this case." (pg. 552, line 18-21)
- d. The jurors were struggling. They came back with a request (2:45, pg. 636) to see the transcripts of mother Tammy and [Minor 1 and Minor 2], the interview videos, State's comments from closing statements, Officer Dill's testimony, Officer Houser, and Arc's doctor statement. She commented that that was a lot of testimony that would take a lot of time, and perhaps they could whittle it down. (My counsel failed to argue this). The judge told the jurors that that would be hours of testimony and sent them back to review their request. They came back with smaller requests thereby deleting all above, except for [Minor 1] and the mothers testimony, and the first 3 arresting officers. I believe that it would have been favorable to my defense for the jurors to review the Arc doctor, [Minor 2's], and Officer's Dill's testimony. My attorney failed to object.
- e. At 5:05 the jurors requested to "SEE" the laws for reasonable doubt (pg. 640, 641). The judge again discouraged this by saying that she was supposed to send the entire charge but she had a lot of scratch outs and that she would have to go edit, and that there's nothing wrong with her just reading the reasonable doubt portion to them. My counsel failed to argue this even though the jurors

requested to seeing it on paper. Some people (like me for instance) understanding writing better than listening. The jurors also questioned how long they would be staying tonight. The judge told the jurors that we are here for the long haul as long as it takes until you come to a verdict. (pg. 644, 6-11).

- f. 8:00 the jurors ask what if you don't feel persuaded and your decision is final (pg. 645, 14-15). The judge seemed agitated, and replied, "when I declare a mistrial, nobody wins. It means that this case is going to be retried and 12 other people will sit in the very same seats that y'all are sitting in and hear the same testimony and evidence that y'all received, and there's no reason to think that they would be smarter or more capable to reach a verdict." (pg. 646, 1-10). She then later reneged on staying for the long haul and said that they would break at midnight until noon the next day. She later said again, (pg. 647, 19) "Like I said, Nobody wins when there is a mistrial, okay"? I think that the jurors were intimidated by these comments. (I later found out that she was not well during my trial.)
  - g. Next day. A request was made for more testimony regarding Dr. Luberoff findings and what the findings say equivocally (pg. 649, 18-22) and the hard copy of the definitions of the charges. One juror was reported for writing notes outside of the courtroom. The judge said well, I don't need to see your notes as long as they are just your feelings and thoughts (pg. 653, 25). The notes were neither examined nor recorded. My attorney failed to inspect the notes.
  - h. Around 4:15-4:30 my attorney said that the judge was going to talk to the jurors one more time. At 4:42, on Friday evening, they came back with a verdict, as predicted by the judge, before the deliberations began. What did she say to the jurors on her last visit.
  - i. Page 670, 14-19. After the verdict was read and before sentencing, the judge quoted, "I think my sentence speaks for itself, but I do want to say one thing that I think is important and that is to Ms. Maynard. I believe you. I believe you." Some of the jurors were viewed as being distressed outside the court by others. I request that the jurors be interviewed regarding feeling pressured to come to a verdict before Friday evening and what did the judge say during her last visit to them, on Friday evening before the 5:00 closing.
4. Ineffective assistance of counsel for counsel Good's failure to get trial continued due to Applicant's pain medication from Dr. Julie Taylor and failed to present paperwork related to this to the trial judge;

5. Ineffective assistance of counsel for Appellate counsel's failure to raise the issue of judge allowing hearsay from Cpl. Brooks Houser to victim's mother's statement to him re victim's statements (p.122, line 14);
6. Ineffective assistance of counsel for counsel Good's failure to object to hearsay testimony from Officer Houser regarding CAD information "mother had found out recently that her husband had forced their daughter to have sexual intercourse" (p.120, Line 11-13) and defendant's statement "whatever she says, that's what happened. If she said it, it's not a lie." (p.125, Lines 17-19, p.133, Lines 9-10);
7. Ineffective assistance of counsel for counsel Good's failure to object to hearsay testimony from Officer Houser regarding victim's statement (p.131, Line 24-25, p.132, Lines 1-8);
8. Ineffective assistance of counsel for Applicant's counsel Good's failure to object to hearsay from Officer Scott regarding defendant's statement "whatever she says, that's what happened. If she said it, it's not a lie." (p.147, Line 19-20);
9. Ineffective assistance of counsel for counsel Good's failure to object to hearsay and to object to the solicitor misstating testimony by asking Officer Hathaway about defendant stating "whatever she says is true" (p.166, Lines 14-15) following testimony by Hathaway defendant stated "whatever she said" (p.164, Lines 5-6);
10. Ineffective assistance of counsel for counsel Good's failure to object to testimony from the victim regarding the Applicant showing her a "porn video" as evidence of other crimes that the Applicant was not on trial for (p.217, Line 16-21);
11. Ineffective assistance of counsel for counsel Good's failure to object to hearsay testimony from Tammy Price regarding victim answer to the question "is he touching you", "every

- day” (p.299, Lines 1-2) and statements from victim regarding the assault (p.310, Lines 17-21, p.311, Lines 10-18);
12. Ineffective assistance of counsel for Applicant’s counsel Good’s failure to object to hearsay testimony from Tammy Price regarding defendant’s statement “it wasn’t all his fault.” (307, Lines 3-5).
  13. Ineffective assistance of counsel for Applicant’s counsel Good’s failure to object to hearsay testimony from Tammy Price regarding defendant’s statements as hearsay and evidence of other crimes stating “just make it go away. I will pay you whatever you want” (p.311, Lines 25, p.312, Lines 1-3);
  14. Ineffective assistance of counsel for counsel Good’s failure to object to hearsay testimony from Tammy Price regarding defendant’s statements as hearsay and prejudicial regarding statements religious views and reading the Bible (p.313, Lines 5-14);
  15. Ineffective assistance of counsel for counsel Good’s failure to object to improper bolstering offered by the state’s witness Dr. Susan Luberoff regarding her review of a medical examination of the victim along with “her (victims) history” to be “consistent with sexual abuse” (p.252, Lines 12-14). (*Farid A. Mangal v. State of South Carolina*, 781 S.E.2d 732);
  16. Ineffective assistance of counsel for counsel Good’s failure to object to a leading question and prejudicial statement calling for speculation by the witness Martha Penrod “what part of James body was touching (victim)?” “So would that be his genitalia?” Followed by the answer “yes I guess you could saw that” (p.452, Lines 9-10, 14-15);
  17. Ineffective assistance of counsel for counsel Good’s failure to object to hearsay by Capt. Steven Knafelc “I received a phone call from Tammy, she just told me of something on some carpeting some bed spreads” (p.465, Line 3-5);

18. Ineffective assistance of counsel for counsel Good's failure to call an expert in child abuse assessment or child abuse pediatrics to counter the opinions of the state's witnesses in these areas. *Bobby Joe Reeves v. State of South Carolina*, 782 S.E.2d 747;
19. Ineffective assistance of counsel for counsel Good's failure to object to the admissibility of defendant's statement and to a leading question to Inv. Dill by the state, "did he say he needed to get his story on the same page as hers ?" (p.532, Lines 21-23);
20. Ineffective assistance of counsel for counsel Good's failure to object to the jury charge as unconstitutionally coercive for failing to instruct the jury that they should not surrender their conscientiously held beliefs simply for the sake of reaching a verdict. Also the charge mentioned that the case would have to be retried in the event of a mistrial (p.645, Line 24, 25 to p. 646 Lines 1) and did not advise the jury that they have a right to not reach a verdict. *The State v. Billy Lemurces Taylor*, 829 S.E.2d 723;
21. Ineffective assistance of counsel for counsel Good's failure to object to the state's closing as instructing the jury as to the law under S.C. Code § 16-3-657 as prejudicial and as it caused confusion and an unconstitutional comment on the facts not allowed in a jury charge. (p.568, Lines 14-17) *State v. Witherspoon*, 795 S.E.2d 685 (S.C. 2016); and
22. Ineffective assistance of counsel for counsel Good's failure to call character witnesses for the defense including Michael B. Norwood.

Applicant proceeded forward on these allegations at the evidentiary hearing.

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

Applicant has alleged various claims of ineffective assistance of counsel against trial counsel; ineffective assistance of appellate counsel; unlawful arrest and police brutality; and judicial bias. 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 presented, which allowed the Court to scrutinize the credibility of all witnesses presented. This Court finds Applicant has failed to meet the high burden required for the grant of post-conviction relief and all allegations are denied with prejudice. 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).

**A. Unlawful Arrest/Police Brutality**

Applicant has raised two claims (Allegations 1a-b) related to what he perceived as an unlawful arrest and mistreatment by the officers during his arrest. These issues are more statements regarding his discontent with his arrest. They are not raised as claims of ineffective assistance of trial counsel and his current counsel did not include any of the claims in his Amended Application as claims of ineffective assistance of trial counsel. PCR is not a substitute for an appeal. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). PCR is only proper when the application collaterally attacks the validity of the conviction or sentence. *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). As a result, they are not cognizable under the Uniform Post-Conviction Procedure Act (the Act). See S.C. Code Ann. § 17-27-20.

**B. Ineffective Assistance of Trial Counsel**

Applicant raises twenty-four claims (Allegations 2a-x) of ineffective assistance of trial counsel in his *pro se* Application. Additionally, counsel for Applicant has raised seventeen additional claims (Allegations 4, 6-21) of ineffective assistance of trial counsel in his Amended Application. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations

in his or her application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland*, 466 U.S. 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

*Strickland* does not guarantee perfect representation, only a “‘reasonably competent attorney.’” 466 U. S. at 687 (quoting *McMann v. Richardson*, 397 U. S. 759, 770 (1970)); Representation is constitutionally ineffective only if it “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair trial. *Strickland*, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. *See, generally, Id.*

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*, 466 U.S. 668. First, an 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*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. “A fair assessment of attorney performance requires that every

effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, *Wiggins*, 539 U. S., at 526-527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U. S. 1, 8 (2003) (*per curiam*). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. *Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. *Id.* at 688; *Harrington v. Richter*, 562 U.S. 86 (2011)

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." *Id.* 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*, 562 U.S. 86.

“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 adversary 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, with opposing counsel, and with 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; *Harrington*, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of trial counsel as to any of his various allegations. The allegations will be addressed in more detail below.

### **Failure to Provide Basic Needs**

Applicant alleges (Allegations 2a-b) counsel was ineffective for failing to ensure he was provided his basic needs. He testified at the hearing that he was not given food while in the detention center and was not allowed a shower. He also maintained the officers put him in a shock vest and told him if he spoke to his family, then they would shock him. He claimed he had unkept clothes and could not maintain his person hygiene. His counsel testified that he may have been in a sweatshirt or hoodie on the first day of trial, but that he was in a suit the remaining days. Additionally, she indicated he did not have lunch the day they took him into custody but got him sandwiches. Further, she indicated he was treated the same as everyone else in the detention center from that point forward and never was asked to do anything more regarding his basic needs.

Initially, these claims do not appear to be cognizable under the Act because they relate to conditions of his confinement. “PCR is a proper avenue of relief *only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence* as authorized by Section 17–27–20(a).” *Al-Shabazz v. State*, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000) (emphasis in original).

Even if the allegations are construed as claims of ineffective assistance of counsel, this Court finds them without merit. Counsel’s testimony was credible. Counsel indicated the steps she took to ensure Applicant’s needs were met and her belief he was properly attended to while in

the detention center. This Court finds counsel was not deficient because she utilized reasonable effort and means to ensure his basic needs were met and her representation did not fall below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052. Additionally, while this Court finds the allegations unfortunate if true, Applicant has failed to establish prejudice sufficient to undermine the outcome of the trial. *See Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 102 (2013) (“[T]he applicant must demonstrate he was prejudiced by counsel’s performance in such a manner that, but for counsel’s error, there is a reasonable probability the result of the proceedings would have been different.”); *Cf. People v. Payne*, 774 N.W.2d 714, 722 (Mich. Ct. App. 2009) (finding even if counsel failed to object to defendant’s appearance at trial, including his “wild beard,” relief not warranted because defendant could not establish that, but for counsel’s error, the outcome of his trial would have been different). Accordingly, this Court finds Applicant has failed to meet his burden of proving trial counsel was both deficient and any deficiency caused him sufficient prejudice to find the result of the proceeding would have been different.

#### **Failure to Call Witnesses**

Applicant raises various claims of ineffective assistance of counsel for failing to call various individuals as witnesses. (Allegations 2c, 2i-j, 2r, 17, and 21). In particular, he maintained counsel should have called Michael Norwood and Pamela Edwards as witnesses regarding Applicant’s good character as well as to refute allegations made by the victim and the victim’s mother regarding Applicant’s controlling nature. Additionally, he contends counsel should have called Sally Williamson, the forensic interviewer, to testify as well as experts to counter the State’s expert testimony.

Initially, Applicant failed to present the testimony of the forensic interviewer or any experts at the PCR hearing. The South Carolina Supreme Court has “repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.” *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis in original). Because Applicant failed to produce the testimony of the forensic interviewer or any experts, he failed to establish the requisite prejudice to grant relief.

Applicant claims he wanted trial counsel to call Pamela Edwards as a witness to dispute statements by the victim and as a character witness. Applicant presented the testimony of Pamela Edwards at the hearing. She indicated she could have testified the victim did have friends and a social life to refute her testimony Applicant would not allow her to have friends and that he kept her isolated. Further, Ms. Edwards testified neither victim nor the victim’s mother seemed hurt or traumatized by Applicant’s arrest and the victim was not acting like a victim. Finally, she did acknowledge she was called to testify during sentencing in mitigation.

Applicant also called Michael Norwood as a character witness. He indicated he and his family spent considerable time with Applicant and his family. Mr. Norwood indicated his children stayed at Applicant’s house and that he trusted Applicant with his family and children. He testified that many people were working on his mom’s house at the time the victim alleged she was raped by Applicant. However, he acknowledged he was never behind closed doors with Applicant and the victim and that at his mother’s house he was not with them at all times.

Trial counsel testified she considered calling witnesses, including Mr. Norwood and Ms. Edwards. She testified that they did not have anything to offer about the actual allegations. She indicated her strategy was to show the victim and the mom were motivated to make up the

allegations in order to get away from Applicant. Trial counsel testified her strategy was to portray Applicant as controlling and that the victim was seeking to get away from him. Testimony about her having lots of friends would not have been beneficial to that strategy. Further, she believed last argument was important to have the final say before the jury explaining their theory on why the victim fabricated the charges.

“Counsel’s performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’ ” *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052). This Court’s analysis is “focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks.” *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). Additionally, this Court “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694.

This Court finds trial counsel articulated a valid and reasonable trial strategy in light of the evidence presented at trial against Applicant. As part of that strategy, trial counsel believed it best to have the final argument before the jury to set forth their theory on why the victim would make up the allegations against Applicant. Additionally, the witnesses Applicant now claims should have been called were known to trial counsel, considered by trial counsel as witnesses, and ultimately did not have enough to offer into evidence to warrant calling and upsetting the trial strategy. As a result, I find Applicant has not met his burden of proving trial counsel was deficient for failing to call the witnesses presented at the hearing. Finally, this Court finds Applicant has failed to demonstrate sufficient prejudice to undermine the Court’s confidence in the outcome of

the trial. Accordingly, this Court finds Applicant has failed to meet his burden of proving trial counsel was both deficient and any deficiency caused him sufficient prejudice to find the result of the proceeding would have been different.

#### **Failure to Investigate or Prepare Defense**

Applicant raises various issues claiming trial counsel was ineffective for failing to investigate or prepare a proper defense for trial. (Allegations 2d-g, 2k). He asserts trial counsel should have obtained full discovery, records from DSS and other entities, and a polygraph of Applicant. Further, he maintains she failed to consult or prepare any defense. Counsel must, at a minimum, make some effort to interview potential witnesses identified by the defendant, and make an independent investigation of the facts and circumstances of the case. *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011); *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014).

Initially, Applicant failed to provide copies of the DSS records or records from other entities he believed trial counsel should have obtained. As a result, he cannot establish prejudice because this Court is unable to properly consider and judge the necessity of the records. See *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998) (applicant failed to establish prejudice from counsel's failure to investigate where he failed to substantiate his claims at PCR hearing through testimony or records); *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (stating failure 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).

As to the polygraph, the results would have been inadmissible at trial on the question of innocence or guilt. As a result, Applicant cannot establish how trial counsel was deficient by failing to obtain a polygraph or how he was prejudiced by the failure. See *State v. Johnson*, 334

S.C. 78, 90, 512 S.E.2d 795, 801 (1999) (“Evidence regarding the results of a polygraph test or the defendant’s willingness or refusal to submit to one is inadmissible.”); *State v. Wright*, 322 S.C. 253, 255, 471 S.E.2d 700, 701 (1996) (“Generally, the results of polygraph examinations are inadmissible because the reliability of the polygraph is questionable.”).

Finally, this Court considered testimony regarding discovery from both Applicant and trial counsel. While Applicant alleged trial counsel failed to obtain discovery or discuss discovery with him, trial counsel presented contrary testimony indicating she sought and obtained discovery early in her representation and met with Applicant upon receipt of the discovery. Trial counsel indicated she did not give copies of the discovery to Applicant at his request because he did not want other inmates to see it. She also testified she provided discovery to Ms. Edwards and received notes back and had discussion with both Ms. Edwards and Applicant regarding the discovery.

Trial counsel indicated there were few defenses available to Applicant based on his testimony and the evidence against him. She indicated she attempted to have videos suppressed because of references to the need for counsel. This is supported by the trial record. (T.16-62; 85-87). She testified the only defense was that Applicant did not commit the crimes and the victim and her mother were trying to use the allegations to get him out of the family. According to trial counsel, this was the strategy utilized throughout trial.

This Court finds trial counsel’s testimony credible and finds Applicant has failed to establish trial counsel’s investigation and preparation related to discovery from the State fell below prevailing professional norms. Trial counsel conducted more than the minimum required investigation to review discovery, identify witnesses, and construct a defense. Accordingly, this Court finds Applicant has failed to meet his burden of proving trial counsel was both deficient and any deficiency caused him sufficient prejudice to find the result of the proceeding would have been

different. As a result, Applicant has failed to meet his burden to establish trial counsel was ineffective for failing to properly investigate his case or prepare a defense.

#### **Failure to Have Co-Counsel**

Applicant claims trial counsel was ineffective because she failed to have co-counsel after she indicated to his family that she would have assistance and because there were two solicitors representing the State. Trial counsel testified she was prepared and did not need co-counsel. This Court finds trial counsel's testimony to be credible. This Court is unaware of any requirement that counsel have co-counsel at trial. Instead, the question is whether counsel was prepared to go forward, and this Court concludes trial counsel was properly prepared. Additionally, Applicant has failed to demonstrate anything trial counsel failed to do which could have been done with co-counsel or any way he was prejudiced by trial counsel's failure to have co-counsel during trial. As a result, Applicant has not met his burden of proof to show trial counsel was ineffective.

#### **Failure to Allow Applicant to Testify**

Applicant claims trial counsel prevented him from testifying and that he wanted to testify on his own behalf. (Allegations 21-m). At the hearing, he testified trial counsel would not let him testify and suggested to his family that he should not testify. Trial counsel, however, testified she always gives her opinion regarding a defendant testifying at trial, but leaves the decision to them. She explained the benefit of last argument to Applicant and also considered how he would do on the stand in recommending he not testify at trial. Ultimately, she testified it was his determination not to testify and her recommendation even at the hearing would be that he would not testify.

Trial counsel's testimony is credible and further supported by the trial record in this case. After putting Applicant under oath, the trial court began its colloquy related to his decision to testify. The court specifically explained:

We have reached the stage of the trial where you may present your defense. You have the right to claim the protections given to you by the Fifth Amendment to the Constitution and that amendment states in part no person shall be compelled in any criminal case to be a witness against himself. This means you can't be required to testify in this case. You have a right to testify on your own behalf, but no one can make you do that and this is a personal right and no one can make the decision about whether to testify except for you.

(T.557-558). The trial court the explained that his decision must be freely, voluntarily and intelligently made and, again, reiterated: "It is left entirely up to you whether you testify or not."

(T.558). The trial court allowed Applicant to consult with his attorney and family and then this colloquy occurred:

THE COURT: Have you discussed with your lawyer whether or not to testify?

MR. MILLER: Yes, ma'am. I feel like I already have.

THE COURT: And do you wish to testify?

MR. MILLER: No, ma'am.

(T.559). As a result, the record demonstrates Applicant was provided every opportunity to testify and voluntarily chose not to testify on his behalf. This Court does not view that decision in hindsight, but instead only considers it at the time it occurred. *See Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694 ("a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight."). This Court finds Applicant has failed to meet his burden of proving trial counsel was both deficient and any deficiency caused him sufficient prejudice to find the result of the proceeding would have been different. Accordingly, this Court finds Applicant has failed to establish counsel was ineffective in providing him advice not to testify and that the record demonstrates the decision not to testify entirely belonged to Applicant.

### **Failure to Suppress Statements**

Applicant maintains trial counsel was ineffective for failing to suppress the video recorded interrogations presented as evidence. (Allegation 2n). He asserts he requested counsel move to suppress the video several times. Additionally, he contends trial counsel should have objected to the redacted versions of the videos being admitted.

This Court notes the trial court conducted a hearing pursuant to *Jackson v. Denno*, 378 U.S. 368, 376-77, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) (entitling a defendant in a criminal case to an evidentiary hearing on the voluntariness of a statement). At the hearing, trial counsel articulated her objection to the admission of the statement including that Applicant requested counsel. (T.60-61). Here, the trial judge determined that the statements given in the interrogation video were voluntary and any requests for counsel were ambiguous and not a violation of Applicant's constitutional rights. (Tr. 87).

In order to eliminate any prejudice to the defendant from the jury hearing he might want to speak with counsel prior to discussing the charges, the judge had the State play a redacted version of the video removing the ambiguous requests for counsel. Counsel already maintained her objections to the statement being entered but sought to protect Applicant from any adverse inferences the jury could take from the request. (T.59-61). While the Applicant takes issue with the redacted video being played for the jury without objection, this Court finds he has failed to show how this prejudiced the outcome of this case when the redactions made were for his benefit. *See State v. Mazique*, 419 S.C. 282, 298, 797 S.E.2d 730, 738 (Ct. App. 2016) (finding trial court did not err in allowing the State to play only redacted portions of police interviews to eliminate prejudice to the defendant). Accordingly, this Court finds Applicant has not met his burden of

proving trial counsel was deficient in her representation or he was prejudiced by the decisions she made regarding the recordings of his statements.

### **Failure to Adequately Cross-examine Witnesses**

Applicant raises multiple claims regarding trial counsel's alleged failure to properly and adequately cross-examine witnesses during trial. (Allegations 2o-q, 2s-t). He asserts trial counsel failed to raise discrepancies in the testimony and written statements of investigators, failed to question comments from the State's medical expert, should have conducted re-cross examination on witnesses regarding their inaccuracies and discrepancies in testimony. At the hearing, Applicant failed to elaborate on most of these claims or indicate what questions should have been asked or what testimony, discrepancies, inaccuracies should have been exploited by trial counsel. The only question he specifically presented testimony regarding was a desire for trial counsel to cross-examine the medical expert about how the victim never became pregnant even though she was allegedly raped so many times.

Additionally, a review of the transcript of the trial demonstrates trial counsel cross-examined the State's witnesses, including the State's expert witnesses. She testified she was able to bring out all the relevant and important information during cross-examination consistent with their overall defense strategy. Additionally, she testified she was able to keep out the testimony of the victim that she had multiple miscarriages during that time, and she thought asking that question would have been a problem.

In addition to finding trial counsel's testimony to be credible and the record supporting her testimony that she cross-examined witnesses and excluded potentially damaging testimony about possible miscarriages by the victim, the Court finds Applicant failed to meet his burden of proof. He has not provided this Court with any specifics regarding his allegations other than the one

question about how the victim could not become pregnant. As trial counsel surmised, this could have opened the door to very damaging testimony about the possibilities of miscarriages. As a result, counsel was not deficient in failing to ask the one specific question presented at the hearing that Applicant believes should have been asked. Accordingly, this Court finds Applicant has failed to meet his burden of proving trial counsel was both deficient and any deficiency caused him sufficient prejudice to find the result of the proceeding would have been different.

### **Failure to Object to Closing Argument**

Applicant claims trial counsel failed to object to arguments made by the Solicitor that the victim's testimony need not be corroborated in order to be believed. (Allegations 2u and 20). He maintained trial counsel should have objected when the solicitor argued:

The legislature recognizes that these are crimes of secrecy and they are shameful so unlike armed robberies and unlike murders, sometimes, oftentimes there are no other witnesses. Luckily in this case there were other witnesses that corroborated the victim's testimony and I'll get to that because there were plenty that corroborated the victim's testimony including the defendant himself. But the law does state as it relates to criminal sexual conduct in the State of South Carolina, the testimony of the victim need not be corroborated.

(T.568).

While the above language, which comes from S.C. Code Ann. § 16-3-657, is not appropriate for a judge to charge to the jury, nothing limits the State's ability to argue there is no need for corroboration. *See State v. Stukes*, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016) (finding the corroboration charge should no longer be given). Even though the charge should not be given, it is a correct statement of the law. Because there was no legal basis on which counsel should have objected to the argument by the State, trial counsel cannot be considered deficient. Additionally, because it is a legally correct charge and the State presented corroborating testimony from the

sister, mother, and neighbor as detailed above, there can be no prejudice from the failure to object to this particular statement. This Court finds Applicant has failed to meet his burden of proving trial counsel was both deficient and any deficiency caused him sufficient prejudice to find the result of the proceeding would have been different. Accordingly, Applicant has failed to meet his burden of proof to establish trial counsel was ineffective for failing to object to the closing argument.

### **Failure to Object to Mother in Courtroom**

Applicant contends trial counsel should have objected to the victim's twin sister testifying while the mother was in the courtroom because the testimony was the result of the witness being intimidated by her mother's presence. (Allegation 2v). Applicant did not present any testimony or evidence supporting this claim at the PCR hearing. The victim's sister did not testify, nor was there any evidence of intimidation by the mother at the hearing. Further, the trial court's order on sequestration specifically ended upon the testimony of each witness and so there would have been no basis to prevent the mother from being in the courtroom absent evidence of intimidation. (T.93). Accordingly, this Court finds Applicant has failed to meet his burden of proving trial counsel was both deficient and any deficiency caused him sufficient prejudice to find the result of the proceeding would have been different.

### **Failure to Consult or Participate**

Applicant contends counsel failed to consult with him during trial or pay attention to the proceedings and, instead, was disinterested and reading a book. (Allegations 2h and 2x). At trial, Applicant testified trial counsel did not consult with him other than to write the word "bullsh\*t" on a piece of paper. He stated she spent her time reading a book or playing on her phone.

Trial counsel testified she did discuss strategy and defenses with Applicant. She further indicated she gave him a notepad to make any notes or to provide her with information and she did not remember him writing anything down. Trial counsel explained she arrived early before trial and would read or would read while on lunch break, but otherwise was fully attentive during trial.

This Court finds trial counsel's testimony to be credible. A review of the trial record, demonstrating numerous objections by counsel and thorough cross-examination of witnesses, supports counsel's assertion she was involved in trial and not disinterested or distracted. Accordingly, this Court finds Applicant has failed to meet his burden of proving trial counsel was both deficient and any deficiency caused him sufficient prejudice to find the result of the proceeding would have been different.

**Failure to Present Documentation on Medical Condition and  
Failure to Get Trial Continued**

Applicant maintains trial counsel failed to make a full and complete argument in favor of having his trial continued so that he could obtain medical treatment and because he was unable to properly assist in his defense because of his condition. (Allegation 4). At the hearing, Applicant presented multiple pages of medical documents purportedly related to his need for medical treatment for his back as well as supporting his need for prescription medication. Applicant's Exhibits 1-4. Applicant was asked to identify Applicant's Exhibit 1, documents from Sentinel Health, and he was unable to identify all the pages and was unable to say if he gave them to trial counsel. When later addressing Applicant's Exhibits 2-4, Applicant indicated they were some of the paperwork available to present to the judge supporting his need for back surgery and medications. He asserted trial counsel did not want to present all of the pages to the trial court because she did not want the judge to see Applicant was a daily smoker. He also claimed trial

counsel told him that she could not ask him to fall out of his wheelchair, but if he did it would help continue the case.

Pamela Edwards also testified that Applicant had medical issues with his back and that Applicant's Exhibits 1-4 detailed those conditions and treatment. However, she testified she assumed but did not know if trial counsel had the paperwork at trial.

Trial counsel testified she tried to meet with Applicant the week before trial and he pushed her off. It was then she probably had notice of the back issue and the possible need for a continuance. She testified she asked him to get her whatever he could so she could address it with the judge. She testified Respondent's Exhibit 1 was the only documentation Applicant provided her and she gave it to the trial court for consideration during her motion for a continuance. Also, a review of the motion for a continuance shows counsel presented to the trial court Court's Exhibit 1, which was the same email document as Respondent's Exhibit 1 from the PCR hearing. Additionally, counsel indicated she requested he be able to take his medications when she found out he was not taking them. A review of the trial record demonstrates trial counsel requested the medications, which were reviewed by the trial court. (T.555-556). The trial court allowed him to be transported with the two medications for which he was able to show prescriptions in his name.

This Court finds trial counsel's testimony to be credible. This Court finds neither Applicant nor any of his witnesses could testify with certainty which documents were given to trial counsel prior to the hearing. This Court finds his statement that trial counsel refused to present relevant documents because she did not want the trial court to find out he was a daily smoker is not credible. The Court has reviewed the trial transcript and the motion made by trial counsel and holds counsel

was not deficient in her request for a continuance or in presenting what was available to the trial court for consideration.<sup>1</sup>

This Court also notes that Applicant made no showing of how he was prejudiced by not receiving the continuance. He did not provide any evidence or testimony he was unable to assist in his defense nor did he provide any evidence which would have come to light had a continuance been granted. This Court finds Applicant has failed to meet his burden of proving trial counsel was both deficient and any deficiency caused him sufficient prejudice to find the result of the proceeding would have been different. Accordingly, Applicant has not met his burden of establishing trial counsel was ineffective for failing to present documentation to the trial court or get Applicant's trial continued.

#### **Failure to Object to Hearsay Testimony**

Applicant raises numerous allegations that his trial counsel was ineffective for failing to object to hearsay during trial. (Allegations 6-9, 11-14, 16, 18). Applicant maintains trial counsel should have objected to testimony by law enforcement relaying statements made by Applicant either when they confronted him or at other times. Additionally, he contends statements by the victim testified to by others were hearsay and required an objection.

Allegations 6, 8, 9, 11-13, and 18 all involve trial counsel's failure to object to hearsay testimony when the statements were statements made by the defendant. Pursuant to Rule 801(d)(2)(A), SCRE, a statement is not hearsay if "[t]he statement is offered against a party and is . . . the party's own statement in either an individual or a representative capacity." *See also, State*

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<sup>1</sup> This Court also notes the denial of the motion for a continuance was the subject of one of the issues raised in Applicant's direct appeal, and the Court of Appeals found the denial was not an abuse of discretion by the trial court. *See State v. Miller*, Op. No. 2018-UP-121 (S.C.Ct.App. filed March 21, 2018).

*v. Gilchrist*, 342 S.C. 369, 373 n.3, 536 S.E.2d 868, 870 n.3 (2000) (finding admission by defendant was admissible). As a result, there was no legal basis for trial counsel to object to the various statements made by the defendant because they were not hearsay and were properly admitted. Accordingly, trial counsel could not be deficient for failing to object.

Allegations 7 and 11 maintain testimony by the mother or Officer Houser regarding disclosures made by the victim should have been objected to as hearsay. Both of the statements relate to the time or place where the various assaults by Applicant occurred. Both statements are not hearsay pursuant to Rule 801(d)(1)(D), SCRE (A statement is not hearsay if “[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant’s testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident.”). As a result, there was no legal basis upon which trial counsel could have objected to the testimony, and so this Court finds counsel cannot be deficient in her representation of Applicant.

Applicant’s final allegation regarding hearsay, Allegation 16, relates to testimony by Captain Knafelc that he received a call from the victim’s mother with information regarding “something on some carpeting and some bed spreads and pillows that possibly could be some sort of bodily fluid.” (T.465). Trial counsel indicated she did not object to the testimony because she did not believe it was admitted for the truth of the matter asserted. *See* Rule 801(c), SCRE (defining hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, **offered in evidence to prove the truth of the matter asserted**” (emphasis added)). This Court finds it was entirely reasonable for counsel to believe the State did not introduce the statement of the mother for the truth of the matter asserted, but instead to explain why Captain

Knafelc obtained the search warrant he was discussing and why SLED went out to the site. As a result, this Court finds trial counsel was not deficient in failing to object to the testimony. Accordingly, this Court finds Applicant has failed to meet his burden of proving trial counsel was both deficient and any deficiency caused him sufficient prejudice to find the result of the proceeding would have been different.

### **Failure to Object to Doctor's Testimony**

Applicant alleges his trial counsel was ineffective for failing to object to testimony by Dr. Luberoff that the medical examination she performed when considered with the victim's history was consistent with sexual abuse. (Allegation 12). He maintains it was impermissible bolstering.

Dr. Luberoff testified the victim had a "finding on her hymen that can be the result of trauma or injury to the hymen." (T.349). Dr. Luberoff testified victim had a "notch" in her hymen that was "likely the result of penetrating trauma to her vaginal area, to her hymen." (T.352). The State asked: "And is that finding along with her history consistent with sexual abuse?" Dr. Luberoff responded: "It is." (T.352). On cross-examination, trial counsel got Dr. Luberoff to admit the notch could have been made by other injuries and not just sex. (T.353). Significantly, trial counsel asked: "And based on your examination without any history or anything else you cannot state that she was abused, can you?" Dr. Luberoff answered: "Based just on the examination, no." (T.355).

Trial Counsel testified she did not want to bring attention to the statement by the doctor but sought to challenge it on cross-examination. She further indicated the statement did not go contrary to her trial strategy of trying to tie the State's witnesses to the victim so that she could attempt to discredit the victim by asserting the allegations were fabricated in order to get Applicant out of the family. Additionally, she stated she believed she brought out significant points on cross-

examination about the possibility of other causes of the penetrative injury and the fact that the examination alone did not indicate sexual abuse.

This Court finds counsel was not deficient for failing to object. This Court finds she articulated valid reasons for not objecting including not wanting to bring attention to the statement and her desire to build a house of cards on the testimony of the victim and then challenge the victim's credibility.

Even if deficient, this Court finds Applicant has failed to demonstrate prejudice from the failure to object. Generally, the failure to object is prejudicial and warrants a grant of relief when the entirety of the State's case is premised on the victim's testimony. *See e.g., Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018) (finding failure to object to bolstering testimony was prejudicial because no testimony other than that of the victim linked defendant to the crime). However, in this case there is more than just the testimony of the victim, and so this Court finds there is not a reasonable probability that the result of the trial would have been different.

The Court of Appeals recently articulated the standard for the Court to consider in determining prejudice from a claim of bolstering:

The determination whether a bolstering error [prejudiced the outcome of a trial] depends on whether the case turn[ed] on the credibility of the victim. The outcome of a trial turns on the credibility of the victim when the State presents no physical evidence or relie[s] solely upon the victim's testimony to establish the details of the crime. . . ."

*Chappell v. State*, 429 S.C. 68, 80, 837 S.E.2d 496, 502 (Ct. App. 2019) (internal quotation marks and citations omitted). Additionally, the Supreme Court has stated:

However, for the evidence to be "overwhelming" such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, **or a combination of physical and corroborating evidence** so strong that the *Strickland* standard of "a

reasonable probability ... the factfinder would have had a reasonable doubt” cannot possibly be met.

*Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018) (emphasis added). This Court finds this case presents the combination of physical evidence and corroborating evidence so strong that the *Strickland* standard cannot be met.

There was extensive testimony by the victim regarding the abuse, the nature of the abuse, and the circumstances of the abuse. She explained how he would get into bed with her and rape her, even when she shared a room with her twin sister. (T.188). She testified that once she got her own room, Applicant would sleep in her room instead of with her mom. (T.192-193). In addition to the rape, she testified about Applicant lying in the hammock with her and being on the dock with her where he would “smack [her] butt or just hug on [her] and rub on [her].” (T.212).

This Court finds, based on a review of the record, significant portions of the victim’s testimony were corroborated by other witnesses. The victim’s mother testified throughout her marriage she shared a bed with Applicant until they moved to Camden, where the rapes of victim began. She testified she found him sleeping in the bed with their daughter. She indicated he never slept in the bed with the twin daughter, only the victim. Further, when she confronted him about it, he asserted how close he and his daughter were made her jealous. (T.281-282). The victim’s mother further testified she and Applicant had a healthy sex life prior to moving to Camden, but after moving they only had sex two or three times in a year. (T.284).

This Court finds the twin sister’s testimony also corroborated facts presented by the victim. The sister stated Applicant never chose her first for anything, but instead had victim as his favorite. She testified “[t]here was a lot more attention towards her than me.” (T.368). Significantly, victim’s twin sister testified that Applicant would sleep in victim’s bed but never slept in her bed.

(T.370). She testified that she felt something weird was happening between victim and Applicant.

She described an incident on the couch:

[T]here was one time when I had came into our living room and they were both laying on the couch. My dad was behind her and they had a comforter, like a big blanket over them, uhm, and the blanket was all the way up to their necks and for some reason the way they were positioned, when I saw that, my heart kind of dropped. I felt just real uncomfortable with how they were laying together.

(T.371). She testified they were “spooning” and Applicant was holding victim from behind.

This Court finds the neighbor, Martha Penrod, also provided corroborative testimony. She testified she noticed unusual behavior between Applicant and victim. She would see them in the water “facing each other his arms around her . . . pulling her in close, playing with her . . . .” (T.444). She also stated she saw them on the hammock in their yard “snuggling.” She indicated “they were spooning.” (T.445). She testified to a final incident that made her so uncomfortable she had to go back inside when Applicant pulled victim over on his chest and swung his leg around her, basically straddling his daughter with her between his legs. (T.446, 452).

Significantly, Applicant’s own statements support the victim’s claims. When officers arrived, Applicant’s response was to indicate: “whatever she says, that’s what happened. If she said it, it’s not a lie.” (T.147). Further, in his interviews with police, indicated he needed to get his story consistent with the victim’s (State’s Exhibit 46), he never explained the statement made when law enforcement arrived, and admitted he slept in the bed with the victim. (State’s Exhibit 47).

In addition to the corroborative testimony, this Court finds the physical evidence supported the victim’s claims. Dr. Luberoff testified about the medical examination. This Court concludes even if the testimony Applicant alleges should have been objected to by trial counsel was excluded,

the remaining testimony by Dr. Luberoff provided evidence of physical trauma and penetrative injury to the victim's hymen.

This Court finds victim's testimony and credibility were not the sole evidence presented regarding Applicant's identity as the victim's abuser. The physical evidence established a penetrative injury occurred. Victim's testimony, coupled with the significant corroborative testimony of her sister, her mother, and her neighbor provided overwhelming evidence of Applicant's identity as the abuser. As a result, this Court concludes Applicant has failed to establish prejudice which undermines confidence in the outcome of the trial.

#### **Failure to Object to Prior Bad Act**

Applicant contends trial counsel was ineffective for failing to object to testimony by the victim regarding a "porn video" Applicant showed her. (Allegation 10). He maintains this was evidence of a prior bad act and should have been excluded. Trial counsel initially indicated it appeared to be evidence of a prior bad act. She testified that her trial strategy related to how controlling Applicant was over the victim as a reason why the victim made up the allegations to get out from under her control. She testified the video, and the way Applicant used the video, supported their overall strategy.

The testimony admitted at trial, which when reviewed in full, demonstrates the "porn video" was not admitted to demonstrate a propensity to act based on a prior bad act such that it should be excluded under Rule 404(b), SCRE. Instead, it was admitted to show the lengths Applicant went to in order to control the victim and explain why the victim would not have disclosed the abuse. The testimony explained how the video was used by Applicant to claim to the victim that one of her friends was in a "porn video" and to prevent her from being around that friend or talking to the friend. (T.217-218).

This Court finds trial counsel's testimony that allowing the admission of the testimony played into the defense strategy regarding how controlling Applicant was of victim and how she no longer wanted to be sheltered by Applicant. Additionally, this Court finds the testimony was not admitted to prove the character of Applicant, but instead was admitted as part of the *res gestae* of the crime to explain why the victim would not have disclosed the abuse. *See Anderson v. State*, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003) ("A defendant's prior bad act is admissible if it forms part of the *res gestae* of the crime."); *State v. Adams*, 322 S.C. 114, 121-22, 470 S.E.2d 366, 370-71 (1996) (providing evidence of other crimes that supply the context of the crime, or is intimately connected with and helps explain the crime charged, is admissible as *res gestae* evidence), overruled on other grounds by *State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014). As a result, there would not have been a basis to object. This Court finds counsel allowed the testimony to be admitted because it supported the defense strategy, and this Court finds she was not otherwise deficient because the testimony was properly admitted, not as a prior bad act but as part of the *res gestae* to explain the victim's actions in delaying disclosure. Accordingly, this Court finds Applicant has failed to meet his burden of proving trial counsel was both deficient and any deficiency caused him sufficient prejudice to find the result of the proceeding would have been different.

### **Failure to Object to Leading Question**

Applicant alleges trial counsel failed to object to a leading and prejudicial question that called for speculation by Applicant's neighbor Martha Penrod. (Allegation 15). At trial, Ms. Penrod testified regarding seeing Applicant and the victim on their dock. She was asked: "What part of James' body was touching [the victim]?" Her response was: "Uhm, her side would have been in between his legs. One leg was around her back and one leg was hanging down on the

dock.” The State followed up: “So would that be his genitalia?” She responded: “Yeah, I guess you could say that.” (T.452).

Trial counsel was asked why she did not object to the testimony. She indicated her belief it was not a leading question, but merely a clarification of the prior question. This Court finds counsel was not deficient in failing to object as the question was clearly intended to clarify what was already provided as an answer. Additionally, this Court does not find Applicant has established his burden of proving the result of the trial would have been different or any failure to object was sufficient to undermine confidence in the outcome. Accordingly, this Court finds Applicant has failed to meet his burden to establish trial counsel was ineffective on this ground.

#### **Failure to Object to Jury Instruction**

Applicant contends trial counsel should have objected when the trial court addressed the jury after the jury asked the question: “What if you don’t feel persuaded and your decision is final. What is going to happen?” The trial court responded:

I mean, if it’s not going to be an all guilty or an all not guilty, if you can’t come to a unanimous verdict, then I would have to declare a mistrial. When I declare a mistrial, nobody wins. It just means that this case is going to have to be retried and 12 other people will be selected from Kershaw County who would sit in the very same seats that y’all are sitting in and they would hear the same testimony and receive the same evidence that y’all have received, and there’s no reason to think that they would be 12 smarter people or that they would be 12 more capable people to reach a verdict. And so I say that to tell you that I hope that you will continue to deliberate. I understand that some of you may be thinking that it may not be a unanimous verdict. I do want to let you know that you can’t be forced into a unanimous verdict.

As I told you in your instructions, you are to remain with your convictions and that is okay. But I do want you to keep an open mind, to listen to each other and to continue to try. If y’all want to discuss that in the jury room before coming back out here to hear the remainder of the testimony, I’ll allow you to do that. Otherwise, we can hear the remainder of the testimony. And let me just go ahead and tell you that I think that we need to break at about midnight. If

y'all think you can have fruitful conversation still and that deliberations are still working, then I would like us to come back tomorrow.

(T.645-646). The jury continued to listen to testimony and deliberate, including returning the following day.

Applicant contends the trial court's response was "unconstitutionally coercive for failing to instruct the jury that they should not surrender their conscientiously held beliefs for the sake of reaching a verdict." Trial counsel indicated she did not see anything wrong with the trial court's response, believed it was similar to a charge pursuant to *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896), and did not believe it was intimidating to the jurors.

This Court finds the response to the jury's question was not improper or unconstitutionally coercive. The trial court told the jurors they could not be "forced into a unanimous verdict." Significantly, she told them: "As I told you in your instructions, you are to remain with your convictions and that is okay." (T.646). The trial court specifically referred to a prior instruction in which the trial court explained:

It is important that you attempt to reach a unanimous verdict but, of course, only each of you can do so after having made your own decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict. In other words, do not change your opinions solely for the sake of reaching a unanimous verdict.

(T.633). This Court takes note that the response Applicant believes warranted an objection did not come after the jury actually indicated it was deadlocked. It came after a general question about the effect of possible deadlock. This Court finds this significant when viewed in light of the importance of an *Allen* charge and what must be told to the jury in an *Allen* charge.

When viewed as a whole, it is clear the trial court's instructions to the jury were proper and not unconstitutionally coercive. While she did not use the exact language from *State v. Taylor*, 427

S.C. 208, 218, 829 S.E.2d 723, 729 (Ct. App. 2019), that “they should not surrender their conscientiously held beliefs simply for the sake of reaching a verdict” the trial court did use language which conveyed the exact same instruction. The trial court stated: “you are to remain with your convictions and that is okay” in response to the question after previously instructing: “Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict. In other words, do not change your opinions solely for the sake of reaching a unanimous verdict.” (T.633).

This Court finds trial counsel reasonably believed the response to the question was correct and sufficient. Trial counsel did not believe it to be coercive and this Court, based on a review of the totality of the instructions given to the jury, agrees they were not coerced into rendering a unanimous verdict. As a result, Applicant has failed to meet his burden of establishing counsel was ineffective for failing to object to the trial court’s response to the jury question.

### **C. Claims of Judicial Bias**

Applicant has raised numerous allegations in which he claims judicial bias. (Allegations 3a-j). Many of these allegations are raised as statements appropriate for direct appeal review and are not raised in a manner cognizable under the Act. Allegations 3a-c, 3f, and 3h-i are not raised as claims of ineffective assistance of trial counsel and his current counsel did not include any of the claims in his Amended Application as claims of ineffective assistance of trial counsel. PCR is not a substitute for an appeal. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). PCR is only proper when the application collaterally attacks the validity of the conviction or sentence. *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). As a result, they are not cognizable under the Act. See S.C. Code Ann. § 17-27-20. The remaining claims will be addressed.

### **Failure to Object to Limitation on Testimony Replayed**

Applicant contends counsel was ineffective for failing to object when the trial court asked the jurors to reconsider how much of the testimony they needed to rehear, and they chose to only rehear a portion of the testimony originally requested. Jurors sent out a note to the judge indicating a desire to get transcripts of and hear numerous witnesses' testimony including the victim, the victim's mother, the victim's sister, video of Applicant's statements, officer testimony, and other portions of the trial. The trial judge noted there was no transcript available and reminded the jury how long it would take to replay all they requested and asked them to review their request. (T.638-639). She made it abundantly clear if the jury wanted to hear everything, they would get it ready for the jury. (T.639). They returned with a smaller, though still significant, request for testimony to rehear.

There is no indication in the record the jury did not get to listen to all the testimony they wanted to hear. Trial counsel could not force the jury to rehear portions of the testimony. Had the jury desired additional testimony to be replayed, it could have been requested. *See Armstrong v. Toler*, 11 Wheat. 258, 279, 6 L.Ed. 468 (1826) (opinion of Marshall, C. J.) ("Had the jury desired further information, they might, and probably would, have signified their desire to the court. The utmost willingness was manifested to gratify them, and it may fairly be presumed that they had nothing further to ask"). The judge never articulated a restriction on the amount of testimony; instead, she simply sought them to review what was necessary. Most significantly, Applicant does not demonstrate how the failure to hear the remaining testimony impacted the outcome of the case. The jury heard the testimony during trial. This Court finds it would be pure speculation to assume they did not recall the testimony or consider it in reaching their verdict. As a result, this Court finds Applicant has failed to prove counsel was deficient or, even if counsel should have objected

to the trial court's request that the jury review their request, he has failed to demonstrate any prejudice which resulted as the jury was never precluded from hearing any testimony it requested.

#### **Failure to Request Written Jury Instructions**

Applicant maintains the jury requested to "see" the jury instructions on reasonable doubt. The trial court noted she did not have a clean copy of her entire charge and would be required to send the full charge back to the jury. *State v. Covert*, 382 S.C. 205, 210, 675 S.E.2d 740, 743 (2009) ("It is never appropriate, however, to give only part of the charge to the jury as was done in this case."). The trial court offered to reread her instructions to the jury and both counsel agreed. Most significant, however, the trial court ultimately gave the jurors a written copy of the entire jury charge. (T.656). As a result, I find Applicant cannot establish prejudice even if trial counsel could have been deficient in failing to request the charge on reasonable doubt be presented in writing to the jury.

#### **Failure to Inspect Juror's Notes**

Applicant claims his counsel was ineffective for failing to request to examine the notes taken by a juror. After an evening break, a note was given to the trial court indicating a juror arrived with notes he had taken during the night. The trial court examined the juror on the record regarding the substance of the notes. (T. 653-655). The juror indicated the notes were his own thoughts and not research or outside information. (T.655). Because he indicated they were his thoughts that he intended to share during deliberations, it is questionable whether counsel or anyone would be allowed to see the notes under Rule 606, SCRE. Significantly, this Court finds Applicant has failed to articulate any prejudice from counsel's failure to request a review of the notes. Accordingly, he has failed to meet his burden of establishing trial counsel was ineffective for failing to review the juror's notes.

#### **D. Ineffective Assistance of Appellate Counsel**

Applicant contends appellate counsel was ineffective for failing to raise an issue related to alleged hearsay testimony by Corporal Brooks Houser. Trial counsel objected to his testimony that upon his arrival he met the victim's mother and "[s]he stated to me that her daughter [victim] told her that her father Mr. James Miller had forced her to have sexual intercourse with him several times over the past year." Appellate counsel did not raise this issue in her brief to the Court of Appeals.

"A defendant is entitled to effective assistance of appellate counsel." *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). "Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it 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). "Thus, . . . we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance." *Id.*

"Although appellate counsel is required to provide effective assistance of counsel, 'appellate counsel is not required to raise every nonfrivolous issue that is presented by the record.'" *Id.* quoting *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). "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 . . . ." *Id.* citing *Jones v. Barnes*, 463 U.S. 745, 754, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith v. Robbins*, 528 U.S. 259, 288, 120 S. Ct. 746 (2000). "Generally, only when ignored issues are

clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Id.* (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

Appellate counsel filed a merits brief to the South Carolina Court of Appeals. In the Brief, she raised two issues related to the denial of Applicant’s request for a continuance and the admission of testimony from Dr. Foster over objection that it impermissibly bolstered the victim’s testimony and was unreliable. Appellate counsel testified she considered raising the objected to hearsay issue. She stated she did not raise the issue because she believed it was not more meritorious than the issues she raised. She reviewed her notes and felt the State had several grounds to contest the issue. First, she testified the State could argue the testimony was not hearsay because it was not admitted for the truth of the matter asserted and instead related to the investigation. Second, she said it could be argued the statement by the victim’s mother was an excited utterance because it was made when the mother was upset and distressed over learning of the abuse from her daughter. Third, she explained her belief the State could argue it was entirely harmless because the same testimony came in through the mother without objection. Finally, she reiterated the issue was less meritorious than the issues she raised to the Court of Appeals.

This Court finds appellate counsel’s testimony to be eminently credible. Appellate counsel articulated a very reasonable basis for deciding to raise the two issues raised as opposed to the issue complained of by Applicant. Further, even if the issue is meritorious, which is questionable given the reasons articulated by appellate counsel, counsel is not required to raise every non-frivolous issue. This Court finds Applicant has failed to demonstrate the issue he asserts counsel should have raised was “clearly stronger” than the two issues she raised. As a result, this Court finds Applicant has not met his burden of proving appellate counsel was ineffective for failing to raise the hearsay issue.

**E. Any Other Allegations**

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.



## VI. CONCLUSION

Based on the evidence presented at the PCR hearing and a thorough review of the complete record, this Court finds and concludes Applicant failed to meet his burden of proof pursuant to *Strickland* and Rule 71.1, SCRCR. Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, based on the foregoing, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

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. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, 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. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 5<sup>th</sup> day of May, 2022.

Spartanburg, South Carolina

  
GRACE GILCHRIST KNIE  
Presiding Circuit Court Judge

**RECEIVED**  
JUN 02 2022  
S.C. SUPREME COURT