

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Anderson County
R. Lawton McIntosh, Circuit Court Judge

RECEIVED

JUN - 3 2013

S.C. Supreme Court

HOWARD THOMPSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213031

APPENDIX

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STATEMENT OF FACTS

Appellant was the minor victim's baby-sitter. He kept the minor victim and his brother from about 2:00 or 3:00 p.m. until their mother would pick them up around 10:00 p.m. (T.231-234; R. 20-23). On May 18, 2005, the minor victim's mother got off earlier than usual and went to Appellant's house to pick up her children. When she arrived, she let herself into the house after no one came to the door. (T.235-236; R. 24-25).

As she looked for the children, she went to Appellant's bedroom and the door was locked. After the victim's mother knocked, Appellant opened the door. (T.236-237; R. 25-26). The mother saw Appellant without his shirt and in boxers or shorts. The minor victim was on the bed, completely naked, and holding a sheet. (T.237-238; R. 26-27). Appellant stated the minor victim removed his clothes because he was hot. The mother told the child to put his clothes on, she grabbed the two kids, and they left. (T.238; R. 27). They left and the mother took the children to her boyfriend. After telling him what she had seen, the boyfriend decided to take the children to the hospital. (T.247-248; R. 29-30).

Dr. James Reese, an emergency room doctor, examined the minor victim. (T.265-267; R. 33-35). When Dr. Reese questioned the minor victim regarding what happened to him, the minor victim replied he had been touched on his "wee wee" and his butt. The minor victim was touched with both a hand and a mouth. (T.269-271; R. 37-39).

Lieutenant Nikki Carson, an investigator of sex crimes and crimes against children, conducted a forensic interview with the minor victim. (T.275-283; R. 40-48). As a result of information from the minor victim obtained during the interview, Lieutenant Carson and her partner proceeded to Appellant's house to speak with him and to look for specific

photographs disclosed by the minor victim. (T.283; R. 48). Appellant waived his Miranda rights and gave a written statement. (T.284; 288-289; R. 49; 50-51). In the statement, Appellant indicated the minor child took his clothes off because he was hot when Appellant was out of the room. (T.294-295; R. 52-53). After Lieutenant Carson and her partner searched the residence, they locate the pictures of nude males described by the minor victim during the forensic interview. (T.298-299; R. 54-55). After Lieutenant Carson found the photos in Appellant's book bag in his bedroom, Appellant agreed to give a second statement. In his second statement, Appellant admitted performing oral sex on the minor victim on many occasions:

Beginning at the end of February I began engaging in sexual encounters with [the minor victim]. On more that one occasion, I would insist that [the minor victim] take off his clothes and I would take off mine and we would get in the bed. I would suck his penis. . . . [The minor victim] would lick on my neck, chest, penis, down to my feet. I would also lick code about his body. This happened a lot, probably if not 50 times. I would never force [the minor victim] to do this, it would just happen. (T.312-313; R. 312-313).

After giving the second statement, Appellant was arrested and charged with criminal sexual conduct with a minor, first degree.

Prior to trial in December 2006, Appellant moved to relieve counsel and represent himself. The Honorable Howard P. King conducted a hearing and granted Appellant's motion to represent himself. Counsel was appointed as advisory counsel. (12/7T.3-14; R. 5-16). At trial before the Honorable Alexander S. Macaulay and a jury, Appellant was convicted of criminal sexual conduct with a minor, first degree. (T.469; R. 65). He was sentenced to thirty years in prison. (T.477-478; R. 66-67). This appeal follows.

ARGUMENT

- I. Appellant was adequately informed of the dangers of self-representation and made a knowing and voluntary waiver of his right to counsel. Additionally, Appellant failed to preserve this issue for review on appeal.**

Appellant maintains the trial court failed to adequately warn him of the dangers of self-representation; therefore, his waiver of the right to counsel was not knowing and voluntary. Appellant, however, failed to preserve this issue for review on appeal. Additionally, the trial court adequately warned Appellant of the disadvantages of self-representation and Appellant knowingly and voluntarily waived his right to counsel. Finally, a review of the whole Record indicates the decision to accept Appellant's waiver of the right to counsel was not in error.

First, the issue is not preserved for review on appeal. Appellant moved to relieve counsel and represent himself at a pre-trial motions hearing. The Honorable Howard P. King granted his motion to relieve counsel and appointed advisory or standby counsel. (12/7T.3-14; R. 5-16). When trial began five and a half months later before the Honorable Alexander S. Macaulay, Appellant was asked whether Judge King "advised you on the fact that an attorney might be of valuable assistance to you and if you do proceed you do so at a certain disadvantage?"¹ (T.54; R. 17). Appellant indicated he had been advised. Judge Macaulay continued: "I wanted just to be sure that you had been advised of the fact that an attorney might be of valuable assistance to you, as well as the dangers of representing yourself." Appellant responded: "Thank you, Your Honor." (T.55; R. 18). There is no indication

¹Appellant initially recited the incorrect name of the judge that handled the pre-trial hearing, but this was corrected by the Assistant Solicitor.

Appellant ever requested the court re-appoint counsel or that he asked to reconsider the waiver of his right to counsel. Additionally, Appellant did not raise the issue of an invalid waiver in a motion for a new trial after trial ended. Accordingly, this Court should find the issue is not properly preserved for review on appeal. See State v. Pride, 372 S.C. 443, 447, 641 S.E.2d 921, 923 (Ct. App. 2007) (questioning preservation of issue when not raised in a motion for a new trial based on invalid waiver of counsel); State v. Cabrera-Pena, 350 S.C. 517, 535, 567 S.E.2d 472, 481-82 (Ct. App. 2002) (citing State v. Hyatt, 132 N.C.App. 697, 513 S.E.2d 90, 94 (1999) (“[T]o obtain relief from a waiver of his right to counsel, a criminal defendant must move the court for withdrawal of the waiver”)); see also, State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004) (to be preserved for appeal, issue must be raised to and ruled on by trial court); State v. Byram, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) (failure to raise constitutional issues at trial results in waiver on appeal).

Appellant’s argument also must fail after reviewing the merits. “The Sixth Amendment guarantees criminal defendants a right to counsel. This right may be waived.” State v. Gill, 355 S.C. 234, 243, 584 S.E.2d 432, 437 (Ct. App. 2003) (citations omitted). “A defendant may surrender his right to counsel through (1) waiver by affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture.” State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003).

To establish a valid waiver of counsel, Faretta requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation. Prince v. State, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990) (citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). “The trial judge must determine

whether there is a knowing and intelligent waiver by the defendant. If the trial judge fails to address the disadvantages of appearing pro se, as required by the second prong of Faretta, ‘this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source.’” State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 135 (Ct. App. 2003) (quoting Prince, 301 S.C. at 424, 392 S.E.2d at 463) (internal citations omitted).

In the instant case, Judge King asked Appellant about his legal experience. While he had not been in court previously, he indicated he took a course in criminal justice and did his own research into criminal procedure. (12/7T.7; R. 9). Further, Judge King explained to him the possible sentence Appellant faced on the charges, as well as the fact the charges were considered most-serious and required Appellant to register as a sex offender. (12/7T.8-10; R. 10-12). Judge King then explained Appellant would be required to abide by the rules of procedure and would not be assisted by the trial judge in how to try his case. Further the court explained the rules of evidence apply and Appellant would be held to those rules. (12/7T.10-11; R. 12-13). Judge King advised Appellant:

I must advise you that in my opinion you would be far better defended by a trained lawyer than by yourself. I think it is unwise of you to try to represent yourself. You’re not familiar with the law, you’re not familiar with court procedure, you’re not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself. (12/7T.12-13; R. 14-15).

Judge King then asked Appellant: “In light of the penalty that you might suffer if you are found guilty and in light of all the difficulties in representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?” Appellant responded: “Yes, sir, I do.” (12/7T.13; R. 15). Judge King relieved counsel and allowed

Appellant to represent himself; however, counsel was appointed as standby counsel to assist Appellant during trial.

Prior to trial, after Appellant had five months to reconsider his decision to proceed without an attorney, Judge Macaulay asked Appellant if he had been advised of the valuable assistance an attorney could provide and the disadvantages he would face in trying to represent himself. (T.54; R. 17). Appellant indicated he had been advised of the danger of self-representation. Appellant, however, never asked for counsel or indicated he was not prepared to go forward with trial.

The questioning by Judge King as well as the warnings by both Judge King and Judge Macaulay indicate Appellant was appropriately apprised of the dangers of self-representation and knowing and voluntarily waived his right to counsel. Both judges ensured Appellant knew the dangers of self-representation, Appellant was advised he would be required to follow the rules of procedure and rules of evidence during trial, and Appellant had over five months from the time counsel was relieved to the time trial began to reconsider his decision to relieve counsel. Accordingly, the court did not err in relieving counsel and allowing Appellant to represent himself at trial.

Further, the record indicates Appellant knew the risks of self-representation and voluntarily waived the right.

While a specific inquiry by the trial judge expressly addressing the disadvantages of a pro se defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding. If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied.

Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (citations omitted). To determine if an accused has sufficient background to comprehend the dangers of self-representation, courts consider a variety of factors including:

- (1) the accused's age, educational background, and physical and mental health;
- (2) whether the accused was previously involved in criminal trials;
- (3) whether the accused knew the nature of the charge(s) and of the possible penalties;
- (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation;
- (5) whether the accused was attempting to delay or manipulate the proceedings;
- (6) whether the court appointed stand-by counsel;
- (7) whether the accused knew he would be required to comply with the rules of procedure at trial;
- (8) whether the accused knew of the legal challenges he could raise in defense to the charge(s) against him;
- (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and
- (10) whether the accused's waiver resulted from either coercion or mistreatment.

Gardner v. State, 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87 (2002).

In the instant case, a review of the facts demonstrates Appellant knew the dangers of self-representation. While he recently graduated high school and did not have prior experience in the courtroom, Appellant was advised of the charges and penalties he faced. Appellant understood he would be required to comply with all rules of procedure and evidence, had been told of the elements of the crimes by counsel prior to counsel being relieved, and was advised of the dangers of self-representation. (12/7T.4-14; T.54-55; R.6-16; 17-18). Appellant raised objections to testimony, conducted cross-examination of State's

witnesses, presented his own witnesses, and even moved for directed verdict at the close of the State's case. These actions demonstrate he had the knowledge and ability to represent himself at trial. Accordingly, Appellant's decision to relieve counsel and proceed *pro se* was knowing and voluntary, and made with his "eyes open."

II. The trial court did not err in overruling Appellant's objection to the testimony of the minor victim's mother regarding why she did not allow the minor victim to testify at trial.

Appellant maintains the trial court erred in allowing the minor victim's mother to testify regarding why the minor victim would not testify at the trial. Appellant contends this information is beyond the personal knowledge of the minor victim's mother, was speculation, and prejudiced Appellant because the testimony made it appear the child was afraid of Appellant. The testimony, however, was offered to explain why the child was not being presented as a witness. The mother testified regarding her decision not to allow the child to be present and her mental state in making that decision. Even if the testimony relates to the mental state of the child, it is something clearly within the personal knowledge of the mother. Finally, any error in admitting the testimony was harmless because the testimony never said what the child was scared of and there is overwhelming evidence in the record of Appellant's guilt.²

Pursuant to Rule 602, SCRE: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." "The admission or exclusion of evidence is left to the sound discretion of

²It is also questionable whether the issue is properly preserved for review on appeal. While it is notable that a *pro se* defendant would object to this testimony, Appellant never argued the mental state of the child was beyond the personal knowledge of the mother. He simply argued the State should not have the right to testify about why the victim was not going to testify. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding party may not argue one ground at trial and another on appeal). The objection by Appellant, however, further indicates Appellant had the basic knowledge necessary to represent himself.

the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.”

State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001).

The State asked the minor victim’s mother if the minor victim was going to testify at the trial. After the mother responded that he was not going to testify, the State asked the mother “why not?” She began her response stating: “Because he was scared - -” and then Appellant objected. (T.249; R. 31). After the court overruled the objection, the State asked: “[A]s a mother, why is he not going to be testifying today? Without telling what [the minor victim] said to you.” The mother responded: “Well, he is scared and I don’t want to put him through that.” (T.250; R. 32) (emphasis added). Clearly, the mother’s testimony related to her own state of mind and her reasoning for not allowing the minor victim to testify. She was simply explaining her reason and not discussing anything beyond her personal knowledge.

Even if the victim’s mother was testifying regarding the child’s state of mind, that is a subject clearly within her personal knowledge. After the court overruled the objection by Appellant, the Solicitor specifically asked: “[A]s a mother, why is [the minor victim] not going to be testifying today?” (T.250; R. 32) (emphasis added). A foundation was laid for how the witness knew the minor victim’s state of mind, and the testimony was relevant to explain to the jury why the child was not testifying. It is not pure speculation on the part of a mother to testify about the state of mind of her eight-year old child, and the trial court properly allowed the testimony. (T.231-232; R. 20-21).

Additionally, any comparison to the statements in Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994), is clearly not appropriate in this case. In Mincey, the prosecutor alleged

testimony favorable to the defendant was false and obtained through intimidation and threats. Nothing in the record indicated any threats were made nor supported the claim the testimony resulted from intimidation. *Id.* at 358, 444 S.E.2d at 511-12. In the instant case, the victim's mother never testified Appellant threatened the child, intimidated the child into not testifying, or played any role in the child not testifying at trial.

Finally, Appellant has failed to prove how he was prejudiced by the comment and any error is harmless. The victim's mother never stated the minor victim was afraid of Appellant. She simply stated "he is scared and I don't want to put him through that." The testimony makes it clear that the child is scared of being in court and of testifying; not that he is afraid of Appellant. Given the testimony in this case, as well as the written statement by Appellant admitting the sexual abuse of the minor, the comment that the child was scared was entirely harmless. *See Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (finding error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained); *State v. Garner*, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (holding improperly admitted evidence was harmless error given the overwhelming evidence of guilt).

Accordingly, the trial court did not err in allowing the minor victim's mother to explain why the child would not be testifying at trial. The testimony explained the mother's state of mind, was within her personal knowledge as it related to the child, and did not prejudice Appellant. Even if the admission was error, the error was harmless given a review of the record. Therefore, this court should affirm the trial court's decision to admit the testimony.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

February 10, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Anderson County
Hon. Alexander S. Macaulay, Circuit Court Judge

The State,

Respondent,

v.

Howard Thompson, III,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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February 10, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Anderson County
Hon. Alexander S. Macaulay, Circuit Court Judge

The State,

Respondent,

v.

Howard Thompson, III,

Appellant.

PROOF OF SERVICE

I, ELLEN DuBOIS, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
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Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 10th day of February, 2009.



ELLEN DuBOIS
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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

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

The State, Respondent,

v.

Howard Thompson III, Appellant.

Appeal from Anderson County
Alexander S. Macaulay, Circuit Court Judge

Unpublished Opinion No. 2010-UP-102
Submitted January 4, 2010 – Filed February 4, 2010

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of
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Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General Josh W. McIntosh,
Assistant Deputy Attorney General Salley W.
Elliott, and Assistant Attorney General William M.
Blitch, Jr., all of Columbia; and Solicitor Christina
T. Adams, of Anderson, for Respondent.

PER CURIAM: Howard Thompson III appeals his conviction for criminal sexual conduct with a minor, first degree, following a trial by jury. Thompson argues that the circuit court erred by not obtaining an intelligent waiver of his right to counsel and by overruling his objection. We affirm^[1] pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Thompson's decision to proceed pro se: State v. Howard, 384 S.C. 212, 219, 682 S.E.2d 42, 46 (Ct. App. 2009) (an argument must be raised to and ruled upon by the trial judge in order to be preserved for appellate review).
2. As to the testimony of victim's mother: State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997), cert. denied, 522 U.S. 853 (U.S. 1997) (appellant must state the grounds of an objection to the trial judge in order to preserve it for appellate review); State v. Rice, 375 S.C. 302, 323, 652 S.E.2d 409, 419 (Ct. App. 2007) ("A general objection which does not specify the particular ground on which the objection is based is insufficient to preserve a question for

review.").

AFFIRMED.

WILLIAMS, PIEPER, and LOCKEMY, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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February 22, 2010

REMITTITUR

The Honorable Cathy M. Phillips
100 S Main
PO Box 8002
Anderson, SC 29622-8002

Re: The State v. Thompson, Howard III
2005-GS-04-01699; 2005-GS-04-01700

Dear Ms. Phillips:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,

Tanya A. Gee
Clerk of Court

TAG/lm

cc: Appellate Defender Lanelle C. Durant
Assistant Attorney General William M. Blicht, Jr.
Christina Theos Adams, Esquire

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

County of ANDERSON)

HOWARD THOMPSON, III, # 322000)

Full name and prison number (if any) of Applicant)

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF

2010-CP-04-04229

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

- 1. Place of detention LEE CORRECTIONAL INSTITUTION, 990 WISACKY HIGHWAY, BISHOPVILLE, SOUTH CAROLINA
- 2. Name and location of Court which imposed sentence ANDERSON COUNTY COURT OF GENERAL SESSIONS, ANDERSON, SOUTH CAROLINA
- 3. Name(s) of co-defendant(s) (if any) N/A

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

- (a) 2005-95-04-1700; CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE FIRST DEGREE

A TRUE COPY

NOV 24 2010

Marilyn G. Houston
CLERK OF COURTS

5. The date upon which sentence was imposed and the terms of the sentence:

(a) MAY 23, 2007; THIRTY (30) YEARS

(b) _____
(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

YES, I DID

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. SOUTH CAROLINA COURT OF APPEALS

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. AFFIRMED

ii. _____

iii. _____

(c) the date of each such result:

i. FEBRUARY 4, 2010

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. 2010-UP-102

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

(c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL
- (b) DENIAL OF RIGHT OF CONFRONTATION

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) FAILED TO PROVIDE ADVICE CONCERNING STATEMENTS
- (b) WITNESS WAS NOT COMPELLED TO TESTIFY ACCORDING
- (c) TO PARENTAL PERSONAL KNOWLEDGE

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? YES

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. EVIDENCE TAMPERING / FABRICATION AND
 - ii. OBSTRUCTION OF JUSTICE

- (b) the name and location of the Court in which each was filed:
 - i. UNITED STATES DISTRICT COURT

(c) the disposition thereof:

- i. DISMISSED WITHOUT PREJUDICE
- ii. _____
- iii. _____

(d) the date of each such disposition:

- i. JUNE 30, 2006
- ii. _____
- iii. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. SEE CASE No. 3:2006-1461-MBS-JRM
- ii. _____
- iii. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

YES, IT HAS.

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. DENIAL OF RIGHT OF CONFRONTATION (10)(b)
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. SOUTH CAROLINA COURT OF APPEALS
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) (10)(a) NOT FOR APPELLATE REVIEW
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? N/A
- (b) your trial, if any? YES, I WERE.
- (c) your sentencing? YES, I WERE.
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES, I WERE.
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
N/A

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. CHARLES W. WHITEN, JR., POST OFFICE BOX 716, ANDERSON, SOUTH CAROLINA 29622
 - ii. LANELLE CANTEY DURANT, POST OFFICE BOX 11589, COLUMBIA, SOUTH CAROLINA 29211
 - iii. _____

- (b) the proceedings at which each such attorney represented you:
 - i. TRIAL AND SENTENCING IN THE COURT OF GENERAL SESSIONS
 - ii. SOUTH CAROLINA COURT OF APPEALS
 - iii. _____

19. State clearly the relief you seek in filing this application:

BASED ON THE ALLEGATION(S) RAISED, THE
CONVICTION AND SENTENCE BE REVERSED AND
REMANDED FOR A NEW TRIAL.

20. Are you now under sentence from any other court that you have not challenged?

NO, I AM NOT.

STATE OF SOUTH CAROLINA)

County of ANDERSON)

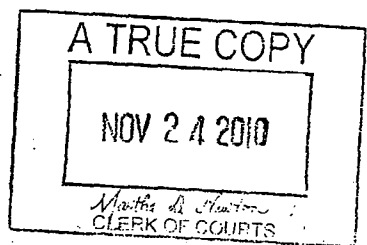
VERIFICATION

I, HOWARD THOMPSON III, #32000, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Howard Thompson III

SWORN to and subscribed before me this 23
day of NOV 2010.
Debra Sims (L.S.)
Notary Public

My Commission Expires: 11-4-2015



APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, HOWARD THOMPSON III #322001, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

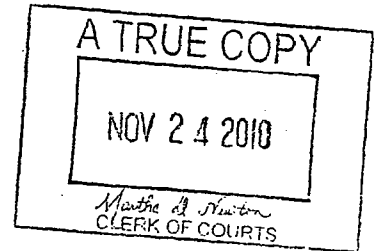
- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Howard Thompson III
Applicant

SWORN or affirmed to and subscribed before me this
23 day of Nov., 2010.

Debra Sims
Notary Public

My Commission Expires: 11-4-2015



ATTACHMENT

(11)(a)
MADE BY VICTIM TO LAW ENFORCEMENT OFFICER
THAT TENDS TO PROVE ME INNOCENT OF THE CRIME
CHARGED AND THE MATERIAL EVIDENCE PRODUCED AT
TRIAL WAS DIFFERENT WARRANTING A DIRECTED
VERDICT.

FORM 5

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

)IN THE COURT OF COMMON PLEAS)

Howard Thompson, III, SCDC#322000,)
Applicant,)

AMENDED APPLICATION FOR
POST CONVICTION RELIEF

vs.)

2010-CP-04-4229

State of South Carolina,)
Respondent.)

1. Place of detention: Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC

2. Name and location of Court which imposed sentence: Anderson County Court of General Sessions, Anderson, SC

3. Name of co-defendants if any: N/A

4. The indictment number or numbers (if known) upon which the offenses for which sentence was imposed:

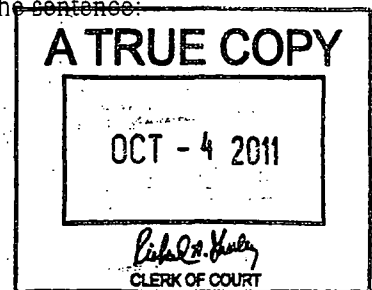
a. 2005-GS-04-1700; criminal sexual conduct with a minor in the first degree

5. The date upon which sentence was imposed and the terms of the sentence:

May 23, 2007, thirty years

6. Check whether a finding of guilty was made:

- a. after a plea of guilty
- b. after a plea of not guilty ✓
- c. after a plea of nolo contendere



7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

- a. the name of each Court to which you appealed: SC Court of Appeals
- b. the result in each such Court to which you appealed: Affirmed
- c. the date of each such result: February 4, 2010
- d. if known, citations of any written opinion or orders entered pursuant to such results: 2010-OP-102

9. If you answered "no" to (7), state your reasons for not so appealing: N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- Ineffective assistance of trial counsel
 - Denial of right of confrontation
 - Ineffective assistance of appellate counsel
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- Trial counsel failed to provide advice concerning statements
 - Trial counsel failed to call the victim and victim was not compelled to testify according to parental personal knowledge
 - Trial counsel failed to adequately advise of the dangers of self-representation and suggested that applicant represent himself
 - Trial counsel did not offer advice as to how to preserve the record for appeal
 - Appellate counsel, Lanelle C. Durant, failed to file a Petition for Rehearing with the Court of Appeals or petition for cert.
12. Prior to this application have you filed with respect to this conviction:
- Any petition in a State Court under South Carolina law? No
 - Any petition in State or Federal Courts for habeas corpus or post-conviction relief? No
 - any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
 - any other petitions, motions or applications in this or any other Court? Yes
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- the specific nature thereof:
 - Evidence tampering/fabrication and obstruction of justice
 - the name and location of the Court in which each was filed:
 - United States District Court
 - the disposition thereof:
 - Dismissed without prejudice
 - the date of each such disposition:
 - June 30, 2006
 - if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - See Case No. 3:2006-1461-MBS-JRM
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal in any petition, motion or application which you have filed? Yes

15. If you answered "yes" to (14), identify:
- a. which grounds have been presented:
 - i. Denial of Right of Confrontation (10)(b)
 - b. the proceedings in which each ground was raised:
 - i. South Carolina Court of Appeals
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- a. (10)(a) Not for Appellate review
17. Were you represented by an attorney at any time during the course of:
- a. your arraignment and plea? N/A
 - b. your trial, if any? No
 - c. your sentencing? No
 - d. your appeal, if any, from the judgment of conviction or the imposition of sentence?
Yes
 - e. preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A
18. If you answered "yes" to one or more parts of (17), list:
- a. the name and address of each attorney who represented you:
 - i. Charles W. Whiten, Jr., P.O. Box 716, Anderson, SC 29622
 - ii. Lanelle C. Durant, P.O. Box 11589, Columbia, SC 29211
 - b. the proceedings at which each such attorney represented you:
 - i. Trial and sentencing in the Court of General Sessions
 - ii. South Carolina Court of Appeals
19. State clearly the relief you seek in filing this application:
- Based on the allegations raised the conviction and sentence be vacated and remanded for a new trial.
20. Are you now under sentence from any other court that you have not challenged? No

STATE OF SOUTH CAROLINA)
) VERIFICATION
COUNTY OF ANDERSON)

I, Howard Thompson, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attached in this application; and that the matters and allegations therein set forth are true.

Howard Thompson III
Howard Thompson

Sworn to and subscribed before me this 27
day of Sept., 2011.

Tracey Spivey
Notary Public for South Carolina

My Commission Expires: 5-16-12

STATE OF SOUTH CAROLINA)

)IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON)

Howard Thompson, III, SCDC#322000,)

CERTIFICATE OF SERVICE

) Applicant,)

) vs.)

) 2010-CP-04-4229

) State of South Carolina,)


) Respondent.)

I, J. Victor McDade, of the law firm of Doyle, Tate & McDade, P.A., attorneys for Applicant, Howard Thompson, do certify that I have served Applicant's Amended Application for Post Conviction Relief on Kaelon E. May, Assistant Attorney General, by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Kaelon E. May
Assistant Attorney General
P.O. 11549
Columbia, SC 29211

DOYLE, TATE & MCDADE, PA

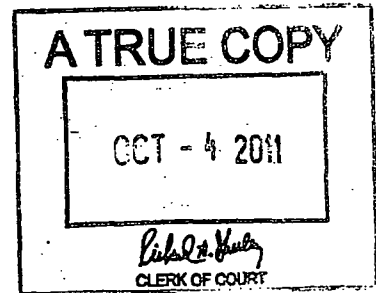
By:



J. Victor McDade
Attorneys for the
Applicant
Fed. ID No.: 2790

Post Office Box 2125
Anderson, SC 29622
(864) 224-7111

Dated: September 28, 2011



Department of Corrections, and the trial transcript. The Respondent reserves the right to amend and/or supplement this Return upon receipt with any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel;
 - a. "Failed to provide advice concerning statements;"
 - b. "Victim was not compelled to testify according to parental personal knowledge;"
 - c. Denial of right to confrontation."

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was

deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland.

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.

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. Nevertheless, the allegation of ineffective assistance of counsel probably raises a question of fact which cannot be conclusively refuted by the record and, therefore, requires that an evidentiary hearing be held. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983); Delaney v. State, 269 S.C. 555, 238 S.E.2d 679 (1977).

IV.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

A. WEST LEE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

February 28, 2011

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)
)
)
)
 HOWARD THOMPSON, III, #322000)
)
 Applicant,)
)
 vs)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

2010-CP-04-4229

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James McDade, Esquire
Post Office Box 2125
Anderson, SC 29622

DATED this 28th day of February, 2011



Lena Pelishenko, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)	IN THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON)	THE COURT OF COMMON PLEAS
)	2010-CP-04-04229
HOWARD THOMPSON, III,)	
)	
PLAINTIFF,)	
)	
VERSUS)	
)	
THE STATE OF SOUTH CAROLINA,)	
)	DATE: MARCH 8, 2012
DEFENDANT.)	ANDERSON, SOUTH CAROLINA

POST-CONVICTION RELIEF HEARING

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH

A P P E A R A N C E S:

JAMES MCDADE, ESQUIRE
ATTORNEYS FOR THE APPLICANT

KAELON MAY, ATTORNEY AT LAW
ATTORNEY FOR THE STATE

CHARLES WHITEN, ESQUIRE
WITNESS

PROVIDED FOR: SCCID, SHARON GRAHAM

FOR COPIES CONTACT: JO RICE
jrice@sccourts.ORG
OFFICIAL COURT REPORTER
SOUTH CAROLINA JUDICIAL DEPARTMENT

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EXHIBITS

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DEFENSE EXHIBITS

NO DEFENSE EXHIBITS

COURT EXHIBITS

NO COURT EXHIBITS

1 THE COURT: All right, Ms. May, would you give me the
2 factual background, please?

3 MS. MAY: Yes, Your Honor. Mr. Thompson was charged
4 with two counts of criminal sexual conduct with a minor in
5 the first degree. There were a number of proceedings. The
6 first proceeding was December 7, 2006. Initially, he was
7 represented by Mr. Whiten and then pursuant to December 7,
8 2006, there was a motion to have counsel relieved and for
9 Mr. Thompson to proceed pro se, which was granted by Judge
10 King. Trial commenced May 21, 2007, at which Mr. Thompson
11 was found guilty. He filed an appeal and it was dismissed
12 by the South Carolina Court of Appeals.

13 THE COURT: Mr. Whiten was the initial counsel and he
14 was relieved?

15 MS. MAY: And then he was appointed stand-by counsel.

16 THE COURT: Okay. Stand-by.

17 MS. MAY: Yes, sir. And the Applicant has a motion
18 to dismiss, at the appropriate time.

19 THE COURT: Okay. I'll be glad to hear any motions,
20 Mr. McDade.

21 MR. MCDADE: Your Honor, my client did file a motion
22 for default and the basis of that is, his PCR was filed on
23 November 24, 2010. The return wasn't made until February
24 28, 2011. He properly filed on April 27th, an affidavit of
25 default and a motion for default was entered.

1 THE COURT: Ms. May, what's your response?

2 MS. MAY: Your Honor, the State would submit that the
3 time limit of 30 days to file a return is discretionary and
4 not mandatory and the cite for that is Guinyard v. State,
5 260 S.C. 220, and Mr. Thompson, as the applicant, did not
6 show any prejudice from our return being filed late. Also,
7 I'd point out that the date I filed our response to the
8 amended application was in September of 2011.

9 THE COURT: Did you timely respond to the amended
10 application?

11 MS. MAY: It just further specified the claims in the
12 initial application and we didn't feel it necessary to
13 respond.

14 THE COURT: What is the prejudice that Mr. Thompson
15 suffered as a result of the untimely response?

16 MR. MCDADE: Your Honor, I can't show any -- in all
17 candor with the Court, I can't show an prejudice based on
18 being 60 days late, given the time that we are actually
19 trying the case.

20 THE COURT: All right. I am going to deny that
21 motion. Are you ready to proceed?

22 MR. MCDADE: Yes, sir, Your Honor.

23 THE COURT: Would you call your first witness.

24 MR. MCDADE: We would call Chuck Whiten.

25 THE COURT: Come around, Mr. Whiten.

HOWARD THOMPSON, III VERSUS THE STATE OF SOUTH CAROLINA

1 MS. MAY: Your Honor, we have a few motions to dismiss
2 claims made in the application.

3 THE COURT: I didn't realize that. What are they?

4 MS. MAY: We would like to dismiss claims made in the
5 amended application. They are: A, B, and D, which are
6 ineffective assistance by trial counsel. Mr. Thompson
7 waived his right to counsel at that hearing on December 7,
8 2006. The Defendant is not entitled to hybrid
9 representation. The cases on point are State v. Jones,
10 Koon v. Chare, and State v. Stuckey. The South Carolina
11 Supreme Court has not addressed this issue of ineffective
12 assistance of counsel when the defendant proceeds pro se,
13 but other jurisdictions have and they've held that a
14 defendant who waives his right, properly waives his right
15 to counsel, they are not entitled to come back and claim
16 stand-by counsel was ineffective.

17 THE COURT: Mr. McDade?

18 MR. MCDADE: Your Honor, I think ordinarily, those
19 cases would apply, but in this particular case our
20 allegation is that Mr. Thompson was happy with Mr. Whiten's
21 representation, but that Mr. Whiten suggested to him or
22 advised him that he should make a motion for him to be
23 relieved as his counsel and we believe that is the
24 ineffective assistance, in essence, in this case and so I
25 don't think that goes away simply because he's been

1 relieved by the Court as his attorney.

2 THE COURT: I haven't read the transcript. Did Mr.
3 Thompson seek another attorney to be appointed for him or
4 did he ask the Court that he be allowed to proceed pro se?

5 MR. MCDADE: No, sir. Before Judge King, he asked
6 that he be allowed to represent himself and that Mr. Whiten
7 be stand-by counsel, but again, our position is that this
8 whole thing was orchestrated by Mr. Whiten. It certainly
9 was not in Mr. Thompson's best interest to go to trial on
10 charges this serious without an attorney and we think
11 that's the ineffective assistance in this case.

12 THE COURT: I want to listen to the evidence and I
13 will take that under advisement and let you know. Ms. May,
14 are there any other motions?

15 MS. MAY: No, Your Honor.

16 THE COURT: Would you call your first witness.

17 MR. MCDADE: Yes, sir. Still, Mr. Whiten.

18 (After being duly sworn by the clerk of court, Charles
19 Whiten testified as follows:)

20 MR. MCDADE: Are you ready, Your Honor?

21 THE COURT: Yes, sir.

22 DIRECT EXAMINATION OF CHARLES WHITEN BY MR. MCDADE

23 Q Mr. Whiten, when were you appointed to represent Mr.
24 Thompson?

25 A April 19, 2006.

DIRECT EXAMINATION OF CHARLES WHITEN BY MR. MCDADE

7

- 1 Q And how long did you represent him?
- 2 A Until I was relieved. I think it was December when
- 3 the order was issued relieving me as counsel.
- 4 Q And that was issued by Judge King?
- 5 A Yes. I'm sorry, January 4, 2007.
- 6 Q All right, sir. And during that time, did you meet
- 7 with him?
- 8 A Yes, I met with him several times.
- 9 Q Did you discuss trial strategies?
- 10 A Yes.
- 11 Q And was it your suggestion to him that he would be
- 12 better off without you representing him?
- 13 A Well, let me -- it's more complicated than that.
- 14 Q All right. I guess, can you answer it and then,
- 15 obviously, you can explain it?
- 16 A No. It was not my suggestion.
- 17 Q All right, sir. Was it your idea?
- 18 A It was our idea, our concurrence at the time. If I
- 19 can explain why?
- 20 Q Yes, sir.
- 21 A Mr. Howard [verbatim] wanted to cross examine or --
- 22 when we discussed Minor² who was the minor victim in
- 23 this case and very young at the time, he said, I want
- 24 -- I think if I can just talk to or examine Minor that
- 25 he will tell what Mr. Howard said was the truth. Minor

1 maintained -- Mr. Howard always maintained he didn't
2 do anything to him, he wasn't guilty, he didn't do it.
3 But he said, "If I can just have a chance to question
4 him then I think he would say, Minor² would say that I
5 didn't do what I was accused of." So, we discussed
6 that several times and I told him he probably would
7 not -- not probably, but he would not be able to
8 question Minor in court, or anytime for that matter,
9 unless he represented himself, at which point,
10 possibly, he could cross examine Minor even if Minor was
11 called as a witness and then if he wasn't called as a
12 witness, then they would have to explain why there
13 were special circumstances under which he would not be
14 called as a witness. Even though he was still a
15 child, they would still have to go through the motions
16 of the code section that says you have to have some
17 verification or justification for not calling him and
18 one of the justifications would be his age and his
19 ability to testify truthfully, you know. We talked
20 about all that and I said, "It's your decision. If you
21 want to do that, then you need to do it and if you
22 don't, then I'll continue on with representing you in
23 the case." Later on -- Minor did not testify, by the
24 way. There was a motion that he not be required to
25 testify because he was "afraid" to testify. At the

DIRECT EXAMINATION OF CHARLES WHITEN BY MR. MCDADE

9

1 trial, we objected to that and made a motion that the
2 testimony through the mother was hearsay and that was
3 denied and Minor did not testify.

4 Q Okay. You said, "we objected". You mean, you and Mr.
5 Howard?

6 A Well, my role at that time was advisory. I never
7 objected to anything. I advised Mr. Howard to raise
8 that objection and he did. So ---

9 THE COURT: You did what, now, please?

10 MR. WHITEN: I advised him to -- when I was his
11 advising counsel, I sat right there beside him and every
12 step of the way, I advised him what to do and at that
13 point, I advised him to object to Minor² mother being able
14 to testify for Minor² basically, because it was hearsay and
15 Minor needed to tell the story.

16 THE COURT: Was there a direct appeal to this?

17 MS. MAY: Yes, sir, Your Honor.

18 THE COURT: What was the result of that appeal?

19 MS. MAY: The direct appeal, it was denied. The
20 objection was not specific enough. It was just kind of a
21 general objection and was not sufficient.

22 MR. MCDADE: That's another thing I'll get to in a
23 minute, Your Honor, is that objection.

24 Q So, isn't it true that in this particular case,
25 probably the most damaging witness that could testify

1 against Mr. Thompson would be Minor² the victim?

2 A Well, there were -- Mr. Howard called three witnesses
3 that I advised him in the trial not to call. As
4 vehemently as I could, I said, "Do not call these
5 witnesses," and one of them was his brother.

6 Q I'm not talking about who actually testified and what
7 the effect of their testimony was. I'm talking about
8 in planning this trial, isn't the one witness you were
9 worried about getting on the stand and testifying was
10 the victim?

11 A Yes.

12 Q If the victim gets up there and says he did that to me
13 that's the most damaging witness that the State could
14 have testify.

15 A Yes.

16 Q All right. And isn't it true that the strategy,
17 didn't you suggest that strategy, that if you
18 represent yourself, it's less likely that Minor is
19 going to get on the stand and possibly say these
20 things happened? Or are you saying Mr. Thompson came
21 up with that?

22 A No, I probably, I probably advised him that that would
23 be the case.

24 Q Okay.

25 A I don't remember specifically, but it makes sense to

DIRECT EXAMINATION OF CHARLES WHITEN BY MR. MCDADE 11

1 me that that would be the case. The whole underlying
2 reason for it was because Mr. Howard wanted to cross
3 examine Minor if he took the stand.

4 Q All right. And didn't you advise him that he should
5 do that if that's what he wanted because that was the
6 least likely scenario where Minor was going to testify?

7 A Ultimately, yes.

8 Q Okay. So, when you went before Judge King and there
9 was a motion to be relieved, you were at least
10 somewhat supportive of that motion because that was a
11 strategy that you had.

12 A Well, are you asking me -- I would say yes.

13 Q And when Judge King questioned him, he didn't go over
14 the ten factors, all of those ten factors in the
15 Gardner case that are supposed to be asked about his
16 education, his background and his experience and
17 whether or not he was going to have stand-by counsel
18 or those things, did he?

19 A No, he didn't. He just asked him -- well, Mr. Howard
20 was sent to Columbia for a McNaughton evaluation and
21 brought back competent, but no, he didn't ask all
22 those questions.

23 Q And he's a high school graduate.

24 A He's smarter than that. He was getting ready to go or
25 going to tech school at the time.

1 Q Okay. But you would agree with me that, generally,
2 it's a very bad idea for somebody who doesn't have
3 legal training to represent themselves against charges
4 this serious.

5 A Yes. We -- I did advise him of the consequences of
6 representing himself. We talked, maybe, twenty times.

7 Q Did you go over the ten factors with him from the
8 Gardner case?

9 A No, I didn't.

10 Q Now, in this particular trial, what I call the
11 backdoor testimony of the victim, didn't the victim
12 sort of have a backdoor testimony that came in anyway
13 from other witnesses?

14 A Yes, mainly through the mother.

15 Q Okay. When the doctor testified, didn't the doctor
16 testify that there were no physical findings?

17 A Frankly, I can't remember that. If that's in the
18 transcript, then, yes.

19 Q Didn't the doctor also testify that somebody did these
20 things to Minor2 without specifically naming anybody?

21 A I can't remember that testimony, but if it's in the
22 transcript -- I don't -- I agree with whatever the
23 transcript says.

24 Q All right. And you would agree with me that if it
25 came in like that, that the only somebody in that

DIRECT EXAMINATION OF CHARLES WHITEN BY MR. MCDADE 13

1 courtroom would have been Mr. Thompson?

2 A That makes sense, doesn't it?

3 Q Okay. You're sitting on a jury and a doctor says
4 somebody did these things to Minor and there is
5 somebody sitting at counsel table that's on trial for
6 those charges, that's pretty much the same thing as
7 the doctor coming in and saying that Minor said Mr.
8 Thompson did this.

9 A Yes. Did he object to it?

10 Q That's in the transcript. And then the mother, as you
11 said, was allowed to testify that Minor was scared?

12 A Yes.

13 Q Would you have made a different objection or what
14 objection would you have made if you were his actual
15 trial counsel?

16 A I would have objected that the, that there had been no
17 testimony, no petition that Minor was unable to testify
18 on his own, other than his mother said he was afraid
19 and in my mind, that doesn't comply with the statute.
20 You have to have a better reason. What they should
21 have done, probably, is examine Minor in camera to see
22 whether he was able to testify or not. Understand, I
23 did not object because I couldn't, but I did tell Mr.
24 Howard to do so and I think he did that.

25 Q Okay. But the only objection that Mr. Howard raised

1 in the transcript --

2 A Was to hearsay.

3 Q --- to the mother was hearsay.

4 A That's correct.

5 Q And the judge found that there were two exceptions
6 that would apply under the hearsay, basically, the
7 excited utterance as it's set forth in our new rules
8 of evidence and allowed it in.

9 A Yes.

10 Q Okay. So, you would have made a different objection?

11 A I would have -- it's in my notes about the failure to
12 establish that Minor was unable to testify. I don't
13 know if I told him about that objection, but it's in
14 my notes and it's my contention that my objection
15 doesn't necessarily have to be made. That's for the
16 Court to make that determination under the law whether
17 or not Minor was competent to testify.

18 Q Right.

19 A So, the objection -- No, he didn't make the objection,
20 I don't believe, but yes, I would have made, I would
21 have made the motion that he be examined in camera
22 under the statute.

23 Q All right. And are you aware of the direct appeal in
24 this case?

25 A Somewhat.

DIRECT EXAMINATION OF CHARLES WHITEN BY MR. MCDADE 15

1 Q Okay. Can I show you a copy just to refresh your
2 memory?

3 MR. MCDADE: If I may, Your Honor?

4 THE COURT: Yes, sir.

5 Q And the appeal in this case was denied and if you look
6 at the second page, the second note down there, it
7 talks about; as to the testimony of the victim's
8 mother, the appellate must state the grounds of the
9 objection and a general objection does not, it does
10 not specify a particular ground. If you had been
11 attorney rather than stand-by counsel, isn't it true
12 that you would have made an objection that at least
13 would have gotten this to the court and not be thrown
14 out on that ground?

15 A Well, in hindsight I would say yes, but I do have in
16 my notes that that was one of the issues that should
17 have been raised, so yes, I suppose I would have. In
18 hindsight, I know I would have. At the time, all I
19 can tell you is that I had that issue in my notes, if
20 you want to see my notes.

21 Q No, that's fine.

22 A It does say that in my notes.

23 THE COURT: Let me ask you something, Mr. McDade.

24 MR. MCDADE: Yes, sir.

25 THE COURT: If the Court of Appeals found as a matter

1 of law that Mr. Thompson, well, that the Court did not err
2 in allowing him to waive his right to counsel, what basis
3 does he have for relief under PCR for the same grounds?

4 MR. MCDADE: I think for the same thing, Your Honor.
5 It's that he was advised to waive counsel by his attorney.
6 That's basically the crux of our case.

7 THE COURT: Okay, sir. I'm just trying to get my arms
8 around it. You are saying that the Court, or the Court of
9 Appeals found that Judge King asked the necessary
10 questions, but the advice given to him to go ahead and go
11 forward with it is the ineffective assistance ---

12 MR. MCDADE: Yes, sir.

13 THE COURT: Okay. All right. Go ahead. I'm sorry.

14 MR. MCDADE: Okay.

15 Q All right, sir, you would agree with me that in this
16 particular case we've got two issues. We've got the
17 appellate counsel, too. There are either one of two
18 things that occurred; that either the objection was
19 properly made and the Court of Appeals was in error to
20 say that it was not and in that event there should
21 have been a petition for rehearing based on the merits
22 of the appeal or it actually was not properly raised
23 and I believe you said if you had been an attorney
24 rather than stand-by counsel you would have raised a
25 different objection that would have met the scrutiny

DIRECT EXAMINATION OF CHARLES WHITEN BY MR. MCDADE 17

1 of the Court of Appeals.

2 A In hindsight I would say yes. I don't know -- all I
3 can tell you is at the time, and it's in my notes,
4 that he should have been, that Minor should have been
5 examined as to his ability to testify. I don't know,
6 I can't tell you what my mind set was at the time,
7 except it's in my notes.

8 Q The transcript, as I recall, does not indicate any
9 objection of that type or that any request of that
10 type was made.

11 A No. Not that I'm aware of.

12 Q So, you didn't tell Mr. Thompson to do that?

13 A I ---

14 THE COURT: Just one second. Are you proceeding on
15 the grounds that as a hybrid counsel that he had the duty
16 to tell him all the objections he should make?

17 MR. MCDADE: I think as a hybrid counsel, Your Honor,
18 he certainly had the duty to advise him of the procedures
19 and ---

20 THE COURT: I'm going to deny your petition on those
21 grounds. To me, the question is whether or not Mr. Whiten
22 was ineffective by allegedly advising him to represent
23 himself, but otherwise, I find that Mr. Whiten -- if there
24 is a valid waiver, then that ends it, as far as I'm
25 concerned. I may be wrong, but I think that's correct.

DIRECT EXAMINATION OF CHARLES WHITEN BY MR. MCDADE 18

1 MR. MCDADE: All right, sir. And I'm almost finished,
2 Your Honor.

3 Q The last few things, Mr. Whiten. As to other
4 witnesses, isn't it true that one reason why Mr.
5 Thompson could not call Minor as a witness was that he
6 was not on a witness list?

7 A Minor was not on our witness list. We had ten
8 witnesses listed, but he was not one of them.

9 Q Okay. Did Mr. Thompson want him on your witness list
10 so he would have the opportunity to call him?

11 A I don't think so, because Minor was -- Minor would --we
12 would not have wanted Minor on the stand.

13 Q Okay. Even though Minor² backdoor testimony had
14 already come in through two other witnesses?

15 A Well, I still wouldn't have called him or I wouldn't
16 have advised him to call the victim who would testify
17 about matters that would have buried Mr. Howard, in my
18 mind.

19 Q All right. Now, isn't it true that Mr. Thompson also
20 wanted to call the stepfather of Minor and he was also
21 not on the witness list.

22 A That's true. The stepfather was the one who alerted
23 the authorities about the alleged sexual abuse with
24 his mother, in tandem with his mother, so he would not
25 have been a, he would not have been a good witness for

DIRECT EXAMINATION OF CHARLES WHITEN BY MR. MCDADE 19

1 Mr. Howard. What happened was, the mother came home,
2 and this is just for background, came home and caught,
3 supposedly caught, Mr. Howard with the child and she
4 told the stepfather, who was not there, and then he
5 was irate and, together, they reported it.

6 Q All right. Did you assist him with the witness list?

7 A Yes.

8 Q Did you actually prepare the witness list?

9 A Yes.

10 Q Okay.

11 A Based on what we discussed. Yes.

12 Q All right. Isn't it true that he also wanted his
13 mother to be called as a witness? Alice Mazyck.

14 A I can't recall that for sure.

15 Q Okay. And isn't it true that she could have testified
16 about -- because I believe there was some issue with a
17 missing statement?

18 A There was an issue of a missing statement. I don't
19 know that she would have verified that or not.

20 Q Okay.

21 THE COURT: Are these witnesses here to testify about
22 what they would have testified about if they had testified?

23 MR. MCDADE: Ms. Mazyck is here, Your Honor.

24 THE COURT: Okay.

25 Q And she could have testified as to Minor 2 bowel habits

1 and that sometimes he had accidents and needed to be
2 cleaned up?

3 A I do recall that that was discussed.

4 Q And that's the same thing that Mr. Thompson stated in
5 the statement that he gave?

6 A Yes.

7 Q Okay. And also, Ms. Mazyck was in the house during
8 the time that these events allegedly occurred?

9 A I don't recall that being the case.

10 Q Okay. And certainly she could have testified that
11 there was no change, no visible change in the behavior
12 of Minor² the alleged victim?

13 A I do believe that was cited, yes.

14 Q Okay.

15 MR. MCDADE: That's all I have, Your Honor. Thank
16 you.

17 THE COURT: All right. Ms. May?

18 CROSS EXAMINATION OF CHARLES WHITEN BY MS. MAY

19 Q Mr. Whiten, can you discuss exactly what you advised
20 Mr. Thompson regarding the consequences of proceeding
21 pro se?

22 A Yes, I did.

23 Q Can you discuss what you advised him during that
24 conversation?

25 A Basically, I guess I did it in general terms, because

CROSS EXAMINATION OF CHARLES WHITEN BY MS. MAY

21

1 I didn't go through the ten things that counsel has
2 mentioned. I told him that it was very dangerous to
3 do this because he was not trained, a trained lawyer.
4 He didn't know the nuances of questioning and
5 answering, that the answers, that the answers that the
6 witness gave may be damaging and he wouldn't even
7 understand the damage that had been done. I,
8 especially, we especially went over what Minor was
9 going to say if Minor took the stand, how dangerous
10 that would have been and how that mostly would hurt
11 his case. I told him at the trial, he called some
12 witnesses, his brother was one of them and another
13 witness and I just, I told him right there, in fact,
14 my notes say, "You just lost your case," because he
15 called these witnesses. They destroyed him and I told
16 him not to do it, "Don't do this," and he did it
17 anyway. His brother indicated that Mr. Howard was
18 alone with Minor and the other witness said the same
19 thing and after they testified, that was the end of
20 the case as far as I was concerned and I had
21 specifically told him, "Do not call these people". In
22 fact, I told him not to call any witnesses at all for
23 a reason, the reason being, he was not trained to
24 question them.

25 Q Do you recall when y'all found out that the victim

1 would not testify? Was that at trial or prior to
2 trial?

3 A I can't recall, specifically, when it was determined
4 he would not testify. I can't say when it was, but I
5 believe it was at trial, though.

6 Q It was at trial?

7 A I believe so.

8 Q And do you recall, initially, when the idea for Mr.
9 Thompson to proceed pro se came up?

10 A It would have been prior to December or in December,
11 prior to January 4th, so a couple of months before the
12 trial.

13 Q Did Mr. Thompson bring that up or did it come up just
14 in general discussions you had together?

15 A Mr. Thompson wanted to examine Minor² He wanted to
16 question him. The way it came up was, he said, "I
17 think if I can talk to Minor either before the trial or
18 at the trial, he would change, he would be honest
19 about it and say I didn't do anything." That's how it
20 started and then we went into detail about it, what he
21 would say, what he maybe would not say, and when we
22 went over what Minor² testimony would be and Mr.
23 Howard said, "Well, I don't think he would say that
24 particular thing, you know, and I said, "Well, if you
25 want to be able to cross examine him yourself or

CROSS EXAMINATION OF CHARLES WHITEN BY MS. MAY

23

1 question him yourself, then you have to represent
2 yourself because you cannot question him. I can, but
3 you can't. That's basically how that happened.

4 Q Did you agree with his decision to represent himself?

5 A Well, I agreed that if he wanted to question Minor he
6 would have to represent himself. I couldn't -- he
7 would not be allowed to question him otherwise and
8 that's the way it fell.

9 Q And he was adamant that he wanted to question him?

10 A Yes. Yes.

11 THE COURT: Let me ask you a question. I was looking
12 at the transcript and you told Judge King that -- let me
13 just read it on page three of the transcript on December 7,
14 2006. "Your Honor, Mr. Thompson wishes to represent
15 himself and he wishes to relieve me as his counsel except
16 as a consultant and the motion is that I be relieved as
17 counsel. I have discussed it with him in detail. I don't
18 agree with his decision, but it is his decision and he has
19 the right to make that decision." So, in my mind, the
20 question is, did you disagree with his wish to relieve you
21 as counsel?

22 MR. WHITEN: Well, it's hard to remember that far
23 back, but at the time ---

24 THE COURT: Well, when you represent to the Court that
25 you disagree with it ---

1 MR. WHITEN: Yes. I disagreed at the time. It's
2 difficult to put things in context when you are talking to
3 a client about how they want to proceed, but I definitely
4 did not think it was in his best interest, at all, for him
5 to proceed that way. Having said that and that's what I
6 thought at the time, I also -- and maybe I advised Mr.
7 Howard that if he wanted to question this child at any
8 time, either before or at trial, he would have to do it
9 that way and that was his decision, not mine. And I did
10 advise him, there are other witnesses that are going to
11 testify. You don't know what you are doing if you do this.

12 THE COURT: So, just so I understand and I apologize
13 for ---

14 MR. WHITEN: Your Honor, just one more. And I said,
15 "Well, if you want to do it, I can serve in an advisory
16 capacity and help you right there during trial with these
17 things if you follow my advice, which unfortunately, he
18 didn't do.

19 THE COURT: Just so I understand. What you are
20 saying, Mr. Whiten is: I didn't think it was a good idea
21 for him to represent himself, but he was adamant about his
22 examining or cross examining the victim himself as opposed
23 to through his attorney and to do that he would have to
24 relieve you as counsel. Is that, basically, what it is?

25 MR. WHITEN: Yes, sir.

CROSS EXAMINATION OF CHARLES WHITEN BY MS. MAY 25

1 THE COURT: All right. Go ahead. I'm sorry.

2 Q Mr. Whiten, did you explain to Mr. Thompson that if
3 the victim testified that you, yourself, would be able
4 to cross examine him if you were not relieved?

5 A If I was not relieved? Yes. Yes.

6 Q But Mr. Thompson wanted to cross examine him, himself.
7 Right?

8 A Yes.

9 Q Do you have a copy of the December 2006 transcript
10 with you?

11 A December 7th?

12 Q Yes, sir.

13 A Yes.

14 Q If I could direct your attention to page four. The
15 Court asked and inquired as to Mr. Thompson's age. Is
16 that correct?

17 A Yes.

18 Q And how far he went in school?

19 A Yes.

20 Q And what kind of work he did?

21 A Yes.

22 Q As well as, he questioned Mr. Thompson about whether
23 he had ever been treated for mental illness?

24 A Yes.

25 Q And then continuing on page five, the Court inquired

1 into any medications that Mr. Thompson was taking?

2 A Yes. I need to correct one thing that I said earlier.

3 I said that he had gone to tech school. That's not

4 true. He was arrested one day before graduation from

5 high school. I remember that now.

6 Q Continuing on to page six. The Court inquired as to

7 whether he had ever studied law.

8 A Where is that?

9 Q Line nine on page six.

10 A On page five?

11 Q On page six.

12 A I see that the Court asked him that question. Yes.

13 Q All right. And the Court inquired as to where he

14 studied law? That's further down at line sixteen.

15 A Yes.

16 Q And further inquired if he ever took a course on it?

17 A Yes.

18 Q And continuing on to page seven, the Court inquired

19 whether the course contained information about

20 criminal procedures in South Carolina courts?

21 A Yes.

22 Q And then on to page ten, the Court advised Mr.

23 Thompson about the dangers of proceeding pro se at

24 line nineteen.

25 A Yes.

CROSS EXAMINATION OF CHARLES WHITEN BY MS. MAY

27

1 Q And on to page eleven and on page twelve, line twenty-
2 one, the Judge continued to advise Mr. Thompson the
3 dangers of proceeding pro se?

4 A Yes.

5 Q And continued on to page thirteen. Is that correct?

6 A Yes.

7 Q Do you feel the Court adequately advised Mr. Thompson
8 of the dangers of proceeding pro se?

9 A Yes, I do.

10 Q And that he did inquire into his background, his
11 schooling and his knowledge of the law?

12 A Yes.

13 Q Okay. Do you think, based on your discussions with
14 Mr. Thompson and the Court's inquiries that Mr.
15 Thompson made his decision knowingly and
16 intelligently?

17 A Yes.

18 Q And did Mr. Thompson agree with proceeding pro se? He
19 was not forced?

20 A Yes, he agreed to it.

21 Q And did Mr. Thompson prior to trial ever change his
22 mind or have any concerns about proceeding pro se?

23 A No. He had adequate time after our discussions in the
24 detention center deciding. He didn't decide right
25 away after discussing it. There was some period of

REDIRECT EXAMINATION OF CHARLES WHITEN BY MR. MCDADE 28

1 time that he gave it some thought.

2 Q If Mr. Thompson had changed his mind prior to trial,
3 what would you have done at that point?

4 A Well, I would ---

5 MR. MCDADE: I don't see the relevance of that.

6 THE COURT: I sustain that. It's just speculation.

7 Ms. MAY: I have no further questions, Your Honor.

8 THE COURT: Redirect?

9 MR. MCDADE: Yes, sir.

10 REDIRECT EXAMINATION OF CHARLES WHITEN BY MR. MCDADE

11 Q The -- I'm a little bit confused because you are
12 stand-by counsel, but you are giving him advice as to
13 strategy like an attorney would. Isn't that right?

14 A Yes.

15 Q So, were you representing him as an attorney or were
16 you just his stand-by counsel?

17 A I was -- they call it, advisory counsel, so I was
18 giving him advice as to how to proceed at trial.

19 Q Okay. But advisory counsel, as I understand it, would
20 not tell somebody who to call as a witness or what to
21 ask them, it would be more in line with, "Can I do
22 this? What do the rules of evidence say? What is the
23 procedure for doing certain things." Isn't that
24 right?

25 A I felt like it was my responsibility to tell him what

REDIRECT EXAMINATION OF CHARLES WHITEN BY MR. MCDADE 29

1 to expect from the witnesses that he was going to call
2 and I knew what they were going to say and so did he,
3 because it had been gone over before, but as far as --
4 advisory counsel, to me, gives him advice that's in
5 his best interests at the trial and that's what I did.

6 Q Which is what an attorney does.

7 A He was acting as his own attorney, yes. I gave him
8 questions to ask. I guess I may have gone a little
9 bit further than most people would, but I was
10 concerned about what he was doing.

11 Q Isn't it true that you were acting as his attorney
12 with the only exception being that he was the one
13 actually asking the questions?

14 A No. That's not true.

15 THE COURT: Let me stop you here. I think we are
16 starting to blur the lines here. We've got a question of
17 law that's been answered by the Court of Appeals that he
18 waived his attorney, so what happened during the trial has
19 been answered as far as I'm concerned. I may be wrong
20 about that, but I think the issue today, as you told me
21 earlier, is the decision that allegedly Mr. Whiten came to
22 the applicant and had him petition to have him proceed pro
23 se and that seems, to me, to be the issue, not what
24 actually occurred at trial. That question of law has been
25 answered. Would you disagree with that? If you do, I'll

1 be glad to hear from you.

2 MR. MCDADE: No, sir. I think I have enough in the
3 record now that my issue is there, so.

4 THE COURT: I'm not trying to cut you off. I just
5 think the issue is really prior to, not what happened
6 during trial from what I'm reading and what I'm asking is,
7 do you disagree with me. If you do, let me know, because I
8 certainly don't want to deprive Mr. Thompson his right to
9 have his hearing held. After hearing what you stated the
10 issues are in this case, it seems like we are looking at
11 pre-trial decisions and not trial activity, necessarily.

12 MR. MCDADE: But I think the point that I'm making,
13 and again, I believe I have enough in the record already,
14 is we started out with Mr. Whiten as counsel.

15 THE COURT: Right.

16 MR. MCDADE: Okay. And then Mr. Whiten had an idea
17 that if you don't want or you want to ask Minor questions or
18 we don't want Minor to testify, this is the way we can do it
19 and that was done in front of Judge King, but then when we
20 started into the trial, and I'm not sure if the Court of
21 Appeals actually addressed this one, it sort of strayed
22 back into the area of doing what attorneys do rather than
23 advisory counsel.

24 THE COURT: All right. Well, again, to me, if the
25 question centers around the decision to go forward with the

REDIRECT EXAMINATION OF CHARLES WHITEN BY MR. MCDADE 31

1 motion to be relieved and if he was properly relieved, then
2 what happened at trial would be on Mr. Thompson and not Mr.
3 Whiten.

4 MR. MCDADE: Unless Mr. Whiten strays over the line
5 and because his counsel ---

6 THE COURT: I disagree with that. If Mr. Thompson, if
7 the Court properly relieved Mr. Whiten then he's not the
8 attorney. That's not the issue before the Court today.
9 The issue is the decision for that motion to go forward.
10 Now, I'll protect you on the record. I may be wrong, but
11 that seems to me, listening to what's been going on here.
12 The Court of Appeals already issued its ruling as to that
13 issue.

14 MR. MCDADE: I understand that, Your Honor. Nothing I
15 can do to change those things either.

16 THE COURT: All right. And please, anything you feel
17 you need to put on the record, please do. I want you to,
18 but what happened during trial, quite honestly, is not
19 something that I'm looking at.

20 MR. MCDADE: All right, sir. That's fine.

21 Q I guess the last question, again, it was your idea
22 that he represent himself, that that suggestion or
23 that possibility came from you?

24 A In connection with his request to be able to question
25 Minor 2 yes.

DIRECT EXAMINATION OF HOWARD THOMPSON BY MR. MCDADE 32

1 Q Okay. All right, sir. Thank you.

2 THE COURT: Ms. May, anything further?

3 MS. MAY: Nothing further, Your Honor.

4 THE COURT: May Mr. Whiten be excused?

5 MR. MCDADE: Yes, sir, from our perspective,
6 certainly.

7 THE COURT: Thank you, sir. You are excused.

8 MR. WHITEN: Thank you.

9 THE COURT: Are you getting ready to call Mr.
10 Thompson?

11 MR. MCDADE: Yes, sir.

12 THE COURT: All right. Let's take a quick break. We
13 will be back in about five minutes.

14 MR. MCDADE: Your Honor, I just have Mr. Thompson and
15 his mother and she will be very short.

16 THE COURT: All right. Thank you.

17 (Brief Break)

18 THE COURT: All right. Would you call your next
19 witness, please, sir:

20 MR. MCDADE: Your Honor, we call Howard Thompson.

21 (After being duly sworn by the Clerk of Court, Howard
22 Thompson testified as follows:)

23 CLERK OF COURT: Have a seat, please, sir.

24 DIRECT EXAMINATION OF HOWARD THOMPSON BY MR. MCDADE

25 Q Mr. Thompson, I think it's been brought out, but you

DIRECT EXAMINATION OF HOWARD THOMPSON BY MR. MCDADE 33

1 were arrested on these charges for, I think, just a
2 couple of days before you were going to graduate from
3 high school.

4 A That's correct.

5 Q Okay. And when they were asking you about, or when
6 they were talking about the courses that you took at
7 another place, was that something that you took during
8 high school?

9 A Yes. That's also correct.

10 Q Okay. So, nothing like law school, is it?

11 A No.

12 Q Okay. So, what kinds of things did you learn there?

13 A It was just basic criminal justice, you know. Law
14 enforcement. Nothing that deals with court
15 proceedings.

16 Q Okay. Did you talk about the Court of General
17 Sessions and the Court of Common Pleas in South
18 Carolina or just courts in general?

19 A Just courts in general.

20 Q Okay. Did they teach you any of the Rules of
21 Evidence?

22 A Not that I can recall. All I remember was just law
23 enforcement.

24 Q Okay. Anything about the rights that have under the
25 constitution?

DIRECT EXAMINATION OF HOWARD THOMPSON BY MR. MCDADE 34

1 A I remember the rights, yeah.

2 Q Enough so that you would be able to come into court and
3 protect those rights or defend those rights?

4 A Yes.

5 Q Okay. In this particular case, you were represented
6 by Chuck Whiten. Is that correct?

7 A For a lengthy period. Yes.

8 Q Okay. Would you tell the Court how you came to
9 represent yourself in these criminal proceedings,

10 A It was around November, mid-November, when Mr. Whiten
11 had come to the detention center and we had discussed
12 about Minor making a voluntary statement and he was
13 basically exonerating me, but he said in order for me
14 to bring that out, I would have to cross examine him
15 myself and I wanted Minor to testify. I wanted to
16 speak with Minor myself, but in order to do that,
17 Charles Whiten said that I had to represent myself and
18 so I went with it.

19 Q Okay. Did he raise that as a possibility or did he
20 advise you or suggest that you go that route?

21 A There was no probability at all. He said more than
22 likely Minor would not testify and if you don't, he
23 will testify and I will cross examine him and you're
24 going to lose that right to have him give his version
25 of what happened.

DIRECT EXAMINATION OF HOWARD THOMPSON BY MR. MCDADE 35

1 Q Okay. So, it wasn't to keep Minor off the stand to
2 have you represent yourself.

3 A He said that if I represented myself, then more than
4 likely Minor would not testify and I told him I want
5 Minor to testify. I want him to get on the stand.

6 Q I understand that, but I want to get to -- did Mr.
7 Whiten express to you that he didn't want Minor to
8 testify?

9 A In so many words. He didn't say, "I don't want Minor
10 to testify" or "I don't want him on the stand." It
11 was, more than likely he won't.

12 Q Okay. But did he say that Minor could hurt you, Minor
13 could mess your case up?

14 A Not that I can recall.

15 Q Okay. So, it was his idea?

16 A It was his idea and I followed it.

17 THE COURT: What was his idea, please?

18 MR. MCDADE: That he represent himself.

19 THE COURT: Okay.

20 Q Did Mr. Whiten talk to you or did Mr. Whiten ever tell
21 you that he advised you strongly not to represent
22 yourself?

23 A I remember him saying it maybe once or twice, but
24 again, he stressed that if I did, then more than
25 likely Minor would not testify and he advised me and I

1 followed it. I mean, I'm not experienced.

2 Q Okay. Well, somebody may ask you did he also advise
3 you that you should keep an attorney and you didn't
4 follow that advice. What would you say to that?

5 A I don't recall anyone. If I was advised of that, then
6 more than likely I would have went back to
7 representation.

8 Q Okay. Well, I'm talking about before you went before
9 Judge King and said, "I want to represent myself".
10 Did Mr. Whiten tell you that you are making a mistake
11 or that you needed an attorney and you should not go
12 that route?

13 A No, sir.

14 Q Okay. Did he tell you that you needed to go that
15 route, that you needed to represent yourself?

16 A It was more of a 65% of his advice than me wanting to.

17 Q What do you mean by that?

18 A It wasn't all my decision to represent myself. It was
19 more his advice and he being experienced, he should
20 know what he's doing or he should be, should know the
21 rules, so he should know what's best for me so I went
22 with it.

23 Q Okay. Now, you have to concede that it is your
24 decision, ultimately, when you are before Judge King
25 to either say, "Yes, Judge, I want to represent myself

DIRECT EXAMINATION OF HOWARD THOMPSON BY MR. MCDADE 37

1 or no, Judge, I want to keep an attorney."

2 A I realize that now, but at the present time all I can
3 remember is Charles Whiten just saying, you know, just
4 follow the judge's questions, you know, and the
5 proceeding will go faster. You know, you don't want
6 him to vote against you when you say you want to
7 represent yourself.

8 Q So, are you saying that he told you that if you wanted
9 to go through with this and represent yourself, that
10 you better not raise any other issues with the judge
11 and you better just say, "Yes, Judge, Yes, Judge, Yes,
12 Judge," all the way down the line?

13 A In agreement. Yes.

14 Q Okay. And you've looked at that Gardner case. Have
15 you ever talked with anybody, either Judge King or
16 with Charles Whiten about those ten factors in the
17 Gardner case?

18 A Um.

19 Q I don't mean some of them. I mean the entirety, all
20 ten.

21 A May I review the ten?

22 (Mr. McDade hands document to witness)

23 THE COURT: Do you have a case site for that case, Mr.
24 McDade?

25 MR. MCDADE: As a matter of fact, I do, Your Honor.

DIRECT EXAMINATION OF HOWARD THOMPSON BY MR. MCDADE 38

1 (Mr. McDade hands document to Judge McIntosh) Your Honor,
2 I believe that's Footnote 3 in the body of the case and
3 it's on the third page. For the record, that's
4 Gardner v. State, 570 S.E. 2d 184.

5 THE COURT: Gotcha. Thank you.

6 A All right.

7 Q Did anybody discuss, either Judge King or Mr. Whiten,
8 discuss all ten of those factors with you?

9 A Not all ten of them. Charles Whiten, absolutely not.

10 Q Okay. All right. And in the trial of this case, we,
11 in essence, had the testimony of the victim Minor when
12 the doctor testified that Minor said that somebody did
13 these things to him. Is that right?

14 A Yes.

15 Q Okay. You weren't named specifically.

16 A Not that I can recall. No.

17 Q Okay. You were the only one in the courtroom other
18 than court personnel, you were the only one charged
19 with that crime.

20 A That's correct.

21 Q Okay. And then over your objection, Minor's mother was
22 allowed to testify that he was scared.

23 A Yes, sir.

24 Q Okay. Did Mr. Whiten tell you how to make that
25 objection?

DIRECT EXAMINATION OF HOWARD THOMPSON BY MR. MCDADE 39

1 A At the beginning, when it was testified to, I remember
2 looking at Mr. Whiten and told him that there was no
3 evidence to support that and that sounds like hearsay
4 because his testimony was not entered and he was like,
5 "Object to hearsay". So, I stood up and objected to
6 hearsay.

7 Q Okay. Did he tell you anything else, any other
8 objections to raise?

9 MS. MAY: Your Honor, I think we are getting into what
10 Mr. Whiten did during trial.

11 THE COURT: I sustain that objection.

12 MR. MCDADE: Okay. It's in the record.

13 Q And ultimately, after the guilty verdict, did you talk
14 with counsel about filing an appeal?

15 A When I was convicted and sentenced, they wouldn't
16 allow me to consult with him. It was more, after the
17 sentence, I was removed from the courtroom.

18 Q Okay. Ultimately, your case went up on appeal to the
19 Court of Appeals? Is that right?

20 A Yes.

21 Q Okay. And one of the grounds in affirming the
22 conviction was that you didn't properly raise an
23 objection as to the victim's mother testifying?

24 A Correct.

25 Q Okay. And you objected on the grounds of hearsay?

1 A Yes.

2 Q Okay. And did you talk with your Appellate Counsel,
3 Ms. DuRant, about filing a petition for rehearing?

4 A Absolutely. Yes.

5 Q Okay. And did she file that petition for a rehearing?

6 A No. When I had called her, she was not in her office
7 and after I received a letter and looked at the
8 letter, it said that she actually marked that she was
9 going to file a petition for a rehearing, but she, in
10 essence, did not file it and she marked no or she
11 actually scratched out yes and marked no.

12 Q Okay.

13 MR. MCDADE: If I may, Your Honor.

14 THE COURT: Yes, sir.

15 Q Is this the letter that you are referring to?

16 A That is correct.

17 Q Okay.

18 A By the way, I didn't receive that from Ms. DuRant. I
19 received that from the Court of Appeals.

20 MR. MCDADE: All right. Your Honor, this is the only
21 copy I have, but I'd like to put it in and if I could
22 substitute a copy after the hearing.

23 THE COURT: Yes, sir. Any objection?

24 MS. MAY: No objection.

25 THE COURT: Admitted, without objection.

DIRECT EXAMINATION OF HOWARD THOMPSON BY MR. MCDADE 41

1 (Whereupon, a letter from the Court of Appeals to
2 LaNelle DuRant is marked as Applicant's Exhibit #1, without
3 objection.)

4 MR. MCDADE: We can mark it and just get a marked copy
5 of it, would be fine.

6 THE COURT: If you would, identify that for us, for
7 the record.

8 MR. MCDADE: I'm sorry, Your Honor. This is a letter
9 from the Court of Appeals dated February 4, 2010 to
10 Appellate Defender LaNelle DuRant and Assistant Attorney
11 General, William Blicht, Junior.

12 THE COURT: Thank you, sir.

13 Q All right. Is it true that you wanted other witnesses
14 to testify in your criminal trial?

15 A Correct.

16 Q Who did you want to testify?

17 A I wanted my mother to testify and the Complainant,
18 Brian Cain, as well as the victim, Minor 2

19 Q And Brian Cain, is that who was earlier referred to as
20 Minor 2 stepfather?

21 A Correct.

22 Q Okay. And why were you not allowed to call the victim
23 or Brian Cain in the trial?

24 A Well, Charles Whiten had said that since they were not
25 listed on my witness list that was previously provided

1 to the Court before trial, that I couldn't call them
2 as witnesses.

3 Q Okay. Who prepared that witness list?

4 A I prepared my version and Charles Whiten prepared his
5 version.

6 Q Okay. Did he see your version?

7 A Yes.

8 Q Did your version have Brian Cain and Minor² the victim,
9 on there?

10 A Yes.

11 Q Okay. Did the list that Mr. Whiten prepared and
12 submitted to opposing counsel, did it include those
13 two names?

14 A It only included -- well, it didn't include those
15 specific names, no, but there were only nine witnesses
16 on his list.

17 Q Okay. All right. And why didn't you call your
18 mother?

19 A Because Charles Whiten advised me that the testimony
20 that she had provided during the Jackson versus Denno
21 was damaging and that if she testified at trial, then
22 her testimony would be very essential and damaging to
23 produce my conviction.

24 Q Do you recall what testimony was given in the Jackson
25 v Denno hearing that was harmful to you, in his

CROSS EXAMINATION OF HOWARD THOMPSON BY MS. MAY 43

1 opinion?

2 A He did not specify.

3 Q All right. All right, sir. I believe those are all
4 the questions that I have for you.

5 THE COURT: Ms. May?

6 MS. MAY: May it please the Court, Your Honor.

7 CROSS EXAMINATION OF HOWARD THOMPSON BY MS. MAY

8 Q Mr. Thompson, do you -- if you wanted to cross examine
9 the victim and Mr. Whiten advised you that it was
10 unlikely that the victim would testify if you
11 proceeded pro se. Is that correct?

12 A Can you please restate the question?

13 Q You wanted to cross examine the victim. Is that
14 correct?

15 A Yes.

16 Q And you testified that Mr. Whiten advised you that in
17 order to do that you would have to proceed pro se.

18 A Yes.

19 Q Okay. Did Mr. Whiten also advise you that it was
20 likely the victim would not testify if you proceeded
21 pro se?

22 A He said -- or to answer the question, yes.

23 Q Okay.

24 A Mr. Whiten had stated that, in turn, if the Judge
25 doesn't decide that the victim would not testify, then

1 Mr. Whiten would do the cross examination and even if
2 he was standing as advising counsel only.

3 Q Okay. But he advised you that it was likely that the
4 victim would not testify if you proceeded pro se?

5 A Correct.

6 Q So, if you wanted to cross examine the victim, why did
7 you proceed pro se when Mr. Whiten advised you that it
8 was likely the victim would not testify?

9 A Well, I wanted the truth to be told before the Court,
10 or the Court and the jury, and the only one that could
11 give that truth would be Minor himself.

12 Q But Mr. Whiten advised you that it would be likely
13 that he would not testify. Correct?

14 A Well, during the trial, yes. But not prior to trial,
15 no.

16 Q So, you decided to proceed pro se thinking that the
17 victim was going to testify?

18 A Yes.

19 Q After Mr. Whiten advised you it was not likely he
20 would testify if you went pro se?

21 A That was, again, only during, around the time of
22 trial, not before the decision, no.

23 Q And it was your desire to cross examine the victim or
24 speak with him before the trial?

25 A Not before trial, but at trial. Yes.

CROSS EXAMINATION OF HOWARD THOMPSON BY MS. MAY 45

1 Q To cross examine him. Okay. And you told Mr. Whiten
2 that you wanted to cross examine the victim. Is that
3 correct?

4 A Yes.

5 Q Okay. And do you have a copy of the December 7th? Is
6 there a copy up there?

7 A No, ma'am.

8 MS. MAY: May I approach, Your Honor?

9 THE COURT: Yes, ma'am.

10 Q Mr. Thompson, this is a copy of the December 2006
11 transcript. (Hands document to the witness) If I
12 could ask you to turn to page ten, please, at line
13 nineteen. Do you recall the Court advising you of the
14 dangers of proceeding pro se?

15 A May I read it, please?

16 Q Sure. Go ahead.

17 A I remember that, yes.

18 Q Okay. And on page twelve, at line twenty-one. Do you
19 recall the court advising you that you would be far
20 better off being defended by a trained lawyer rather
21 than yourself?

22 A Where is that?

23 Q Line twenty-one on page twelve.

24 A And what is your question?

25 Q Do you recall the Judge advising you that you would be

1 better off or far better defended by a trained lawyer
2 rather than yourself?

3 A Yes.

4 Q Okay. And the Court asked you if the decision was
5 entirely voluntary on your part. Correct? At page
6 thirteen, line nine.

7 A Yes.

8 Q And you indicated that it was voluntary, one hundred
9 percent. Correct?

10 A Truthfully, that answer is untrue.

11 Q That was not true?

12 A That's correct.

13 Q Okay.

14 MS. MAY: I have no further questions. Thank you.

15 THE COURT: Redirect?

16 MR. MCDADE: Nothing further, Your Honor.

17 THE COURT: Thank you. You may step down, sir.

18 (Witness complies) Would you call your next witness?

19 MR. MCDADE: Yes, sir, Your Honor. I would call Mary
20 Mazyck, who I erroneously referred to as Alice for some
21 reason, earlier.

22 (After being duly sworn by the Clerk of Court, Mary
23 Mazyck testified as follows:)

24 CLERK OF COURT: Thank you. You may have a seat on
25 the witness stand and once you are seated, if you would

DIRECT EXAMINATION OF MARY MAZYCK BY MR. MCDADE 47

1 please state your name and spell your last name for the
2 record.

3 MS. MAZYCK: Mary Alice Mazyck. M-A-Z-Y-C-K.

4 CLERK OF COURT: Thank you, ma'am.

5 DIRECT EXAMINATION OF MARY MAZYCK BY MR. MCDADE

6 Q Ms. Mazyck, you are Howard Thompson's mother?

7 A Yes.

8 Q Okay. And if you would, if you would tell the Court,
9 did you also know the victim?

10 A Yes.

11 Q How did you know the victim?

12 A Well, I met his mother years prior to and I loved and
13 adored the children.

14 Q How did the children come to stay in your home?

15 A Well, Sarah was, she was less likely to trust people
16 with her children and due to the fact that I loved the
17 children as much as I did, she trusted them in my
18 care.

19 Q Okay. Were they in your care or in your son's
20 Howard's care?

21 A Both of our care, honestly.

22 Q Okay. Did it start out that your son was babysitting
23 these two children or did it develop into that?

24 A It still didn't change. It was still they was more in
25 my care but he was the one watching over them because

1 I worked third shift.

2 Q Okay. During the times that these events allegedly
3 occurred, were you in the home?

4 A Yes.

5 MS. MAY: Your Honor, may I object to the relevance of
6 this, because I thought we were discussing events prior to
7 trial.

8 THE COURT: What is the relevance of this testimony?

9 MR. MCDADE: Well, I think, Your Honor, if we are
10 alleging she was an important witness and should have been
11 allowed to testify, I think I need to at least get in the
12 basis of her testimony. Otherwise, I haven't shown any
13 prejudice.

14 THE COURT: I tell you what. I'm going to sustain the
15 objection. I will let you make a proffer of that in case
16 I'm incorrect in my rulings. Go ahead and just proffer
17 that testimony, please, sir.

18 MR. MCDADE: Okay.

19 PROFFERED TESTIMONY OF MARY MAZYCK

20 Q The -- if you had testified in this case, were you
21 familiar with the statements that your son Howard gave
22 to the police officers?

23 A Yes.

24 Q Okay. And would it be your testimony that there were
25 three one-page statements that he gave?

DIRECT EXAMINATION OF MARY MAZYCK BY MR. MCDADE

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1 A Yes.

2 Q Okay. And would you be able to testify as to the
3 bowel habits of Minor 2

4 A Yes, I would.

5 Q Okay. And what was the issue with that, with Minor 2

6 A was a little hot box. He stayed hot all the time
7 and he didn't want to put clothes on. Many times
8 over, not only me, my daughter-in-law and my other
9 daughter-in-law had to make him put his clothes on.
10 He would not keep his clothes on. In Minor 2 home, me
11 being in his home quite a lot, Minor walked around the
12 house with no clothes on but his underwear and he was
13 just a hot box.

14 Q Okay. Did he sometimes have accidents?

15 A Yes.

16 Q Okay. And would have to be cleaned up?

17 A Yes.

18 Q He wasn't capable of doing that himself?

19 A Minor is more of a spoiled child by mother and she
20 didn't have discipline set up on him. She just went
21 along with him and that's the way it is.

22 Q Okay. And during the time that these events allegedly
23 happened, did you notice any change in Minor 2
24 behavior?

25 A No. There was none. I talked to him many times.

1 There was no change in this child and in guarding him,
2 I did talk to him. If I had had even just a thought
3 that anything was wrong -- I loved this child. I
4 loved his mother and I still cannot stop loving them
5 today no matter what happens here. I don't stop
6 loving them. I just want all of this to come and put
7 the truth on the table. That's all that I want.

8 Q Okay.

9 A I mean, I don't have no anger, I have hurt, because I
10 cannot get past the fact that this story has not been
11 told and until this story is told, the well-being of
12 not only my child, which I love my child, but the
13 well-being of the other child is in this case, too,
14 and I cannot get past the fact that if they are both
15 innocent, when the truth is put on the table, it will
16 go away, but if something is wrong, we all need to
17 know that and then we can help that child, too. My
18 heart goes to both of these children, mine and hers.

19 Q Okay. What story are you talking about that needs to
20 be told?

21 A The truth. The truth hasn't been laid on the table in
22 this case..

23 Q What is the truth?

24 A The truth is stated, they have not, at this given
25 time, I haven't heard the truth, but at this given

CROSS EXAMINATION OF MARY MAZYCK BY MS. MAY

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1 time they have not given me, my family, and all the
2 people that know me and my family, one reason to
3 believe that my child is guilty of this crime. We
4 don't believe this crime has been committed. We have
5 nothing. I went through the trial. I heard
6 everything that they have said and I have yet to hear
7 anybody prove to me in any shape, form, or fashion
8 that this crime has been committed.

9 A All right. If you would, answer any questions that
10 the State has for you.

11 CROSS EXAMINATION OF MARY MAZYCK BY MS. MAY

12 Q Ms. Mazyck, you did not testify at trial?

13 A No, I did not.

14 Q You did not? May I ask you who is Mary Alice Mazyck?

15 A That's me.

16 Q And you did not testify at trial?

17 A No, I did not.

18 Q Even if the transcript reflects that you did?

19 (Mr. McDade speaks to Ms. May)

20 Q You testified at the Jackson v Denno hearing. Is that
21 correct?

22 A Yes.

23 Q Okay. But you did not testify at trial.

24 A No. Okay. Thank you.

25 THE COURT: Redirect?

1 MR. MCDADE: We have nothing further, Your Honor. We
2 don't have anything else.

3 THE COURT: Thank you, ma'am. You may step down. So,
4 you have nothing else?

5 MR. MCDADE: No, Your Honor.

6 THE COURT: You have no witnesses you want to call?

7 MS. MAY: No, Your Honor.

8 THE COURT: Let me just say this: I'm going to read
9 through these documents. I've read through the transcript
10 and the petition, but there are certain other matters that
11 I haven't read in these documents. I am going to do so. It
12 is my belief now that the issue is not, regardless of the
13 nomenclature used for Mr. Whiten at trial, I'm not looking
14 at what he did or didn't do during this trial. My
15 consideration is whether or not he gave improper advice
16 that would fall below the objective standards of a
17 reasonably competent attorney to this gentleman to go
18 forward pro se and that's the only way I'm going to look at
19 this case. I may be incorrect, but I believe that's the
20 proper issue before me. I think you are also preserved on
21 the record. Do you have any final closing statements you
22 want to make, Mr. McDade?

23 MR. MCDADE: No, sir, Your Honor. I believe you
24 understand all our arguments.

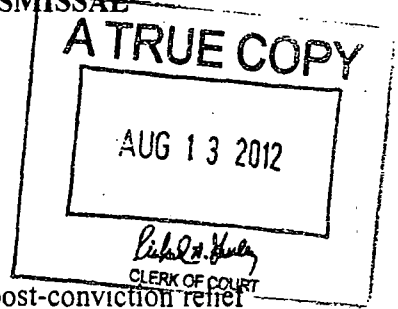
25 THE COURT: Ms. May?

1 MR. MAY: No, Your Honor.

2 THE COURT: All right. Thank you very much. I will
3 give the attorneys my decision and when that's done, you
4 will be notified of my decision. Good luck to you.

STATE OF SOUTH CAROLINA) FILED-CLERK'S OFFICE)
) ANDERSON IN THE COURT OF COMMON PLEAS)
)) TENTH JUDICIAL CIRCUIT)
 COUNTY OF ANDERSON) 7/17 AM 10 P 12:32)
)) 2010-CP-04-4229)
) COMMON PLEAS AND)
) GENERAL SESSIONS)
 Howard Thompson, III, #322000,)
 Applicant,)
))
))
 v.)
))
))
 State of South Carolina,)
 Respondent.)

ORDER OF DISMISSAL



This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed November 24, 2010. Respondent made its Return on February 28, 2011. An evidentiary hearing into the matter was convened on March 8, 2012, at the Anderson County Courthouse. The Applicant was present at the hearing and was represented by James McDade, Esquire. The Respondent was represented by Kaelon E. May of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Additionally, the Applicant proffered the testimony of Mary Mazyck. The State offered the testimony of Charles Whiten, Esquire (Mr. Whiten) Applicant's stand-by trial counsel. This Court also had before it the records of the Anderson County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. The Applicant was indicted at the June 2005 term of the Anderson County Grand Jury for Criminal Sexual Conduct with a Minor—First Degree (2005-GS-04-1700). Applicant represented himself, *pro se* and was appointed

stand-by counsel, Charles Whiten, Esquire. On or about May 23, 2007, the Applicant underwent trial pursuant to which he was found guilty as charged. He was sentenced to confinement for a period of thirty (30) years.

A timely notice of appeal was filed on the Applicant's behalf. The South Carolina Court of Appeals subsequently affirmed the Applicant's conviction by order dated on or about February 4, 2010. (2010-UP-102).

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

- (1) Ineffective assistance of counsel
 - (a) failed to provide advice concerning statements;
 - (b) victim was not compelled to testify according to parental personal knowledge;
 - (c) denial of right to confrontation;

On September 28, 2011, Applicant filed an amended application for PCR raising the following issues:

- (d) trial counsel failed to provide advice concerning statements;
 - (e) trial counsel failed to call the victim and victim was not compelled to testify according to parental knowledge;
 - (f) trial counsel failed to adequately advise of the dangers of self-representation and suggested that Applicant represent himself;
 - (g) trial counsel did not offer advice as to how to preserve the record for appeal;
- (2) Ineffective assistance of appellate counsel
 - (a) failure to file a petition for rehearing with the Court of Appeals or petition for cert.

II. SUMMARY OF EVIDENCE AND TESTIMONY PRESENTED AT THE PCR

EVIDENTIARY HEARING

Applicant's Testimony

At the PCR hearing Applicant testified that prior to representing himself at trial Applicant had taken a criminal justice course, that he remembered the constitutional rights, and that Applicant had enough knowledge to defend his rights. Applicant testified that initially Mr. Whiten represented Applicant, that counsel met with Applicant and discussed Applicant representing himself at trial. Applicant testified that counsel informed Applicant that it was likely the victim would not testify at trial if the Applicant was Pro Se, but that Applicant wanted the victim to testify at trial. Applicant testified that it was counsel's idea for Applicant to represent himself, that counsel informed Applicant once or twice about the dangers of representing himself, and that Applicant's decision to represent himself was sixty-five percent based on counsel's advice and thirty-five percent based on Applicant wanting to represent himself. Applicant testified that counsel did not discuss or explain any of the ten factors from Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002).

Applicant testified that he wanted to cross-examine the victim himself at a trial even though Mr. Whiten advised Applicant it was likely the victim would not testify if Applicant represented himself because Mr. Whiten did not tell Applicant that the victim was not likely to testify until the trial after Applicant already made the decision to represent himself. Applicant testified that he informed Mr. Whiten that he wanted to cross-examine the victim himself at trial.

Mr. Whiten's Testimony

At the PCR hearing Mr. Whiten testified that he was appointed to represent Applicant on April 19, 2006 and was subsequently relieved as Applicant's attorney on January 4, 2007. Mr.

Whiten testified that it was not his suggestion for Applicant to represent himself at trial and that when Mr. Whiten and Applicant discussed the minor victim Applicant maintained that if Applicant was able to cross-examine the victim then the victim would tell the truth. Mr. Whiten testified that Applicant always wanted to either to be able to speak with the victim prior to trial or question the victim at trial, and that Applicant was adamant about questioning the victim himself. Mr. Whiten testified that he did not believe it was in Applicant's best interest that Applicant proceed *pro se*, but that Mr. Whiten advised Applicant that if Applicant wanted to question the victim during the trial, then Applicant would have to proceed *pro se* and the prosecution would have to call the victim as witness. Mr. Whiten testified that he advised Applicant representing himself was dangerous because Applicant was not a trained attorney.

Mr. Whiten testified that Applicant was in agreement with the strategy of Applicant proceeding *pro se* and that at no time after Applicant made the decision to represent himself did Applicant change his mind or inform Mr. Whiten that Applicant did not want to represent himself. Mr. Whiten testified that he advised Applicant that if Applicant proceeded *pro se* that it was not likely the victim would take the stand at trial. Mr. Whiten testified that in connection with Applicant's desire to question and cross-examine the victim, he only advised Applicant that Applicant would have to represent himself at trial in order to cross-examine the victim himself.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial

cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. 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.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the outset of the hearing Respondent made a motion to dismiss Applicant's claims of ineffective assistance of counsel on the ground that Applicant represented himself at trial and Mr. Whiten did not represent Applicant at trial as he was relieved from Applicant's representation upon Applicant's motion to represent himself. Respondent argued that there is no right to hybrid representation in South Carolina, that is, representation which is partially *pro se* and partially by counsel. Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989); Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002); Koon v. Clare, 338 S.C. 423, 527 S.E.2d 357 (2000); State v. Stuckey, 333 S.C.

56, 508 S.E.2d 564 (1998). Respondent contended that a defendant that waives his right to counsel waives any right to challenge the effectiveness of counsel. This Court finds that Applicant's claims of ineffective assistance of counsel are not proper as Applicant waived his right to counsel and chose to represent himself. The only ineffective assistance of counsel claim that this Court will consider is Applicant's allegation that counsel was ineffective for failing to properly advise Applicant on whether to proceed *pro se*. Therefore, this Court grants Respondent's motion to dismiss, excluding the aforementioned allegation.

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the exhibits introduced into evidence at the hearing, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

Applicant alleges that counsel was ineffective for failure to properly advise Applicant on whether to proceed *pro se*. At the PCR hearing Applicant testified that it was Mr. Whiten's idea for Applicant to proceed *pro se* at trial and that Mr. Whiten did not discuss any of the ten (10) factors delineated in the Gardner case, *supra*. Applicant testified that at the December 7, 2006 hearing for Applicant's motion to relieve counsel and proceed *pro se*, Applicant only remembered Mr. Whiten telling Applicant to say 'yes' to the judge. Applicant admitted that Mr. Whiten explained to

Applicant the dangers associated with Applicant representing himself at trial. At the PCR hearing Mr. Whiten testified that Applicant was adamant about being able to question the victim prior to trial and about being able to cross-examine the victim at trial himself because Applicant maintained that the victim would tell the truth if questioned by Applicant. Mr. Whiten testified that in connection with Applicant's request to question the victim during trial, Mr. Whiten advised Applicant only that Applicant would have to represent himself at trial. Mr. Whiten testified that he advised Applicant of the consequences and dangers of Applicant representing himself at trial.

In order to waive the right to counsel, the accused must be (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation. Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (1990) (citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). The trial judge must determine whether there is a knowing and intelligent waiver by the defendant. State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977). If the trial judge fails to address the disadvantages of appearing *pro se*, as required by the second prong of Faretta, the court should look to the record to determine whether a defendant had sufficient background or was apprised of his rights by some other source. See Prince, 301 S.C. at 424, 392 S.E.2d at 463. When determining if an accused has a sufficient background to understand the dangers of self-representation, the courts consider many factors including:

(1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether the accused knew of the nature of the charges and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew of legal challenges he could raise in defense to the charges against him; (9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) whether the accused's waiver resulted from either coercion or

mistreatment. Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002) (citing State v. Cash, 309 S.C. 40, 419 S.E.2d 811 (Ct. App. 1992)).

The record reflects that on December 7, 2006, the Applicant appeared before the Honorable Howard P. King and presented a motion for Mr. Whiten to be relieved as counsel and a motion to proceed *pro se*. At the waiver hearing Mr. Whiten informed the court that he had discussed the motions with Applicant in detail but that he did not agree with Applicant's decision. (Waiver Tr. p.3, lines11-17). The court then questioned about his background including Applicant's age; education level; employment; whether Applicant had ever been treated for substance abuse or mental illness; whether Applicant had been examined by a doctor to determine mental capacity to stand trial; the extent to which Applicant studied the law; and whether Applicant was familiar with the procedures in South Carolina criminal courts. (Waiver Tr. p.4, line8 – p.7, line14). The judge explained to Applicant that with regard to the charge of criminal sexual conduct 1st degree the maximum penalty was thirty years, that it was a violent offense, and that it was a no parole offense. (Waiver Tr. p.8, lines9-24). The Applicant indicated that he understood and explained to the judge his understanding. (Id). The judge informed Applicant that he was facing up to fifty years in prison on both charges and Applicant indicated that he understood. (Waiver Tr. p.9-10). The judge advised Applicant that in representing himself, the trial court would not be able to advise or assist Applicant during the trial and Applicant indicated that he understood this. (Waiver Tr. p.10, line19 – p.11, line2).

The judge engaged Applicant in a discussion concerning Applicant's understanding and knowledge of the rules of evidence, the rules of criminal procedure, and motions that can be made at trial. (Waiver Tr. p.11, line3 – p.12, line12). Mr. Whiten informed the judge that he and Applicant had discussed the elements of the crimes Applicant was charged with. (Waiver Tr. p.12, lines18-19).

The judge warned Applicant of the dangers of self-representation and advised Applicant that it was unwise of Applicant to try to represent himself. (Waiver Tr. p.12, line21 – p.13, line2). The judge asked Applicant if it was Applicant's desire to represent himself and give up his right to be represented by a lawyer, and Applicant indicated this was his desire. (Waiver Tr. p.13,lines3-8). Moreover, the judge asked Applicant if Applicant's decision was entirely voluntarily on Applicant's part and Applicant replied, "Voluntarily one hundred percent." (Waiver Tr. p.13, lines9-10). The judge then found that Applicant knowingly, voluntarily, and intelligently waived his right to counsel. (Waiver Tr. p.13, lines11-15). The judge relived Mr. Whiten as primary counsel but appointed him as stand-by counsel.

This Court finds that Applicant has failed to show that counsel was ineffective for failing to properly advise Applicant on whether to proceed *pro se*. This Court finds that the Applicant's testimony is not credible. This Court does find Mr. Whiten to be credible. The Applicant sought Mr. Whiten's advice on how Applicant would be able to question the victim at trial and Mr. Whiten provided his client with an answer. This Court does not believe Applicant's claim that the idea of Applicant proceeding *pro se* at trial was entirely Mr. Whitens'. This Court finds that Mr. Whiten advised Applicant of the dangers of self-representation and the waiver hearing judge extensively questioned Applicant about his decision to and understanding of proceeding *pro se*. The waiver hearing was held about five (5) months prior to Applicant's trial and at no time did Applicant change his mind or indicate to Mr. Whiten that Applicant did not want to represent himself. This Court finds that Applicant has failed to show counsel's performance was deficient and any resulting prejudice; therefore, this allegation is denied and dismissed.

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

V. CONCLUSION

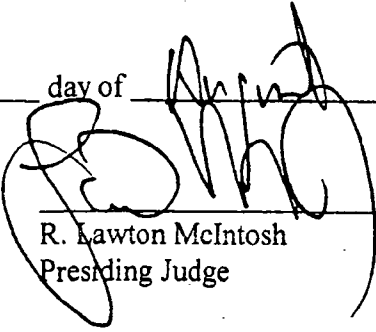
Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post conviction relief. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 7 day of August, 2012.



R. Lawton McIntosh
Presiding Judge

Anderson, South Carolina

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COMMON PLEAS AND
GENERAL SESSIONS

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

HOWARD THOMPSON, III,

Applicant,

v.

STATE OF SOUTH CAROLINA,

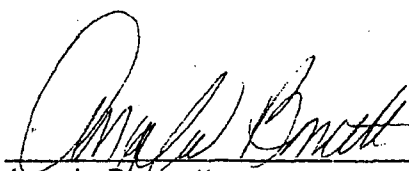
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Order of Dismissal has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

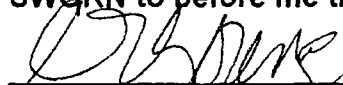
James McDade, Esquire
P.O. Box 2125
Anderson, South Carolina 29622

This 24th Day of August, 2012.



Angela Bennett
Legal Assistant for Respondent

SWORN to before me this 24th Day of August, 2012.



Notary Public for South Carolina.
My Commission Expires: 10/28/2014