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June 3, 2013

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: State of South Carolina, Respondent v. Jerome Chisholm, Appellant,
Case No. 2012-CP-24-0092

Dear Mr. Shearouse:

Enclosed for filing is a Notice of Appeal in the above case. Also enclosed are the following:

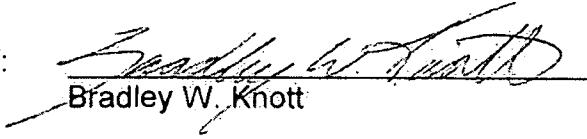
- (1) Proof of Service of the Notice of Appeal on the Attorney for the Respondent.
- (2) A copy of the Judgment which is to be challenged on appeal.

This is a Post-Conviction Relief proceeding in which I was appointed. It is requested that the filing fee be waived. I have forwarded a copy of the Notice of Appeal to the SC Office of Appellate Defense and asked that they handle this appeal.

Sincerely,

CALLISON, DORN, THOMASON,
& KNOTT, P.A.

BY:


Bradley W. Knott

Enclosures

Copy: J. Rutledge Johnson
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-3727
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

R. Lawton McIntosh Circuit Court Judge

Case No. 2012-CP-24-0092

State of South Carolina, Respondent,

v.

Jerome Chisholm Appellant.

NOTICE OF APPEAL

Jerome Chisholm appeals the decision by the court, order [judgment] of the Honorable R. Lawton McIntosh entered on this verdict dated March 25, 2013.

June 4, 2013

Callison, Dorn, Thomason & Knott PA

BY: 

Bradley W. Knott

SC Bar # 64100

Greenwood, South Carolina 29648

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Attorney for Appellant

Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2012-CP-0092

State of South Carolina,

Respondent,

v.

Jerome Chisholm, #335354

Appellant.

PROOF OF SERVICE

I certify that on **June 4, 2013** I mailed the following to the Attorney for the Respondent:

PLEADINGS/DOCUMENTS SERVED:

1. Notice of Appeal

by depositing a copy in the United States Mail, postage prepaid addressed to:

PERSONS/ENTITIES SERVED:

J. Rutledge Johnson
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

CALLISON, DORN, THOMASON,
KNOTT, P.A.

By: 

Bradley W. Knott
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Attorney for the Appellant
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June 3, 2013
Greenwood, SC

STATE OF SOUTH CAROLINA)
 COUNTY OF GREENWOOD)
)
 Jerome Chisholm, #335354,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 EIGHTH JUDICIAL CIRCUIT

2012-CP-24-0092

ORDER OF DISMISSAL

FILED
 8TH JUDICIAL CIRCUIT
 2012 JUN 11 10:56 AM

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 26, 2012. Respondent made its Return on May 1, 2012. An evidentiary hearing into the matter was convened on November 29, 2012, at the Laurens County Courthouse. Bradley Knott, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, Applicant testified on his own behalf. Charles Grose, Esquire also testified. This Court had before it a copy of the records of the Greenwood County Clerk of Court, records from the South Carolina Department of Corrections, the trial transcript and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenwood County Clerk of Court. The Applicant was indicted at the December 2005 term of the Greenwood County Grand Jury for Criminal Sexual Conduct with a Minor, 1st degree (2005-GS-24-1386). The Applicant was represented by Charles Grose, Esquire and Janna Nelson, Esquire. On June 15-18, 2009, the Applicant underwent trial by

jury and was convicted of Criminal Sexual Conduct with a Minor, 1st degree. The Honorable Eugene C. Griffith, Jr. sentenced the Applicant to imprisonment for thirty (30) years.

A Notice of Appeal was timely filed on behalf of the Applicant and an appeal was perfected. The South Carolina Court of Appeals by written opinion affirmed the Applicant's conviction and sentence. State v. Chisholm, Op. No. 4899 (Ct. App. filed on October 26, 2011). The Remittitur was sent on November 15, 2011.

In his application, the Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "Defendant's counsel did not offer a defense"
2. "Due Process Violation"
 - a. "Time frame between arrest and trial"
3. "6th & 14th Amendment Violation"

At the PCR hearing, Applicant proceeded on the claim of ineffective assistance of counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged 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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 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.

Failure to retain and call an expert witness

The Applicant alleges Counsel was ineffective for failing to retain and call an expert witness on the Applicant's behalf.

At the PCR hearing, the Applicant testified he expected Counsel to retain and call at trial an expert witness to counter the State's expert witness concerning testimony about the victim and Applicant both being HIV positive.

Counsel testified he consulted with an expert and decided not to call him at trial because, in

Counsel's professional opinion, the expert's testimony would have created a scene for the jury of on-going sexual abuse by showing the victim contracted HIV virus by some other act than the one for which the Applicant was tried. Counsel also testified he did not call any witnesses on the Applicant's behalf because he wanted to have the last chance to argue to the jury.

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court had a copy of the Clerk's records and has read the trial transcript, all of which assists the Court in judging the witnesses' credibility. This Court finds Counsel's testimony very credible based upon his extensive experience in criminal law and knowledge of this case.

First, the Applicant has failed to prove Counsel was ineffective in deciding not to retain and call an expert witness at trial. Counsel testified he consulted with an expert, and the expert would not have aided the Applicant's case, but rather would have painted a picture for the jury of on-going sexual abuse of the victim by the Applicant. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds Counsel's decision not to call an expert witness at trial was based upon his experience, the facts of this case, and his valid trial strategy of having the last argument.

Second, prejudice from trial counsel's failure to call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the

witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). The Applicant produced no such testimony of an expert witness at the PCR hearing, and therefore cannot show any resulting prejudice.

This Court finds counsel was effective in his representation of Applicant and no prejudice resulted in this case. The Applicant has failed to meet his burden of proof and thus, this allegation is denied.

Failure to call lay witnesses

The Applicant alleges Counsel was ineffective for failing to call lay witnesses on his behalf at trial. The Applicant testified he consulted with Counsel and provided a list of witnesses the Applicant wanted Counsel to interview and call at trial. The Applicant also stated he asked Counsel about deposing the State's witnesses in the case, and Counsel said he would not depose the witnesses.

Counsel testified the only witnesses in the case were the victim and the victim's mother. These were also the State's witnesses. He stated he chose not to interview the victim or the victim's mother because they were both adverse to the Applicant and because Counsel already had statements from each of them. Counsel also testified there is no rule which provides the defense the right to depose witnesses in a criminal case. Moreover, Counsel stated the discovery and the facts of the case, along with the statements from the victim and victim's mother, provided the basis for a sufficient cross-examination. Counsel further testified he did not call any witnesses because he wanted to last opportunity to argue the defense case to the jury. He stated since there were several strong pieces of evidence against the Applicant, his strategy was to challenge and attempt to suppress the evidence.

This Court finds Counsel's testimony credible concerning the decision not to call witnesses on the Applicant's behalf at trial.

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead, *supra*. Counsel testified he did not call any witnesses on the Applicant's behalf because he wanted the last argument before the jury. He also explained he did not interview the victim or the victim's mother because they were adverse to the Applicant, and he had sufficient information based on the facts of the case and the victim and victim's mother's statement to adequately cross-examine them at trial. This Court finds Counsel articulated valid reasons for not calling witnesses on the Applicant's behalf based on his reasonable trial strategy.

Second, prejudice from trial counsel's failure to call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood, *supra*. An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister, *supra*. The Applicant produced no such testimony of an expert witness at the PCR hearing, and therefore cannot show any resulting prejudice.

This Court finds counsel was effective in his representation of Applicant and no prejudice resulted in this case. The Applicant has failed to meet his burden of proof and thus, this allegation is denied.

Applicant's testimony at trial

The Applicant alleges he wanted to testify at trial, but upon Counsel's advice, he did not. The Applicant testified he and Counsel discussed his testimony at trial, but Counsel advised him not

to testify.

Counsel testified it was the Applicant's decision not to testify.

This Court has reviewed the entire record and finds evidence in the trial transcript which directly refutes the Applicant's claim. The Applicant was thoroughly advised by the trial court of his constitutional rights to remain silent or to testify on his own behalf. (Tr. p. 441 ln 22- p. 443 ln. 15) When questioned by the trial court about his decision not to testify, the Applicant agreed that he was freely and voluntarily deciding not to testify in this case. (Tr. p. 443 ll. 11-15). Because there is evidence which directly refutes the Applicant's claim, this allegation is denied.

Speedy Trial Motion

The Applicant alleges Counsel was ineffective for not filing a Motion for a Speedy Trial. S.C. Code Ann. §17-27-90 states "All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application." This issue was not raised in the original application, and no amended application was filed. Thus, it is not properly before this Court.

Even assuming *arguendo* the issue was raised in an application, the allegation is without merit. Counsel testified he did not file a Motion for Speedy Trial because this case was not the type of case in which he would file such a motion. He explained, although quite prepared for trial, he wanted to avoid a trial based on the facts and evidence in this case. Counsel also stated he negotiated with the State to reach an agreement or a plea, but these efforts were not successful. Counsel testified he would have had this discussion with the Applicant about wanting to work out this case with the State.

The Applicant's allegation rests on the fact that approximately two years into his

incarceration awaiting trial, the sexual assault examination kit of the victim, which was taken at the hospital shortly after the sexual assault, had not been analyzed. The solicitor sent this kit to the South Carolina Law Enforcement Division (SLED) for analysis, where a mixture of blood and semen was found on the victim's underwear. This mixture consisted of the victim's blood and an unidentified male's semen. Then, a hearing was conducted to obtain a sample of the Applicant's DNA for comparison. The sample from the Applicant matched the semen in the mixture on the victim's underwear. All of this evidence was admitted into evidence over Counsel's objections.

At the PCR hearing, the Applicant claimed Counsel did not discuss with him the right to a speedy trial and claimed this aforementioned evidence would not have been admissible had Counsel filed a Motion for a Speedy Trial. Counsel testified even if he had filed this motion, the solicitor would have discovered that the sexual assault examination kit had not been analyzed when he reviewed his file and would have had the kit analyzed.

First, this Court finds Counsel's decision not to file a Motion for Speedy Trial was based on a reasonable trial strategy based on the facts and evidence of this case. Counsel stated he was trying to negotiate with the State for a satisfactory plea agreement, which ultimate did not occur. Second, no prejudice can be shown because even had Counsel filed this Motion and the Court granted it, the solicitor still would have had this evidence analyzed as further proof of the Applicant's guilt. Thus, even if this allegation was properly raised, it would be denied.

Jury selection

The Applicant alleged Counsel was ineffective for not striking a juror during jury selection who was a relative of the Applicant's cellmate in the Greenwood County Detention Center.

The Applicant testified he informed Counsel that the Applicant's cellmate was related to one

of the jurors who was on the jury that ultimately convicted the Applicant. He also stated Counsel should have struck this juror, but failed to do so.

Counsel testified he does not recall the Applicant informing him that the Applicant's cellmate was related to a juror on this case. Counsel stated, had he known this, he might have moved to strike the juror, but that he must have had a reason for doing so. Counsel further testified he did, in fact, challenge the jury selection because, as this case was tried during the summer, he believed there were a disproportionate number of teachers in the jury pool. The reason for Counsel's argument was he believed because of the teachers' specialized training and sensitivity towards children, they may not have been able to be impartial in this case.

This Court finds the Applicant's testimony regarding Counsel's ineffective for failure to strike a particular juror is not credible, while finding Counsel's testimony credible. Counsel testified he did not recall the Applicant informing him that the Applicant's cellmate was related to a juror. Counsel also correctly stated he would have to have had a legitimate reason to move to strike a juror.

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and **on information supplied by the defendant**. In particular, what investigation decisions are reasonable depends critically on such information.

Strickland at 691, 104 S. Ct. at 2066 (emphasis added).

Counsel cannot be held accountable for information the Applicant does not relay to him. Based on the testimony at the PCR hearing, this Court finds this allegation is without merit. Further, the Applicant provided no testimony or proof of any effect this juror had on the jury's decision to convict the Applicant. Moreover, any effect this juror had on the jury would be pure speculation. Because the Applicant has failed to meet his burden of proof under 71.1(e) SCRCPP, this allegation is

denied.

Overwhelming Evidence

This Court further finds overwhelming evidence of the Applicant's guilt in this case. No prejudice can be shown, even when trial counsel's performance is deficient, where there is overwhelming evidence of the Applicant's guilty. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) (citing Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2008)).

In this case, there was testimony from the victim that she was raped by the Applicant. Specifically, she testified the Applicant put victim on the bed, turned victim over, pushed the victim's pants and underwear down to her knees, and put "his wiener" "in [her] butt." (Tr. p. 226 ll. 3-6; ln. 11; ll. 19-25; p. 227 ll. 1-4; 10-15). Additionally, the victim's mother testified she walked into her own bedroom, saw the Applicant in her bed under the covers with a crazy look in his eye, saw the victim's hairbow sticking out from the top of the bed covers, and pulled the covers back. (Tr. p. 211 ll. 24-25; p. 212 ll. 10-12; 19-22). When the victim's mother pulled the covers back, she saw her daughter's pants pulled down and the Applicant's "penis hanging down between his legs and inside [the victim's] butt." (Tr. p. 213 ll. 9-11). Moreover, there was testimony that both the victim and the Applicant were HIV positive. An expert in sexual assault examination of children testified there were three ways to become HIV positive: 1.) a congenital infection; 2.) a blood transfusion; or 3.) sexual contact. (Tr. p. 425 ln. 17- p. 426 ln. 20). From testimony at trial, the victim's mother was HIV negative and the victim had not had a blood transfusion; leaving sexual acquisition and abuse as the diagnosis for why the victim was HIV positive. (Tr. p. 426 ll. 9-20). Furthermore, an expert in forensic DNA from SLED testified he analyzed the small stain found inside the victim's underwear. He found a blood mixture which matched two DNA profiles: one was the victim and the other was

an "unidentified male." (Tr. p. 311 ll. 13-18). He then requested a DNA sample from any likely suspects. (Tr. p. 313 ll. 1-2). The Applicant's DNA sample was obtained and analyzed by SLED, and the Applicant's sample matched the "unidentified male" in the blood mixture. (Tr. p. 315 ll. 5-11). The expert then concluded the stain was a mixture of the victim's blood and semen. (Tr. p. 315 ln. 20- p. 316 ln. 1). The semen matched the DNA profile of the Applicant. (Tr. p. 316 ll. 7-11). Combining all of the testimony presented at trial, there is overwhelming evidence of the Applicant's guilt.

Because there is overwhelming evidence of the Applicant's guilt in this case, no prejudice can be shown by Counsel alleged errors.

CONCLUSION

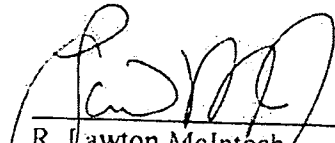
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

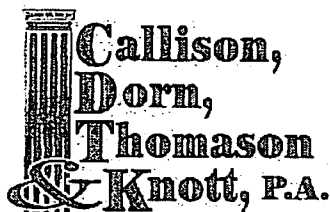
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!



R. Lawton McIntosh
Presiding Circuit Court Judge
Eighth Judicial Circuit

3-25 ²⁰¹³
Andrus, South Carolina



RECEIVED

JUL 25 2013

Trial Attorneys & Counselors at Law **SC Supreme Court**

G. William Thomason
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*Certified Family Court Mediator

June 3, 2013

Mr. Robert M. Dudek
Chief Attorney
SC Office of Appellate Defense
P. O. Box 11433
Columbia, SC 29211-1433

RE: Jerome Chisholm v. State of South Carolina - 2012-CP-24-0092

Dear Mr. Dudek:

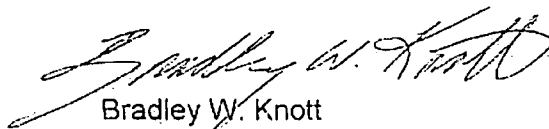
In regard to the above-referenced matter, I have enclosed a copy of the Notice of Appeal concerning the appeal of a Post-Conviction Relief proceeding involving Jerome Chisholm. This was an appointed Post-Conviction case. Following the hearing, my client requested that this matter be appealed. It is my understanding that your office will handle the appeal on behalf of Mr. Chisholm.

I filed this Appeal based on the attached Order which I received on May 6, 2013. Please contact me concerning this matter. If there is anything further that you need, please let me know.

With kind regards, I am

Sincerely,

CALLISON, DORN, THOMASON,
& KNOTT, P.A.



Bradley W. Knott

BWK/pm
Enclosure

cc: Daniel E. Shearouse, SC Supreme Court
J Rutledge Johnson, Office of the Attorney General
Jerome Chisholm

RECEIVED

JUN -5 2013

OFFICE OF
APPELLATE COUNSEL

THE STATE OF SOUTH CAROLINA
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BY: 

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Attorney for Appellant

Other Counsel of Record:
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