

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

AUG 16 2013

S.C. Supreme Court

THEODORE COBBS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-001537

RETURN TO MOTION FOR APPOINTMENT
OF OUTSIDE COUNSEL

Undersigned counsel, making this return to the motion for the appointment of counsel, respectfully shows this Court that:

- (1) Petitioner Cobbs was indicted at the May 2008 term of the Charleston County Grand Jury for five counts of Criminal Sexual Conduct with a Minor First Degree (2008-GS-10-3721, 3722, 3724, 3732, and 3737), six counts of Criminal Sexual Conduct with a Minor Second Degree (2008-GS-10-3725, 3727, 3728, 3729, 3739, and 3742), and two counts of Unlawful

Conduct Towards a Child (2008-GS-10-3744 and 3745). He was represented by Carl B. Grant and Eduardo Curry.

(2) Petitioner proceeded to trial and was found guilty. On September 19, 2008, petitioner was sentenced by the Honorable J.C. Nicholson, Jr. to a total of thirty-eight years imprisonment.

(3) A timely Notice of Appeal was filed on petitioner's behalf at the South Carolina Court of Appeals. The undersigned Chief Appellate Defender represented petitioner on appeal, and filed a merit brief. The South Carolina Court of Appeals affirmed petitioner's convictions and sentences. See State v. Cobbs, No. 2011-UP-355 (S.C. Ct. App. June 30, 2011).

(4) Petitioner filed an application for post-conviction relief on January 30, 2012. Respondent made its Return on August 16, 2012. An evidentiary hearing on the matter was convened on May 20, 2013 at the Charleston County Courthouse. Petitioner was present at the hearing and represented by Charles T. Brooks, III. Assistant Attorney General Ashleigh R. Wilson, represented the state.

(5) An Order of Dismissal was filed by the Honorable Deadra L. Jefferson on July 11, 2013 denying relief on the allegations of ineffective assistance of trial and appellate counsel. Trial Attorneys Curry and Grant testified at the evidentiary hearing. Undersigned appellate counsel did not testify. The order stated: "As the Applicant confirmed in his testimony, Appellate counsel appears to have briefed the strongest issue on appeal. This Court finds appellate counsel was not ineffective for failing to raise all issues preserved at trial. The Applicant has failed to carry his burden of proving ineffective assistance of appellate counsel." See Order of dismissal at 13-14,

Exhibit A. A Notice of Appeal was filed on July 15, 2013.

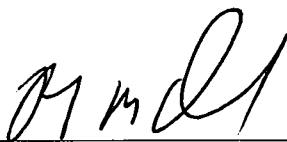
(6) On August 9, 2013, petitioner filed a *pro se* motion to appoint outside counsel.

(7) In his motion petitioner alleges that since he alleged ineffective assistance of appellate counsel in PCR that it “[w]ould be unfair and a denial of due process of law to have any lawyer from the Office of Appellate Defense represent Appellant on his pending appeal.” Motion at 2. (emphasis by the petitioner). Petitioner also wrote that he “believes the Court should be made aware that during his PCR process, appellant filed a disciplinary complaint (# 13-DE-L-0626) against his allegedly appointed PCR lawyer Charles T Brooks, III. So it would be also unfair and a denial of due process of law to appoint Mr. Brooks back to this case . . . Appellant should be appointed outside counsel to assist him with his pending appeal.”

(8) Undersigned counsel agrees that since petitioner desires the appointment of counsel outside of the office of appellate defense be appointed to represent him on appeal that the motion should be granted – always subject, of course, to this Court’s ultimate discretion on the matter -- since an allegation of ineffective assistance of appellate counsel was made against the Chief Appellate Defender. Further, that allegation was addressed in the order of dismissal. Undersigned counsel takes no position on what attorney should be appointed to represent petitioner on appeal if this Court, in its discretion, determines that outside counsel should be appointed.

WHEREFORE, undersigned counsel does not oppose petitioner’s motion for the appointment of counsel outside the Office of Appellate Defense to represent petitioner on appeal from the denial of his PCR action, and leaves the matter to this Court’s discretion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

August 16, 2013

Exhibit

A

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Theodore Cobbs, #330717,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2012-CP-10-0684

ORDER OF DISMISSAL

FILED
 2013 JUL 11 AM 11:25
 JULIE J. ARMSTRONG
 CLERK OF COURT

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Charles T. Brooks, III, Esq.
Respondent's Attorney:	Ashleigh R. Wilson, Esq.
Trial Counsel:	Carl B. Grant, Esq. Eduardo K. Curry, Esq.
Date of Hearing:	May 20, 2013
Court Reporter:	Deborah Garrison

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 30, 2012. The Respondent made its Return on August 16, 2012. An evidentiary hearing on the matter was convened on May 20, 2013 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Charles T. Brooks, III, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

At the evidentiary hearing, the Applicant testified along with Carl B. Grant, Esquire, and Eduardo K. Curry, Esquire. The Court had before it the trial transcript, the Charleston County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's return, and the appellate court records.

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PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the May 2008 term of the Charleston County Grand Jury for five (5) counts of Criminal Sexual Conduct with a Minor First Degree (2008-GS-10-3721, 3722, 3724, 3732, and 3737), six (6) counts of Criminal Sexual Conduct with a Minor Second Degree (2008-GS-10-3725, 3727, 3728, 3729, 3739, and 3742), and two (2) counts of Unlawful Conduct Towards a Child (2008-GS-10-3744 and 3745). He was represented by Carl B. Grant, Esquire, and Eduardo Curry, Esquire.

The Applicant proceeded to trial and was found guilty. On September 19, 2008, the Applicant was sentenced by the Honorable J.C. Nicholson, Jr. to a total of thirty-eight (38) years imprisonment.¹

A timely Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Robert Dudek, Esquire, of the South Carolina Office of the Appellate Defense represented the Applicant on appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Cobbs, No. 2011-UP-355 (S.C. Ct. App. June 30, 2011).

¹ Pursuant to S.C. Code Ann. § 16-3-0655(A)(1), the offense of criminal sexual conduct with a minor, first degree, carries a maximum penalty of thirty (30) years, no part of which may be suspended nor probation granted. The offense is also classified as violent and most serious. Pursuant to S.C. Code Ann. § 16-3-0655(B)(1), the offense of criminal sexual conduct with a minor, second degree, victim 11-14 years old, carries a maximum penalty of twenty (20) years. The offense is also classified as violent and most serious. Pursuant to S.C. Code Ann. § 16-3-0655(B)(2), the offense of criminal sexual conduct with a minor, second degree, victim 14-16 years old, carries a maximum penalty of twenty (20) years. The offense is also classified as violent and most serious. Pursuant to S.C. Code Ann. § 63-5-70, the offense of unlawful conduct towards a child carries a maximum penalty of ten (10) years, and/or a fine in the discretion of the court.

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ALLEGATIONS

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

1. Ineffective assistance of trial counsel.
 - a. Counsel failed to adequately prepare for trial.
2. Ineffective assistance of appellate counsel.
 - b. Appellate counsel failed to argue against the admission of prior bad acts.
 - c. Appellate counsel failed to adequately argue against the trial judge's denial of defense motions.
3. Prosecutorial misconduct.

At the hearing, the Applicant proceeded solely on the allegations of ineffective assistance of trial and appellate counsel. This Court finds the issue of prosecutorial misconduct was abandoned by the Applicant at the evidentiary hearing.

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Summary of the Testimony

The Applicant testified he met with his attorneys seven (7) or eight (8) times prior to trial. He testified his attorneys advised him of his right to testify and told him not to testify at trial. He testified he wanted to testify at trial but did not. More specifically, the Applicant testified that Mr. Grant did not tell him not to testify. He now contends, however, that Mr. Curry told him not

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to testify. Ultimately in the course of his testimony the Applicant admits that the decision to testify or not testify was his to make and his decision was freely made.

The Applicant testified his attorneys did not do a good job of trying to exclude references to his Berkeley County charges at trial. He testified his attorneys should have brought in a doctor to discuss the victim's intact hymen. Lastly, the Applicant testified his appellate attorney abandoned several issues that were preserved at trial. He testified his appellate counsel did not thoroughly argue the pointing and presenting of a firearm in his appeal. He testified his appellate counsel told him he felt the issue presented was the strongest issue on appeal.

Also present and testifying was Eduardo Curry, Esquire. Mr. Curry represented the Applicant and was second chair at trial. He testified the Applicant initially hired Carl Grant, Esquire but he was hired as co-counsel after the additional charges were brought against the Applicant. Counsel testified he has been practicing law for twenty-three (23) years. He testified he reviewed all evidence with the Applicant. Counsel also testified he discussed with the Applicant the elements of the charges, potential defenses, potential penalty and his version of the facts.

Counsel testified this case was unique because the Applicant had control and access to his entire family. He testified there was a plethora of evidence against the Applicant and several witnesses who recounted specific incidents of sexual activity with the Applicant when they were kids. Counsel testified the Applicant was alleged to have abused both the mother and the children. Further he testified there was evidence of the Applicant's controlling nature regarding the household and the mother's tendency to look away and inability to protect her minor children.

Counsel testified there was not a lot of forensics involved in the Applicant's case since a lot of time had passed since the abuse was alleged to have begun. He testified his investigation

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involved looking for potential witnesses and investigating the hymen issue. Counsel testified further that presenting the jury with testimony about the victim's hymen could have worked for or against the Applicant. He testified that he fully discussed these pros and cons regarding this issue with the Applicant. He testified there was a discrepancy about the victim's hymen being torn and as a trial strategy they chose not to present that evidence. He testified he could not further look into the herpes issue since the Applicant would not offer himself to be tested for herpes which could have proved exculpatory. As a result they could not determine whether the Applicant did or did not have herpes. He further testified the Applicant raised issues from his memory with no factual or scientific support resulting in substantial restrictions in the defenses ability to legitimately pursue these issues. He testified the Applicant wanted he and Mr. Grant to raise the book "Bastard out of South Carolina" as it was his contention that the children had made up the allegations after seeing the movie and reading the book. However, he had no good faith basis to do so or any assurance such evidence would have been held admissible by the court.

He testified the Applicant did not testify at trial. Counsel testified he normally asks clients if they want to testify and explains to them that if they testify the need for them to explain the allegations. However, he likewise advises clients they have no burden of proof and of their right against self-incrimination and their right not to testify. He also testified that he explains the pros and cons of taking the stand. Counsel testified he advised the Applicant of his right to testify and told him that he did not think his case would benefit from his testimony. He testified he advised the Applicant that the ultimate decision to testify or not testify was his and his alone to make. He testified that the facts alleged by the victims were heinous and aberrant. He also testified that the case was unusual in that the alleged acts took place between 1994 and 1998

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when the victims were minors, there was no independent corroboration and the victims were now coming forward as adults. He testified the Applicant was aware he could take the stand to refute all the testimony, but the Applicant decided not to take the stand. He testified the Applicant made a free and voluntary decision after thorough discussion with counsel of the pros and cons of such testimony and the decision to testify or not to testify in his case. (Tr. 986:1-8.) He further testified that the Judge questioned the Applicant regarding his right to testify and the Applicant knew testifying was his option. He testified the Applicant made the decision solely on his own.

Counsel testified he challenged the references to any prior bad acts as referenced in the Berkeley County charges. He testified at trial after the State's first witness, Judge Nicholson offered the Applicant the opportunity to plead guilty to five (5) years. Counsel testified the Applicant did not want any jail time or probation and was adamant in his desire for a jury trial and steadfast in his belief that he could "beat" the charges. Counsel testified he raised the issue of subsequent bad acts and preserved the issue for appeal. He testified that he and Mr. Grant filed the appropriate Motions in Limine to preserve these issues prior to trial and ensured the matters were heard and preserved for the record for appellate purposes. He further testified that he and Mr. Grant filed the appropriate post-trial motions for a new trial further preserving the issues for appellate review.

Carl B. Grant, Esquire, also testified at the evidentiary hearing. He testified he has been practicing law for twenty-eight (28) years. He testified he was retained to represent the Applicant and met with him at least once a week prior to trial. He further testified he met with him approximately fifteen (15) times and that he saw the Applicant frequently at least once per week to once every two (2) weeks. Counsel testified he hired Eduardo Curry, Esquire after additional charges were brought against the Applicant.

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Counsel testified he filed appropriate pre-trial, Brady and Rule 5 motions on the Applicant's behalf. He testified he thoroughly reviewed the discovery material he received with the Applicant. He further testified that he discussed the pending charges, possible punishment, constitutional rights, and potential defenses with the Applicant. Counsel testified the Applicant did not provide him with any potential witnesses or leads to investigate prior to trial. He testified he had ample time to prepare for trial.


Counsel testified the Applicant's case was one of credibility. He testified he advised the Applicant about his right to testify. He testified he advised him that the right to testify was his decision and his decision alone to make. He further testified that the Applicant thought about the right to testify for quite some time. (Tr. 986:1-8.) He further testified that the Applicant's decision, after being fully advised of the pros and cons of his decision, was made in an informed and intelligent manner deciding not to testify. He testified he always tells clients that they can testify or choose not to testify. He testified he also tells his clients that the court will tell the jury not to hold it against them if they choose to remain silent. Counsel testified he explained to the Applicant the pros and cons of taking the stand and ultimately the Applicant decided not to testify because he did not think the State had enough evidence to convict him. He further testified the Applicant was adamant in his desire to pursue a jury trial.

Counsel also testified he filed pre-trial motions and argued against admission of references to the Applicant's prior bad acts. He testified the court denied his motion. Counsel testified he felt the jury charges given were accurate and the jury charge given on prior inconsistent statements was proper. He also testified he did not recall any jurors falling asleep during trial, but if he had noticed it he would have brought it to the court's attention at trial.

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Counsel testified they discussed the herpes and hymen issue and concluded the case was about the credibility of the witnesses. He testified they did not need an expert to testify about the victim's hymen. Counsel also testified the Applicant rejected a plea offer in which the Berkeley County solicitor would have dropped all charges except one for a plea to a lesser included offense with probation and without the necessity to register on the sex offender registry. He testified that he and the solicitor would have negotiated something in the nature of a charge of assault and battery. He further testified that he advised the Applicant that once any deal was rejected the solicitor intended to and would investigate more, bring additional charges, wash his hands of the matter and send the case to Charleston County. He testified he fully informed the Applicant of this offer and the Applicant turned down the plea offer. He testified the Applicant signed a confirmation of advice and rejection of the plea offer, which stated, in part, "I reject this offer after being advised by Mr. Grant that the prosecution is willing to allow me to plead to a single count of lewd act, dismiss all other charges, and not object to me receiving a probationary sentence from the judge I make this decision freely and voluntarily after being fully advised of its meaning and effect." Mr. Grant supplemented the record with a copy of the confirmation of advice and rejection which has been provided to counsel and made part of the Court's record and file.

Counsel further testified the Applicant turned down the opportunity to plea to a five year sentence on a reduced charge in the nature of an ABHAN a ten (10) year misdemeanor after the start of trial. Counsel testified the Applicant turned down the second plea opportunity as well. He further testified that he advises his clients that sometimes you have to give up some "skin" to save your "bones" but ultimately the decision to accept or reject any plea offers was left up to the Applicant.

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He further testified the state's witnesses were very compelling and so convincing that the jury was crying. He also testified that the jury came back so quickly from deliberation that he and co-counsel didn't even have the chance to order lunch across the street from the courthouse.

Ineffective Assistance of Trial Counsel

This Court finds the Applicant has failed to carry his burden of proving ineffective assistance of trial 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).

For the Applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. at 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. 668, 104 S. Ct. at 2052).

This Court finds the Applicant’s testimony is not credible, while also finding trial counsels’ testimony is credible. This Court finds that counsel for the Applicant have extensive experience in the practice of criminal law and have each been practicing law over twenty (20) years. This Court finds counsel met with the Applicant numerous times prior to trial and fully

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investigated the Applicant's case. This Court finds counsel filed appropriate pretrial, Brady and Rule 5 motions on the Applicant's behalf and reviewed the received discovery with the Applicant. This Court finds counsel fully discussed with the Applicant the elements of the charges against him, what the State was required to prove, potential penalty, and his constitutional rights. This Court finds counsel discussed the Applicant's version of the facts and possible defenses with the Applicant.

This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to prepare for trial. This Court finds there is no evidence in the record to support this allegation.

This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to advise the Applicant of his right to testify. This Court finds the Applicant was fully aware of his right to testify and voluntarily exercised his right to remain silent. Trial counsel both provided credible testimony that the Applicant was advised of his right to testify and ultimately decided not to take the stand. This Court also finds persuasive as well as dispositive the colloquy between the Applicant and the trial court about his right to testify. In this colloquy the applicant advised the Court of the following: he fully understood his rights, he had spoken with his attorneys, that he had ample opportunity to speak with his attorneys and understood his talks with them, and that he had no further questions of his attorneys or of the Court regarding his right to testify. The record is also clear that the Applicant had additional time during the colloquy to take a break and speak with his attorneys regarding his right to testify. (Tr. 982:19-988:16.) The Applicant, after being advised of his right to testify by the trial court, stated he had not been subjected to any force, threatened or coerced to not testify and that it was his decision not to take the stand. (Tr. 982:16-987:24.) The Applicant also stated that his attorneys

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did not recommend that he not testify. (Tr. 987:22–987:24.) This Court finds the Applicant was fully informed of his rights and freely and voluntarily waived his right to testify at trial. (Tr. 987:24–988:15.) This Court further finds this record void of any support for the Applicant's contention that he was adamant in his desire to testify but for counsel's advice against same.

This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to object to the introduction of prior bad act evidence. This Court finds and the record reflects trial counsel filed the appropriate motions to challenge evidence of the prior bad acts of the Applicant. Counsel argued pre-trial motions to suppress evidence that the Applicant pointed a gun at the alleged victims in this case and evidence of the Applicant's prior bad acts in Berkeley County. (Tr. 126:4–131:12; Tr. 131:15–137:1.) This Court finds counsel also made contemporaneous objections to the prior bad act evidence when presented by the State during trial. This Court finds counsel sufficiently challenged and objected to the admission of prior bad act testimony. This Court further finds counsel sufficiently preserved these issues for any appellate review.

This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to present expert witness testimony on the victim's herpes and intact hymen. This Court finds counsel provided credible testimony that they made a strategic decision not to present this evidence at trial. The Applicant has presented no good faith basis for counsel to have presented evidence of the victim's untorn hymen at trial and it is unlikely their decision to not present such testimony affected the outcome of the Applicant's trial. This Court finds credible counsel's testimony that the Applicant had no independent corroboration on this issue and only had his memory and no basis for scientific support. This Court also finds counsel's decision not to pursue testimony about the victim's sexually transmitted disease was valid since

had the issue been presented to the jury during trial, the State could have required the Applicant be tested for herpes and the results could have been inculpatory to the Applicant. This Court finds that counsels' decision not to present this testimony to the jury was valid. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008).

Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test– that trial counsel failed to render reasonably effective assistance under prevailing professional norms. 466 U.S. at 668, 104 S. Ct. at 2052. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland– that he was prejudiced by trial counsel's performance. 466 U.S. at 668, 104 S. Ct. at 2052. In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. 668, 104 S. Ct. at 2052). This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

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Ineffective Assistance of Appellate Counsel

This Court finds the Applicant failed to carry his burden of proving appellate counsel provided ineffective assistance of counsel. The Applicant alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). "Thus, in this case, we ask 1) whether appellate counsel's performance was deficient and 2) whether Respondent was prejudiced by appellate counsel's deficient performance." Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). "To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

This Court finds the Applicant received competent representation on appeal. Appellate counsel did not have to present every non-frivolous issue on appeal and used his discretion when choosing which issues to address on appeal. As the Applicant confirmed in his testimony, Appellate counsel appears to have briefed the strongest issue on appeal. This Court find appellate

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counsel was not ineffective for failing to raise all issues preserved at trial. The Applicant has failed to carry his burden of proving ineffective assistance of appellate counsel.

CONCLUSION

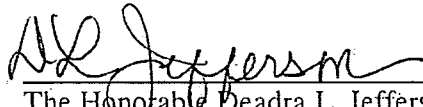
Based on the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application is denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

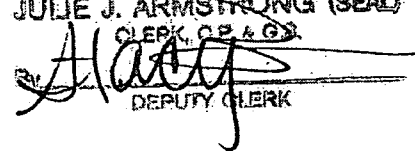
IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 11th day of August, 2013.


The Honorable Debra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

July 11, 2013
Charleston, South Carolina.

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, CP & GS

DEPUTY CLERK

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

THEODORE COBBS,

PETITIONER,

V.

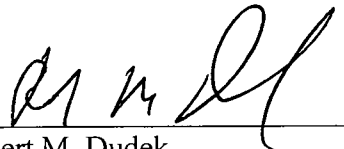
STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-001537

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the return to the motion for outside counsel in the above-referenced case has been served upon opposing counsel, Ashleigh Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and upon Theodore Cobbs, #330717, at Perry Correctional Institution, this 16th day of August, 2013.



Robert M. Dudek
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 16th day of August, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 2, 2013.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

August 16, 2013

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AUG 16 2013

S.C. Supreme Court

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

Re: Theodore Cobbs v. State, Appellate Case No. 2013-001537

Dear Mr. Shearouse:

Enclosed please find an original and six copies of the return to the motion for outside counsel along with a certificate of service.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/kam

Enclosure

cc: Ashleigh Wilson, Esquire
Theodore Cobbs, #330717