

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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MAY 19 2025

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Daniel D. Hall, Circuit Court Judge

Case No. 2019-CP-39-0828

Douglas Kelly Phillips, #369118

Appellant,

v.

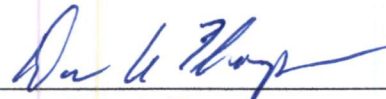
State of South Carolina,

Respondent.

NOTICE OF APPEAL

Douglas Kelly Phillips appeals the order of the Honorable Daniel D. Hall dated April 4, 2025. Appellant received written notice of entry of this order on April 14, 2025.

May 6, 2025



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STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

Douglas Kelly Phillips, #369118

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THIRTEENTH JUDICIAL CIRCUIT

Case No: 2019-CP-39-0828

ORDER OF DISMISSAL
(with prejudice)

Clerk of Court Pickens County, SC
APR 14 '25 AM 9:14

This matter comes before the Court by way of an application for post-conviction relief filed by Douglas Kelly Phillips (Applicant) on June 25, 2019. An evidentiary hearing was held on March 9, 2023, at the Greenville County Courthouse with the Honorable Daniel D. Hall presiding. Applicant was present with his counsel Don A. Thompson Esq. Assistant Attorney General Taylor Smith of the South Carolina Attorney General’s Office represented the State. This Court received testimony from Applicant and Cheryl Aaron, Esq. At the conclusion of the hearing, this Court took the matter under advisement. On March 21, 2023, this Court ruled that post-conviction relief must be denied and directed counsel for Respondent to submit a proposed order.

The Court now issues this order with its findings of facts and conclusions of law as required under S.C. Code Ann. § 17-27-80. Based upon the record of the case, the evidence presented at the evidentiary hearing held in this matter, the argument of the parties, and consideration of the applicable statutory and case law, this court finds that the applicant has failed to establish any deficient performance on the part of counsel and/or any prejudice resulting from counsel’s performance required under *Strickland v. Washington*, 466 U.S. 668 (1984) and *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989), or any other cognizable claim allowed under S.C. Code Ann. § 17-27-20. Consequently, Applicant’s request for post-conviction relief should be and is

DENIED and the application is **DISMISSED** with prejudice.

GENERAL PROCEDURAL HISTORY

Applicant is presently incarcerated according to orders of commitment of the Pickens County Clerk of Court. During its February of 2014 term, the Pickens County Grand Jury indicted Applicant for 3rd degree criminal sexual conduct with a minor (2013-GS-39-2329) and two counts of 2nd degree criminal sexual conduct with a minor (2013-GS-39-2328; -2327).

On July 25-26, 2016, Applicant's case was called to trial with the Honorable Thomas A. Russo, presiding. Applicant was represented by Cheryl Aaron, Esq., (Trial Counsel) and Assistant Solicitor Christopher Jones of the 13th Circuit Solicitor's Office prosecuted the case. The jury found Applicant guilty as indicted, and Judge Russo sentenced Applicant to imprisonment to fifteen (15) years for 3rd degree criminal sexual conduct with a minor and to twenty (20) years for each count of 2nd degree criminal sexual conduct with a minor, to be served concurrently and with credit for time served. Judge Russo also ordered that Applicant was to be placed in sex-offender treatment, if available, by the Department of Corrections, and ordered that he register as a sex offender.

Direct Appeal

Applicant, through counsel, filed a notice of appeal. Chief Appellate Defender Robert M. Dudek perfected Applicant's appeal, and Assistant Attorney General Frederick Schumacher, IV, represented Respondent. On appeal, Applicant argued the trial court erred in ruling that the victim's testimony that Applicant had molested her on previous occasions was admissible. The Court of Appeals affirmed in an unpublished opinion. *State v. Phillips*, Op. No. 2019-UP-016 (S.C. Ct. App. filed January 9, 2019) (per curiam). The Remittitur was issued on January 25, 2019.

CURRENT ALLEGATIONS

In his *pro se* application filed on June 25, 2019, Applicant alleges trial counsel was ineffective in the following ways:

1. Counsel failed to cross-examine the victim;
2. Counsel failed to cross-examine the victim in an in-camera proffer;
3. Counsel failed to cross-examine the victim's mother;
4. Counsel failed to introduce an affidavit of the victim's mother that the investigating detective had coerced her;
5. Counsel failed to cross-examine an expert witness;
6. Counsel failed to question the investigating detective;
7. Counsel advised Applicant not to testify at trial;
8. Counsel failed "to convey to the jury the fact that [Applicant] [had] no prior history of sexual misconduct of any kind."

Applicant additionally alleges that he was denied due process as follows:

1. "I was never brought before a judge for arraignment or plea. If a hearing was held, I was not informed about it. I'm sure if a hearing was held it was recorded by the court reporter via transcripts or something. The only time I was in a courtroom or spoke to a judge about the charges against me was 3 yrs. After my arrest when I was to stand trial for these charges on July 25, 2016. I was denied 'Due Process.'"

Applicant prays that the PCR court would vacate his conviction and remand his case for a new trial.

At the beginning of the evidentiary hearing, PCR counsel clarified that Applicant was abandoning the allegation that Counsel failed "to convey to the jury the fact that [Applicant] [had] no prior history of sexual misconduct of any kind," and the due process allegation that he was never brought before a judge for arraignment or plea. (PCR Tr. 4). PCR Counsel clarified that the main allegation that Applicant was proceeding on was "the minor victim who was in-camera

hearing where she testified. And counsel cross-examined her in that hearing. Her statements conflicted with each other. Then when it came time to testify in front of the jury, there was no cross-examination by counsel as to the conflicting stories” as well as that counsel did not raise issue with an adult witness, *i.e.* the victim’s mother. (PCR Tr. 5). In regard to the allegations that trial counsel failed to cross-examine an expert witness, failed to question the investigating detective, and advised Applicant not to testify at trial, this Court considers these allegations to be abandoned as no evidence or testimony was presented for this Court to consider.

STANDARD OF REVIEW: INEFFECTIVE ASSISTANCE CLAIMS

This Court is guided by the familiar test: To show a violation of the Sixth Amendment, an applicant must show that counsel’s representation fell below an objective standard of reasonableness, and but for counsel’s error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Simpson v. Moore*, 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the trial. *Strickland*, at 694. It is presumed that counsel made all decisions in exercise of reasonable judgment. *Strickland*, at 689. It is the applicant’s burden to prove, by a preponderance of the evidence, that he is entitled to relief. Rule 71.1 (e), SCRPC. *See also Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) (“the burden of proof is on the applicant to prove the allegations in his application”).

To conduct a fair review of counsel’s performance, a reviewing court must “eliminate the distorting effects of hindsight” and attempt “to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. Further, it is presumed that counsel made all decisions in exercise of reasonable judgment. *Strickland*, at 689. It is the applicant’s burden to prove, by a preponderance

of the evidence, that he is entitled to relief. Rule 71.1 (e), SCRPC. *See also Speaks*, 377 S.C. at 399, 660 S.E.2d at 514 (“the burden of proof is on the applicant to prove the allegations in his application”).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court denies relief on the merits after considering the pleadings, the trial transcript as well as additional attachments, testimony at the PCR hearing, and the arguments of counsel. Specifically, at the evidentiary hearing, this Court had the opportunity to observe the witnesses, consider their demeanor, listen to their testimony, and judge their credibility accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. §17-27-80 (2003).

INEFFECTIVE ASSISTANCE OF COUNSEL ALLEGATIONS

Failure to Cross-Examine Victim at Trial

Applicant alleges that counsel was ineffective for failing to cross-examine the victim during trial. This Court finds that Applicant has failed to establish counsel acted deficiently by foregoing cross-examination of the victim, and failed to show that there exists a reasonable probability the outcome of trial would have been different had trial counsel done so. *See Strickland, supra*.

Pre-trial and Trial Testimony of the Victim

Prior to trial, the State notified the Court of its intent to introduce evidence in accordance with *Lyle*,¹ that in the victim’s disclosure to law enforcement and in preparation for trial, the victim indicated that the abuse began when she was six or seven years old which was when her mother began dating Applicant. (Trial Tr. 38). At that time, the abuse was described as “touching, some

¹ *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

oral sex and then culminated in the month of July 2013 with several actual sexual intercourse acts[.]” (Trial Tr. 38-39). The State indicated that its intent would be to have the Victim testify as to that history of abuse. (Trial Tr. 39).

Trial counsel objected to the victim testifying as to any prior abuse because the common scheme exception dictates that the alleged behavior must constitute the same type of behavior as the underlying charge its admitted to prove. (Trial Tr. 39-40). Trial counsel argued that the alleged prior abuse is not the same type for which the Applicant is charged. (Trial Tr. 40). She argues that Applicant is charged with CSC 3rd degree and an escalation of behavior over time is not a required element of that charge rendering the victim’s testimony of any prior sexual relations with the Applicant improper. (Trial Tr. 40-42). The Court delayed ruling on the State’s motion until subsequent the victim’s proffered testimony.

Upon proffered direct examination, the victim testified that her birthday was April 30, 2000. (Trial Tr. 115). She met Applicant when he and her mother began dating when she was six or seven years old. (Trial Tr. 122). When asked what she told her pediatrician, Dr. Carla Richards, she responded that she told the doctor she was being abused by Applicant. (Trial Tr. 117). She confirmed that her mother was never in the room when Applicant sexually abused her. (Trial Tr. 118).

When asked about the incident in her bedroom, she testified that she was in her bedroom watching a movie, and Applicant came into her room and locked the door. (Trial Tr. 118). A while later, her mother knocked on the door, Applicant let her in, and her mother and Applicant had sex in front of her in her room. (Trial Tr. 118). The victim testified that when Applicant had initially come into her room and locked the door, he was “touching my breasts and like my vaginal area,” but her mother did not see. (Trial Tr. 119). She testified that prior to her mother entering her

bedroom, Applicant told her that her mother was aware that Applicant was “messaging with me and having sex with me, she knew about it.” (Trial Tr. 120). When she tried to leave the room while her mother and Applicant were having sex, Applicant grabbed her to prevent her from leaving. (Trial Tr. 125). She noted the incident was similar to an earlier occasion when Applicant and her mother had sex in front of her and her brother in a motel room. (Trial Tr. 127).

The victim testified that Applicant actually inserted his penis inside of her three times prior to July of 2013. (Trial Tr. 121). She testified that Applicant started touching her inappropriately when he started dating her mother. (Trial Tr. 123). She testified that she told her mother about the abuse but she “didn’t really say anything.” (Trial Tr. 124). She testified that Applicant inserted his penis inside her in July of 2013 and that the abuse occurred at her house in her room. (Trial Tr. 125). She testified to an incident in McCormick which Applicant asked the victim to “suck his penis,” while he touched her breasts and vagina. (Trial Tr. 124-125).

On cross-examination, trial counsel questioned the victim on her vocabulary as related to “vaginal area” and if she was told to use that word. (Trial Tr. 127). When asked to describe sex, the victim stated, “like when he inserts his penis in my vaginal area.” (Trial Tr. 128). Trial counsel asked her when the assaults occurred, and she responded that one of the three instances of intercourse occurred in McCormick when she was nine years old, in Applicant’s camper. (Trial Tr. 128-129). People in the area, but not in the camper, included her mother, her brother, and Applicant’s ex-wife, Denise. (Trial Tr. 129). The other two instances of intercourse occurred at her home and Applicant’s home. (Trial tr. 130). The victim recalled that she had intercourse with Applicant in her home in July of 2013, but could not recall when she had intercourse with Applicant at his home until counsel suggested that it occurred in July of 2013. (Trial Tr. 130).

Trial counsel further questioned the victim about the McCormick incident, asking her why she thought she was nine when it occurred, triggering the following exchange:

Trial Counsel: Okay. Now when you talk about McCormick, you said you thought you were nine?

Victim: Yes, ma'am.

Trial Counsel: Why does that stick out in your mind?

Victim: Like why was I nine?

Trial Counsel: Why does that stick out in your mind that you were nine if you went there many times? [cleaned up]

Victim: I mean, because we went down there a lot, but like I know I was nine.

Trial Counsel: How do you know you were nine?

Victim: Because that's my age. I know my age.

Trial Counsel: So what month would that have been? [cleaned up]

Victim: Like -it was like we went down there for the 4th of July.

Trial Counsel: So this would have been July of 2009?

Victim: No.

Trial Counsel: When would that have been?

Victim: I was nine years old.

Trial Counsel: Okay. But when –

Victim: I wasn't saying 2009. I was nine years old.

Trial Counsel: Okay, so what year would it have been?

Victim: Like - in like August.

Trial Counsel: What year?

Victim: What year? 2013.

Trial Counsel: So in 2013, you- in August of 2013 is when you're alleging this McCormick Happened?

Victim: Yes, ma'am.

Trial Counsel: Okay. And you say that you met [Applicant] six or seven years ago?

Victim: Yes, ma'am.

Trial Counsel: So that would have been 2010, ---

Victim: Yes, ma'am.

Trial Counsel: --- 2009? So you're talking about six or seven years from now?

Victim: Yes, ma'am.

Trial Counsel: The solicitor asked you before, I guess, of 2013 ---

Victim: Yes, ma'am.

Trial Counsel: --- if [Applicant] had ever touched- well, he says touched you inappropriately. So you said breasts and vaginal area?

Victim: Yes, ma'am.

Trial Counsel: And when did you say that that happened?

Victim: It was in July.

Trial Counsel: In July of 2013?

Victim: Yes, ma'am.

Trial Counsel: Okay. So you met him in 2010 and he touched your vaginal area and your breasts in 2013?

Victim: Yes.

Trial Counsel: Okay. Anytime before then?

Victim: Yes.

Trial Counsel: All right. When before then?

Victim: Like when I was young, I was like seven. Well, I was seven.

Trial Counsel: How do you remember you were seven?

Victim: Because I remember my age?

Trial Counsel: And what happened when you were seven?

Victim: He touched me inappropriately.

Trial Counsel: And that would have been what year?

Victim: Like it was in 2013.

Trial Counsel: It was in 2013- -

Victim: Yes.

Trial Counsel: - was the first time he touched you inappropriately?

Victim: Yes.

(Trial Tr. 130-133).

After hearing further argument, the Court found the victim's testimony regarding the prior alleged abuse admissible. The Court observed the record showed the abuse began when the victim was six or seven years old, approximately the time Applicant and Peggy began dating. Recognizing the confusion in the victim's testimony, the Court noted trial counsel could argue any credibility issues on cross-examination. (Trial Tr. 135-136).

At trial before the jury, the victim testified regarding the bedroom incident similarly to her testimony upon proffer. *See* Trial Tr. 162-163. When asked about the incident that happened a few weeks prior, the victim testified that Applicant had come into her room and had sex with her and told her not to tell anybody. (Trial Tr. 163-164).

After providing the victim with the statement she made to Detective Hamby, the victim testified that she met Applicant when she was seven, which was about the time her mother began dating him. (Trial Tr. 165). She testified that she had sex with Applicant three times, that she could not remember when, but they were close in time to when she saw her pediatrician. (Trial Tr. 165). When asked if there were any other times when Applicant sexually abused her, she responded in the negative. (Trial Tr. 165-166). When asked if anything other than sex happened between her and Applicant, she responded only that he touched her. (Trial Tr. 166). When asked how long Applicant was touching her, she confirmed that it was seven years. (Trial Tr. 166).

She then testified to the McCormick incident in which Applicant asked her to “suck his private area” and touched her inappropriately. (Trial Tr. 166-167). Additionally, she recalled the incident in a motel when Applicant and her mother had sexual intercourse while she and her brother were in the room. (Trial Tr. 169). The solicitor then asked if the victim had a difficult time remembering specific dates due to the abuse occurring over a long period of time, which she responded that she did. (Trial Tr. 170). After an off-the-record bench conference, trial counsel forewent her cross-examination of the victim. (Trial Tr. 170).

PCR Testimony

Applicant’s testimony mostly consists of information that is in the record. Applicant testified that his conviction involved a minor victim who was the daughter of Peggy Robinson, who he was dating at the time the allegations were made. (PCR Tr. 7). He testified that he dated Peggy for approximately six years, he knew the minor victim the entire time he was dating her mother, and that he did not live with Peggy. (PCR Tr. 7). He testified that he had previously leased hunting property in McCormick, South Carolina. (PCR Tr. 7-8). Applicant recalled that the victim had made allegations against him that he was molesting her however Applicant could not recall

when the allegations were made. (PCR Tr. 8). After reviewing the record, Applicant testified that the victim had made allegations to a doctor on July 30, 2013. (PCR Tr. 8). Applicant testified that he was incarcerated at Pickens County Law Enforcement Center in August of 2013 and that he wasn't in McCormick in July of 2013, so nothing could have happened with the victim in McCormick in that time frame. (PCR Tr. 13-14). Applicant testified that the victim would have been thirteen years old in 2013, though the victim testified that she was seven years old in 2013. (PCR Tr. 14). Applicant testified that trial counsel did not cross-examine the victim and that the victim's discrepancies were not disputed in front of the jury. (PCR Tr. 16).

Trial counsel testified that Applicant's case consisted of a latent report of sexual abuse allegations of Applicant, who was dating the victim's mother at the time. (PCR Tr. 22). She testified that the victim was caught being sexually active with an individual and when she was sent to the police station, she mentioned Applicant's name. (PCR Tr. 22). She testified that the victim was "all over the map," her mother was in jail, and other than the State's attempt to bolster the victim's testimony through a therapist or forensic examiners, there "wasn't going to be a lot of meat." (PCR Tr. 22). She testified that the substance of the defense was the identification of the other perpetrator, who was also charged in relation to sexual activity with the victim.

As to the allegation that trial counsel was ineffective for not cross-examining the victim in front of the jury, trial counsel testified that both the victim and her mother were "wild card witnesses." (PCR Tr. 23-24). She testified that she never knew what either were going to say and that they could say certain things on direct but something different on cross-examination. (PCR Tr. 24). After hearing the victim's testimony during the proffer, trial counsel testified that she did not believe the victim was a good witness for Applicant because she was all over the place, and trial counsel had no indication of what she would say or if she would say something worse in front

of the jury. (PCR Tr. 24). She testified that the victim used words such as “vaginal penetration” and “inserted his penis” which she didn’t believe to be attributable vocabulary to someone of the victim’s age. She added that one of her strategies on cross during the proffer was to see how the coached aspect of the victim’s testimony could be dealt with in front of a jury. (PCR Tr. 24). Trial counsel testified that she discussed the situation with Applicant thoroughly and Applicant did not have any confidence in the victim’s ability to tell what he considered to be the truth. (PCR Tr. 25).

Trial counsel testified that the only thing she found to be consistent with the victim’s testimony was that she had sex with Applicant, and that her inconsistencies were dates and how old she was. (PCR Tr. 31). She added that the victim was a young teenager at the time of trial and that she did not feel the risk of emphasizing the activity that was charged was worth questioning her about her inconsistencies of dates and places. (PCR Tr. 31). Further, trial counsel added that there was no mention of the abuse occurring in McCormick in the State’s presentation of the case and trial counsel did not see the benefit in risking that the jury heard another potential location was where prior abuse occurred. (PCR Tr. 31-32). She testified that she wanted to be able to address the lack of corroboration and inconsistencies in closing, and that she felt like the strength of their case was the absence of corroboration. (PCR Tr. 32). She testified that she did not think that her cross-examination was going to play well with the jury and if anything, it was going to re-emphasize the relationship and make the jury feel sorry for the victim because she was being picked on for not remembering a date. (PCR Tr. 33).

Findings

The record supports that upon pretrial matters, trial counsel challenged the State’s intent to question the victim in regard to other instances of sexual abuse by Applicant, which predated the charges Applicant was facing at trial. Trial counsel conducted a cross-examination of the victim’s

proffered testimony and subsequently, in response to the State's motion to admit the testimony, trial counsel argued that the victim's testimony indicated that the first instance of abuse took place in 2013 which did not support a history of abuse. Trial counsel added that the victim testified she was seven years old in 2013 when Applicant first started abusing her, which trial counsel emphasized that the victim had "twisted up" the dates and ages of when the abuse allegedly occurred.

This Court credits trial counsel's testimony that she was weary of the details the victim would testify to, considering her proffered testimony was inconsistent as to the dates, locations and her own age of when the abuse occurred. Not only was the victim testifying as to the incidents which Applicant was charged, but the victim was permitted to testify to previous incidents which led up to the incidents for which Applicant was on trial.

Additionally, Applicant did not present testimony that indicated he asked trial counsel to cross-examine the victim after he had discussed with trial counsel that it was not in his best interest to do so. Further, Applicant presented no information that trial counsel should have used to effectively cross exam the victim. The victim disclosed the abuse to her pediatrician on July 30, 2013, and the victim alleged that numerous incidents occurred in that same month, which is not an impossibility. Applicant's PCR testimony that the abuse could not have happened in July of 2013 because he was not in McCormick, offers no weight considering the solicitor established that the victim had trouble remembering specific dates, and the State did not allege that the charged incidents occurred in McCormick.

Strickland requires that "every effort be made to eliminate the distorting effects of hindsight" and that counsel's decisions be evaluated at the time they were made. 466 U.S. at 689, 104 S.Ct. 2052. "[W]hen counsel articulates a valid reason for employing a certain strategy, such

conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008).

Instead of highlighting the discrepancies of the victim's testimony on cross-examination, trial counsel addressed the victim's credibility in her closing argument. In closing, trial counsel emphasized that three people were arrested after the victim disclosed abuse allegations to the doctor and subsequently to the police. Those three people are the victim's mother, Peggy Robinson, Applicant and a third individual arrested for criminal sexual conduct, 2nd degree, with the victim.

Trial counsel noted Dr. Beals' testimony that the victim's characteristics she observed are conducive with a child who has been abused sexually but called into question if these characteristics of abuse were at Applicant's hands or from the other individual charged for abusing the victim. (Trial Tr. 259). She adds that no physical evidence has been presented, and the only indication that the abuse occurred was through the victim's statement that she had sex with Applicant. (PCR Tr. 261).

Trial counsel underscores that every time the victim was asked a question regarding the abuse, the victim was unable to answer the question without reading her statement she wrote on July 30, 2013, in which she reports that Applicant "inserted his private part into her vaginal area." (Trial Tr. 260, 262). She submits that the statement was made to avoid potential consequences, whether that be for Peggy or the victim herself. (Trial Tr. 263). Trial counsel points out the inconsistency between the report, which the victim indicates that she was "rubbing on" Applicant, and the victim's trial testimony that she was "rubbing his private parts." (Trial Tr. 264).

Upon review of the discrepancies trial counsel identifies in her closing, the record supports trial counsel's PCR testimony that the defense strategy was to place doubt as to whether Applicant

or the other unidentified charged individual abused the victim, thereby providing an explanation as to the victim's behavior being consistent with a child who has been sexually abused and reason as to why there appears to be discrepancies in the victim's description of events. Because trial counsel described that the victim's testimony was difficult to predict and coupled with the fact that she is a thirteen-year-old attempting to recall allegedly years' worth of abuse, it is reasonable for counsel to highlight the inconsistencies in closing rather than attempting to use them for impeachment purposes. Moreover, given that this was a sexual abuse case involving a young teenager with the abuse potentially occurring as early as seven years old, it may have been prudent for counsel to forgo cross examination of the victim to avoid the exposure of unnecessarily prejudicial information, as well as to avoid picking apart the victim's testimony based on discrepancies of dates, locations and ages.

The solicitor acknowledged that the victim had trouble remembering dates and details, and had trial counsel further questioned the victim in regard to those details, it is unlikely that the determination of guilt would have been affected.

Failure to Cross-Examine Peggy Robinson (Victim's Mother)

Applicant alleges that trial counsel was ineffective for failing to cross-examine the victim's mother, Peggy Robinson. This Court finds that Applicant has failed to establish counsel acted deficiently by foregoing cross-examination of Peggy Robinson and failed to show that there exists a reasonable probability the outcome of trial would have been different had trial counsel questioned Peggy in regard to her recantation. *See Strickland, supra.*

Trial Testimony of Peggy Robinson

At trial, after initially being uncooperative in answering the solicitor's questions, the solicitor requested that Peggy be treated as a hostile witness. (Trial Tr. 171-173). The Court granted

as such. (Trial Tr. 174). Peggy confirmed that in her statement to Detective Hamby that she stated she had found Applicant and the victim in the victim's room watching a movie, joined them in the bedroom, and then had sex with Applicant while the victim watched. (Trial Tr. 174). Peggy confirmed that in her statement, she stated that she had a conversation with Applicant about "being truthful," and during that conversation Applicant told her that on July 4, 2012, Applicant had let the victim "play with his dick," followed by both of them performing oral sex on each other. (Trial Tr. 174-175).

After Peggy's arrest while she was in jail, she called her mother and her nephew answered the phone. She confirmed that her nephew asked her why she didn't tell anyone about the abuse, and she told him that she didn't want to get Applicant in trouble, and that he is her world. (Trial Tr. 175-176). She confirmed that she told her nephew about the incident in the victim's bedroom as well as the incident on July 4, 2012. (Trial Tr. 176). She confirmed that she commented to her nephew, "what am I supposed to do tell them it didn't happen?" (Trial Tr. 176).

Peggy also confirmed that she spoke with Denise, Applicant's ex-wife, while she was in jail and told her that she didn't want Applicant to get in trouble. (Trial Tr. 181). She confirmed that she told Denise about the incident in the victim's bedroom as well as the July 4, 2012, incident. (Trial Tr. 182). She confirmed that she told Denise that when she took the victim to the pediatrician, she didn't know the victim was going to tell the pediatrician about the incidents. (Trial Tr. 183).

PCR Testimony

In regard to the allegation involving the failure to cross-examine Peggy Robinson, Applicant testified that he initially hired Richard Warder, Esq., to represent him. (PCR Tr. 16). He testified that Peggy gave a statement to Mr. Warder's paralegal in support of Applicant. (PCR Tr.

16-17). Applicant testified that he knew trial counsel had the statement and that he believes if she had cross-examined Peggy that reasonable doubt could have been raised. (PCR Tr. 17-18).

Trial counsel testified that Peggy was combative and “a complete wildcard.” (PCR Tr. 25). Trial counsel testified that Peggy had a written statement recanting her statement she had made to Detective Hamby. (PCR Tr. 25). She testified that there was no way that Peggy could back up her statement and that she was afraid of what Peggy would say, regardless of whether it had any merit. (PCR Tr. 25). She testified that Applicant believed the recantation to “be a winner” and that she thought that Applicant believed that these people would tell what he believed to be the truth, but they disappointed him. (PCR Tr. 25-26). Trial counsel testified that she believed the recantation was “fraught with problems” and that she anticipated that the prosecution would have argued that had she wanted to recant, Peggy would have gone to the police. Trial counsel testified that she didn’t think that was valuable to discuss in front of the jury. (PCR Tr. 26).

Findings

This Court finds that counsel was not deficient in forgoing a cross examination of Peggy Robinson. Again, great deference is given to counsel’s performance, and counsel’s decisions are evaluated at the time they were made. *Strickland, supra*. Even if trial counsel had questioned Peggy regarding her recantation, the State presented evidence which called into question Peggy’s credibility and her motivations for recanting. Under the circumstances, trial counsel’s decision to not question her on the recantation due to her objective unreliability was a reasonable strategy.

Further, Peggy was incarcerated at the time of Applicant’s trial and confirmed that she pled guilty to two counts of unlawful neglect of a child which stemmed from the incident in the victim’s bedroom where she had sex with Applicant while the victim was present. (Trial Tr. 183). It is a reasonable concern that further testimony from Peggy could damage Applicant’s defense

considering she admitted guilt in a separate incident – one of a sexual nature involving the same victim – of which Applicant was not on trial.

Even so, Applicant has not presented Peggy Robinson as a witness, nor has he identified the information that Peggy recanted. *See Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998) (finding that our Supreme Court “has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.”); *Edwards v. State*, 392 S.C. 449, 710 S.E.2d 60 (2011) (“where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel’s failure to bring it forward.”)

To establish that Applicant was prejudiced due to trial counsel’s alleged deficiency, Applicant must show that “the factfinder would have had a reasonable doubt respecting guilt.” *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. On direct, the State had established that Peggy regretted incriminating Applicant and indicated that Peggy considered saying that “it didn’t happen.” If the jury had heard that Peggy had recanted her statement to Detective Hamby accusing Applicant of abusing the victim, the State – on redirect – undoubtedly would have called into question her motivation for making that statement and why she made it to Applicant’s former attorney rather than to the police.

While, if found to be credible, Peggy’s recantation certainly would diminish the evidence against Applicant, the benefit of questioning Peggy about the recantation must be evaluated against the legitimate concerns regarding her credibility and the unpredictability of her testimony. *See Edwards v. State*, 392 S.C. 449, 710 S.E.2d 60 (2011). It is unlikely that if trial counsel cross-examined Peggy in regard to her recantation, that the jury would have given it any credence

considering the testimony the State elicited on direct examination, and the incriminating statements Applicant made to the police.

Applicant is unable to meet his *Strickland* burden, and this Court finds that trial counsel was not deficient in her decision to forgo cross-examinations of the victim and her mother. Further, Applicant has not shown that there is a reasonable probability that had trial counsel cross examined the victim and her mother, that the jury would have reasonable doubt respecting guilt. *Strickland, supra.*

CONCLUSION

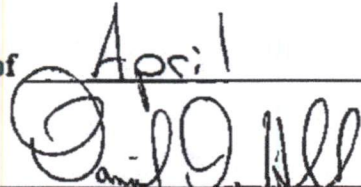
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations during his trial. Therefore, this PCR application must be **DENIED** and **DISMISSED** with prejudice.

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 also 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. Respondent's motion to dismiss is granted and Applicant's application is dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent for completion of his sentence.

AND IT IS SO ORDERED this 4th day of April, 2025.



 THE HONORABLE DANIEL D. HALL
 Presiding Judge

York, South Carolina