

VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Union County

Edgar W. Dickson, Circuit Court Judge

RECEIVED

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S.C. Supreme Court

LUTHER BERNARD PEARSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001116

APPENDIX

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1 Q. And I believe you pulled your pants half-way
2 down?

3 A. Yes.

4 Q. And that's when you had vaginal intercourse with
5 her?

6 A. That's what she said.

7 Q. In addition she also claimed that you had a
8 condom on the entire time?

9 A. Yes, sir.

10 Q. How long have you been dating her mother when
11 this incident occurred?

12 A. About five six months.

13 Q. Five or six months. And who is Courtney's
14 mother?

15 A. Delmar Johnson.

16 MR. JOHNSON: I don't know if we are trying
17 to retry this case here. I don't see where he is
18 going to ineffective assistance of counsel. And
19 also counsel is testifying and leading. I want
20 to put that on the record.

21 THE COURT: Mr. Campbell, if it is
22 ineffective assistance of counsel do you want
23 to get to that?

24 MR. CAMPBELL: I will. I was trying to get
25 some background. I apologize.

1 THE COURT: All right.

2 BY MR. CAMPBELL:

3 Q. After you were arrested, did you hire an
4 attorney?

5 A. Yes, sir, Albert Smith.

6 Q. And how long did Mr. Submit represent you?

7 A. Almost four years. Three years and some change.
8 Something like that.

9 Q. And what happened with that representation?

10 A. Albert Smith was kin to the victim and he failed
11 to notify me for court.

12 Q. Okay. And did it end up that you had a bench
13 warrant put out on you?

14 A. I had a bench warrant for failing to appear. I
15 ended up I turned myself in.

16 Q. Okay. And then how did Doug Brannon and David
17 Collins end up representing you?

18 A. I was given several different lawyers. It was
19 time to go to trial. The lawyers would back out. They
20 would give me another and ended up with Doug Collins and
21 Mr. Brannon.

22 Q. And how long before trial did they represent you?

23 A. Maybe thirty days. Somewhere around a month.

24 Q. Did you meet with them prior to trial?

25 A. One time.

1 Q. Did you go over Discovery with them?

2 A. I don't recall that.

3 Q. So you don't remember whether or not they went
4 over all the evidence against you prior to you going to
5 trial?

6 A. No, sir.

7 Q. Now, you have alleged that Doug was ineffective
8 in the trial of this case, correct?

9 A. Yes.

10 Q. Detail to the Court how he was ineffective?

11 A. Well, there were several things. He could have
12 went to the teacher. The teacher had said -- one
13 teacher said that she wasn't a bad kid and come to find
14 out she was.

15 MR. JOHNSON: I will object to this.

16 This has already been dealt with on appeal,
17 therefore it is not proper for this Court.

18 THE COURT: Hold on one second okay.

19 MR. CAMPBELL: Your Honor, there was
20 additional teachers who could have been called to
21 testify.

22 THE WITNESS: Right.

23 MR. CAMPBELL: That had given statements in
24 Discovery about the type of student that the
25 victim was and indicated disciplinary problems

1 and that is the answer that we are trying to
2 elicit at this time Your Honor.

3 THE COURT: Do you want to get to that?

4 MR. CAMPBELL: I am.

5 THE COURT: You can lead him a little bit.

6 BY MR. CAMPBELL:

7 A. It was bunch of things man. It was other
8 students that she had told that nothing happened that he
9 knew about and we never addressed it in Court. There
10 was a bunch of things man.

11 Q. Okay. Luther. Was there ever a band teacher who
12 indicated that Courtney had been a disciplinary problem?

13 A. Yes, sir.

14 Q. Was this band teacher called to testify?

15 A. No, sir. There was a state trooper next door
16 that knew of other actions and he was never called.

17 Q. In regards to calling people to testify at any
18 point did you ask Doug to call your sons to testify?

19 A. Yes, sir.

20 Q. And why was that?

21 A. Because they had been -- even after the
22 allegations were made they were sneaking being with her.

23 Q. And did Doug call your sons to testify?

24 A. No, sir.

25 Q. And why do you feel like it would have helped

1 your case for your sons to testify?

2 A. Because if the alleged things would have happened
3 she would never have been having contact with my sons.
4 It was ridiculous.

5 Q. So you are saying the victim was also having sex
6 with your sons?

7 A. Yes, sir.

8 Q. And part of the reason you were convicted was
9 because of DNA evidence?

10 A. They said it was DNA but my story never came out
11 at trial which I had told Mr. Brannon how me and her
12 momma had sex that morning. We were going to buy a
13 house that day so the girl never knew what was going on.
14 So when the momma leave to go to work the girl end up
15 calling me into the bedroom telling me come and fix the
16 TV. The TV wasn't working. This was never called out
17 in the Court. Told me when I get in there the TV was
18 not busted. It is not plugged in. When I turn around
19 she is laying butt naked in the bed. That is why her
20 clothes was never torn. This is all happened to me.
21 But I am the victim.. But I am the one doing time for
22 something that never happened.

23 Q. Mr. Pearson did you testify at trial?

24 A. Yes, sir.

25 Q. And did you have a chance to tell that story at

1 trial?

2 A. I mean it never came out.

3 Q. In addition was the victim ever arrested for
4 shoplifting?

5 A. Yes, sir.

6 Q. Do you know if Mr. Brannon questioned her in
7 regards to that arrest?

8 A. He didn't.

9 Q. And you feel like he was ineffective for not
10 questioning her as to that?

11 A. Yes, sir. She had a girlfriend that had told --
12 had made statements to the momma that nothing happened.
13 She had told the girlfriend that nothing happened. She
14 was trying to go live with the dad. The girlfriend was
15 told to testify.

16 Q. And who was that girlfriend?

17 A. I don't recall the name. Shamika something. I
18 don't know her name.

19 Q. Shamika?

20 A. I don't know the name.

21 Q. Did Doug ever question her as to that?

22 A. No, sir.

23 Q. What else, other than the failure to call
24 witnesses and I apologize - - do you feel that Doug
25 talked easy to the victim?

1 A. He had her in the corner a couple of times and
2 she -- I don't know -- he had her where she was about to
3 break and I feel like as she was ready to testify and
4 backed off of her.

5 Q. You don't feel like he was aggressive enough?

6 A. Not trying to defend me as he could have been.

7 Q. And you feel like if he had been more aggressive
8 and more effective in his questioning that you would
9 have been found not guilty of the lewd act as well?

10 A. See the situation is this, she call me in there
11 and she approached me. I didn't do anything. The one
12 time that came out in school later she went to school
13 and said these things happened. She was in the bathroom
14 and according to the records with her cell phone after
15 the incident happened. She could have called the police
16 or whatever. State trooper lived next door. That never
17 happened when she could ran out when I went in the
18 bathroom. That never happened. She didn't make the
19 allegation until I told her I was going to tell her
20 mother. So when she get to the school she fabricated
21 the story and the police allowed her to change her story
22 numerous amounts of time and I have been locked up all
23 this time.

24 Q. She road to school with your son after she said
25 all this happened.

1 A. Yes.

2 Q. In what other ways was Mr. Brannon ineffective in
3 his representation of you other than what you stated to
4 the Court already?

5 A. I feel like it was a bunch of things he could
6 have done different. The witnesses, like the girl
7 directly lied. They said they could have proved she
8 lied about the condom. That means she is lying. She
9 said about going in the bathroom, lying about the door
10 because the door did not lock. If she lied about that
11 she lying. She can't prove she was held down and raped.
12 There was no scar. The doctor said there was nothing
13 there.

14 Her momma and me have sex that morning. She get
15 the DNA out of the the dirty clothes. The thing they
16 said the DNA was consistent with her. They never said
17 it matched her momma's. They never tested the momma.

18 I feel like the whole case is bogus. The police
19 states the evidence. The door. The dog. The blanket
20 out of the room. Pull across the bed. Submit it as
21 evidence.

22 The dog blanket they hide it against the couch.

23 Q. Now David Collins was representing you as well,
24 correct?

25 A. Yes, sir.

1 Q. Now, I understand that Doug Brannon was the lead
2 counsel in this case?

3 A. Yes, sir.

4 Q. Do you feel like David was ineffective in his
5 representation of you?

6 A. I don't know how the courts work. I know they
7 were hired to represent me and I don't know who was in
8 charge of it.

9 I know I wasn't represented of my side of the
10 story to be told. I know I wasn't represented like I
11 should have been. Who do I need to accuse.

12 I don't know. From the beginning with Albert
13 Smith all the way up to now I have been railroaded
14 through the whole case. I know that.

15 Q. And as a matter of fact a lot of your complaints
16 are against Albert Smith?

17 A. Albert Smith is really the one that got me jammed
18 up.

19 Q. And when you say "jammed up" --

20 A. Look at me.

21 MR. CAMPBELL: No further questions for this
22 witness, Your Honor.

23 THE COURT: All right. Mr. Johnson, your
24 witness.

25 MR. JOHNSON: Just briefly.

1 CROSS EXAMINATION

2 BY MR. JOHNSON:

3 Q. I know this is an emotional subject for you and I
4 will be as respectful as I can.

5 You claim that there were some witnesses that Mr.
6 Brannon should have called to testify namely a band
7 teacher, state trooper, maybe a friend. You said he
8 should have call them to testify at trial.

9 A. Yes, sir.

10 Q. Did you bring those witnesses here today?

11 A. I am a locked up man.

12 Q. Are they here to testify on your behalf?

13 A. No, sir.

14 Q. You also -- one of the claims is that the victim
15 was lying about the condom and you can prove that?

16 A. Yes.

17 Q. Do you have any testimony hear today to prove
18 that?

19 A. Albert Smith, my attorney, said he could prove
20 that off the top. He is the one that said that. When
21 the doctor examined her the doctor didn't find no traces
22 of no condom in her. No traces of rape. Everything was
23 in tack is what the doctor said. I ain't said it.

24 Q. But Mr. Albert was kin to a victim?

25 A. Mr. Smith ceased representation when he failed to

1 notify me for Court and they locked me up. The whole
2 time Mr. Smith was my attorney he didn't do anything to
3 help me. He didn't do anything and I ended up getting
4 locked up on bench warrant. He is my attorney. At
5 least he is suppose to do is tell me about court. He
6 never did that.

7 Q. Another claim is that your story didn't come out
8 at trial, isn't that correct?

9 A. Yes, sir.

10 Q. But you testified didn't you?

11 A. Yes, sir.

12 Q. Quite extensively, didn't you?

13 A. I testified to what my lawyer asked him. What I
14 told him he already knew this before I got to Court.

15 Q. But you testified. That is my question.

16 A. Yes, sir.

17 MR. JOHNSON: No further questions.

18 THE COURT: Anything on redirect.

19 MR. CAMPBELL: Nothing Your Honor.

20 THE COURT: All right. You may step down.

21 Thank you, sir.

22 THE WITNESS: Yes, sir.

23 THE COURT: All right. Mr. Campbell who
24 is your next witness.

25 MR. CAMPBELL: Your Honor, we call Doug

1 Brannon.

2 MR. JOHNSON: Before we get started, I don't
3 think it is necessary for Mr. Collins to be here.
4 We would ask that you release him.

5 THE COURT: All right. Mr. Collins, I
6 appreciate you coming but they apparently don't
7 need to hear from you.

8 MR. COLLINS: Thank you, Your Honor.

9 THE COURT: Mr. Campbell, that is correct
10 you don't need to hear from him?

11 MR. CAMPBELL: Yes, he can be excused.

12 THE COURT: Mr. Brannon, is your witness.

13 DIRECT EXAMINATION

14 BY MR. CAMPBELL:

15 Q. Doug, please state your full name for the record?

16 A. Norman Douglas Brannon.

17 Q. How long have you been practicing law?

18 A. Thirteen years.

19 Q. In what areas of the law do you practice?

20 A. Criminal defense and Family Court.

21 Q. And how long have you doing that, for 13 years,
22 correct?

23 A. Yes.

24 Q. How long have you practiced in criminal defense?

25 A. 13 years.

1 Q. The entire time?

2 A. Yes. Let me rephrase it. I was a prosecutor at
3 the very beginning, so criminal defense for -- criminal
4 cases for 13 years.

5 Q. No problem. And how did you begin your
6 representation of Luther Pearson?

7 A. My office is in Spartanburg. So myself and Mr.
8 Collins put our names on the criminal defense
9 appointment list in Cherokee County, Union County. I
10 think even in York County. So I was appointed to
11 represent him.

12 Q. You were not a paid attorney?

13 A. I was not.

14 Q. And how long before trial were you appointed to
15 represent Mr. Pearson?

16 A. It was months. Not one month. It was months.

17 Q. Okay. And did you have adequate time to do a
18 investigation into this case?

19 A. Yes.

20 Q. And you did do an investigation?

21 A. Yes.

22 Q. Now, I know Mr. Pearson made a claim in his
23 application that his attorney was kin to the victim.
24 That is not you, is it?

25 A. That wouldn't have been this attorney, no.

1 Q. That was Mr. Smith?

2 A. Yes.

3 Q. Now, Mr. Pearson has essentially said you were
4 ineffective in his representation and specifically in
5 regards to the questioning of Minor [REDACTED]

6 A. Yes.

7 Q. You're an experienced criminal defense attorney.
8 Did you go easy on Miss Eison?

9 A. I didn't go easy on her. You know, there are a
10 few crimes that one can be accused of that in the eyes
11 of a jury are more heinous. CSC with a minor. I mean,
12 when the judge tells the jury what the charge is, the
13 jury already doesn't like the client. When you are
14 talking about CSC with a minor and it is a young female,
15 in my opinion it is not a good idea to beat-up a little
16 girl on the witness stand.

17 I got Courtney to say everything that I thought I
18 needed her to say. She said that my client pulled her
19 pants down to her knees and then had vaginal intercourse
20 with her. I don't know. I was pretty good in geometry
21 and it is not possible for that to have had happened and
22 the jury didn't find him guilty of CSC with a minor.

23 Could I have been more harsh on Courtney. Certainly.
24 But I think that my choice of questioning strategy
25 worked in that case.

1 Q. And specifically one of the areas she testified
2 to was that Luther essentially pulled her panties and
3 pajama bottom down around her knees and his pants were
4 down around his knees. I am assuming you made the
5 inference that couldn't have been possible to have raped
6 her?

7 A. Well, I said that in my closing argument. I said
8 it is not possible.

9 Q. But did you attack her credibility in regards to
10 if she was lying about that she was lying about
11 everything?

12 A. I felt like I attacked her credibility with ever
13 single witness. Her mother testified. Luther
14 testified. Everybody was saying, look this child can't
15 be believed. Even the school teacher that did testify
16 said something along those lines.

17 Q. Did you ask Miss Eison about being arrested for
18 shoplifting?

19 A. Shawn, I don't know if I asked her, but I know I
20 asked her mother about it.

21 Q. And she had been arrested for shoplifting?

22 A. Yeah.

23 Q. If I say you did not ask her directly could you
24 give me a reason that you would not have done that?

25 A. No. Other than I knew I was going to get that

1 from mom.

2 Q. Now, the band teacher that indicated that he had
3 had disciplinary problems with Courtney, did you call
4 him to testify?

5 A. Did not.

6 Q. Is there a reason why you would not have called
7 him?

8 A. The only thing I would say to you it would have
9 been duplicative testimony. The child had a
10 disciplinary problem and the jury knew she had a
11 disciplinary problem.

12 Q. One of the issues I believe was Miss Balkum who
13 was her teacher, correct?

14 A. Yes.

15 Q. And she stated that Courtney was a excellent
16 student?

17 A. I remember that.

18 Q. And you tried to get into specific incidents of
19 conduct in her classroom and were denied, is that
20 correct?

21 A. Yes.

22 Q. After that was denied, why not call the band
23 teacher then?

24 A. I don't have a good answer for you, Shawn.

25 Q. I know Luther specifically asked you to call his

1 two sons to testify?

2 A. He did.

3 Q. And you did not do so?

4 A. That's right.

5 Q. What was there testimony going to be?

6 A. There testimony would have been that they had
7 each had sex with this woman. This juvenile.

8 Q. And why did you not call them to testify?

9 A. His sons were there. They were on my witness
10 list. I could have called them, but what you have to
11 understand they were both adults. They were both over
12 the age of 18. They would have been admitting to the
13 same crime that Luther was on trial for.

14 Q. But you didn't represent those two boys, did you?

15 A. No, I didn't represent those two boys. I didn't
16 believe that I needed to threaten the liberty of another
17 individual to defend my client because I didn't believe
18 that any sexual activity ever took place between Luther
19 and this victim and I believed we proved it to the jury.

20 Q. But Luther was convicted of lewd act on a minor?

21 A. And Luther needs a new trial.

22 Q. You feel like Luther deserves a new trial?

23 A. Luther didn't commit these crimes. Either of
24 them.

25 Q. Now, in addition the DNA evidence was let in

1 based on inevitable evidence, correct?

2 A. I never heard that before this trial. What
3 happened is and all of the DNA evidence was gathered
4 before myself and Mr. Collins got appointed. There was
5 a sample taken from Luther very early after his arrest
6 but there was apparently a problem with that sample. In
7 other words, the first sample taken from Luther was
8 taken without a Court Order. I am pretty sure it was
9 John Anthony, the deputy solicitor who said, oh, we
10 might have a problem with this and so they got a Court
11 Order to get a second sample from Luther. So now SLED
12 has two samples of DNA from Luther.

13 All of the the testing was from the first sample
14 taken from Luther. The one that they didn't have a
15 proper chain on. They didn't legally gather that first
16 sample. So the second sample was there, but they didn't
17 use it for the testing. There was a huge pretrial
18 conference. I am talking about an hour long pretrial
19 conference with Judge McMahon, myself, Mr. Collins, John
20 Anthony and whoever was second chair for him, and the
21 judge decided that what we were going to do, we were
22 going to treat the chain as being complete for only one
23 sample. Okay.

24 Q. The second sample?

25 A. The second sample, but then John Anthony brings

1 up the first sample in one of his questions. I don't
2 know who he was questioning, but David and I both jumped
3 up. We both objected at the same time. They crossed
4 that line and we proved that they didn't have a chain on
5 the first sample and I thought it was in the transcript,
6 but it is not. Judge McMahon said I am going to let
7 this in under the inevitable evidence rule. I mean,
8 because we made a motion for mistrial and if he had
9 granted a mistrial then they would have simply corrected
10 the error in the chain and retried Luther. So I am
11 assuming that is what he meant by the inevitable
12 evidence rule. But we made the motion. It was there.

13 Q. Did you ever have him put inevitable evidence
14 rule on the record?

15 A. Apparently I didn't, Shawn, but I thought I did.
16 I thought it was said on the record, but apparently I
17 didn't.

18 Q. But would that have been an appealable issue had
19 it been put on the record?

20 A. Probably would have been.

21 MR. JOHNSON: Your Honor, it is on the
22 record. I know I had it in my notes. If you
23 would allow me just a second.

24 THE COURT: I appreciated that Mr. Johnson,
25 if you can find it.

1 BY MR. CAMPBELL:

2 Q. I want to go back to his son real fast. I know
3 you stated that he was above age at the time of trial?

4 A. Yes.

5 Q. At time that they had sex with Courtney, though,
6 they were 16, correct?

7 A. But they were still more than two years older
8 than her so under the CSC with a minor statute they
9 still would have fallen under that.

10 Q. But once again I want to reiterate you were
11 appointed to represent Luther and not his two sons,
12 correct?

13 A. Correct.

14 MR. JOHNSON: Your Honor, to bring your
15 attention to 214 and 215.

16 Q. And finally, Doug, do you believe you were
17 ineffective?

18 A. I believe Luther Pearson deserves a new trial.
19 If I have to be ineffective to do that, yes. I would
20 like the opportunity to represent him again.

21 MR. CAMPBELL: No further questions Your
22 Honor.

23 THE COURT: All right.

24 MR. JOHNSON: A few questions on cross.

25 THE COURT: Your witness Mr. Johnson.

1 CROSS EXAMINATION

2 BY MR. JOHNSON:

3 Q. Mr. Brannon.

4 A. Yes, sir.

5 Q. When we spoke I understand you certainly believe
6 Mr. Pearson is innocent. I get that.

7 As a matter of fact you did call one of the sons
8 to testify, Mr. Pearson Jr.?

9 A. Yeah, but where Luther is going I wouldn't ask
10 him -- I didn't ask him the question he wanted me to ask
11 him.

12 Q. And you wouldn't ask him that question today,
13 would you?

14 A. Never..

15 Q. Did DNA, inevitable discovery, you made that
16 motion didn't you?

17 A. I did.

18 Q. And you actually made a motion for mistrial once
19 the State tried to open that door?

20 A. I did.

21 Q. And you asked the victim's mother about the
22 victim's charge of shoplifting didn't you?

23 A. I did.

24 Q. He claims you didn't call some of these witnesses
25 to come testify. Do you see them here in the courtroom

1 today?

2 A. No, sir.

3 MR. JOHNSON: No further questions, Your
4 Honor.

5 THE COURT: Anything on redirect.

6 MR. CAMPBELL: Nothing, Your Honor.

7 THE COURT: All right. Thank you, sir.
8 You may step down.

9 All right. Mr. Campbell, you can call your
10 next witness.

11 MR. CAMPBELL: At this time the petitioner
12 rests.

13 THE COURT: All right. Mr. Johnson.

14 MR. JOHNSON: The State has no further
15 witnesses, Your Honor.

16 THE COURT: All right. What I will do is I
17 will read over the transcript and I will get back
18 to you all.

19 MR. CAMPBELL: Thank you, Your Honor.

20 (END OF TRANSCRIPT)

21

22

23

24

25

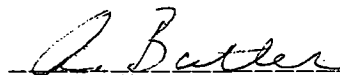
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C E R T I F I C A T E

I, the undersigned Aileen Butler, Official Court Reporter for the 16TH Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for York County, South Carolina, on the 8th day of October, 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

August 3, 2013



JUDGEMENT ROLL NO. 2010 CP 44 00410

STATE OF SOUTH CAROLINA)
COUNTY OF UNION)

IN THE COURT OF COMMON PLEAS)
SIXTEENTH JUDICIAL CIRCUIT)

Luther Pearson, Sr., #327560,)

2010-CP-44-0410)

Applicant,)

ORDER OF DISMISSAL)

v.)

State of South Carolina,)

Respondent.)

WILLIAM F. GAULT
CLERK OF COURT
UNION, SC

2013 MAY 9 PM 1 31

FILED FOR RECORD

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 8, 2010. The Respondent made its Return on May 3, 2011. An evidentiary hearing into the matter was convened on October 8, 2012, at the Moss Justice Center in York, SC. Shawn Campbell, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

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

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Union County. The Applicant was charged by direct indictments for Lewd Act Upon a Child (2007-GS-44-0416), and Criminal Sexual Conduct with a Minor, second degree (2007-GS-44-0417). The Applicant was represented by Douglas Brannon, Esquire, and David Collins, Esquire. On February 12, 2008, the Applicant

proceeded to a jury trial before the Honorable R. Knox McMahon. On February 14, 2008, the jury found the Applicant not guilty of Criminal Sexual Conduct with a Minor, and guilty of Lewd Act upon a Child. On February 15, 2008, Judge McMahon sentenced the Applicant to confinement for fifteen (15) years.

A notice of appeal was filed, and an appeal was perfected on the Applicant's behalf by Lanelle C. Durant, Esquire.¹ The South Carolina Court of Appeals affirmed his convictions and sentences. State v. Pearson, 2010-UP-216 (filed March 15, 2010). The Remittitur was sent on March 31, 2010.

II.

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

1. "Not given a fast and speedy trial . . . and was incarcerated unjustly for an inappropriate bench warrant while represented by legal counsel"
 - a) "Case was dragged out to get me to plead guilty, arrested for failure to appear for court while having an

I The following issues were raised on appeal:

- (1) Did the trial court err in not allowing appellant to question the victim concerning her fifteen pages of school disciplinary actions under Rule 608 SCRE because the records were indicative of her credibility as a witness and character for truthfulness?
- (2) Did the trial court err in not allowing appellant to cross examine the victim's teacher, Ms. Balkum, on specific instances of the victim's conduct after the teacher testified that the victim had no disciplinary actions in her class room when the school records indicated that the victim did?
- (3) Did the trial court err in not granting a mistrial or providing a curative instruction when the State introduced a statement about the first blood sample taken from appellant in 2005 which was not admissible based on an insufficient chain of custody?

attorney who admitted to the courts that he failed to notify me for court hearings. This caused me to be arrested and was repeatedly denied bond after turning myself in. This caused me not to be able to seek affordable counsel which resulted in my imprisonment."

2. "Not properly represented by law by my legal representatives throughout my entire case"
 - a) "Attorney failed to notify me for court"
 - b) "He also failed to tell me that he was a member of the family of the alleged victim"
 - c) "Not filing appropriate legal motions on my behalf"
 - d) "Also not objecting to 2nd DNA test after State admitted to botching"

3. "Not properly sentence according to justice as an alleged first time offender for the alleged crime which I was not originally indicted on given the max"
 - a) "Initially arrested for Criminal Sexual Conduct I and II, not Lewd Act. But was read my indictment for Lewd Act against a minor on the third day of trial. Then given the maximum sentence for the crime as a first time offender for a nonviolent offense being found not guilty of CSC I and CSC II. Not to mention the repeated hung jury that was forced to [illegible]."

At the hearing, the Applicant proceeded on his claims of ineffective assistance of trial counsel.

SUMMARY OF TESTIMONY

The Applicant testified he was convicted of lewd act upon a minor child, but was acquitted of the criminal sexual conduct of a minor charge. He stated he alleged molested Victim by holding her down and ripping her clothes half-way down Victim's body. He testified ^{that he} originally hired Albert Smith, who represented him for around three to four years in various matters. He stated Mr. Smith

was related to the victim of this case. He then stated there was a bench warrant for his arrest for failure to make an appearance at a hearing. The Applicant testified Doug Brannon (Counsel) was his counsel for only thirty days prior to trial and he met with Counsel once before trial. He did not recall reviewing the discovery with Counsel. The Applicant asserted Counsel was ineffective for failing to interview and call witnesses at trial on his behalf; specifically, Victim's band teacher, a state trooper, his two sons, and his girlfriend. He further stated his story did not come out at trial. The Applicant also alleged Counsel did not cross-examine Victim concerning Victim's shoplifting charge. Additionally, the Applicant stated Counsel did not cross-examine Victim vigorously enough and that Counsel should have been more aggressive. He lastly stated Victim as lying about his condom usage in the case.

On cross-examination, the Applicant admitted he did not have any of the witnesses that Counsel allegedly failed to interview at the PCR hearing to testify on his behalf. Additionally, he admitted he actually did testify at trial and explained his version of the facts.

Counsel testified he has practiced criminal defense and family law for thirteen years. He stated he was appointed to the Applicant's case months before trial and had adequate time to prepare this case. Counsel testified he did not 'go easy' on Victim's cross-examination. He stated criminal sexual conduct of a minor is a heinous crime to defend against in front of jury, and he believed it was not strategically sound to 'beat-up' on female child victim. Counsel further testified he got Victim to admit everything he needed her to admit. He asserted he attacked Victim's credibility and did not need to ask Victim about her shoplifting charge, as he elicited that information from Victim's mother, who testified on the Applicant's behalf. Counsel stated he did not call Victim's band teacher to testify as it would have been duplicative. He also testified he found no reason to call Victim's

band teach after the trial judge ruled Ms. Balkum, another of Victim's teachers, was not allowed to testify about Victim's behavior in school. Additionally, Counsel testified he did not ask the Applicant's sons certain questions because, with their involvement with Victim, they would have been admitting to criminal sexual conduct with a minor. However, Counsel did call one of the Applicant's sons to testify about Victim's demeanor on the car ride to school on the morning of the incident. Counsel also testified the DNA found on Victim's panties, which matched the Applicant (with a probability of 1 in 1 quintillion), was a product of inevitable discovery.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court also has read the trial transcript, all of which assists the Court in judging their credibility. The Court finds the testimony of Doug Brannon, Applicant's trial counsel, very credible. This Court finds the Applicant's testimony concerning ineffectiveness of trial counsel is not credible.

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 (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 Interview/Call Witnesses

The Applicant alleges Counsel was ineffective for failing to interview and call witnesses on his behalf during the Applicant's trial.

The Applicant testified Counsel failed to call Victim's band teacher, a state trooper, his two sons, and his girlfriend. Counsel testified Victim's band teacher would have created cumulative testimony and did have a reason to call her as the trial judge had already ruled a different teacher was not allowed to testify about Victim's behavior in school. Additionally, Counsel testified he did not call one of the Applicant's sons because the son would have been admitting to criminal sexual conduct of a minor himself. The other son actually was called to testify on the Applicant's behalf. Further, Counsel called Victim's mother/Applicant's girlfriend, who testified very favorably on the Applicant's behalf.

Prejudice from trial counsel's failure to interview or 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). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). 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).

This Court finds Counsel was effective in his representation of the Applicant in this case. Counsel did, in fact, call some of these witnesses on the Applicant's behalf at trial. Counsel also had a valid reason for not calling Victim's band teacher as duplicative and more likely would not have been allowed to testify. Most importantly, the Applicant, at the PCR hearing, failed to present any of these witnesses or evidence of what they would have testified to that would have affected the outcome of the Applicant's trial. Therefore, no prejudice from Counsel's alleged error can be shown. Accordingly, this allegation is denied.

Cross-examination of the Victim

The Applicant alleges Counsel was ineffective for failing to aggressively cross-examine Victim in this case.

The Applicant testified Counsel 'took it easy' on Victim during cross-examination, and Counsel should have been more aggressive in attacking her credibility. He also stated Counsel failed

to cross-examine Victim concerning her shoplifting charges. Counsel testified he did not 'take it easy' on Victim, but that criminal sexual conduct is a serious crime to defend against in front of a jury. Counsel stated, in his professional opinion, it was not a wise decision to 'beat-up' on a 'little girl' in front of the jury. Counsel also testified he was able to extract all of the necessary information from Victim on cross-examination. Counsel further asserted he attacked Victim's credibility, but found it unnecessary to ask about her shoplifting charges, as this information was brought to light through Victim's mother's testimony.

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions Counsel allegedly failed to ask, and did not present any testimony showing the Victim's answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense.

Additionally, 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 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). Counsel articulated valid strategic reasons for not cross-

examining Victim concerning her shoplifting charges. Further, Counsel was able to discredit Victim using other tactics and angles. The Applicant has not shown that Counsel was deficient in that choice of tactics.

This Court finds the Applicant has failed to show that the outcome of his case would have been different had Counsel cross-examined Victim in a different manner. Cherry, supra. This Court also finds Counsel thoroughly discredited Victim in direct relation to the theory of the Applicant's defense: that Victim was upset about her father and mother separating and did not want her mother dating the Applicant. Additionally, the Applicant has failed to prove any resulting prejudice from Counsel's choice of tactics. Accordingly, this allegation is denied.

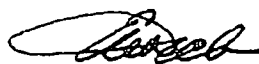
CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. 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), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the 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.

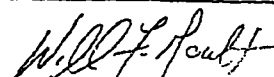
AND IT IS SO ORDERED!

Edgar W. Dickson
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

April 18, 2013

Orangeburg, South Carolina

**JUDGEMENT SIGNED AND
ENTERED UP** 5-9-13


CLERK OF COURT

WITNESSES

PSD

DOCKET NO. 2007-GS-44-417

The State of South Carolina

County of Union

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

COURT OF GENERAL SESSIONS

April 5th Term 2007

ARREST WARRANT NUMBER

Arrestment (In Re: H457314)

Defendant

THE STATE

Witness:

C.C.C. PLS. AND G.S.

ACTION OF GRAND JURY

^(Pln) ~~BARRETT~~ PEARSON ^(Pln)

Date

Date of Grand Jury

VERDICT

Indictment for

CRIMINAL SEXUAL CONDUCT WITH A MINOR, SECOND DEGREE

SC Code: 16-3-555(3)
CDR Code: 0397

STATE OF SOUTH CAROLINA)
)
COUNTY OF UNION)

INDICTMENT

At a Court of General Sessions, convened on April 5, 2007 the Grand Jurors of Union County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR, SECOND DEGREE

That on or about February 28, 2005, the Defendant Luther ~~PEARSON~~ ^{(Rpm) PEARSON JR. (Rpm)} Pearson, did willfully and unlawfully commit the crime of Criminal Sexual Conduct with a Minor in the Second Degree, in that the Defendant Luther ~~PEARSON~~ ^{(Rpm) PEARSON JR. (Rpm)} Pearson, did engage in a sexual battery with a minor victim who, at the time of the incident, was at least (14) years of age but who was less than sixteen (16) years of age, to wit: the Defendant Luther ~~PEARSON~~ ^{(Rpm) PEARSON JR. (Rpm)} Pearson, (Date of Birth: ^{gr. (Rpm)}) did commit the sexual battery of sexual intercourse upon and with the minor victim **Minor** (Date of Birth:

0), a minor who was fourteen (14) years old at the time of the incident. Said Defendant was older than said victim at the time of said incident. Said incident occurred within Union County, South Carolina. All in violation of Section 16-3-655(3), of the Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

WITNESSES

The State of South Carolina

County of Union

I am hereby advised as to my legal rights. I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

COURT OF GENERAL SESSIONS
April 5th Term 2007

Defendant

ARREST WARRANT NUMBER

THE STATE

Witness:

C.C.C. PLS. AND G.S.

VS.

ACTION OF GRAND JURY

LUTHER ~~BARNEED~~ PEARSON, SR.

Grand Jury

VERDICT

Indictment for

LEWD ACT UPON A CHILD

SC Code: 16-15-140
CDR Code: 2468

STATE OF SOUTH CAROLINA)
)
COUNTY OF UNION)

INDICTMENT

At a Court of General Sessions, convened on April 5, 2007, the Grand Jurors of Union County present upon their oath:

LEWD ACT UPON A CHILD

That on or about February 28, 2005, the Defendant Luther ~~PEARSON~~ ^{(JMA) BARNARD SR (JMA)} Pearson did commit the crime of Lewd Act upon a Child, in that the Defendant Luther ~~PEARSON~~ ^{(JMA) BARNARD SR (JMA)} Pearson, who was over the age of fourteen (14) years at the time of the incident, did wilfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body, or any part or member thereof, of the victim, **Minor** a child under the age of sixteen (16) years at the time of the incident, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the Defendant Luther ~~PEARSON~~ ^{(JMA) BARNARD SR (JMA)} Pearson, or of the child victim Courtney Eison, in that the Defendant Luther ~~PEARSON~~ ^{(JMA) BARNARD SR (JMA)} Pearson, ^{SR (JMA)} (Date of Birth:) did rub and/or touch and/or fondle the breast(s) and/or the genital/vaginal area and/or the buttocks of the minor victim **Minor** (Date of Birth:). Said incident occurred in Union County, South Carolina. All in violation of Section 16-15-140, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF UNION)
)

IN THE COURT OF GENERAL SESSIONS
OF THE SIXTEENTH JUDICIAL CIRCUIT

Indictment No. 07-GS-44-416 & 417

STATE OF SOUTH CAROLINA,)
)
)

VERDICT FORM

vs.)
)
)

LUTHER BERNARD
PEARSON, SR.)
)
)

Defendant.)
)
)

PLEASE MARK BY CHECKING AND CIRCLING THE APPROPRIATE VERDICT BELOW
AND FOLLOW THE ACCOMPANYING INSTRUCTIONS CAREFULLY.

1. AS TO THE CHARGE OF CRIMINAL SEXUAL CONDUCT WITH A MINOR IN
THE SECOND DEGREE, WE THE JURY UNANIMOUSLY FIND THE
DEFENDANT

✓

GUILTY

NOT GUILTY

2. AS TO THE CHARGE OF LEWD ACT UPON A CHILD UNDER THE AGE OF
SIXTEEN, WE THE JURY UNANIMOUSLY FIND THE DEFENDANT

✓

GUILTY

NOT GUILTY

STOP AND END YOUR DELIBERATIONS

Please sign and date.

Frankie A. Walker
Presiding Juror

2/14/08
Date