

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenwood County

R. Lawton McIntosh, Circuit Court Judge

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S.C. Supreme Court

JEROME CHISHOLM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001639

APPENDIX

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FACTS

Appellant was accused of criminal sexual conduct involving the six year old victim, on September 17, 2005, while he was at the victim's residence. The victim's mother was also at home along with her two year old son. The police were called about the incident and Officer Vernon Peppers responded to the scene. The mother told Peppers they had all been lying in bed together and she had gotten up to use the phone. The alleged incident occurred while she was outside the room. The victim told Peppers she was touched by appellant and demonstrated by putting her open right hand across the right side of her buttocks. Peppers asked her if she had been touched anywhere else and she told him no. (ROA p. 125, line 3 – p. 129, line 3). Later, Peppers went to the hospital where the victim had been sent. He picked up the rape kit and the nurse who collected the evidence told him she and the doctor did not think there was any penetration. (ROA p. 129, line 19 – p. 132, line 25). Sometime later the SLED forensic examiner found a blood stain on the victim's underwear that Peppers, the nurse, and the doctor had not seen or told him about. Peppers did not hear about this until two (2) years later. (ROA p. 134, line 22 – p. 135, line 16).

Dr. Pritchard examined the victim about a month after the incident and the victim told her that appellant had not inserted his penis into any openings and he did not ejaculate. (ROA p. 264, line 22 - p. 265, line 9).

During the trial the victim's mother testified. She said she and the kids had gotten up that Saturday morning. The mother had made her bed. She got a phone call and went outside to take it on the back porch. When she came back inside she found her son in her bed. (ROA p. 77, line 6 – p. 80, line 2). She saw appellant in bed and then saw part of her daughter's hair sticking out. She pulled back the covers and saw her daughter's pants all the

way down and appellant's penis hanging down between his legs and inside her daughter's rear. (ROA p. 81, line 24 – p. 83, line 11). The mother put the victim's clothes back on and sent her down the street to her sister-in-law's house. The police were called. After they arrived, she took the victim to the hospital. (ROA p. 84, line 4 – p. 85, line 14).

The victim testified that appellant put her in the bed, turned her over on her stomach and got on her. He took her underwear off and put his penis in her rear. (ROA p. 96, line 3 – p. 97, line 15).

Shannon Rodgers, the nurse who examined the victim at the hospital, testified that she also collected evidence for the sexual assault kit to be sent to SLED. (ROA p. 105, line 12 – p. 106, line 23). She submitted swabs from the victim along with her underwear. (ROA p. 107, line 1 – p. 109, line 1). A blood sample was also submitted. (ROA p. 114, lines 3-11).

Kenneth Bogan, who worked in the SLED forensic DNA analysis section, testified that he examined the victim's underwear and the other evidence obtained in the sexual assault kit. (ROA p. 161, line 12 – p. 163, line 8). He saw a spot of blood about the size of the end of a pencil eraser on the panties. (ROA p. 166, lines 1-15). His initial DNA analysis revealed DNA from two (2) individuals. One profile was consistent with the victim's and the other was from an unidentified male individual. (ROA p. 167, lines 11-18). Because appellant was a suspect, he requested a sample from him. The sample matched the DNA found on the underwear. (ROA p. 169, line 1 – p. 171, line 11).

Dr. Pritchard, an expert in child sexual assault examination, testified she examined the victim on October 12, 2005. (ROA p. 243, line 16 – p. 244, line 3). She had the victim

testified for sexually transmitted diseases and the test came back positive for HIV. (ROA p. 259, line 12 – p. 260, line 7).

Jean Banks, the supervisor over medical records at the Greenwood County Health Department, testified that blood was drawn there; it was packaged up and sent to DHEC. After DHEC tested it, results were sent back to Greenwood. The victim's test came back HIV positive and appellant's test came back HIV positive. (ROA p. 266, line 25 – p. 271, line 5).

ARGUMENT I

The State lacked probable cause to obtain oral swabs from appellant because there was insufficient evidence to establish that the blood found in the victim's underwear because there was no evidence of trauma that would have caused blood to be on the underwear.

A hearing was held on July 25, 2007, before the Honorable Brooks P. Goldsmith to determine if the State had probable cause to obtain oral swabs from appellant for DNA comparison purposes. Officer Peppers testified that Agent Bogan at SLED contacted him because he found blood on the victim's underwear that had the victim's DNA along with the DNA of an unknown male individual. Agent Bogan wanted Peppers to obtain oral swabs from appellant to see if his DNA matched the blood from the DNA sample. (Supp. ROA p. 1, line 14 - p. 2, line 18)

Defense counsel noted at the hearing that there was no evidence of trauma to the victim that would have cause her blood to be on the underwear as a result of the alleged sexual assault. (Supp. ROA p. 3, line 2 – p. 4, line 7) The victim was also in bed with a male sibling that the blood could have come from. In addition, there was nothing in the record to establish that the underwear had been clean or how long the blood had been there. (Supp. ROA p. 4, lines 7-13) Because there was no evidence to establish what caused the blood to be on the underwear and how long it was there it was only speculation concerning appellant's blood. There was no "substantial basis upon which to conclude that probable cause existed. State v. Baccus, 367 S.C. 41, 49 625 S.E.2d 216, 221 (2006) See, also Fourth and Fourteenth Amendment U.S. Constitution; Article 1, & 10 South Carolina Constitution; S.C. Code §17-13-140.

ARGUMENT II

The trial court erred in failing to exclude HIV test results because no competent chain of custody existed.

On cross-examination Jean Banks with the Greenwood County Health Department said that she did not have the names of the nurses who drew the blood for the HIV tests. She did not have the name of the person who took the blood to Columbia. She did not have the names of the people who actually did the tests. She did not have the name of anybody who handled it. (ROA p. 271, line 10 – p. 272, line 17)

In spite of a complete lack of a chain of custody the trial court admitted the HIV test results by relying on the case of Ex parte DHEC v. John Doe, 350 S.C. 243, 565 S.E.2d 293 (2002) (ROA p. 2, line 1 – p. 13, line 16; ROA p. 62, lines 8-23; ROA p. 222, line 10 – p. 240, line 18) The reliance on Ex parte v. DHEC was in error.

In Ex parte v. DHEC the South Carolina Supreme Court ruled that “HIV tests taken for purposes of medical diagnosis before any charges are pending are trustworthy and should be admitted as business records without a chain of custody.” 350 S.C. at 251, 565 S.E.2d at 297. (emphasis supplied) The Court went on to note that it “has consistently required a chain of custody in criminal prosecutions to prove the samples analyzed are in fact the defendant’s” 350 S.C. at 248, 565 S.E.2d at 296. (emphasis supplied)

In this case appellant had charges pending when the State sought and administrated the test. The State’s purpose in requesting the test was to seek relevant and probative evidence as to appellant’s guilt on the charge of criminal sexual conduct with a minor. Finally, the purpose of the test was not for purposes of diagnosis and treatment. Because

appellant's situation is not covered by Ex parte v. DHEC, it was necessary for the State to establish a complete chain of custody.

ARGUMENT III

The trial court erred in failing to exclude HIV test results when the probative value of such evidence was substantially outweighed by the danger of unfair prejudice.

The subject of whether appellant gave the six year old victim HIV is very emotionally charged. Rule 403, SCRE provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..." Unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly, through not necessarily, an emotional one." State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) quoting Fed. Rule Evid. 403 advisory note. The solicitor did not need the HIV test results to prove criminal sexual conduct with a minor and appellant was not charged with knowing giving the victim HIV. The solicitor was just gilding the lily. He was trying to prejudice appellant. In his closing argument he told the jury that the victim "had a deadly incurable disease for the rest of her life to remind her of this incident." (ROA p. 277, lines 15-16) He mentioned HIV five times near the end of his argument. (ROA p. 281, line 18 – p.282, line 20)

The trial judge's decision found that the HIV test was relevant and not unduly prejudicial to appellant. (ROA p. 240, lines 21-23) That decision was error and denied appellant a fair trial under the Fourteenth Amendment to the United States Constitution. While there was other evidence against appellant, he was still denied a fair trial. See, Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006) There was no way for the jury not to take into consideration the HIV test results in reaching their verdict. That is why it was so prejudicial.

ARGUMENT IV


The trial court erred in overruling defense counsel's motion for a mistrial after Dr. Pritchard testified that the victim told her that appellant did something bad because it was improper hearsay.

Dr. Pritchard testified about her examination of the victim and she said the victim told her that appellant did something bad. Defense counsel said he had a matter of law and the jury was excused from the courtroom. (ROA p. 245, lines 6-17) Defense counsel noted that the doctor's testimony was hearsay and went to identity. He noted State v. Burroughs, 328 S.C. 489, 492 S.E.2d 408 (1997); State v. Camele, 293 S.C. 302, 360 S.E.2d 307 (1987) and State v. Brown, 286 S.C. 445, 334 S.E.2d 816 (1985) all of which limit a doctor's testimony as to history and only to include those facts related to her by the victim upon which she relied in reaching her medical conclusions. Those cases do not allow the suspect identity to be gone into. The solicitor admitted this was wrong but tried to argue it was harmless. (ROA p. 246, line 14 – p. 249, line 23) The error was not harmless because the victim and mother gave factual contradictions and the doctor's hearsay testimony bolstered the State's case. "Improper corroboration testimony" cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration. Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994).

CONCLUSION

Because appellant did not receive a fair trial as guaranteed by the Fourteenth Amendment, he should be granted a new trial.

Respectfully submitted,



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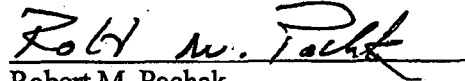
ATTORNEY FOR APPELLANT.

This 27th day of January, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 27th, 2011



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEROME CHISHOLM,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Harold Coombs, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of January, 2011.

Robert M. Pachak
Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 27th day of January, 2011.

Felicia K. Berry (L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenwood County
Honorable Eugene C. Griffith, Jr., Judge

THE STATE,

Respondent,

vs.

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STATEMENT OF ISSUES ON APPEAL

1. The defendant questions the existence of probable cause to get oral swabs from the defendant due to the purported insufficient evidence establishing that blood in the victim's underwear was the result of trauma caused by the sexual assault.
2. The defendant asks whether HIV test results should have been excluded when no chain of custody was established.
3. The defendant asks whether HIV test results should have been excluded when the probative value was substantially excluded by the danger of unfair prejudice.
4. The defendant asks whether he should have been granted a mistrial after Dr. Pritchard testified to the victim telling her that the defendant did something bad - since that was improper hearsay.

STATEMENT OF THE CASE

The Greenwood Grand Jury charged the defendant with first degree criminal sexual conduct with a minor (05-GS-24-1386). The defendant and his counsel came before the Honorable Eugene C. Griffith, Jr., Judge, and a jury on June 15-18, 2009. The jury found the defendant guilty, and the court sentenced him to a term of imprisonment for thirty years. The defendant served opposing counsel a timely notice of appeal.

STATEMENT OF FACTS

The mother of the six year old victim was at home on Saturday, September 17, 2005, with her two year old son and the victim. When the defendant arrived, the family was out of bed and the bed was made. The defendant is a former boyfriend and the father of her son. He is not the father of the victim. The mother took a telephone call from a friend on the back porch since she did not want the defendant in her personal business. After talking no longer than ten minutes, she discovered the defendant in bed with her son. She asked the defendant about the victim, noted the defendant's "little crazy look," and then spotted her child's hair bow among the bed covers. She pulled back the covers. The victim lay face down. Her pants and her underwear were all the way down. The defendant's penis was inside her "butt," (ROA. pp. 74-83). The mother put the clothes back onto the child and took her straight to the hospital. (ROA. pp. 84-85).

The nurse at the hospital followed the SLED protocol which included collecting the victim's underwear in the mid-afternoon of September 17, 2005. (ROA. pp. 105-108). Nothing out of the ordinary was noted on her external exam. The Child's Place did an internal exam. (ROA. pp. 109-111).

A SLED chemist found a small, bloody stain about the size of the end of a pencil eraser in the hem area near a leg opening of the victim's underwear, and it included the defendant's DNA profile. (ROA. pp. 156-172).

Pediatrician, Dr. Lyle Pritchard, examined the six year old victim (DOB 2/13/99) on October 12, 2005 at the request of law enforcement concerning possible child sexual abuse. The child's physical exam was normal. In addition to existing lab work, Dr. Pritchard tested

the victim's blood for HIV, and the child's HIV test was positive. Based upon the child's history, physical, and HIV test, she diagnosed sexual abuse. (ROA. pp. 244; 258-260).

ARGUMENT

I.

The court properly admitted evidence of DNA testing.

In camera the defendant moved to exclude DNA test results since the state had wanted the defendant's blood to compare with unidentified blood on the victim's underwear. Instead of a blood sample, the state got swabs from his cheek. (ROA. pp. 22-25). The defendant thought that Judge Goldsmith was misled because the testimony before him was a comparison of DNA to blood. Judge Goldsmith authorized testing blood, and they tested something else. (ROA. p. 56).

The chemist found a blood stain near the crotch of the victim's panties. Analysis showed a mixed DNA profile - a mixture of body fluids from at least two persons - including the victim and an unidentified male. He requested a DNA standard from the suspect and received a cheek swab. In further analysis of the stain, he found there was both blood and semen. The blood could have come from either the victim or the defendant. The DNA profile of the stain from the panties matched the DNA profile of the defendant. (ROA. pp. 26-34). In sum, there was DNA profile from a male donor [in the stain on the panties], and the chemist needed a DNA standard for comparison. He thought the stain was likely a mixture of blood and semen. The chemist made a differential extraction separating the male and female portions from the stain on the crotch of the panties and defendant's DNA profile matched the male's profile, and that indicated the DNA came from semen. (ROA. pp. 44-46).

The court found that the substance of the Judge Goldsmith's order concerned DNA analysis on the victim's panties of a mixture of her blood and the DNA of an unknown male.

The state clearly wanted a DNA sample from the defendant to determine whether his DNA was mixed with the blood of the victim - since that would be material evidence. The court found that the Judge had notice that the state wanted the defendant's DNA sample for comparison to a blood stain on the victim's panties. (ROA. p. 54, line 17 - p. 56, line 1). The court noted that Judge Goldsmith's order specified the materiality of determining whether the defendant's DNA was found mixed with the blood of the victim, and the order did not specify the source for extracting the DNA. (ROA. p. 58, lines 9-25).

On appeal the defendant feels the blood on the victim's underwear was not necessarily his blood. (IBOA, p. 8). The state presented substantial evidence of probable cause to the hearing judge: The defendant was found in bed behind the victim with his penis in his hand. The victim was bent over, and her panties were down. Police collected the victim's clothing. A SLED agent with the DNA department examined the underwear and found a blood stain. Further examination revealed the stain was a mixture of the victim's blood and DNA from an unidentified male. (ROA. pp. 309-311). The ruling of the hearing judge was canvassed before trial in considerable detail. The finding of the blood stain in the victim's panties - with a mixed DNA profile from the mixture of body fluids from the victim and an unidentified male - was, in light of the circumstances presented, a substantial basis upon which to find probable cause to seek the defendant's DNA for comparison to that of the male DNA body fluid in the stain.

II.

The trial court admitted HIV test results from DHEC that were done in the course of business.

In camera, the state said there were two blood tests; blood was drawn on November 14, 2005 and November 30, 2005. Apparently, DHEC did the second test absent any prosecutorial investigation. The state relied on Ex parte DHEC v. Doe to allow HIV testing by DHEC without a chain of custody since HIV testing - unlike some other tests - can be repeated, confirmed or proved false by retesting at a later date. DHEC has procedures to keep blood from getting mixed up, and the HIV tests should be admissible as a business record. (ROA. pp. 4-7; p. 10, lines 21-23).

In limine the court admitted the first (of two) HIV test result under Doe and as a business record, Rule 803(6), SCRE. The defendant objected to both test results but "definitely" objected to the one not admitted. (ROA. pp. 62 and 66):

The court again found that the HIV tests for both the defendant and the victim were admissible as business records pursuant to Ex parte DHEC v. Doe, 350 S.C. 243, 565 S.E.2d 293 (2002) but noted that in Doe the test had been done before the charge. The court also found the HIV testing was relevant and not unduly prejudicial. (ROA. pp. 236-237; 240).

The administrative supervisor of the Greenwood County Health Department and supervisor of medical records testified that their lab slips were records kept in the normal course of business. A nurse drew blood for their tests. The blood was sent by courier to Columbia where the DHEC lab tested the blood and sent the results to a printer in Greenwood. State's Exhibit No. 12 was a positive HIV test for the victim on a blood sample collected on October 21, 2005. State's Exhibit No. 13 was a positive HIV test for the

defendant on a blood sample collected on November 14, 2005. (ROA. pp. 266-271). Apart from affirming that DHEC had procedures for their handling of samples, she knew nothing about the chain of custody, including who tested the sample. (ROA. pp. 271-273).

Parenthetically, the victim's HIV test on a blood sample collected on October 21, 2005 was cumulative to testing by pediatrician, Dr. Lyle Pritchard who examined the victim on October 12, 2005. (ROA. pp. 244; 258-260). In camera, the doctor had noted that test was done in the hospital lab for medical diagnosis. Also, in camera, the doctor noted: [1] a positive HIV test some four weeks after the present incident [and possible first exposure] would be relatively early for a patient to "convert" and most patients converted within three to six months; [2] the doctor thought it would be helpful for the jury to know that the child had a sexually transmitted disease, but she could not determine the date when the virus was transmitted; [3] the child reported that "this" had taken place frequently. (ROA. pp. 217-224). In closing argument the defendant observed that the two positive HIV tests meant that two people can test positive for HIV, and that did not establish guilt. (ROA. p. 286, lines 9-13).

On appeal the defendant apparently challenges the admission of his HIV test by the Greenwood County Health Department from blood drawn on November 14, 2005 on the ground that there was no chain of custody. (IBOA pp. 9-10). The court found that the state was offering the defendant's HIV test for a permanent condition that was either present or not present, and the test was not time sensitive. Once the defendant had tested positive for HIV, subsequent tests should be the same and consistent. (ROA. pp. 236-241). The admission of evidence rests in the sound discretion of the trial judge. The defendant's test result showed that by November 14, 2005 he was HIV positive. This was about two months

after the alleged incident on September 17, 2005, and the defendant's positive HIV test did not by itself prove that he transmitted the HIV virus to the victim on the date of the alleged incident. Rather, it was circumstantial evidence of a sexual battery upon the victim, and that was cumulative to the testimony of the victim, eyewitness observation of the mother, and the presence of the defendant's DNA in a bloody stain in the victim's underwear. Moreover, while DHEC did not offer testimony to a chain of custody, the record demonstrates that the agency offers second testing to confirm its test results. Since the HIV test can be repeated, and was repeated in the present case, there was no prejudice.

III.

The defendant asks whether HIV test results should have been excluded when the probative value was substantially excluded by the danger of unfair prejudice.

The external examination on the afternoon of the incident by a nurse showed nothing out of the ordinary. The pediatrician examined the victim weeks later and noted a normal physical examination. (ROA. pp. 244; 258-260; 105-111). A SLED chemist found a small stain - apparently blood - about the size of the end of a pencil eraser in the hem area near a leg opening of the victim's underwear. The stain contained the DNA profile of the victim and the DNA profile of the defendant. (ROA. pp. 156-172). The vaginal swab from the victim was streaked with blood. (ROA. p. 174).

The defendant wanted to establish testimony supporting the absence of a battery, and argued to the jury there was no evidence of injury, blood, or penetration. (ROA. p. 263-265; 289-292). Additionally, the defendant argued that the stain [found on the victim's underwear] came into existence "mysteriously" after not being present for two years. (ROA. p. 291, line 21-p. 292, line 7).

Dr. Pritchard testified that transmission of HIV during sexual contact required an exchange of bodily fluids and blood or semen could mix as a result of a very small micro trauma. (ROA. p. 263).

Contrary to the defendant's contention, the HIV test results were probative evidence reasonably explaining the victim's complaint and the observation of the eyewitness.

IV.

The fleeting reference to nickname did not deny the defendant a fair trial.

The defendant complains that the state's violation of the time and place limitation for outcry evidence required the court to grant him a mistrial.

Pediatrician Dr. Pritchard testified that she examined the victim (DOB 2/13/99) on October 12, 2005, about four weeks after the incident and got histories from both the victim and her mother. The child told her that her brother and she were under the covers and Rome did something bad. The state noted having attempted to stop the mention of defendant's nickname and maintained that a curative instruction to the jury would be sufficient to cure the error. The court noted that both parties had immediately stopped the witness, and, in context of the trial, the comment was harmless but offered to give a requested curative instruction. Defense counsel explained his disdain for a curative instruction through the ringing bell and pink elephant analogies. The court found the comment harmless in light of the mother's eye witness account and identification of the defendant. The defendant did not want the state to examine the doctor further about time and place, and the state agreed. (ROA. pp. 242-256). Testimony continued. The doctor found a normal genital exam, but the victim's HIV test was positive. The doctor affirmed that [in the present case] she believed the HIV had been transmitted by an exchange of bodily fluids, for example, such as blood or semen. A very small micro trauma could be sufficient. The doctor diagnosed sexual abuse based upon her exam, history, and HIV test. (ROA. pp. 258-265).

The doctor apparently referenced her notes about the patient history and testified to her patient's reporting "they got underneath the covers and then Rome did something bad." (ROA. p. 245). First, the defendant does not show where "Rome" had been previously used

to identify the defendant. The trial immediately stopped, and the court addressed the matter. Further, in camera the court had carefully considered the time and place limitation. (ROA. pp. 14-20). In context of the trial the assigned error is fairly described as fleeting and inadvertent. Additionally, the court offered the defendant an opportunity to propose a curative instruction.

The trial court's ruling on a motion for mistrial lies in the exercise of the court's sound discretion and should not be disturbed on appeal without a showing of an abuse of discretion amounting to an error of law. State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (Ct.App. 2005). The record supports the court's sound exercise of discretion in denying the motion.

CONCLUSION

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

Respectfully submitted,

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January 18, 2011

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IN THE COURT OF APPEALS

Appeal From Greenwood County
Honorable Eugene C. Griffith, Jr., Judge

THE STATE,

Respondent,

vs.

JEROME CHISHOLM.

Appellant.

PROOF OF SERVICE

I, Harold M. Coombs, Jr., certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Pachak, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 18th day of January, 2011.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenwood County
Honorable Eugene C. Griffith, Jr., Judge

THE STATE,

Respondent,

vs.

JEROME CHISHOLM,

Appellant.

CERTIFICATE OF COUNSEL

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

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January 18, 2011

Westlaw

717 S.E.2d 614
 395 S.C. 259, 717 S.E.2d 614
 (Cite as: 395 S.C. 259, 717 S.E.2d 614)

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Court of Appeals of South Carolina.
 The STATE, Respondent,
 v.
 Jerome CHISHOLM, Appellant.

No. 4899.
 Heard Sept. 14, 2011.
 Decided Oct. 26, 2011.

Background: Defendant was convicted in the Circuit Court, Greenwood County, Eugene C. Griffith, Jr., J., of criminal sexual conduct (CSC) with a minor in the first degree. Defendant appealed.

Holdings: The Court of Appeals, Huff, J., held that:
 (1) there was substantial basis for probable cause to issue order to collect defendant's DNA;
 (2) any error in admitting defendant's positive HIV test results was harmless; and
 (3) any error in physician's testimony that victim told her "Rome did something bad" was harmless.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⇨661

110 Criminal Law
 110XX Trial
 110XX(C) Reception of Evidence
 110k661 k. Necessity and scope of proof.
 Most Cited Cases

Criminal Law 110 ⇨1153.1

110 Criminal Law
 110XXIV Review
 110XXIV(N) Discretion of Lower Court
 110k1153 Reception and Admissibility of Evidence
 110k1153.1 k. In general. Most Cited

Cases

The admission or exclusion of evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion; an abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law.

[2] Criminal Law 110 ⇨867.3

110 Criminal Law
 110XX Trial
 110XX(J) Issues Relating to Jury Trial
 110k867 Discharge of Jury Without Verdict; Mistrial
 110k867.3 k. Grounds in general. Most Cited Cases

Criminal Law 110 ⇨867.4

110 Criminal Law
 110XX Trial
 110XX(J) Issues Relating to Jury Trial
 110k867 Discharge of Jury Without Verdict; Mistrial
 110k867.4 k. Necessity in general. Most Cited Cases

A mistrial should be granted only when absolutely necessary, and a defendant must show both error and resulting prejudice to be entitled to a mistrial.

[3] Searches and Seizures 349 ⇨113.1

349 Searches and Seizures
 349II Warrants
 349k113 Probable or Reasonable Cause
 349k113.1 k. In general. Most Cited Cases

Searches and Seizures 349 ⇨200

349 Searches and Seizures
 349VI Judicial Review or Determination
 349k200 k. Scope of inquiry or review, in

general. Most Cited Cases

A search warrant may issue only upon a finding of probable cause, and it is the duty of the reviewing court to ensure the issuing official had a substantial basis upon which to conclude that probable cause existed. U.S.C.A. Const.Amend. 4.

[4] Searches and Seizures 349 ⇐102

349 Searches and Seizures

349II Warrants

349k102 k. Permissible subjects, objects, and purposes. Most Cited Cases

An order issued pursuant to statute governing search warrants for property connected with commission of crime that allows the government to procure evidence from a person's body constitutes a search and seizure under the Fourth Amendment and must comply with constitutional and statutory guidelines. U.S.C.A. Const.Amend. 4; Code 1976, § 17-13-140.

[5] Searches and Seizures 349 ⇐113.1

349 Searches and Seizures

349II Warrants

349k113 Probable or Reasonable Cause

349k113.1 k. In general. Most Cited Cases

Considerations for determining whether there exists probable cause to permit the acquisition of evidence from a person's body as identification evidence include the following elements: (1) probable cause to believe the suspect has committed the crime; (2) a clear indication that relevant material evidence will be found; and (3) the method used to secure it is safe and reliable. U.S.C.A. Const.Amend. 4; Code 1976, § 17-13-140.

[6] Searches and Seizures 349 ⇐114

349 Searches and Seizures

349II Warrants

349k113 Probable or Reasonable Cause

349k114 k. Particular concrete applications. Most Cited Cases

There was substantial basis for probable cause to issue order to collect defendant's DNA in investigation of criminal sexual conduct (CSC) with a minor; defendant was found by victim's mother in bed with victim with his penis in his hand, victim's underwear was pulled down, and analysis of underwear found victim's blood as well as unknown male DNA. U.S.C.A. Const.Amend. 4; Code 1976, § 17-13-140.

[7] Criminal Law 110 ⇐1169.1(10)

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1169 Admission of Evidence

110k1169.1 In General

110k1169.1(10) k. Documentary

and demonstrative evidence. Most Cited Cases

Any error in admitting defendant's positive HIV test results, due to alleged insufficiencies in chain of custody, was harmless in prosecution for criminal sexual conduct (CSC) with a minor in light of the overwhelming evidence of defendant's guilt; victim testified that defendant sexually assaulted her, mother testified that she found defendant in bed with victim, and testing of victim's underwear showed mixture of victim's blood and defendant's semen.

[8] Criminal Law 110 ⇐1153.3

110 Criminal Law

110XXIV Review


110XXIV(N) Discretion of Lower Court

110k1153 Reception and Admissibility of Evidence

110k1153.3 k. Relevance. Most Cited Cases

An appellate court reviews rulings balancing whether the probative value of evidence was substantially outweighed by its prejudicial effect pursuant to the abuse of discretion standard, and gives great deference to the trial judge's decision. Rules of Evid., Rule 403.

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[9] Criminal Law 110  338(7)

110 Criminal Law

110XVII Evidence

110XVII(D) Facts in Issue and Relevance

110k338 Relevancy in General

110k338(7) k. Evidence calculated to create prejudice against or sympathy for accused. Most Cited Cases

Probative value of positive HIV test results for defendant and victim to show defendant committed sexual battery of the victim was not outweighed by prejudice to defendant in prosecution for criminal sexual conduct (CSC) with a minor. Rules of Evid., Rule 403.

[10] Criminal Law 110  867.2

110 Criminal Law

110XX Trial

110XX(J) Issues Relating to Jury Trial

110k867 Discharge of Jury Without Verdict; Mistrial

110k867.2 k. Discretion of court. Most Cited Cases

Criminal Law 110  1155

110 Criminal Law


110XXIV Review

110XXIV(N) Discretion of Lower Court

110k1155 k. Issues related to jury trial.

Most Cited Cases

The decision to grant or deny a motion for a mistrial is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law.

[11] Criminal Law 110  1169.1(9)

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1169 Admission of Evidence

110k1169.1 In General

110k1169.1(9) k. Hearsay. Most

Cited Cases

Any error in physician's hearsay testimony that victim told her "Rome did something bad" was harmless in prosecution for criminal sexual conduct (CSC) with a minor; it was questionable whether the jury even understood that the name "Rome" referred to defendant as that name was never used by any other witness, and both victim and mother identified defendant as the perpetrator.

**615 Appellate Defender Robert Pachak, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Deputy Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

HUFF, J.

*262 Appellant, Jerome Chisholm, appeals his conviction of criminal sexual conduct (CSC) with a minor in the first degree, asserting (1) the State lacked probable cause to obtain oral swabs from him for DNA comparison, (2) the trial court erred in failing to exclude Human Immunodeficiency Virus (HIV) test results when no chain of custody was established, (3) the trial court erred in failing to exclude HIV test results because the probative value was substantially outweighed by the danger of unfair prejudice, and (4) the trial court erred in overruling defense counsel's motion for a mistrial after the child victim's treating doctor testified the child told her Chisholm "did something bad," as this testimony amounted to improper hearsay. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The mother of the victim (Mother) testified that on Saturday morning, September 17, 2005, Chisholm came to the home she shared with her six year-old daughter (Victim) and Mother and Chisholm's two year-old son. Mother and the two children were up early that morning, and Mother

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had already made her bed by the time Chisholm arrived. Mother received a phone call and went to her back porch to take the call, which lasted five to ten minutes. When Mother returned inside the home, the children were not in their bedroom where she left them. Mother looked in her bedroom, where she found her son and Chisholm in her bed, underneath the covers. Mother did not see Victim, and when she inquired where Victim was, Chisholm did not answer, but he had a "crazy look." Mother then noticed Victim's hair bow sticking out from under the top of the covers. When Mother pulled the covers back, she observed Victim face down in the bed, with her underwear and shorts pulled down and "Chisholm's penis hanging down between his legs and inside [her] child's butt." Mother lifted Victim and put her clothes back on her. She tried to call *263 police, but was thwarted by Chisholm, who would not let Mother leave the home either. Mother sent Victim down the street to her sister-in-law's home, and Mother eventually made it there as well. After talking with police, Mother transported Victim to the hospital for a sexual assault examination.

Victim, who was ten years old at the time of the trial, also testified concerning the incident. Victim stated that on Saturday, September 17, she and her brother were playing **616 in their room at Mother's house. Her brother's father, Chisholm, put her in the bed, turned her over from her back to her stomach, and got on her. At this time, Chisholm had pulled Victim's shorts and underwear down to her knees. Victim testified Chisholm put his penis inside her, "in [her] butt." Mother walked in, pulled Victim up, and took Victim to her aunt's house to call the police. After she talked to the police, Mother took her to the hospital where she underwent an examination. Thereafter, Victim went to see Dr. Pritchard for another examination.

Victim was seen in the emergency room that same day and was examined following her complaint of sexual assault. Included with the sexual assault kit in the evidence turned over to law enforcement was Victim's underwear. Victim had an

external vaginal and rectal exam at the emergency room, but because of her young age she was referred to "The Child's Place" for an internal examination. Nothing out of the ordinary was noted from her emergency room examination.

South Carolina Law Enforcement Division (SLED) Agent Kenneth L. Bogan, who was qualified as an expert in the field of DNA analysis, testified regarding his analysis of the various items submitted in regard to Victim's emergency room visit. Agent Bogan found no semen on the vaginal and rectal smears and swabs, but did find the presence of blood on the vaginal swab. Upon inspecting Victim's underwear, he observed what he believed to be a blood stain. A presumptive analysis for the presence of blood was positive. Agent Bogan proceeded to extract DNA from the underwear stain and found a mixture of DNA from two individuals, one being consistent with that of Victim and the other belonging to an unidentified male. Agent Bogan then requested a DNA standard from any likely suspects in the case. After receiving a known DNA standard *264 in the form of buccal swabs from Chisholm, Agent Bogan made a comparison of Chisholm's DNA to the mixed sample taken from Victim's underwear, and determined the DNA profile from the unidentified male matched the DNA of Chisholm. Further analysis revealed there was semen present in the stain, and the DNA profile from the semen matched Chisholm's DNA profile.

Pediatrician Dr. Lyle Pritchard, who was qualified as an expert in child sexual assault examination, testified Victim was referred to her by law enforcement for a medical exam for possible child sexual abuse. Dr. Pritchard examined Victim on October 12, 2005. At that time, Victim complained of genital discomfort and pain. Child had a normal genital exam, but Dr. Pritchard stated this was common in cases where children had been sexually abused, particularly when there is a time lapse between the alleged trauma and her examination, as mucosal skin heals very quickly. Dr. Pritchard agreed that the records from the hospital indicated

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Victim had a normal exam on the day the allegations were reported, but explained the hospital did not use a special instrument for examination, called a the culpascope, in Victims' exam. Rather, the hospital personnel just looked at the skin on the outside of the bottom. Dr. Pritchard further testified she tested Victim for certain sexually transmitted diseases, and the HIV test came back positive. She noted that children can become HIV positive in three major ways: (1) from a congenital infection where the mother passes it on to the baby in utero or from the baby passing through the birth canal; (2) from a blood transfusion; or (3) from sexual contact. Dr. Pritchard noted Mother's HIV testing from her pregnancy with Victim and her pregnancy with Victim's younger brother were both negative, and found no history of Victim having a blood transfusion. Therefore, based on Victim's history of sexual contact and her positive HIV test, Dr. Pritchard diagnosed Victim with sexual abuse.

Finally, the State presented the testimony of Jean Banks, Greenwood County Health Department's administrative supervisor and the supervisor of medical records. Banks testified clients would have their blood drawn by a nurse at the Health Department, and it would then be sent by courier to the DHEC lab in Columbia where it is tested. The results are then sent from Columbia to a printer at the Health Department,*265 where the results are printed out and maintained in a file at the Health Department. These records**617 are kept by the Health Department in the normal course of business. The Health Department's records show Victim had her blood collected on October 21, 2005, which showed Victim was HIV positive, and Chisholm had his blood collected on November 14, 2005, and he likewise tested positive for HIV. Banks admitted she did not have the names of the nurse, courier, the person who ran the test, or anyone who handled the blood before testing. She stated, however, that DHEC had procedures in place in terms of handling, packaging and transporting to keep the blood samples straight.

ISSUES

1. Whether the State lacked probable cause to obtain oral swabs from Chisholm when there was insufficient evidence to establish that the blood found in Victim's underwear was the result of trauma caused by the alleged assault.

2. Whether the trial court erred in failing to exclude the HIV test results when no chain of custody was established.

3. Whether the trial court erred in failing to exclude HIV test results when the probative value of such evidence was substantially outweighed by the danger of unfair prejudice.

4. Whether the trial court erred in overruling defense counsel's motion for a mistrial after Dr. Pritchard testified that Victim told her Chisholm did something bad, because this testimony was improper hearsay.

STANDARD OF REVIEW

[1][2] In criminal cases, this court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *State v. Winkler*, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *Id.* "Similarly, whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an *266 abuse of discretion." *State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). A mistrial should be granted only when absolutely necessary, and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000).

LAW/ANALYSIS

I. Probable Cause to Obtain Oral DNA Swabs

The record shows that in July 2007, the State

sought an order requiring Chisholm to submit to a blood draw for the purpose of DNA comparison pursuant to section 17-13-140 of the South Carolina Code (2003). At a hearing before Judge Goldsmith on July 25, 2007, the State presented the testimony of Officer Vernon Peppers, who testified Mother reported finding Chisholm in a sexual situation with her six-year-old daughter, noting Mother indicated she pulled the bed sheets back and discovered her daughter's panties around her ankles with Chisholm behind the child with his penis in his hand. Officer Peppers testified he spoke with SLED Agent Bogan, who analyzed Victim's underwear and found a blood stain in them. On the blood stain, Agent Bogan identified Victim's blood, "along with an unidentified male's DNA." Agent Bogan therefore requested a DNA swab from the defendant to make a comparison to the stain found in Victim's underwear. Officer Peppers acknowledged the nurse at the hospital indicated there was no evidence of trauma in the visual examination of Victim. However, he further testified Victim was referred to "The Child's Place" because the hospital was unable to perform a vaginal exam on Victim since the hospital did not have the necessary equipment for such an examination on a child her age.

Chisholm opposed the State's motion arguing, in part, that the State failed to establish probable cause that a crime had taken place as there was no evidence of any trauma to Victim; there was evidence that Victim was in bed with a male sibling such that the male blood could have come from another source; and there was "nothing in the record to establish that the underwear was clean and **618 contaminated with blood." Judge Goldsmith found the State demonstrated probable cause existed to believe Chisholm committed the crime of CSC *267 with a minor, that relevant and material evidence was involved which necessitated the comparison of Chisholm's blood sample with that taken from the crime scene, and that the swab method was a safe and reliable method for obtaining DNA. He further found the crime involved was of a serious nature. Judge Goldsmith therefore ordered

Chisholm provide an oral swab to the police in order to enable comparison with the blood evidence.

On appeal, Chisholm contends the State lacked probable cause to obtain oral swabs from him for DNA comparison because "there was no evidence to establish what caused the blood to be on the underwear and how long it was there," and therefore, there was only speculation that it was Chisholm's blood. He cites *State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006) for the proposition that there was no substantial basis upon which to conclude that probable cause existed.

[3][4][5] A search warrant may issue only upon a finding of probable cause, and it is the duty of the reviewing court to ensure the issuing official had a substantial basis upon which to conclude that probable cause existed. *Id.* at 50, 625 S.E.2d at 221. "A court order issued pursuant to § 17-13-140, which stands in place of a search warrant, should only be issued upon a finding of probable cause, which is supported by oath or affirmation." *Id.* at 54-55, 625 S.E.2d at 223. "An order issued pursuant to § 17-13-140 that allows the government to procure evidence from a person's body constitutes a search and seizure under the Fourth Amendment," and must comply with constitutional and statutory guidelines. *Id.* at 53, 625 S.E.2d at 222. Considerations for determining whether or not there exists probable cause to permit the acquisition of such nontestimonial identification evidence include the following elements: (1) probable cause to believe the suspect has committed the crime; (2) a clear indication that relevant material evidence will be found; and (3) the method used to secure it is safe and reliable. *Id.* at 53-54, 625 S.E.2d at 222-23. "Additional factors to be weighed are the seriousness of the crime and the importance of the evidence to the investigation." *Id.* at 54, 625 S.E.2d at 223. "The judge is required to balance the necessity for acquiring involuntary nontestimonial identification evidence against constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures." *Id.*

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*268 [6] The record shows Judge Goldsmith was presented with evidence that Mother found Chisholm in a "sexual situation" with the six-year-old Victim, discovering him in bed with her daughter, whose body was mostly hidden under the covers, and when Mother pulled the covers away, she found Victim bent over, with her underwear pulled down and Chisholm behind Victim with his penis in his hand. Additionally, the State presented evidence to Judge Goldsmith that Victim's clothing was collected at the hospital following this incident, Officer Peppers submitted the clothing to SLED, and the SLED agent who analyzed Victim's underwear found a blood stain in her underwear that contained Victim's blood, along with the DNA of an unidentified male. Judge Goldsmith properly considered the necessary elements in determining whether probable cause existed, and the record supports these findings. Accordingly, we find there was a substantial basis upon which to conclude that probable cause existed for the issuance of the order.

II. Failure to Exclude HIV Test Results Based on Chain of Custody

Prior to trial, Judge Maddox granted the State's motion requiring Chisholm to submit to an HIV blood test, noting Chisholm had been charged with CSC with a minor and Victim's sexual assault examination indicated the child had the HIV virus.^{FN1} Thereafter, Chisholm sought to exclude HIV test results, maintaining the State was required to supply the chain of custody before the results could be admitted.^{FN2} The trial judge disagreed, ruling **619 the results were admissible as business records under *Ex parte Dep't of Health & Envtl. Control*, 350 S.C. 243, 565 S.E.2d 293 (2002) (hereinafter *Ex parte DHEC*).

FN1. It appears as though Chisholm actually consented to this blood test.

FN2. Although Chisholm's argument to the trial judge focused more on the admission of Chisholm's HIV test results, he also raised the chain of custody argument as to Victim's HIV test.

On appeal, Chisholm contends the trial court erred in failing to exclude the HIV test results because no competent chain of custody existed. He notes that Banks testified she did not have any names of the persons who drew the blood, transported*269 the blood to Columbia, performed the tests, or actually handled the blood. He argues the trial court erroneously relied upon *Ex parte DHEC*, as that case was distinguishable from the case at hand inasmuch as *Ex parte DHEC* dealt with HIV tests taken for purposes of medical diagnosis before any charges were pending. Chisholm argues charges were already pending against him when the State sought and administered the test, the State's purpose in requesting the test was to seek evidence as to his guilt, and the test was not performed for purposes of diagnosis and treatment. He therefore maintains that *Ex parte DHEC* does not apply, and the State was required to establish a complete chain of custody.

In *Ex parte DHEC*, the State sought to prove that defendant Doe had knowingly exposed the minor victim to HIV. *Id.* at 246, 565 S.E.2d at 295. The State filed a motion seeking to compel DHEC to, among other things, release the names and addresses of any possible chain of custody witnesses in the matter. *Id.* After the circuit court ordered the release of the names and access to all possible chain of custody witnesses, and this court affirmed that portion of the circuit court's order, DHEC petitioned the supreme court for certiorari, which was granted. *Id.* at 246-47, 565 S.E.2d at 294-95. The State maintained it was required by the South Carolina Rules of Evidence to establish a chain of custody to admit Doe's HIV blood test at trial, while DHEC argued the exception to the rule against hearsay contained in Rule 803(6), SCRE allowed Doe's HIV test results to be admitted into evidence as business records without the requirement of establishing a chain of custody. *Id.* at 247, 565 S.E.2d at 295. The supreme court disagreed with the State's position, but agreed with DHEC. *Id.* The supreme court specifically determined "the procedure for admitting business records would afford suffi-

cient indicia of reliability to admit HIV test results without a chain of custody." *Id.* at 249, 565 S.E.2d at 297.

In addressing the issue, the supreme court noted that our courts consistently require a chain of custody in criminal prosecutions to prove the samples analyzed are, in fact, those of the defendant. *Id.* at 248, 565 S.E.2d at 296. However, it further differentiated HIV test results from those blood and urine samples taken at the time of an accident or other crime such as in driving under the influence (DUI) cases. *Id.* *270. Specifically, the court noted that DUI cases "involve time-sensitive tests taken at the time of an arrest or an accident that cannot be replicated outside of that time frame," as a defendant's blood alcohol level could not be retested at a later time with an accurate result, and thus such cases require a chain of custody. *Id.* at 248-49, 565 S.E.2d at 296. "HIV test results, on the other hand, can be confirmed or proved false by retesting at a later date, as HIV is a permanent condition, unlike the level of alcohol or drugs in the bloodstream." *Id.* at 249, 565 S.E.2d at 296. Based upon this distinction, the supreme court found the admission of HIV test results was not controlled by the line of cases dealing with drug and alcohol tests. *Id.*

It should be noted, however, that the supreme court's decision was also premised upon the fact that "[t]he trustworthiness of medical records is presumed, based on the fact that the test is relied on for diagnosis and treatment." *Id.* at 250, 565 S.E.2d at 297. The rationale for admitting laboratory test results as business records is that "if it is sufficiently trustworthy to be relied upon for medical treatment, it is sufficiently trustworthy to be admitted as a business record." *Id.* The court in *Ex parte DHEC* found this rationale persuasive and held Doe's HIV tests were admissible as business records, observing that the blood test was taken by DHEC personnel for the purpose of diagnosis and was relied upon for subsequent diagnosis, treatment, and counseling; that Doe **620 was not

tested by DHEC for purposes of litigation; and he was tested voluntarily before any charges were pending against him. *Id.*

However, the supreme court did not center its decision in *Ex parte DHEC* solely on the basis that Doe's HIV blood test was taken for the purpose of diagnosis and treatment and that Doe was not tested by DHEC for the purposes of litigation and charges were not pending at the time of the test. Rather, the court immediately thereafter stated as follows:

Further, Doe could be retested at any time to refute the evidence presented against him at trial. If Doe tested negative at the time of trial, the DHEC test results could be ruled out as a false positive as HIV is a permanent condition. A person charged with DUI based on a blood alcohol test taken at the time of his arrest has no such protection *271 and, therefore, needs the indicia of reliability provided by a chain of custody.

Id.

Based upon the supreme court's opinion in *Ex parte DHEC*, it is not clear whether that court intended to provide that no chain of custody is necessary for the submission of the results of HIV testing performed by DHEC, as HIV tests are distinguishable from drug and alcohol prosecution tests since HIV is a permanent condition and the test could be replicated, or whether the decision would also require the test be taken, not for purposes of litigation, but for medical diagnosis before any charges are pending in order for the HIV test results to be admissible without a chain of custody. However, we find it unnecessary to make that determination in the case at hand, as we hold that any error in the admission of the HIV test results was harmless in light of the overwhelming evidence of Chisholm's guilt.

"Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Sims*, 387 S.C. 557, 567, 694 S.E.2d 9, 14 (2010) (quoting *State v. Pagan*, 369

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S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). "When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, [the appellate court] will not set aside a conviction for insubstantial errors not affecting the result." *Baccus*, 367 S.C. at 55, 625 S.E.2d at 223.

[7] Here, the State presented evidence from Victim that at the time in question, Chisholm pulled Victim's shorts and underwear down to her knees, placed her in the bed, turned her over on her stomach, got on her and put his penis inside her "butt." Mother testified as an eyewitness, stating she discovered Chisholm in her bed underneath the covers, that Chisholm failed to respond when she asked where Victim was, she then noticed Victim's hair bow sticking out from under the top of the covers, and when she pulled the covers back, she observed Victim face down in the bed, with her underwear and shorts pulled down and "Chisholm's penis hanging down between his legs and inside [her] child's butt." Finally, forensic evidence revealed a vaginal swab collected on the day of the incident from Victim tested positive for blood, and Victim's *272 underwear, also collected the day of the incident, contained a stain which tests proved to contain a mixture of Victim's blood and Chisholm's semen. Accordingly, admission of the HIV test result, even if erroneous, was harmless. See *State v. Herring*, 387 S.C. 201, 215-16, 692 S.E.2d 490, 497 (2009) (holding admission of evidence seized in search, even if erroneous, was harmless where there was overwhelming evidence of guilt); *State v. Tench*, 353 S.C. 531, 537, 579 S.E.2d 314, 317 (2003) (finding any error in admission of the seized evidence harmless beyond a reasonable doubt given the abundant evidence of appellant's guilt); *State v. Woods*, 376 S.C. 125, 129, 654 S.E.2d 867, 869 (Ct.App.2007) (finding error in admission of defendant's hair, blood, and saliva samples obtained through an order that was defective on its face was harmless in light of overwhelming evidence of defendant's guilt).

III. Failure to Exclude HIV Test Results Based

on Rule 403, SCRE

At trial, Chisholm requested the trial court rule on whether the unfair prejudice outweighed the probative value of the HIV test **621 results. In considering Rule 403, SCRE, the trial court determined the HIV test results were relevant, and would not unduly prejudice Chisholm. On appeal, Chisholm argues the State did not need the HIV test results to prove CSC with a minor, and he was not charged with knowingly giving Victim HIV. He contends the trial court's ruling in this regard denied him a fair trial and was prejudicial, asserting "[t]here was no way for the jury not to take into consideration the HIV test results in reaching their verdict." The State counters that the HIV test results were probative evidence of the sexual battery committed on Victim.

[8] Generally, all relevant evidence is admissible. Rule 402, SCRE. However, relevant evidence must be excluded if the danger of unfair prejudice substantially outweighs the probative value of the evidence. Rule 403, SCRE; *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *Wiles*, 383 S.C. at 158, 679 S.E.2d at 176. An appellate court reviews Rule 403, SCRE balancing determinations pursuant to the abuse of discretion standard, and *273 gives great deference to the trial court's decision. *State v. Myers*, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004).

[9] Here, as noted by the State, Chisholm sought to establish there was no battery upon Victim, maintaining there was no evidence of injury or trauma to show penetration. The State sought to counter that position by presenting Dr. Pritchard's testimony that transmission of HIV during sexual contact required an exchange of body fluids, and blood or semen could mix as a result of a "very small micro trauma," thereby showing the HIV test results were probative evidence of the sexual battery committed on Victim. Therefore, the evidence of the HIV test results was probative of whether Chisholm committed a sexual battery upon Victim.

Further, giving deference to the trial court's decision, we do not believe there was an undue tendency of the HIV test results evidence to suggest a decision on an improper basis which substantially outweighed the probative value of the evidence. At any rate, as previously discussed, given the overwhelming evidence, including the testimony of Victim, the eyewitness testimony of Mother, and the DNA evidence showing a mixture of Victim's blood and Chisholm's semen found in Victim's underwear following the incident of Chisholm's guilt, any error in the admission of the HIV test results would be harmless. Accordingly, we find no reversible error.

IV. Motion for Mistrial Based on Improper Hearsay

Finally, Chisholm argues the trial court erred in overruling his motion for a mistrial after Dr. Pritchard testified Victim told her appellant "did something bad," as this testimony was improper hearsay. He contends this improper corroboration evidence cannot be harmless, because it is the cumulative effect which enhances the devastating impact of improper corroboration.

During direct examination of Dr. Pritchard, when the solicitor asked about the history given to her, the doctor stated she asked the patient about why she was brought there, and Victim told Dr. Pritchard "she and her brother had gotten cold and they got underneath the covers and then Rome did something bad." The solicitor immediately interjected in an apparent attempt to stop the testimony, and defense counsel *274 requested he be heard on a matter of law. The trial court took up the matter outside the jury's presence, at which time defense counsel maintained it was improper for Dr. Pritchard to testify as to identity, which went beyond the nonhearsay exception of time and place, and asserted "Rome" was an obvious nickname for Jerome. Although acknowledging the testimony was improper, the trial court found other witnesses had consistently identified Chisholm as the perpetrator such that the comment was cumulative and harmless. Noting the problem was caught quickly,

the trial court indicated a curative instruction might serve to highlight the improper testimony, but stated he would give such instruction if requested. Defense counsel argued a curative instruction would not cure the harm, and asked instead for a mistrial. The trial court found the full name of Chisholm was not given, both the solicitor and defense counsel stopped the testimony, and that Victim**622 and Mother both identified Chisholm as the perpetrator such that the comment was harmless. It therefore found no basis for a mistrial.

[10] The decision to grant or deny a motion for a mistrial is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. *State v. Council*, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). A mistrial should be granted only when absolutely necessary. *Id.* at 13, 515 S.E.2d at 514. "In order to receive a mistrial, the defendant must show both error and resulting prejudice." *Id.* "The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way." *Herring*, 387 S.C. at 216, 692 S.E.2d at 498.

[11] Here, it is questionable whether the jury even understood that the name "Romé" referred to Chisholm, as there is nothing in the record before us to indicate that Chisholm ever used the name "Rome" or that the witnesses knew him by that name. Furthermore, the comment was fleeting, with both the solicitor and defense counsel immediately stopping the testimony from going any further. Additionally, even if the jury understood the name "Rome" to refer to Chisholm, the properly admitted testimony of both Victim and Mother identified *275 Chisholm as the perpetrator such that the comment would have been harmless. *See State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (noting the admission of improper hearsay evidence is harmless where the evidence is merely cumulative to other evidence). Accordingly, we find no abuse of discretion in the trial court's denial

717 S.E.2d 614
395 S.C. 259, 717 S.E.2d 614
(Cite as: 395 S.C. 259, 717 S.E.2d 614)

Page 11

of Chisholm's motion for a mistrial. We further find, as previously stated, there is overwhelming evidence of Chisholm's guilt such that any error in the brief comment regarding "Rome" would be harmless. *See id.* (holding, where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed).

CONCLUSION

For the foregoing reasons, Chisholm's conviction is

AFFIRMED.

PIEPER and LOCKEMY, JJ., concur.

S.C.App., 2011.
State v. Chisholm
395 S.C. 259, 717 S.E.2d 614

END OF DOCUMENT

FORM 5

FILED CO. CLERK
8TH JUDICIAL CIRCUIT
GREENWOOD, SC
2012 JAN 28 PM 3:18

STATE OF SOUTH CAROLINA)
)
COUNTY OF Greenwood)
)
Jerome Chisholm 335354)
Full name and prison number (if any) of Applicant.)
)
v.)
)
State of South Carolina)
)

IN THE COURT OF COMMON PLEAS

12CP240

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Broad River
2. Name and location of Court which imposed sentence Greenwood County Court house
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) GA 05-00000484
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 6/20/09
 - (b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

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

yes _____

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

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

i. The State of South Carolina Court of Appeals

ii. _____

iii. _____

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

i. Affirmed

ii. _____

iii. _____

(c) the date of each such result:

i. 10/26/11

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

(a) _____

(b) _____

(c) _____

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

- (a) Ineffective Assistance of Counsel
- (b) Due process Violation
- (c) 6th E14 amendment Violation

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

- (a) Defendants counsel did not offer a defense.
- (b) Time frame between arrest and trial
- (c) _____

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

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

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

- (a) the specific nature thereof:
 - i. direct appeal
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. South Carolina Court of appeals
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. Affirmed
 - ii. _____
 - iii. _____

iv. _____

(d) the date of each such disposition:

i. 10/26/11 _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

NO _____

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

(a) _____

(b) _____

(c) _____

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

- (a) your arraignment and plea? yes
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? no

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

- (a) the name and address of each attorney who represented you:
 - i. W. Alexander Buergey
 - ii. Charles Grose
 - iii. ~~Charles Grose~~ Robert Parhak
- (b) the proceedings at which each such attorney represented you:
 - i. Arraignment
 - ii. Trial
 - iii. Appeal

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

~~to vacate the conviction~~ Vacated & Remanded

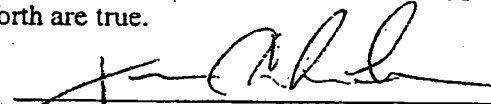
20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
)
County of Greenwood)

VERIFICATION

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



SWORN to and subscribed before me this 18th
day of January, 2012

Susan H. Frye (L.S.)
Notary Public

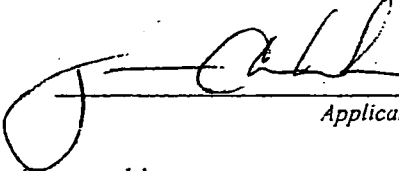
My Commission Expires
March 5, 2018

My Commission Expires: _____

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

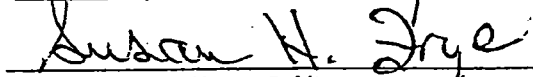
I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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



 Applicant

SWORN or affirmed to and subscribed before me this
18th day of January, 2012



 Notary Public

My Commission Expires
March 5, 2018

My Commission Expires: _____

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Jerome Chisholm, #335354,

2012-CP-24-0092

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

The Respondent, making its Return to the application for post conviction relief (PCR) filed January 26, 2012, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenwood County Clerk of Court. The Applicant was indicted at the December 2005 term of the Greenwood County Grand Jury for Criminal Sexual Conduct with a Minor, 1st degree (2005-GS-24-1386). The Applicant was represented by Charles Grose, Esquire and Janna Nelson, Esquire. On June 15-18, 2009, the Applicant underwent trial by jury and was convicted of Criminal Sexual Conduct with a Minor, 1st degree. The Honorable Eugene C. Griffith, Jr. sentenced the Applicant to imprisonment for thirty (30) years.

A Notice of Appeal was timely filed on behalf of the Applicant and an appeal was perfected. The South Carolina Court of Appeals by written opinion affirmed the Applicant's

conviction and sentence. State v. Chisholm, Op. No. 4899 (Ct. App. filed on October 26, 2011). The Remittitur was sent on November 15, 2011.

Attached herewith and incorporated herein are the records of the Greenwood County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

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

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRPC.

III.

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

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

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent

requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant alleges "Time frame between arrest and trial" as a ground for PCR. The Respondent submits that this allegation should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160 (2003). An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by the Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. The allegations presented by Applicant raises direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264

S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised these issues at trial or on appeal. His failure to do so has waived these allegations as grounds for relief. Therefore, the Court should summarily dismiss this application for post-conviction relief.

V.

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

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held on Applicant's allegations.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549

Columbia, SC 29211

May 1, 2012.

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

IN THE COURT OF COMMON PLEAS

2012-CP-24-0092

JEROME CHISHOLM,
Applicant,

vs

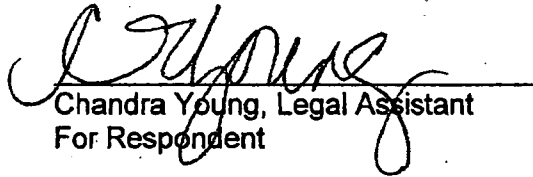
AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,
Respondent.

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

Bradley W. Knott
PO Box 3208
Greenwood, South Carolina 29648

DATED this 1st day of May 2012.



Chandra Young, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)	
)	COURT OF GENERAL SESSIONS
COUNTY OF GREENWOOD)	
Jerome Chisholm,)	
)	
Plaintiff,)	
)	
vs.)	No. 13-CP-24-1639
)	
State of South Carolina,)	
)	
Defendant.)	

TRANSCRIPT OF HEARING

The within Hearing was held in the above-captioned case on November 29, 2012, before the Honorable R. Lawton McIntosh, Circuit Judge, attended by counsel, as follows:

APPEARANCES:

Bradley Knott, Esq.
(Information Not Provided)
Appearing for Applicant

J. Rutledge Johnson, Esq.
(Information Not Provided)
Appearing for State of South Carolina

Transcribed for Vivian Court, Circuit Court Reporter

DEBORAH GARRISON
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 901
Johns Island, South Carolina 29457
dGarrison@sccourts.org

1 J. RUTLEDGE JOHNSON: May it please
2 the Court?

3 THE COURT: Yes, sir.

4 J. RUTLEDGE JOHNSON: This is the case
5 of Jerome Chisholm versus the State of South
6 Carolina. It is case number 2012-CP-24-0092.

7 Mr. Chisholm was indicted the December
8 2005 term of the Greenwood County Grand Jury for
9 criminal sexual conduct with a minor, first
10 degree. He was represented by Charles Grose.

11 On June 15th through the 18th of 2009
12 he underwent trial by jury, pursuant to which he
13 was convicted of criminal sexual conduct with a
14 minor, first degree. The Honorable Eugene C.
15 Griffith, Jr. sentenced him to imprisonment for
16 thirty (30) years.

17 A notice of appeal was filed on his
18 behalf. The appeal was perfected. The South
19 Carolina Court of Appeals, by written Opinion,
20 affirmed his conviction and sentence.

21 Remittance was thereafter issued on November
22 15th, 2011.

23 He filed a timely PCR application on
24 January 26th, 2012. The State filed its
25 return May 1st, 2012. He is represented here

1 today by Mr. Bradley Knott.

2 THE COURT: Mr. Knott, good
3 morning.

4 BRADLEY KNOTT: Yes, sir, Your
5 Honor, good morning. I was sent five hundred
6 pages of a trial transcript, which I've
7 reviewed on Mr. Chisholm's behalf. I sent him
8 a letter -- I believe that it is dated
9 November 2nd, -- giving him my impressions on
10 that. We've had an opportunity to speak today.

11 He has asked me to request a
12 continuance on his behalf. He is currently
13 incarcerated at the Broad River location, has
14 just recently gained access to a computer,
15 WestLaw, things there at the law library in
16 prison. He feels like since he's researched
17 some issues that he wants to be able to amend
18 his petition to include. On that basis, he
19 has requested a continuance.

20 THE COURT: When did you get these
21 -- this disks that you reviewed?

22 BRADLEY KNOTT: I want to say that
23 I got it ---

24 THE COURT: Have you got it?

25 J. RUTLEDGE JOHNSON: No.

1 BRADLEY KNOTT: I've got -- your
2 return, like you said, was in May. I want to
3 say that it was in the early Fall.

4 J. RUTLEDGE JOHNSON: It should have
5 been with our return, or it may have been in
6 the Fall. I don't think I have the documenta-
7 tion of when we sent it to you.

8 BRADLEY KNOTT: It was not at the
9 same time as the return. I am not going to
10 tell the court that 'I just got it.' I've had
11 it for sixty to ninety days.

12 THE COURT: Do you feel like you've
13 had sufficient time to research the issues in
14 this case?

15 BRADLEY KNOTT: I do, Your Honor.
16 He brought up one additional issue that I
17 didn't feel like really went along with what
18 he's claimed in his application. I think his
19 main focus is that he's now got access to more
20 recent case law, by virtue of the computer
21 system, that he did with probably an
22 antiquated law library.

23 I've explained to him -- I think with
24 one of the other matters today that got
25 continued, that that would mean March. He has

1 expressed to me that he has no complaint with
2 that.

3 THE COURT: Well, my concern is
4 that you are the attorney on this matter.

5 BRADLEY KNOTT: Yes, sir. You
6 certainly have access to current/recent case
7 law.

8 BRADLEY KNOTT: Yes, sir.

9 THE COURT: I want to make sure
10 that you feel like you've had sufficient time
11 to review the matter and -- and come up with
12 any kind of claims that he may have that are
13 legitimately presented in the transcript.

14 BRADLEY KNOTT: Yes, sir.

15 THE COURT: But at the same time, I
16 am not inclined to continue it so that you can
17 go on a fishing expedition.

18 BRADLEY KNOTT: I understand. I
19 understand, Your Honor.

20 THE COURT: So from what you have
21 observed or read, do you see that there is a
22 legitimate need to continue this case?

23 BRADLEY KNOTT: From my review of
24 the transcript, I can't say that there is
25 anything that I would have amended his

1 petition to include.

2 THE COURT: I know that you are
3 answering me as an officer of the Court and
4 I ---

5 BRADLEY KNOTT: Yes, sir.

6 THE COURT: I hate to put you on
7 the spot, but I'm going to deny your request
8 for a continuance. We will go forward with
9 the hearing this morning.

10 BRADLEY KNOTT: Yes, sir.

11 THE COURT: Thank you.

12 BRADLEY KNOTT: In that event, we
13 would call Jerome Chisholm.

14 THE COURT: Come around, please,
15 sir.

16 (WITNESS TAKES STAND)

17 JEROME CHISHOLM, being duly sworn to
18 tell the truth, the whole truth and nothing
19 but the truth, testified, as follows:

20 DIRECT EXAMINATION

21 BY BRADLEY KNOTT:

22 Q. Mr. Chisholm, if you would, state your
23 full name.

24 A. Jerome Chisholm.

25 Q. And you've been present in the courtroom

1 while the Attorney General outlined the facts
2 of your trial and sentence; is that correct?

3 A. Yes.

4 Q. You were sentenced to thirty years?

5 A. Yes.

6 Q. On the charge of criminal sexual conduct
7 with a minor?

8 A. Yes.

9 Q. Now, your application for post-conviction
10 relief outlines a couple of issues which I
11 want to give you the opportunity to speak to.

12 The initial statement you made here
13 regarding ineffective assistance of counsel
14 is that your counsel, Mr. Grose, did not offer
15 a defense in this case. Would you tell the
16 Court what you mean by that?

17 A. He -- uh, he -- he had no witnesses. Or
18 he didn't, uh, -- we didn't discuss any
19 specific offense and I was ---

20 THE COURT: What is the last thing
21 that you said? That you didn't discuss what?

22 APPLICANT: Any specific defense.

23 THE COURT: Excuse me.

24 BRADLEY KNOTT: That's all right.

25 DIRECT EXAMINATION CONTINUED

1 BY BRADLEY KNOTT:

2 Q. Go ahead.

3 A. And I was unsure of his -- you know, what
4 he was going to do as far as a defense. I was
5 surprised when he didn't offer any.

6 Q. All right. Were you under the impression
7 that witnesses were going to be called on your
8 behalf?

9 A. Yes.

10 Q. What gave you that feeling or that
11 indication that that was going to happen?
12 Had you discussed that with Mr. ---

13 A. Well, I didn't have a lot of discussions
14 with him prior to the trial. But, uh, -- with
15 respect to the evidence that the State brought
16 up, I -- I would have expected him to call
17 expert witnesses to counter the statements by
18 the State's witnesses.

19 Q. All right. Do you recall, was there any
20 discussion about that with Mr. Grose?

21 A. Not that I recall.

22 Q. About retaining an expert witness?

23 A. No, there was no discussion about it.

24 Q. Did you provide him with the names of any
25 of what we would call lay witnesses, that you

1 wish -- that you believe would have helped in
2 your defense?

3 A. Well, in fact, -- well, I asked him about
4 the State's witnesses, as far as taking the
5 depositions from State's witnesses. Which at
6 that time he told me that he couldn't do, which
7 I thought was strange. And, well, -- and that
8 came up when there were statements that were
9 untrue, that were said by the State's
10 witnesses.

11 Q. Did you ask him at any time to depose any
12 of these witnesses?

13 A. Yes.

14 Q. Okay. And how did he respond to that?

15 A. He said that he couldn't.

16 Q. That he could not depose them?

17 A. Right.

18 Q. All right. Did you ask him to interview
19 those witnesses?

20 A. I thought that was one and the same thing.

21 Q. The deposition versus the interview?

22 A. Right.

23 Q. All right. A deposition is typically a
24 more formal sit-down affair under oath?

25 A. Right, (affirmative nod).

1 Q. But, regardless, his indication to you was
2 that that was not something that he could do?

3 A. Yes.

4 Q. All right. Now, what about your ability
5 to testify. Did the two of you discuss the
6 pros and cons of you taking the witness stand
7 and testifying in your defense?

8 A. Yes. He told me that he thought that I
9 shouldn't testify, so I didn't.

10 Q. All right. And you understand that part
11 of this trial transcript that we've spoken
12 about includes your knowing waiver to testify?

13 A. Right.

14 Q. Do you have any complaints about that
15 discussion that you had with Mr. Grose, today?

16 A. As far as that went, no.

17 Q. Okay. Now, the other issue that you
18 raised in your application has to do -- and I
19 will just state it from your application,
20 (reading): "...the timeframe between arrest
21 and trial." Tell the Court what you're
22 referring to there.

23 A. Okay. I -- I found out that I have a
24 right to a speedy trial. But I had -- I wasn't
25 told, uh, about that, uh, throughout that

1 entire process. And I spent three and a half
2 years in the county jail awaiting trial. In
3 that three years, two and a half years into
4 this they come up with some additional
5 evidence which would not have been in the
6 trial process had I had the right, or the
7 knowledge of the right, to a speedy trial.

8 I would go to the case of *Montayo v. Louisiana*
9 where it states that counsel -- I mean, that
10 the defense has the right to effective counsel
11 throughout the entire legal process. I feel
12 like I didn't have that right -- that counsel.

13 Q. Throughout the process?

14 A. Exactly.

15 Q. Did you and Mr. Grose, or anyone from Mr.
16 Grose's office, discuss applying for a speedy
17 trial?

18 A. No.

19 Q. Okay.

20 A. And one thing -- before Mr. Grose took
21 over the case, I had a different attorney
22 before him. He never explained it. I'd never
23 seen him except for one time, the other guy.

24 Q. He was likewise in the public defender's
25 office?

1 A. Yes, sir.

2 Q. Okay. So that as not discussed?

3 A. Not at all.

4 Q. Do you recall any discussions with Mr.
5 Grose about the disadvantages of not having a
6 speedy trial?

7 A. No, we didn't discuss speedy trial at all.

8 Q. At all?

9 A. No.

10 Q. Okay. And your testimony is that but for
11 the length of time prior to your trial some
12 evidence that eventually came out would not
13 have come out?

14 A. Exactly.

15 Q. Prior to you actually having a trial?

16 A. Yes.

17 Q. All right. Now, you had raised an issue
18 with me this morning when we consulted about
19 the make up of your jury.

20 A. Yes.

21 Q. You are aware that your trial transcript
22 goes into great detail about Mr. Grose
23 challenging the make up of your jury?

24 A. Yes.

25 Q. And the way that the jury was struck?

1 A. Yes.

2 Q. What is your complaint about the jury
3 today?

4 A. Well, I have one complaint, major
5 complaint, as far as the jury make up. One
6 specific juror was a relative of my roommate
7 that was in the, uh, uh, on the jury panel.

8 J. RUTLEDGE JOHNSON: Objection, Your
9 Honor. This is a direct appeal issue. You'll see
10 in the transcript that Mr. Grose challenged this,
11 so this issue has already been dealt with.

12 APPLICANT: No, that's not the issue.

13 THE COURT: No, no. No, sir. Let us
14 argue that. I missed what he said last, Mr.
15 Knott. He said that he had a roommate that was on
16 the ---

17 BRADLEY KNOTT: I believe that while
18 he was at the detention center a fellow inmate
19 actually had a relative on the jury, that
20 eventually got struck, in Mr. Chisholm's trial.

21 APPLICANT: They didn't get struck.

22 THE COURT: I will listen to it. I
23 note your objection. Go ahead.

24 DIRECT EXAMINATION CONTINUED

25 BY BRADLEY KNOTT:

1 Q. So to pick up from what I just stated,
2 there eventually ended up a relative ---

3 A. Yes, a relative.

4 Q. --- of your roommate in the detention
5 center on your jury. Is that correct?

6 A. That's correct.

7 Q. All right. And what, if any, conver-
8 sations did you have with this roommate
9 regarding this juror?

10 A. Well, he was telling me that he ---

11 J. RUTLEDGE JOHNSON: Objection to
12 anything that the roommate said.

13 THE COURT: Sustained.

14 BRADLEY KNOTT: All right.

15 DIRECT EXAMINATION CONTINUED

16 BY BRADLEY KNOTT:

17 Q. What is your complaint about this relative of
18 your roommate being on this jury?

19 A. well, because I -- I explained that to Mr.,
20 Grose and he had took it to the court. I believe
21 that they discussed this in court, behind closed
22 doors. But the juror was still on the panel. Not
23 only that, I know that this was done, through my
24 roommate as well, because when I come back from
25 court, they had moved him out. He'd said

1 something for ---

2 Q. Don't get into anything that he said.

3 A. Okay.

4 Q. How do you believe that that prejudiced you
5 in terms of the make up of the jury?

6 A. Well, because of the fact that the fact that
7 the judge would have had to speak with this juror.

8 She would have been more apt to go along with the
9 rest of the jury regardless of the evidence.

10 J. RUTLEDGE JOHNSON: Speculation.

11 THE COURT: Overruled. Go ahead.

12 DIRECT EXAMINATION CONTINUED

13 BY BRADLEY KNOTT:

14 Q. Go ahead. Finish your answer.

15 A. Right. She would have been more inclined to
16 follow the rest of the jurors rather than listen
17 to the evidence, what was going on regardless of,
18 uh, especially the evidence there.

19 Q. Do you believe that Mr. Grose made an effort
20 to get her removed from your jury panel?

21 A. Well, I -- I have no idea of what was
22 discussed behind closed doors.

23 Q. All right.

24 A. I wasn't ---

25 Q. Did you discuss it with Mr. ---

1 A. I -- yeah. I spoke to him about it,
2 (affirmative nod).

3 Q. The end result was that she remained on your
4 jury?

5 A. Yeah. Yes.

6 Q. Is there anything related to the complaints
7 that you made in your application that you want to
8 make clear or make known to the court today?

9 A. You -- well, as far as, uh, -- I explained
10 the speedy trial, the right to effective counsel
11 throughout the entire legal process. And, uh, --
12 (pause) -- the failure to conduct pretrial
13 discoveries (sic), to have witness statements
14 before the trial.

15 J. RUTLEDGE JOHNSON: Your Honor, if
16 I may, this is not in the application. We would
17 object to this coming in. This may be late --
18 also, the speedy trial issue was not in his
19 allegations in his original application, so we
20 would ask to strike that testimony?

21 THE COURT: Mr. Knott?

22 BRADLEY KNOTT: Your Honor, I just
23 felt that fell under the overall umbrella of
24 ineffective assistance of counsel.

25 THE COURT: I am not saying that I

1 will consider it but I will allow it.

2 DIRECT EXAMINATION CONTINUED

3 BY BRADLEY KNOTT:

4 Q. Go ahead. You were making your list there,
5 to make sure that you included everything.

6 A. Okay. Well, he didn't -- we went over the
7 jury-tainted cases, the juries, uh, ---

8 Q. Let me encapsulate it for you.

9 A. Okay.

10 Q. You made your complaint about not being
11 advised about your right to a speedy trial.

12 A. Right.

13 Q. You've made reference to how that affected
14 evidence that came in your pretrial incarceration?

15 A. Right.

16 Q. You've referenced the fact that no witnesses
17 were called in your defense.

18 A. Right.

19 Q. That no expert witness was retrained to
20 combat the testimony of the expert witnesses
21 produced by the State.

22 A. Correct.

23 Q. The fact that Mr. Grose advised you that he
24 was not entitled to interview the State's

25 witnesses, or depose them.

1 A. Right.

2 Q. Then the make up of the jury issue.

3 A. Right.

4 Q. Is that everything?

5 A. I believe so.

6 BRADLEY KNOTT: That's all the
7 questions that I have, Your Honor.

8 THE COURT: Cross examination?

9 J. RUTLEDGE JOHNSON: Just briefly.

10 CROSS EXAMINATION

11 BY J. RUTLEDGE JOHNSON:

12 Q. Mr. Chisholm, one of your allegations is that
13 Mr. Grose failed to call expert witnesses on your
14 behalf at trial; isn't that correct?

15 A. Yes, sir.

16 Q. Did you bring any expert witnesses here with
17 you today?

18 A. No.

19 Q. And you said that you provided Mr. Grose with
20 lay witnesses that he could call on your behalf?

21 A. Have I provided him with lay witnesses?

22 Q. Provided names of lay witnesses.

23 A. Well, we didn't discuss a defense, so how
24 consider I provide witnesses if that wasn't
25 discussed?

1 Q. Okay, I am just asking. Did you or did you
2 note provide him with any names that could have
3 been people, you know, of people who could have
4 been called on your behalf?

5 A. Well, the State's witnesses were the same
6 witnesses, one and the same witnesses that could
7 have been called in my defense.

8 Q. But those State witnesses testified at trial,
9 didn't they?

10 A. Right but he didn't depose them. Without
11 deposing them, you wouldn't have their statements
12 before and know what they are going to say at the
13 trial. So we had -- I -- the first time that they
14 testified, that's the first time that we are
15 hearing this evidence.

16 Q. Mr. Chisholm, wasn't there statements given
17 to an Officer Peppers that were introduced at
18 trial?

19 A. (No response).

20 Q. From, I believe a Miss Berry?

21 A. Right.

22 Q. And a Miss [REDACTED]?

23 A. Right.

24 Q. They were statements that they gave to
25 Officer Peppers that were introduced at trial,

1 weren't they?

2 A. I believe so. I would imagine, right.

3 Q. And Mr. Grose actually cross-examined them on
4 the statements, did he not?

5 A. On the statement? I believe that he didn't.

6 Q. Okay. So the victim in the -- the alleged
7 victim in this case testified against you, isn't
8 that right?

9 A. Yes.

10 Q. Them other of the victim testified that she
11 saw you in the bedroom with the alleged victim?

12 A. Yes.

13 Q. There is an expert that comes in, that says
14 that the DNA matches you.

15 A. Yes.

16 Q. Isn't that right?

17 A. Yes.

18 Q. And that the blood on the panties mixed the
19 victim. That was put in evidence at the trial.

20 A. Yes.

21 Q. And there is also testimony about being HIV
22 positive.

23 A. Yes.

24 Q. Is that correct? You were HIV positive and
25 the victim thereafter was HIV positive.

1 A. Yes.

2 Q. Okay. Mr. Grose actually objected to all of
3 that.

4 A. Yes.

5 Q. Mr. Grose objected to the make up of the
6 jury. He actually filed, I believe, a *Batson*
7 Motion and then they redrew the jury, did they
8 not?

9 A. No. They didn't redraw the jury, sir.

10 Q. So on Page 86 to 93 of your transcript, you
11 are saying that they didn't redraw the jury
12 pursuant to Mr. Grose's challenges?

13 A. (No verbal response)

14 Q. Would you agree with me that that happened?

15 A. They didn't redraw the jury. They called in
16 the prospective jurors and they made up the jury
17 according to that. They didn't throw out the
18 panel. Or -- either I'm not understanding your
19 question correctly.

20 Q. I think you are. The judge threw out the
21 first panel, then they reselected the second
22 panel.

23 Q. Pursuant to Mr. Grose's challenges; am I not
24 correct?

25 A. I am not sure. I don't know ---

1 BRADLEY KNOTT: Your Honor, ---

2 THE COURT: Okay.

3 CROSS EXAMINATION CONTINUED.

4 BY J. RUTLEDGE JOHNSON:

5 Q. And then in the second selection he tried to
6 challenge the -- he used his strikes and the court
7 allowed that jury to sit on the jury. Right?

8 A. Right.

9 Q. Okay.

10 J. RUTLEDGE JOHNSON: Court's
11 indulgence, Your Honor.

12 THE COURT: Yes, sir.

13 J. RUTLEDGE JOHNSON: That's all that
14 I have for this witness.

15 THE COURT: Thank you. Any redirect?

16 BRADLEY KNOTT: No questions, Your
17 Honor.

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

19 (WITNESS STEPS DOWN)

20 BRADLEY KNOTT: That is the
21 Applicant's case.

22 THE COURT: Did I hear you say,
23 Mr. Knott, that's your case?

24 BRADLEY KNOTT: Yes, sir.

25 THE COURT: Would you call your first

1 witness, Mr. Johnson?

2 J. RUTLEDGE JOHNSON: Yes, sir. We
3 call Mr. Grose to the stand, please.

4 (WITNESS TAKES STAND)

5 CHARLES GROSE, being duly sworn to tell the
6 truth, the whole truth and nothing but the truth,
7 testified, as follows:

8 DIRECT EXAMINATION

9 BY J. RUTLEDGE JOHNSON:

10 Q. Good morning, Mr. Grose.

11 A. Good morning.

12 Q. How long have you been practicing criminal
13 law?

14 A. I've been exclusively practicing criminal law
15 since 1996.

16 Q. And what was your capacity in this case?

17 A. I was the lawyer for Mr. Chisholm.

18 Q. Were you the head public defender at this
19 time?

20 A. I was. I believe that this trial was after
21 the circuit system.

22 Q. And do you remember when you became involved
23 in this case?

24 A. Yes, I probably -- well, not "probably." The
25 case was originally assigned to Mr. Burdine

1 (phonetic) who worked in my office up until the
2 Spring of 2006. So I would have had some
3 involvement as the head of the office, talking
4 with Mr. Burdine. I remember that I knew about
5 the case. But when Mr. Burdine left in 2006, I
6 took over the case.

7 Q. And in your representation, did you have a
8 chance to meet with Mr. Chisholm?

9 A. I did.

10 Q. About how many times did you meet with him?

11 A. I don't know. There would have been a number
12 of meetings because of how long the case was
13 pending before it went to trial. There were
14 probably periods of inactivity and then periods
15 when there were things going on that we would need
16 to talk about.

17 Q. I guess going right to his allegations, did
18 you ever file a speedy trial Motion?

19 A. I don't recall doing that. This is probably
20 not the type of case that I would do that in
21 either.

22 Q. Why is that?

23 A. This was a case that I think that we were
24 very much hoping, or at least I was, and I think
25 Mr. Chisholm as well, was very much open to avoid

1 having to go to trial because of the, uh, -- one,
2 partly the nature of the allegations but, uh, the
3 nature of the evidence that they had against Mr.
4 Chisholm. There was, uh, substantial efforts on
5 my part to try to reach some sort of negotiation
6 for a plea situation, but that never materialized.

7 Q. And the decision to hopefully avoid trial and
8 not file a speedy trial Motion, was that based on
9 your experience as a criminal attorney?

10 A. Did Mr. Chisholm ever provide you with the
11 names of lay witnesses in this case?

12 A. I don't remember. You know, he testified
13 earlier, talking about some of the same people
14 that were on the State's witness list. I know
15 that we talked about those people and some of the
16 people, you know, that were involved in, you know,
17 his life. As far as witnesses to call at trial
18 that weren't called, I don't have any recollection
19 of him giving me that information.

20 Q. Would you have been able to interview these
21 witnesses, namely the alleged victim and the
22 victim's mother?

23 A. I don't think that I did interview them.
24 That was -- I would not have wanted to interview
25 the victim in this case, because of how young she

1 was. I am not certain that I would have gotten
2 access to her, or not. I also think the mother in
3 the case was very averse to us. I didn't
4 interview her. But, you know, I had information
5 about her statements and her involvement. I mean,
6 it was no surprise what -- and there may have been
7 things that came out at trial that weren't in the
8 statements at all but there was no surprise as to
9 what the evidence was or as to what these people
10 would be saying.

11 Q. But you were able, at trial, to thoroughly
12 cross examine the alleged victim? I know it's
13 tough to cross examine a child, especially in
14 these type situations. But the mother, as well?

15 A. You know, I don't remember much about the
16 cross examination of the child. That would be in
17 the record. I do remember pretty thoroughly cross
18 examining the mother, trying to establish some
19 sort of bias on her part.

20 Q. Is there a reason that you didn't call the
21 witnesses in this case?

22 A. You know, I think that this was a case that
23 -- well, let me back up for a second. There was
24 several pretty strong pieces of evidence against
25 Mr. Chisholm. The strategy was to try to

1 challenge every one of those, if possible;
2 hopefully to suppress some of it, which we were
3 unsuccessful in doing. We were unsuccessful in
4 suppressing it, having these issues for appeal.

5 Of course the appeal was unsuccessful. And, you
6 know, I think that given those circumstances, the
7 fact that we didn't have a whole lot that we could
8 add that would necessarily counter some of that,
9 you know, it was a case that I wanted to try to
10 take advantage of having the final argument in if
11 at all possible.

12 Q. So wanting to have the final argument, was
13 that based on your professional judgment?

14 A. Yes, and the nature of this case. My
15 analysis is different in different cases.

16 Q. I believe that Mr. Holloway -- excuse me, I
17 mean Mr. Chisholm -- that Mr. Chisholm testified
18 that there was a discussion about whether or not
19 he should testify?

20 A. Yes, there would have been.

21 Q. And he said that he felt that you encouraged
22 him not to.

23 A. (No verbal response).

24 Q. Whose decision is it to testify in a case?

25 A. It's his decision. I typically make my

1 recommendation to the client, though.

2 Q. He also alleges that there was this make up
3 of the jury. Can you tell the court a little bit
4 about that issue and what your challenges were
5 based off of?

6 A. You know, I didn't realize that there were
7 going to be any jury issues before I came here
8 today, so I haven't reviewed those. But my
9 recollection is that -- is that this case was
10 tried in the summer, when we would have had a lot
11 of teachers that were transferred in because
12 they'd claimed their -- not exemption but the, uh,
13 right to be deferred in prior terms of court
14 throughout the year. Being a small county, the
15 jury pools are usually pretty small, we had a
16 disproportionate number of teachers; which it was
17 not representative of the community, it would have
18 been a very narrow segment of the community.
19 Based on their training and their requirements to
20 be reporters of sexual abuse, that might have a
21 bias built into their service -- a legitimate
22 bias, but nonetheless one that was there. A bias
23 built into their service that would have affected
24 our, you know, ability to strike a jury out of
25 that. I recall making that Motion and not really

1 getting anywhere with that. I recall -- I think
2 that there was a *Batson* Motion, that we did
3 restrike the jury. And I think by restriking
4 them that -- my recollection was that the second
5 jury that we struck had less teachers that were
6 actually selected on the panel than -- not just
7 teachers, but people affiliated with schools --
8 that were set on the panel than were on the first
9 jury.

10 Now, this issue about the relative or the
11 roommate, I am drawing a blank on that.
12 Apparently that's in the transcript but I don't
13 have any recollection of that.

14 Q. And if you had found out that information,
15 would you have moved to strike that individual?

16 A. I would think so. I mean -- like I said,
17 apparently it was something about that in the
18 transcript but I don't have any recollection of
19 it.

20 Well -- and assuming that the discussions
21 were that there was a reason to strike that
22 person. Sometimes -- I could see that going
23 either way. I don't remember what the particular
24 -- I mean, it sounds like it was somebody that he
25 wanted struck. If that was the information that

1 we had.

2 J. RUTLEDGE JOHNSON: That's all that

3 I have at this time.

4 THE COURT: Any redirect? Excuse me.

5 Cross?

6 BRADLEY KNOTT: Yes, sir.

7 CROSS EXAMINATION

8 BY BRADLEY KNOTT:

9 Q. Mr. Grose, is it customary for you to discuss
10 with your client the pros and cons of this speedy
11 trial Motion versus training to string the case
12 out as long as you can?

13 A. That would -- my answer would be to that that
14 would depend upon the circumstances.

15 Q. Okay. Do you have any recollection of
16 whether or not y'all discussed those pros and
17 cons, you and Mr. Chisholm?

18 J. RUTLEDGE JOHNSON: Your Honor,
19 just to assert myself for the record, I object to
20 the speed trial issue.

21 THE COURT: I note your objection.

22 J. RUTLEDGE JOHNSON: Thank you.

23 THE WITNESS: You know, I don't know if
24 we had any discussions about the speedy trial
25 right, per se. But, you know, the discussions

1 that we would have had, that I recall us having,
2 had to do with wanting to try to work out this
3 case and the fact that, you know, our discussions
4 with the solicitor's office were not moving in the
5 direction to where it looked like that would
6 happen.

7 That there were also opportunities -- and
8 this was not so much just with the blessing but
9 also with the encouragement of the solicitor's
10 office to see if there were any judges that were
11 coming through that might impose a sentence that
12 Mr. Chisholm would live -- be able to live with,
13 be happy with. Based on the facts of this case,
14 that never came down. So, uh, we were trying to
15 use the time to see if there was a way that this
16 case could be resolved without trial and without
17 the type of sentence that Mr. Chisholm ultimately
18 had imposed upon him. That was completely
19 unsuccessful.

20 Q. Was his testimony accurate that -- just to
21 use the phrase of 'approximately two years' into
22 his pretrial incarceration that additional
23 evidence came out?

24 A. Basically that's accurate. I don't remember
25 the timeframe but what -- what happened was, you

1 know, that as time went on and we weren't
2 successful in working it out that the solicitor
3 started looking at his file and determined that
4 there had been a rape kit done at the hospital,
5 that had never been analyzed. So they had that
6 either sent to SLED or -- or it was already at
7 SLED, had SLED work on it. You know, that came
8 back -- and this was litigated throughout the
9 record. That came back and we were told that
10 there was a mixed sample of blood. We had a
11 hearing under the *Bokas* case and search warrant
12 statute but the judge -- I believe that it was
13 Judge Goldsmith -- ordered that Mr. Chisholm would
14 have to give up a DNA sample that could be
15 compared with that. Then the -- again, this
16 appeared later in the case. So when the analysis
17 came back, a semen sample had appeared that had
18 never been identified by anybody that ever looked
19 at the evidence before. All that was litigated.

20 Q. Do you have any opinion as to whether that
21 evidence would have come out had the trial been
22 held sooner than it was?

23 A. My -- you know, my gut says that if -- you
24 know, if we had -- say that we had filed a motion
25 for speedy trial earlier and that forced the

1 solicitor to look at his file sooner than he did,
2 then they would have discovered that and would
3 have been asking the court to have that evidence
4 examined. Now, this was a problem -- and this
5 happened in other cases where we would get pretty
6 far in the case and then find out that there was
7 something like this.

8 You know, it -- and -- if you were in a
9 speedy trial context, I think that you could argue
10 -- I don't know how persuasively, but you could
11 argue that there responsibility of that is on the
12 State and that the State shouldn't be able to
13 benefit from their negligence in not having, you
14 know, evidence that was collected to the beginning
15 of the case tested in a timely manner. My gut
16 tells me that based on the facts of this case and
17 the nature of the evidence, number one, that the
18 judge probably would have ruled with the State;
19 number two, even if the State didn't rule with the
20 State, still having the child's testimony,
21 eyewitness testimony and the HIV test results,
22 that -- (negative gesture).

23 Q.: With regard to the witness statements, you
24 had access to those?

25 A. I did. Yes.

1 Q. And you had ample opportunity to review those
2 reports?

3 A. I did.

4 Q. And with the understanding that sometimes
5 things come out on the witness stand that are not
6 in a witness' statement, did you feel that it
7 prejudiced Mr. Chisholm's case not to have deposed
8 those witnesses or to have in some way interviewed
9 them prior to the trial?

10 A. Well, as far as deposing witnesses are
11 concerned, there is no rule provided for deposing
12 witnesses in a criminal case. I have done it
13 myself and seen it done in extraordinary
14 circumstances but that is very much the minority
15 of the cases.

16 The -- you know, I'm pretty certain that I
17 didn't talk with the child's mother. You know,
18 sometimes I don't talk to -- a lot of times I
19 don't talk to witnesses that I know are going to
20 be adverse, when I know what their statements have
21 been to law enforcement. You're able to prepare a
22 cross examination based on that.

23 Mr. Chisholm, you know, I do remember some of
24 the stuff about the potential motive of the mother
25 that we tried to expose. That was based on, I

1 think, information that Mr. Chisholm gave me and
2 that sort of thing. So I feel like based on the
3 discovery and the facts of the case that I had
4 what I needed to prepare my cross examination of
5 those two witnesses.

6 Q. You had testified about informally consulting
7 with experts. What goes into your decision making
8 on whether you retain an expert witness in a case
9 such as Mr. Chisholm's?

10 A. Well, the -- the informal consultation in
11 this case was with a, uh, an infectious disease
12 expert. I don't know that this expert would have
13 been available to have been retained but it --
14 because of his schedule. But I was able to talk
15 to him and learn a little bit about the HIV aspect
16 of the case.

17 Q. Do you believe that he would have been
18 helpful if you'd been able to have him testify?

19 A. I think he would have been not helpful.

20 The reason why I think he would have been not
21 helpful is that the information that was described
22 -- and this came up in the transcript, so I can
23 tell you. The information that was, uh, provided
24 in the discovery about the incident was very
25 unlikely that the HIV would have been transmitted

1 in an incident like that alone, where it would
2 have showed up in the establish that was done.

3 So the infectious disease expert would have
4 created the impression that this was an ongoing
5 sexual abuse situation and that would not have
6 been helpful.

7 Q. And, finally, on this issue of the make up of
8 the jury -- and I understand, I heard your
9 testimony that you weren't anticipating questions
10 about that issue. Has the testimony jogged your
11 memory at all about this relative of the roommate?

12 A. No, it really hasn't. I mean, if I looked --
13 if I looked at the transcript, that part of it,
14 that might help me but I really have drawn a blank
15 on that.

16 Q. If the court had a conference with a juror,
17 would that be in the transcript?

18 A. It should be, yes.

19 THE COURT: Do you know if it is in
20 the transcript, Mr. Knott?

21 BRADLEY KNOTT: I don't remember
22 seeing it. Like I say, it's five hundred pages
23 worth. But I don't recall seeing it. There is a
24 lot of transcript testimony in there, arguments
25 that were made about redrawing the jury and things

1 of that nature, the teacher issue.

2 THE WITNESS: Let me say this. There
3 would not been -- if there were any closed door
4 kind of thing, that would not have been with a
5 juror. I mean, if we'd gone in chambers, that
6 would not have been with a juror. That would not
7 have been the typical practice. We're in
8 Greenwood for this trial, so the typical practice
9 is that if something comes up where the judge is
10 talking to the juror the judge usually comes down
11 off the bench to where the court reporter is and
12 the juror and the lawyers congregate there. So
13 the ordinary procedure would have that. Uh, would
14 have the court reporter recording that
15 conversation.

16 CROSS EXAMINATION CONTINUED

17 BY BRADLEY KNOTT:

18 Q. What if an issue like this comes out in the
19 midst of trial?

20 A. Uh, -- and, again, I'm talking generally if
21 something like this were to come out in the midst
22 of trial, there could be a discussion with the
23 lawyers in chambers. Typically the juror is going
24 to be brought into the courtroom with people
25 present and a discussion on the record. Were

1 there to be an exception to that, uh, typically
2 it's going to be talked about on the record. So
3 there would be a record one way or the other.

4 Q. It would be done ---

5 THE COURT: May I ask a question?
6 Mr. Grose, if there's an objection to a juror
7 being selected and if you think that there is a
8 ground for cause for the court to strike the
9 juror, if that is not raised before the swearing
10 in of the jury, is that not waived?

11 THE WITNESS: That is correct, it's
12 waived. And, you know, there's -- in my
13 experience, my practice would be that sometimes
14 that objection might be made at the bench, where
15 the court reporter may or may not be taking it
16 down. But then you put it on the record later.
17 So, again, there should be a record. But, yes,
18 you're correct that it would be waived if it was
19 not done before the jury is seated.

20 THE COURT: All right. Excuse me,
21 Mr. Knott.

22 BRADLEY KNOTT: Yes, sir. That's
23 all the questions that I have.

24 THE COURT: Any redirect?

25 J. RUTLEDGE JOHNSON: No, Your Honor.

1 THE COURT: May Mr. Grose be excused?

2 BRADLEY KNOTT: No objection.

3 J. RUTLEDGE JOHNSON: I don't have
4 any other cases with him.

5 THE COURT: Thank you, sir.

6 (WITNESS STEPS DOWN)

7 THE COURT: Any other witnesses, Mr.
8 Johnson?

9 J. RUTLEDGE JOHNSON: No, sir, Your
10 Honor. The State ---

11 THE COURT: Any reply?

12 BRADLEY KNOTT: No, Your Honor.

13 THE COURT: Let me say this. I am
14 going to look at some of this. This is a big
15 transcript and I have not gone through all of it.
16 There are certain issues that I am going to
17 dispose of now. One, as to the alleged failure to
18 retain expert witnesses, Mr. Grose testified that
19 he did not formally consult with witnesses, did
20 not feel that they would be helpful, in fact would
21 be hurtful, is what I took from this case. But,
22 more importantly, there's been no showing in this
23 Hearing of what prejudice was suffered as a result
24 of not having called witnesses; i.e., that there
25 was no -- what the witnesses would have reflected

1 or testified to, to refute the State's case which
2 appeared to be overwhelming against Mr. Chisholm.

3 Therefore, I am denying your petition on those
4 grounds.

5 Further, as to the witnesses, the
6 Applicant testified that the witnesses would have
7 been the same as the State's and that he provided
8 no other witnesses to Mr. Grose. Mr. Grose had
9 their witness statements and was able to prepare
10 his cross examination based on what he had.

11 It's understandable with a young victim
12 why you would not necessarily speak to her or an
13 antagonistic mother.

14 At the same time, there's been no
15 showing from the Applicant what these alleged
16 witnesses should have testified to. In fact, if I
17 understood the testimony, they in fact testified
18 at trial, so he's shown no prejudice whatsoever
19 about Mr. Grose's alleged failure to consult with
20 the other witnesses. I find that his viewing
21 their statements was sufficient.

22 Also Mr. -- to the extent that this is
23 an issue, Mr. Chisholm made a knowing and
24 intelligent waiver of his right to testify. It
25 goes to his defense which was presented, which was

1 gone through on the record with the court. Mr.
2 Chisholm made his own personal decision not to
3 testify, albeit with the recommendation of
4 counsel, who is very learned.

5 One of the questions that I am going to
6 look at a little bit is the speedy trial issue. I
7 am convinced that the evidence would have probably
8 been there regardless, it would have just made the
9 State go -- step up its pace in preparing the
10 case. But I will look at that. I'm going to take
11 that under advisement.

12 There is really -- except for Mr.
13 Grose's testimony, the Applicant didn't testify as
14 to any witnesses -- any evidence that would not
15 have come out that came out, that would not have
16 done so had we gone to trial earlier. As I stated
17 earlier, it seems to be overwhelming evidence of
18 the defendant's guilt in this matter.

19 As to the selection of the jury, clearly
20 in the record beginning at Page 86, Mr. Grose
21 successfully made a Batson Motion and was able to
22 have a new jury selected.

23 As to the relative of a cellmate, I tend
24 to agree with Mr. Grose that that could cut both
25 ways. However, regardless, the Applicant has not

1 presented any evidence, which it is his burden to
2 do; as to the effect of having this relative
3 placed on the jury, allegedly. Therefore, I am
4 denying your petition on those grounds.

5 Also, his testimony -- I agree with Mr.
6 Johnson -- excuse me -- that what he was
7 testifying to in regards to the effect on the jury
8 would have been speculation. Probably a matter of
9 direct appeal and not a matter of collateral
10 attack. It appears that Mr. Grose did all that he
11 could do as an attorney to properly challenge the
12 make up of the jury.

13 I will note for the record that the
14 issue of a speedy trial has not been raised in
15 this petition. I am going to keep that under
16 advisement with me, looking at the other issue
17 involved in this case.

18 Now, Mr. Knott, any issues that I have
19 not addressed on the record? That I have not
20 placed under advisement.

21 BRADLEY KNOTT: Not in terms of
22 issues raised today.

23 THE COURT: Thank you, Mr. Knott.
24 Mr. Johnson, from the State's position, any issues
25 that I have not placed on the record; that I

1 should do, that I've not taken under advisement.

2 J. RUTLEDGE JOHNSON: Give me one

3 second, Your Honor.

4 THE COURT: Absolutely.

5 J. RUTLEDGE JOHNSON: I agree with

6 Mr. Knott. I don't believe there are any other

7 issues, Your Honor.

8 THE COURT: Okay. Just to follow up,

9 with the exception of the speedy trial issue, the

10 -- the Applicant has failed to meet his burden of

11 proof in this case, especially with regard to

12 ineffective assistance of counsel. He has failed

13 to show how Mr. Grose's actions fell below the

14 standard of care required of an attorney and

15 further has failed to show any prejudice that

16 would accompany that alleged failure to prepare up

17 to the standard of care.

18 That being said, the other issue is

19 under advisement and I'll give you my decision.

20 BRADLEY KNOTT: Thank you, Your

21 Honor.

22 (HEARING CONCLUDED)

23

24

25

1 CERTIFICATE OF REPORTER

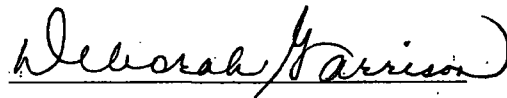
2

3 I, the undersigned, Deborah Garrison,
4 official court reporter for the 9th Judicial
5 Circuit of the State of South Carolina, do hereby
6 certify that the foregoing is a true, accurate and
7 complete transcript of the hearing held before The
8 Honorable R. Lawton McIntosh on the 29th of
9 November, 2012, as prepared from the audio notes
10 of Vivian Cross, Court Reporter;

11 I further certify that I am neither kin nor
12 counsel to any of the parties and have no interest
13 in the outcome of this action.

14

15



16

Deborah Garrison

17

Circuit Court Reporter

18

9th Judicial Circuit

19

20

21

22

23 Charleston, South Carolina

24

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Jerome Chisholm, #335354,

2012-CP-24-0092

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

FILED
EIGHTH JUDICIAL CIRCUIT
JUN 11 2012

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

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

PROCEDURAL HISTORY

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

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

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

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Ineffective Assistance of Counsel

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

that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Failure to retain and call an expert witness

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

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

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

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

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

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

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

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

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

Failure to call lay witnesses

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

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

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

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

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

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

Applicant's testimony at trial

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

to testify.

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

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

Speedy Trial Motion

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

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

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

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

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

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

Jury selection

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

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

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

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

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

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

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

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

denied.

Overwhelming Evidence

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

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

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

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

CONCLUSION

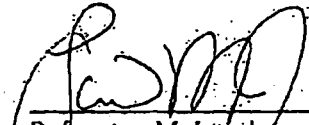
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED!



R. Lawton McIntosh
Presiding Circuit Court Judge
Eighth Judicial Circuit

3-25 ²⁰¹³ 2012
Andrus South Carolina

WITNESSES

Travis Clark
Jimmy Powers

WARRANT NUMBERS

H-983370

Richard W. Shoman, Texas Bill

Foreman of the Grand Jury

Date: 12-12-05

VERDICT

Guilty

James R. Bickel
Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

COURT OF GENERAL SESSIONS

December Term, 2005

Indictment # 05GS24-1386

THE STATE

vs.

JEROME CHISHOLM

INDICTMENT FOR

CRIMINAL SEXUAL CONDUCT WITH A
MINOR-FIRST DEGREE

RECEIVED
CLERK OF COURT
GREENWOOD COUNTY
SOUTH CAROLINA

Solicitor

**THE STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD**

INDICTMENT FOR

**CRIMINAL SEXUAL CONDUCT WITH A MINOR-FIRST
DEGREE**

At a Court of General Sessions, convened on the 17th day of December, 2005, the Grand Jurors of Greenwood County present upon their oath:

COUNT ONE

That JEROME CHISHOLM, did in Greenwood County, state aforesaid, on or about the 17th day of September, 2005, being older than the victim, wilfully and unlawfully commit criminal sexual conduct with a minor in the first degree, to wit: that the said defendant did engage in sexual battery upon a person under the age of eleven (11) years, to wit: one minor [REDACTED], [REDACTED], in violation of Section 16-3-655(A)(1) of the South Carolina Code of Laws, 1976, as amended

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

[Handwritten signature]

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

613

COUNTY OF Greenwood
STATE _____

INDICTMENT/CASE#: 05-GS-24-1386

VS.
Jerome Chisholm

AW#: 4983370

AKA: _____
Race: D Sex: M Age: 46

Date of Offense: 9/17/05

DOB: _____

S.C. Code § 16-3-655

Address: _____

CDR Code #: 0385

City, State, Zip: Greenwood SC 29646

SENTENCE SHEET

DL# _____ SID# _____

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS

TO: CSC w/minor 1st (0-30 years)
in violation of § 16-3-655 of the S.C. Code of Laws, bearing CDR Code # 0385

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS §17-25-45

(CSC w/minor 1st or Lawd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury, _____ (defendant initial)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST:

[Signature] Solicitor _____ Defendant _____ Attorney for Defendant: _____ SC Bar # _____

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 30 days/months/years or under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____ plus costs and assessments as applicable, the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: _____

The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP: _____

Total: \$ _____ plus 20% fee: \$ _____ _____ days/hours Public Service Employment

Payment Terms: _____ Obtain GED

set by SCDPPPS _____ Attend Voc. Rehab. or Job Corp. _____

Recipient: _____ May serve W/E beginning _____ Substance Abuse Counseling

*Fine:	\$
§14-1-206 (Assessments 107.5%)	\$
§14-1-211 (A) (1) (Conv. Surcharge)	\$100
§14-1-211 (A) (2) (DUI Surcharge)	\$100
§56-5-2995 (A) (2) (DUI Assessment)	\$12
§35.13 (Public Def/Prob)	\$500
§73.3, 1B TP (Law Enforce. Funding)	\$25
§33.7, 1B TP (Drug Court Surcharge)	\$100
§50-21-114 (BUI Breath Test Fee)	\$50
§56-5-2942 (J) (Vehicle Assessment)	\$40/ea
3% to Country (If paid in installments)	\$50
§90.11 TP (SCCJA Surcharge)	\$5
TOTAL	\$

Random Drug/Alcohol Testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ Beginning \$ _____ paid to the Public Defender Fund
Other: _____

Appointed PD or appointed other counsel, §35.13 TP
 Requires \$500 be paid to Clerk during probation.

[Signature]
Clerk of Court/Deputy Clerk

PRESIDING JUDGE [Signature]

Judge Code: 21154

Sentence Date: 6-18-09

Court Reporter: [Signature]