

PATRICK BRYANT, # 215212

Q3A-201 P.C.T.

430 OAKLAWN RD

Pelzer, S.C. 29669

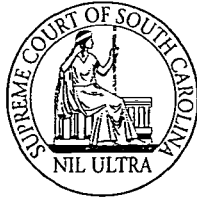
South Carolina Supreme Court

c/o DANIEL SHEAROUSE, Clerk

P.O. Box 11330

Columbin, S.C. 29211

RECEIVED



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

August 9, 2011

Patrick P. Bryant #215212
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

Re: Bryant, Patrick P. v. The State

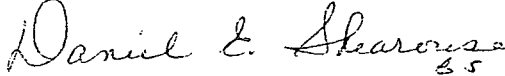
Dear Mr. Bryant:

Your counsel has submitted a Petition for Writ of Certiorari indicating that this appeal is without merit and moves to be relieved as your counsel. Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). The records of this Court reflect that counsel served you with a copy of the Petition & Appendix on August 8, 2011.

You may, within forty-five (45) days of the date of this letter, file with this Court a pro se response to the Petition filed by your counsel. In this response, you may raise and argue any issues you believe the Court should consider in this appeal. Upon receipt of your pro se response or the expiration of forty-five (45) days, the matter will be submitted to the Court for its consideration.

If you do decide to file a pro se response, the response must be either typewritten or legibly hand printed, and must have at least a one inch margin on all sides. Further, you will need to only submit one copy of your response, and this copy should **not** be stapled or bound in any manner.

Very truly yours,


CLERK

DES/jj

cc: Appellate Defender Tristan M. Shaffer
Assistant Attorney General Christina J. Catoe

The Supreme Court of South Carolina

Patrick P. Bryant,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Steven H. John
Georgetown County
Trial Court Case No. 2010-CP-22-00727

ORDER

For good cause shown, the request for an extension until August 8, 2011 to serve and file the Petition for Writ of Certiorari and Appendix in this matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Amanda J. Shealy*
Clerk

Columbia, South Carolina *Chief Deputy*

July 11, 2011

cc: Appellate Defender Tristan M. Shaffer
Assistant Attorney General Christina J. Catoe

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Steven H. John, Circuit Court Judge

ORIGINAL

RECEIVED

JUL - 8 2011

S.C. Supreme Court

PATRICK P. BRYANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

The undersigned counsel would respectfully request a **final** thirty-day extension in which to file the petition for writ of certiorari and appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following exigent circumstances:

1. The petition for writ of certiorari and appendix in this case are due to be served and filed today, having been extended by two prior orders of this Court.

2. Counsel is filing the initial brief of appellant and designation of matter in the case of *State v. Quentin Holt* today. Counsel filed the initial brief of appellant and designation of matter in the case of *State v. Reginald Nance* on July 7, 2011. Counsel filed the initial brief of appellant and designation of matter in the case of *State v. William Kelly* on June 28, 2011. Counsel filed the initial brief of appellant and designation of matter in the case of *State v. Ricardo Acevedo* on June 22, 2011. Counsel filed the initial brief of appellant and designation of matter in the case of *State v. Ricky Cheeks* on June 20, 2011. Counsel filed the initial briefs of appellant and designations of matter in the

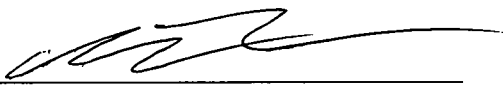
cases of *State v. Thomas Smart* and *State v. Ruben Silva-Aguilar* on June 16, 2011. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of *State v. Shirley Mae Geer* (in the COA) on June 10, 2011. Counsel filed the initial brief of appellant and designation of matter in the case of *State v. Shelly Mauney* on June 9, 2011. Counsel filed the petition for rehearing in the case of *State v. Desmond Sams* on June 3, 2011. In May, 2011, Counsel filed the initial briefs of appellant and designations of matter in the cases of *State v. Jimmy Gallishaw, Jr.*, *State v. Jeremiah Turner*, *State v. Legerald Dickerson*, *State v. Jason Turmon*, *State v. Zerell McClurkin*, and *State v. Bobby Davis*. Also in May 2011, Counsel filed the petition for writ of certiorari and accompanying appendix in the case of *Lorenzo A. Curry v. State*.

3. This request is made in good faith, and not for purposes of delay.

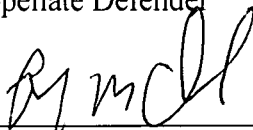
4. As indicated by her consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a **final** thirty-day extension in which to file the petition for writ of certiorari and appendix in this case. Counsel requests that the time limits for filing the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Tristan M. Shaffer
Appellate Defender



Robert M. Dudek
Chief Appellate Defender

July 8, 2011

I DO NOT OPPOSE:



Christina J. Catoe

The Supreme Court of South Carolina

Patrick P. Bryant,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Steven H. John
Georgetown County
Trial Court Case No. 2010-CP-22-00727

ORDER

For good cause shown, the request for an extension until July 8, 2011 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Suzanne J. Sheehy*
Clerk

Columbia, South Carolina *Chief Deputy*

June 9, 2011

cc: Appellate Defender Tristan M. Shaffer
Assistant Attorney General Christina J. Catoe

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUN - 8 2011

S.C. Supreme Court

Certiorari to Georgetown County
Steven H. John, Circuit Court Judge

PATRICK P. BRYANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

(2)

The undersigned counsel would respectfully request a thirty day extension in which to file the petition for writ of certiorari and appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following exigent circumstances:

1. The petition for writ of certiorari and appendix in this case are due to be served and filed today, having been extended by one prior order of this Court.


2. Counsel will be filing the initial briefs of appellant and designations of matter in the cases of *State v. Ricky Cheeks* and *State v. Shelly Mauney* tomorrow, June 9, 2011. Additionally, Counsel will be filing the petition for writ of certiorari and accompanying appendix in the case of *State v. Shirley Mae Geer* (in the COA) on Friday, June 10, 2011. Counsel filed the petition for rehearing in the case of *State v. Desmond Sams* on June 3, 2011. Counsel filed the initial brief of appellant and designation of matter in the case of *State v. Jimmy Gallishaw, Jr.* on May 31, 2011. Counsel filed the

initial brief of appellant and designation of matter in the case of *State v. Jeremiah Turner* on May 26, 2011. Counsel filed the initial brief of appellant and designation of matter in the case of *State v. Legerald Dickerson* on May 25, 2011. Counsel filed the initial brief of appellant and designation of matter in the case of *State v. Jason Turmon* on May 13, 2011. Counsel filed the initial brief of appellant and designation of matter in the case of *State v. Zerell McClurkin* due on May 11, 2011. Counsel filed the initial brief of appellant and designation of matter in the case of *State v. Bobby Davis* on May 4, 2011. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of *Lorenzo A. Curry v. State* on May 2, 2011. In April 2011, Counsel filed the petitions for writ of certiorari and accompanying appendices in the cases of *Eric Joshua Turner v. State* and *State v. Nathaniel Bradley* (in the COA). Additionally, in April 2011, Counsel filed the initial briefs of appellant and designations of matter in the cases of *State v. Jacob Breda*, *State v. Alexander Partain* and *State v. Steven Burton*. Counsel also filed the brief of petitioner in the case of *State v. James Michael Lucas* and the reply brief in the case of *State v. Kevin Gilliard* in April, 2011.

3. This request is made in good faith, and not for purposes of delay.

WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension in which to file the petition for writ of certiorari and appendix in this case. Counsel requests that the time limits for filing the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,


Tristan M. Shaffer
Appellate Defender

June 8, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Steven H. John, Circuit Court Judge

PATRICK P. BRYANT,

PETITIONER,

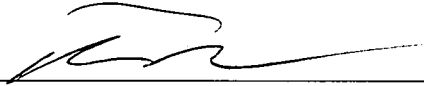
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

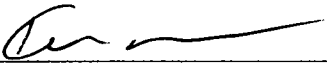
The undersigned attorney hereby certifies the petition in which to file the petition for writ of certiorari and appendix in the above referenced case has been served upon Christina J. Catoe, Esquire, Assistant General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 8th day of June, 2011.



Tristan M. Shaffer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of June, 2011.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013 .

The Supreme Court of South Carolina

Patrick P. Bryant,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Steven H. John
Georgetown County
Trial Court Case No. 2010-CP-22-00727

ORDER

The request for an extension until June 8, 2011 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda J. Shady
Clerk

Columbia, South Carolina *Chief Deputy*

May 11, 2011

cc: Appellate Defender Tristan M. Shaffer
Assistant Attorney General Christina J. Catoe

ORIGINAL



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

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

May 9, 2011

RECEIVED

MAY - 9 2011

S.C. Supreme Court

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

Re: Patrick P. Bryant v. State of South Carolina

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in the above-referenced case are due to be served and filed today. Because of my present workload, I respectfully request a thirty-day extension of this deadline. No prior extensions have been requested in this case.

By copy of this letter, I am informing Christina J. Catoe, Esquire, of the Office of the Attorney General, of this extension request.

Thanking you for your cooperation and assistance in this matter.

Sincerely,

Tristan M. Shaffer
Appellate Defender

TMS/kam

cc: Christina J. Catoe



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

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

RECEIVED

MAR 10 2011

S.C. Supreme Court

March 10, 2011

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

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Patrick P. Bryant v. State of South Carolina

3/10/2011

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Loriene French
Legal Services Coordinator



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

January 13, 2011

RECEIVED

JAN 13 2011

Ms. Dixie C. Eubank
Circuit Court Reporter
P O Box 2194
Murrells Inlet, SC 29576-2194

S.C. Supreme Court

Dear Ms. Eubank:

Our office has been requested to perfect the appeal arising out of:

Patrick P. Bryant v. State of South Carolina Case #: 10-CP-22-00727

County: Georgetown Date of Trial: November 16, 2010

Presiding Judge: Steven H. John

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Dixie C. Eubank
January 13, 2011
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

Loriene French
Legal Services Coordinator

cc: S.C Supreme Court
Attorney General's Office

PAUL ARCHER

Attorney at law

Phone/FAX: (843) 979-4000

Email: archerlawfirm@gmail.com

Certified as Lead Counsel for Death Penalty Defense

Member N.Y. Bar since 1966

Member S.C. Bar 1994

Federal Bar since 1967

United States Supreme Court 1976

*233 Muirfield Drive
Pawleys Island, South Carolina 29585*

Honorable Daniel E. Shearouse
Clerk Of Court
SC Supreme Court
P.O. Box 11330
Columbia, SC 29211

December 14, 2010

Re: Notice Of Appeal Patrick P. Bryant 2010-CP-22-00727

Dear Mr. Shearouse:

Enclosed is a Notice Of Appeal and Proof of Service in the above PCR.

I have served the necessary parties.

I was appointed in the 15th. Judicial Circuit.

Thank you.

Very truly yours,

Paul Archer

RECEIVED

DEC 17 2010

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
HONORABLE STEVEN H. JOHN.

Case # 2010-CP-22-00727

PATRICK P. BRYANTAPPLICANT

STATE OF SOUTH CAROLINA.....RESPONDENT

NOTICE OF APPEAL

RECEIVED

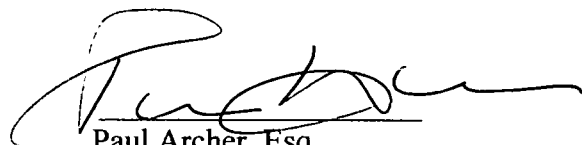
DEC 17 2010

S.C. SUPREME COURT

Patrick P. Bryant appeals the Order of the Honorable Steven H. John. dated December 2, 2010.

Other Counsel of record:

Christina Catoe, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737



Paul Archer, Esq.
Attorney for Petitioner
233 Muirfield Drive
Pawleys Island, SC 29585
(843) 979-4000

Dated: December 14, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE HONORABLE
STEVEN H. JOHN

Case # 2010-CP-22-00727

PATRICK P. BRYANT.....APPLICANT

STATE OF SOUTH CAROLINA.....RESPONDENT

PROOF OF SERVICE

The undersigned, Attorney for the Applicant, hereby certifies that a true copy of the Notice Of Appeal in the above case has been served upon the following by mailing a copy to each in a properly addressed envelope on December 14, 2010.

South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Patrick P. Bryant # 215212
Perry Correctional
.430 Oaklawn Rd.
Pelzer, SC 29669

Christina Catoe, Esq.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

Office Of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

Georgetown Clerk's Office
P.O. Drawer 421270
Georgetown SC 29442


PAUL ARCHER, ESQ.

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)
Patrick P. Bryant, # 215212,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2010-CP-22-00727

**ORDER DENYING
POST-CONVICTION RELIEF**

This matter came before the Court pursuant to an Application for post-conviction relief filed May 4, 2010, by Patrick P. Bryant. Respondent made its Return on June 21, 2010. An evidentiary hearing was convened at the Georgetown County Courthouse on November 16, 2010. The Applicant was present in court and represented by Paul Archer, Esquire. The Respondent was represented by Christina J. Catoe, Assistant Attorney General.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Georgetown County. The Applicant was indicted in March 2006 for criminal sexual conduct ("CSC") in the first degree (2006-GS-22-267). The Applicant was later indicted in July 2007 for CSC with a minor in the second degree (2007-GS-22-667). Both indictments dealt with the same incident, but the first-degree CSC indictment alleged aggravated force, while the CSC with a minor indictment relied upon the victim's age. J. Eric Fox, Esquire, represented the Applicant on these charges. On July 23-26, 2007, the Applicant was tried before the Honorable J. Michael Baxley.¹ The jury found him guilty of second-degree CSC with a minor, but not guilty of first-degree CSC. Judge Baxley sentenced the Applicant to life without

¹ Prior to trial, another indictment for first-degree CSC (2005-GS-22-753) was merged into the 2006 first-degree CSC indictment.

parole ("LWOP") pursuant to S.C. Code Ann. § 17-25-45.² A notice of appeal was timely filed, and an appeal was perfected on the Applicant's behalf by Kathrine H. Hudgins, Esquire. The South Carolina Court of Appeals affirmed the conviction on January 21, 2010 (2010-UP-006), and the case was remitted to the Circuit Court on February 8, 2010.

STANDARD OF REVIEW

In a post-conviction relief proceeding, the applicant bears the burden of proving his or her allegations by a preponderance of the evidence. Caprood v. State, 338 S.C. 103, 109-110, 525 S.E.2d 514, 517 (2000); Rule 71.1(e). 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The correct measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, supra. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." Caprood, supra, at 109, 525 S.E.2d at 517 (citations omitted). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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,

² The predicate "most serious" offense for LWOP was a prior armed robbery conviction. CSC with a minor (any degree) is classified as a "most serious" offense pursuant to S.C. Code Ann. § 17-25-45 (c)(1).

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. When a defendant challenges his conviction after a trial, the proper consideration is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt. Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 527-28 (2007). (citations omitted). In order to receive relief, an applicant must prove both ineffective assistance and resulting prejudice. See, e.g., Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

Allegations

In his Application, Mr. Bryant alleged that his custody was unlawful for the following reasons:

- (1) Ineffective assistance of trial counsel;
- (2) Conflict of interest; and
- (3) Failure to investigate.

Set forth below are the relevant findings of fact and conclusions of law, as required by S.C. Code Ann. § 17-27-80 (2003):

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In considering the Applicant's case, this Court had before it the Applicant's PCR file, including all pleadings filed, the records of the Georgetown County Clerk of Court regarding the conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the direct appeal records. Both the Applicant and his former trial attorney, J. Eric Fox, Esquire, testified at the hearing. This Court carefully listened to all of the testimony and weighed the same according to credibility. This Court found the Applicant's testimony to be lacking in credibility with respect to his description of his beliefs regarding the victim's age. This Court found Mr. Fox's testimony to be highly credible in all respects.

The Applicant made several allegations of ineffective assistance of counsel. First, he contended that counsel should have done more to show that he was not aware that the victim was a minor. He asserted that counsel could have called other witnesses to corroborate that the victim visited a local nightclub where patrons must be either 18 or 21 years of age to enter. However, the Applicant did not present any such witnesses at the PCR hearing. Accordingly, this Court cannot evaluate prejudice to the Applicant and cannot conclude that he is entitled to relief based upon counsel's failure to call any such witnesses. See, e.g., Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) (mere speculation of a witness's testimony is insufficient); Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (a PCR applicant cannot show he was prejudiced by counsel's failure to call a witness at trial if that witness does not later testify at the PCR hearing). In any event, Mr. Fox testified that the Applicant provided the name of only one possible witness who might have seen the victim at the nightclub. Mr. Fox contacted this witness but was not satisfied that he would be a stable or helpful defense witness. Therefore, Mr. Fox made a conscious and strategic decision not to further pursue this witness's testimony. Mr. Fox stated that he did not learn of any other potentially helpful defense witnesses.

Furthermore, this Court finds that, where the victim admitted to going to that particular nightclub, admitting to hanging out with an older crowd, and admitted to having a prior record, the issue of the victim presenting herself as an older person was sufficiently before the jury. Counsel emphasized these things to the jury repeatedly throughout trial and in his closing argument. He also pointed out that the victim expressly admitted that she never actually told the Applicant her age. In any event, the "mistake of age" defense was dependent upon whether

the jury found the Applicant's *own* testimony to be credible.³ Therefore, counsel did advise the Applicant to testify at trial, which gave the Applicant the opportunity to fully explain to the jury his beliefs about the victim's age and the reasons for his beliefs. It was within the jury's province to evaluate the Applicant's testimony in light of the jury's own observations about the victim's appearance and the other evidence presented at trial. For all of these reasons, this Court concludes that the Applicant failed to prove any ineffective assistance of counsel with respect to the presentation of the "mistake of age" defense.

The Applicant also contended that counsel should have objected to the testimony of Crystal Smith, his former girlfriend. He testified at the PCR hearing that he believed that Smith's testimony had a "devastating impact" on his trial. Prior to trial, Attorney Fox made a motion to exclude Smith's testimony from the State's case-in-chief. (See Trial Transcript, pages 80-81). Ultimately, Smith was not called in the State's case-in-chief, but was only called in rebuttal to refute certain statements made by the Applicant in his trial testimony. (See Trial Transcript, pages 463-68). Her testimony was very brief and took up only five pages in the transcript. She refuted the Applicant's previous assertion in his own testimony that she was not the victim in a prior CDVHAN case. She also refuted the Applicant's testimony that he did not smoke marijuana. On cross-examination, Mr. Fox properly brought out the fact that Smith was biased against the Applicant since the relationship ended. Notably, counsel did object to the details of the prior CDVHAN conviction (which involved Crystal Smith) being brought out in the Applicant's testimony, and he also objected to the solicitor being allowed to play a recording of portions of the Applicant's telephone calls to Ms. Smith from the jail. However, the trial judge ruled that the Applicant had opened the door to these matters through his testimony. In

³ "Mistake of age" was specifically set forth as a permissible defense in the 2007 CSC with a minor statute. That part of the statute has since been repealed. See S.C. Code Ann. § 16-3-655.

any event, the information brought out during Smith's reply testimony was limited and was merely cumulative to the details already brought out during the Applicant's testimony. Accordingly, this Court concludes that the Applicant failed to prove that counsel had any basis for moving to exclude Smith's reply testimony, and failed to prove specific prejudice from this testimony.

The Applicant also alleged that counsel had a conflict of interest based upon counsel's previous representation of him on a previous CDVHAN charge which was later overturned in February 2010. Counsel testified that he did not believe that his prior representation of the Applicant constituted a conflict of interest. This Court finds that the Applicant failed to prove any conflict of interest on this basis. See Fuller v. State, 347 S.C. 630, 633-34, 557 S.E.2d 664, 665 (2001) ("To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance. An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction.") (citations omitted). If anything, counsel's previous representation of the Applicant on another matter strengthened the attorney-client relationship. Furthermore, the fact that the CDVHAN conviction was subsequently overturned - three years later - cannot retroactively create a conflict of interest at the time of trial.

In his PCR Application, the Applicant alleged that his indictments were obtained through perjury and prosecutorial misconduct. This Court finds that no evidence was presented in support of these allegations at the PCR hearing. Accordingly, such allegations were waived and are hereby denied and dismissed.

Finally, the Applicant's PCR counsel asserted that a sentence of life without parole was unfair considering the nature of the Applicant's offense. He further asserted that post-conviction relief should be granted "in the interests of justice." This Court first finds that the issue of the application of the LWOP statute for this particular crime was fully presented to the trial judge. Trial counsel argued that under the statute, the judge should conclude, based upon the jury's verdict of "not guilty" on the first-degree CSC charge, that the sexual encounter was consensual and that the LWOP statute did not therefore apply. See S.C. Code Ann. § 17-25-45(C)(1). However, the trial judge refused to make a finding that the encounter was consensual since it was a hotly disputed issue at trial. (See Trial Transcript, pages 556-61). Accordingly, the judge properly applied the statute and imposed a sentence of life without parole. The fairness of the statute in general is not a matter properly before this Court. Further, this Court was presented with no authority for granting post-conviction relief "in the interests of justice," and this Court declines to do so.

CONCLUSION

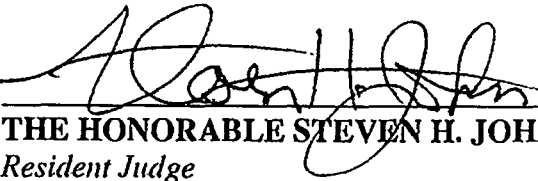
In conclusion, based upon the entire record, this Court finds and concludes that the Applicant failed to meet his burden of proof as to any of his allegations. The Applicant failed to prove that counsel's performance fell below the standard of reasonable professional norms, and the Applicant did not show prejudice as to the outcome. Based upon the foregoing, the Application for post-conviction relief must be denied and dismissed with prejudice for failure to meet the burden of proof under Strickland v. Washington, 466 U.S. 668 (1984), and Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Counsel's attention is directed to Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), and Rule 59(e), SCRPC, regarding the filing of a Motion to Alter or Amend should counsel

believe this Order fails to adequately address all issues raised as required by S.C. Code Ann. § 17-27-80 (2003). This Court further advises that if Applicant desires to secure appellate review of this Order, a notice of appeal must be filed and served **within thirty (30) days** of the service of this Order. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed. Therefore, it is

ORDERED that the Application for post-conviction relief is DENIED and DISMISSED with PREJUDICE. It is further

ORDERED that the Applicant must remain in the custody of the State for completion of his sentence.



THE HONORABLE STEVEN H. JOHN
Resident Judge
Fifteenth Judicial Circuit

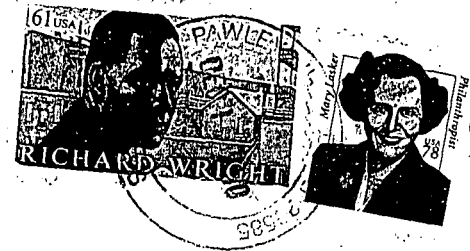
12/21, 2010
Georgetown, South Carolina

PAUL ARCHER

Attorney at Law

233 Muirfield Drive

Pawleys Island, South Carolina 29585



Honorable Daniel E. Shearouse
Clerk Of Court
SC Supreme Court
P.O. Box 11330
Columbia, SC 29211

Patrick P.
Bryant

29211 11330 8099

