

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Honorable G. Thomas Cooper

2013-CP-10-4151

S.C. Supreme Court

S.C. SUPREME COURT

RECEIVED

JAN 21 2015

S.C. SUPREME COURT

Jeremiah Turner, #340197

Petitioner

State of South Carolina

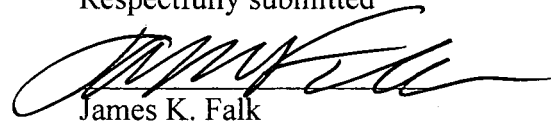
Respondent

NOTICE OF APPEAL

Petitioner, Jeremiah Turner appeals the Honorable G. Thomas Cooper's December 11, 2014, ORDER OF DISMISSAL, of Petitioner's application for Post-Conviction Relief.

Undersigned counsel received notice of the entry of the order on January, 5, 2015. A copy of the order on appeal is attached to this notice.

Respectfully submitted



James K. Falk  
Bush Law Group  
3 Broad Street, Suite 450  
Charleston, SC 29401  
Attorney for Applicant

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
Honorable G. Thomas Cooper

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2013-CP-10-5614

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**RECEIVED**

JAN 22 2015

**S.C. Supreme Court**

Jeremiah Turner, #340197

Petitioner

State of South Carolina

Respondent

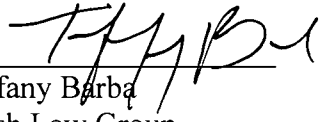
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PROOF OF SERVICE

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I, Tiffany Barba, certify that I have today served the within NOTICE OF APPEAL upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to its attorney of record, Ashleigh R. Wilson, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 15<sup>th</sup> day of January, 2015.

Respectfully Submitted,

  
\_\_\_\_\_  
Tiffany Barba  
Bush Law Group  
3 Broad Street, Suite 450  
Charleston, SC 29401

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 Jeremiah Turner, #340197, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 2013-CP-10-4151

**ORDER OF DISMISSAL**

FILED  
 2014 DEC 15 PM 1:54  
 JUDITH A. STRONG  
 CLERK OF COURT

Presiding Judge:	The Honorable G. Thomas Cooper
Applicant's Attorney:	James Falk, Esquire
Respondent's Attorney:	Ashleigh R. Wilson, Esquire
Trial Counsel:	Andrew Grimes, Esquire
Appellate Counsel:	Tristan Shaffer, Esquire
Date of Hearing:	September 10, 2014
Court Reporter:	Joyce C. Rueger

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 16, 2013. The Respondent made its Return on December 5, 2013. An evidentiary hearing on the matter was convened on September 10, 2014 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by James Falk, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying were Andrew Grimes, Esquire, and Tristan Shaffer, Esquire. This Court had before it the trial transcript, the Charleston County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's Return, and the Applicant's appellate records.

*GT*

## PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the March 2009 term of the Charleston County Grand Jury for four counts of criminal sexual conduct with a minor- first degree (2009-GS-10-2423, -2424, -2428, -2432) and lewd act on a minor under 16 (2009-GS-10-2435). He was represented by Andrew Grimes, Esquire, and Megan Ehrlich, Esquire.

The Applicant proceeded to trial and was found guilty by a jury. On April 8, 2010, the Applicant was sentenced by the Honorable J.C. Nicholson to confinement for thirty (30) years for each count of criminal sexual conduct with a minor- first degree and for fifteen (15) years for lewd act on a minor under 16. The sentences are to be served concurrently.

A Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Tristan Shaffer, Esquire formerly of the South Carolina Office of the Appellate Defense perfected the appeal. Counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Turner, Op. No. 2012-UP-362 (S.C. Ct. App. June 13, 2012).

## ALLEGATIONS

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

1. Ineffective assistance of counsel.

At the hearing, Applicant proceeding solely on the following allegations:

1. Ineffective assistance of trial counsel.
  - a. Counsel failed to challenge the forensic video presented at trial.
2. Ineffective assistance of appellate counsel.
  - a. Counsel failed to raise the issue of factual innocence on appeal.

*GT*

b. Counsel filed a brief pursuant to Anders.

This Court finds the Applicant abandoned any and all claims not pursued during his evidentiary hearing or addressed in this order.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

**Summary of the Testimony**

Andrew Grimes, Esquire, was present and testified he was appointed to represent the Applicant. He testified he has been a public defender since 2006 and has experience trying criminal sexual conduct with a minor cases. Counsel testified he began representing the Applicant shortly after his arrest. He testified he filed a Brady motion on the Applicant's behalf and reviewed the discovery materials with the Applicant. Counsel testified the State's evidence against the Applicant included the Applicant's statement that the child victim initiated sex with him, the victim's testimony, and evidence of the victim's medical condition which would have made intercourse very painful. Counsel testified their trial strategy was to show through the Applicant's testimony that his confession was just a fantasy and to present character witnesses.

Counsel testified he consulted Dr. Betsy Gibbs prior to trial to review the video of the victim's forensic interview. He testified Dr. Gibbs concluded the forensic interview was done according to the appropriate protocol. He testified he did not want to present Dr. Gibbs' testimony at trial. Counsel testified prior to trial he reviewed the case law on the admissibility of

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the forensic interview video. He testified that based on his review of the case law he believed the video of the forensic interview would be admissible at trial.

Counsel testified he objected to the admissibility of the video at trial on the basis that there were inconsistencies in the video and the victim's live testimony. Counsel testified he also objected to the admissibility of the video on the basis that it violated the confrontation clause. He testified he did not have any other arguments to make to the court based on his review of the case law at the time. Counsel testified the video of the forensic interview was damaging, but did not make or break the Applicant's case. He testified the victim's live testimony was more damaging than the video of the victim's forensic interview.

Tristan Shaffer, Esquire, was present and testified he prepared the appellate brief submitted in the Applicant's appeal. Counsel testified when he received the Applicant's case on appeal he reviewed the record to find any appellate issues that were preserved for appeal. Counsel testified he spoke with trial counsel about the appeal and was alerted of some potential issues to raise on appeal. Counsel testified he did not find any meritorious issues to argue on appeal, therefore, he filed an Anders brief. He testified the Applicant was given the chance to submit a *pro se* brief to the Court. He testified pursuant to Anders the Court reviewed the entire appellate record for meritorious issues that were preserved in the lower court. Counsel testified he did not think the Applicant had any issues that would be meritorious on appeal.<sup>1</sup>

#### **Ineffective Assistance of Trial Counsel**

The Applicant alleges trial counsel was ineffective for failing to challenge the admissibility of a video of the victim's forensic interview at trial. This Court finds the Applicant has failed to carry his burden of proving trial counsel provided ineffective assistance of counsel.

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<sup>1</sup> The Applicant was present and voluntarily waived his right to testify as his post-conviction relief hearing.



In a PCR action, “the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For the Applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668 (1984), Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668).

Regarding the Applicant’s claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that Applicant’s attorney presented credible testimony and demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant and provided thorough representation. This Court finds that counsel’s representation did not fall below an objective standard of reasonableness.

This Court finds the Applicant’s claim that trial counsel was ineffective for failing to challenge the admissibility of the victim’s forensic interview video is without merit. This Court finds and the record reflects counsel objected to the admissibility of the forensic interview video

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on two basis at trial. First, counsel objected to the admissibility of portions of the video on the basis that the victim made statements on the video which were inconsistent with the victim's testimony at trial. (Tr. 313:25-314:8, 315:16-21). Second, counsel objected to the admissibility of the video on the basis that it violated the Confrontation Clause. (Tr. 323:17-19). The trial court denied both of counsel's objections to the admissibility of the video. (Tr. 323:9-23). This Court finds counsel adequately challenged the admissibility of the forensic interview video at trial.

This Court also finds counsel provided credible testimony that he had an expert review the video prior to trial and that he researched case law on the admissibility of the video prior to trial. This Court finds counsel's performance was not deficient and did not affect the outcome of the Applicant's trial. This Court also finds overwhelming evidence of the Applicant's guilt precludes a finding of prejudice by this Court. Concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt. Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991). At trial, the State presented the child victim who testified the Applicant put his finger and tongue on her privates and the Applicant put his privates in her mouth and backside. (Tr. 210-220). The State also presented the Applicant's statement to police in which he admitted engaging in masturbation, oral sex, and anal sex with the child victim who he claimed initiated the sexual acts. (Tr. 467-468). This Court finds the Applicant has failed to carry his burden of proving trial counsel's performance was deficient. This Court also finds the Applicant has failed to carry his burden of proving trial counsel's performance affected the outcome of his trial proceeding.



### Ineffective Assistance of Appellate Counsel

The Applicant claims appellate counsel was ineffective for filing an Anders brief and failing to raise factual innocence as an issue on appeal. This Court finds the Applicant has failed to carry his burden of proving ineffective assistance of appellate counsel.

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Id. at 754, 103 S.Ct. 3308.

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

In Anders v. California, the United States Supreme Court announced the procedure an appointed attorney should follow if the attorney believes the client's appeal is frivolous and



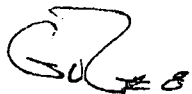
without merit. 386 U.S. 738, 87 S.Ct. 1396 (1967). The U.S. Supreme Court held the attorney could petition for permission to withdraw from the case, but that the petition for withdrawal must be accompanied by a brief “referring to anything in the record that might arguably support the appeal. Id. at 744. Under Anders, the defendant must be given time to respond and raise any additional points after his attorney submits the Anders brief. Id. The Court then is obligated to conduct a “full examination” of the record to determine whether the appeal is “wholly frivolous”. Id. According to Anders, if the reviewing court finds the appeal is frivolous, “it may grant counsel’s request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires.” Id. at 744. It is clear from a reading of Anders that the decision to file, or not file, a no-merit brief rests solely with appellate counsel. Poston v. State, 303 S.C. 167, 168, 399 S.E.2d 592 (1989).

This Court finds appellate counsel was not ineffective for filing an Anders brief in the Applicant’s appeal. This Court finds appellate counsel appropriately exercised his discretion to file an Anders brief in the Applicant’s appeal and provided effective assistance of counsel.

This Court finds counsel was not ineffective for failing to raise factual innocence on appeal. This Court finds the Court of Appeals reviewed all preserved issues in the record and dismissed the Applicant’s appeal. This Court finds the Applicant was not prejudiced by counsel’s failure to raise the issue of factual innocence on appeal since the Applicant could have raised the claim himself in a *pro se* response to counsel’s Anders brief.<sup>2</sup> This Court finds further the Applicant has also failed to show that he would have prevailed on the issue of factual innocence on appeal. This Court finds the Applicant’s success on the issue of factual innocence is particularly unlikely in light of the Applicant’s lengthy statement to police in which he admitted

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<sup>2</sup> The unpublished opinion from the Court of Appeals indicates the Applicant did not file a *pro se* response to appellate counsel’s Anders brief for the Court to review.



committing sexual acts with the child victim. (Tr. 467-468). This Court finds the Applicant has failed to carry his burden of proving appellate counsel was ineffective for failing to raise factual innocence on appeal. This Court also finds the Applicant has failed to show that but for counsel's performance he would have prevailed on appeal.

#### **All Other Allegations**

As to any and all allegations that were raised in the application in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence or testimony regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations. Therefore, they are hereby denied and dismissed.

#### **CONCLUSION**

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

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



[Signature on the following page.]

**IT IS THEREFORE ORDERED:**

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

**AND IT IS SO ORDERED** this 10 day of December, 2014



The Honorable G. Thomas Cooper  
Presiding Judge  
9th Judicial Circuit

COLUMBIA, South Carolina.

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n, SC 29401

Supreme Court of South Carolina  
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