ALAN WILSON
ATTORNEY GENERAL

February 26, 2015

The Honorable Jeanette W. McBride
Post Office Box 2766
Columbia, South Carolina 29202-2766

Re: David L. Carmichael, Respondent v. State of South Carolina, Petitioner
Civil Action No. 2012-CP-40-2293

Dear Ms. McBride:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. Correspondence with the court reporter regarding the transcript.

Sincerely,

Joshua L. Thomas
Assistant Attorney General

JLT/jlt

Enclosures

CC: Kristy G. Goldberg, Esquire
South Carolina Department of Corrections
The Honorable Daniel E. Shearouse, Clerk of the South Carolina Supreme Court
The Honorable Daniel E. Johnson, Fifth Circuit Solicitor
Office of Appellate Defense
Ms. Trisha Allen, Victim Services

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
FEB 26 2015
S.C. Supreme Court

February 26, 2015

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

Re: David L. Carmichael, Respondent v. State of South Carolina, Petitioner
Civil Action No. 2012-CP-40-2293

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. Correspondence with the court reporter regarding the transcript.

Sincerely,

Joshua L. Thomas
Assistant Attorney General

JLT/jlt

Enclosures

CC: Kristy G. Goldberg, Esquire
South Carolina Department of Corrections
The Honorable Jeanette W. McBride, Richland County Clerk of Court
The Honorable Daniel E. Johnson, Fifth Circuit Solicitor
Office of Appellate Defense
Ms. Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge

RECEIVED
FEB 26 2015
S.C. Supreme Court

Case No. 2013-CP-40-02293

David L. Carmichael, #352788, ...Respondent,

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Order Granting Post-Conviction Relief of the Honorable Robert E. Hood, dated December 18, 2014, and filed December 22, 2014. Petitioner received written notice of entry of the order denying its Rule 59(e), SCRCP, motion on January 29, 2015.

Feb. 26, 2015

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

Other Counsel of Record:

Kristy G. Goldberg, Esquire
1720 Main Street, Suite 301
Columbia, South Carolina 29201

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge

Case No. 2013-CP-40-02293

David L. Carmichael, #352788, ...Respondent,

v.

State of South Carolina, ...Petitioner.

PROOF OF SERVICE

I, Joshua L. Thomas, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Kristy G. Goldberg, Esquire
1720 Main Street, Suite 301
Columbia, South Carolina 29201

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

Feb. 26, 2015

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013-CP-40-2293

David L. Carmichael
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other _Dismissed without prejudice_____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

RICHLAND COUNTY FILED
2015 JAN 20 AM 11:13
JEANETTE W. WALKER C.C.P. & G.S.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : State's Motion to Reconsider is Denied.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** 2164 **Date** January 20, 2015

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of ____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 23 day of Jan, 20 15 to attorneys of record or to parties (when appearing pro se) as follows:

Kristi Goldberg
ATTORNEY(S) FOR THE PLAINTIFF(S)

Josh Thomas
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. Walker

STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	)	**IN THE COURT OF COMMON PLEAS** **FOR THE FIFTH JUDICIAL CIRCUIT**
DAVID L. CARMICHAEL **SCDC # 352788,** **Applicant,**	)	**2013-CP-40-2293**
vs.	)	**ORDER GRANTING** **POST-CONVICTION RELIEF**
STATE OF SOUTH CAROLINA, **Defendant.**	)	

This matter comes before the Court by way of an Application for post-conviction relief (PCR) filed April 16, 2013. The Respondent made its Return on or about September 12, 2013. Applicant thereafter filed an Amended Application on August 15, 2014. The matter was scheduled for an evidentiary hearing on September 5, 2014 at the Richland County Courthouse. Applicant was present and represented by Kristy Goldberg, Esq. Respondent was represented by Joshua Thomas, Esq. of the Office of the Attorney General. Also present was James Shadd, Esquire, trial counsel for the Applicant.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted at the September 2007 term of the Richland County Grand Jury for two counts of Lewd Act on a Minor Child (2007-GS-40-3373 and 2007-GS-40-3372) and at the July 2012 term of the Richland County Grand Jury Lewd Act on a Minor Child (2012-GS-40-413). James Shadd, Esquire represented him during his jury trial whereupon the Applicant was tried for all three indictments in one trial. Applicant's trial began October 8, 2012 in front of the Honorable Roger L. Couch and he was convicted as indicted on October 11, 2012.

Judge Couch sentenced Applicant to fifteen years imprisonment suspended upon the service of ten years imprisonment followed by five years of probation for each charge, with all three sentences to be served concurrently. A Notice of Appeal was never filed. The Applicant then filed his timely Application for Post-Conviction relief on April 16, 2013.

EVIDENTIARY HEARING

At the evidentiary hearing the Applicant testified on his own behalf. The Respondent called trial counsel James Shadd as a witness at the proceeding. In Applicant's current Amended Application for post-conviction relief the Applicant alleged he was being held unlawfully based upon the following allegations:

a) Ineffective assistance of counsel – Trial counsel failed to sufficiently prepare for trial and investigate the Applicant's case.

b) Ineffective assistance of counsel - Trial counsel failed to request that the trial be severed.

c) Ineffective assistance of counsel – Trial counsel failed to file notice of appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is weather 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. at 668, 104 S.Ct. at 2064. 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 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, 286 S.E.2d at 625, citing Strickland, supra. 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, 286 S.E.2d at 625.

Ineffective assistance of counsel – Trial counsel failed to sufficiently prepare for trial and investigate the Applicant's case

The Court finds Applicant failed to meet his burden of proving trial counsel ineffective for failing to prepare for trial and investigate. Regarding this allegation, the Court finds trial counsel's testimony credible, and Applicant's not credible. Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Applicant has not shown what further information trial counsel could have discovered with a further investigation. Here, trial counsel reviewed all the evidence

in the case, which consisted almost entirely of victim statements. He read these statements, reviewed the discovery, and was not surprised by the testimony at trial. Such an investigation was reasonable under the circumstances. Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011) (citing Daniels v. State, 676 S.E.2d 13 (Ga. 2009)). Trial counsel also spoke to Applicant's family members extensively before trial. He strategically presented testimony from Applicant's family to bolster Applicant's character. Applicant also alleged his mother had a recording of another victim's mother that exculpated him. However, trial counsel could not have been reasonably expected to discover and utilize the recording because it was lost prior to his representation. Thus, Applicant has not shown how trial counsel's investigation and preparation were deficient in any way.

Furthermore, trial counsel reviewed the State's evidence with Applicant prior to trial, including the forensic interviews of the victims. The testimony of the victims at trial was generally consistent with their prior statements. To the extent there were inconsistencies, trial counsel brought those out on cross-examination. Trial counsel also objected to one victim testifying about digital penetration where no such testimony was indicated by her prior statements. Trial counsel impeached a victim's mother with her Facebook messages to Applicant. Applicant presented no evidence of what information other witnesses would have provided had trial counsel interviewed them. Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))). Accordingly, the Court finds trial counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation.

Ineffective assistance of counsel - Trial counsel failed to file notice of appeal

The Court finds Applicant failed to meet his burden of showing counsel was ineffective for failing to file a notice of appeal. The Court finds trial counsel's testimony on this issue credible, and Applicant's testimony not credible. Counsel must ensure a criminal defendant is made fully aware of his right to an appeal. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). However, a defendant may waive a direct appeal by making a "knowing and intelligent decision not to pursue the appeal." Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-40 (2010) (quoting Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004)). Furthermore, "[a]cts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver." Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) (citing 92 C.J.S. Waiver, p. 1063 (1955)). In the absence of a waiver by the defendant, counsel must either initiate an appeal or comply with the Anders[1] procedure. White, 263 S.C. at 118, 208 S.E.2d at 39.

Testimony presented by both parties' shows that trial counsel and Applicant discussed an appeal immediately after the trial. Applicant testified that he initially told his attorney that he wanted to file for an Appeal. In Response, Counsel informed him that he should not file for an Appeal because Counsel believed that the Applicant received a good sentence because he could have been sentenced up to 45 years. The Applicant essentially testified that he didn't push the issue further at that time. The Applicant testified that he mailed his attorney a letter on or about October 16, 2014 (five days after conviction) asking Counsel to file a Notice of Appeal. Applicant never received a response and a Notice of Appeal was never filed.

[1] Anders v. California, 386 U.S. 738 (1967).

Trial counsel testified similarly to the Applicant, except he believed that the Applicant legitimately made the decision not to appeal during their conversation immediately after sentencing. Counsel stated that the notes in his file reflect this. Counsel believed that the Applicant voluntarily made an informed decision not to appeal and he believed the Applicant made this decision because he was at peace with the decision of the jury due to his strong faith. However, Counsel wrote to Applicant on October 12, 2012 informing the Applicant of his right to appeal again. *See*, Applicant's Exhibit 1. Counsel recalled receiving a letter from the Applicant after trial but could not remember what it said and could not find it in his file, but he believes he would have received this letter more than 10 days after the trial.

Applicant argues that it is objectively and subjectively unreasonable for Counsel not to have filed Notice of Appeal based upon two considerations. First, several objections were raised in the jury trial which could have provided issues ripe for Appellate review. Second, while the Applicant's sentence to imprisonment may have been reasonable, the Applicant is subject to mandatory registration on the sex offender registry for the rest of his life. The Applicant argues that Counsel should have filed Notice of Appeal on the Applicant's behalf ensuring that his rights are preserved. If the Applicant wanted to withdraw this Appeal later, that would have been his right.

Despite these arguments, this Court finds Applicant had an in-person conversation with Counsel wherein he knowingly and voluntarily waived his right to a direct appeal. Accordingly, counsel was not ineffective in this regard.

Ineffective assistance of counsel – Trial counsel failed to request

that the trial be severed

The testimony and transcript reflect that trial counsel did not make a motion to sever any of the three indictments underlying the Applicant's convictions. Applicant asserts that trial counsel was ineffective for not requesting a severance in his case, and that if he had made this motion it is probable that the Court would have severed the indictments. Further, Applicant asserts that it is probable that the outcome at trial (or trials) would have been different and he would not have three convictions had all three indictments not been tried together in one trial.

The testimony presented at the evidentiary hearing was that Applicant and trial counsel discussed the possibility of severance prior to trial. Applicant testified that he relied on trial counsel to make the decision in this regard. Applicant assets this was reasonable as Applicant is not an attorney and is not familiar with the law and the standard required for severance. Trial counsel Shadd testified that he believed it was in the Applicant's best interest to have all indictments tried together. Shadd stated that he was afraid that if one or two of the indictment trials resulted in convictions, the conviction(s) and their underlying facts could be offered against the Applicant in his subsequent trial(s) against Carmichael. However, Shadd conceded that the underlying facts of all three indictments were presented in this trial.

Applicant asserts that this was an objectively unreasonable strategy by trial counsel. There were three possible outcomes trial counsel should have considered in making his determination regarding a severance request. 1) All indictments are tried together and

resolved simultaneously; 2) Indictments are tried separately and the first trial is free[2] from contamination of any other allegations - and if it results in a conviction it could be used in the subsequent trial(s) pursuant to 404(b), SCRE or 609, SCRE, or 3) Indictments are tried separately and the first trial is free from contamination of any other allegations - and if Applicant is acquitted on the first trial, he would then be allowed a subsequent trial on another indictment also without the contamination of other allegations. It appears that trial counsel did not even consider the true merit of options #2 or #3 - that being Applicant may be entitled to at least one trial un-contaminated by other unrelated allegations. As a result, counsel was ineffective for deciding not to request a severance of the indictments.

Applicant asserts that a request for severance of the indictments would most likely have been granted by the trial court. The recent South Carolina Court of Appeals case State v. Beekman reviews the legal standard for when separate indictments *may be tried together* in one trial. 405 S.C. 225, 746 S.E.2d 483 (2013). The Court stated:

> "[W]here the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion to order the indictments be tried together if the defendant's substantive rights would not be prejudiced. Offenses are considered to be of the same general nature when they are interconnected.
> Conversely, offenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together.
> Charges can be joined in the same indictment and tried together where they 1) arise out of a single chain of circumstances; 2) are proved by the same evidence, 3) are of the same general nature; and 4) no real right of the defendant has been prejudiced."

[2] Counsel for Applicant agrees that the other allegations could possibly be offered as bad character evidence without a conviction in each and every one of the trials. However, this would only be done if the State offered the evidence properly under State v. Lyle. As an analysis under Lyle is necessary in making a decision on the merits of this Severance issue, counsel will assume, for the purposes of this argument, that if the indictments should have properly been severed they also would have not been allowed in each trial pursuant to Lyle and the trials would have been conducted without the contamination of other allegations.

Id. at 229, 486 (emphasis added).

Applicant asserts the indictments presented at trial should not have been tried jointly as they did not involve interconnected transactions, did not arise out of a single chain of circumstances, and are not provable by the same evidence. Applicant contends that counsel was ineffective for failing to request a severance. A summary of the facts presented at trial is necessary to illustrate this point.

Indictment 2007-GS-40-3372 involves an allegation of a one-time-only incident occurring between 1999 and 2004 when the victim was somewhere between the ages of 4 and 9 (pre-puberty). *See,* Indictment. There was a delayed disclosure and therefore no evidence was presented as to exactly when the alleged event occurred. *See,* trial transcript generally. The victim knew the Applicant from church but he did not frequently come to her house. *See,* Trial Transcript page 174-175. The alleged incident took place while he was babysitting at her house and no adults were around. *Id.* at 175-176. The victim testified that while she was asleep the Applicant placed her on his lap and put her hand on his penis and made her rub it. *Id.* at 178-180. The victim also testified that, although her pants were down when she woke up, she had no memory of being touched inappropriately. *Id.* at 180. The victim did not testify that any coercion or threats were made other than "shhh don't' say nothing." *Id.* at 181.

Regarding Indictment 2007-GS-40-3373, the victim alleged that three incidents occurred between 2001 and 2005 when she was between the ages of 7 and 11 (pre-puberty). *See,* Indictment. Again, there was a delayed disclosure and therefore no evidence was presented regarding exactly when the alleged event occurred. *See,* trial transcript

generally. The victim knew the Applicant from church but his family was also very close with her family and he regularly visited her home. *Id.* at 90-91. The first incident allegedly took place at the victim's home while the Applicant was babysitting. *Id.* at 92. Victim testified that Applicant told the victim to turn around and pull her pants down and he inappropriately touched her vagina. *Id.* at 92-94. She also testified that he pulled his penis out and tried to put her on top of his penis but it "didn't work" and he stopped all the activity voluntarily. *Id.* at 95. The victim testified that the second incident occurred sometime later at her mom's apartment while her family was outside. *Id.* at 96. She testified that he touched her "boob area" on this occasion and he said "give me that cat." *Id.* at 97. Finally, the victim testified that the third incident occurred at the Applicant's house while his sister was home and asleep in a different room. *Id.* at 98. She testified that on this occasion the Applicant started to unzip her pants and began to go into her panties with his hand but was interrupted when her ride showed up. *Id.* at 100. On this occasion the victim testified that the Applicant said "don't tell anyone or I will kill you." *Id.* at 101.

Regarding Indictment 2012-GS-40-4135, the victim alleged that a one-time-only incident occurred on August 28, 2011 when the victim was 13 years old[3]. *See,* Indictment. The victim knew Applicant from church and her step-father was a close friend of the Applicant. *See,* Trial transcript page 455. The victim testified that the incident took place while she was in the backseat of a car while her step-father was driving and the Applicant was in the front-passenger seat. *Id.* at 460-463. The victim testified that the Applicant was pretending to sleep when he reached into the backseat and began rubbing up and down her leg and plucking at her clothing like he was trying to get into the bottom of her pants. *Id.*

[3] While there was no testimony offered at trial regarding this victim's development Applicant would assert that the age 13 is typically post-puberty.

The testimony reflects that this happened while her step-father was in the car and she did not alert him to what was going on. *Id.* at 464. The victim did not testify that the Applicant made any threats or coercive statements to her at any time. *See,* trial transcript generally.

Applicant asserts that a review of the transcript clearly shows that, while the allegations may be of the same *general* nature, the incidents did not involve connected transactions closely related in time, place or character. They did not arise out of a single chain of circumstances. Further, the incidents were not provable by the same evidence. While the only evidence to prove any of the indictments was testimony evidence[4], each allegation had separate witnesses necessary to prove the case. The only exception is that the victims in the first two indictments had a conversation with each other which resulted in their disclosures and as a result their cases were investigated by the same investigator. *See,* trial transcript generally. The third indictment was proved by completely separate evidence without exception. *Id.*

In Beekman, the sexual abuse allegations against the defendant arose over the course of an eight month period and involved his two pre-pubescent stepchildren. 405 S.C. 225, 746 S.E.2d 483 (2013). The court found that the charges arose from "a single course of conduct or connected transactions" and that "there was a great deal of overlap of evidence between the two charges, and the two charges were provable by the same evidence." *Id.* at 231, 486.

Looking at the test for when indictments can be joined in trial, it is probable that a Court would have found that the Applicant's indictments should not have been tried

[4] No physical evidence existed directly related to any of the three indictments.

together. Applicant was charged with three indictments for incidents involving three unrelated victims occurring at different times and places. There was no single chain of circumstances. The evidence offered to prove each indictment was entirely separate with minor exceptions. To the extent that a Court may have determined that the first two indictments could be tried together due an overlap in their disclosure, it is more likely than not that the Court would have at least found that the third indictment should have been severed.

It should also be noted that in making this determination the Court would have also been required to look at the fourth prong of the test for joinder of the indictments – prejudice. Prejudice is also necessary to review in determining whether trial counsel's failure to request a severance of the indictments prejudiced the Applicant for the purpose of granting post-conviction relief.

Applicant again cites to State v. Beekman which explains "[P]rejudice to a defendant may occur where the defendant is jointly tried on charges resulting in the admission of prior bad act evidence that would have otherwise been inadmissible." 405 S.C. 225, 230, 746 S.E.2d 483, 486 (2013)(emphasis added). In other words, the Applicant suffers no prejudice from the joint trial of indictments if the facts underlying the severed indictment could have been offered in trial as evidence of bad conduct pursuant to Rule 404(b), SCRE. "When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. When the similarities outweigh the dissimilarities, the bad act evidence is admissible under 404(b)." *Id.* at 231,487, citing State v. Wallace, 384 S.C. 428, 683 S.E.2d 275, 277-78 (2009). "In

determining whether a close degree of similarity exists, some of the factors to consider are 1) the age of the victims when the abuse occurred, 2) the relationship between the victims and the perpetrator; 3) the location where the abuse occurred; 4) the use of coercion or threats; and 5) the manner of the occurrence, for example, the type of sexual battery." *Id.* at 232, 487. A summary of these factors is below:

A review of the facts previously listed provides a basis for analysis of these factors. As to the first and second indictments, no one knows exactly when the incidents allegedly occurred but it clearly involved pre-pubescent victims, while the third indictment alleges abuse of a thirteen year old. The incidents underlying the first and second indictments occurred at least five years prior to the third indictment's allegation. While Applicant attended church with all alleged victims, he had closer relationships with some than others. All alleged incidents occurred at different locations. The first two indictments allegedly occurred in a house while no other adults were in the room, but the third indictment allegedly occurred in a car while another adult was present. The only allegation of coercion or threats was present during the second indictment. Finally, the manner of each occurrence as described above was very different. The first indictment alleged that the Applicant made the victim touch him inappropriately. The second indictment alleged that the Applicant touched the victim inappropriately. The third indictment alleged that the Applicant rubbed the victim's legs and plucked at her clothing with an inappropriate intention.

At the evidentiary hearing the State argued that the indictments were similar because the Applicant had the same defense to all indictments. As an initial matter, this argument is not compelling because the defense was simply denial – a defense used

commonly by defendants who plead not guilty to criminal charges. Further, the State's argument was incorrect regarding the third indictment, as Attorney Shadd testified that they also asserted a defense that the victim's allegations were physically impossible and therefore not credible.

This Court finds that the similarities of the details do not outweigh the dissimilarities. While all allegations are of the same general nature sufficiently to result in the same criminal charge of Lewd Act being charged, the details have sufficient dissimilarities such that introduction of the facts of any severed indictment would likely not have been introduced to prove common scheme or plan, and therefore the Applicant was prejudiced by having all three indictments tried together.

Additionally, the Beekman court pointed out that "even if the prior bad act evidence is found admissible under Rule 404(b) SCRE, the evidence may nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE." 405 S.C. 225, 230, 746 S.E.2d 483, 486 (2013). In the Applicant's case the danger of unfair prejudice was made clear by the Solicitor herself. In the cross examination of the Defendant the Solicitor asked:

> "So all this arose out of three little girls who were - whose families were either jealous or had no reason or who you were trying to get in trouble making up independently these heinous allegations?"
>
> *See, Trial transcript, page 818, lines 19-22.*

Subsequently in her closing argument the Solicitor made the following comments:

> "In this case what you have is solid direct evidence of the crimes that were committed that is totally and completely corroborated by the circumstantial evidence that you have before you. You can consider either and in this case it's not just one or the other, this isn't a case where you just have one person

come forward and make allegations about what happened to them. You can use any and all of the evidence before you to corroborate each and every one of these victims and I would ask you to do so."

See, Trial transcript, page 834 line 25 though page 835 line 8.

"But this case has a whole unique flavor to it because this is the case of a grand conspiracy, a grand conspiracy that was initiated by little girls who were 11 and 12 by the time they told what happened to them in elementary school, who were clever and cunning enough to frame this poor man, David Carmichael, Jr. Uncle Junior. They were clever and cunning enough to anticipate that even when the police became involved that the police would just become complicit in the conspiracy, and when they questioned him they just didn't give him enough time to come up with the church is jealous. And they were clever enough to know that six years later – excuse me, five years later that another young woman who was 13, she would have been seven at the time they reported it, would decide that, "Oh, great idea for Uncle Junior," this clever, cunning, lying little girl would then join in the conspiracy and, Oh my God, just happen to come up with allegations that is just happened to mirror what he did before."

See, Trial transcript, page 845, line 10 through page 846 line 2.

In proving her case, the Solicitor used the fact that the Applicant was alleged of committing a lewd act by three separate girls in three separate unrelated instances to enhance her case and bolster the credibility of her victims. She did this by using the testimony of each victim to corroborate the testimony of the other victims and argue that any disbelief of any victim would tantamount to accusing the victims of participating in a "conspiracy."

In sum, this Court finds that trial counsel was ineffective for not requesting a severance when these three indictments were called to trial at the same time. Counsel's deficiency prejudiced the Applicant by allowing the State to contaminate the trial by allowing unrelated allegations to be used against each other to strengthen the State's case and bolster the credibility of the victims. As a result, this Court finds that evidence exists

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 and accordingly the Applicant's Application for Post-Conviction Relief must be granted. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, (1984).

CONCLUSION

Based on the foregoing, this Court finds and concludes that the Application has established deprivations that would require this court to grant his application.

IT IS THEREFORE ORDERED:

1. That this current Application for Post-Conviction Relief be granted on the claims of ineffective assistance of counsel for failure to sever trials.
2. That this current Application for Post-Conviction Relief be denied on the claims of ineffective assistance of counsel for failure to investigate and for failure to file an appeal.

AND IT IS SO ORDERED this 18 day of December, 2014.

Robert

The Honorable Robert E. Hood
Presiding Judge

Columbia, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013CP4002293

David L #352788 Carmichael
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 30 December 2014 to attorneys of record or to parties (when appearing pro se) as follows:

David L #352788 Carmichael Kristy Grafton Goldberg Megan Harrigan Jameson

David L #352788 Carmichael
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)