

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2015-000136

KEVIN C. BRADLEY, 339031,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

DANIEL GOURLEY
Assistant Attorney General
Post Office Box 11549
Columbia, S. C. 29211
(803) 734-3737

TARA DAWN SHURLING
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, S. C. 29204
(803)738-8622 Phone
(803)738-1600 Fax
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR PETITIONER.

ATTORNEYS FOR RESPONDENT.

Appellate Case 2015-000136
On the 2010 PCR Docketed at 2010-CP-45-389
Indictment 2009-GS-45-249

INDEX

VOLUME I OF II

Index i

Transcript of Guilty Plea hearing held on January 25, 2010 1
Plea stands down, proceeds to jury trial

Transcript of Trial held January 25, 26, 27, 2010 9

Application for Post-Conviction Relief filed September 29, 2010 310
Docketed at 2010-CP-45-389 ¹
Includes 2009-GS-45-249 CSC with Minor 1st and CSC with Minor 2nd Degree
and 2010-GS-45-030 CSC with Minor 2nd Degree

Amended Application for Post-Conviction Relief filed June 12, 2012 317
Docketed at 2010-CP-45-389
Includes 2009-GS-45-249 CSC with Minor 1st and 2nd Degree
and 2010-GS-45-030 CSC with Minor 2nd Degree

State’s Return dated September 7, 2011 324
Docketed at 2010-CP-45-0389
On Indictment No. 2009-GS-45-249 CSC with Minor 1st and 2nd Degree

Amended Application for Post-Conviction Relief filed February 25, 2013 329
Docketed at 2010-CP-45-389
On Indictment 2009-GS-45-249 CSC with Minor 1st and 2nd Degree

State’s Amended Return dated October 28, 2013 336

Second Amended Application for Post-Conviction Relief filed May 21, 2014 342
2010-CP-45-0389
On Indictment 2009-GS-45-249 CSC with Minor 2nd Degree..... 347

¹ Applicant originally filed a timely Post-Conviction Relief Application (Docket No. 2010-CP-45-389) on September 29, 2010. In this original application, Applicant raised various allegations stemming from both Indictment No. 2009-GS-45-249 and Indictment No. 2010-GS-45-030. Applicant filed an amendment to that application on June 13, 2012. Due to the fact that both of these indictments are completely unrelated, the State requested PCR Counsel file a separate PCR Application for Indictment #2010-GS-45-030. Subsequently, PCR Counsel filed a new PCR Application (Docket No. 2013-CP-45-098) for Indictment No. 2010-GS-45-030 on February 25, 2013)

Clerk of Court Records351

SCDC Records357

PCR Hearing Transcript dated May 27, 2014.....363

VOLUME II OF II

Memorandum in Support of PCR Application in the Form of a Proposed Order
Filed August 6, 2014482

Order of Dismissal filed August 25, 2014511

Motion to Alter or Amend Pursuant to Rule 59(e), SCRCF filed October 15, 2014541

Order Denying Motion to Alter or Amend filed December 5, 2014.....547

Notice of Appeal filed October 23, 2014.....552

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF WILLIAMSBURG)	
KEVIN C. BRADLEY, #339031)	2010-CP-45-389
Applicant,)	
)	Applicant's Memorandum in Support of PCR
v.)	Application in the Form of a Proposed Order
THE STATE OF SOUTH CAROLINA,)	
Respondent.)	
_____)	

I.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to the orders of commitment of the Williamsburg County Clerk of Court. The Applicant was originally indicted for Second Degree Criminal Sexual Conduct with a Minor on Indictment No. 2010-GS-45-30. The State subsequently sought an amendment to the original indictment to add a count of First Degree Criminal Sexual Conduct with a Minor involving the same Victim as the original indictment for Second Degree Criminal Sexual Conduct with a Minor. The true billed, amended indictment charging Applicant with both first degree CSC with a minor and second degree CSC with a minor was true billed by the Grand Jury on January 21, 2010. Applicant was represented by retained counsel, Richard Strobel, Esquire.

Applicant was also indicted for a separate count of Criminal Sexual Conduct with a Minor Second Degree involving a different Victim in Indictment No. 2010-GS-45-30. Applicant was represented on that charge by Assistant Public Defender, Legrand Carraway. On January 25, 2010, Applicant appeared before the Honorable Clifton Newman for a guilty plea proceeding at which he was expected to enter pleas to one count of Criminal Sexual Conduct with a Minor 1st Degree from Amended Indictment No. 2009-GS-45-249 and one count of Second Degree Criminal Sexual Conduct with a Minor on Indictment No. 2010-GS-45-30. The State had agreed to dismiss count two of Amended Indictment No. 2009-GS-45-249 which charged Applicant with Second Degree CSC with a Minor involving the same minor as referenced in Count One of that indictment. At that proceeding, the Applicant was anticipated to waive Grand Jury presentment on Indictment No. 2010-GS-45-30. That plea proceeding was terminated before the Court accepted Applicant's pleas

after he advised the Court that he did not “want to give up [his] rights.” Plea Hearing, 1.25.2010, Tr. p. 7, ll. 1-9. Attorney Carraway, spoke once on the record during this plea proceeding. Plea Hearing, 1.25.2010, Tr. p. 4, ll. 15 – 18. Likewise, Attorney Strobel spoke out only once during this proceeding and that was when he introduced an affidavit prepared by him in anticipation of the pleas. Plea Hearing, 1.25.2010, Tr. p. 4, ll. 12 – 14.

Applicant proceeded to trial by jury before the Honorable Clifton Newman later in the same day as the attempted plea proceeding; January 25, 2010. Applicant was present at that trial, and was represented by Attorney Strobel. The State was represented by Assistant Solicitor, Kimberly Barr. Applicant was found guilty as charged on both counts of Indictment No. 2009-GS-45-249 and was sentenced by Judge Newman to twenty-five (25) years incarceration for First Degree CSC with a Minor, and twenty (20) years for Second Degree CSC with a Minor. Said sentences were specifically ordered to be served concurrent with each other. No direct appeal from these judgments and sentences was perfected on behalf of Applicant.

On January 27, 2010, immediately after the Court imposed sentences on both counts of Indictment No. 2009-GS-45-249, Judge Newman reminded him that he was looking at a mandatory life without parole sentence if he was ultimately convicted on the other pending charge against him. Trial Tr. p. 299, ll. 4 – 11. Applicant then asked if he could just go ahead and plead guilty, be sentenced on his other outstanding charge and be sentenced concurrently. While Applicant stated that he did not want to plead guilty, because he knew he was not guilty of that crime, he indicated a desire to just plead and “get it over with” and receive concurrent sentences. He reminded the Court that he had reached a plea agreement with the State on these charges before his trial. Trial Tr. p. 299, ll. 12 – 18. At that juncture, Judge Newman informed Applicant that;

Well, I don't accept guilty pleas from people who are not guilty. I only take guilty pleas from people who are guilty. They have to convince me, just as the Solicitor has to convince the jury that you are guilty in this case, you've got to convince me that you are guilty in that other case before I can accept a guilty plea. We'll give you overnight to think about that.

Trial Tr. p. 299, ll. 19 – 25.

The following day, January 28, 2010, Applicant once again appeared before Judge Newman, at which time he entered a plea of guilty on Indictment No. 2010-GS-45-030 on which he was charged with Second Degree CSC with a Minor. Said indictment had not yet been presented to the Grand Jury. Applicant waived his right to Grand Jury presentment on the record during this

plea proceeding. There were no plea negotiations entered in exchange for Applicant's plea on that indictment with the exception of the fact that the State allowed Applicant to plead as though he had no prior convictions. Plea Hearing, 1.28.2010, Tr. p. 3, ll. 21 – 23. He was sentenced by Judge Newman to five (5) years imprisonment for that offense. It was expressly ordered that said sentence be served consecutively to the sentence imposed on Indictment No. 2009-GS-45-249. Plea Hearing, 1.28.2010, Tr. p. 12, ll. 3 – 10.

Applicant originally filed an Application for Post-Conviction Relief on September 29, 2010. The State made Return to said application on September 7, 2011. In said application, docketed at 2010-CP-45-389, Applicant raised allegations concerning the judgments and sentences imposed against him following his jury trial on Indictment No. 2009-GS-45-0249, as well as allegations addressing the judgment and sentence imposed following his plea of guilty on Indictment No. 2010-GS-45-030. On June 12, 2012, Counsel for Applicant filed an amended Application for Post-Conviction Relief on his behalf. Counsel for Applicant filed another Amended PCR Application on February 25, 2013 in which Applicant addressed only claims relating to Indictment No. 2009-GS-45-249. The State made its amended Return on October 28, 2013. Pursuant to agreement with the State, Applicant filed a separate application separating his claims concerning his guilty plea on Indictment No. 2010-GS-45-030 from the allegations addressing his jury trial. That Application was docketed at 2013-CP-45-00098.

An evidentiary hearing was convened in this matter at the Sumter County Courthouse on May 27, 2014. Applicant was present for this proceeding and was represented by Tara Dawn Shurling, of the Richland County Bar. The Respondent was represented by Daniel Gourley, Assistant Attorney General.

II.

ALLEGATIONS RAISED

The Applicant has alleged generally that he received ineffective assistance of counsel prior to and during his trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14, of the South Carolina Constitution. In support of that claim he has raised the following specific allegations in his original Application for Post-Conviction Relief and in his first Amended Application for Post-Conviction Relief. Trial Counsel failed to provide client effective assistance prior to and during his trial proceeding.

Inasmuch as counsel failed to recognize errors which occurred during his trial, and thereafter failed to make appropriate objections, and supporting legal arguments relating thereto. Counsel's failure to make these objections may have changed the outcome of Applicant's trial and deprived him of the opportunity to have these issues addressed on their merits on direct appeal. His first Application for PCR specifically asserted the following:

1. Trial Counsel failed to file a direct appeal for the Applicant and the Applicant did not knowingly waive his right to a direct appeal.
2. Applicant pled guilty on his 2010 indictment without being fully advised of his right to appeal the judgments and sentences entered against him the previous day.

In his Second Amended Application for Post-Conviction Relief, filed on May 21, 2014 the Applicant raised the following additional specific allegations:

1. Trial Counsel was ineffective for failing to sufficiently argue the validity of the race neutral explanations given by the Applicant for striking jurors during the selection of the first jury selected in his case.
2. Trial Counsel was ineffective for failing to fully argue against the selection of a second jury panel in the Applicant's case where the reasons given by the Applicant for striking the jurors in question during the State's *Batson*¹ challenge were sufficiently race neutral pursuant to known precedent in South Carolina at the time of the Applicant's trial.
3. Trial Counsel was ineffective for failing to repeat and fully articulate for the record the Applicant's reasons for striking each of the jurors in dispute at his trial during the *Batson* hearing held pursuant to motion by the State.
4. Trial Counsel was ineffective for failing to explain to the Applicant that all of his reasons for striking each juror against whom he exercised a peremptory strike had to be fully stated for the record *as to each juror* when the strike used against that particular juror was addressed during the *Batson* hearing held pursuant to the State's motion.
5. Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to advise the Applicant, who being allowed by Trial Counsel to participate in decisions concerning the use of preemptory strikes in the selection of his jury, that in order to preserve a record for

¹ *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712(1986).

appeal from the trial court's ruling on a potential *Batson* motion by the State, he needed to be prepared fully articulate his reasons for using strikes against each juror.

6. Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to restate for each juror addressed during the *Batson* hearing the Applicant's reasons for using strikes against each juror as articulated in Trial Counsel's general response to the State's *Batson* motion..

7. Trial Counsel was ineffective for neglecting to exercise a peremptory strikes to remove five (5) jurors from the Applicant's jury who had been previously struck by the Applicant in the selection of his first jury where the explanations given by the Applicant for the use of a strike against each of these jurors, if properly articulated, provided a race neutral justification for the use of a peremptory strike against each of these jurors.

8. Trial Counsel was ineffective for characterizing the Applicant's reason for striking Juror number 96, Kenneth Lancaster, as an excuse, where this statement supported the prosecution's position that the reasons proffered by the Applicant for striking this juror were pretext Ural.

9. Trial Counsel was ineffective for failing to fully articulate the Applicant's objection to the testimony of State witness Barbara Greggs and for failing to present appropriate authority in support of the Applicant's objection to this testimony.

10. Trial Counsel was ineffective for failing to research and present potential character witnesses to testify in the Applicant's behalf at trial; specifically Sgt. Robert McCarty, Debra Black, Manager at Skies in Kingstree, South Carolina, Sgt. Staggers, employed with the 1052nd Transportation Company Army National Guard, and Frederick Davis of the Kingstree Police Department.

11. Trial Counsel was ineffective for failing to present testimony from Sgt. Robert McCarty, Army National Guard, who would have been able to present alibi evidence for some of the dates the Applicant was accused of committing sexual battery upon the Victim, Samaria G. and where said witness could have presented character testimony for the Applicant.

12. Trial Counsel was ineffective for failing to request a continuance after a material amendment to Applicant's indictment where the new indictment was presented to the Grand Jury days before the Applicant's trial, and where he was not made aware of the more serious charge brought in the new indictment until immediately before his trial.

During the evidentiary hearing held in this matter, Applicant requested leave of Court to further amend his Application to include the following claims:²

13. Trial Counsel was ineffective for failing to object to hearsay testimony from State witness Trina Hamlet, where said testimony was clearly hearsay and as such violated Applicant's right to fully confront his accuser and where said testimony prejudiced Applicant by allowing the prosecution to improperly bolster the credibility of the Victim in this case.
14. Trial Counsel was ineffective for failing to object to hearsay testimony from State witness Robin Tyler Griggs, where said testimony was clearly hearsay and as such violated Applicant's right to fully confront his accuser and where said testimony prejudiced Applicant by allowing the prosecution to improperly bolster the credibility of the Victim in this case.
15. Trial Counsel was ineffective for failing to object to testimony from forensic interviewer Robin Tyler Griggs in which she was allowed to offer expert opinion concerning the Victim's competency at the time of her taped interview where said testimony went beyond the scope of the expertise for which she was qualified as a witness and improperly bolstered the Victim's testimony.

III.

EVIDENCE BEFORE THE COURT

In deciding this collateral action this Court has before it a copy of the pre-trial hearing held on January 25, 2010, the trial record dated January 25 -27, 2010, a transcript of the PCR hearing held on May 27, 2014, the Applicant's records from the South Carolina Department of Corrections and the records of the Williamsburg County Clerk of Court regarding the subject convictions and

² For clarity in addressing these allegations, these additional issues are numbered sequentially with those found in the Second Amended Application.

sentences. What follows below are this Court's findings of fact and rulings of law as required by S.C. Ann. §17-27-80.³

V.

DISCUSSION

In this case, the Applicant alleges generally that trial counsel failed in multiple regards in his preparation for trial and in his representation of Applicant during that trial. On the facts of this case, this Court is constrained to agree. The Applicant has met his burden of proof concerning multiple errors and omissions of Trial Counsel which acted to deprive him of a fair trial. Having evaluated each of these allegations, this Court finds that there exists a reasonable probability that the result at trial would have been different but for these errors and omissions by Counsel. In order to demonstrate both the nature of Counsel's errors and omissions, and the prejudice to the Applicant arising there from, it is necessary and helpful to consider the following summary of portions of the General Sessions records and PCR hearing record.

RELEVANT TESTIMONY

During the PCR hearing held in this case, Trial Counsel's responses to most questions were vague: He acknowledged that he was retained to represent Applicant. When asked how long he had represented Applicant before this case went to trial he responded, "*Seemed like for years. These instances took place sometime before the trial.*" PCR Tr. P. 7, l. 21- p. 8, l. 2. He testified that he "*could not recall*" whether his file contained any indication of when he was retained. PCR Tr. P. 8, ll. 3-5.

When asked what charge Applicant was charged with right up until days before Applicant's trial, he responded, "*He was charged with raping a 10 year old child. She gave birth to a baby when she was 11. They did D.N.A. testing of the baby, and it turned out that he was the father,*

³ For purposes of supporting this Order on appeal, the finding of fact and rulings of law contained herein may be viewed as interchangeable as may be necessary to affirm the ruling of this Court on any appeal which may follow.

and he alleged that he raped her when she was 11, not 10. So basically that was the issue: when was she raped?" PCR Tr. P. 9 ll. 1-5..

Trial Counsel could not recall that Applicant was originally only charged with second degree criminal sexual conduct with a minor. PCR Tr. P. 99, ll. 6-9. Ultimately he acknowledged that the amended indictment charging Applicant with First Degree Criminal Sexual Conduct with a Minor was not true billed until January 21, 2010; just days before Applicant's trial began on January 25, 2010. He could not recall, however, how long before January 25, 2010, he was aware that the more serious charge of First Degree Criminal Sexual Conduct with a Minor had been added against Applicant. PCR Tr. P. 9, l. 16- p. 17, l. 18. It is apparent that he had to know the additional charge had been made prior to the attempted plea hearing on January 25, 2010 because when they went to Court that day he obviously was aware Applicant was going to plead guilty to the more serious charge of First Degree Criminal Sexual Conduct with a Minor. PCR Tr. P. 10, ll. 15-21; Plea Hearing, 1.25.2010, Tr. p. 4, ll. 6 – 14.

During an attempted guilty plea before Judge Newman prior to Applicant's trial on Indictment No. 2010-GS-45-30, the Court was informed that Applicant was pleading to the First Degree CSC with a Minor count charged in Indictment No. 2009-GS-45-249 *and* the one count of Second Degree Criminal Sexual Conduct with a Minor found in Indictment No. 2010-GS-45-30. Plea Hearing, 1.25.2010, Tr. p. 3, ll. 1 – 18. Trial Counsel's PCR testimony indicates that he wasn't at all familiar with the charge Applicant was supposed to plead to on Indictment No. 2010-GS-45-30. His PCR testimony indicates that he did not even recall Legrand Carraway, who represented Applicant on Indictment No. 2010-GS-45-30, being in the Courtroom on January 25, 2010, when the plea hearing was held. PCR Hearing, Tr. p. 13, l. 23 – p. 15, l. 16. During the January 25, 2010 hearing, Applicant indicated that he did not wish to waive his right to a jury trial. Plea Hearing, 1.25.2010, Tr. p. 7, ll. 1 – 7. Trial Counsel indicated that he didn't understand what was going on when Applicant declined to waive his right to a jury trial. He never considered asking for a brief recess to determine which charge(s) he wanted a jury trial on. Trial Counsel was further confounded by the fact that Applicant had executed an affidavit acknowledging his guilt before he spoke up demanding a jury trial. Plea Hearing, 1.25.2010, Tr. p. 16, l. 16 - p. 17, l. 23. Following jury selection at Applicant's jury trial the State interjected a *Batson* challenge concerning the jurors struck by the defense. Trial Tr. p. 21, l. 9 - 24. In response to this challenge Trial Counsel stated the following;

Your Honor, my client says that he didn't strike under the Batson – he didn't strike anybody because of race or gender. He struck by the way they answered the questioned and the way that they looked at him in particular.

Trial Tr. p. 23, ll. 3-8.

The State then asked that the defense be required to state for the record its specific reason for exercising peremptory strikes against numerous jurors. Trial Tr. p. 24, ll. 5-22. With regard to Juror No. 96, Trial Counsel stated, *"The same excuse, no different."* Trial Tr. p. 25, ll. 21-22. With regard to Juror No. 81, Linda Horton, Trial Counsel stated, *"he did not fully understand her explanation of employment and where she worked."* Trial Tr. p. 25, l. 23 – p. 26, l. 5. As to juror No. 196, Sandra Wilson, Trial Counsel explained that Applicant, *"did not like the way she presented herself."* Trial Tr. p. 26, ll. 6 – 9. Trial Counsel stated that Applicant struck Juror No. 66, Celeste Gatlin, for the same reason. Trial Tr. p. 26, ll. 10 – 12. On Juror No. 131, T. Murray, Trial Counsel explained that Applicant had struck her because he did not fully understand where she worked. Trial Tr. p. 26, ll. 13 – 16. Trial Counsel explained that he had a major role in striking Juror No. 104. He explained that he is always leery of people who sit on the front row during jury selection and felt as though this juror acted *"very excited, very into it, and the way she was looking at them, I felt as if she was already pro-Solicitor's Office before she even got here to be qualified on the jury."* Trial Tr. p. 26, l. 17 – p. 27, l. 5. With regard to Juror No. 201, R. Martin, Trial Counsel explained that Applicant did not like that she was a school teacher at Johnsonville School, was anxious about the number of deputy sheriffs associated with the school system and further, he *"didn't like the way she presented herself."* Trial Tr. p. 27, ll. 6 – 13. As to Juror No. 16, K. Brown, Trial Counsel explained that Applicant struck this juror because he worked for the fire department, and Applicant was afraid he would be pro-law enforcement because of his affiliation with the fire department. Trial Tr. p. 27, ll. 14 – 21. Following these explanations, the State noted that there had been two additional strikes used by the defense that had not been explained. With reference to Juror No. 80, the prosecution noted that Trial Counsel had explained that this juror worked for the Department of Special Needs and that *"he was concerned that there may be some sort of bias or affiliation with the Department of Social Services."* Trial Tr. p. 228, ll. 4 – 8. The State then required that the defense explain the reason for striking Juror No. 2. Trial Tr. p. 28, ll. 8 – 11. In response to this inquiry, Trial Counsel stated, *"He didn't have a reason for Patricia Chandler; he just didn't want her to serve on his jury. He gave no reason."* Trial Tr. p. 28, ll. 12

- 16. After the State articulated its reasons for believing their *Batson* motion should be granted, Trial Tr. p. 268, l. 18 – p. 29, l. 9, Trial Counsel offered no argument in reply to the State’s position. Trial Tr. p. 29, ll. 10 – 11. After lengthy analysis on the record, the presiding judge granted the State’s *Batson* motion and expressly ruled that none of the jurors struck from the first panel could “*be discriminated against in any future jury selection in this case.*” Trial Tr. p. 29, l. 23 – p. 33, l. 17.

Trial Counsel’s PCR testimony indicated that he was not familiar with the contemporaneous objection rule adhered to in South Carolina. PCR Tr. p. 21, ll. 19-22. He added that he saw nothing to object to with regard to the selection of the Applicant’s second jury. PCR Tr. p. 21, l. 23- p. 22, l. 4. Trial Counsel testified that he was not concerned that his characterization of Applicant’s reason for exercising a strike on juror No. 96 as an “*excuse*” could be equated with the State’s argument that the reason for the strike was pretextual. PCR Tr. p. 22, ll. 5-24.

Trial Counsel’s PCR testimony illustrates a basic lack of understanding of the issues inherent in the State’s *Batson* challenge. His responses to questions on this subject reflect that Trial Counsel had no understanding of the necessity to fully present his client’s race neutral explanation for striking each juror he utilized a peremptory strike to remove from his jury panel. PCR Tr. p. 22, ll. 1-15. Trial Counsel went so far as to testify that he didn’t see any reason to object to the first panel being quashed. PCR Tr. p. 22, ll. 1-4. PCR Tr. p. 22, l. 25- p. 23 l. 9, PCR Tr. p. 24, ll. 11-25. This was his position, notwithstanding the fact that he indicated that at least one of the strikes was utilized for reasons of his own. He went so far as to blame his failure to fully articulate the reasons for a strike on Applicant, arguing he wasn’t asked to. PCR Tr. p. 24, ll. 2-24

In his original indictment, Applicant was indicted for Second Degree Criminal Sexual Conduct with a Minor involving the young girl involved in this case. On January 21, 2010 Applicant was charged with First Degree Criminal Sexual Conduct with a Minor in an amended indictment true billed just days before the Applicant’s trial. Trial Counsel testified that he saw no reason to ask for a continuance after this development. PCR Tr. p. 26, ll. 18-25. He admitted that he never even discussed the reasons for the last minute escalations of the charges with the State. He testified that he considered himself fully prepared to challenge the State’s new assertion that the Victim was younger than eleven (11) when the first sexual battery occurred. PCR Tr. p. 27, ll. 1-25.

At trial, Trial Counsel initially objected to hearsay testimony from State witness, Barbara Griggs, a registered nurse who examined the Victim in August, when the child was eleven (11) years old. In his PCR testimony, he could not recall whether he ever considered objecting to her testimony on the ground that it exceeded a report of the time and place of the event. He admitted that he never considered objecting to this testimony indirectly allowing this nurse to testify not only to what the Victim said, but the grandmother as well. PCR Tr. p. 27, l. 25-p. 31, l. 9.

Trial Counsel's PCR testimony claimed that he didn't need more time to develop a defense to the new claim by the State that this child was ten (10) years old at the time of the first sexual battery by Applicant because *"I don't do that."* PCR Tr. p. 31, l. 23- p. 32, l. 2. After extensive questioning about the fact that the trial record did in fact reveal that he cross-examined the Victim at length about her recollection as to timing issues, Trial Counsel stated, *"I go with what the record says."* During his PCR testimony on this crucial point Trial Counsel actually testified that, *"Well, it was trial strategy for me to stick with what the child – what she testified to."* He expressed concern about the fact that her medical records showed that she had a discharge at age 10. PCR Tr. p. 32, l. 3- p. 34, l. 23. At trial the testimony of the doctor who treated the Victim indicated that she was approximately thirteen and six-sevenths weeks pregnant when an ultrasound was performed on August 26, 2009. Trial Tr. p. 137, ll. 13 – 17; Trial Tr. p. 138, ll. 2 – 10, Trial Tr. p. 140, ll. 4 - 21 and Trial Tr. p. 142, ll. 6 – 14. Dr. Luberoff estimated that this information put the date of conception at *early May*. Trial Tr. p. 142, ll. 17 – 20.⁴

At trial the Victim claimed Applicant began molesting her in the summer of 2008 when she was ten (10) years old. Trial Tr. p.115, ll. 1 – 12. As noted above, the testimony of Dr. Susan Luberoff put the date of conception at approximately May, 2009. When asked why he did not question the Victim concerning how long the sexual relationship had been going on when she got pregnant, Trial Counsel repeated his position that he wasn't about to question her memory as to the timing of the onset of the sexual relationship. The record of this trial, however, clearly reflects that he did cross-examine the child concerning her recollection concerning the timing of the events. He simply did not question her concerning the timing of the first sexual encounter as it related to the pregnancy and subsequent abortion. Trial Tr. p. 124, l. 15 – p. 132, l. 7. Applicant admitted having sex with this young girl and testified to as much at trial. He denied that the acts occurred

⁴ Counting back 14 weeks from August 26th would actually place the date of conception near the middle of the month of May. Thus, the approximate date of conception would more be more accurately more nearly *the third week in May*, not early May as testified to by this witness.

before the girl's eleventh birthday. Trial Tr. p. 236, ll. 1 – 14. On cross-examination, Applicant admitted that he did not know the Victim's date of birth until his trial. He asserted, however, that he was certain he never had sex with the Victim in 2008. He acknowledged that he had visited Dasheia's apartment in 2008, but was firm about the fact that he never stayed in her house during 2008. Trial Tr. p. 237, l. 2 – p. 238, l. 8. The Victim claimed she could recall that the first time she had sex with Applicant occurred in the summer of 2008 when she was ten (10) years old. Trial Tr. p. 115, l. 1 – 12.

~~Applicant~~ ^{Victim} never actually testified that Applicant had sexual intercourse with her in the summer of 2008. She testified that Applicant "*started touching me and feeling me and stuff.*" When asked where Applicant touched her, she responded by pointing and answering yes when the prosecution asked if she was indicating her chest and breast area as well as her vagina. Trial Tr. p. 116, l. 4- p. 117, l. 9. She stated Applicant "*did it to it.*" Trial Tr. p. 117, ll. 2-12. The Prosecution prompted Victim by asking, "*he put his what in your what?*" Only then did the Victim say Applicant, "*put his thing in my crotch.*" Trial Tr. p. 117, l. 16. The Victim testified that she wasn't sure how many times "*it*" happened, but claimed the first time was in June, 2008, and the last was the Fourth of July, 2009. Trial Tr. p. 117, l. 22- p. 118, l. 8.

The only person to state that "*he placed his penis in your vagina*" was the prosecutor. Even that reference was not in connection with the summer of 2008. The prosecutor asked the Victim how many time "*he placed his penis in your vagina.*" The Victim responded affirmatively when asked if it happened more than five times. Trial Tr. p. 118, l. 25- p. 119, l. 4. The prosecution also asked the victim if it ever hurt when Applicant "*would do those things to you*" and questioned whether she was "*ever bleeding.*" Although the Victim answered these questions affirmatively, her responses did not when those occurrences took place. Trial Tr. p. 120, l. 8- p. 121, l. 4.

During Trial Counsel's PCR testimony he recalled that Applicant admitted having sex with this girl multiple times. He acknowledged, however, that Applicant never admitted that the sex acts occurred when she was ten (10) years old. He testified that Applicant never admitted any specific timing of these sexual encounters with the girl. Trial Counsel confirmed that the Applicant himself was only approximately eighteen (18) years old at the time of the alleged conduct. PCR Tr. p. 34, l. 3- p. 39, l. 21. In his PCR testimony Trial Counsel actually denied that Applicant disputed the claim that the sexual contact with the Victim was initiated when she was ten (10) years old. PCR Tr. p. 39, l. 22-p. 40, l. 11. As previously noted, the trial record clearly refutes this position.

During his PCR testimony Trial Counsel denied any recollection of testimony from a forensic interviewer named Robin Tyler Griggs. PCR Tr. p. 42, ll. 3-6. He did not recall anyone being qualified as an expert in the field of *“forensic interviewing and child abuse assessment.”* PCR TR. p. 42, ll. 7-14. Trial Counsel testified that he never considered objecting to this witness’s testimony despite the fact that portions of it went beyond reports of the time and place of the sexual battery. PCR Tr. p. 43, l. 18- p. 44, l. 21. When questioned about other hearsay testimony from this witness that was not objected to at trial, Trial Counsel answered, *“strategy.”* When asked what that “strategy” was he asserted only *“to win”* without any explanation as to why his failure to object could in any way of operated to Applicant’s advantage. PCR Tr. p. 44, l. 22- p. 45, l. 14. Likewise, Trial Counsel offered no explanation for his failure to object to further hearsay from this witness concerning the Victim’s statements concerning a desire to harm herself or the examiner opinion that she needed immediate counseling. PCR Tr. p. 45, l. 15- p. 46, l. 11. Neither did he offer any reason for failing to object to this witness’s testimony directed toward the Victim’s competency, and her ability to ascertain right from wrong. PCR Tr. p. 46, l. 12- p. 47, l. 23. He testified that he never considered objecting to this testimony as exceeding the field in which she had been qualified as an expert. PCR Tr. p. 47, l. 21- p. 48, l. 6.

Trial Counsel was expressly asked why he didn’t object to a question put to Officer Trina Hamlet regarding what the Victim told her. In response to this line of inquiry by the State, this witness testified that the Victim said Applicant, whom she named, had *“forced having sex with her.”* In his PCR testimony Trial Counsel asserted he didn’t object to this line of testimony because the child had already testified to that fact. PCR Tr. p. 49, l. 10- p. 50, l. 12; Trial Tr. p. 170, l. 25- p. 171, l. 1.

In his PCR testimony, Trial Counsel admitted that he never discussed *any possible defenses with Applicant . PCR Tr. p. 51, ll. 16-17.* Trial Counsel expressed the view that *“with the blood results”* there were no possible defenses to the charges. After prompting by a question from Respondent, he agreed that it was correct that there were no defenses *“other than the fact that he alleged that he did not have sexual intercourse with [Victim] at the age of 10.”* PCR Tr. p. 51, ll. 16-23. Trial Counsel’s PCR testimony reflected his belief that he had no basis, as an attorney, for striking the jurors that were the subject of the State’s *Batson* challenge *“outside of the defendant’s request to strike them.”* PCR Tr. p. 54, ll. 2-10. He saw no reason to strike the contested jurors when some of them came back up for the second panel. He believed he had fully developed, and

argued, Applicant's reasons for striking these jurors from the first panel. He expressed the view that Applicant had a fair and impartial jury. PCR Tr. p. 54, l. 11-p. 55, l. 4. With regard to witness Barbara Griggs, Trial Counsel testified that he felt he had argued his objection to hearsay testimony introduced through her to the best of his abilities. PCR Tr. p. 55, ll. 5-12.

During his PCR testimony, Trial Counsel agreed with Respondent that the Victim's testimony that sexual intercourse began in June, 2008, was corroborated by testimony that Victim was taken to the doctor for a "*discharge*" when "*she was around with the boy...*". PCR Tr. p. 56, l. 12- p. 57, l. 1. During another portion of his PCR testimony, PCR Counsel erroneously argued that the portion of the trial record which reflected that the Victim had tested positive to these STDs did not clearly indicate at which doctor's appointment, the Victim tested positive for these diseases. PCR Tr. p. 71, l. 12- p. 72, l. 2.

Trial testimony actually revealed the following about the Victim's June, 2008 and August, 2009 doctor visits.

- Nurse Barbara Gregg testified that the Victim was brought to the doctor's office on June 24, 2008 by her Grandmother, Sadie McBride. Trial Tr. p. 56, ll. 1 – 7;
- The grandmother reported that she had caught her granddaughter with a boy, that the child had a discharge and that she was concerned that the girl had some kind of sexual disease; Trial Tr. p. 56, ll. 10 – 13;
- Nurse Gregg reported that the girl was tested for various venereal diseases and all the test results were negative. She did not indicate that she conducted a physical exam on the girl during the June, 2008 examination. Trial Tr. p. 56, ll. 14– 18;
- Nurse Gregg testified that the girl was brought in for a check-up on August 14, 2009. Nurse Gregg specifically does mention conducting a physical examination on the girl during the August visit. During that visit, a pregnancy test was done and the test results were positive. Trial Tr. p. 56, l. 19 – p. 57, l. 9;
- When questioned about the testimony concerning her having caught her granddaughter with a boy in June, 2008, the grandmother verified having heard the testimony to that effect from Nurse Gregg. When she was asked who the boy was, however, she denied having ever caught her granddaughter with a boy. Trial Tr. p. 85, ll. 2 – 11;
- Dr. Susan Greeland Luberoff testified to conducting a "good head-to-toe" physical examination of this girl on August 26, 2009. She described finds which included a tear in her hymen which had healed and an enlarged uterus. Trial Tr. p. 136, l. 5 – p. 139, l. 19.

Trial Counsel admitted that he never discussed filing an appeal with Applicant . PCR TR. p. 57, ll. 8-12. He then claimed that following Applicant's conviction he "*very quickly*" told Applicant about his right to appeal and advised him that "*it must be done or I must be notified within 10 days of today.*" He initially unequivocally testified that Applicant "*didn't tell me he wanted to appeal, but he did not tell me I do not want to appeal.*" After specifically testifying twice that Applicant never told him he didn't want to appeal, Trial Counsel claimed that when he asked Applicant if he wanted him "*to appeal*", Applicant said, "*no*". PCR Tr. p. 58, l. 1 – p. 59, l. 11. He confirmed that he did not file an appeal on Applicant's behalf. PCR Tr. p. 59, ll. 12-13.

Trial Counsel admitted that he never questioned Applicant concerning whether he had ever tested positive for any of the STDs the Victim tested negative for in June, 2008, and positive for the following August, 2009. He never asked his client if he had ever had these diseases. He testified that he did not believe proof that Applicant had never had the diseases in question would have been valuable to the defense despite the fact that the girl's credibility regarding the timing of the onset of her sexual relationship with Applicant was crucial to the charge of First Degree Criminal Sexual Conduct with a Minor. PCR Tr. p. 62, l. 10- p. 66, l. 5. During the *Batson* hearing held during Applicant's trial, the presiding judge's ruling indicated that where Applicant struck jurors in question because he didn't like the way they looked, the reasons given were "*pretextual.*" Trial Tr. p. 30, ll. 32, ll. 2 – 13. Trial Counsel admitted that he did not consider objecting to this ruling not fully and accurately reflect Applicant's race neutral explanations for striking the jurors at issue. PCR Tr. p. 67, l. 22- p. 68, l. 22. He asserted that he explained the need to preserve his position on the *Batson* issues for a potential appeal, but claimed that Applicant just didn't want to preserve that. PCR Tr. p. 67, ll. 13-21. Trial Counsel actually claimed in his PCR testimony that Applicant had admitted having sex with the Victim when she was 10 years old. PCR Tr. p. 69, ll. 3-8. He directly contradicted this assertion in other portions of his PCR testimony summarized herein.

Applicant's initial PCR testimony indicates that he was not certain whether he discovered that he had been charged with First Degree Criminal Sexual Conduct with a Minor charge involving ~~Victim~~ ^{Victim} in addition to the original charge of Second Degree Criminal Sexual Conduct with a Minor involving this same Victim on the Thursday before his trial or the day of the trial. PCR Tr. p. 74, ll. 4-24. He stated that he never knew he had actually been indicted for that additional charge. PCR Tr. p. 75, ll. 3-22. After further question, however, he recalled that on the day of his trial

before his jury trial began, there was a hearing at which he thought he was pleading to Second Degree Criminal Sexual Conduct with a Minor with regard to [REDACTED]; the Victim in this case. PCR Tr. p. 76, l. 11-p. 77, l. 12. He testified that prior to the Solicitor putting the charges he was pleading to on the record, he wasn't aware he was being charged with First Degree Criminal Sexual Conduct with a Minor. PCR Tr. p. 76, l. 6-p. 77, l. 19. Once he realized his "deal" was to plead to First Degree Criminal Sexual Conduct with a Minor with regard to [REDACTED], he advised the Court that he did not wish to waive his right to a jury trial. PCR Tr. p. 77, l. 20- p. 78, l. 1.; Plea Hearing, 1.25.2010, Tr. p.7, ll. 2 – 9. Applicant noted that he admitted his guilt regarding having had sex with [REDACTED], but had always asserted that it didn't happen until after [REDACTED], 2009. He disputed his guilt concerning the Second Degree Criminal Sexual Conduct with a Minor charge, involving a different Victim. He was represented on that charge by Public Defender, William LaGrand Carraway, whose name appears on the transcript of the plea hearing held on January 25, 2010. PCR Tr. p. 76, l. 11- p. 78, l. 9.

Applicant testified that when they met the Thursday before his trial, he and Mr. Strobel were preparing for a guilty plea as opposed to a jury trial. Trial Counsel never told him that if the plea did not go through for any reason he would be going to trial on that charge that Monday. PCR Tr. p. 78, ll. 10-20.

In his PCR testimony, Applicant articulated his reasons for striking the jurors involved in the State's *Batson* challenge at trial. His testimony reflects his belief that Trial Counsel failed to fully articulate Applicant's race neutral reasons for striking the jurors at issue. PCR Tr. p. 78, l. 21- p. 79, l. 21. Applicant's PCR testimony indicates that he questioned Trial Counsel about raising an objection to jurors who were previously struck being seated on the second panel, but Trial Counsel chose to seat them without raising the issue. One juror previous struck by Applicant actually ended up being selected as the foreperson for the second panel. PCR Tr. p. 79, l. 22-p. 82, l. 3. Applicant testified that he asked Trial Counsel to strike these jurors from the second panel. PCR Tr. p. 82, l. 4- p. 83, l. 14.

Applicant testified that once he stated he did not want to waive his rights during the plea hearing on January 25, 2010 there were no side bar conferences or recesses during which there was any further discussion about why the plea fell apart. PCR Tr. p. 83, ll. 16-25. Trial Counsel never discussed the possibility of requesting a continuance with Applicant despite the fact that Applicant was not indicted for First Degree Criminal Sexual Conduct with a Minor until January 21, 2010, the

Thursday before Applicant's trial began on Monday the 25th of January, 2010. He asserted that he would have wanted Trial Counsel to ask for a continuance had he known such a request was possible. PCR Tr. p. 84, ll. 1-11.

Applicant's PCR testimony reflects his position that witness Griggs' hearsay testimony prejudiced him because it bolstered the Victim's testimony. PCR Tr. p. 84, ll. 12-24. In his PCR testimony, Applicant asserted that his attorney never discussed his right to a direct appeal with him. His testimony asserted that he wanted a direct appeal. PCR Tr. p. 84m, l. 25- p. 85, l. 6.

Applicant's PCR testimony reflected his belief that Trial Counsel was "very non-chalant" about presenting his position concerning the reasons why he wanted certain jurors struck from the first jury selected. He recalled that his lawyer reflected a "*didn't care attitude*" when responding to the State's *Batson* motion. PCR Tr. p. 85, l. 18- p. 86, l. 23. Applicant's PCR testimony reflects that the sole reasons he went to trial in this case was the fact that he contested that the sexual intercourse with the Victim happened before she turned eleven (11) years old. PCR Tr. p. 87, ll. 2-5.

Applicant testified that he would have wanted Trial Counsel to object to the testimony of the forensic interviewer presented as a State witness during his trial had he known there was a basis for doing so. PCR Tr. p. 87, ll. 6-11.

Applicant testified that he would have wanted Trial Counsel to use the approximate date when the Victim became pregnant, Summer of 2009, as established through the trial testimony of Dr. Susan Luberoff, to challenge the Victim's claim that she began having sex with Applicant the summer of 2008. PCR Tr. p. 88, ll. 1-19. Likewise, Applicant testified that he had never tested positive for either gonorrhea or chlamydia. He stated that he would have been willing to be tested for those STDs prior to his trial and would still be willing to be tested. PCR Tr. p. 88, l. 20-p. 89, l. 8.

STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rule 71.1(e), SCRPC. In evaluating an Application for Post-Conviction Relief, the

moving party must demonstrate that Defense Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where Defense Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that,

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

A.

Allegation 1, Original Application and Amended Application

Trial Counsel failed to file a direct appeal for the Applicant and the Applicant did not knowingly waive his right to a direct appeal.

This Court finds that Applicant has met his burden of proof with regard to his claim that Trial Counsel provided him ineffective assistance of Counsel in that he failed to preserve Applicant's right to a direct appeal following his jury trial. The testimony of Trial Counsel at best indicates that there was some rushed discussion of Applicant's right to a direct appeal following the verdict at trial. The record before this Court does not support a finding that Applicant made a knowing and voluntary waiver of his right to a direct appeal from his convictions and sentences. Therefore, this Court finds that he is entitled to a belated review of his substantive claims under the guidelines and procedures set forth by our Supreme Court in White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974); Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

B.

Allegations 1 – 8 Second Amended Application

***Batson* Related Claims**

The record below indicates that Trial Counsel failed to fully articulate his client's explanations for striking each of the jurors who were eliminated from jury service through the use of a preemptory strike by the defense. Although Trial Counsel generally set forth Applicant's explanation when the challenge was first raised by the State, he did not set forth that explanation in detail with regard to each juror in question during the *Batson* hearing that followed. It is equally apparent that Trial Counsel made no effort to argue Applicant's position in response to the State's challenge. Likewise he made no effort to place legal arguments on the record which would have refuted the lower court's position that Applicant's justification for striking these jurors was pretextual. Trial Counsel's own characterization of Applicant's reasons for striking the jurors in question as an "excuse" argued against his client's position when there existed South Carolina

precedent for the adequacy of the reasons asserted by Applicant as sufficient to withstand a *Batson* challenge.

It has long been well established that the reasons offered for use of a peremptory strike do not have to be clear, reasonably specific, or even legitimate, they simply must be race neutral. *Purkett v. Elam*, 514 U.S. 765, 115 S.Ct. 1769 (1995); *State v. Adams*, 322 S.C. 114, 123, 470 S.E.2d 366, 371(1996); *State v. Cochran*, 369 S.C. 308, 314, 631 S.E.2d 294, 298 (Ct. App. 2006). “The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike.” *State v. Haigler*, 334 S.C. 623, 629, 515 S.E.2d 88, 91 (1999). In order for the opponent of strikes to show that the reasons offered for their use, even if facially race-neutral, were pretextual they must demonstrate that the reasons were actually mere pretext for engaging in purposeful racial discrimination. *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298. If the trial court erroneously grants a *Batson* motion made by the State, but none of the jurors at issue serve on the subsequently selected jury, the error is harmless. *State v. Edwards*, 384 S.C. 504, 509 682 S.E.2d 820, 823 (2009). On the other hand where, as in Applicant case, one or more of the jurors in question is seated on the new jury panel prejudice is assumed and the error will never be harmless. *State v. Rayfield*, 369 S.C. 106, 114, 631 S.E.2d 244, 248 (2006); *Edwards*, 384 S.C. at 509, 682 S.E.2d at 823.

The court record reflects that *Applicant struck four black females* from the first jury; No. 128, Foyola D. Murphy, No.131, Teresa G. Murray, No. 196, Sandra Wilson⁵ and No. 80, Yara Hilton. Jurors number 131 and No. 80 were struck for reasons having to do with their employment or Applicant’s understanding of their employment. Trial Tr. p. 26, ll. 13 – 16 and Trial Tr. p. 28, ll. 4 – 8. The record reflects that the reason given for striking juror No. 128, a black female, was that,

⁵ The Court Reporter’s juror form indicated that this juror was seated on the first panel. Trial Tr. p. 5, however the trial record reflects that Applicant used a strike to remove this juror. Trial Tr. p. 17, ll. 21 – 24.

“he didn’t like the way she presented herself as a juror.” Trial Tr. p. 25, ll. 5 – 11. With regard to juror No. 196, Sandra Wilson, Applicant stated that *“he did not like the way she presented herself.”* Trial Tr. p. 26, ll. 6 – 9.

Out of twelve peremptory strikes (counting those used on alternates) , Applicant , an African American, used four to strike members of his own race. Of the remaining eight strikes, four were used to strike jurors due to employment issues. (Juror No, 81) Trial Tr. p. 25, l.23 – p. 26, l. 5; (Juror No. 131) Trial Tr. p.(Juror No. 201) Trial Tr. p. 26, ll. 13 – 16; (Juror No. 201) Trial Tr. p. 27, ll. 6 – 13; (Juror No. 16) Trial Tr. p. 27, ll. 14 – 21. Of those four, one juror was excused due to employment concerns as well as, how she presented herself. The defense used a strike to excuse Juror No. 104, Teresa McCants. The record reflects that the decision to strike this juror was made by Trial Counsel who indicated that he was always leery of jurors who sat on the front row during *voir dire*. He expressed the view that this juror appeared very excited and *“into it”* and felt that she was looking at *“them”* in a way that indicated that she was already pro-Solicitor’s office before she even got up to be qualified. (Juror No. 104) Trial Tr. p.26, l. 17 – p. 28, l. 5. In the final analysis, only three white juror were actually struck based upon Trial Counsel’s original assertion that Applicant had used his strikes on prospective jurors, *“by the way they presented themselves to him and the way they answered the questions and the way they looked at him in particular.”* Trial Tr. p. 23, ll. 5 – 8. As previously noted, two black jurors were struck for the exact same reason.

On the facts of this case, this Court finds that Trial Counsel failed to provide Applicant with reasonable professional assistance of counsel in that he failed to fully articulate the Applicant’s reasons for striking each of the jurors against whom he utilized a peremptory strike. Counsel further failed to meet his duty to Applicant when he characterized the explanations given by Applicant in response to the State’s *Batson* challenge as excuses. In addition, the trial court dismissed

Applicant's explanations for having struck several jurors as *per se* pretextual. In so ruling, the lower court found that the reasons advanced for the strikes were "*so fundamentally implausible.....that those strikes were done in a discriminatory manner.*" Trial Tr. 32, ll. 2 - 13. It is clear from the record below that Trial Counsel did not object to this finding in the absence of any showing by the State that the reasons given were pretext for purposeful discrimination. Trial Counsel was ineffective for failing to point out that Applicant had used four peremptory strikes to remove jurors of his own race, and that two of those jurors were excused by the defense for the very same reason as the explanation found by the Court to evidence purposeful discrimination. Likewise, Trial Counsel made no effort to advocate for his client's position by arguing existing authority which would have supported his position that his explanations were sufficiently race neutral and not pretextual. Where five of the jurors removed by peremptory strikes exercised by Applicant ultimately served on the jury that determined his fate, Applicant would be likely to win a new trial on this issue if it had been fully argued and preserved at trial. For that reason, this Court finds that Applicant has met his burden of proof that Trial Counsel was deficient with regard to his representation during jury selection and the subsequent *Batson* challenge and that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different.

C.

Allegation No. 12, Second Amended Application

Trial Counsel was ineffective for failing to request a continuance after a material amendment to Applicant's indictment where the new indictment was presented to the Grand Jury days before the Applicant's trial, and where he was not made aware of the more serious charge brought in the new indictment until immediately before his trial.

The records of the Clerk of Court confirm that Applicant was not indicted for First Degree Criminal Sexual Conduct with a Minor until January 21, 2010, the Thursday before his trial began on Monday, January 25, 2010. The testimony at Applicant's trial reveals that he forthrightly admitted his guilt of having sexual intercourse with the Victim beginning in February, 2009 when she was eleven (11) and he was nineteen (19). Trial Tr. 236, ll. 1 – 14 and SCDC Records confirming Applicant's date of birth as [REDACTED]/1989. It is clear from Applicant's trial testimony and his PCR testimony that the sole issue that he disputed was the timing of him having sexual intercourse with the girl for the first time. The testimony from the PCR hearing strongly indicates that Counsel simply did not comprehend the significance of the State's amended indictment nor did he understand the need to prepare Applicant's defense with an eye toward this one crucial event.

As repugnant as this Court may find Applicant's behavior with Victim, the fact remains that there was a substantial difference in Applicant exposure if the onset of this sexual relationship began after the girl turn eleven rather than before as the State suddenly claimed, one business day before Applicant's trial. Counsel's failure to be adequately prepared to defend on this crucial issue is evident by numerous factors at trial. For example,

- This young Victim acknowledged a sexual relationship with Applicant that spanned a period of months;
- She initially referenced Applicant putting his penis in her crouch, not in her vagina. While she was ultimately lead into stating that it hurt at times and that she bleed twice, she did not testify to when the act of intercourse itself began. Trial Counsel never explored what type of sexual contact began in the summer of 2008 and whether that contact may not have escalated to involve intercourse, or other conduct that would qualify as a sexual battery, until much later. There is no indication as to when the acts which hurt and caused her to bleed happened;
- The Victim became pregnant by Applicant. That undisputed fact was established through medical testimony that also placed the date conception in 2009 at approximately the same time of year the Victim claimed the "sex" began, but a year later than the state claimed. Notwithstanding this fact, no one,

including Trial Counsel bothered to explore with this girl how long she had been intimate with Applicant before she became pregnant;

- Trial Counsel apparently failed to understand the need to fully prepare for this crucial issue once the indictment against his client was amended. Indeed, Trial Counsel apparently did not even explore why the State had for the first time added this more serious charge just days before trial;
- The nurse who saw this young girl in June of 2008 did not mention a physical examination of the girl during the office visit which occurred that summer. The physician who did examine the girl in late August, 2009 noted that she had a tear in her hymen that had healed. Trial Counsel did not bother to explore how long it would typically take for a hymen tear to heal, but rather allowed the witness to reference the injury as an "old" injury without any insight as to how recently it may have occurred and still have healed to the degree she found in August 2009;
- The girl involved in this case tested positive for two STDs in August, 2009. Trial Counsel was not prepared to introduce any evidence with regard to his client's medical history regarding these diseases;
- The nurse who saw this girl in June 2008 testified that the grandmother had reported that she had caught the girl with a boy and wanted her tested for STDs. In her trial testimony the grandmother denied telling the medical personnel this fact. Trial Counsel did not explore the possibility that the girl may have been reporting her sexual encounter with Applicant as occurring earlier than it did in order to protect someone else who had been with her earlier than the Applicant.

Based upon the totality of the record before this Court, it is apparent that Trial Counsel was not prepared to respond to the material change in the charges against his client as a result of the Amended Indictment obtained by the State on Thursday before Applicant's trial the following Monday. The record supports Applicant's claim that Trial Counsel was ineffective for failing to request a continuance based upon that material change in the case against his Client. The record supports Applicant's claim that Trial Counsel was not adequately prepared to respond to this major change in the State's theory of the case and should have sought a continuance. Given this last minute amendment to the indictment against Applicant, there is every reason to believe the lower court would have responded favorably to such a motion. The Applicant therefore is entitled to a new trial on this issue as well.

D.

Allegation No. 9 from Second Amended Application

Allegations No. 13 and 14 as Developed during PCR Hearing

Trial Counsel was ineffective for failing to fully articulate the Applicant's objection to the testimony of State witness Barbara Gregg, RN, and for failing to present appropriate authority in support of the Applicant's objection to this testimony. In addition, Trial Counsel was ineffective for failing to object to hearsay testimony from State witnesses Trina Hamlet and Robin Tyler Griggs, where said testimony was clearly hearsay and as such violated Applicant's right to fully confront his accusers and where said testimony prejudiced Applicant by allowing the prosecution to improperly bolster the credibility of the Victim in this case.

While Trial Counsel did make a motion to exclude the testimony of Nurse Gregg, he failed to fully develop his objection and failed to argue authority in support of his objection. The testimony of this witness clearly exceeded the scope of hearsay testimony permissible to establish that a Victim reported the place and time of a sexual battery. Trial Counsel was ineffective for failing to fully articulate all the available legal arguments for the exclusion of this evidence. In addition, Trial Counsel neglected to argue that some of the testimony elicited from this witness was in fact hearsay on hearsay in that it repeated what the grandmother claimed she had been told by the girl. In addition, portions of this testimony were highly inflammatory and were designed to appeal to the passions and prejudices of this jury. Trial Counsel failed to argue that any probative value this testimony may have had was far outweighed by its tendency to appeal to the passions and prejudices of the jury. Trial Counsel failed to object the first and every time this witness testified to what she was told by the Victim and her grandmother.

Likewise, Officer Trina Hamlet, was allowed to testify, without objection, to statements made by the Victim to her that went far beyond statements concerning time and place of a sexual battery. She was allowed to repeat statements by the girl concerning who she had sex with and that the sexual intercourse was forced. Trial Tr. p. 170, l. 11 – p. 171, l. 1.

Forensic Interviewer Robin Tyler Griggs was permitted to testify at length concerning her interview with the Victim and to repeat statements made to her by the girl that went far beyond a simple report of an assault and the time and place it occurred. Trial Counsel once again failed to articulate a legal basis for his few objections beyond noting that the testimony was hearsay. At one point he was even invited by the Court to give a legal basis for his objections and failed to do so. Trial Tr. p. 157, ll. 4 – 16.

During his PCR testimony Trial Counsel denied any recollection of testimony from a forensic interviewer named Robin Tyler Griggs. PCR Tr. p. 42, ll. 3-6. He did not recall anyone being qualified as an expert in the field of *“forensic interviewing and child abuse assessment.”* PCR TR. p. 42, ll. 7-14. Trial Counsel testified that he never considered objecting to hearsay testimony introduced through this witness despite the fact that portions of it went beyond reports of the time and place of the sexual battery. PCR Tr. p. 43, l. 18- p. 44, l. 21. As previously noted, when questioned about other hearsay testimony from this witness that was not objected to at trial, Trial Counsel answered, *“strategy.”* When asked to explain what that *“strategy”* was, Trial Counsel stated, without explanation, *“to win”*. PCR Tr. p. 44, l. 22- p. 45, l. 14. As addressed in the summary of the PCR testimony presented above, Trial Counsel offered no explanation his failure to object to hearsay testimony from this witness concerning the Victim’s statements about her alleged desire to harm herself. PCR Tr. p. 45, l. 15- p. 46, l. 11.

Although Applicant admitted having had sexual intercourse with the Victim in this case, he expressly denied doing so while the girl was under eleven (11) years old. This distinction potentially made the difference between Applicant being found guilty of the charge of First Degree Criminal Sexual Assault with a Minor and the lesser charge of Second Degree Criminal Sexual Conduct versus, Second Degree CSC with a Minor alone. This Court finds that Trial Counsel was

deficient for failing to raise proper objections to this testimony. Given how crucial the credibility and reliability of the Victim's testimony was at trial, any hearsay testimony which tended to bolster her testimony was prejudicial to Applicant. As in the recent case of *Vail v. State*, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013), the testimony introduced through these two witnesses far exceeded the limited testimony which is admissible under Rule 801(d)(1)(B) and (D), SCRE. While the *Vail* appeal had not been decided at the time of this trial, the precedents upon which it was rooted had been. It was already well established the time of Applicant's trial that,

[i]n a CSC case, the testimony of a witness regarding the Victim's out-of-court statement is not hearsay when: "The declarant testifies at trial...and is subject to cross-examination concerning the statement, and the statement is ...consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged Victim and the statement is limited to the time and place of the incident."

Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631-32 (2010) (quoting Rule 801(d)(1)(D), SCRE). Precedents in place well before Applicant's trial made it clear that, "any other details or particulars, including the perpetrator's identity, must be excluded." *Watson v. State*, 370 S.C. 68, 71-72, 634 S.E.2d 642, 644 (2006); *Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 262-63 (2001).

E.

Allegation No. 15 as Developed during PCR Hearing

Trial Counsel was ineffective for failing to object to testimony from forensic interviewer Robin Tyler Griggs in which she was allowed to offer expert opinion concerning the Victim's competency at the time of her taped interview where said testimony went beyond the scope of the expertise for which she was qualified as a witness and improperly bolstered the Victim's testimony.

As demonstrated by the PCR testimony summarized herein, Trial Counsel did not offer any reason for failing to object to this witness's testimony offering her expert opinion as to the Victim's competency, and her ability to ascertain right from wrong. PCR Tr. p. 46, l. 12- p. 47, l. 23. He

testified that he never considered objecting to this testimony as exceeding the field in which she had been qualified as an expert. PCR Tr. p. 47, l. 21- p. 48, l. 6.

During this witness's testimony she not only testified to statements made by the Victim during her interview of the girl, which went beyond reports of the time and place of the alleged sexual battery, she also offered her opinion as to whether the girl was competent at the time she conducted the forensic interview. Trial Tr. p. 162, ll. 3 – 12. This witness was qualified, without objection by Trial Counsel, as an expert in "forensic interviewing and child abuse assessment." Trial Tr. p. 145, l. 23 – p. 146, l. 2. This witness testified that in addition to working for DSS for nineteen and a half years, she had taken two courses "on interviewing kids" and had participated in other yearly training which she did not even describe. Trial Tr. p. 144, l.22 – p. 145, l. 9.

There is nothing in the credentials of this witness, as presented during this trial, which indicates she had the education or training to be considered an expert in child psychology or any other whether that would give her the expertise necessary to determine the competency a child witness. Our Courts have recognized that it is improper for a "forensic interviewers" to testify concerning their opinion about the credibility or believability of a child witness. *Smith*, 386 S.C. at 564 – 65, 689 S.E.2d at 631.⁶ There is no evidence that this witness had any particular expertise that would qualify her to determine the competency of this Victim. In addition, there is, in the view of this Court, too great a risk that a jury would equate an assessment of competence with an opinion as to credibility which is clearly prohibited under law that was well established at the time of Applicant's trial. Accordingly, this Court finds that Trial Counsel was ineffective for failing to object to this line of testimony. Inasmuch as portions of the interview conducted by this witness went directly to the question of the timing of the onset of Applicant's sexual intercourse with this Victim, this Court is constrained to find that Applicant was prejudiced by Counsel's omissions on this point.

CONCLUSION

For all the foregoing reasons, this Court now finds that the Applicant has met his burden of proof with regard to his claim that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section

⁶ In the recent case of *State v. Kromah*, ___ S.C. ___, ___ S.E.2d ___, Opinion No. 27212, (S.Ct., decided January 23, 2013), the Supreme Court made it very clear that testimony from such "forensic interviewers" will be narrowly restricted in the future.

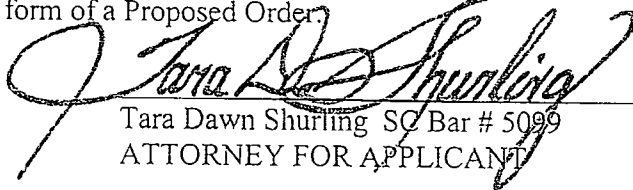
14, of the South Carolina Constitution, was violated prior to and during his jury trial. Accordingly, the Applicant's judgment and sentence are hereby reversed and his case is remanded to the Williamsburg County Court of General Sessions for a new trial.

IT IS SO ORDERED.

R. Ferrell Cothran, Jr.
Presiding Circuit Judge
Third Judicial Circuit

This ____ day of _____, 2014.

Document above submitted as a Memorandum in Support of the PCR Application, addressed herein, submitted to the Court in the form of a Proposed Order.



Tara Dawn Shurling SC Bar # 5099
ATTORNEY FOR APPLICANT

This 4th day of August, 2014

STATE OF SOUTH CAROLINA)
 COUNTY OF WILLIAMSBURG)
 Kevin C. Bradley, #339031,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE THIRD JUDICIAL CIRCUIT

Case No. 2010-CP-45-389

2014 AUG 25 PM 12:01
 WILLIAMSBURG COUNTY
 CLERK OF COURT
 KINGSTREE, S.C.

FILED

ORDER OF DISMISSAL

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on September 29, 2010 and amended on February 25, 2013 and May 20, 2014. Respondent made its amended return on October 28, 2013. An evidentiary hearing into the matter was convened on May 27, 2014, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Tara D. Shurling, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Applicant was true bill indicted at the January 2010 term of the Williamsburg County Grand Jury for Criminal Sexual Conduct with a Minor—First Degree and Criminal Sexual Conduct with a Minor—Second Degree (2009-GS-45-249). Richard Strobel, Esquire represented Applicant. Applicant proceeded to a jury trial before the Honorable Clifton Newman and on January 27, 2010, Applicant was found guilty. Judge Newman sentenced Applicant to twenty-five years imprisonment for Criminal Sexual Conduct with a Minor—First

Degree and twenty years for Criminal Sexual Conduct with a Minor—Second Degree. The sentences were to run concurrently. Applicant did not appeal his conviction or his sentence.

ALLEGATIONS

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

1. "The Applicant received Ineffective Assistance of Counsel Prior and during his trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution."
 - a. "Counsel failed to provide client effective assistance of counsel prior to and during his trial proceeding. Inasmuch as Counsel failed to recognize errors which occurred during his trial, and therefore failed to make appropriate objections and supporting legal arguments relating thereto. Counsel's failure to make these objections may have changed the outcome of the Applicant's trial and deprived him of the opportunity to have these issues addressed on their merits on direct appeal."
2. "Trial counsel deprived the Applicant of his right to a direct appeal by failing to file a Notice of Appeal on his behalf following his jury trial on Indictment No. 2009-GS-45-0249."
 - a. "Trial Counsel neglected to file a direct appeal for the Applicant and the Applicant did not knowingly and voluntarily waive his right to a direct appeal."

Applicant amended his application on May 20, 2014, alleging that he was being held in custody unlawfully based on the following allegations:

1. Trial Counsel was ineffective for failing to sufficiently argue the validity of the race neutral explanations given by the Applicant for striking jurors during the selection of the first jury selected in his case.
2. Trial Counsel was ineffective for failing to fully argue against the selection of a second jury panel in the Applicant's case where the reasons given by the Applicant for striking the jurors in question during the State's *Batson* challenge were sufficiently race neutral pursuant to known precedent in South Carolina at the time of the Applicant's trial.

3. Trial Counsel was ineffective for failing to repeat and fully articulate for the record the Applicant's reasons for striking each of the jurors in dispute at his trial during the *Batson* hearing held pursuant to motion by the State.
4. Trial Counsel was ineffective for failing to explain to the Applicant that all of his reasons for striking each juror against whom he exercised a peremptory strike had to be fully stated for the record *as to each juror* when the strike used against that particular juror was addressed during the *Batson* hearing held pursuant to the State's motion.
5. Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to advise the Applicant, who being allowed by Trial Counsel to participate in decisions concerning the use of peremptory strikes in the selection of his jury, that in order to preserve a record for appeal from the trial court's ruling on a potential *Batson* motion by the State, he needed to be prepared fully articulate his reasons for using strikes against each juror.
6. Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to restate for each juror addressed during the *Batson* hearing the Applicant's reasons for using strikes against each juror as articulated in Trial Counsel's general response to the State's *Batson* motion.
7. Trial Counsel was ineffective for neglecting to exercise a peremptory strikes to remove five (5) jurors from the Applicant's jury who had been previously struck by the Applicant in the selection of his first jury where the explanations given by the Applicant for the use of a strike against each of these jurors, if properly articulated, provided a race neutral justification for the use of a peremptory strike against each of these jurors.
8. Trial Counsel was ineffective for characterizing the Applicant's reason for striking Juror number 96, Kenneth Lancaster, as an excuse, where this statement supported the prosecution's position that the reasons proffered by the Applicant for striking this juror were pretextual.
9. Trial Counsel was ineffective for failing to fully articulate the Applicant's objection to the testimony of State witness Barbara Greggs and for failing to present appropriate authority in support of the Applicant's objection to this testimony.

10. Trial Counsel was ineffective for failing to research and present potential character witnesses to testify in the Applicant's behalf at trial; specifically Sgt. Robert McClary, Debra Black, Manager at Skyes in Kingstree, South Carolina, Sgt. Staggers, employed with the 1052nd Transportation Company Army National Guard, and Frederick Davis of the Kingstree Police Department.
11. Trial Counsel was ineffective for failing to present testimony from Sgt. Robert McClary, Army National Guard, who would have been able to present alibi evidence for some of the dates the Applicant was accused of committing sexual battery upon the victim, Shataria G. and where said witness could have presented character testimony for the Applicant.
12. Trial Counsel was ineffective for failing to request a continuance after a material amendment to Applicant's indictment where the new indictment was presented to the Grand Jury days before the Applicant's trial, and where he was not made aware of the more serious charge brought in the new indictment until immediately before his trial.

During the evidentiary hearing, Applicant stated that he did not intend to pursue issues regarding alibi witnesses or character witnesses. Therefore, this Court finds Applicant has abandoned issues # 10 and # 11. Additionally, Applicant verbally amended his application to include an allegation of ineffective assistance of counsel for failing to object to the testimony of Trina Hamlet. Applicant further amended his application claiming Trial Counsel was ineffective for failing to have him tested for Sexually Transmitted Diseases and for failing to file a direct appeal.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant called Trial Counsel, Richard Strobel, Esquire, (hereinafter "Trial Counsel"). Applicant further testified on his own behalf. This Court also had before it a copy of the trial transcript, the Williamsburg County Clerk of Court records, Applicant's South Carolina Department of Correction records, the PCR application, amended allegations, and amended return.

During the evidentiary hearing, Applicant called Trial Counsel to testify. Trial Counsel testified that he was the only attorney of record for these charges. Trial Counsel stated that he represented Applicant for years and met with him several times prior to trial. Trial Counsel stated that he filed and reviewed all Brady and Rule 5 materials. Trial Counsel stated that he and Applicant discussed the elements of the charges. Trial Counsel stated Applicant was out on bond until he violated a condition of his bond by contacting Shateria G (hereinafter "Victim"). Trial Counsel stated that he had the assistance of a paralegal. Trial Counsel stated that the issue at trial was whether Applicant raped the Victim when she was ten years old. Trial Counsel explained that Victim was pregnant with Applicant's child at the age of eleven. Trial Counsel stated that the fetus was approximately fourteen weeks old in utero which meant the Victim was eleven years old at the time of conception. Trial Counsel stated they attempted to argue to the jury that Applicant did not have sex with Victim when she was ten years old, thereby negating the Criminal Sexual Conduct - First Degree charge.

Trial Counsel recalled that Applicant was originally charged with Criminal Sexual Conduct - Second Degree, but the indictment was amended on January 21, 2010. Trial Counsel stated that they proceeded to trial on January 25, 2010. Trial Counsel could not recall the exact date that he informed Applicant of the amended indictment. Trial Counsel clarified that Applicant was prepared to plead guilty as indicted to all charges and had given an affidavit admitting to raping the Victim at age ten and eleven. Trial Counsel explained that Applicant further admitted his guilt during the course of the guilty plea but later stated that he wanted to proceed to trial. Trial Counsel stated that he did not request a continuance after the indictment was amended because he was prepared to go forward with trial.

Trial Counsel stated that jury selection immediately followed the attempted guilty plea. Trial Counsel stated at the end of the first jury panel selection, the State made a Batson motion. Specifically, Trial Counsel stated the State asked for specific reasons as to why each juror was struck. The State argued that Applicant exhausted all of his preemptory challenges; and in doing so struck a total of eight Caucasians and nine females (Trial Tr. p. 21). Trial Counsel stated that Applicant requested certain potential jurors be struck because of the way they looked at him. Trial Counsel clarified that some of the potential jurors refused to look at Applicant or would turn their head. Trial Counsel stated Applicant would not give a more detailed explanation outside of the fact that they would not look at him. Trial Counsel stated that he articulated Applicant's reasoning for striking the jurors to the best of his abilities. Trial Counsel further stated the trial court did not request a more detailed explanation from him. Trial Counsel stated that he had no other reason to request the potential jurors be struck outside of Applicant's reasoning. Trial Counsel stated jurors # 128, 92, 196, 66, 131, and 96 were struck solely because Applicant wanted them struck. Trial Counsel stated he was not concerned with the fact that his response to striking juror #96 was "same excuse" because he was referring to the same reason given by Applicant in regards to the previously mentioned jurors. (Trial Tr. P. 25 line 22). Trial Counsel stated that the first jury panel was ultimately quashed and they selected a second jury panel.

Trial Counsel stated that five jurors originally struck during the first jury selection were seated on the second jury. Trial Counsel stated that he had no concerns with those jurors being seated on the second jury. Trial Counsel further clarified that had Applicant wanted those jurors struck a second time, he would have requested that they be struck. Trial Counsel further stated

that he had no new basis to strike the jurors a second time. Trial Counsel opined that Applicant had a fair and impartial jury.

Trial Counsel stated that he continually objected to Barbara Gregg's (hereinafter "Nurse Gregg") testimony during trial. Trial Counsel stated Nurse Gregg testified that the child was screaming and emotionally upset at the time of the meeting, because she found out that she was pregnant. Trial Counsel stated that he did not object as to whether some of Nurse Gregg's comments would inflame the passions of the jury nor did he object to her testimony as hearsay on hearsay. Trial Counsel stated that in his opinion he articulated the proper objection to the best of his abilities, and the trial judge overruled some of his objections. Trial Counsel further stated that he knew that the Victim would be testifying and anything elicited from Nurse Gregg would be corroborated from the Victim. Trial Counsel stated that he did not attempt to impeach the Victim's credibility due to trial strategy. Specifically, Trial Counsel stated he did not want to appear "mean" when questioning the Victim, an eleven year old rape victim.

Trial Counsel stated that the Victim said she was ten years old when Applicant first raped her. Trial Counsel stated that the Victim was babysitting her cousin's infant child. Trial Counsel stated that he attempted to develop a timeline with the Victim by establishing the date that the infant child's father died. Trial Counsel further recalled the Victim's grandmother taking her to the doctor in the summer of 2008 due to irregular vaginal discharge. Trial Counsel reiterated that it was his trial strategy not to attack the testimony of the minor child for fear of the jury developing a poor opinion of him.

Trial Counsel stated that Applicant took the stand and admitted having sex with the Victim when she was eleven years old. Trial Counsel stated that there was no question that Applicant had sex with the Victim when she was eleven years old because she was pregnant with

his child. Trial Counsel reiterated that the only thing in dispute was when the sexual assault of the Victim began. Trial Counsel recalled during his representation that Applicant gave him several statements admitting that he had no knowledge of her age. Trial Counsel further stated that Applicant continually questioned him about the age differentiation of ten or eleven as applied to the law. Trial Counsel stated that during their conversation, Applicant never disputed that he raped the Victim when she was ten years old.

Trial Counsel could not recall whether the forensic expert Robin Griggs (hereinafter "Griggs") was ever qualified as a forensic expert. Trial Counsel stated that he had no reason to object to the video of the interview being played. Trial Counsel opined that the video was not cumulative or prejudicial. Trial Counsel further stated that he did not object to the testimony presented by Griggs regarding the Victim's recounting of the events on the day of the incident. Trial Counsel reasoned that he did not object because Applicant was not disputing that he had sex with the Victim. Trial Counsel further stated that he did not have a reason for not objecting to Griggs' testimony that it was her recommendation that the Victim not be around Applicant. Trial Counsel testified that he did not recall any testimony from the forensic interviewer regarding her personal belief in the credibility of the Victim in the forensic interview. If there would have been any such testimony, Trial Counsel stated he would have objected.

Trial Counsel further stated that he was not going to object and draw attention to the fact that Trina Hamlet, a Kingstree police officer, stated that Victim claimed during their interview that Applicant forced her to have sex with him. Trial Counsel further reasoned that Victim had already testified that she had sex with Applicant and Trina Hamlet's testimony was redundant. Trial Counsel stated it was not in dispute that Applicant had sex with the Victim. Trial Counsel stated that he did not have Applicant tested for Sexually Transmitted Diseases (STD) because it

did not matter whether he tested positive for STDs as he admitted to having sex with the Victim. Trial Counsel stated that he did not want to harp on the issue of STDs in front of the jury. Trial Counsel reasoned that it may inflame the passions of the jury to hear about the Victim suffering from various STDs.

Trial Counsel further recalled discussing with Applicant his right to a direct appeal. Trial Counsel recalled telling Applicant that he had ten days to file a notice of appeal. Trial Counsel stated Applicant did not tell him that he wanted to appeal the case. Trial Counsel stated that he would not file a notice of appeal unless Applicant requested him to do so.

Following Trial Counsel's testimony, Applicant was called to testify on his own behalf. Applicant testified that he met with Trial Counsel approximately three or four times prior to his trial. Applicant stated that he did not review any discovery materials or discuss any possible defenses with Trial Counsel. Applicant stated Trial Counsel told him about the new Criminal Sexual Conduct – First Degree charge either the week prior to trial or the morning of trial. Applicant stated that he was unaware that there was a new indictment. Applicant stated that he was entering a guilty plea to Criminal Sexual Conduct – Second Degree not Criminal Sexual Conduct – First Degree. Applicant stated that he was under the impression that they had been preparing for a guilty plea and had no idea that they would be going to trial. Applicant stated Trial Counsel did not inform him that there would be a trial that same day and he was not prepared for trial. Applicant stated Trial Counsel never discussed asking for a continuance.

Applicant stated he desired for certain jurors to be struck because they looked mean. In Applicant's opinion they appeared stern and pro-state. Applicant further stated he could not hear where various jurors were employed. Applicant recalled that juror # 29 was a professor and he did not want him to sit on his jury. Applicant stated that jurors # 29, 196, 96, 128, and 82 were

originally struck during the first jury selection but were seated on his second jury. Applicant stated that he wanted jurors # 29, 196, 96, 128, and 82 struck from his second jury panel because they had been previously struck. Applicant stated Trial Counsel was “nonchalant” about articulating reasons for striking the jurors.

Applicant stated that he wanted Trial Counsel to object to Nurse Gregg’s testimony because it bolstered the Victim’s testimony and was prejudicial. Applicant further testified that Trial Counsel refused to object to the State playing the video recording of the forensic interview. Applicant stated that Trial Counsel should have objected to Trina Hamlet stating Victim told her during an interview that Applicant forced her to have sex.

Applicant recalled testifying at trial and admitting to having sexual relations with the Victim. Applicant stated as a result of their sexual relations, the Victim became pregnant with his child. Applicant recalled telling the jury that he felt terrible and was morally wrong for raping the Victim. Applicant again did not deny that he had sex with the Victim. Applicant recalled stating that the sexual assault occurred on Victim’s cousin’s, Dasheia McBrides, couch. Applicant recalled testifying during trial that he was nowhere near Victim in 2008 (when Victim was ten years old). Applicant further recalled the State introducing a filed police report naming Applicant as Dasheia McBride’s boyfriend in October 2008.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Specifically, this Court finds Trial Counsel’s testimony credible

and Applicant's testimony not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 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.

Trial Counsel was ineffective for failing to sufficiently argue the validity of the race neutral explanations given by the Applicant for striking jurors during the selection of the first jury selected in his case.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to argue the validity of the race neutral and gender neutral reason is without merit. A review of the record reveals that the trial court found Trial Counsel articulated valid race neutral and gender neutral reasons for striking juror's # 104, 80, and 16. (Trial Tr. pages 26-31). Trial Counsel specifically stated that he struck those jurors without the consultation of Applicant. The nine additional preemptory strikes used during the first jury selection were done so at the request of Applicant. Trial Counsel specifically stated that he had no other reason to strike the remaining nine potential jurors outside of Applicant's request. The fact that Applicant was unable to provide Trial Counsel with a race neutral and gender neutral reason for striking the jurors is of no consequence.

This Court finds Trial Counsel's performance did not fall below professional norms. This Court notes that the process of jury selection inherently falls within the expertise and experience of Trial Counsel. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). In Palacio, the court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. Id. at 516, 511 S.E.2d at 68. The court in Palacio further noted that "a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. at 516, 511 S.E.2d at 68.

Based on the foregoing, this Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, Applicant did not present sufficient

evidence to support a finding that Trial Counsel's alleged error's resulted in a violation of Applicant's right to a trial by a competent and impartial jury.

Trial Counsel was ineffective for failing to fully argue against the selection of a second jury panel in the Applicant's case where the reasons given by the Applicant for striking the jurors in question during the State's Batson challenge were sufficiently race neutral pursuant to known precedent in South Carolina at the time of the Applicant's trial.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to fully argue against the selection of a second jury panel in Applicant's case is without merit. Trial Counsel stated at the end of the first jury panel selection, the State made a Batson motion. Trial Counsel stated the State asked for specific reasons as to why each juror was struck. The State argued that Applicant exhausted all of his preemptory challenges; and in doing so, struck a total of eight Caucasians and nine females (Trial Tr. p. 21). Trial Counsel stated that Applicant requested certain potential jurors be struck because of the way they looked at him. Trial Counsel clarified that some of the potential jurors refused to look at Applicant or would turn their head. Trial Counsel stated that he articulated Applicant's reasoning to the best of his abilities.

This Court finds Trial Counsel's testimony credible while Applicant's testimony is not credible. Furthermore, Trial Counsel stated that he articulated Applicant's reasoning to the best of his abilities. A review of the record reveals that Trial Counsel relayed to the trial judge the reasons given to him by Applicant for using nine of the twelve preemptory strikes. The remaining three strikes were done so by Trial Counsel without Applicant's involvement and notably withstood the State's Batson challenge. This Court finds Trial Counsel argued the reasons relayed to him by Applicant to the best of his abilities. The fact that the trial judge granted the State's Batson motion after hearing the reasons given is beyond the control of Trial Counsel. Additionally, this Court notes that the process of jury selection inherently falls within

the expertise and experience of Trial Counsel. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). In Palacio, the court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. Id. at 516, 511 S.E.2d at 68. The court in Palacio further noted that “a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.” Id. at 516, 511 S.E.2d at 68.

This Court finds Trial Counsel’s actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds Applicant has failed to allege “what more” Trial Counsel should have argued to the trial court in support of his request to strike the nine jurors. Furthermore, Applicant did not present sufficient evidence to support a finding that Trial Counsel’s alleged error resulted in a violation of Applicant’s right to a trial by a competent and impartial jury.

Trial Counsel was ineffective for failing to repeat and fully articulate for the record the Applicant’s reasons for striking each of the jurors in dispute at his trial during the Batson hearing held pursuant to motion by the State.

This Court finds Applicant’s allegation that Trial Counsel was ineffective for failing to repeat and fully articulate for the record Applicant’s reasons for striking each of the jurors is without merit. This Court finds Trial Counsel’s testimony credible while Applicant’s testimony is not credible. Furthermore, Trial Counsel stated that he articulated Applicant’s reasoning to the best of his abilities. A review of the record reveals that Trial Counsel relayed to the trial judge the reasons given to him by Applicant for using nine of the twelve preemptory strikes. The remaining three strikes used were done so by Trial Counsel without Applicant’s involvement and notably withstood the State’s Batson challenge. Additionally, this Court notes that the process of jury selection inherently falls within the expertise and experience of Trial Counsel. Palacio v.

State, 333 S.C. 506, 511 S.E.2d 62 (1999). In Palacio, the court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. Id. at 516, 511 S.E.2d at 68. The court in Palacio further noted that “a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.” Id. at 516, 511 S.E.2d at 68.

This Court finds Trial Counsel’s actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds Applicant has failed to allege “what more” Trial Counsel should have argued to the trial court in support of his request to strike the nine jurors. Furthermore, Applicant did not present sufficient evidence to support a finding that Trial Counsel’s alleged error resulted in a violation of Applicant’s right to a trial by a competent and impartial jury.

Trial Counsel was ineffective for failing to explain to the Applicant that all of his reasons for striking each juror against whom he exercised a peremptory strike had to be fully stated for the record as to each juror when the strike used against that particular juror was addressed during the Batson hearing held pursuant to the State’s motion.

This Court finds Applicant’s allegation that Trial Counsel was ineffective for failing to explain to him that all of his reasons for striking each juror against whom he exercised a peremptory strike had to be fully stated for the record is without merit. This Court finds Trial Counsel’s testimony credible while Applicant’s testimony not credible. Trial Counsel stated that Applicant requested certain jurors be struck because of the way they looked at him. Trial Counsel clarified that some of the potential jurors refused to look at Applicant or would turn their head. Additionally, Trial Counsel explained to the Court that Applicant was unable to hear where various jurors were employed and that was a cause for concern with the Applicant.

During the evidentiary hearing, Trial Counsel stated that he articulated to the best of his abilities, Applicant's reasons for striking the jurors. A review of the record reveals Trial Counsel gave reasons for each of the struck jurors. This Court notes, Trial Counsel stated that he articulated Applicant's reasons for striking the jurors to the best of his abilities. The mere fact that the trial court found Applicant's reasons for striking the jurors pretextual is beyond the control of Trial Counsel. Additionally, this Court notes that the process of jury selection inherently falls within the expertise and experience of Trial Counsel. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). In Palacio, the court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. Id. at 516, 511 S.E.2d at 68. The court in Palacio further noted that "a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. at 516, 511 S.E.2d at 68.

This Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds Applicant has failed to allege "what more" Trial Counsel should have argued to the trial court in support of his request to strike the nine jurors. Furthermore, Applicant did not present sufficient evidence to support a finding that Trial Counsel's alleged error resulted in a violation of Applicant's right to a trial by a competent and impartial jury.

Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to advise the Applicant, who being allowed by Trial Counsel to participate in decisions concerning the use of preemptory strikes in the selection of his jury, that in order to preserve a record for appeal from the trial court's ruling on a potential Batson motion by the State, he needed to be prepared fully articulate his reasons for using strikes against each juror.

This Court finds Applicant's allegation that Trial Counsel failed to inform him that he needed to fully articulate his reasons on the record for appeal purposes to be without merit. This Court finds Trial Counsel's testimony credible, while Applicant's testimony not credible. Specifically, Trial Counsel testified that he articulated Applicant's reasoning for striking each juror to the best of his abilities. Trial Counsel stated Applicant would not give a more detailed explanation outside of the fact that they would not look at him. Trial Counsel further stated the trial court did not request a more detailed explanation from him. Additionally, this Court notes that the process of jury selection inherently falls within the expertise and experience of trial counsel. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). In Palacio, the court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. Id. at 516, 511 S.E.2d at 68. The court in Palacio further noted that "a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. at 516, 511 S.E.2d at 68.

This Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds Applicant has failed to allege "what more" Trial Counsel should have argued to the trial court in support of his request to strike the nine jurors. Furthermore, Applicant did not present sufficient evidence to support a finding that Trial

Counsel's alleged error resulted in a violation of Applicant's right to a trial by a competent and impartial jury.

Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to restate for each juror addressed during the Batson hearing the Applicant's reasons for using strikes against each juror as articulated in Trial Counsel's general response to the State's Batson motion.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to restate for each juror addressed during the Batson hearing Applicant's reasons for using strikes to be meritless. This Court finds Trial Counsel's testimony credible, while Applicant's testimony not credible. Trial Counsel testified that he stated Applicant's reasons for striking each juror to the best of his abilities. Trial Counsel further stated the trial court did not request a more detailed explanation from him outside of what was already stated. After hearing the reasons for striking the jurors, the trial court granted the State's Batson motion. To require Trial Counsel to merely repeat the already stated reasons as to why the jurors were struck would simply be redundant and have no impact on the trial court's decision. Furthermore, Applicant has failed to show how Trial Counsel's reassertion of his reasons for striking the jurors would have had any impact on the trial court's decision to grant the State's Batson motion. Additionally, this Court notes that the process of jury selection inherently falls within the expertise and experience of trial counsel. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). In Palacio, the court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. Id. at 516, 511 S.E.2d at 68. The court in Palacio further noted that "a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. at 516, 511 S.E.2d at 68.

This Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds Applicant has failed to allege "what more" Trial Counsel should have argued to the trial court in support of his request to strike the nine jurors. Furthermore, Applicant did not present sufficient evidence to support a finding that Trial Counsel's alleged error resulted in a violation of Applicant's right to a trial by a competent and impartial jury.

Trial Counsel was ineffective for neglecting to exercise a peremptory strikes to remove five (5) jurors from the Applicant's jury who had been previously struck by the Applicant in the selection of his first jury where the explanations given by the Applicant for the use of a strike against each of these jurors, if properly articulated, provided a race neutral justification for the use of a peremptory strike against each of these jurors.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to strike five jurors during the second jury selection that were previously struck during the first jury selection to be without merit. In State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995), the circuit court quashed a jury, finding the defendant struck a juror in a discriminatory manner. Subsequently, upon starting the jury selection process de novo, the defendant attempted to strike the same juror again, and the circuit court seated the juror. Id. at 51, 456 S.E.2d at 359. The court noted that defense counsel conceded that there were no new facts supporting the constitutionality of the second attempt to strike the same juror. Id.

Trial Counsel stated at the end of the first jury panel selection, the State made a Batson motion. Specifically, Trial Counsel testified that the State asked for specific reasons as to why each juror was struck. The State argued that Applicant exhausted all of his preemptory challenges; and in doing so, struck a total of eight Caucasians and nine females (Trial Tr. p. 21).

Trial Counsel stated that Applicant requested certain potential jurors be struck because of the way they looked at him. Trial Counsel clarified that some of the potential jurors refused to look at Applicant or would turn their head. Trial Counsel stated Applicant would not give a more detailed explanation outside of the fact that they would not look at him. Trial Counsel stated that he articulated Applicant's reasoning for striking the jurors to the best of his abilities. Trial Counsel further stated the trial court did not request a more detailed explanation from him. Trial Counsel stated that he had no other reason to request the potential jurors be struck outside of the Applicant's reasoning. Trial Counsel stated jurors # 128, 92, 196, 66, 131, and 96 were struck solely because Applicant wanted them struck. Trial Counsel testified that he had no new or additional reasons to strike the five prospective jurors during the second jury selection. Trial Counsel stated that the first jury panel was ultimately quashed, and they selected a second jury panel.

Trial Counsel stated that five jurors originally struck during the first jury selection were seated on the second jury. Trial Counsel stated that he had no concerns with those jurors being seated on the second jury. Trial Counsel further clarified that had Applicant wanted those jurors struck a second time, he would have requested that they be struck. Trial Counsel further stated that he had no new basis to strike the jurors a second time.

Therefore, as held in Franklin, Trial Counsel could not have struck the five prospective jurors again, because Trial Counsel conceded that there were no new facts supporting the constitutionality of striking the five prospective jurors a second time. As such, this Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, Applicant has failed to show he was prejudiced such that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Trial Counsel was ineffective for characterizing the Applicant's reason for striking Juror number 96, Kenneth Lancaster, as an excuse, where this statement supported the prosecution's position that the reasons proffered by the Applicant for striking this juror were pretextual.

This Court finds Applicant's allegation that Trial Counsel was ineffective for stating Applicant's reason for striking Juror number 96, Kenneth Lancaster, as an excuse, is without merit. Trial Counsel stated he was not concerned with the fact that his response to striking juror #96 was "[Applicant] said the same excuse, no different" because he was referring to the same explanation stated previously. (Trial Tr. P. 25 line 22). Additionally, this Court notes that the process of jury selection inherently falls within the expertise and experience of trial counsel. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). In Palacio, the court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. Id. at 516, 511 S.E.2d at 68. The court in Palacio further noted that "a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. at 516, 511 S.E.2d at 68.

This Court finds Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds Applicant has failed to allege "what more" Trial Counsel should have argued to the trial court in support of his request to strike the nine jurors. Furthermore, Applicant did not present sufficient evidence to support a finding that Trial Counsel's alleged error resulted in a violation of Applicant's right to a trial by a competent and impartial jury.

Trial Counsel was ineffective for failing to fully articulate the Applicant's objection to the testimony of State witness Barbara Greggs and for failing to present appropriate authority in support of the Applicant's objection to this testimony.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to fully articulate Applicant's objection to the testimony of Nurse Greggs is without merit. This Court finds Trial Counsel's testimony credible, while Applicant's testimony not credible. Trial Counsel stated Nurse Gregg testified that the child was screaming and emotionally upset at the time of the meeting, because she found out that she was pregnant. Trial Counsel stated that in his opinion he articulated the proper objection to the best of his abilities, and the trial judge overruled some of his objections.

A review of the record reveals that Trial Counsel made timely objections to Nurse Gregg's testimony where appropriate. (Trial tr. p. 57 line 18-19; p. 58 line 20; p. 60 line 2; page 69-71). Trial Counsel argued against the State's assertion that Victim's statement to Nurse Gregg fell within Rule 803(2). This Court finds Trial Counsel articulated a sufficiently specific reason to preserve the issue for appellate review. See State v. Byers, 392 S.C. 439, 446, 710 S.E.2d 55 (2011). It is apparent from reviewing the record that Trial Counsel was objecting to the hearsay nature of Nurse Gregg's testimony. Counsel stated that, in his opinion, he articulated the proper objection to the best of his abilities. As such, this Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, Applicant has failed to show sufficient resulting prejudice as a result of Trial Counsel's alleged deficiency.

Trial Counsel was ineffective for failing to request a continuance after a material amendment to Applicant's indictment where the new indictment was presented to the Grand Jury days before the Applicant's trial, and where he was not made aware of the more serious charge brought in the new indictment until immediately before his trial.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to request a continuance after Applicant's indictment was amended to be without merit. This Court finds Trial Counsel's testimony credible, while Applicant's testimony not credible. "Where there is no showing that any other evidence on behalf of the [Applicant] could have been produced or that any other points could have been raised had more time been granted for the purpose of preparing the case for trial," a continuance is unnecessary. State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51-52 (1996).

Trial Counsel stated that he did not request a continuance after the indictment was amended because he was prepared to go forward with trial. This Court notes that Applicant's indictment was amended to add a charge of Criminal Sexual Conduct—First Degree. Applicant had been previously indicted for Criminal Sexual Conduct—Second Degree. Both charges involved the same Victim. Trial Counsel credibly testified that he was prepared to go forward with the trial. As such, this Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, Applicant has failed to allege or provide any additional evidence that Trial Counsel would have been able to offer if he had requested and been granted a continuance. Applicant presented no additional witness, introduced no additional evidence, and only made a bare assertion that Trial Counsel could have investigated into the crime. As such, this Court finds Applicant has failed to show sufficient resulting prejudice as a result of Trial Counsel's alleged deficiency.

Ineffective assistance of counsel for failing to object to the hearsay testimony of Trina Hamlet stating Applicant forced Victim to have sex.¹

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to object to Trina Hamlet's (hereinafter "Hamlet") testimony is without merit. This Court is well aware that "the rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001). One exception to the rule allows limited corroborative testimony in criminal sexual conduct cases when the victim testifies. Id.; Rule 801(d)(1)(D), SCRE. The corroborative testimony is restricted to the victim's complaint of the time and place of the sexual assault. Dawkins, 346 S.C. at 156, 551 S.E.2d at 262. Any other details or particulars, including the perpetrator's identity, must be excluded. Id. at 156, 551 S.E.2d at 263. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984). With this framework in mind, this Court finds Trial Counsel's decision not to object was reasonable. Specifically, this Court notes that Applicant argues Trial Counsel should have objected to Hamlet's testimony that Applicant "forced having sex with her" as corroborative and cumulative. However, the fact that Applicant had sexual relations with Victim was not in dispute. Additionally, the fact that Hamlet testified the raping

¹ Applicant requested the opportunity to amend his post-conviction relief application to include the above mentioned allegation because Applicant's Counsel discovered the allegation during the course of the evidentiary hearing. The State objected to the amendment citing the fact that Applicant had previously filed two amended applications, lack of notice, and the lack of ability to properly prepare to refute such an allegation. This Court in interest of finality and judicial economy addresses the merits of the issue in this Order.

began in the Summer of 2008 is appropriate testimony. See Dawkins, 346 S.C. at 156, 551 S.E.2d at 262.

Additionally, Applicant cannot show any resulting prejudice as a result of Counsel's alleged deficiency as there is clear overwhelming guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). The record reveals Applicant readily admitted to the fact that he engaged in sexual intercourse with the Victim. (Trial tr. p. 236—p. 246). Applicant admitted that he "felt terrible" and what he did was "wrong." (Trial. tr. p. 239). Applicant admitted to raping this Victim on the couch in an apartment. (Trial tr. p. 243). Furthermore, DNA evidence proved that Victim became pregnant with Applicant's child. (Trial tr. p. 204). Applicant further admitted to raping the Victim during this evidentiary hearing. Applicant only disputed whether he raped the Victim when she was ten years old. However, it is apparent that the jury did not find Applicant credible. As the trial judge instructed the jury:

And as the jurors then it is your duty to determine the facts, the value, the weight and the truth of evidence presented during this trial. You are also the judges, the sole judge, of the credibility, that is, the believability of the witnesses who have testified in this case. And passing upon their credibility you may take into consideration many things such as demeanor or the manner of testifying; whether the witness had a reason to be biased or prejudiced; whether a witness's testimony was contradicting on the one hand or supportive and corroborative on the other hand. You may believe a small portion of a witness's testimony and disregard the large part or vice versa. You may believe one witness against many or many against one. All of these things you will consider, bearing in mind that you should give the defendant the benefit of any reasonable doubt.

Based on the verdict of the jury, it is apparent that they did not find Applicant's testimony credible. This Court finds that there is clear evidence of overwhelming guilt based on a review

of the entire record and the testimony and evidence presented during the PCR hearing. As such, Applicant cannot show any resulting prejudice from Trial Counsel's alleged deficiency.

Trial Counsel was ineffective for failing to have Applicant tested for Sexually Transmitted Diseases (hereinafter "STD's") when Victim tested positive for various STD's.²

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to have Applicant tested for STDs to be without merit. This Court finds Trial Counsel's testimony credible while Applicant's testimony is not credible. Trial Counsel stated it was not in dispute that Applicant had sex with the Victim. Trial Counsel stated that he did not have Applicant tested for Sexually Transmitted Diseases (STD) because it did not matter whether he tested positive for STDs as he admitted to having sex with the Victim. Trial Counsel stated that he did not want to harp on the issue of STDs in front of the jury. Trial Counsel reasoned that it may inflame the passions of the jury to hear about the Victim suffering from various STDs. Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Trial Counsel articulated valid strategic reasons for not having Applicant tested for STDs. This Court finds Counsel's reasons valid, as it was not in dispute that Applicant raped Victim. Therefore, whether or not Applicant tested positive for STDs is of no consequence. Based on the foregoing, this Court finds Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry,

² Applicant requested the opportunity to amend his post-conviction relief application to include the above mentioned allegation because Applicant's Counsel discovered the allegation during the course of the evidentiary hearing. The State objected to the amendment citing the fact that Applicant had previously filed two amended applications, lack of notice, and the lack of ability to properly prepare to refute such an allegation. This Court in interest of finality and judicial economy addresses the merits of the issue in this Order.

300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds that Applicant has failed to establish the requisite prejudice required for relief pursuant to Strickland. Therefore, this Court finds that Trial Counsel was not ineffective and that this allegation must be denied and dismissed with prejudice.

Trial Counsel was ineffective for failing to advise and file a Notice of Appeal on Applicant's behalf.

This Court finds Applicant's allegation that he received ineffective assistance of Trial Counsel for failing to advise him and file a direct appeal to be without merit. This Court finds Trial Counsel's testimony credible while Applicant's testimony is not credible. Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (citation omitted) (Turner I); see also Turner v. State, 384 S.C. 451, 456, 682 S.E.2d 792, 794 (2009) (finding counsel must inform criminal defendant found guilty of a crime after a trial about the possibility of an appeal) (Turner II). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)." Turner, 380 S.C. at 224, 670 S.E.2d at 374 (citation omitted).

In the instant case, Trial Counsel credibly testified that he discussed Applicant's right to a direct appeal. Trial Counsel recalled telling Applicant that he had ten days to file a direct appeal. Trial Counsel stated Applicant did not ask him to file a notice of appeal on his behalf. Based on the foregoing, this Court finds Applicant knowingly and intelligently waived his right to a direct appeal. This Court finds Applicant was fully advised of his right to a direct appeal and based on his conduct waived his appellate rights. This Court further finds Counsel's actions were reasonable under the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Additionally, this Court finds that

Applicant has failed to establish the requisite prejudice required for relief pursuant to Strickland. Therefore, this Court finds that Trial Counsel was not ineffective and that this allegation must be denied and dismissed with prejudice.

Accordingly, this Court finds Applicant failed to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance of counsel under prevailing professional norms. Applicant failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant failed to prove the second prong of Strickland – that he was prejudiced by Trial Counsel’s performance. This Court concludes Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance. See Frazier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

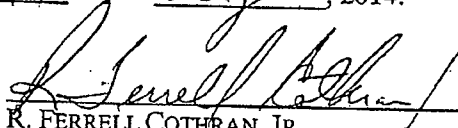
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Plea counsel rendered effective assistance and Applicant’s plea was knowingly and voluntarily entered. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

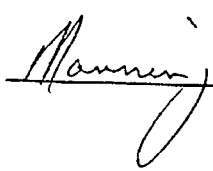
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 19 day of Aug, 2014.


 R. FERRELL COTHAN, JR.
 Presiding Judge
 Third Judicial Circuit

, South Carolina

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

KEVIN BRADLEY, #339031

Applicant,

v.

STATE OF SOUTH CAROLINA,

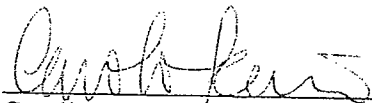
Respondent.

CERTIFICATE OF SERVICE

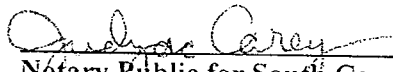
The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Tara Dawn Shurling, Esquire
Law Office of Tara Dawn Shurling, PA
3614 Landmark Drive, Suite A
Columbia, SC 29204

This 29th day of September, 2014.


Caroline Kaiser, Legal Assistant
For Respondent

SWORN to before me this 29th day of September, 2014.


Notary Public for South Carolina.
My Commission Expires: 5/14/2024

STATE OF SOUTH CAROLINA)
)
 COUNTY OF WILLIAMSBURG)
 KEVIN C. BRADLEY, #339031)
 Applicant,)
 v.)
 THE STATE OF SOUTH CAROLINA,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 THIRD CIRCUIT

FILED
 2014 OCT 15 PM 4:39
 2010-CP-45-389

MOTION TO ALTER OR AMEND
 PURSUANT TO RULE 59(e), SCRPC

NOW COMES the Applicant in the above-captioned case, acting by and through undersigned counsel, respectfully moving this Court pursuant to Rule 59(e), SCRPC, to alter or amend its Order of Dismissal in the above captioned PCR matter which was filed on August 25, 2014. The undersigned PCR Counsel was not served with the clocked Order of Dismissal until September 30, 2014. Applicant now serves and files a timely Motion pursuant to Rule 59(e), SCRPC, requesting that the Order of Dismissal be Altered or Amended in light of the following.

The Order of Dismissal fails to make specific findings of fact and ruling of law with regard to two of Applicant's allegations as presented during his PCR hearing. During the evidentiary hearing held in this matter, Applicant requested leave of Court to further amend his Application to include the following claims:¹

13. Trial Counsel was ineffective for failing to object to hearsay testimony from State witness Trina Hamlet, where said testimony was clearly hearsay and as such violated Applicant's right to fully confront his accuser and where said testimony prejudiced Applicant by allowing the prosecution to improperly bolter the credibility of the Victim in this case.
14. Trial Counsel was ineffective for failing to object to hearsay testimony from State witness Robin Tyler Griggs, where said testimony was clearly hearsay and as such violated Applicant's right to fully confront his accuser and where said testimony prejudiced Applicant by allowing the prosecution to improperly bolter the credibility of the Victim in this case.
15. Trial Counsel was ineffective for failing to object to testimony from forensic interviewer Robin Tyler Griggs in which she was allowed to offer expert opinion concerning the Victim's competency at the time of her taped interview where said testimony went beyond the scope of the expertise for which she was qualified as a witness and improperly bolstered the Victim's testimony.

¹ For clarity in addressing these allegations, these additional issues were set forth in Applicant's Memorandum in Support of this PCR Application and numbered sequentially with those found in the Second Amended Application.

Allegations 14 and 15

Allegation number 13 above was addressed in this Court's Order of Dismissal. In denying relief on this ground the Court noted the Respondent's objection to Applicant being allowed to raise this claim, but found that "in the interest of finality and judicial economy it would address the merits of the issue" in the Order of Dismissal. Allegation numbers 14 and 15, as set forth above and in the Memorandum in Support, are not addressed in the Order of Dismissal at all. Where the Court found that the "interest of finality and judicial economy" warranted a decision on the merits on the other similar issue raised in the same manner as these two allegations, Applicant would ask that the Order of Dismissal be amended to include findings of fact and rulings of law on these two issues as well in order to preserve Applicant's right to be heard on these issues in his Post-Conviction Relief appeal. Counsel would note that our Supreme Court has indicated that catch all provisions which purport to rule on issues not specifically addressed in the Order of Dismissal are not sufficient to preserve such issues for appellate review. *Marlar v. State*, 375 S.C. 407, 653 S.E. 2d 266 (2007).

Applicant presented testimony concerning these issues at the evidentiary hearing held in this matter. That testimony was summarized in Applicant's Memorandum in Support filed in this matter. Arguments in support of these allegations were likewise presented in Applicant's Memorandum. *See, Memorandum pgs. 26 – 28.*

The Applicant would respectfully submit that the amended order issued by this Court fails to comply with S.C. Ann. § 17-27-80 which provides:

The application shall be heard in, and before any judge of, a court of competent jurisdiction in the county in which the conviction took place. A record of the proceedings shall be made and preserved. All rules and statutes applicable in civil proceedings are available to the parties. The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing. If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence or other matter that may be necessary and proper. *The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.* This order is a final judgment. (Emphasis added)

Our Supreme Court has consistently declined to review issues on their merits in a Post-Conviction Relief appeal unless the Order of Dismissal contains the findings of fact and rulings of law required by section § 17-27-80 for the issue in question. The requirement of a detailed Post-

Conviction Relief Order was emphasized by the Supreme Court in *Marlar, supra*. The Applicant means no disrespect to this Court; however he cannot fail to bring the insufficiency of this order to the Court's attention without risking a subsequent finding, by the Supreme Court or the Court of Appeals, that he has waived his right to be heard on these issues raised during his circuit court Post-Conviction Relief action.

Failure of Trial Counsel to Preserve Applicant's right to a Direct Appeal

Applicant respectfully submits that the Order of Dismissal issued in this case fails to take into account key testimony from the PCR hearing held in this matter concerning this allegation. In his original PCR Application, Applicant alleged "Trial Counsel failed to file a direct appeal for the Applicant and the Applicant did not knowingly waive his right to a direct appeal." Allegation No. 1.

The Testimony presented during Applicant's evidentiary hearing established the following:

Trial Counsel admitted that he never discussed filing an appeal with Applicant. PCR TR. p. 57, ll. 8-12. He then claimed that following Applicant's conviction he "*very quickly*" told Applicant about his right to appeal and advised him that "*it must be done or I must be notified within 10 days of today.*" He initially unequivocally testified that Applicant "*didn't tell me he wanted to appeal, but he did not tell me I do not want to appeal.*" After specifically testifying *twice* that Applicant never told him he didn't want to appeal, Trial Counsel claimed that when he asked Applicant if he wanted him "*to appeal*", Applicant said, "*no*". PCR Tr. p. 58, l. 1 – p. 59, l. 11. He confirmed that he did not file an appeal on Applicant's behalf. PCR Tr. p. 59, ll. 12-13.

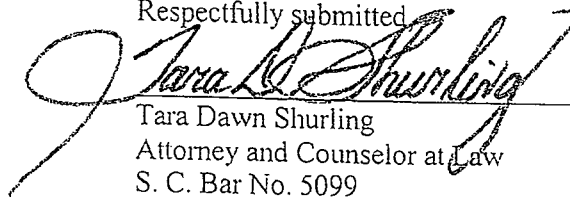
Thus, the record below reveals that Trial Counsel testified under oath *twice* that Applicant never told him he didn't want to appeal. For this reason, Applicant respectfully asks this Honorable Court to reconsider its finding that Trial Counsel's testimony was more credible than that of Applicant. The record before this Court does not support a finding that Applicant made a knowing and voluntary waiver of his right to a direct appeal from his convictions and sentences. Therefore, this Court finds that he is entitled to a belated review of his substantive claims under the guidelines and procedures set forth by our Supreme Court in White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974); Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986). Under standing Supreme Court Order, In Re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 486(1991) it is the obligation of any defense attorney to preserve his client's right to a direct appeal by filing a Notice of Appeal even if that attorney has not been appointed for or retained for purposes of appellate review. Where, as

Trial Counsel admitted in his PCR testimony, Applicant "*didn't tell me he wanted to appeal, but he did not tell me I do not want to appeal*". Trial Counsel had a clear duty to preserve his client's right to a direct.

Conclusion

Based upon the foregoing reasons and authorities, Applicant asks that this Court issue an Amended Order in which findings of facts and rulings of law are made with regard to Allegations 14 and 15. Applicant asks that the Amended Order of this Honorable Court grant Applicant a new trial on one or more of the multiple meritorious claims presented by Applicant in this action. In the alternative, Applicant seeks an order which grants partial relief in the form of a belated direct appeal.

Respectfully submitted,


Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Dr., Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 (fax)
tdslaw@shurlinglaw.com

Attorney for the Applicant

This 8th day of October, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF WILLIAMSBURG)

IN THE COURT OF COMMON PLEAS

KEVIN BRADLEY, #339031)
)
Applicant,)

2010-CP-45-389

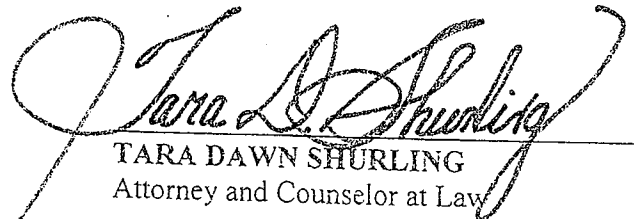
v.)

CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA,)
)
Respondent.)

The undersigned attorney hereby certifies that one copy of the Rule 59(e) SCRPC, Motion to Alter or Amend in the above-entitled cause has been served upon, the Honorable R. Ferrell Cothran, Jr., Circuit Court Judge for the Third Judicial Circuit, by depositing in the U.S. Mail, postage prepaid, on this the 8th day of October, 2014 to:

The Honorable R. Ferrell Cothran, Jr.
Circuit Court Judge for the Third Circuit
16 N. Brooks Street
Manning, SC 29102



TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT

SHANNON L. JOHNS
CLERK OF COURT
KINGSTREE, S.C.
2014 OCT 15 PM 4:39
FILED

SWORN TO BEFORE ME this 8th day of
October, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA)
)
COUNTY OF WILLIAMSBURG)

IN THE COURT OF COMMON PLEAS

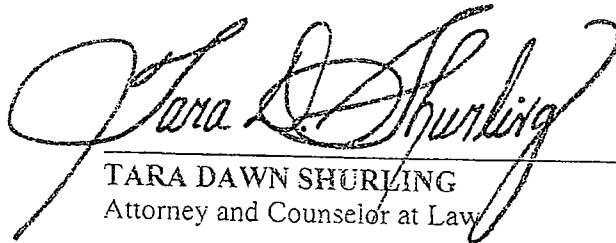
KEVIN BRADLEY, #339031)
)
Applicant,)
)
v.)
)
THE STATE OF SOUTH CAROLINA,)
)
Respondent.)

2010-CP-45-389

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that one copy of the Rule 59(e) SCRPC, Motion to Alter or Amend in the above-entitled cause has been served upon, Assistant Attorney General, Daniel Gourley, by depositing in the U.S. Mail, postage prepaid, on this the 8th day of October, 2014 to:

Daniel Gourley
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

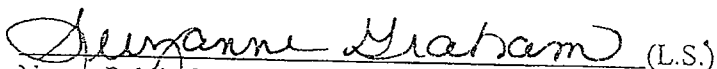

TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

2014 OCT 15 PM 4:39
FILED
CLERK OF COURT
KINGSTREE, S.C.

SWORN TO BEFORE ME this 8th day of October, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA)
COUNTY OF WILLIAMSBURG)

IN THE COURT OF COMMON PLEAS)
FOR THE THIRD JUDICIAL CIRCUIT)

Kevin Bradley, #339031)

2010-CP-45-389)

Applicant,)

vs.)

ORDER)

State of South Carolina,)

Respondent.)

FILED
2014 DEC -5 AM 11:50
SHARON E. STEGEMERS
CLERK OF COURT
KINGSTREE, S.C.

This matter comes before the Court by way of Applicant's Motion to Reconsider. The Respondent made its Return to this response on or about October 30, 2014.

The Order of Dismissal in this matter was signed by this Court on August 19, 2014. This Court finds that as it relates to all issues, other than the claims that Trial Counsel was ineffective for failing to object to hearsay testimony of Robin Griggs (hereinafter "Griggs") and for failing to object to opinion testimony from Griggs that Victim was competent at time of her taped interview, this Order contains the required findings of facts and conclusions of law as required by S.C. Code Ann. §17-27-80 (1976), and Rule 52(a) SCRPC. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

Asel

This Court finds that the original order signed August 19, 2014 and filed August 25, 2014, shall be amended to include the findings on the allegations of whether Trial Counsel was ineffective for failing to object to hearsay testimony of Griggs and whether Trial Counsel was ineffective for failing to object to opinion testimony from Griggs that Victim was competent at time of her taped interview.

Specifically, this Court finds Applicant's allegation that Trial Counsel was ineffective for failing to object to hearsay testimony of Griggs to be without merit. This Court notes Trial Counsel objected to the hearsay testimony of Griggs. (Tr. t. p. 156 line 14—p. 157 line 9).

Specifically, Trial Counsel stated “The jury has the absolute right of hearing what the child has to say, and we don’t need [Griggs] to tell what the child testified to on the video. It’s what the Jury hears.” (Tr. p. 156 lines 16-19). Trial Counsel further stated “she cannot testify as to what somebody else said.” (Tr. p. 156 lines 23-24). The trial judge overruled Trial Counsel’s objection. This Court notes Trial Counsel is not required to “harass the judge by parading the issue before him again.” State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995). This Court finds Trial Counsel properly objected to the hearsay testimony presented by Griggs and was not required to repeatedly object to every instance of hearsay testimony as asserted by Applicant. Furthermore, this Court notes Griggs testimony was cumulative to Victim’s testimony already presented. Based on the foregoing, this Court finds Trial Counsel’s actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

This Court finds Applicant can show no prejudice due to Trial Counsel’s alleged error of failing to object to the hearsay testimony of Griggs as the only issue Applicant disputed was whether Applicant began raping the Victim when she was ten years old. As noted in Applicant’s memorandum, Griggs was properly allowed to testify to the *time* and place of the incident. Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631-632 (2010) (emphasis added). Griggs corroborated Victim’s testimony that the incident began in 2008 when Applicant was ten years old. (App. p. 114 lines 22-25; p. 158 lines 1-11). The fact that Griggs was allowed to testify to the details of the incident is of no consequence as Applicant did not dispute the fact that he raped the Victim. To the contrary, Applicant readily admitted that he engaged in sexual intercourse with the minor Victim. (Trial tr. p. 236—p. 246). Applicant admitted that he “felt terrible” and what he did was “wrong.” (Trial. tr. p. 239). Applicant admitted to raping Victim on the couch in his then girlfriend’s apartment. (Trial tr. p. 243). Furthermore, DNA evidence proved that

Victim was pregnant with Applicant's child. (Trial tr. p. 204). Applicant further admitted to raping the Victim during this evidentiary hearing. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). Therefore, this Court finds that there is clear evidence of overwhelming guilt based on a review of the entire record and the evidence presented during the PCR hearing. As such, Applicant cannot show any resulting prejudice from Trial Counsel's alleged deficiency.

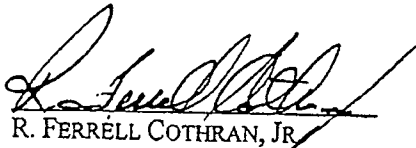
This Court further finds Applicant's allegation that Trial Counsel was ineffective for failing to object to testimony from Griggs stating that Victim was competent at the time of the interview to be without merit. Applicant argues that Griggs testimony stating Victim was "competent" at the time of the interview creates too great of a risk that the jury would equate an assessment of competence with an opinion as to credibility. This Court finds Griggs was merely testifying to her own personal observations regarding the Victim's behavior and demeanor when stating that she had no concerns regarding her competency. State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 501 (2013).

Furthermore, this Court finds Applicant can show no prejudice from Trial Counsel's alleged deficiency. As noted in Applicant's memorandum, Griggs was properly allowed to testify to the *time* and place of the incident. Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631-632 (2010) (emphasis added). Griggs corroborated Victim's testimony that the incident began in 2008 when Applicant was ten years old. (App. p. 114 lines 22-25; p. 158 lines 1-11). The fact that Griggs stated in her opinion Victim was competent at the time of the interview is of no consequence as Applicant did not dispute the fact that he raped the Victim. To the contrary, Applicant readily admitted that he engaged in sexual intercourse with the minor Victim. (Trial

tr. p. 236—p. 246). Applicant admitted that he “felt terrible” and what he did was “wrong.” (Trial tr. p. 239). Applicant admitted to raping Victim on the couch in his then girlfriend’s apartment. (Trial tr. p. 243). Furthermore, DNA evidence proved that Victim was pregnant with Applicant’s child. (Trial tr. p. 204). Applicant further admitted to raping the Victim during this evidentiary hearing. Where there is overwhelming evidence of guilt, a trial counsel’s deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). Therefore, this Court finds that there is clear evidence of overwhelming guilt based on a review of the entire record and the evidence presented during the PCR hearing. As such, Applicant cannot show any resulting prejudice from Trial Counsel’s alleged deficiency.

Based upon careful reconsideration of all the evidence in this case and upon full consideration of Applicant’s Motion, this Court is not persuaded to alter or amend the judgment as it relates to any other allegation or issue raised in Applicant’s Motion. Therefore, this Court finds that the Order of Dismissal, which was served on September 30, 2014, shall only be amended by this Order to reflect the dismissal of Applicant’s allegation regarding Trial Counsel’s ineffectiveness for failing to object to Griggs testimony. This Order shall be incorporated as part of the Order of Dismissal in this matter.

AND IT IS SO ORDERED this 24 day of Nov., 2014.



R. FERRELL COTHRAN, JR.
Presiding Judge
Third Judicial Circuit

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

KEVIN BRADLEY, #339031

Applicant,

v.

STATE OF SOUTH CAROLINA,

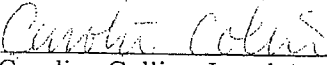
Respondent.

CERTIFICATE OF SERVICE


The undersigned hereby certifies that a true copy of the **Order** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Tara Dawn Shurling, Esquire
Law Office of Tara Dawn Shurling, PA
3614 Landmark Drive, Suite A
Columbia, SC 29204

This 31st day of December, 2014.


Caroline Collins, Legal Assistant
For Respondent

SWORN to before me this 31st day of December, 2014.


Notary Public for South Carolina.
My Commission Expires: 5/14/2024

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
R. Ferrell Cothran, Jr., Presiding Judge

RECEIVED

JAN 22 2015

2010-CP-45-389

S.C. Supreme Court

KEVIN C. BRADLEY, 339031

Applicant,

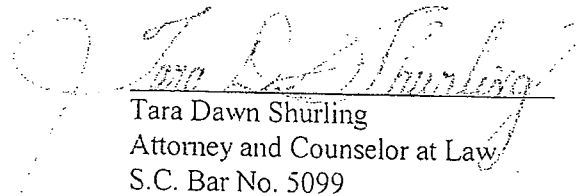
v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Order of Dismissal denying his Post-Conviction Relief filed August 25, 2014, and the Order Denying the Applicant's Motion to Alter or Amend pursuant to Rule 59(e) SCRPC which was filed with the Williamsburg County Clerk of Court on December 5, 2014 and served on Counsel December 31, 2014.


Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

ATTORNEY FOR APPLICANT

This 19th day of January, 2015.

Other Counsel of Record:
Daniel Gourley, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
R. Ferrell Cothran, Jr., Presiding Judge

RECEIVED

JAN 22 2015

S.C. Supreme Court

2010-CP-45-389

KEVIN C. BRADLEY, 339031

Applicant,

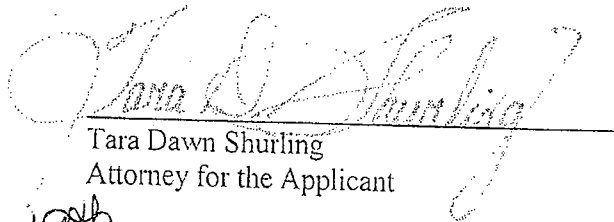
v.

THE STATE OF SOUTH CAROLINA,

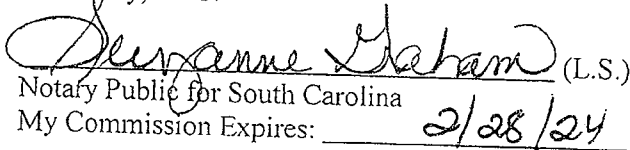
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Daniel Gourley, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 19th day of January, 2015.


Tara Dawn Shurling
Attorney for the Applicant

SWORN TO BEFORE me this 19th day
of January, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24