

EC
SDC
GS
AT
AG

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
)
Clark Thomas aka George Keith Nichols,)
#187845,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
2012-CP-10-8354

ORDER OF DISMISSAL

FILED
2015 JUN -2 AM 11:50
CLERK OF COURT

Presiding Judge: The Honorable J.C. Nicholson
Applicant's Attorney: Tristan Shaffer, Esquire
Respondent's Attorney: Ashleigh R. Wilson, Esquire
Trial Counsel: Michael Tommy Bolus, Esquire
Date of Hearing: December 8, 2014
Court Reporter: Joy C. Rueger

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 21, 2012 and amended on December 3, 2014. The Respondent made its return on November 1, 2013. An evidentiary hearing on the matter was convened on December 8, 2014 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Tristan Shaffer, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying were Michael Tommy Bolus, Esquire, and several other witnesses called by the Applicant. The Court had before it the trial transcript, the Charleston County Clerk of Court records, and the Applicant's records from the South Carolina Department

of Corrections, the Applicant's application, the Respondent's return, the appellate records, and exhibits submitted by the parties.¹

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the December 2006 term of the Charleston County Grand Jury for kidnapping (2006-GS-10-12295), criminal domestic violence of a high and aggravated nature (CDVHAN) (2006-GS-10-12296), and criminal sexual conduct- first degree (2007-GS-10-12295). The Applicant was represented by Michael T. Bolus, Esquire.

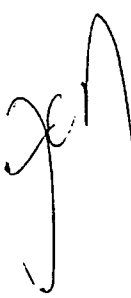
On July 10, 2008, the Applicant proceeded to trial and was convicted of kidnapping and CDVHAN. The Applicant was sentenced by the Honorable Deadra L. Jefferson to confinement for a period of twenty (20) years for kidnapping and ten (10) years for CDVHAN. The sentences are to be served concurrently. The Applicant filed a timely notice of appeal and a *pro se* brief. After review of the brief pursuant to Anders v. California, 386 U.S. 738 (1967), the Court of Appeals dismissed the Applicant's appeal. State v. Clark David Thomas, 2012-UP-486 (S.C. Ct. App. August 8, 2012).

ALLEGATIONS

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


1. Ineffective assistance of counsel.

¹ Applicant's Exhibit 1: victim's medical records from Roper Hospital (admitted), Applicant's Exhibit 2: incident report (not admitted); Applicant's Exhibit 3: notes from the solicitor's file regarding the victim's medical records (admitted); State's Exhibit 1: notes used by witness Kristen Boyer during her hearing testimony (admitted); State's Exhibit 2: the indictment, arrest warrant affidavit, and sentencing sheet from the Applicant's prior 2003 criminal domestic violence of a high and aggravated nature conviction (admitted).

- 
- a. Defense counsel failed to effectively cross examine the victim by failing to highlight contradictions in the victim's statements and testimony and failing to impeach victim with evidence of prior behavior and prior statements.
 - b. Defense counsel failed to investigate and obtain the medical, dental, and toxicology records of the victim generated after this alleged incident. Accordingly, these documents were not used by defense counsel for impeachment purposes.
 - c. Defense counsel failed to object to items entered into evidence which were unreliable, unauthenticated, and irrelevant in this matter. Defense counsel did not ensure that a proper chain of custody was maintained as to these items.
 - d. Defense counsel failed to obtain all evidence collected from Defendant's computer by the digital evidence unit to evaluate said evidence for potential relevance to the Defense's case.
 - e. Defense counsel improperly requested that the Court not charge the lesser included offense of criminal domestic violence for the jury to consider.
 - f. Defense counsel made negative statements regarding the defendant during trial which were excessive and extreme and could not be reasonably considered to be within his trial strategy. In doing so, defense counsel also was ineffective in his closing argument.
 - g. Defense counsel did not meet with or consider additional witnesses offered by Defendant who would have provided relevant information to assist the jury. Defense counsel did not allow relevant witnesses to testify on the Defendant's behalf.
 - h. Defense counsel refused to present character evidence on behalf of the Defendant even though he was aware of multiple witnesses willing to testify.
 - i. Defense counsel failed to properly object during the State's cross examination of the Defendant when the prosecutor badgered the witness by repeatedly asking the same questions and refusing to allow the Defendant to complete his answers. Defense counsel then failed to rehabilitate Defendant on re-direct.
 - j. Defense counsel failed to object when Assistant Solicitor incorrectly stated Defendant's prior record during sentencing.
 - k. Defense counsel failed to request that the Judge, in her discretion, consider not requiring the Defendant to register on the Sex Offender Registry.
 - l. Defense counsel failed to sufficiently meet with Defendant and prepare for trial.
 - m. Defense counsel failed to sufficiently assert client's right to a speedy trial.
 - n. Defense counsel failed to object when the Prosecutor repeatedly vouched for the victim's credibility.

Shortly before his evidentiary hearing, counsel for the Applicant amended his application for post-conviction relief to allege the following:

1. Ineffective assistance of counsel.
 - a. Counsel denied his 6th and 14th amendment rights to effective assistance of counsel based on defense counsel's abbreviation of the trial to make sure trial counsel was able to leave for vacation.
 - b. Trial counsel was ineffective for failing to bring up contradictions in the victim's testimony and previous statements.


- 
- c. Trial counsel was ineffective for failing to call witnesses demonstrating that the victim previously made statements that she like being tased.
 - d. Trial counsel was ineffective for failing to impeach the victim with her medical records.
 - e. Trial counsel failed to impeach the victim with evidence of her plea offer with the State.
 - f. Trial counsel failed to request a lesser included charge of CDV.
 - g. Trial counsel failed to present evidence that the Applicant was entitled to a sentence pursuant to S.C. Code 16-25-90.
 - h. Trial counsel failed to object to the kidnapping instruction.
 - i. Trial counsel made negative statements about the Applicant throughout his opening and closing statements.
 - j. Trial counsel failed to call witnesses to corroborate the Applicant's claim that the victim enjoyed S&M.
 - k. Trial counsel failed to call character witnesses for the Applicant.
 - l. Trial counsel failed to argue that the kidnapping should not have subjected the Applicant to the sex offender registry.
 - m. Trial counsel failed to communicate and prepare the Applicant for trial.
 - n. Trial counsel failed to object to the prosecution vouching for the credibility of the witnesses in its closing.
 - o. Trial counsel failed to object to the State's seek the truth language in closing.
 - p. Trial counsel failed to object to the State's Exhibits 41-45.
 - q. Trial counsel failed to properly cross-examine the detective with his contradicting affidavit.
 - r. Trial counsel failed to object to the jury charge for kidnapping that was given to the jury.
 - s. Trial counsel failed to object to the circumstances of aggravation charged to the jury in the instruction on CDVHAN.

2. Brady violation.

- a. The State failed to disclose medical records of the victim.
- b. The State failed to disclose information concerning a plea offer with the victim.
- c. The State failed to disclose prior police reports concerning the victim.

This Court finds the Applicant failed to present evidence, argument, or testimony on several of the Applicant's numerous claims raised in his original and amended applications. Therefore, this Court finds any allegations not addressed in this order are deemed abandoned by the Applicant. This Court finds at the evidentiary hearing, the Applicant pursued relief solely on the following claims:

1. Ineffective assistance of counsel.

- 
- a. The Applicant alleges counsel was ineffective for failing to present evidence that Thomas was entitled to a sentence pursuant to S.C. Code §16-25-90. (State moved to dismiss this claim, but denied.)
 - b. The Applicant alleges counsel was ineffective for abbreviating the Applicant's trial to ensure he was able to leave for vacation.
 - c. The Applicant alleges counsel was ineffective for failing to communicate and prepare the Applicant for trial.
 - d. The Applicant alleges counsel was ineffective for failing to call witnesses to demonstrate that the victim previously made statements that she like being tased.
 - e. The Applicant alleges counsel was ineffective for failing to call witnesses that could corroborate the Applicant's claim that the victim enjoyed S&M.
 - f. The Applicant alleges counsel was ineffective for failing to bring up contradictions in the victim's testimony and previous statements.
 - g. The Applicant alleges counsel was ineffective for failing to impeach the victim with her medical records.
 - h. The Applicant alleges counsel was ineffective for failing to argue that the kidnapping should not have subjected the Applicant to the sex offender registry.
 - i. The Applicant alleges counsel was ineffective for making negative statements about the Applicant throughout opening and closing statements.
 - j. The Applicant alleges counsel was ineffective for failing to call character witnesses for the Applicant.

2. Brady violation.

- a. The Applicant claims the State failed to disclose the victim's medical records.
- b. The Applicant claims the State failed to disclose prior police reports concerning the victim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

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

Summary of the Testimony

Lasonya Epps was the first witness called by the Applicant. She testified she worked at Roper Hospital as a medical records specialist. She testified she received a subpoena for records

and that she brought the records with her to the hearing. Applicant's exhibit 1- the victim's medical records- were admitted into evidence.

The Applicant called Chris Talbott as a witness. Talbott testified that he has worked at the North Charleston Police Department for 11 years. He testified he responded to the scene and encountered the victim and the Applicant after receiving a call about a female jumping from a car on the highway. Officer Talbott testified he pulled up to the bridge and observed a van partially in the roadway. He testified he observed a male carrying a female to the van. He testified he arrested the Applicant. Officer Talbott testified when he arrived at the scene, the victim was clearly upset and feared for her life. He testified he did not recall injuries to the victim's face. Officer Talbott testified he testified at the Applicant's trial and did not recall his testimony about the victim's teeth. He testified his incident report (Applicant's Exhibit 2) did not mention the victim having a busted or cracked tooth. He testified further that the testimony he gave at the trial was accurate.

The Applicant called Teddy Martin as a witness. He testified the Applicant was his roommate and he helped him get his license to start a business. He the Applicant is his close friend and he is familiar with the victim. Mr. Martin testified he was around when the victim and the Applicant originally started dated. He testified he saw the victim and the Applicant around each other frequently.

Mr. Martin testified he has seen the victim physically abuse and assault the Applicant. He testified they had a violent relationship that was fueled by the victim and drug use. He testified he has seen the victim hit the Applicant when the Applicant did nothing to instigate the assault. Mr. Martin testified he witnessed an incident in the grocery store where the victim came out of nowhere and attacked the Applicant.

Mr. Martin testified he spoke to trial counsel and offered to testify on the Applicant's behalf. He testified the Applicant is not violent. He testified the victim was the violent one in the relationship. Mr. Martin testified the victim was not scared of the Applicant, but wanted to be with him. Lastly, Mr. Martin testified the victim and the Applicant's relationship involved a "weird violence". He testified one minute they would be fighting and the next minute they would be making love.

The Applicant also called Crystal Martin as a witness. Mrs. Martin is married to witness Teddy Martin. Mrs. Martin testified she has known the Applicant for a few years and has been around the victim and the Applicant regularly, but interacted with the victim very few times. Mrs. Martin testified she was once at a pizza place with her husband and the Applicant. She testified the victim walked over to them and the Applicant became afraid. Mrs. Martin testified she does not recall ever seeing the victim and the Applicant arguing in the three or four times that she has seen them together. She testified she has never seen the victim physically abuse the Applicant or vice versa. Mrs. Martin testified she met with trial counsel and offered to testify for the Applicant. She later changed her testimony and stated that she did not actually speak to trial counsel directly, but saw him in the hallway prior to trial.

The Applicant called Joel Longnecker as a witness. Mr. Longnecker testified he suffered from a severe head injury a while ago and has a hard time remembering things. He testified he knew the Applicant. He testified he tried to stay away from the victim because the Applicant was violent when the victim was around. He testified the victim and Applicant yelled at each other. He testified he knew the victim shocked herself to get sexually aroused. He testified he did not recall the victim attacking the Applicant. He testified he did not recall what happened last week. Finally, Mr. Longnecker testified he did not recall anything going on.

The Applicant called Thomas Randy Harbeson as a witness.² Mr. Harbeson testified he has known the Applicant for the last fifteen to twenty years. He testified the Applicant was a good friend and he has never known him to be violent. Mr. Harbeson testified he also knows the victim from seeing her around the Applicant. Mr. Harbeson testified he has seen the victim assault the Applicant. He testified he has seen the victim punching the Applicant and going crazy. He testified he has never seen the Applicant hit the victim. He testified he saw the victim hit the Applicant during a verbal argument. He testified the victim and Applicant argued like lovers. Mr. Harbeson testified he never knew that the Applicant had previously been convicted of criminal domestic violence against the victim.

The Applicant called Cecil Terry as a witness. Mr. Terry testified the victim is his stepdaughter. He testified the Applicant and the victim used to live with him. Mr. Terry testified he has seen the victim hit the Applicant, but only after getting the "crap beat out of her" by the Applicant. He testified he has seen the victim with marks on her, but has never seen any marks on the Applicant. He testified he has witnessed physical injuries to the victim as a result of the Applicant's abuse. Mr. Terry testified the Applicant beat the victim. He testified the victim was a minor when she first met the Applicant and he was responsible for introducing the victim to drugs. Mr. Terry testified the violence in the victim and the Applicant's relationship was not one-side.

The Applicant called Kristen Boyer (formerly Kristen Thomas) as a witness.³ Ms. Boyer testified she is the Applicant's daughter. She stated that she testified for the Applicant during his trial. She testified her father started to "fade away" after he started dating the victim. She testified

² This Court notes Mr. Harbeson was removed from the courtroom during the Applicant's testimony for answering questions asked of the Applicant from the courtroom galley. He was returned to the courtroom for his testimony.

³ This Court notes that during Ms. Boyer's testimony the State moved to strike her testimony on the basis that she was improperly referring to notes during her testimony. This Court denied the State's motion to strike and allowed the State to cross-examine the witness on the origin of her "testimony notes".

she spoke with trial counsel about a recording she had of the victim. She testified trial counsel told her that the tapes would not help the Applicant. Ms. Boyer testified she saw the victim tased by police at Folly Beach. She testified that when tased the victim laughed and said "do it again." She testified she also witnessed the victim grab the steering wheel of the car while her father was driving.

During cross-examination by the State, Ms. Boyer testified she was referring to notes during her hearing testimony. She testified the notes she was referencing to during her testimony were prepared by someone else. Ms. Boyer eventually admitted that the notes she was using during her testimony were prepared by her father (the Applicant) and given to her to testify based on. She testified she did not discuss her testimony with the Applicant, but got the notes from him. Ms. Boyer then admitted she had discussed her hearing testimony with the Applicant.


The Applicant called Carol Cook as a witness. Ms. Cook testified she was the Applicant's mother and hired trial counsel to represent the Applicant. She testified the Applicant had a lot of knowledge about everything and knew a lot of people who would come to his defense. Ms. Cook testified she suggested several character witnesses to trial counsel. She testified she did not know their names, but trial counsel told her he would not call the witnesses because they were all drug addicts. She testified the victim was jealous and would take the phone when she called the Applicant. Ms. Cooke testified she has a recording of the victim saying that she would not testify against the Applicant at trial if they gave her money.⁴

The Applicant also called Nathan Williams (former solicitor on the Applicant's case) as a witness. He testified he requested the victim's medical records by subpoena. He testified he

⁴ This Court notes it agreed to listen to the recording of the victim Ms. Cook claimed to have during her testimony. However, the Court was never presented a copy of this recording by the Applicant. Counsel for the Applicant later told the Court that the contents of the recording were not as Ms. Cook recounted and he did not wish to present the recording to the Court.

believes he received the records and turned them over to trial counsel. He testified he would have given any medical records he had over to trial counsel. He testified the victim's mouth injury was reflected in a photo taken by police. Lastly, Williams testified the victim's medical records were not exculpatory.

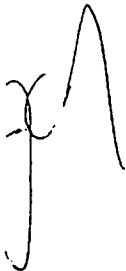
The Applicant Clark Thomas, took the stand to testify. The Applicant testified he was represented by the trial counsel. The Applicant testified trial counsel told him about a plea offer, but he rejected the offer because he was innocent. The Applicant testified he never received his discovery materials.

The Applicant testified he gave trial counsel witnesses to investigate. He testified he told trial counsel to call the police involved in the Folly Beach arrest of the victim, the man who controlled the electronic monitoring bracelet, his daughter, and Teddy and Crystal Martin. The Applicant testified trial counsel told him his potential witness would not be good because they were drug addicts.

The Applicant testified trial counsel was not properly prepared for trial. He testified he did not discuss anything about his case with trial counsel. He testified he wanted trial counsel to bring out the inconsistencies in the victim's statements. The Applicant testified the victim never alleged he hit her with his hands or feet. He testified further the victim did not report sexual assault in her first statement to police. The Applicant testified he was not able to participate or allowed to ask any questions during his trial. He testified trial counsel was not interested in calling his witnesses, but was trying to shut the trial down as soon as possible.

The Applicant testified trial counsel made him look like a monster. He testified he did not agree with trial counsel's strategy. He testified he did not consent to trial counsel's statements in opening statement.

The Applicant testified the victim was not afraid of him, but he was afraid of the victim. He testified he never struck the victim, but the victim struck him numerous times. He testified trial counsel did not discuss S.C. Code §16-25-90 with him. He testified he wanted trial counsel to pursue a claim under 16-25-90. The Applicant testified he told trial counsel about the time the victim punched him in the head. He testified the victim liked being tased and he told trial counsel and the Court that the victim also liked to be choked. The Applicant testified he does not have a history of criminal domestic violence. He testified he did however, plead guilty to criminal domestic violence of a high and aggravated nature for an incident involving the same victim on May 22, 2003.

The Applicant testified trial counsel also did not argue against sex offender classification. He testified there was no sexual evidence of crime because the jury found him not guilty. He testified further trial counsel did not object to the solicitor's closing because he needed to catch a plane. Lastly, he testified trial counsel did not discuss with him his testimony at trial.

The State called Michael Tommy Bolus, Esquire, as a witness. Counsel testified he has been practicing law for thirty-eight years. He testified he has extensive experience in criminal defense. Counsel testified he was retained three days after the incident. He testified he met with the Applicant six times in the jail. He testified he also spoke with the Applicant regularly by phone and corresponded with him via mail. Counsel testified he also spoke with the Applicant's mother (Carol Cook). He testified the Applicant's mother was interested in paying the victim not to testify at trial. He testified he told the Applicant's mother not to speak to the victim.

Counsel testified he reviewed the discovery materials with the Applicant during their meetings. He testified he received everything he wanted from the State. He testified he did not make a special request for the victim's medical records because they were not necessary. He

testified the victim's broken tooth was not his concern since both the victim and doctor who treated her injuries testified about the extent of her injuries at the Applicant's trial. Counsel testified he did not know if bringing up the victim's broken tooth would have been helpful at trial since the State had the doctor's testimony, the victim's injuries, and the police officer's testimony.

Counsel testified the Applicant was offered a straight up guilty plea. He testified that was no real plea bargain and the Applicant would not take the plea because he thought he was not guilty. He testified the Applicant thought he did nothing wrong.

M
Counsel testified prior to trial he reviewed the Applicant's criminal record. He testified the Applicant did not tell him who he really was and he later learned the Applicant used an alias. He testified the record included forty to fifty bad check convictions. Counsel testified he did not bring up the Applicant's character because of his extensive record. He testified this was a nasty case to bring up the Applicant's character and the Applicant knew prior to trial they would not call character witnesses at trial. He testified further he did not present character evidence because the Applicant did not have good character. Counsel testified bringing up the Applicant's character would also have opened the door for the State to present evidence about the Applicant's prior criminal domestic violence of a high and aggravated nature conviction. He testified bringing up the Applicant's character would have been a bad idea.

Counsel testified he discussed with the Applicant his version of the facts. He testified the Applicant's version of facts did not indicate the Applicant's assault on the victim was the result of any domestic violence he suffered at the hands of the victim. Counsel testified he discussed possible defenses with the Applicant. He testified he ultimately decided to argue to the jury that the sex with the victim was consensual and that the victim liked unusual sexual acts. Counsel

testified the Applicant was aware of the trial strategy and their need for the jury to sympathize with him.

Counsel testified he elicited testimony about the victim enjoying being tased at trial during the Applicant's daughter's testimony. He testified further that he had received the police reports about the victim assaulting the Applicant's daughter in the prior Folly Beach incident.

Counsel testified the facts of the case were so bad because of the constant use of hard drugs that he did not want to present the Applicant as a good honest character. He testified based on the victim and Applicant's heavy drug use he had to portray them in a less than positive way. Counsel testified he had to present to the jury some explanation for the victim and Applicant's enjoyment of tasers and freaky sex in the bedroom.

M Counsel testified he had ample time to prepare for trial. He testified he had planned a vacation and obtained an order of protection for the following week after the Applicant's trial. He testified the Applicant trial ended Thursday or Friday morning.

Counsel testified he was able to adequately cross-examine the State's witnesses at trial. He testified he questioned the victim about the fact that she did not initially disclose the sexual assault to police. Counsel testified he would not have interrupted the solicitor's closing argument to object unless he made a comment that was very bad.

Counsel testified the Applicant never mentioned being abused by the victim. He testified the Applicant only told him the victim liked kinky sex. He testified he never knew of any abuse by the victim towards the Applicant.

Credibility of Witnesses

This Court having had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility makes the following findings of fact and

conclusions of law. As an initial matter, this Court finds credible the testimony of Officer Chris Talbott, Cecil Terry, former assistant solicitor Nathan Williams and defense counsel Michael Tommy Bolus. This Court does not find credible the testimony of the following witnesses provided by the Applicant: Teddy Martin, Crystal Martin, Joel Longnecker, Thomas Randy Harbeson, Kristen Boyer (formerly Kristen Thomas), Carol Cooke, and Clark Thomas (the Applicant). Specifically, this Court does not find credible the testimony of both Teddy Martin and Crystal Martin because the married couple provided conflicting testimony regarding witnessing violence in the Applicant's relationship with the victim. Mr. Martin testified he frequently saw violence in the relationship initiated by the victim. Mrs. Martin testified she had never seen violence in the victim and Applicant's relationship. This Court does not find credible the testimony of Joel Longnecker because he began and concluded his testimony at the evidentiary hearing with the statement that he had suffered a serious head injury and did not recall many things including what happened the week previous to his testimony. This Court does not find credible the testimony of Thomas Randy Harbeson because he was removed from the courtroom prior to his testimony during the evidentiary hearing for whispering answers to questions asked of the Applicant while the Applicant was on the stand testifying. This Court does not find the testimony of Kristen Boyer (formerly Kristen Thomas) credible since she admitted to using notes during her testimony prepared by the Applicant (her father). She also admitted to using the notes prepared by the Applicant as the basis for her hearing testimony. This Court does not find credible the testimony of the Applicant mainly because he testified during the evidentiary hearing that he did not have a history of criminal domestic violence, but then admitted to pleading guilty to a criminal domestic violence charge involving the same victim in 2003.

Ineffective assistance of counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). For the Applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668 (1984), Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668).

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

The Applicant alleges counsel was ineffective for failing to present evidence that Thomas


was entitled to a sentence pursuant to S.C. Code §16-25-90.⁵ This Court finds the Applicant has failed to carry his burden of proving he is eligible for early parole pursuant to S.C. Code Section 16-25-90 and that counsel's performance was ineffective in this regard. This Court finds the Applicant has failed to establish by the preponderance of the evidence that he has a history of criminal domestic violence suffered at the hand of the victim in this case. This Court finds the Applicant is not entitled to early parole eligibility.

Pursuant to S.C. Code §16-25-90, a person who is convicted of or pleads guilty to an offense against a household member is eligible for parole after serving one-fourth of his or her prison term if the person presents credible evidence of a history of criminal domestic violence suffered at the hands of the household member. State v. Blackwell-Selim, 392 SC 1, 707 S.E.2d 426 (2011). Such history must be proven by a preponderance of the evidence. Id. A mere production of evidence does not automatically result in earlier parole eligibility. Id. The defendant must persuade the judge by presenting proof which leads the trier of fact to find that the existence of the contested fact is more probable than its nonexistence. Id. The defendant has the burden of persuading the judge that his evidence is reliable. Id.

This Court finds the Applicant has failed to present any credible evidence that he suffered from a history of domestic violence at the hands of the victim in this case. This Court finds the witnesses presented by the Applicant in support of this claim were not credible. As mentioned above by the Court in its credibility findings, the Applicant's witnesses provided testimony that was both conflicting and difficult to believe. This Court finds the evidence presented by the Applicant was not plausible or trustworthy.

⁵ At the start of the evidentiary hearing, the State moved to summarily dismiss this claim on several basis. This Court denied the State's motion to allow the Applicant's to present evidence in support of this claim.

This Court finds the evidence presented by the State at the evidentiary hearing reflects the victim actually suffered from a history of domestic violence at the hands of the Applicant. (See State's Exhibit 3). The Applicant denied having a history of criminal domestic violence, but admitted pleading guilty to criminal domestic violence of a high and aggravated nature for an incident involving the same victim in 2003. This Court also finds persuasive trial counsel's testimony that during the course of his representation of the Applicant, the Applicant never mentioned suffering from a history of domestic violence at the hands of the victim. This Court finds the testimony presented about the victim allegedly jerking the wheel of the car while the Applicant was driving the car appears to be more a reflection of the victim and Applicant's heavy drug use than an act of criminal domestic violence by the victim against the Applicant.

 This Court using its discretion and considering all the evidence and testimony presented at the evidentiary hearing finds this claim is wholly without merit. This Court finds counsel's performance was not ineffective. This Court finds further the Applicant is not entitled to early parole pursuant to S.C. Code Section 16-5-90.

The Applicant alleges counsel was ineffective for abbreviating the Applicant's trial to ensure he was able to leave for a vacation. This Court finds this allegation is wholly without merit. This Court finds the Applicant has failed to present any evidence other than the Applicant's incredible testimony that trial counsel rushed or attempted to abbreviate the Applicant's trial in any way. This Court finds the trial record is also void of any showing of such activity by counsel. This Court finds the Applicant's trial proceeding progressed at a normal pace and the Applicant was given a full opportunity to challenge the State's case and present a defense and witnesses. This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective in this regard.

The Applicant alleges counsel was ineffective for failing to communicate and prepare the Applicant for trial. This Court finds this allegation is wholly without merit. The Applicant has failed to show that counsel failed to communicate and prepare him for trial. The record reflects from the Applicant's lengthy testimony at trial, that the Applicant was aware of the charges he was facing and that his testimony was aligned with counsel's defense strategy. This Court finds the Applicant has also failed to show what additional communication and preparation of the Applicant by counsel would have yielded at trial. This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective in this regard.

M The Applicant alleges counsel was ineffective for failing to call witnesses to demonstrate that the victim previously made statements that she like being tased. This Court finds this allegation is wholly without merit. The record reflects counsel presented testimony from both the Applicant and his daughter Kristen Thomas that the victim liked being tased. Kristen Thomas testified at trial that when she lived with the Applicant she would hear a clicking noise coming from their bedroom followed by the victim screaming out in pleasure. (Trial Tran. 571-572). She testified further about an incident on Folly Beach where the victim was tased by police and appeared to enjoy it. (Trial Tran. 574-577).

The Applicant also testified at trial that the victim liked the taser. (Trial Tran. 615). It is clear from the record that trial counsel presented testimony to the jury about the victim liking tasing. This Court finds and the record reflects counsel's performance was not deficient in this regard. This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to call witnesses to demonstrate that the victim previously made statements that she like being tased.

The Applicant alleges counsel was ineffective for failing to call witnesses that would corroborate the Applicant's claim that the victim enjoyed S&M. This Court finds this allegation is wholly without merit. Because the defense's theory at trial was that the victim enjoyed being tied up and tased, the record reflects numerous references to the victim's alleged enjoyment of unusual sexual practices by defense witnesses. Trial counsel elicited testimony from Kristen Thomas about the victim and Applicant's use of a taser and rough sex in the bedroom. Thomas also testified the Applicant and the victim would often have bite marks and scratches on them after having sex. (Trial Tran. 571-572). Trial counsel also elicited testimony from the Applicant about his unusual sexual relations with the victim. The Applicant testified at trial about the following: the victim's desire to be tied up, the victim's desire to be choked during orgasm, the victim's desire to bite, scratch, and slap during sex, and the victim's enjoyment of tasing during sex. (Trial Tran. 605-608, 615-618). This Court finds counsel effectively presented testimony about the victim's unusual sexual habits for the jury to consider and did not provide deficient performance. This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to call witnesses that would corroborate the Applicant's claim that the victim enjoyed S&M.

The Applicant alleges counsel was ineffective for failing to bring up contradictions in the victim's testimony and previous statements. This Court finds this allegation is wholly without merit. The record reflects trial counsel effectively cross-examined the victim's testimony. The purpose of cross-examination at trial is "to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." State v. Gillian, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004) aff'd as modified, 373 S.C. 601, 646 S.E.2d 872 (2007) (citing

Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

This Court finds counsel effectively cross-examined the victim and highlighted any contradictions and inconsistencies in her statements. The record reflects counsel cross-examined the victim about a note threatening to put the Applicant in prison (Trial Tran. 215-219), about whether or not she was living in the hotel room with the Applicant at the time of the incident (Trial Tran. 222-224), and about her first statement to police not mentioning any rape by the Applicant (Trial Tran. 238-239). This Court finds counsel's cross-examination of the victim did not result in deficient performance.

This Court finds further the Applicant has also failed to show how any additional cross-examination of the victim would have affected the outcome of the trial. Due to the nature of the offense and the facts elicited at trial, this Court notes it is highly likely that a more aggressive cross-examination of the victim by trial counsel may have reflected poorly on the Applicant in the eyes of the jury. This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to highlight contradictions in the victim's testimony and previous statements on cross-examination.

The Applicant alleges counsel was ineffective for failing to impeach the victim with her medical records. This Court finds this allegations is wholly without merit. This Court finds the victim's medical records as presented by the Applicant (Applicant's Exhibit 1) do not contradict the victim's testimony and it is unlikely counsel could have used the record as effective impeachment material. At trial the victim testified the Applicant tased and hit her all over her body over the course of the incident. (Trial Tran. 147-161). The victim also testified that the Applicant chipped her tooth. (Trial Tran. 159). The medical records presented by the Applicant essentially corroborated the victim's version of her injuries.

This Court finds further the Applicant has failed to show how impeaching the victim with these records would have affected the outcome of his trial. This Court finds it is unlikely impeaching the victim on these records would have resulted in a different outcome at trial since Officer Talbott who first encountered the victim and the Applicant on the side of the road and Dr. Theodore Paraschos who treated the victim in the emergency room both testified about the victim's extensive injuries. (Trial Tran. 307-309, 438-455). This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to impeach the victim with her medical records.

f n
The Applicant alleges counsel was ineffective for failing to argue his kidnapping conviction should not have subjected the Applicant to the sex offender registry since he was acquitted of the sex offense. This Court finds counsel was not ineffective in this regard. S.C. Code Section 23-3-430(15), requires a person convicted of kidnapping to register for the sex offender registry unless the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense. This Court finds a conviction for a sexual offense is not a prerequisite for sex offender registry by a person convicted of kidnapping. This Court finds the sex offender registry is a statutory requirement associated with a conviction for the offense of kidnapping. This Court finds counsel was not ineffective in this regard. This Court finds this allegation is wholly without merit.

The Applicant alleges counsel was ineffective for making negative statements about the Applicant throughout opening and closing statements. This Court finds this allegation is wholly without merit. This Court finds trial counsel articulated a valid strategic basis for the statements he made during opening and closing about the Applicant. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules

for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

This Court finds valid trial counsel's testimony that he chose to portray the victim and Applicant in a somewhat negative light and as drug addicts in his statements as a way to explain to the jury the victim and Applicant's unusual sexual activities. This Court finds since counsel articulated a valid strategic basis for his statements about the Applicant at trial, this Court will not second guess counsel's trial tactic. This Court finds counsel's performance was not deficient in this regard. This Court finds the Applicant has failed to carry his burden of proving trial counsel provided ineffective assistance of counsel by making certain statements about the Applicant during opening and closing arguments.

The Applicant alleges counsel was ineffective for failing to call character witnesses for the Applicant. This Court finds this allegation is without merit. This Court finds counsel was not deficient and provided a valid strategic basis for failing to present character witnesses for the

Applicant at trial. Counsel testified he did not want to bring up the Applicant's character because of his extensive record and because the Applicant did not have good character. Counsel also testified he did not want to present evidence of the Applicant's character and possibly open up the door for the State to bring up the Applicant's prior criminal domestic violence convictions. This Court finds counsel's strategy was legitimate. See Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (finding trial counsel adequately put forth a defense by calling the only witness whom he believed to be credible and supportive of the defense strategy). This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to call character witnesses on the Applicant's behalf during trial

Lastly, this Court finds overwhelming evidence of the Applicant's guilt precludes the success of any claims of ineffective assistance of counsel. The presence of overwhelming evidence of guilt negates any claim that counsel's performance could have reasonably affected the result of the defendant's trial. Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002); see also (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt). This Court finds the State presented ample evidence of the Applicant's guilt at trial which makes it highly unlikely but for counsel's alleged deficiency the outcome of the Applicant's trial would have been different.

Brady violation

The Applicant alleges the State failed to disclose the victim's medical records and prior police reports concerning the victim. This Court finds this claim is wholly without merit. Brady

requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady⁶ claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985)).

JCM
This Court finds the Applicant has failed to show that the victim's medical records and the incident report from the Folly Beach incident involving the victim were suppressed by the prosecution. This Court finds and the record reflects the victim's medical records were not exculpatory and the Applicant has failed to show that the solicitor failed to hand over the records to trial counsel or suppressed the evidence in any way. This Court finds further the Applicant has failed to show that the Folly Beach incident report involving the victim was suppressed by the solicitor. Trial counsel testified at the evidentiary hearing that he was in possession of the incident report prior to trial. It is also obvious from the record that trial counsel was aware of the incident prior to trial because he cross-examined the victim about the incident during he testimony. (Trial Tran. 227-228). This Court finds the Applicant has failed to carry his burden of proving the existence of any Brady violations. This Court finds the Applicant has failed to show that the solicitor suppressed any material evidence.

All Other Allegations

⁶ Brady v. Maryland, 373 U.S. 83 (1963).

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

CONCLUSION

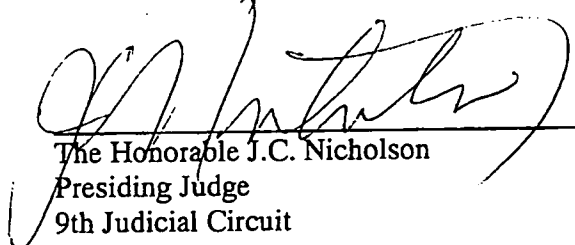
Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this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

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

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 13 day of MAY, 2015


The Honorable J.C. Nicholson
Presiding Judge
9th Judicial Circuit

Charleston, South Carolina.