LAW OFFICE OF
C. RAUCH WISE
Attorney & Counselor at Law
305 Main Street
Greenwood, SC 29646
e-mail rauchwise@gmail.com

C. Rauch Wise

Telephone
(864) 229-5010
Facsimile
(864) 229-2665

January 9, 2017

Jenny Abbott Kitchings, Clerk
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Eric VanCleave vs. State of South Carolina
Case № 2015-CP-06-00326

Dear Ms. Kitchings:

I am enclosing herewith for filing the original Notice of Intent to Appeal together with the original Affidavit of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/slt
Enclosure

cc Julie Coleman
Hon. Robert E. Hood
Clerk, Barnwell County
S.C. Court Administration

RECEIVED
JAN 17 2017
S.C. SUPREME COURT
RECEIVED
JAN 18 2017
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case № 2015-CP-06-00326

Eric VanCleave, 00354843, ... Appellant,

vs.

State of South Carolina ..... Respondent.

NOTICE OF INTENT TO APPEAL

Eric VanCleave appeals the Order of the Honorable Robert E. Hood dated November 21, 2016, and filed on November 29, 2016, and the Order Denying Applicant's Motion to Alter or Amend Judgment dated December 28, 2016. Appellate received notice on December 29, 2016.

January 9th, 2017

C. Rauch Wise
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Attorney for Appellant

OTHER COUNSEL OF RECORD

Julie Coleman
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case № 2015-CP-06-00326

Eric VanCleave, 00354843, ... Appellant,

vs.

State of South Carolina ..... Respondent

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Michelle Collins who, after being duly sworn, deposes and says that she is the legal assistant for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on January 9, 2017, she did deposit in the United States Mail with proper postage affixed thereto a copy of the Notice of Appeal in the above case addressed to Julie Coleman, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211.

Michelle O Collins

SWORN to and Subscribed
before me this 9th day
of January, 2017.

Sandra Traynham (L.S.)
Notary Public for South Carolina
My Commission expires: 2-12-25

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP0600326

Eric VanCleave		South Carolina State of	
PLAINTIFF(S)		DEFENDANT(S)	
Submitted by:		Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

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

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: **Order Denying Applicant's Motion to Alter or Amend Judgment**

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/ Robert E. Hood — 2164 — 1/6/2017

Circuit Court Judge | **Judge Code** | **Date**

For Clerk of Court Office Use Only

RECEIVED
JAN 13 2017
SC Court of Appeals

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 12/2016)

This judgment was entered on **January 5, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **January 6, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Clarence Rauch Wise 305 Main St. Greenwood, SC 29646

Julie Amanda Coleman PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Mansfield

Court Reporter

Constance B. Mansfield - Deputy Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Eric VanCleave, #354843, Applicant, v. State of South Carolina, Respondent.	2015-CP-06-00326 **ORDER DENYING APPLICANT'S MOTION TO ALTER OR AMEND JUDGMENT**

This matter comes before the Court on Applicant's Motion to Alter or Amend Judgment dated December 9, 2016. After reviewing the Court's file and Applicant's Motion, and upon careful consideration, the Court hereby finds that Applicant's Motion should be denied.

THEREFORE, Applicant's Motion to Alter or Amend Judgement is hereby DENIED.

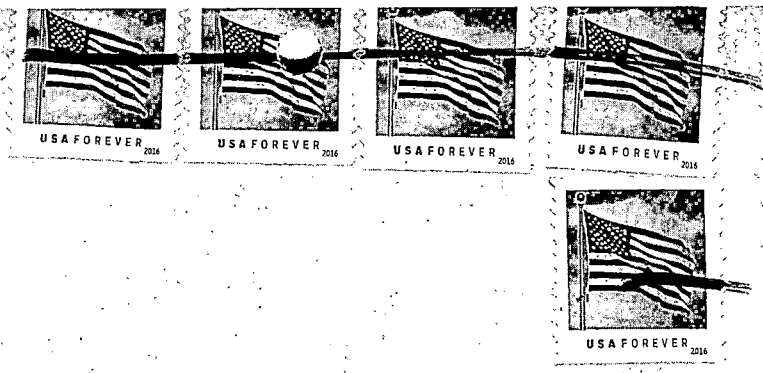
AND IT IS SO ORDERED this 28 day of Dec, 2016.

R E Hood

ROBERT E. HOOD
Presiding Judge
Second Judicial Circuit

Columbia, South Carolina

OFFICE OF
.UCH WISE
Counselor at Law
Main Street
ood, SC 29646



Jenny Abbott Kitchings, Clerk
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP0600326

Eric VanCleave		South Carolina State of	
PLAINTIFF(S)		DEFENDANT(S)	
Submitted by:		Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

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

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

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

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: **Order of Dismissal**

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

s/ Robert E. Hood — **Circuit Court Judge**

2164 — **Judge Code**

12/1/2016 — **Date**

For Clerk of Court Office Use Only

RECEIVED
JAN 13 2017
SC Court of Appeals

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

This judgment was entered on **November 29, 2016,** and a copy mailed first class or placed in the appropriate attorney's box on **December 1, 2016,** to attorneys of record or to parties (when appearing pro se) as follows:

Clarence Rauch Wise 305 Main St. Greenwood, SC 29646

Julie A. Coleman P.O Box 11549, Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Mansfield

Court Reporter

Constance B. Mansfield - Deputy Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Eric VanCleave, #354843, Applicant, v. State of South Carolina, Respondent.	2015-CP-06-00326 **ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on September 17, 2015. Respondent submitted its return on January 28, 2016. An evidentiary hearing into the matter was convened on September 19, 2016, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Rauch Wise, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

I. 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 Barnwell County Clerk of Court. Applicant was true bill indicted at the February 2013 term of the Barnwell County Grand Jury for two counts criminal sexual conduct with a minor (2013-GS-06-00076; -00079), Lewd act upon a child (2013-GS-02-00077), and assault and battery of a high and aggravated nature (2013-GS-06-00078). Robert "Theo" Williams, Esquire, represented Applicant. Applicant proceeded to a jury trial before the Honorable Doyet A. Early, III. Applicant was found guilty and Judge Early sentenced Applicant to a twenty year term of imprisonment for criminal sexual conduct with a minor-second degree, a fifteen year term of

imprisonment for lewd act upon a child under 16, a ten year term of imprisonment for assault and battery of a high and aggravated nature, and a ten year term of imprisonment for criminal sexual conduct – third degree with all sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf. Benjamin Stitley, Esquire, represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. VanCleave, 2014-UP-444 (S.Ct. App. filed December 10, 2014). Certiorari was filed to the South Carolina Supreme Court and was denied on June 18, 2015. The remittitur was issued on June 24, 2015.

Applicant filed a timely application for post-conviction relief on September 17, 2015.

II. ALLEGATIONS

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

1. Trial Counsel was not effective in preserving for review the admission of other alleged bad act which were admitted under Rule 404(b) of S.C. Rules of Evidence.
    a. Trial counsel failed to object when the testimony that was present in a pre-trial motion was admitted during the trial. This error prevent an effective review of the admissibility of the evidence.
2. Trial counsel was not effective in arguing against the admissibility of the other bad act which were admitted under Rule 404b(b) of the South Carolina Rules of Evidence.
    a. Trial counsel failed to argue that the other alleged bad acts were not admissible under Rule 404(b) because mere similarity is not a basis for admitting other bad acts when identity is not an issue, trial counsel failed to not that one of the other alleged bad acts was not committed on a minor, and trial counsel failed to read the law in this area to make an effective argument.
3. Trial Counsel was not effective in providing the state with his alibi and other evidence required to be submitted under Rule 5 of the South Carolina Rules of Criminal Procedure.
    a. The Applicant had several documents that would have supported the fact that he was not at the camp at the date and time as alleged by the state. Trial counsel failed to provide these documents to the state pursuant to Rule 5 and therefore he was not able to use them at trial.

4. Trial Counsel was not effective in crossing examining the witness against the applicant.
    a. Trial counsel failed to cross-examine the complaining witness about several of the alleged incidents. The failure to cross-examine the complaining witness gave the jury the impression that those incidents were true from which the jury could conclude that the other allegations were true.

At the evidentiary hearing, Applicant orally amended his application to include an additional allegation of ineffective assistance of counsel for failing to object to the trial judge's jury instructions to "seek the truth," which shifted the burden of proof from the State to the defendant.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

At the PCR hearing, Applicant testified on his own behalf. Applicant also presented testimony from Denneauh Wich and appellate attorney Benjamin Stitely. Respondent presented testimony from Trial Counsel Theo Williams (hereinafter "Trial Counsel"). Applicant introduced eleven exhibits during the course of the hearing.

Applicant

Applicant testified that he retained attorney Richard J. Breibart to represent him in this matter after he was arrested. He stated that Mr. Breibart was subsequently disbarred, so Applicant hired Trial Counsel Theo Williams to represent him in June 2012. He stated that the case was tried in April of 2013. Applicant testified that he told his first attorney that he did not purchase the camper that was described in the State's evidence against him until after Easter of 2005. He stated that he provided his first attorney with the bill of sale and with documentation that he was in Charleston during Easter weekend in 2005. He stated that these documents were introduced into evidence and used at trial.

Applicant testified that he met with Trial Counsel as many times as possible prior to trial. He recalled reviewing discovery and discussing possible defenses with Trial Counsel. He stated that he gave Trial Counsel potential witnesses to investigate, and these witnesses were used at trial.

Applicant testified that he only went camping with the victim in Barnwell County one time. He stated that it was a tent camping trip in 2004, the victim wrote a statement about it, and nothing happened on that camping trip.

Applicant testified that on February 11, 2013, Trial Counsel sent his notice of an alibi defense to the State. He stated that on February 13, 2013, Trial Counsel told him that the State informed him in an e-mail that they were bringing additional charges against Applicant. He stated that Trial Counsel objected to these additional charges before the trial and the judge held that notice was properly given. He stated that on February 25, 2013, a hearing was held where the court granted a continuance because the State had not yet indicted Applicant on the new charges.

Applicant testified that the State never named a specific date on which the crimes occurred, but the victims testified about approximate times when it happened. Applicant stated that he collected all of his financial records and gave them to Trial Counsel sometime in March after the continuance was granted in February. He stated that he tried to provide documentation that covered every single weekend within the indictment period to prove that he was not in Barnwell County. Applicant stated that his documentation proved that during Memorial Day Weekend in the indictment period, when the State alleged this crime took place, he was tent camping with no electricity in Bryson City, North Carolina with a youth group and the Wich family. He stated that this information was not introduced at trial.

Applicant testified that one of the victim's accusations against him was said to have occurred on Easter weekend in 2005, which was before the indictment period. He further stated that one of the State's witnesses testified at trial that it might have happened during Halloween weekend. Applicant stated that he had given Trial Counsel bank statements with receipts from the BiLo in Cayce, South Carolina and Rush's restaurant in Lexington, South Carolina dated October 28 and 29 that proved he was not in Barnwell County that weekend. He stated that he remembered being at home that weekend watching the football game, because he recalled the University of South Carolina beating the University of Tennessee football team in Knoxville in a huge play at the end of the game. Applicant's Exhibit 3, the statistics of this football game, was introduced into evidence to confirm his testimony about this game. Although Applicant stated that he did testify at trial about being home that weekend watching this football game, he opined that if these game statistics had been introduced into evidence at trial, it would have changed the outcome of the case.

Applicant testified that he had also gone camping in Maggie Valley, North Carolina, which is near Cherokee, North Carolina. Applicant introduced photographs of pop-up campers like the one he owned and used on these camping trips that he argued would have helped him at trial if the jury could have seen a visual image of how the camper was set up. Applicant introduced other photographs of his prior camping trips which included his pop-up camper and his travel trailer. He stated that he did testify at trial about the travel trailer and about the receipt for his pop-up camper, which he stated he had purchased in September of 2006.

Applicant testified that there was a dispute about the date of the Maggie Valley camping trip with the Wich family; one witnesses said it happened in 2004 or 2005, and one said it happened in 2005 or 2006, but they both said it could not have been in 2007. However,

Applicant stated that the photograph used at trial of the Maggie Valley camping trip must have been taken in 2007 because it included the Wich's youngest child, Elizabeth, who was born in 2005 and was nearly two years old in the photograph. Applicant further explained that Victim 2 testified at trial that he was on the Maggie Valley camping trip with the Wich family, but Victim 2 was not in the photograph, so he must not have been there. Applicant argued that all of these details attacked the standard of clear and convincing evidence that was required for Victim 1 and Victim 2 to testify about this at trial.

Applicant testified that none of his bank records were used at trial, but they should have been used because they proved that he used his Mastercard in Bryson City, North Carolina, and Clinton, South Carolina on the weekend in question. However, Applicant agreed that dates on bank statements are not always completely accurate, and sometimes charges do not clear until a few days after the transaction. Applicant stated that the State had absolutely no documentation of him being in Barnwell County in 2005.

Denneauh Wich

Ms. Wich testified that she lives in Gilbert, South Carolina, and is married with four children, the youngest of which is Elizabeth Wich, the baby in the photograph from the camping trip in Maggie Valley. She stated that she believed that photograph must have been taken in 2007 because of how old her daughter was in the picture. She stated that she did not recall Victim 2 being present at the camping trip. Ms. Wich testified that Applicant's Exhibit 9 was a ticket from that trip to Maggie Valley and it was dated 2007. She stated that this ticket was kept inside of a scrapbook and she never gave the ticket to Trial Counsel.

Ms. Wich testified that she did attend the camping trip on Memorial Day Weekend in 2005. She stated that she and Applicant were there with two youth groups, but she was not asked

about this at trial. She stated that Applicant's Exhibit 5 was a photograph of her husband grilling in Maggie Valley, and the photograph was from July 4, 2007. She further testified that the oldest victim was older than 17 years old in 2007.

Benjamin Stitely

Mr. Stitely testified that he was not present at the trial but he wrote the brief for the direct appeal. He stated that Applicant's prior bad acts were not the most important issue, but he chose to focus on how the indictments were changed before the trial in addition to the Lyle issue. He stated that he thought he had done a pretty good job on his brief, but his arguments were unsuccessful and the South Carolina Supreme Court denied certiorari. Mr. Stitely shared that he is as satisfied as he can be with his brief. He stated that one of the issues he experienced is that some witnesses died before they knew about the new indictments.

Mr. Stitely testified that his argument regarding the Lyle evidence revolved around how the victims' testimony about the number of camping trips to Barnwell County was in question and the manner of abuse was different. Mr. Stitely explained that the victim witnesses testified about trips to North Carolina on different dates, and it's possible to read their testimony as describing more than one trip to North Carolina. While Mr. Stitely agreed that there is a substantial difference between a pop-up camper and a trailer, he did not see this as an issue because it was fully discussed at trial.

Mr. Stitely stated that the record did support a potential appellate review of Applicant's alibi because Applicant testified about his alibi at trial. He testified that he did not argue that common scheme or plan was an essential element of this case. Mr. Stitely recalled that he added new case law to his argument after he wrote the brief as soon as the new law came out. He stated

that he chose not to dispute every single detail written in the Brief of Respondent, and he did not think that challenging any of those details would have changed the outcome of the appeal.

Trial Counsel

Trial Counsel testified that he has been practicing law for forty years. He stated that he was retained in this case and he met with Applicant twenty to thirty times prior to trial. He stated that Applicant cooperated during the course of his representation and he was always calling and meeting with him to check in on his case. Trial Counsel stated that he filed Rule 5 and Brady motions and reviewed the discovery with Applicant, discussed the elements of the charges and what the State was required to prove, discussed possible defenses and Applicant's version of the facts.

Trial Counsel testified that at the beginning of the case Applicant had enough evidence to avoid a conviction on the original warrants. However, this changed when the State presented him with the new indictments. He stated that he was very prepared for trial. He testified that Applicant gave him all of his bank records and documents that he believed proved his alibi right before the trial, but Trial Counsel decided not to use the documents at trial. He stated that he could not recall why he chose not to use these documents.

Trial Counsel testified that he argued against the Lyle testimony of Applicant's prior bad acts by arguing that it was highly prejudicial and was being used only to buttress the argument in the allegations. He stated that he submitted a memorandum to the trial court in opposition to the Lyle testimony and he properly objected to the testimony on the record.

Trial Counsel testified that the State's witnesses did not say that the crime definitely happened on Halloween weekend of 2005, and they named several different date ranges in which these crimes could have occurred. He stated that Applicant did not provide him with an alibi for

every potential date that the camping trip could have been because it would be impossible to do that.

Trial Counsel stated that his trial strategy in this case was to show that the State's witnesses were not consistent. He stated that he vigorously cross-examined each of the State's witnesses and tried to point out to the jury that all of these events had allegedly happened years before they gave their testimony. Trial Counsel stated that he saw no reason at the trial to object to the trial judge's jury instructions to "seek the truth."

Trial Counsel stated that Applicant testified about the football game at trial, but he agreed that, if he had introduced the statistics from the game, then the jury could not have concluded that he was wrong about the weekend during which the game was played. He stated that he wished he had been given the 2007 North Carolina ticket to use at trial, that it would have been helpful, although the ticket does not say who purchased the ticket or who used it. He reiterated that the ticket was never given to him by Ms. Wich. He opined that Ms. Wich's testimony at trial was very credible.

Trial Counsel opined that the testimony presented made it reasonable for a jury to think that there were two separate trips to North Carolina rather than just one. He further stated that Applicant's bank records only proved that his credit card was used in North Carolina during the weekend in question; it did not definitely prove that Applicant was in North Carolina.

Trial Counsel stated that, regardless of the details about the date or what pop-up camper or trailer the trip took place in, the jury found beyond a reasonable doubt that Applicant sexually abused the victim in this case in Barnwell County at some point during the indictment period.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; 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. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart , 474 U.S. 52, 106 S.Ct. 366 (1985).

V. 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. 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

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they should be denied and dismissed with prejudice.

Failure to preserve admission of prior bad acts for appellate review

Applicant alleges that Trial Counsel was ineffective for failing to properly object to the prior bad acts admitted in the Lyle hearing to preserve the issue for appellate review. This allegation is meritless and must be denied.

Trial Counsel credibly testified at the PCR hearing that he vigorously argued against the admission of this evidence at the Lyle hearing. He submitted a memorandum in opposition to the admission of the evidence for the trial court to consider, and he simply was unsuccessful in his argument. The trial judge told Trial Counsel on the record that his objection was fully protected. Tr. Transcript 70, ll. 15-16. The trial judge listed all of the reasons why he allowed this testimony in on page 70 of the trial transcript. Further, the issue was preserved for appellate review, and was argued by Mr. Stitely in Applicant's Brief to the Court of Appeals and on Petition for Writ of Certiorari to the Supreme Court. The Court of Appeals fully addressed this issue when they affirmed Applicant's convictions. Applicant has failed to prove that Trial

 Pett 11

Counsel was ineffective in any regard to preserving this issue for appeal, and this allegation is denied and dismissed with prejudice.

Failure to effectively argue against admission of prior bad acts

Trial Counsel credibly testified that he argued against the admission of Applicant's prior bad acts by insisting that it was highly prejudicial and was used only to buttress the State's allegations. He stated that his strategy was to point out the discrepancies between the two victim's stories. Trial Counsel submitted a memorandum to support his argument and it was denied. The trial judge explained all of his reasoning for denying the motion in the trial transcript. This Court finds that Trial Counsel argued against the admission of this evidence as effectively as he could. The arguments he chose to make were within his trial strategy and cannot be questioned in hindsight.

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). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland at 689, 104 S. Ct.at 2065.

Because Trial Counsel's actions were taken in furtherance of his trial strategy, this Court finds that Applicant has failed to meet his burden of proving that Trial Counsel was ineffective in this regard, this allegation is denied and dismissed with prejudice.

Failure to present alibi defense

Applicant has failed to present any probative evidence that any of Trial Counsel's actions or inactions in regard to this allegation were ineffective and prejudicial, and this allegation is denied and dismissed with prejudice.

As explained above, Strickland sets a very high bar for questioning the actions of trial counsel. Trial Counsel testified that his strategy was to point out inconsistencies in the State's witnesses to cause the jury to question their credibility. Trial Counsel was given all of Applicant's bank records to support his alibi, but he made a conscious decision not to use them at trial. Even though Trial Counsel cannot recall why he did not use them, this is not prejudicial. "The fact that trial counsel candidly admits that he cannot now recall the advice given is not dispositive." Hinson v. State, 297 S.C. 456, 458, 377 S.E.2d 338, 339 (1989). Again, 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). Trial Counsel made the strategic decision to focus on other defenses rather than his alibi because he did not think these bank records were very strong support of what Applicant had already testified to at trial. Regarding the Maggie Valley ticket presented by Ms.

Wich, this Court finds that Trial Counsel was not given this piece of evidence and no further investigation on his part would have revealed that ticket to him. His failure to use this ticket as evidence cannot be ineffective. This Court also finds that the bill of sale from Applicant's camping trailer was used as an exhibit at trial, and thus Trial Counsel cannot be said to be ineffective for failing to use it.

Furthermore, Applicant has failed to prove any prejudice from Trial Counsel's choice not to use these alibi documents. The jury heard testimony of Applicant's alibi from him and from Ms. Wich, including his recollection of being home watching the football game and going to Maggie Valley in 2007 rather than in 2005 or 2006. Having a couple of credit card transactions and the statistics from a South Carolina football game is not proper alibi evidence to prove that Applicant absolutely could not have been in Barnwell County on that day, or at any point in the indictment period.

> [B]y an alibi the accused attempts to prove that he was at a place so distant that his participation in the crime was impossible. To be successful, his alibi must cover the entire time when his presence was required for accomplishment of the crime. To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime...And since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.

State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980). A credit card transaction from the BiLo in Lexington on one of the weekends in question does not absolutely prove that he was not in Barnwell County sexually abusing the victim. As Trial Counsel testified, that only means that his credit card was used there that day, not that Applicant was with it. Applicant agreed that not all bank statement dates are completely reliable; sometimes it takes several days for a transaction to clear and the date on the statement does not accurately reflect the date the purchase was made. It is also possible that Applicant made a purchase in Lexington County, drove to

Barnwell County, and drove back to Lexington County the following day. The alibi documents provided here cannot prove that it was impossible for Applicant to have been present at the scene of the crime. This Court finds that Trial Counsel's choice not to use these documents would not have changed the jury's verdict, and thus Applicant has failed to prove prejudice.

Because Applicant has failed to meet his burden of proof for both prongs on the Strickland test, this allegation is denied and dismissed with prejudice.

Failure to effectively cross-examine State's witnesses

Applicant has failed to meet his burden in proving that Trial Counsel was ineffective for failing to properly cross-examine witnesses at trial.

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 that Trial Counsel properly cross-examined each of the State's witnesses enough to expose their biases and create doubt as to their credibility in the minds of the jury. Trial Counsel credibly testified that his trial strategy was to show the jury that the State's witnesses were not consistent. He questioned them on the details that did not match up between their stories and he made it clear that the events alleged happened year prior to their testimony, thus making it unreliable.

Furthermore, Applicant failed to present the proper cross-examination testimony from witnesses at the evidentiary hearing, and thus cannot establish prejudice because their testimony is merely speculative. "This Court has repeatedly held a PCR applicant must produce the

testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

Since Applicant cannot prove either prong of the Strickland test, this allegation is denied and dismissed with prejudice.

Failure to object to "seek the truth" instructions

Applicant alleges that Trial Counsel was ineffective for failing to object to the trial court's jury instructions to "seek the truth." This allegation is meritless and must be denied.

"Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'" State v. Aleksey, 343 S.C. 20, 26–27, 538 S.E.2d 248, 251 (2000) (citing State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)). "However, jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." Id. (citing State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994)). "The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." Id. (citing Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991); Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190 (1990)).

The trial court instructed the jury to "seek the truth" in his opening remarks before the trial began. Tr. Transcript 41, 75-86. The court repeated this instruction at the close of the trial

before the jury went to deliberate. Tr. Transcript 297. However, in its jury charges, the trial court explained thoroughly the State's burden of proof (Tr. Transcript 298 ll. 13) and the defendant's presumption of innocence (Tr. Transcript 293 ll. 6). When taken as a whole, it is clear that the jury instructions do not shift the burden of proof to the defendant, but clearly explain how the State was required to prove the charges.

This Court finds that this language did not shift the burden of proof to Applicant and was not improper. Thus, Trial Counsel was not ineffective for failing to object to this language because it was not objectionable. Additionally, Applicant cannot show that he was prejudiced by the trial court's instruction as there is not a reasonable likelihood that the jury improperly decided the case on a lower burden of proof than beyond a reasonable doubt. Therefore, this allegation is denied and dismissed with prejudice.

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, this Court finds the 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.

VI. CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the 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 is denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 21 day of Nov, 2016.

ROBERT E. HOOD
Presiding Judge
Second Judicial Circuit

Columbia, South Carolina