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February 9, 2017

Hon. Daniel Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211
Fax: (803) 734-1499

Re: Maxwell Sipes, #320502, v. State of South Carolina,
Case No. 2012-CP-04-0084

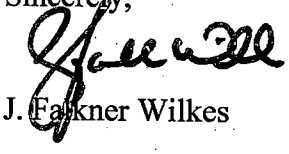
Dear Mr. Shearouse,

I was PCR counsel for Maxwell Sipes. I am enclosing herewith the Notice of Appeal and Certificate of Service in the above captioned cases. I am also enclosing a copy of the Order of Dismissal.

My representation does not extend to the appeal of the case. I have therefore forwarded an affidavit of indigent status to the South Carolina Commission on Indigent Defense, Appellate Division. As I am anticipating Mr. Sipes will qualify for services I will not order the transcript or take further action unless directed to do so by the Court or SCCID.

If you need anything further please let me know.

Sincerely,



J. Falkner Wilkes

c:
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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COMMON PLEAS COURT
R. Scott Sprouse, Circuit Court Judge

Case No. 2012-CP-04-0084

Maxwell Sipes, #320502, ... Appellant,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Maxwell Sipes hereby appeals from the Order of Dismissal in a Post Conviction Relief case entered on January 30, 2017, having been signed by the Hon. R. Scott Sprouse, Circuit Judge.

A copy of the Order of Dismissal from which appeal is taken are provided herewith and incorporated herein.

Respectfully submitted,

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Counsel for Appellant

February 9, 2017.

Other counsel of record:

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM ANDERSON COUNTY
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Case No. 2012-CP-04-0084

Maxwell Sipes, #320502, ... Appellant,

v.

State of South Carolina, ... Respondent.

CERTIFICATE

I certify that on February 9, 2017, I served the Appellant's Notice of Appeal on the Respondent and others by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record and others as indicated below, and by facsimile, if indicated:

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Respectfully submitted,

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Counsel for Appellant

February 9, 2017.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON)

Maxwell Sipes, #320502,) Case No.: 2012-CP-04-0084
)
Petitioner,)
)
v.) **ORDER OF DISMISSAL**
)
State of South Carolina,)
)
)
Respondent.)

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 13, 2012. Respondent filed a Return on or about March 26, 2013. An evidentiary hearing into the matter was convened on June 9, 2016, at the Anderson County Courthouse. Applicant was present and represented by J. Falkner Wilkes, Esquire. Respondent was represented by Senior Assistant Deputy Attorney General Johanna C. Valenzuela.

Applicant; Applicant's trial counsel, David Stoddard, Esquire; Dr. Christopher Rubel; and Gaye Allen-Cook testified at the hearing. This Court also had before it all relevant pleadings and documents, the Clerk of Court records for Anderson County, the South Carolina Department of Corrections' records, the transcript of Applicant's trial, and Applicant's appellate records. At the hearing, Applicant admitted Victim's redacted medical records[1] and Opinion 2009UP540 as Exhibits 1 and 2. Following the hearing, by stipulation of the parties and permission of the Court, Respondent admitted the State's Rule 5 Filing as Exhibit 1.

[1] At Respondent's request and without objection by Application, in an order filed July 5, 2016, the Court ordered Victim's medical records to be sealed.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. Applicant was indicted at the March 2005 term of the Court of General Sessions for Anderson County for criminal sexual conduct, first degree (2005-GS-04-0382). Applicant was represented by David Stoddard, Esq., On March 5, 2007, the jury convicted Applicant as indicted. The Honorable Alexander Macaulay sentenced Applicant to thirty years imprisonment.

Applicant filed a timely Notice of Appeal to the South Carolina Court of Appeals on March 16, 2007. Tara Dawn Shurling, Esquire, represented Applicant. The South Carolina Court of Appeals affirmed Applicant's sentence and conviction on November 2, 2009, in Opinion No. 2009-UP-540.

Applicant thereafter filed a Petition for Rehearing on December 3, 2009. The South Carolina Court of Appeals denied Applicant's Petition for Rehearing in an order dated January 20, 2010.

On April 20, 2012, Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. Respondent made a response on May 11, 2010. The South Carolina Supreme Court, in an order dated May 2, 2011, denied Applicant's petition and the matter was remitted to the lower court.

At the hearing, Applicant's counsel stated the allegations were as follows:

1. Trial counsel was ineffective for failing to "timely obtain and utilize medical records, properly cross-examine the State's expert, and use those records in support of the defense theory of the case."

2. Trial counsel was ineffective for failing to use "medical records to properly present psychological evidence as to a specific diagnosis in the medical records, particularly the borderline personality disorder, among other things, but primarily that one, as it may impact the issues at trial."

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3. Trial counsel was ineffective for failing to "preserve [an] objection at trial relating to a Fifth Amendment issue. There was a timely objection, but the judge indicated he'd make a curative instruction, and no curative instruction was ever made. And the failure to raise it again and get the curative instruction or put it on the record was the basis of the court of appeals to no address the issue."

(PCR Hearing Tr. p. 4, l. 7-p.5, l. 10.)

SUMMARY OF TESTIMONY

David Stoddard

Applicant's trial counsel, David Stoddard, Esquire, testified first. He explained that at the time he represented Applicant, he had practiced law for about twenty-two years with at least thirteen years spent in criminal defense. (PCR Hearing Tr. p. 48, ll. 2-13, ll. 17-24.) He testified he represented Applicant for about three years before Applicant's case was called to trial. (PCR Hearing Tr. p. 6, ll. 2-7.)

When asked about the discovery, trial counsel explained he had received discovery starting in 2004. Trial counsel could not remember what medical records he received as part of discovery and which he received in trial. (PCR Hearing Tr. p. 8, ll. 3-19.) He believed the State gave him four pages of medical records in 2006 and had possibly given him more records after that. (Id.) Later, counsel testified that other than those four pages, he may not have received all the Carolina Behavioral Health medical records until the day of trial. (PCR Hearing Tr. p. 13, ll. 10-13.) Counsel further clarified that in 2005 he sent a letter to the State seeking help in obtaining the victim's psychiatric records and at some point obtained those records. (PCR Hearing Tr. p. 18, ll. 15-22.) He did not realize he did not have the entire set of medical records at that time. (Id.) The State's Rule 5 showed it had provided counsel records from Georgia Mountains Community Services therapist Michelle Matthews (1 page), Letter from therapist Denise Houston (2 pages), Forsyth Mental Health Correspondence (4 pages), and North Fulton

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Regional Hospital Medical Records and Children's Health Care of Atlanta Medical Records (62 pages) three years prior to the start of trial. (Respondent's Exhibit 1.) Counsel testified the State did not have at least some of the medical records at the time of the trial either, and the State received a copy in trial when he received them. (PCR Hearing Tr. p. 49, ll. 6-9.) Trial counsel explained he received medical records from several facilities and that after he spoke to Cindy Stichnoch, and she advised there should be more records, he made inquiries on how to get those records. (PCR Hearing Tr. p. 6, ll. 12-19.) Trial counsel confirmed once he was alerted there were more medical records in the middle of trial, he secured a court order to get those records. (PCR Hearing Tr. p. 18, ll. 15-25.) Counsel testified he did have an opportunity to "scrutinize" the records and review them with his expert, Cindy Stichnoth. (PCR Hearing Tr. p. 11, ll. 19-21; p. 16, l. 22-p. 17, l. 7.)

Trial counsel testified his theory of the case was that the victim fabricated her allegations, the victim's mother was manipulating the victim due to the ongoing custody battle, and that the victim's rectal prolapse was caused, not by anal intercourse, but rather by chronic constipation. (PCR Hearing Tr. p. 14, ll. 2-20; p. 53, ll. 14-16; p. 84, ll. 6-p. 85, l. 6.) While trial counsel acknowledged that he received additional records after the State's expert testified, (PCR Hearing Tr. p. 9, ll. 13-25) he confirmed he could have recalled the expert if necessary and would have made the decision to recall the expert if he had seen anything important or material that he wanted to redirect the witness about. (PCR Hearing Tr. p. 50, ll. 14-p. 51, l. 3.) After reviewing the records, counsel did not "observe potentially other causes or things that could have been used to show alternative causes" to the victim's rectal prolapse. (PCR Hearing Tr. p. 17, ll. 15-18.) Counsel further noted that he did not believe the records he received would have changed the State's witness's answer, noting the State's witness, Dr. Payne, testified that he was aware of the

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victim's history with psychiatric medication and that Dr. Payne's conclusion that it was not chronic constipation that caused the prolapse was based in part on Dr. Payne's physical examination of the victim's rectum. (PCR Hearing Tr. p. 20, l. 10-p. 21, l. 13; p. 54, ll. 8-15; p. 54, ll. 8-15; p. 60, ll. 15-25.)

Counsel testified he did not know if the specific medical records that came in the middle of trial would have helped his expert, Dr. Lund. (PCR Hearing Tr. p. 21, l. 14-p. 23, l.1.) Counsel also agreed the transcript showed testimony from Dr. Lund stating he reviewed medical records that had come in that same day, indicating he may have reviewed the new records prior to testifying. (PCR Hearing Tr. p. 107, ll. 19-25 (referencing Trial Tr. p. 297.) Counsel also agreed his last expert witness, Cindy Stichnoch, testified after reviewing the records. (PCR Hearing Tr. p. 51, ll. 14-19.) Counsel confirmed that Cindy Stichnoch, who had personal interactions with the victim and who had reviewed all the records prior to testifying, could not definitely state the victim had borderline personality disorder and that this had a strong correlation with false allegations. (PCR Hearing Tr. p. 86, ll. 1-11.)

Counsel disagreed with the characterization that the State had been able to impeach Dr. Lund by relying on a medical record that noted a finding of constipation had a date that followed the victim's surgery for rectal prolapse because the record still noted a "history of constipation," which went to the Applicant's strategy of the case, but agreed that any record of constipation predating the date would be helpful. (PCR Hearing Tr. p. 24, l. 8- p. 26, l. 6.) After a review of Applicant's Exhibit 1, counsel agreed that "to the extent . . . [the references in the medical] records could have established alternative causation, they would have been desirable in [his] theory of the case." (PCR Hearing Tr. p. 44, ll. 20-25.)

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However, counsel also agreed that there were things in the medical records that "cut against us" as well, and agreed that the medical record that showed anal bleeding in the victim near the time the victim claimed she had been anally raped by Applicant would have been harmful to his case. (PCR Hearing Tr. p. 62, l. 8-p. 68, l.13.) Counsel testified that when he sees "stuff that's cutting both way, you know, I don't know that I want the jury to hear that." (PCR Hearing Tr. p. 67, l. 24-p.68, l.1.) Counsel also agreed that he was able to elicit information through direct or cross-examination in front of the jury about victim's diagnosis of borderline personality disorder (Trial Tr. p. 273), victim's past history of lying and stealing, victim's statements to providers that she was "seeing things" (Trial Tr. p. 134), victim's being treated at a mental hospital for eating disorders (Trial Tr. p. 134), victim's problems with bulimia (Trial Tr. p. 134), victim's history with self-mutilation (Trial Tr. p. 132), examples of victim's spiteful or vindictive behavior, victim's significant drug use, victim's claim to abuse speed, diet pills, Adderrall, and diuretics (Trial Tr. p. 363), and mother of the victim's manipulative behavior (Trial Tr. p. 361) through testimony and his witness Cindy Stinoch. (PCR Hearing Tr. p. 69, l. 7-p. 83, l. 4.)

As to the curative instruction, trial counsel testified he had forgotten to follow up on the curative instruction. However, on cross-examination, trial counsel agreed the trial court gave long explanations to the jury a few times after objections were made. (PCR Hearing Tr. p. 86, l. 13-p. 87, l. 6 (referencing Trial Tr. pp. 126-127).) Counsel agreed that "there is a very good chance—normally I'm not going to want a curative—or often I won't want a curative instruction because it may highlight it more. I don't think curative instructions help a whole lot. . . . I objected to it, and I think I asked for a mistrial. . . . . When I didn't get the mistrial, I think the damage was done. And, again, I can't remember, but normally, often on those kind of issues, I

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don't seek the curative instruction because I feel like it just reminds the jurors of what they already heard." (PCR Hearing Tr. p. 89, ll. 1-24.) Counsel agreed the jury may not have even noticed the limited reference in the testimony to Applicant running off when the investigator tried to speak with him. (PCR Hearing Tr. p. 90, ll. 1-15.)

Dr. Rubel

Dr. Rubel, a medical doctor, was admitted as an expert in family medicine. (PCR Hearing Tr. p. 114, ll. 11-20.) Dr. Rubel testified he reviewed the medical records that were Applicant's Exhibit 1. Dr. Rubel testified some of the medications the victim was taking slowed the mobility of the bowel.

Dr. Rubel said studies show a significant connection between the use of the drugs and the condition of prolapsed rectum. (PCR Hearing Tr. p. 115, ll. 13-21.) Dr. Rubel explained that constipation could cause straining and straining could cause prolapse. (PCR Hearing Tr. p. 116, ll. 18-19.) He agreed, however, that the study on which he was relying used patients who also had pelvic weakness due to previous pelvic surgery. (PCR Hearing Tr. p. 126, ll. 3- 24.) Dr. Rubel agreed the medical records did not indicate the victim had ever had pelvic surgery. (PCR Hearing Tr. p. 126, l. 25-p. 127, l. 5.) Dr. Rubel explained that his review of the medical records showed the victim was on several psychotropic medications, leading Dr. Rubel to disagree with the State's witness, Dr. Payne, when he stated the victim's history with psychotropic drugs was not significant. (PCR Hearing Tr. p. 120, ll. 4-9.) Dr. Rubel admitted, however, that he did not know how long someone would have to be taking psychotropic medications before they would run the risk of having constipation so chronic it would cause rectal prolapse. (PCR Hearing Tr. p. 127, ll. 6-20.) Dr. Rubel agreed that not everyone who takes psychotropic medication suffers

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such slowing of the bowel as to have chronic constipation. (PCR Hearing Tr. p. 130, ll. 23-p. 131, l.1)

Dr. Rubel also testified there was a research study showing a connection between eating disorders and prolapse, where the study specifically related to young women. (PCR Hearing Tr. p. 117, ll. 16-24; p. 118, ll. 15-18.) He admitted, again, that he did not know how long someone would need to suffer from an eating disorder before being vulnerable to having constipation so chronic it would cause rectal prolapse. (PCR Hearing Tr. p. 127, l. 21-p. 128, l.1)

Finally, Dr. Rubel testified that in a person suffering from chronic constipation he expects to see abdominal pain and indications they are having less than one stool a week. (PCR Hearing Tr. p. 131, ll. 18-24.) He admitted he did not see any information on stool counts or the number of stools the victim was passing in a week in the victim's medical records. (PCR Hearing Tr. p. 132, ll. 1-7.) He also admitted he did not see any references to abdominal pain in the victim's medical records. (PCR Hearing Tr. p. 132, ll. 8-11.)

Gaye Allen-Cook

Ms. Allen-Cook was admitted as an expert in diagnosis and treatment of individuals with psychological disorders. (PCR Hearing Tr. p. 138, ll. 2-8.) Ms. Allen-Cook testified that people who are diagnosed with borderline personality disorder have a "much higher prevalence of not telling the truth, of embellishing things, even often minor things," that this relates to their lack of empathy, and that they can also be "wickedly vindictive." (PCR Hearing Tr. p. 140, ll. 7-p. 141, l. 25.) Ms. Allen-Cook stated her review of the records indicated the victim had been diagnosed with borderline personality disorder by Dr. Martin. (PCR Hearing Tr. p. 150, ll. 19-23.)

Ms. Allen-Cook agreed she had not met the victim in this case and that her license precluded her from diagnosing someone she had not treated. (PCR Hearing Tr. p. 141, l. 20- p.

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142, l. 7.) She agreed that typically children under the age of eighteen were not diagnosed with personality disorder because of their hormones and developing personalities, but stated, that although it was rare, the DSM-5 allowed diagnosing of a patient under the age of eighteen if they had characteristics of borderline personality disorder for a year or more. (PCR Hearing Tr. p. 143, l. 13–p.144, l.7.) Ms. Allen-Cook agreed that in her experience treating victims of sexual abuse, she observed "stealing and making up stories" in both people who are diagnosed with borderline personality disorder and in children victims of sexual abuse, along with other similar characteristics such as extreme anger, abandonment issues, and not handling change well. (PCR Hearing Tr. p. 146, ll. 17-22-p.148, l. 25.)

Applicant

Applicant testified he was represented by his trial counsel for about three years prior to trial, and he was out on bond during that representation. (PCR Hearing Tr. p. 153.) He also testified that at the beginning of trial counsel's representation, Applicant had described victim's medical history and treatments, including her time at DJJ, AnMed, Carolina Behavioral Health, Carolina Children's Home, and the Scottish Rite Hospital in Atlanta. (PCR Hearing Tr. p. 154.) Applicant said he asked counsel to get those records from those facilities and discussed those records with counsel more than three times. (Id.) Applicant claimed to have only seen the medical records produced by the state. (PCR Hearing Tr. p. 155.)

Applicant agreed he testified at trial and was able to testify as to the victim's medical history and his understanding of the victim's mental health. (PCR Hearing Tr. p. 157.)

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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. Furthermore, this Court has had the opportunity to observe the witnesses presented at the hearing, and closely pass upon all witnesses' 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 (2003).

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 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 counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, Applicant must prove 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, 466 U.S. at 668, 104 S.Ct. at 2064). Second,

counsel's deficient performance must have prejudiced 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.

"However, where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006 (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)). "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Id. (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

In Watson, this Court reversed a PCR court's determination that counsel was ineffective for failing to prevent the introduction of hearsay testimony of several witnesses who testified about the abuse allegations against the defendant. Watson, 370 S.C. at 72, 634 S.E.2d at 644. This Court held that "counsel articulated a valid reason for failing to object to the hearsay testimony" where that reason was that counsel "wanted to avoid the possibility that the prosecution would have shown the video of the victim talking about the sexual abuse." Id.

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Allegation Number 1: Medical Records

Applicant claims trial counsel was ineffective for failing to "timely obtain and utilize medical records, properly cross-examine the State's expert, and use those records in support of the defense theory of the case." (PCR Hearing Tr. p. 4, l. 7-p.5, l. 10.)

At the PCR hearing, trial counsel testified he was not aware he was missing some of the medical records until one of his consultants pointed out that there should be more records. In response, trial counsel made efforts to secure the medical records and did secure them before the end of trial. Through direct or cross-examination, the content of the medical records that supported the defense's theory of the case was presented to the jury. Counsel also testified there were strategic considerations as to what he chose to highlight and how he chose to highlight the information in the medical records. (PCR Hearing Tr. p. 62, l. 8-p. 68, l.13; p. 67, l. 24-p.68, l.1.)

A review of the trial transcript shows the State's witness, Dr. Payne, testified his belief that the rectal prolapse in the victim was caused by forcible rape rather than anything else was related, at least in part, to his physical examination of the victim. (Trial Tr. p. 70.) Dr. Payne testified he did not believe the medication or constipation caused her prolapse. (Trial Tr. pp. 74-75.) Trial Counsel challenged Dr. Payne's limited review of victim's medical records, and also presented an expert, Dr. Lund, to challenge Dr. Payne's physical examination of the victim and resulting conclusion that forcible rape had caused her rectal prolapse.

This Court finds Applicant showed additional evidence may have been helpful and strengthened his defense, particularly in cross-examining the State's expert; however, the Court finds the evidence presented falls short of meeting Applicant's burden. Dr. Payne was questioned about his lack of review of the patient's medical records before reaching a conclusion, and he was questioned about the victim's medications and the possibility of chronic constipation

causing the prolapse. Applicant's own medical expert at the PCR hearing agreed that a review of the victim's medical records did not show evidence of either stool counts or complaints of abdominal pain; the two indicators Dr. Rubel stated were associated with chronic constipation that could cause rectal prolapse. (PCR Hearing Tr. p. 131, ll. 18-24; p. 132, ll. 1-11.)

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test: that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland: that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance.

Therefore, having reviewed the pleadings, considered the applicable law, reflected upon the testimony and evidence at trial, and considered the arguments of counsel, this Court finds Applicant is not entitled to relief on this allegation.

Allegation Number 2: Borderline Personality Disorder

In his second allegation, Applicant alleges trial counsel was ineffective for failing to use "medical records to properly present psychological evidence as to a specific diagnosis in the medical records, particularly the borderline personality disorder, among other things, but primarily that one, as it may impact the issues at trial." (PCR Hearing Tr. p. 4, l. 7-p.5, l. 10.)

At trial, Applicant presented two expert witnesses. It is undisputed the second witness, Cindy Stichnoth, had complete access to the medical records before testifying. A review of the trial transcript shows Cindy Stichnoth testified at length to the qualities observed in the victim that called the victim's motives into question and highlighted the victim's trouble telling the truth

and managing her emotions. (Trial Tr. pp. 355-411.) Trial counsel testified he made strategic decisions about what to present with the medical records he had because the medical records included information that cut against him. (PCR Hearing Tr. p. 62, l. 8-p. 68, l.13; p. 67, l. 24-p.68, l.1.) A review of the trail transcript shows trial counsel cross-examined the state's expert, Dr. DeFelice, using the medical records and the reference to the victim's discharge diagnosis by Dr. Shane Shabonde with The Carolina Center. (Trial Tr. p. 272) Dr. DeFelice was asked directly about the borderline personality disorder diagnosis, which Dr. DeFelice challenged was not a diagnosis. (Trial Tr. p. 273.)

At the PCR hearing, Ms. Allen-Cook testified the records indicated a clear diagnosis of borderline personality disorder in the victim by Dr. Martin. Ms. Allen-Cook also testified to the characteristics of a person with borderline personality disorder, such as exhibiting a tendency to lie, showing a lack of empathy, showing extreme anger, having abandonment issues, and not handling change well.

While this Court finds that the medical records could have been used in a different way and Cindy Stichnoth's testimony could have been expanded to strengthen the defense, it also finds that this would have been cumulative evidence, not new evidence. See Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) ("We previously have held where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward." (citing Jackson v. State, 329 S.C. 345, 350–51, 495 S.E.2d 345, 770–71 (1998); Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995); Cherry v. State, 300 S.C. 115, 118–19, 386 S.E.2d 624, 625-26 (1989))).

A review of the trial record shows that through direct and cross-examination, trial counsel was able to show the jury the victim's medical record references to borderline personality disorder (Trial Tr. p. 273), victim's past history of lying and stealing, victim's statements to providers that she was "seeing things" (Trial Tr. p. 134), victim's being treated at a mental hospital for eating disorders (Trial Tr. p. 134), victim's problems with bulimia (Trial Tr. p. 134), victim's history with self-mutilation (Trial Tr. p. 132), examples of victim's spiteful or vindictive behavior, victim's significant drug use, victim's claim to abuse speed, diet pills, Adderrall, and diuretics (Trial Tr. p. 363), and mother of the victim's manipulative behavior (Trial Tr. p. 361).

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test: that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland: that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance.

Therefore, having reviewed the pleadings, considered the applicable law, reflected upon the testimony and evidence at trial, and considered the arguments of counsel, this Court finds Applicant is not entitled to relief on this allegation.

Allegation Number 3: Failure to Preserve Objection

Applicant's last allegation is that trial counsel was ineffective for failing to "preserve [an] objection at trial relating to a Fifth Amendment issue. There was a timely objection, but the judge indicated he'd make a curative instruction, and no curative instruction was ever made. And

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the failure to raise it again and get the curative instruction or put it on the record was the basis of the court of appeals to no address the issue." (PCR Hearing Tr. p. 4, l. 7-p.5, l. 10.)

Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. State v. Sweet, 374 S.C. 1, 647 S.E.2d 202 (2007). The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way." State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999). "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes." State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1997). The Supreme Court favors the exercise of wide discretion of the trial judge in determining the merits of a mistrial motion in each individual case. State v. Howard, 296 S.C. 481, 374 S.E.2d 284 (1988). Among the factors to be considered are the character of the testimony, the circumstances under which it was offered, the nature of the case, and the other testimony. Id. "Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error." State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005).

A review of the record shows the testimony at issues is as follows:

> A. No. That was for child support. When I was going through child support getting my kids medical help because my daughter was needing prolapsed rectum surgery, [Applicant] quit his job. When Eddie Colbert went to look for him, he would not come in for the interview. When Eddie Colbert, the investigator, looked for him to question him about the sexual abuse, [Applicant] quit his job and left. So I had to go get assistance."

(Trial Tr. p. 193, ll. 9-16.)

Immediately following this testimony, trial counsel informed the Trial Court he had a matter of law, and the jury was removed from the court room. Counsel then made a motion for mistrial on the grounds the witness commented on his client's assertion of his Fifth Amendment

rights. After argument from trial counsel and the State, the Trial Court denied the motion for a mistrial, explaining "I don't think that it has risen to the degree of prejudice that would make it impossible for the Defendant to have a fair trial. However, if the Defendant wants, I will give a curative instruction that there's no need for the Defendant to ever present a defense." (Trial Tr. pp. 193-199.) No curative instruction was given.

Trial counsel testified at the PCR hearing that, although he could not remember specifically, and it is possible he just forgot to follow up on the instruction, it was his practice, with over twenty years of criminal experience, to consider whether he actually wanted a curative instruction in situations where he thought the instruction may draw more attention to the issue.

Like in Watson, 370 S.C. at 72, 634 S.E.2d at 644, this Court finds trial counsel has articulated a valid reason for failing to object when no curative instruction was given. Furthermore, a review of the character of the testimony given, the circumstances under which it was offered, the nature of the case, the other testimony offered at the trial, and considering the Trial Court's clear ruling that the testimony had not risen to "the degree of prejudice that would make it impossible for the Defendant to have a fair trial," (Trial Tr. p. 199), this Court finds that even had the issue been preserved, it would not have resulted in the Trial Court's ruling being reversed.

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test: that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland: that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance.

Therefore, having reviewed the pleadings, considered the applicable law, reflected upon the testimony and evidence at trial, and considered the arguments of counsel, this Court finds Applicant is not entitled to relief.

CONCLUSION

Based on all the foregoing, this Court finds and concludes 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 notifies Applicant that he must file and serve a notice of appeal within thirty (30) 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 PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

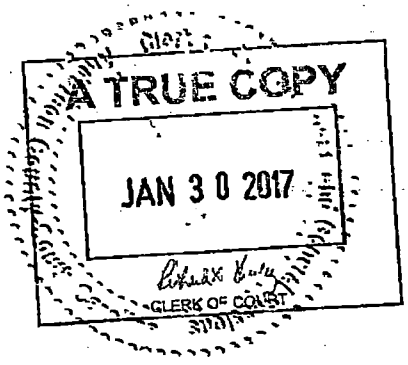
1. The application for Post-Conviction Relief must be denied and dismissed with prejudice; and

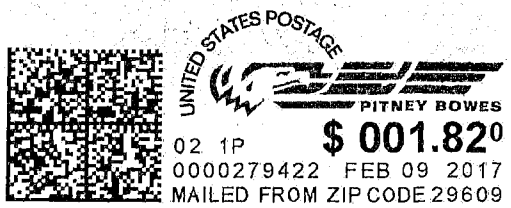
2. Applicant must be remanded to the custody of the Respondent.

IT IS SO ORDERED.

R. SCOTT SPROUSE
Presiding Judge
Tenth Judicial Circuit

1-24-2017 (date)
Walhalla, South Carolina





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