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RECEIVED
AUG 14 2017
S.C. SUPREME COURT

August 9, 2017

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330

Re: Prentiss Wayne Love, #315271 v. State of South Carolina; 2015-CP-22-00209.

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal on behalf of the above-captioned Post-Conviction Relief client. An Order of Dismissal denying this client's Post-Conviction Relief was filed on May 4, 2017 and received by counsel on May 10, 2017. An Order denying my 59(e) Motion was filed with the Georgetown County Clerk of Court on July 10, 2017 and received by counsel on July 12, 2017. The procedural history in this case is somewhat unusual in that my 59(e) Motion was timely served on the presiding judge and opposing counsel. It was mailed that same date to the Office of the Clerk of Court at the address listed in the Bar directory, which was the same address previous pleadings in this case were mailed to. That mail was returned to my law firm for "insufficient address." In his Order denying that 59(e) Motion, Judge Goldsmith ruled that the motion was timely filed and denied it on its merits. I have been *retained* by the family to handle this appeal. I have already received the transcript of the PCR hearing held in this matter and therefore request that the time limits for this appeal be set from the date this Notice of Appeal is filed. The Appellate Division of the South Carolina Commission on Indigent Defense has been copied on this correspondence so they will make note that I am retained in this case, and won't need to send me an inquiry concerning this appeal. With my thanks for your assistance in this matter, as always, I remain,

Sincerely yours,

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosures
cc: Johnny E. James, Jr., Assistant Attorney General (w/enclosure)
Paula Murdoch, South Carolina Commission on Indigent Defense, Office of Appellate Defense (w/enclosure)
Prentiss Wayne Love, #315271 (w/enclosure)
Lorraine L. Buckwell (w/enclosure)

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Brooks P. Goldsmith, Presiding Judge

RECEIVED
AUG 14 2017
S.C. SUPREME COURT

2015-CP-22-00209

PRENTISS WAYNE LOVE, #315271 Applicant,

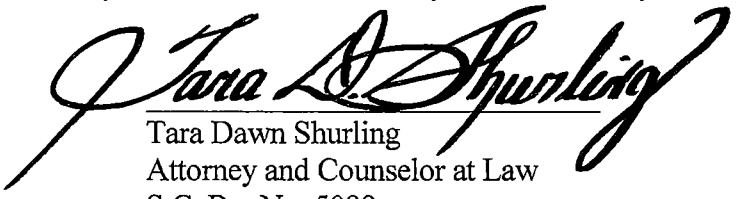
v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Final Order of Dismissal denying his Post-Conviction Relief filed May 4, 2017 and the Order Denying the Applicant's Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, which was filed with the Georgetown County Clerk of Court on July 10, 2017, and received by Counsel on July 12, 2017.



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

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ATTORNEY FOR APPLICANT

This 9th day of August, 2017.

Other Counsel of Record:

Johnny E. James, Jr., Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
AUG 14 2017
S.C. SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Brooks P. Goldsmith, Presiding Judge

2015-CP-22-00209

PRENTISS WAYNE LOVE, #315271 Applicant,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Johnny E. James, Jr., Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 9th day of August, 2017.

Tara Dawn Shurling
Attorney for Applicant

SWORN TO BEFORE me this 9th day
of August, 2017.

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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	
Prentiss Wayne Love, S.C.D.C. No. 315271,	)	Case No.: 2015-CP-22-00209
Applicant,	)	
v.	)	**ORDER DENYING APPLICANT'S MOTION PURSUANT TO RULE 59(e), SCRCP**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the court by way of Applicant's "Rule 59(e) SCRCP, Motion to Alter or Amend" dated[1] May 22, 2017. The Court finds as follows:

I.

This matter originally came before the Court by way of an application for post-conviction relief filed February 24, 2015. Responded made its return on or about June 25, 2015. The Court convened an evidentiary hearing into the matter on November 16, 2016, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and was represented by Tara Dawn Shurling, Esquire. Respondent was represented by Patrick Schmeckpeper and Valerie Garcia Giovanoli, of the South Carolina Office of the Attorney General. Applicant did not testify; only Applicant's trial counsel, Jonathan Eric Fox, Esquire, testified. At the Court's direction, the parties submitted memoranda in support of their respective positions after the hearing—Applicant filed on January 3, 2017, and Respondent filed on January 30, 2017. The Court denied the application by order signed April 24, 2017, and filed May 4, 2017. This motion followed.

[1] As discussed in Section II of this Order, the present motion was not properly filed with the Georgetown County Clerk of Court.

II.

As an initial matter, the Court notes that Applicant's motion has not been filed with the Georgetown County Clerk of Court. Upon communication with both parties, the Court's understanding is that the motion that was mailed to the Clerk of Court was returned to Applicant's counsel for inadequate postage[2] on or about June 9 or June 12, 2017. Therefore, the motion was never filed. See Rule 5(e), SCRCP; see also Gary v. State, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001) ("It is clear under South Carolina law that mailing does not constitute filing. When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer.").

Copies of the motion were properly served upon Respondent and the undersigned. Because the undersigned and the opposing party were properly served, and because the Court has timely received a return to the motion from Respondent, the undersigned hereby considers the motion served upon him to be filed.

III.

This Court's Order of Dismissal contains the required findings of fact and conclusions of law as required by S.C. Code Ann. §§ 17-27-70(c) and -80 and Rule 52(a), SCRCP. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). This Court properly addressed and ruled on all issues properly raised in the post-conviction relief action, and Applicant's motion is denied.

[2] Applicant's letter dated June 12, 2017 and received by Respondent on June 15, 2017, indicates the problem was an "insufficient address." Upon review of the scanned envelope, Respondent submits the hypothesis that Applicant's use of "401 Cleland Street", rather than P.O. Box 479, was not satisfactory to the postal service.

IV.

Applicant seeks modification of this Court's Order on the grounds that because the testimonies of A. Jenkinson and S. Bellamy included statements which allegedly constitute hearsay,[3] the remainder of their testimony cannot serve as a basis for the Court's finding that any instances of alleged hearsay were merely cumulative to unobjectionable evidence. This Court finds that that the *broad* net of Applicant's allegations of improper hearsay testimony falls over A. Jenkinson and S. Bellamy is of no consequence to the reasoning and foundation of the Court's order. The order, as Applicant himself notes, ignores allegedly improper testimony and relies on the unobjectionable observations of the witnesses presented at trial. The alleged improper hearsay statements are not poison pills that invalidate the unchallenged portions of the witnesses' testimony. To the contrary, the foundation of the Court's order is that the unchallenged portions of testimony are adequate antidotes to the alleged deficiencies. Consequently, there is no need for the Court to comb the transcript and render late judgments as to what is and is not hearsay.

Applicant also argues that the unchallenged testimony fails to prove the elements of the offenses charged. The Court finds that the testimony of the victim is itself sufficient. See State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999) (finding victim's testimony sufficient to support a conviction for lewd act on a minor); S.C. Code Ann. § 16-3-657 ("The testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658.").

As to Applicant's repeated insistence upon Vail v. State, 402 S.C. 77, 738 S.E.2d 502 (Ct. App. 2013), Respondent's affirmative disregard for the comparison is of no consequence to

[3] Applicant does not specify in the motion precisely which portions of testimony by A. Jenkinson and S. Bellamy raise concerns. Rather, Applicant begs the question by vaguely referring to "any testimony . . . in which they testified to hearsay statements allegedly made by the Victim concerning the identity of the person she claimed had molested her[.]" Applicant's Motion, p. 1-2.

the validity of the Court's order. The Court did not rely upon Vail in its order. In any event, the Court finds that the hearsay statements in Vail were far more detailed and prejudicial,[4] such that the cases are substantively incomparable. The present matter compares more favorably to State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (Ct. App. 2014), where the substance of the allegedly improper corroboration was put into evidence by other, properly admitted live testimony. Finally, the Court of Appeals, in considering prejudice in Vail, held only to the standard that "improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless." Vail at 90, 738 S.E.2d at 510 (citing Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 556, 569 (1994)). The Court of Appeals failed to recognize that a majority of the South Carolina Supreme Court had already rejected that rule in State v. Jennings, 394 S.C. 473, 482-83 716 S.E.2d 91, 95-96 (2011).[5] See also Hendricks at 536, 759 S.E.2d at 440 (citing Jennings for the proposition that "Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless."). For all of these reasons, both in fact and in substantive law, Vail is utterly incomparable to the present matter and provides no guidance of merit to resolving the present case.

[*Conclusion and signature on following page*]

[4] In particular, the Court took issue with a statement from the victim's father in Vail: "Well, there was kind of a real poignant moment where she said, daddy, he took everything, she [sic] took everything I have." Vail at 91, 738 S.E.2d at 510-511.

[5] Justices Kittredge and Hearn, in concurrence, and then Chief Justice Toal, in dissent, together opined that the categorical rule was at odds with longstanding harmless error jurisprudence.

CONCLUSION

Based on all of the foregoing, this Court finds and concludes that Applicant has not established any reason to amend its Order of Dismissal dated April 24, 2017, and filed May 4, 2017. Accordingly, Applicant's Motion to Alter or Amend is **DENIED**.

AND IT IS SO ORDERED this 27 **day of** June, 2017.

BROOKS P. GOLDSMITH
Presiding Judge
Fifteenth Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	
Prentiss Wayne Love, S.C.D.C. No. 315271,	)	Case No.: 2015-CP-22-00209
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the court by way of an application for post-conviction relief (PCR) filed February 24, 2015, and twice amended on November 15, 2016. The State made its return on or about June 25, 2015. The Court convened an evidentiary hearing into the matter on November 16, 2016, at the Horry County Courthouse. Applicant was present at the hearing and represented by Tara Dawn Shurling, Esquire. Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant did not testify; only Applicant's trial counsel, Jonathan Eric Fox, Esquire, testified. At the Court's direction, the parties submitted memoranda in support of their respective positions after the hearing—Applicant filed on January 3, 2017, and Respondent filed on January 30, 2017. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. In May 2011, the Georgetown County Grand Jury indicted Applicant for second-degree criminal sexual conduct with a minor (2011-GS-22-00431) and lewd act on a minor (2011-GS-22-00432). Jonathan Eric

Fox, Esquire, represented Applicant. On April 23, 2012, Applicant proceeded to trial before the Honorable Garrison D. Hill and a jury. On April 25, 2012, the jury found Applicant guilty of lewd act on a minor.[1] Judge Hill sentenced Applicant to fifteen (15) years imprisonment.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense, perfected the appeal with the filing of an Anders[2] brief. The South Carolina Court of Appeals dismissed the appeal on May 21, 2014. State v. Love, Op. No. 2014-UP-195 (S.C. Ct. App. filed May 21, 2014). The remittitur was issued to the circuit court on June 16, 2014.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witness presented at the hearing, passed upon his credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court's records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys, both through arguments at the hearing and post-hearing memoranda.

Applicant raised thirty-six independent allegations of ineffective assistance of counsel, covering nearly every facet of his attorney's representation. In the interest of clarity and brevity, the Court considers those allegations in the same order as considered in the parties' post-hearing memoranda.

Ineffective Assistance of Counsel

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

[1] The Applicant was acquitted of criminal sexual conduct, second degree.
[2] Anders v. California, 386 U.S. 738 (1967).

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 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." Id. at 117-18, 386 S.E.2d at 625.

II.A.

Applicant's first allegation is that counsel was ineffective in failing to object to hearsay, which he argues improperly corroborated the victim's testimony. The Court finds that the alleged improper evidence was cumulative to admissible testimony of witnesses other than the victim, and that its impact was negligible in light of substantial corroborative evidence presented by the state. As such, the Court finds that Applicant has failed to meet his burden.

Applicable law

A well-settled exception to the general prohibition against hearsay in criminal sexual conduct cases allows limited corroborative testimony. Sanchez v. State, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002). When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration; however, such evidence is limited to the time and place of the assault and cannot include details or particulars or the identity of the perpetrator. Id. Courts have been particularly wary where the only evidence corroborating a minor victim's testimony is inadmissible hearsay. See, e.g., Sanchez, supra. However, in the context of post-conviction relief, the proper standard for determining ineffective assistance of counsel is still Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). For the following reasons, Applicant has failed to meet his burden with respect to this allegation.

II.A.1.

The alleged improper testimony concerning the Applicant's identity as the perpetrator was merely cumulative to the admissible testimony of Ashley Jenkinson and Shannon Bellamy, which corroborated the victim's accusation[3] by independently establishing that she and the Applicant were in an inappropriate, romantic relationship.

Testimony at trial

Ashley Jenkinson, the victim's best friend, and Shannon Bellamy, the victim's mother, each testified to their direct observations at trial. Ms. Jenkinson described the victim's relationship with the Applicant as "a normal . . . boyfriend-girlfriend relationship,"[4] in which "they would talk and flirt and text all the time." Tr. p. 183. She also testified to the victim's

[3] Specifically with respect to the Applicant's identity as the perpetrator of the abuse.
[4] The Applicant was thirty years old at the time. The victim was fourteen.

demeanor following multiple disclosures, explaining that she acted like she "liked"[5] the Applicant, like there was "nothing wrong" with the abuse, and treated the Applicant "[l]ike a boyfriend almost." Tr. p. 180-83. Following the final incident of abuse, the victim spent the night with Ms. Jenkinson. Tr. p. 183. Ms. Jenkinson said she observed the victim texting back and forth with the Applicant "all night long." Tr. p. 184-85.

Ms. Bellamy also noticed improprieties between the victim and the Applicant arising out of the sheer number of text messages they sent to one another. Once, while the victim was put on restriction, Ms. Bellamy confiscated her phone. Tr. p. 115-16. In checking the phone records on her online account, Ms. Bellamy was able to see the number of incoming and outgoing texts and calls made by the victim. Tr. p. 118. She became concerned by "hundreds" of text messages between the victim, who was fourteen, and the Applicant, who was thirty. Tr. p. 122-23; 133.[6]

Discussion

Given the admissible corroborative evidence clearly indicating an inappropriate, romantic relationship between the victim and the Applicant, any improper references to the Applicant as the perpetrator are clearly not prejudicial. Jolly v. State is instructive, and establishes that while improper evidence that is cumulative to *only* the victim's testimony is problematic, prejudice is significantly less likely where it is also cumulative to other, admissible corroborative evidence. 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994).

Jolly was convicted of sexually abusing his underage step-granddaughter. At trial, in an attempt to bolster the victim's shaky testimony, the state elicited testimony – over counsel's objection – from a social worker that the child had made a prior statement that Jolly abused her.

[5] Given the context, the word "like" here is clearly meant to convey romantic affection, as is normally used by adolescents and children.

[6] Those text messages prompted Ms. Bellamy to confront the victim, which ultimately led to the disclosure.

Later, the victim's uncle testified without objection that the child had previously told him Jolly abused her. Jolly was ultimately convicted.

The Court of Appeals affirmed Jolly's conviction in a published opinion, finding that any error from the admission of the social worker's improper testimony was cumulative to the testimony of the victim *and her uncle*, and therefore harmless. State v. Jolly, 304 S.C. 34, 402 S.E.2d 895 (Ct. App. 1991). The Supreme Court denied certiorari.

Jolly then filed a PCR application, and was denied relief at the circuit level. The Supreme Court reversed, finding counsel ineffective for failing to object to the uncle's testimony. The Court distinguished the circumstances from the direct appeal where, because of the rules of issue preservation, the Court of Appeals was

> precluded from examining the improper admittance of [the uncle's] testimony. Accordingly, the Court of Appeals, affirming Jolly's conviction, held that the admittance of the social worker's hearsay testimony identifying Jolly as the perpetrator was harmless error because the testimony was *merely cumulative to [the uncle's] unobjected testimony and the victim's testimony.*

Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) (emphasis added). The key difference being that in the context of post-conviction relief, the Supreme Court could freely examine the previously unobjected testimony. It specifically found that but for counsel's failure to object to the uncle's testimony, the Court of Appeals could not have held the social worker's testimony was harmless because it would have been "*merely cumulative to the victim's testimony,*" rather than the both victim's testimony and additional independent, properly admitted corroborative evidence. Id.

Application to this Case

Turning to the facts of this case, the alleged inappropriate references to the Applicant as the perpetrator were clearly not prejudicial. The actual identity of the victim was not an issue in

this case, and any bolstering from improper corroboration was outweighed by and cumulative to the independent, compelling testimony provided by Ms. Jenkinson and Ms. Bellamy *which corroborated the victim's testimony on the same point.* Their testimony indicates the Applicant and the victim were engaged in an inappropriate romantic relationship, given the victim's demeanor and behavior toward the Applicant, as well as the frequency and nature of their private communications. Therefore, the Court finds that Applicant has failed to meet his burden to prove ineffective assistance of counsel, and the application, to the extent it relies upon these allegations, is **DENIED**.

II.A.2.

The Court finds additionally that, in light of the substantial admissible evidence presented in corroboration of the victim's testimony, there is no reasonable likelihood that counsel's failure to object to the alleged hearsay affected the outcome.

Proper Corroboration of the Victim's Testimony

The Court finds that the State presented proper independent testimony and evidence that corroborated the victim's testimony, particularly with regards to her timeline and the opportunities the Applicant had to perpetrate the abuse.

Testimony at trial

a.

The victim testified to multiple instances of abuse by the Applicant. The first time Applicant sexually abused her was at his house on New Year's Eve of 2009. Tr. p. 149. She was thirteen years old. Tr. p. 149. She testified she spent the night with the Applicant and his family. After Applicant's wife, Tabitha, went to bed, he and the victim continued to watch television on the couch. Tr. p. 150-51. Applicant was drinking. Tr. p. 151. At one point,

Applicant started kissing the victim and attempted to put his hand up her shirt. Tr. p. 151. He tried to initiate the abuse again later that night. Tr. p. 152.

The victim's mother was able to corroborate that the victim did, in fact, spend the night at Applicant's house on New Year's Eve of 2009, and that Applicant was drinking. Tr. p. 108-09. The victim's step-father, Anthony Carter, testified to the closeness of the two families, and agreed that the victim regularly spent the night at Applicant's house. Tr. p. 61-74; p. 57.

b.

The victim testified that the next several instances of abuse occurred during multiple fishing trips. The victim, her step-father, and Applicant regularly participated in fishing tournaments, including during the summer of 2010. The victim said that during a fishing trip following the initial abuse, while she and Applicant were on a boat alone together, he "started kissing me and he stuck his hand up my shirt and he also tried to get down my pants." Tr. p. 154. Applicant continued to abuse the victim on several subsequent fishing trips. Tr. p. 156; 57.

Mr. Carter strongly and independently corroborated the circumstances and timeline surround the abuse. He testified that he, the victim, and Applicant participated in a number of fishing tournaments the summer of 2010. Tr. p. 68. During some of those fishing trips, Mr. Carter explained that the victim would fish alone in a boat with Applicant, involving "several occasions that they disappeared for twenty minutes, thirty minutes." Tr. p. 70-71. Mr. Carter testified that he was very familiar with the creeks and channels in the area, and explained that it was relatively easy to "lose sight of somebody." Tr. 72-73. Ms. Bellamy also testified that the victim would sometimes fish alone with Applicant in his boat. Tr. p. 111-13.

c.

The victim testified that the final instance of abuse occurred on September 11, 2010, while she was home alone. Ms. Bellamy was working, and Mr. Carter was at an event at "Dead Dog Saloon" to commemorate fallen firefighters. Tr. p. 158-59. Earlier that day, Applicant texted the victim multiple times requesting "nude photographs." Tr. p. 158. When the victim's step-father left for the event, the victim stayed home waiting for Ms. Jenkinson's mother to pick her up so she could spend the night at their house. Tr. p. 158-60. Applicant was supposed to meet Mr. Carter at Dead Dog Saloon. However, upon learning the victim was home alone, he made a detour. The victim testified that upon arriving, Applicant "started kissing me, he stuck his hand up my shirt and he also stuck his hand down my pants." Tr. 161. While digitally penetrating the victim, Applicant also masturbated. Tr. p. 161-62. After leaving, he and the victim continued texting throughout the night. Tr. p. 163.

As discussed earlier, Ashley Jenkinson testified that she observed the victim texting back and forth with Applicant throughout the night following the abuse.[7] Additionally, Mr. Carter independently corroborated Applicant's timeline and opportunity. He testified that on September the 11, 2010, he went to Dead Dog Saloon for an event to salute fallen firefighters. Tr. p. 75. He arrived around 5:00 pm. Tr. p. 75. He explained that the victim stayed home, planning to spend the night with Ms. Jenkinson, instead. Tr. p. 76-77.

Mr. Carter said that Applicant was supposed to meet him at the event, and told him that he was "on the way" when he talked to him. Tr. p. 76. He did not arrive for "40, 45 minutes." Tr. p. 76. During the interim, Mr. Carter said Applicant called him multiple times saying "I'll be there in a minute, I'll be there in a minute." Tr. p. 78. Mr. Carter testified that Applicant did not answer calls "for a period there, until finally he said, 'I'm about to pull in the driveway, I will be

[7] Ms. Jenkinson also testified that the victim disclosed the abuse upon arriving to spend the night. Tr. p. 184.

there in two minutes,' and fifteen minutes later he showed up finally." Tr. p. 78. Mr. Carter noticed that Applicant appeared to be "real jumpy," and saw him on the phone several times that night. Tr. p. 79-80.

Discussion

Given the independent corroborative evidence in this case, there is no reasonable likelihood that but for counsel's purported deficiency the outcome would have been different. Applicant's argument appears to be that any improper corroboration in a case in which credibility is a key issue is automatically prejudicial. Such an interpretation ignores the fact that the standard for determining ineffective assistance of counsel – even in a criminal sexual conduct with a minor case – is still governed by Strickland. In order to establish prejudice in such a claim, the Applicant bears the burden of proving counsel's error likely contributed to the outcome at trial. Looking at the facts and circumstances of this case, it is clear that he failed to meet that burden. Any impact from the alleged improper identification testimony – where neither identification *nor the consistency of the victim's disclosures* was an issue – was entirely consumed by the substantial amount of admissible corroborative evidence. Therefore, the Court finds that Applicant has failed to meet his burden to prove ineffective assistance of counsel, and the application, to the extent it relies upon these allegations, is **DENIED**.

II.A.3.

Other Appropriate Corroboration

Applicant also alleges counsel was ineffective for failing to object to testimony elicited from Ginger Pop, the lead investigator, and Dianne Nordeen, the forensic interviewer. The Court finds that their testimony did not constitute objectionable hearsay. In any event, given the

substantial corroborative evidence in this case, Applicant has not met his burden to prove prejudice.

Investigator Pop's testimony was not hearsay because it was not an out of court statement offered to prove the truth of the matter asserted. See, Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000). "An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. Id.; see also Brown v. State, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994). Investigator Pop testified that, after reviewing the forensic interview of the victim, it revealed "several incidents that the child had revealed to the interviewer of events between the defendant and the child." Tr. p. 219. This, however, was in response to whether she had been able to determine the "time and place of event [sic] **for actually following up with your investigation.**" Tr. p. 219 (emphasis added). The purpose of the testimony was to establish a baseline from which Investigator Pop could conduct her investigation. Because this testimony was not hearsay, counsel's failure to object was not deficient.

Applicant's argument with respect to Ms. Nordeen's testimony is similarly without merit. The Applicant specifically takes issue with the fact that Ms. Nordeen testified that the victim told her the abuse occurred in "[t]he living room in the home of Wayne and Tabitha Love," and "Wayne Love's boat." Tr. p. 208, l. 6-17; 208, l. 18-25.

As previously discussed, a well-settled exception to the general prohibition against hearsay in criminal sexual conduct cases allows limited corroborative testimony. Sanchez v. State, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002). When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration;

however, such evidence is limited to the time and place of the assault and cannot include details or particulars or the identity of the perpetrator. Id.

Ms. Nordeen's testimony did not identify the Applicant as the perpetrator. Rather, it conveyed the location of the assaults. This testimony is within the limits of the outcry exception regardless of any additional probative value in inferring the Applicant was the assailant. Applicant has failed to meet his burden to prove a reasonable likelihood that counsel's alleged errors affected the outcome of the trial. Therefore, the Court finds that Applicant has failed to meet his burden to prove ineffective assistance of counsel, and the application, to the extent it relies upon these allegations, is **DENIED**.

II.B.

Applicant argues counsel should have moved to exclude phone records or testimony concerning phone records of the victim's cell phone account. The Court finds that this allegation is similarly without merit. The phone records were properly objected to and excluded. Tr. p. 124-30. Ms. Bellamy's testimony as to what she saw was not hearsay, because it was not admitted for the truth of the matter asserted. Rule 801(c), SCRE. Rather, her testimony was introduced for the purpose of explaining how she became suspicious of the victim's relationship with the Applicant. PCR Tr., p. 80-81. That suspicion caused her to confront the victim, which ultimately led to the disclosure of abuse. Because the records were not admitted into evidence, and Ms. Bellamy's testimony did not constitute impermissible hearsay, the application, to the extent it relies upon these allegations, is **DENIED**.

II.C.

The Applicant argues counsel was ineffective in failing to properly address jurors who were allegedly sleeping during the trial. The Court finds that Applicant has not met his burden

with respect to this allegation. While there were reports of jurors potentially sleeping, the trial judge specifically advised the jury how important it was to "pay attention throughout the trial and to remain alert," and asked them to assist their fellow jurors in remaining alert. Tr. p. 103-04. A jury is presumed to follow instructions. Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n.1 (1999).

Later during trial, the State brought to the court's attention that several people had seen one juror appear to "nod off" during the trial. Tr. p. 242. That juror was brought before the judge and questioned. Tr. p. 244-45. While under oath, he said that he was paying attention, but that his eyes were "messing" with him. Tr. p. 245. He said that he was not asleep, had not missed any testimony, and was confident that he had not missed any of the proceedings. Tr. p. 245-46. The trial judge made a specific finding that the juror was credible. Tr. p. 247.

At that time, counsel informed the court that he had not noticed, but conveyed the Applicant's concern that it "might be more than one juror." Tr. p. 243-44. There was no other evidence that any other jurors appeared to have been sleeping, and even the judge pointed out that he had "not seen [anyone] who appeared to be sitting with his eyes closed." Tr. p. 244.

Given the trial judge's credibility finding, as well as the lack of any evidence other than the Applicant's self-serving testimony to support this allegation, the Court finds he has failed to meet his burden to show ineffective assistance of counsel. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

II.D.

Applicant argues counsel was ineffective for failing to investigate the use of the Applicant's cell phone as a tool for the defense, particularly to establish the "innocent nature of the Applicant's text communications" with the victim. Applicant did not present any such

evidence at the PCR evidentiary hearing. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (failure to investigate does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result). Therefore, Applicant has failed to meet his burden of proof as to this allegation. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

II.E.

Applicant argues counsel was ineffective for "failing to object to improper implication that Applicant had made admissions which prompted his arrest." Specifically, he alleges that counsel should have objected to testimony that the Applicant was arrested following his interview with law enforcement. Applicant appears to be taking issue with the fact that law enforcement officers testified to the events as they chronologically occurred. The Court finds that Applicant has failed, however, to provide an actual basis for making a nonfrivolous objection. *Obviously* there are multiple inferences possible from the testimony in question. The same is likely true of all testimony. Counsel's failure to make a frivolous objection does not rise to the level of deficient performance. Moreover, Applicant denied abusing the victim during his trial testimony, refuting any inference that he admitted doing so to law enforcement. He has therefore failed to meet his burden to prove deficient performance or prejudice. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

II.F.

Applicant argues counsel was ineffective for failing to cross-examine Ashley Jenkinson regarding potential impeachment information. The thrust of this allegation appears to be that counsel should have impeached Ms. Jenkinson with evidence that she could have been charged

for distributing the Vicodin to the victim, and was ineffective for failing to introduce evidence any sort of deal in exchange for her testimony.

Applicant has not presented any evidence that Ms. Jenkinson was given "consideration" in exchange for her testimony. Therefore, the Court finds that he has failed to show prejudice. See Moorehead, supra.

The Court finds Applicant has also failed to prove deficiency, given counsel's credible testimony. Counsel testified at the evidentiary hearing that if he had thought cross-examining Ms. Jenkinson about Vicodin would have helped the Applicant, he would have done it. PCR Tr. p. 81. Counsel said his impression was that the friend was not a very credible witness, and that there was not a lot to be gained in drilling her possessing Vicodin. PCR. p. 34. As the Applicant has failed to meet his burden to prove ineffective assistance of counsel, the application, to the extent it relies upon these allegations, is **DENIED**.

II.G.

Applicant argues counsel was ineffective in failing to question the Victim "concerning her theft of Vicodin from her father in addition to the isolated incident testified to by her step-father and mother wherein she got the same drug from her best friend." The Court finds that Counsel testified credibly as to his trial strategy, emphasizing that he did not believe there was a lot to be gained "in drilling [the victim] possessing Vicodin," and that he did not see a lot of points to be scored "by picking fights" with the victim. PCR Tr. p. 34. Counsel explained that he wanted to be careful not to make the victim appear more sympathetic. PCR Tr. p. 34. Regardless, Applicant has failed to show that but for counsel's failure to press the issue, the outcome would have been different. The victim acknowledged in front of the jury that she had the pill, and admitted that she got in trouble for having it. Tr. p. 163-64. The Court finds that

Applicant has failed to meet his burden to prove deficiency or prejudice. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

II.H.

Applicant argues counsel was ineffective in failing to "pursue the question of who deleted information on [the victim's] phone and why." Applicant appears to imply the victim was responsible. Applicant's post-hearing memorandum, p. 46-47. However, he has not presented any evidence to support such a claim. See, Moorehead, supra. The Court finds that Applicant has failed to meet his burden to show deficiency or prejudice. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

II.I.

Applicant next argues counsel was ineffective in failing to object each and every time the forensic interviewer was referred to as a "forensic interviewer," as well as a "doctor or therapist." Additionally, the Applicant argues counsel was ineffective for, himself, referring to the forensic interviewer as a "forensic interviewer." Seeing as there is no rule against referring to forensic interviewers as forensic interviewers, the Court finds that Applicant has failed to present any evidence that counsel was deficient in failing to make such an objection.

The Court finds that Applicant has also failed to meet his burden to prove counsel was ineffective in failing to object when the solicitor referred to the person who conducted the victim's forensic interview as a "therapist" or "doctor." Applicant has failed to show deficiency or prejudice. Even if, as the Applicant argues, such a claim "signal[ed] the Prosecutor possessed knowledge of [the forensic interviewer's] expertise which went beyond the evidence before the

jury,"[8] the witness did not provide any expert or opinion testimony. PCR Tr. p. 88. Instead, in accordance with the rules, she testified that she conducted an interview. Id.[9]

Applicant alleges counsel was ineffective for failing to object to testimony from Ms. Bellamy that the Children's Recovery Center "recommended that [the victim] receive counseling where said testimony could have been interpreted by the jury to infer" they believe the victim. A cursory review of the record makes quite clear that the victim's mother "asked the people at the Children's Recovery if they could recommend a counselor" for her. Tr. p. 137.

Because Applicant has failed to present any inappropriate testimony, he has failed to meet his burden to show ineffective assistance of counsel. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

II.J.

Applicant argues counsel was ineffective for failing to object to the State's opening argument. Specifically, Applicant takes issue with the solicitor's comment that the victim was thirteen when the abuse started. Looking at the offending passage, Applicant appears to have misread the record. The solicitor argued:

> "the evidence will show that during the time when [the victim] knew [the Applicant] from the time she met him when she was thirteen, until September, October, or September of 2010 he did commit sexual battery on her. **She had turned fourteen by that time but still that is what I have to show you.**"

Tr. p. 52 (emphasis added). As the solicitor clearly expressed that the abuse began when the victim turned fourteen, the assertion is supported by the evidence.

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[8] It appears to this Court that the solicitor simply misspoke.

[9] As part of this allegation, Applicant argues the forensic interviewer was allowed to testify that the victim identified Applicant as the person who sexually assaulted her. As discussed in section **II.A**, her testimony was limited to the time and location of the events, and while she referred to property owned by Applicant as the location of the abuse, she did not refer to him as the perpetrator.

Additionally, the victim testified as to when the first incident occurred, which was on New Year's Eve of 2009. Tr. p. 149. The trial judge told the jury that they were to "determine what the facts are from the evidence," and that their memory controlled over the lawyers' arguments. Tr. p. 490.

Given the trial judge's correct charge on the jury's role as factfinder, as well as the solicitor's correct statement during opening remarks, the Court finds that Applicant has failed to meet his burden with respect to this allegation. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

II.K.

Applicant argues counsel was ineffective for interjecting an implication that the victim was suicidal at trial. The Court finds that Applicant has failed to show deficiency or prejudice. Counsel testified at the evidentiary hearing that he disagreed with the characterization that the victim was trying to commit suicide, and that he did not concede the point. PCR Tr. p. 43-44. However, he said that the victim was, in his mind, "less than credible," and there were "other ways to attack her." Tr. p. 43-44. The record reveals that he was, in fact, using the incident to attack the victim's credibility. Counsel was clearly attempting to show, through defense witnesses, that the victim regularly communicated with and texted both Applicant *and* Applicant's wife because of the close relationship she had with *both* of them. Tr. p. 270-74. In any event, and in response to the Applicant's lamentation that it is "impossible to know the degree to which this remark prejudiced" his case, the Court finds that it is the Applicant's burden to prove each of his allegations. Having failed to do so with respect to deficiency or prejudice, the application, to the extent it relies upon these allegations, is **DENIED**.

II.L.

Applicant argues counsel was ineffective for failing to adequately represent Applicant during sentencing. Applicant takes issue with counsel's failure to clarify the precise circumstances surrounding a previous criminal sexual conduct charge out of Lexington County, which was ultimately reduced to assault and battery of a high and aggravated nature. Applicant claims counsel should have informed the judge that the sexual conduct in that case was consensual.

Counsel testified that he felt the judge could read between the lines of what was charged and what the Applicant ultimately pled to. PCR Tr. p. 70. Counsel said that in his experience, "when the State has a CSC with a minor, and they feel they have a strong case, no problems with the witnesses or evidence, they don't budge with that very often." PCR Tr. p. 70. Counsel testified that he did not go into the specifics of that charge because he did not think it was "worth reminding the Court that [the Applicant] . . . had allegations of being with a young woman **consensual or not.**" PCR Tr. p. 71-72 (emphasis added). Counsel pointed out that consent had been an "underlying theme" in the current trial, as well, and that the jury had come back and asked whether consent was an excuse or defense to lewd act. PCR Tr. p. 72. "Having watched the whole trial," counsel said he thought the jury believed that the victim was a willing participant in everything. PCR Tr. p. 72. Because such a consideration was not relevant, however, counsel "did not see any points to be gained by reminding the Court or suggesting that what happened in Lexington was okay," or further emphasizing that the Applicant "gets in trouble with relationships with underage girls." PCR Tr. p. 72.[10] Counsel further expressed that he did not believe the solicitor was not being disingenuous or factually inaccurate. PCR Tr. p.

[10] The jury specifically asked whether the victim "had any right to consent to anything" with respect to the lewd act. Tr. p. 504.

72. Given counsel's sound strategy in dealing with this mitigation issue, the Court finds that Applicant has failed to meet his burden to prove ineffective assistance of counsel. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

II.M.

Applicant argues counsel was ineffective in failing to object to purported improper impeachment concerning details of his prior record, specifically by questioning him on his prior conviction. The Court finds that Applicant has failed to show deficiency or prejudice. Specifically, Applicant has failed to establish an actual breach of the applicable standard of reasonableness. The rules allowed the State to impeach the Applicant with his prior convictions – particularly the crime of dishonesty – on cross-examination. Rule 609, SCRE. Applicant has not contested the admissibility of Applicant's conviction for breach of trust. Moreover, Applicant has not provided any authority to support his argument that counsel should have objected to the question of whether he was a "convicted felon." In addition, Applicant has failed to show prejudice given the impact the crime of dishonesty would have had on his credibility. See State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015) ("In common human experience, acts of deceit, fraud, cheating, or stealing . . . are universally regarded as conduct which reflects adversely on a man's honesty and integrity"). Because Applicant has failed to show either deficiency or prejudice, the application, to the extent it relies upon these allegations, is **DENIED**.

II.N.

Applicant argues counsel was ineffective in his closing argument to the jury. Applicant focuses on his attorney's theory that it did not make sense for the victim to lie simply because she had gotten in trouble for possessing Vicodin. Counsel clearly and credibly articulated a valid strategy in making his closing argument. Counsel testified that while the "fear of punishment"

could be an explanation for false allegations, "I do think sometimes it is a trap for a lawyer to go there. Juries seem to put the burden of proof on you." PCR Tr. p. 83. He testified that he "didn't know why she lied, little girls lie sometimes for their own reasons, and I don't have to prove to you why she lied, but look at other things." PCR Tr. p. 83. Counsel expressed to the jury that it was a mistake to think of the minor child victim as a rational adult. PCR Tr. p. 84.

Applicant now disagrees with counsel's strategy. Disagreement as to which strategy would have worked best, however, does not support a claim of ineffective assistance of counsel. "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 2066. Because Applicant has failed to meet his burden to show deficiency or prejudice, the application, to the extent it relies upon these allegations, is **DENIED**.

II.O.

Applicant has also raised a number of claims that counsel was ineffective for failing to object to alleged improper comments during the solicitor's closing arguments. A review of a solicitor's closing argument is "based upon the standard of whether his comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004). The Court addresses each of these claims below:

- Many of Applicant's claims with respect to the solicitor's closing arguments involve comments that are allegedly not supported by the evidence. The Court finds that none of these comments rise to the level of "so infecting the trial with unfairness as to make the resulting conviction a denial of due process." Von Dohlen, supra. Additionally, as discussed in section **II.J**, the trial judge correctly charged the jury on their role as the factfinders, and specifically told them that their memory controlled over that of the attorneys. Tr. p. 490.

- Applicant argues counsel should have objected to the solicitor's comment that Applicant and his wife had prior convictions because 1) the argument invited the jury to convict Applicant based on his prior criminal record; 2) it erroneously implied that both Applicant has his wife had felony convictions; and 3) it "interjected an important detail

about Applicant's prior record which went beyond the scope of permissible impeachment under Rule 609(a)(1)." The Court finds that, 1) the argument merely rehashed what had already been testified to and was limited to the context of credibility; and 2) it did not imply that Applicant's wife had a felony conviction, but rather repeated her testimony that she had previously been convicted of assault and battery of a high and aggravated nature. With respect to the third reason Applicant argues counsel should have objected, the Court would refer to its explanation in section **II.M.**

- Applicant argues the solicitor mischaracterized statements made by Applicant's wife as telling him that if he made certain statements she could get "caught" for perjury. The Court finds that the solicitor properly argued that the jury should draw certain inferences from facts presented at trial. Counsel argued the opposite inferences should be drawn. Tr. p. 444-45. Applicant has failed to show any actual deviation from the applicable standard with respect to this allegation.

- Applicant argues counsel should have objected to each reference to the "forensic interview." For the reasons discussed in section **II.I**, the Court dismisses this allegation.

- Applicant alleges counsel should have objected to the alleged improper argument that Applicant was a convicted felon. For the reasons discussed in section **II.M**, the Court dismisses this allegation.

- Applicant argues counsel was ineffective for failing to object to the solicitor "[i]mproperly advising jury of his personal opinion that Applicant and his wife were liars." The Court finds that the comment was not objectionable where the solicitor was properly arguing the Applicant and his wife were not credible based on the evidence, and did not inject her personal opinion into the matter. See State v. Caldwell, 300 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) ("A solicitor's argument concerning the credibility of the State's witnesses based on the record and its reasonable inferences is not error.").

II.P.

Applicant argues counsel was ineffective in failing to object to testimony concerning "prior bad acts not relevant to case which did not involve crimes of moral turpitude." Evidence was admitted during the trial that Applicant and his wife were aware the victim had been caught by her step-mother with a cigarette and pain pill, but kept the information from the victim's parents. First, the Court finds that the evidence was clearly relevant, in that it tended to show a generally inappropriate relationship between Applicant and the victim. Further, it was not admitted to prove the character of Applicant, but instead the nature of his relationship with the

victim, and would have been admissible under Rule 404(b) to show evidence of a common scheme or plan. Because the Applicant has failed to establish a meritorious basis for mounting an objection, he has failed to show deficiency or prejudice. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

{Conclusion and signature on following page}

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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 the 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 the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 24 **day of** April, 2017.

BROOKS P. GOLDSMITH
Presiding Judge
Fifteenth Judicial Circuit

Georgetown, South Carolina

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August 9, 2017

Johnny E. James, Jr., Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-

RE: Prentiss Wayne Love, #315271 v. State of South Carolina; 2015-CP-22-00209.

Dear Mr. James:

Enclosed please find for your records a copy of the Notice of Appeal that was filed in the above-captioned matter. The family has retained me to handle this appeal. If you have any questions or concerns please feel free to contact my office. I remain,

Sincerely yours,

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosure
cc: The Honorable Daniel E. Shearouse, Clerk, Supreme Court of South Carolina
Prentiss Wayne Love, #315271
Lorraine Buckwell

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