

THE BOOZER LAW FIRM, LLC

Lance S. Boozer, Esq.*
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October 6, 2017

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

OCT 10 2017

The Honorable Robert J. Harte
Clerk of Court
P.O. Box 583
Aiken, SC 29802-0583

S.C. SUPREME COURT

RE: Raphael Robertson, #306718, v. State of South Carolina
2016-CP-02-1903

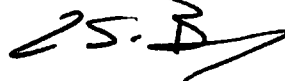
Dear Mr. Shearouse and Mr. Harte:

Enclosed for filing is a Notice of Cross-Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Cross-Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Robertson in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Robertson in this appeal.

Yours very truly,



Lance S. Boozer

cc: Julie Coleman, AAG
Office of Appellate Defense
Raphael Robertson, #306718

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

OCT 10 2017

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Maite Murphy, Circuit Court Judge

Case No. 2016-CP-02-1903

Raphael Robertson, #306718,Petitioner,

v.

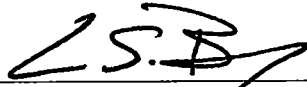
State of South Carolina,.....Respondent.

NOTICE OF CROSS-APPEAL

The Petitioner's PCR application was granted in part and denied in part by the Honorable Maite Murphy's Order dated March 16, 2017. The State's motion to reconsider was denied by Order dated September 5, 2017. Thereafter the State served its Notice of Appeal on October 3, 2017. The Notice of Appeal was received by undersigned counsel on October 5, 2017. Petitioner files this Notice of Cross-Appeal and appeals the denial of the remaining allegation his trial counsel was ineffective for failing to object to and/or move for mistrial following an Allen charge. A copy of the Order on appeal is attached to this notice.

[Signature Page Follows]

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'L.S. Boozer', written over a horizontal line.

Lance S. Boozer
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October 6, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM AIKEN COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Maite Murphy, Circuit Court Judge

Case No. 2016-CP-02-1903

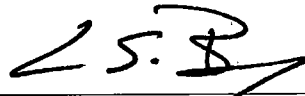
Raphael Robertson, #306718,Petitioner,

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Cross-Appeal upon the State by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Julie Coleman, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 6th day of October, 2017.



Lance S. Boozer
The Boozer Law Firm, LLC
1400 Laurel Street, Suite 4A
Columbia, SC 29201
Tele: 803-608-5543

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN)	C/A NO: 2016-CP-02-1903
)	
Raphael Robertson, #306718.)	
)	
Applicant,)	
)	ORDER GRANTING APPLICATION
v.)	FOR POST-CONVICTION RELIEF
)	
State of South Carolina,)	
)	
Respondent.)	

FILED 3-27 20 12:25 SP
Robert J. Harte
 C.C.P. & G.S.
Shodell Parks
 Deputy Clerk

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is currently confined in the South Carolina Department of Corrections pursuant to the Aiken County Clerk of Court's orders of commitment. Applicant was indicted by the Aiken County Grand Jury for two (2) counts of criminal sexual conduct with a minor, first degree, (2014-GS-02-382, 384) and two (2) counts of lewd act on a child (2014-GS-02-385, 386). Applicant was tried by jury before the Honorable Eugene C. Griffith, Jr. on July, 17, 2014. Applicant was represented by Michael Routzong, Esquire ("counsel"). The jury found Applicant guilty of all charges and Judge Griffith sentenced the Applicant to thirty (30) years imprisonment for both convictions of CSC, first degree, to run concurrently, and fifteen (15) years imprisonment for one conviction of lewd act, to run concurrently, and ten (10) years consecutive for the other conviction of lewd act.

Applicant filed a timely Notice of Appeal. The South Carolina Court of Appeals affirmed the appeal. State v. Robertson, Unpublished Opinion No. 2016-UP-329 (S. Ct. App. June 29, 2016). The Remittitur was issued on July 19, 2016.

Applicant initially filed an Application for post-conviction relief on August 2, 2016.

Applicant raised the following allegations:

1. Ineffective assistance of counsel.
 - a. Failure to object - Erroneous jury instructions, coercive Allen charge and improper corroboration testimony.
2. Ineffective assistance of appellate counsel.
 - a. Failure to brief coercive Allen charge.

Applicant subsequently filed an amendment on January 13, 2017, alleging:

1. Counsel failed to object to Allen charge being given.
2. Counsel failed to object to the substance of the Allen charge.
3. Counsel failed to move for mistrial following the Allen charge.
4. Counsel failed to object to hearsay testimony by witness Santana Gonzalez.

The State made its Return on December 16, 2016. An evidentiary hearing was convened on January 26, 2017, at the Bamberg County Courthouse before the Honorable Maite Murphy. The Applicant was present and represented by Lance S. Boozer, Esq. The State was present and represented by Julie Coleman, Esq. This Court makes the following findings of fact and conclusions of law.

STANDARD OF REVIEW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial

cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 268 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is 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. Based on the record and testimony presented at the PCR hearing, this Court finds that the Applicant has met his burden of proof.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Counsel failed to object to Allen charge.

Applicant alleged and testified counsel was ineffective for failing to object to the trial court issuing an Allen charge; failing to object to the substance of the Allen charge; and failing to move for mistrial following the Allen charge and guilty verdict.

Allen v. United States, 164 U.S. 492, 17 S.Ct. 154 (1896) allows trial courts to instruct hung juries to reconsider their opinions and work together to reach a unanimous verdict. As long as these instructions are not unduly coercive, they are lawful and constitutional. South Carolina has adopted four factors to examine whether the instructions are unconstitutionally coercive. These factors are set out in Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001), and are known as the "Tucker factors":

- (1) Does the charge speak specifically to the minority juror(s)?
- (2) Does the charge include any language such as "You have got to reach a decision in this case?"
- (3) Is there an inquiry into the jury's numerical division, which is generally coercive?
- (4) Does the time between when the charge was given, and when the jury returned a verdict, demonstrate coercion?

These four factors are used to examine the facts of each specific case. The factors were adopted from the definitive United States Supreme Court decision on the constitutionality of an Allen charge, Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546 (1988). Lowenfield held that the question of whether an Allen charge is unconstitutionally coercive must be judged "in its context and under all the circumstances." Id.

Based on the trial record and testimony presented at the PCR hearing, this Court finds the Allen charge issued by the trial court was not unconstitutionally coercive and trial counsel was not ineffective in failing to object to the charge and/or move for mistrial following the jury verdict. This Court further finds, even if counsel should have objected to the charge, Applicant was not prejudiced by counsel's failure to object. Accordingly, this allegation is denied and dismissed with prejudice.

2. Counsel failed to object to impermissible hearsay testimony.

Applicant alleged and testified counsel was ineffective for failing object to impermissible hearsay testimony made by the victim's mother, Santana Gonzales. Specifically, Applicant alleged and testified counsel should have objected to the following:

Q: Santana, who did MINOR say touched her?

A: The defendant.

Trial tr. p. 102, ll. 13-14.

At the PCR hearing, counsel admitted he did not object to the testimony. Counsel also admitted that this would constitute improper hearsay testimony and he was not aware of any good reason why he did not object and concluded he must have missed the objection.

The rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001); Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994). A well-settled exception in criminal sexual conduct cases allows limited corroborative testimony. Id. 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 not include details or particulars or the identity of the perpetrator. In Sanchez, the mother and father of an alleged sexual assault victim testified that their daughter identified the defendant (Sanchez) as the perpetrator of the sexual assault. Sanchez v. State, 351 S.C. 270, 569 S.E.2d 363 (2002). Counsel did not object. The Court found since the mother's and father's testimony was inadmissible hearsay, counsel was ineffective for failing to object. Id. at 275. The Court further found "Sanchez was prejudiced by counsel's deficient performance because

improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless." Id.; see also Jolly v. State, 314 S.C. at 21, 443 S.E.2d at 560, "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." The Court in Sanchez found Applicant was entitled to a new trial.

This Court finds Ms. Gonzalez's testimony that her daughter identified the Applicant as the perpetrator was inadmissible hearsay testimony. This Court finds counsel was ineffective for failing to object to the testimony and that the the testimony and counsel's inaction prejudiced Applicant. The Court further finds, based on the trial record and PCR hearing testimony, the corroborative testimony was not harmless. Accordingly, this Court finds Applicant is entitled to a new trial.

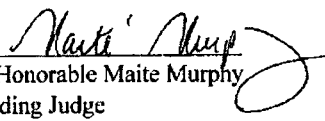
CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has met his burden of proof in showing he received ineffective assistance of counsel and counsel's performance prejudiced him. Accordingly, this application for post-conviction relief must be granted.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be granted;
2. The Applicant's convictions and sentences are vacated;
3. Applicant is entitled to a new trial; and
4. Applicant is remanded to the custody of Aiken County.

AND IT IS SO ORDERED this 16 day of March, 2017.


The Honorable Maite Murphy
Presiding Judge
Second Judicial Circuit

St. Mary, South Carolina

STATE OF SOUTH CAROLINA)
 COUNTY OF AIKEN)
 Ralpheal Robertson,)
 Plaintiff(s),)
 -vs-)
 South Carolina State Of,)
 Defendant(s).)

IN THE COURT OF COMMON PLEAS
 2nd JUDICIAL CIRCUIT
 CASE NO.: 2016CP0201903
 APPOINTMENT OF COUNSEL OR GAL
 (Select one.)

ORDER
 AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- Post-Conviction Relief (PCR)/habeas case Adoption Juvenile
 SVP case Custody and/or Visitation Abuse and Neglect
 Minor Name Change Other: Post Convict Rel 500

It appears Ralpheal Robertson, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
 counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:
 counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
 court appointed counsel has obtained , Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
 Other:

Therefore, it is ordered that Lance Boozer hereby is appointed as (Select one.)

counsel lead counsel (if capital PCR case) guardian ad litem
 for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered that , Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED
 September 28, 2016

[Signature]
 Circuit Judge Clerk of Court

Plaintiff Attorney:	
Lance Boozer	Ralpheal Robertson # 306718
807 Gervais St. Ste 2013	PCI Q3 203A
Columbia, SC 29201	430 Oaklawn Road
	Pelzer, SC 29669

Defendant Attorney:	
Julia Amanda Coleman	
PO Box 11549	
Columbia, SC 29211	

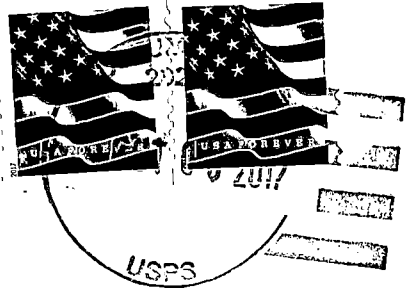
NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

CP20 (08/08)
 SCCA/267 (03/07)

[Signature]
 9/28/2016
[Signature]
 1:15

THE BOOZER LAW FIRM, LLC

400 Laurel Street, Suite 4A
Columbia, SC 29201



The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211