

THE BOOZER LAW FIRM, LLC

Lance S. Boozer, Esq.*
*Also admitted in Florida

1400 Laurel Street, Suite 4A
Columbia, SC 29201

Telephone: 803-608-5543
Fax: 803-926-3463

Email: lsb@boozerlawfirm.com
Website: www.boozerlawfirm.com

November 17, 2017

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

RECEIVED

NOV 20 2017

The Honorable Mary Brown
Clerk, Berkeley County
300 California Dr.
Moncks Corner, SC 29461

S.C. SUPREME COURT

RE: Jeffrey Michaelson, #341675, v. State of South Carolina
2015-CP-08-2521

Dear Mr. Shearouse and Ms. Brown:

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

- (1) Proof of Service of the Notice of 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. Michaelson in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Michaelson in this appeal.

Yours very truly,



Lance S. Boozer

cc: Lindsey McCallister, AAG
Office of Appellate Defense
Jeffrey Michaelson, #341675

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Case No. 2015-CP-08-2521

RECEIVED

NOV 20 2017

S.C. SUPREME COURT

Jeffrey Michaelson, #341675,.....Petitioner,

v.

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

NOTICE OF APPEAL

The Petitioner appeals the Honorable Michael G. Nettle's Order dated November 1, 2017, denying post-conviction relief to the Petitioner. Undersigned counsel received notice of entry of the Order on November 14, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



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

November 17, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

NOV 20 2017

The Honorable Michael G. Nettles, Circuit Court Judge

S.C. SUPREME COUR

Case No. 2015-CP-08-2521

Jeffrey Michaelson, #341675,.....Petitioner,

v.

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

PROOF OF SERVICE

I, Lance S. Boozer, attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Lindsay McCallister, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 17th day of November, 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)
COUNTY OF BERKELEY)
))
Jeffrey Michaelson, #341675,)
))
Applicant,)
))
v.)
))
State of South Carolina,)
))
Respondent.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

C. A. No. 2015-CP-08-2521

ORDER OF DISMISSAL

2017 NOV -6 PM 2:44
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY S.C.
FILED

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed by Jeffrey Michaelson (Applicant) on November 4, 2015, and amended on July 14, 2017. Respondent made its Return on June 9, 2016. An evidentiary hearing into the matter was convened on ^{July 31,} ~~August 1,~~ 2017, at the Berkeley County Courthouse. Lance Boozer, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf. Patricia Kennedy, Esquire, also testified. This Court had before it a copy of the records of the Berkeley County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application and amendment, the State's Return, the trial transcript, and Applicant's appellate records.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. Applicant was indicted at the August 2008 term of the Berkeley County Grand Jury for one count of burglary, second degree (2009-GS-08-1669), and at the November 2009 term of the Berkeley County Grand Jury for one count of murder (2009-GS-08-2295). Patricia Kennedy, Esquire, represented Applicant. On July

8, 2010, Applicant proceeded to a jury trial before the Honorable Kristi Lea Harrington and a jury. Applicant was found guilty as indicted on the count of murder and not guilty for of burglary, second degree. Judge Harrington sentenced Applicant to incarceration for forty-five years.

A notice of appeal was filed on Applicant's behalf and an appeal perfected on his behalf by Robert Dudek, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Michaelson, Op. No. 2015-UP-188 (filed on May 8, 2013). Applicant then sought a writ of certiorari to review the South Carolina Court of Appeals' opinion. The petition was denied on November 7, 2014, and the Remittitur was issued on April 29, 2015.

SUMMARY OF FACTS ADDUCED AT TRIAL

The victim in this case, Parrish Reeves, was last seen on January 19, 2001. Tr. p. 291. After searching for him on her own for several weeks, his wife reported him missing on February 1, 2001. Tr. pp. 299-300. At the same time, she also reported a burglary in their home. Tr. pp. 299-300.

The case remained cold until August 2007 when some jewelry, owned by victim's family at the time of the burglary, was located after being pawned. Tr. pp. 481-83. The items were tied to the victim's stepdaughter, Katherine Feaster, through the pawnshop records. Tr. pp. 483-84. Ms. Feaster was arrested and gave a statement to police. Tr. pp. 484-85. She named Applicant; her brother, Jeremiah Scharer; and her husband, Treze Feaster, as being involved in the theft of the jewelry. Tr. pp. 485. Applicant was arrested and gave a statement detailing his involvement in the crime, admitting he provided the gun and helped bury the victim, and naming the location where he disposed of the gun. Tr. pp. 486, 508-13. A search warrant was executed at

Applicant's former residence, and investigators recovered a buried fifty-five gallon drum with the victim's body inside from the front yard. Tr. pp. 395-96, 400, 509-11. Applicant was arrested for murder on August 7, 2007. Tr. pp. 332-33.

In addition to Applicant's confession, testimony was also received from Jeremiah Scharer, the victim's stepson and Applicant's codefendant. Tr. pp. 587, 592. Jeremiah testified he was at Katherine and Trey Feaster's house, along with Applicant, when Applicant made a comment about going to deal with the victim. Tr. pp. 589-90. Scharer testified he knew his stepdad was going to be killed because Applicant had shown him a small handgun with a silencer on it. Tr. pp. 593-594. Scharer further testified his role was to knock on the door and get the victim to come outside. Tr. pp. 593. Treze Feaster dropped off Applicant and Scharer, and they walked to the victim's house. Tr. p. 593. Scharer testified the ruse was to get the victim into his vehicle by claiming Treze Feaster's truck was stuck in the mud, and they needed help to pull it out. Tr. pp. 596-597, 610. After the victim got in his vehicle, with Applicant in the passenger seat, the group took off down the road. Tr. pp. 596-97. Scharer, riding in the bed, testified he felt the truck sway and then stop. Tr. pp. 596, 598, 609. Sharer testified when the driver's side door opened, Applicant was now driving, and the victim was slumped on the passenger side. Tr. pp. 597-599. Applicant drove the truck back to the victim's home, and Scharer called and asked for Feaster to come and take him home. Tr. pp. 600-01. Applicant told Scharer after what they did that day, "that made me a man." Tr. pp. 602.

Brian Valbert, who at the time was civilly committed pursuant to the Sexually Violent Predator Act, testified about a jailhouse admission Applicant made to another inmate in a bragging manner. Tr. pp. 684-687. A recorded telephone call Applicant made to his girlfriend,

Christine Thomas, was also admitted, in which Applicant declared he was “sticking with I didn’t do it.” Tr. pp. 781-782.

ALLEGATIONS

In his original application and the subsequent amendment thereto, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Counsel failed to contact lead detective;
 - b. Counsel allowed prosecutorial misconduct;
 - c. Counsel failed to use witness letters which would have established a conspiracy against Applicant;
 - d. Counsel should have requested trial judge be recused;
 - e. Counsel should have requested a change of venue;
 - f. Counsel should have requested a mistrial due to misconduct between victim’s mother and a juror during trial;
 - g. Counsel failed to argue the State opened the door to Katherine Feaster’s hearsay testimony regarding her relationship with the victim.
2. Prosecutorial misconduct
 - a. Solicitor deliberately elicited perjured testimony.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel 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. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. (quoting Strickland, 466 at 688). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Applicant testified he was arrested and tried for murder, and Patricia Kennedy (Counsel) was appointed to represent him. Applicant testified he was arrested in August 2007 and tried in June 2010, and he met with Counsel three or four times in jail before he posted bond in November 2008. Applicant testified, after that, Counsel would call him by phone if she needed to get in touch with him. Applicant also testified he met with an investigator in preparation for trial.

Counsel testified she has worked at the Charleston County Public Defender’s Office since 2013, and before that, she was the Chief Public Defender for Berkeley County for ten years. Counsel testified her general rule is to meet with clients who are in jail every 30-45 days,

although she could not recall a specific number of meetings with Applicant. Counsel testified she did not recall receiving any plea offers, but she would have discussed that with Applicant. Further, Counsel testified Applicant maintained his innocence and was set on going to trial.

Counsel testified this case began in February 2001 when the victim was first reported missing, and it remained a cold case, despite considerable media attention, until August 2007, when Detective Merrithew got involved and tracked down Katherine Feaster based on pawnshop records. Counsel testified Applicant was the only non-family-member involved in the case, and he was the last person to be arrested and interviewed; Applicant was implicated by Treze Feaster. Counsel further testified Applicant always denied direct involvement in the murder, but the victim's body was recovered from his front yard. Counsel testified the State's theory at trial was Applicant was upset over his grandmother's death and "just wanted to kill someone." Counsel testified the defense theory was that Applicant was innocent, and she emphasized he was not related, had little to no contact with the victim, and had no motive to kill him, whereas the codefendants did.

Issue #1 – Counsel failed to contact lead detective, who was a key witness, for trial.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), overruled on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 744 (2014). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In order to prevail on a claim of ineffectiveness

based on counsel's failure to call a favorable witness, the South Carolina Supreme Court has repeatedly held a PCR applicant *must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis added). Applicant's speculation the witness' testimony would have been favorable cannot, by itself, satisfy his burden of showing prejudice. Glover v. State, 318 S.C. 396, 498-99, 458 S.E.2d 538, 540 (1995).

Applicant testified he believed Counsel should have attempted to contact the lead detective in the case, Detective Merrithew. Applicant testified Merrithew had left the country for Afghanistan by the time of trial, and Counsel did request and was granted several continuances to try to locate him. However, Applicant testified Counsel was given an email address she should have used to contact him. Applicant testified the detective was necessary because he transported Katherine Feaster from Anderson to Berkeley County after her arrest, and the times on the statement taken from her "do not match." Applicant further testified Merrithew was not present for trial, and Counsel requested another continuance, which was denied.

Counsel testified at length about her attempts to contact Merrithew, or, in the alternative, have the trial delayed until he returned to the United States. Counsel testified Merrithew was the main driver of the investigation, and she wanted to be able to question him about his investigative steps. Counsel testified she has personal experience with Merrithew, and in her opinion, he jumps to conclusions and isn't always thorough in his investigation, and she felt he had not done a competent job in this case. Counsel testified Merrithew was under subpoena for trial during the spring and summer of 2009, but the case was not called. Counsel testified when the case was put back on the docket for November 2009, Merrithew was already gone. Counsel

testified she requested a continuance based on his absence, and Judge Dennis ruled he was an essential witness and continued the case. Counsel testified she was given an email address by the solicitor, but it was not Merrithew's personal account, just a supervisor or someone within the company he was working for, and she got no reply when she attempted to contact him that way. Counsel testified Merrithew was beyond the reach of any subpoena, and there was nothing legally she could do to bring him back. Counsel also testified she was aware the case would be tried without him after Judge Harrington denied multiple continuance requests, and she prepared her case accordingly.

This Court finds Applicant has failed to prove Counsel was deficient or failed to render reasonably effective assistance under prevailing professional norms in regards to her attempts to secure the presence of Detective Merrithew at trial. This Court finds Counsel made reasonable efforts to locate Merrithew after she became aware he had left the country, and there was nothing further she could have done. The Court further finds Counsel had no legal recourse to compel Merrithew's attendance at trial from Afghanistan, even if she had been able to contact him. Additionally, Applicant did not call Merrithew, the witness he alleges should have been called at trial, to testify at the evidentiary hearing. Applicant's assertion alone this witness would have provided favorable testimony is not enough to meet his burden as to this allegation. See Glover, 318 S.C. at 499, 458 S.E.2d at 540 ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Furthermore, this issue was properly preserved by Counsel and raised on appeal as a Confrontation Clause issue, and Applicant's appeal on that ground was denied. This allegation is therefore denied and dismissed.

Issues #2 – Counsel allowed “prosecutorial misconduct” by failing to object to perjured testimony.

Nondisclosure of evidence of perjured testimony about which the prosecution knew or should have known is a Brady violation. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324-25 (1999) (citing U.S. v. Agurs, 427 U.S. 97 (1976)). “A Brady claim is based on the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Id. at 524, 514 S.E.2d at 324.

Applicant testified Jeremiah Scharer, a witness called by the prosecution, lied during his testimony, and Applicant believes Counsel should have objected or done more to prevent him from testifying. On cross-examination, however, Applicant could not explain what he wanted Counsel to have done.

Counsel testified her concern with Scharer’s testimony was that it kept getting more and more detailed as time went on. Counsel testified he only gave one written statement, but later gave additional oral statements. Counsel further testified, because of this, she specifically asked about his meetings with the solicitor and how many times they discussed his statements. Counsel testified although she personally did not believe Scharer’s testimony, there was nothing she could do other than cross-examine him about his various statements and argue his questionable veracity to the jury during closing.

This Court finds Applicant has failed to prove Counsel was ineffective for failing to object to Scharer’s testimony. Applicant has not established that any perjured testimony was presented or that Counsel had any reason to believe perjured testimony was deliberately presented. Further, this Court notes Counsel reviewed Jeremiah Scharer’s statements and cross-

examined him on inconsistencies in his trial testimony. Lastly, Applicant has failed to show there was an objection or motion Counsel could have made that would have resulted in a different outcome, particularly where he has set forth no absolutely evidence to substantiate this claim. Accordingly, this allegation is denied and dismissed.

Issue #3 – Counsel failed to introduce or otherwise use at trial witness letters which would have shown the existence of a conspiracy to frame Applicant.

“There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland v. Washington, 466 U.S. 668 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)). In order to prove Counsel was ineffective, Applicant must show Counsel’s performance was deficient, and there is a reasonable probability that, but for Counsel’s errors, the result of the trial would have been different. Strickland, 466 U.S. at 688. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Id. When evaluating the reasonableness of Counsel’s conduct, this Court must “keep in mind that [C]ounsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Id. at 690. “Furthermore, when a defendant’s conviction is challenged, ‘the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.’” Catoe, 372 S.C. at 331, 642 S.E.2d at 596 (quoting Strickland, 466 U.S. at 695).

Applicant introduced copies of three letters he believes were sent between his codefendants Treze Feaster and Jeremiah Scharer. Applicant testified he was not aware of the existence of the letters until a year after trial, when he requested a copy of his file and discovery

from Counsel. Applicant testified the letters were not introduced at trial nor used to confront witnesses, and he believes Counsel could have and should have used them to his benefit.

Counsel testified she believed she had been given a full copy of the State's file pursuant to Brady and Rule 5. She testified she received discovery in multiple batches from several different solicitors, and she prepared a copy of this and gave it to Applicant via his family. Counsel reviewed the letters Applicant introduced and asserted she had received them from the State. Counsel testified the letters appear to have been written by Treze Feaster, addressed to Jeremiah Scharer, and if the letters could be authenticated, she would have liked to use them to discredit Scharer and show the existence of a possible conspiracy to blame Applicant. However, Counsel testified Treze Feaster had a right not to testify, and he did not testify, so she felt she had no way to authenticate them. Additionally, Counsel testified there was no indication Scharer ever received the letters or changed his story based on the letters.

This Court finds Applicant has failed to prove Counsel was deficient or failed to render reasonably effective assistance under prevailing professional norms in regards to the use of the witness letters at trial. Counsel testified she believed the letters were written by Treze Feaster, who did not testify at trial and could not be compelled to testify. This Court agrees with Counsel's assessment that she would likely have been unable to authenticate the letters in order to use them for impeachment purposes as they are undated and unsigned. Further, Applicant presented no evidence Scharer even received the letters, much less took any action based on them. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by any deficiencies in Counsel's performance. This Court finds use of the letters would not have changed the result at trial, especially given the fact Applicant himself

admitted to significant involvement in the crime. This allegation is therefore denied and dismissed.

Issue #4 – Counsel should have requested the trial judge be recused.

“Pursuant to Canon 3(E)(1)(a) of Rule 501, SCACR, a judge should disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned. It is not enough for a party seeking disqualification to simply allege bias or prejudice. The party must show some evidence of that bias or prejudice. The alleged bias or prejudice must stem from an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge.” State v. Jackson, 353 S.C. 625, 627, 578 S.E.2d 744, 745 (S.C. Ct. App. 2003).

Applicant testified he believed Counsel should have asked Judge Harrington to recuse herself from hearing his case because before she took the bench in 2008, she was a supervisor in the Berkeley County Solicitor’s Office, and he believed she had prior knowledge of the case. Applicant testified he was unaware of Judge Harrington’s work as a solicitor until after the trial, so he never discussed the issue with Counsel, but he would have asked Counsel to make a motion if he had known.

Counsel testified she did not discuss Judge Harrington’s previous employment as a solicitor with Applicant. Counsel testified Applicant was arrested in August 2007, and Judge Harrington was elected to the bench in February 2008, so there was only a short overlap. Additionally, Counsel testified Judge Harrington prosecuted criminal domestic violence, criminal sexual conduct, and child abuse matters, not murder cases, and she was not a supervisor in the office. Counsel further testified Applicant’s case was handled mostly by the Charleston

Solicitor's Office, particularly as trial approached, and she had no reason to believe Judge Harrington was ever involved.

This Court finds Counsel rendered reasonably effective assistance under prevailing professional norms, and Applicant has failed to prove Counsel's performance was deficient. Applicant presented no evidence whatsoever of any direct involvement by Judge while she was still at the Solicitor's office, nor of any bias because of her former position. Additionally, Counsel testified she was aware of Judge Harrington's previous employment and had no reason to believe she was involved in the case. Therefore, Counsel had no basis to request recusal. This allegation is denied and dismissed.

Issue #5– Counsel should have requested a change of venue.

Applicant testified he wanted Counsel to file a motion for a change of venue because the victim's mother was prominent at some flea markets in the area and 20-30% of the jury pool indicated they knew who she was. Applicant also testified the case had been reported in newspapers and other media sources in the area. Applicant testified he asked Counsel to make the motion, but Counsel refused and told him it would not be successful.

Counsel testified she did not request a venue change due to her belief, based on past experience, it would not be granted. Counsel further testified the only successful venue change she ever had granted was in a serial rape case that received thousands of newspaper articles and television stories, and even then she had to "jump through hoops" for it to happen. Counsel testified there were a few newspaper articles about this case, and jurors were questioned about their knowledge of it, but the media coverage was nothing abnormal.

The Court finds Applicant has failed to prove Counsel's performance was deficient in her handling of this issue or that Applicant suffered any prejudice as a result. Applicant did not

present any evidence of difficulties impaneling a jury as a result of pre-trial publicity. Further, it does not appear to this Court that Applicant's case received an unusual amount of publicity. Counsel testified potential jurors were asked about their knowledge of the case, and this Court finds there is no evidence the trial court failed to ask appropriate questions. The Court notes the fact that a jury was successfully drawn is evidence a change of venue was unnecessary, and such a motion would be premature until there were problems impaneling a jury. This allegation is therefore denied and dismissed.

Issue #6 – Counsel should have requested a mistrial based on contact between a juror and the victim's mother during trial.

Applicant introduced the affidavit of George David Palms, Applicant's now-deceased brother-in-law. Applicant testified he was sitting in a vehicle with Palms in the parking lot outside the courthouse on the last day of trial, when he and Palms observed a juror approach the victim's mother, speak to her and give her a hug, then enter the courthouse. Applicant testified he was about 20 yards away at the time and could not hear the conversation, but he saw mouths moving. Applicant further testified he informed Counsel of the encounter before trial resumed that morning, but Counsel told him it was not worth bringing up unless he had pictures as proof.

Counsel testified Applicant never reported this allegation to her, and, because it is an unusual occurrence, she believed she would remember if she had been told about it. Counsel further testified she would have been obligated to inform the judge if she had known about it because it is so improper, and she would have done so.

This Court finds Counsel's testimony on this issue to be credible and finds Applicant's testimony was not credible. This Court finds Applicant never reported this incident to Counsel, if it ever took place. Therefore, this Court finds Counsel's performance was not deficient. Further, this Court finds Applicant failed to prove prejudice as he did not call the juror in

question to testify, despite knowing her name and juror number. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (“This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . .”). This allegation is therefore denied and dismissed.

Issue #7 – Counsel failed to argue the State opened the door to Katherine Feaster’s hearsay testimony regarding her relationship with the victim.

Applicant alleges Counsel should have argued the State opened the door to allowing hearsay testimony regarding Katherine Feaster’s relationship with the victim, who was her stepfather. Specifically, Applicant alleges the State opened the door after successfully objecting to Counsel’s questions to Sergeant Freeman regarding the family relationships, “bad blood” between the victim and Applicant’s codefendants, and the statements given by the codefendant’s before police arrested Applicant. See Tr., pp. 555-56. Applicant contends Counsel was deficient for then failing to object to the State’s question on re-direct as to whether Katherine Feaster had implicated Treze Feaster, Jeremiah Scharer, and Applicant in her statement to police. See Tr., p. 579. Applicant alleges this “opened the door” for Counsel to go into the statement, but Counsel failed to make that argument.

Counsel testified she received Katherine Feaster’s statement to police in discovery and felt it would have been beneficial if she could have used it at trial because it supported her argument that the codefendants had much stronger motives for killing the victim. Counsel agreed she should have made an argument the State opened the door to bring in the contents of the statement, but, although there was a bench conference, she never did so on the record. On cross-examination, Counsel testified the State made a motion in limine to keep out any mention of the victim’s alleged sexual abuse or assault of Katherine Feaster. Counsel acknowledged she

questioned Scharer about being beaten by the victim and Scharer's dislike of the victim. Counsel also testified her closing focused on the argument that everyone else had a reason to be involved except Applicant, and she did argue to the jury the victim had a history of physical abuse and had sexually assaulted Katherine Feaster.

This Court finds Applicant has failed to prove Counsel's performance was deficient, and Counsel rendered reasonably effective assistance under prevailing professional norms. The trial court has wide discretion as to what evidence and testimony is admissible. See, e.g., State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) ("The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.") (citing State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001)). This Court finds the issue of the victim's alleged sexual misconduct was ruled upon during pre-trial motions, and this ruling controlled during trial. Further, the Court finds the State's question did not open the door or give Counsel a basis to challenge the previous ruling, despite Counsel's assessment of her own performance. See Harris v. Dugger, 874 F.2d 756, 761 n. 4 (11th Cir. 1989) ("Because ineffectiveness is a question which [the court] must decide, admission of deficient performance by attorneys are not decisive."). Additionally, Counsel was able to cross-examine Scharer regarding physical abuse by the victim, and she argued the issue of sexual assault during closing. Therefore, this Court finds Applicant has not met his burden of proving he was prejudiced by the lack of testimony on these issues or that he would have been likely to prevail on this issue on appeal even if it had been preserved. This allegation is therefore denied and dismissed.

CONCLUSION

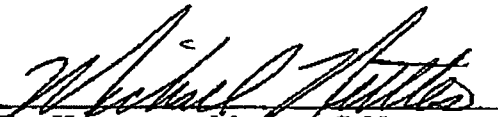
Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by any alleged deficiencies in Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, Applicant must serve and file a notice of appeal. Applicant 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 be denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent.

AND IT IS SO ORDERED this 1 day of November, 2017.


THE HONORABLE MICHAEL G. NETTLES
Presiding Judge
Ninth Judicial Circuit

Florence, South Carolina.

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
Jeffrey Michaelson 341675,)
Plaintiff(s),)
-vs-)
State of South Carolina,)
Defendant(s).)

IN THE COURT OF COMMON PLEAS
JUDICIAL CIRCUIT
CASE NO.: 2015CP0802521
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 Jeffrey Michaelson 341675, 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
February 18, 2016

Mary P Brown

Circuit Judge Clerk of Court

Plaintiff Attorney:

Lance Boozer	
807 Gervais St., Ste 203	
Columbia, SC 29201	

Defendant Attorney:

James Rutledge Johnson	
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.

THE BOOZER LAW FIRM, LLC

1400 Laurel Street, Suite 4A
Columbia, SC 29201



The Honorable Dan
Clerk, Supreme Co
P.O. Box 11330
Columbia, SC 29