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

January 18, 2018

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

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

RE: Dwayne Rudd, #358140, v. State of South Carolina
2016-CP-02-1361

Dear Mr. Shearouse and Mr. Harte:

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. Rudd in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Rudd in this appeal.

Yours very truly,

Lance S. Boozer

cc: Julie Coleman, AAG
Office of Appellate Defense
Dwayne Rudd, #358140

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JAN 22 2018
S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, Circuit Court Judge

Case No. 2016-CP-02-1361

Dwayne Rudd, #358140, ...Petitioner,

v.

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

NOTICE OF APPEAL

The Petitioner appeals the Honorable J. Mark Hayes's Order dated January 2, 2018, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on January 17, 2018. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,

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

January 18, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JAN 22 2018
S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, Circuit Court Judge

Case No. 2016-CP-02-1361

Dwayne Rudd, #358140, ...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 Appeal upon the Respondent 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 this18th day of January, 2018.

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 AIKEN	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Dwayne Lee Rudd, #358140, Applicant, v. State of South Carolina, Respondent.	)	2016-CP-02-1361 **ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on June 10, 2016. Respondent submitted its return on December 16, 2016. An evidentiary hearing into the matter was convened on September 18, 2017, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Lance Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant testified on his own behalf. Applicant also presented testimony from Robert Bank, Esquire, Kate Chappell, an expert in forensic pediatric medical exams, and Trial Counsel Aimee Zmroczek ("Trial Counsel"). Respondent presented testimony from Assistant Solicitor Ashley Agnew Hammack, Esquire. This Court had before it the records of the Aiken County Clerk of Court regarding the subject convictions, the Record on Appeal, and Applicant's records for the Department of Corrections. The Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was true bill indicted by the October 2013 term of the Aiken County

Grand Jury for five counts of third degree criminal sexual conduct with a minor (2013-GS-02-01638, -01639, -01640, -01644, -01645), and five counts of second degree criminal sexual conduct with a minor (2013-GS-02-01642, -01643, -01679, -01680, -01681). Applicant was represented on these charges by Aimee Zmroczek, Esquire. Applicant proceeded to a jury trial and was convicted as indicted of five counts of CSC second degree and two counts of CSC third degree. On December 12, 2013, Applicant was sentenced by the Honorable James R. Barber, III to fifteen years' imprisonment for each charge of CSC second degree, to run concurrently, and five years' imprisonment for both charges of CSC third degree, with one sentence to run concurrently and the other to run consecutively.

A timely notice of appeal was filed on Applicant's behalf by Tommy A. Thomas, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Rudd, Unpublished Opinion No. 2016-UP-088 (S.C. Ct. App. February 24, 2016). The Remittitur was issued March 17, 2016.

II. ALLEGATIONS

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

1. Ineffective Assistance of Trial Counsel
    a. Failure to introduce the May 28, 2013 Forensic Interview Transcripts and DVDs to impeach State's key witnesses.
    b. Failure to introduce the June 11, 2013 Forensic Medical Exam Reports to impeach State's witnesses.
    c. Failure to introduce DSS supervisor's written statement to impeach State's witnesses.
    d. Failure to introduce June 13, 2013 Detective's photographs.
    e. Failure to subpoena June 11, 2013 Forensic Medical Exam Reports.
    f. Failure to object to jail phone call conversation to preserve for appellate review.

g. Failure to introduce doctor's medical notes from October 16, 2012 surgery and accurately cross-examine witness Dr. Donohoe.
h. Failure to subpoena Forensic Interviewer Anne Laver.
i. Failure to subpoena Dr. Christopher Houk.
j. Failing to contemporaneously object to qualification of juror number seventy-nine to preserve the issue for appellate review.
k. Failure to challenge the trial court's lack of subject matter jurisdiction.
l. Failure to object to indictments.
m. Failure to investigate.

2. Ineffective Assistance of Appellate Counsel
   a. Failure to raise issue of relevancy of State's exhibits 3 and 4.
   b. Failure to raise issue of sufficiency of indictments.
   c. Failure to report State's misconduct when they changed the evidence on appeal.
3. Prosecutorial Misconduct
   a. Rule 5, Brady violation.
   b. Falsely represented evidence as an admission of guilt by Applicant.
   c. Knowingly used perjured testimony to obtain conviction.
   d. Used false evidence.
4. Lack of Subject Matter Jurisdiction

Applicant filed an amendment on October 31, 2016, adding an allegation of ineffective assistance of counsel for failing to object to the Solicitor's statements in closing arguments which vouched for the credibility of the State's witnesses and which were misleading to the jury. At the evidentiary hearing, Applicant informed the Court he was abandoning the first allegation of failure to introduce the forensic interview videos of the victims.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant's testimony

Applicant testified that Aimee Zmroczek represented him at trial, and their defense was going to be that Applicant's wife had a motive to lie about the allegations against him because the divorce papers were served on him one week after the allegations came out. He stated one of his daughters, who were both alleged victims in the case, had a medical condition, congenital

adrenal hyperplasia, that required her to have a corrective surgery on her genitalia to create a vaginal opening where there was not one before. Applicant testified he did not recall seeing or discussing with Trial Counsel either of his daughter's medical examination reports before the trial. He stated if those had been used at trial, they would have helped his case because his daughters credibility was at issue, and he could have called Kate Chappell as a witness to testify about the reports.

Applicant testified that Trial Counsel did not impeach witness Esther Timmerman with her prior written statement about whether Applicant told her he was the victim's father and he would touch her vagina if he "wanted to" rather than if he "had to." He stated Trial Counsel was ineffective for moving to keep out most of the photographs of his writings on the wall of their home at the beginning of trial, because the State only admitted a cropped portion of the writings that said "I'm sorry" and did not explain the context of the rest of the writings on the wall. He stated this gave the jury the impression that he was apologizing to his daughters for sexually molesting them, but in reality he was only apologizing to them for not spending more time with them and for ruining their marker by writing on the wall. Applicant stated he testified at trial and explained why he wrote the writings to the jury.

Applicant testified the jail phone calls introduced at trial should have been played in full to get the correct context for the conversation. In the alternative, he stated Trial Counsel should have moved to have the phone calls suppressed. He testified Dr. Donohoe, who testified at trial about his daughter's medical condition, should have had a diagram to show the jury exactly what the condition looked like, and even though Dr. Donohoe did use a diagram at trial, it was not a detailed diagram of the actual condition. Applicant stated Anne Laver should have been used as a witness at trial to show inconsistencies in his daughter's testimony, and Dr. Houk should have

been called as a witness to support Applicant's testimony about his daughter's medical treatment, but neither witness was called.[1]

Applicant testified Appellate Counsel Tommy Thomas should have raised the issue of sufficiency of the indictments on his appeal. He stated the dates on the indictment were wrong because the grand jury convened one week before the General Sessions trial. He stated he did not discuss this with Trial Counsel, but she should have looked into it. Applicant testified Assistant Solicitor Ashley Hammack engaged in prosecutorial misconduct by eliciting false testimony from the witnesses. He stated it was physically impossible for him to do what the State alleged he had done because his daughter had no orifice to digitally penetrate because of her condition. He testified the Solicitor's closing argument was improper when she told the jury to give the victims "an Academy Award" for acting if they were lying on the stand, which improperly vouched for the witnesses' credibility.

Robert Bank's testimony

Robert Bank testified that he was the attorney who sat second chair on this case at trial. He stated he worked with the Public Defender's Office in Richland County and did some cases for John Delgato and Aimee Zmroczek, which is how he became involved in this case. He stated he sat in on some meetings with Trial Counsel and Applicant. Bank testified that he cross-examined witness Esther Timmerman, and they strategically wanted to keep out a lot of her testimony because it was harmful to their client. He stated he did not impeach her with her statement to the police, but it may have been helpful if he had pointed out the inconsistency in her statement with her testimony.

[1] The Court notes neither Anne Laver nor Dr. Houk testified at the evidentiary hearing.

Kate Chappell's testimony

Kate Chappell, C.P.N.P., was admitted to testify as an expert witness in the field of forensic pediatric medical examinations. Chappell testified that she performed the medical examinations of the two victims in this case, Applicant's daughters. She stated that when she performs these examinations, nobody tells her what to look for, but she does get a summary of their disclosure before the exam. She stated she spoke directly to the victims' mother, but not to Applicant. She stated that Victim 1's physical exam[2] was normal, but there still could have been normal findings even without abuse or for other reasons. She stated Victim 2 had some scarring from her surgical procedure, which made it difficult to find potential signs of abuse.

Chappell testified that in 95 percent of cases, there will not be signs of sexual abuse, even if sexual abuse did occur. She stated this statistic is from the forensic guidelines based on all expert examinations in the field, but there were no specific studies based on the same medical condition affecting Victim 2.

Trial Counsel's testimony

Trial Counsel testified that she was retained on November 3, 2013, right before Applicant's trial date. She stated she was able to get a continuance, and she absolutely had enough time to prepare the case for trial; she was able to dedicate "24/7" to the case during the holidays. Trial Counsel testified she filed numerous motions to compel. She stated she did her own investigation on the case, and she met with Applicant several times, and reviewed the discovery with him numerous times. She stated there was a plea offer from the State for a negotiated nonviolent twelve year sentence; she discussed this with Applicant but he maintained his innocence and did not want to plead guilty.

[2] This Court will refer to the victims as Victim 1 and Victim 2 to protect their identity as minors.

Trial Counsel testified she did get the medical examination reports of the two victims, and she filed a motion to compel to obtain them, but they were given to her under seal and she was not allowed to show them to anyone including Applicant, which is not unusual. She stated she met with the solicitor numerous times to discuss the evidence. Trial Counsel stated both she and Robert Bank spoke with Kate Chappell and had a huge file on her, but they decided not to use her as a witness at trial because her expert opinion testimony was going to be that she would find no signs of sexual abuse in 95 percent of cases, even if there may have been abuse, which did not help her case. She stated she filed a motion to keep Chappell's testimony out and Judge Barber agreed that her testimony was not relevant because she did not find anything in her exam. She stated it was her trial strategy not to use Chappell as a witness at trial because her testimony would not help Applicant's case. Trial Counsel testified that Applicant would not take her advice and made the case more difficult by hiring his own expert.

Trial Counsel testified that the State wanted to introduce all of the photographs of Applicant's writing on the walls of his children's home, and she absolutely wanted to keep them out because they would damage her client. She stated "normal people" don't write notes on the wall, and it made Applicant look bad and placed him in a bad light, and the State was using it as an admission of his guilt. She testified she did not want to admit the rest of the photographs of his writings because in the photographs Applicant made statements that contradicted their defense. She stated his writings included apologies for not being around his children or spending enough time with them, but their theory of defense is that Applicant was the primary caretaker of the children and was always with them and did everything for them, including medical care. Based on this strategy, Trial Counsel moved to suppress the photographs. She stated Andy

Anderson, who previously represented Applicant, had him evaluated for mental competency, and there were no competency issues.

Regarding the juror selection issue, Trial Counsel testified that she had used all of her jury strikes by the time the juror in question was selected, so she could not have stricken her. She stated the juror told the trial court she could be fair and impartial, and the juror was a caregiver to someone with cerebral palsy, so Trial Counsel opined the juror would have a better understanding of being a medical caregiver and could be sympathetic to Applicant, who claimed he needed to give medical care to his daughter by applying medicine to her genitals.

Trial Counsel testified that she should have objected to the solicitor's statement in closing argument that vouched for the victim's credibility by telling the jury to give them "the Academy Award" if they were lying, and she does not know why she did not object. She stated that, looking back now, she should have asked for a mistrial or at least for a curative jury instruction. Trial Counsel testified that there was a third party aspect to this case, and they were able to keep that out of the trial, and it never came up. She stated she tried her best to present an alibi defense, and she used a demonstrative calendar in her closing argument to support the defense. She stated she did not want to introduce or allow in the rest of the jail phone call recordings because there were some things in the recordings that she did not want the jury to hear her client say.

Trial Counsel testified she contacted and spoke with Dr. Houk, the victim's doctor who treated her condition, but she did not want to use him as a witness at trial because Dr. Houk did not tell Applicant to apply medicine to his daughter's genitals, which contradicted his defense. She stated she did not want Anne Laver to testify at trial because she was sympathetic to the victims and would bolster their credibility.

Solicitor Ashley Hammack's testimony

Solicitor Ashley Agnew Hammack testified that the interviewer and video interviews of the victim were not admissible in this case because of the victim's age. She stated the State presented evidence which included the testimony of both victims, the photographs of the writings on the wall in which Applicant apologized to his daughters, and the jail phone calls in which Applicant stated he needed to be forgiven by God for the sins he committed. Solicitor Hammack testified her strategy was to show the jury that Applicant took his daughters, the victims, out of school to be their caregiver and he isolated them and molested them both separately and tried to normalize his behavior. She stated she made a plea offer to Applicant through former counsel Andy Anderson for third degree CSC nonviolent for a sentence of up to fifteen years.

Solicitor Hammack testified the medical examination reports of the victims were inadmissible hearsay, but Dr. Donohoe addressed the lack of physical signs of sexual abuse in his testimony at trial. She testified that she would not have objected if Applicant had tried to put into evidence all of the photographs of the writings because it helped the State's case. Regardless, she stated Applicant testified at trial about the substance of the statements he wrote on the wall and explained to the jury why he was apologizing. Solicitor Hammack stated the remaining portions of the jail phone calls that were not played at trial were not relevant to the case and inadmissible. She stated Trial Counsel argued in her closing argument that the victims were not credible, so her statement about the "Academy Award" was in response to Trial Counsel's argument.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart , 474 U.S. 52, 106 S.Ct. 366 (1985).

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INEFFECTIVE ASSISTANCE OF COUNSEL

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

a. *Failure to introduce the May 28, 2013 Forensic Interview Transcripts and DVDs to impeach State's key witnesses.*

Applicant voluntarily abandoned this issue at the evidentiary hearing and failed to present any evidence to support the allegation. Accordingly, this allegation is denied and dismissed with prejudice.

b. *Failure to introduce the June 11, 2013 Forensic Medical Exam Reports to impeach State's witnesses.*

Applicant alleges Trial Counsel was ineffective for failing to introduce the forensic medical examination reports of the victims and call witness Kate Chappell, who conducted the interviews, to show the victims' examinations revealed no physical signs of sexual abuse. This

allegation is meritless, as the report and Kate Chappell's testimony regarding Victim 2 was inadmissible hearsay because she was over the age of twelve, Trial Counsel articulated a valid trial strategy in choosing not to seek to introduce the reports or testimony from Kate Chappell, and none of the evidence would have affected the outcome of the trial.

First, the medical examination report of Victim 2 was inadmissible hearsay under South Carolina law, so Trial Counsel cannot be deficient for failing to introduce the report at trial. S.C. Code Ann. § 17-23-175 provides that the out-of-court statement of a child *under the age of twelve* is admissible when they testify at trial and are subject to cross-examination, the statement is the result of an investigative interview, the statement is preserved on film or tape, and the court finds the circumstances surrounding the making of the statement provide trustworthiness. While those four statutory factors are met here, the victim who gave the statement was fourteen years old at the time the statement was given, and thus because she was over the age of twelve, the statement is not admissible under the statute.

Second, Trial Counsel articulated a valid trial strategy in choosing not to use these reports or call Kate Chappell as a witness, so she cannot be found ineffective. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland, at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312

(1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

The information stated in these reports repeats and confirms the testimony of the victims at trial. Trial Counsel credibly testified that she investigated and spoke with Kate Chappell and was aware that she would testify that there are no physical signs of sexual abuse in 95 percent of cases, and it does not mean that no sexual abuse occurred. Trial Counsel explained that this information would not help her case and she strategically chose to file a motion to keep Chappell's testimony out of the trial. The Court finds this was a valid trial strategy, and Trial Counsel was not deficient for making this strategic decision.

Furthermore, this Court finds Applicant has failed to prove any prejudice from the failure to call Kate Chappell as a witness because her testimony and the examination reports of the victims would have not changed the outcome of the trial. Chappell testified that although she found no physical signs of sexual abuse on either victim, Victim 2 was difficult to examine because of the scar tissue from her surgery, and in 95 percent of cases there are no physical signs of sexual abuse. She testified the absence of findings specific to the allegation of sexual abuse does not contradict the child's statements of abuse or determine whether abuse did or did not occur. This Court finds this testimony and the statements made in the reports would not have changed the jury's verdict, and may in fact have hurt Applicant's case.

Therefore, because Applicant has failed to prove that Trial Counsel was deficient or that her deficiency prejudiced his case, this allegation is denied and dismissed with prejudice.

c. *Failure to introduce DSS supervisor's written statement to impeach State's witnesses.*

Applicant alleges counsel Robert Bank was ineffective when he failed to impeach witness Esther Timmerman on cross-examination with her prior statement. At trial, Timmerman testified that she investigated this case for DSS and took a statement from Applicant at his house, and while doing so, Applicant told her "I'm the father of this, of these girls so I can touch their vagina if I want to. That's pretty much what he said to me." Tr. 240, line 8-10. Counsel Bank then cross-examined Timmerman as follows:

> Q: Okay. And I wanted to discuss very quickly about a comment or part of the statement that you said, and you can correct me if I'm wrong. Did you say that Mr. Rudd said, they're my kids and I can touch if I want to? I can touch them if I want to; is that what you said Mr. Rudd said?
>
> A: I believe what I said, I had written down—what I believe I said was that he said to me that I'm their daddy and I can touch their vagina if I want to.
>
> Q: Right. He didn't say, I'm their father and I can touch it if I need to?
>
> A: No, that's not what he said to me. I wrote down exactly in my statement in the CAPS, in our system, what he said.

Tr. 244, line 15 – Tr. 245, line 3.

At the evidentiary hearing, Applicant introduced Applicant's Exhibit #3, the voluntary statement of Timmerman taken by the Aiken County Sherriff's Office on June 11, 2013. Applicant alleged Bank should have used this actual statement to impeach Timmerman's testimony, because the statement read "Mr. Rudd also stated 'Am their father, I can tough my girls vagina if I have to.'" App. Ex. #3, pg. 2.

This Court finds that, although counsel Bank may have been deficient in his cross-examination of Timmerman by failing to specifically use this statement to impeach her, Applicant has not established prejudice given the totality of the evidence presented at the evidentiary hearing and at the trial. This Court finds, even if Bank had impeached Timmerman

with this statement, the outcome of the trial would not have been different, and thus Applicant cannot prove counsel was ineffective in this regard. Therefore, because Applicant failed to meet both prongs of the Strickland test, this allegation is denied and dismissed with prejudice.

d. Failure to introduce June 13, 2013 Detective's photographs.

Applicant alleges Trial Counsel was ineffective for failing to introduce the full set of photographs of the message he wrote on the wall of his children's bedrooms after the allegations against him came out. Trial Counsel moved at trial to suppress the majority of the photographs, and the State introduced only part of the photographs, showing Applicant's apology he wrote to the victims. The writings included the phrase "I'm sorry" written on their walls, and the State used this as an admission and argued to the jury is that he was apologizing for the sexual abuse. At trial, Applicant testified that he was really apologizing for not spending more time with the victims and for ruining their marker by writing on the wall. He now alleges Trial Counsel should have introduced the entirety of the photographs to corroborate his testimony about the substance of the writings.

Trial Counsel credibly testified at the evidentiary hearing that she strategically chose to keep as many of the photographs out as possible to avoid putting Applicant in a bad light before the jury. She testified that "normal people" do not write messages on the walls, and the jury would not take this evidence well against Applicant. She further stated the substance of the writings contradicted her trial strategy, which she articulated was to show Applicant was the victims' primary caretaker who spent all of his time with the girls and did everything for them, including medical care. She stated that showing an apology for not spending enough time with his daughters would harm their defense strategy. This Court finds Trial Counsel articulated a valid trial strategy in choosing to keep these photographs out of trial. Where counsel articulates a

valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Therefore, this Court finds no deficiency for this allegation.

Furthermore, this Court finds no prejudice in failing to introduce the photographs because Applicant testified at trial about the substance of the writings on the wall. The jury heard his account of the writings and was presented with the argument that he was not apologizing for the sexual abuse but for something else. Applicant has not proven that the introduction of these photographs would have changed the jury's verdict, and this Court finds there is no prejudice. Therefore, because neither prong of the Strickland test is met, this allegation is denied and dismissed with prejudice.

e. Failure to subpoena June 11, 2013 Forensic Medical Exam Reports.

Applicant's allegation that Trial Counsel was ineffective for failing to subpoena the June 11, 2013 forensic medical examination reports is meritless. Trial Counsel credibly testified that she did receive the reports from the solicitor and met with her numerous times about the reports. Solicitor Hammack credibly testified that she turned over the complete discovery materials for the case, including the records, on November 8, 2013. Both testified the reports were under a protective order and Trial Counsel was unable to review the reports with Applicant. Because Trial Counsel did have these reports, there was no reason to subpoena them, and Applicant's allegation that she was ineffective for failing to do so is denied and dismissed with prejudice.

f. Failure to object to jail phone call conversation to preserve for appellate review.

Applicant's allegation that Trial Counsel is ineffective for failing to object to the introduction of the jail phone call conversation or, in the alternative, that Trial Counsel should

have introduced the full recording of the conversation, is meritless. At trial, the State admitted a recording of a phone call Applicant made from jail about how he was asking God's forgiveness for his sins. Applicant testified at trial and explained to the jury that his statements in the conversation did not refer to abusing his daughters, but he was only asking God to forgive him for not being close enough to God or being a good enough Christian. Tr. 345, line 6-20. He explained to the jury his statements had nothing to do with touching his daughters innapropriately. Tr. 345, line 21-24.

Solicitor Hammack testified she introduced this hearsay evidence as an admission, and that the rest of the phone calls were not relevant to the case and were inadmissible hearsay evidence. Trial Counsel credibly testified that she did not want to introduce the full recording of the jail phone call because it contained statements by Applicant that she did not want the jury to hear. This Court finds Trial Counsel articulated a valid trial strategy in choosing not to admit the full recording of the phone call, and her choice was not deficient.

Furthermore, this Court finds there was no prejudice from any failure to object to the admission of the jail phone call because Applicant cured any alleged error by testifying at trial about the phone calls. He explained to the jury that he was not admitting to abusing his daughters, but he was asking God's forgiveness for his sins in general, such as not reading his Bible enough or being close enough to God. Therefore, any possible potential error was cured, and there is no prejudice from not having the admission of the phone call reviewed by an appellate court. Accordingly, Applicant has failed to meet either prong of the Strickland test and this allegation is denied and dismissed with prejudice.

g. *Failure to introduce doctor's medical notes from October 16, 2012 surgery and accurately cross-examine witness Dr. Donohoe.*

This Court finds Trial Counsel was not deficient in her cross-examination of Dr. Donohoe or for failing to introduce medical notes from surgery, and there is no resulting prejudice from any of these actions. The trial transcript shows the jury was fully informed of Victim 2's medical condition and the surgical procedure she underwent. The jury was also presented with testimony that Applicant was required to provide medical care to her by applying medicine to her genitals. Notably, even if the jury did agree that Applicant touched Victim 2 only to treat her medical needs, it is not likely that any further evidence presented about Victim 2's medical condition would not convince the jury that it was necessary for Applicant to touch Victim 1, who did not have a medical condition, so there can be no prejudice regarding any of the charges of abuse against Victim 1. Therefore, this allegation is denied and dismissed with prejudice.

h. *Failure to subpoena Forensic Interviewer Anne Laver.*

This Court finds Applicant has failed to show Trial Counsel was deficient for failing to call Anne Laver to testify about the forensic interviews of the victims. As discussed above, the examination reports were inadmissible hearsay evidence because Victim 2 was over the age of twelve. Similarly to Kate Chappell, Anne Laver's testimony likely would not have been favorable to Applicant as it probably would have confirmed the victim's testimony. Most importantly, Applicant cannot prove prejudice because he did not introduce Laver's testimony at the evidentiary hearing, so this Court cannot speculate as to what her actual testimony would have been. In order to support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence.

Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id. Accordingly, neither prong of the Strickland test is met, and this allegation is denied and dismissed with prejudice.

i. Failure to subpoena Dr. Christopher Houk.

Applicant alleges Trial Counsel was ineffective for failing to call Dr. Houk as a witness, who was Victim 2's primary doctor, to testify about her medical condition and the surgical operation she underwent, which required him to care for her by applying medicine to her genitals. Trial Counsel credibly testified that she spoke with Dr. Houk, and his testimony at trial would be that he did not tell Applicant to apply medicine to Victim 2. This is a direct contradiction to Applicant's defense and trial strategy, and this Court finds Trial Counsel made a valid strategic decision not to call Dr. Houk as a witness.

Furthermore, Dr. Houk did not testify at the evidentiary hearing, so this Court will not speculate as to his testimony, and Applicant cannot prove prejudice. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Therefore, this allegation is denied and dismissed with prejudice.

j. Failing to contemporaneously object to qualification of juror number seventy-nine to preserve the issue for appellate review.

Applicant's allegation that Trial Counsel was ineffective for failing to object to the qualification of a juror who served as a caregiver for a patient with cerebral palsy is meritless. During jury selections, the juror indicated that she could be fair and impartial during the trial. Tr. 66, line 19-20. Trial Counsel credibly testified there was no reason to object to this jury being qualified, as she believed the juror would be sympathetic to Applicant as a medical caregiver, which aligned with his theory of defense. She further testified she did not have any more jury strikes to use by the time this juror was called, so she could not have stricken her even if she

wanted to. This Court finds no deficiency in choosing not to strike this juror. Furthermore, Applicant has failed to prove that this juror changed the jury's verdict in any way. Accordingly, neither prong of the Strickland test is met, and this allegation is denied and dismissed with prejudice.

k. Failure to challenge the trial court's lack of subject matter jurisdiction. / l. Failure to object to indictments.

The Applicant alleges that the indictments in his case were insufficient, and Trial Counsel was ineffective for failing to object. "An indictment is merely a notice document." State v. Baker, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing State v. Gentry, 363 S.C. 93, 102-103, 610 S.E.2d 494, 500 (2005). Whether or not the indictment could be made more definite and certain is irrelevant. Baker, 390 S.C. at 62, 700 S.E.2d at 442. This Court noted the following:

> "Rather, the court must look at "the indictment with a practical eye in view of all the surrounding circumstances. The sufficiency of the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that are intended to be charged.

Id. (citing Gentry, 363 S.C. at 102-103, 610 S.E.2d at 500).

Moreover, "an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." Id. at 63, 700 S.E.2d at 443 (citing State v. Tumbleston, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007.) A court reviewing an indictment for sufficiency should consider the indictment "'on its face,' *and* consider the events at trial." State

v. Reddick, 348 S.C. 631, 636, 560 S.E.2d 441, 443 (Ct. App. 2002). In other words, a court should examine "the totality of the circumstances" to determine if Appellant was cognizant of the crimes for which he was charged. Id.

Applicant was true bill indicted by a proper grand jury before his trial, and was properly put on notice of the charges against him. Applicant has failed to prove there was any objectionable defect in the indictments against him. Circuit courts obviously have jurisdiction over criminal cases where there the defendant has been properly indicted. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). Because the indictments against Applicant were proper, the trial court had proper subject matter jurisdiction over him. Furthermore, Trial Counsel *did* challenge the indictments against Applicant based on the lack of specificity in the time period of the crimes. This Court finds no deficiency or prejudice against him. Therefore, this allegation is denied and dismissed with prejudice.

l. Failure to investigate.

Applicant's allegation that Trial Counsel was ineffective for failing to investigate is meritless. "[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). 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 any ineffectiveness case, a particular decision not to investigate must be directly assessed for

reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

Trial Counsel credibly testified that she fully investigated Applicant's case and spoke with all potential witnesses that he wished for her to interview. She clearly made strategic choices in choosing which witnesses to call. Applicant has not presented any specific evidence that Trial Counsel failed to investigate that would have affected the outcome of his trial. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to object to Solicitor's closing argument statement vouching for witnesses' credibility

Applicant's allegation that Trial Counsel was ineffective for failing to object to the Solicitor's statement in closing argument that the victims "deserve the Academy Award" if they were lying in their testimony is meritless. Although Trial Counsel may have been deficient for failing to object to this statement, this Court finds there is no resulting prejudice given the totality of the evidence against Applicant. Therefore, this allegation is denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Applicant's allegations of ineffective assistance of appellate counsel are meritless. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise

every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Applicant cannot satisfy neither requirement of the Strickland test.

Applicant alleges Appellate Counsel was ineffective for failing to raise this issue of sufficiency of the indictments. This allegation is meritless, as Applicant has failed to prove the indictments were insufficient. The indictments were true billed, signed by the foreman of the grand jury, and sufficiently law out the allegations against Applicant in a way that put him on notice of the charges against him. Appellate Counsel was not deficient in choosing not to raise this issue, and Applicant can show no prejudice from failing to do so.

Applicant next alleges Appellate Counsel was ineffective for failing to challenge the relevancy of the photographs of the writing on the wall introduced at trial. Before the trial, Trial Counsel objected to the introduction of the photographs based on relevancy. The trial court ruled that they were relevant because one possible interpretation of the jury is that Applicant was apologizing to the victims for abusing them. Tr. 48. This Court agrees with the trial court's finding that the photographs are relevant and finds that any challenge to their relevancy would

not have been successful on appeal. Therefore, Appellate Counsel was not deficient for choosing not to raise this issue, and there is no prejudice because the issue would not have been successful on appeal.

Finally, Applicant alleges Appellate Counsel was ineffective for failing to report the State's "misconduct" when they changed the evidence on appeal and submitted a different picture than the original photographs used at trial. The testimony at the evidentiary hearing suggested that the photograph used as an exhibit on appeal had been altered and was a close-up version of the original photograph entered at trial. Even if this were true, Applicant has failed to show that the use of a slightly different version of the same exhibit used at trial changed the outcome of the appeal in any way. The issue before the appellate court was clear, and there is no evidence that the State intentionally altered the evidence. Therefore, Appellate Counsel cannot be deficient for "failing to report" this alleged misconduct, and Applicant can show no prejudice on this allegation. Accordingly, this Court finds Appellate Counsel was not ineffective, and these allegations are denied and dismissed with prejudice.

PROSECUTORIAL MISCONDUCT

Applicant also alleges prosecutorial misconduct. It is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Applicant has not carried his burden of proving actual prosecutorial misconduct. Applicant has failed to prove that any evidence presented by the State in this case was false or perjured. The introduction of the photographs of Applicant's writing as an admission of his guilt was a valid strategy by the State, and it the question of whether it was an admission to the crime was properly left to the jury to decide. Nothing about the State's actions were improper or stemmed from misconduct. Furthermore, Applicant has failed to prove a Brady violation or Rule 5

violation. The testimony and the exhibits introduced at the evidentiary hearing show Solicitor Hammack turned over all discovery material, including the medical examination reports of the two victims, to Trial Counsel well before the trial. Accordingly, because Applicant has failed to prove any misconduct, these allegations are denied and dismissed with prejudice.

SUBJECT MATTER JURISDICTION

Applicant alleges the trial court lacked subject matter jurisdiction based on a defective indictment. This allegation is meritless. First, the South Carolina Supreme Court has held that a challenge to the sufficiency of an indictment must be made before the jury is sworn. "[I]f an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards." State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005) (citing to S.C.Code Ann. § 17–19–90 (2003) ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards.")).

Circuit courts obviously have jurisdiction over criminal cases where there the defendant has been properly indicted. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). Because the indictments against Applicant were proper, the trial court had proper subject matter jurisdiction over him. This allegation is denied and dismissed with prejudice.

VI. CONCLUSION

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

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and

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

AND IT IS SO ORDERED this 2nd day of January, 2018.

J. MARK HAYES
Presiding Judge
Second Judicial Circuit

Aiken, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF AIKEN Dwayne Lee Rudd, Plaintiff(s), -vs- South Carolina State Of, Defendant(s).	)))))))	IN THE COURT OF COMMON PLEAS 2nd JUDICIAL CIRCUIT CASE NO.: 2016CP0201361 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 Dwayne Lee Rudd, 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
December 9, 2016

Signed by William M. Payne

☐ Circuit Judge ☒ Clerk of Court

Plaintiff Attorney:

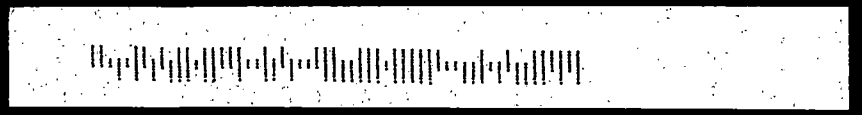
Lance Boozer	Dwayne Lee Rudd
807 Gervais St Ste 2013	BRCI MLT 2039
Columbia SC 29201	4460 Broad River Road
	Columbia SC 29210

FILED 12/19 2016
Lee Godard
CCCP 29201
William M. Payne
12:30

Defendant Attorney:

Julie 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.



THE BOOZER LAW FIRM, LLC
1400 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