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May 30, 2018

**Via US Mail**
Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

***Re:*** ***Notice of Intent to Appeal from Gary Hamilton v. State of SC***
***C.A. No.: 2016-CP-39-1079***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable Letitia H. Verdin's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Pickens County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law

R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM PICKENS COUNTY
Court of Common Pleas

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Letitia H. Verdin, Circuit Court Judge

Case No. 2016-CP-39-1079

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Gary Hamilton,..... Appellant,

v.

State of South Carolina ..... Respondent.

**NOTICE OF APPEAL**

Appellant appeals the Honorable Letitia H. Verdin's Order of Dismissal dismissing Appellant's application for post-conviction relief. On May 15, 2018, the Honorable Letitia H. Verdin signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on May 29, 2018. A copy of the Honorable Letitia H. Verdin's Order of Dismissal is attached.

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Attorney for Appellant

Greenville, South Carolina
May 30, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM PICKENS COUNTY
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Letitia H. Verdin, Circuit Court Judge

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Gary Hamilton,..... Appellant,

v.

State of South Carolina ..... Respondent.

**CERTIFICATE OF SERVICE**

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this May 30, 2018, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

**DeShawn Mitchell, Esq.**
**Assistant Attorney General**
**PO Box 11549**
**Columbia, SC 29211**

**Pickens County Clerk's Office**
**Pickens County Courthouse**
**214 East Main Street**
**Pickens, SC 29671**

**Gary Hamilton #00360860**
**386 Redemption Way**
**McCormick SC 29899**

**SC Commission of Indigent Defense**
**Division of Appellate Defense**
**PO Box 11433**
**Columbia, SC 29211-1433**

Denise Tanner LaBeck
Denise Tanner LaBeck

May 30, 2018

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| STATE OF SOUTH CAROLINA<br>COUNTY OF PICKENS | ) | IN THE COURT OF COMMON PLEAS<br>THIRTEENTH JUDICIAL CIRCUIT |
| Gary Hamilton , #360860<br>Applicant,<br><br>v.<br><br>State of South Carolina,<br>Respondent. | ) | 2016-CP-39-1079<br><br>**ORDER OF DISMISSAL** |



This matter comes before the Court by way of an application for post-conviction relief filed on September 16, 2016 by Gary Hamilton (Applicant). Respondent made its Return on or about May 26, 2017. An evidentiary hearing into the matter was convened on October 25, 2017, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by R. Mills Ariail, Jr, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's Trial Counsel Teal Johnson, Esquire also testified. This Court had before it a copy of the records of the Pickens County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

## PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Pickens County Clerk of Court's orders of commitment. Applicant was indicted by the

September 2012 term of the Pickens County Grand Jury for one count of criminal sexual conduct with a minor first degree (2012-GS-39-1527) and the July 2014 term of the Pickens County Grand Jury for one count of lewd act upon a minor (2014-GS-39-1485). Applicant was represented by Teal Johnson, Esquire. On Jury 28, 2014, Applicant proceeded to a trial before the Honorable G. Edward Welmaker and a jury. The jury found Applicant guilty. Judge Welmaker sentenced Applicant to thirty-two years imprisonment for criminal sexual conduct with a minor first degree pursuant to § 16-3-655(A)(1), and fifteen years imprisonment for lewd act upon a minor pursuant to § 16-15-140, to be served concurrently.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals affirmed Applicant's convictions in an unpublished opinion filed July 27, 2016. State v. Hamilton, Op. No. 2016-UP-379 (S.C. Ct. App. 2016). The Remittitur was returned on August 12, 2016.

**FACTUAL HISTORY**

Victim was six years old at the time of trial. She was three years old when Hamilton sexually assaulted her. Victim testified that Hamilton would take her to the store and to church. Victim testified about a particular occasion Hamilton took her to church. While parked at the church, Hamilton pulled Victim's tights and panties halfway down. Hamilton put his finger in her "butt" and told her that if she kept moving, it would hurt worse.[1] Victim testified Hamilton pulled his pants down and "screamed" while he pulled his "weiner." Tr. pp. 190-192. Afterwards, Hamilton and Victim went to the church service. Victim said she felt sad and missed her mom during the service. Tr. p. 193. Victim later told her mother about the abuse while Victim was taking a bath. Tr. pp. 193-194. Victim explained she disclosed the abuse to her mother because "if I choose the truth, I know that it would be safer and she would protect

[1] Victim explained on cross-examination that she never told anyone before about Hamilton's advice not to move. She testified, "I've never said that in my life." Tr. p. 198, lines 9-16.

me." Tr. p. 194, lines 7-8. Victim testified on redirect that no one told her what to say on the witness stand. Tr. p. 201.

Victim's mother (Mother) testified she was friends with Hamilton's daughter, which was how she met Hamilton. Mother admitted Hamilton's family helped her out while she was going through difficult times. For a couple of weeks, Mother did not have a place for her daughters to stay, and Hamilton let Victim and her sister stay at his house. Mother confirmed that Hamilton took Victim to church. She described Hamilton as a grandfather figure to Victim. Mother was able to secure a new home and about a month after they were in the new home, Mother was giving Victim a bath. Victim looked depressed and after Mother inquired, Victim disclosed she was sexually assaulted at church when no one else was around. Mother testified that at first, she did not want to believe Victim, but Victim later restated that she was abused, and Mother decided to call the Pickens County Sheriff's Office. Tr. pp. 209-213.

Mother testified that before August 2011, Victim "was so happy." Tr. p. 213, lines 16-22. Ever since then, Victim has struggled. She has night terrors and wets the bed. She has received counseling. Tr. pp. 213-214. Mother described the ordeal as "literally watching the innocence of my child be stripped away. And the constant fear and worry of somebody coming to attack her or get her." Tr. p. 213, lines 19-22.

Hamilton's counsel asked Mother if she had bragged about getting Hamilton in trouble. Mother explained that she talked about the situation at work and explained as follows:

> [B]ecause I had to take time off for bond hearings. I had to take time off for different things. You know, I wouldn't say I bragged about it. But because it's not really something to brag about. It's caused a lot of pain, a lot of heartache in my family.

Tr. p. 226, lines 4-8.

Mary Jane Bryant is friends with Mother. She testified that in October 2011, Victim

disclosed that she was abused in a church parking lot. When Victim told Bryant, Mother walked out of the room. Bryant testified that Victim was sad when she disclosed the abuse. Tr. pp. 229-231.

Investigator Michele Hendrix from the Anderson County Sheriff's Office testified she received the case from the Pickens County Sheriff's Office in November 2011. She interviewed Hamilton on April 5, 2012. Hamilton appeared to have no problem understanding what was going on. Investigator Hendrix was unaware that Hamilton had a "special education." Tr. pp. 235-236. Hamilton denied the allegations. He admitted he took Victim to church but claimed his wife always accompanied them. Tr. pp. 234-237.

Investigator James Collins accompanied Investigator Hendrix to the first interview on April 5, 2012. Investigator Collins then met with Hamilton on April 19, 2012. Investigator Collins gave Hamilton his Miranda warnings while Hamilton's daughter was present. Tr. pp. 244-247. The first thing Hamilton said was he barely touched Vicitm. He claimed his finger barely went inside Victim's vagina. Tr. p. 249.

Hamilton tried out several explanations. His first explanation was that he tried to pick up Victim from the car seat by her waist. Hamilton explained his finger might have accidently touched Victim's vagina. Tr. p. 249, lines 11-15. Naturally, this explanation made little sense to Investigator Collins.[2] Investigator Collins testified he told Hamilton he "didn't quite understand how [Hamilton] picked her up by the waist and . . . that she had on a dress, he picked her up by the waist, how his hand accidently went under her dress, moved her panties out of the way and his finger went inside of her at that point." Tr. p. 249, lines 15-23.

Instead of offering clarification, Hamilton made up a second story. Hamilton claimed he

[2] The prosecutor noted during closing argument that you would not pick up a child from a car seat by the waist. Instead the child would be picked up from underneath their armpits. Tr. p. 395, lines 20-25.

was picking Victim up by the waist, she almost fell, and when Hamilton went to catch her, that's when his finger might have accidently touched her vagina. Tr. p. 249, line 23 – p. 250, line 2. Investigator Collins found the explanation odd because Hamilton's hands were injured and he was "very immobile;" Hamilton was using a cane. Investigator Collins questioned whether Hamilton would have been able to pick up Victim by the waist. Further, Investigator Collins understood that Victim was able to walk, so it would seem unnecessary for Hamilton to pick Victim up. Tr. p. 250.

Rather than provide any clarification in response to Investigator Collins' valid observations, Hamilton provided a third story. Now Hamilton claimed Victim was sitting in the backseat and soiled herself. Hamilton surmised he must have touched her vagina while cleaning her. He first said he did not have anything on his hand. Then Hamilton said he used a wipe, and his finger might have accidently touched her vagina at that point. Tr. p. 250, line 21 – p. 251, line 4.

Noting this story was much different from the first two stories, Investigator Collins challenged Hamilton on these inconsistencies. Hamilton became frustrated so he resorted to telling the truth: Hamilton yelled "I did it." Then Hamilton provided his confession. Tr. p. 251. Investigator Collins testified that Hamilton's "special education" did not affect his ability to give a statement. Tr. p. 253.

In his statement, Hamilton explained he took Victim to church after dropping off his son at another church. No one else was there yet. While waiting, Hamilton went to the back of the car where Victim was sitting and rubbed his hand between Victim's legs and rubbed her vagina underneath her panties. Hamilton claimed to rub Victim's vagina but he did not put his finger inside Victim. Hamilton admitted rubbing Victim's vagina for a few minutes. Hamilton claimed

he stopped of his own accord and waited on the steps of the church with Victim for another thirty to forty minutes before somebody else arrived. Tr. pp. 255. Investigator Collins noted that notwithstanding Hamilton's typed statement, Hamilton orally admitted to inserting his finger in Victim's vagina. Tr. pp. 255-256. Investigator Collins estimated the interview lasted only thirty minutes. Tr. p. 261.

Julie Anne Hamilton is Hamilton's daughter, and she testified for the State. She testified she was friends with Mother until the assault. It was Mother's choice to end the friendship, but Julie understood why Mother ended it and she did not blame Mother. Julie lived with her parents. She verified that Victim stayed with them. Julie testified that her mother, Hamilton's wife, had infections that kept her from going to church. Julie and her mother went with Hamilton to the police station when he was interviewed by Investigator Collins. Julie was present when Hamilton was read his rights, and he did not have trouble understanding them. On the way home from the station, Hamilton handed Julie the confession and said "please don't hate me." Tr. pp. 267-272.

The case was transferred to the Central Police Department because the church was in Central which is not in Anderson County. Police Chief Khristy Justice was an investigator at the time she interviewed Hamilton. She went through Hamilton's rights with Hamilton. She testified she did not see any competency issues with Hamilton. At first, Hamilton claimed that he only accidently touched Victim's vagina. But then he admitted he rubbed Victim's vagina for two minutes. Hamilton demonstrated to Chief Justice how he rubbed Victim. Hamilton admitted he knew what he did was wrong. Tr. pp. 281-288. Hamilton claimed his "dick don't even work no more" when Chief Justice asked him if he masturbated in front of Victim. Tr. p. 298, lines 22-24.

Hamilton dictated another statement to Chief Justice consistent with the statement he provided Investigator Collins. However, Hamilton further claimed in this statement the following: "I don't know why I did this to [Victim], but it wasn't for sexual reasons. My dick don't even get hard. I don't know why." Tr. p. 301, lines 19-21. Hamilton was calm and he did not seem intimidated. Tr. p. 302.

The State's case against Hamilton was strong, the defense was weak. Desperation apparently prompted Hamilton's counsel to attack Chief Justice's supposed lack of investigation. Hamilton's attorney asked Chief Justice the following question: "You never confirmed that he was ever there?" and Chief Justice replied: "Well that came out of your client's mouth that he was there." Tr. p. 309, lines 6-8.

Frederick Durham was an officer at the time of the statement, and he was present when Chief Justice interviewed Hamilton. Durham confirmed that Chief Justice provided warnings to Hamilton. Hamilton did not appear to have any trouble understanding what was going on, and he was not forced to give his statement to Chief Justice. When Chief Justice read Hamilton his statement back to him, Hamilton had no objections. Tr. pp. 316-318.

Brenda Hamilton, Hamilton's wife, testified Hamilton was disabled from a fall while working at a Duke Power dam. Brenda stopped going to church due to a debilitating staph infection. Brenda confirmed that Hamilton would take Victim to church alone. Brenda also testified she was unaware of any medical diagnosis that prevented Hamilton from having an erection. Tr. p. 320-323; p. 327.

Shauna Galloway-Williams was the State's penultimate witness. She was amply qualified as Hamilton's trial attorney surely recognized when she stated she did not object to Galloway-Williams' qualifications, explaining to the trial court: "No, I don't have any issue

about her qualifications; just what her testimony would be, Your Honor." Tr. p. 335, lines 18-20. Hamilton's attorney declined voir dire concerning Galloway-Williams' qualifications.

Galloway-Williams is the Executive Director of the Julie Valentine Center, a child abuse and sexual assault recovery center serving Greenville and Pickens Counties. The Center provides services for children and families impacted by child abuse and sexual assault. The Center also provides education and prevention services. Tr. pp. 348-349.

Galloway-Williams earned a bachelor's degree in psychology and a master's degree in counseling. She is a licensed professional counselor in South Carolina. She has worked in the field of mental health for seventeen years and has worked with children and families impacted by abuse and neglect for thirteen years. Tr. p. 349.

Galloway-Williams was the immediate past board president of the South Carolina Network of Children's Advocacy Centers. She is also a former board member for the South Carolina Professional Society on the Abuse of Children. She is Co-Chair of the Silent Tears Task Force. Tr. p. 350.

Galloway-Williams received over 140 hours of skills-based training directly related to working with children who may have been abused or neglected. Galloway-Williams is an adjunct faculty member of the Child Advocacy Studies Program at University of South Carolina Upstate. Galloway-Williams conducts training related to recognizing and responding to child sexual abuse. Tr. pp. 350-351.

Galloway-Williams testified she never met Victim or observed Victim provide any statement. Galloway-Williams did not know anything about Hamilton. Tr. p. 352, line 24 – p. 353, line 7.

Galloway-Williams discussed grooming: She discussed how a perpetrator develops a

trusting relationship with a child and the child's family by giving special attention to the child and the child's family. A perpetrator may also test the waters with the child by innocuous touching to see how the child reacts. Tr. p. 353.

Galloway-Williams noted "most children are abused by someone that's known, loved and trusted to the child and to the family." Tr. p. 353, lines 3-4. Galloway-Williams explained, "And that a lot of times is why children have a hard time telling someone or letting someone know that this has happened to them." Tr. p. 354, lines 7-8.

Galloway-Williams explained how a child's disclosure is affected if the perpetrator is someone the child knows, explaining the following:

> That's really one of the main reasons why children don't tell, is because they know, love and trust the person that has done this to them. A lot of times they fear what's going to happen to them or to the person that's done this. A lot of times children have a very -- have a lot of really good characteristics so there's a lot of good things about the relationship with the person in addition to the abuse. This may be the one person that gives them the most attention, that they like to play with. This may be the one person that they feel closest to. This may be the one person that the other family members are closest to. Knowing those things and experiencing those things makes it really hard for children to tell that something's happened.

Tr. p. 354, line 13 – p. 355, line 1. Galloway-Williams further explained:

> In most cases that we see at the Julie Valentine Center and in my experience and in what the research tells us, most children don't tell right away. And in fact, many adults live into their adult lives without having ever told anyone that this has happened to them. So from my experience and training and education, it's very common that children don't disclose or that they delay their disclosure.

Tr. p. 355, lines 4-11.

Galloway-Williams discussed factors affecting delayed disclosure:

> [O]ne of the strongest factors or one of the biggest influences is

> that relationship that the child has with the perpetrator; it being a loving, trusting relationship with them or a relationship with the family. Children may fear the consequences of what's going to happen to them or the perpetrator if they tell. They may have been threatened that something's going to happen. Children may know, without anyone even telling them, they may know that there are things that will happen if they tell. That they or something's going to have to move. That someone's not going to be able to take care of them or the household. Children are very aware of some of the consequences that may happen if they tell.

Tr. p. 355, line 19 – p. 356, line 6. Galloway-Williams explained the difference between partial and full disclosure, noting that "disclosure is a process." Tr. p. 356, lines 9 – 14. Galloway-Williams advised the jury, "Children don't always know exactly what we want to know." Tr. p. 356, lines 21-22.

Galloway-Williams explained children "may not have the same knowledge and understanding of sexuality and how to articulate what it is that's happened. So the way that children communicate is different than the way that adults communicate." Tr. p. 357, lines 15-19.

Galloway-Williams discussed factors affecting the risk to a child of sexual abuse:

> What we know is that there are certain things that put children and their families at higher risk for abuse. You know, one of the highest risk factors is substance abuse by a care giver. That puts a child and a family at risk for abuse and makes them more vulnerable. Single parent households make children more vulnerable to abuse. And again, none of these things are to indicate that parents . . . are at fault for this happening. These are just risk factors that often offenders will take advantage of. . . . Just by virtue of being much younger, children are more vulnerable. The less verbal a child is, the less likely they are to be able to talk or tell that something's happened. And often if children have some sort of disability, if children have had behavior problems, if they've been known to get in trouble, those kind of things set children up at higher risk and can often make them targets for offenders.

Tr. p. 357, line 23 – p. 358, line 16.

On cross-examination, Galloway-Williams explained: "Just because a child delays reporting or delays a disclosure, that doesn't really indicate that it didn't happen. Because what we know is that most times children delay disclosure and don't tell right away." Tr. p. 359, lines 2-5. She explained: "it's not really my job as an interviewer or as a therapist or in any of those roles to really determine whether the child has told the truth or not. That's not really my job." Tr. p. 359, lines 16-20. Galloway-Williams explained that she was speaking in general terms but that her testimony was "based on research and training and experience." Tr. p. 360, lines 3-4.

Dr. Mary Fran Croswell examined Victim and the exam was normal. This was consistent with 85% of the cases of reported child abuse. Victim told Dr. Croswell she was abused on the way to church. Tr. pp. 369-371.

The record fails to disclose any existing animus between Mother and Hamilton, or Victim and Hamilton.

## ALLEGATIONS

1. Ineffective Assistance of Trial Counsel
   a. "Counsel failed to investigate the facts of the case."
   b. "Counsel failed to challenge testimony given by witness Galloway-Williams"
2. Ineffective Assistance of Appellate Counsel
   a. "Counsel failed to file Notice of Intent to Appeal the Court of Appeals Decision."
3. Judicial Misconduct while behind the Bench
   a. "Honorable Judge Welmaker utilized bias and personal emotions during the course of Trial."

## SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

### Applicant's Testimony

Applicant testified he had a hard time remembering what happened in this case. He testified he did not understand the process when he was charged. He testified he was represented by Teal Johnson. Applicant testified he did not remember reviewing discovery in his case but he

remembered telling Trial Counsel he did not commit the crimes. He testified the first time he found out about these allegations was from a friend who worked at Waffle House. Applicant testified Susan B. Hackett, Esquire represented him on appeal but that he wanted to drop the allegations regarding Ms. Hackett and only focus on the allegations regarding Trial Counsel. He testified he did not think Trial Counsel investigated the facts of his case. He testified he could not remember half of the things from his case. Applicant testified he met with Trial Counsel at her office and she told him he could get up to twenty five years in prison. He testified Trial Counsel did not discuss potential witnesses with him. Applicant testified he was evaluated to see if he was competent to stand trial and he was found competent. However, he testified he could not read or write. Applicant testified Trial Counsel failed to challenge Shauna Galloway-Williams's testimony. He testified there was no DNA or medical evidence only the minor's statement. Applicant testified Trial Counsel did not discuss with him that he could be convicted based solely on victim's statement.

On cross-examination, Applicant testified he told law enforcement he did not do it and then they wrote it down but that he did not remember confessing to the crime. He testified he met with Trial Counsel about four to six times before trial. He testified he did not remember discussing evidence with Trial Counsel and the only thing he remember from their conversations was that he could get twenty-five years in jail. Applicant testified he was not on any types of medications other than ones for his diabetes. He testified there were no witnesses because he did not do anything.

Trial Counsel's Testimony

Trial Counsel testified Applicant was charged with a lewd act and first degree criminal sexual conduct with a minor. She testified the lewd act charge was sprung on Applicant at the

last minute and she objected to the charge. Trial Counsel testified she met with Applicant thirteen times while he was incarcerated and six times while he was out on bond. She testified Applicant had given a statement to law enforcement. Trial Counsel testified there was a plea offer of twelve years but Applicant rejected it because he was firm in his innocence. Trial Counsel testified based on her interactions with Applicant she immediately had him evaluated and also because he could not read or write and had been in special education classes. She testified Applicant was found competent to stand trial. Trial Counsel testified she regretted not having Applicant privately evaluated because she will "go to her grave" thinking Applicant was not competent to stand trial. She testified Applicant would just repeatedly tell her he did not touch the victim. She testified she tried to elicit facts from Applicant but he was not able to produce much. Trial Counsel testified she made a huge deal in front of the judge and jury that the interrogation of Applicant was not videotaped. She testified she called Applicant during the Jackson v. Denno[3] hearing. She testified she could not argue Applicant was not competent because she did not have that finding. Trial Counsel testified she made a global objection to the forensic interview with Shauna Galloway-Williams. She testified she did not remember if she made an objection based on State v. Chavis but she did not think that Mrs. Galloway-Williams' testimony would have been excluded in its entirety. Trial Counsel testified as part of her investigation she tried to pursue witnesses and visited the church where the crime took place. She testified on July 16, 2014 she talked to the pastor of the church but that the pastor said Applicant brought the victim to church alone and would arrive early. She testified she also talked to Applicant's wife and daughter about where the allegations took place. She testified Applicant's whole family was against him other than his brother.

On cross-examination, Trial Counsel testified she had practiced law for eight years. She

3 Jackson v. Denno 378 U.S 368, 84 S.Ct. 1774 (1964)

testified the allegations where that Applicant had touched a two year old girl in a parking lot at Central Church of God. Trial Counsel testified she met with Applicant thirteen times while he was in jail and six times at her office. She testified Applicant could "parrot" things back but she did not think Applicant understood. Trial Counsel testified Applicant's evaluation came back that he was competent to stand trial and that he did not have any intellectual disabilities. She testified they had a Jackson v. Denno concerning Applicant's statements to law enforcement. She testified she cross-examined Shauna Galloway-Williams. Trial Counsel testified her theory of the case was this victim was two years old when she made these allegations and she could not remember one day from the next and made it up. She testified Applicant was not physically able to commit the crime as he was obese and on a cane or if Applicant did touch her it was in an effort to clean her up or change her. Trial Counsel testified the victim was six years old at the time of trial and was more credible then.

**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 had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

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 v. Washington, 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.

**Ineffective Assistance of Counsel**

*Failure to Investigate*

Applicant alleges Trial Counsel was ineffective in failing to investigate facts and adequately prepare for trial. Applicant failed to present any evidence in support of this allegation. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue

had counsel more fully prepared for the trial."). 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)). Applicant has failed to show what beneficial information could have been discovered had Counsel done more investigation. Even so, Counsel testified credibly that she reviewed all of the discovery with Applicant and met with Applicant almost twenty times. Trial Counsel testified as part of her investigation she tried to pursue witnesses and visited the church where the crime took place. She testified on July 16, 2014 she talked to the pastor of the church but that the pastor said Applicant brought the victim to church alone and would arrive early. She testified she also talked to Applicant's wife and daughter about where the allegations took place. She testified Applicant's whole family was against him other than his brother. This Court finds Trial Counsel's investigation was beyond reasonable as was her preparation. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in her representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

*Failure to Challenge Testimony*

Applicant alleges Trial Counsel was ineffective in failing to challenge testimony given by expert witness Shauna Galloway-Williams. This Court finds Applicant's allegation that Trial

Counsel was ineffective for failing to properly cross-examine or challenge Ms. Galloway-Williams' testimony meritless. This Court finds Trial Counsel's representation was well within reasonable professional norms.

Here, Trial Counsel's cross-examination and argument that she advanced at trial fully set forth enough information so that the jury could properly assess the witness' credibility and counsel could demonstrate the supposed lack of it. See, e.g., Fugate v. Head, 261 F.3d 1206, 1219 (11th Cir. 2001) ("The decision as to whether to cross-examine a witness is a tactical one well within the discretion of a defense attorney.... Absent a showing of a single specific instance where cross-examination arguably could have affected the outcome of either the guilt or sentencing phase of the trial, a[n] [applicant] is unable to show prejudice necessary to satisfy the second prong of *Strickland*") (citations and internal quotation marks omitted); Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam ) ("the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish") (emphasis in original); Mills v. Singletary, 161 F.3d 1273, 1288 (11th Cir. 1998) (defendant's Sixth Amendment right to confront witnesses is satisfied where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable").

Trial Counsel thoroughly cross-examined Ms. Galloway-Williams. This Court finds that Trial Counsel's strategic decisions of how to cross-examine witnesses were proper and reasonable. Furthermore, Applicant has failed to show exactly what information should have been elicited if the witness was properly cross-examined or challenged. "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the

applicant's burden of showing prejudice." Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). This Court cannot speculate as to what testimony could have been elicited upon a different strategy of cross-examination, and thus Applicant cannot meet his burden of proving prejudice.

Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

**Applicant's Competency to Stand Trial**

While not raised in his application, during the evidentiary hearing issues related to Applicant's competency were brought up. Out of an abundance of caution, this Court addresses this issue. Trial Counsel testified based on her interactions with Applicant she immediately had him evaluated and also because he could not read or write and had been in special education classes. She testified Applicant was found competent to stand trial. This Court finds based on a review of the record that Applicant was competent to stand trial. This Court finds Applicant was not evaluated as part of this PCR proceeding nor did he introduce any records to establish that he currently or previously lacked sufficient competency to stand trial. Therefore, this Court dismisses this allegation with prejudice.

**Ineffective Assistance of Appellate Counsel**

Applicant alleged Appellate Counsel was ineffective for failing to file a Notice of Intent

to Appeal the Court of Appeals Decision. Applicant testified Susan B. Hackett, Esquire, of the Office of Indigent Defense, Division of Appellate Defense represented him on appeal. Applicant testified he wanted to abandon this claim. This Court finds this claim was expressly waived by Applicant. Therefore, this allegation is denied and dismissed with prejudice.

**Judicial Misconduct**

Applicant alleged judicial misconduct by Judge Welmaker in that he utilized bias and personal emotions during the course of his trial. Applicant did not present any evidence on this allegation at the PCR hearing. Accordingly, this Court finds Applicant failed to prove there was any evidence of this allegation. Accordingly, this Court denies and dismisses this allegation.

**CONCLUSION**

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

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. Reefer to Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

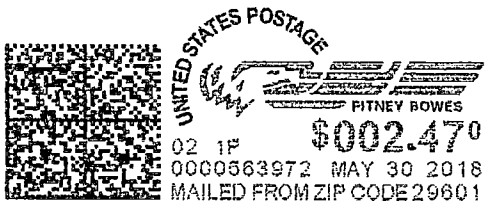
1. The application for Post-Conviction Relief is denied and dismissed with prejudice;

2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

**AND IT IS SO ORDERED** this 15 day of May, 2018.

LETITIA H. VERDIN
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina




[redacted]

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