LAW OFFICE OF

TRICIA A. BLANCHETTE

RECEIVED

AUG 15 2018

S.C. SUPREME COURT

August 5, 2018
VIA HAND DELIVERY

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

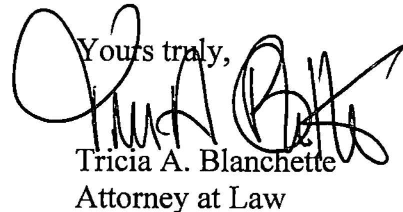
RE: James B. Irby v. State

Dear Sir:

For filing, attached please find a Notice of Appeal, Certificate of Service and copies of the Order from the underlying PCR Application. I have not been retained to assist Mr. Irby with this Appeal. By copy of this letter, I am sending this Notice to Jeremy A. Thompson, Esquire, as it is my understanding he has been retained.

Thank you for your assistance with this matter. Please contact me if any additional information is needed.

Yours truly,



Tricia A. Blanchette
Attorney at Law

cc: Spartanburg County Clerk of Court (without Orders)
Jordan Cox, Assistant Attorney General
Jeremy A. Thompson, Esquire
James B. Irby

PO Box 2147 • Leesville, SC 29070

803.908.3266 • blanchettelaw@gmail.com

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
AUG 15 2018
S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2015-CP-42-00996

James B. Irby, Petitioner,

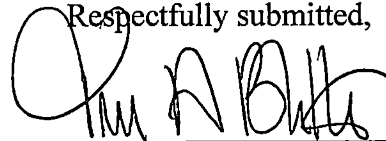
vs.

State of South Carolina Respondent.

NOTICE OF APPEAL

James B. Irby, Petitioner, appeals the Order of Dismissal issued by the Honorable G. Thomas Cooper, Jr. on May 31, 2018, which was filed on June 4, 2018. Petitioner also appeals the Order Denying Applicant's Motion to Alter or Amend the Judgment issued by the Honorable G. Thomas Cooper, Jr. on June 20, 2018, which was filed on June 25, 2018. Petitioner, through counsel, received notice of the entry of the Order by email from the Office of the Attorney General on July 16, 2018.

Respectfully submitted,



Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

August 14, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
AUG 15 2018
S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2015-CP-42-00996

James B. Irby, Petitioner,

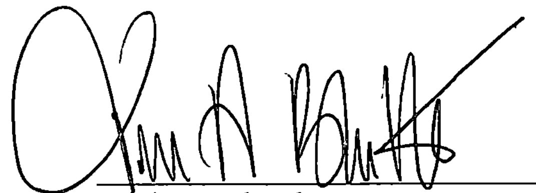
vs.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney at Law, hereby certify that served this 14th day of August 2018 a Notice of Appeal to Jordan Cox, of the Attorney General's Office, by placing it in the United States mail addressed as follows:

Office of the Attorney General
Att: Jordan Cox, Assistant Attorney General
PO Box 11549
Columbia, SC 29211



Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

August 14 2018

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

RECEIVED
AUG 15 2018
S.C. SUPREME COURT

James Benjamin Irby, #352507,

Applicant,

v.

State of South Carolina,

Respondent.

2015-CP-42-0996

ORDER OF DISMISSAL WITH PREJUDICE

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN -4 AM 11:55
M. HOPE BLACKLEY

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by James Benjamin Irby (Applicant) on March 25, 2015. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on November 16-17, 2017 at the Spartanburg County Courthouse. Applicant was present and represented by Tricia Blanchette, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Christopher Brough, Esquire, (Counsel), Bernadette Smith, Gaye Allen-Cook, Professor Richard Leo (false confession expert), and Captain Michael Prodan (of SLED) also testified. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the direct appeal records, the PCR application, Respondent's return, Applicant's supplemental application all exhibits admitted during the hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at

the 2008 term of the Spartanburg County Grand Jury for criminal sexual conduct with a minor, second degree (2008-GS-42-1536). Christopher Brough, Esquire, represented Applicant. Assistant Solicitors Susan Reese and Jennifer Jordan represented the State.

On January 29, 2011, an extensive Jackson v. Denno hearing was held before the Honorable J. Derham Cole on Applicant's Motion to Suppress multiple statements made to law enforcement. After the hearing, Judge Cole found Applicant's statements were voluntarily given and denied Applicant's Motion to Suppress. Applicant then proceeded to trial on November 18-19, 2012, before Judge Cole and a jury. The jury found Applicant guilty as indicted. Judge Cole sentenced Applicant to imprisonment for a term of 18 years.

Applicant filed a timely Notice of Appeal. Robert M. Dudek, Esquire, represented Applicant on appeal. The issue briefed and argued on appeal was the knowing and voluntary nature of Applicant's statements to law enforcement. On January 14, 2015, the South Carolina Court of Appeals upheld Judge Cole's denial of the Motion to Suppress and affirmed Applicant's conviction. State v. Irby, Op. No. 2015-UP-021 (S.C. Ct. App. filed January 14, 2015). The remittitur was returned on March 03, 2015.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
20[illegible] JUN -4 AM 11:55
HOPE BLACKLEY

In his *pro se* application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel, in that;
   a. Counsel failed to investigate, in that:
      i. Counsel failed to "interview witnesses and victim" prior to trial
      ii. Counsel "failed to go over or even consider possible defenses with petitioner"
      iii. Counsel failed "to prepare for case and trial by not investigating evidence"
      iv. Counsel failed to investigate the background of the witnesses and victim
      v. Counsel "failed to obtain expert witnesses"

        vi. Counsel "failed to contact, interview and subpoena potential witnesses"
        vii. Counsel failed to present character witnesses and evidence of Applicant's good character
    b. Counsel abandoned trial strategy
    c. Counsel "failed to motion [sic] for in camera hearing"
    d. Counsel "failed to object to hearsay and perjury testimony"
    e. Counsel failed to impeach witnesses and victim
    f. Counsel "failed to object to prosecutor's unconstitutional, burden shifting, and prejudicial comments and motion for mistrial"
    g. Counsel "failed to prepare and present mitigation [sic] evidence at trial"
    h. Counsel "failed to disclose and go over discovery material with" Applicant
    i. Counsel failed to objected to irrelevant testimony and evidence
    j. Counsel failed to object to the bolstering of witnesses and victim's testimony
    k. Counsel failed at *Jackson v. Denno* hearing to submit relevant evidence to the judge
    l. Counsel failed to file a motion to reconsider Applicant's sentence.
2. "Involuntary Assistance of Appeal Counsel," in that:
    a. Counsel "failed to present all available relevant and admissible mitigating evidence in brief"
    b. Counsel "failed to brief all coercion issues on DVD and their time frames of events"
    c. Counsel "failed to have records saved after he was informed testimony was missing"
    d. Counsel "failed to brief direct verdict of acquittal issue which was preserved for Applicant review"
3. "Prosecutor Misconduct," in that:
    a. Prosecutor vouched for the credibility of government witnesses and victims;
    b. Prosecutor presented and failed to correct perjured testimony of victims and witnesses;
    c. "Prosecutor making misstatements of law and facts";
    d. "Prosecutor made unfair improper prejudicial biased and burden-shifting statements at trial;
4. Rule 5/Brady Violation
    a. "Prosecutor violated Rule 5/Brady Motion for Discovery"

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN -4 AM 11:55
M. HOPE BLACKLEY

On or about October 16, 2017, Applicant, through counsel, filed a supplemental application[1] alleging Ineffective Assistance of Counsel, in that:

1. Trial counsel rendered ineffective assistance regarding the admission and defense of Applicant's interrogation and statements, including but limited to:
    a. Failure to properly utilize Dr. Richard Leo (or an expert in the area of false confessions) in trial preparation and as an expert witness at the suppression and trial stages. See Reeves v. State. 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).
    b. Failure to properly prepare Applicant to testify at the suppression and trial stages regarding his interrogation and statements.
    c. Failure to properly utilize the video evidence at the suppression and trial stages.
2. Trial counsel rendered ineffective assistance for failing to object to the qualification of Lynn McMillian as an expert and failing to object to her testimony thereafter. Trial Transcript p. 101.
3. Trial counsel rendered ineffective for failing to further cross-examine Dr. Nancy Henderson.
4. Trial counsel rendered ineffective assistance for failing to further cross-examine the victim.
5. Trial counsel rendered ineffective assistance in his handling of the decision to utilize Lillian Collins as a witness at trial and his handling of her trial testimony, to include but not limited to the following:
    a. Failing to properly prepare for and handle impeachment of Ms. Collins.
    b. Failing to advise Applicant that Ms. Collins testimony may open the door to otherwise inadmissible testimony from the State's witness regarding the victim's disclosure(s).
    c. Opening the door to otherwise inadmissible testimony from the State's witness regarding the victim's disclosure(s). Trial Transcript pp. 185-191.
6. Trial counsel rendered ineffective assistance for failing to utilize an expert in the area of sexual abuse to assist in trial preparation, assist in trial and potentially be utilized as an expert at trial.
7. Trial counsel rendered ineffective assistance when he failed to utilize available evidence and witnesses, to include Bernadette Smith, for the defense.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN -4 AM 11:55
M. HOPE BLACKLEY

[1] Applicant was initially appointed J. Brandt Rucker, Esquire, as PCR counsel. Subsequently, Applicant retained Mrs. Blanchette. At the start of the hearing, Applicant informed this Court he would only be proceeding on the amended allegations as filed by Mrs. Blanchette. Therefore, this Court considers the *pro se* allegations withdrawn and not part of this action.

8. Pursuant to Rule 1 5(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

STATEMENT OF FACTS

Jackson v. Denno Hearing

On January 29, 2011, the trial judge held a Jackson v. Denno hearing. The following testimony and evidence was presented:

Testimony of Brenda Azzara

On November 14, 2007, Brenda Azzara, an employee with the Department of Social Services, met with Applicant. According to Azzara, Detective Tonya Aldridge and Applicant's wife were both present during the interview. Applicant was not under arrest. Detective Aldridge read Applicant his rights under Miranda.[2] Applicant gave a written statement denying Victim's allegations of sexual abuse. Applicant claimed Victim got mad at him when he told her that she could not go on a field trip unless she cleaned her room, and the next thing he knew the police were at his home.

Testimony of Detective Aldridge

On November 30, 2007, Detective Aldridge ("Aldridge") met with Applicant at the detention center. Applicant was at the detention center for a family court issue. Aldridge read Applicant his rights under Miranda. According to Aldridge, Applicant agreed to take a polygraph examination, which was eventually scheduled for December 5, 2007. On December 5, 2007, before the polygraph was administered, Detective Aldridge read Applicant his rights under Miranda, and Applicant gave another statement denying the allegations. Detective Danny Morgan ("Morgan") administered the polygraph examination. After the polygraph examination, Aldridge transported Applicant to the courthouse for a family court hearing. After the hearing, which lasted

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN -1 AM 8:55
M. HOPE BLACKLEY

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

approximately one hour, Aldridge stopped at McDonald's in order to get Applicant something to eat. Thereafter, Aldridge took Applicant back to the sheriff's office to see Morgan. According to Aldridge, she did not witness any threats or coercion by Morgan. Moreover, Applicant never requested an attorney or asked to stop the interview. Applicant apologized for not being completely truthful. After the interview was over, Aldridge transported Applicant back to the detention center. According to Aldridge, Applicant never told her that he was threatened or coerced by Morgan.

Testimony of Detective Morgan

On December 5, 2007, Morgan performed a polygraph examination on Applicant. Before Morgan began the examination, he read Applicant his rights under Miranda and went over the waiver of rights form with Applicant. According to Morgan, Applicant was not under the influence of drugs or alcohol at that time. Further, Applicant's speech was coherent, and Applicant seemed to understand Morgan's questions. Additionally, Applicant did not appear to have any mental health issues.

After Applicant completed the polygraph examination, Applicant went to a family court hearing. After the family court hearing, Applicant returned to the sheriff's office in order to discuss the results of his polygraph examination. Morgan testified that he did not threaten Applicant, coerce Applicant, or promise Applicant anything. In addition, Detective Morgan offered Applicant breaks throughout the course of the interview. Morgan also testified that he never offered Applicant a sentence of four years if Applicant would just confess to the crime. In fact, Morgan told Applicant he did not have the power to make any deals. In addition, Morgan told Applicant that he was not making Applicant any promises and was not threatening Applicant.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
20[illegible] JUN -4 [illegible] 11:55
HOPE BLACKLEY

Testimony of Applicant

During the PCR hearing, Applicant testified on his own behalf. Applicant claimed that he was not advised of his rights under Miranda when Aldridge picked him up from the detention

center on December 5, 2007. Applicant claimed he "felt threatened" during his interview with Morgan. Applicant claimed he felt threatened because Morgan allegedly said to him that "if [Applicant] didn't tell [Morgan] something they would give [him] so many years, and if [he] did tell [Morgan] something, then they would only give [him] like five or four years." [3] Further, Applicant claimed he felt threatened when Morgan stated that he did not want to see Applicant thrown to the wolves. But when defense counsel asked Applicant why he felt threatened by Morgan's wolves comment, Applicant stated: "Well, I mean, in the video, I mean, he told me about, you know, if I told him something he would give me five years, but if I didn't tell him something he would give me 20 years." Further, Applicant admitted that one of the officers got him lunch that day.

On cross-examination, the solicitor asked Applicant what Morgan said to make Applicant feel threatened. In response, Applicant stated: "I believe he told me if I tell him something they would give me only five years or four years, but if I didn't tell him something, then they was going to give me the maximum." Applicant admitted that Morgan read him his rights under Miranda, and Applicant knew he had the right to an attorney and could stop the interview. In addition, Applicant admitted that he signed a form waiving his rights.

FILED SPARTANBURG COUNTY CLERK OF COURT JUN -4 AM 11:55 M. HOPE BLACKLEY

Notably, after Applicant gave the five page statement, Morgan questioned Applicant regarding another allegation involving a different minor ["Victim 2"]. Applicant refused to make any admissions regarding the allegations made by Victim 2 and repeatedly denied all allegations made by Victim 2. Interestingly, Applicant testified: "If [Morgan] asked me anything about [Victim 2], nothing happened with [Victim 2], so I had no reason to, you know, go into that."

State's Exhibits 2 & 3

---

[3] Nowhere in the video does Detective Morgan tell Applicant that he would get four or five years if he confessed. In fact, Detective Morgan denied making that statement. (R. p. 58.)

During the Jackson v. Denno hearing, the State introduced a video of the polygraph examination and a video of the interview that occurred on December 5, 2007.

Before the polygraph examination began, Applicant told Morgan that he was not under the influence of drugs or alcohol and was in good mental health. Approximately two hours and thirty minutes later, Applicant had to take a break in order to go to family court.

After Applicant returned from family court, Morgan told Applicant that he failed the polygraph examination. Thereafter, Applicant implied that Victim was involved in sexual activities with someone else. Approximately twenty-five minutes into the second video, Morgan told Applicant that Victim probably turned to Applicant because she either liked him, and wanted to feel that way with him, or Victim turned to Applicant because she is devious and wanted to have something over Applicant to hang him. A few seconds later, Morgan stated: "James, there has been sexual contact between you and [Victim]. You have been involved in having sex with her. The thing is I don't want to just see you being thrown to the wolves on this . . . I think it needs to be clear what she was doing – how she did this. . . ."

Around twenty-eight minutes into the interview, Applicant stated that he and Victim never had sex. However, Applicant claimed Victim came into the living room where Applicant was sleeping. Applicant's penis was exposed. When Applicant woke up, Victim had her mouth on his penis. Applicant told Victim to go to her room. Applicant claimed he did not tell anyone of this event because he wanted to protect his family.

Morgan told Applicant that it was important to be honest. Around thirty-one minutes into the second video, Morgan told Applicant that this alleged living room incident could have caused Applicant to fail the polygraph examination. However, it was unlikely. Morgan reminded Applicant that the question Applicant failed on the polygraph examination was "did you put your

FILED
CLERK OF COURT
SPARTANBURG COUNTY
JUN -4 AM 11:55
M. HOPE BLACKLEY

penis in [Victim's] vagina." And the second question was "did you put your penis in [Victim's] vagina in her bedroom." Thus, according to Morgan, Applicant's living room story did not explain why Applicant failed the polygraph examination considering the question was so specific.

Around thirty-two minutes into the second interview, Morgan reminded Applicant that it was important for Applicant to be completely honest. "I'm not telling you that if you do this then you're going to get this kind of deal . . . I do not have any kind of power at all to make deals." Morgan explained that he was going to tell Applicant about things he had seen in his experience. Morgan stated: "None of this is designed to tell you that you should do this or you should do that. Those are choices you are going to have to make." Thereafter, Morgan told Applicant that he believed that more sexual activity occurred between Victim and Applicant.

Approximately thirty-nine minutes into the second interview, Morgan told Applicant he "really [does not] believe that [Applicant] would have done these things without [Victim] initiating it. But the fact is there has been a lot more happened between you." Thereafter, Morgan urged Applicant to tell the truth. Approximately forty-one minutes into the second interview, Morgan told Applicant about a defendant who eventually told the truth. However, that defendant molested children that were six and seven years old. That defendant ultimately got the maximum sentence for each child, and the sentences ran consecutively.

Thereafter, Applicant denied committing the alleged acts while blaming Victim for any inappropriate behavior. Applicant did not confess to any involvement on his part. In response, Morgan told Applicant that there was more sexual contact between Applicant and Victim than what Applicant claimed occurred. Detective Morgan stated: "I know you had sex with her. I know your penis has been inside her vagina."

FILED
CLERK OF COURT
SPARTANBURG COUNTY
JUN -4 AM 11:55
HOPE BLACKLEY

Around forty-four minutes into the second interview, Applicant told Morgan he was going to tell what really happened. Applicant claimed he was sleeping naked in the living room. He claimed he had a "hard on." When Applicant woke up, Victim was on top of and straddling Applicant, and his penis was on the lips of her vagina. Applicant claimed he whipped Victim and sent her to her room.

Approximately fifty-eight minutes into the second interview, Morgan stated: "I believe that there's been an ongoing sexual relationship here." Morgan told Applicant that he believed there has been more sexual activity that occurred than what Applicant described. However, Morgan explained that Applicant's best bet was to tell the truth about everything and get everything out in the open. Once again, Applicant blamed Victim. Applicant did not admit to any culpability on his part. Applicant stated he never had "full force vaginal sex with [Victim]."

Around one hour and eight minutes into the second interview, Morgan offered Applicant water. Approximately one hour and twenty-four minutes into the interview, Morgan asked Applicant if he wanted to provide a corrected statement. Applicant stated he wanted to provide a corrected statement, and that he was "not trying to do no 30 or 60 years. . . ." Morgan told Applicant he was not threatening Applicant with 30 or 60 years and explained the case he described earlier involved younger girls. Applicant indicated he understood and asked what the sentence for what he was charged with carried. Applicant stated he was "going to get pinned with this anyway."

FILED CLERK OF COURT SPARTANBURG COUNTY 2018 JUN -4 AM 11:55 HOPE BLACKLEY

Before Applicant gave a written statement, approximately one hour and twenty-seven minutes into the second interview, Morgan offered Applicant water, but Applicant refused. Morgan left the room to get himself some water for a few minutes. Morgan brought back Applicant water and asked if he needed anything else. Thereafter, Applicant asked if he would be charged

even though he did not initiate any of the sexual activity. Applicant wrote a statement, which blamed Victim for the sexual activity that occurred. Applicant denied any culpability on his part.

Approximately two hours and thirty-five minutes into the second interview, Applicant stated that he had been treated professionally, not coerced or threatened, and was offered breaks. About nine minutes later, Applicant stated he told the truth because it was the right thing to do, not because he was coerced or threatened. Around two hours and fifty-five minutes into the second interview, Applicant took a break for approximately five minutes.

When Applicant returned from the break, Morgan brought up the allegations made by Victim 2. Applicant repeatedly denied touching or doing anything sexual with Victim 2.

Applicant continued to deny the allegations made by Victim 2. When Morgan tried to end the interview, approximately three hours and eighteen minutes into the second interview, Applicant stated he wanted to tell him one more thing. He then admitted he let Victim perform oral sex on him in Victim's bedroom. However, Applicant once again denied the allegations made by Victim 2. Towards the end of the second interview, Applicant denied having sex with Victim; he only admitted to oral sex.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN -4 AM 11:55
M. HOPE BLACKLEY

Trial

On November 18, 2012, Applicant proceeded to trial. Before the trial began, the trial Court denied Applicant's Motion to Suppress his statements.

Testimony of Victim

On one occasion, Applicant forced Victim to the floor and performed digital penetration on Victim. Victim told her mother, but Applicant continued to live in the house with Victim. On another occasion, Applicant came into Victim's room, pulled her clothes down, and touched her

legs. Victim told her mother of this occurrence, but Applicant continued coming into Victim's room. At one point, Victim started placing a dresser in front of her door and wearing blue jeans to bed so that Applicant could not bother her.

In November of 2007, Applicant came into Victim's room while Victim was sleeping and pulled down her clothes. Thereafter, Applicant put his penis inside Victim's vagina. Victim told Applicant to stop and called out for her mother, but Applicant hit her, covered her mouth, and told her to "shut up." Victim called her aunt to tell her what happened, and Victim's aunt called the police.

Testimony of Jennifer Turner

Turner is Victim's auntTurner received a phone call from Victim disclosing a sexual assault that occurred in Victim's home. Victim was very upset and crying. Turner maintained contact with Victim and since that time, Victim has disclosed sexual abuse that occurred in Victim's home.

Testimony of Brenda Izarra

At the time of Applicant's arrest and investigation, Izarra worked for the Spartanburg Department of Social Services (DSS). There was an ongoing DSS case involving the same allegations of abuse. On November 14, 2007, Izarra interviewed Applicant. Izarra was present when Aldridge read Applicant his rights under Miranda. Applicant denied the allegations Victim made against him. In fact, Applicant grabbed his crotch and said he was not an average sized man so if he had touched Victim, she would have been "torn up." Izarra also interviewed Victim's mother, Lillian (Dannette) Collins. Izarra understood Ms. Collins did not believe any sexual abuse had occurred.

Testimony of Tanya Aldridge

Aldridge was an investigator of juvenile sexual assault cases with the Spartanburg County Sheriff's Office. On November 14, 2007, Aldridge was present during an interview with DSS. Applicant, his wife, Aldridge and Izarra were present during the interview. Aldridge read Applicant his Miranda rights from a pre-interrogation waiver form and witnessed Applicant sign the waiver.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN -4 AM 11:55
M. HOPE BLACKLEY

On December 5, 2007[4], Aldridge again met with Applicant at the Sheriff's Office. Aldridge informed Applicant of his Miranda rights again, but did not have a signed waiver form. Applicant then wrote a statement which accused Victim of fabricating allegations because she misbehaved regularly and did not like being punished. The statement also accused Victim of making inappropriate comments to him like asking him if he "wanted to smell her cookies" and telling him she had smelled his underwear. Applicant did not mention this information during his previous interview with DSS.

After giving the statement, Applicant agreed to speak to another investigator. Although Aldridge did not stay in the room during the subsequent interview, Applicant did receive an extended break during which time Aldridge transported him to a family court hearing and then to McDonald's for lunch. During the interview with Detective Morgan, Aldridge was asked to notarize two other written statements signed by Applicant.

Testimony of Lynn McMillian

McMillian was qualified as an expert witness in the field of child abuse assessments. McMillan interviewed Victim on two occasions at the Children's Advocacy Center. Victim disclosed sexual abuse that had occurred in her home between 2006 and 2007.

Testimony of Dr. Nancy Henderson

[4] The transcript reads December 15th, but this appears to be in error given the surrounding testimony and evidence.

Dr. Henderson is a child abuse pediatrician employed by the Greenville Hospital System. Dr. Henderson was qualified as an expert witness in the field of child sexual abuse. Dr. Henderson explained that the common myth that if a child is sexually abused, a physical exam will show evidence of that abuse by damage to the hymen, is not true. Dr. Henderson opined a physical exam of a child who has alleged sexual abuse can appear normal. Dr. Henderson's opinion was based both on her experience and on the medical literature in the field, and made specific reference to a landmark paper from 1994 entitled, "It is Normal to be Normal," authored by Joyce Adams.

Testimony of Danny Morgan

Detective Morgan was working for Spartanburg Sheriff's Office at the time of Applicant's investigation. Morgan interviewed Applicant on December 5, 2007 andread Applicant his Miranda rights, which Applicant appeared to understand. Morgan described his interview with Applicant in detail. He used the first couple hours to get to know Applicant and his background to establish a rapport with him. After the initial interview, Applicant left for a family court hearing and lunch, then returned to complete the interview. During the second phase of the interview Morgan began directly questioning him regarding the allegations made by Victim. Applicant then gave Morgan a statement describing an event in which Applicant was sleeping in his living room in boxer shorts and awoke to Victim performing oral sex on him. Later, Applicant made another disclosure indicating he was sleeping naked in the living room another time and had awoken to Victim straddling him and beginning to have vaginal intercourse with him. Morgan reduced Applicant's statements to writing which Applicant reviewed, initialed, and signed. Morgan read Applicant's full statement into the record.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
JUN 4 AM 11:05
HOPE BLACKLEY

After Applicant signed the first statement, Morgan continued to question him regarding the location Victim alleged the sexual abuse occurred. Applicant made another disclosure in which

he stated that during the summer when he went to Victim's bedroom to turn off her TV, that she offered to perform oral sex on him and he allowed her to. This statement was again reduced to writing, reviewed, initialed, and signed by Applicant.

Testimony of Lillian Dannette Collins

Applicant called Collins to testify for the defense. Collins is the mother of Victim. Collins testified that during one of Victim's sessions with a counselor, Victim recanted the allegations and claimed nothing happened. On cross-examination, Collins testified Applicant had admitted putting his finger in Victim's vagina. Collins also testified that on one occasion, she caught Applicant standing naked in the hallway of their home in the middle of the night.

Testimony of James Irby

Irby testified in his own defense. During direct examination, he testified he never did anything sexually inappropriate with Victim. Applicant testified Victim was upset with him because he would not allow her to go on a field trip after she failed to clean her room.

On cross-examination, Applicant claimed he felt threatened during Detective Morgan's questioning so he told him "what they wanted." Applicant also testified about the inappropriate overtures Victim made toward him.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN -4 AM 11:55
M. HOPE BLACKLEY

Testimony of Gina Odom

Victim's mother testified that during the therapy session with Gina Odom, a contract therapist with the Children's Advocacy Center in Spartanburg, Victim denied the sexual abuse by Applicant. However, at trial, Odom testified that Victim never recanted the allegations she made against Applicant. In fact, according to Odom, Victim disclosed the sexual abuse to her and Victim's mother during the counseling session. Further, Odom testified Victim's mother did not support Victim in this matter.

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 has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that Applicant was prejudiced by any deficiency. Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient and that the deficiency prejudiced the outcome of his trial. Applicant has failed to do so.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN - AM 11:55
M. HOPE BLACKLEY

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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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 (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.

A. Interrogation and statements

Applicant alleged Counsel did not properly utilize Dr. Richard Leo, an expert in the area of false confessions. At the PCR hearing, Applicant presented the testimony of Dr. Richard Leo and a report generated by Dr. Leo. Respondent objected to the qualification and testimony of Dr. Leo on the basis that his testimony would not assist the Court to understand the evidence or determine a fact in issue as required by Rule 702, SCRE, and that his testimony was based on science, theories, and methodologies that are unreliable. Dr. Leo's extensive curriculum vitae was admitted into evidence. This Court allowed Dr. Leo to testify as an expert regarding false confessions and coercive police interrogation tactics during the PCR hearing.[5]

Dr. Leo testified as to the contents of his report. Dr. Leo testified that several police interrogation tactics that increase the likelihood of eliciting false confessions were present during Applicant's interrogation. Some of the tactics he discussed were "presumption of guilt" and "investigative bias," lengthy interrogation, fatigue and exhaustion, false evidence ploys, minimization, threats, and promises. Although Dr. Leo testified that these tactics increase the likelihood of eliciting a false confession, he also conceded that they increase the likelihood of eliciting true confessions. Notably, he cannot determine at what rate the likelihood for each

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN -1 AM 11:
M. HOPE BLACKLEY

[5] At the hearing, there was some confusion over whether the State was making a Daubert motion, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), to exclude Dr. Leo's testimony, however, South Carolina has declined to adopt the Daubert standard. Expert testimony in South Carolina is governed by South Carolina Rule of Evidence 702 and State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). Although the Jones standard is not useful in cases of non-scientific evidence challenges, the court "must still exercise its role as gatekeeper and determine whether the proffered evidence is reliable." Graves v. CAS Medical Systems, Inc., 401 S.C. 63, 75, 735 S.E.2d 650, 656 (2012).

increases, or if the likelihood of eliciting a false confession is higher or lower than the likelihood of eliciting a true confession.

Dr. Leo did not consider either the legal distinction or the practical distinction between confessions and statements from which guilt can be inferred, in either his decision to testify in this case or his analysis. See State v. Cunningham, 275 S.C. 189, 192, 268 S.E.2d 289, 291 (1980) ("A 'confession' in legal sense, is restricted to acknowledgment of guilt, and does not apply to a mere statement of fact from which guilt may be inferred.") (citing State v. Miller, 211 S.C. 306, 45 S.E.2d 23 (1947) (citing State v. Pittman, 137 S.C. 75, 134 S.E. 514 (1926))). Applicant never confessed to the crime he was accused of having committed. Rather, Applicant gave statements calculated to deflect guilt while supplying Morgan information he presumably believed would justify his failing the polygraph examination. So, while Dr. Leo's report states,

> Detective Alridge's (sic) and Detective Morgan's pre-polygraph and post-polygraph interrogation of James Irby were guilt-presumptive, accusatory, and theory-driven rather than evidence driven. The interrogations were not structured to find the truth but, instead, to intentionally incriminate Mr. Irby by pressuring and persuading him to repeat back the alleged victim's allegations, which Detective Alridge (sic) and Morgan assumed must be true but never sought to independently verify with actual evidence[,]

Applicant never did repeat the victim's allegations. Victim alleged Applicant digitally penetrated her and vaginally raped her in her bedroom. Notwithstanding the fact Applicant vehemently and repetitively denied digitally penetrating the victim. Applicant told Detective Morgan the twelve year-old victim had been coming onto him for a while and that he woke up while sleeping to find her performing fellatio on him. Another time he awoke to find her straddling him with her vagina on his hard penis, and that both times he immediately stopped and chastised her. Applicant never once made an acknowledgment of guilt, rather he consistently projected blame on Victim. This Court finds Dr. Leo's testimony is a criticism of interrogation tactics used to elicit confessions.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN -4 AM 11:55
HOPE BLACKLEY

Notwithstanding, Counsel went beyond expectations by consulting with Dr. Leo, and he also had valid reasons for not further retaining him to testify. First, although Applicant could afford to retain Counsel and pay Dr. Leo $2,500 to "consult," he and his family could not afford to hire Dr. Leo to testify. Secondly, Counsel discussed the case with Dr. Leo who advised Counsel of what he could testify to at trial. Counsel did not believe his testimony would sway the Court in the suppression hearing, or the jury in the trial. Thirdly, Dr. Leo could not testify to the ultimate conclusion that Applicant's statements were false or coerced. Dr. Leo's testimony would criticize Detective Morgan's performance based on the indicators he saw present in the interview, rather than identify which of Applicant's statements were untrue. Lastly, Applicant never recanted to Counsel. These are legitimate concerns. This Court finds Counsel's decision was reasonable.

Applicant also alleged Counsel failed to properly prepare him to testify both at the Jackson v. Denno hearing and trial regarding his statements. This Court finds Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. While preparation of a defendant's testimony is important, it is incumbent upon a defendant to testify to the truth. This Court notes Applicant's testimony was inconsistent in the DSS case, the Jackson v. Denno hearing, and the PCR hearing in various respects.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
JUN -4 AM 11:55
M. HOPE BLACKLEY

Counsel spent time discussing the case with Applicant and preparing for the Jackson v. Denno hearing and the trial. However, once a defendant takes the stand, Counsel cannot control his testimony. Counsel advised Applicant against testifying. Counsel was cautious in limiting Applicant's time on the stand because he was concerned he would testify to the version of events he had disclosed to Counsel – that Applicant woke up to Victim performing oral sex on him and he allowed it to go on for a minute or two before stopping her. Counsel testified that even under Applicant's version of events, he could still be convicted. Counsel sought the advice of Dr.

Richard Leo, the false confession expert, in order to make strong arguments to suppress Applicant's statements. Counsel thoroughly argued for the suppression. That was the issue taken up on appeal and affirmed by the Court of Appeals. This Court fails to see how any further preparation of Applicant on the issue of the statements would have affected either the outcome of the Jackson v. Denno hearing or the trial, because the video recorded interview illustrates his statements were voluntarily given.

Applicant also alleged ineffective assistance at trial for failing to use the video recorded interview during the suppression and trial stages. However, this Court has reviewed the police interview in its entirety, and finds Applicant was in control of his responses in the interview, even contributing additional unsolicited information at times while maintaining his denial of various allegations. There is no sign that his will was overborn or that Detective Morgan used coercive tactics. Applicant was offered multiple bathroom breaks, provided plenty of water, and taken to lunch in the middle of the interview. The video undermines Applicant's claims that his statement was false or involuntary. It also contradicts Applicant's testimony regarding the threats and promises he received regarding sentencing. Counsel was prudent in only playing the few portions that could arguably be characterized as coercive. Therefore, Counsel was not deficient for not using it.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN -4 AM 11:55
M. HOPE BLACKLEY

B. Failure to object to expert qualification and testimony of Lynn McMillian

Applicant alleged Counsel was ineffective for failing to challenge the expert qualification of Lynn McMillian and her testimony. First, this Court can find nothing objectionable about her qualifications as an expert. McMillian was not offered as an expert in "forensic interviewing," but rather, she was qualified as an expert witness in the field of child abuse assessments. Our Supreme Court has approved the use of experts in the field of child abuse assessment. In State v. Anderson,

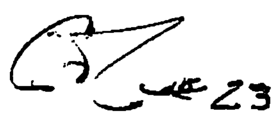
Applicant alleged Counsel failed to further cross-examine Dr. Henderson regarding her testimony that a normal physical exam can be consistent with sexual abuse. In support of his argument, Applicant offered some of the article to which Dr. Henderson referred at trial – "It's Normal to be Normal," by Joyce Adams. However, Applicant failed to prove how Counsel was deficient for failing to read the article. Dr. Henderson's opinion was based on more than just the article. Counsel also had experience with Dr. Henderson in trial. Counsel testified, as with most State expert medical witnesses in sexual abuse cases, that Dr. Henderson will testify that normal exams are consistent with sexual abuse and then on cross-examination, she will testify that normal exams are also consistent with no abuse. Counsel elicited that testimony. This Court finds Counsel's cross examination of Dr. Henderson reasonable and not deficient.

D. Testimony of Lillian Collins

Applicant alleged Counsel rendered ineffective assistance in calling Lillian Collins as a defense witness at trial. This Court finds Counsel's testimony on this issue credible and agrees. Counsel testified Applicant told him Collins, Applicant's wife at the time of the allegations and investigation, wanted to testify that Victim had recanted her accusations. Counsel was concerned about Collins' truthfulness. When Collins provided his office with an affidavit swearing Victim had recanted, Counsel felt compelled to present her testimony at trial. Applicant was also adamant that Counsel call Collins to the stand to testify to the recantation.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
201[illegible] JUN 24 AM 11:55
M. HOPE BLACKLEY

In *hindsight*, Counsel conceded the consequences of doing so. However, Counsel stands by his decision to elicit recantation testimony from Collins and believes not doing so would have been ineffective. Counsel opined that he needed to plant some seed of doubt in the jurors' minds and could think of no better way than Victim's own mother saying Victim denied the allegations. When asked why he asked Victim about recantation, Counsel explained the question was strategic



in order to ensure he could get Collins' hearsay testimony in as a prior inconsistent statement. After Collins' testimony opened the door to Odom's testimony that Victim always remained consistent in her disclosures, Counsel moved for a mistrial citing State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (2012).

This Court agrees with Counsel. Collins was Victim's mother, claiming Victim denied the allegations at one point. It was Applicant's wish for Counsel to call her. In hindsight, it is apparent the decision to call her did not come without consequence. The decision to present Collins as a witness was reasonable in light of the circumstances.

E. Failure to further cross-examine Victim

Applicant alleged Counsel was ineffective for further cross-examining Victim. Specifically, Applicant testified that when Victim testified that her little sister slept on the top bunk bed, Counsel should have more thoroughly cross-examined her on that point because, according to Applicant, those were never the sleeping arrangements. Also, Applicant testified Counsel should have more thoroughly cross-examined her regarding whether Victim's little sister was home the night of November 7. This Court does not find these arguments compelling.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
20[illegible] JUN -4 AM [illegible] 55
HOPE BLACKLEY

This Court notes the allegations in this case involve Applicant sexually abusing Victim, his twelve year-old step-daughter. Victim testified at trial, at which time she was only seventeen years-old. Counsel's questions were calculated to elicit only testimony Counsel believed was necessary, while treading carefully so not to engage in meaningless debate over specifics or appear aggressive or condescending. This Court cannot find Counsel's cross-examination, on the whole, unreasonable or deficient, because he did not question her on insignificant portions of her direct

testimony. Additionally, this Court believes it is conjecture to claim such further questioning would have potentially affected the outcome of the trial.

F. Failure to utilize expert in sexual abuse

Applicant alleged Counsel was ineffective for failing to utilize an expert in sexual abuse. Applicant offered the testimony of Gaye Allen-Cooke to support his allegation. Allen-Cooke essentially testified that she would have advised against presenting lay testimony from Collins regarding recantation because it is a "delicate issue" that and not something the "average joe" can discuss. She also testified she would advise not to present Collins' testimony because she did not see any evidence of recantation in the defense file. However, on cross-examination, she conceded she saw Collins' affidavit swearing her daughter denied anything happened. This occurred during a counseling session, which Allen-Cooke testified was not recorded.

Allen-Cooke also testified that if Counsel did choose to call Collins, she would strongly advise Counsel to have an expert, like herself, to come testify to address the recantation. She testified that for a $1,500 fee plus $250 per hour she would offer her expertise and guidance to a defense attorney about recantation issues. However, she did not provide any testimony on what that advice, expertise, or guidance would have been in this case – other than to not call Victim's own mother to testify that Victim denied the allegations. She did not explain how or why recantation is a delicate issue not meant to be discussed by lay people, nor did she testify as to what useful information she could have provided with regard to the recantation issue in this case.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN -? AM 11:55
M. HOPE BLACKLEY

Finally Allen-Cooke testified that standard procedure calls for only one forensic interview of a child alleging sexual abuse. However, she refused to agree that some children, who may not readily disclose to a stranger in their first interview, may require more interviews.

for example, the Supreme Court held that a forensic interviewer may be qualified as an expert in child abuse assessment to "testify to the behavioral characteristics of sex abuse victims," 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015). Even more recently, the Supreme Court found a trial attorney not deficient for not objecting to the qualification of a child abuse assessment expert, similar to McMillian in this case. Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017). Therefore, Counsel was not deficient for not objecting.

Additionally, this Court sees nothing objectionable about McMillian's testimony. Her testimony was limited as she explained what a forensic evaluation was and what the rules were. In describing the rules, she testified, "specific to the child there are rules about truth telling." She testified that she interviewed Victim on two occasions at the Children's Advocacy Center and Victim disclosed sexual abuse that had occurred in her home between 2006 and 2007. Her testimony is consistent with the state of the law as it existed at the time of Applicant's trial in 2012. State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) was controlling at the time. In Douglas, the Supreme Court found a forensic interviewer's testimony about truth telling rules was not error, and was not improper vouching or bolstering of the victim's veracity. It was not until 2015 in Anderson when the Court changed directions and held "there is to be no testimony" before the jury from a forensic interviewer about instructing the victim on the importance of telling the truth. Anderson, 421 S.C. at 221, 776 S.E.2d at 80; See also Briggs, 421 S.C. at 322–23, 806 S.E.2d at 717 (Counsel's decision not to object to truth telling rules was reasonable under the circumstances that existed at the time of Briggs' trial in 2010.) Thus, on this issue, Counsel was not deficient based on the circumstances that existed at the time of the trial.

FILED - CLERK OF COURT
SPARTANBURG COUNTY
M. HOPE BLACKLEY

C. Failure to further cross-examine Dr. Henderson

Captain Michael Prodan of SLED was qualified as an expert in the area of police interrogations. Captain Prodan testified all of the tactics criticized by Dr. Leo have been practiced, studied, analyzed, and perfected over many years. Without such tactics, law enforcement would be left simply "interviewing" (as opposed to "interrogating") suspects in the hopes they would confess without any sort of technique or tactic applied to encourage confessions. Without confessions from the prime suspects, many sex offenders would go unpunished. Our criminal justice system offers ample protections for those instances of police misconduct during interrogations, without the need for expert testimony. See State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010) (incriminating statements involuntary where police questioned defendant without Miranda warnings until incriminating information was elicited, then administered Miranda warnings and again re-eliciting incriminating information); State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (1992) (defendant's statement involuntary where police coerced it through implied threats to arrest defendant's wife and take his children); State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987) (defendant's inculpatory statement involuntary where police induced it by promising not to seek the death penalty).

This Court finds Counsel was not deficient for not calling Dr. Leo to testify, but finds Counsel's performance by consulting with him was reasonable – and more than what is required by prevailing professional norms. To find Counsel ineffective for failing to utilize a false confession expert in this case would require a different standard be applied to Counsel than that which Strickland requires. If Counsel's performance is analyzed based on a reasonable standard in light of prevailing professional norms, calling false confession experts to testify in cases where there is a confession would have to be the accepted and prevailing norm. This is not the case.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN -4 AM 11:55
HOPE BLACKLEY

testimony at trial, about how much she and Applicant conversed, would negatively influence Collins' (a key defense witness) testimony.

This Court finds Counsel's testimony on the issue to be credible. Counsel's decision not to utilize Smith was prudent and based on sound professional judgment. When balancing the lack of actual benefit Applicant would receive from having Smith testify with the risk of upsetting or influencing a very beneficial witness, it is reasonable Counsel chose not to call Smith to testify at trial. Therefore, this Court finds Counsel was not deficient in this regard. Even if he had called Smith to testify, there is no reasonable possibility the outcome of the trial would have been any different.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

This Court notifies Applicant 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. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN -4 AM 11:55
M. HOPE BLACKLEY

This Court finds Counsel was not deficient in not utilizing the services of Allen-Cooke or any other expert purported to be an expert in child sex abuse. As discussed above, Counsel was compelled to present such exculpatory evidence despite the consequences.

F. Failure to utilize Bernadette Smith

Applicant alleged Counsel was ineffective for failing to utilize Bernadette Smith at trial. Smith testified she met Applicant by calling the wrong phone number and ending up on the phone with Applicant. They continued talking and became romantically involved. After he married Collins, Smith's relationship with Applicant was platonic. However, they continued to talk "all day and all night." Smith testified she was talking to him on the phone the entire night of the sexual assault. Smith testified Applicant would confide in her about his family dynamics. Smith advised him to leave Collins. Smith testified she appeared at every one of Applicant's court appearances, she met with Counsel to explain their relationship and provide Counsel phone records, and she was subpoenaed by Counsel to court. She also provided a letter to Counsel dated May 5, 2008, which was admitted into evidence, attesting to Applicant's good character. However, she did not testify at trial.

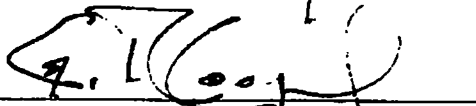
Counsel testified he received the May 5, 2008 letter from Smith to use for Applicant's bond hearing as a character reference. However, after a number of meetings with Smith, Counsel did not intend to call her as a witness. Counsel did not believe she could provide beneficial testimony merely because she had phone records showing she spoke to Applicant a lot. The allegations spanned an extended period of time and Counsel did not believe Smith could say she had been on the phone with him the entire time or knew everything that went on at his house. Counsel also believed Collins' testimony was much more beneficial. Because of the romantic nature of Smith's relationship with Applicant, and the already troubled marriage, Counsel believed Smith's

FILED SPARTANBURG COUNTY CLERK OF COURT 2018 JUN -4 AM 11:5? M. HOPE BLACKLEY

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 31 day of May, 2018.



G. THOMAS COOPER, JR.
Presiding Judge
Seventh Judicial Circuit

[illegible], South Carolina

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 JUN -4 AM 11:55
M. HOPE BLACKLEY

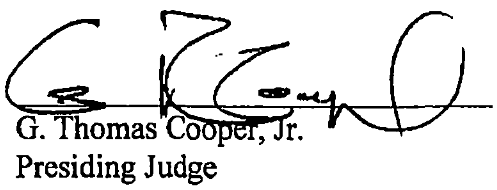
STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	C/A No. 2015-CP-42-00996
James Benjamin Irby, III, #352507, Applicant,	**ORDER DENYING APPLICANT'S MOTION TO ALTER OR AMEND THE JUDGMENT**
v.	
State of South Carolina, Respondent.	

RECEIVED
AUG 15 2018
S.C. SUPREME COURT

2018 JUN 25 PM 1:14
M. HOPE BLACKLEY
CLERK OF COURT
SPARTANBURG COUNTY
FILED

After careful consideration of the Applicant's Motion and the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES Applicant's Motion pursuant to Rule 59(e) SCRCP to Alter or Amend Judgment of this Court's Order entered on or about June 5, 2018. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.



G. Thomas Cooper, Jr.
Presiding Judge

June 20, 2018