

IN THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM RICHLAND COUNTY  
COURT OF COMMON PLEAS

**RECEIVED**  
SEP 20 2018  
S.C. SUPREME COURT

J. DERHAM COLE, CIRCUIT COURT JUDGE

2014-CP-40-3036

John Barnes,.....Petitioner.

vs

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

**NOTICE OF APPEAL**

John Barnes appeals the Honorable J. Derham Cole's September 6, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on September 18, 2018. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



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Attorney for the Petitioner.

September 20, 2018

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**PROOF OF SERVICE**

I, Anna Browder, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, J. Clayton Mitchell, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 20 day of September 2018.

Respectfully submitted,



Anna R. Browder, Esquire

PO Box 7284

Columbia, South Carolina 29202

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF RICHLAND )  
 )  
 John Barnes, SCDC #347845, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS

ORDER OF DISMISSAL

Civil Action No. 2014-CP-40-03636

RICHLAND COUNTY  
 FILED  
 2018 SEP 10 AM 11:46  
 JEMETTE W. HARRIS  
 C.C. & C.S.

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an application for post-conviction relief filed May 12, 2014, and an amendment thereto filed May 27, 2014. Respondent made its Return on December 19, 2014, requesting an evidentiary hearing be held. Thereafter, through counsel, Applicant filed another amended application for post-conviction relief on March 26, 2015. An evidentiary hearing into the matter was convened on February 3, 2016, at the Richland County Courthouse before the Honorable J. Derham Cole. Applicant was present at the hearing and was represented by Anna R. Good, Esquire. Assistant Attorney General J. Clayton Mitchell, III of the South Carolina Attorney General's Office represented Respondent.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. During its December 2010 term, the Richland County Grand Jury indicted Applicant for Lewd Act on a Minor Child (2010-GS-40-7545). Assistant Public Defenders J. Rhodes Bailey and Gregory B. Collins, both of the Richland County Public Defenders' Office, represented Applicant on this charge. On September 12-15, 2011, Applicant proceeded to a jury trial before the Honorable DeAndrea G. Benjamin, where he was convicted as indicted. Judge Benjamin sentenced Applicant to fifteen years imprisonment.

Applicant filed a timely Notice of Appel in the South Carolina Court of Appeals. Appellate Defender LaNelle C. DuRant of the South Carolina Commission on Indigent Defense, Division of

Appellate Defense perfected an appeal on Applicant's behalf. Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence by unpublished opinion. *State v. Barnes*, 2013-UP-314 (Ct. App. Filed July 10, 2013). Applicant subsequently petitioned the Court for a rehearing, which was denied on August 27, 2013. The Remittitur was issued on October 2, 2013.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following allegations:

1. Ineffective Assistance of Counsel;

- a. "Applicant was denied his Sixth and Fourteenth Amendment right(s) to an effective assistance of counsel insofar as his trial counsel failed to provide competent representation and these omissions were prejudicial to his defense."
- b. "Applicant's counsel failed to properly investigate the facts surrounding the circumstances that lead [sic] to his arrest."
- c. "Applicant contends trial counsel did not have a strategic reason for failing to call key witnesses, but rather was unable to call such witnesses due to lack of adequate preparation."
- d. "Counsel was ineffective in failing to fully investigate the case and present evidence that the Applicant 'acted under duress.'"
- e. "Counsel also failed to have the Applicant evaluated by a psychiatric expert which would have established a defense of duress supporting the Applicant's claim."

2. Judicial Error; and

- a. "The Applicant contends the trial court erred in qualifying the ARC interviewer (the interviewer) in this case as an expert witness, when he clearly was not, which was incredibly prejudicial to his defense."

3. Prosecutorial Misconduct

- a. "The prosecutor's remarks mislead [sic] the jury;"
- b. "The remarks were not isolated but extensive in nature;"

- c. "Absent those remarks, the strength of competent proof introduced to establish guilt would be lost;"
- d. "The comments were deliberately placed before the jury to divert attention to extraneous matters;" and
- e. "The prosecutor's remarks were invited by the inaction and improper conduct of the court and counsel."

In his amended application, filed March 26, 2015, Applicant also raised the following allegations of ineffective assistance of counsel:

1. Failure to preserve text messages for impeachment purposes;
2. Failure to investigate and call witnesses on Applicant's behalf;
3. Failure to have Applicant psychologically evaluated for suicidal thoughts;
4. Failure to object to a jury charge on the video statute.

Applicant also raised an allegation of ineffective assistance of appellate counsel for failing to argue the ruling on admissibility of the second ARC interview and testimony from witness Scarlett Murray.

#### **STATEMENT OF FACTS ADDUCED AT TRIAL**

After initially disclosing to his sister, Scarlett Murray, what took place at Applicant's home, Applicant's eleven-year old son (Victim) disclosed to a forensic interviewer at the Assessment Resource Center (ARC) that Applicant had given him bubble baths and masturbated Victim as he bathed him. Trial Tr. 94, 96. Applicant was contacted by law enforcement, went in voluntarily, and gave a written statement. Trial Tr. 260-61. In this first statement, Applicant admitted to bathing his son, but he said that if he had washed the boy's genitals, it was unintentional. Trial Tr. 268. Applicant later returned and gave a second statement, in which he admitted to touching and masturbating Victim. Trial Tr. 275, 277.

Prior to trial, Applicant moved to disqualify one of the solicitors pursuant to Rule 3.7, RPC, Rule 407, SCACR. September 12 Tr. 43-45. Applicant argued that because both solicitors interviewed Victim prior to trial, the trial court should conduct a hearing pursuant to *State v. Sanders* to determine the manner in which Victim was interviewed. September 12 Tr. 44.

Applicant argued one of the solicitors would need to be called as a witness by the defense and should be removed from the case. September 12 Tr. 45. Applicant asked for a proffer and a hearing based on *Sanders*. September 12 Tr. 49-50. The trial court allowed the proffer. September 12 Tr. 50. Applicant objected to the proffer because the trial court did not require the solicitor to be put under oath and take the stand. September 12 Tr. 50-52. The trial court determined it would order a hearing if one was needed after the State's proffer. September 12 Tr. 53. The State then explained it had interviewed Victim, received details from him consistent with the ARC interview, sent the ARC interview tapes home with Victim for him to review, and then interviewed Victim again. September 12 Tr. 53-54. The State reported that after viewing the ARC videotapes, Victim relayed three details he had not given the ARC interviewer, which the State provided to defense counsel in an email: (1) he would use the excuse that he had to urinate to stop the masturbation, (2) he remembered Applicant playing music and remembered two songs in particular, and (3) it started after he found out Applicant was his biological father. September 12 Tr. 54. At the end of the proffer, the trial court ruled the interviews were trial preparation and there was no violation of Rule 3.7. September 12 Tr. 55-56.

At trial, Applicant cross-examined Victim concerning his interviews with the solicitors. Trial Tr. 148-50. Applicant specifically questioned Victim about what type of questions the solicitors asked and whether they were the only ones present during the interviews. Trial Tr. 145, 150.

The State then called Raymond Olszewski, the forensic interviewer from the ARC. Trial Tr. 152. The State moved to qualify him as an expert in child sexual abuse and child forensic interviewing. Trial Tr. 156. Applicant initially objected that the proper foundation had not been laid, and he then objected that child sexual abuse was too broad a category. Trial Tr. 156. The trial court permitted him to examine Olszewski. Trial Tr. 156. After his *voir dire*, Applicant again objected that child sexual abuse was too broad a subject in which to be deemed an expert. Trial Tr. 161. He also objected to Olszewski's being an expert in child forensic interviewing "because there is no way to test if it is actually a science." Trial Tr. 161. The trial court admitted Olszewski as an expert in child forensic interviewing. Trial Tr. 161.

Olszewski testified he used the R-A-T-A-C method to interview Victim. Trial Tr. 170. He explained the difference between purposeful and accidental disclosures, the process of delayed disclosure in children, and the commonality of tentative, incomplete disclosure in children. Trial Tr. 172-73, 175. He then went into further detail regarding delayed disclosure and minimization of abuse and why it is not common for children to give all details in one interview. Trial Tr. 182-86. Olszewski then testified about the two interviews he conducted with Victim, explaining Victim was able to give additional details in the follow-up interview. Trial Tr. 186-87.

#### **TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING**

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from trial counsel, Public Defender J. Rhodes Bailey of the Richland County Public Defender's Office. Respondent presented testimony from trial counsel Gregory B. Collins, Esquire. This Court also had before it a copy of the Applicant's trial transcript, the records of the Richland County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified Bailey represented him during trial, and Collins assisted Bailey. He testified he was arrested in September 2010, but he was out on bond during trial. He testified he met with Bailey approximately two to three times prior to trial, where they discussed some trial strategy. During these meetings, he told Bailey about different things said by different people, texts on a cellphone, as well as emails being exchanged. In particular, Applicant testified Scarlett texted and emailed Applicant after he was charged but before his trial. Applicant further testified he gave Bailey access to these texts, and they had an opportunity to discuss them. Applicant testified he brought his cellphone to his meetings with Bailey but that Applicant neither gave his phone to Bailey nor printed out the text messages. He elaborated he wanted to use these text messages and emails in order to impeach Scarlett. Specifically, Applicant testified that although Scarlett testified at trial that he was merely someone with whom her mother had an affair, the text messages showed Applicant was the only one acting like a father to her and she did not believe the charges against Applicant.

Applicant testified he and Bailey discussed Applicant testifying at trial during their meetings. He further testified Bailey helped him in preparing to testify at trial. He also testified he did not recall discussing his statement to law enforcement in great detail with Bailey. He did, however, testify he admitted to fondling Victim in his statement and that he argued at trial that this statement was a false confession. He elaborated that he was trying to protect Victim from further abuse because he did not want Victim to endure any further interrogations. He further testified he believed that if he confessed, Victim would be alright and not subject to any more interviews. Applicant testified he was aware that his statement to law enforcement would be used at trial.

Applicant also testified he was aware the forensic interview videos would be introduced at trial. He further testified that one of the forensic interview videos was argued successfully, that the video was inadmissible because of Victim's age.

Following Applicant's testimony, Bailey testified. He has been practicing law since 2006 and has been working at the Richland County Public Defender's Office for approximately five years. He testified he discussed the case with Applicant and went over all discovery materials with him. He further testified Applicant decided he wanted a trial. Bailey testified he had met with Applicant approximately five times before he formulated his defense strategy. He explained his strategy was Applicant wanted visitation rights over his sons, Victim and Victim's little brother, in order to reconnect with them but that their mother was not interested in Applicant being a part of their lives. He further testified his strategy was that in an effort to keep Applicant away from the children, Victim's mother and her husband exaggerated the fact that Applicant gave Victim baths to make it appear as though Applicant had molested Victim. He further testified that a key component of his case was that Applicant's confession had been coerced.

He testified during his preparation for trial, he did extensive research regarding ARC videos and forensic interviews. He testified Collins had more experience in ARC videos than he did, so the two of them discussed the videos extensively. He testified Collins handled most of the forensic interviews and videos at trial. He elaborated there were two videos involved in this case. The first was an interview with Victim when he was eleven-years-old in which Victim mentioned Applicant never touched him inappropriately. In the second video, Victim was twelve, and he stated that Applicant had touched him inappropriately. Bailey elaborated that they had a dispute

with the Solicitor's Office as to the admissibility of these videos, due to the fact there is a statute which states that a forensic interview video is inadmissible if the victim is over the age of twelve. He testified the Solicitor wanted the video that was inculpatory to come in but was not interested in the video in which Victim stated he had not been touched inappropriately by Applicant. He further testified the trial court ruled if the first video came in, then the second video would come in as a continuation of the first video under the rule of completeness. Bailey testified he did not agree with this ruling, so he objected. He also testified this ruling made him feel hamstrung because it limited his strategy. He explained he could no longer admit the video in which Victim said Applicant did not touch him because then the video in which Victim accused Applicant of touching him would come into evidence. He further testified he did not think this ruling arose on appeal but that he did not follow the appeal closely. He further testified he tried his best to preserve the issues surrounding the ARC videos.

Bailey testified he did not remember the videos being entered into evidence through the forensic interviewer. He further testified he did not recall a discussion regarding the jury charges concerning the statute which would make one video admissible and the other inadmissible. He testified the State could enter the first interview into evidence and request a jury charge explaining the statute and why the second interview had not been entered.

Bailey also testified that Scarlett testified at trial that Victim had disclosed to her that Applicant had molested him. He could not recall whether or not he objected to this testimony but that he did object that Scarlett's testimony should be limited to time and place. He further testified he objected to her testimony leading to the identification of Victim's alleged abuser. He elaborated he was careful to try to limit Scarlett's testimony as much as possible. Specifically, he testified his strategy regarding Scarlett's testimony was to question her credibility by undermining that she got into conflicts with her family and by highlighting that Victim had called her a liar at one point. He testified he was unsure if this arose on appeal. He further testified he did not remember seeing any text messages from Scarlett, but he could not state with certainty whether or not Applicant brought him any text messages. He elaborated if he had seen the text messages, he did not think they were helpful. He testified he does not have any copies of text messages. He testified he remembered Applicant telling him that Scarlett tried to contact him. He further testified Applicant

would frequently talk about Scarlett because he thought she would want to help him. However, Bailey testified it seemed as though Scarlett was saying she was annoyed by Applicant; and, therefore, he did not think Scarlett would be a good witness for Applicant.

Bailey testified Applicant's testimony was necessary, but he would not have pressured Applicant into testifying. He elaborated that in order to overcome the confession, Applicant would need to testify that he confessed, but he did not mean it. Furthermore, he explained that he needed to put up a case in order to have a chance. He further testified there were no disagreements between him and Applicant over whether Applicant should testify; and, in fact, they were in agreement that Applicant needed to testify.

He also testified he discussed at trial Victim's conflict with his parents. He explained Victim had posted on Facebook that he was fighting with his family and that he wanted to spend time with Applicant. He testified that in order to impeach Victim, he wanted to underscore this fight with his family. He further testified that he did not want to spend too much time on Victim's family, but he did focus on it significantly.

He testified Collins handled the argument regarding the disqualification of the solicitors. Specifically, he testified they moved to recuse the solicitors prosecuting Applicant's case because they had met with Victim without anyone else present. He further testified, however, the trial court did not see any reason to disqualify the solicitors.

The State then called Collins as a witness. He testified he began practicing law in 2005, and most of his practice has been in criminal law. He further testified he worked at the Richland County Public Defender's Office for approximately five-and-a-half years. He testified he too was appointed on this case and that Bailey had come to him for advice, so he ended up serving as co-counsel. He testified he handled most of the legal issues so that Bailey could handle the jury and the overall defense strategy.

He testified a prior inconsistent out-of-court statement of a child is admissible in a case involving a lewd act or criminal sexual conduct. He testified in Applicant's case, there were two different videos, which were approximately four months apart. He testified the first video was of a forensic interview where Victim was eleven years old, and the second video was of another interview of Victim where he was twelve years old. He explained that in order for the video to be

admissible, the child had to be under the age of twelve, so the second video did not comply with the statute. He explained his trial strategy was to enter the first video, where Victim stated Applicant had not touched him sexually, into evidence. He further testified the solicitor objected to the introduction of the video; and following the objection, the trial court ruled if the first video were introduced, then the second video would be introduced under the rule of completeness. He testified he objected to that ruling because it hamstrung the entire defense. He further testified eventually the solicitor agreed to introduce the first video on the condition that the trial court instruct the jury the only reason they did not see the second video was because Victim was over the age of twelve. He testified his position was the second video was inadmissible evidence, therefore the jury did not need to be instructed on it. Furthermore, he testified he argued this proposed charge commented on the age of Victim, which was an element of the crime, and commented on the facts. He testified the trial court amended the jury charge to a generic charge. Collins testified he also wanted to limit the number of sources from which the jury heard about these separate forensic interviews.

He also testified he argues the qualification of an expert in every case. Specifically, he testified he argued that a forensic interviewer had no field of expertise and were essentially human lie detectors. He testified he followed *State v. Douglas* very closely.

He further testified the solicitors interviewed Victim alone. He elaborated he wanted to put the solicitor on the stand in order to ask how they conducted interviews of Victim and how they elicited those details that Victim gave them. He testified, however, they were not afforded a hearing on this issue.

Collins testified he objected as much as he could. In particular, he testified he objected numerous times to the jury charge on the statute, but he did not object after the trial court amended the charge to a generic one. He further testified he had specific motions and objections prepared to preserve issues on appeal.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to

observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

***Ineffective Assistance of Counsel***

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant 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. 441, 334 S.E.2d 813.

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Specifically, this Court finds that the testimony of both trial counsels is very credible while Applicant's testimony is not credible. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

***Counsel's alleged failure to preserve text messages for impeachment purposes***

Applicant alleges that Counsel was ineffective for failing to preserve text messages between Applicant and Scarlett. This Court finds that Applicant has failed to establish any

deficiency of Counsel and that this allegation must be denied and dismissed with prejudice. *Strickland* requires that trial counsel must be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland v. Washington*, 466 U.S. 668, 688-689 (1984). Moreover, "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693. Therefore, judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *See Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Furthermore, "courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

The uncontroverted testimony reveals that Applicant would frequently talk to Bailey about Scarlett, specifically that she tried to contact him and that she would want to help him. However, Bailey testified he believed that Scarlett would not be a good witness for Applicant and also believed she appeared to be annoyed with Applicant. Bailey further testified that he did not specifically remember seeing any text messages between Applicant and Scarlett; but if he did see them, he would have determined they would not have been helpful. In addition to believing Scarlett would not be a helpful witness for Applicant, Bailey also testified that his strategy regarding her testimony was to undermine her credibility as much as possible by highlighting the fact that she had gotten into disagreements with her family. Counsel clearly specified his reasons behind not pursuing any alleged text messages between Scarlett and Applicant. Moreover, Counsel articulated and employed a clear strategy when dealing with Scarlett. Therefore, this Court finds that Counsel's performance was reasonable and effective under professional norms. *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*).

Additionally, this Court finds that Applicant cannot prove any resulting prejudice from this alleged deficiency, as Applicant failed to present any concrete evidence of these alleged text

messages at the evidentiary hearing. “[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” *Walker v. State*, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014)). Moreover, “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’s bare assertions as to what these alleged text messages said, without more, do not give rise to the level of proof required for Applicant to meet his burden. Based on the foregoing, this Court finds that this allegation must be denied and dismissed with prejudice.

Counsel’s alleged failure to investigate and call witnesses

Applicant alleges that Counsel was ineffective for failing to investigate and call witnesses on his behalf. This Court finds that Applicant has failed to establish any deficiency on the part of Counsel and that this allegation must be denied and dismissed. “[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” *Walker v. State*, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014)). Moreover, “failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result.” *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In reviewing counsel’s performance, “a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Here, Applicant wholly failed to provide any testimony concerning any witnesses he wanted Bailey to investigate. Without specific leads as to potential witnesses that would be beneficial to Applicant, Counsel’s performance cannot have fallen below professional norms.

This Court also finds Applicant has wholly failed to establish any prejudice resulting from Counsel's alleged failures. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995). An applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the post-conviction relief hearing in order to establish prejudice from the witness' failure to testify at trial. *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998). Therefore, as Applicant provided neither the names of any favorable witnesses nor the testimony of any such witnesses, Applicant has failed to establish any resulting prejudice. This allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to have Applicant psychologically evaluated*

Applicant alleges that Counsel was ineffective for failing to have Applicant psychologically evaluated for suicidal thoughts. However, Applicant failed to present such an expert at the evidentiary hearing or offer any evidence of how such an expert would have aided his defense and led to his acquittal.

Because Applicant neither produced such an expert "nor offered [his] testimony in some other manner consistent with the rules of evidence," what his additional testimony would have been is "purely speculative." *Bannister v. State*, 333 S.C. 298, 304, 509 S.E.2d 807, 810 (1998). This Court finds this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to object to a jury charge on the video statute*

Applicant alleges that Counsel was ineffective for failing to object to a jury charge on the video statute<sup>1</sup> concerning the admissibility of a video of an interview of a child victim. Collins

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<sup>1</sup> Section 17-23-175(A) of the South Carolina provides "an out-of-court statement of a child is admissible if: (1) the statement was given in response to question conducting during an investigative interview of the child; (2) an audio and visual recording of the statement is preserved on fil, videotape, or other electronic means . . . ; (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness."

testified that their position at trial was that the video of the second interview of Victim, in which Victim was twelve years old, was inadmissible and, therefore, a jury instruction explaining why only one video was entered into evidence was unnecessary. Collins further testified that the State proposed an instruction that because the child was twelve in that video, it was inadmissible. The defense argument, however, was the instruction would comment on the age of Victim, which was an element of the crime, and would comment on the facts. Collins further testified that the trial court amended the jury charge to a generic charge. In fact, the trial court instructed the jury:

During this trial you have heard witnesses mention a video which has not been placed into evidence as a matter of law. This video itself has not been entered into evidence and you should not consider it for any purpose during your deliberation. To do so is outside of your role as jurors. Trial Tr. 437-38.

Because Counsel successfully argued against the trial court charging the jury as to why they did not see the video of Victim's second interview, Applicant cannot show any deficiency. Furthermore, Applicant cannot show any resulting prejudice from this alleged deficiency, as, ultimately, the jury was not instructed regarding this video statute. This allegation must be denied and dismissed with prejudice.

#### ***Ineffective Assistance of Appellate Counsel***

A defendant is entitled to effective assistance of appellate counsel. *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. *Southerland*, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. *See Ezell v. State*, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); *Southerland*, 337 S.C. 615-16, 524 S.E.2d at 836. *See also Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

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Moreover, the statute provides a child is "a person who is under the age of twelve years at the time of the making of the statement or who functions cognitively, adaptively, or developmentally under the age of twelve." S.C. Code Ann. § 17-23-175(C)(1).

Although ineffective assistance of appellate counsel claims for failure to raise a particular issue on direct appeal can be successful, the Supreme Court has reiterated that it is “difficult to demonstrate that counsel was incompetent.” *Smith v. Robbins*, 528 U.S. 259, 288 (2000). While appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing *Jones v. Barnes*, 463 U.S. 745 (1983)). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .” *Jones*, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. *Tisdale*, 357 S.C. at 476, 594 S.E.2d at 167. “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Smith v. Robbins*, 528 U.S. at 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986).

In order to meet his burden, an applicant must establish a reasonable probability that, but for appellate counsel’s failure to raise a specific issue on appeal, he would have prevailed on his appeal. *Smith*, 528 U.S. at 285-86.

*Appellate Counsel’s alleged failure to argue the ruling on admissibility of the second ARC interview and testimony from witness Scarlett Murray*

Applicant alleges that appellate counsel was ineffective for failing to argue on appeal the trial court’s ruling regarding the admissibility of the second ARC interview, as well as the trial court’s ruling surrounding Scarlett’s testimony. This Court finds Applicant has failed to establish his burden of both deficiency of appellate counsel and requisite prejudice entitling him to relief and that this allegation must be denied and dismissed with prejudice. On appeal, appellate counsel raised two issues:

- (1) Did the trial court err in qualifying the ARC interviewer as an expert in child forensic interviewing when his testimony was not required by an expert witness?  
[and]

(2) Did the trial court err in denying [Applicant's] motion for a hearing pursuant to *State v. Sanders*, 341 S.C. 386, 534 S.E.2d 696 (2000) to remove one of the solicitors from the case pursuant to Rule 3.7, Rules of Professional Conduct, SCACR because the solicitor was a necessary witness to testify to the interview of the child's statement given to the solicitors which contained new information?"

Both issues were thoroughly briefed and argued before the Court of Appeals.

Both of Applicant's trial counsels, Bailey and Collins, testified at the evidentiary hearing that Collins handled most of the issues surrounding the ARC videos. Collins testified that at trial, he and Bailey wanted to introduce the first ARC video, in which Victim stated that Applicant touched him while bathing him and that the touching was not sexual, to show that they were not hiding from it. However, the trial court ruled if Applicant were to introduce the first video, then the second ARC video, in which Victim stated that Applicant had molested him, would be admissible under the rule of completeness. Collins objected to the trial court's ruling. Collins elaborated this ruling hamstrung their entire defense. After that ruling, Collins explained they wanted to limit the number of sources from which the jury heard that Applicant had abused Victim, and did not want to introduce either video. Bailey also testified the trial court's ruling regarding the admissibility of the ARC videos hamstrung their entire defense and that they objected to this ruling. Bailey elaborated this ruling limited their strategy in that they could no longer admit the video where Victim said Applicant did not touch him because the second video, in which Victim stated Applicant did touch him, would be admissible.

Bailey also testified he handled the testimony of Scarlett. He testified Scarlett testified at trial that Victim disclosed to her that he had been molested by Applicant. Bailey stated he did object to Scarlett's testimony and argued she should only be able to testify as to the time and place of the disclosure. He further argued that Scarlett's testimony should not go into who had actually molested Victim. Bailey explained he was careful in trying to limit Scarlett's testimony as much as possible and that his strategy in cross-examining Scarlett was to undermine her credibility with conflicts between her and her family.

This Court finds Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds Applicant has failed to show

that appellate counsel's performance was deficient, where there is no standard requiring appellate counsel to brief every possible meritorious issue and counsel appropriately raised two stronger, meritorious issues on Applicant's behalf. Second, this Court finds Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal had the issues as to the admissibility of the second ARC video and Scarlett's testimony been raised.

Both the United States Supreme Court and the South Carolina Supreme Court have consistently ruled that appellate counsel has no duty to raise all meritorious issues on appeal. *See Jones*, 463 U.S. 745; *Smith*, 528 U.S. at 288; *Tisdale*, 357 S.C. 474, 594 S.E.2d 166. When appellate counsel reviews all possible issues and elects to raise those issues she deems most meritorious, she has performed in accordance with professional standards and is not deficient. As appellate counsel raised two meritorious issues on appeal, her performance was in accordance with professional norms and this Court finds that this allegation must be denied and dismissed with prejudice.

Additionally, this Court finds Applicant has failed to establish any prejudice from counsel's alleged deficiency, as there is no reasonable likelihood that he would have prevailed on appeal had the issues concerning the admissibility of the second ARC video and Scarlett's testimony been raised.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. *State v. Gaster*, 349 S.C. 545, 564 S.E.2d 87 (2002); *State v. Saltz*, 346 S.C. 114, 551 S.E.2d 240 (2001). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. *State v. Hamilton*, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001); *State v. Mansfield*, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law. *State v. McDonald*, 343 S.C. 319, 540 S.E.2d 464 (2000); *State v. Mattison*, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

Under the rule of completeness, "when a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." SCRE 106. In addition, when part of a recorded statement is

introduced, the opposing party may require the admission of other portions to ensure the partial statements are not taken out of context. *State v. Cabrera-Pena*, 361 S.C. 372, 379, 605 S.E.2d 522, 525 (2004). Only that portion which explains or clarifies the already admitted evidence should be allowed into evidence. *Id.*

Here, Applicant sought to introduce the first ARC interview of Victim, in which he denies any abuse by Applicant. However, the trial court ruled that, given the rule of completeness, the second ARC interview of Victim, in which he accuses Applicant of molestation, would be admitted. Specifically, the trial court noted that it would confuse the jurors to admit one video but not the other. Trial Tr. 71. Additionally, given the fact that the second interview of Victim was a follow-up interview, the trial court found that the second video was a continuation of the first interview, which occurred in close proximity to the time of the initial interview. Trial Tr. 71-72. Given the extensive review of the totality of the circumstances surrounding both interviews of Victim made by the trial court, it is unlikely this issue would have prevailed on appeal had appellate counsel raised it. Therefore, this Court finds that Applicant has failed to establish any resulting prejudice from appellate counsel's alleged deficiency.

Similarly, Applicant cannot show any resulting prejudice from appellate counsel's alleged failure in not raising the issue of Scarlett's testimony. Hearsay is an out-of-court statement made by the declarant offered into evidence to prove the truth of the matter asserted. SCRE 801(c). Here, the State offered the testimony of Scarlett purely to show what she did as a result of the conversation she had with Victim. In other words, the State did not offer this testimony to prove that Applicant had molested Victim but rather to explain how the incident report against Applicant came about. Because the conversation between Victim and Scarlett was not offered to prove the truth of the matter asserted therein, it is not hearsay and, therefore, is admissible. Consequently, it is unlikely that this issue would have been successful on appeal had it been raised. Therefore, this Court finds there is no resulting prejudice from appellate counsel's alleged deficiency. This Court further finds that this allegation must be denied and dismissed with prejudice.

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his

application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

**IT IS THEREFORE ORDERED:**

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this 6 day of September, 2018.

Spantawny, South Carolina

J. Derham Cole  
J. DERHAM COLE, Presiding Judge  
The Fifth Judicial Circuit Court