ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

December 21, 2018

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Michael Edward Williams v. State
2018-CP-23-0131

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,

Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Greenville County Clerk of Court

330 E. COFFEE ST.• GREENVILLE/SC • 29601
PHONE: (864) 242-0029
E-MAIL: SUSANNAH@ROSSENDERLIN.COM

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 27 2018

S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

2018-CP-23-0131

Michael Edward Williams, ... Appellant,
v.
The State, ... Respondent.

NOTICE OF APPEAL

Michael Edward Williams appeals the Honorable Alex Kinlaw, Jr.'s Order of Dismissal filed December 14, 2018.

This 21 day of December 2018.

Susannah Ross, Attorney at Law
330 E. Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
DeShawn Mitchell, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

STATE OF SOUTH CAROLINA	)	
	)	**IN THE SUPREME COURT**
COUNTY OF GREENVILLE	)	
	)	
MICHAEL EDWARD WILLIAMS, APPELLANT,	)	
	)	
	)	
VS.	)	**CERTIFICATE OF SERVICE BY MAIL**
	)	
	)	
THE STATE OF SOUTH CAROLINA, RESPONDANT.	)	
	)	

1. I am the attorney for the Applicant in the above-captioned matter.

2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

Mr. Christian Saville
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Attorney for Defendant

This 21 **day of** December**, 2018**

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
MICHAEL EDWARD WILLIAMS, APPLICANT. v.	)	POST HEARING ARGUMENT
THE STATE OF SOUTH CAROLINA, RESPONDENT.	)	CASE # 2018-CP-23-0131

This matter comes before the Court by way of application of post conviction relief filed January 8, 2018, alleging ineffective assistance of trial counsel. A Return was made on May 9, 2018. A hearing was held October 24, 2018 before the Honorable Alex Kinlaw. Applicant testified on his own behalf. He stated that he was prejudiced by ineffective assistance of his trial counsel and testified regarding the allegations made in his Application and the Supplemental Application. He stated that he was not guilty of the charge. He also said that the child witness did not recall any allegations against him in court and was unable to identify him even after he looked directly at her when the solicitor pointed him out. The State called Dorothy Manigault, Esquire. She also testified regarding the allegations made in the Application and the Supplemental Application. She said that the trial strategy was that the charge was based on the child's mother being vindictive. The testified that the trial judge's jury instructions were thorough and proper so she did not object to his instruction that the jury's objective is to find the truth. She said that the child testified and was unable to identify the Applicant or recall the incident. She stated that she did not cross examine the child on the elements of the offenses charged or the making of the forensic video. Counsel maintaining that to do so would be introducing potentially damaging testimony against her client. At the conclusion of testimony the court allowed the Applicant submit this argument in writing.

The crux of this case whether the Applicant was denied a fair trial when the State introduced a forensic video that was completely uncorroborated by the child witness. In her reply to Ms. Manigault's directed verdict motion in Mr. William's trial, the solicitor stated that the forensic video was admitted under S.C. Code Ann. 17-25-175 and it was a matter for the jury to decide whether or not the interview alone was sufficient to find the defendant guilty. (R. Vol. II pp. 136-139). She conceded that a jury conviction must be based solely on the child's forensic interview. A review of the full transcript shows that the State presented no testimony as to any elements of the crime charged. The only evidence of any elements of the charged offenses was presented through the forensic video. This was not testimony given under oath. Applicant's counsel failed to argue this point in her objections to the forensic video or her directed verdict motion. (R. Vol. II pp. 78-81& pp. 136-139). Counsel also failed to argue that without the sworn testimony of the child regarding the allegations made in the video, there was no foundation for the admission of the video.

A review of the child's testimony shows that she was unable to identify the Applicant even after he was pointed out to her in the courtroom by the solicitor; she did not recall making the forensic video; she did not recall any elements of the charges against Mr. Williams; and she was not asked whether she understood the truth and the importance of telling the truth. (R. pp. 62-73). A witness is incompetent if they lack the mental capacity to perceive, *recall*, or relate the facts or to understand the duty to tell the truth when testifying. South Carolina Dept. of Social Services v. Doe, 355 S.E.2d 543, 548, 292 S.C. 211 (S.C. App., 1986) *emphasis added.* Counsel failed to argue the child's inability to recall the facts pertinent to the charges or to identify the Applicant made her an incompetent witness under the rules of evidence. *See* SCRE 601 & 602.

The pre-trial ruling on the video's admissibility was contingent on the child testifying and being subject to cross examination on the elements of the offense and the making of the out of court statement. (R. Vol. I, p. 81, l. 18) The child's inability to recall and testify to the facts pertinent to the charges or the making of the video negated the foundation for the admissibility of the forensic video under S.C. Code Ann. 17-25-175 (A)(3). The child could not be subject to cross examination on the elements of the offence and the making of the forensic video as required by S.C. Code Ann. 17-25-175 (A)(3) when she could not recall them. Counsel failed to argue this or point out to the Court that the child's failure to recall also effected whether the video contained particularized guarantees of trustworthiness as required by S.C. Code Ann. 17-25-175 (A)(4) and (B)(5). (R. p. 81, l. 18)

In State v. Legg, the Appellant argued that S.C. Code Ann. 17-25-175 allowed an alleged victim to testify twice in violation of the defendant's Due Process right to a fair trial. The Court ruled that because it would be possible to apply S.C. Code Ann. 17-25-175 without offending procedural Due Process, it was not facially unconstitutional. The Court reasoned that there would be no grounds for a Due Process duplication of testimony argument if the State called the minor in its case in chief and "only questioned the minor as to the creation of the videotape prior to its publication to the jury and cross-examination" and found the statute could thus be applied constitutionally. State v. Legg, 416 S.C. 9, 785 S.E.2d 369, 372 (S.C., 2016)

The Court does envision a scenario where State can call the minor to the stand, elicit nothing relevant to the charge or the making of the video, and then tender the minor to the defense for cross examination because that scenario is not valid under S.C. Code Ann. 17-25-175 and our constitutions. It is burden shifting and sandbags the defense. The State's the burden of proof cannot be fulfilled by presenting a witness with no recollection of the allegations

underlying the charge or the making of the video, reserving the video until the minor is off the stand, and then argue the witness was available for cross examination or recall. Such action forces the defendant to either compromise his Sixth Amendment right to effective confrontation and a fair trial or his Fifth Amendment due process rights and his right to remain silent. The procedure which was allowed in this case was unconstitutional and denied the Applicant a fair trial. "A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice." State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997). Counsel did not argue to the trial judge that the State's total reliance on the forensic video and failure to elicit any testimony from the child witness regarding the elements of the offence, any recollection of the incident or recognition of the defendant was fundamentally unfair and burden shifting.

Without these arguments preserved on the record, the Court of Appeals said in its unpublished opinion, "[A]s to cross-examination specifically, the Confrontation Clause 'guarantees only an **opportunity** for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (quoting United States v. Owens, 484 U.S. 554, 559 (1988)). Citing State v. Hill and State v. Anderson they also pointed out that trial counsel could recall the child witness after the state has presented the forensic video if they want to cross examine on the statements made in the video. However, in State v. Hill and State v. Anderson where the constitutionality of S.C. Code Ann. 17-25-175 was similarly challenged, the child victims *testified to abuse* and were made subject to cross examination regarding that abuse before the video was presented pursuant to S.C. Code Ann. 17-25-175. State v. Hill, 394 S.C. 280, 291,715 S.E.2d 368, (Ct. App. 2011), State v. Anderson, 413 S.C. 212, 217-18, 776 S.E.2d 76, 78-79 (2015). Testimony is defined as evidence given by a

competent witness under oath or affirmation. *Black's Law Dictionary* 1476 (6th ed. 1990). There was no testimony of abuse in this case. The outcome on appeal would likely have been different if trial counsel had effectively preserved the record to address this issue.

Alternatively, if the Court is saying that the trial procedure here where the admission of an unsworn forensic video requiring no recollection of events relating to the charges or the making the video, is constitutionally sound; trial counsel was ineffective for not probing the child witnesses total lack of recollection on cross examination. Counsel also failed to stress in closing argument that the child witness was unable remember the incident or to identify the Applicant while under oath and that when the doctor who conducted a forensic examination asked the child whether she'd been hurt or touched on her body she "did not share any information" meaning she said no. (p.122, pp.170-8) As to argument regarding the jury instruction asking the jury to seek the truth State v. Beaty provides some insight. There the court instructs trial judges to omit any language, whether in remarks to the jury or in an instruction, which might have the effect of lessening the State's burden of proof in a criminal case. State v. Beaty, 813 S.E.2d 502 (S.C., 2018). The State's burden of proof in the Applicant's case was substantially lessened to the degree that Mr. William's was denied a fair trial and counsel's errors amounted to ineffective assistance that effected the outcome of his trial.

Respectfully submitted,

Susannah Ross
Attorney for the Applicant
330 E. Coffee St,
Greenville, SC 29601
(864) 242-0029

Greenville, South Carolina
This 2 day of November, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
	)	2018-CP-23-0131
MICHAEL EDWARD WILLIAMS,	)	
	)	
Applicant,	)	
	)	
vs.	)	AFFIDAVIT OF SERVICE
	)	BY MAIL
THE STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am the attorney for the Applicant in the above-captioned matter.

2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Supplemental Application** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

Attorney General
Alan Wilson
P.O. Box 11549
Columbia, SC 29211
Attn: Megan Jameson

Attorney for Defendant

This 2 **day of** November **, 2018**

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
Michael Edward Williams, #282256, Applicant, v. State of South Carolina, Respondent.	)	C/A No. 2018-CP-23-0131 **ORDER OF DISMISSAL** ENTERED COMPUTER

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Paul Wickensimer COC GVL SC

This matter comes before this Court pursuant to an application for post-conviction relief (PCR) filed January 8, 2018, by applicant. The State made its return May 9, 2018. Applicant amended the applicant on October 18, 2018 through PCR counsel. An evidentiary hearing was convened on October 24, 2018, before this Court at the Greenville County Courthouse. Applicant was present and represented by Susannah Ross. Assistant Attorney General Sherrie Butterbaugh represented respondent. Testimony was taken from trial counsel, Dorothy Manigault, and applicant.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the hearing, this Court finds applicant has failed to establish any constitutional violations and denies the PCR application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. A Greenville County grand jury indicted applicant on the charge of first-degree criminal sexual conduct (CSC) with a minor and then in February 2013 on the charge of third-degree CSC with a minor. (2012-GS-23-10455; 2013-GS-23-698A). Dorothy Manigault represented applicant and Lisa Bentley prosecuted the case. Applicant proceeded to trial before the Honorable Steven H.

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John and a jury on October 6, 2014. The jury found applicant not guilty of first-degree CSC with a minor, but found him guilty of third-degree CSC with a minor. Judge John sentenced applicant to a term of fifteen years for third-degree CSC with a minor.

Applicant timely filed a notice of appeal and was represented by LaNelle Cantey Durant. Appellate counsel argued: (1) the trial court erred in denying applicant's motion that S.C. Code Ann. § 17-23-175 was unconstitutional based on a violation of the Confrontation Clause when applicant did not have an opportunity to cross examine the child during the forensic interview and the State did not elicit details about the incident during direct examination so applicant could not cross examine her about it during trial; and, (2) the trial court erred in admitting the videotape where the forensic interviewer asked leading questions which were barred by S.C. Code Ann. § 17-23-175 and used a nonscientific method of interviewing, which impacted the trustworthiness of the interview. Applicant's conviction and sentence were affirmed in an unpublished opinion from the Court of Appeals. *State v. Williams*, Op. No. 2017-UP-026 (S.C. Ct. App. filed Jan. 11, 2017). Applicant submitted a petition for rehearing which the court denied by order filed February 1, 2017.

On March 22, 2017, applicant submitted a Petition for a Writ of Certiorari to the South Carolina Supreme Court. The Court denied the petition on November 15, 2017. The remittitur was issued on April 3, 2018.

SUMMARY OF FACTS GIVING RISE TO THE CONVICTIONS

On Saturday, March 31, 2012, applicant spent the night at the home of mother and her five-year-old daughter, the victim. (Oct. 7 Tr.p.23). Mother and applicant were friends, and not romantically involved. While still in mother's home the next day, applicant spent several hours in the playroom alone with victim. Mother periodically checked on victim. (Oct. 7 Tr.pp.30-

31). Around 6:00 p.m., when mother was preparing to leave with victim to pick up victim's grandmother, mother saw applicant on the floor next to victim. Applicant appeared caught "off guard." (Oct. 7 Tr.p.24; p.31; p.33). When mother entered the room, applicant immediately got up while victim remained lying on her left side. Mother observed victim pulling and tugging at her shorts and underwear. (Oct. 7 Tr.p.32).

Applicant left. (Oct. 7 Tr.p.33). Because she observed uncharacteristic behavior from victim, mother asked victim why she was tugging at her shorts. (Oct. 7 Tr.p.33). Mother asked victim whether applicant touched her privates. (Oct. 7 Tr.p.34). Victim began to cry. (Oct. 7 Tr.p.34). Mother testified, previously, applicant oddly persisted in offers to babysit victim which mother declined. (Oct. 7 Tr.p.28).

Mother called law enforcement and met with Investigator Michael Robertson (Robertson) on April 3, 2012. (Oct. 7 Tr.p.35; p.94). After taking a written statement, Robertson advised mother he would schedule a forensic interview for victim at the Julie Valentine Center. (Oct. 7 Tr.p.34, p.94).

The clinical coordinator at the Julie Valentine Center, Sarah Davis (Davis), conducted a forensic interview of victim on April 30, 2012. (Oct. 7 Tr.p.76). The interview was preserved in an audio and video recording. (Oct. 7 Tr.p.77).

The court held a pre-trial motion hearing to determine the admissibility of the out-of-court statement made by victim pursuant to S.C. Code Ann. § 17-23-175. (Oct. 6 Tr.p.69). The State called Davis to testify out of the presence of the jury. (Oct. 6, Tr.p.69). Davis testified she had conducted over 530 forensic interviews with children. (Oct. 6 Tr.p.72). Davis had a bachelor's degree in psychology from Clemson University and a master's in social work from the University of South Carolina; she was a licensed social worker in South Carolina and attended

classes regularly in social work and forensic interviewing. (Oct. 6 Tr.p.71). Davis defined a forensic interview as a semi-structured, developmentally appropriate non-leading method of questioning children about allegations of abuse. (Oct. 6 Tr.p.72). Davis testified she was trained to use non-leading questions so the information elicited did not stem from something she suggested. (Oct. 6 Tr.p.72). Davis testified she knew victim from the forensic interview she performed on April 30, 2012. (Oct. 6 Tr.pp.72-73).

Although there were some questions victim had difficulty understanding, Davis testified the responses were developmentally appropriate given victim was five years old. (Oct. 6 Tr.pp.74-75). To ensure she heard correctly, Davis would repeat victim's answers and allow victim the opportunity to correct wrong responses. Victim corrected Davis during the interview. (Oct. 6 Tr.p.75). The State sought to move the recorded interview into evidence for the purposes of the hearing. (Oct. 6 Tr.p.76). Applicant objected on the grounds it violated the Confrontation Clause because he was not present during the interview to cross-examine victim and because the statement exceeded time and place restrictions. (Oct. 6 Tr.pp.76-77; p.80). In response, the State clarified, pursuant to § 17-23-175, it must make victim available for cross examination at trial to address Confrontation Clause concerns and that victim would be called to testify as a witness at trial. (Oct. 6 Tr.p.77).

At the conclusion of the pre-trial motion hearing, the trial judge found the out-of-court statement was admissible given victim would testify and be subject to cross examination. (Oct. 6 Tr.p.84). Specifically, the judge found the statement was given in response to an investigative interview of victim; an audio and visual recording of the statement was preserved on videotape; the child would testify and be subject to cross examination; and, finally, the totality of the circumstances surrounding the making of the statement provided particularized guarantees of

trustworthiness. (Oct. 6 Tr.p.84). The judge reiterated that based upon what he heard from Davis and his observation of the interview, the requirements concerning the admissibility of the statement were met. (Oct. 6 Tr.pp.80-82; p.84).

The trial judge also made specific findings in determining that the statement possessed the particularized guarantees of trustworthiness. First, he found that the interviewer's questions did not suggest answers. Second, the judge concluded the interviewer's training was substantial, and sufficient to allow her to conduct the interview. Third, he found the statement represented a sufficiently detailed account of the offense such that if the evidence was believed by the jury, it would represent a detailed account of the offense. Fourth, the judge found the nature of the questions did not obstruct the overall internal coherence of victim's statements. Lastly, he concluded that the sworn testimony of Davis regarding the circumstances surrounding the interview was the only testimony necessary, in addition to the court's viewing of the videotape. (Oct. 6 Tr.p.84).

The trial commenced and the State called victim to testify. Victim identified her mother in the courtroom and an investigator, also named Michael. She stated she lived with mother and has dogs. (Oct. 7 Tr.pp.63-66). Applicant cross-examined victim on her age, birthday, school, address, sleep-overs, and what she does to make mother feel better. (Oct. 7 Tr.pp.68-72).

The State also again called Davis to testify before the jury regarding the circumstances of the recorded interview of victim. (Oct. 7 Tr.p.78). The State then sought to move the interview into evidence. (Oct. 7 Tr.p.78). Applicant renewed his earlier challenge to the constitutionality of § 17-23-175 on Confrontation Clause grounds. Applicant argued the content of the recorded interview was suggestive in nature due to the use of leading and repetitive questions. (Oct. 7 Tr.pp.78-79).

The trial judge admitted the interview into evidence, rejecting the arguments that the statute was unconstitutional and leading questions were used. (Oct. 7 Tr.pp.79-80). Instead, the judge found all of the statutory requirements concerning the admissibility of an out-of-court statement by a child under twelve were met. (Oct. 7 Tr.pp.79-84). Applicant's objections were overruled. (Oct. 7 Tr.p.81).

During the direct examination of Davis, the State published the forensic interview to the jury. (Oct. 7 Tr.p.85). During the recorded interview, victim referred to applicant by name and stated that he touched her "bottom" with his finger and his tongue. Victim described that the incident took place when she was five in the playroom at her house. Victim, not the interviewer, is the first to mention applicant's name. The interviewer asks questions about the specific incident only after victim identified applicant and stated that he inappropriately touched her "bottom."

Forensic pediatrician Nancy Henderson examined victim on May 3, 2012. The doctor found the physical examination was normal, but explained a normal examination does not preclude sexual touching and provided an explanation to the jury to support her testimony. (Oct 7 Tr. pp.115-125). Shauna Galloway-4Williams testified that she does not know and has never met victim. She explained disclosure behavior to the jury. (Oct. 7 Tr. pp.135-137).

At the close of the State's case, applicant moved for a directed verdict, asserting the State failed to prove its case because the victim did not testify at trial to the elements of the indicted offenses. The trial judge denied the motion. (Oct. 7 Tr.p.138).

Applicant elected not to present any witnesses. The jury convicted applicant of third-degree CSC with a minor, but acquitted him of the more serious charge of first-degree CSC with a minor. (Oct. 8 Tr.p.124).

ALLEGATIONS

In his initial application, applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
   a. Failure to request a preliminary hearing
   b. Failure to object to indictment of third-degree of CSC with a minor
   c. Failure to fully cross examine child victim's mother
   d. Advising applicant a prior conviction could be used against him if he testified at trial
   e. Failure to object to trial judge's order telling jurors to stay until they reached a verdict
   f. Failure to object when applicant improperly sentenced as a second offender
2. Judicial bias and prejudice

In the amended application, PCR counsel alleges the following claims of error:

1. Ineffective assistance of counsel:
   a. Failure to strike juror #34 and deplete all strikes
   b. Failure to fully cross examine witness Tammy ____
   c. Failure to effectively cross or recall the child witness
   d. Failure to argue the child witness's testimony did not meet S.C. Code Ann. § 17-23-175(A)'s requirements
   e. Failure to argue the child witness was not a competent witness under SCRE 601 & 602 or that the video did not contain particularized guarantees of trustworthiness
   f. Failure to stress in closing argument the child witness was unable to remember the incident or to identify the applicant while under oath and other evidentiary issues
   g. Advising applicant that his prior conviction could come in if he testified
   h. Failure to object to the jury instruction, "Your job, your objective is to find the truth . . ."
2. Applicant was denied his Fifth Amendment due process rights when the State called the child witness to the stand and she was unable remember the incident or to identify applicant. After the child was released as a witness, the State played a video of the child's forensic interview which was entered it into evidence through the interviewer. This order of presentation of the evidence effectively compelled applicant to present a defense. A defendant cannot be forced to give either up his Sixth Amendment right to confrontation or his Fifth Amendment right to remain silent. This procedure was unconstitutional and denied the applicant a fair trial
3. Applicant was denied a fair trial when the trial judge attempted to rehabilitate

jurors who stated they could not be impartial on a questionnaire rather than did not striking them for cause. This violated the applicant's Sixth Amendment right to an impartial jury

At the start of the hearing, respondent moved to dismiss claims Two and Three in the amended application, and the claim of judicial bias in the initial application, arguing they were not proper for post-conviction relief (PCR) and asserted they were direct appeal issues specifically barred by statute. This Court agrees and summarily dismisses all three claims. Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(b); *see also Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."). All three of the allegations could have been raised in applicant's direct appeal. The claims were raised in the initial PCR application and amended application with cites to the record. Nothing prevented applicant from raising them prior to this action. *See Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993) (explaining issues that could have been raised at trial or on direct appeal cannot be asserted in an application for PCR absent a claim for ineffective assistance of counsel). Applicant's failure to raise the allegations when he had the opportunity to do so waived these issues as grounds for PCR. Therefore, claims Two and Three in the amended application, and the claim of judicial bias in the initial application are dismissed with prejudice.

Also prior to the start of the hearing, PCR counsel indicated applicant would proceed only on the ineffective assistance of counsel claims raised in the amended application. Therefore, to the extent any allegations in the initial application are not explicitly denied in this order, they are dismissed with prejudice as no testimony was presented to prove the claims. *See* Rule 71.1(e), SCRCP (providing the burden of proof is on the applicant to prove his allegations

by a preponderance of the evidence).

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant testified on his own behalf. Applicant testified trial counsel did not review discovery with him, develop a defense, and urged him to plead guilty. Applicant stated he was not aware of the State's evidence against him until the day of trial. He testified counsel failed to fully cross examine the victim's mother about text messages they sent each other or about the nature of their relationship. Applicant stated the mother wanted to have sex with him, but he was engaged so he told her he did not want to have a romantic relationship with her. Applicant testified he told the victim's mother he had a prior second-degree CSC with a minor charge, told her the allegations were not true, and the mother did not mind if he spent time with her daughter. Applicant stated the victim could not identify him in the courtroom, but rather pointed to "Michael" the investigator, and counsel failed to cross examine her about the failure to identify him. Applicant also testified counsel did not cross examine the victim about the alleged incident in the playroom.

Applicant testified he felt the trial judge was biased during jury qualifications, particularly because some jurors indicated on the questionnaire they could not be impartial during trial. Finally, applicant stated he believed trial counsel did not effectively argue his case before the jury during her closing argument.

During cross examination, applicant acknowledged he was on the sex offender registry at the time of the incident and that he talked to trial counsel about his prior criminal record when they discussed whether or not he should take the stand to testify at trial. Applicant testified he gave a statement to investigators in which he denied the allegations and explained the victim's mother checked on them every few minutes while they were in the playroom. Applicant also

acknowledged the jury found him not guilty of the more serious charge of first-degree CSC with a minor.

Trial counsel testified she was appointed to represent applicant and met with him numerous times, including after she received discovery. Counsel stated she met with applicant to watch the victim's forensic interview and review other discovery materials with him. Counsel noted the mother gave a statement to investigators in which she told them applicant spent the night at her house several times, applicant had been alone with the victim in a separate room, and the victim told the forensic interviewer applicant "licked her butt." Counsel testified her strategy at trial was to argue applicant was not guilty and the victim's mother was being vindictive by bringing charges against applicant because he would not have a romantic relationship with her. Further, counsel stated her strategy was to argue to the jury the victim never made a clear statement about the allegations in the interview. Counsel testified she explained applicant's constitutional rights to him and he told her he did not want to testify at trial because of his criminal history and because he was still on probation.

Trial counsel testified there was a plea offer from the State for twenty-five years, which applicant rejected. Counsel stated applicant told her he did not think he would take any offer. The State made a second offer for the lesser-included offense of lewd act upon a minor which applicant also turned down. Applicant also did not agree to plead guilty pursuant to *Alford*.[1] Counsel testified the trial judge limited the reference of applicant's prior charge to simply a prior felony.

Regarding cross examination of witnesses, trial counsel testified her strategy was to limit the testimony of the victim's mother. Counsel stated she wanted to keep her cross examination

[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

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short because the mother gave information to investigators she believed was more harmful to applicant and she wanted to avoid the jury hearing that information. Counsel testified she also explained to applicant she would have to be careful about how she questioned a child witness. Counsel stated she wanted to limit the victim's testimony and to avoid the possibility of the child blurting out something that would hurt her client's case. Specifically, counsel testified she did not believe the forensic interview was particularly harmful because the child was not specific in her allegations and her strategy was to limit the child's testimony at trial. Further, counsel stated she objected pre-trial and during trial to the admission of the videotaped interview, but was ultimately unsuccessful in keeping the interview out. During her closing argument, counsel testified she wanted the jury to hear the defense strategy that applicant was not guilty and he did not harm the child.

Regarding jury selection, trial counsel testified there were eleven potential jurors who were individually examined by the trial judge during *voir dire* after indicating "yes" to at least one question on the juror questionnaires.[2] When asked by the judge, ten of the potential jurors indicated they could be fair and impartial, while one said he could not and the judge excused him. Counsel stated she made a motion to excuse the other ten, but the judge denied it. Counsel testified she did not strike juror #34 who was one of the ten because he told the judge he could be fair and impartial, and because she wanted to save some of her remaining strikes to use if other members of the pool came up during jury selection. Counsel stated she was more concerned about members other than #34 possibly being seated.

Finally, trial counsel testified she did not object to the trial judge's closing instruction to

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[2] One question asked if the potential juror or anyone in their immediate family had ever been a victim of CSC or sexual abuse, and the other asked if the person had strong beliefs about CSC or sex abuse that would prevent them from being fair and impartial in their consideration of the evidence. (Oct. 6 Tr.p.40).

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the jury that their objective was to "find the truth." Counsel stated she did not think the charge was objectionable because that language was used in the context of the jury's role in the case and was not near the burden of proof instruction. Counsel testified the charge was not prejudicial to her client because it did not shift the burden away from the State, and the jury instruction, as a whole, was correct.

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 further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony. As a matter of general impression, this Court finds trial counsel's testimony was credible and persuasive on all matters, while also finding applicant's testimony and assertions lack credibility. These credibility findings have been applied to the Court's findings set forth below. Pursuant to S.C. Code Ann. §17-27-80, the Court makes the following findings of facts and conclusions of law based on the probative evidence presented.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 686. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

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In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, an applicant must prove counsel's performance was deficient. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. 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 of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds applicant has failed to carry his burden of proof and has not established any ineffectiveness of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by applicant:

Failure to strike juror #34 and deplete all strikes

Applicant alleges trial counsel was ineffective in failing to strike juror #34 and deplete all strikes to preserve the argument the trial judge should not have qualified jurors who indicated on a questionnaire they could not be impartial. (Amended App.p.1). This Court finds this claim is without merit.

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Applicant has failed to present any credible evidence to support this allegation. While the Sixth and Fourteenth Amendments provide a defendant with the constitutional right to a fair and impartial jury of his peers, this right does not entitle him to handpick a jury. *State v. Stanko*, 376 S.C. 571, 576, 658 S.E.2d 94, 97 (2008). The trial judge has a duty to ensure a jury of fair, impartial, and unbiased jurors is impaneled. S.C. Code Ann. §§ 14-7-1010 & 1020. To identify potential sources of bias, the judge must ask potential jurors whether they are aware of any bias or prejudice against a party—a process commonly known as *voir dire*. *State v. Woode*, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001).

At trial, eleven people in the jury pool answered "yes" on at least one question on the questionnaire. (Oct. 6 Tr.p.6). The trial judge examined them each individually to determine if they could be fair and impartial. The judge explained to them the duties and responsibilities of a juror and asked if they could be fair to applicant and State. One indicated he could not be and the judge immediately excused him. (Oct 6 Tr.p.12). The other ten indicated they could be fair and impartial and the judge determined they were qualified to serve.

This Court finds trial counsel's testimony on this issue credible and supported by the record. Counsel testified, based on the information revealed during the oral examination, she did not believe it prudent to exercise a peremptory strike for juror #34, one of the ten who indicated he could be impartial. Counsel believed she needed to save her strikes for future and more compelling *voir dire* issues. Further, counsel testified she made an earlier motion to excuse all the individually questioned potential jurors, but the trial judge denied the motion. Both strategic decisions are entitled to deference by this Court. *See Strickland*, 466 U.S. at 689 (holding a petitioner must overcome the presumption that the challenged action taken by counsel is considered sound trial strategy). This Court finds counsel was not deficient.

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In addition, applicant failed to show he was prejudiced by the jury selected because he cannot demonstrate the jurors were not impartial and there is no evidence of bias. *See Stanko*, 376 S.C. at 576, 658 S.E.2d at 97 (explaining a defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury). Accordingly, this Court finds applicant has failed to meet his requisite burden of proof. This allegation is denied and dismissed with prejudice.

Failure to fully cross examine mother

Applicant next alleges trial counsel was ineffective in failing to fully cross examine the victim's mother. (Amended App.p.1). This Court finds this allegation is without merit as applicant has failed to establish what further cross examination of the mother would have brought out to the jury. The purpose of cross-examination at trial is "to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." *State v. Gillian*, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004) *aff'd as modified*, 373 S.C. 601, 646 S.E.2d 872 (2007) (citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)).

At trial, trial counsel elicited information from the mother that she never left the victim and applicant fully alone, she could see into the playroom, and applicant and her daughter sitting on the floor. (Oct. 7 Tr.pp.57-59). The record also demonstrates counsel tried to establish through questioning that the mother wanted to develop more than a friendship with applicant, but mother denied it. (Oct 7 Tr.p.61).

Both trial counsel and applicant testified about this issue at the evidentiary hearing. This Court finds counsel's testimony more credible than applicant's. Counsel testified she had a strategic reason for limiting the mother's cross examination and for asking the types of questions

she did—counsel did not want potentially harmful from her statement to investigators being heard by the jury. It also supported the defense theory applicant was not guilty of the crime because he did not have the opportunity to be alone with the victim or because the mother was being vindictive by bringing charges because applicant would not have sex with her. Therefore, because counsel had a valid, strategic reason for asking the types of questions she did during cross examination, her performance was reasonable. "When counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). The Court finds applicant cannot demonstrate counsel was deficient.

Applicant also fails to prove he was prejudiced by counsel's cross examination of the victim's mother. Counsel's cross examination and argument that she advanced at trial fully set forth enough information so the jury could properly assess the witness's credibility and counsel attempted to demonstrate the supposed lack of it regarding the nature of the relationship the mother wanted with applicant. *See, e.g., Fugate v. Head*, 261 F.3d 1206, 1219 (11th Cir. 2001) ("The decision as to whether to cross-examine a witness is a tactical one well within the discretion of a defense attorney" and absent a showing of a single specific instance where cross-examination arguably could have affected the outcome of "either the guilt or sentencing phase of the trial, an applicant is unable to show prejudice necessary to satisfy the second prong of *Strickland*") (citations omitted). Accordingly, this Court finds this allegation must be denied and dismissed with prejudice.

Failure to effectively cross examine or recall the child witness

Applicant next claims trial counsel was ineffective in failing to effective cross examine or recall the child victim. (Amended App.p.1). This Court does not find this argument compelling.

Trial counsel's credible testimony at the evidentiary hearing before this Court was she wanted to be careful in cross examining the child victim and limit her testimony to avoid the possibility she blurted out something more harmful to applicant's case.

This Court notes the charges in this case involve applicant sexually abusing the victim, a five year old girl. The victim testified at trial, at which time she was seven years old. (Oct. 7 Tr.p.63). The cross-examination of a female child in sexual misconduct cases is a delicate task to be performed with care and caution. A review of the record in this case reveals trial counsel did just that. Counsel's questions were calculated to elicit only testimony counsel believed was necessary while treading carefully not to engage in meaningless debate over specifics or appear aggressive or condescending. This Court simply cannot find counsel's cross-examination, on the whole, unreasonable or deficient. Counsel attempted through her questioning to establish the child did not have a good memory about various events and to question her ability to recognize applicant. (Oct. 7 Tr. pp.68-72). Additionally, this Court believes it is pure conjecture to claim such further questioning would have potentially affected the outcome of the trial. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to argue the child witness's testimony at trial did not meet S.C. Code Ann. § 17-23-175(A)'s requirements

Applicant asserts trial counsel was ineffective in failing to argue the child witness's testimony at trial did not meet S.C. Code Ann. § 17-23-175(A)'s requirement that the child testify and be subject to cross examination because she was unable to remember the incident or to identify applicant in the courtroom. (Amended App.p.1). This Court finds this allegation is without merit.

This Court finds trial counsel was not deficient where the record shows counsel objected to the admission of the videotaped interview pursuant to S.C. Code Ann. § 17-23-175 during trial

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on confrontation grounds—the very issue now raised to this Court. When the State sought to move the forensic interview into evidence, counsel objected and argued it violated applicant's constitutional rights to confront the child, a more general objection than the one applicant now asserts should have been used. (Oct. 7 Tr.pp.78-79). This was a renewed objection to the video's admission from the pre-trial hearing where counsel argued the interview violated the Confrontation Clause because applicant was not present to cross examine the child. (Oct. 6 Tr.pp.76-77). The trial court found the statutory requirements were met, in particular, because the child testified at the proceeding and was subject to cross examination. (Oct. 7 Tr.pp.79-80). As this Court found above, counsel effectively cross examined the child witness because she strategically chose to limit her questions to ensure the victim's answers would not be harmful to her client. This Court finds counsel credibly testified she felt she adequately addressed the forensic interview and did what she could to prevent its admission at trial. This Court will not second guess counsel's trial tactics and finds her strategy reasonable. *See Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing *Goodson v. United States*, 564 F.2d 1071 (4th Cir. 1977)) (holding 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). Moreover, this Court must make "every effort" to "eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. *Strickland*, 466 U.S. at 689. This Court finds counsel's efforts regarding the forensic interview were not deficient.

Because applicant cannot demonstrate the first prong of *Strickland*, he also fails to prove he was prejudiced by trial counsel's objection to the forensic interview and child victim's testimony. Particularly where there is nothing in the record to indicate the trial court would

have made a different ruling regarding the admissibility of the interview had counsel used different language, as argued by applicant, as counsel had already tried to prevent its admission twice and been unsuccessful. Accordingly, this Court finds this allegation must be denied and dismissed with prejudice.

Failure to argue the child witness was not a competent witness under Rules 601 and 602, SCRE, or that the video did not contain particularized guarantees of trustworthiness

Applicant next asserts trial counsel was ineffective for failing to argue the child victim's inability to remember the incident or to identify applicant showed she was not a competent witness under Rules 601 and 602, SCRE, or that the video did not contain particularized guarantees of trustworthiness required for its admission after the child was unable to remember the incident or identify applicant during her testimony. (Amended App.p.2). This Court finds this allegation is without merit and dismisses it with prejudice.

A child is competent to testify at trial if she, among other factors, is mature enough to understand the questions and answer them, know the difference between right and wrong, understand it is right to tell the truth and wrong to tell a lie, and be willing to tell the truth, and fear punishment if she lies. *S.C. Dep't of Soc. Servs. v. Doe*, 292 S.C. 211, 219, 355 S.E.2d 543, 547 (S.C. Ct. App. 1987). The competency of a child witness is not dependent on the content of her testimony, but rather on whether "the child is substantially rational and responsive to the questions asked." *Id.* at 219, 355 S.E.2d at 547.

Prior to the child's testimony, the trial court gave the jury a special instruction regarding child witnesses. (Oct 7 Tr.p.64). The court explained the jury would judge her credibility as they would any witness who testified, but cautioned children are different than other witnesses because of their age and it was up to the jury to "decide whether a child understands the seriousness of appearing as a witness in a criminal case, whether the child understands the

questions, whether the child has a good memory, whether the child understands the difference between lying and telling the truth." (Oct. 7 Tr.pp.64-65).

This Court finds trial counsel was not ineffective where counsel heard the testimony of the child and there was nothing to indicate the child was not a competent witness or that counsel could have realistically made that argument. The record demonstrates the child was responsive to the questions asked, answered all questions appropriately, and was a rational witness. *See Doe, supra.* During direct and cross examination, the child victim answered questions about who lived with her, where she went to school, her age, sleep-overs, who she recognized in the courtroom, among others. The child also acknowledged there were things she did not remember and when she did not know an answer. Accordingly, this Court finds applicant fails to prove either prong of *Strickland*—counsel cannot be ineffective for failing to make what would be a frivolous argument. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (explaining an applicant bears the burden of proving the allegations in his or her application).

Next, this Court finds trial counsel was not ineffective in failing to argue the forensic interview did not possess particularized guarantees of trustworthiness based on the child victim's testimony. Similar to the allegation above, the Court finds counsel was not deficient particularly where there record demonstrates counsel objected to the admission of the videotaped interview pursuant to S.C. Code Ann. § 17-23-175(B) during trial—the very issue now raised to this Court. When the State sought to move the forensic interview into evidence, counsel objected and argued the interviewer used leading questions, the questions were suggestive in nature, the questions were repetitive and in multiple-choice form, and the protocol used was not scientific, a more general objection than the one applicant now asserts should have been used. (Oct. 7 Tr.pp.78-79). This was a renewed objection to the video's admission from the pre-trial hearing where

counsel argued a similar motion. (Oct. 6 Tr.p.80). The trial court made specific findings in determining the statement possessed the particularized guarantees of trustworthiness. First, the court found the interviewer's questions did not suggest answers. Second, the interviewer's training was substantial and sufficient to allow her to conduct the interview. Third, the court found the statement represented a sufficiently detailed account of the offense such that if the evidence was believed by the jury, it would represent a detailed account of the offense. Fourth, the court found the nature of the questions did not obstruct the overall internal coherence of the victim's statements. Lastly, the court concluded the sworn testimony of the interviewer regarding the circumstances surrounding the interview was the only testimony necessary, in addition to the court's viewing of the videotape. (Oct. 6 Tr.p.84). During trial, the court again rejected counsel's argument leading questions were used, in particular, the court found the totality of the circumstances surrounding the making of the statement provided guarantees of trustworthiness. (Oct. 7 Tr.p.79-80).

This Court finds counsel's strategy reasonable where the record shows counsel objected to the admission prior to trial and again when the State moved to admit the video into evidence. *See Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531 (holding 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). Again, this Court finds counsel's testimony credible she felt she did what she could to prevent the forensic interview's admission at trial.

Because applicant cannot demonstrate the first prong of *Strickland*, he also fails to prove he was prejudiced by trial counsel's argument. Particularly where there is nothing in the record to indicate the trial court would have made a different ruling had counsel used different language

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during the second motion to prevent the video's admission, as argued by applicant. The trial court ruled in the pre-trial hearing the only sworn testimony necessary for his decision was that of the forensic interviewer, so any other argument by counsel would not have been successful and this Court finds applicant cannot demonstrate prejudice. *See Strickland*, 466 U.S. at 687 (holding an applicant must show not only that counsel's performance was deficient, but that the deficiency prejudiced his defense). Accordingly, this Court finds this allegation must be denied and dismissed with prejudice.

Failure to argue in closing the child witness could not remember incident or identify applicant and other evidentiary issues

Applicant argues trial counsel was ineffective in failing to stress during closing argument the child witness was unable to remember the incident or identify applicant while under oath and point out that when the doctor who performed the forensic examination asked the child whether she had been hurt or touched she did not share any information which meant she said "no." (Amended App.p.2). This Court finds this allegation is without merit and applicant has failed to establish any deficiency of trial counsel regarding the claim.

"'[C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case.'" *State v. Mouzon*, 321 S.C. 27, 31, 467 S.E.2d 122, 125 (Ct. App. 1995) (quoting *Herring v. New York*, 422 U.S. 853 (1975)). Further, "it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole" because "[o]nly then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." *Mouzon*, 321 S.C. at 31, 467 S.E.2d at 125.

This Court finds trial counsel credibly testified her strategy was to preserve the last argument, argue applicant was not guilty, and the victim's mother was being vindictive by

bringing charges against applicant because he would not have a romantic relationship with her. Further, counsel stated during the evidentiary hearing her strategy was to argue to the jury the victim never made a clear statement about the allegations in the interview. This Court finds counsel did make such arguments during her closing, including the following portions:

> It is important to note that Ms. Davis and Ms. Galloway testified that their interview process is a non-leading process. That's for you to decide. The video, as you've seen it, you have seen whether the questions were leading, whether the information was applied, whether there were choices given, whether words were planted in a five year old's mind. So you can recall that for yourself. (Oct 7 Tr.p.174).
>
> [T]here were several times in the video [victim] kept saying to Ms. Davis, He did not touch me. And Ms. Davis's question would be, right after she said, He didn't touch me, her question would be, Well, how did it feel when he touched you? Is that suggestive? Is that planting an idea? (Oct 7 Tr.p.175).
>
> Did you have your clothes on?
> Yes, all my clothes were on.
> What did you have on?
> Shorts.
> Another time in the interview, What did you have on?
> Blue jeans.
> Another time in the interview, What did you have on?
> A dress.
> This is coming from [victim]. (Oct 7 Tr.p.175).
>
> Did he touch you under your clothes or on your clothes?
> And [victim] would say, On the clothes.
> And as the interview goes on, Did he touch your skin?
> The testimony from Ms. Davis and or Ms. Galloway, one or the other, saying that well, she may not have understood the words on, in or under. Okay. That's very important. That's very important. The words touching on your clothing, touching on your skin or touching within your vaginal area. Those very important words because they are elements of the crime that is charged. CSC is having to prove an intrusion into the body part. [Victim] said that he didn't hug me, he didn't kiss me. (Oct 7 Tr.pp.175-76).
>
> [Mother] herself testified they had a three month relationship. She testified to that. Maybe she'd see him once a week, maybe. Or on

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> the weekends or whatever the regularity of their visitation was. But she testified about texting him. (Oct 7 Tr.p.177).

> [Victim] lived with her mother so she was probably talking to her mother about things. If she was talking to any other investigator – Investigator Mike, who she recognized very quickly, she recognized her mommy. Solicitor asked her, do you recognize anybody else? No. Okay, the reason for this picture is they want to try to tell you that she couldn't – [victim] couldn't recognize [applicant] because he looked so much different. I'm offering you this for your consideration. That as you deliberate and weigh the testimony and the evidence that has been presented to you, that you come back with a verdict of not guilty on CSC first and not guilty on CSC third. We submit to you that The State has not proved the elements of the crime as charged and we ask for a not guilty verdict from all of you. (Oct 7 Tr.p.178).

The record conclusively establishes counsel thoroughly noted throughout her closing argument the child did not make clear allegations against applicant and did not have a good memory, generally, and tied it directly to the defense strategy. Therefore, this Court finds counsel was not deficient in her performance.

Additionally, this Court finds applicant has failed to establish any prejudice from this purported deficiency as there is no likelihood the result of applicant's trial would have been different had counsel argued her closing any differently. Counsel pointed out the weaknesses in the State's case and the jury ultimately returned a verdict partially in applicant's favor when it found him not guilty of the more serious charge of first-degree CSC with a minor. Therefore, this allegation must be denied and dismissed with prejudice.

Ineffectiveness in advising applicant his prior conviction could be used against him

Next, applicant asserts trial counsel was ineffective in advising him his prior conviction could be used against him if he chose to testify at trial. (Amended App.p.2). This Court finds this allegation is meritless.

At trial, the trial court informed applicant the State could impeach him on his prior

conviction if he testified. (Oct 7 Tr.pp.143-44). However, because it was a second-degree CSC with a minor and similar to the offense for which applicant was currently on trial, the State would be limited to asking if he had been convicted of a prior felony, but could not ask him about the specific charge. (Oct 7 Tr.p.144). The court proceeded to engage in a colloquy with applicant wherein his rights were explained to him, he had a short conference with trial counsel, and he chose not to testify. (Oct 7 Tr.pp.144-46).

Before this Court, applicant testified he talked to trial counsel about his prior criminal record when they discussed whether or not he should take the stand to testify at trial. Counsel testified she explained applicant's constitutional rights to him and he told her he did not want to testify at trial because of his criminal history and because he was still on probation.

This Court finds trial counsel's testimony more credible than applicant's on this issue. The record demonstrates applicant voluntarily chose not to testify following pre-trial discussions with counsel, a lengthy colloquy with the trial court, and a discussion at trial with counsel following the court's decision regarding his prior CSC charge. Further, counsel testified applicant always told her he did not want to testify so any advice she gave him regarding his prior charge was made in the context of that strategy. *See Strickland*, 466 U.S. at 691 (stating counsel's actions are often based on information supplied by the defendant). This Court finds counsel was not deficient.

This Court also finds applicant has failed to demonstrate trial counsel's advice prejudiced him in any way. *See Jackson v. State*, 329 S.C. 345, 352-53, 495 S.E.2d 768, 772 (1998) (holding advising applicant not to testify is a valid strategic decision not prejudicing him where applicant had prior convictions for crimes of moral turpitude). The trial court had already ruled the nature of applicant's prior conviction could not be raised and the State would be limited to

asking him if he had been convicted of a prior felony. Further, if applicant testified, the State could have tested his version of events. This Court finds applicant has not met his burden of demonstrating the result of trial would have been any different. Therefore, the Court finds applicant has failed to meet his burden regarding his allegation and it must be denied and dismissed with prejudice.

Failure to object to "find the truth" language

Finally, applicant alleges trial counsel was ineffective in failing to object to the trial court's closing instructions to the jury in which he told jurors, "Your job, your objective is to find the truth." (Amended App.p.2); *see also* (Oct 7 Tr.p.180). This Court finds applicant has failed to meet his burden as to this allegation.

At the evidentiary hearing, this claim was primarily addressed through testimony by trial counsel. Counsel testified she did not object to the language because she did not think the charge was objectionable. Counsel stated language was used in the context of the jury's role in the case and was not near the burden of proof instruction. Counsel testified the charge was not prejudicial to her client because it did not shift the burden away from the State, and the jury instruction, as a whole, was correct.

On this issue, our State Supreme Court has cautioned "[j]ury instructions **on reasonable doubt** which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to the defendant.'" *State v. Aleksey*, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (emphasis added). However, the *Aleksey* court went on to hold because the "truth-seeking" instruction in that case was "given in the context of the jury's role in determining the credibility of witnesses" there was "not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a

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reasonable doubt." *Id.* at 28-29, 538 S.E.2d at 252. The court cautioned the circuit courts to abandon the truth-seeking language in future charges, but held that the instruction as a whole in that case was a correct statement of law and found no basis for reversal on that ground. *Id.*

The recent opinion in *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018), revisited the *Aleksey* decision and held a preliminary instruction using the phrases "search for the truth," "true facts," and "just verdict" were delivered in error but caused no prejudice warranting reversal where the instruction appeared in the preliminary remarks to the jury and, again, did not speak to the State's burden of proof. *Beaty*, 423 S.C. at 33, 813 S.E.2d at 506. The *Beaty* court held "the disputed comments can be distinguished from *Aleksey* because they were a mere statement to the jury and not a charge on the law." *Id.* at 34, 813 S.E.2d at 506. Further, the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges as was condemned in *Aleksey*. *Id.*

This Court finds that the jury instruction applicant cited do not form the basis for a grant of post-conviction relief. The instruction delivered in this case is limited to a single line at the very beginning of a lengthy jury instruction. The limited nature of this phrase imparted no duty upon counsel to object in light of the *Aleksey* decision, which existed at the time of trial, and the failure to object to this limited phrase did not rendered counsel's performance deficient. Further, the lack of objection to the charges excerpted above did not prejudice applicant because the trial court's issuance of any language pertaining to the jury's role at trial did not address the burden of proof the jury was to apply to its deliberations. The cited instruction referenced only the jury's role in the greater scheme of the trial and role to deliver a unanimous verdict. The relevant case law makes it clear the instruction did not prejudice applicant because it spoke only generally to the jury's role as the factfinder. The instruction was not anywhere near the burden of proof

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instruction and did nothing to shift the burden from the State. There is no reasonable possibility of a different outcome had counsel lodged an objection to the instruction. Accordingly, pursuant to *Aleksey* and *Beaty*, this Court finds applicant has failed to demonstrate *Strickland* error-and-prejudice warranting a grant of relief.

CONCLUSION

Based on the foregoing, this Court finds applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief.

The Court notes the 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 appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek review, PCR counsel must file a notice of appeal on the applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for further procedures for appeal.

IT IS THEREFORE ORDERED:

1. The PCR application is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 12 day of December, 2018.

THE HONORABLE ALEX KINLAW, JR.
Presiding Judge

Greenville, South Carolina

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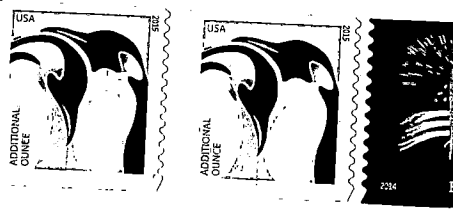

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