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July 17, 2019

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

JUL 22 2019

S.C. SUPREME COURT

Re: Arthur Franklin Smith 306393 v State, 2016-CP-07-00279

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, in the above Beaufort County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc: *SARA E GUNTON* JF

~~Benjamin Limbaugh, Esq~~
Arthur Franklin Smith 306393
Beaufort County Circuit Court Clerk

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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JUL 22 2019

APPEAL FROM BEAUFORT COUNTY

S.C. SUPREME COURT

Court of Common Pleas

Honorable Thomas A. Russo, Circuit Judge

Case No.: 2016-CP-07-6279

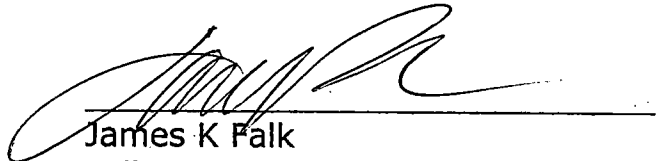
Arthur F. Smith 306393.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Arthur F. Smith appeals the Honorable Thomas A Russo's July 9, 2019 Order of Dismissal. Undersigned counsel received notice of entry of the order on July 17, 2019. A copy of the order on appeal is attached hereto.



James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

July 17, 2019

Sara E Gunton, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Beaufort CP
PO Box 1128
Beaufort, SC 29901

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 22 2019

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable Thomas A Russo, Circuit Judge

S.C. SUPREME COURT

Case No.: 2016-CP-07-0279

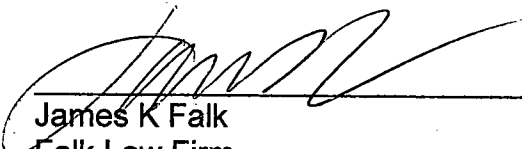
Arthur F Smith 306393.....PETITIONER

V.

State of South Carolina.....RESPONDENT

CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Sara E Gunton Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Beaufort County Clerk of Court. I further certify that all parties required by Rule to be served have been served this July 17, 2019.


James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
))
))
Arthur Franklin Smith, #306393,)
))
Applicant,)
))
))
v.)
))
State of South Carolina,)
))
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
THE FOURTEENTH JUDICIAL CIRCUIT

Case No. 2016-CP-07-00279

ORDER OF DISMISSAL

2019 JUL 12 PM 1:01
JERRI ANN ROSENBERG
BEAUFORT COUNTY, S.C.
CLERK OF COURT

The above-captioned matter comes before the Court via an application for post-conviction relief filed by Arthur Franklin Smith on January 29, 2016. This Court convened an evidentiary hearing into the matter on October 10, 2017, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by James Falk, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, Gail Lovell, Esquire, testified via phone; Applicant was present and testified. This Court had the opportunity to listen to their testimony and rule on their credibility. This Court also had before it a copy of the trial transcript, the records of the Beaufort County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter.

I. PROCEDURAL HISTORY

Applicant was indicted by the September 2003 term of the Beaufort County Grand Jury for Criminal Sexual Conduct with a Minor (2003-GS-07-1756). Trasi Campbell, Esquire, represented him. In November 2004, Applicant proceeded to a jury trial, pursuant to which he was found guilty as indicted. The Honorable Jackson Gregory sentenced Applicant to confinement for twenty years. However, the trial court subsequently granted Applicant a new trial on the ground that Victim's

testimony was coached by his aunt, *State v. Smith*, 372 S.C. 404, 406, 642 S.E.2d 627, 628-29 (Ct. App. 2007). The South Carolina Court of Appeals affirmed. *Id.* at 406, 642 S.E.2d at 629. The South Carolina Supreme Court subsequently found that the trial court judge did not abuse his discretion or commit an error of law and remanded the case for a new trial. *Id.* Applicant proceeded to a second jury trial on September 19, 2011, where he was represented by Gail Lovell, Esquire (Counsel) pursuant to which he was found guilty as indicted. The Honorable Roger M. Young, Sr. sentenced Applicant to confinement for thirty (30) years. A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to *Anders v. California*, 378 U.S. 738, 87 S.Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. *State v. Smith*, 411 S.C. 161, 767 S.E.2d 212 (Ct. App. 2014). The Remittitur was issued on June 30, 2015.

II. ALLEGATIONS

Applicant alleged the following grounds in his application:

1. Ineffective Assistance of Counsel
 - a. Failure to timely object to Andres Florencio's testimony as hearsay and failure to move for mistrial on Kendra McIlvee Twitty's testimony.

III. FACTUAL HISTORY

After Victim and his parents moved from Buffalo, New York, to Beaufort County, South Carolina, Victim's parents separated and he lived primarily with his biological mother. R. p. 106- 07. Victim visited his biological father, Applicant, at his house from time to time. R. p. 107. During these visits, beginning around when Victim was six years old, Applicant would perform oral and anal sex on Victim. R. p. 108. He would also make Victim perform oral sex on him and make him try to perform anal sex. R. p. 109-10. The sexual abuse always occurred in Applicant's house, specifically in Applicant's bedroom, when the two of them were alone. R. p. 108, ln. 18- 22. Applicant threatened to kill Victim or break his bones if he told anyone what was happening. R. p. 110, ln. 20-24. Victim stated that the abuse continued for about two years. R. p. 110, ln. 2-5. He testified that the sexual abuse made

him feel "terrible" and "angry" and that it hurt. R. p. 109, ln. 11-20. Because he was scared, Victim did not tell anyone about the abuse until after he stopped having contact with Applicant. R. p. 110-11.

Victim's aunt obtained custody of Victim and his two siblings in November of 2001. R. p. 91. At the time, Victim was "acting out" and exhibiting behavior that was "concerning." R. p. 92. Specifically, Victim fondled other children, was physically aggressive, and destroyed property. R. p. 92-93. Victim was sent to two different counseling centers because of these behaviors. R. p. 93-94. One of Victim's counselors testified that it appeared that Victim had been sexually abused and that he was suffering from symptoms of post-traumatic stress disorder. R. p. 186-88. Victim's aunt learned in January 2002 that Victim had been sexually abused. R. p. 95. After allowing Victim to spend more time in counseling trying to deal with his health issues, she took Victim to file a police report regarding the sexual abuse in May of 2003. R. p. 94-95. Victim had a forensic interview shortly thereafter and disclosed that he had been sexually abused in his biological father's bedroom and that it began around age six or seven. R. p. 148-49. The forensic interviewer recommended that Victim have no contact with his biological father. R. p. 150, ln. 1-4.

Victim's brother testified at Applicant's trial that Applicant also sexually abused him beginning around age six. R. p. 118-19. The abuse involved oral and anal sex either in Applicant's bedroom or his bedroom, and Applicant threatened to hurt his mother if he told anyone about the abuse. R. p. 119; p. 122-23. Additionally, Victim's sister testified that Applicant sexually abused her when she was six and seven years old. R. p. 126-27. She testified that Applicant made her touch his penis with her hand and her mouth, and he would touch her vagina and her "butt." R. p. 127. The abuse mainly occurred in Applicant's bedroom. Applicant told her that she should not tell anyone about the abuse. R. p. 128.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her 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 plea counsel as a ground for relief, they must present evidence to satisfy the two prong test enumerated in *Strickland v. Washington*, to determine whether plea counsel's "assistance was so defective as to require a reversal of" Applicant's sentence. *Id.* at 466 U.S. 668, 687 (1984). First, the Applicant must show plea counsel's performance was deficient; and second, the applicant must show they were prejudiced by that deficiency. *State v. Stalk*, 383 S.C. 559, 560-61 (2009) (citing *Hill v. Lockhart*, 474 U.S. 52).

In order to prove deficient performance under the first prong of *Strickland*, the burden is on Applicant to show that plea counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. *Id.* 688. In considering whether counsel's performance was reasonable, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 690). The applicant

must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Even if the Applicant can establish that counsel's performance was deficient, they must still overcome their burden to demonstrate prejudice from that deficiency. The second prong of *Strickland* requires Applicant to prove that counsel's deficient performance prejudiced Applicant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625 (citing *Strickland*, 466 U.S. at 694).

a. Failure to timely object to Florencio hearsay testimony and move for mistrial on Twitty's testimony

Andres Florencio, a criminal investigator for the Beaufort County Sheriffs Office, testified without objection that in May of 2003, Victim and his aunt came to the Sheriffs Office "to report that sometime during the time between May [of] 2009 and June of the year 2000, that [Child] had been sexually assaulted by his father." R. p. 82. Counsel did not object. Later in the trial, Kendra Twitty, a forensic interviewer and counselor at Hope Cottage, testified, "[Victim] disclosed that he had to suck his dad's penis" Counsel immediately objected; the trial judge sustained the objection and instructed the jury to disregard her statement. Twitty then testified:

When I asked about time frame, [Victim] had said that it happened since he was, like, six or seven years old. . . I'm not exactly sure of the number, but he said it had been happening for a number of years. He was ten at the time I interviewed him and it happened in South Carolina in a trailer and they would be in his dad's bedroom.

R. p.148-49. Counsel objected and was overruled. R. p. 149.

On Appeal, Applicant argued the trial court erred in overruling his objection to Twitty's testimony that identified Applicant as the perpetrator. The Court of Appeals held that because Applicant was previously identified as the perpetrator without objection, Twitty's later testimony also identifying Applicant as the perpetrator was "harmless because it was cumulative." *State v. Smith*, 411

S.C. 161, 170, 767 S.E.2d 212, 217 (Ct. App. 2014) (citations omitted). The question before this Court, then, is whether Counsel's failure to object to the initial identification testimony of Investigator Florencio rose to the level of error required to grant post-conviction relief. The Court finds it does not.

Even assuming the first prong of Strickland was met, Applicant has not carried his burden of showing that there is a reasonable probability that the outcome at trial would have been different but for Counsel's deficient performance. In the trial of this case, the jury heard testimony not only from the Victim, but from the Victim's brother and sister, that Applicant repeatedly sexually abused each of them separately on multiple occasions over a period of years. R. p. 107-111; p. 118-120; p. 125-129. The Victim and his sister both specifically testified that the abuse occurred in Applicant's bedroom in his residence in Bluffton. R. p. 108; R. p. 127. All three witnesses testified with detail and specificity, and identified Applicant in the courtroom. Thus, it is reasonable to conclude that the jury could have found Applicant guilty beyond a reasonable doubt based on the testimony of the Victim and his siblings alone.

V. CONCLUSION

Based on the foregoing, this Court finds and concludes that Applicant failed to prove he was prejudiced by Counsel's alleged deficiencies. 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.

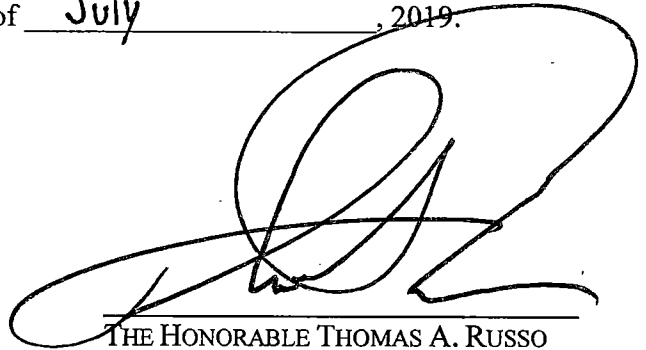
This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1g, SCRCR, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney

must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

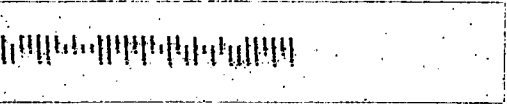
1. The Application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 9th day of July, 2019.



THE HONORABLE THOMAS A. RUSSO
Presiding Judge

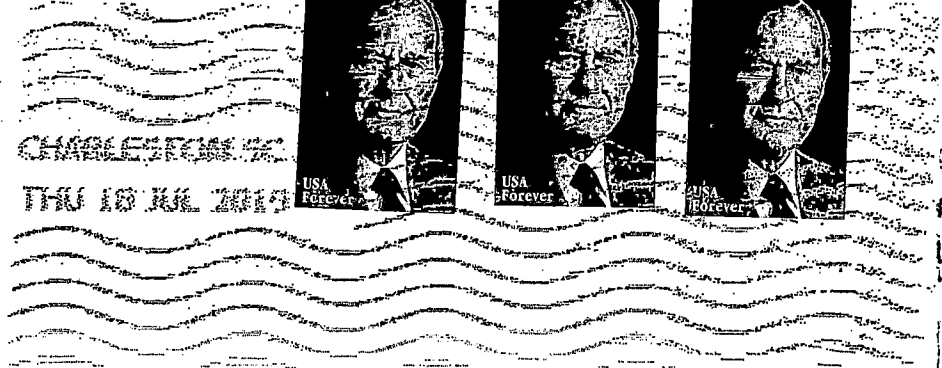
Florence, South Carolina



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JUL 22 2019

S.C. SUPREME COURT



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