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RECEIVED

AUG 14 2019

S.C. SUPREME COURT

Arthur K. Aiken

A. Bea Hightower

August 12, 2019

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

Re: August B. Kreis, III #365988 v. State of South Carolina
Civil Action No.: 2018-CP-32-00864

Dear Mr. Shearouse:

I am appointed counsel for the Applicant, August B. Kreis, III, in the above captioned post-conviction relief case. I have enclosed an original and one (1) copy of a Notice of Appeal for this case. Please file the original and return the file stamped copy in the enclosed SASE.

By copy of this letter with the filing enclosed, I have filed the filing with the Clerk of the Lexington County Court of Common Pleas. I have also served the filing on the Office of the Attorney General for South Carolina. Please call with any questions.

Thank you for your help

Sincerely,



Arthur K. Aiken

art@aikenandhightower.com

cc: Clerk, Lexington County Court of Common Pleas (w/enclosures)
Office of the Attorney General for South Carolina (w/enclosures)
August B. Kreis, III (w/enclosures)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

AUG 14 2019

S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, IV, Circuit Court Judge

Case No. 2018-CP-32-00864

August B. Kreis, III #365998.....Applicant/Appellant

v.

State of South Carolina.....Respondent/Respondent

NOTICE OF APPEAL

This is a post-conviction relief case. Appellant appeals from the Order of Dismissal filed on July 9, 2019 in this case. Appellant received written notice of the Order of Dismissal by email on July 25, 2019. A copy of the Order of Dismissal appealed from is attached.

August 12, 2019



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OTHER COUNSEL OF RECORD:

South Carolina Attorney General's Office
Assistant Attorney General Johnny E. James, Jr.
PO Box 11549
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ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

AUG 14 2019

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Walton J. McLeod, IV, Circuit Court Judge

Case No. 2018-CP-32-00864

August B. Kreis, III #365998.....Applicant/Appellant

v.

State of South Carolina.....Respondent/Respondent

PROOF OF SERVICE AND FILING

I certify that, on August 12, 2019, I served and filed the Notice of Appeal in this case by mailing copies of the Notice to:

South Carolina Attorney General's Office
Assistant Attorney General Johnny E. James, Jr.
PO Box 11549
Columbia, SC 29211

and

The Honorable Lisa M. Comer
Lexington County Clerk of Court
205 E. Main Street
Lexington, SC 29072

SIGNATURE ON THE FOLLOWING PAGE



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Columbia, SC
August 12, 2019

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

) IN THE COURT OF COMMON PLEAS
) FOR THE ELEVENTH JUDICIAL CIRCUIT
)

August Byron Kreis, III,
S.C.D.C. No. 365998,

) Case No.: 2018-CP-32-00864
)

Applicant,

)

) **ORDER OF DISMISSAL**
)

v.

)

State of South Carolina,

)

Respondent.

)

)

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FILED

This matter comes before the court by way of an application for post-conviction relief filed by August Byron Kreis, III ("Applicant") on March 9, 2018. The State of South Carolina ("Respondent") made its return on or about June 8, 2018. The court convened an evidentiary hearing into the matter on Friday, April 5, 2019, at the Marc H. Westbrook Judicial Center in Lexington, South Carolina. Applicant was present at the hearing and represented by Arthur K. Aiken, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Thomas E. Shealy, Esq. ("Counsel") also testified. The court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Lexington County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The court finds as follows:

I. PROCEDURAL HISTORY

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

2015 term of the Lexington County Grand Jury for attempting or committing a lewd act upon a child (2015-GS-32-02030), criminal sexual conduct with a minor, second-degree (2015-GS-32-02034), and lewd act upon a child (2015-GS-32-02036). Thomas E. Shealy, Esq. represented Applicant. Suzanne Mayes and Christopher Samellas, Esqs., of the Eleventh Circuit Solicitor's Office, prosecuted the case. On November 2, 2015, Applicant proceeded to trial before Judge Doyet A. Early, III and a jury. The jury found Applicant guilty as indicted on November 5, 2015. Judge Early sentenced Applicant to imprisonment for consecutive terms of 15 years for attempting a lewd act upon a child, 20 years for CSC, and 15 years for lewd act upon a child.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Dudek, Esq., who raised the following issues:

1. Whether the court committed reversible error by instructing the jury that "the testimony of the victim need not be corroborated" since this was an impermissible instruction, and appellant is entitled to the benefit of State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) on direct appeal?
2. Whether the court erred by admitting the testimony of daughter #3, and Eddie Kreis regarding alleged subsequent bad acts committed by appellant since they were not admissible under State v. Lyle, or Rule 404, SCRE, they were dissimilar, and even if this evidence was relevant, the probative value of it was substantially outweighed by its unfair prejudice?

By opinion decided January 31, 2018, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Kreis, Op. No. 2018-UP-052 (S.C. Ct. App. filed Jan. 31, 2018). The Remittitur was issued on February 16, 2018.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons (excerpted):

1. "Major Issues for PCR Reliefs [sic] & Felony Acts & Court Lack Subject Matter"
 - a. "State threaten K. Hollis – Mother with arrest, if she didn't get accusers to frame ProSe (Nov. 2-5, 15);"

- b. "Big major secrets withheld that would have impeached Sols. & SLED & Atty. Gens. & stopped any trial;"
- c. "Direct Appeal tampered with & gotten rid of by DEfs. 2015-002340;"
- d. "Court judges Defs., & Dudek-Def., & Gunter-Def. refusal to remove R. M. Dudek & his office & appoint Street Atty., to conseal [sic] felonies in ProSe's Memorandum Brief, 43 pgs.;"
- e. "State used Kershaws untriable [sic] false-mixed ind. 2015- -28-215 & Warr/No: 2014-A-28-10100113 (No. Ind.) for 1st & 2nd degree charges, to frame ProSe in Lexington (Nov. 2-5, 15);"
- f. "State used Kershaws Ind. 15-GS-28-215 & Warr./No. 2014-A-28-10100113 as Richlands non-existing charges;"
- g. "Kershaw & Richland cty. Charges were one & the same false charges used Nov. 2-5, 15);"
- h. "State has no evidence to support convictions by Kershaw & Richlands false charges are-were nolle processed [sic] (Jan. 2, 2017 & March 31, 17);"
- i. "25 major issues that void (Nov. 2-5, 15) Judgts. & 'Court lack jurisdn [sic]' over ProSe; that proves Ineff. Assist conflict conspiracy acts by R.M. Dudek & V.H. Gunter, & judges, on ProSe's appeals by blocking ProSe's Memorandum Brief;"
- j. "Court erred by allowing K. Hollis letter used, violated Crawford;"
- k. "Court erred by allow jury to rehear [Victim 2]'s & ProSe's testimonies was a form of vouching for all state wits. (3 times triple) was reversible error;"
- l. "Court erred by allowing Sol. Mayes to put up voucher State Wits. To manipulate juries into believing non-existing evidence (Insufficient Evid.);"
- m. "Court erred by failing to dismiss [Victim 2]'s inds. By she was an adult at 18 years, by (statute of limitations) & she was 19 yrs. Old when she reported said false (revenge-mad) charges;"
- n. "Court erred by giving third & second degree charges to jury, when ProSe not charged with 3rd degree;"
- o. "Court erred by not dismissing Ind. 15-2030, for 16-15-140 lewd act upon a child, when [Victim 2]'s age was 11 yrs. Old, & 14 yrs. Old, fell under 2nd degree statute & overlapsed [sic] into Ind. 15-2034;"
- p. "Court erred by not dismissing Ind. 15-2034 for 16-03-655(B)(1) c/s/4 w/m 2nd degree, when [Victim 2]'s age was 11 yrs. Old on . . . & 14 yrs. old on . . ., on to 3rd degree;"
- q. "Court erred by not dismissing Ind. 15-2036 for 16-15-140 lewd act upon a child under 16 yrs. Old 16-3-655(c) (1976), when [Victim 1]'s age 8 yrs. Days old . . . & 12 yrs. On . . . fell under 1st degree statute & 2nd degree, not lewd act one;"
- r. "Court erred by not dismissing all Inds. For per Inds. Delay, violated 180

- days set by Chief Justice Finney May 5, 1999;”
- s. “Court erred by holding a Blair hearing;”
 - t. “Court erred by allowing Sol. Mayes to tell jury in closing argument that (ProSe admitted he’s guilty) & violated Crawford & his 5th Amend. Rights to remain silent by Miranda, & was reversible error;”
 - u. “Court erred by allowing Sol. Mayes to vouch for State Wits. During trial & closing arguments;”
 - v. “Court erred by sentencing ProSe to a life & death sentence by his 61 yrs age by the S. Car. Sentencing table 10 yrs is the expected life in SCDC prison, & violated 8th Amend. Cruel punishment;”
 - w. “Court erred by allowing Sol. Mayes, to argue ProSe’s (non-beliefs) of hatred & bigotry & anti-government, which he wasn’t Ind. Nor on trial for, was reversible error & unconstal. [sic];”
 - x. “Court erred by allowing Sol. Mayes to make it look like [Victim 2] & [Victim 1] & [Victim 3] were little children & was vouching & manipulating the jury calling on juries passion, was reversible error;”
 - y. “Court erred by not allowing ProSe a ‘Public Trial’ his 6th & 14th Amend. Rights;”
 - z. “Court erred by allowing untried [Victim 3] pending mixed charges for Richland & Kershaw ctys. & [Victim 1] to be used to vouch Lexington Cty. False charges, in violation of Old Chief (1997);”
 - aa. “Court erred by allowing Jennifer K’s letter to be read by [Victim 2] before sentencing, was hearsay, & proves bias judge, & violated Crawford holdings, & prejudice ProSe;”
 - bb. “Court erred by not ‘consolidating’ all Richland & Kershaw charges & Lexington’s once Sol. Mayes sought to use them to vouch her cases, court was to dismiss all but one charge, per 3-Kreis;”
 - cc. “Court erred by not dismissing all Inds. By all related, violated Blockburger holdings;”
 - dd. “Court erred by not forcing Sol. Mayes, Atty. Gens., SLED, all Sols. To turn over impeachment evid. Crimes of SLED agents that would have stopped any trials it was withheld from ProSe, grand & trial juries;”
 - ee. “Jeopardy Clause bars any use of (Nov. 2-5, 15) at any other trials State may try to frame ProSe on later;”
 - ff. “Court erred and gave unconstal. [sic] charge to jury on being ‘unanimous;’”
 - gg. “Trial atty. Shealy was ineff. Assist on ProSe’s behalf, before, during, & after trial, by above facts & crimes did to false imprison ProSe;”
 - hh. “All Lexington judgments. Are void, by Kershaw’s & Richland’s false charges being nolle processed [sic] for lack of evidence to support;”

- ii. "Appellate Counsel Def. Dudek was ineff. Assist & aided State & his cases, by refusing to file & argue ProSe's Memorandum Briefs issues above & his refusal to remove himself;"
- jj. "Dudek-Def. on appeals & in lawsuits to 'maintain a low profile on ProSe's appeal' & actively supported a conflict of interest, & hired W.H. Davidson-Def. To defend himself against ProSe . . . , as judges & Atty. Gens. Did & Sols. & all Defs. Also did;"
- kk. "Judge L.C. Manning & G.M. McFaddin, 'did enter into conspiracy with Defs.' & Atty. W.H. Davidson & B.M. Briggs & R.M. Dudek & V.H. Gunter & A.M. Wilson, to get rid of suits 17-CP-40-1181 & 17-CP-28-131 off Defs. & themselves, by allowing Davidson & Briggs to file (pieces of filings) to courts (6-8-17) & (7-24-17) & paid bribes out to get good rulings when cases were in defaults & attys. & clerks & judges were committing frauds, perjuries, & conspiracy acts to stop their own arrests & Defs. & cover up these PCR felony issues therein . . . & judges J. Lockmey [sic] & W.P. Keesley & W.B. [sic] Beatty also joined Defs & Davidson & Briggs conspiracies;"
- ll. "ProSe maxs [sic] out his illegal 50 yrs. Sentences (Sept. 15 or Oct. 1, 2018) . . . , as proof, which Clerk rejected & refused to put before the court (Nov. 1, 15) nor would Atty. Shealy, nor Judge Early, trial judge, correct-clarify his time to build & it falls to PCR court to do so because no SCDC staff are trained to do so since 1995 & keep all IM's times wrong, to keep SCDC open wrongly; ProSe seeks for his PCR counsel to get this done also;"
- mmm. "And proof Judge Keesley joined def. Conspiracies to cover up ProSe's PCR issues, he blocked the lawsuit (March 3, 2017) & said it wasn't filed properly when Kershaw & Richland & Clerk R.L. Blume & Fed. Judges by forger Beth Drake, all filed the same copies 17-CP-40-1181 & 17-CP-131 & 3:17-344-TLW-PJG, his acts were felony to stop def. Arrests & ProSe's release & to protect his co-workers & friends & cover-up SLED felonies that effects millions of framed ProSe's So. Car. & nation-wide & SCDC - killing death row now Im by Tom Clark Im acts & all Ims whom SLED lied at trial & got those put to death . . . he also hired Defs. Davidson Attys. To help cover-up PCR felony acts, as did A.M. Wilson & V.H. Gunter;"
- nn. "Def. Then got Lesley M. Coggiola- Judicial Conduct, to cover-up their felony acts . . . ;"
- oo. "There was a conspiracy at fact to frame ProSe, & then to block his appeals & suits by above & below felony acts."

Applicant, by and through PCR counsel Aiken, thereafter amended his application to allege the following additional grounds for relief:

- 1) "Ineffective assistance of counsel"
 - a. "Kreis' trial counsel did not try his case by developing a theme of the case supported by a theory of the case.
 - b. "Kreis' trial counsel consented to a joint trial of all three Indictments. (Tr. 43-46)."
 - c. "Kreis' trial counsel missed critical hearsay objections. (Tr. 225-229)."
 - d. "Kreis' trial counsel did not cross-examine the forensic interviewers or the State's 'blind' expert."

Applicant requests relief as follows:

- "Order vacating conviction and sentence."

At the evidentiary hearing, Applicant proceeded forward only upon the allegations set forth in the amended application.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this court makes the following findings of fact and conclusions of law based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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 v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel’s performance was deficient. Strickland, 466 U.S. at 686; 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 the 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). “When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”). 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 Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 300 S.C. at 117-18, 386 S.E.2d at 625. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. 466 U.S. at 696-97.

1. Failure to Develop Theme, Theory of the Case

Applicant's allegation that Counsel was ineffective in failing to develop and present to the jury a consistent theme or theory of the case is without merit.

Applicant testified at the evidentiary hearing to varying beliefs as to why he was charged, incarcerated, and convicted. Applicant asserted that he told Victim 1 that neither she, nor her "paramour", were allowed in the house any longer because they were stealing drugs, which resulted in Victim 1 disclosing the first allegation of abuse. Applicant recalled that he also told Victim 1 that she would have to dispense with her pets, and either get a job or go back to school. Applicant also testified that Victim 1 first heard of allegations against him from Victim 2, his eldest daughter. Applicant theorized Victim 1 was lying because she had an axe to grind against

him for trying to throw her out of the house. Applicant testified that he told Counsel the children were all lying.

Applicant also claimed that federal law enforcement were involved in putting him jail, and compelled his children to adopt and corroborate the claims against him while he was incarcerated. Applicant asserted that the Federal Bureau of Investigation knew his family and was in contact with his children. Applicant testified that federal law enforcement "swarmed" him after he moved to South Carolina and later noted he was sorry he ever came to South Carolina. Applicant implied his prosecution was motivated in part by the supposed sexual preferences of the solicitor.

Despite the application, Applicant testified to his belief that there was "[n]ot much more that [Counsel] could have done[.]" Applicant explained he figured the trial was his "last hurrah" and admitted to doing stupid things during the course of the trial, such as holding up a sign in the presence of the jury encouraging them to vote for then-candidate Donald J. Trump.

Counsel testified he had been practicing law for forty years, and that some thirty years of his experience was in criminal law. Counsel explained his theory of the case was that Victim 1 had a boyfriend and that when her mother communicated Applicant's ultimatum to leave the house, the allegations came out. Counsel also explained his theory that the home in which the abuse was said to have occurred was simply too small for Applicant to have abused his children without anybody else in the family finding out. Counsel noted that the jury deliberated for more than a day and that they thoroughly considered Applicant's case. Counsel also testified that Applicant thanked him in a letter after the trial. (State's Exhibit #1). Counsel testified he had no evidence of a broader government conspiracy against his client and that as a practical matter there was no way for him to verify Applicant's claims of such. Confronted on cross-examination about the absence of any theme or theory of the case in his opening statement, Counsel explained that he did

not wish to promise anything he could not deliver and that at that time he was not certain exactly what the victims would say. Counsel testified that the State overpromised in its own opening statements and that he hammered them for their shortcomings in his closing arguments.

The court finds the record and testimony at the evidentiary hearing refute Applicant's allegation. Counsel proceeded at trial with a mind to a defense theory that the allegations were a response to Applicant's attempt at discipline, that the victims were lying and that the claims were "physically impossible" given the diminutive size of the house. The court finds Counsel's testimony to this effect at the evidentiary hearing to be credible and reflected by the trial transcript. As to the FBI conspiracy advanced by Applicant, there is no evidence in the record to support it, and Applicant's own speculative testimony in support of the theory is lacking in credibility. The court does agree with Applicant's observation that there was not much more Counsel could have done. For all of these reasons, Applicant has failed to meet his burden of proof as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

2. Failure to Move for Severance

Applicant's allegation that Counsel was ineffective in failing to object to a joint trial and move to sever the indictments is without merit. Courts may try separate charges together "where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no [substantive] right of the defendant has been prejudiced." State v. McGaha, 404, S.C. 289, 744 S.E.2d 602 (Ct. App. 2013) (quoting State v. Harris, 351 S.C. 643, 652, 572 S.E.2d 267, 272 (2002)).

At trial, while discussing the admissibility of Victim 3 and another minor witness, Counsel informed the trial court that Applicant asked him "not to contest the children testifying." (Tr. 181-82). The trial court then engaged Applicant in a colloquy on the matter, during which Applicant

explained "I'd rather have it all come out now." (Tr. 182-83). Counsel emphasized he disagreed with his client's decision, and the trial court permitted him to put his Lyle argument on the record. (Tr. 183-86). After further arguments from the State and Counsel, and a brief tangent with Applicant, the court found the proffered testimony admissible under Lyle, and noted Applicant's desire to have "the whole story come out and tell his side" was not part of his analysis. (Tr. 186-95).

Applicant himself testified at the evidentiary hearing that he wanted to "get it all over with at once" and proceed on all of the indictments together, contrary to the advice of his Counsel. Counsel somewhat corroborated Applicant, and testified that Applicant wanted to proceed on all of the indictments at once. Counsel recalled he pointed out the pros and cons of doing so; for example that (1) the State's case would improve with each successive trial, and (2) if successful in a joint trial, the matter would be concluded. Counsel testified that he ultimately agreed with Applicant's decision.

Applicant fails to show either deficiency or prejudice under Strickland. As to deficiency, the court finds Counsel properly and adequately advised Applicant as to the question of whether to seek separate trials on the separate indictments. The court further finds that Applicant wanted to proceed with only a single trial on all of the indictments. Applicant cannot now prevail upon a claim that Counsel was ineffective for pursuing the course of action reasonably demanded by Applicant. As to prejudice, the court finds there was no evidence or argument presented to show that Applicant would have prevailed upon a motion to sever the charges, and finds that the record in its totality provides that the charges (1) arose from a single chain of circumstances, (2) were proved by the same evidence, (3) were of the same general nature, and (4) that no substantive right of the defendant was prejudiced. Applicant's own demanded "theory of the case" only works by

addressing all of the charges in a single trial. Applicant has failed to show any deficiency on the part of Counsel, or any prejudice from the deficiency alleged, and his request for relief by way of this allegation is DENIED.

3. Failure to Object to Hearsay

Applicant's claim that Counsel was ineffective in failing to object to alleged hearsay by Sergeant Traci Barr, of the Lexington County Sheriff's Department, is without merit. A statement is not hearsay if the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident. Rule 801(d)(1)(D), SCRE. Corroborative testimony introduced under this rule cannot include details or particulars regarding the assault. Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 632 (2010) (quoting Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001)).

Victims 1, 2, and 3, all testified at trial. (Tr. 77-214). During the State's subsequent examination of Sgt. Barr, while the State was building towards asking Barr regarding disclosures of sexual abuse made to her by the victims, Counsel objected that the anticipated testimony constituted hearsay. (Tr. 224, ll. 8-23). The State replied it was offering the testimony under the "time-and-place exception" of Rule 801(d)(1)(D), SCRE, and the trial court overruled the objection. (Tr. 224-25). Barr thereafter testified that Victim 1 disclosed a sexual assault, and gave the time and place of the assault. (Tr. 225-27). Counsel again objected in the middle of the questioning, arguing the witness was "getting close to hearsay." (Tr. 226, ll. 21-23). The trial court overruled the objection. (Tr. 226, line 23). Barr then testified to interviewing Victim 2, that

she reported sexual assault, along with the time and place of the assaults. (Tr. 227-28). Counsel did not further object during the testimony regarding Victim 2's disclosures.

At the evidentiary hearing, Counsel testified that he did object that the questions were going to go beyond the time-and-place limitation, and that he perceived no other available basis for objection. Counsel explained he attempts to limit his objections to those necessary.

The court finds Applicant cannot show ineffectiveness by way of this allegation. First, Counsel *did* timely object to at least Barr's testimony regarding Victim 1's disclosures, and arguably to Victim 2's as well. Barr did not testify to the disclosure of any particulars of the abuse beyond time and place, such that the trial court properly overruled Counsel's objections. "The couch" is a place. "Everyone was at the house asleep" describes the time. The court further finds that even if some aspect of Barr's testimony does constitute a "detail" beyond the scope of the time-and-place limitation, the breach beyond the restraints of the rule would be so minimal as to be utterly harmless. For these reasons, Applicant cannot meet his burden under Strickland, and his request for relief by way of this allegation is **DENIED**.

4. Failure to Cross-Examine Brooke Wymer, Colleen Corbin

Applicant's claim that Counsel was ineffective in failing to cross-examine the State's forensic interviewers is without merit.

Brook Wymer, director of "social work field experiences" and lecturer at Columbia College, and former employee of the Dickerson Children's Advocacy Center, testified on behalf of the State at trial. (Tr. 241-45). Wymer testified she conducted the forensic interview with Victim 2 on February 3, 2014. (Tr. 243, ll. 1-4). Wymer briefly testified to the setting of the interview, that Victim 2 reported a sexual assault, and the time and place of the assaults. (Tr. 243-

44). Wymer testified that she noted Victim 2 appeared "fearful" during the forensic interview. (Tr. 244-45). Counsel did not cross-examine Wymer. (Tr. 245, ll. 5-6).

Colleen Corbin, of the Dickerson Children's Advocacy Center, testified to conducting two forensic interviews with Victim 3: one on February 3, 2014, and again on February 18, 2014. (Tr. 245-50). Corbin testified to Victim 3's disclosure of sexual assault at the first forensic interview, and the time and place of the abuse Victim 3 disclosed. (Tr. 247-48). Corbin recalled that Victim 3 "shut down" during the interview, resulting in its termination and a second interview roughly two weeks later. (Tr. 248-49). Corbin described Victim 3's demeanor at the second interview: "She became very distressed, started crying, curled into a fetal position, buried her head into her chest. And then shortly thereafter, I ended the interview." (Tr. 249-50).

Heather Smith, a licensed professional counselor with the Assessment and Resource Center, the child advocacy center for Richland County, also testified for the State at trial. (Tr. 283-84). After exploring Smith's education, work, and experience, the State offered Smith as an expert "in the field of child abuse assessment and/or treatment." (Tr. 284-87). Counsel *voir dire*d Smith on what constituted "child abuse assessment," "child abuse treatment," "child abuse dynamics," and the reliability of the research cited by Smith. (Tr. 287-91). Counsel objected to the reliability of the research, prompting additional questioning by the State, and ultimately the trial court's qualification of Smith as an expert "in the field of child abuse assessment and forensic interview." (Tr. 291-92). Smith did *not* interview the victims, but instead testified to the typical nature of sexual abuse disclosure, delayed disclosure, the role and characteristics of chronic sexual abuse which provide for delayed disclosure, and partial disclosures. (Tr. 292-300). Counsel cross-examined Smith on how various characteristics and details might impact the nature and reliability of sex abuse disclosure. (Tr. 300-07).

Counsel explained that he thoughtfully approached cross-examination throughout trial with a mind to clearing up questions elicited in direct examination and that he was concerned about opening the door to testimony and evidence otherwise excluded. Counsel noted that he did *voir dire* and cross-examine the State's "blind expert." Counsel judged that there was nothing presented by the forensic interviewers that he needed to clear up.

The court finds Applicant has failed to meet his burden under Strickland. Applicant offered no evidence or argument in support of this allegation. Counsel thoroughly cross-examined Smith on both the validity of her qualification as an expert and then on the substance of the subject-matter in which she was qualified. As to Wymer and Corbin, given their testimony regarding the demeanor of the victims during their forensic interviews, further questioning of the two could have elicited answers profoundly harmful to Applicant's cause. Applicant offered no questions Counsel could have asked the forensic interviewers or evidence of answers that could have been elicited had Counsel cross-examined them. Counsel articulated broad strategic considerations he kept in mind in all of his cross-examinations, based on his more than three decades of experience as an attorney practicing criminal law. For all of these reasons, Applicant has failed to present any evidence to support his claim that Counsel was deficient, let alone that Applicant was prejudiced by the deficiency alleged, and accordingly his request for relief is **DENIED**.

III. CONCLUSION

Based on all the foregoing, this court finds and concludes that 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.

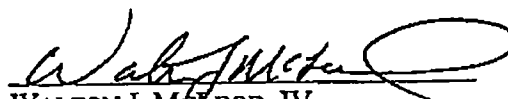
This court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the

appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 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), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

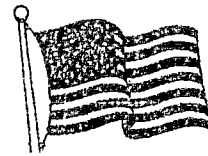
IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

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


WALTON J. McLEOD, IV
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina



The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211