

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

March 10, 2020

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

RECEIVED

MAR 12 2020

S.C. SUPREME COURT

Re: Gary R. Thompson v. State
2017-CP-23-6516

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

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAR 12 2020

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Carmen T. Mullen, Circuit Court Judge

2017-CP-23-6516

Gary R. Thompson, Appellant,

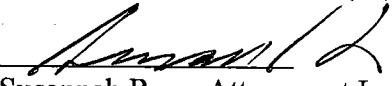
v.

The State, Respondent.

NOTICE OF APPEAL

Gary R. Thompson appeals the Honorable Carmen T. Mullen's Order of Dismissal filed July 31, 2019, and Order Denying Applicant's Motion to Alter or Amend filed March 3, 2020.

This 1st day of March, 2020.


Susannah Ross, Attorney at Law
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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Gary R. Thompson, #218312,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Case No. 2017-CP-23-6516

**ORDER DENYING APPLICANT'S
MOTION TO ALTER OR AMEND
THE JUDGMENT IN PART AND
GRANTING IN PART**

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This matter comes before this Court by way of an application for post-conviction relief filed on October 13, 2017, by Gary R. Thompson (Applicant). The State (Respondent) filed its return on January 24, 2018. On May 9, 2019. An evidentiary hearing in the matter was held before the undersigned on April 17, 2018, at the Greenville County Courthouse. Applicant was present at represented by Susannah C. Ross, Esquire, and Respondent was represented by Assistant Attorney General DeShawn H. Mitchell of the South Carolina Attorney General's Office. After reviewing the record, this Court found Applicant failed to establish any constitutional deprivations that entitle him to the grant of post-conviction relief and denied his application in an Order of Dismissal issued on July 24, 2019.¹ Applicant then filed on August 8, 2019, a motion to alter or amend the judgment, pursuant to Rule 59(e), SCRCPP. Respondent filed a return to the motion to alter or amend on September 20, 2019. After reviewing the record, including the records from the Greenville County Clerk of Court regarding Applicant's convictions, the transcript from Applicant's trial, the application for post-conviction relief, Respondent's return to the application for post-conviction relief, the records from the South Carolina Department of Corrections, the records from Applicant's direct appeal, Applicant's

¹ The undersigned's signature on the final page of the Order of Dismissal indicates that the order was issued on July 24, 2018; however, this was a typographical error.

motion to alter or amend the judgment, Respondent's return to the motion to alter or amend the judgment, and the transcript from Applicant's PCR hearing, this Court finds Applicant's motion to alter or amend the judgment, pursuant to Rule 59(e), SCRPC, is granted in that this Court has altered its analysis of Applicant's claims in light of State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019), and finds that the motion is denied in that this Court's finding that Applicant has failed to demonstrate that he is entitled to post-conviction relief is reaffirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In his motion to alter or amend the judgment, Applicant argues this Court should alter or amend its Order of Dismissal because (1) each of Applicant's allegations that trial counsel was constitutionally ineffective was shown to be an actual instance of the ineffective assistance of counsel, (2) the cumulative effect of trial counsel's alleged errors constituted the ineffective assistance of counsel, (3) this Court failed to consider State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019), while finding trial counsel was not constitutionally ineffective for failing to contemporaneously object to the stipulation that Applicant previously had been convicted of criminal sexual conduct with a minor, and (4) this Court failed to consider Cross while finding trial counsel was not constitutionally ineffective for failing to request to bifurcate Applicant's trial so as to avoid the jury's knowing of Applicant's prior conviction of criminal sexual conduct with a minor.

Each of Applicant's allegations that trial counsel was constitutionally ineffective was shown to be an actual instance of the ineffective assistance of counsel.

Applicant argues that this Court erred in finding he had failed to demonstrate that trial counsel was constitutionally ineffective with regarding to the specific instances he put before this Court at the PCR hearing. With the exception of his present appeals to the theory of cumulative errors and Cross, Applicant has not provided any new authority or argument as to why the

findings of facts and conclusions of law articulated by this Court in the Order of Dismissal regarding the specific allegations of the ineffective assistance of trial counsel raised by Applicant should be altered or amended. This Court made detailed findings of fact and conclusions of law in its Order of Dismissal with respect to the allegations raised by Applicant, and Applicant has not shown any reason for this Court to depart from them.

The cumulative effect of trial counsel's errors caused Applicant to suffer prejudice.

Applicant argues instances of deficient performance on the part of trial counsel that were not prejudicial in and of themselves had a cumulative effect that was sufficiently prejudicial to warrant a grant of post-conviction relief to Applicant.

A motion to alter or amend the judgment under Rule 59(e), SCRCP, should not be used to present an issue that was not presented to the trial court before it issued its judgment. Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (S.C. Ct. App. 1990) (citations omitted). Applicant did not argue at the PCR hearing that he was entitled to post-conviction relief based upon the cumulative effect of errors committed by trial counsel, and this Court finds he is barred from raising the issue now in his motion to alter or amend the judgment.

Notwithstanding Applicant's failure to properly raise the issue during or before his PCR hearing, Applicant is not entitled to relief in reliance upon the theory of cumulative errors. "When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice." Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836. "Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina. Id.; see also Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (holding that it is unsettled whether individual errors that may not be prejudicial when considered independently may be

prejudicial when considered cumulative, but recognizing that an applicant for post-conviction relief would have to show, as a threshold matter, that counsel committed errors). Claims that a defendant was afforded the ineffective assistance of counsel should be reviewed by post-conviction relief courts individually, not cumulatively. Smalls, at 194, 810 S.E.2d at 846 (“As we have explained, the strength of the evidence must be considered along with the specific impact of counsel’s errors.”); Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) (in upholding the trial court’s denial of habeas relief, explicitly holding that the claims are not to be reviewed collectively). Applicant has failed to demonstrate any reason that the theory of cumulative errors should be recognized in his case and that trial counsel committed errors that, when considered collectively, support a finding that there is a reasonable likelihood that the outcome of Applicant’s trial would have been different had the alleged errors not been committed. This Court finds Applicant has failed to show that this Court should alter or amend its Order of Dismissal with regard to his argument that he is entitled to post-conviction relief based upon the theory of cumulative errors.

This Court failed to consider State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019), while finding trial counsel was not constitutionally ineffective for failing to contemporaneously object to the stipulation that Applicant previously had been convicted of criminal sexual conduct with a minor.

Applicant argued at the PCR hearing that trial counsel was constitutionally ineffective for failing to preserve for appellate review his objection to the stipulation that Applicant previously had been convicted of first-degree criminal sexual conduct with a minor and was registered as a sex offender and to the publishing of the stipulation to the jury.

In Cross, the South Carolina Supreme Court considered whether the trial court erred in denying Cross’s request that his trial be bifurcated when he was being tried for committing first-degree criminal sexual conduct with a minor in violation of South Carolina Code Section 16-3-

655(A)(2) and he previously had been convicted of first-degree criminal sexual conduct with a minor. Pursuant to Section 16-3-655(A)(2), a defendant is guilty of first-degree criminal sexual conduct with a minor if he “engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).” Cross moved to have his trial bifurcated because he argued he would be unfairly prejudiced if evidence of his prior conviction of CSC with a minor and his being on the sex offender registry were introduced to prove the relevant element of Section 16-3-655(A)(2). Cross, at 470, 832 S.E.2d at 283-84. The trial court denied Cross’s motion to bifurcate, allowed the State to introduce into evidence the indictment and sentencing sheet from Cross’s prior conviction, and gave the jury a limiting instruction that it would not consider his prior conviction as evidence of Cross’s guilt of the offense for which he was being tried. Id. at 472, 832 S.E.2d at 285. The Supreme Court held that:

Evidence of [Cross’s] conviction for a specific offense under section 23-3-430(C) was admissible to prove the prior-conviction element of first-degree CSC with a minor. Therefore, the State must be allowed to introduce the conviction.

Id. at 484, 832 S.E.2d at 291.

The Supreme Court specifically noted that the evidence of Cross’s prior conviction had to be admitted at trial in order for the State to prove the elements of the offense codified at Section 23-3-430(C). Id. Since an element of the offense for which Cross was being tried was whether Cross had a qualifying prior conviction, the evidence of Cross’s prior conviction “had significant probative value.” Id. at 474, 832 S.E.2d at 286. The Court later referred to the “insurmountable probative value in [the State’s] proving the prior conviction element of first-degree CSC with a minor.” Id. at 477, 832 S.E.2d 287. Instead, the proper question was not whether the evidence should have been admitted, but whether the **timing and method** of the admission of the evidence

was proper. Id. at 484, 832 S.E.2d at 291 (emphasis added). According to the Court, this was due to the fact that evidence of Cross's prior conviction was not probative evidence of whether Applicant had sexually abused the minor victim making the allegations underpinning his trial for violating Section 16-3-655(A)(2), and because the danger of unfair prejudice from the admission of his prior conviction at a phase of his trial concerning his guilt in abusing the present victim was "exceedingly high" Id. at 477-78, 832 S.E.2d 287-88 (emphasis added).

Like Cross, Applicant was convicted of committing first-degree criminal sexual conduct with a minor in violation of Section 16-3-655(A)(2). Applicant's trial counsel requested that the parties be required to stipulate that Applicant had a prior, qualifying conviction, in order to prevent the State from offering evidence of the prior offense to the jury. Trial Tran. 13-14. The State agreed to stipulate that Applicant had a prior conviction for first-degree criminal sexual conduct with a minor and was listed on the South Carolina Sex Offender Registry, and the trial court offered to give a limiting instruction to the jury at trial counsel's request. Trial Tran. 24-25. Trial counsel read, approved, and signed the stipulation. Trial Tran. 45. When the State offered to admit the stipulation and publish it to the jury, trial counsel affirmed that he did not have an objection, and the stipulation was admitted. Trial Tran. 165-66. The trial court instructed the jury that it was prohibited from considering the stipulation was proof of Applicant's guilt for the offense for which he was being tried. Trial Tran. 167, 361.

Applicant argued during his PCR hearing that trial counsel was constitutionally ineffective for failing to object contemporaneously to the stipulation so as to preserve the issue for appellate review; in his motion to alter or amend, he argues that Cross supports his position and that the Court should have taken the case into consideration when analyzing his argument on this issue. Applicant's criminal trial and PCR hearing predated the Supreme Court's decision in

Cross, and this Court issued its Order of Dismissal on the same day on which the Supreme Court published Cross. The question this Court must answer now is whether its finding that Applicant failed to establish that he was prejudiced by trial counsel's failure to object contemporaneously to the stipulation should be altered or amended in light of Cross. This Court finds that the Supreme Court's decision in Cross does not require it to depart from its finding that Applicant failed to demonstrate prejudice. As is provided in the Order of Dismissal, evidence of Applicant's prior conviction was admissible, due to its being relevant and probative to the jury's determination of Applicant's guilt in violating Section 16-3-655(A)(2), as a qualifying prior conviction is an element of the offense. This Court noted that the substance of the stipulation "had immense probative value in Applicant's case", a note that tracks closely with the Supreme Court's language emphasizing the admissibility of evidence of qualifying prior convictions in Cross. This Court found that "any limitation to the stipulation would defeat the clear legislative purpose behind the inclusion of the statutory element requiring proof of a prior conviction for an offense of a sexual nature", and Cross does not challenge that finding. Nothing in Cross limits the substance of the evidence the State may offer at trial, whether offered through testimony, sentencing sheets, or a mutually acceptable stipulation, to prove a defendant was previously convicted of a qualifying prior conviction. The record indicates trial counsel believed it preferable that he enter into the stipulation rather than have the State offer testimonial or documentary evidence of Applicant's prior conviction. Applicant has failed to show that, even if trial counsel had objected contemporaneously, the issue would have been resolved in his favor on appeal, as Cross does not stand to prevent the admission of the evidence of a prior conviction; instead, it regulates the timing and method of the admission. This Court finds that Applicant has failed to show that Cross requires this Court to depart from its finding that Applicant failed to

demonstrate he would have been successful on appeal had trial counsel objected contemporaneously to the stipulation that Applicant had previously been convicted of first-degree criminal sexual conduct with a minor.

This Court failed to consider Cross while finding trial counsel was not constitutionally ineffective for failing to request to bifurcate Applicant's trial so as to avoid the jury's knowing of Applicant's prior conviction of criminal sexual conduct with a minor.

Applicant argued at his PCR hearing that trial counsel was constitutionally ineffective for failing to request that Applicant's trial be bifurcated in order to avoid the jury's hearing that Applicant had a prior conviction for criminal sexual conduct with a minor and was listed on the South Carolina Sex Offender Registry, and argues now in his motion to alter or amend that this Court failed to consider Cross when finding trial counsel was not constitutionally ineffective for failing to request that Applicant's be bifurcated. The South Carolina Supreme Court had not yet issued its decision in Cross at the time of Applicant's PCR hearing and did not issue Cross so as to give this Court adequate time in which to incorporate an analysis pursuant to Cross into its Order of Dismissal. This Court was therefore unable to incorporate into its Order of Dismissal an analysis of Applicant's claim as to bifurcation in light of Cross. After reviewing Cross, this Court finds that its analysis of Applicant's claim that trial counsel was constitutionally ineffective for failing to request that Applicant's trial be bifurcated should be amended as explained herein, but also finds that Applicant has nevertheless still failed to show that he is entitled to post-conviction relief.

In the Order of Dismissal, this Court found Applicant was not entitled to a bifurcated trial as Applicant failed to identify any authority authorizing the bifurcation of a trial for the commission of first-degree criminal sexual conduct with a minor in violation of Section 16-3-655(A)(2). This Court cited State v. Hamilton when finding the propriety of the admission of the evidence of Applicant's prior conviction in light of the trial court's limiting jury instruction at

trial. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (S.C. Ct. App. 1997), cert. denied, Hamilton v. State, 525 U.S. 901 (filed Oct. 5, 1998). In Hamilton, the defendant was tried for first-degree burglary according to Section 16-11-311(A)(2), which required the State to prove, as an element of the offense, that the burglary was committed “by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both” Hamilton, at 443, 486 S.E.2d at 513. The South Carolina Court of Appeals held that the trial court did not err in admitting evidence of Hamilton’s prior convictions because the trial court adequately instructed the jury that it could consider Hamilton’s prior convictions, only for the purpose of determining whether he was guilty of one of the aggravating factors that the State had to prove as an element of first-degree burglary. Id. at 447-48, 486 S.E.2d at 516. In its Order of Dismissal, this Court also cited State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000), to support its finding that bifurcation was not necessary to preserve the fairness of Applicant’s trial in light of the trial court’s charging the jury with a limiting instruction regarding Applicant’s prior conviction. In Benton, the defendant was tried for first-degree burglary according to Section 16-11-311(A)(2). Benton, at 153-54, 526 S.E.2d at 229-30. The South Carolina Supreme Court instructed that, to ensure that a defendant is not convicted on an improper basis while allowing the State to prove the elements of first-degree burglary, a trial court presiding over a trial for the offense should limit the evidence to the prior convictions, refuse to admit particular information about the prior crimes, and, upon request, instruct the jury that it could not consider the defendant’s prior convictions in order to determine whether he had entered the dwelling at issue in the present trial without consent and with the intent to commit a crime therein. Benton, at 156, 526 S.E.2d at 230-31.

In Cross, the South Carolina Supreme Court acknowledged that the evidentiary issues in Cross resembled those presented in Benton and Hamilton and that the trial court in Cross followed the instructions provided in Benton for the mitigation of the prejudicial effect of introducing evidence of Cross's prior conviction. Cross, at 478, 832 S.E.2d 281, 288 (citations omitted). The Supreme Court acknowledged that bifurcation had not been required previously or commonly seen in proceedings in this State or in the federal courts. Cross, at 478-79, 832 S.E.2d at 288 (citing Chubb v. State, 303 S.C. 395, 397, 401 S.E.2d 159, 161 (1991) ("[A] bifurcated proceeding is not required in a non-capital case."); State v. Bennett, 256 S.C. 234, 242, 182 S.E.2d 291, 295 (1971) ("[A bifurcated trial] is not required by either the common law, the statutory law, or the constitution of this State. It has not been settled by the United States Supreme Court that a bifurcated trial is not required by the United States Constitution."); Spencer v. Texas, 385 U.S. 554, 568 (1967) ("Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure.")). All of these serve as indication that this Court's analysis of this issue, as found in the Order of Dismissal, was reasonable in light of the existing authorities at the time of its issuance.

However, the Supreme Court held in Cross that the trial court had erred in denying Cross's request to bifurcate his trial because the trial court had the authority to bifurcate, stemming from Rule 11(a), SCRE, and had the duty to bifurcate in order to ensure that the State could present evidence to prove an element of Section 16-3-655(A)(2) while simultaneously guarding against a violation of Rule 403, SCRE. Cross, at 479, 832 S.E.2d at 288-89 (quoting Rule 11(a), SCRE ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and

presentation effective for the ascertainment of the truth”). The Supreme Court, writing as a divided Court in Cross, instructed that it was not creating new law. Id. at 479-80, 832 S.E.2d at 289 (stating that the majority’s reliance upon Rule 611(a), SCRE, is “not a disguise for a motivation on our part to change the law or adopt a new rule of procedure. It is simply a plain reading of the English language.”; arguing that “[i]t is equally apparent that, contrary to the position taken by the dissent, we are changing no procedural rule and are creating no procedural rule. We are simply recognizing what has been there all along.”). The disagreement as to whether Cross has brought about a change in law appears to stem from the disagreement between the members of the Supreme Court about whether the Court had the authority to hold that bifurcation is authorized or required by Rule 11 in light of this State’s constitutional mandate that changes in procedural law be submitted for approval to the General Assembly, not from any intention on the part of the Supreme Court’s that Cross be applied directly to post-conviction relief cases stemming from trials conducted years before the Supreme Court took up Cross. Cross, at 484-85, 832 S.E.2d at 291-92 (Few, J., dissenting).

Under the first prong of the two-part test for the constitutional ineffectiveness of counsel, which was outlined by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), the post-conviction relief court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 690). Applicant must overcome this

presumption to receive relief. Cherry, at 118, 386 S.E.2d at 625. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id., at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney. Id. at 690.

This Court finds Applicant has failed to demonstrate any deficiency in trial counsel’s performance with respect to his failing to request that Applicant’s trial be bifurcated. Applicant has not shown that the prevailing professional norms at the time of his trial would have required Applicant to request the bifurcation. Although Applicant was correct in his motion to alter or amend the judgment that this Court’s analysis of this claim should be modified in light of Cross, he has failed to show that the range of professional competence demanded in criminal defense practice included requests to bifurcate in trials for criminal sexual conduct under Section 16-3-655(A)(2). Furthermore, when this Court considers the Supreme Court’s language that Cross did not represent a change in law in the full context of the opinion and the disagreement between the majority and the dissent, and considers the Supreme Court’s careful acknowledgements that other courts had held that bifurcation was not required by the Constitution, that bifurcation had not been in common practice at the time of Cross’s trial, and that Cross’ trial court had tried to follow the practice specified by the South Carolina Supreme Court in the context of burglary trials, this Court finds it would have been unreasonable to expect Applicant’s trial counsel to have anticipated that the South Carolina Supreme Court would hold in July of 2019,

approximately five-and-a-half years after Applicant's trial, that Rule 11(a), SCRE, authorizes the trial court to bifurcate a trial for CSC under Section 16-3-655(A)(2) and that bifurcation was required in order to overcome prejudice resulting from the lack of bifurcation. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (explaining that the South Carolina Supreme Court "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."). It is simply not a requirement of constitutional effectiveness that a defense attorney be a trailblazer in the courts' acceptance of a new legal and procedural practice.

Applicant has failed to show that trial counsel was constitutionally ineffective for failing to request to bifurcate the trial. Although this Court's analysis of the issue has changed in light of Cross, this Court's denial of post-conviction relief is reaffirmed. This Court's findings of fact and conclusions of law, as presented in the section of the Order of Dismissal concerning the claim that trial counsel should have requested that the trial be bifurcated, are amended as specified herein. This Court's analysis of the issue in light of Cross and as presented in this order, is substituted for the Court's analysis on the same issue as presented in the Order of Dismissal.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. With respect to the four grounds for relief presented in his motion to alter or amend the judgment, only Applicant's argument that this Court failed to consider Cross when finding trial counsel was not constitutionally ineffective for failing to request that Applicant's trial be bifurcated has presented has provided any reason for this Court to alter or amend its

judgment. Though this order presents new findings and analysis as to that issue, this Court's finding that Applicant is not entitled to post-conviction relief is reaffirmed.

IT IS THEREFORE ORDERED:

1. Applicant's motion to alter or amend the judgment, pursuant to Rule 59(e), SCRCP, is granted in that this Court has altered its analysis of Applicant's claims in light of State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019);
2. Applicant's motion to alter or amend the judgment is denied in that this Court's finding that Applicant has failed to demonstrate that he is entitled to post-conviction relief is reaffirmed herein; and
3. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 26 day of February, 2020.



Carmen T. Mullen
Presiding Judge

Beaufort, South Carolina

Copy mailed to Attorney <u>General / S. Ross</u> on <u>3 / 3 / 2020</u>

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Gary R. Thompson, 218312,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
IN THE THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2017-CP-23-6516

ORDER OF DISMISSAL

19 JUL 31 AM 11:01
Paul Wickens - COC GUL SC

This matter comes before the Court by way of an application for post-conviction relief filed on October 13, 2017 by Gary R. Thompson (Applicant). Respondent made its Return on January 17, 2018. An evidentiary hearing into the matter was convened on April 17, 2018, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by Susannah C. Ross, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's Trial Counsel, Randall L. Chambers, Esquire, also testified. This Court had before it a copy of the records of the Greenville County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In November of 2013, the

Greenville County Grand Jury indicted Applicant for disseminating obscenity to a minor (2013-GS-23-8831) and criminal sexual conduct with a minor first degree (2013-GS-23-700A). Randall L. Chambers, Esquire, represented Applicant. Applicant proceeded to trial on January 13, 2014, before the Honorable D. Garrison Hill and a jury. On January 15, 2014 the jury found Applicant guilty as indicted of both charges. Judge Hill sentenced Applicant to life without parole pursuant to S.C. Code Ann. § 17-25-45 for first-degree criminal sexual conduct with a minor along with a consecutive term of imprisonment of five years for disseminating obscene material to a minor.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals issued an unpublished opinion in which it unanimously affirmed Applicant's convictions. State v. Thompson, Op. No. 2015-UP-524 (S.C. Ct. App. filed Nov. 18, 2015). Thereafter, Applicant petitioned the Court of Appeals for rehearing, and the petition was denied. Applicant then filed a petition for a writ of certiorari in the Supreme Court. The petition for writ of certiorari was denied on November 9, 2016.

FACTUAL HISTORY

In 2010, the victim ("Victim"), who was nine years old at the time, falsely alleged at the behest of her mother, Jessica Taylor ("Mother"), her paternal uncle had sexually abused her. (Tr. p. 138; p. 245; pp. 281-282). In response, Victim was referred to the Children's Advocacy Center in Spartanburg, South Carolina, and met with Tricia Austin, a licensed professional counselor at the center, on June 15, 2010. (Tr. p. 279; pp. 281-282). During Austin's meeting with Victim, Victim admitted her paternal uncle had never sexually abused her. (Tr. p. 145; p. 307). However, Victim spontaneously disclosed she had been sexually abused many times by her stepfather, Applicant, Gary Reece Thompson, Jr. (Tr. pp. 286-288; p. 294; p. 306; p. 309).

Following Victim's disclosure, Austin reported the allegations to Lieutenant Ty Miller of the Greenville County Sheriff's Office, and he began an investigation into the reported sexual abuse. (Tr. pp. 168-170; pp. 288-289). As a result of the investigation, Applicant and Mother were arrested in September of 2010. (Tr. p. 175; p. 177). Lieutenant Miller then obtained a search warrant for Applicant's home and discovered pornography consistent with pornography Victim had described being shown to her by Applicant during the time period she was being abused. (Tr. p. 135; pp. 177-180).

Subsequently, Applicant was indicted for first-degree criminal sexual conduct with a minor and disseminating obscene material to a minor, and he proceeded to trial. (Tr. pp. 46-48; Indictments). At the outset of trial, defense counsel moved for the trial judge to preclude the solicitor from prosecuting Applicant for first-degree criminal sexual conduct with a minor pursuant to S.C. Code Ann. § 16-3-655(A)(2) because he contended there was no question Applicant could instead be prosecuted pursuant to S.C. Code Ann. § 16-3-655(A)(1) in light of the fact Victim was unquestionably under the age of the eleven at the time she was sexually abused. (Tr. pp. 7-8). In response, the solicitor indicated she was entitled to proceed forward with the prosecution under any theory supported by the evidence just as a prosecution for first-degree burglary involving prior convictions as an aggravating circumstance would be permitted to go forward even if other aggravating circumstances could also be proven aside from the existence of two or more prior qualifying convictions. (Tr. pp. 9-12).

Following the solicitor's remarks, defense counsel again urged the trial judge to force the solicitor to prosecute Applicant for a violation of S.C. Code Ann. § 16-3-655(A)(1) instead of a violation of S.C. Code Ann. § 16-3-655(A)(2). (Tr. pp. 12-14). However, in the event he would not do so, defense counsel asked the trial judge to permit him to stipulate to the existence of

Applicant's qualifying prior conviction while also precluding the solicitor from presenting that stipulation to the jury. (Tr. pp. 13-14; p. 17). In response, the solicitor asserted the South Carolina Supreme Court had previously rejected a similar argument that the State could be forced to stipulate to an element in the context of first-degree burglary. (Tr. pp. 14-15). However, the solicitor offered to stipulate to the prior conviction in Applicant's case while noting the stipulation had to be presented to the jury due to the fact the existence of a prior conviction was an element of the charged offense that necessarily had to be found by the jury. (Tr. pp. 14-15; p. 18).

After considering the arguments of counsel, the trial judge declined to preclude the solicitor from prosecuting Applicant pursuant to S.C. Code Ann. § 16-3-655(A)(2) and declined to bar the jury from hearing the stipulation to which the parties agreed in regard to the existence of Applicant's prior conviction. (Tr. pp. 23-24). In reaching that decision, the trial judge found the probative value of Applicant's prior conviction was "essential" to prove a violation of the statute and determined the situation in Applicant's case was distinguishable from the situation in Old Chief v. United States, 519 U.S. 172 (1997), due to the fact the prior conviction necessary to prove first-degree criminal sexual conduct with a minor in South Carolina had to be for a specific type of offense related to the charged offense. (Tr. pp. 23-24). However, the trial judge indicated he would provide a limiting instruction to the jury when the stipulation was introduced if one was desired. (Tr. pp. 24-25).

Subsequently, during trial, Victim testified about the abuse she suffered at the hands of Applicant. (Tr. pp. 130-135). Specifically, Victim stated Applicant was physically abusive towards her, her mother, and her three sisters, and she reported Applicant began sexually abusing her when she was six years old. (Tr. p. 130). In regard to the abuse, Victim testified Applicant

painfully inserted his penis into her vagina and anus on numerous occasions, performed oral sex on her and forced her to perform oral sex on him multiple times, and showed her "a bunch" of pornographic films depicting women engaged in sexual acts. (Tr. pp. 130-135). Furthermore, Victim stated Applicant threatened to kill her or hurt her mother if she did not engage in the sexual acts with him, and she indicated she did not reveal the abuse earlier because she was frightened of Applicant. (Tr. p. 136).

At the conclusion of Victim's testimony, the solicitor moved to admit the stipulation regarding Applicant's prior conviction and publish it to the jury. (Tr. p. 165). In response, defense counsel stated: "[T]he Defense has no objection, Your Honor." (Tr. pp. 165-166). Thereafter, the stipulation was admitted into evidence without objection, and the trial judge presented the following limiting instructions to the jury:

Now, this particular stipulation, before it is read to you, I want to instruct you on something else. And you'll, also, recall that I made what probably seemed a curious statement earlier as well.¹ And that is that you can use some evidence for one purpose and one purpose only, and not for any other purpose. And this stipulation you're about to read can only be used by you, the jury, for a very limited purpose. And that purpose is simply on the issue of whether the State has met its burden of proof as to an element of the crime of criminal sexual conduct with a minor in the first degree. And you can give this stipulation whatever weight you decide to in that regard. You may not consider this stipulation for any other purpose. Your oath forbids you, for example, from using the evidence of this stipulation as proof of whether [Applicant] committed the acts for which he's on trial here today, except on that issue of that element of the offense. So the law doesn't allow you to use the stipulation as proof of [Applicant]'s guilt for any charge that he's on trial for here today, except for deciding whether the State has met its burden of proof about a prior offense.

(Tr. pp. 166-167). Following those limiting instructions, the trial judge presented the agreed-upon stipulation to the jurors, which instructed them Applicant "[had] been convicted of criminal

¹ Regarding that "curious statement," the trial judge had earlier stated to the jurors during his preliminary instructions: "Now, some evidence can be used for limited purposes. And I'll tell you more about that later. But simply because something comes into evidence for one purpose doesn't mean you can use it for other purposes. So bear that in mind as well. And remember, too, that this is an important trial for both sides, of course." (Tr. p. 109).

sexual conduct with a minor first degree, an offense listed pursuant to South Carolina Code Section 23-3-430(C), and [was] currently on the South Carolina Sex Offender Registry.” (Tr. p. 167). The trial judge then again instructed the jurors they could only consider the stipulation that had just been presented to them for the limited purpose identified to them and not for any other purpose. (Tr. p. 167).

As the trial continued, Lieutenant Miller testified about his investigation into the reported sexual abuse, and Wiley Garrett, a therapist assigned to work with Victim after she disclosed the sexual abuse, noted Victim was exhibiting symptoms of trauma subsequent to the abuse. (Tr. pp. 170-175; p. 184; pp. 192-193). Additionally, Dr. Nancy Henderson, a board-certified child abuse pediatrician, testified about her physical examination of Victim after the abuse was revealed, indicated Victim disclosed during the examination she was sexually abused between the ages of six and nine, and stated the examination results were normal. (Tr. pp. 205-206; p. 212; pp. 215-218). However, Dr. Henderson noted normal examination results were extremely common in sexual abuse cases and did not mean no sexual abuse had occurred due to the fact injuries to the genital area heal very rapidly. (Tr. pp. 217-218; p. 229). Furthermore, Mother, who had earlier pled guilty to unlawful conduct towards a child, testified for the prosecution, indicated Applicant treated Victim very differently from her other children, noted Victim and her other children began to exhibit sexualized behavior after Applicant moved into their home, and stated she awakened one time and saw Applicant on the floor with his face at Victim’s crotch. (Tr. pp. 230-231; pp. 239-245; p. 269). Mother also candidly acknowledged she instructed Victim to falsely accuse her paternal uncle of sexually assaulting her, and she admitted Victim informed her Applicant was touching her genital area but did not do anything in response.² (Tr.

² During her testimony, Mother also indicated Applicant wanted her to wear her hair in ponytails, pretend to be a little girl, and call him “Daddy” when they engaged in sexual intercourse. (Tr. p. 244).

p. 241; p. 245). Finally, following Mother's testimony, Austin testified about her meetings with Victim and confirmed Victim disclosed she had been sexually abused by Applicant. (Tr. pp. 286-288; p. 294; p. 306; p. 309).

Thereafter, at the conclusion of the evidentiary phase of trial, the parties rested their cases and presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (Tr. pp. 319-372). As part of his jury instructions, the trial judge advised the jurors they must apply the law as he provided it to them and informed them they must follow all of his instruction. (Tr. pp. 360-361). Furthermore, in regard to the evidence of Applicant's prior conviction, the trial judge instructed the jury:

You have heard evidence that the Defendant was convicted of a crime other than the one for which is now on trial. This testimony, if you conclude it is true, may only be considered by you for the limited purpose for which I told you that it could be. And that is whether the State has met its burden of proof as to an element of the crime for criminal sexual conduct in the first degree with a minor. You may not consider it for any other reason or any other purpose. You may not and must not consider this evidence of the commission of another offense as proof of Applicant's guilt of the crime that we are charging – guilt of the crime that he is on trial for here today, other than to the extent I've told you that you could do so.

(Tr. p. 365).

Subsequently, at the conclusion of trial, the jury convicted Applicant as indicted. (Tr. p. 375). Following the verdict, the trial judge sentenced Applicant to life imprisonment without the possibility of parole for first-degree criminal sexual conduct with a minor based on the fact Applicant had previously been convicted of that same "most serious" offense. (Tr. pp. 379-380). Additionally, the trial judge sentenced Applicant to a consecutive five-year term of imprisonment for disseminating obscene material to a minor. (Tr. p. 380).

ALLEGATIONS

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

1. "Lawyer said he had know objection when he should have."
 - a. Did not have my case heard at direct appeal, because lawyer didn't object.

Applicant filed a supplemental application on March 27, 2018, further alleging Trial Counsel was ineffective for the following reasons:

1. Failing to move for a severance of CSC with minor and disseminating pornography;
2. Failing to make a contemporaneous objection to stipulation of prior CSC with a minor and registry requirement;
3. Failing to request to bifurcate the trial to avoid the fundamental unfairness of the jury's knowledge of the Applicant's prior CSC with a minor and registry requirement;
4. Failing to investigate issue of pornography being purchased after child had been removed from the home;
5. Failing to object to unfounded prejudicial expert testimony;
6. Failing to object to hearsay testimony by clinical social worker expert;
7. Failing to object in State's closing to a misstatement of the burden of proof and improperly appealing to the emotions of the jury;
8. Failing to take exception to jury instruction that the prior record should be considered only for the limited purpose of proving the elements of the indicted charge;
9. The Applicant also alleges a Due Process violation based on his failure to get a fair trial by an impartial jury.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified Trial Counsel represented him on his charges. He testified Trial Counsel initially objected to the stipulation of his prior criminal sexual conduct (CSC) conviction with a minor and registry requirement being published to the jury pretrial, but Trial Counsel failed to object during the introduction of this evidence during trial. Applicant testified he was not guilty but the jury thought he was guilty of the charges because they heard about his prior conviction for CSC. He testified Trial Counsel should have investigated his case more

thoroughly. Applicant testified he did not have any porn videos at the home he shared with victim when they all lived there and that the children were removed from the house in May before he was arrested. He testified the house was searched by police later that year in December after he had been locked up and porn videos were found. Applicant testified he did not look at any of the videos and they were purchased after the children were removed from the home in May. He testified Trial Counsel could have gone to the store where he purchased them from to investigate when the videos were brought to show the victim could not have seen them since they were purchased after the children were removed from the home. Applicant testified Trial Counsel did not meet with him enough in preparing his case and believed Trial Counsel only met with him twice. He testified he did not testify at his trial because Trial Counsel did not want him to as he had the ability to sometimes talk too much. Applicant testified he wanted to testify at trial because he wanted to tell the truth and believed his testimony would have helped his case. He testified the Department of Social Services (DSS) were involved in the children lives the whole time he was together with the children's mother. Applicant testified someone called DSS anonymously on him and the children's mother. He testified during a visit to the doctor, the doctor examined the children to see if they had been molested. Applicant testified because of this there was a family court case involving the children as well but that the facts from that case did not come up during his trial even though he thought they should have. He testified those facts would have shown there was no evidence against him. Applicant testified because of these charges and conviction he had lost his life, family and freedom. He testified the children's paternal grandmother made the allegations against him and there were previous allegations of sexual misconduct made against the children's biological dad.

On cross-examination, Applicant testified he only met with Trial Counsel two times

during his representation. He testified while his charges were pending he had three different lawyers. Applicant testified he had received his discovery before trial and that the State had extended a plea offer of twenty years which he declined. He testified he was not going to accept the plea offer for something he did not do. Applicant testified Trial Counsel told him life without parole was off the table in terms of a potential sentence. He testified he had previously pled guilty twenty years ago to CSC and that he was not guilty of the crime then but that his father wanted him to take the plea. Applicant testified Trial Counsel did not discuss any defenses with him. He testified he told Trial Counsel about his previous charge and about when he purchased the porn. Applicant testified Trial Counsel told him he did not want him to testify at trial. He testified he did not remember the trial judge examining him about his wishes on whether to testify or not. Applicant testified Trial Counsel never talked to him about severing his charges.

Trial Counsel's Testimony

Trial Counsel testified he had practiced law since 1992 and all of that time had been devoted to criminal law. He testified he had taken numerous cases to trial. Trial Counsel testified he was appointed to represent Applicant and that the charges arose from an allegation from the maternal grandmother of the victim. He testified the allegations were referred to the Sheriff's office from the Rape Crisis Center. Trial Counsel testified he did not remember the number of times he met with Applicant but that he certainly met with Applicant more than two times. He testified prior to being appointed to represent Applicant, Applicant had two previous attorneys. Trial Counsel testified it was his routine to review discovery in cases and also provide a copy to his clients. He testified Applicant maintained his innocence during his representation and Applicant rejected a twenty year plea offer from the State. Trial Counsel testified he did not have a discussion about severing Applicant's two charges. He testified he did not think about

severance or asking to bifurcate Applicant's trial. Trial Counsel testified he would have investigated Applicant's porn purchase as the victim indicated Applicant had watched it with her and gave a description of it. He testified a search warrant was executed and porn DVDs were found that matched the description the victim gave to authorities. Trial Counsel testified he did not recall Applicant telling him he bought the porn videos after the allegations had been made.

He testified Applicant had a prior conviction for CSC and the State sought to introduce evidence of the conviction. Trial Counsel testified the stipulation of the conviction was forced on him because Applicant could have been prosecuted under a different section of the statute considering the victim was nine at the time of the charge. He testified this would have stopped the jury from hearing about Applicant's prior conviction. Trial Counsel testified the trial judge ruled that the stipulation could come in but that the trial judge would give limiting instructions to the jury on what to consider when hearing about Applicant's prior conviction. He testified he did not object to the stipulation during trial but should have and that based on his arguments he thought the issue may have been preserved anyway. Trial Counsel testified there was no way Applicant could get a fair trial if the jury knew about his prior conviction. He testified his strategy was to keep out any mention of Applicant's prior conviction by stipulating to the jury that Applicant met the statutory requirement without mentioning the prior conviction. Trial Counsel testified the trial judge felt as though he was required by law to let the jury know about Applicant's prior conviction as it was an element of the crime he was charged with. He testified Applicant did not bring up bifurcating or severing his charges when they met. Trial Counsel testified he did not think he had an argument for trying to bifurcate or sever Applicant's charges anyway because they were closely related. He testified he did not have any concerns about Dr. Henderson's testimony, as there was no physical evidence to support the allegations so her

testimony was not as damaging to Applicant. Trial Counsel testified he thought he covered important points on his cross-examination of Dr. Henderson. He testified he did not recall having any issues with the testimony of the social worker who testified for the State. Trial Counsel testified that just like the testimony of Dr. Henderson, the social worker's testimony was essentially the information the victim testified to. He testified he did not think the closing argument by the State was burden shifting and had he thought so he would have objected and moved for a mistrial. Trial Counsel testified he did not have any issues with the jury instructions.

On cross-examination, Trial Counsel testified regarding the jury instructions. He testified he did not think the trial judge's instructions to the jury about how they could only consider Applicant's prior conviction in relation to his current charges was going to help Applicant because the jury knew Applicant already had a prior CSC. Trial Counsel testified he thought it was prejudicial to Applicant that the jury heard he had a prior conviction for CSC after it was decided during pre-trial that the stipulation would be read to the jury. He testified in retrospect Applicant's issue concerning the stipulation would have been better preserved had he made a contemporaneous objection during trial. Trial Counsel testified Applicant was served with a Life Without Parole Notice (LWOP). He testified he did not request a lesser included charge of assault and battery of a high and aggravated nature (ABHAN) during jury charges for strategic reasons. Trial Counsel testified he did not object to the State's closing argument when they made a statement about the child speaking the truth. He testified he tries not to object during closing arguments unless he believes the comments are totally objectionable and he did not believe that comment to be objectionable. Trial Counsel testified part of his defense was to show that the victim had been coached and that prior to his client being charged, the victim had made allegations against someone else that turned out to be false. He testified he believed the victim

had been abused just not by Applicant. Trial Counsel testified he did not keep out the forensic interviews because he thought they were more helpful to Applicant's case than hurtful. He testified he did not recall having any information or records from the DSS case involving the children. Trial Counsel testified the victim's mother was charged as well and that he did not bring out that the victim's mother did not believe the victim's allegations. He testified he did not think about requesting to bifurcate Applicant's trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his 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 the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). 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 hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. This Court finds as follows on the following grounds presented by Applicant at the evidentiary hearing:

Ineffective Assistance of Counsel

Failure to Move for Severance of Charges

Applicant alleges Trial Counsel was ineffective in failing to move for a severance of his CSC with a minor charge and disseminating pornography charge. This court finds Trial Counsel was not ineffective in this regard. A motion for severance is addressed to the sound discretion of the trial court, and the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002) (internal citations omitted). Generally, when offenses charged in separate indictments are of the same

general nature involving connected transactions closely related in kind, place, and character, the trial judge has the discretion to order the indictments tried together, but only so long as the defendant's substantive rights are not prejudiced. State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005); State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996); State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974). Criminal charges may be consolidated 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 real right of the defendant has been prejudiced. State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996). "Offenses are considered to be of the same general nature where they are interconnected." State v. Jones, 325 S.C. 310, 315, 479 S.E.2d 517, 519 (Ct. App.1996). Here, this court notes Trial Counsel testified Applicant did not bring up bifurcating or severing his charges when they met. This court would further note Trial Counsel testified he did not think he had an argument for trying to bifurcate or sever Applicant's charges because they were so closely related. Upon review of the record, this court agrees with Trial Counsel's assessment of Applicant's charges and finds that Applicant would not have been successful on a motion to sever his charges. This court finds Applicant's charges were interconnected and Trial Counsel was not ineffective for failing to move to have them severed. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Trial Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Trial Counsel's performance. This Court concludes Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed with

prejudice.

Failure to Make a Contemporaneous Objection

Applicant alleges Trial Counsel was ineffective in failing to make a contemporaneous objection to the stipulation of Applicant's prior CSC with a minor and registry requirement being published to the jury. Applicant argues Trial Counsel failed to argue that the statute he was charged with was constitutionally overbroad. This Court finds that Applicant cannot show that he was prejudiced by Counsel's failure to make a contemporaneous objection.

To establish trial counsel was ineffective for failing to preserve an issue for appellate review, Applicant must establish both deficiency and prejudice. Milledge v. State, 422 S.C. 366, 374, 811 S.E.2d 796, 800-01 (2018). Therefore, the inquiry does not end, and relief is not automatically granted, simply because an applicant establishes his counsel did not contemporaneously object and the issue was not preserved for appellate review, as an applicant must also establish prejudice.

The appropriate inquiry for determine whether an applicant was prejudiced by counsel's failure to contemporaneously object to the introduction of evidence is not merely whether the issue would have been preserved for appellate review, but rather, whether the appellate court would have reversed Applicant's convictions based on trial court error and granted him a new trial. Id. In Milledge, the South Carolina Supreme Court articulated the proper standard for determining whether an applicant established prejudice from counsel's failure to contemporaneously object to the admission of evidence following the denial of a pre-trial motion to suppress based on Forth Amendment grounds, finding "the appropriate inquiry is whether the search conducted by the deputies was lawful under the Fourth Amendment, as that issue would have controlled the outcome on direct appeal. We further agree with the State that the search was

supported by the deputies' reasonable, articulable suspicion, and thus Milledge was not prejudiced by counsel's failure to contemporaneously object." Id. at 375, 811 S.E.2d at 801. "In determining whether a PCR applicant has established prejudice, the PCR court does not act as a finder of fact and substitute its judgment for that of the trial court. Rather, in instances like the case before us, the PCR court must view the trial court's ruling through the same lens that would be applied on appeal, which here requires giving appropriate deference to the trial court's findings." Id., at 366, 380, 811 S.E.2d at 804 (citing State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459-60 (2002) (explaining that on appeal from a Fourth Amendment motion to suppress, an appellate court will only reverse the trial court if there is clear error, and will affirm if there is any evidence to support the ruling)). "[T]he proper inquiry for determining prejudice in this case is whether there is evidence in the record to support the trial court's finding the officer had reasonable suspicion. If so, an appellate court would necessarily have affirmed the trial court's denial of the motion to suppress." Milledge, 422 S.C. at 380, 811 S.E.2d at 804.

Here, this court finds the publication of the stipulation to the jury was properly charged and carefully considered by Trial Judge Hill, and Trial Counsel was not ineffective for failing to make a contemporaneous objection to it because the stipulation was relevant evidence required to prove an element of the offense charged whose probative value was not substantially outweighed by the danger of unfair prejudice.

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. Douglas, 369 S.C. at 430, 632 S.E.2d at 848; see Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.").

“Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.” State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (“ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’ ”).

However, even if relevant, evidence must be excluded from trial if its probative value is **substantially outweighed** by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence’s tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev’d on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). Significantly though, unfair prejudice does **not** mean damage to a defendant’s case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State

in a criminal trial is meant to be prejudicial to the defendant. Id. It is only unfair prejudice that must be avoided. Id.

Trial judges have “particularly wide discretion” in ruling on the comparative probative value and potential prejudicial effect of evidence. Collins, 398 S.C. at 209, 727 S.E.2d at 757. A trial judge’s ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, “[a] trial judge’s balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence.” State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). “If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.” Id. at 358, 543 S.E.2d at 594.

In the case at bar, Applicant was charged with committing first-degree criminal sexual conduct with a minor in violation of S.C. Code Ann. § 16-3-655(A)(2). Pursuant to that statutory section, an individual is guilty of first-degree criminal sexual conduct with a minor if he or she “engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).”³ S.C. Code Ann. § 16-3-655(A)(2). Notably, in

³ Significantly, Section 23-3-430(C) outlines a list of different offenses involving criminal conduct of a sexual nature that require offenders to register as sex offenders in South Carolina upon conviction. See S.C. Code 23-3-430(C) (requiring sex offender registration for anyone convicted of twenty-two delineated South Carolina offenses, including first-degree criminal sexual conduct with a minor, or “any other offense specified in” the federal Sex Offender Registration and Notification Act). Likewise, Section 23-3-430(D) provides a trial judge with discretion to place any offender convicted of an offense not listed in Section 23-3-430(C) on the South Carolina sex offender registry if good cause is shown. See S.C. Code Ann. § 23-3-430(D) (“Upon conviction, adjudication of

delineating the elements of the offense, the legislature chose not only to make the age of the victim and the commission of a sexual battery elements of the offense but, in order to deter recidivist sex offenders, also elected to make the fact the offender had previously committed an offense that required him or her to be placed on the sex offender registry an element of the offense. Id.; cf. Benton, 338 S.C. at 154, 526 S.E.2d at 230 (“To deter repeat offenders, the General Assembly chose to include two or more prior burglary and/or housebreaking convictions as an element of first degree burglary.”). Thus, in order to prove Applicant’s guilt for the charged offense, the solicitor was required to prove Applicant committed a sexual battery with a victim under the age of sixteen and was on the sex offender registry by virtue of a conviction for a delineated offense – such as first-degree criminal sexual conduct with a minor – or by virtue of a sentencing judge making a determination there was good cause for him to register as a sex offender.

In order to prove the element of first-degree criminal sexual conduct with a minor that required a showing Applicant was a recidivist sex offender who either had been placed on the registry following a conviction for an offense specified in Section 23-3-430(C) or had been placed on the sex offender registry for good cause, the solicitor in Applicant’s case introduced into evidence a stipulation agreed upon and signed by defense counsel. That stipulation, which was admitted without objection, proved Applicant’s status as a recidivist sex offender by instructing the jury he “ha[d] been convicted of Criminal Sexual Conduct with a Minor First Degree, an offense listed pursuant to S.C. Code 23-3-430 (C) and is currently on the South Carolina Sex Offender Registry.” (Tr. pp. 165-167; State’s Ex. # 7). As a result, the stipulation had immense probative value in Applicant’s case as it established an element of the offense that

delinquency, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor.”).

necessarily had to be proven, and, since the stipulation – or comparable evidence – was necessary to prove the charged offense, the probative value of the stipulation was not substantially outweighed by a danger of unfair prejudice, which was particularly true in light of the limiting instructions the trial judge presented to the jury in regard to that stipulation on multiple occasions both before and after the stipulation was introduced. See United States v. Gaudin, 515 U.S. 506, 510 (1995) (“[The Fifth Amendment and Sixth Amendment to the United States Constitution] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.”); In re Winship, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); see also State v. Cheatham, 349 S.C. 101, 109-110, 561 S.E.2d 618, 623 (Ct. App. 2002) (“It is well settled the admission of prior burglary or housebreaking convictions for limited consideration as an element of first degree burglary does not constitute undue prejudice. Thus, the admission of Cheatham's prior burglary and housebreaking convictions as an element of first degree burglary does not constitute unfair prejudice in this case. Further, the trial judge specifically instructed the jury not to consider Cheatham's prior convictions as evidence of the Patel burglary and to limit their consideration of the prior convictions to whether an element of first degree burglary was proven. We find no error in the admission of the convictions because the trial court took every precaution to prevent the improper consideration of Cheatham's convictions and to guard against undue prejudice.”); see generally Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) (“A jury is presumed to follow instructions.”).

Significantly, any limitation to the stipulation would defeat the clear legislative purpose behind the inclusion of the statutory element requiring proof of a prior conviction for an offense of a sexual nature because it would remove all context from the prior conviction in the eyes of the jurors and would leave them simply speculating in regard to what Applicant's prior conviction was for, what the significance of the statutory provision referenced in the stipulation was, and why the general statement regarding the prior conviction was even presented to them at all, which could potentially result in significant prejudice to the prosecution. Old Chief v. United States, 519 U.S. 172, 189 (1997). ("If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, 'never mind what's behind the door,' and the jurors may well wonder what they are being kept from knowing. A party seemingly responsible for cloaking something has reason for apprehension, and the prosecution with its burden of proof may prudently demur at a defense request to interrupt the flow of evidence telling the story in the usual way."). In light of the fact the stipulation in Applicant's case was highly probative and essential to proving Applicant's guilt for first-degree criminal sexual conduct with a minor and was not unduly or overly prejudicial in light of the trial judge's multiple limiting instructions, the trial judge did not abuse his broad discretion in permitting the solicitor to introduce the stipulation admitted in Applicant's case. See Hamilton, 344 S.C. at 358, 543 S.E.2d at 593-594 ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal."); cf. State v. Simmons, 352 S.C. 342, 359, 573 S.E.2d 856, 865 (Ct. App. 2002) ("[T]he trial court properly allowed the State to present evidence of Simmons' prior burglary/housebreaking convictions as an element to support first degree burglary."). As there is evidence to support this rulings, the trial court properly denied Applicant's attempt to not have

the stipulation entered into evidence. Accordingly, Applicant cannot establish prejudice as to counsel's failure to contemporaneously object to the stipulation of Applicant's prior CSC with a minor and registry requirement being published to the jury. This allegation must be denied and dismissed with prejudice.

Failure to Request to Bifurcate

Applicant alleges Trial Counsel was ineffective for failing to request to bifurcate the trial to avoid the fundamental unfairness of the jury's knowledge of Applicant's prior CSC with a minor and registry requirement. Here, this court finds Trial Counsel was not ineffective as Applicant was not entitled to bifurcate his trial. This court can think of no authority authorizing bifurcation of criminal charges in this context and would note Applicant has not identified any further authority that would specifically authorize a trial judge in South Carolina to bifurcate a criminal trial to prevent the jury from considering all the elements of a single offense at the same time during a unitary trial.

Further, this court finds a bifurcated trial was not necessary for Applicant. This court would note just as our appellate courts have instructed should be done in first-degree burglary cases when evidence of two or prior burglary or housebreaking convictions is introduced, the trial judge issued two separate limiting instructions to prevent the jury from considering Applicant's prior conviction for any purpose other than as evidence of the element expressly requiring proof of that prior conviction.⁴ See Benton, 338 S.C. at 156, 526 S.E.2d at 230-231. ("To ensure a defendant is not convicted on an improper basis while allowing the State to prove the elements of first degree burglary, the trial court should limit evidence to the prior burglary

⁴ Significantly, the trial judge's issuance of a limiting instruction instead of bifurcating the trial was entirely consistent with the method to be followed when evidence of limited admissibility is introduced during trial as outlined by the South Carolina Rules of Evidence. See Rule 105, SCRE ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

and/or housebreaking convictions, as it did here. Particular information regarding the prior crimes should not be admitted. Additionally, the trial court, as it did here, should, on request, instruct the jury on the limited purpose for which the prior crime evidence can be considered.”); State v. Simmons, 352 S.C. 342, 357, 573 S.E.2d 856, 864 (Ct. App. 2002) (explaining a trial judge should limit evidence of prior convictions offered to prove an element of first-degree burglary by excluding particular information about the details of the prior convictions and by issuing a limiting instruction to the jury upon request); State v. Hamilton, 327 S.C. 440, 447, 486 S.E.2d 512, 516 (Ct. App. 1998) (“When evidence of other crimes is admitted for a specific purpose, the trial judge should instruct the jury to limit its consideration of this evidence to the particular purpose for which it is offered.”); see also Gilliam, 994 F.2d at 100 (“[W]here the district court issues a proper curative instruction, we must presume that a conscientious jury will only use the proof of the prior conviction to satisfy the element of the crime.”); see generally Shotwell Mfg. Co. v. United States, 371 U.S. 341, 367 (1963) (“This limiting instruction is clear. It must be presumed that the jury conscientiously observed it.”). Based on those curative measures, a bifurcated trial was not necessary in order to ensure Applicant received a fair trial under the circumstances. Accordingly, this court concludes Applicant has not met his burden of proving Trial Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

Failure to Investigate

Applicant alleges Trial Counsel was ineffective in failing to investigate the issue of pornography being purchased after the victim had been removed from the home. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d

768, 772 (1998) (“Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial.”). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). Applicant has failed to show what beneficial information could have been discovered had Trial Counsel done more investigation. Even so, Trial Counsel testified he would have investigated Applicant’s porn purchase as the victim indicted Applicant had watched it with her and gave a description of it to authorities. Trial Counsel testified a search warrant was executed and porn DVDs were found that matched the description the victim gave to authorities. Trial Counsel testified he did not recall Applicant telling him he bought the porn videos after the allegations had been made. Furthermore, this court finds Applicant presented no evidence at the evidentiary hearing that would show he purchased pornographic videos after the charges against him were filed. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel’s performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

Failure to Object

Applicant alleges Trial Counsel was ineffective for failing to object at different intervals during trial. First, Applicant alleges Trial Counsel was ineffective for failing to object to unfounded prejudicial expert testimony. During trial Dr. Nancy Henderson, a board-certified child abuse pediatrician, testified about her physical examination of Victim after the abuse was revealed, indicated Victim disclosed during the examination she was sexually abused between the ages of six and nine, and stated the examination results were normal. (Tr. pp. 205-206; p. 212; pp. 215-218). However, Dr. Henderson noted normal examination results were extremely common in sexual abuse cases and did not mean no sexual abuse had occurred due to the fact injuries to the genital area heal very rapidly. (Tr. pp. 217-218; p. 229). Applicant argues that Trial Counsel was ineffective for failing to object to Dr. Henderson's testimony that normal examinations were common. This court finds Trial Counsel was not ineffective for failing to object to this testimony. Trial Counsel testified he did not have any concerns about Dr. Henderson's testimony as there was no physical evidence to support the allegations so her testimony was not that damaging to Applicant. Trial Counsel testified he thought he covered important points on his cross-examination of Dr. Henderson. This court finds an objection to this testimony would likely have been overruled as the doctor was giving her medical opinion about an issue she had seen numerous times. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegation is denied and dismissed.

Secondly, Applicant alleges Trial Counsel was ineffective for failing to object to hearsay testimony by the clinical social worker expert. This court finds Trial Counsel was not ineffective for failing to object as Applicant cannot demonstrate sufficient prejudice. Applicant contends the social worker's testimony about his sessions with the victim contained hearsay. This court finds the testimony in this instance (Tr.p.184-196) to not be prejudicial because there was substantial evidence of this matter already in the record as the victim had already testified to this information (Tr.p.127-141) and any failure to object was harmless. Accordingly, this court finds this allegation is without merit. This allegation is denied and dismissed with prejudice.

Lastly, Applicant alleges Trial Counsel was ineffective for failing to object in the State's closing to a misstatement of the burden of proof and improperly appealing to the emotions of the jury. This court finds Trial Counsel was not ineffective for failing to object to the State's closing arguments. "Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For 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. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." State v. Mouzon, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995), aff'd, 326 S.C. 199, 485 S.E.2d 918 (1997) (citing Herring v. New York, 422 U.S. 853 (1975)). "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices; and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609-10, 602 S.E.2d at 744. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not

receive a fair trial because of the alleged improper argument.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id. Here, Applicant argues the State’s remarks shifted the burden of proof and when the State said to the jury “your recall of all the evidence that you saw to guide you to the verdict that speaks the truth about this case. It all boils down to, do you believe the child is telling the truth” appealed to the emotions of the jury. (Tr.p.324). Trial Counsel testified he did not think the closing argument by the State was burden shifting and had he thought so he would have objected and moved for a mistrial. This court agrees and finds that during the trial judge’s introductory remarks to the jury panel and during its charge to them at the conclusion of trial, the trial judge informed the jury that the burden of proof was entirely on the State. (Tr.p.110-112)(Tr.p.364-366). Moreover, this court also finds Trial Counsel was not ineffective for failing to object to the State’s comments about “a verdict that speaks the truth”. This Court declines to grant relief as there exists no authority supportive of a limitation on the State’s ability to utilize this language in its closing argument. Cf. State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), reh’g denied (May 25, 2018) (preliminary remarks to the jury that its role was to “search for the truth,” determine “true facts,” and render a “just verdict,” was found improper but not prejudicial); State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (instructing trial court “to remove any suggestion from his general sessions charges that a criminal jury’s duty is to return a verdict that is ‘just’ or ‘fair’ to all parties); State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (instructing trial courts to omit “speak the truth” language from its opening and closing jury charges). Nor have our appellate courts assigned a finding of prejudice to the inclusion of such language in a jury instruction where the instructions otherwise properly instructed the jury regarding the burden of

proof and circumstantial evidence. *Id.* This Court finds the State's closing argument not objectionable upon the basis alleged such that no Strickland error and prejudice flows from trial counsel's failure to object to this isolated portion of the argument. See State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) ("We must review the [closing] argument in the context of the entire record."); see also Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998) (prejudice prong may be met if "the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process"); State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) (discussing tailoring of State's closing argument so as not to appeal to personal bias or to arouse passion or prejudice). And, the court's final jury instructions were free of any reference to the verdict speaking the truth. (Tr.p.360-372). Accordingly, this court finds this allegation to be without merit. This allegation is denied and dismissed with prejudice.

Failure to Take Exception to Jury Instruction

Applicant alleges Trial Counsel was ineffective in failing to take exception to jury instructions that Applicant's prior record should be considered only for the limited purpose of proving the elements of the indicted charge. This Court finds this allegation is without merit. "In reviewing jury charges for error, the charge must be taken as a whole in light of the evidence presented at trial. State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). Moreover, a jury charge is correct if, when it is read as a whole, it contains the correct definition and adequately covers the law." *Id.* at 318, 577 S.E.2d at 464. A jury charge which is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). Furthermore, "the substance of the law is what must be charged to the jury, *not* any particular verbiage." Adkins, 353 S.C. at 318-19, 577 S.E.2d at 464 (emphasis

added). This court finds Trial Counsel was not ineffective for objecting to this jury charge. This court finds this jury charge was correctly given by the trial judge and can think of no reason Trial Counsel should have objected as the trial judge was once again informing the jury they could only consider Applicant's prior record for the limited purpose of proving the elements of the indicted charge. Accordingly, this court finds this allegation to be without merit. This allegation is denied and dismissed with prejudice.

Due Process violation

Applicant alleges Trial Counsel committed a Due process violation based on his failure to get a fair trial by an impartial jury. Applicant presented testimony in a cursory fashion concerning a due process violation. However, Applicant failed to set forth with specificity the grounds upon which these constitutional violations were based or present any evidence of a specific violation. After a review of the record, this Court finds this allegation is without merit. Accordingly, this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court, after careful and deliberate consideration, 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

(1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC 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 THAT:

1. 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.

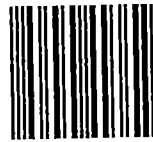
AND IT IS SO ORDERED this 24 day of July, 2018.


CARMEN T. MULLEN
Presiding Judge
Thirteenth Judicial Circuit

Beaufort, South Carolina



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