McMahan & Taylor Attorneys LLC

March 16, 2020

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

RE: Keith Denver Tate, #236480 vs. State of South Carolina
2018-CP-01-0064

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Tate.

Best regards,

ASHLEY A. MCMAHAN
ATTORNEY AT LAW

AAM

cc: Keith Denver Tate, #236480
Asst. Attorney General Janell H. Gregory
Abbeville County Clerk of Court
Office of Appellate Offense

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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2018-CP-01-0064

Keith Denver Tate, #236480, ... Petitioner,

v.

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

NOTICE OF APPEAL

Applicant, Keith Denver Tate, appeals the order of the Honorable L. Casey Manning filed March 16, 2020.

Mar. 16th, 2020

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STATE OF SOUTH CAROLINA
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APPEAL FROM ABBEVILLE COUNTY
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PROOF OF SERVICE

I, Ashley A. McMahan, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Janell H. Gregory, Asst. Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

Mar. 18th, 2020

ASHLEY A. MCMAHAN, ESQUIRE
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STATE OF SOUTH CAROLINA COUNTY OF ABBEVILLE	IN THE COURT OF COMMON PLEAS FOR THE EIGHTH JUDICIAL CIRCUIT
Keith Denver Tate, #236480, Applicant, v. State of South Carolina, Respondent.	2018-CP-01-064 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed on February 28, 2018, by Keith Denver Tate (Applicant). The State (Respondent) filed a Return on June 13, 2018, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on October 14, 2019, at the Greenwood County Courthouse. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf. Public Defender Janna Nelson Gregory (Nelson) of the Eighth Circuit Public Defender's Office, Assistant Public Defender Shane E. Goranson (Goranson) of the Eighth Circuit Public Defender's Office, E. Charles Grose, Jr. (Grose), Esquire, and Christopher Lance Sheek (Sheek), Esquire also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Abbeville County Clerk of Court. During its February 2011 term, the Abbeville County Grand Jury indicted Applicant for nine counts of criminal sexual conduct

with a minor, second degree (2011-GS-01-45, -46, -47, -49, -50, -51, -52, -53, -54). Nelson and Goranson represented Applicant. Assistant Solicitors C. Yates Brown and Sheek prosecuted the case.

On May 27-29, 2014, Applicant proceeded to a jury trial before the Honorable Donald B. Hocker, circuit court judge. On May 29, 2014, the jury convicted Applicant of one count of criminal sexual conduct with a minor in the second degree (2011-GS-01-0046) and acquitted Applicant of the eight remaining counts. Judge Hocker sentenced Applicant to a sixteen year term of imprisonment.

Applicant filed a timely notice of appeal and the appeal was perfected by Appellate Defender Susan B. Hackett of the South Carolina Commission of Indigent Defense – Division of Indigent Defense. On appeal, Applicant raised the following issues:

I. Did the trial judge's failure to declare a mistrial based upon the alleged victim's multiple emotion outbursts that disrupted the trial and improperly influence the jury to decide the case on emotion instead of the evidence presented violate Applicant's state and federal constitutional rights to a fair and impartial jury?

II. Did the trial judge's failure to require the state to open in full during closing argument and reply only to the defense's closing argument violate Applicant's state and federal constitutional rights to a fair trial and due process of law?

III. Did the trial judge's refusal to permit Applicant to elicit testimony concerning the content of three illicit photographs found on the alleged victim's phone where the content was necessary for the jury to understand the alleged victim's motive to fabricate the allegations against Applicant violate Applicant's state and federal constitutional rights to present a defense and confront his accuser?

(FBOA).

Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence on October 19, 2016. State v. Tate, Op. No. 2016-UP-436 (S.C. Ct. App. Filed October 19, 2016). Applicant petitioned for rehearing on November 3, 2016. On December 14, 2016, the Court of Appeals denied the petition for rehearing and attached a substituted opinion that

affirmed Applicant's conviction and sentence. Applicant filed a second petition for rehearing on December 29, 2016. Applicant's second request for rehearing was denied on January 10, 2017. Applicant timely submitted a Petitioner for Writ of Certiorari to the South Carolina Supreme Court, which was subsequently denied. The remittitur was issued on October 25, 2017.

SUMMARY OF FACTS

In July of 2009, Mother moved to Calhoun Falls in Abbeville County with her children and Applicant. (Tr. p. 73.) Applicant was Mother's boyfriend and the father of one of her sons. (Tr. p. 74.) Mother had three children: Victim, T.R., and T.R. (Tr. p. 72.) Applicant and Mother dated for three or four years and cohabitated for the entirety of the relationship. (Tr. p. 74.) Mother suffers from significant health problems including seizures, schizophrenia, bipolar disorder, fibromyalgia, rheumatoid arthritis, and neuropathy. (Tr. p. 75.) To treat her various illnesses, Mother took approximately thirty-six pills per day and had prescriptions for Xanax, Geodon, Depakote, Ativan, Seroquel, Lortab, Phenergan, Flexeril, and Zanaflex. (Tr. pp. 74-75.) As a result of being heavily medicated, Mother slept most of the day. (Tr. p. 76.) Mother would take the first dose of medication and sleep until 5:00 p.m. or 6:00 p.m., take the second dose and sleep until 9:00 p.m. or 10:00 p.m., then take a third and final dose and sleep through the night. (Tr. p. 75.) Due to Mother's poor health, Applicant primarily cared for the children. (Tr. p. 135.)

Rebecca Holland worked at Calhoun Falls Charter School, where Victim was a student, as a substitute teacher, bus supervisor, track coach, band director, and bus driver. (Tr. pp. 232-233.) Victim was in the color guard in the band during the 2009 season and part of the 2010 season. (Tr. p. 233.) Holland took Victim home from band practice every day. (Tr. p. 234.) Holland testified that Victim would cry on the way home and ask her not to take her back to her house. (Tr. p. 235.) Holland sometimes witnessed Applicant grab Victim by the arm when she would drop Victim off

at home. (Tr. p. 235.) On August 23, 2010, Victim disclosed to Holland that she had been sexually assaulted. (Tr. p. 233.) Following Victim's disclosure, pursuant to school policy, Holland reported the incident to Lori Lindler, the school's assistant principal and guidance counselor. (Tr. p. 234.) Sometime earlier in 2010, Victim also disclosed the abuse to T.C., her boyfriend at the time. (Tr. p. 112.) Victim detailed Applicant's abuse to T.C. around five or six months after the abuse had been happening. (Tr. p. 115.) Victim did not want T.C. to tell anyone about the abuse because it would "mess the family up." After Victim told T.C. the abuse was continuing, he told his mother. T.C. subsequently gave a statement to police on August 26, 2010. (Tr. p. 121.) Lori Lindler spoke with Victim regarding her allegations of sexual abuse on August 25, 2010. (Tr. p. 248). Lindler testified that Victim came to speak with her after confiding in the parent of a student and Rebecca Holland, who subsequently referred the matter to her. (Tr. p. 247.) In her conversation with Lindler, Victim recounted Applicant's abuse. (Tr. p. 248.) Victim identified ten separate occasions where she had been sexually abused by Applicant. (Tr. p. 248.) Nine of the instances of assault occurred in Abbeville County and one instance took place in Greenville County. (Tr. p. 248.) Lindler went through a calendar with Victim in an effort to identify the dates of the assaults as closely as possible. (Tr. p. 248.) They used the school calendar to aid them in selecting dates because Victim could remember when certain assaults occurred based on what school events were happening at the time. (Tr. p. 248.) Following her conversation with Victim, Lindler contacted the Calhoun Falls Police Department. (Tr. p. 249.) The officers subsequently obtained a search warrant for the residence and an arrest warrant for Applicant. (Tr. p. 265.)

On September 28, 2010, Jessica Bell interviewed Victim at The Child's Place. (Tr. p. 328.) The Child's Place was a children's advocacy center whose role is to make the investigation of child abuse easier on children. (Tr. p. 329.) The case was referred to The Child s Place by Monique Bell

of the Calhoun Falls Police Department. (Tr. pp. 329.) Jessica Bell testified that she did not ask Victim about specific dates, as children generally only remember things like their age at the time and what events were going on around the time of the abuse. (Tr. p. 332.) Bell prepared a report following her interview with Victim. (Tr. p. 329.) Several weeks after the forensic interview, Dr. Lyle Pritchard performed a forensic medical examination on Victim on November 23, 2010. (Tr. p. 291.) The forensic medical examination took place at The Child's Place. (Tr. p. 296.) Dr. Pritchard is part of the South Carolina Child Abuse Medical Response System. (Tr. p. 290.) Dr. Pritchard testified that during his examination of Victim, he noticed a transection of Victim's hymen. (Tr. p. 293.) A transection of the hymen is an injury that is consistent with something being forced into the vaginal opening. (Tr. p. 293.) Dr. Pritchard testified there is a delay in disclosure in the vast majority of child sexual abuse cases. (Tr. p. 294.) Dr. Pritchard also noted that any signs of physical abuse (bruising, lacerations, etc.) would have healed by the time he examined Victim. (Tr. pp. 294-295.) While at the Child's Place for her physical examination. Victim told a nurse that she never had sexual contact with anyone other than Applicant. (Tr. p. 179.) On cross examination, Defense Counsel asked Dr. Pritchard if Victim was using contraceptives at the time of the examination. (Tr. p. 299.) Dr. Pritchard indicated that she was using contraceptives. (Tr. p. 299.)

At trial, Victim fully recounted the extensive abuse she suffered at the hands of Applicant. Victim was sixteen years old at the time of trial. (Tr. p. 130.) In August of 2009, Victim was twelve years old. (Tr. p. 132.) Applicant took care of Victim and her siblings while Mother was sleeping. (Tr. p. 135.) Victim testified that she referred to Applicant as "Dad." Victim testified that Applicant no longer has her trust because he sexually assaulted her. (Tr. p. 136.)

Some months after the abuse began occurring. Victim disclosed the abuse to her boyfriend, T.C. (Tr. p. 136-137.) Victim did not immediately disclose the abuse because she did not know

who to tell. (Tr. p. 137.) Victim did not think anyone would believe her, as it would be her word against Applicant's. (Tr. p. 138.) Applicant also told Victim that if she told, her mother would have a seizure. (Tr. p. 350.)

Victim testified that Applicant touched her with his penis. (Tr. p. 140.) Specifically, Applicant penetrated her vagina with his penis. (Tr. p. 141.) When she sat down with Lori Lindler to try and ascertain the dates of the assaults, Victim identified ten dates when Applicant sexually assaulted her. (Tr. p. 142.) On all ten of these occasions, Applicant penetrated Victim's vagina with his penis. (Tr. p. 142.) Victim also testified that on the last occasion. Applicant put his penis in her mouth. (Tr. p. 151.) Victim also recalled Applicant penetrating her anus. (Tr. p. 151.) Victim testified that she bled the first time Applicant penetrated her vagina and on the occasion when he penetrated her anus. (Tr. p. 152.) Victim bled onto a sheet, which Applicant subsequently took away. (Tr. p. 152.) The dates of the nine assaults that occurred in Abbeville County were August 26, 2009, October 31, 2009, December 14, 2009, February 6, 2010, February 13, 2010, March 3, 2010, March 14, 2010, March 15, 2010, and March 18, 2010. (Tr. pp. 142-143.) Applicant also sexually assaulted Victim on a tenth occasion in Greenville County on December 26, 2009, at the home of Victim's aunt. (Tr. p. 169.)

Victim testified the first assault took place at their home in August of 2009. (Tr. p. 145.) The assault took place on the couch in the living room of the home while Victim s mother and siblings were home. (Tr. pp. 145-146.) No one else was in the room at the time of the assault. (Tr. p. 149.) Applicant told Victim he wanted to see what size bra and panties she wore. (Tr. p. 146.) Applicant then began kissing her neck and rubbing her bottom. (Tr. pp. 146-147.) Applicant tried to take Victim's shirt off and told her "he was helping her for her bra." (Tr. p. 147.) Applicant eventually took Victim's clothes off and lay on top of her, telling her "don't act like you don't want

it." (Tr. p. 150.) Applicant then penetrated her with his penis. (Tr. p. 150.) Victim testified that after the first assault, she was afraid to go home from school. (Tr. p. 157.) Following the first incident, Victim began writing poetry about her feelings. (Tr. p. 157.) Following the first incident. Victim's journal read:

> So many questions. Should I stay or should I go. Should I walk away from my fears or should I be strong. Should I love him. Should I hate him. Should I keep it to myself. Should I let them know. So many questions. Would she still love me - -would she still love my [sic] for me or hate me for something that wasn't my fault. Will she kick me out because she didn't believe me. Should I run away or should I stay. So many questions that have no answers. Does he know how I feel. Do he know. Do he know. Do he know. So many questions.

(Tr. p. 162.)

Applicant's second sexual assault of Victim occurred on October 31, 2009. (Tr. p. 189.) Victim recalled the date because there was a school football game on October 30th. (Tr. p. 189.) Victim reported to Jessica Bell that on this particular incident, she screamed and Applicant hit her in the face, busting her lip open. (Tr. p. 191.) Minor's mother also recalled noticing Victim had a busted lip at some point in time. (Tr. p. 80.) When Mother asked why Victim's lip was busted, she was told that Victim injured herself while playing. (Tr. p. 81.) After the assault on October 31st, Victim woke up to an empty house and noticed that her shorts were up, her underwear was down, and her shirt was on a lamp. (Tr. p. 194.) During Applicant's final assault of Victim, Applicant put her on the couch and put his penis in her mouth. (Tr. p. 208.) Victim bit Applicant's penis and he began screaming. (Tr. p. 209.) Victim then ran down the hallway and barricaded her bedroom door with her dresser. (Tr. p. 209.) Victim also told T.C. about this incident, disclosing to him that one night when she was asleep. Applicant put his penis in her mouth. (Tr. p. 120.) Victim told T.C. that Applicant got angry with her and grounded her. (Tr. p. 120.) Eventually, Victim began sleeping with her mother to get away from Applicant. (Tr. p. 190.)

ALLEGATIONS RAISED

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

1. Ineffective Assistance of Counsel:

    a. Trial counsel failed to convey a plea offer;
    b. Trial counsel failed to object to the testimony of state witness;
    c. Trial judge erred in his ruling of chain of custody.

On October 1, 2019, Applicant filed an amended application alleging:

    d. Ineffective assistance of counsel Grose – failure to convey a plea offer. Once pela offer was discovered by Ms. Nelson, the solicitor refused to honor it.
    e. Ineffective assistance of counsel by Nelson and Goranson – failure to properly object to the lack of jury instructions on sexual battery to be proven beyond a reasonable doubt.

At the evidentiary hearing, Applicant stated he was going forward on the allegations set forth in his amended application.

APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether 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. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 300 S.C. 115.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, the application for post-conviction relief, the amended application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

Grose was provided ineffective assistance of counsel because he failed to convey a plea offer. Once plea offer was discovered by Nelson, the solicitor refused to honor it.

Applicant alleges Grose failed to convey a five year plea offer to him from the State during his representation of Applicant. Applicant further alleges, once the five year plea offer was discovered by Nelson, the State refused to honor the plea offer.

Applicant testified he talked to Grose one time and that was for a bond reduction. Applicant testified he applied for a job and there was a "red flag" regarding his pending charges

and he reached out to Grose and found out he had gone into private practice. Applicant testified he thought his charges had been dropped and did not realize they were still pending because until he applied for the job. Applicant testified Nelson started representing him at that time. Applicant testified Nelson told him about a six year plea offer and Applicant told her he did not know anything about it. Applicant testified Nelson never communicated any plea offers to him during her representation.

On cross-examination, Applicant testified he was out of custody for five years prior to his trial. Applicant testified he never met with Grose in person. Applicant testified Grose told him not to contact him. Applicant testified he met with Nelson in person and had a couple of phone calls with her during her representation. Applicant testified he discussed plea offers with Nelson and they discussed the definition of an Alford plea. Applicant testified he does not recall the content of those discussions. Applicant testified he recalled wanting to take an Alford plea. Applicant testified he would have taken a plea prior to trial even if it was not an Alford plea. Applicant testified he recalled telling the court prior to his sentencing that he was innocent. Applicant testified he was not aware of any Alford plea discussions.

Grose testified he left his office as the Public Defender for the Eighth Circuit on August 16, 2012. Grose does not have a recollection one way or another regarding this offer of six years. Grose identified an email sent to him from Assistant Solicitor Patricia Bolen (Bolen) extending an offer to Applicant that was a cap of six years. Grose testified, according to his email response, he told Bolen he needed to have the evidence examined. Grose does not have notes from Applicant's case. Grose testified he looked through file materials and he did not find any notes or letters regarding the plea offer. Grose testified he wants all discovery before he discusses plea offers.

On cross-examination, Grose testified he was the head Public Defender for the Eighth Circuit at the time he represented Applicant. Grose testified he cannot rule out that he told Applicant about the six year cap plea offer. Grose testified it is his typical practice to communicate plea offers, and it is also his typical practice to record those communications. Grose testified it is possible that he made a note and discussed the cap of six year offer with Applicant and the note is just not in the file, but that is just speculation.

Nelson testified she represented Applicant prior to trial. Nelson testified Applicant reached out to her after his pending charges caused him a problem with obtaining a job. Nelson testified she informed Applicant the earliest possible trial date would be April of 2014 and that she would take steps to try to get his case resolved. Nelson testified she would have looked through the file when she met with Applicant. Nelson testified she found the offer of a six year cap in the file and brought that to Sheek's attention. Nelson testified she asked Sheek if he would let Applicant plea to the cap of six years under Alford and Sheek said no. Nelson testified her email to Sheek was something to the effect of "I don't know if [Applicant] would be willing to accept a cap of six years." Nelson testified she does not recall Applicant being interested to pleading to the charges straight-up because he could receive twenty years on one charge. Nelson testified their discussions about proceeding to trial revolved a lot around Applicant maintaining his innocence. Nelson does not recall specifics about what pleas he was willing to take, but did not believe Applicant would even consider a plea unless it was an Alford plea because he was maintaining his innocence.

On cross-examination, Nelson identified an email she sent to Sheek on Wednesday, May 14, 2014. Nelson read the relevant portion during the evidentiary hearing, which stated:

> . . . I'm not sure if I ever got a definite answer on whether you'd accept a plea to one count with a negotiated 6-year cap. It would have to be an Alford plea, which I don't think Judge Hocker would have a problem taking. I can't swear that [Applicant] would take

> that, but the last time we talked, he did ask me if that was on the table so I just want to make sure I ask about it.

(Defense exhibit #1.) Nelson testified her email cannot be construed as an acceptance of Bolen's cap of six year offer.

Nelson testified she received an email from Sheek on May 20, 2014, indicating he would be willing to encourage the victims to accept a ten year plea, but it was not an affirmative offer because he had not checked with the victim yet. Nelson testified she received a subsequent email from Sheek offering to have Applicant plead straight up to one count of criminal sexual conduct with a minor in the second degree and the State would dismiss the remaining charges. Nelson testified Sheek sent a follow up email indicating that a straight up plea to one charge could be an Alford plea. Nelson testified she cannot imagine she would not have communicated that to Applicant and her email response indicates she communicated that offer to Applicant. Nelson testified Applicant was very firm in saying he was not guilty. Nelson testified she believed it would have been good for Applicant to consider taking a plea in his case, but does not remember specifics. Nelson testified she did not see the plea offer of one count straight up as a benefit to Applicant since she did not believe he would get consecutive time from the court if he was found guilty on all of his charges.

Goranson testified he did not have any involvement in the plea offers in Applicant's case.

Sheek testified he was the prosecutor assigned to Applicant's case in 2014. Sheek testified he became aware of Bolen's cap of six year plea offer during his discussion with Nelson. Sheek testified there was no policy in the solicitor's office that made Bolen's previous offer to Applicant binding on him when he took over Applicant's case. Sheek testified his practice as to reevaluate cases to see what offer would be proper.

Sheek testified he took Nelson's email (defense exhibit #1) to be a counter-offer since Nelson's email indicated the offer would have to be an Alford plea, which was not in the original offer extended by Bolen. Sheek testified every offer he discussed with Nelson, she indicated it had to be an Alford plea since Applicant was maintaining his innocence. Sheek testified he ultimately offered to dismiss all charges except one and allow Applicant to plead under Alford straight up to one charge. Sheek testified Applicant chose to proceed to trial.

On cross-examination, Sheek testified he does not recall Nelson telling him Applicant never received the cap of six year plea offer. Sheek testified the general policy of the solicitor's office was that they do not allow Alford pleas in CSC cases. Sheek testified he did extend a potential offer to Nelson of ten years on May 20, 2014 at 9:19AM and, prior to her responding, he emailed her again the same morning at 10:43AM providing Nelson with an official offer for Applicant to plead to one count straight up under Alford. Sheek testified he Grose had come to him and said he had never provided the original plea offer from Bolen to Applicant, it may have made a difference since there is case law that states attorneys have to give their clients plea offers.

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frye, 566 U.S. 134, 145 (2012); see also Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (adopting "rule that counsel's failure to convey a plea offer constitutes deficient performance"). When alleging plea counsel was deficient in his or her handling of a plea offer, an applicant "must demonstrate a reasonable probability that: (1) he would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel; (2) the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it; and (3) the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge

or a sentence of less prison time." Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (citing Missouri v. Frye, 566 U.S. 134, 147 (2012)); see Lafler v. Cooper, 566 U.S. 156, 164 (2012) (stating "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed"). If an applicant is able to meet the requirements set forth above, the appropriate relief is to require the State to re-extend the previous plea offer to Applicant. Lafler, 566 U.S. at 174. ("The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement.").

Here, Nelson's email to Sheek (defense exhibit #1) and Nelson's testimony show Applicant would not have accepted Bolen's initial offer of a cap of six years since it was not an Alford plea. Nelson and Sheek both testified Applicant was maintaining his innocence and was not interested in any plea offer that was not an Alford plea. Further, Sheek testified he believed Nelson's email asking if the six year cap offer was still on the table was a counter-offer since she further stated the six year cap would have to be an Alford plea, which was not part of Bolen's original offer.

Accordingly, this Court finds the testimony of Grose, Nelson, and Sheek very credible as to this allegation and Applicant's testimony not credible. This Court finds Applicant has failed to meet his burden to show he would have accepted the original cap of six year offer from Bolen as it was not an Alford plea and the credible testimony of Nelson and Sheek show Applicant was only interested in an Alford plea as he was adamant about maintaining his innocence. Therefore, this

Court finds Applicant has failed meet his requisite burden of establishing Grose or Nelson were constitutionally ineffective and this allegation is denied and dismissed with prejudice.

Ineffective assistance of counsel by Nelson and Goranson – failure to properly object to the lack of jury instructions on sexual battery to be proven beyond a reasonable doubt.

Applicant alleges Nelson and Goranson should have objected to the lack of instruction that sexual battery must be proven beyond a reasonable doubt. However, during Goranson's testimony, Applicant modified this allegation to allege Goranson and Nelson were ineffective for failing to require the jury be instructed to find a specific type of sexual battery that occurred for any guilty verdict.

Goranson testified his issue with the jury instructions was that it did not require the jury to find a particular type of sexual battery was committed by Applicant for them to find Applicant guilty beyond a reasonable doubt. Goranson testified the verdict form did not require the jury to say what type of sexual battery occurred on each indictment. Goranson testified they submitted a verdict form to the trial court that would have required the jury to find the type of sexual battery for any indictment Applicant was found guilty of, but the trial court did not use their proposed form.

On cross-examination, Goranson testified Applicant was found guilty of only one indictment and that indictment alleged Applicant sexually assault Victim on October 31, 2009. After being shown that indictment, Goranson testified only one type of sexual abuse was alleged to have occurred on October 31, 2009.

The jury instructions provided to the jury by the trial court regarding second degree criminal sexual conduct with a minor was as follows:

> . . . the Defendant is charged with second degree criminal sexual conduct with a minor. The State must prove beyond a reasonable doubt that the Defendant engaged in a sexual battery with the victim.

> Now a sexual battery is defined in this state as sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion however slight of any part of a person's body or of any object into the genital or anal openings of another person's body, except when the intrusion is accomplished for medically recognized treatment or diagnostic purposes. The State must prove beyond a reasonable doubt all of the elements of this offense that is stated in each of the nine indictment and also must prove beyond a reasonable doubt that the victim was at least 11-years-old but not more than 14 years-old at the time of the sexual battery.

(Tr. 414-415.)

This Court finds the trial court's instruction properly instructed the jury on the State's burden to prove the allegations of sexual assault beyond a reasonable doubt. Further, the trial court provided the jury with an instruction on the "beyond a reasonable doubt" burden and reiterated the State's burden appropriately throughout the instruction. This Court finds Applicant has failed to meet his burden to show any deficiency on behalf of Nelson and Goranson for failure to object to the trial court's instruction. Further, Applicant has failed to show any resulting prejudice from the alleged deficiency as the trial court's instructions to the jury were proper.

As to Applicant's allegation that Nelson and Goranson were constitutionally ineffective for failing to have the trial court provide a special verdict form to the jury, this Court finds Applicant has failed to meet his burden to show how Nelson and Goranson were deficient as Nelson created the special verdict form and presented it along with argument to the trial court in support of using the special verdict form in Applicant's trial. (Tr. 361-363.) The trial court did not agree with Nelson, despite her efforts.

As to this allegation, Applicant has failed to meet his burden to show any resulting prejudice from the alleged deficiency. Applicant has failed to show this Court how the outcome of his trial would have been different had the jury used Nelson's proposed verdict form. As Goranson testified, Applicant was found guilty on only one of the nine indictments. The

indictment Applicant was convicted on alleged only one type of sexual assault, so the verdict form requiring the jury to find what specific type of sexual battery occurred on that one date would not have changed the outcome of his trial. As such, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Nelson and Goranson were constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on the foregoing, the Court finds and concludes 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.

The Court notes Applicant must file and serve a notice of appeal within thirty days from post-conviction relief counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

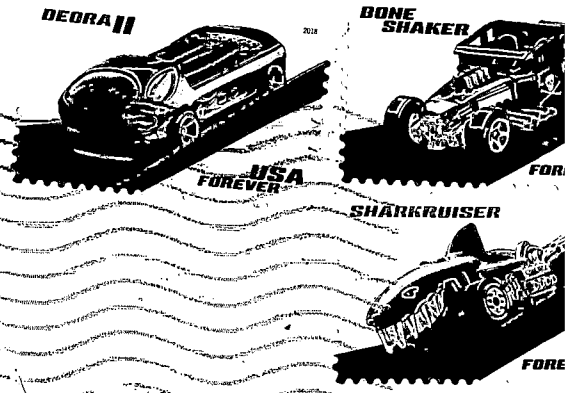
1. The application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant is to remain in the custody of the Respondent.

AND IT IS SO ORDERED this 31 day of January, 2020.

L. CASEY MANNING
Presiding Judge
Eighth Judicial Circuit

Florence South Carolina



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