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**Jul 27 2020**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lancaster County

Honorable D. Craig Brown, Circuit Court Judge

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ALBERT LEE WITHERSPOON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001896

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APPENDIX

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VICTOR R SEEGER  
Appellate Defender

ALAN WILSON  
Attorney General

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

LINDSEY MCCALLISTER  
Assistant Deputy Attorney General  
1000 Assembly Street, Room 519  
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

ATTORNEY FOR PETITIONER

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1 STATE OF SOUTH CAROLINA

2 -----x

3 STATE,

4 Plaintiff,

5 Case No.

6 -against-

2010-GS-29-1662

7 ALBERT LEE WITHERSPOON,

8 Defendant.

9 -----x

10 March 13, 2017

11 Lancaster, S.C.

12 B E F O R E:

13 HONORABLE W. JEFFREY YOUNG

14

15 A P P E A R A N C E S:

16 DAVID A. FERNANDEZ, Esquire

17 Assistant Attorney General

18

19 MICHAEL LIFSEY, Esquire

20 Attorney for the Defendant

21

22 Aileen Butler

23 Official Court Reporter

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD.</u>
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NO EXHIBITS RECEIVED

1 MR. FERNANDEZ: Good morning. This is state v.  
2 Albert Witherspoon, Indictment 2010-GS-29-1662. Your  
3 Honor, right before you is Mr. Witherspoon. This is a  
4 guilty plea to the charge of -- he is charged with CSC  
5 with a minor, first degree. The State is permitting  
6 him to plead to the charge of CSC with a minor second  
7 degree, which is a lesser included offense, Your  
8 Honor. I will hand forward the Indictment as well as  
9 the sentencing sheets.

10 Permission to approach?

11 THE COURT: Yes.

12 MR.: Your Honor, Mr. Witherspoon will be entering  
13 this plea. There is no recommendation from the State.  
14 There have been no negotiations. The charge is  
15 violent and most serious offense as well, and after  
16 the plea is taken there is a matter of bond that will  
17 need to be taken up.

18 THE COURT: All right. Mr. Lifsey, you represent  
19 Albert Lee Witherspoon?

20 MR. LIFSEY: I do.

21 THE COURT: Have you had an opportunity to explain  
22 to him the charges contained in the Indictment, the  
23 possible punishment he faces and his constitutional  
24 rights?

25 MR. LIFSEY: I have.

1 THE COURT: Do you think he understood what he  
2 told you him?

3 MR. LIFSEY: Yes, sir, I believe he does.

4 THE COURT: And does he wish to plead guilty?

5 MR. LIFSEY: He does. Your Honor, if I may add  
6 one thing to what the Assistant Attorney General said.  
7 My understanding is the State has no objection to  
8 deferring sentencing in this matter until later in the  
9 week.

10 MR. \* that's correct, Your Honor. I apologize.  
11 We discussed this and the State has no issue with  
12 deferring until later in the week to allow Mr. Lifsey  
13 to perhaps arrange for more people to be present.

14 THE COURT: Okay.

15 MR. LIFSEY: But beyond that what he said was  
16 correct.

17 THE COURT: And Mr. Lifsey, you say your client  
18 does wish to pled guilty?

19 MR. LIFSEY: Yes, sir.

20 THE COURT: And have you had an opportunity to  
21 review all the facts and the circumstances in this  
22 case, all the evidence and do you feel if this case  
23 were to go to trial there would be a substantial  
24 likelihood your client could be found guilty?

25 MR. LIFSEY: Yes, sir.

1 THE COURT: Now, Mr. Witherspoon, I need to ask  
2 you a series of questions to make sure you are  
3 entering this plea freely, voluntarily, knowingly and  
4 intelligently. The first question I have is are you  
5 under the influence of alcohol or today.

6 THE DEFENDANT: No, sir.

7 THE COURT: Okay, I need you to speak up.

8 THE DEFENDANT: No, sir.

9 THE COURT: Have you taken any medications that  
10 would cloud your judgement?

11 THE DEFENDANT: No, sir.

12 THE COURT: Are you aware of any physical,  
13 emotional or nervous condition that would keep you  
14 from understanding what is happening in this Court  
15 today?

16 THE DEFENDANT: No, sir.

17 THE COURT: Now, it is my understanding that you  
18 are wishing to plead guilty under Indictment  
19 2010-GS-29-1662, which is charges you with criminal  
20 sexual conduct with a minor in the first degree. Now  
21 the State has agreed to reduce that to criminal sexual  
22 conduct with a minor in the second degree. But the  
23 indictment reads that Albert Lee Witherspoon did in  
24 Lancaster County on or about September 17, 2010 engage  
25 in sexual battery, with Kenedric Kensley (phonetics),

1 a minor less than 11 years of age in violation of  
2 section 16-3-655(A)1 of the South Carolina code of  
3 laws, 1976 as amended. Is what's stated in this  
4 Indictment the truth?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: As least as far as the criminal sexual  
7 conduct in the 2nd degree goes?

8 THE DEFENDANT: Yes, sir. All right.

9 THE COURT: What are the facts?

10 MR. FERNANDEZ: Thank you, Your Honor. This  
11 incident occurred around September of 2010,  
12 specifically September 18th or 19th of that year,  
13 2010, five-year old victim, Kenedric Kensley  
14 (phonetics) disclosed to his mother that the  
15 defendant, Albert Witherspoon, was being quote,  
16 unquote, nasty. When asked what that meant for  
17 clarification, the victim did disclose the sexual  
18 assault, specifically that Mr. Witherspoon did insert  
19 his penis into the victim's anus. The victim was then  
20 taken for sexual assault exams at a local hospital and  
21 then at Charlotte Medical Center where it was revealed  
22 that he did have tearing of his anus as a result of  
23 this assault.

24 The victim was also taken for a forensic interview  
25 where he disclosed the same sexual assault to the

1 interviewer and that was video and audio recorded.  
2 Additionally, while incarcerated for these charges --  
3 for this charge, the defendant did confess to a fellow  
4 inmate friend of his while in jail that he did in fact  
5 commit this crime and that inmate would have been  
6 present for testimony as well.

7 THE COURT: Mr. Witherspoon, you heard the facts  
8 as presented by the attorney general. Is what he  
9 stated the truth?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Are you in fact guilty?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right. Now do you understand that  
14 this charge originally you were facing up to life in  
15 prison. Now that it's reduced to a 2nd degree,  
16 criminal sexual conduct with a minor, do you  
17 understand that you are facing 20 years in jail?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: I need for you to speak up sir.

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Okay. Now, you understand that is a  
22 violent, most serious crime. So if you should get  
23 another charge, a serious one such as this, you can be  
24 charged with the possibility of a life sentence. Do  
25 you understand?

1 THE DEFENDANT: Yes, sir.

2 THE DEFENDANT: And do you understand that because  
3 of this charge being what it is that you will have to  
4 spend 85 percent in prison before you are eligible for  
5 parole. Do you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: So if I were to give you the max you  
8 are looking at somewhere between 16 to 17 years before  
9 you would be eligible for parole. Do you understand?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Okay. You also understand that  
12 because of the nature of this charge you will be on  
13 the sexual offender registry and will have to have  
14 monitoring on you for the rest of your life?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: So if you're an old man and you're in  
17 one room in a nursing home and you move to another  
18 nursing home or to a different room in that nursing  
19 room then that monitor will be on you and you will  
20 have to notify somebody of any change of address. Do  
21 you understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Knowing that, all of that, do you  
24 still wish to plead guilty?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. Now, understand that when  
2 you plead guilty you waive certain constitutional  
3 rights. The first right you waive is your right  
4 against self incrimination. Whether in this Court or  
5 any other Court in this great land that we live in,  
6 would you ever be required to testify against  
7 yourself. However when you plead guilty you are doing  
8 that. Do you understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: So you wish to waive your right  
11 against self incrimination and continue with this  
12 plea?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right. You also understand that  
15 you are waiving your right to have a jury trial. We  
16 have got a pool of jurors who are ready to listen to  
17 the case who are all from Lancaster. Local folks.  
18 But when you plead guilty they won't have the  
19 opportunity and you won't have an opportunity to  
20 present that to them. During that trial you would not  
21 have to testify and I would explain to the jury that  
22 they couldn't hold that against you. Further, Mr.  
23 Lifsky could cross examine the witnesses presented by  
24 the State. You can call witnesses on your behalf to  
25 raise any legal defenses that you might have that

1 would result in your being exonerated. But when you  
2 plead guilty the State doesn't have to prove anything  
3 and you don't get to ask any questions about the  
4 evidence. Do you understand that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: So, knowing that do you wish to waive  
7 your right to have a jury trial and confront the  
8 witnesses against you?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: All right. Has anybody threatened you  
11 in any way to get you to plead guilty?

12 THE DEFENDANT: No, sir.

13 THE COURT: Has anybody promised you anything  
14 other than the reduction of the charge from a criminal  
15 sexual conduct with a minor in the first degree to  
16 criminal sexual conduct with a minor in the second  
17 degree?

18 THE DEFENDANT: No, sir.

19 THE COURT: So is the only reason you are pleading  
20 guilty to criminal sexual conduct with a minor in the  
21 second degree is because you are in fact guilty of  
22 that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Now, are you satisfied with the  
25 services of Mr. Lifsky.

1 THE DEFENDANT: Yes, sir.

2 THE COURT: All right. Please speak up for me.  
3 There is noise back there.

4 MR. LIFSEY: And I apologize to you. I would just  
5 tell you in my dealings with him he has always been  
6 soft spoken like that. I don't think he's  
7 intentionally speaking like that.

8 THE COURT: I understand that. I just need to  
9 hear him.

10 MR. LIFSEY: Yes, sir. I understand. Thank you.  
11 Sorry to interrupt you.

12 THE COURT: And I wasn't implying he is holding  
13 back. I just I need to hear him.

14 Has Mr. Lifsey done everything you asked him to  
15 do?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: And has he done anything you wished he  
18 would not have done?

19 THE DEFENDANT: No, sir.

20 THE COURT: Do you need any more time to speak to  
21 Mr. Lifsey.

22 THE DEFENDANT: No, sir. And he was going to ask  
23 you something.

24 THE COURT: I will give you an opportunity to  
25 speak.

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Have you understood everything that I  
3 said here?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Do you have any questions?

6 THE DEFENDANT: No, sir.

7 THE COURT: Okay. And do you understand that if  
8 you change your mind about your decision to plead  
9 guilty or the sentence that I give you that you will  
10 only have ten days in which to file an appeal?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Now, under indictment 2010-GS-29-1662  
13 charging you with criminal sexual conduct with a  
14 minor, second degree, how do you plead guilty or not  
15 guilty?

16 THE DEFENDANT: Guilty.

17 THE COURT: All right. I find there is a  
18 substantial factual basis for the plea. I find the  
19 defendant has entered into it freely, voluntarily,  
20 knowingly and intelligently. He has had the advice of  
21 counsel with whom he says he is well pleased. I will  
22 wait until the sentencing to find out his criminal  
23 history, if he even has one and will give you an  
24 opportunity to present any other witnesses that you  
25 want at that time.

1           At least as far as sentencing I find that he has  
2 entered into the plea and he is now convicted of this  
3 charge.

4           MR. FERNANDEZ: Thank you, Your Honor.

5           MR. LIFSEY: Your Honor, the only thing I would  
6 ask you -- I am sorry -- I would ask the Court to  
7 consider allowing him out to remain on bond until we  
8 sentence him and I'm fine if we say Friday morning or  
9 whatever else date suits the rest of everybody in the  
10 courtroom. His mother is in the courtroom. Raise  
11 your hand. She is right there, Your Honor. She came  
12 up here today with him. He would reside with his  
13 aunt, Auntie Grace Bingo, who lives right off of  
14 Chesterfield Avenue right here in Lancaster.

15           I would be forthright with the judge, you know,  
16 because he and I have been forthright. In recent  
17 months -- in the last several months we've had some  
18 difficulty staying in touch with each other, but he  
19 did voluntarily come to court today facing a charge  
20 that is as serious as any charge that would be tried  
21 in this court this week or probably any week this  
22 year. So I would ask the court to allow him to remain  
23 on bond if you would. That way he can help me. Part  
24 of the purpose in allowing this deferring of  
25 sentencing -- and I appreciate the State's willingness

1 to agree to sentencing being deferred -- and Your  
2 Honor as well -- is to allow me to gather more in the  
3 way of mitigation for him. If he were out on bond and  
4 able to assist me in that that would make my task  
5 easier. So I would ask the Court to consider allowing  
6 him to remain on bond. He showed up today and he  
7 certainly wasn't under any compunction to do so.

8 THE COURT: Well, other than being under bond.

9 MR. LIFSEY: Well, sure, but no bench warrants  
10 have been issued as of this moment.

11 MR. FERNANDEZ: Not yet.

12 MR. LIFSEY: Correct. But he did come to court so  
13 I would ask the Court to allow -- to consider allowing  
14 him to remain on bond until we can sentence him.

15 THE COURT: Yes, sir.

16 MR. FERNANDEZ: Your Honor, as I discussed with  
17 Mr. Lifsey we would move to revoke bond pending  
18 sentencing. Mr. Witherspoon did not appear for an  
19 appearance prior in this case and a bench warrant was  
20 necessary at this point. Leading up to this trial  
21 today we were unsure if he would show up or not. We  
22 in fact planned on him not showing up. We had  
23 information to also believe that Mr. Witherspoon had  
24 been out of state which would have been a violation of  
25 his bond anyway. So, because of those reasons we

1 believe -- and the fact that he is facing a  
2 significant amount of time -- we believe it is  
3 appropriate for him to have his bond revoked and be  
4 held in jail pending sentencing.

5 THE COURT: Thank you.

6 Mr. Lifsey, I understand your position and  
7 understand your client's request but at this moment in  
8 time he has gone from being someone who is presumed to  
9 be innocent to a convicted child predator. I think it  
10 would be erroneous of me to release him at this point  
11 in time. I will make it so that you have all the time  
12 that you need to get in touch with him. We will have  
13 sentencing at 11 o'clock on Friday morning.

14 MR. LIFSEY: Thank you, Your Honor.

15 THE COURT: Thank you. Take him into custody.

16 (END OF TRANSCRIPT)

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## C E R T I F I C A T E

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I, the undersigned Aileen Butler, Official Court Reporter for the 16TH Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for Lancaster County, South Carolina, on the 13th day of March, 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

April 5, 2018

S/ Aileen Butler

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STATE OF SOUTH CAROLINA  
COURT OF GENERAL SESSIONS  
COUNTY OF LANCASTER  
2010-GS-29-01662

State of South Carolina  
vs.  
Albert Lee Witherspoon, Jr.

Lancaster, South Carolina  
March 17, 2017 (Sentencing)  
Before the Honorable W. Jeffrey Young

APPEARANCES

For the State: David Fernandez  
For the Defendant: Mike Lifsey  
  
Reported by: Michael C. Watkins  
Official Court Reporter

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NO EXHIBITS

1           THE COURT: We are back on the record in State versus  
2 Albert Lee Witherspoon under indictment number  
3 2010-GS-29-1662. On Monday the 13th of March I took the  
4 plea of Mr. Albert Lee Witherspoon. The attorneys have  
5 asked for some time to get some -- the victim and the  
6 defendant's mother here, I have granted that, and now it is  
7 today, the 17th of March of 2017, and we are coming back on  
8 the record for sentencing. Yes, sir?

9           MR. FERNANDEZ: Thank you, Your Honor. Your Honor, as  
10 you recall Mr. Witherspoon did plead guilty on Monday, I  
11 did put the facts on the record to support the guilty plea,  
12 however with Your Honor's permission I would like to be a  
13 little bit more specific with the facts and also allow some  
14 people who have come today to address the Court.

15           THE COURT: Yes, sir.

16           MR. FERNANDEZ: Your Honor, this incident occurred  
17 back in 2010 of September, the victim's mother, Lakeshia  
18 (phonetically) Montgomery, permitted the defendant and his  
19 mother to stay at their house for a time when they were in  
20 between locations. During this approximate months stay the  
21 defendant was also allowed to babysit the victim and his  
22 very young siblings, at the time the victim was five years  
23 old. During these occasions -- well, on September 17th the  
24 victim came to his mother while the mother, the victim and  
25 the defendant were all in the kitchen and said that Red,

1 who is what he knew the defendant by, was being "nasty."  
2 When the mother asked for clarification, the defendant very  
3 quickly denied touching the boy or doing anything to the  
4 boy. The victim then corrected the defendant in front of  
5 his mother and said, "no," and that's when he disclosed the  
6 sexual assault to his mother very specifically detailing  
7 that Red had put his penis in the victim's anus. This  
8 appeared to have occurred on multiple occasions every time  
9 the defendant had babysat the victim. The mother then  
10 immediately kicked the defendant out of her house and  
11 contacted the police and the police arrived. The victim  
12 was taken to Springs Memorial Hospital and then ultimately  
13 to Charlotte Medical Center for sexual assault  
14 examinations. During these examinations it was revealed  
15 that the anus and the boy's rectum had tears in them  
16 indicating some foreign object had been inserted into it.  
17 The mother would have been prepared to testify that the boy  
18 was having no issues using the bathroom or constipation at  
19 the time, which would have been an alternative reason but  
20 he was not having any issues with that. The victim was  
21 also taken for a forensic interview where he did again  
22 disclose the sexual assault. He also disclosed sexual  
23 assault to every medical personnel he came in contact with  
24 that evening. At the forensic interview, which was  
25 reported, he did disclose a sexual assault with specificity

1 and also indicated through the use of dolls how exactly it  
2 had occurred. And again, Your Honor, this a five year old  
3 boy. The case was ready to be tried on Monday and quite  
4 honestly we were not sure whether or not the defendant  
5 would appear, he did appear and ultimately elected to enter  
6 a guilty plea to the reduced charge. The State believes  
7 that we have given him a significant benefit by reducing  
8 the charge from CSC first with a minor to CSC second,  
9 obviously the sentencing range would be lower under the CSC  
10 second. This plea was extended only in consideration of  
11 the victim and his -- and the ability to avoid a  
12 potentially embarrassing and disruptive trial in his life.  
13 The State regards this is a strong case, as strong a case  
14 as you're going to likely see in any CSC. With my personal  
15 interactions with the boy he is a relatively normal ten  
16 year old now, Your Honor, he is somewhat withdrawn, he is  
17 shy and obviously embarrassed about this happening. The  
18 people that would like to address Your Honor is Lakeshia  
19 Montgomery, who is the victim's mother, and Teresa Mingo  
20 who is the victim's grandmother, and then ultimately the  
21 victim may or may not decide to address the Court. He  
22 indicated earlier he was going to think about it but  
23 expressed some interest in addressing the Court. In light  
24 of all of this, Your Honor, the State -- and this plea was  
25 entered into with no negotiations, in light of all of this

1 the State does feel comfortable respectfully requesting the  
2 maximum sentence for this charge. Lakeshia Montgomery, if  
3 you will.

4 SPEAKER: I'm Lakeshia Montgomery. It really does --  
5 I call him buddy, his name is [REDACTED] (phonetically), it  
6 really does affect him a lot when it first happened to him,  
7 which I used to have to go to the school because he thought  
8 the defendant was there. He hardly ever sleeps and still  
9 at 11 years old he still doesn't sleep. And a lot of stuff  
10 that I can't really say but it does affect him, which a lot  
11 of times at school -- and he also thinks that he sees the  
12 defendant at all times, which I have to basically avoid if  
13 he does, you know, that's even driving on the road. If you  
14 see him walking down the road I have to do a detour and go  
15 another way.

16 THE COURT: Anything further?

17 SPEAKER: Sir?

18 THE COURT: Anything further?

19 SPEAKER: No, sir.

20 THE COURT: Thank you, ma'am.

21 MR. FERNANDEZ: Teresa Mingo, if you would please.

22 SPEAKER: Good morning, Your Honor.

23 THE COURT: Good morning.

24 SPEAKER: I'm Teresa Mingo, I am [REDACTED]

25 Grandmother.

1 THE COURT: What is your name?

2 SPEAKER: I'm Teresa Mingo. This has affected  
3 [REDACTED] When this first happened when [REDACTED] would go  
4 to school he would literally have to sit on the teacher's  
5 lap, the teacher would have to hold him in the class  
6 because he was so afraid of all of his surroundings and  
7 everything. This young man is a coward, this should never  
8 happen to the child. What he did was hideous and I think  
9 he deserve the maximum sentence, because my grandbaby is  
10 going through a lot on account of this. Like he said, he's  
11 withdrawn. He was an outgoing child but now he --  
12 sometimes he run around and play but then again he sits  
13 under his mother. No child deserves that. He's 11 years  
14 old, he need to be outside playing, running around with the  
15 other kids having fun, but when he see this man he just  
16 ultimately just look like he just balled up in a knot, he  
17 is so afraid of this young man. He needs to be put away  
18 where my grandbaby can have some peace. Thank you.

19 THE COURT: Thank you.

20 SPEAKER: High, I'm Ms. Blake, I'm actually --

21 THE COURT: State your full name, please.

22 SPEAKER: Charlene Blake. I'm actually an outpatient  
23 therapist and I have been working with this family for two  
24 and a half years. And I can just say that as far as  
25 working with this family it has done a lot of damage. We

1 have had some challenging times with ██████████ in the school  
2 environment, within the community and at home. A lot of  
3 the behaviors that have been reported to me from him and  
4 from mom, continuous nightmares about what has happened  
5 even though he's older it still lives in his head. And I'm  
6 just coming before them for the family to say that I know  
7 how much damage is done to this little boy, and I think it  
8 would be good for him to have some peace of mind.

9 THE COURT: Thank you, ma'am.

10 MR. FERNANDEZ: I think that's all, Your Honor, thank  
11 you.

12 THE COURT: Mr. Lifsey?

13 MR. LIFESY: May it please the Court, Your Honor?  
14 Your Honor, I represent Albert Witherspoon, Jr. Let me  
15 tell you a little bit about my representation and then I  
16 will discuss Albert himself. Our office was appointed --  
17 this case goes back to 2010, our office was appointed  
18 shortly after his arrest, he was arrested in September of  
19 2010 shortly after this incident. Another lawyer in our  
20 office handled it for awhile, they left our office, I've  
21 been involved in the case at least three or four years.  
22 I've interacted with Mr. Witherspoon throughout that time.  
23 I've talked originally to the solicitor's office who  
24 handled this case first and then they sent it to the  
25 attorney general's office. I have dealt with Mr. Fernandez

1 I think really ever since the AG's office had it. They  
2 have provided me with what I believe to be full discovery  
3 in the matter, I've reviewed it. There is -- as the  
4 attorney general mentioned there is a forensic video that I  
5 believe meets the standards of our statute and our case law  
6 and would have been admitted.

7 THE COURT: I've reviewed it and I think it does too,  
8 it would have been admitted into evidence.

9 MR. LIFESY: And I will tell you that I think it's a  
10 fairly compelling videotape as --

11 THE COURT: And I'll say this, it's probably one of  
12 the clearest least objectionable forensic interviews I have  
13 ever seen.

14 MR. LIFESY: Yes, sir. And obviously that factored in  
15 to our decision making process in entering a plea in this  
16 case. I discussed it with him, we discussed the sentencing  
17 ranges both for the original charge and then for the  
18 chances of success at trial and he made a decision to enter  
19 the plea to the lesser charge, which I think is the correct  
20 decision because I think the most likely outcome at trial  
21 would have been conviction. Obviously you never know  
22 anything with certainty with a jury, but --

23 THE COURT: Well, if he would have gone to trial and  
24 been found guilty the minimum sentence would have been 25  
25 years and then up to life.

1 MR. LIFESY: Yes, sir.

2 THE COURT: He's gotten a benefit by them reducing the  
3 charge.

4 MR. LIFESY: Yes, sir. And I agree with his decision.  
5 I'm grateful to the attorney general's office for their  
6 willingness to extend the offer right here at the eve of  
7 trial. I think this resolution allows him to pled guilty  
8 to a sentence that carries -- to a charge that carries a  
9 significant sentence, but at the same time significantly  
10 less than what he would have faced otherwise, and also  
11 allows the victim not to have to testify at trial. Your  
12 Honor, as far as the case, let me -- I wanted to tell you a  
13 little bit about Albert, Red is what he goes by. What I'm  
14 about to say is not in any way to denigrate what has  
15 happened to the victim in this case, but it is -- and not  
16 an excuse, it's really kind of an explanation, or at least  
17 as I understand it of how we got here. You know, my first  
18 interaction with this family goes back to the mid-nineties.  
19 He's Albert Witherspoon, Jr., I represented Albert  
20 Witherspoon, Sr. in Chester County on a sex assault charge.  
21 His dad lived in Great Falls which is one of those  
22 communities right on the border really of all three  
23 counties, but in Chester County, and I represented Albert,  
24 Sr. in a sexual assault charge in the -- I think it was  
25 probably about '95 or 1996. And I don't mean this

1 disrespectfully to him or his mother who is here in the  
2 courtroom, Ms. Diane Hall who may or may not wish to speak  
3 to you in a few moments, but I feel like this is the time  
4 we ought to be forthright about everything. This is a  
5 family with a history that's replete with sexual abuse,  
6 with assaults, with drug addiction and with crime. Like I  
7 say, I represented Albert, Jr. originally. Tim  
8 Witherspoon, who is no relation, was the investigating  
9 officer in this case. I told Mr. Witherspoon he and I are  
10 getting old, and I guess this is proof of it, not only did  
11 I represent the father of this defendant, Mr. Witherspoon  
12 investigated and charged a man with sexual assault where  
13 this man was the victim himself. He's been in and out of  
14 foster care most of his life, he was placed in foster care  
15 when he was three years old. He really stayed under the  
16 custody and control of DSS from three to 17. This happened  
17 when he was 18 years old, so he really only had been out of  
18 foster care a fairly short period of time, probably less  
19 than two years. As I said, he was a victim of sexual abuse  
20 himself that we know resulted in charges when he was about  
21 ten years old. An older cousin who would have been in his  
22 early forties was charged, that man is dead now, I don't  
23 believe there was any resolution to his criminal charge at  
24 least that I'm aware of, or if they did they pled it down  
25 to very little. And that's the reported sexual abuse. As

1 I said, like I say, I represented his daddy on sexual  
2 charges. I don't know how you end the cycle of these kinds  
3 of things. In my experience -- I put criminal sexual  
4 conduct with a minor cases sort of in two different  
5 categories. You have the case where the victim is an  
6 adolescent, often the 14 -- 13, 14, 15 year olds, those  
7 perpetrators vary, they tend to be a acquaintances. But  
8 the cases that involve prepubescent children, as this case  
9 did, first of all are rarer but they're almost in my  
10 experience, I'm not a doctor, I'm not a psychiatrist, but  
11 they are almost always in my experience committed by people  
12 who have been victimized in this way themselves. So  
13 regardless of whatever you do and regardless of sentencing  
14 in this case, I certainly hope that appropriate counseling  
15 is given to the young man in this case, because you fear --

16 THE COURT: It appears that there is.

17 MR. LIFESY: And that's good because it appears that  
18 cycle is bound to repeat itself. As I said he's 18 years  
19 old, he really had just gotten out of foster care when this  
20 happened, less than two years out. His work history is  
21 limited. He worked at Gus' House of Pizza which is a  
22 little place in Kershaw he worked there --

23 THE COURT: Actually I ate there the other day on the  
24 way back.

25 MR. LIFESY: He also worked at Burger King for a few

1 months doing fast food work. On the one hand he pled, they  
2 certainly reduced the charge for him to plead, so you can  
3 say on the one hand that he's taken advantage of the plea  
4 offer, which he did. But, you know, on the other hand it's  
5 very rare that in my experience that I have clients,  
6 especially with sexual offenses, which clients are loathed  
7 to admit they committed even if there's overwhelming  
8 evidence, it's rare that they stand up and face a potential  
9 sentence of 20 years on prison. I would ask the Court --  
10 let me see if his mother wants to say anything to you, but  
11 I would ask the Court to obviously hear from him if he  
12 wants to say anything to you, but I would ask the Court to  
13 take into account that he has led -- that he himself has  
14 been victimized in this way in a manner -- it's just not me  
15 saying it, like I say, criminal charges resulted out of it,  
16 and take into account his background and his history in  
17 deciding what is the appropriate sentence, Your Honor.

18 THE COURT: All right, thank you.

19 MR. LIFESY: Ma'am, do you want to say anything?  
20 Thank you, Judge.

21 THE COURT: Did your client want to say anything?

22 MR. LIFESY: No, sir.

23 THE COURT: Anything further to say?

24 MR. FERNANDEZ: Nothing further, Your Honor, thank  
25 you.

1           THE COURT: You know, if I were to find a magic bottle  
2 that you could open and a genie would come out and give me  
3 three wishes, the first wish I would have would be that I  
4 could stop child abuse, physical as well as sexual abuse, I  
5 mean, it's just rampant in our society. And right now in  
6 Sumter the vice wing commander of the 20th Fighter Wing  
7 is -- has pled guilty to possession of child pornography  
8 and is in the process of being sentenced probably right  
9 while we're here now. So if I could wipe that out I think  
10 I could change the world so significantly because then  
11 people would grow up confident as to who they are, who  
12 their sexuality is, their relations with members of the  
13 opposite sex and families would be stronger, but I don't  
14 have that option. I wish I did. What happened here was so  
15 vile, and it happened on multiple times, this little five  
16 year old -- again, the video that I saw was so compelling,  
17 it was the clearest -- I have every confidence in knowing  
18 how I react to these type things, if he had gone to trial  
19 the jury would have convicted him, and in a short period of  
20 time, it would have been probably the shortest life  
21 sentence trial I would have ever had, and I would have  
22 given him somewhere between 25 and life. He has taken  
23 advantage, they have made a gracious offer to him in this  
24 situation. And again, although I cannot stop child sexual  
25 abuse overall I am going to stop it for this defendant for

1 the next 20 years. So the sentence of this Court is that  
2 he be committed to the state department of corrections for  
3 a period of 20 years. He will be placed on the central  
4 registry of child abuse and neglect and will be subject to  
5 electronic monitoring for the rest of his life. Good luck.

6 (End of the hearing.)

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1 I, the undersigned, Michael C. Watkins,  
2 Official Court Reporter for the Sixth Judicial  
3 Circuit of the State of South Carolina, do hereby  
4 certify that the foregoing is a true, accurate and  
5 complete transcript of the proceedings had and  
6 evidence introduced in the trial of the captioned  
7 case relative to appeal in the Court of General  
8 Sessions for Lancaster County, South Carolina, on  
9 the 17th day of March, 2017.

10 I do further certify that am neither of kin, counsel,  
11 nor interest to any party hereto.

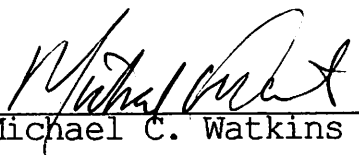
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October 16, 2017

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Michael C. Watkins

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Court Reporter

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FORM 5

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF Lancaster )  
 )  
Albert Lee Witherspoon, 371774 )  
 Full name and prison number (if any) of Applicant. )  
 )  
 v. )  
 )  
 State of South Carolina )  
 )

IN THE COURT OF COMMON PLEAS

FILED  
 OFFICE OF CLERK  
 OF COURT  
 LANCASTER, SC  
 2017 APR -4 PM 3:27

APPLICATION FOR

POST-CONVICTION RELIEF

2017CP2900862

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River C.I. - Murray 229, 4460 Broad River Rd, Columbia, SC, 29210
2. Name and location of Court which imposed sentence Lancaster county - General sessions
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2010-GS-29-01662
  - (b) Criminal sexual conduct
  - (c) \_\_\_\_\_
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) March 24, 2017
  - (b) \_\_\_\_\_

(c) \_\_\_\_\_

6. Check whether a finding of guilty was made:

(a) after a plea of guilty Yes

(b) after a plea of not guilty N/A

(c) after a plea of nolo contendere N/A

7. Did you appeal from the judgment of conviction or the imposition of sentence?

NO

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. N/A

ii. N/A

iii. N/A

(b) the result in each such Court to which you appealed:

i. N/A

ii. N/A

iii. N/A

(c) the date of each such result:

i. N/A

ii. N/A

iii. N/A

(d) if known, citations of any written opinion or orders entered pursuant to such

results:

i. N/A

ii. N/A

iii. N/A

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) Told my lawyer to appeal my plea but my lawyer didn't.

(b) \_\_\_\_\_

(c) \_\_\_\_\_

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel  
 (b) \_\_\_\_\_  
 (c) \_\_\_\_\_

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Please See Attachment Sheets  
 (b) \_\_\_\_\_  
 (c) \_\_\_\_\_

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? N/A  
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A  
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A  
 (d) any other petitions, motions or applications in this or any other Court? N/A

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:  
 i. N/A  
 ii. N/A  
 iii. N/A  
 iv. N/A  
 (b) the name and location of the Court in which each was filed:  
 i. N/A  
 ii. N/A  
 iii. N/A  
 iv. N/A  
 (c) the disposition thereof:  
 i. N/A  
 ii. N/A  
 iii. N/A

→ Attachment 11(a) - Ineffective Assistance of Counsel - Petitioner was denied the right to effective assistance of counsel, which violated the Petitioner's 5th, 6th, and 14th Amendment rights of the U.S. Constitution; and violated the Petitioner's S.C. constitution, Article 1, 3 and 1, 14 rights, by the following reasons:

- 1) Counsel failed to go over discovery material with petitioner.
- 2) Counsel failed to visit petitioner and go over case with petitioner.
- 3) Counsel failed to get petitioner mental evaluation to see if petitioner was mentally competent.
- 4) Counsel failed to appeal the petitioner's plea when petitioner told counsel to appeal plea decision.
- 5) Counsel failed to file for sentence reconsideration after sentence.
- 6) Counsel failed to interview and investigate victim and witnesses.
- 7) Counsel failed to present favorable evidence to show petitioner's innocence.
- 8) Counsel failed to present character witnesses for petitioner.
- 9) Counsel failed to give Petitioner Discovery material.
- 10) Counsel failed to file motions to suppress prejudicial evidence.
- 11) Counsel failed to prepare for case.
- 12) Counsel failed to investigate facts and circumstances of case.

\* (I, Petitioner) respectfully reserves the right to amend application for further issues

iv. N/A

(d) the date of each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. N/A

iii. N/A

(b) the proceedings in which each ground was raised:

i. N/A

ii. N/A

iii. N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is initial P.C.R

(b) \_\_\_\_\_

(c) \_\_\_\_\_

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? YES
- (b) your trial, if any? NO
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Michael H. Lifsey; 104 N. Main St; P.O. Box 1809; Lancaster  
S.C. 29721

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(b) the proceedings at which each such attorney represented you:

i. Plea hearing

ii. \_\_\_\_\_

iii. \_\_\_\_\_

19. State clearly the relief you seek in filing this application: For convictions and sentences vacated and to be released from custody, or convictions and sentences reversed and remanded for new trial.

20. Are you now under sentence from any other court that you have not challenged?

NO

\* Petitioner believes he has additional claims for postconviction relief, but does not yet have collateral counsel, access to the discovery process, or funds for expert services to investigate these claims. As such I, the Petitioner, would respectfully reserve the right to amend application for further issues.

STATE OF SOUTH CAROLINA )

VERIFICATION

County of Lancaster )

Albert Lee Witherspoon, 371774

I, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

*Albert Witherspoon*

SWORN to and subscribed before me this 1st

day of August, 2017

*Janelle T. Spearman* (L.S.)  
Notary Public

My Commission Expires:



APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT

IN SUPPORT THEREOF Albert Lee Witherspoon, 371174

I, ✓, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress. (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Handwritten signature of Albert Lee Witherspoon, Applicant

SWORN or affirmed to and subscribed before me this 1st day of August, 2017.

Handwritten signature of Janelle T. Spearman, Notary Public

My Commission Expires



STATE OF SOUTH CAROLINA )  
 COUNTY OF LANCASTER )

IN THE COURT OF COMMON PLEAS  
 FOR THE SIXTH JUDICIAL CIRCUIT

Albert Lee Witherspoon, 371774 )

2017-CP-29-0862

Applicant, )

v. )

State of South Carolina, )

**RETURN**

Respondent. )

---

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on August 4, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lancaster County Clerk of Court. In December of 2010, the Lancaster County Grand Jury indicted Applicant for criminal sexual conduct with a minor first degree (2010-GS-29-1662). Michael Lifsey, Esquire, represented Applicant. David A. Fernandez, Esquire prosecuted the case. On March 13, 2017, Applicant pled guilty to the lesser included offense of criminal sexual conduct with a minor second degree before the Honorable W. Jeffrey Young. On March 17, 2017, Judge Young sentenced Applicant to twenty years imprisonment. Applicant did not appeal his sentences or convictions.

Attached to this Return and incorporated by reference are the records of the Lancaster County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections and plea transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

## II.

This incident occurred around September 18th or 19th of 2010. The five-year old victim disclosed to his mother that Applicant was being “nasty”. When asked what that meant for clarification, the victim did disclose the sexual assault, specifically that Applicant did insert his penis into the victim’s anus. The victim was then taken for sexual assault exams at a local hospital and then at Charlotte Medical Center where it was revealed that he did have tearing of his anus as a result of this assault. The victim was also taken for a forensic interview where he disclosed the same sexual assault to the interviewer and that was video and audio recorded. Additionally, while incarcerated for this charge Applicant did confess to a fellow inmate and friend of his while in jail that he did in fact commit this crime. (GP. Tr. 6-7).

## III.

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

1. Ineffective Assistance of Counsel
  - a. Counsel failed to go over discovery material with petitioner.
  - b. Counsel failed to visit petitioner and go over case with petitioner.
  - c. Counsel failed to get petitioner mental evaluation to see if petitioner was mentally competent.
  - d. Counsel failed to appeal the petitioner’s plea.
  - e. Counsel failed to file for sentence reconsideration after sentence.
  - f. Counsel failed to interview and investigate victim and witnesses.
  - g. Counsel failed to present favorable evidence to show petitioner’s innocence.
  - h. Counsel failed to present character witnesses for petitioner.
  - i. Counsel failed to give petitioner discovery material.
  - j. Counsel failed to file motions to suppress prejudicial evidence.
  - k. Counsel failed to prepare for case.
  - l. Counsel failed to investigate facts and circumstances.

## IV.

Respondent submits Applicant’s allegations of ineffective assistance of counsel are

without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the proceeding "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption 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 counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. 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." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact the

record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

VI.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VII.

WHEREFORE, having made its Return, Respondent requests an evidentiary hearing be held on any claims so requiring one.

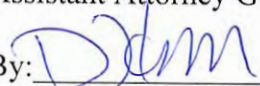
Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

DESHAWN H. MITCHELL  
Assistant Attorney General

By:   
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
Telephone: (803) 734-3737

May 23, 2018



1 STATE OF SOUTH CAROLINA  
2 COURT OF COMMON PLEAS  
3 COUNTY OF LANCASTER  
4 2017-CP-29-00862

5 Albert L. Witherspoon

6 Vs.

7 State of South Carolina

8

9 Lancaster, South Carolina

10 July 29, 2019

11 Before the Honorable D. Craig Brown

12 APPEARANCES

13 For the State: Lindsey A. McCallister

14 For the Applicant: Donae A. Minor

15

16 Reported by: Michael C. Watkins

17 Official Court Reporter

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1 MS. MCCALLISTER: This is Albert Lee Witherspoon versus  
2 the State of South Carolina, 2017-CP-29-0862. Your Honor,  
3 Mr. Witherspoon in December of 2010 was indicted by the  
4 Lancaster County grand jury for criminal sexual conduct with  
5 a minor in the first degree. He was represented on that  
6 charge by Michael Lifsey, and David Fernandez prosecuted the  
7 case on behalf of the State. On March 13, 2017, Mr.  
8 Witherspoon pleaded guilty to the lesser included offense of  
9 criminal sexual conduct with a minor in the second degree  
10 before Judge Jeffrey Young. On March 17 Judge Young  
11 sentenced Mr. Witherspoon to 20 years in prison. He did not  
12 appeal that sentence or his conviction. He timely filed  
13 this application for post conviction relief on August 4,  
14 2017. Ms. Donae Minor has been appointed to represent him  
15 in this matter, both Mr. Witherspoon and Ms. Minor are  
16 present in the courtroom today, Your Honor, and are ready to  
17 go forward at this time as far as I'm aware.

18 THE COURT: Yes, ma'am?

19 MS. MINOR: May it please the Court, Your Honor? I  
20 would like to call Mr. Albert Witherspoon to the stand,  
21 please.

22 THE COURT: All right. Sir, if you would come around  
23 and be sworn, please. Yes, ma'am, go ahead.

24 The witness, ALBERT LEE WITHERSPOON, was first duly  
25 Sworn and testified as follows:

## ALBERT WITHERSPOON - DIRECT

1 DIRECT EXAMINATION

2 BY MS. MINOR:

3 Q Please state your name for the record.

4 A Albert Lee Witherspoon, SCDC number 371774.

5 Q And Mr. Witherspoon, you pled guilty to a charge of  
6 criminal sexual conduct with a minor in the second degree,  
7 correct?

8 A Yes, ma'am.

9 Q And was Michael Lifsey your attorney?

10 A No. I had Brandon Steen as the representative, and  
11 Brandon Steen is not here at the moment I see.

12 Q Well, Brandon Steen started off as your attorney but  
13 Michael Lifsey later was your attorney, correct?

14 A No, ma'am, he was not. Brandon Steen is who I had.

15 Q You are aware that there is a -- we went over your  
16 guilty plea transcript, correct?

17 A Yes, ma'am.

18 Q And on that guilty plea transcript it had Mr. Lifsey as  
19 your attorney, you're aware of that, correct?

20 A Yes, ma'am.

21 Q And you understand that in order for him to be present  
22 at your guilty plea transcript that means that he  
23 represented you, you understand that?

24 A But he didn't. I'm telling the truth, he did not  
25 represent me.

## ALBERT WITHERSPOON - DIRECT

1 Q But we do agree that he was present at your guilty  
2 plea.

3 A No, he was not, Frick was. I know who was there, Frick  
4 was there. The same man that's sitting right there, I seen  
5 him and Frick. Frick was on the other side in the other  
6 courtroom that was on this side, Frick was.

7 MS. MINOR: Your Honor, may I approach the witness?

8 A Yes, ma'am.

9 Q Are you able to read, Mr. Witherspoon?

10 A A little bit.

11 Q What is it that I've handed you? Does it have your  
12 name on it?

13 A Yes, ma'am.

14 Q And is it a transcript? It states your name versus the  
15 State of South Carolina, correct?

16 A Yes, ma'am.

17 Q And it also indicates Michael Lifsey as the attorney,  
18 correct?

19 A But I'm saying he was not my attorney, though, he  
20 didn't have me.

21 Q I understand. But does it say Michael Lifsey was your  
22 attorney on that document?

23 A It says right here, yes.

24 Q And do you agree that that is your guilty plea  
25 transcript?

## ALBERT WITHERSPOON - DIRECT

1 A Because this wasn't my transcript. I have the original  
2 transcript, the one I had got sentenced on.

3 Q So you met with Mr. Steen. Have you ever met with  
4 Mr. Lifsey?

5 A Met with Lifston (sic) once.

6 Q You met with him once. Okay. So let's talk about when  
7 you met with him once.

8 A And he didn't go over stuff or nothing.

9 Q He didn't go over things. Okay. Let's talk about  
10 that. So --

11 A The only thing --

12 Q -- what types of things did --

13 THE COURT: Hold on a minute, can't have you both  
14 talking at the same time.

15 A It was me and Mr. Benson, we were together that day we  
16 went to the courthouse and I was up for a probation  
17 violation and I went upstairs. When I went upstairs to the  
18 second floor he told me he needed to see me and he was  
19 saying something about a video of something, I don't know,  
20 and he didn't show that and he said that was it. And he  
21 left out of the courtroom, I mean, not courtroom, the office  
22 room.

23 Q So Mr. Lifsey was the one that didn't show you the  
24 video.

25 A He didn't show no video.

## ALBERT WITHERSPOON - DIRECT

1 Q Okay. Did you ask him about showing the video?

2 A No, ma'am.

3 Q Why didn't you ask him to show you the video?

4 A Because he -- I don't remember what was the cause.

5 Q Okay. So it's your testimony that Mr. Lifsey met with  
6 you once to discuss your case, and during that time he  
7 didn't show a video.

8 A He didn't discuss it because I had someone with me.

9 Q Because he didn't discuss, do you feel like that you  
10 had all of the information you needed in order to enter a  
11 guilty plea?

12 A No, ma'am.

13 Q Do you believe it would have benefited you if he met  
14 with you more times?

15 A More than once, yes.

16 Q Did you ever have any -- did he ever make any phone  
17 calls with you?

18 A No, ma'am, no phone calls or nothing.

19 Q And you mentioned the videos. Did he discuss with you  
20 what's called discovery?

21 A He ain't show me the stuff. I already had the  
22 discovery before and when I moved I had lost my discovery.

23 Q Okay. So --

24 A -- and everything was not like still there. It had  
25 step one, step two, it didn't have the rest of the steps

## ALBERT WITHERSPOON - DIRECT

1 that was missing on the case for me to actually have someone  
2 to help me study.

3 Q So you had those documents, you were provided with  
4 discovery. So it's your testimony that Mr. Lifsey didn't go  
5 over that information with you.

6 A He didn't.

7 Q Did you ever ask him to go over that information?

8 A No, I really didn't ask.

9 Q And why is that?

10 A Because I was worrying about probation and probation  
11 violation and stuff, because I was on probation while this  
12 charge was still going on.

13 Q So based on Mr. Lifsey's inability to -- not inability,  
14 excuse me, failure to meet with you sufficiently and also to  
15 go over the discovery you believe that he failed you as an  
16 attorney; is that correct?

17 A Yes, ma'am.

18 Q And is there anything else that you would like the  
19 Court to know about how Mr. Lifsey failed you?

20 A No, ma'am.

21 Q And another question. Are you on any medication today?

22 A I took it earlier, it's HIV meds.

23 MS. MINOR: Okay. No further questions, Your Honor.

24 THE COURT: Cross examination?

25 MS. MCCALLISTER: Your Honor, I don't have any

## ALBERT WITHERSPOON - DIRECT

1 questions for this witness.

2 THE COURT: Sir, now you may step down, thank you. All  
3 right. Anything further from the applicant's counsel?

4 MS. MINOR: No, Your Honor.

5 THE COURT: State?

6 MS. MCCALLISTER: Thank you, Your Honor. We would call  
7 Mr. Michael Lifsey.

8 The witness, MICHAEL LIFSEY, was first duly sworn and  
9 Testified as follows:

10 DIRECT EXAMINATION

11 BY MS. MCCALLISTER:

12 Q Good morning, Mr. Lifsey.

13 A Good morning.

14 Q Where are you currently employed?

15 A I'm the circuit public defender for the Sixth Judicial  
16 Circuit.

17 Q And how long have you been in that position?

18 A Since March 1st of 2009.

19 Q Okay. And do you recall representing Mr. Witherspoon  
20 on this charge?

21 A I do.

22 Q Okay. And when you represented him you were in the  
23 same position that you're in now, correct?

24 A Correct, yes, ma'am.

25 Q And so were you appointed to his case?

## MICHAEL LIFSEY - DIRECT

1 A Our office was appointed to represent him. He  
2 originally was assigned to William Frick who at that time  
3 was an -- worked as an assistant public defender in  
4 Lancaster County, he's now the deputy public defender over  
5 Chester and Fairfield, but William had his case originally.  
6 At some point the case was transferred to me, I believe that  
7 was when William took a little vacation from our office to  
8 attempt to run for a political office and so I took over  
9 that case at that time.

10 Q And at the time that Mr. Witherspoon entered his plea  
11 and was sentenced, were you the attorney of record for his  
12 case?

13 A I was, yes, ma'am.

14 Q And did you receive discovery from the State?

15 A Yes, ma'am. The office received, yes, ma'am.

16 Q And did you have a chance to review that discovery with  
17 Mr. Witherspoon?

18 A I did. I did review discovery with him. I will tell  
19 you that -- if I can give you just a little bit of  
20 background about that. I know he and Mr. Frick met several  
21 times and discussed the case, I don't know what they  
22 discussed but I know that William had the case and William  
23 and he worked on the case. When I got it it was kind of in  
24 a holding pattern. The solicitor in our circuit, Randy  
25 Newman, had just gotten elected and Solicitor Newman had

MICHAEL LIFSEY - DIRECT

1 given a number of cases to the attorney general's office to  
2 prosecute, this was one of those cases. So there was a  
3 period of time where this was kind of on hold. Ultimately  
4 it was, I believe, Mr. Fernandez from the attorney general's  
5 office contacted me and wanted to move forward with it. You  
6 know, obviously I was in no hurry, basically the State had a  
7 pretty strong case and my client, for the most part, was out  
8 on bond. But I do remember meeting with him on at least  
9 three occasions in discussion of discovery. I remember  
10 specifically -- he is correct, he did come one time with  
11 someone and because of the nature of these allegations,  
12 which are pretty embarrassing and horrific, we did not  
13 discuss the details of the facts at that time. But I do  
14 remember showing him the forensic video. Now, I will tell  
15 you he disappeared several months before the scheduled  
16 trial, and the last probably three or four months we had no  
17 contact with him and couldn't find him. My understanding is  
18 he moved to the State of Tennessee. One of my lawyers was  
19 able to find a person they believed to be him on Facebook  
20 and sent him a Facebook message indicating he needed to be  
21 here because they were going to try his case, but ultimately  
22 he did not respond and he -- really I was prepared to try  
23 the case in his absence until he showed up the Monday  
24 morning of trial.

25 Q And let me just back up a little bit, you talked a

## MICHAEL LIFSEY - DIRECT

1 little bit -- can you explain a little bit about the  
2 allegations and the evidence that the State had against Mr.  
3 Witherspoon?

4 A It was a criminal sexual conduct. Basically he was  
5 alleged to have forcibly sodomized a five year old boy.  
6 There was some -- my memory is, and I really haven't  
7 reviewed the file in detail prior to this hearing, but my  
8 memory is there was some degree of physical evidence. But  
9 for the most part obviously like a lot of these cases it's  
10 the victim saying it happened. There was a forensic video  
11 in this case that I believe would have been admitted in the  
12 trial pursuant to our rules of evidence and laws, it was  
13 really frankly one of the more compelling forensic videos  
14 I've ever watched. The child is five at the time that it  
15 happened but in child-like language describes in pretty  
16 excruciating -- described what happened to him in a way that  
17 I believe would have been compelling to the jury.

18 Q And there was also some evidence of the abuse; is that  
19 correct?

20 A That's my memory. Once again, I haven't really looked  
21 at the file, but my memory is there was. Now, you know,  
22 with these kinds of cases you can always argue there's  
23 alternate explanations for some of the anal injuries in this  
24 case, but that certainly would have corroborated an already  
25 very good forensic video in this case.

## MICHAEL LIFSEY - DIRECT

1 Q Okay. And you had the video, correct, and you were  
2 able to watch it and discuss it at some point with Mr.  
3 Witherspoon?

4 A Yes, ma'am. Now, I will say when we discussed it it  
5 was not as in we got to make a decision tomorrow, you know,  
6 because they're -- it wasn't like that. It was, "This is  
7 the evidence they've got to get you, so at some point  
8 they're going to want to do something with this case and  
9 you've got to make a decision." We would have had a more  
10 lengthy and more serious discussion of it with him had he  
11 been anywhere I could find him in the last several months  
12 before this case ultimately was concluded.

13 Q Okay. And so then the next time that you -- there was  
14 a period of time where he left the area, correct, and he was  
15 not in contact with your office either in person or through  
16 correspondence -- written correspondence, telephone calls,  
17 nothing.

18 A There was a period of time he was not in communication  
19 with our office. My understanding is he went to Tennessee,  
20 okay? I don't know that I can independently verify that,  
21 but he did not respond to our letters, our phone calls, I'm  
22 sure we would have reached out to family members. And like  
23 I say, one of my young lawyers a week or two before the  
24 trial found an Albert Witherspoon that appeared to be him on  
25 Facebook and sent a Facebook message to him.

## MICHAEL LIFSEY - DIRECT

1 Q Okay. And then the next time that you saw him was the  
2 day that the case was called for trial, correct?

3 A Yes, ma'am.

4 Q And you were able to talk to him that morning and  
5 explain to him what was happening.

6 A Yes, I was. Obviously it was a brief conversation  
7 because there was a jury in the jury assembly room waiting  
8 to be picked. I will tell you I had -- well, I just --  
9 that's the answer to your question, we discussed the case  
10 briefly that morning.

11 Q Okay. And so how did the plea come about? Because you  
12 were there that morning to try it, correct?

13 A Yes, ma'am.

14 Q And so how did the plea come about?

15 A The charge originally was criminal sexual conduct with  
16 a minor in the first degree, which I believe would have been  
17 under the 25 to life provisions of the statute. The  
18 attorney general's office offered him and had a standing  
19 offer frankly, at which I never really was able to  
20 communicate with him because he was absent, but several  
21 months before the trial they had offered to reduce the  
22 charge to criminal sexual conduct with a minor in the second  
23 degree, which would have resulted in an up to a 20 range.  
24 Obviously I cannot communicate that offer to him because he  
25 was not anywhere we could find him. But that morning when

MICHAEL LIFSEY - DIRECT

1 he got there and arrived I asked the attorney general,  
2 assistant attorney general, Mr. Fernandez, and he had  
3 someone else with him too, I can't remember, there was  
4 another woman prosecuting it with him, but it was  
5 Fernandez's case, but I asked him was that offer still open  
6 so I can talk to my client. They spoke to their -- they at  
7 some point communicated to me, yes, it would still be open.  
8 So I told Mr. Witherspoon, I mean, "Here is the deal,  
9 they're offering you the range up to 20. If you go to trial  
10 you're going to get 25 to life, these are horrible facts and  
11 it's a pretty good video, so what do you want to do?" And  
12 he ultimately decided he wanted to take the plea.

13 Q Did you feel that you had enough time with him that  
14 morning to discuss the plea, I mean, under the circumstances  
15 given that he just showed up that day?

16 A Well, I mean, you know, I would have liked to have not  
17 tried it that day. I would have liked to -- him to have  
18 appeared the last several months before so we could have  
19 worked it out ahead of time. We had a conference call with  
20 Judge Young, I can't remember the exact date, and I think it  
21 was a conference call. It's possible the attorney general  
22 and I drove to where Judge Young was holding court, but I  
23 think it was a conference call, a week or two before the  
24 trial when we thought it would be a trial in absence, and  
25 Judge Young indicated he would not grant me a continuance on

## MICHAEL LIFSEY - DIRECT

1 that basis. Now, I didn't make that formal motion because  
2 obviously he showed up Monday morning. So, yeah, I would  
3 have liked a lot more time to talk to him, but, you know,  
4 there's a jury sitting out there. And if the Judge was not  
5 going to grant me a continuance because he hadn't been --  
6 he'd been absent I found it very hard to believe that that  
7 Judge would have granted me a continuance when he showed up  
8 if that makes any sense.

9 Q And you've talked a little bit about you were prepared  
10 to try it in his absence. In terms of a defense, and I  
11 think you've said, you know, that you thought you could  
12 possibly offer some alternate explanations, but was there  
13 any sort of obvious good defense in your opinion to these  
14 charges for Mr. Witherspoon?

15 A No. That's what made this even worse. I mean, a lot  
16 of times in these cases you have a situation where you can  
17 allege someone put the child up to it. Say you've got a  
18 couple that are divorcing and there's a custody dispute and  
19 you can say maybe mama wants the child to lie in order to  
20 gain some advantage in custody. Or if it's -- if it's  
21 mama's former boyfriend who has now got a new girlfriend,  
22 you can allege that, well, maybe mama put the child up to  
23 lying because, you know, she doesn't like him having a  
24 girlfriend. It was none of that in this case. This was a  
25 kid from the neighborhood, I mean, it was horrible. And

## MICHAEL LIFSEY - DIRECT

1 there was no obvious reason for this child to have lied or  
2 for this -- for any family member of this child to have  
3 advocated that he lied. So it was, you know -- I mean, it  
4 would not have been a fun case to try, but, you know, that's  
5 what you have to do. When the Judge says try a case you try  
6 a case.

7 Q And I assume you explained all of this, or your opinion  
8 about all of this to Mr. Witherspoon.

9 A I did. Once again, I would have liked to have had more  
10 time to do that, but once again that was his absentiong  
11 himself from the area the reason it was not a lengthy  
12 conversation.

13 Q And whose decision ultimately was it for him to enter a  
14 guilty plea?

15 A It was his.

16 Q Okay. And did you feel that he understood what he was  
17 doing when he entered the guilty plea?

18 A I did. Now, Mr. Witherspoon is slow, okay? And, I  
19 mean, I dealt with him for a couple of years and I believe,  
20 and you probably saw a little bit of it from him testifying  
21 a little bit ago, that he is slow, but I do not believe he  
22 was not competent to stand trial. But I do believe he is  
23 slow and so it takes awhile for things to get through to  
24 him.

25 Q Okay. And in your presentation at sentencing you

## MICHAEL LIFSEY - DIRECT

1 brought up some things involving his family history in  
2 mitigation.

3 A Yes, ma'am.

4 Q Can you explain why you did that?

5 A Well, I mean, here is the problem, these are crimes  
6 that are shocking to the conscious of not only victims but I  
7 often find of judges, so I feel it is incumbent to try to  
8 offer some context or some explanation for how the crime  
9 occurred. In this case -- I represented Albert  
10 Witherspoon's father in probably 1995 or 1996 on a sex  
11 assault charge in Chester County when I was the Chester  
12 County public defender. The investigating officer in this  
13 case, Mr. Witherspoon, who was no relation, my memory is  
14 investigated a case where this Mr. Albert Witherspoon, Jr.  
15 was himself a victim of sexual assault by another family --  
16 another person. I brought those topics up to the Judge to  
17 try to offer some context as to how this happens that Albert  
18 Witherspoon, Jr. is not just somebody who was born a violent  
19 predator or a sociopath or someone -- he was a product of a  
20 very difficult upbringing in a home where I believe was  
21 replete with violence, including sexual violence. And  
22 considering his young age, at the time that these crimes  
23 happened my memory is Mr. Witherspoon was only about 18  
24 years old, he had been in foster care for a number of years,  
25 I was trying to give the Judge some explanation as to how

## MICHAEL LIFSEY - CROSS

1 this happened in hopes that that would provoke some more  
2 degree of mercy from the Judge when it came to sentencing.

3 Q Okay. And do you recall Mr. Witherspoon ever asking  
4 you to file an appeal in this matter?

5 A No, ma'am.

6 Q If he had, would you have filed one?

7 A Yes, ma'am.

8 MS. MCCALLISTER: Okay. I think that's all of the  
9 questions I have for Mr. Lifsey, Your Honor.

10 THE COURT: Cross examination?

11 MS. MINOR: Yes, Your Honor, real briefly.

12 CROSS EXAMINATION

13 BY MS. MINOR:

14 Q Mr. Lifsey, you testified earlier that you wished that  
15 you had more time on this case; is that correct?

16 A Yes, ma'am.

17 Q And the fact that you didn't have more time on this  
18 case, whether it's to meet with my client to discuss  
19 information, do you believe that prejudiced him?

20 A No, ma'am. I mean, I was prepared to try the case. I  
21 would have -- if we had gone to trial the biggest thing  
22 would have been -- if I had anymore time to talk to him  
23 would have been more time to discuss whether or not he would  
24 have testified at trial, and that would have been a  
25 helpful -- that's a decision he would have had to make but

1 it would have been helpful to discuss that. But I don't  
2 think -- ultimately I don't think it made any difference  
3 because the plea offer was still open.

4 Q Do you believe because of the insufficient time it was  
5 a rush decision for him to take the plea?

6 A I think he had to make a decision in a rush, yes,  
7 ma'am, I agree with that.

8 Q And is your testimony that he fully understood the  
9 decision that he was making in regards to the plea?

10 A I believe he did.

11 MS. MINOR: Nothing further, Your Honor.

12 THE COURT: Any redirect?

13 MS. MCCALLISTER: No, Your Honor.

14 THE COURT: Sir, you may step down, thank you.

15 MS. MINOR: Your Honor, I know that I have rested my  
16 case, but I wanted to -- I have spoken to the attorney  
17 general's office, and I had requested a mental evaluation at  
18 a previous hearing. I don't believe there's no objections,  
19 but I would ask that the results of the evaluation be  
20 entered into evidence as Applicant's 1.

21 MS. MCCALLISTER: There is no objection.

22 (The evaluation was received as Applicant's 1.)

23 THE COURT: Ms. Minor, let me ask you this, pursuant to  
24 your request for a mental evaluation and pursuant to such  
25 evaluation being done on your client, has a Blair hearing

1     been conducted?

2           MS. MINOR:   No, Your Honor.

3           THE COURT:   Okay.  Well, without objection I'm going to  
4     allow this report to be admitted.  The Court has reviewed in  
5     full the evaluation -- the written evaluation prepared by  
6     Dr. Matthew Gaskins and the Court hereby adopts the findings  
7     of such evaluation finding the defendant competent pursuant  
8     to State v. Blair.  I will order that this be marked as an  
9     exhibit and it will be sealed not to be opened absent a  
10    court order.  Okay.  So I'm giving this back to you.  Ms.  
11   Minor, let me ask you a few questions, please -- before I do  
12   that, anything further from the State?

13          MS. MCCALLISTER:  Your Honor, I didn't have anymore  
14    witnesses.  I was just going to point out some of the points  
15    in the transcript that the State would rely for some of  
16    these allegations.

17          THE COURT:   I will come back to you in just a second.

18          MS. MCCALLISTER:  Thank you, Your Honor.

19          THE COURT:   And I may have missed this, Ms. Minor, but  
20    was there any testimony concerning the assertion or  
21    allegations in the application number five attachment to 11A  
22    counsel failed to file for sentence reconsideration?  I  
23    don't remember hearing anything concerning that.

24          MS. MINOR:   No, Your Honor.

25          THE COURT:   So that's abandoned.  Failed to interview

1 and investigate victim and witnesses?

2 MS. MINOR: No, Your Honor.

3 THE COURT: Failed to present favorable evidence to  
4 show petitioner's innocence?

5 MS. MINOR: No, Your Honor.

6 THE COURT: Failed to present character witnesses for  
7 petitioner?

8 MS. MINOR: No, Your Honor.

9 THE COURT: Failed to get petitioner's discovery  
10 testimony, there was testimony concerning that. Failed to  
11 file motions to suppress prejudicial evidence?

12 MS. MINOR: No, Your Honor.

13 THE COURT: There was allegations and testimony failure  
14 to prepare case?

15 MS. MINOR: Yes, Your Honor.

16 THE COURT: As well as to some extent number 12, I  
17 believe. Number one through four, there was some testimony  
18 concerning those, but all others would have been five, six,  
19 seven, eight and ten, I did not hear any specific testimony  
20 concerning those; is that correct?

21 MS. MINOR: Yes, Your Honor.

22 THE COURT: And on the question number nine of the  
23 application there was some testimony certainly from Mr.  
24 Lifsey concerning that issue.

25 MS. MINOR: The appeal issue, Your Honor.

1 THE COURT: Yes.

2 MS. MINOR: Yeah.

3 THE COURT: Any others that I may have missed, Ms.  
4 Minor?

5 MS. MINOR: No, Your Honor.

6 THE COURT: All right. Ms. McCallister, you indicated  
7 you wanted to point some portions of the transcript?

8 MS. MCCALLISTER: Yes, Your Honor. Well, just that the  
9 State would argue that the transcript as a whole sort of  
10 indicates that Mr. Witherspoon understood what was  
11 happening. He was able to have a coherent and, you know,  
12 full plea colloquy with the Court. Your Honor, on page 11  
13 the Court specifically asked him if he needs more time to  
14 talk with his attorney and he indicated that he did not need  
15 more time. He also indicated that he was satisfied with  
16 Mr. Lifsey's services and that Mr. Lifsey had done  
17 everything that he had been asked to do. So, Your Honor, we  
18 would just rest on that, that this was Mr. Witherspoon's  
19 decision, and maybe it was rushed but he is the one who  
20 chose to absent himself from the area and not keep in  
21 communication with his attorney, and when he was offered  
22 more time to speak with his attorney he turned that down.

23 THE COURT: All right. Anything, Ms. Minor?

24 MS. MINOR: No, Your Honor.

25 THE COURT: All right. Based on the testimony I have

1 heard here today, based upon my review of the application as  
2 well as the return and the plea transcripts, I note for the  
3 record there's a transcript from March 13 of 2017 and a  
4 subsequent transcript sentencing, which occurred on March 17  
5 of 2017. Pursuant to the law as it relates to post  
6 conviction relief actions, there is a strong presumption  
7 that counsel provided or rendered adequate assistance and  
8 made all significant decisions in the exercise of reasonable  
9 and professional judgment. Furthermore applicant must prove  
10 counsel's performance was deficient and such performance  
11 failed to be reasonable under prevailing professional norms.  
12 Second, applicant must prove deficient performance  
13 prejudiced the applicant such that there is a reasonable  
14 probability that but for counsel's unprofessional errors the  
15 result of the proceedings would have been different. Based  
16 upon the testimony I've heard here today as well as the  
17 review in the file I do not find that the applicant has met  
18 either prong of Strickland v. Washington and therefore the  
19 Court is respectfully denying the relief requested. Thank  
20 you. Ms. McCallister, if you will prepare me an order,  
21 please.

22 MS. MCCALLISTER: Yes, Your Honor, thank you.

23 (End of the hearing.)

24

25

1 I, the undersigned, Michael C. Watkins,  
2 Official Court Reporter for the Sixth Judicial  
3 Circuit of the State of South Carolina, do hereby  
4 certify that the foregoing is a true, accurate and  
5 complete transcript of the proceedings had and  
6 evidence introduced in the trial of the captioned  
7 case relative to appeal in Court of Common Pleas for  
8 Lancaster County, South Carolina, on the 29th days  
9 of July, 2019.

10 I do further certify that I am neither of kin, counsel,  
11 nor interest to any party hereto.

12

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January 27, 2020

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Michael C. Watkins

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Court Reporter

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	FOR THE SIXTH JUDICIAL CIRCUIT
Albert Lee Witherspoon, #371774,	)	C.A. No. 2017-CP-29-0862
	)	
Applicant,	)	
	)	<b>ORDER OF DISMISSAL</b>
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

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This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Albert Lee Witherspoon (Applicant) on August 4, 2017. Respondent made its return on May 23, 2018. An evidentiary hearing into the matter was convened on July 29, 2019, at the Lancaster County Courthouse before the undersigned. Donae A. Minor, Esquire, represented Applicant. Assistant Attorney General Lindsey A. McCallister represented Respondent.

Applicant testified on his own behalf. Michael H. Lifsey, Applicant's plea counsel, testified on behalf of Respondent. This Court had before it a copy of the records of the Lancaster County Clerk of Court, records from the South Carolina Department of Corrections, the PCR application, Respondent's Return, and the plea transcript. 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 this application for relief.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lancaster County Clerk of Court. In December of 2010, the

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P-10716*

Lancaster County Grand Jury indicted Applicant for criminal sexual conduct (CSC) with a minor – first degree (2010-GS-29-1662). Michael H. Lifsey, Esquire (Counsel), represented Applicant. Assistant Attorney General (AAG) David A. Fernandez, Esquire, prosecuted the case. On March 13, 2017, Applicant pleaded guilty to the lesser-included offense of CSC with a minor – second degree before the Honorable W. Jeffrey Young. On March 17, 2017, Judge Young sentenced Applicant to twenty years' imprisonment. Applicant did not appeal his sentence or conviction.

### ALLEGATIONS

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

1. Ineffective Assistance of Counsel
  - a. Counsel failed to go over discovery material with petitioner.
  - b. Counsel failed to visit petitioner and go over case with petitioner.
  - c. Counsel failed to get petitioner mental evaluation to see if petitioner was mentally competent.
  - d. Counsel failed to appeal the petitioner's plea.
  - e. Counsel failed to file for sentence reconsideration after sentence.
  - f. Counsel failed to interview and investigate victim and witnesses.
  - g. Counsel failed to present favorable evidence to show petitioner's innocence.
  - h. Counsel failed to present character witnesses for petitioner.
  - i. Counsel failed to give petitioner discovery material.
  - j. Counsel failed to file motions to suppress prejudicial evidence.
  - k. Counsel failed to prepare for case.
  - l. Counsel failed to investigate facts and circumstances.

Through PCR counsel, Applicant amended his application on November 13, 2018, to include the following allegations:

1. Ineffective Assistance of Counsel
  - a. Failure to properly investigate Applicant's case, including but not limited to interviewing potential witnesses and evaluating the veracity of evidence sought against Applicant;

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- b. Failure to adequately provide Applicant with all discovery and properly discuss all discovery and evidence sought against him prior to Applicant accepting his plea bargain;
- c. Failure to counsel, discuss, and explain the pending charges and consequences so that Applicant could make an informed decision as to whether to accept a plea bargain or pursue a trial;
- d. Failure to discuss defense and possible challenges to the evidence with the Applicant;
- e. Failure to pursue an appeal despite Applicant's request;
- f. Failure to obtain a competency evaluation prior to Applicant's guilty plea, rendering his guilty plea involuntary;
- g. Prejudiced Applicant by discussing [Applicant's] family['s] criminal sexual history during sentencing.

At the evidentiary hearing, Applicant did not present any testimony to support the allegations Counsel failed to file for sentence reconsideration after sentence; Counsel failed to properly investigate Applicant's case and interview potential witnesses; Counsel failed to file motions to suppress prejudicial evidence; Counsel failed to present favorable evidence to show petitioner's innocence; and Counsel failed to present character witnesses for Applicant. This Court therefore finds those allegations were abandoned, and they are denied and dismissed with prejudice.

#### SUMMARY OF TESTIMONY

Applicant testified he pleaded guilty to CSC – second degree, and Brandon Steen was his attorney. Applicant then testified Counsel was not present at his plea, and William Frick, Esquire, represented him. Applicant agreed the transcript of record states Counsel was his attorney, but Applicant again testified Counsel was not his attorney, and he only met with Counsel one time.

Applicant testified Counsel did not “go over things” in Applicant's case. Applicant further testified he was up for a probation violation, and he met with Counsel. According to Applicant,

Counsel said something about a video, but Counsel did not show it to Applicant. Applicant testified Counsel merely said there was a video and left. Applicant testified someone else was with him during this meeting with Counsel, so Counsel never showed him the video. Applicant also testified Counsel did not review discovery with him. Applicant explained he already had discovery from before Counsel assumed representation, but he lost some of the paperwork when he moved, and he did not have everything. Applicant stated Counsel did not go over the information Applicant had, and Applicant did not ask Counsel to do so because Applicant was more concerned about the probation violation.

Counsel testified he has been the Chief Public Defender in Lancaster County since March 2009. Counsel recalled representing Applicant and explained the case was originally assigned to a different attorney, William Frick. Counsel testified he took over the case from Frick, and Counsel was the attorney of record at the plea hearing.

Counsel testified his office received discovery in Applicant's case, and Counsel reviewed the discovery with him. Counsel also testified he was aware Applicant and Frick met several times and discussed the case. Counsel explained the case was "in a holding pattern" when he took over, and he was not in a hurry to resolve it because Applicant was out on bond and the State had a pretty strong case against Applicant. Counsel agreed there was an occasion where he met with Applicant, but because of the nature of the case, they did not discuss the details.

Counsel explained Applicant allegedly forcibly sodomized a five-year-old boy, and the State had some physical evidence along with a video of the victim's forensic interview which would have been admissible at trial. According to Counsel, it was one of the more compelling

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videos he has ever watched. Counsel also explained the physical evidence corroborated the victim's testimony. Counsel testified he and Applicant watched and discussed the video. Counsel testified there were no viable defenses available, and this would not have been a good case to try. Counsel testified he explained all this to Applicant. According to Counsel, Counsel told Applicant he would need to make a decision at some point about what he wanted to do. Counsel testified they did not have a chance to talk more because Applicant left and never responded.

Counsel testified he would have had further discussions with Applicant if he had able to find Applicant, who was out on bond, leading up to the trial date. Counsel explained Applicant disappeared several months before the trial, and there was a period of time Applicant was not in communication with Counsel's office. Counsel testified his understanding was that Applicant had moved to Tennessee. Counsel testified Applicant did not respond to Counsel's attempts to contact him until one of the young lawyers in Counsel's office found a person who appeared to be Applicant on Facebook and sent a message. Counsel testified he was prepared for the trial to proceed in Applicant's absence until Applicant showed up on the Monday morning of his trial.

Counsel further testified the Attorney General's office had made an offer for Applicant to plead guilty to the lesser-included charge of CSC with a minor – second degree, down from CSC with a minor – first degree. Counsel explained he had no way to communicate that offer to Applicant until Applicant showed up the morning of trial. Counsel testified he asked AAG Fernandez about the offer, and Fernandez said the offer was still open. Counsel testified he and Applicant had a brief conversation, and although he would have preferred not have to try the case that day and to have worked the plea offer out it ahead of time, he felt he and Applicant had enough

time under the circumstances. Counsel explained he and AAG Fernandez had a conference call with the plea judge a week or two earlier, when they thought it would be a trial in Applicant's absence, and the judge indicated he would not grant a continuance on that basis. Counsel testified he did not move for a continuance when Applicant showed up because he felt the judge would not grant it then if he refused to grant it in Applicant's absence.

Counsel further testified although he would have liked more time to discuss the situation with Applicant, he did not feel Applicant was prejudiced in any way because Counsel was prepared for trial, and the plea offer was still open. Counsel explained if they had more time, he would have used it to discuss if Applicant would testify at a trial. Counsel testified although Applicant had to make a decision quickly, he felt Applicant understood what he was doing. Counsel also testified, based on his interactions with Applicant, he believed Applicant understood the issues in his case. Counsel stated Applicant is "a little slow," but Counsel believed he was competent to stand trial.

Finally, Counsel explained he brought up Applicant's family's criminal sexual history in mitigation because Counsel felt he needed to offer some context or explanation for what happened. Counsel stated the circumstances of these types of crimes are often shocking to the conscience of victims and to judges. Counsel explained he represented Applicant's father on a sexual assault case in the 1990s wherein Applicant himself was a victim of sexual assault. Counsel testified he brought up that family history to try to show Applicant had a very difficult upbringing in order to give the judge some explanation of how this might have happened.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record and heard the testimony at the PCR hearing. This Court has observed the evidence and witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code.

Applicant alleges he received ineffective assistance of counsel. 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, Applicant must prove “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 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 plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove 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, 466 U.S. at 688 (1984)).

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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." Id. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

This Court finds Applicant failed to prove Counsel's performance was deficient in any way, nor was Applicant prejudiced by Counsel's performance. Counsel met with Applicant on several occasions and reviewed with him the evidence and discovery in the case. Applicant then voluntarily left South Carolina to live out of state, during which time Applicant did not respond to Counsel's repeated attempts to contact him. This Court finds Applicant ultimately chose to plead guilty rather than face the possibility of life without parole should Applicant be found guilty after a trial, and this decision was made freely and voluntarily. This Court finds the combined record of the plea transcript and the testimony from the evidentiary hearing establishes Applicant received

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effective assistance of counsel. Therefore, for the reasons stated below, the Court denies relief and dismisses the allegations with prejudice.

1. Involuntary Guilty Plea

Applicant alleges he received ineffective assistance of counsel such that his guilty plea was entered involuntarily due to Counsel's failure to adequately explain the discovery and evidence in Applicant's case and Counsel's failure to seek a mental health evaluation.

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). An applicant who pleads guilty with the advice of counsel may collaterally attack the plea only by showing (1) counsel was deficient and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Lockhart, 474 U.S. at 56.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "[T]he

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voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.” Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. Harres, 282 S.C. at 133, 318 S.E.2d at 361. However, statements made during a guilty plea should be considered conclusive, unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir. 1975), overruled on other grounds by United States v. Whitley, 759 F.2d 327 (4th Cir. 1985).

A. Failure to review discovery/evidence

Applicant alleges Counsel’s ineffective assistance in failing to adequately review discovery with Applicant, led to Applicant entering an involuntary and unknowing guilty plea. This Court disagrees and finds the combined record from the plea hearing and the evidentiary hearing clearly establishes Counsel reviewed the discovery and evidence with Applicant, and Applicant entered his guilty plea freely and voluntarily.

The plea transcript reflects Applicant informed the court he understood the charges and the terms of the plea agreement. Tr. pp. 5, 7-8, 12. The plea court read the indictment, and Applicant indicated the facts contained in the indictment were true. Tr. pp. 5-6. The plea court explained Applicant’s right to have a jury trial, and, specifically, Applicant’s right to call witnesses and present a defense, and Applicant indicated he understood those rights and wished to give them up in order to plead guilty. Tr. pp. 9-10. The plea court also explained the plea agreement and clearly informed Applicant if it accepted his plea, the sentence could be up to twenty years, and it would

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be classified as a violent and most serious conviction, and Applicant again indicated he understood and wished to plead guilty. Tr. pp. 7-8.

Importantly, Applicant informed the plea court he had enough time to talk with his attorney, and there was nothing Counsel had not done that Applicant wanted him to do, nor anything Counsel had done that Applicant had *not* wanted him to do. Tr. p. 11. Applicant stated he was satisfied with Counsel's representation. Tr. p. 11. Applicant never indicated he did not understand the charges against him, the terms of the plea agreement, or that he was not entering the plea freely and voluntarily.

The Court finds Counsel's testimony credible on this issue. Counsel testified he reviewed discovery with Applicant, including watching and discussing the forensic interview of the victim. Further, Counsel testified he would have had more numerous and in-depth discussions of the case with Applicant, but Applicant voluntarily absented himself from South Carolina and did not keep in contact with Counsel until he returned on the morning his trial was set to begin. At that time, Counsel informed Applicant of the State's offer and explained Counsel did not feel Applicant had a good chance at trial because Applicant did not have a strong defense to offer. The Court finds Counsel also explained Applicant did not have to plead guilty, and he was prepared for trial had Applicant chosen that option. For all of these reasons, this Court finds Applicant's decision to enter the guilty plea was made freely and voluntarily. Though Applicant may have felt the decision was rushed, this was only so because Applicant voluntarily left the state and did not communicate with his attorney while he was gone.

Accordingly, based on the combined record of the plea transcript and the testimony presented at the evidentiary hearing, this Court finds Counsel's representation of Applicant was

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not deficient, nor was Applicant prejudiced by Counsel's representation. Counsel met with Applicant on multiple occasions to review discovery, discuss the facts of the case, and explain Applicant's constitutional rights and options for resolving the case. Further, the plea transcript reflects Applicant understood the proceedings, interacted intelligently with the plea court, and entered his guilty plea knowingly and voluntarily. Therefore, this Court denies relief and dismisses this allegation with prejudice.

B. Failure to obtain competency evaluation

Applicant alleges his plea was entered involuntarily because Counsel did not obtain a competency evaluation prior to Applicant entering his plea. The Court finds this allegation is without merit and denies relief as to this claim.

PCR counsel obtained a competency evaluation of Applicant from the Department of Mental Health, which was entered as an exhibit at the evidentiary hearing.<sup>1</sup> This Court has reviewed the report and adopts its finding, including the finding Applicant is competent. The Court further finds credible Counsel's testimony that while Applicant may have some intellectual challenges, Counsel believed Applicant was competent. As noted above, the plea transcript reflects Applicant interacted intelligently with the plea court, gave coherent answers to the plea court's questions, and never indicated he did not understand any part of the proceeding.

In determining if counsel is ineffective for failing to request a competency hearing, an applicant must show a reasonable probability exists that he would be found incompetent at the

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<sup>1</sup> This report shall be sealed and is not to be opened without a court order.

time of this trial or plea. Jeter v. State, 308 S.C.230, 417 S.E.2d 594 (1992). Counsel may reasonably rely on his own perceptions in deciding if a client is competent to stand trial. Id. Because Applicant has failed to present any evidence of incompetency, the Court denies relief on this ground, and this allegation is hereby dismissed with prejudice.

## 2. Mitigation

Applicant also alleges he was unfairly prejudiced due to Counsel's ineffective assistance when Counsel brought up Applicant's family's criminal sexual history during sentencing. Based on a review of the plea transcript and Counsel's credible testimony at the evidentiary hearing, this Court finds this allegation is without merit.

Counsel testified he felt he needed to offer some context or explanation for what happened because the crime was shocking to the conscience of victims and to judges. Counsel explained he represented Applicant's father on a sexual assault case in the 1990s wherein Applicant himself was a victim of sexual assault. Counsel testified he brought up that family history to try to show Applicant had a very difficult upbringing in order to give the judge some explanation of how this might have happened. The Court finds this testimony to be credible. The Court additionally finds Counsel was not deficient because Counsel's decision to bring up Applicant's family history in mitigation was a reasonable strategic choice.

Strickland requires defense counsel be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland, 466 U.S. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound

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or even brilliant in another.” Id. at 691. Therefore, judicial scrutiny of counsel’s performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

Because Counsel articulated a valid strategic reason for presenting this evidence in mitigation, Counsel was not deficient, and therefore, not constitutionally ineffective. The Court denies relief on this ground, and this allegation is dismissed with prejudice.

### 3. Failure to File Appeal

Finally, Applicant alleges Counsel failed to file a notice of appeal, despite Applicant’s request Counsel do so. The Court finds this allegation is without merit and denies relief as to this issue.

The plea transcript reflects the plea court informed Applicant of his right to appeal the entry of his guilty plea and sentence within ten days of the plea. Tr. p. 12. At the evidentiary hearing, however, Applicant did not offer any testimony about whether he asked Counsel to file a notice of appeal. On the other hand, Counsel unequivocally testified Applicant never made such a request, and if Applicant had, Counsel would have filed one. This Court finds Counsel’s testimony to be credible.

Accordingly, because Applicant failed to present any evidence to support his claim, the Court denies relief as to this issue. See, e.g., Roe v. Flores-Ortega, 528 U.S. 470, 484, 120 S. Ct. 1029, 1038, 145 L. Ed. 2d 985 (2000) (“If the defendant cannot demonstrate that, but for counsel’s deficient performance, he would have appealed, counsel’s deficient performance has not deprived

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him of anything, and he is not entitled to relief.”). This allegation is therefore dismissed with prejudice.

### CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel’s representation. Therefore, this application for post-conviction relief is denied, and Applicant’s claims are dismissed with prejudice.

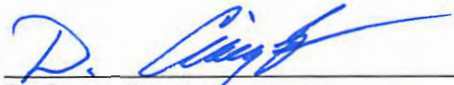
Applicant must file and serve a notice of appeal within thirty days from PCR counsel’s receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to Austin v. State, 305 S.C. 453, 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. Further, Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant’s behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

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**IT IS THEREFORE ORDERED:**

1. The application for post-conviction relief is denied, and Applicant's claims are dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED.**

  
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D. CRAIG BROWN  
Presiding Circuit Court Judge  
Sixth Judicial Circuit

11-4, 2019

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FRISK  
DOCKET NO. 2010-GS-29-1662

The State of South Carolina  
County of Lancaster

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OF COURT

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CLERK OF COURT  
LANCASTER, SC

COURT OF GENERAL SESSIONS

DECEMBER TERM 2010

THE STATE  
vs.

Albert Lee Witherspoon

Indictment for  
Criminal Sexual Conduct with a Minor  
First Degree

SC Code: § 16-3-655(A) (1), (C) (1)  
CDR Code: 0385  
Class: Felony Exempt

WITNESSES

Witherspoon - LPD #10-16189

*A. Greenlee*

ARREST WARRANT NUMBER/DOA

M700271 (DOA-9-20-10)

ACTION OF GRAND JURY

*Asch. P. Marshall*

Foreperson of Grand Jury

Date: DEC 2 2010

VERDICT

TRUE BILL

Foreperson of Petit Jury

Date:

