

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Brooks P. Goldsmith, Circuit Court Judge

VOLUME II OF II

RECEIVED

SEP 06 2016

S.C. SUPREME COURT

MICHAEL RAY ELDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000242

APPENDIX

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Attorney General

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ATTORNEYS FOR RESPONDENT

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THE FOLLOWING SEALED EXHIBITS FROM AUGUST 14, 2013 PCR HEARING ARE ON FILE WITH THIS COURT: APPLICANT’S EXHIBIT # 1 (VIDEO); APPLICANT’S EXHIBIT # 3 (PHOTO); APPLICANT’S EXHIBIT # 4 (PHOTO); APPLICANT’S EXHIBIT # 5 (PHOTO); APPLICANT’S EXHIBIT # 6 (PHOTO)

1 within a reasonable amount of time. I'll give you
2 whatever time you need to respond, okay?

3 MR. WHITMIRE: Yes, Your Honor.

4 THE COURT: Okay.

5 MR. WHITMIRE: For the record, I talked to
6 Mr. Shaffer. The reason he supplied the exhibits is
7 so Your Honor would have the evidence before the Court.

8 THE COURT: Okay, thank you all.

9 MR. SHAFFER: Thank you, Your Honor.

10 MR. WHITMIRE: Thank you, Your Honor.

11 --End of Transcript of Record--


STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT THOMAS, OFFICIAL COURT REPORTER,
AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH
CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE
ABOVE-CAPTIONED CASE ON AUGUST 15, 2013, IN LEXINGTON,
SOUTH CAROLINA.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL NOR
KIN TO ANY OF THE PARTIES TO THIS CAUSE OF ACTION, NOR
AM I INTERESTED IN ANY MANNER IN ITS OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND
AND SEAL AT LEXINGTON, SOUTH CAROLINA, THIS THE
NINETEENTH DAY OF FEBRUARY, 2015.


REMA K. GANTT THOMAS
OFFICIAL COURT REPORTER
STATE OF SOUTH CAROLINA

503w
/1

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2014 MAY -2 A 11:11
Case No: 2012-CP-32-3136

Michael Elders,
S.C.D.C. No. 345023,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter comes before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed August 2, 2012. Respondent made its Return. An evidentiary hearing into the matter was convened on at the Lexington County Courthouse on August 14, 2013. Applicant was present at the hearing and was represented by Tristan Shaffer, Esq. Respondent was represented by Walt Whitmire, Esq., of the South Carolina Attorney General's Office. Counsel testified at the hearing.

Attached herewith and incorporated herein by reference are the records of the Lexington County Clerk of Court regarding the subject conviction(s), the Applicant's records from the Department of Corrections, the trial transcript, and Applicant's appellate records.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. Applicant was indicted at the October 2009 term of the Court of General Sessions for Lexington County for criminal sexual conduct with a minor, first-degree (2009-GS-32-2677). Applicant was then indicted at the February 2011 ^{term} for lewd act upon a minor (2011-GS-32-0364). He was represented by William

Rast, Esq. On March 2, 2011, Applicant proceeded to trial where he was found guilty as charged. He was sentenced by the Honorable William P. Keesley, to a thirty (30) year term of imprisonment for criminal sexual conduct with a minor, first-degree and to a fifteen (15) year term of imprisonment lewd act upon a minor. The sentences were to be served concurrently.

A timely Notice of Appeal was filed on Applicant's behalf. Applicant was represented by Elizabeth Franklin-Best, Esq., of the Office of Appellate Defense. The appeal was subsequently withdrawn.

At the PCR hearing, Applicant proceeded with his action on following claims:

1. Ineffective assistance of counsel:
 - a. failure to investigate Applicant's case in consulting an independent medical expert on sexual trauma;
 - b. failure to object to Miller-Dupree being qualified as an expert in child abuse assessment and forensic interviewing;
 - c. failure to object to Miller-Dupree's alleged bolstering of the victim's credibility;
 - d. failure to object to Agent Caldwell being qualified as an expert in child abuse assessment;
 - e. failure to object to allegedly improper hearsay from the Robin Baker, the SANE nurse;
 - f. failure to object to the solicitor pitting defense witness Gene Elders;
 - g. failure to object to improper comments made the solicitor in her opening and closing statements;
 - h. failure in waiving his opening statement.

SUMMARY OF TESTIMONY

Counsel testified he was retained soon after Applicant's arrest. He had known Applicant and his family for some time and had successfully represented Applicant in prior cases where Applicant was either acquitted or had his charges dismissed on those prior cases. He noted that three of these six cases were brought by Applicant's wife. Counsel had also represented other



members of Applicant's family. Counsel stated that Applicant's case was going to proceed to trial from the beginning where the State made no viable plea offer and Applicant protested his innocence. He independently investigated the State's evidence and formulated a defense theory of the case. Counsel did not employ a private investigator and found one unnecessary where he was intimately familiar with all of the relevant family members. Counsel met with Applicant numerous times and apprised him of victim's statement and the forensic interview. He advised Applicant that tape of the victim's forensic interview constituted admissible evidence. Counsel testified that Applicant's brother and father were the only possible beneficial character witnesses to consider calling at trial. Counsel interviewed the victim's doctor and called him at trial to testify to the victim's good health and lack of symptoms commonly present abused children. Based upon counsel's pre-trial consultations with Applicant, counsel was under the impression that Applicant would testify. Counsel advised Applicant to testify during these consultations. Counsel was surprised with Applicant decided not to testify during the course of trial. Applicant's decision surprised and dismayed counsel who reasoned Applicant was a critical witness for the defense's theory of the case.

He stated that accusations against Applicant originated when Johnny Hutto witnessed the victim sitting in Applicant's lap while Applicant was operating his truck. He noted that Shelly Elders, the victim's mother, and her family disdained Applicant well before Hutto's encounter or the victim's disclosures. Thus, counsel developed a narrative to show ^{the fact} event that Hutto witnessed between Applicant and the victim ^{was} as ambiguous and innocent. It was the defense's theory that the allegations of sexual misconduct took a life of their own once conjecture circled Shelly Elders' family. Counsel elicited testimony that Hutto never saw sexual contact between Applicant and the victim. Counsel intended on calling Hutto during his case-in-chief to illustrate

the defenses' theory on how allegations of Applicant's sexual misconduct with the victim manifested. Although counsel did not anticipate eliciting testimony from Hutto that Applicant had made friendly gestures, interpreted by the witness as inappropriate, to high school girls in the neighborhood, he reasoned the testimony did not warrant an objection. (Trial Tr. p.295). Counsel stated he reasoned "honking the horn does not lead to molesting one's own daughter." Counsel did not object to improper hearsay and speculative testimony from family witnesses because it played into the presentation of defendant's case. It was an important part of the counsel's presentation his case to portray the adverse family witnesses as an irrational mob predisposed to falsely accuse Applicant of inappropriate behavior. Counsel noted that this was critical to attack the credibility of these witnesses. Unsubstantiated rumors of prior abuse was utilized to benefit Applicant's case where no third party witnessed Applicant molest the victim. (Trial Tr. p.213; p.233). He stated, "sometimes people will believe where there's smoke there's fire."

Counsel also testified that part of the defense theory of the case was to impeach the victim's credibility by showing that she was employed as a conduit for her mother who had a motive to send Applicant to prison. The victim's mother had a history of abusing narcotics. It was counsel's recollection that the victim would look in the direction of her mother when she could not remember details at trial. He noted that it was the defense's theory that the victim's mother was the underlying catalyst that led to Applicant's arrest.

Applicant alleged counsel was ineffective for waiving his opening statement. Counsel testified that it is his general practice in criminal trials where the jury has yet to hear testimony and view evidence. It was his opinion that juries ignore opening statements from attorneys. Counsel reasoned that he does not want to be ignored in his first substantive interaction with the jury. Applicant alleged counsel was ineffective for not sufficiently objecting to the expert

qualifications or testimonies from the State's two forensic interviewers, Miller-Dupree and Agent Caldwell. (Trial Tr. p.194) Counsel noted that he interviewed Miller-Dupree, who conducted the taped interview with the victim, prior to trial. Counsel could not recall if he made a motion to redact portions of the taped interview. Counsel objected to the State calling Agent Caldwell, a second interviewer, as an expert in forensic interviewing where she never met with the victim. (Trial Tr. pp.322-23). He reasoned the State called Agent Caldwell to explain the phenomena of delayed disclosure in child abuse cases. It was counsel's strategy to impeach the victim on the delayed disclosures. Counsel noted he elicited inconsistent testimony from Agent Caldwell and Miller-Dupree on the purpose and role of forensic examination. Applicant alleged counsel was ineffective for failing to object to Miller-Dupree's assessment of the interview as "not problematic" and her testimony that it was recommended that the victim receive evidence based therapy. (Trial Tr. p.203; p.208). Counsel reasoned the objection was not warranted in light of his opinion that neither testimonies from Miller-Dupree or Agent Caldwell held credibility. Last, Applicant alleged counsel was ineffective for failing to properly object to Robin Baker, the SANE nurse who treated the victim, to hearsay testimony regarding her pre-screening interview with the victim. Applicant alleged the objection was not properly preserved for appellate review because counsel failed to contemporaneously reference Rule 803, SCRE, or Rule 404(b), SCRE. (Trial Tr. pp.266-67).

Applicant alleged counsel was ineffective for not objecting to the solicitor's pitting of Gene Ray Elders Jr., Applicant's brother's, testimony against prior testimony from State witnesses. (Trial Tr. p.361, lines 15-21). Counsel agreed that the manner the solicitor's question was posed was objectionable but that he did not object because the question was relevant to the

case. Furthermore, the question caught him off guard. Applicant also alleged counsel's performance in cross-examining the victim was inadequate. (Trial Tr. p.182).

Applicant alleged counsel was ineffective for not objecting to three "Golden Rule" violations during the solicitor's opening and closing argument. (Trial Tr. p.263, lines 14-19; p.163, lines 16-20, p.392, lines 14—p.393, line 1). Counsel testified that he is generally deterred from objecting during a solicitor's argument at the risk of isolating through an interruption. He testified that he evaluates whether or not to object in opening statements or closing arguments on a case-by-case basis. Counsel noted that a solicitor's closing argument is inherently and permissibly prejudicial to an accused. He was hesitant to assert even in hindsight that the above referenced comments constituted impropriety. Counsel was not familiar with recent case law on the matter. Applicant also alleged counsel was ineffective for not objecting to similar comments made by the solicitor that were unduly prejudicial. (Trial Tr. p.386, lines 3-11). Counsel noted the comments here illustrated his success in exploiting the inconsistent responses from Dupree-Miller and Agent Caldwell on the fundamental role of the forensic interviewer. Counsel ~~stated~~ ^{stated} reiterated the same trial strategy for his decision not to object.

APPLICABLE LAW

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, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court's records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and exhibits from the prior proceedings, and, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant claims that due to his attorney's sub-standard performance, he has been denied his constitutionally protected right to

from a medical professional relevant to the allegation.¹ See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (“A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence.”). Therefore, this allegation is denied and dismissed.

B.

This Court finds Applicant failed to meet his burden to prove counsel was ineffective for failing to object to Miller-Dupree's qualification as an expert in forensic interviewing and child abuse assessment or objecting to the portions of her testimony at issue. “This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.” Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). At the time of Applicant's trial, the controlling case law rendered any error qualifying Miller-Dupree as an expert harmless at best. See State v. Baker, 390 S.C. 56, 67, 700 S.E.2d 440, 445 (Ct. App. 2010). Furthermore, Miller-Dupree's testimony that the victim's disclosures were “not problematic” did not equate to prejudice at the time of trial. This Court also finds the clinical professional did not bolster the victim's testimony when she testified to her recommendation that the victim obtain therapy. Even if objectionable, her testimony would not have warranted a mistrial at the time of trial. See State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) (testimony of psychiatrist who treated child victim of sexual assault was improper where psychiatrist answered “yes” to solicitor's question of whether, based on his examination and observations of the victim, he was “of the impression that [the victim's] symptoms [were] genuine.”). Last, Applicant failed to prove counsel was ineffective for not adequately specifying his objection to Baker testifying to pre-examination interview with the victim. “For an objection

¹ PCR counsel apprised the Court of his efforts to fully investigate and present this allegation at the PCR hearing.



to be preserved for appellate review, the objection must be made at the time the evidence is presented, State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996), and with sufficient specificity to inform the circuit court judge of the point being urged by the objector, Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).” State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). The trial judge implicitly recognized the grounds for the objection when he overruled counsel’s objection and noted the testimony was cumulative. (Trial Tr. pp.267-68). Furthermore, any preservation argument here is speculative where Applicant withdrew his intent to appeal his conviction. See Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (“PCR is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.”). Therefore, these allegations are denied and dismissed.

B.

This Court finds Applicant failed to meet his burden to prove counsel was ineffective for failing to object to speculative bad act testimony from Katlyn Bradley and Shelly Elders. The victim’s cousin and mother both testified that their family had suspected Applicant had been abusing the victim for a period of time prior to the victim’s disclosures. (Trial Tr. p.213; p.230). This Court certainly agrees that the testimony at issue was objectionable. However, counsel made a valid strategic decision to not object because the testimony played right into the defense’s theory of the case that the “questionable” allegations were the direct product of a “witch hunt” caused by the maternal family of the victim ^{and their} long standing hatred of the Applicant. See Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (“When counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.”). It was critical to Applicant’s case to develop a timeline of when these

family members were told of the abuse and how they ~~perpetuated~~^{perpetuated} the allegations to others. Counsel presented this timeline in the context of Jonny Hutto's eyewitness account of the events that occurred on June 27, 2009. (Trial Tr. pp.291-92). See Sanchez v. State, 351 S.C. 270, 569 S.E.2d 363 (2002) (Burnett & Toal, JJ., dissenting) (noting that there are circumstances where it may be reasonable trial strategy for counsel to decline to object to inadmissible hearsay testimony in a case involving criminal sexual conduct.). Counsel testified he executed a sound trial strategy. This Court agrees. This Court further finds counsel's testimony that Applicant's case was most adversely effected by Applicant's charge of heart in the middle of the trial to not take the stand in his own defense to be compelling. Counsel discussed the matter and presented "the witch hunt" theory of defense in reliance that Applicant would take the stand. This Court finds counsel adequately consulted Applicant on the matter prior to trial.

Last, this Court finds Applicant failed to meet his burden to prove counsel was ineffective for eliciting objectionable testimony ~~from~~^{from} Johnny Hutto by posing the question, "Have you seen ~~the~~^{the} [Applicant] around other children in the neighborhood and family?" (Trial Tr. p.295, lines 17-18). This Court agrees with counsel that "blowing the horn" at teenage girls bears negligible relationship to the child molestation of one's child. The witness's unresponsive testimony would not have merited a mistrial. Furthermore, counsel immediately elicited testimony from Hutto that he had never witnessed Applicant inappropriately touch family children or any other young girls after Hutto made the comment in question. (Trial Tr. pp.295-96). Counsel's performance here brought out Hutto's animosity and bias towards the Applicant without eliciting prejudicial testimony. Therefore, these allegations are denied and dismissed.

C.

This Court finds Applicant failed to meet his burden to prove counsel was ineffective for

failing to object to the solicitor's alleged pitting of a defense witness. The solicitor posed the following question to Gene Elders, Applicant's brother at issue:

Solicitor: "So everyone that's come in here and said that, Johnny Hutto that was in the house, [the victim], that they slept in that bed, your're telling this jury that they didn't sleep in the bed?"

Gene Elders: "No, Jonny and [Applicant], when everything started, everything started on the outside of the house. Johnny was drunk, you know, and then Johnny started on [Applicant].

(Trial Tr. p.361, lines 15-22.) "Improper pitting constitutes reversible error only if the accused was unfairly prejudiced." Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990). The witnesses answer negated any potential prejudice where he clarified that Hutto's encounter with Applicant occurred outside the residence. Although the solicitor posed an in artful compound question here, the question's substance concerned issues not in dispute that were not particularly prejudicial. Therefore, this allegation is denied and dismissed.

D.

This Court finds Applicant failed to meet his burden to prove counsel was ineffective for failing to object to the solicitor's allegedly improper comments made during her opening and closing statements. This Court finds counsel's testimony here credible.

First this Court finds alleged instances of a "golden rule violation" did not warrant objections from counsel. "A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166

(2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* Counsel testified that the comments at issue did not warrant an objection. This Court agrees with counsel. This Court finds the solicitor's comment that sexual misconduct with one's own child constituted a betrayal of trust was not objectionable. (Trial Tr. p.162). Neither was counsel ineffective for failing to object to the solicitor's comments on the inherent turmoil a child victim undergoes in testifying against a parent. (Trial Tr. p.165; p.384 p.392; p.393).

This Court also finds Applicant failed to prove counsel was ineffective for failing to object to allegedly improper bolstering and vouching in the solicitor's closing argument. "A solicitor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness.... Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity." *Gilchrist v. State*, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002). This Court finds counsel opened the door for the solicitor to comment on the interview assessments from Miller-Dupree. Counsel's exceptional performance in cross-examining the two forensic interviewers negated any prejudicial impact from the solicitor's comments that Miller-Dupree's finding that the victim's interview was "not problematic" inferred credibility where Miller-Dupree explicitly testified that she does not personally assess the truthfulness of a child victim's disclosure. (Trial Tr. p.386). Counsel elicited contradictory testimony from Miller-Dupree and Agent Caldwell regarding the purpose of the forensic interview and the role of the forensic interviewer. As a result, the testimonies were vague, confusing, and certainly did not read as convincing.

Counsel executed a reasonable trial strategy in limiting possible objections in the State's


Application for Post-Conviction Relief. Therefore, this Application for Post-Conviction Relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief ~~must~~ ^{is} and hereby is, ~~is~~ be denied and dismissed with prejudice; and
2. Applicant ~~must~~ ^{shall} be remanded to the custody of Respondent

AND IT IS SO ORDERED this 28th day of April, 2014.



 EDGAR W. DICKSON
 Presiding Judge
 Eleventh Judicial Circuit

Orangeburg, South Carolina

FILED
 2014 MAY -2 A 11:11
 BETH A. CARRIGG
 CLERK OF COURT
 LEXINGTON, SC

STATE OF SOUTH CAROLINA)
COUNTY OF Lexington)
Michael Elders, #345023)
Full name and prison number (if any) of Applicant.)
v.)
State of South Carolina)

IN THE COURT OF COMMON PLEAS

2014 CP 3204072

APPLICATION FOR

POST-CONVICTION RELIEF

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 McCormick Corr. Inst. 386 Redemption Way, McCormick, SC 29899
2. Name and location of Court which imposed sentence General Sessions Court, Lexington County Courthouse, Lexington, SC
3. Name(s) of co-defendant(s) (if any) none
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: (2009-GS-32-2677)(2011-GS-32-0364)
(a) Criminal Sexual Conduct W/minor first degree (30) years.
(b) Lewd act upon minor (15) years.

- 5. The date upon which sentence was imposed and the terms of the sentence
(a) March 2, 2011 (30) years.
(b) March 2, 2011 (15) years.

A TRUE COPY

2014 NOV -7 P 11:12
DETHA CARRICO
CLERK OF COURT
LEXINGTON, SC
FILED
Revised 3/2003

- (c) _____
- 6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty _____
 - (b) after a plea of not guilty yes
 - (c) after a plea of nolo contendere _____

2014 CP 3204072

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

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

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

- i. Supreme Court of South Carolina
- ii. _____
- iii. _____

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

- i. Appeal Dismissed.
- ii. _____
- iii. _____

(c) the date of each such result:

- i. Unknown.
- ii. _____
- iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results: Withdrawn Appeal.

- i. _____
- ii. _____
- iii. _____

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

- (a) _____
- (b) _____
- (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully. Please see additional page 3(a).

FILED
 2014 NOV - 7 P 4: 12
 BETH A. CARRICO
 CLERK OF COURT
 LEXINGTON, NC

A TRUE COPY

 Lex. Co. C.C.C.P., G.S. & E.C.

ORIGINAL

JM

Michael Elders, #345023
PCR Additional Page 3(a).

2014CP3204072

Allegation.

10(a). The Applicant's Post Conviction Relief Counsel Tristan M. Shaffer, denied the Applicant his statutory right under South Craolina Law to appeal from the order of dismissal filed April 28, 2014 of Edgar W. Dickson, PCR Judge, and also, under Austin v. State, 409 S.E.2d 395 (1991). Applicant told his Counsel that he was innocent of these false charges and that he wanted to file a notice of appeal to the Supreme Court of South Carolina.

Supporting Facts.

11(a). The Applicant told his PCR Counsel Tristan M. Shaffer, that he was innocent of these false charges and that if his PCR Application was denied, he want him to file a notice of appeal to the South Carolina Supreme Court. Also, the PCR Court stated on page 15 of its order of dismissal: "This Court notes that Applicant must file and serve a notice of intent to appeal within (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR Rule 71.1(g), SCRPC; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed."

Applicant's PCR counsel failed and denied Applicant the above court notice of appeal. Also, the Applicant's family paid PCR Counsel Tristan M. Shaffer, to represent the Applicant in his Post Conviction Relief. The Applicant will consent to by passing the Austin PCR hearing and going direct to the South Carolina Supreme Court by way of notice of appeal.

The Applicant leaves this application open, that he may amend, after appointment of counsel by the court.

A TRUE COPY

[Handwritten Signature]

Lex. Co. C.C.O.P., G.S. & F.C.

BETH A. CARRIS
CLERK OF COURT
LEXINGTON, SC

2014 NOV -7 P 4:12

FILED

ORIGINAL

JM

2014CP320407?

- (a) _____
 - (b) _____
 - (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10): Please see additional page 3(a).
- (a) _____
 - (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? yes
 - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
 - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
 - (d) any other petitions, motions or applications in this or any other Court? yes
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application: Post Conviction Relief Application. Case No. 2012-CP-32-3136
- (a) the specific nature thereof:
 - i. PCR Application. Case No. 2012-CP-32-3136
 - ii. _____
 - iii. _____
 - iv. _____
 - (b) the name and location of the Court in which each was filed:
 - i. Court of Common Pleas, Lexington, Courthouse, Lexington, SC
 - ii. _____
 - iii. _____
 - iv. _____
 - (c) the disposition thereof:
 - i. Order of Dismissal. Case no. 2012-CP-32-3136
 - ii. _____
 - iii. _____

ETHA A. CARRICO
CLERK OF COURT
LEXINGTON, SC

2014 NOV - 7 P. 4:13

FILED

Revised 3/2003

A TRUE COPY
[Signature]
Lex. Co. C.C.O.P., G.S. & EC.

ORIGINAL

JM

iv. _____
(d) the date of each such disposition:
i. April 28, 2014 Case No. 2012-CP-32-3136

2014 CP 3204072

ii. _____
iii. _____
iv. _____

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

i. Order of Dismissal filed with Clerk of Court, April 28, 2014.
Case No. 2012-CP-32-3136
ii. _____
iii. _____
iv. _____

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. _____
ii. _____
iii. _____

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

i. _____
ii. _____
iii. _____

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) PCR Counsel failed to file a notice of appeal on my behalf.

(b) _____

(c) _____

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

BETH A. CARRICO
CLERK OF COURT
LEXINGTON, VA

2014 NOV - 7 P 11:13

FILED

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ORIGINAL

JM

- (a) your arraignment and plea? _____
 - (b) your trial, if any? yes
 - (c) your sentencing? yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
 - (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. Tristan M. Shaffer 4701 Oleander Drive, Myrtle Beach, SC 29577
 - ii. Elizabeth Franklin-Best, Office of Appllate Defense, Columbia, SC.
 - iii. William Rast, 1316 Augusta Rd. West Columbia, SC 29169
 - (b) the proceedings at which each such attorney represented you:
 - i. Post Conviction Relief
 - ii. Direct Appeal
 - iii. Jury Trial
19. State clearly the relief you seek in filing this application:
 I want my right to appeal my PCR Application, to SC Supreme Court.
Appointment of new counsel.
20. Are you now under sentence from any other court that you have not challenged?
no

2014 CP 3204072

BETH A. CARRICO
CLERK OF COURT
LEXINGTON, VA

2014 NOV -7 PM 4:13

FILED

Revised 3/2003

A TRUE COPY

Lex. Co. C.C.C.R., G.S. & F.O.

ORIGINAL

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APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

Michael Elders, #345023

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.

Applicant

SWORN or affirmed to and subscribed before me this
_____ day of _____, 2_____.

Notary Public

My Commission Expires: _____



ORIGINAL

STATE OF SOUTH CAROLINA)
)
County of Lexington)
Michael Elders, #345023

VERIFICATION

JM

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.

SWORN to and subscribed before me this _____
day of _____, 2____.

Notary Public (L.S.)

My Commission Expires: _____

A TRUE COPY

[Signature]
Lex. Co. C.C.C.P., G.S. & E.O.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
)	
Michael Elders,	)	C.A. No. 2014-CP-32-4072
S.C.D.C. No. 345023,)	
)	
Applicant,)	
)	
v.	)	RETURN
	)	(counsel has been appointed pursuant
State of South Carolina,	)	to Rule 71.1(d), SCRCP) ¹
)	
Respondent.)	
)	

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed November 7, 2014, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. Applicant was indicted at the October 2009 term of the Court of General Sessions for Lexington County for criminal sexual conduct with a minor, first-degree (2009-GS-32-2677). Applicant was then indicted at the February 2011 for committing a lewd act upon a minor (2011-GS-32-0364). He was represented by William Rast, Esq. On March 2, 2011, Applicant proceeded to trial where he was found guilty as charged. He was sentenced by the Honorable William P. Keesley, to confinement for a period of thirty (30) years for criminal sexual conduct with a minor, first-degree (2009-GS-32-2677) and fifteen (15) years for committing a lewd act upon a minor (2011-GS-32-0364). The sentences were to be served concurrently. A timely Notice of Appeal was filed on Applicant's behalf. Applicant was represented by Elizabeth Franklin-Best, Esquire at the direct appeal. The appeal was subsequently withdrawn.

¹ By order of Appointment of Counsel, Anna Good, Esq. was appointed on December 30, 2014.

C.A. No. 2012-CP-32-3136

Applicant filed a timely Application for PCR on August 2, 2012. An evidentiary hearing into the matter was convened on at the Lexington County Courthouse on August 14, 2013. Applicant was present at the hearing and was represented by Tristan Shaffer, Esq. Respondent was represented by Walt Whitmire, Esq., of the South Carolina Attorney General's Office. Counsel testified at the hearing. The Honorable Edgar W. Dickson denied and dismissed the Application in an order filed on May 2, 2014. Applicant did not seek a discretionary appeal.

Attached herewith and incorporated herein are the records of the Lexington County Clerk of Court regarding the subject conviction and prior PCR action, the Applicant's records from the South Carolina Department of Corrections, and Applicant's trial transcript, and the transcript from Applicant's prior PCR hearing. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective Assistance of PCR counsel:
 - a. "PCR counsel denied Applicant his statutory right to an appeal."

III.

Applicant seeks a belated appeal of the denial of his prior PCR application. Respondent submits that this is a successive application. Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981). However, Applicant

alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. The Respondent lacks sufficient information to admit or deny this allegation. The Respondent requests an evidentiary hearing on this ground for relief. Sharper, Id.; Austin, Id.

IV.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of failure to file a notice of appeal from the order of dismissal. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code '17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing. Respondent intends to move to dismiss Applicant's action absent timely and sufficient amended pleadings.

VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

WALT WHITMIRE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

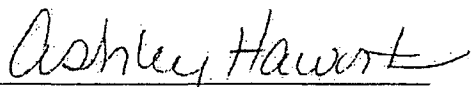
March 17, 2015

STATE OF SOUTH CAROLINA)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)	
)	
	)	2014-CP-32-4072
MICHAEL ELDERS, #345023)	
)	
Applicant,)	
)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	
)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Mrs. Anna Rawl Good, Esquire
 O'Neil, Good & Li, LLC
 PO Box 7284
 Columbia, SC 29202**

DATED this 17th day of March, 2015.



 Ashley Haworth, Legal Assistant
 For Respondent

1	State of South Carolina	)	In the Court
2	County of Lexington	)	Of Common Pleas
3		)	Case No.: 2014-CP-32-4072
4	Michael Elders,)	
5	Plaintiff,)	
6	vs.)	Transcript of Record
7	State of South Carolina,)	
8	Defendant.)	

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April 23, 2015

Lexington, South Carolina

BEFORE:

The Honorable Brooks P. Goldsmith, Judge

APPEARANCES:

Anna R. Good, Esquire
Attorney for the Plaintiff

Walt Whitmire, Assistant Attorney General
Attorney for the Defendant

ALSO PRESENT:

Michael Elders

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INDEX

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EXHIBITS

NO.	DESCRIPTION	PAGE
NONE		

1 Whereupon, the following proceedings were had,

2 THE COURT: Good morning, ladies and gentlemen.
3 Please be seated.

4 MR. WHITMIRE: May it please the Court. Your Honor,
5 the first matter before Your Honor today is Michael
6 Elders versus the State of South Carolina,
7 2014-CP-32-4072.

8 This is Mr. Elders' second application, however, it
9 is timely within the rules pursuant to Austin v. State.
10 We had a hearing two years ago in front of Judge Dickson.
11 He was represented at that PCR by Tristan Shaffer. The
12 judge held it under advisement for several months and
13 when the judge ruled, Mr. Shaffer was switching offices
14 and missed filing a notice of appeal from that order and
15 informed my office and me personally right away and we
16 tried to expedite this.

17 We already have the PCR transcript to help expedite
18 the appeal, but I'm consenting to Austin relief and I
19 believe Mr. Elders, who is presently represented by Ms.
20 Good, Ms. Good has an affidavit from Mr. Shaffer just to
21 put on the record.

22 MS. GOOD: Your Honor, it's not an affidavit. It's
23 a letter that Mr. Shaffer had sent to -- which I believe
24 Mr. Whitmire has seen -- my client stating that he failed
25 to file a timely appeal on his behalf and the reason

1 why.

2 THE COURT: Okay. No objection to the Court
3 considering this?

4 MR. WHITMIRE: Absolutely not, Your Honor.

5 THE COURT: All right. The State consents as I
6 understand it?

7 MR. WHITMIRE: Yes, sir.

8 THE COURT: Anything else then, Ms. Good?

9 MS. GOOD: No, sir.

10 THE COURT: All right.

11 MR. WHITMIRE: It's an extensive packet for what is
12 a relatively simple matter.

13 THE COURT: The Court will approve that agreement
14 then. Do you have a proposed order?

15 MR. WHITMIRE: Not on me for this case, Your Honor,
16 but I can get you one within the week.

17 THE COURT: Ms. Good, do you want to present any
18 evidence on this matter?

19 MS. GOOD: On Mr. Elders? If you're approving the
20 agreement for the appeal, then that's all we need, Your
21 Honor.

22 THE COURT: All right. The file was lost? Is that
23 what happened?

24 MR. WHITMIRE: Oh, no. We have that file.
25 Everything is extensive. Mr. Shaffer, the original PCR

1 attorney, missed filing a notice of appeal by a few weeks
2 when he was switching offices.

3 THE COURT: Oh, switching offices. Okay.

4 MR. WHITMIRE: And he actually let me know
5 immediately and that's not something that we can waive
6 with the Supreme Court. In fact, they are now insisting
7 on having a very limited hearing on Austin or White for
8 notice of appeal and we went ahead and got the PCR
9 transcript which I think will help expedite the order.
10 That's pretty much the whole file. All the record is
11 right there.

12 THE COURT: Is there anything else we need to do?

13 MR. WHITMIRE: Unless he is trying to go on the
14 other allegations which I would contest based on the bars
15 against success and the substantial limitations with
16 them.

17 MS. GOOD: No, Your Honor. He merely just wanted to
18 be able to appeal his PCR.

19 THE COURT: Okay. That motion is granted.

20 MS. GOOD: Thank you, Judge.

21 MR. WHITMIRE: Thank you, Judge.

22 WHEREUPON THE HEARING WAS CONCLUDED.
23
24
25

1 CERTIFICATE OF REPORTER

2 (STATE OF SOUTH CAROLINA)

3 (COUNTY OF LEXINGTON)

4

5 I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R.,
6 and Official Circuit Court Reporter for the Eleventh Judicial
7 Circuit in and for the State of South Carolina, do hereby
8 certify that I reported the proceedings in the before
9 captioned case in the Court of Common Pleas in and for the
10 State of South Carolina on the 23rd day of April, 2015.

11 I FURTHER CERTIFY that the forgoing 5 pages
12 constitute a true and accurate record of said proceedings.

13 I FURTHER CERTIFY that I am neither related, counsel
14 to, nor of interest to any party hereto.

15 IN WITNESS WHEREOF, I have hereunto set my hand at
16 Lexington County, this 25th day of March, 2016.

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Steven E. LeBlanc, Sr., R.P.R.
Eleventh Circuit Court Reporter
State of South Carolina.

ORIGINAL

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON)

ELEVENTH JUDICIAL CIRCUIT

Michael Elders,
S.C.D.C. No. 345023,

2015 JUN -6 PM 2:20

C.A. No. 2014-CP-32-4072

RECEIVED

FEB 10 2016

SC SUPREME COURT

Applicant,

CLERK OF COURT
LEXINGTON, SC

ORDER OF DISMISSAL PURSUANT
TO AUSTIN V. STATE.¹

v.)

State of South Carolina,

Respondent.)

_____)

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed November 7, 2014. The State submitted its responsive pleadings requesting partial summary dismissal. An evidentiary hearing into the matter was convened on April 23, 2015 at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Anna Goode, Esq. The Respondent was represented by Walt Whitmire, Esq., of the South Carolina Attorney General's Office.

In lieu of Tristan Shaffer's affidavit (1st PCR counsel), the State stipulated that Applicant would be able to meet his burden to prove that PCR counsel's failure to file a notice of appeal from denial of the C.A. No. 2012-CP-32-3136 Application entitled him to a Austin relief. Counsel for Applicant apprised the Court that she had fully discussed the current PCR Application with Applicant, advised Applicant of the procedural bars against successive and untimely PCR litigation, and was fully prepared to proceed forward.

This Court also had before it a copy of the transcript from the Applicant's trial transcript, the records of the Lexington County Clerk of Court, the Applicant's records from the South

¹ Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991).

Carolina Department of Corrections, the Application for Post-Conviction Relief, the State's Return, the prior PCR record and transcript, Counsel Shaffer's affidavit, and evidence presented at the hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. Applicant was indicted at the October 2009 term of the Court of General Sessions for Lexington County for criminal sexual conduct with a minor, first-degree (2009-GS-32-2677). Applicant was then indicted at the February 2011 committing a lewd act upon a minor (2011-GS-32-0364). He was represented by William Rast, Esq. On March 2, 2011, Applicant proceeded to trial where he was found guilty as charged. He was sentenced by the Honorable William P. Keesley, to confinement for a period of thirty (30) years for criminal sexual conduct with a minor, first-degree (2009-GS-32-2677) and fifteen (15) years committing a lewd act upon a minor (2011-GS-32-0364). The sentences were to be served concurrently. A timely Notice of Appeal was filed on Applicant's behalf. Applicant was represented by Elizabeth Franklin-Best, Esquire at the direct appeal. The appeal was subsequently withdrawn.

C.A. No. 2012-CP-32-3136

Applicant filed a timely Application for PCR on August 2, 2012. An evidentiary hearing into the matter was convened on at the Lexington County Courthouse on August 14, 2013. Applicant was present at the hearing and was represented by Tristan Shaffer, Esq. Respondent was represented by Walt Whitmire, Esq., of the South Carolina Attorney General's Office. Counsel testified at the hearing. The Honorable Edgar W. Dickson denied and dismissed the Application in an order filed on May 2, 2014. Applicant did not seek a discretionary appeal.

C.A. No. 2014-CP-32-4072 (present case)

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

1. Ineffective Assistance of PCR counsel:
 - a. "PCR counsel denied Applicant his statutory right to an appeal."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the stipulations and waivers presented at the evidentiary hearing. Further, this Court reviewed the Clerk of Court records regarding the subject's convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents, the written plea agreement from the General Sessions Records, the record from the original 2011 PCR Application, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact.

A.

As a result of Attorney Shaffer's affidavit, the State stipulated that Applicant would be able to meet his burden to prove that PCR counsel's failure to file a notice of appeal from denial of the C.A. No. 2012-CP-32-3136. Application entitled him to Austin relief where PCR counsel was unable to locate his file to rebut the allegation. Successive PCR Counsel for Applicant apprised the Court that she had fully discussed the current PCR Application with Applicant, advised Applicant of the procedural bars against successive and untimely PCR litigation, and was fully prepared to proceed on his case. Successive PCR Counsel apprised the Court that Applicant desired a discretionary appeal from Judge Dickson's order. Successive PCR Counsel also apprised the Court that Applicant wished to abandon any and all allegations that are

procedurally barred as untimely and successive.

This Court accepts the stipulation and finds that Applicant's allegation he was denied an appeal from the decision in his prior post-conviction relief action. "The right to seek appellate review of the denial of PCR is expressly authorized by state law." Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (citing S.C. Code Ann. § 17-27-100). "A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived." Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) (citations omitted). Even if the post-conviction court determines the applicant did not freely and voluntarily waive his appellate rights, the applicant must still petition the South Carolina Supreme Court to determine "whether he was prejudiced by his failure to obtain review of a meritorious issue." Odom, 337 S.C. at 263, 523 S.E.2d at 756 (1999).

Based on the stipulations, the Court finds Applicant did not knowingly and voluntarily waive the right to seek appellate review of Judge McIntosh's order. Accordingly, the Court hereby grants Applicant's request for appellate review of his prior post-conviction relief action pursuant to Austin v. State.

CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant is entitled to an appeal of his prior post-conviction relief action pursuant to Austin v. State.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Counsel and Applicant are directed to King v. State, 308 S.C.

WITNESSES

Cayce Department of Public Safety

Danielle Belk

Law Enforcement Case #:

SMB

ARREST WARRANT NUMBER

1203356

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: 10-12-09

VERDICT

GUILTY

Foreperson of Petit Jury

Date: MARCH 2, 2011

DOCKET NO. 2009GS3202677

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

OCTOBER TERM 2009

THE STATE

vs.

Michael Ray Elders

CDR #: 0385

Indictment for

Criminal Sexual Conduct with a Minor 1st Degree

§ 16-03-0655(A)(1)

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)

INDICTMENT FOR
Criminal Sexual Conduct with a Minor 1st
Degree

§ 16-03-0655(A)(1)

At a Court of General Sessions, convened on October 2009, the Grand Jurors of Lexington County present upon their oath:

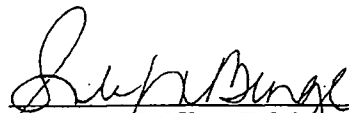
That **Michael Ray Elders** did in Lexington County, South Carolina, on or between January 1, 2008 and June 28, 2009, commit a sexual battery upon Minor (date of birth , a minor who was less than eleven years of age, to wit: the defendant penetrated the victim's vagina with his finger, in violation of Section 16-3-655(A)(1), Code of Laws of South Carolina, 1976, as amended.

A TRUE COPY



Lex. Co. C.C.C.P., G.S. & F.C.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA
COUNTY OF Lexington
STATE

LCDC

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2009GS3202677

VS.
Michael Ray Elders

AW#: 1203356
Date of Offense: 6/27/2008
S.C. Code §: 16-03-0652
CDR Code #: 0160

AKA:
Race: Sex: M Age: 47
DOB: SS#:
Address:
City, State, Zip: Cayce, SC 29033-1607
DL# SID#

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
In disposition of the said indictment comes now the Defendant who was
TO: Sex / Criminal sexual conduct with a minor - First degree

CONVICTED OF or PLEADS

In violation of § 16-03-0655 (A)(1) of the S.C. Code of Laws, bearing CDR Code # 0385
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS §17-25-45
(CSC w/ minor 1st or Lewd Act)

The charge is: As indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (def.'s initials)
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST:

Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the State Department of Corrections County Detention Center,
for a determinate term of 30 days/months/years or under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____, provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are
incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
 The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.
 The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP _____

Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

Payment Terms: _____ Obtain GED

Set by SCDPPPS _____ Attend Voc. Rehab. Or Job Corp. _____

Recipient:		
*Fine:	\$	
§14-1-206 (Assessments 107.5%)	\$	
§14-1-211 (A)(1)(Conv. Surcharge)	\$100	\$ 100
§14-1-211 (A)(2)(DUI Surcharge)	\$100	\$
§56-5-2995 (DUI Assessment)	\$12	\$
§56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§14-1-212 (Law Enforce. Funding)	\$25	\$ 25
§14-1-213 (Drug Court Surcharge)	\$150	\$
§50-21-114 (BUI Breath Test Fee)	\$50	\$
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5
§44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)	\$	\$
TOTAL	\$	\$ 130

May serve W/E beginning _____
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal consecutive weekly/monthly
pmts. of \$ _____ Beginning _____
\$ _____ Paid to Public Defender Fund

Other: Pay court costs within 9 mo.
As release from prison; recommend
as condition of any release that def.
 Conditional Discharge, §44-53-450(C) requires
\$350 be paid to the Clerk prior to case disposition have
 Appointed PD or appointed other counsel, No
§47.12 requires \$500 be paid to Clerk Contract
during probation. w/ victim

Clerk of Court/Deputy Clerk Beth A. Carrigan / 138

Presiding Judge William P. Harty

Court Reporter: S. Sheppard
SCCA217 (06/2010)

Judge Code: 2050

Sentence Date: March 2, 2011

NOTE: JURY FOUND THAT THE DEFENDANT DIGITALLY PENETRATED THE
VICTIM'S VAGINA (W/A)

WITNESSES

Cayce Department of Public Safety

Danielle T. Belk

Law Enforcement Case #:

DBM

ARREST WARRANT NUMBER

11-STR-00165

ACTION OF GRAND JURY

TRUE BILL

[Signature]
Foreperson of Grand Jury

Date: 2/17/11

VERDICT

GUILTY

[Signature]
Foreperson of Petit Jury

Date: MARCH 2, 2011

DOCKET NO. 2011GS320364

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2011

THE STATE
vs.

Michael Ray Elders

CDR #: 2468

Indictment for

Comitting a Lewd Act Upon a Minor

§ 16-15-0140

DONALD V. MYERS, SOLICITOR

SESSIONS

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)

INDICTMENT FOR
Comitting a Lewd Act Upon a Minor
§ 16-15-0140

At a Court of General Sessions, convened on February 2011, the Grand Jurors of Lexington County present upon their oath:

That **Michael Ray Elders** did in Lexington County, South Carolina between January 1, 2008 and June 28, 2009, being a person over the age of fourteen, willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, to wit: Minor _____, date of birth: _____ with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child, to wit: the defendant touched the victim's genitals, in violation of § 16-15-140 of the Code of Laws of South Carolina, 1976, as amended

A TRUE COPY
[Signature]

Lex. Co. C.C.C.P., G.S. & I.C.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

[Signature]

ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA
COUNTY OF Lexington
STATE

CCDE

IN THE COURT OF GENERAL SESSIONS

545

INDICTMENT/CASE#: 2011GS320364

AW#: 11-STR-00165
Date of Offense: 6/27/2008
S.C. Code §: 16-15-0140
CDR Code #: 2468

VS.
Michael Ray Elders
AKA:
Race: Sex: M Age: 47
DOB: SS#:
Address:
City, State, Zip: Cayce, SC 29033-1607
DL# SID#
*CDL CMV Yes No Hazmat Yes No

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS
TO: Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1996)
In violation of § 16-15-0140 of the S.C. Code of Laws, bearing CDR Code # 2468

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS §17-25-45
(CSC w/minor 1st or Lewd Act)

The charge is: As indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (def.'s initials)
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST:
Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the State Department of Corrections County Detention Center,
for a determinate term of 15 days/months/years or under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are
incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
 The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.
 The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:
 RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP _____

Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

Payment Terms: _____

Set by SCDPPPS _____

Recipient		
*Fine:	\$	
\$14-1-206 (Assessments 107.5%)	\$	
\$14-1-211 (A)(1)(Conv. Surcharge)	\$100	\$ 100
\$14-1-211 (A)(2)(DUI Surcharge)	\$100	\$
\$56-5-2995 (DUI Assessment)	\$12	\$
\$56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
\$14-1-212 (Law Enforce. Funding)	\$25	\$ 25
\$14-1-213 (Drug Court Surcharge)	\$150	\$
\$50-21-114 (BUI Breath Test Fee)	\$50	\$
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5
\$44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)	\$	\$
TOTAL	\$	\$

Obtain GED

Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal consecutive weekly/monthly
pmts. of \$ _____ Beginning _____

\$ _____ Paid to Public Defender Fund

Other: Same as 2009-GS-32-02677

Conditional Discharge, §44-53-450(C) requires
\$350 be paid to the Clerk prior to case disposition

Appointed PD or appointed other counsel,
§47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/Deputy Clerk Beth A. Cunniff

Court Reporter: S. Shepard

SCCA217 (06/2010)

Presiding Judge William P. Hendry

Judge Code: 2050

Sentence Date March 2, 2011

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

RECORD SUMMARY REPORT DATED 09/07/12

C0511

ELDER, MICHAEL RAY FBI # 924972HB3 SID# SC01201475 SCDC # 345023

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION ...: LEE CORR INST

DORM.....: SUM2129T

SECURITY/CUST.: 3 MINIMUM IN

RACE....:W SEX...:M

CURR INCARC SENT...: 30 YRS 0 MOS 0 DYS

PROJ MAXOUT DATE: 07/08/2039

CENTRAL MONITORING.: YES

PROJ PAROLE DATE: 00/00/0000

SOCIAL SECURITY #....:

EWC JOB...: SR TRAY LINE OPERATO

EDUC PGM.: NO CURR EDUC PROGRAM

CURRENT PROGRAM...: NO CURRENT PROGRAM

EWC LEVEL: 3F5 EEC LEVEL:

AGE...: 48 DATE OF BIRTH...:

ASSIGNMENT...: CAFETERIA

PREVIOUS NUMBERS:

** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE			COUNTY	SENTENCE		
	YRS	MOS	DYS		START	V/NV	CATEGORY
LEWD ACT/CHILD UNDER 16	15	0	0	LEXINGTON	7/15/20	9 N	4
CRIM SEX COND.W/MINOR(1S	30	0	0	LEXINGTON	7/15/20	9 V	5

PRIOR COMMITMENTS OVER 90 DAYS:

MISSING PRIORS DATA

DETAINERS (HOLD,WANTED,NOTIFY):

CODE NOT IN TABLE	HOLD	IRO	CATEG: 5
ABANDONMENT/NON-SUPPORT	WANTED	PRESIDING JUDGE	CATEG: 1
LEWD ACT/CHILD UNDER 16	HOLD	PRESIDING JUDGE	CATEG: 4

NO DETAINERS

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

NO ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

NO NON-ASSAULTIVE DISCIPLINARY HISTORY

HISTORY OF MOVEMENTS:

6/ 6/11	LEE	INCARCERATED	ADMINISTRATIVE
3/ 4/11	KIRKLAND	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
SR TRAY LINE OPERATO	09/26/11	0/ 0/ 0		YF5
WASH RACK ATTENDANT	06/07/11	9/25/11	LATERAL TRANSFER	YF5

HISTORY OF EARNED EDUCATION CREDITS:

EEC DESCRIPTION	START DATE	END DATE	TERMINATION REASON

NO SCHOOL ASSIGNMENTS

***** END OF REPORT *****

The South Carolina Court of Appeals

The State, Respondent,
 v.
 Michael Ray Elders, Appellant.

The Honorable William P. Keesley
 Lexington County
 Trial Court Case No. 2009-GS-32-02677
 2011-GS-32-00364

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DEC 7 2011

SC OFFICE OF
 APPELLATE DEFENSE

ORDER of DISMISSAL

The above entitled case is pending on appeal in this Court. It appears that Appellant, with full understanding of all possible consequences of this action and with agreement of counsel, wishes to withdraw the appeal and moves the Court for an Order dismissing the appeal.

IT IS ORDERED that the above captioned appeal is dismissed. The remittitur will be sent to the lower court as provided by Rule 221(b), of the South Carolina Appellate Court Rules.

JOHN CANNON FEW, CHIEF JUDGE

BY V. Claire Allen, Deputy
 CLERK

Columbia, South Carolina

cc: Appellate Defender Elizabeth A. Franklin-Best
 William Y. Rast, Jr, Esquire
 Assistant Deputy Attorney General Salley W. Elliott
 Debra Barry Moore, Esquire

FILED

12-7-11 *SW*

The South Carolina Court of Appeals

The State, Respondent,

v.

Michael Ray Elders, Appellant.

The Honorable William P. Keesley
Lexington County
Trial Court Case No. 2009-GS-32-02677
2011-GS-32-00364

REMITTITUR

No Petition for Reinstatement having been filed in the above matter since issuance of this Court's Order dated December 12, 2011,

IT IS SO ORDERED that the above appeal be and hereby is remitted.

JOHN CANNON FEW, CHIEF JUDGE

BY

[Handwritten Signature]
Clerk

RECEIVED

JAN 6 2012

SC OFFICE OF APPELLATE DEFENSE

Columbia, South Carolina

Original to: The Honorable Beth Carrigg

cc: Appellate Defender Elizabeth A. Franklin-Best
William Y. Rast, Jr, Esquire
Assistant Deputy Attorney General Salley W. Elliott
Debra Barry Moore, Esquire

FILED

1-6-12 PW