ALAN WILSON
ATTORNEY GENERAL

August 6, 2021

The Honorable Renee Elvis
Horry County Clerk of Court
P.O. Box 677
Conway, SC 29528-0677

Re: **Panteleimon Spirakis, #343051 v. State of South Carolina**
2019-CP-26-02651

Dear Ms. Elvis:

Enclosed please find the original Order of Dismissal signed by the Honorable William H. Seals, Jr. in the above-captioned case, for filing in your office.

In addition, please forward proof of service and a time stamped copy back to our office for our file.

Sincerely,

for WHR

William H. Ray
Assistant Attorney General

WHR/gch

CC: Carla F. Grabert-Lowenstein, Esquire

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Panteleimon Spirakis, SCDC No. 343051	)	Case No. 2019-CP-26-02651
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina	)	
Respondent.	)	

This matter comes before the Court by way of Applicant Panteleimon Spirakis's May 2, 2019, application for post-conviction relief. Respondent made its return and partial motion to dismiss on July 12, 2019. The Court convened an evidentiary hearing on June 25, 2021. Applicant was present at the hearing and represented by Attorney Carla F. Grabert-Lowenstein. Assistant Attorneys General William H. Ray and Chelsey F. Marto represented Respondent.

Applicant's plea counsel, Attorney Ralph J. Wilson, testified at the hearing. Applicant's codefendant, Lindsay Honeycutt, also testified. Applicant himself did not offer any testimony. The Court had before it Applicant's records from the South Carolina Department of Corrections, the current and amended application for post-conviction relief, transcripts from a pretrial hearing, transcripts from Applicant's and Honeycutt's plea hearings, and the records from the Horry County Clerk of Court regarding the subject convictions. This Court has reviewed the record and the pleadings, heard the testimony, observed the witnesses, and finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections. Applicant was indicted for sexual exploitation of a minor in the first degree (2016-GS-26-4786), two counts of engaging a child for sexual performance (2016-GS-26-4788; -4789), and two counts of criminal

sexual conduct with a minor in the first degree (2016-GS-26-4790; -4791) by the Horry County Grand Jury at its October 2016 term. Applicant was represented by Attorney Ralph Wilson, Sr., and Assistant Solicitors Mary-Ellen Walter and Leigh Andrew, of the Fifteenth Circuit Solicitor's Office, prosecuted the case.

On August 21, 2018, Applicant appeared before the Honorable Larry B. Hyman and entered a guilty plea, as indicted and without negotiation or recommendation, to two counts of first degree criminal sexual conduct, one count of first degree sexual exploitation of a minor, and two counts of engaging a child for sexual performance. Judge Hyman sentenced Applicant to imprisonment for consecutive terms totaling twenty years' imprisonment.

Applicant's plea counsel filed a notice of appeal on August 30, 2018, at Applicant's request and asserted that there were no apparent issues properly presented for appellate review. Applicant filed a *pro se* response on January 8, 2019 and asserted the following issues:

1. The jury pool was tainted.
   A. There was 24 hour a day coverage on newspaper, internet and TV. There were live internet feeds of all my court proceedings. Everyone had a preconceived opinion I was guilty with no evidence.
   B. There was an outbreak of violence towards me at the table during jury selection with my attorney. Jurors who were not chosen threatened me in front of my chosen jury as they left the courtroom. Judge Hyman was told immediately. By the time he called the bailiffs the men were gone. A change of venue and a new jury pool was requested. Both motions were denied.

2. Solicitor Crystal Leigh Andrew denied me access to my computer records and property. Information which could show that I was not around during the time in question. The other codefendant, Anthony Strickland, was allowed to get his property. The information was crucial in my defense.

3. Solicitor Crystal Leigh Andrew lied to my codefendant, Lindsay Honeycutt, saying she would get mental health court if she testified against me, Lindsay Honeycutt and her mother Lynn Sullivan both told me in person. Ms. Andrew used blackmail and extortion to get testimony. When Ms. Andrew was asked by Judge Hyman "if that was true, if mental health court was offered" Ms. Andrew replied, "No your honor she was just screened for it."

Lying in a court room. I reported Crystal Leigh Andrew to the South Carolina Bar, C Tex David. I filed numerous grievances and phone calls.

4. The corrupt Horry County Police fabricated the story against me by pressuring Lindsay Honeycutt. The HCPD knew she was addicted to pills, opiates, marijuana, and heroin. They pressured Lindsay to drop gang rape charges against Anthony Strickland who had the police on his pay roll at Chez Joey's strip club. By charging me they could manipulate any testimony out of Lindsay. Lindsay was released on bond. Presently she is back in J. Reuben Long Detention after she testified against me. Found in a car passed out [illegible] drugs.

5. Ineffective counsel. Ralph Wilson, Sr. did nothing to get testimony to clear my name. In the holding cell right after Lindsay Honeycutt pled out he said the following. "I met with Judge Hyman in chambers. I can not win with this jury. I have no one to testify for you. The only evidence they have is sworn testimony from Lindsay Honeycutt putting you at the scene with her. Judge Hyman said if you go to trial he will give you the maximum over 60 years if you lose. You will die in prison, you may get as little as 14 years. If you say I told you this I will deny it." He refused to go to trial. My brother attorney George Spirakis was in the holding cell with me. Ralph Wilson Sr. told me to plead out.

All I want is a fair trial with an unbiased judge. I was found guilty before I was tried. The jury was biased with a guilty verdict before we went to trial. I need access to my computer records. Time to question and subpoena witnesses. The Horry County Police needs to be investigated. Especially the detectives on my case. I have enclosed a letter to Allen Wilson SC State Attorney General with a brief story of my struggles. Please read it and this letter before you render a decision. Thank You.

The South Carolina Court of Appeals issued an order finding that Applicant had failed to provide a sufficient explanation as required by Rule 203 (d)(1)(B)(iv) of the South Carolina Appellate Court Rules (SCACR) and dismissed the appeal on March 6, 2019. The remittitur was sent on March 22, 2019. This application for post-conviction relief followed on May 2, 2019.

II. FACTUAL HISTORY

Between the dates of December 1, 2014 and April 30, 2015, Applicant sexually assaulted two twin four year old children. (Tr. 209, 9-13). The victims' biological parents, Lindsay Honeycutt and Ambrose Heavner, actively participated in the abuse and made the children

available to Applicant in exchange for drugs and money. (Tr. 209, 14-16). Applicant sexually penetrated the children, made them perform sex acts on each other, and other adults. (Tr. 209, 16-25). Applicant also filmed the abuse. (Tr. 209, 25 – Tr. 210, 2). The crimes took place at Chez Joey's, an Horry County strip club, and at Applicant's Horry County home. (Tr. 209, 20-22).

III. CURRENT APPLICATION

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

1. Ineffective assistance of counsel
   a. Failed to call witnesses to provide testimony on my behalf which caused me to plead guilty.
2. Judicial error
   a. The judge was told about a tainted jury pool and failed to allow a new jury selection.

At the evidentiary hearing Applicant proceeded forward with amended allegations that were served on Respondent, through counsel, on June 12, 2021, which alleged as follows:

1. Trial Counsel, Mr. Ralph Wilson, Sr., did not adequately investigate the statements of Ms. Lindsey Honeycutt, who was also charged as a Co-Defendant, to ascertain the validity and truthfulness of her statements. Multiple conflicting statements were made by Ms. Honeycutt that went without investigation. The Applicant was prejudiced by Mr. Wilson's lack of investigation given that Ms. Honeycutt's statements were a substantial portion of the reason the Applicant, Mr. Spirakis entered a plea of guilty. Had he known about the fact Ms. Honeycutt's statements went uninvestigated as to validity and truthfulness, he would have not entered his guilty plea.

2. Trial Counsel, Mr. Wilson did not adequately investigate the fact that there were additional suspects of which Ms. Honeycutt had material information. Investigation would have revealed possible affirmative defenses in the facts of other suspects If a proper investigation had been completed by Trial Counsel of these potential suspects and information attained thereof, Mr. Spirakis would not have entered his plea of guilty.

3. Trial Counsel, Mr. Wilson did not adequately investigate the impact of facts that Ms. Honeycutt was not on her proper mental health medication and was self-medicating with drugs not prescribed to her by a physician, and, the use

of illicit drugs. Mr. Spirakis was prejudiced as proper investigation would have revealed Ms. Honeycutt's statements were caused by her being under the influence of improper non-prescribed medications and use of illicit drugs.

4. The record shows there was no credible information found in the law enforcement investigation substantiating that the alleged minor victims could identify Mr. Spirakis as the perpetrator of the alleged molests on the minor victims. This is particularly significant as the victims were five year old twins. Trial counsel was derelict in not filing a written motion to have the victims identify Mr. Spirakis in court. At the very least the methods of probable cause which led Mr. Spirakis to be a suspect should have been questioned. His identify as the actual perpetrator of the alleged sexual assaults was not established. This critical motion which was not heard prior to entering the guilty plea. Mr. Spirakis was prejudiced by this motion not being heard since the minor victims likely could not identify Mr. Spirakis by the alleged victim as the perpetrator. It is unlikely that the State's case would have survived a motion to dismiss on this basis.

5. While Defendant's Counsel made a challenge to the interviews of the alleged victims and the methods used resulting in the allegations against Mr. Spirakis charged in this issue. There were additional specific, important reasons to challenge the interview tapes, as the minor children were not being able to testify. Specifically, Mr. Spirakis could not be identified as the perpetrator and the children could not give specifics of the alleged incidents. There were insufficient challenges by trial counsel. Mr. Wilson, to the trial judge's refusal to allow information from the tapes. The children were 5 year old twins. Judge Hyman's remark regarding "the memory of children that age," brought forth a serious question of credibility of the children due to their age. This may be found in the transcript of the hearing for ID motion. The Applicant believes examination and challenge of the tapes would have revealed the children displayed gaps in memory, became distracted by surroundings, drifted away from the interviewers questions and in general exhibited a substantial amount of inability to focus on the interview and the questions.

6. All these factors should have been presented and discussed within the discussion of admission of the children's interviews. This is a crucial point listed as an element of admissibility.

These statements become even more relevant in light of the fact that one of the solicitors assigned to this case stated during a motion hearing that the State was intending to have the children testify, and, was asking for admission of the taped interviews from the Children's Recovery Center.

Ms. Honeycutt was the only other alleged witness beyond the children's

tapes. By this critical factor not being challenged, Mr. Spirakis was prejudiced by the fact a challenge would likely have resulted in the tapes being determined as inadmissible. In light of Ms. Honeycutt's statements not being thoroughly challenged, and, the most important factor of the children's interviews not being challenge, Mr. Spirakis was prejudiced and felt forced into no choice but to plead guilty

7. Trial Counsel, Mr. Wilson, did not investigate the fact that the alleged victims in this case did not live at Applicant's residence. The children's school records, had they been obtained would have revealed their true residence. Other documents which should have been obtained were utility and rent records which would have evidenced Mr. Spirakis did not have access to the children at his residence or business.

Additional documents showing Mr. Sparikas did not have access to the children would have been documents from the Horry County Sheriffs Office of the visits made to the home of Mr. Spirakis as a condition of his being on probation. No children nor Ms. Honeycutt were found in the home of Mr. Spirakis

8 Whether or not the State intended to move to admit alleged prior bad acts contributed to the Petitioner's decision to enter a plea of guilty. Petitioner was without the full knowledge of the evidence which was going to potentially be used against him as it was not discussed with him by Trial Counsel. Such actions proved highly prejudicial as the Applicant could not and did not enter a fully informed guilty plea having been denied full knowledge of the evidence he was facing.

9 Furthermore, an appropriate and timely *Motion to Quash the Search Warrant* should have been heard. When the search warrant was executed two units were searched, #1: downstairs unit - 2811 Highway 17 South, North Myrtle Beach, South Carolina and #2: upstairs unit - 2809 Highway 17 South, North Myrtle Beach, South Carolina, while the warrant only included the address of #. Thus, the search of unit #2 was illegal and all evidence found therein should have been declared as Excluded. Thus, illegally obtained, (inadmissible) evidence improperly prejudiced Applicant, Spirakis' decision to plead guilty.

10 Trial counsel, Mr. Wilson, did not investigate whether or not the grandmother of the children, with whom the children were placed, had influence on the children's interviews. If it were found that the grandmother influenced the minor children's interviews, then Mr. Spirakis would not have entered his plea of guilty. This factor, too, materially prejudiced Mr. Spirakis.

11. If all the aforementioned factors cited above had been properly investigated, Applicant, Panteleimon Spirakis would not have entered his guilty plea. This is true even though the State represented they were not planning to proffer any of the evidence seized. Mr. Spirakis remained concerned about its potential admission, thus felt compelled over his free will to enter a plea of guilty.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Applicant's allegations are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e). SCRCP. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*,

286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *See Blackledge v. Allison*. 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

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

Failure to Investigate

Applicant raises five allegations that his plea counsel was ineffective for failing to investigate various aspects of his case. Namely, Applicant alleges that counsel failed to investigate the truthfulness of codefendant Honeycutt's statements, failed to investigate information Honeycutt had about additional suspects that would have revealed affirmative defenses at trial,

failed to investigate the impact of Honeycutt's mental health and drug abuse, failed to investigate the children's place of residence, and failed to investigate the influence that the children's grandmother had on their statements.

To establish counsel failed to adequately prepare for trial, an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998); *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998) (failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); *Davis v. State*, 326 S.C. 283, 486 S.E.2d 747 (1997) (relief denied where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); *Skeen v. State*, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial); *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999) (Trial counsel not ineffective for failing to timely request discovery because contents of documents were not presented at PCR hearing). At a minimum counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). However, a PCR applicant claiming that their counsel failed to present favorable witness testimony must present that testimony at the PCR hearing in order to prove prejudice from counsel's omissions. *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005).

Here, plea counsel testified that the evidence in this case largely consisted of the statements of the two minor victims, and that Applicant was prepared to proceed to trial until Honeycutt agreed to testify against him. He explained that Applicant's relationship with Honeycutt consisted

of him giving her drugs and money in exchange for access to the children. He stated that he believed her testimony would have likely led to a conviction at trial, and it was the catalyst that induced Applicant's guilty plea. He stated that he was aware of Honeycutt's mental health issues and drug abuse and would have attempted to impeach her credibility on those points had Applicant proceeded to trial. He also stated that he would have attempted to impeach her credibility for wavering and inconsistent statements that she had given to police, as well as her willingness to jeopardize the safety of her children. He stated that he would have attempted to impeach the children's testimony and identification of Applicant, but was weary of cross-examining the children too harshly and putting off the jury.

However, he stated that even if the jury found that she lacked credibility, her testimony would still have been brought out and would likely be very damaging to Applicant's chances at trial. Even though he would have challenged Honeycutt's credibility, Applicant chose to enter his guilty plea rather than risk going to trial and facing the maximum penalty. Plea counsel stated that Honeycutt's testimony would give Applicant no chance of winning, and that he had no doubt that he would have been convicted at trial.

Plea counsel stated that he may have called the children's therapist to testify had the case gone to trial. Otherwise, he was not aware of any other witness who could offer any defenses. He stated that he did not believe obtaining the children's school records would have helped with the defense. The evidence showed that the children were abused multiple times and that it may not have even occurred at Applicant's house. Honeycutt was expected to testify that the children were living with her at the time of the abuse and would have confirmed that Applicant had access to the children.

Plea counsel also testified that he attempted to contact the grandmother of the children but was unsuccessful. He indicated that she was uninterested in speaking with him because of the allegations against Applicant. She had previously given statements to the North Carolina Department of Social Services in relation to a separate investigation into allegations of abuse against the parents and Applicant. That investigation had not resulted in any charges, but he did not believe there was any way to investigate the notion that she had planted the story in the heads of the children, given that she would not communicate with him.

Honeycutt testified that she was on drugs at the time of Applicant's plea hearing and that she made up incriminating statements against him. She did so because she was told that she would be given mental health court if she cooperated against him. She stated that she lied when she testified that he threatened to kill her at his bond revocation hearing. On cross-examination she stated that her teenage daughter also lied, at her instruction, at the bond revocation hearing. She stated that she had recently tested positive for narcotics while in the Department of Corrections, and still takes psychiatric medication. She stated that she does not know if she would have told the truth at trial, but that she has never told the truth before in this specific case.

This Court finds that Applicant has failed to meet his burden of proving the allegations of ineffective assistance of counsel for failure to investigate. Honeycutt recanted her statement at the hearing, and admitted that she had lied to the court while under oath for reasons unknown to this Court. Therefore, this Court finds her testimony to lack credibility. Furthermore, plea counsel's credible testimony shows that he was well aware of precisely the facts that Applicant claims warranted further investigation. He attempted to contact the grandmother but she would not speak with him to assist in the defense, and he had no other method of casting doubt on the authenticity of the children's story. Finally, this Court finds that the evidence at trial would have shown that

Applicant had access to the children through his relationship with Honeycutt, whether it was at his home or at the strip club, and therefore further investigation into their address would have been pointless. As such, this Court finds no deficiency in counsel's investigation into the facts and evidence of this case.

Furthermore, Applicant has failed to prove that he was prejudiced by his counsel's performance. Regardless of Honeycutt's statements, Applicant could still have been found guilty based on the children's testimony alone. A jury could have found her completely incredible and nevertheless believed the children's story and identification. No amount of investigation into Honeycutt's credibility would have changed that. Applicant also has not presented testimony or evidence supporting the theory that the children's grandmother showing any influence on the children's statements. Applicant has failed to show that but for counsel's deficient investigation, he would have proceeded to trial. Instead, this Court finds that his decision to enter his guilty plea was freely, intelligently, and voluntarily made with the advice of competent counsel, and was made because he wanted to avoid trial and the risk of receiving the maximum sentence. Therefore, Applicant has failed to meet his burden of proof and these allegations must be denied.

Children's Identification

Applicant alleges that plea counsel was ineffective for failing to adequately challenge the children's identification of Applicant. Specifically, Applicant alleges that his counsel should have filed a written pretrial motion to have the children identify him, should have challenged the probable cause that arose from their statements, and should have specifically challenged the interview tapes on the grounds that the children "displayed gaps in memory, became distracted by surroundings, drifted away from the interviewers questions and in general exhibited a substantial amount of inability to focus on the interview and the questions."

Reliability of properly admitted eyewitness identification, like credibility of other parts of the prosecution's case, is a matter for the jury. *Foster v. California*, 394 U.S. 440 (1969). However, suggestive elements in identification procedures may so undermine the reliability of the eyewitness identification and implicate constitutional concerns. *Id.*; *Neil v. Biggers*, 409 U.S. 188 (1972).

Prior to trial plea counsel moved for an in-camera hearing to determine whether the minor victims could identify Applicant. (Tr. 78, 20 – Tr. 79, 3). He explained that the only reference to Applicant by the children in the interview tapes had been when they referred to someone named "Pete." (Tr. 79, 10-13). He requested a photograph lineup to determine who "Pete" was before the children be allowed to testify. (Tr. 79, 22 – Tr. 80, 8). The State pointed out that Applicant "looked markedly different" at the time of the prosecution than he did at the time of the crime, and it would likely be difficult for them to actually identify Applicant given their age. (Tr. 81, 4 – Tr. 2, 11). She explained that the State intended to have Honeycutt provide the identification at trial, and that the children would not be asked to identify him in court. (Tr. 82, 14-23). The Court agreed to allow Applicant to be absent from the courtroom if he requested an identification, but also noted that it would open the door to testimony about the extent to which children could accurately identify someone. (Tr. 85, 24 – 88, 5).

Plea counsel testified at the PCR hearing that the victims in this case were very young at the time of the crime. While it is rare for kids of such a young age to qualify to testify, he believed these two children were unquestionably qualified to testify at trial. He noted that there were some issues with their ability to keep focus, but that was to be expected with young children. Overall he believed they did a good job giving statements to the Children's Recovery Center, and did not see any adequate basis for challenging admission of the interview tapes, other than the narrow grounds presented in his pretrial motion. Had they gone to trial he explained that he would have targeted

their focus in an attempt to impeach their credibility. Furthermore, he stated that this strategy would have been very relevant if Applicant had proceeded to trial, but given that he decided to enter his plea because of Honeycutt's potential testimony would likely lead to a conviction, there was nothing he could do regarding the children's credibility.

He stated that he did not want to file a written pretrial motion to have the children identify Applicant in court because he did not want them to be notified of his intention to seek the identification, because it may allow the children to be coached. He believed having a spontaneous in-court identification would have been more authentic. He also explained that he had asked for a lineup, but that there was no requirement of one at trial. He believed that the children were aware of who Applicant was, and could identify him. Even if they could not, it would still have presented a risk at trial because the jury likely would have believed the rest of the children's story.

This Court finds that plea counsel fulfilled his duties to his client by challenging admission of the interview tapes on the basis that the interviewer asked leading questions. He did so even though he believed that the children were not improperly influenced by the questions they were asked. Furthermore, this Court finds that plea counsel was prepared to challenge the credibility of the children had Applicant taken the case to trial. Finally, plea counsel offered a specific strategic reason for not filing a written pretrial motion requesting that the children identify Applicant in court. He was concerned that doing so would effectively provide the children with notice that they would need to specifically identify Applicant, and believed that it would be more beneficial to have the identification be spontaneous. This Court finds that to be objectively reasonable under the circumstances given the children's age, the significance of their testimony, and the difference in Applicant's appearance at the time of the crimes and the time of trial. Therefore, Applicant has failed to meet the burden imposed upon him to prove that his counsel's performance was deficient.

As for prejudice, Applicant has failed to show that he would have proceeded to trial had his counsel done anything different regarding the children's potential testimony, and therefore has not met his burden. He was not motivated to enter his plea because he believed that counsel should have done more to challenge the admissibility or credibility of the children's statements against him. Instead, the record shows that he was prepared to proceed to trial specifically because he believed his counsel could successfully challenge the testimony of the children. Applicant's assertion that his counsel's performance regarding the testimony and credibility of the children somehow induced his plea is contrary to the evidence in the record and the testimony presented at the PCR hearing. Therefore, Applicant has failed to meet the burden imposed upon him because he has failed to prove he was prejudiced. These allegations must be denied.

Prior Bad Acts

Applicant alleges that he did not know that evidence of prior bad acts would be used against him at trial, because plea counsel did not discuss it with him.

Plea counsel raised the issue of prior bad acts in a pretrial hearing (Tr. 74, 24 – Tr. 75, 3). He stated that he understood that the State was going to offer Applicant's criminal history, even if Applicant did not take the stand. (Tr. 75, 1-3). The State explained that it was required to do so because it was an element of Applicant's criminal sexual conduct with a minor in the first degree charge. (Tr. 75, 6-23). That statute states as follows:

> A person is guilty of criminal sexual conduct with a minor in the first degree if the actor engages in sexual battery with a victim who is less than eleven years of age; or the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of . . . an offense listed in §23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to §23-3-430(D)."
>
> S.C. Code Ann. §16-3-655.

The Court ruled that the evidence must be admitted because there was no other way for the State to prove its case, since the prior bad acts themselves are an element of the offense. (Tr. 77, 8 – Tr. 78, 17).[1]

At the PCR hearing plea counsel testified that he discussed the charges with Applicant and reviewed every bit of discovery with him. He also explained that Applicant was on probation for a similar offense at the time the subject crime occurred, and he had actually represented Applicant on those prior charges. Applicant did not produce any evidence to support his assertion that he was unaware of evidence of these convictions being introduced. Instead, it is clear from the record that he was aware that this prior bad acts evidence would be introduced because it was discussed at length at a pretrial hearing. Therefore, Applicant has failed to meet his burden of proving his counsel's representation was deficient. Even if deficiency exists, Applicant has not shown prejudice because any misunderstanding about the prior bad acts evidence against him was cured by the Court's ruling in the pretrial hearing. Therefore, this allegation must be denied.

Search Warrant

Applicant alleges that his counsel provided ineffective assistance by failing to challenge a search warrant of his home. Specifically, Applicant alleges that police searched the wrong address, and that plea counsel should have challenged the probable cause giving rise to his prosecution. This allegation is without merit.

[1] Since Applicant's plea the Supreme Court of South Carolina has found that evidence of prior §23-3-430 convictions are admissible in prosecutions for criminal sexual conduct with a minor in the first degree, but the criminal defendant is entitled, upon a proper motion, to a bifurcated trial because of the risk of unfair prejudice created by introduction of such evidence. *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019). Applicant has not alleged or introduced any evidence that his counsel was ineffective for failing to move for bifurcation, or that he entered his guilty plea because his charges were going to be tried together.

The remedy in a criminal case for unlawful searches and seizures in violation of the United States Constitution's Fourth Amendment is exclusion of the unlawfully obtained evidence at trial. *Mapp v. Ohio*, 367 U.S. 643 (1961). If no evidence is seized, there is no evidence to exclude. Additionally, minor inaccuracies on the face of a search warrant will not necessarily lead to exclusion of evidence. *See U.S. v. Leon*, 468 U.S. 897, 926 (1984) (suppression is appropriate only where officers could not have harbored an objectively reasonable belief in the existence of probable cause). It is patently reasonable for counsel to refrain from filing frivolous motions and unnecessarily delaying criminal proceedings. *See Strickland*, 466 U.S. at 688-89 (acknowledging that the American Bar Association's Standards for Criminal Justice serve as guidelines for reasonable trial strategy); *ABA Standards for Criminal Justice 4-1.9; 4-8.1*.

Plea counsel testified that he was aware of the issue with the search warrant, but did not believe it was worth challenging because the police did not find anything pursuant to the search. He described the location as a duplex style residence with two separate addresses inside one building, both of which belonged to Applicant. Police had a warrant for one, but actually searched both. Police were looking for videos, cameras, or other incriminating evidence, and specifically targeted a safe that was found within one of the units, but found nothing. Nothing was discovered during the search that would have been used against Applicant at trial. Plea counsel believed it would have been a waste of time to attempt to quash this search warrant because there was nothing to suppress and it simply would not have benefitted Applicant in any material way. Furthermore, he testified that he believed it may have just been as scrivener's error on the face of an otherwise valid warrant, so a motion to suppress or quash the warrant may have not even been successful. He stated that he would have challenged the warrant if he believed it would have helped Applicant.

This Court finds that Applicant has not met his burden of proving ineffective assistance of counsel for failing to challenge the search warrant in this case. Plea counsel's testimony shows that he made a strategic decision to not challenge the search warrant because doing so would have been a waste of time and would not have benefitted his client's interest. Plea counsel's decision was reasonable under the circumstances because the search did not produce any incriminating evidence to be used against Applicant at trial.

Applicant has failed to prove that he was prejudiced by the failure to challenge the warrant for largely the same reason. He would have gained no conceivable benefit from a quashed warrant that produced no evidence to suppress. There is also no evidence in the record indicating that his decision to enter a guilty plea was motivated by the search warrant issue. Therefore, Applicant has failed to meet his burden of proving ineffective assistance of counsel and the application shall be dismissed with prejudice.

CONCLUSION

Based on the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 31 **day of** July **, 2021.**

William H. Seals, Jr.
Presiding Judge
Fifteenth Judicial Circuit

Marion, South Carolina

Mailed
8-11-2021