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Aug 10 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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On Petition for Writ of Certiorari from Spartanburg County  
Honorable J. Mark Hayes, II, Post-Conviction Relief Judge  
Honorable R. Keith Kelly, Trial Judge

Appellate Case No. 2022-000434

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DANIEL SPADE,

Respondent-Petitioner,

vs.

THE STATE,

Petitioner-Respondent.

---

APPENDIX  
VOLUME III OF VII

---

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## INDEX

|                                                                                                         |      |
|---------------------------------------------------------------------------------------------------------|------|
| TRIAL TRANSCRIPT .....                                                                                  | 1    |
| CLERK’S RECORDS . .....                                                                                 | 347  |
| SCDC RECORDS.....                                                                                       | 418  |
| FINAL BRIEF OF APPELLANT .....                                                                          | 421  |
| FINAL BRIEF OF RESPONDENT .....                                                                         | 444  |
| FINAL REPLY BRIEF OF APPELLANT.....                                                                     | 487  |
| RECORD ON APPEAL .....                                                                                  | 424  |
| COURT OF APPEALS UNPUBLISHED OPINION AFFIRMING CONVICTION .....                                         | 984  |
| PETITION FOR REHEARING.....                                                                             | 993  |
| ORDER DENYING PETITION FOR REHEARING.....                                                               | 1003 |
| PETITION FOR WRIT OF CERTIORARI .....                                                                   | 1004 |
| RETURN TO PETITION FOR WRIT OF CERTIORARI .....                                                         | 1033 |
| ORDER DENYING PETITION FOR WRIT OF CERTIORARI.....                                                      | 1062 |
| REMITTITUR .....                                                                                        | 1063 |
| PCR APPLICATION.....                                                                                    | 1064 |
| MOTION FOR DISCOVERY .....                                                                              | 1074 |
| RETURN TO MOTION FOR DISCOVERY .....                                                                    | 1078 |
| FIRST AMENDED PCR APPLICATION.....                                                                      | 1084 |
| DISCOVERY MOTION HEARING TRANSCRIPT, NOVEMBER 12, 2017.....                                             | 1095 |
| ORDER ON DISCOVERY MOTION/ORDER DENYING MOTION TO COMPEL SIGNED<br>BY JUDGE COLE, FEBRUARY 8, 2018..... | 1142 |
| RETURN TO APPLICATION FOR POST-CONVICTION RELIEF.....                                                   | 1145 |
| RESPONSE AND AFFIDAVIT OF SERVICE OF DISCOVERY MATERIAL .....                                           | 1155 |

|                                                                                |                      |
|--------------------------------------------------------------------------------|----------------------|
| MOTION FOR STATUS CONFERENCE AND ORDER SETTING DATE CERTAIN.....               | 1161                 |
| ORDER SETTING EVIDENTIARY HEARING SIGNED BY JUDGE HAYES, NOVEMBER 6, 2018..... | 1165                 |
| SECOND AMENDED PCR APPLICATION.....                                            | 1167                 |
| THIRD AMENDED PCR APPLICATION.....                                             | 1179                 |
| MEMORANDUM IN SUPPORT OF PCR.....                                              | 1190                 |
| POST-CONVICTION RELIEF HEARING TRANSCRIPTS .....                               | 1241                 |
| MAY 14, 2019 .....                                                             | 1241                 |
| MAY 15 – 17, 2019 .....                                                        | 1278                 |
| MAY 20, 2019 .....                                                             | 1868                 |
| PCR HEARING EXHIBITS, PETITIONER’S #1-40.....                                  | 2073                 |
| Petitioner's Exhibit No. 1, 12-24-2020 E-Mail Packet .....                     | 2076                 |
| Petitioner's Exhibit No. 2, 8-10-2007 E-Mail .....                             | 2100                 |
| Petitioner's Exhibit No. 3, Cellphone Audio 3-31-2011 .....                    | 2101                 |
| Petitioner's Exhibit No. 4, 3-20-11 Call on Sunday Evening .....               | 2102                 |
| Petitioner's Exhibit No. 5, Photo of Sign on Door .....                        | 2104                 |
| Petitioner's Exhibit No. 6, Order for Continuance .....                        | 2105                 |
| Petitioner's Exhibit No. 7, 12-11-13 E-Mail .....                              | 2109                 |
| Petitioner's Exhibit No. 8, USB Drive .....                                    | TRANSPORTED TO COURT |
| Petitioner's Exhibit No. 9, Transcript of Minor Child 4-7-11 .....             | 2127                 |
| Petitioner's Exhibit No. 10, Transcript of Minor Child 4-8-11 .....            | 2153                 |
| Petitioner's Exhibit No. 11, Transcript of Minor Child 4-12-11 .....           | 2176                 |
| Petitioner's Exhibit No. 12, Transcript of Minor Child 4-14-11 .....           | 2199                 |
| Petitioner's Exhibit No. 13, Transcript of Minor Child 5-6-11 .....            | 2227                 |
| Petitioner's Exhibit No. 14, Family Court Transcript 10-15-12 .....            | 2256                 |
| Petitioner's Exhibit No. 15, Curricular Vitae .....                            | 2448                 |
| Petitioner's Exhibit No. 16, Dr. Bruck's Report .....                          | 2462                 |
| Petitioner's Exhibit No. 17, Summary of Dr. Bruck .....                        | 2467                 |
| Petitioner's Exhibit No. 18, Curriculum Vitae .....                            | 2479                 |
| Petitioner's Exhibit No. 19, Lamb Report Summary .....                         | 2617                 |
| Petitioner's Exhibit No. 20, Update Request E-Mail .....                       | 2637                 |
| Petitioner's Exhibit No. 21, E-Mail Dated 2-29-12 .....                        | 2638                 |
| Petitioner's Exhibit No. 22, E-Mail Dated 9-18-12 .....                        | 2640                 |
| Petitioner's Exhibit No. 23, E-Mail Dated 9-17-12 .....                        | 2642                 |
| Petitioner's Exhibit No. 24, E-Mail Dated 3-20-13 .....                        | 2643                 |
| Petitioner's Exhibit No. 25, E-Mail Dated 5-13-13 .....                        | 2645                 |
| Petitioner's Exhibit No. 26, E-Mail Dated 5-24-13 .....                        | 2646                 |
| Petitioner's Exhibit No. 27, E-Mail Dated 9-10-13 .....                        | 2647                 |

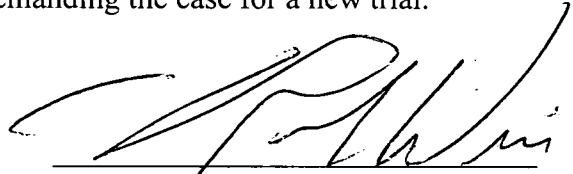
|                                                                                   |      |
|-----------------------------------------------------------------------------------|------|
| Petitioner's Exhibit No. 28, E-Mail Dated 12-11-13 .....                          | 2650 |
| Petitioner's Exhibit No. 29, E-Mail Dated 2-11-14 .....                           | 2653 |
| Petitioner's Exhibit No. 30, E-Mail Dated 2-20-14 .....                           | 2655 |
| Petitioner's Exhibit No. 31, Order on Defendant's Motion .....                    | 2656 |
| Petitioner's Exhibit No. 32, Order for Date Certain .....                         | 2657 |
| Petitioner's Exhibit No. 33, Order on Defendant's Motion .....                    | 2658 |
| Petitioner's Exhibit No. 34, Order for Continuance .....                          | 2659 |
| Petitioner's Exhibit No. 35, E-Mail Packet .....                                  | 2660 |
| Petitioner's Exhibit No. 36, Affidavit .....                                      | 2661 |
| Petitioner's Exhibit No. 37, Letter Dated 9-11-17 .....                           | 2662 |
| Petitioner's Exhibit No. 38, Letter Dated 9-13-17 .....                           | 2663 |
| Petitioner's Exhibit No. 39, Transcript .....                                     | 2664 |
| Petitioner's Exhibit No. 40, Letter Dated 7-10-18 .....                           | 2674 |
| PCR HEARING EXHIBITS, DEFENSE #1 .....                                            | 2675 |
| ORDER FOR DSS FILE, MAY 20, 2019 .....                                            | 2678 |
| APPLICANT’S MEMORANDUM IN SUPPORT OF ACCESS TO DSS RECORDS, JUNE 25,<br>2019..... | 2681 |
| DISCOVERY ORDER/ORDER OF PROTECTION, FILED AUGUST 16, 2019.....                   | 2688 |
| STATE’S PROPOSED ORDER OF DISMISSAL .....                                         | 2755 |
| APPLICANT’S OBJECTIONS TO STATE’S PROPOSED ORDER OF DISMISSAL .....               | 2830 |
| FILED ORDER OF DISMISSAL .....                                                    | 3028 |
| APPLICANT’S RULE 59(E) MOTION .....                                               | 3112 |
| STATE’S RETURN TO RULE 59(E) MOTION.....                                          | 3112 |
| REPLY TO STATE’S RETURN TO RULE 59(E) MOTION.....                                 | 3148 |
| MOTION TO RECONSIDER HEARING TRANSCRIPT .....                                     | 3168 |
| ORDER MODIFYING PRIOR ORDER AND GRANTING NEW TRIAL .....                          | 3263 |
| STATE’S MOTION TO RECONSIDER UNDER RULE 59(E).....                                | 3291 |
| APPLICANT’S RESPONSE IN OPPOSITION TO RULE 59(E) MOTION.....                      | 3318 |
| ORDER DENYING STATE’S 59 (E) MOTION.....                                          | 3323 |



**CONCLUSION**

For the foregoing reasons this Court should rehear this matter and issue an order reversing the conviction of Daniel William Spade and remanding the case for a new trial.

July 20, 2016

A handwritten signature in black ink, appearing to read 'C. Rauch Wise', written over a horizontal line.

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Attorney for Daniel William Spade

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED

JUL 21 2016

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

SC Court of Appeals

Honorable R. Keith Kelly, Circuit Court Judge

SC Court of Appeals No. 2014-000448

The State, ..... Respondent,

vs.

Daniel William Spade ..... Appellant

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Trayhnam who, after being duly sworn, deposes and says that she is the legal assistant for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on July 20, 2016, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Rehearing in the above case addressed to William M. Blitch, Jr., Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211.

SWORN to and Subscribed

Sandy Trayhnam

before me this 20 day

of July, 2016.

Mark Gene Harten (L.S.)

Notary Public for South Carolina

My Commission expires: 11/30/22

**1002**  
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JUL 21 2016  
SC Court of Appeals

LAW OFFICE OF  
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July 20, 2016

Jenny Abbott Kitchings, Clerk  
SC Court of Appeals  
1220 Senate St.  
Columbia, SC 29211

Re: The State vs Daniel William Spade (2014-000448)

Dear Ms. Kitchings:

Enclosed herewith is the original Petition for Rehearing concerning the above referenced matter, together with the original Affidavit of Service.

With kindest regards, I am

Very truly yours,



C. Rauch Wise

CRW/mjh  
cc William M. Blitch, Jr.

# The South Carolina Court of Appeals

The State, Respondent,

v.

Daniel William Spade, Appellant.

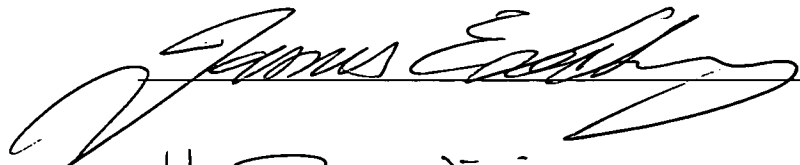
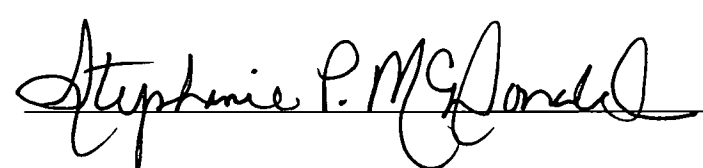
Appellate Case No. 2014-000448

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## ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.  
 J.  
 J.

Columbia, South Carolina

cc:

Barry Joe Barnette, Esquire  
Alan McCrory Wilson, Esquire  
Clarence Rauch Wise, Esquire  
William M. Blich, Jr., Esquire

**FILED**

August 18, 2016 27

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**OCT 11 2016**

**S.C. SUPREME COURT**

**THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

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**CERTIORARI TO THE COURT OF APPEALS**

**APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas**

**Honorable R. Keith Kelly, Circuit Court Judge**

---

**SC Court of Appeals No. 2014-000448**

---

**The State, ..... Respondent,**

**vs.**

**Daniel William Spade ..... Petitioner.**

---

**PETITION FOR WRIT OF CERTIORARI**

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## INDEX

*Page:*

|                                                                                                                                                                                                                                                                                                                                                                                                                                 |    |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Table of Authorities .....                                                                                                                                                                                                                                                                                                                                                                                                      | ii |
| Certificate of Counsel .....                                                                                                                                                                                                                                                                                                                                                                                                    | 1  |
| Questions Presented .....                                                                                                                                                                                                                                                                                                                                                                                                       | 1  |
| Statement of the Case .....                                                                                                                                                                                                                                                                                                                                                                                                     | 2  |
| Argument:                                                                                                                                                                                                                                                                                                                                                                                                                       |    |
| Question I: Did the trial court err in excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than Daniel Spade were present when the occurrence of panic attacks was used by the State to prove Mr. Spade had abused his daughter? .....                                                                                                                        | 6  |
| Question III: Did the trial court err in permitting Douglas Brannon, a private attorney, to actively participate in the trial of this case when he had represented the mother and adoptive father of the minor child in the family court case? .....                                                                                                                                                                            | 11 |
| Question III: Did the trial court err in ruling that Doug Brannon had been properly appointed as required by S. C. Code § 1-7-470 when the solicitor failed to produce the commission from the governor as required by the statute? .....                                                                                                                                                                                       | 17 |
| Question IV: Did the trial court err in failing to exclude the testimony of Meredith Thompson-Loftis when the State had been ordered to turn over to the defendant the file of Ms. Loftis if they intended to use her as a witness a reasonable time before trial and the State did not turn over substantial portions of the file until four days before trial and portions were not turned over until the day of trial? ..... | 19 |
| Conclusion .....                                                                                                                                                                                                                                                                                                                                                                                                                | 25 |

## Table of Authorities

| Cases:                                                                                           | Page:  |
|--------------------------------------------------------------------------------------------------|--------|
| <i>Berger v. United States</i> , 295 U.S. 78 (1935) .....                                        | 14     |
| <i>Downey v. Dixon</i> , 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987) .....                       | 23     |
| <i>Duke v. Westvaco Dev. Corp.</i> , 279 S.C. 464, 309 S.E.2d 293 (Ct. App. 1983) .....          | 24     |
| <i>Ganger v. Peyton</i> , 379 F.2d 709 (4 <sup>th</sup> Cir. 1967) .....                         | 15, 19 |
| <i>Herron v. Century BMW</i> , 395 S.C. 461, 719 S.E.2d 640 (2011) .....                         | 18     |
| <i>People v. Aguilar</i> , 218 Ill. App. 3d 1, 578 N.E.2d 109 (1991) .....                       | 23     |
| <i>S. C. Dep't of Soc. Servs. V. Mary C.</i> , 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011) ..... | 22     |
| <i>Samples v. Mitchell</i> , 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997) .....                  | 24     |
| <i>Sedore v. Epstein</i> , 864 N.Y.S.2d 543 (2008) .....                                         | 15     |
| <i>State v. Addis</i> , 257 S.C. 482, 186 S.E.2d 415 (1972) .....                                | 15, 16 |
| <i>State v. Collins</i> , 409 S.C. 524, 763 S.E.2d 22 (2014) .....                               | 8      |
| <i>State v. Eldridge</i> , 951 S.W.2d 775 (Tenn. Ct. Cr. App.) .....                             | 15     |
| <i>State v. Huntley</i> , 349 S.C. 1, 562 S.E.2d 472 (2002) .....                                | 19     |
| <i>State v. Kerr</i> , 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1999) .....                        | 21     |
| <i>State v. Lyles</i> , 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008) .....                       | 11     |
| <i>State v. Mattoon</i> , 287 S.C. 493, 339 S.E.2d 867 (1986) .....                              | 16, 18 |
| <i>State v. Trotter</i> , 322 S.C. 537, 473 S.E.2d 452 (1996) .....                              | 4, 21  |
| <i>State v. Wiles</i> , 383 S.C. 151, 679 S.E.2d 172 (2009) .....                                | 8      |
| <i>Taylor v. Illinois</i> , 484 U.S. 400 (1988) .....                                            | 24     |
| <i>United States v. Bonds</i> , 12 F.3d 540 (6 <sup>th</sup> Cir.1993) .....                     | 9      |

|                                                                                                                                                                                                       |               |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| <i>United States v. Ibisevic</i> , 675 F.3d 342 (4 <sup>th</sup> Cir. 2012) .....                                                                                                                     | 11            |
| <i>Young v. United States</i> , 481 U.S. 787 (1987) .....                                                                                                                                             | 14, 16        |
| Constitution:                                                                                                                                                                                         |               |
| Article I, § 3 of the Constitution of the State of South Carolina .....                                                                                                                               | 14            |
| Fourth Amendment to the Constitution of the United States of America .....                                                                                                                            | 14            |
| Fifth Amendment to the Constitution of the United State of America .....                                                                                                                              | 14            |
| Statutes:                                                                                                                                                                                             |               |
| S. C. Code § 1-7-405 .....                                                                                                                                                                            | 18            |
| S. C. Code § 1-7-470 .....                                                                                                                                                                            | 1, 12, 17, 18 |
| S. C. Code § 1-7-4701 .....                                                                                                                                                                           | 4             |
| Rules:                                                                                                                                                                                                |               |
| Rule 401, South Carolina Rules of Evidence .....                                                                                                                                                      | 8             |
| Rule 403, South Carolina Rules of Evidence .....                                                                                                                                                      | 8             |
| Rule 5, South Carolina Rules of Criminal Procedure .....                                                                                                                                              | 21            |
| Other Authorities:                                                                                                                                                                                    |               |
| Eli Wald, <i>Disqualifying a District Attorney When a Government Witness Was Once the District Attorney's Client: The Law Between the Courts and the State</i> , 85 DENV. U. L. REV. 369 (2007) ..... | 15            |
| John D. Bessler, <i>The Public Interest and the Unconstitutionality of Private Prosecutors</i> , 47 ARK. L. REV. 511 (1994) .....                                                                     | 12            |



**Certificate of Counsel**

I hereby certify that a Petition for Rehearing was filed on July 21, 2016. The Petition for Re-hear ing was denied by the South Carolina Court of Appeals on August 18, 2016.

**Questions Presented**

Question I: Did the trial court err in excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than Daniel Spade was present when the occurrence of panic attacks was used by the State to prove Mr. Spade had abused his daughter?

Question II: Did the trial court err in permitting Douglas Brannon, a private attorney, to actively participate in the trial of this case when he had represented the mother and adoptive father of the minor child in the family court case?

Question III: Did the trial court err in ruling that Doug Brannon had been properly appointed as required by S. C. Code § 1-7-470 when the solicitor failed to produce the commission from the governor as required by the statute?

Question IV: Did the trial court err in failing to exclude the testimony of Meredith Thompson-Loftis when the State had been ordered to turn over to the Defendant the file of Ms. Loftis if they intended to use her as a witness a reasonable time before trial and the State did not turn over substantial portions of the file until four days before trial and portions were not turned over until the day of trial?

## STATEMENT OF THE CASE

### *Procedural Facts*

Daniel Spade was arrested on May 3 , 2011 and charged with criminal sexual conduct with a minor. The Spartanburg grand jury indicted him on June 17, 2011. An amended indictment was returned on February 21, 2014. He was tried before the Honorable R. Keith Kelley and a jury on February 24-26, 2014. Prior to the start of the trial, Solicitor Barry Barnett presented a letter written by him appointing Mr. Doug Brannon, the attorney who had represented the mother and adoptive father in the second termination of parental rights matter, as a special prosecutor in the trial. The jury convicted Mr. Spade of criminal sexual conduct with a minor. Judge Kelly sentenced him to 35 years in prison. Mr. Spade filed his notice of appeal on March 4, 2014.

Mr. Spade appealed his conviction to the South Carolina Court of Appeals. On July 6, 2016, the Court of Appeals affirmed his conviction in an unpublished opinion. *State v. Spade*, Opinion No. 2016–UP–352 (S.C. Ct. App. July 6, 2016). A petition for rehearing was filed on July 21, 2016. The Petition for Rehearing was denied on August 18, 2016.. On September 22, 2016 this Court granted a 20 day extension to file this Petition for Writ of Certiorari which is now due on October 10, 2016.

### *Facts of the Case*

While Daniel Spade was employed with the same company as Heather Smith, they met and had a brief affair.<sup>1</sup> As a result of this affair, a daughter was born. Mr.

---

<sup>1</sup>

In December of 2007 Mrs. Smith married David Jolley who later adopted the minor child. App. at 257, ll 20-21.

Spade, who then resided in Virginia, came to Spartanburg a few months after the birth of his child to visit. App. at 257 ll 5-9. He visited numerous other times as she grew older. App. at 257, ll 15-17.

Mr. Spade expressed a desire to establish regular visitation with his daughter. When the mother rebuked this attempt, he filed an action in August of 2007 seeking visitation. App. at 257, ll 15-17; App. at 279, ll 23-25. The parties agreed to mediate the matter prior to a hearing. During the mediation conference, the mother of the minor child decided that “Danny D” would be the appropriate name for their daughter to call Mr. Spade. App. at 258, ll 6-23. No explanation was given for the name chosen for the daughter to use.

As a result of the mediation, Mr. Spade was given visitation with his daughter. Before visitation could begin, Mrs. Jolley filed the first action to terminate Mr. Spade’s parental rights. This action was filed in 2008. App. at 258, ll 24-25 to 259, ll 1-14; App. at 298, ll 20-23. After Mrs. Jolley lost the first termination of parental rights action, Mr. Spade started his visitation. He visited with the minor child several times in Spartanburg and for ten days in the summer of 2010 she went to Virginia to stay with him. App. at 260, ll 19-23. After the visitation in Virginia, Mr. Spade visited in Spartanburg, SC in September and October of 2010.

After the September of 2010 visit, Mrs. Jolley complained of their daughter having anxiety attacks, not sleeping well, crying for no reason and, after being potty trained, starting to wet herself. App. at 263, ll 8-25 to 265, ll 1-9. She sought out Kimberly Roseborough, a counselor who was qualified at trial as an expert in child abuse

and treatment. App. at 304, ll 19-22. At that time she also filed an action to stop all visitation. App. at 281, ll 20-23. The purpose of the minor child seeing the counselor was to resolve the anxiety issues. After about 6 months of counseling, during which no allegation of sexual abuse arose, the counselor, on March 28, 2011, told Mrs. Jolley she was recommending that visitation resume. App. at 286, ll 5-22; 319, ll 11-16. This counselor had also recommended to Mrs. Jolley that a “sit down” be held with Mr. Spade, the counselor, and Mr. And Mrs. Jolley. App. at 300, ll 3-8. This was the last contact Ms. Rosborough had with the minor child and Mrs. Jolley.

During the time visitation stopped, Mr. Spade did have telephone contact with his daughter. App. at 290, ll 13-13-16; 292, ll 14-18. Mrs. Jolley testified she was “not happy” that Mr. Spade had told their daughter “[Minor child], you can say I love you too, daddy.” App. at 291, ll 11-18.

Three days after the recommendation that visitation resume, Dale Smith, the grandmother of the minor child, first reported that the child told her of an incident of alleged sex abuse. App. at 32, ll 9-21. A “day or two” after Mrs. Smith was first told of the alleged incident, she told her husband. App. at 345, ll 16-25 to 346, ll 1-2 After a few more days, Mrs. Smith reported what had been said to Mrs. Jolley. App. at 347, ll 20-22.

The child’s mother then took the child to Tabitha Webber for a forensic interview. She was qualified at trial as an expert in family counseling and child therapy. App. at 363, ll 17-20. Ms. Webber testified that as a result of her interview she contacted the local police and made arrangements for the minor child to enter therapy. App. at 355, ll

2-13. As a result of the statement by the minor child, Mr. Spade was arrested.

The minor child testified that during a visit at the hotel Mr. Spade was staying in, he put his private parts in her mouth. App. at 244, ll 7. The minor child further testified that no other act of sexual abuse occurred. App. at 246, ll 8-9. She did not identify on which visit this occurred, but that it occurred in the restroom near the pool. App. at 244, ll 8-25. She further testified that the pool was on the same floor as their room. App. at 250, ll 15-22. The testimony by the witness from the hotel was that Mr. Spade stayed on the second floor on one visit and the third floor on the other stay. App. at 340, ll 18-25 to 341, ll 1-13. The pool was located on the first floor. App. at 341, ll 1-2. The minor child also testified that a lot of people were present at the pool. App. at 253, ll 23-24. These people would have had ready access to the restroom at the pool. She further stated that the bathroom did not contain a stall. App. at 251, ll 13-18. The record did not establish on which day Mr. Spade stayed at the hotel that this incident allegedly occurred.

## Argument

### Question I

**Did the trial court err in excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than Daniel Spade were present when the occurrence of panic attacks was used by the State to prove Mr. Spade had abused his daughter?**

At trial defense counsel proffered the testimony of Dale Smith to establish that the minor child had had panic attacks when people other than Mr. Spade were present. Rec. on App. at 330, ll 11-17. The proffered testimony also established that a panic attack had occurred in the presence of Mrs. Smith over two years after Mr. Spade's last visit. App. at 329, ll 1-7; 330, ll 15-17. The State argued that this was proof of third party guilt which had been excluded in a pre-trial hearing. App. at 331, ll 21-25. The State further argued the testimony should be excluded because it tended to show "[a]nd even in the best light I don't think you could say that it's just David Jolley. It could be any male person, or whatever, that could cause these panic attacks from there but there were other people available." App. at 331, ll 23-25 to 332, ll 1-2. The State then concluded "To me, even if it is relevant in this case, it's highly prejudicial. It outweighs the probative effect in this case." App. at 332, ll 20-22. In response, defense counsel appropriately pointed out "We are not establishing third party guilt. We are establishing explanation for symptoms, which the State of South Carolina is going to argue is a symptom of child sexual abuse and she's having panic attacks because of what her biological father did." App. at 334, ll 15-19. The testimony was excluded.<sup>2</sup>

---

<sup>2</sup>

The trial judge cautioned defense counsel concerning this testimony "Don't point to any

True to the prediction by defense counsel, the State argued in closing the anxiety attacks were caused by the sexual abuse. Mr. Brannon said in closing “Then what we found out was that he got to take ██████ to Virginia for an extended period of time. And then you hear that ██████ becomes anxious You hear that a potty trained little girl wets herself. You hear that a four year old girl, is afraid of the dark. You hear that a four year old little girl has to sleep under a table like this. You hear that this baby does this just so she can close her eyes and not be afraid.” App. at 403, ll 3-10. He further argued “But what we know is before that meeting ██████ was curled up under a table. ██████ was fearful. ██████ was clinging. ██████, potty trained, stands behind a door in the bathroom in her mommy’s house and pees herself.” App. at 405, ll 10-15. But what the jury did not hear was that anxiety attacks had occurred two years after the last visit of Mr. Spade. They also did not hear that anxiety attacks had occurred in the presence of David Jolley, the adoptive father. The jury, unfortunately, was left with only one impression - the attacks were caused by the alleged sexual abuse. With no other explanation for the anxiety attacks and no testimony that the attacks occurred at a time other than Mr. Spade’s visitation, the conclusion of the jury was both logical and compelled by the incomplete evidence.

The alternative explanation for the anxiety attacks was relevant evidence as it tended to prove the anxiety attacks were not caused by any alleged sexual abuse by Mr. Spade. As this court has said “Evidence is relevant and admissible if it tends to establish

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particular individual.” App. at 336, ll 8-9. This admonishment apparently did not apply to the prosecution as Mr. Brannon, in his closing argument, pointed to only one individual - Mr. Spade.

or make more or less probable the matter in controversy.” *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); Rule 401, South Carolina Rules of Evidence. The trial court mistakenly viewed the testimony as being evidence of third party guilt which he had excluded in a pre-trial motion. He failed to recognize, and therefore did not use his discretion in so ruling, that the testimony was relevant on the issue of the cause of the anxiety attacks. Defense counsel never argued the testimony related to third party guilt. Nor did the trial judge explain how the testimony related to third party guilt. Defense counsel only argued that panic attacks had occurred at times other than around Mr. Spade.

As the State argued below, an alternative explanation for the anxiety would have been prejudicial to the theory of the State’s case. Mr. Spade agrees. But when one argues that evidence is prejudicial, this is not what is meant. As this Court has said “Moreover, the standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of unfair prejudice that substantially outweighs the probative value of the evidence.” *State v. Collins*, 409 S.C. 524, 536, 763 S.E.2d 22, 28 (2014). Evidence that supplies an alternative explanation for the anxiety attacks is probative of a very relevant issue. Any alleged prejudice to the State in admitting the testimony is not outweighed by the Defendant being able to explain a series of facts in a manner inconsistent with the State’s theory of guilt. As has been said by another court “Unfair prejudice does not mean the damage to [the State’s] case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir.1993)



The trial judge used an improper basis to rule that the testimony was not admissible. This ruling prevented the jury from hearing relevant evidence that would have established that the anxiety attacks occurred when Mr. Spade was not around and therefore lessened the probability that he was the cause of the anxiety attacks. This testimony would not have caused the jury to decide the case on an improper basis. In fact, the testimony would have aided the jury in deciding the case on a proper basis.

The Court of Appeals in addressing this issue issued an opinion that is contradictory and did not consider the facts of the case. The Court of Appeals properly noted that the proffered testimony did establish that panic attacks did occur when David Jolly and his wife Heather were present. The Court then concluded “Appellant failed to show that the evidence was inconsistent with Appellant’s guilt.” *State v. Spade*, Op. No. 2016–UP–352 (S.C. Ct. App. July 6, 2016) App. at 89. What the Court of Appeals failed to consider was that as the State argued to the jury the panic attacks happened only concerning the visitation of Mr. Spade, panic attacks at times other than visitation with Mr. Spade would be inconsistent with Mr. Spade’s guilt. Certainly a panic attack two years after his last visit would be relevant to prove the State’s theory was not correct or reliable.

In making the analysis as to the panic attacks, the Court of Appeals stated “No context was provided as to the circumstances existing before and during the attacks, and there was no indication of whether the panic attacks did or did not occur around the time of Appellant’s visits with Victim.” *Spade*, App. At 89. What the Court of Appeals failed to consider was that the proffered testimony did establish a panic attack that occurred

after October of 2012. App. at 329, ll 1-7. That date was two years after Mr. Spade last saw his child. The Court of Appeals in essence judged the weight of the testimony as to the other panic attacks, not its admissibility. As panic attacks in the presence of Mr. Jolly would tend to make the State's argument less likely, then the testimony was admissible. In cross examination of Ms. Smith, the State never argued or suggested that the timing was improper or not probative. All that was asked was who else was around during the panic attacks. During argument against the admissibility of the other panic attacks the State argued that the panic attack occurred around Mr. Jolly and other males. They argued:

And I understand the defense's point that it's going to be - - they are going to argue that the only time the panic attacks occurred is when David Jolly was there, but I think you heard evidence of the witness testify it could be any kind of factors. Therefore, I think it's not reliable. It's not relevant. And even if it is relevant in this case, it's highly prejudicial. It outweighs the probative effect in this case." App. at 333, ll 14-22.

The State never argued that "no context" of the panic attacks was given. They conceded the cause of the panic attacks "could be any kind of factors," which is the precise reason defense counsel wanted to introduce the other panic attacks. If the State believed attacks were "confusing" to the jury, they should have at least made some argument before the trial judge to explain their position. As the evidence of the panic attacks was relevant, the Court of Appeals erred in holding the exclusion of the evidence of other panic attacks was proper. This Court should grant the Petition for Writ of Certiorari and reverse the decision of the Court of Appeals. As the Court of Appeals has said "Few rights are more fundamental than that of an accused to present witnesses in his

own defense.” *State v. Lyles*, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008).

The State never offered a compelling reason to exclude the testimony Mr. Spade proffered. As the testimony of Mrs. Smith was the only testimony as to another cause of the panic attacks, the exclusion was prejudicial to Mr. Spade. As the Fourth Circuit has said reversing the exclusion of the only testimony to support the defense theory “ [T]he excluded testimony was the only evidence that would have corroborated the Defendant's own testimony of assertedly innocent conduct.” *United States v. Ibisevic*, 675 F.3d 342, 351 (4th Cir. 2012). This Court should grant the Petition for writ of Certiorari and reverse the decision of the Court of Appeals.

## Question II

**Did the trial court err in permitting Douglas Brannon, a private attorney, to actively participate in the trial of this case when he had represented the mother and adoptive father of the minor child in the family court case?**

A criminal justice system simply cannot operate with a prosecutor in the criminal case having an ethical obligation of confidentiality to a witness or potential witness. If before an attorney becomes a prosecutor, he had previously represented a key witness or potential witness in a civil case or a family court matter, he should not prosecute the criminal case unless he obtains the consent of defense counsel or a waiver of the attorney client privilege by the witness or potential witness. The reason is obvious. As the former attorney for the witness or potential witness, he would have an ethical obligation not to reveal any impeaching knowledge he may have. He would have an ethical obligation to keep a potential witness off the stand if he knew the witness would not testify truthfully. But as a prosecuting attorney he would also have an ethical obligation to inform the

defense counsel of the impeaching information, which he, as a private attorney, is also ethically obligated not to disclose. Which master does he serve?

The constitutionality of private prosecutors and its impact on the criminal justice system has been called into question. As one author said:

Thus, to ensure the reliability of criminal convictions, the use of private prosecutors must be strictly prohibited. Such prosecutors have strong incentives to please their private clients, and consequently, the potential for prosecutorial misconduct is particularly high. Specifically, private prosecutors may charge an accused inappropriately, fail to deliver complete Brady materials, seek a harsher punishment than is deserved, or engage in misconduct at trial. Because the discretion of prosecutors is virtually unchecked and nearly impossible to monitor, the only way to ensure the reliability of convictions is to prohibit the use of private prosecutors.

John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511 (1994).

Against these concerns, the facts of this case must be evaluated. On the morning of trial, the solicitor for the Seventh Judicial Circuit gave counsel for Daniel Spade a letter stating that Doug Brannon, the attorney who represented the mother and the adoptive father in the second action involving the termination of the parental rights of Mr. Spade, would be a special prosecutor in the case. Counsel for Mr. Spade asked that Mr. Brannon be disqualified on two grounds. First, he had not been appointed in keeping with the provisions of S.C. Code § 1-7-470. Second, counsel pointed out that Mr. Brannon had represented both the natural mother and the adoptive father in the action in Family Court to terminate the parental rights of Mr. Spade and “that creates an inherent conflict of interest . . .” App. at 120, ll 1-25. The TPR action was based upon the same allegations as this present action.

In arguing against the motion the solicitor argued:

MR. BARNETTE: Your honor, I think the solicitor has the right to appoint a special prosecutor.

Mr. Brannon has been involved in this case almost from the beginning. He knows it inside and out. He's been very helpful to our prosecutors. We have actually gotten Jennifer Jordan and Kim Leskanic going to be trying this case, Your Honor, from that standpoint.

\* \* \*

This weekend I made that decision going through, and we actually met with Ms. Jordan, and I said "why don't we just appoint you as special prosecutor to help out in case some issue comes up and potentially help with a witness or help with the situation within the trial itself."

App. at 121, ll 3-21.

Mr Brannon did more than just "help out" on some issue. He argued the *Batson* motion. App. at 193, ll 18-25 to 201, ll 1-16. He assisted the minor child from the stand. App. at 255, ll 9-11. He conducted the direct examination of Meredith Thompson-Loftis and the motions related to her testimony. App. at 356, ll 3-25 to 378, ll 1-14. He argued the issue of the order of closing arguments. App. at 387, ll 21-25 to 389, ll 1-18; 394, ll 6-18. Finally he made the only closing argument for the State. App. at 398, ll 15 to 25, to 408, ll 1-8.

In denying the motion on both grounds, the trial judge simply said "Well, I don't see a conflict, though Mr. Shabel. I really don't. Mr. Barnette, as the solicitor of this circuit, can appoint any licensed attorney to act as a special prosecutor. That's my understanding." App. at 122, ll 7-10. He further said "[A]s far as the conflict, I don't see the conflict. Certainly there would be a conflict had he represented your client - - . . . but he didn't." App. at 122, ll 14-19.

The inherent conflict of the special prosecutor mentioned by defense counsel below violates the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fifth and Fourteenth Amendments to the Constitution of the United States of America. A Defendant in a criminal case has the right to be prosecuted by a prosecutor who is free from any conflict of interest, potential or actual.

The United States Supreme Court has held that an attorney for a company cannot be appointed as special prosecutor in a trademark criminal contempt action for violation of a restraining order where the attorney also represents the company who owned the trademark. The Court said “[A]s will generally be the case, the appointment of counsel for an interested party to bring the contempt prosecution in this case at a minimum created *opportunities* for conflicts to arise, and created at least the *appearance* of impropriety.” *Young v. United States*, 481 U.S. 787, 807 (1987)(emphasis in original).

The reason for such a rule is clear. As the United States Supreme Court said in *Berger v. United States*, 295 U.S. 78, 88 (1935):

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.

No prosecutor should have the obligation of confidentiality to the natural mother and adoptive father that Mr. Brannon has. The obligation of confidentiality to a client is exactly what creates the conflict. A prosecutor has an ethical duty to share with defense

counsel all conversations with prosecution witnesses which may be inconsistent with prior statements. The private lawyer has the exact opposite obligation. His conversations with his client must remain sacrosanct. In holding that a prosecutor who had represented the wife in a divorce action could not also prosecute the husband on a criminal assault charge, the Fourth Circuit Court of Appeals said “ We think the conduct of this prosecuting attorney in attempting at once to serve two masters, the people of the Commonwealth and the wife of Ganger, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment.” *Ganger v. Minor Victim* 379 F.2d 709, 714 (4th Cir. 1967); *See also, State v. Eldridge*, 951 S.W.2d 775 (Tenn. Ct. Cr. App.)

An argument has been made that the rule of confidentiality is so strong that even with a waiver, a trial court should disqualify a prosecutor from handling a case that involves his former client. “Moreover, given the public interest in reserving confidentiality, the court may exercise its inherent power and disqualify the district attorney even if the former client waives his confidentiality.” Eli Wald, *Disqualifying a District Attorney When a Government Witness Was Once the District Attorney’s Client: The Law Between the Courts and the State*, 85 DENV. U. L. REV. 369, 383 (2007). In denying the right of private counsel to prosecute the case, a New York court said “In the case of the prosecutor, all of these obligations flow not to the complainant, but to the public, which is the client.” *Sedore v. Epstein*, 864 N.Y.S.2d 543, 548 (2008).

To the extent *State v. Addis*, 257 S.C. 482, 186 S.E.2d 415 (1972) is contrary to the argument of Mr. Spade in this matter, the case should be overruled. *Addis* recognizes

that privately retained counsel “assumes the same obligations to the court as the solicitor himself.” *Id.* at 417, 257 S.E.2d at 487. The case does not address the inherent conflict involved in this dual representation as discussed in this brief. The Court further stated “If he participates in the trial of a case and does only what a solicitor should do, the Defendant has no right to complain.” *Id.* As noted above, as a matter of ethics, a private attorney cannot do only what a solicitor does. The private attorney is required to honor the confidentiality of his conversations with his client. The solicitor does not have such a requirement.

The practice of appointing “special prosecutors” has been criticized by the this Court. This Court has said “Although we find no error in this practice, we express our disapproval of the practice of appointing private counsel to prosecute criminal cases. Because of the increased possibility of a conflict when private counsel is involved, we believe the practice should be discouraged.” *State v. Mattoon*, 287 S.C. 493, 495, 339 S.E.2d 867, 869 (1986). The Court of Appeals failed to discourage the practice. No case in South Carolina involving special prosecutors has discussed or mentioned the inherent conflict of the duty to disclose evidence by a prosecutor and the duty of the private attorney to honor the confidentiality.

Mr. Spade is not required to prove actual prejudice in this case. As noted by the United States Supreme Court “Given the fundamental and pervasive effects of such an appointment, we therefore hold that harmless-error analysis is inappropriate in reviewing the appointment of an interested prosecutor in a case such as this.” *Young* at 814. In fact, to develop prejudice Mr. Spade would have to be permitted to examine Mr. Brannon



under oath and ask that he obtain a waiver from his clients of the attorney-client privilege. If Mr. Spade were to examine Mr. and Mrs. Jolley about their conversation with Mr. Brannon they would have the absolute right to refuse to answer the questions. The simplest solution is for this Court to reverse the conviction of Mr. Spade with a decision barring in this case and in all future cases, the use of a special prosecutor who has represented parties involved in the same incident as the criminal prosecution.

### Question III

**Did the trial court err in ruling that Doug Brannon had been properly appointed as required by S. C. Code § 1-7-470 when the solicitor failed to produce the commission from the governor as required by the statute?**

The Court of Appeals found that Mr. Spade did not preserve this issue for review. The Court of Appeals apparently held the lower court did not rule upon the issue and not that counsel for Mr. Spade failed to raise the issue. The Court of Appeals erred in this ruling. Beginning on page 120 of the Appendix, a discussion of the issue involving Douglas Brannon being a special prosecutor begins. The issue involving the statute is raised at line 11 of the page. The issue involving the conflict of interest is found beginning at line 17. At that point, the trial judge had two issues before him. His ruling begins on page 122 at line 7. In ruling against the statute issue, the trial judge states “Mr. Barnette, as the solicitor of this circuit, can appoint any licensed attorney to act as a special prosecutor. That’s my understanding. In fact, I have had it happen to me before Mr. Barnette was the prosecutor in a case.” App. at 122, ll 8-12.<sup>3</sup> Defense counsel then

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Trial counsel’s acknowledgment that the solicitor has the right to appoint a special prosecutor is nothing more than an acknowledgment that the solicitor may do so if the

acknowledges the ruling saying “we understand. Thank you.” App. at 122, l 13. In that ruling the trial judge only mentions the appointment of a special prosecutor. He does not at that point discuss the conflict issue. The statute only relates to the appointment of a special prosecutor.

After this acknowledgment by defense counsel, the trial judge then rules on the conflict issue. He then begins by saying “And the other - - as far as the conflict, I don’t see the conflict.” App. 122, ll 14-15. When he begins his ruling by saying “And on the other” he obviously had concluded ruling on the issue involving the statute. His ruling on that issue had even been acknowledged by defense counsel. The record shows that everyone understood the first ruling had been on the statute issue. The issue was preserved. As this Court has said “We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner.” *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011).

In *State v. Matton*, 287 S.C. 493, 339 S.E.2d 867 (1986) the South Carolina Supreme Court held that S. C. Code § 1-7-405 applies to special prosecutors. Thus, S. C. Code § 1-7-470 should also apply to the special prosecutor in this case. Defense counsel called to the attention of the trial court that Doug Brannon had not been commissioned by the governor’s office as required by the statute. App. at 120, ll 12-16. The trial court simply ignored this argument and permitted Mr. Brannon to act as a counsel in the case.

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solicitor goes through the proper procedure. The trial judge obviously understood that or the trial judge would have used the trial counsel’s words against him.

This Court has held that a violation of a statute does not cause a reversal of a trial unless the defendant can establish prejudice. *State v. Huntley*, 349 S.C. 1, 6, 562 S.E.2d 472, 474 (2002)(“Evidence the simulator test was not run in conformity with Act 434 goes to the weight, not the admissibility, of Huntley's breathalyzer results.”). In this case Mr. Spade can establish prejudice. As the Fourth Circuit has said “We think the conduct of this prosecuting attorney in attempting at once to serve two masters, the people of the Commonwealth and the wife of Ganger, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment.” *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967). By permitting Mr. Brannon to assist in prosecuting this matter, the due process right of Mr. Spade to have a truly independent prosecutor prosecute his case has been violated.

#### Question IV

**Did the trial court err in failing to exclude the testimony of Meredith Thompson-Loftis when the State had been ordered to turn over to the Defendant the file of Ms. Loftis if they intended to use her as a witness a reasonable time before trial and the State did not turn over substantial portions of the file until four days before trial and portions were not turned over until the day of trial?**

The order of the Honorable J. Mark Hayes filed on February 27, 2013 specifically required the State, within a reasonable time before trial, to turn over the file of Meredith Thompson-Loftis in the event they elected to use her as a witness in the case. Order of J. Mark Hayes filed February 22, 2013, App. at 106. On October 31, 2013 the State sent to defense counsel the records of Ms. Loftis from May 17, 2011 through February 16, 2012. App. at 137, ll 15-21. This act advised defense counsel that the State intended to use Ms. Thompson-Loftis and the Defendant concedes this was a reasonable time before trial. On

Thursday before the trial, the State sent to the Defendant records of Ms. Loftis from February 23, 2012 until December 31, 2013. App. at 137, ll 18-25 to 138, ll 1-6. The majority of the records were available to the State when they sent the records on October 23, 2013. No reason was ever offered for not disclosing all the available documents when the previous disclosure was made. Assuming that at least 30 days prior to trial was a reasonable time to make the disclosure, the State had over 270 days, excluding weekends, to make the disclosure ordered by Judge Hayes. They apparently made a decision not to make the full disclosure.

During the testimony of Ms. Loftis, defense counsel learned that the minor child had continued to see Ms. Loftis for January and February of 2014. App. at 370, ll 10-25. These notes were not given to defense counsel prior to trial. The trial judge, in rejecting defense counsel's motion to strike her testimony and exclude her testimony from the record, ruled that the State could not use any testimony from the counseling sessions in January and February of 2014. App. at 373, ll 4-23.<sup>4</sup>

The violation of the discovery rules in this case is more than a violation of Rule 5 of the South Carolina Rules of Criminal Procedure. Arguably the notes from Ms. Loftis may not have been obtainable under Rule 5. See, *State v. Trotter*, 322 S.C. 537, 473

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The fact that the trial judge did exclude any testimony from January 2014 until February of 2014 (App. at 268-269) only serves to point out the State had not seriously taken their obligations under the order of Judge Hayes. Ms. Thompson-Loftis had seen the child into 2014 and this issue should have been brought to the trial court's attention at the pre-trial Motion. A defense used by Mr. Brannon that the records were not under the "control" of the State flies in the face of the plain wording of the Order. App. at 269, ll 2-4. It further illustrates Mr. Brannon did not understand his obligations as a prosecutor as opposed to a private lawyer.

S.E.2d 452 (1996). Defense counsel, in preparation for the trial, and not relying entirely upon Rule 5, had over a year before trial obtained a specific order from Judge Hayes requiring that the notes be turned over a reasonable time before trial. As defense counsel appropriately pointed out to the trial judge “Furthermore, Your Honor, just for the record, it does - - you know, the fact that we got it prevents us from being able to have any experts, should we have wanted to have an expert look at it.” App. at 140, ll 18-21.

The courts of South Carolina have held on several occasions that a violation of Rule 5 discovery is not reversible unless the defendant can show actual prejudice. *See, State v. Kerr*, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1999). The Defendant contends that this analysis should not apply here because the State has violated a specific order of a circuit judge to produce the information in time for the Defendant to be able to use the information at trial. When a specific order is involved, this court should not use a prejudice standard for the State had knowledge of the specific court order and what it required. The State simply failed to comply with the order.

A defendant would not know how the information may be helpful until defense counsel has had the opportunity to further review and evaluate the information with an expert. The State had ample notice to provide the Defendant with the proper information. In fact had the State simply provided all the notes from Ms. Loftis that it had available on October 31, 2013 this issue might not have arisen. At the trial below the State never offered an explanation as to why they did not produce all of Ms. Loftis’ notes that were in fact available when they made a partial disclosure. The State cannot assert a good faith effort to comply with the order.

A thorough review of the counseling notes reveals some notations that the defendant would want to review with an expert or even cross examine upon if counsel had had the time to read and understand the notes. For example, on page 466 of the Record on Appeal the note suggests that Ms. Thompson-Loftis is preparing the child for the upcoming trial and not counseling her. His notation near the top states “Plan for upcoming trial.” Page 568 reflects a discussion with the child about “court trial - mid February.” At the bottom of the page the therapist is again going over events that allegedly occurred almost three years earlier. Page 572 continues to prepare the child for court. On page 573 again there is a discussion about the upcoming trial. Had the Defendant had time to consult with an expert, he could have determined whether continuing to discuss the alleged abuse almost three years after it allegedly occurred is appropriate therapy. In addition, should the child’s therapist be the one who is “prepping” her for court. These practices become suspicious. As the Court of Appeals said about the same therapist:

Ms. Stichnoch was highly critical of Ms. Loftis' interviewing techniques, specifically her continuing to have therapy sessions with Anna G. about the sexual abuse allegations until a full assessment was conducted. Ms. Stichnoch stated a child of Anna G.'s age is easily influenced, and repetitive sessions and questions about the allegations could inadvertently and inappropriately reinforce those allegations with the child.  
*S. C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 23, 720 S.E.2d 503, 507 (Ct. App. 2011).

Trial counsel requested that the testimony of Ms. Loftis be excluded. The trial judge refused. But this was not the only alternative available to the trial court. “[O]nce a trial court determines that a discovery violation has occurred, the court may order further

discovery, grant a continuance, exclude the evidence, or impose any sanction which, in its discretion, it deems just under the circumstances.” *People v. Aguilar*, 218 Ill. App. 3d 1, 9, 578 N.E.2d 109, 115 (1991). At the very least the trial judge should have continued the case to permit defense counsel to evaluate the evidence. Only after an evaluation by an expert can the Defendant clearly establish harm.

By requiring Mr. Spade to show how he was prejudiced by the late discovery, the trial court applied the wrong standard. The trial court should have presumed the late disclosure was prejudicial to Mr. Spade. When a specific court order had been violated, the State should be required to overcome this presumption of prejudice. To require Mr. Spade to show prejudice simply rewards the party that violated the court order. As the Court of Appeals has said “The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required.” *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). The same rule should apply in a criminal case. As the Court of Appeals has issued a conflicting standard of review between civil and criminal cases, this Court should grant this Petition to resolve the conflict.

If a discovery order is to have any meaning, there must be sanctions for the failure to comply with the Order. A failure to sanction is as much an abuse of discretion as to under sanction an offender of a discovery order. As the United States Supreme Court said in applying an exclusion sanction against a defendant for a discovery violation, “It may well be true that alternative sanctions are adequate and appropriate in most cases, but

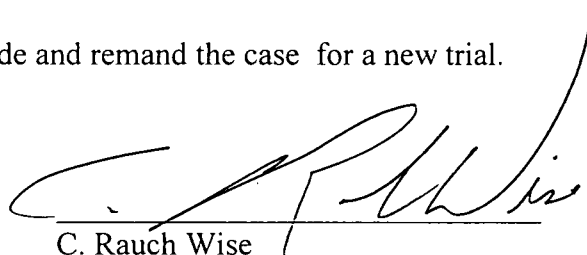
it is equally clear that they would be less effective than the preclusion sanction and that there are instances in which they would perpetuate rather than limit the prejudice to the State and the harm to the adversary process.” *Taylor v. Illinois*, 484 U.S. 400, 413 (1988). If exclusion is an appropriate sanction when a defendant fails to comply with discovery obligations, how much more is the same sanction appropriate when the State violates the discovery obligations. In the context of a violation of the civil discovery rules, the Court of Appeals has held “Even though the imposition of sanctions is usually left to the sound discretion of the trial judge, whatever sanction the judge imposes should serve to protect the rights of discovery provided by the Rules. Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery. *Samples v. Mitchell*, 329 S.C. 105, 114, 495 S.E.2d 213, 217 (Ct. App. 1997)(internal citations omitted) *See also Duke v. Westvaco Dev. Corp.*, 279 S.C. 464, 467, 309 S.E.2d 293, 295 (Ct. App. 1983).



**CONCLUSION**

For the foregoing reasons this Court should grant the Petition for Writ of Certiorari, reverse the conviction of Daniel Spade and remand the case for a new trial.

October 5, 2016

A handwritten signature in black ink, appearing to read 'C. Rauch Wise', is written over a horizontal line.

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THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

RECEIVED

OCT 11 2016

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Honorable R. Keith Kelly, Circuit Court Judge

SC Court of Appeals No. 2014-000448

The State, ..... Respondent,

vs.

Daniel William Spade ..... Petitioner.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Trayhnam who, after being duly sworn, deposes and says that she is the legal assistant for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on October 6, 2016, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Writ of Certiorari in the above case addressed to William M. Blich, Jr., Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211, and to Jenny Abbott Kitchings, Clerk, SC Court of Appeals, P.O. Box 11629, Columbia, SC 29211.

SWORN to and Subscribed

*Sandy Trayhnam*

before me this 6 day

of October, 2016.

*Mary Jane Harten* (L.S.)

Notary Public for South Carolina

My Commission expires: 11/30/22

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals  
Appeal From Spartanburg County  
Hon. R. Keith Kelly, Circuit Court Judge  
Appellate Case Tracking No. 2016-001965

**RECEIVED**

NOV 01 2016

S.C. SUPREME COURT

The State,

Respondent,

v.

Daniel William Spade,

Petitioner.

Opinion No. 2016-UP-352 (S.C. Ct. App. filed July 6, 2016)

**RETURN TO PETITION FOR WRIT OF CERTIORARI  
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## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                                                                                                                                                                                                  |    |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| STATEMENT OF QUESTIONS PRESENTED.....                                                                                                                                                                                                                                                                                                                                                                                            | 1  |
| STATEMENT OF THE CASE.....                                                                                                                                                                                                                                                                                                                                                                                                       | 2  |
| ARGUMENT.....                                                                                                                                                                                                                                                                                                                                                                                                                    | 4  |
| I. The Court of Appeals correctly affirmed the trial court's decision not to admit testimony regarding who was present at the time of the child's panic attacks, especially when the trial court allowed Petitioner to call witnesses or cross-examine witnesses about the causes of the panic attacks and Petitioner failed to avail himself of the opportunity. Further, the issue is not preserved for review on appeal. .... | 4  |
| II. The Court of Appeals properly affirmed the trial court's decision to allow a private attorney to participate in the prosecution where no conflict of interest existed. ....                                                                                                                                                                                                                                                  | 9  |
| III. The Court of Appeals properly found the issue related to application of section 1-7-470 of the South Carolina Code in this case was not preserved for review on appeal. Further, the issue is entirely without merit because section 1-7-470 is not applicable and Appellant cannot demonstrate any prejudice from the appointment.....                                                                                     | 17 |
| IV. The Court of Appeals correctly affirmed the trial court's decision to allow the testimony of the victim's counselor.....                                                                                                                                                                                                                                                                                                     | 20 |
| CONCLUSION.....                                                                                                                                                                                                                                                                                                                                                                                                                  | 25 |

**STATEMENT OF QUESTIONS PRESENTED**

I. The Court of Appeals correctly affirmed the trial court's decision not to admit testimony regarding who was present at the time of the child's panic attacks, especially when the trial court allowed Petitioner to call witnesses or cross-examine witnesses about the causes of the panic attacks and Petitioner failed to avail himself of the opportunity. Further, the issue is not preserved for review on appeal.

II. The Court of Appeals properly affirmed the trial court's decision to allow a private attorney to participate in the prosecution where no conflict of interest existed.

III. The Court of Appeals properly found the issue related to application of section 1-7-470 of the South Carolina Code in this case was not preserved for review on appeal. Further, the issue is entirely without merit because section 1-7-470 is not applicable and Appellant cannot demonstrate any prejudice from the appointment.

IV. The Court of Appeals correctly affirmed the trial court's decision to allow the testimony of the victim's counselor.

## STATEMENT OF THE CASE

### Procedural History

The State agrees with Petitioner's procedural Statement of The Case.

### Factual Background

The victim's mother and Appellant met at work and ultimately had a child together, the victim, who was born in [REDACTED] of 2006. (App. 255-257). Appellant, who lived in Virginia at the time, first saw the victim in January or February of 2007. (App. 257). Sometime in the year 2007, Appellant filed an action in family court seeking visitation with the victim. (App. 257-258). The victim's mother married her husband David in December 2007. (App. 257). The victim referred to David as "daddy." (App. 257). In 2008, the victim's mother and her husband filed an action in family court seeking to terminate Appellant's parental rights. (App. 258-59). The action was not successful and a visitation schedule was thereafter established. (App. 259). In the summer of 2010, the victim, then almost four years old, went to Virginia to visit with Appellant. (App. 260). The next two visitations took place in South Carolina in September 2010 and October 2010. (App. 261-65).

The September 2010 visit took place at a Holiday Inn Express in Spartanburg County. (App. 232-33; p. 263). During this visit, Appellant took the victim to the hotel's pool. (App. 244-46). At one point he took the victim into the private bathroom near the pool area and "stuck his private part in [her] mouth." (App. 244). Appellant told the victim that if she "didn't do it," he wouldn't take her home to her mother. (App. 246).

Following the September visit, the victim's mother noticed some behavioral changes in the victim. (App. 263). Because of the significant behavioral changes, after Appellant's October 2010 visit, the victim's mother decided to seek counseling for the victim. (App. 269). That same

month, the victim began counseling with Kim Rosborough. (App. 269-70). At the time counseling began, the victim's mother did not know of the sexual assault. (App. 270). Instead, the goal of the counseling was to figure out the cause of the victim's anxiety and to try to ease any anxiety she may have had regarding her visits with Appellant. (App. 271). Following the commencement of counseling, the victim had no further in-person visits with Appellant, and the victim's mother noticed an improvement in the victim's anxiety symptoms. (App. 272).

The victim disclosed the sexual abuse to her grandmother in late March of 2011. (App. 344-45). The grandmother was in shock regarding the disclosure, but after a day or two she told her husband about it. (App. 345-46). Her husband reported the disclosure immediately to the victim's family court guardian ad litem. (App. 348). He also called Ms. Rosborough and reported the disclosure. (App. 309-10). In response, Ms. Rosborough referred the victim for a forensic interview at the Child Advocacy Center. (App. 310). The victim's mother found out about the allegation from her parents around this time. (App. 272-73).

Tabitha Webber, a forensic interviewer at the Child Advocacy Center, conducted forensic interviews with the victim on several different dates in April and May of 2011. (App. 353-54). During the course of these interviews, the victim made a disclosure of sexual abuse that occurred "at a hotel with a pool" in South Carolina. (App. 354-55). The victim thereafter began counseling with Meredith Thompson-Loftis in May of 2011. (App. 365). The victim disclosed sexual abuse during the counseling sessions and provided a specific time period and location. (App. 376). Although the victim started out having a variety of symptoms of anxiety, she exhibited a great deal of improvement over the course of the counseling sessions. (App. 374-76). Appellant's parental rights were terminated in family court in November of 2012, and the victim's last name was subsequently changed to that of her adoptive father. (App. 383).

## ARGUMENT

**I. The Court of Appeals correctly affirmed the trial court's decision not to admit testimony regarding who was present at the time of the child's panic attacks, especially when the trial court allowed Petitioner to call witnesses or cross-examine witnesses about the causes of the panic attacks and Petitioner failed to avail himself of the opportunity. Further, the issue is not preserved for review on appeal.**

The Court of Appeals correctly found the trial court did not err in excluding the proffered testimony related to the people present when the child had her anxiety or panic attacks. The testimony was merely a backdoor attempt at admitting third-party guilt evidence. Further, Petitioner asked for and obtained the relief he sought which was permission to question individuals regarding the circumstances of the panic attacks. He did not avail himself of the opportunity. Finally, because he received the relief he requested, the issue is not preserved for review on appeal.

Appellant's counsel informed the judge that he wished to proffer some testimony from Dale Smith, the victim's grandmother. (App. 327). Ms. Smith was called to the stand and briefly examined by Appellant's counsel. (App. 328-330). She recalled testifying in a family court proceeding in October 2012, and in that proceeding, she testified that she observed the victim having panic attacks. (App. 328). Ms. Smith then stated the following: (1) she had, on one occasion after October 2012, observed the victim have a panic attack in her backyard when she was alone with the victim; (2) prior to October 2012, she had never observed the victim having a panic attack when she was alone with the victim; (3) she had never, before October 2012, observed the victim having a panic attack when only herself and her husband were present; (4) she had never observed the victim having a panic attack when only herself and the victim's mother were present; (5) she had never observed the victim having a panic attack when only



herself and the victim's adoptive father, David Jolley, were present; (6) she had never observed the victim having a panic attack when only herself, the victim's mother, and the victim's adoptive father were present; (7) the victim's adoptive father was not present for the panic attack the victim had in the witness's backyard after October 2012; (8) both the victim's mother and the victim's adoptive father were present during all of the panic attacks she had observed prior to October 2012. (App. 328-30). On cross-examination, Ms. Smith testified that the following persons were present during the panic attacks she witnessed prior to October 2012: herself, her husband, the victim's mother, the victim's adoptive father, and the victim's little brother. (App. 331).

Appellant's counsel subsequently argued that "[t]his is a situation where there are allegations that the child is having panic attacks. That panic attacks in and of itself could or could not have anything to do with the fact that my client may have committed this act." (App. 334). He continued, "[w]hat we are trying to do is give potentially other reasons, non-criminal reasons, why the panic attacks are occurring." (App. 334). Finally, Appellant's counsel stated he was not attempting to establish third-party guilt but was trying to establish an **"explanation for symptoms."** (App.334) (emphasis added).

The trial judge told Appellant's counsel he was free to call an expert witness to testify that panic attacks could be caused by a number of other things in a child's life. (App.334). The judge also indicated Appellant's counsel could ask the State's own expert similar questions. (App. 335). However, he ruled that "this court looks at this as sort of a back door to third-party guilt, and I have already ruled on that yesterday in pre-trial motions. And the defendant has failed to show that the proper evidence is inconsistent with his guilt, so I'm not - I'm not going to allow that in." (App. 335). Nevertheless, the judge stated he would allow questions about what

was going on when the panic attacks occurred, where the child was, what the child was doing, or whether or not she was being disciplined at the time. (App. 335). After clarifying that he would indeed be permitted “to ask what was going on without mentioning a specific individual,” Appellant’s counsel stated, “Thank you.” (App. 336).

When Ms. Smith was later called to testify, Appellant’s counsel did not cross-examine her regarding panic attacks.<sup>1</sup> (App. 347-49). In fact, Appellant’s counsel did not question any subsequent witness regarding panic attacks. Appellant did not call any defense witnesses. (App. 382). No expert witness or other witness was called to provide alternative explanations for the panic attacks as Appellant claimed was the basis for the needed testimony.

Appellant now contends on appeal that the trial court erred in excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than Petitioner were present. This issue is not preserved for appellate review, is patently without merit, and is wholly without support in the record.

### **Preservation**

Following his proffer, Appellant received the relief he requested - i.e., to be permitted to ask questions regarding the circumstances surrounding the victim’s panic attacks - and had no complaints about the trial judge’s ruling. The trial judge even told Appellant’s counsel that he could call an expert witness, or question the State’s witness, regarding potential alternative causes for panic attacks. Where Appellant received the relief he requested below and made no complaint about the limitations of the judge’s ruling, he should not be permitted to complain on appeal. See State v. Patterson, 324 S.C. 5, 16, 482 S.E.2d 760, 765 (1997) (an issue is not preserved for review if the objecting party accepts judge's ruling on a particular matter and does

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<sup>1</sup> The prosecutor also did not ask Ms. Smith about panic attacks during direct examination. (App. 342-47).

not contemporaneously make an additional objection indicating his dissatisfaction with any limitations); State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (holding that where the defendant received the relief requested from the trial court, there is no issue for the appellate court to decide); State v. McEachern, 399 S.C. 125, 146, 731 S.E.2d 604, 614-15 (Ct. App. 2012) (where defendant received the relief she sought she could not be heard to complain on appeal).

### Merits

Regardless, this issue is patently without merit and is wholly without support in the record. In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). “The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.

In Holmes, the United States Supreme Court articulated its approval of the rule adopted by this Court in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), for the admission of evidence of third party guilt. Holmes, 547 U.S. at 328. In Gregory, this Court explained:

[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are **inconsistent with his own guilt**, and to such facts as raise a **reasonable inference or presumption as to his own innocence**; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. **Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.**

State v. Gregory, 198 S.C. 98, 104-105, 16 S.E.2d 532, 534-535 (1941) (internal citations omitted) (emphasis added).

To the extent Appellant is alleging he should have been allowed to introduce testimony and/or argument that the victim's panic attacks happened only in the presence of the victim's adoptive father, this testimony has no factual support in the proffer presented by Appellant's counsel and, in fact, no factual support in the record whatsoever. (App. 327-31). Further, the testimony presented in the proffer failed to negate Appellant's guilt, even if Appellant was not present at the time of the attack testified to by Ms. Smith.

Additionally, as both the trial court and Court of Appeals found, the testimony does not provide the context for the panic attacks and certainly does not offer the evidence Appellant claimed he was seeking regarding an alternative explanation for the panic attacks. It merely provided a list of individuals present at the panic attacks. Appellant presented no factual or expert testimony supporting an identifiable alternate cause or trigger for the victim's panic attacks despite the fact that the judge's ruling allowed him the opportunity to present testimony in this regard. There was absolutely no evidence provided to the jury that any person's physical presence triggered the victim's panic attacks. As a result, the Court of Appeals properly affirmed the trial court's exclusion of Appellant's attempt to backdoor improper third-party guilt evidence. This is especially true when the court allowed him opportunity to explore alternative causes for the panic attacks and he never once raised the issue. Appellant has failed to demonstrate the requisite prejudice to justify reversal. In sum, Appellant's issue is unpreserved for appellate review and is clearly without merit. This Court should deny the Petition for Writ of Certiorari as to this ground.

**II. The Court of Appeals properly affirmed the trial court's decision to allow a private attorney to participate in the prosecution where no conflict of interest existed.**

The Court of Appeals correctly found the trial court did not err in allowing Douglas Brannon to participate in the prosecution of Appellant when no conflict of interest existed. Prior to trial, defense counsel requested that the court not allow Douglas Brannon to serve as an appointed prosecutor in the case. (App. 120-23). Counsel indicated he had received a copy of a letter appointing Mr. Brannon as an appointed prosecutor that morning. (App. 120). Counsel did not dispute that the solicitor had the right to appoint a special prosecutor, but noted that he had no evidence "under Section 1-7-470 of the South Carolina Code that his appointment as special prosecutor has been in any way, shape or form commissioned by the Governor's office." (App.120). He also argued that the fact that Mr. Brannon, in October of 2012, represented the mother and adoptive father of the victim in family court created an "inherent conflict of interests." (App. 120). The trial judge denied Appellant's motion, stating that the solicitor had the right to appoint any licensed attorney to act as a special prosecutor and that he did not see a conflict of interest since Mr. Brannon had never represented Appellant. (App. 122).

**Preservation**

On appeal, Appellant now argues that Mr. Brannon's obligation of confidentiality to the victim's mother and adoptive father created a conflict of interest that violated Appellant's due process rights. However, this argument is clearly unpreserved because it was not made to the trial judge below. Although defense counsel made a general argument about an "inherent conflict of interests," he failed to make any arguments regarding Mr. Brannon's duty of confidentiality. Because Appellant is now attempting to raise an argument that was not brought to the trial judge's attention and was not ruled on by the trial judge, the issue argued on appeal is

not properly preserved. See, e.g., I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (imposing preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments; the “purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal”); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (noting “[a] party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground”) (emphasis added); State v. Whitten, 375 S.C. 43, 47, 649 S.E.2d 505, 507 (Ct. App. 2007) (finding an appellate court is limited by appellate rules that allow the court to consider only the precise question that was before the trial judge and ruled upon by him or her). Accordingly, this issue is not properly preserved for review.

### **Merits**

Additionally, the Court of Appeals correctly determined the trial judge properly allowed Mr. Brannon to serve as a special prosecutor in Appellant’s case, and Appellant’s contention that Mr. Brannon’s service as a special prosecutor violated his constitutional rights is contrary to well-reasoned and settled precedent. In State v. Addis, a private attorney who had previously represented the victim’s family in a civil claim against the defendant participated in the defendant’s criminal trial alongside the solicitor. 257 S.C. 482, 486, 186 S.E.2d 415, 416 (1972). The civil claim was settled prior to trial. Id. In finding no error with respect to the private attorney’s participation in the case, this Court found that “traditionally in this State private counsel has been permitted to assist the State in prosecutions.” Id. at 487, 186 S.E.2d at 417. The Court also stated: “the defendant has no right to complain” where private counsel

“participates in the trial of a case and does only what a solicitor should do.” Id. Finally, the Court held: “We cannot say that the participation of private counsel violates the constitution or any statutory or common law principle. Such ruling would appear to be in keeping with the weight of authority.” Id. at 487-88, 186 S.E.2d at 417.

In State v. Nichols, a 1997 murder case, the defendant asserted it was unconstitutional to allow the solicitor to use three private attorneys hired by the victim’s family to prosecute his case. 325 S.C. 111, 119, 481 S.E.2d 118, 122 (1997). This Court again rejected this argument, ruling as follows:

Private counsel’s participation in a trial to assist the solicitor has been sanctioned in State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986); State v. Addis, 257 S.C. 482, 186 S.E.2d 415 (1972); State v. Lee, 255 S.C. 309, 178 S.E.2d 652 (1971); and State v. Gregory, 172 S.C. 329, 174 S.E. 10 (1924).

In State v. Addis, 257 S.C. at 487–88, 186 S.E.2d at 417, we declined to find error in the allowance of a private attorney’s participation in a criminal trial. The trial court has discretion to allow the solicitor to have the assistance of counsel employed by the prosecuting witness or other person interested in securing a conviction with the consent of the solicitor. Id. A special assistant solicitor is not automatically disqualified because of his simultaneous representation of an interested party. **Disqualification occurs when a special assistant solicitor attempts to use his authority in the criminal action to the advantage of his civil client or otherwise compromises his neutrality in the criminal proceeding.** State v. Mattoon, 287 S.C. at 494–95, 339 S.E.2d at 869. There is no evidence the private attorneys who acted as special assistant solicitors here stood to gain an unfair advantage in the civil matter as frowned upon in In re Jolly, 269 S.C. 668, 239 S.E.2d 490 (1977). Further, the solicitor maintained control of the case. We do not find error in the use of private attorneys here.

Id. at 119, 481 S.E.2d at 122-23 (emphasis added).

The reasoning of Nichols and Addis applies squarely in Appellant’s case.<sup>2</sup> The Seventh Circuit Solicitor’s Office maintained control of Appellant’s case and Mr. Brannon merely served

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<sup>2</sup> This Court in State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986), discouraged the practice of appointing private counsel to prosecute criminal cases. The private attorney appointed to prosecute the case in Mattoon was the sole prosecutor and no one from the solicitor’s office was

as a “third chair” and assisted with some aspects of the trial, including arguing two motions, examining one witness (the victim’s therapist), and presenting the State’s closing argument. (App p. 121; Petition for Writ of Certiorari at 13). Significantly, in Appellant’s case, unlike in Nichols, Mr. Brannon did not “simultaneously” represent an interested party; instead, his representation of the victim’s mother and adoptive father concluded in October of 2012, more than a year and three months before Appellant’s trial. (App. 120). Mr. Brannon stood to gain nothing (other than a sense of personal satisfaction, perhaps) from providing *pro bono* assistance to the State, nor has there been any contention that he attempted to use his authority as a special prosecutor in some improper way. (App. 120). Therefore, contrary to Appellant’s suggestion, Mr. Brannon was not “serving two masters at once.” (See Petition for Writ of Certiorari at 15).

Appellant’s argument is based on rank speculation that Mr. Brannon *might* have learned something during his representation of the victim’s mother and adoptive father in the past that *might* have been helpful to the defense in this case, and assumes that Mr. Brannon failed to turn such information over to the defense. He further argues that his representation might require him to violate his oath of confidentiality to his former clients.

There has been **no** contention, either at trial or on appeal, that Mr. Brannon actually possessed pertinent information that was required to be turned over to the defense. Further, there has been no contention at trial or on appeal that Mr. Brannon, as special prosecutor, failed to actually comply with Brady or Rule 5 obligations. Additionally, pursuant to Rule 1.6 of the Rules of Professional Conduct, Rule 407, SCACR, “A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes is necessary: (7) to

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present during trial. Mattoon at 494-95, 339 S.E.2d at 868-69. In any event, despite the statement of discouragement in Mattoon, the decisions of our Supreme Court have consistently upheld the use of special private prosecutors when attacked by the defendant. The Nichols case decided about eleven years after Mattoon reiterates this view.



comply with other law or a court order.” Clearly, Mr. Brannon would be able to avoid any conflict with his client in turning over information required by Brady, Rule 5, or other court order. In addition, Mr. Brannon is bound by Rule 3.3 of the Rules of Professional Conduct which prevent him from making any false statement to the court or offer evidence the lawyer knows to be false. Most significantly, if Mr. Brannon knew any witness intended provide false evidence, including those he previously represented, he “shall take reasonable remedial measure, including, if necessary, disclosure to the tribunal. Rule 3.3(a)(3), RPC, Rule 407, SCACR. Accordingly, if Mr. Brannon knew any information which needed to be divulged to the court, he was under an obligation to do so and the confidentiality of material learned during his prior representation would not have acted as a bar.

The cases cited by Appellant in support of his position are distinguishable in that those cases involved situations where the private attorney simultaneously represented a financially interested party and was in total control of the prosecution. In Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987), private attorneys served as special prosecutors in a criminal contempt action regarding a violation of a trademark infringement injunction. The injunction and consent decree contained a liquidated damages provision in the amount of \$750,000 for a violation of the injunction. Id. at 805. The private attorneys were appointed by the district court and, significantly, the United States Attorney’s Office had no involvement in the case at all. Id. at 791-92. Because the private attorneys simultaneously represented Vuitton in the trademark matter, and in light of the \$750,000 liquidated damages provision for a violation of the injunction, there was the potential for “private interest to influence the discharge of public duty.” Id. at 805-806. Therefore, the private prosecutors were “interested” and their appointment was improper. Id. at 814. The Court refused to employ a harmless error analysis under these

circumstances because the error was “fundamental” where the appointment of interested private prosecutors - with no involvement of the United States Attorney’s Office - raised doubts about “the integrity of the criminal proceeding.” Id. at 809-810.

In Ganger v. Peyton, 379 F.2d 709 (4<sup>th</sup> Cir. 1967), the Fourth Circuit Court of Appeals held the defendant’s conviction for assaulting his wife was constitutionally invalid because the attorney prosecuting the criminal case simultaneously represented the defendant’s wife in a divorce action **then pending** against the defendant, and the divorce action was based upon the same assault involved in the criminal matter. Id. at 711-12. Significantly, the private prosecuting attorney improperly used his influence as a prosecutor because he offered to drop the criminal assault charge if the defendant would make a favorable property settlement in the divorce action. Id. A favorable settlement, of course, would have likely impacted the amount of his fee in the divorce matter. Id. at 713. Because of the prosecuting attorney’s “self-interest” in the outcome of the criminal case, he was not in a position to exercise fair-minded judgment with respect to prosecution of the criminal case. Id. at 712-13. This conflict of interest - wherein the prosecuting attorney was actively attempting to serve two masters at the same time - violated the defendant’s due process rights. Id. at 714. A harmless error analysis was not appropriate because the *sole* prosecuting attorney was not “free to exercise the fair discretion which he owed to all persons charged with crime in his court.” Id.

Appellant’s case is distinguishable from both Young and Ganger. Mr. Brannon merely assisted the State with the trial as a third-chair prosecutor, and he did not have control over Appellant’s prosecution from the inception of the case. Furthermore, Mr. Brannon was not “interested” as were the private prosecutors in Young and Ganger because he was not simultaneously representing the victim’s mother and adoptive father since that matter concluded

in October 2012. Mr. Brannon performed his work as an appointed prosecutor *pro bono* and there was no possibility of pecuniary gain or unfair advantage in any pending, related civil matter. Accordingly, Young and Ganger do not apply to Appellant's case and there was no "fundamental" trial error here.

Notably, in a case subsequent to Ganger, the Fourth Circuit Court of Appeals distinguished Young and held that although Young "flatly proscribes turning the prosecution completely over to private counsel for interested parties," it "certainly did not proscribe all participation by such counsel." Person v. Miller, 854 F.2d 656, 663 (4<sup>th</sup> Cir. 1988). The court then stated:

We therefore read *Young* at least implicitly to approve (or certainly not to forbid) the practice of allowing private counsel for interested parties to participate formally with government counsel in the prosecution of contempt citations so long as that participation (1) has been approved by government counsel; (2) consists solely of rendering assistance in a subordinate role to government counsel; and (3) does not rise in practice to the level of effective control of the prosecution. As indicated, we find authority for this rule of limited participation at least implicit in *Young* and we think it wholly conformable to *Young*'s underlying principles. Accordingly, we adopt it as the appropriate rule governing the participation of private counsel for interested parties in contempt prosecutions.

Id. The court also noted that the evil at which the Young rule was aimed - "the possibility that the criminal contempt sanction would be invoked and prosecuted by private counsel, operating in the adversarial mode, solely to secure advantage to his client and hence without regard for any interests of the defendant and the public in fairness of the criminal process" - is sufficiently guarded against, both in appearance and reality, by "the presence of disinterested government counsel effectively in a position and manifestly prepared to exercise control over the critical prosecutorial decisions - most critically, whether to prosecute, what targets of prosecution to select, what investigative powers to utilize, what sanctions to seek, plea bargains to strike, or immunities to grant." Id. at 664. Significantly, the reasoning of this Fourth Circuit case is fully

in keeping with Nichols and Addis.

Contrary to Appellant's argument, prejudice must be shown in order for Appellant to receive relief. In State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), there existed a potential conflict of interest arising from the fact that one of the prosecutors in the solicitor's office had previously worked for the public defender's office during the pendency of Smart's charges. Smart at 517-18, 299 S.E.2d at 687-88. This Court stated although Appellant's claim had "merit in the abstract," there was no "constitutional grounding" for it and held the defendant was required to show "actual prejudice" from the trial court's failure to disqualify the solicitor's office. Id. at 518, 299 S.E.2d at 688. The Court rejected Appellant's assertion prejudice must be "presumed," stating: "Creating artificial dilemmas does not relieve appellant of his burden to show actual prejudice in this case." Id. at 519, 299 S.E.2d at 688; see also State v. Bell, 374 S.C. 136, 143-44, 646 S.E.2d 888, 892 (Ct. App. 2007) (absent deliberate prosecutorial misconduct (such as intentionally eavesdropping on a confidential conversation between the defendant and his attorney) or actual prejudice to the defendant, the trial judge did not abuse his discretion in refusing to disqualify the solicitor's office).

The Court of Appeals correctly relied on Nichols in finding the trial court did not err in allowing Brannon to act as an appointed prosecutor. This case is controlled by Nichols and Addis, and under these cases, the trial judge did not err in allowing Mr. Brannon to assist the State in Appellant's trial. No actual prejudice has even been alleged, much less shown, and Appellant is not entitled to reversal on this ground. This Court should deny the Petition for Writ of Certiorari as to this Question.

**III. The Court of Appeals properly found the issue related to application of section 1-7-470 of the South Carolina Code in this case was not preserved for review on appeal. Further, the issue is entirely without merit because section 1-7-470 is not applicable and Appellant cannot demonstrate any prejudice from the appointment.**

The Court of Appeals correctly found this issue is not preserved for review on appeal because Appellant never received a ruling on his argument related to the application of section 1-7-470 of the South Carolina Code to this case. Further, even if preserved the issue is entirely without merit because the section is not applicable in this case. Finally, even if applicable the failure to have a Governor's commission did not prevent Mr. Brannon from acting as a prosecutor and Appellant cannot demonstrate any prejudice from that appointment.

### **Preservation**

"Our law is clear that a party must make a contemporaneous objection that is *ruled upon by the trial judge* to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011) (emphasis added). "To be preserved for appellate review, an issue must be both presented to *and passed upon* by the trial court." State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) (emphasis added). "If the issue is raised but not ruled on, it is not preserved for appeal." Id.

Appellant argues that the trial judge erred in allowing Mr. Brannon to participate in the trial as a special prosecutor on the ground that the solicitor failed to produce a commission from the governor as required by S.C. Code § 1-7-470. However, although counsel mentioned below that "I don't have any evidence under Section 1-7-470 of the South Carolina Code that his appointment as special prosecutor has been in any way, shape or form commissioned by the Governor's office," (App.120), the judge did not issue a ruling on this particular point nor did counsel request that the judge include this issue in his ruling. (App.122). In fact, the judge did

not even rule that S.C. Code § 1-7-470 was applicable, since defense counsel conceded that the solicitor “does have the right to appoint a special prosecutor.” (App. 120). Accordingly, the issue was not properly preserved for appellate review.

### **Merits**

Even assuming the issue was somehow preserved for review, Appellant’s argument is without merit. Initially, it is not clear that section 1-7-470 is necessarily applicable to Appellant’s case, since the Seventh Circuit Solicitor appointed Mr. Brannon as a volunteer special prosecutor for the duration of one trial, rather than as a paid “assistant solicitor” as discussed in the statute.<sup>3</sup> This is further illustrated by reference to sections 1-7-405 and 1-7-406 of the South Carolina Code, which appear in the same Article and clearly contemplate a full time hired assistant solicitor and not a one-time special appointment. The case of State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986), cited by Appellant, is distinguishable because, in addition to dealing with a different statutory provision (S.C. Code § 1-7-405), the private attorney in Mattoon was appointed as a “special assistant solicitor” and had an agreement (presumably for pay) to prosecute “a series of obscenity cases” in the county.

Regardless, even if the statute was applicable, it does not require that the Governor’s commission occur prior to the commencement of the service; it merely requires that the commission occur “after appointment.” As noted in other contexts, it is the appointment that confers the powers and not the ministerial requirement of the commission. See State v. Griffin, 413 S.C. 258, 776 S.E.2d 87 (2015) (finding failure to comply with ministerial acts does not render deputy sheriff appointment invalid), Kottman v. Ayer, 34 S.C.L. (3 Strob) 92, 94 (1848)

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<sup>3</sup> As mentioned previously, defense counsel conceded that the solicitor “does have the right to appoint a special prosecutor.” (App.120). Counsel did not reference a particular statute for this point.

(“It is the appointment that confers the office”), and Billy ads. State, 11 S.C.L. (2 Nott & McCord) 356, 358 (S.C. Const. App. 1820).

However, even assuming the statute did apply and the “commissioned by the Governor” requirement was not complied with prior to Brannon’s service as an appointed prosecutor, Appellant has utterly failed to show the required prejudice. See, e.g., State v. Huntley, 349 S.C. 1, 6, 562 S.E.2d 472, 474 (2002) (finding the trial court erred in automatically suppressing a breath test’s results when no prejudice to the defendant was shown as a result of the implied consent statute’s violation); see also State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) (“[E]xclusion of evidence should be limited to violations of constitutional rights and not to statutory violations . . .”).

Contrary to Appellant’s argument, the case of Ganger v. Peyton, 379 F.2d 709 (4<sup>th</sup> Cir. 1967), does not illustrate prejudice by way of a due process violation because the case is distinguishable for the many reasons discussed above in the previous section. Brannon made no decisions regarding whether to prosecute Appellant, the crime for which Appellant was prosecuted, or how the trial would proceed against Appellant. The entire prosecution of Appellant would have occurred in the same manner even if Brannon had never been appointed. Accordingly, Appellant cannot demonstrate prejudice based on the appointment. As a result, this Court should deny the Petition for Writ of Certiorari as to this Question.

**IV. The Court of Appeals correctly affirmed the trial court's decision to allow the testimony of the victim's counselor.**

The Court of Appeals correctly found the trial court did not abuse its discretion in allowing some testimony by the victim's counselor and excluding some testimony as it related to the counseling notes and records turned over by the State to Appellant. As a summary of the relevant facts<sup>4</sup>, on February 27, 2013, the Honorable J. Mark Hayes, II, filed an order that stated, in pertinent part: "The State shall not be required to turn over any mental health records of the alleged victim from Meredith Thompson-Loftis at this time; however, if the State intends to call her as a witness in their case, they must turn over all such records within a reasonable time prior to the trial of this case." (App. 105). The order did not provide for any particular remedy in the event a violation occurred. On February 11, 2014, approximately two weeks prior to Appellant's trial, defense counsel filed a motion to exclude the testimony of Meredith Thompson Loftis on the ground that the State had not yet turned over all of Ms. Loftis' records and that "it is no longer a reasonable time prior to the February 24, 2014 call of the case." (App. 110).

On February 24, 2014, the day the case was called for trial, defense counsel raised the issue of Judge Hayes' order and argued the State violated it by failing to turn over records within a reasonable period of time prior to trial. (App. 136-37). Specifically, defense counsel asserted that although the State, on October 31, 2013, turned over records covering the dates of May 17, 2011 through February 16, 2012, it was not until "last week," February 20, 2014, that the State turned over records spanning the dates of February 23, 2012 through December 30, 2013. Defense counsel also stated that no records for any dates after December 30, 2013, had been turned over. (App.137). Counsel argued, "in essence, Your Honor, four days before this trial

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<sup>4</sup> The State craves reference to its Final Brief of Respondent for a more thorough recitation of the facts.



was to begin they handed over the last twenty-two months of counseling records. I believe that is contradictory to Judge Hayes' ruling. I don't believe they turned over her records within a reasonable time. Therefore, I would ask that any testimony of Meredith Thompson-Loftis be excluded under the terms of Judge Hayes' order, which were issued and filed with the court on February 27 of 2013." (App.137-38).

In response, the State noted that the "twenty-two months" of records in fact included only twenty-five pages of counseling notes: "[i]t was five pages that included some writings and then twelve pages that included drawings." (App. 138). The solicitor also pointed out that the defense had access to the majority of Ms. Loftis' records prior to this; that defense counsel personally cross-examined Ms. Loftis in the family court trial that took place in October of 2012; and that the victim had made no new disclosures to the counselor. (App. 138-39).

Defense counsel agreed that these records were turned over upon receipt and stated, "I'm not saying you withheld it." (App.139). The judge then asked defense counsel if there was anything new or surprising in the records that had recently been turned over. (App. 141). Defense counsel responded that he had learned the "number of appointments this child had with Meredith Thompson-Loftis in the year, plus, since the hearing, but nothing of major significance that I could see or that I could translate in the four days that I have had to take a look at it." (App. 141). The judge responded that the records looked "pretty straightforward" and said that he was able to read Ms. Loftis' handwriting. He also offered assistance with "translating" the records but defense counsel declined. The judge then denied counsel's motion to exclude the testimony of Ms. Loftis. (App. 141). Defense counsel stated, "All right. Thank you, Your Honor." (App. 141).

Later in trial, after Ms. Loftis testified that the victim was still a client of hers to date, defense counsel renewed his motion to exclude. (App. 369-70). He stated that if the victim is a continuing patient of Ms. Loftis, there must be records dated after December 30, 2013 which had not been turned over. He argued that the State was therefore not in compliance with Judge Hayes' order and asked that Ms. Loftis be excluded as a witness and that all of her testimony be stricken from the record. (App. 370). The State noted that it was not in possession of any records dated after December 30, 2013. (App. 371). Ms. Loftis then told the court she did have records for January 2014. (App. 372). Over defense counsel's objection, the judge ruled that Ms. Loftis would not be excluded as a witness but would not be permitted to testify as to anything that occurred with respect to sessions after December 30, 2013, since defense counsel had not been privy to those records prior to trial. (App. 372-74).

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) (“[D]eference is due to the trial court's admission of the evidence.”). An appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

Appellant argues that the trial court erred in refusing to exclude the testimony of Ms. Loftis due to the State's failure to turn over portions of her counseling records within a reasonable time prior to trial. However, despite Judge Hayes' order requiring the State to turn

over the counseling records, Appellant was not in fact entitled to receive the counselor's notes under Rule 5. See State v. Trotter, 322 S.C. 537, 542, 473 S.E.2d 452, 455 (1996) (holding that counseling sessions do not constitute "physical or mental examinations" for purposes of Rule 5, SCRCrimP, and that even if they did, a counselor's notes from such sessions would not be subject to disclosure under Rule 5(a)(1)(D)); see also Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). In that vein, Appellant's receipt of *any* of the counseling notes in advance of trial allowed Appellant to reap a benefit to which he was not entitled and that most defendants do not receive. Appellant cannot predicate reversible error upon his failure to timely receive something he was never actually entitled to receive in the first place under our discovery rules.

In any event, Judge Hayes' order requiring the records to be turned over "within a reasonable time prior to the trial of the case" did not provide for a remedy in the event of noncompliance. Therefore, it was up to the trial judge to determine whether or not a remedy was warranted, and if so, what remedy was appropriate under the circumstances. Cf. State v. Salisbury, 330 S.C. 250, 267, 498 S.E.2d 655, 664 (Ct. App. 1998) ("Even if the State failed to comply with Salisbury's Rule 5 request, the trial court had discretion to provide a proper remedy."), *affirmed as modified on other grounds by* 343 S.C. 520, 541 S.E.2d 247 (2001). Here, after learning (1) the State did not intentionally withhold the records turned over the week before trial (as defense counsel conceded); (2) the records contained only twenty-five pages, some with drawings, and that the records were "pretty straightforward;" and (3) the records had little overall significance to the defense, the trial judge denied Appellant's motion to exclude Ms. Loftis' testimony. (App. 136-41). It cannot be said that this decision was an abuse of discretion under these circumstances. Further, after discovering there were records that had never been in

the possession of the State, and therefore never turned over, the trial judge precluded the State from eliciting any testimony pertaining to those particular records. (App. 369-74). Likewise, this was not an abuse of discretion and was a fair remedy.

Moreover, Appellant, at trial and on appeal, has failed to show any prejudice from the delay in his receipt of the records. See State v. South, 285 S.C. 529, 535-36, 331 S.E.2d 775, 779 (1985) (applying a harmless error analysis to a violation of a discovery order in a death penalty case); cf. State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006) (“A violation of Rule 5 is not reversible unless prejudice is shown.”). He has not asserted, at trial or on appeal, that any of the records, including the post-December records, contained anything relevant or material to either the State or the defense. In fact, Appellant did not even request that the post-December records be made a court’s exhibit. (App. 369-74). Significantly, although on appeal Appellant contends that “[a]t the very least the trial judge should have continued the case to permit defense counsel to evaluate the evidence,” (Petition for Writ of Certiorari at 19), defense counsel below **never** requested a continuance of trial nor even request further time to evaluate the new records or consult with an expert. Cf. Curtis v. Blake, 392 S.C. 494, 503, 709 S.E.2d 79, 83 (Ct. App. 2011) (pointing out that exclusion of a witness is a harsh sanction not to be lightly invoked and noting that the defendant could have but did not move for a continuance prior to the witness’ testimony).

Finally, as suggested above, it is impossible for Appellant to show prejudice from his failure to receive counseling notes, which he was never entitled to receive in the first place. In sum, Appellant has failed to show that the trial judge committed a prejudicial abuse of discretion. This Court should deny the Petition for Writ of Certiorari as to this Question.

**CONCLUSION**

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

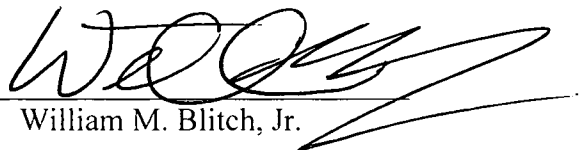
Respectfully submitted,

ALAN WILSON  
Attorney General

WILLIAM M. BLITCH, JR.  
Assistant Attorney General  
S.C. Bar No. 15608

BARRY J. BARNETTE  
Solicitor, Seventh Judicial Circuit

BY:



William M. Blitch, Jr.

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 1, 2016

## STATE OF SOUTH CAROLINA

## IN THE SUPREME COURT

Certiorari to the Court of Appeals  
Appeal From Spartanburg County  
Hon. R. Keith Kelly, Circuit Court Judge  
Appellate Case Tracking No. 2016-001965

The State,

Respondent,

v.

Daniel William Spade,

Petitioner.

**PROOF OF SERVICE**

I, Sally Ellison, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise, Esquire  
305 Main Street  
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.  
This 1<sup>st</sup> day of November, 2016.

  
SALLY ELLISON  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3727

# The Supreme Court of South Carolina

The State, Respondent,

v.

Daniel William Spade, Petitioner.

Appellate Case No. 2016-001965

Lower Court Case No. 2011-GS-42-04171

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## ORDER

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Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

June 16, 2017

cc:

Clarence Rauch Wise, Esquire

Alan McCrory Wilson, Esquire

William M. Blich, Jr., Esquire

Daniel William Spade, 358974

The Honorable M. Hope Blackley

The Honorable Jenny Abbott Kitchings



## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1220 SENATE STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
[www.sccourts.org](http://www.sccourts.org)

June 22, 2017

The Honorable M. Hope Blackley  
PO Box 3483  
Spartanburg SC 29304-3483

### REMITTITUR

Re: The State v. Daniel W. Spade  
Lower Court Case No. 2011GS4204171  
Appellate Case No. 2014-000448

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

*V. Claire Allen, Deputy*

CLERK

Enclosure

cc: Barry Joe Barnette, Esquire  
Alan McCrory Wilson, Esquire  
Clarence Rauch Wise, Esquire  
William M. Blich, Jr., Esquire



## FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF

IN THE COURT OF COMMON PLEAS

Daniel W. Spade #358974  
 Full name and prison number (if any) of Applicant.

2017-CP-42-2372

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legible 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 thereon 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 Lee C.I.
2. Name and location of Court which imposed sentence Spartanburg County

Name(s) of co-defendants, if any: \_\_\_\_\_

[REDACTED] (if known) upon which, and the offenses for which sentence was imposed:

(a) 2011-GS-42-04171

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

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

5. [REDACTED] the date upon which sentence was imposed and the terms of the sentence:

(a) Feb 26, 2014

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

- (c) \_\_\_\_\_
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty \_\_\_\_\_
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere \_\_\_\_\_
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. Court of Appeals
- ii. Supreme Court
- iii. \_\_\_\_\_
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. Writ of Certiorari Denied
- iii. \_\_\_\_\_
- (c) the date of each such result:
- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- 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:

CLERK OF COURT  
SPARTANBURG COUNTY  
2017 JUL 13 AM 10:39  
M. HOPE BLACKLEY

- (a) Ineffective assistance of counsel in failing to request continuance to  
 (b) fully review <sup>exculpatory</sup> therapist records  
 (c) Ineffective assistance of counsel in failing to call character, lay, and expert  
 given last-minute witnesses.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Court of Appeals opined as much; several critical exculpatory findings w/in  
 (b) the notes post-conviction.  
 (c) No expert witness to counter State's witness in that notations in records support  
 Therapist was inappropriate "prepping" child for trial.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? no 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?
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Petition for Writ of Certiorari to the Supreme Court (Direct Appeal)  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_  
 iv. \_\_\_\_\_
- (b) the name and location of the Court in which such was filed:
- i. South Carolina Supreme Court  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_  
 iv. \_\_\_\_\_
- (c) the disposition thereof:
- i. Writ of Cert Denied  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_

FILED  
 CLERK OF COURT  
 SPARTANBURG COUNTY  
 2017 JUL 13 AM 10:49  
 M. McPECKLE

iv. \_\_\_\_\_

(d) the date of each such disposition:

i. 6/16/17

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

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

iv. \_\_\_\_\_

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

i. \_\_\_\_\_

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) Grounds set forth in (10) are PCR issues and thus this application for them to be heard

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

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

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

CLERK OF COURT  
SPARTANBURG COUNTY  
2017 JUL 13 AM 10:40  
M HOPE BLACKLEY

- (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? yes

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. Trial Attorneys → Ken Shabel + Shawn Campbell
  - ii. Appeal Attorney → Rauch Wise
  - iii. PCR Attorneys → Charles Grase + Rauch Wise
- (b) the proceedings at which each such attorney represented you:
  - i. see above
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

19. State clearly the relief you seek in filing this application:

Reversal / Overturning of conviction

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

no

CLERK OF COURT  
 SPARTANBURG COUNTY  
 2017 JUL 13 AM 10:40  
 M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

County of

Spartanburg

VERIFICATION

I, Daniel Spade, 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.

Daniel W. Spade

SWORN to and subscribed before me this 23  
day of June, 2017.

Debra Eastridge (L.S.)  
Notary Public

My Commission Expires: 3/3/2024

CLERK OF COURT  
SPARTANBURG COUNTY  
2017 JUL 13 AM 10:40  
M. HOPE BLACKLEY

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

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 \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
*Notary Public*

My Commission Expires: \_\_\_\_\_

NOT APPLICABLE

M. HOPE BLACKLEY

2017 JUL 13 AM 10:40

CLERK OF DISTRICT COURT  
SPARTANBURG COUNTY

## CIVIL ACTION COVERSHEET

Plaintiff(s) )

vs. )

State of South Carolina

Defendant(s) )

Submitted By: Charles GroseAddress: 404 Main Street, Greenwood, SC 29646SC Bar #: 66063Telephone #: 864-538-4466Fax #: 864-538-4405

Other: \_\_\_\_\_

E-mail: charles@groselawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

## DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.  
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.  
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.  
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

## NATURE OF ACTION (Check One Box Below)

- |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Contracts</b><br><input type="checkbox"/> Constructions (100)<br><input type="checkbox"/> Debt Collection (110)<br><input type="checkbox"/> General (130)<br><input type="checkbox"/> Breach of Contract (140)<br><input type="checkbox"/> Fraud/Bad Faith (150)<br><input type="checkbox"/> Failure to Deliver/Warranty (160)<br><input type="checkbox"/> Employment Discrim (170)<br><input type="checkbox"/> Employment (180)<br><input type="checkbox"/> Other (199) _____ | <b>Torts - Professional Malpractice</b><br><input type="checkbox"/> Dental Malpractice (200)<br><input type="checkbox"/> Legal Malpractice (210)<br><input type="checkbox"/> Medical Malpractice (220)<br><input type="checkbox"/> Previous Notice of Intent Case #<br>20 -NI- _____<br><input type="checkbox"/> Notice/ File Med Mal (230)<br><input type="checkbox"/> Other (299) _____                  | <b>Torts - Personal Injury</b><br><input type="checkbox"/> Conversion (310)<br><input type="checkbox"/> Motor Vehicle Accident (320)<br><input type="checkbox"/> Premises Liability (330)<br><input type="checkbox"/> Products Liability (340)<br><input type="checkbox"/> Personal Injury (350)<br><input type="checkbox"/> Wrongful Death (360)<br><input type="checkbox"/> Assault/Battery (370)<br><input type="checkbox"/> Slander/Libel (380)<br><input type="checkbox"/> Other (399) _____                                                                                                                                               | <b>Real Property</b><br><input type="checkbox"/> Claim & Delivery (400)<br><input type="checkbox"/> Condemnation (410)<br><input type="checkbox"/> Foreclosure (420)<br><input type="checkbox"/> Mechanic's Lien (430)<br><input type="checkbox"/> Partition (440)<br><input type="checkbox"/> Possession (450)<br><input type="checkbox"/> Building Code Violation (460)<br><input type="checkbox"/> Other (499) _____                                                                                                                                                  |
| <b>Inmate Petitions</b><br><input checked="" type="checkbox"/> PCR (500)<br><input type="checkbox"/> Mandamus (520)<br><input type="checkbox"/> Habeas Corpus (530)<br><input type="checkbox"/> Other (599) _____                                                                                                                                                                                                                                                                 | <b>Administrative Law/Relief</b><br><input type="checkbox"/> Reinstate Drv. License (800)<br><input type="checkbox"/> Judicial Review (810)<br><input type="checkbox"/> Relief (820)<br><input type="checkbox"/> Permanent Injunction (830)<br><input type="checkbox"/> Forfeiture-Petition (840)<br><input type="checkbox"/> Forfeiture-Consent Order (850)<br><input type="checkbox"/> Other (899) _____ | <b>Judgments/Settlements</b><br><input type="checkbox"/> Death Settlement (700)<br><input type="checkbox"/> Foreign Judgment (710)<br><input type="checkbox"/> Magistrate's Judgment (720)<br><input type="checkbox"/> Minor Settlement (730)<br><input type="checkbox"/> Transcript Judgment (740)<br><input type="checkbox"/> Lis Pendens (750)<br><input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760)<br><input type="checkbox"/> Confession of Judgment (770)<br><input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780)<br><input type="checkbox"/> Other (799) _____ | <b>Appeals</b><br><input type="checkbox"/> Arbitration (900)<br><input type="checkbox"/> Magistrate-Civil (910)<br><input type="checkbox"/> Magistrate-Criminal (920)<br><input type="checkbox"/> Municipal (930)<br><input type="checkbox"/> Probate Court (940)<br><input type="checkbox"/> SCDOT (950)<br><input type="checkbox"/> Worker's Comp (960)<br><input type="checkbox"/> Zoning Board (970)<br><input type="checkbox"/> Public Service Comm. (990)<br><input type="checkbox"/> Employment Security Comm (991)<br><input type="checkbox"/> Other (999) _____ |
| <b>Special/Complex /Other</b><br><input type="checkbox"/> Environmental (600)<br><input type="checkbox"/> Automobile Arb. (610)<br><input type="checkbox"/> Medical (620)<br><input type="checkbox"/> Other (699) _____<br><input type="checkbox"/> Sexual Predator (510)<br><input type="checkbox"/> Permanent Restraining Order (680)                                                                                                                                           | <input type="checkbox"/> Pharmaceuticals (630)<br><input type="checkbox"/> Unfair Trade Practices (640)<br><input type="checkbox"/> Out-of State Depositions (650)<br><input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660)<br><input type="checkbox"/> Pre-Suit Discovery (670)                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |

Submitting Party Signature: \_\_\_\_\_

Date: June 30, 2017



**Note:** Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.**

**SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.**

**Pursuant to the ADR Rules, you are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

CLERK OF COURT  
SPARTANBURG COUNTY  
2017 JUL 13 AM 10:40  
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA )

COUNTY OF Spartanburg )Daniel W. Spade )

Plaintiff, )

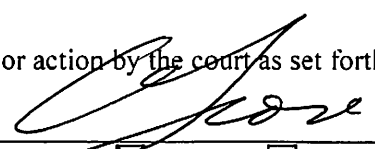
vs. )

State of South Carolina )

Defendant. )

IN THE COURT OF COMMON PLEAS

7th JUDICIAL CIRCUITCASE NO.: 2017-CP-42-02372**MOTION AND ORDER INFORMATION  
FORM AND COVERSHEET**

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                 |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Plaintiff's Attorney:<br><u>Charles Grose, Bar No. 66063</u><br>Address:<br><u>404 Main Street, Greenwood, SC 29646</u><br>Phone: <u>864-538-4466</u> Fax <u>864-538-4405</u><br>E-mail: <u>charles@groselawfirm.com</u> Other: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Defendant's Attorney:<br><u>SC Attorney General's Office, Bar No. _____</u><br>Address:<br><u>PO Box 11549, Columbia, SC 29211-1549</u><br>Phone: _____ Fax _____<br>E-mail: _____ Other: _____ |
| <input checked="" type="checkbox"/> <b>MOTION HEARING REQUESTED</b> (attach written motion and complete <b>SECTIONS I and III</b> )<br><input type="checkbox"/> <b>FORM MOTION, NO HEARING REQUESTED</b> (complete <b>SECTIONS II and III</b> )<br><input type="checkbox"/> <b>PROPOSED ORDER/CONSENT ORDER</b> (complete <b>SECTIONS II and III</b> )                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                 |
| <b>SECTION I: Hearing Information</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                 |
| Nature of Motion: <u>Motion to Conduct Discovery</u><br>Estimated Time Needed: <u>15 min</u> Court Reporter Needed: <input checked="" type="checkbox"/> <b>YES</b> / <input type="checkbox"/> <b>NO</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                 |
| <b>SECTION II: Motion/Order Type</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                 |
| <input checked="" type="checkbox"/> Written motion attached<br><input type="checkbox"/> Form Motion/Order<br>I hereby move for relief or action by the court as set forth in the attached proposed order.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                 |
| <div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: center;"> <br/>           Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant         </div> <div style="text-align: right;"> <u>September 8, 2017</u><br/>           Date submitted         </div> </div>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                 |
| <b>SECTION III: Motion Fee</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                 |
| <input type="checkbox"/> <b>PAID – AMOUNT: \$ _____</b><br><input type="checkbox"/> <b>EXEMPT:</b> (check reason) <div style="display: flex; flex-wrap: wrap;"> <div style="width: 50%;"> <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support<br/> <input type="checkbox"/> Domestic Abuse or Abuse and Neglect<br/> <input type="checkbox"/> Indigent Status    <input type="checkbox"/> State Agency v. Indigent Party<br/> <input type="checkbox"/> Sexually Violent Predator Act    <input checked="" type="checkbox"/> Post-Conviction Relief<br/> <input type="checkbox"/> Motion for Stay in Bankruptcy<br/> <input type="checkbox"/> Motion for Publication    <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC)<br/> <input type="checkbox"/> Proposed order submitted at request of the court; or,<br/>                                                    reduced to writing from motion made in open court per judge's instructions<br/>           Name of Court Reporter: _____<br/> <input type="checkbox"/> Other: _____         </div> <div style="width: 50%;"></div> </div> |                                                                                                                                                                                                 |
| <b>JUDGE'S SECTION</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                 |
| <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br><input type="checkbox"/> Other: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | JUDGE CODE _____<br>Date: _____                                                                                                                                                                 |
| <b>CLERK'S VERIFICATION</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                 |
| Collected by: _____ Date Filed: _____<br><input type="checkbox"/> <b>MOTION FEE COLLECTED: \$ _____</b><br><input type="checkbox"/> <b>CONTESTED – AMOUNT DUE: \$ _____</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                 |

|                             |   |                                  |
|-----------------------------|---|----------------------------------|
| THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS     |
|                             | ) | FOR THE SEVENTH JUDICIAL CIRCUIT |
| COUNTY OF SPARTANBURG       | ) |                                  |
|                             | ) | Case No. 2017-CP-42-02372        |
| Daniel W. Spade,            | ) |                                  |
|                             | ) |                                  |
| Applicant,                  | ) | <b>Motion for Discovery</b>      |
|                             | ) |                                  |
| vs.                         | ) |                                  |
|                             | ) |                                  |
|                             | ) |                                  |
| State of South Carolina,    | ) |                                  |
|                             | ) |                                  |
| Respondent.                 | ) |                                  |
| _____                       | ) |                                  |

Daniel W. Spade moves the Court for an order allowing him “to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure.” S.C. Code Ann. § 17-27-150(a). “All applicants are entitled to a full and fair opportunity to present claims in one PCR application.” *Mangal v. State*, No. 2016-000610, 2017 WL 3045812, at \*7 (S.C.S.Ct. July 19, 2017) (quoting *Robertson*, 418 S.C. 505, 513, 795 S.E.2d 29, 33 (2016) and *Odom*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999)). “[T]he interests of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure.” *Mangal*, at \*7 (emphasis supplied by the Court). Our Supreme Court “encourage[s] trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues.” *Id.* Our Supreme Court’s decision in *Mangal* places a high burden on a PCR applicant to fully investigate the case prior to the hearing. Discovery is necessary in this case to investigate all the potential grounds for relief.

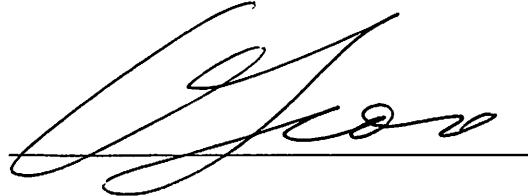
This Court should convene a hearing on this matter. Prior to filing this motion, counsel has not communicated with the Attorney General’s Office because, based on prior cases, counsel

is informed and believes that Office has a policy of leaving these motions to the discretion of the Court. If the Attorney General is willing to consent to this request, counsel will prepare a consent order for the Court's consideration.

IT IS SO MOVED.

Respectfully Submitted,

By

A handwritten signature in black ink, appearing to read 'E. Charles Grose, Jr.', written over a horizontal line.

E. Charles Grose, Jr.  
S.C. Bar Number 66063  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 29646  
(864) 538-4466  
(864) 538-4405 (fax)  
Email: [charles@groselawfirm.com](mailto:charles@groselawfirm.com)

*Attorney for the Applicant*

September 8, 2017  
Greenwood, South Carolina

|                             |   |                                  |
|-----------------------------|---|----------------------------------|
| THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS     |
|                             | ) | FOR THE SEVENTH JUDICIAL CIRCUIT |
| COUNTY OF SPARTANBURG       | ) |                                  |
|                             | ) | Case No. 2017-CP-42-02372        |
| Daniel W. Spade,            | ) |                                  |
|                             | ) |                                  |
| Applicant,                  | ) |                                  |
|                             | ) |                                  |
| vs.                         | ) |                                  |
|                             | ) |                                  |
|                             | ) |                                  |
| State of South Carolina,    | ) |                                  |
|                             | ) |                                  |
| Respondent.                 | ) |                                  |
| _____                       | ) |                                  |

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Post-conviction Relief Section  
 S.C. Attorney General's Office  
 PO Box 11549  
 Columbia, SC 29211-1549

By



E. Charles Grose, Jr.  
 The Grose Law Firm, LLC  
 404 Main Street  
 Greenwood, SC 29646  
 (864) 538-4466

September 8, 2017  
 Greenwood, South Carolina

# The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.

Phone: 864-538-4466 Fax: 864-538-4405

E-mail: [charles@groslawfirm.com](mailto:charles@groslawfirm.com)

Web: [GroseLawFirm.com](http://GroseLawFirm.com)

September 8, 2017

The Honorable M. Hope Blackley  
Clerk of Court, Spartanburg County  
PO Box 3483  
Spartanburg, SC 29304-3483

Re: *Daniel W. Spade v. State of South Carolina*  
Case Number 2017-CP-42-02372

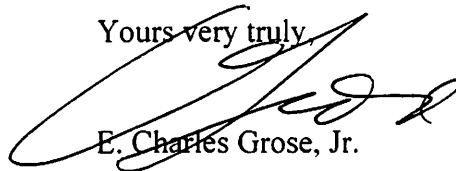
Dear Ms. Blackley:

Enclosed please find Mr. Spade's Motion to Conduct Discovery. In the event that the Attorney General's Office does not consent to this request, I respectfully request that this motion be scheduled for a hearing as soon as reasonably possible.

Thank you for your attention to this matter. If you have any questions or require additional information, please contact me.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Mr. Daniel W. Spade (via US Mail)  
PCR Section, Attorney General's Office (via US Mail)

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

Daniel W. Spade, #358974,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

2017-CP-42-2372

**RETURN TO APPLICANT'S MOTION  
FOR DISCOVERY**

This matter comes before the Court by way of Applicant's Motion for Discovery filed September 11, 2017. Applicant, through his counsel, also requested by letter a complete copy of the Solicitor's file(s) in the underlying criminal matter, including "any materials in your possession related to the Family Court case(s) that involved the same parties and/or allegations." (See Exhibit I attached to this Return). Respondent submits that Applicant's discovery motion is without merit and should be denied without a hearing.

*Discovery in PCR*

The Uniform Post Conviction Procedure Act comprehends and takes the place of the statutory writ of habeas corpus found in S.C. Code Ann. Sec. 17-17-10 (1985), *et seq.*, under which this action has been filed. *See* S.C. Code Ann. Sec. 17-27-20(b). The Uniform Post-Conviction Procedure Act does not allow for discovery in a non-capital post-conviction relief case without good cause and order of the circuit court authorizing discovery. S.C. Code Ann. § 17-27-150(A) states:

A party in a non-capital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of

Civil Procedure **if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.** If necessary for the effective utilization of discovery procedures, counsel may be appointed by the judge for an applicant who qualifies for appointment pursuant to Section 17-27-60 or similar applicable provisions of law.

(Emphasis added). Therefore, utilizing discovery in a noncapital PCR is not a right, but a tool an applicant must show good cause to invoke. S.C. Code Ann. § 17-27-150(A) (1976); see also Hiott v. State, 375 S.C. 354, 357, 652 S.E.2d 436, 437 (Ct. App. 2007)(“Section 17-27-150 indicates the legislature's express intent to afford PCR applicants limited use of the discovery process as stated in the South Carolina Rules of Civil Procedure.”), rev'd on other grounds, 381 S.C. 622, 674 S.E.2d 491 (2009). “Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review.” See Strickler v. Greene, 527 U.S. 263, 286, 119 S.Ct. 1936, 1950-1950 (1999).

#### *Discovery in this case*

First, the conviction being challenged by Applicant in this action arises from a non-capital offense. Therefore, Applicant is not entitled to discovery absent a showing of good cause. Second, the discovery process includes interrogatories, requests for production of documents and things, requests for admissions, subpoenas, funds for expert witnesses, depositions, etc. Applicant's motion is a general and vague request to invoke discovery without specificity as to what form of discovery he requests and without showing justification for requesting such discovery. Discovery in PCR is not meant to serve as a fishing expedition. Applicant's grounds for discovery involve nothing more than speculation about what he might find and where he might find it. Such speculation cannot support a finding of good cause. Id.



To the extent Applicant seeks discovery to demand a full copy of the Solicitor's file, Respondent submits Applicant is not entitled to make such a demand. First, the Solicitor provided any and all relevant documents to Applicant's criminal case during the discovery process prior to trial, pursuant to Rule 5, SCRCrimP, and Brady. Anything that was not provided to Applicant prior to trial would constitute confidential work product. Secondly, Respondent submits Applicant has not alleged nor shown good cause to allege there has been a Rule 5 or Brady violation that would require Applicant to examine the Solicitor's file. Therefore, his request to obtain the Solicitor's file is merely an attempt to comb through each document in hopes of finding something in support of his cause to vacate his conviction. This is not good cause. And to find otherwise would declare open season for the thousands of PCR applicants on the Solicitors to whom they owe their current predicament. Furthermore, setting a precedent that PCR applicants are entitled to demand copies of Solicitor's files would require an entire team within the Solicitor's office to handle such demands in order to pull archived files, screen them for confidential work product, make copies and send them to the demander. Such a daunting task is especially onerous in light of the fact that this process was already carried out when discovery was provided to Applicant prior to his conviction.

Without any specificity as to what Applicant is seeking through discovery and why, no good cause can be shown. Additionally, Respondent's Return is due October 21, 2017. Upon the filing of Respondent's Return, Respondent will provide opposing counsel with every document within its custody and control, including the clerk's records, SCDC records, direct appeal records and the trial transcript.

*Conclusion*

Respondent therefore objects to the Motion for Discovery and requests that the Court deny the Applicant's Motion without a hearing. If this Honorable Court deems a hearing is necessary, Respondent requests to convene a hearing before the Seventh Circuit Chief Administrative Judge for the Court of Common Pleas.

WHEREFORE, the State requests that this Court deny the Motion for Discovery.

Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI  
Assistant Attorney General

BY:

  
ATTORNEYS FOR RESPONDENT

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

September 15, 2017.

|                           |   |                              |
|---------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA   | ) |                              |
|                           | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF SPARTANBURG     | ) |                              |
|                           | ) |                              |
|                           | ) | 2017-CP-42-2372              |
|                           | ) |                              |
| DANIEL W. SPADE, #358974, | ) |                              |
|                           | ) |                              |
| 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 to Applicant's Motion for Discovery** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**E. Charles Grose, Jr., Esquire**  
**Grose Law Firm**  
**404 Main Street**  
**Greenwood, SC 29646**

DATED this 15<sup>th</sup> day of September, 2017.

  
 \_\_\_\_\_  
 Mallory Morris, Legal Assistant

**The Grose Law Firm, LLC**  
404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.  
Phone: 864-538-4466 Fax: 864-538-4405  
E-mail: [charles@groselawfirm.com](mailto:charles@groselawfirm.com)  
Web: [GroseLawFirm.com](http://GroseLawFirm.com)

September 11, 2017

The Honorable Barry J. Barnette  
Solicitor, Seventh Judicial Circuit  
Spartanburg County Courthouse  
180 Magnolia Street  
Spartanburg, SC 29306

N. Douglas Brannon, Esquire  
Kennedy & Brannon, P.A.  
Kennedy & Brannon  
PO Box 3254  
Spartanburg, SC 29304

Jennifer A.J. Jordan, Esquire  
Seventh Circuit Solicitor's Office  
180 Magnolia St.  
Spartanburg, SC 29306

Kimberly Lewis Leskanic, Esquire  
Seventh Circuit Solicitor's Office  
125 Floyd Baker Blvd.  
Gaffney, SC 29340

Re: *Daniel W. Spade v. State of South Carolina*  
Case Number 2017-CP-42-02372

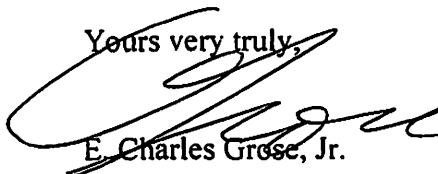
Dear Counsel:

I represent Mr. Spade in his application for post-conviction relief. I understand that you were the prosecutors in his case. This letter is to request a complete copy of your file(s) in this matter. This request also includes any materials in your possession related to the Family Court case(s) that involved the same parties and/or allegations. In the event you claim privilege or work product to any part of your file(s), please take the necessary steps to preserve those materials, including the preparation of a privilege log, for judicial review.

Thank you for your attention to this matter. If you have any questions or require additional information, please contact me.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Mr. Daniel W. Spade (via US Mail)  
Valerie Giovanoli, Esquire (via US Mail)

**The Grose Law Firm, LLC**  
404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.  
Phone: 864-538-4466 Fax: 864-538-4405  
E-mail: [charles@groslawfirm.com](mailto:charles@groslawfirm.com)  
Web: [GroseLawFirm.com](http://GroseLawFirm.com)

October 2, 2017

The Honorable M. Hope Blackley  
Clerk of Court, Spartanburg County  
PO Box 3483  
Spartanburg, SC 29304-3483

Re: *Daniel W. Spade v. State of South Carolina*  
Case Number 2017-CP-42-02372

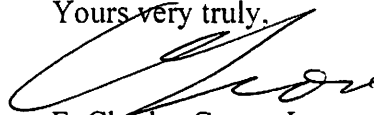
Dear Ms. Blackley:

Enclosed please find Mr. Spade's First Amended Application for Post-Conviction Relief, along with a certificate of service.

Thank you for your attention to this matter. If you have any questions or require additional information, please contact me.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Mr. Daniel W. Spade (via US Mail)  
Valerie Giovanoli, Esquire (via Email and US Mail)

STATE OF SOUTH CAROLINA

COUNTY OF Spartanburg

Daniel W. Spade, SCDC # 358974

**1085**  
IN THE COURT OF COMMON PLEAS

**CIVIL ACTION COVERSHEET**

Plaintiff(s) )

vs. )

State of South Carolina

Defendant(s) )

2017-CP - 42- 02372

Submitted By: Charles Grose

Address: 404 Main Street, Greenwood, SC 29646

SC Bar #: 66063

Telephone #: 864-538-4466

Fax #: 864-538-4405

Other: \_\_\_\_\_

E-mail: charles@groselawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

**DOCKETING INFORMATION (Check all that apply)**

*\*If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.  
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.  
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.  
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

**NATURE OF ACTION (Check One Box Below)**

- Contracts**  
☐ Constructions (100)  
☐ Debt Collection (110)  
☐ General (130)  
☐ Breach of Contract (140)  
☐ Fraud/Bad Faith (150)  
☐ Failure to Deliver/  
Warranty (160)  
☐ Employment Discrim (170)  
☐ Employment (180)  
☐ Other (199) \_\_\_\_\_

- Torts - Professional Malpractice**  
☐ Dental Malpractice (200)  
☐ Legal Malpractice (210)  
☐ Medical Malpractice (220)  
Previous Notice of Intent Case #  
20 \_\_\_\_-NI-\_\_\_\_-\_\_\_\_\_  
☐ Notice/ File Med Mal (230)  
☐ Other (299) \_\_\_\_\_

- Torts - Personal Injury**  
☐ Conversion (310)  
☐ Motor Vehicle Accident (320)  
☐ Premises Liability (330)  
☐ Products Liability (340)  
☐ Personal Injury (350)  
☐ Wrongful Death (360)  
☐ Assault/Battery (370)  
☐ Slander/Libel (380)  
☐ Other (399) \_\_\_\_\_

- Real Property**  
☐ Claim & Delivery (400)  
☐ Condemnation (410)  
☐ Foreclosure (420)  
☐ Mechanic's Lien (430)  
☐ Partition (440)  
☐ Possession (450)  
☐ Building Code Violation (460)  
☐ Other (499) \_\_\_\_\_

- Inmate Petitions**  
☒ PCR (500)  
☐ Mandamus (520)  
☐ Habeas Corpus (530)  
☐ Other (599) \_\_\_\_\_

- Administrative Law/Relief**  
☐ Reinstate Drv. License (800)  
☐ Judicial Review (810)  
☐ Relief (820)  
☐ Permanent Injunction (830)  
☐ Forfeiture-Petition (840)  
☐ Forfeiture-Consent Order (850)  
☐ Other (899) \_\_\_\_\_

- Judgments/Settlements**  
☐ Death Settlement (700)  
☐ Foreign Judgment (710)  
☐ Magistrate's Judgment (720)  
☐ Minor Settlement (730)  
☐ Transcript Judgment (740)  
☐ Lis Pendens (750)  
☐ Transfer of Structured  
Settlement Payment Rights  
Application (760)

- Appeals**  
☐ Arbitration (900)  
☐ Magistrate-Civil (910)  
☐ Magistrate-Criminal (920)  
☐ Municipal (930)  
☐ Probate Court (940)  
☐ SCDOT (950)  
☐ Worker's Comp (960)  
☐ Zoning Board (970)  
☐ Public Service Comm. (990)  
☐ Employment Security Comm (991)

- Special/Complex /Other**  
☐ Environmental (600)  
☐ Automobile Arb. (610)  
☐ Medical (620)  
☐ Other (699) \_\_\_\_\_  
☐ Sexual Predator (510)  
☐ Permanent Restraining Order (680)  
☐ Pharmaceuticals (630)  
☐ Unfair Trade Practices (640)  
☐ Out-of-State Depositions (650)  
☐ Motion to Quash Subpoena in  
an Out-of-County Action (660)  
☐ Pre-Suit Discovery (670)

- ☐ Confession of Judgment (770)  
☐ Petition for Workers  
Compensation Settlement  
Approval (780)  
☐ Other (799) \_\_\_\_\_

Submitting Party Signature: \_\_\_\_\_

Date: October 2, 2017

**Note:** Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**Effective January 1, 2016**, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

**Pursuant to the ADR Rules, you are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note:** You must comply with the Supreme Court Rules regarding ADR.  
Failure to do so may affect your case or may result in sanctions.

|                             |   |                                            |
|-----------------------------|---|--------------------------------------------|
| THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS               |
|                             | ) | FOR THE SEVENTH JUDICIAL CIRCUIT           |
| COUNTY OF SPARTANBURG       | ) |                                            |
|                             | ) | Case No. 2017-CP-42-02372                  |
| Daniel W. Spade,            | ) |                                            |
|                             | ) |                                            |
| Applicant,                  | ) |                                            |
|                             | ) | <b>First Amended Application for Post-</b> |
| vs.                         | ) | <b>Conviction Relief</b>                   |
|                             | ) |                                            |
|                             | ) |                                            |
| State of South Carolina,    | ) |                                            |
|                             | ) |                                            |
| Respondent.                 | ) |                                            |
|                             | ) |                                            |

Pursuant to the Uniform Post-Conviction Relief Act, S.C. Code Ann. § 17-27-10 *et. seq.*, the applicant, Daniel W. Spade, amends his application for post-conviction relief.<sup>1</sup>

- 1) Mr. Spade is confined at the Lee Correctional Institution.
- 2) The Honorable R. Keith Kelly, Presiding Judge, Court of Generals Sessions, Spartanburg County, imposed sentence.
- 3) There were not any co-defendants.
- 4) The sentence was imposed on indictment number 2011-GS-42-04171 for first-degree criminal sexual conduct with a minor.
- 5) On February 26, 2014, Judge Kelly sentenced Mr. Spade to thirty-five years imprisonment.
- 6) The sentence was imposed following a trial by jury.
- 7) Mr. Spade appealed to the South Carolina Court of Appeals. On July 6, 2016, the Court of Appeals affirmed Mr. Spade's conviction and sentence. *State v. Spade*, Unpublished Op. No. 2016-UP- 352 (Appellate Case No. 2014-000448). 2016 WL 3670561 (S.C. Ct. App.

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<sup>1</sup> This pleading is based on Form 5, Revised 3/2003, which can be found on the South Carolina Judicial Department website. Mr. Spade reserves the right to further amend his application for post-conviction relief.



July 6, 2016). On June 16, 2017, the South Carolina Supreme Court denied Mr. Spade's petition for writ of *certiorari*, Appellate Case No. 2016-001965.

8) Please see number 7 above for courts, opinion and order citations, and dates of decisions.

9) Not applicable because Mr. Spade appealed.

10) Statement of grounds for relief:

a) Mr. Spade was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during the guilt/innocence phase of his jury trial.

b) Mr. Spade was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during his sentencing hearing.

c) Mr. Spade was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during his direct appeal.

d) Mr. Spade was denied due process of law during his jury trial because of prosecutorial misconduct. U.S. Const. Am. V and XIV; S.C. Const. Art. I, § 3; *Roviano v. U.S.*, 353 U.S. 53 (1957); *Brady v. Maryland*, 373 U.S. 83, (1963); *Kyles v. Whitley*, 514 U.S. 419, (1995); *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); and Rule 5. SCRCrimP.

11) Statement of facts supporting grounds for relief:

a) Trial counsel's performance was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

1) Failing to request a continuance in order to have time to review and evaluate the child's mental health records that were disclosed for the first time four days prior to trial, when those records contained exculpatory information.

2) Not only failing to object to the trial judge instructing the jurors that their role is to "search for the truth" and make sure "justice is done," which impermissibly diminishes and shifts the burden of proof, but also adopting that language in closing argument, thereby diminishing and shifting the burden of proof.

3) Failing to call available lay, character, and expert witnesses that would have established the unreliability of the child's allegations.

4) Failing to investigate, develop and present evidence that the Special Prosecutor, N. Douglas Brannon, had a conflict of interest and, therefore, was disqualified from prosecuting this case.

5) Failing to request a ruling on Mr. Spade's contention that the Private Prosecutor, N. Douglas Brannon, was unqualified to serve as a special prosecutor because the Solicitor failed to produce a governor's commission pursuant to S.C. Code Ann. § 1-7-470.

6) Failing to move for disclosure of exculpatory information in the possession of the Mr. Spade's Private Prosecutor, N. Douglas Brannon.

7) Failing to investigate, develop, and present evidence that would have established that testimony about the child's panic attacks were not related to Mr. Spade, which would have led to the trial court excluding that testimony or, if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony.

8) Failing to object to and move for a mistrial because of inadmissible testimony that vouched for the child's credibility.

9) Failing to object to Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. In the alternative, failing to impeach Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. *See, e.g., S.C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011).

10) Failing to admit the videotaped interview from the Children's Advocacy Center that contained exculpatory information.

11) Failing to investigate, develop, and present evidence that venue was not in Spartanburg County.

12) Failing to support the directed verdict motion with evidence that venue was not in Spartanburg County.

13) Failing to request a jury instruction on venue.

14) Failing to object to the Special Prosecutor's improper closing argument that appealed the jurors' emotions and improperly vouched for the complaining witness when he recounted a conversation with his daughter discussing how the police arrest "bad people," he (as Special Prosecutor) tells the complaining witness' story, and "the jury takes care of the good people." Tr. 305-07.

15) Failing to object to evidence that the Family Court action involving the same allegations resulted in termination of Mr. Spade's parental rights.

16) Advising Mr. Spade not to present any evidence, including but not limited to his own testimony.

17) Excluding evidence from the forensic computer examination that was exculpatory.

18) The cumulative effect of trial counsel's errors denied Mr. Spade his right to a fair trial.

b) Trial counsel's performance was both unreasonable and prejudicial during sentencing. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

1) Failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing.

2) Failing to present any information or evidence to the trial judge in order to mitigate the sentence imposed.

c) Appellate counsel's performance was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following: Failing to brief on appeal the trial court judge denying the motion for directed verdict when the State failed to present evidence establishing venue in Spartanburg County.

d) The prosecutors' misconduct was prejudicial and denied Mr. Spade his right to a fair trial. The misconduct included, but is not necessarily limited to, the following:

1) Failing to disclose *Brady* information including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County.

2) Failing to disclose *Brady* information in a timely manner including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County.

3) Eliciting false testimony regarding venue.

4) Failing to correct false testimony regarding venue.

12) Prior to filing this application, Mr. Spade has not filed any petition in state court under South Carolina law, and petition in state or federal court for habeas corpus or post-conviction relief, any petition in the United States Supreme Court for certiorari, or any other petitions, motions, or applications in this or any other court, except for the direct appeal identified in number 7 above.

13) Not applicable because Mr. Spade has not filed any petitions for relief with the exception of his direct appeal and the original petition in this post-conviction relief case.

14) No ground set forth in paragraph 10 has been presented to this or any other court.

15) Not applicable because no prior petitions have been filed in any other court.

16) The grounds set forth in paragraph 10 have not been presented to any other court because this is the first opportunity to raise ineffective assistance of counsel.

17) Mr. Spade was represented at his jury trial, sentencing, and on appeal by the attorneys identified in paragraph 18. The undersigned counsel assisted Mr. Spade in preparing this amended application.

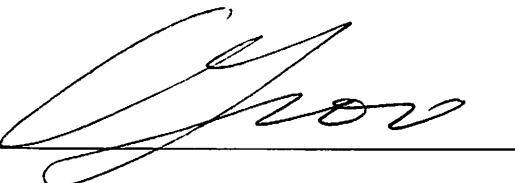
18) Prior Representation.

a) Trial Counsel:

1) Kenneth P. Shabel, Esquire  
Kennedy & Brannon, P.A.  
PO Box 3254  
Spartanburg, SC 29304

- 2) Shawn M. Campbell, Esquire  
Campbell & Shabel, LLC  
1451 E Main St, Ste. 1A  
Spartanburg, SC 29307
- b) Appellate Counsel:
  - 1) C. Rauch Wise, Esquire  
305 Main St.  
Greenwood, SC 29646
  - 2) Kenneth P. Shabel, Esquire<sup>2</sup>  
Kennedy & Brannon, P.A.  
PO Box 3254  
Spartanburg, SC 29304
- 19) Mr. Spade respectfully requests this Court to order a new trial.
- 20) Mr. Spade is not under the sentence of any other court that she has not challenged.

Respectfully Submitted,

By 

E. Charles Grose, Jr.  
S.C. Bar Number 66063  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 29646  
(864) 538-4466  
(864) 538-4405 (fax)  
Email: charles@groselawfirm.com

*Attorney for the Applicant*

October 2, 2017  
Greenwood, South Carolina

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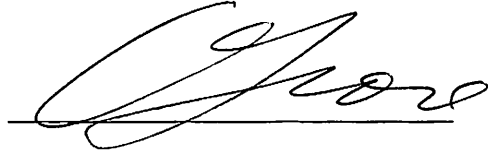
<sup>2</sup> Mr. Shabel withdrew from representing Mr. Spade on appeal when he joined the same law firm as Mr. Brannon, who had been Mr. Spade's special prosecutor.

|                             |   |                                  |
|-----------------------------|---|----------------------------------|
| THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS     |
|                             | ) | FOR THE SEVENTH JUDICIAL CIRCUIT |
| COUNTY OF SPARTANBURG       | ) |                                  |
|                             | ) | Case No. 2017-CP-42-02372        |
| Daniel W. Spade,            | ) |                                  |
|                             | ) |                                  |
| Applicant,                  | ) |                                  |
|                             | ) |                                  |
| vs.                         | ) |                                  |
|                             | ) |                                  |
|                             | ) |                                  |
| State of South Carolina,    | ) |                                  |
|                             | ) |                                  |
| Respondent.                 | ) |                                  |
| _____                       | ) |                                  |

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Valerie Giovanoli, Esquire  
 S.C. Attorney General's Office  
 PO Box 11549  
 Columbia, SC 29211-1549

By



E. Charles Grose, Jr.  
 The Grose Law Firm, LLC  
 404 Main Street  
 Greenwood, SC 29646  
 (864) 538-4466

October 2, 2017  
 Greenwood, South Carolina

1 STATE OF SOUTH CAROLINA ) IN THE COURT OF  
2 ) COMMON PLEAS FOR  
3 ) THE SEVENTH JUDICIAL  
4 ) CIRCUIT  
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DANIEL W. SPADE,  
Applicant,  
vs.  
STATE OF SOUTH CAROLINA,  
Respondent.

TRANSCRIPT OF RECORD  
2017-CP-42-02372

November 22, 2017  
Spartanburg, South Carolina

B E F O R E:

HONORABLE J. DURHAM COLE, Judge.

A P P E A R A N C E S

E. CHARLES GROSE, JR., ESQUIRE  
For Applicant

MS. VALERIE GARCIA GIOVANOLI, DEPUTY ATTORNEY GENERAL  
For Respondent

MR. RUSSELL D. GHENT, ASSISTANT SOLICITOR  
For Respondent

N. DOUGLAS BRENNAN, Esquire  
For Respondent

Julie A. Ashbrook,  
Circuit Court Reporter  
Seventh Judicial Circuit



## I N D E X

| <u>WITNESS</u>                                    | <u>PAGE</u> |
|---------------------------------------------------|-------------|
| ANNOUNCEMENT OF CASE<br>By Ms. Giovanoli          | 4           |
| MOTION FOR DISCOVERY<br>By Mr. Grose              | 5           |
| REPLY TO MOTION FOR DISCOVERY<br>By Ms. Giovanoli | 9           |
| FURTHER ARGUMENT<br>By Mr. Grose                  | 11          |
| FURTHER REPLY<br>By Ms. Giovanoli                 | 16          |
| MOTION TO COMPEL<br>By Mr. Brannon                | 20          |
| REPLY TO MOTION TO COMPEL<br>By Ms. Giovanoli     | 30          |
| REPLY TO MOTION TO COMPEL<br>By Mr. Brannon       | 33          |
| FURTHER ARGUMENT<br>By Mr. Grose                  | 35          |
| FURTHER ARGUMENT<br>By Mr. Brannon                | 38          |
| FURTHER ARGUMENT<br>By Ms. Giovanoli              | 39          |
| FURTHER ARGUMENT<br>By Mr. Grose                  | 43          |
| COURT TAKE UNDER ADVISEMENT                       | 45          |
| CERTIFICATE OF REPORTER                           | 47          |

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EXHIBITS

MARKED

ENTERED

NO EXHIBITS PROFFERED

1                   DANIEL W.SPADE VERSUS THE STATE

2                   MS. GIOVANOLI: Your Honor, would you like me to  
3 call the case for the court reporter for the record?

4                   THE COURT: (Nods head up and down.)

5                   MS. GIOVANOLI: We're before the Court on the  
6 case of Daniel Spade versus the State of South Carolina.  
7 This is a PCR application. Appellant, applicant has  
8 filed a motion for discovery as well as a motion to  
9 compel the production of a special prosecutor's file.  
10 Since this is applicant's motion, I will turn it over to  
11 counsel.

12                  THE COURT: Let me ask this before we do that.  
13 The file that the special prosecutor has, is it the same  
14 file that the solicitor has?

15                  MS. GIOVANOLI: No, Your Honor. Mr. Brannon  
16 represented the victim's mother and adopted father in a  
17 Family Court case, terminating the applicant's parental  
18 rights and for the stepfather to adopt the child. So  
19 this case was actually resolved in 2012, two years,  
20 about two years prior to the criminal trial.

21                  THE COURT: So are we gonna address the motion as  
22 to the allowance of discovery and then we'll address the  
23 motion as to the file when Mr. Brannon shows up?

24                  MS. GIOVANOLI: I think so.

25                  MR. GROSE: We can, we can do that. They are ---

1           THE COURT: Was Doug Brannon, do you all know if  
2 Mr. Brannon was notified to be here?

3           MS. GIOVANOLI: He was. I spoke with him and I  
4 believe he's next door. We're trying to locate him.  
5 But he did indicate that he would be present for this  
6 hearing.

7           THE COURT: Okay. All right, Mr. Grose?

8           MR. GROSE: The motions are inner connected, but  
9 obviously the motion for discovery is a little bit  
10 broader. And as Your Honor is aware, in a noncapital  
11 PCR case, the statute does not automatically provide for  
12 discovery. It requires an order of the Court.

13           There are probably, I guess, two types of things  
14 that we want to be able to do. And I don't know that I  
15 can ever get a consistent interpretation as to whether  
16 issuing records custodian subpoenas is covered by the  
17 statute or not. I tend to think it probably is. And  
18 there's probably some records custodian subpoenas that  
19 we would want to issue to third parties, not the State,  
20 not the solicitor's office, in order to develop records.  
21 And I'll get into a little bit more of an explanation of  
22 that in a minute.

23           There are -- we'll also be in need to take  
24 depositions. Now, when we get into assuming that we're  
25 allowed access to Mr. Brannon's file, he would be the

1 first deposition that we would want to take. There's  
2 also a potential of at least one out-of-state witness  
3 that we would need to get testimony from in order to  
4 present at a hearing because in a civil matter we can't  
5 compel the attendance of an out-of-state witness like  
6 would have been done in the general sessions trial.

7           Depending upon how Mr. Brannon's deposition goes,  
8 if we're allowed to do that, we would probably want to  
9 take some other depositions. One of the issues that's  
10 gonna be critical in this PCR is whether or not the  
11 State established venue, and if they did whether or not  
12 that could have been challenged. And I realize that's a  
13 very unusual claim to come up in a general sessions  
14 court case, but it is a jurisdictional, a quasi  
15 jurisdictional issue.

16           And when you look at the transcript there was  
17 what we believe, and a kind way to say it, would be some  
18 very creative lawyering. For example, when the child,  
19 who was the complaining witness, was testifying and  
20 being questioned by one of the solicitors, the question  
21 was, was all about anything happening in South Carolina.  
22 For example, on Page 140 of the transcript: (Reading.)  
23 Do you remember anything else happening at a motel in  
24 South Carolina? (End reading.)

25           Who Meredith Thompson-Loftis, who's a counselor

1 that was seeing the child when the allegations were  
2 disclosed, they went through, I guess, the Rule 801  
3 questions with regarding time and place and the question  
4 was: (Reading.)

5 Was she specific to location?

6 She was.

7 Was the location in South Carolina?

8 Yes, it was. (Ends reading.)

9 And there's at least one other witness that was  
10 questioned, not about Spartanburg County, but by, you  
11 know, about the incident happening in South Carolina --  
12 happening in South Carolina.

13 One of the things that is important by way of  
14 background is there were probably some pretty  
15 contentious hearings with regard to access to counseling  
16 records. And I believe there was a pretrial ruling that  
17 the defense wasn't gonna get access to them unless the  
18 State was going to end up using them in the case. And  
19 then on the eve of trial there was a, you know, a  
20 document dump that included the counseling records. One  
21 of our allegations was is that there should have been a  
22 continuance in order to have more time to review those  
23 records and perhaps have a, an expert review the  
24 records.

25 And one of the documents -- and the record ended

1 up getting put into the record and on the record on  
2 appeal. And on Page 385 of the record on appeal is a  
3 page of records from Ms. Thompson-Loftis that seems to  
4 us to very clearly say that the allegations that the  
5 child was reporting happened in a hotel in Greenville.  
6 And so if -- and there, there was evidence presented  
7 that Mr. Spade and his daughter, when he had visitation,  
8 because Mr. Spade would have to come down from Virginia  
9 for visitation, there was evidence that they had stayed  
10 in a hotel in Spartanburg County. We think that we  
11 would be able to develop evidence given access to  
12 subpoena power to prove that there was also a hotel in  
13 Greenville County.

14 Now, Mr. Spade at trial and now and all along has  
15 denied that's done anything improper with regards to his  
16 daughter. He maintains his innocence of these claims.  
17 But if what is in Ms. Loftis's notes is true, that the  
18 prop venue was in Greenville, South Carolina, in a  
19 different judicial circuit, that's the court that would  
20 have had jurisdiction to try the case, not the general  
21 sessions court in Spartanburg County.

22 And so we need to be able to develop that a  
23 little bit more. And that may -- this is sort of  
24 starting to segue into, you know, why we need  
25 Mr. Brannon's file. And I don't know if you want me to

1 wait on that until he gets here and I can do that.

2 THE COURT: Yeah, because he'll have to address  
3 it since he was a special prosecutor. I tell you what  
4 we can address. We can address the issue of taking  
5 depositions.

6 MS. GIOVANOLI: Sure. Can I respond briefly?

7 THE COURT: Sure.

8 MS. GIOVANOLI: Okay. First of all, I think that  
9 we need to address discovery in PCR cases. The  
10 legislature's intent is way clear that PCR applicants  
11 are only entitled to discovery if they'd make a showing  
12 of good cause, unlike a criminal trial. And case law is  
13 pretty clear that mere speculation does not equate to  
14 good cause.

15 Citing *Strickler versus Greene*, which was a  
16 United States Supreme Court case, they stated:  
17 (Reading.) Mere speculation that some exculpatory  
18 material may have been withheld is unlikely to establish  
19 good cause for a discovery request upon collateral  
20 review. (Ends Reading.)

21 That, that touches more on the request for  
22 Mr. Brannon's file, but to address some of the issues  
23 that he mentioned about jurisdiction and Mrs. Loftis's  
24 records, those records were turned over to the defense  
25 prior to trial. And I understand that the applicant is



1 now claiming that they should have gotten a continuance  
2 during trial, but those records were turned over. He is  
3 in possession of Mrs. Loftis's records.

4 As far as the -- I want to go back to the good  
5 cause. The whole purpose of good cause is so that we  
6 don't relitigate everything that was litigated at trial.  
7 And essentially everything that he addressed as far as  
8 the records for Ms. Loftis and the child's interviews  
9 were already disclosed to the defense at the time of  
10 trial. With regard to Mr. Brannon's deposition and the  
11 deposition of other parties, I think that we do need to  
12 address his file before we get to whether or not he  
13 needs to be deposed. The State would submit that  
14 there's been no showing of good cause in this case to  
15 even grant discovery to the applicant.

16 Beg the Court's indulgence.

17 MR. GHENT: Your Honor, may it please the Court?  
18 May I just inform the Court that I know you'll  
19 personally check on this, Ms. Jordan advised me that  
20 Mr. Brannon is in front of Judge Sinclair in Family  
21 Court right now and hopefully he can join us soon. I'm  
22 not sure. I'm sure your clerk will be able to get more  
23 certainty than I've got. Thank you, sir.

24 THE COURT: Mr. Grose, is it appropriate to  
25 bifurcate the issue of allowing discovery and then

1 compelling the special prosecutor's file or are those so  
2 intertwined that we need to wait for Mr. Brannon to  
3 address both?

4 MR. GROSE: Well, I think you could probably  
5 address Mr. Brannon's separately because it's very  
6 specific as to that. Whereas, some of the other issues  
7 that we were raising are implicated by the other.

8 THE COURT: All right. Well, let's address the  
9 issue of good cause and allowing discovery at all.

10 MR. GROSE: All right. You know, I would  
11 probably be remiss if I didn't point out that one of the  
12 reasons I think our legislature probably put that  
13 provision in the statute is that they didn't want to  
14 open up cart blanch discovery in, you know, indigent  
15 cases without having some screening by a judge before  
16 the State incurred those costs. Mr. Spade is not  
17 indigent. We would be incurring costs of depositions  
18 and paying any fees for producing records and that sort  
19 of thing.

20 With regard to good cause, you know, I have Ms.  
21 Loftis's notes that says the disclosure was in  
22 Greenville County. They're not in Spartanburg County.  
23 I need to be able to get records from the hotel in  
24 Greenville County to show that, you know, the timeframe  
25 when Mr. Spade, you know, was a guest at that hotel to

1 establish ---

2 THE COURT: Well, what's preventing that?

3 MR. GROSE: Well, my interpretation of the rules  
4 is I can't even issue a records custodian subpoena  
5 unless it's for an actual hearing date without a ---

6 THE COURT: Well, that might be true, but you  
7 can, you can issue a subpoena and a subpoena duces tecum  
8 and if they would rather show up rather than provide you  
9 the information in advance, then that can be  
10 accomplished.

11 MR. GROSE: Well, but I want to get, I want to  
12 get it before the hearing date, which hasn't even been  
13 scheduled. That's, you know, I mean I guess we could  
14 subpoena everything on that day and then if we, you  
15 know, needed a continuance, we could have a continuance,  
16 but that doesn't seem to be -- I don't even have a date  
17 to put in the subpoena right now because the hearing  
18 hasn't been set.

19 THE COURT: Well, we can, we can give you a date.  
20 My experience has been that sometimes people don't want  
21 to comply with a subpoena duces tecum or we needed it in  
22 advance.

23 MR. GROSE: Uh-huh.

24 THE COURT: And so, and so they insist that  
25 something has to be done. And, of course, what else can

1 be done is that they have to come to court and bring  
2 those records.

3 MR. GROSE: Uh-huh.

4 THE COURT: And once they find that out, they  
5 usually end up relenting and go ahead and giving  
6 information in advance unless there's some privilege  
7 issue or confidentiality issue and then they want a  
8 court order to absolve them from that liability.

9 MR. GROSE: Right.

10 THE COURT: But, I mean, that's the way it's  
11 often accomplished. I mean, I'm not suggesting that  
12 those hoops ought to have to be jumped through, but  
13 oftentimes they do have to be.

14 MR. GROSE: If you give me a court date to put in  
15 the subpoena, I'll issue the subpoenas that I think are  
16 relevant and we'll see what happens. That's the primary  
17 one.

18 We also, separate -- well, I'd like to be able to  
19 depose Ms. Loftis to get more information about what  
20 was, you know, in her records. And she is somebody who  
21 can assert a privilege, and so I don't know that I can  
22 do that without a court order, both generally to be able  
23 to conduct discovery and specifically for her to be  
24 required to respond.

25 THE COURT: Okay. Well, haven't those records

1 already been provided?

2 MR. GROSE: They have, but I want to be able to,  
3 to ask her questions about what was in the records that  
4 weren't brought out in trial.

5 THE COURT: Well, she can be subpoenaed to  
6 testify, couldn't she?

7 MR. GROSE: She could. And, again, that's not a  
8 very good use of judicial economy, but if that's the way  
9 you want to do it, we can do it that way.

10 THE COURT: Well, I understand. And I'm just  
11 having a discussion with you right now, but there's a  
12 lot of ways that we can enhance judicial economy, but  
13 sometimes the rules don't provide for that. I mean, I  
14 understand that's the ---

15 MR. GROSE: Uh-huh.

16 THE COURT: That's the goal of the rule is to  
17 promote judicial economy, but sometimes the rules  
18 prevent us from doing that. Like in this case the  
19 legislature has decided that discovery is not  
20 appropriate in a postconviction relief action unless  
21 good cause is shown. That might result in a failure to  
22 promote judicial economy, but that's what the rule is.

23 MR. GROSE: Uh-huh.

24 THE COURT: And that if, if the sole goal in a  
25 postconviction relief action wherein the applicant is

1 requesting discovery, is to promote judicial economy,  
2 then we can just have open discovery in every case. And  
3 the legislature has seen fit to say that's not the case.  
4 These rules do not apply unless the court determines  
5 that they should.

6 MR. GROSE: Well, but our court has also recently  
7 said in the Mangal case that the bench is encouraged to  
8 apply the rules of our procedures with flexibility to  
9 assist applicants in being able to prepare all of their  
10 issues before the court date has come into play. So  
11 that's the most recent time our court has spoken on  
12 that.

13 And that, I think in our motion we cited the  
14 first version of the Mangal case that came out. Of  
15 course they reissued the opinion a few weeks ago. And  
16 so, you know, I didn't -- I feel like we're doing what  
17 they've asked us to do in that regard.

18 There is a matter of an out-of-state witness  
19 because on the eve of trial with some of the documents  
20 that were presented, they, the State, produced evidence  
21 that not only had Mr. Spade sexually abused his  
22 daughter, but his girlfriend at the time in Virginia had  
23 also sexually abused the daughter. She could have  
24 been ---

25 THE COURT: Well, let me just say I recognize

1 that's a real and legitimate issue that likely cannot be  
2 resolved without some help from the Court, and so I  
3 might certainly be willing to help you with that issue.

4 MR. GROSE: Okay. I think at this point I need  
5 to get into more about, you know, why we need to be able  
6 to depose Mr. Brannon and the reasons for access to his  
7 file and deposing him because that really is a big part  
8 of why we're here.

9 THE COURT: All right. Well, I tell you what, do  
10 you all got anything else you want to tell me before we  
11 get Mr. Brannon?

12 MS. GIOVANOLI: I do, Your Honor, just briefly to  
13 clarify two points. The State never alleged that sexual  
14 abuse didn't occur at the hotel in Greenville. The  
15 applicant had two visitations with the victim that year,  
16 one in Greenville, one in Spartanburg. The State  
17 actually proved the abuse occurred in the hotel in  
18 Spartanburg, so that -- and I really have no  
19 opposition ---

20 THE COURT: Do you have a reference in the  
21 transcript to that?

22 MS. GIOVANOLI: I do not. Not at this point,  
23 Your Honor. We just recently got this application and  
24 I'm not that far along in my preparations. I apologize.

25 THE COURT: The reason I say that, or the reason

1 I ask that is because Mr. Grose says that the transcript  
2 will not reflect that.

3 MR. GROSE: The question of the child was did it  
4 happen at a hotel or motel, whichever word they used, in  
5 South Carolina. And they asked Ms. Loftis about whether  
6 it was a hotel in South Carolina, not in Spartanburg  
7 County, but in South Carolina knowing full well they had  
8 her notes saying it happened in Greenville. And so...

9 THE COURT: Well, her answer was correct then.

10 MR. GROSE: It was correct, but it -- it was  
11 not ---

12 THE COURT: It's not complete.

13 MR. GROSE: Right. There's that part about tell  
14 the truth and the whole truth. That would not have been  
15 a whole truth and that would have deprived the Circuit  
16 Court in Spartanburg County of jurisdiction, so...

17 MS. GIOVANOLI: I think it also may have been  
18 overly prejudicial to applicant if they had alleged also  
19 the sex abuse occurred at the Greenville hotel as well,  
20 so that may have been a reason why that was kept out of  
21 the trial as well.

22 MR. GROSE: There's a whole bunch of case law  
23 that says you can bring in everything that happened with  
24 the same victim and the same defendant. That is getting  
25 to the weight of the evidence and that is something more



1 for the hearing on down the road.

2 THE COURT: Anyway, my understanding the point  
3 here is not, not the Greenville case, it's the fact of  
4 whether or not there was any evidence to show that an  
5 event occurred in Spartanburg County.

6 MS. GIOVANOLI: Yes. The hotel clerk from  
7 Spartanburg actually testified at the hearing that they  
8 had stayed at the hotel. So that was connecting the  
9 child's testimony that she had been abused by her father  
10 in a hotel with a pool and that he had -- they had  
11 stayed in a motel in Spartanburg with a pool and that's  
12 how they established venue and jurisdiction.

13 MR. GROSE: And the hotel in Greenville also has  
14 a pool. And while they established their presence in  
15 Spartanburg County, they never established through any  
16 testimony that the sexual abuse occurred at the motel in  
17 Spartanburg County. And quite frankly, at this point  
18 there -- and I want to look into it more because I want  
19 to give you more than just my interpretation of the  
20 circumstantial evidence, but it certainly looks like  
21 these were very carefully crafted questions to avoid the  
22 venue issue during Mr. Spade's trial.

23 MS. GIOVANOLI: I have another issue I just  
24 wanted to clarify, if I may switch over. He mentioned  
25 Mengal, which was a recent Supreme Court case.

1 THE COURT: I've heard of that case.

2 MS. GIOVANOLI: Yes. And he mentioned that they  
3 encouraged flexible use of the rules of civil procedure,  
4 but that was with regard to the issues in that case, not  
5 from discovery. And that case regarded late  
6 allegations, which as Your Honor is pretty aware that  
7 some allegations evolved during the PCR hearing. And  
8 that is exactly what happened during the case in Mengal,  
9 so...

10 MR. GROSE: And that's exactly what I'm trying to  
11 avoid is coming to a hearing and having to move to amend  
12 my application here in the hearing. It's actually a  
13 matter of fairness to you or which ever judge hears the  
14 case to try to get all this done in advance. I've cited  
15 it in part because I knew you would be familiar with it.

16 THE COURT: I was very familiar with it. More  
17 familiar than I actually wanted to be.

18 MR. GROSE: And I actually think some of the  
19 language in it is gonna be stuff that we come back to  
20 over and over on procedural matters in PCRs. It may not  
21 be, you know, a watershed case, but I think it's what's  
22 gonna be cited a good bit.

23 THE COURT: Well, I certainly think in any civil  
24 case it's important that your pleadings reflect what you  
25 intend to prove and you don't wait until the end to

1 amend your pleadings to conform to the evidence. But  
2 you certainly ought to do it at least by then if you're  
3 gonna do it at all.

4 MR. GROSE: That's good advice.

5 THE COURT: All right. Well, we'll be at ease  
6 for a few minutes while waiting on Mr. Brannon to  
7 appear.

8 (Whereupon, a recess was from 2:27 p.m. - 2:54  
9 p.m.)

10 (Whereupon, Mr. Brannon is present in the  
11 courtroom.)

12 THE COURT: Mr. Brannon, Mr. Grose has made a  
13 motion in this postconviction relief case and if  
14 allowed discovery, he's also made a motion to compel a  
15 file that you generated during the course of your  
16 representation of the State as a special prosecutor in  
17 this case and so that's why we're here. He's gonna tell  
18 me why he needs it and then I'll allow you to respond to  
19 it.

20 MR. GROSE: Um, and I want to be clear in what  
21 we're talking about as far as the file is concerned.  
22 We're talking about anything that Mr. Brannon has in his  
23 possession that's related to the subject matter of  
24 Mr. Spade's prosecution. By way of background, there  
25 were three Family Court hearings or proceedings prior to

1 Mr. Spade's trial.

2 My understanding is that in the first one, which  
3 was an effort to terminate Mr. Spade's parental rights,  
4 Mr. Brannon was not involved in that, in that  
5 proceeding. There was a second proceeding for  
6 termination of Mr. Spade's parental rights. Mr. Brannon  
7 was involved in that. The third proceeding was an  
8 adoption proceeding where the mother's new husband was  
9 allowed to adopt the child after the parental rights  
10 were terminated and Mr. Brannon was the attorney in that  
11 proceeding.

12 In the trial, Solicitor Barnette specifically  
13 stated that the reason why he brought Mr. Brannon on --  
14 Brannon on board was because he knows the Family Court  
15 stuff as well as anybody. So there was a -- the  
16 decision to bring him on board related to the  
17 representation in the Family Court case.

18 While there were some issues that were raised on  
19 the direct appeal regarding, you know, the appointment  
20 of a special prosecutor, the Court of Appeals made a  
21 finding that there was no evidence that Mr. Brannon  
22 either used his authority as a special prosecutor to  
23 gain an advantage for a civil client or otherwise  
24 compromised his neutrality. "Or otherwise compromised  
25 his neutrality" I think is a key point because one of

1 the issues that was actually raised in the direct appeal  
2 was that in order to be able to establish some sort of  
3 prejudice on that allegation, that Mr. Brannon would  
4 have to be questioned about what he knew and whatever  
5 other information that he might have had access to and  
6 that would probably require, arguably require, a waiver  
7 of the attorney/client privilege.

8 And so now we jump forward and we're in PCR and  
9 we have sent -- you know, I request information  
10 sometimes through letters and get it sometimes, you  
11 know. And then we wrote all the prosecutors that were  
12 involved in the trial, including Mr. Brannon, and asked  
13 for a copy of his file. And, you know, he responded. I  
14 believe his exact words were that he has:

15 (Reading.) I have a large Family Court file  
16 related to that case. Short of a court order requiring  
17 me to surrender that file, I will not -- it will not be  
18 provided to you in violation of the attorney/client  
19 privilege. (Ends reading.)

20 And so I think that that letter, if that's where  
21 this stops, that letter has established that Mr.  
22 Brannon's neutrality was compromised and that he  
23 shouldn't have been special prosecutor in this case  
24 because when he agreed to act as a special prosecutor,  
25 he then came under the umbrella of all of the case law

1 and all the rules of ethics that pertain to special  
2 duties of prosecutor. He could no longer be a mere  
3 advocate.

4 As our courts have stated over and over, the  
5 prosecutorial function is a quasi judicial function.  
6 The prosecutors are ministers of justice and not mere  
7 advocates. We have going way back before Brady, we have  
8 due process cases, you know, requiring to disclose  
9 information. It doesn't have to be exculpatory. It's  
10 anything that's necessary for a defendant to be able to  
11 prepare a defense and present a defense.

12 We certainly have Brady and *Kyles versus Whitley*  
13 and *Riddle versus Osmint*, which is a state court case  
14 following the logic in Kyles about how prosecutors have  
15 a duty to learn, you know, what's in the files of state  
16 actors that are relevant to the case and turn it over.  
17 So I submit that once, you know, Mr. Brannon became a  
18 special prosecutor, he was subject to Rule 3.8. He was  
19 subject to Rule 5. He was subject to Brady, Kyles,  
20 Giglio and all the other cases that are dealing with due  
21 process.

22 And so he at that point had an obligation to  
23 provide information to Mr. Spade and his attorneys that  
24 was either material to preparing a defense or  
25 exculpatory. And that, you know, might have come in

1 conflict with, you know, his attorney/client  
2 relationship with the mother of this child and her new  
3 husband.

4 And that might be the source of a conflict. And  
5 we might not be able to get past that conflict because  
6 if this stops today on that letter that he's not  
7 surrendering anything that he considers to be a  
8 violation of the attorney/client privilege, we have a  
9 situation at that point where the party on the other  
10 side, the State of South Carolina, it's not just the  
11 Attorney General's office, it's the solicitor's office,  
12 and Mr. Brannon for the purposes of Mr. Spade's case is  
13 a prosecutor and part of the solicitor's office.

14 I think at that point we're entitled to a legal  
15 presumption that evidence that's in the exclusive  
16 control of another party that they refuse to produce is  
17 adverse to them and favorable to Mr. Spade. And we've  
18 already had some discussions about, you know, the whole  
19 venue issue.

20 And it's not just Mr. Brannon asked some of the  
21 questions, some of the other prosecutors asked some of  
22 the questions, but over and over on the record it has to  
23 do with a hotel in South Carolina and not a hotel in  
24 Spartanburg County. It was never pinned down that way.  
25 We think that that was a very clever way of asking

1 questions because they had a leg up knowing what turned  
2 out to be in Ms. Loftis's records about the disclosure  
3 being in Greenville County.

4 That would, asking the questions in that way,  
5 while we acknowledged before that those might have been  
6 true answers, they weren't complete answers. And under  
7 the Riddle case in particular, you know, the prosecutors  
8 have a duty to correct misleading testimony that they  
9 know about. And so this testimony, I think we have  
10 established a prima facia case that this testimony was  
11 misleading.

12 And so we need to be able to have access to his  
13 file in the same way that we would have access to the  
14 prosecutor's file under Rule 5 and Brady and other  
15 discovery motions that might apply. I understand that  
16 there may be things that he might be able to assert a  
17 valid work product claim too. We're under the Rules of  
18 Civil Procedure.

19 If the procedure for that is, is for him to  
20 produce a privilege log of matters that he thinks are  
21 not discoverable and provide enough information in that  
22 log for us to know with enough specificity what it is  
23 that he's trying to protect so that we could make an  
24 argument about it and to provide the actual file to Your  
25 Honor for an *in camera* review, not unlike what was done,



1 you know, in the Riddle case and ended up discovering  
2 some information that was under Brady that should have  
3 been turned over in that case but wasn't.

4 So if they're going to stand on this ideal that  
5 the attorney/client privilege protects that file, then I  
6 think we have established the compromised neutrality,  
7 and I think we're entitled to a presumption that  
8 something in that would be favorable to us and in a  
9 sense this case would be over and we wouldn't need to  
10 get into any of the other issues.

11 If he's gonna be treated as a prosecutor, then I  
12 think his file and the materials that he knows about has  
13 to be treated as materials and information of a  
14 prosecutor that subjects it to review by Your Honor.  
15 And having established what could turn out to be some  
16 very significant misleading testimony, I think that we  
17 are on, you know, notice to dig deeper.

18 This is not speculation. This record from Dr.  
19 Loftis is not speculation. The questions in the  
20 transcript are not speculation. And we have to know  
21 whether or not there was anything else that might have  
22 been Brady material.

23 And I should add, and I don't know where this  
24 would go, but this was in the record before I got  
25 involved in the case. As often happens in these cases,

1 the State makes claims to try to keep out evidence of  
2 third party deals. And there was an objection in the  
3 trial about whether or not an objection from the defense  
4 that the State objected to about whether or not the now  
5 adopted father of the child could have been involved in  
6 some sort of abuse of the child.

7 Well, that father, as it turns out, is one of Mr.  
8 Brannon's clients because that -- he was the father for  
9 the adoption and that father did not testify at trial.  
10 And I think at some point we're entitled to know,  
11 because Mr. Brannon became a prosecutor, we're entitled  
12 to know if he had any information whether it had to do  
13 with possible abuse by that father or anything else that  
14 was material to Mr. Spade and his lawyers to being able  
15 to prepare a defense or was somehow favorable. Once he  
16 accepted that appointment, he fell under those rules.

17 And one of the reasons why this issue about  
18 Spartanburg versus Greenville is so important, it's not  
19 just, you know, we're not just looking for a  
20 technicality, a way out of this case. We're looking for  
21 this case to be presented fully and fairly. And without  
22 getting into a lot of, you know, extraneous details, one  
23 of the things that's gonna happen is if the disclosure  
24 was Greenville and only Greenville, it is going to  
25 change some of the witnesses that are available to the

1 defense because Mr. Spade will have witnesses at that  
2 point that he can call to corroborate the fact that he  
3 didn't commit any abuse in Greenville.

4 And so if that's what the allegation is, we've  
5 got a right to know that that's what it is and to be  
6 able to confront that and be able to present additional  
7 evidence to establish his entitlement to a new trial and  
8 then eventually present those witnesses in a new trial.

9 This is so unusual. I mean, it's pointed out in  
10 the brief that other states don't require proof of  
11 prejudice, you know, when there's a conflict because of  
12 the special prosecutor. Our Supreme Court -- I mean our  
13 Court of Appeals, you know, made that requirement in  
14 this case and they were looking at a record that was  
15 only complete up to that point.

16 We are now moving into an area where we can, you  
17 know, expand that record beyond, you know, what the  
18 court had available to them at that time. But we can  
19 only do that by being able to get access to Mr.  
20 Brannon's files and be able to question him about that  
21 to find out what it is that he knows that might have,  
22 you know, led to things being presented in a misleading  
23 way or an unfair way or even an outright deceitful way  
24 at trial and whether or not there was anything else that  
25 could be, you know, could be raised.

1           This is so unusual to have a special prosecutor  
2 appointed in South Carolina. I realize it's not  
3 unprecedented. But what I find remarkable and a little  
4 frightening about this case is that a special prosecutor  
5 can be appointed in a CSC case and that be the  
6 prosecutor, that be the lawyer who represented the  
7 mother and stepfather of the complaining witness in a  
8 separate custody battle.

9           I know of no other situation where that has ever  
10 happened. And it probably has never happened in a  
11 situation because most people would stop and say, hey,  
12 you really just shouldn't do that. That didn't happen  
13 here.

14           It may have been because Mr. Barnette, Solicitor  
15 Barnette was under pressure to get ready to try the  
16 Blackwell death penalty case, which he was in and out of  
17 court on this case and preparing for that case at the  
18 same time. It may be because of what he said in the  
19 record that he wanted somebody to come in the case that  
20 had more familiarity with the Family Court file. But  
21 once that happened, that opened up a whole new dimension  
22 as far as Rule 3.8, Rule 5, Brady and due process was  
23 concerned.

24           This is not a case of overwhelming evidence. You  
25 know, there was no medical testimony that was presented.

1 It was a case that turned, you know, entirely on  
2 credibility. You know, it's not a case that you can  
3 point to and say that the things that we're arguing  
4 about today could just be swept aside under some sort of  
5 harmless error analysis if we're able to establish some  
6 kind of prejudice on the arguments that we're making  
7 right now.

8 And so the interest of justice I think weighs  
9 extremely heavy in favor of the Court at least  
10 conducting an *in camera* review of the Family Court file,  
11 determining whether we're entitled to access to  
12 additional information. And then maybe at that point it  
13 would be appropriate to reconvene, or you could just  
14 decide at that point whether the deposition is  
15 appropriate.

16 But at a minimum, his file needs to be an  
17 exhibit, a sealed exhibit, to the record in this case so  
18 that we can litigate that issue as far as it might take  
19 us one day if we're not gonna get access to the file.  
20 If it's not going to be in the record, like I say, I  
21 think this case is over because I think we're entitled  
22 to a presumption that what's in that file is favorable  
23 to us and adverse to the State.

24 MS. GIOVANOLI: Your Honor, if I may briefly  
25 address some procedural things before I hand it over to

1 Mr. Brannon. And there was a statement that Mr. Grose  
2 actually made that was we're entitled to see what might  
3 have been in Mr. Brannon's file to see if that would  
4 have been exculpatory to the applicant prior to trial.  
5 And that's kind of the crux of my argument procedurally  
6 is that he's failing to show good cause. It's just  
7 based on mere speculation.

8 Interestingly, I did want to point out that at  
9 the trial and on appeal, in the appeal there was a  
10 briefing to the Court of Appeals as well as a petition  
11 for writ of certiorari to the Supreme Court. The  
12 applicant not only acknowledged, but also embraced Mr.  
13 Brannon's duty of confidentiality whenever it supported  
14 his argument. It was in direct conflict with his duty  
15 as a special prosecutor and, therefore, it violated his  
16 due process rights.

17 Both courts disagreed with that argument. The  
18 appointment was affirmed by the Court of Appeals, and  
19 obviously the Supreme Court denied it after the petition  
20 was filed. And the State would concede that Mr. Brannon  
21 was most certainly required to comply with the duties  
22 under Brady, Rule 5A, and all the other laws. And the  
23 State asserts that Mr. Brannon did comply with those  
24 obligations. Any assertion to the contrary is meritless  
25 and baseless.

1           Notably, applicant never contended neither at a  
2 trial or on appeal that Mr. Brannon actually possessed  
3 pertinent information that was required to be turned  
4 over to the defense or that he failed to comply with  
5 Brady and Rule 5. And they didn't make that contention  
6 because it would be based on mere speculation. There  
7 was no basis.

8           However, now he's using that argument in his PCR  
9 as to show good cause so that they could be entitled to  
10 Mr. Brannon's file as a hail Mary attempt to find  
11 something within there to vacate his conviction for a  
12 criminal sexual conduct first degree with a minor.

13           Interestingly, on appeal Mr. Brannon's duty of  
14 confidentiality, applicant repeatedly described it as  
15 sacrosanct. And that actually means too important or  
16 valuable to be interfered with. And now they're almost  
17 arguing the exact reverse that now he should be able to  
18 penetrate that duty because we want to find something to  
19 vacate his conviction. Once again, that request is made  
20 on mere speculation that there's something in that file  
21 that could help them and that Mr. Brannon did comply  
22 with his duties under Brady and Rule 5.

23           To address briefly, he's made a request that the  
24 Court conduct an *in camera* review of Mr. Brannon's file  
25 to determine if certain privileged material should be

1 turned over to the applicant, and based that on Rule  
2 26(d)(5) and 45(d)(2) of the South Carolina Rules of  
3 Civil Procedure.

4 The South Carolina Rules of Civil Procedure apply  
5 in the context of PCR to the extent that they are not  
6 inconsistent with the PCR Act. And once again we roll  
7 back to the PCR Act. The legislature's clear intent  
8 that discovery is only -- applicant is only entitled to  
9 discovery whenever a showing of good cause. So first  
10 and foremost there needs to be good cause to have access  
11 to Mr. Brannon's file to even go in depth even further  
12 to have an *in camera* review of his file.

13 At this point then I will hand it over to Mr.  
14 Brannon to address his own stance more substantively.

15 MR. BRANNON: May it please the Court?

16 THE COURT: (Nods head up and down.)

17 MR. BRANNON: Your Honor, counsel said that there  
18 should be three files in my possession and that's  
19 patently false. Your Honor, in the letter that counsel  
20 referenced, I informed him that I never maintained a  
21 file in regard to Mr. Spade's criminal file. I was  
22 acting as a special prosecutor. The only file involved  
23 in that criminal case was maintained by the solicitor's  
24 office and no documents were ever transferred from my  
25 Family Court file into the State's prosecution file.



1 They remain completely separate and distinct.

2 But aside from that, Your Honor, there's only one  
3 Family Court file. Your Honor, I represented the mother  
4 of this child and her husband in their attempts,  
5 successful attempts to terminate his parental rights and  
6 to allow the husband to adopt the child. Your Honor,  
7 those occurred in one hearing, in one trial, not two.

8 Your Honor, the judge found that his rights would  
9 be terminated and immediately moved to adoption. So  
10 there's only one file. Your Honor, I'm gonna quote the  
11 Attorney General here. In their appeal, Your Honor,  
12 they allege that my relationship with the adopted family  
13 was so sacrosanct that I should have been excluded as a,  
14 as a prosecutor because I would violate the conflict --  
15 I would create a conflict with my Family Court clients.

16 Your Honor, the Court of Appeals and the Supremes  
17 by omission proclaimed that I had no conflict, that  
18 there was no conflict. Your Honor, and if there's no  
19 conflict, then they don't have a right to invade my  
20 Family Court file. It's work product. It's  
21 attorney/client privilege. And, Your Honor, none of it  
22 went from the Family Court to the Criminal Court. None  
23 of it.

24 Your Honor, I ask you to deny this motion to  
25 invade my Family Court file, but I respect this Court

1 and I will do whatever you direct me to do. May I be  
2 excused? I'm supposed to be in another court, Your  
3 Honor.

4 THE COURT: Yeah, but let me ask you a question  
5 before you go.

6 MR. BRANNON: Yes, sir.

7 THE COURT: So do I understand that your, your  
8 objection to the disclosure of the file is based upon  
9 work product and attorney/client privilege?

10 MR. BRANNON: Yes, Your Honor.

11 THE COURT: Okay.

12 MR. BRANNON: Well, that and the fact that they  
13 don't -- they can show no statutory or other right that  
14 gives them the opportunity to have my file.

15 THE COURT: Okay.

16 MR. BRANNON: Thank you.

17 THE COURT: Do you want to respond to Mr. --  
18 well, wait just a minute, he's got a response.

19 MR. GROSE: I think he just, he just proved our  
20 point. The letter says that he had a file that he  
21 considered separate. It really, once you have the  
22 knowledge and once you have the materials, once it  
23 became part of the prosecution's team, that became  
24 whatever was in there that should be disclosed, it  
25 became an obligation to disclose.

1           His letter that's attached to our motion implies  
2   that he didn't do that. And he just told this Court  
3   that nothing from his family -- whether it's one, two --  
4   I don't think I ever said it was three because I don't  
5   think he was involved in the first proceeding, but  
6   whether it was one or two Family Court files, he said  
7   that those -- that information from that never went into  
8   the prosecutor's file, that they were kept entirely  
9   separate.

10           I think that once he became a part of the team,  
11   he had a duty to share that file with the solicitor's  
12   office. I don't think in all fairness to the Attorney  
13   General, who's making a, you know, a very strong  
14   argument, I don't think that she can say that there was  
15   no Brady violation or Rule 5 violation without having  
16   reviewed those materials in the file and without having  
17   seen what was, what was known to Mr. Brannon.

18           You know, one of the arguments on appeal was it's  
19   because of the attorney/client privilege that if he's  
20   gonna assert that, they shouldn't be required to  
21   establish prejudice. That it may be necessary in order  
22   to establish prejudice to get a waiver of the  
23   attorney/client privilege and be able to inquire into  
24   those matters of Mr. Brannon under oath, which he, to  
25   this Court is saying he's not willing -- it's not his to

1 grant, but it's his client's. And I assume that he's,  
2 as a good advocate, is representing not only his  
3 position, but the position of his clients, you know, in  
4 this matter.

5 What is now -- we're alleging a lot of things  
6 regarding trial counsel's ineffectiveness. They did not  
7 articulate this argument about the conflict very well.  
8 They let Judge Kelly decide it on the fact that Mr.  
9 Brannon didn't have a conflict with Mr. Spade. That  
10 really wasn't the pertinent issue in the case.

11 You know, yes, I understand that the Rules of  
12 Civil Procedure are different than the discovery rules  
13 in a, in a criminal case, but this is what we have  
14 available to us now. And I think really, I think we're  
15 all kind of in the same box here, is if the  
16 attorney/client privilege is allowed to overrule all of  
17 this, particularly now -- and one of our allegations is  
18 that they didn't -- trial counsel didn't investigate and  
19 review Ms. Loftis's notes and incorporate that into the  
20 defense of the case.

21 I think there is a very, very good chance that  
22 Mr. Brannon knows that there was no allegations of  
23 sexual abuse at a hotel in Spartanburg County. I think  
24 that whether he communicated that direct information or  
25 not to the prosecutors, I believe that he probably

1     helped them craft the questions about it being South  
2     Carolina versus Spartanburg County.

3             MR. BRANNON: Your Honor, counsel's making some  
4     pretty sharp accusations there.

5             THE COURT: Well, just a minute. I'm gonna let  
6     you respond to it in a minute.

7             MR. GROSE: Well, this is what -- and I'm happy  
8     to hand up this record, but this is what this record is  
9     showing, and we're not speculating. We've got enough  
10    information to be able to go down this line much further  
11    than we are right now. And if we're not allowed to do  
12    that, then I think we've established that Mr. Brannon's  
13    impartiality was compromised.

14            And, you know, if there's nothing to hide, why  
15    not let you look at it? Why not let us look at it? I  
16    mean, that's the interest of justice and what's at stake  
17    here is enormous. And, you know, I realize that this is  
18    very unusual. I mean, but the path that got us here  
19    today is also very unusual and why we're requesting the  
20    remedies that we're asking for.

21            THE COURT: Mr. Brannon.

22            MR. BRANNON: Your Honor, Mr. Shabel, who was the  
23    defense attorney in the criminal case, was the defense  
24    attorney in the Family Court case. Your Honor, I submit  
25    to this Court that he's already got my Family Court

1 file. There was never a motion made to the Family Court  
2 to suggest that, that I was not disclosing some piece of  
3 evidence in my Family Court case. Your Honor, he's got  
4 my Family Court file.

5 But to ask me here today to turn over what I've  
6 got in storage is a violation of my attorney/client  
7 privilege and I'm not willing to do it short of this  
8 Court's order. Your Honor, I'm not going to respond to  
9 the secondary. I did my job, Your Honor.

10 And counsel did make one statement. He said that  
11 this was a case that swung on credibility. Your Honor,  
12 his client didn't testify in his criminal case. It was  
13 the credibility of a little girl who sat on that witness  
14 stand and convinced those 12 jurors what he did to her.  
15 That was the case, Your Honor. May I be excused to go  
16 to the other ---

17 THE COURT: You may, thank you.

18 MR. BRANNON: Thank you.

19 THE COURT: Ms. Attorney General, do you got  
20 anything else you needed to add?

21 MS. GIOVANOLI: I did just want to address  
22 briefly he said that I couldn't say that Mr. Brannon  
23 didn't violate Brady, but he can also not say to the  
24 contrary, that he did violate it. So I just wanted to  
25 clarify that. Discovery is not meant for a fishing

1 expedition, so that they can come through things that  
2 were previously provided to the defense prior to trial,  
3 as well as confidential files in order to substantiate  
4 speculative and baseless allegations.

5 And that's where I'll conclude. If my  
6 co-counsel, Mr. Ghent, wants to say anything, then  
7 that's where we'll complete it.

8 MR. GHENT: (Witness shakes head back and forth.)

9 MR. GROSE: Like we say, Mr. Brannon's  
10 obligations as an advocate in the Family Court case were  
11 different than his obligations as a prosecutor. And  
12 while there was no reason to be able to pierce, if you  
13 will, the attorney/client privilege or word product in  
14 the Family Court case, the obligations of prosecutors is  
15 so much different. And they're very clearly saying that  
16 that information was not passed on, is not going to be  
17 passed on. And so we're -- and we're asking this Court  
18 to allow us access to that information that we should  
19 have been allowed access to prior to trial. That's it.

20 THE COURT: All right. Let me ask you this. Can  
21 we all agree or not as to the proposition that where a  
22 lawyer assumes the position of a special prosecutor,  
23 that his obligations as a prosecutor trump those with  
24 his obligation as a, as confidentiality with a client?

25 MS. GIOVANOLI: I would say so, but whenever he's

1 representing a client and the interests do not conflict,  
2 then there's really no reason for that to even happen,  
3 for it to trump it.

4 THE COURT: Well, what about when they merge?

5 MS. GIOVANOLI: Well, if they merge, I think what  
6 Mr. Brannon told us was that there was nothing in his  
7 file that hadn't been turned over to the solicitor or  
8 that should have been. And in addition to that, trial  
9 counsel forgot that counsel was actually the opposing  
10 counsel in the Family Court case, so he was well aware  
11 of everything as far as the discovery for that case.

12 THE COURT: Well, maybe, maybe not I don't know.

13 MR. GROSE: Well...

14 MS. GIOVANOLI: He never alleged a violation of  
15 Brady during trial and it didn't -- they wouldn't allege  
16 it during appeal either.

17 MR. GROSE: And we're here second guessing him  
18 and saying he should have alleged those violations.

19 THE COURT: Well, I understand. Well, do you  
20 have a Brady requirement in a, in a termination of  
21 parental rights case?

22 MS. GIOVANOLI: What's that?

23 THE COURT: Is there such thing as a Brady  
24 violation in a termination of parental rights case?

25 MS. GIOVANOLI: No, Your Honor.



1 THE COURT: No.

2 MS. GIOVANOLI: I didn't mean to assert that  
3 there was one.

4 THE COURT: Well, I thought you were, you were  
5 comparing Mr. Shabel and Mr. Brannon's obligations in  
6 Family Court to those in Circuit Court. I think they're  
7 different.

8 MS. GIOVANOLI: Oh, no, Your Honor. I'm just  
9 saying that Mr. Shabel was the attorney in the Family  
10 Court case as well and so whatever discovery was shared  
11 there, he was, he was aware of it.

12 THE COURT: Well, I understand, but would he be  
13 obligated to provide Brady material in the Family Court?

14 MS. GIOVANOLI: No, Your Honor.

15 THE COURT: Okay. But he would in the Circuit  
16 Court.

17 MS. GIOVANOLI: That's correct.

18 THE COURT: Okay. So there is a difference.

19 MS. GIOVANOLI: Yes. We are asserting that he  
20 did comply with Brady.

21 THE COURT: I understand that, but do we know?

22 MS. GIOVANOLI: Based on --

23 THE COURT: -- because what I ---

24 MS. GIOVANOLI: -- Mr. Brannon's representation.

25 THE COURT: Well, what I understood from Mr.

1 Brannon was said he, he took the position that that file  
2 was privileged under the attorney/client privilege. He  
3 didn't say that he shared all exculpatory information  
4 with the defense.

5 MS. GIOVANOLI: I believe his response was some  
6 allegations made against him was pretty heavy ---

7 THE COURT: He said he did his job.

8 MS. GIOVANOLI: Meaning that he --

9 THE COURT: I don't know what that means.

10 MS. GIOVANOLI: -- obeyed the law and did his job  
11 as special prosecutor and complying all the duties and  
12 obligations placed upon him.

13 THE COURT: That's what that meant?

14 MS. GIOVANOLI: That's how I take it.

15 THE COURT: Okay. All right. Anything else?

16 MR. GROSE: I just would say with a proposition  
17 that you asked if we could agree to, I agree with that.  
18 I think that you have obligations once you step into the  
19 role as a prosecutor.

20 THE COURT: Okay. Well, I think everybody -- we  
21 don't need to do any research on that apparently.  
22 Everybody agrees that once you stand in the shoes of a  
23 prosecutor, you have the same obligations you have as a  
24 full-time prosecutor and that includes providing  
25 information even if it violates the attorney/client

1 privilege.

2 MS. GIOVANOLI: In fact, I believe Rule 1.6 of  
3 the Rules of Professionals Conduct or 407: (Reading.)  
4 A lawyer may reveal information relating to the  
5 representation of a client to the extent the lawyer  
6 reasonably believes is necessary. (Ends reading.)

7 And then subsection 7 says: (Reading.) To  
8 comply with other law or court order. (Ends reading.)

9 So clearly he would have been able to avoid any  
10 conflict of interest or any duty of confidentiality to  
11 his client pursuant to that rule. And I think  
12 additionally, Rule 3.3(a)(3) of the Rules of  
13 Professional Conduct also required -- let me read it.

14 THE COURT: Is that candor towards a tribunal?

15 MS. GIOVANOLI: That's right. (Reading.) Shall  
16 take reasonable remedial measures including, if  
17 necessary, disclosure to the tribunal. (Ends reading.)

18 So I think he was under a lot of obligation and  
19 duty to disclose things that required to be disclosed.  
20 And, like I said, based on his response to the  
21 allegations made against him today, it's quite evident  
22 that he fulfilled that duty.

23 And then I just do want to clarify one last  
24 thing. When we talked about research, there is actually  
25 a case that was very much on point where there was a

1 special prosecutor appointed to a case where he had  
2 represented victim's mother in a Family Court case.  
3 It's very similar to this in our brief. I do not have  
4 the name on the top of my head, but I will get that to  
5 counsel.

6 THE COURT: It's in your return to the motion?

7 MS. GIOVANOLI: It is not because his motion was  
8 very vague, so my motion was ---

9 THE COURT: Well, what brief are you referencing?

10 MS. GIOVANOLI: What's that?

11 THE COURT: What brief are you referencing?

12 MS. GIOVANOLI: Oh, the brief to the Court of  
13 Appeals filed by the State.

14 THE COURT: Oh, okay.

15 MS. GIOVANOLI: So we actually addressed the  
16 special prosecutor issue.

17 THE COURT: Okay. Well, I'll accept anything you  
18 wish to submit. Otherwise, in the meantime I'll review  
19 it and then issue an order shortly.

20 MR. GROSE: Can we approach on something  
21 unrelated real quick?

22 THE COURT: You may.

23 (Whereupon, a bench conference was held off the  
24 record.)

25 Okay. We're in recess.

1 MR. GHENT: Thank you, Your Honor.

2 MS. GIOVANOLI: Thank you.

3 (Whereupon, hearing concluded at 3:30 p.m.)

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6 --- THIS ENDS REQUESTED TRANSCRIPT ---

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## 1 COURT REPORTER CERTIFICATE

2  
3 I, the undersigned Julie A. Ashbrook, Court  
4 Reporter for the Seventh Judicial Circuit Court of the  
5 State of South Carolina, do hereby certify that to the  
6 best of my ability the foregoing is a true, accurate,  
7 and complete transcript of record of all the proceedings  
8 and evidence introduced in the hearing and/or trial of  
9 the captioned case, relative to appeal, in the Common  
10 Pleas Court for Spartanburg County, South Carolina, on  
11 the 22nd day of November, 2017.

12 I do further certify that I am neither of kin,  
13 counsel, nor interest to any party hereto.  
14  
15  
16  
17

18 s/Julie A. Ashbrook.  
19 Julie A. Ashbrook  
20 Circuit Court Reporter  
21 Seventh Judicial Circuit  
22  
23  
24  
25

|                                       |   |                                             |
|---------------------------------------|---|---------------------------------------------|
| <b>STATE OF SOUTH CAROLINA</b>        | ) |                                             |
|                                       | ) | IN THE COURT OF COMMON PLEAS                |
| COUNTY OF <b>SPARTANBURG</b>          | ) |                                             |
| Daniel W. <b>SPADE</b> SCDC # 358974, | ) |                                             |
|                                       | ) |                                             |
| Applicant,                            | ) |                                             |
|                                       | ) | <b>ORDER</b>                                |
| -vs-                                  | ) |                                             |
|                                       | ) | Civil Action Number <b>2017-CP-42-02372</b> |
| The <b>STATE</b> of South Carolina,   | ) |                                             |
|                                       | ) |                                             |
| Respondent.                           | ) |                                             |

This matter came before this Court on motion of the applicant Daniel W. Spade, seeking an order of this Court permitting discovery in his application for post-conviction relief pursuant to S. C. Code Ann. Section 17-27-150(A). The defendant further requested that the Court permit the taking of deposition testimony of witnesses who are now residing out of state due to the difficulty and complexity of having such witnesses appear at the hearing held on this application. Applicant also seeks an order of this Court compelling production of "the file of the special prosecutor N. Douglas Brannon". At the hearing on the motion Valerie Garcia Giovanoli, Assistant Attorney General, appeared on behalf of the State. E. Charles Grose, Jr. appeared on behalf of the applicant. Solicitor Barry J. Barnette and N. Douglas Brannon also appeared.

#### **Salient Facts**

The applicant was charged with Criminal Sexual Conduct With a Minor 1<sup>st</sup> Degree by Indictment 2011-GS-42-04171. Mr. Brannon was retained to represent the victim in a related matter which was heard in the Family Court for the Seventh Judicial Circuit. As a result of his familiarity with the circumstances relevant to the event which was the subject of the indictment, he was appointed by the circuit solicitor as a special prosecutor to handle the prosecution of Mr. Spade in the criminal case. Applicant was found guilty after a jury trial and sentenced to 35 years imprisonment on February 26, 2014. He filed a direct appeal of his conviction which was affirmed by the Court of Appeals after which a writ of certiorari was denied by the Supreme Court. Subsequently Mr. Spade filed this non-capital application seeking post-conviction relief in accordance with S. C. Code Ann. Section 17-27-20, et. seq. In his application he alleges ineffective assistance of trial counsel and appellate counsel and further alleges a denial of due process resulting from prosecutorial misconduct.

#### **Applicable Law**

The Uniform Post-Conviction Procedure Act does not allow for discovery in a non-capital post-conviction relief action unless "if, and to the extent that, the judge in the exercise of his discretion and for good cause grants leave to do so, but not otherwise." S. C. Code Ann. Section 17-27-150(A)

"Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review." *State v. Greene*, 527 US 263 (1999)

**Conclusion**

Based upon the presentation made in support of and in opposition to the applicant's motion to allow discovery in accordance with the South Carolina Rules of Civil Procedure, this Court finds that good cause has not been shown for the invocation of all the processes of discovery available under the civil rules but does find good cause to allow the applicant to take deposition testimony of any out of state witness to be used at the hearing on the application in lieu of the witness being required to appear and present testimony in person.

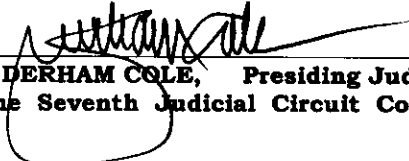
**Motion to Permit Discovery** pursuant to S. C. Ann. Section 17-27-150(A) should be and is therefore **Denied** in part and **Granted** in part, without prejudice.

This Court further finds that the applicant's motion to compel production of the solicitor's and the special prosecutor's file(s), including any file prepared and generated in relation to the action disposed of in the Family Court relating and relevant to the allegations which were the subject of the criminal indictment for which the applicant was convicted, should be denied. This Court does, however, find under the peculiar circumstances attendant to this case that the Assistant Attorney General, the Circuit Solicitor, and Special Prosecutor Brannon shall review all relevant files relating to this matter for the purpose of determination as to whether all information which was subject to discovery during the criminal process pursuant to the South Carolina Rules of Criminal Procedure, *Brady v. Maryland*, and any other applicable rule or case law, has been previously provided to the applicant's trial counsel and, if not, then such shall be provided to applicant's post-conviction relief counsel.

**Motion to Compel** should be and is therefore **Denied** with a review being ordered.

**IT IS SO ORDERED!**

February 8, 2018

  
J. DERHAM COLE, Presiding Judge  
The Seventh Judicial Circuit Court

2018 FEB -8 PM 4:06  
M. HOPE BRANNON  
SOLICITOR GENERAL

# 2



## Spartanburg County

Spartanburg County Court House  
180 Magnolia Street  
P. O Box 3483  
Spartanburg, SC 29304-3483



Phone (864) 596-2591  
Fax (864) 596-2239

M. Hope Blackley  
Clerk of Court

February 9, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Daniel W. Spade  
Applicant # 358974

7<sup>TH</sup> JUDICIAL CIRCUIT

CASE # 2017CP422372

CERTIFICATE OF SERVICE

vs  
Spade  
Respondent

I certify that, on this date, I served a copy of the Order  
In this action dated 2-8-18 on 2-9-18

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Valerie Ciobanu  
Wendy McCoy  
Charles Crosse Jr.

2-9-18  
(Date)

Carrie Spade  
(Signature)

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

Daniel W. Spade, #358974,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

2017-CP-42-2372

**RETURN**

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on July 13, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In February 2014, the Spartanburg County Grand Jury indicted Applicant for first-degree criminal sexual conduct ("CSC") with a minor (victim under the age of eleven) (2011-GS-42-4171). Kenneth P. Shabel, Esquire, and Shawn M. Campbell, Esquire, represented Applicant. Solicitor Barry J. Barnette and Assistant Solicitors Jennifer A.J. Jordan and Kimberly L. Leskanic and Special Prosecutor N. Douglas Brannon represented the State. On February 24, 2014, Applicant proceeded to a jury trial before the Honorable R. Keith Kelly. The jury found Applicant guilty as indicted. Judge Kelly sentenced Applicant to imprisonment for thirty-five years.

Applicant filed a timely notice of appeal. Clarence Rauch Wise, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on July 6, 2016. State v. Spade, Op. No. 2016-UP-352 (S.C. Ct. App. filed July 6, 2016). Applicant filed a Petition for

Writ of Certiorari to the South Carolina Supreme Court on October 5, 2016. Clarence Rauch Wise, Esquire, and Kenneth P. Shabel filed the petition on Applicant's behalf. On June 16, 2017, the Supreme Court denied the petition. The Remittitur was return on June 22, 2017.

Attached to this Return and incorporated by reference are the records of the Spartanburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records (including the Record on Appeal), the application, and the first amended application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

## II.

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

1. "Ineffective assistance of counsel in failing to request continuance to fully review exculpatory therapist records given last-minute."
  - a. "Court of Appeals opined as much; several critical exculpatory findings within the notes post-conviction."
2. "Ineffective assistance of counsel in failing to call character, lay, and expert witnesses."
  - a. "No expert witness to counter State's witness in that notations in records support therapist was inappropriately "prepping" child for trial."

On October 4, 2017, Applicant filed an amended application alleging the following:

1. Ineffective assistance of counsel during guilty phase; in that
  - a. "Failing to request a continuance in order to have time to review and evaluate the child's mental health records that were disclosed for the first time four days prior to trial, when those records contained exculpatory information."
  - b. Not only failing to object to the trial judge instructing the jurors that their role is to "search for the truth" and make sure "justice is done," which impermissibly diminishes and shifts the burden of proof, but also adopting that language in closing argument, thereby diminishing and shifting the burden of proof."

- c. "Failing to call available lay, character, and expert witnesses that would have established the unreliability of the child's allegations."
- d. "Failing to investigate, develop, and present evidence that the Special Prosecutor, N. Douglas Brannon, had a conflict of interest and, therefore, was disqualified from prosecuting the case."
- e. "Failing to move for disclosure of exculpatory information in the possession of the [Special] Prosecutor, N. Douglas Brannon."
- f. "Failing to investigate, develop, and present evidence that would have established that testimony about the child's panic attacks were not related to Mr. Spade, which would have led to the trial court excluding that testimony or if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony."
- g. "Failing to object to and move for a mistrial because of inadmissible testimony that vouched for the child's credibility."
- h. "Failing to object to Meredith Thompson-Loftis as a witness, including but not limited to her qualification as an expert witness, her techniques, and the reliability of her testimony. In the alternative, failing to impeach Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. *See, e.g., S.C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011)."
- i. "Failing to admit the videotaped interview from the Children's Advocacy Center that contained exculpatory information."
- j. "Failing to investigate, develop, and present evidence that venue was not in Spartanburg County."
- k. "Failing to support the directed verdict motion with evidence that venue was not in Spartanburg County."
- l. "Failing to request a jury instruction on venue."
- m. "Failing to object to the Special Prosecutor's improper closing argument that appealed to the jurors' emotions and improperly vouched for the complaining witness when he recounted a conversation with his daughter discussing how the police arrest 'bad people,' he (as Special Prosecutor) tells the complaining witness' story, and 'the jury takes care of good people.' Tr. 305-07."
- n. "Failing to object to evidence that the Family Court action involving the same allegations resulted in termination of Mr. Spade's parental rights."
- o. "Advising Mr. Spade not to present any evidence, including but not limited to his own testimony."
- p. "Excluding evidence from the forensic computer examination that was exculpatory."
- q. "The cumulative effect of trial counsel's errors denied Mr. Spade his

right to a fair trial.”

2. Ineffective assistance of counsel during sentencing phase, in that
  - a. “Failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing.”
  - b. “Failing to present any information or evidence to the trial judge in order to mitigate the sentence imposed.”
3. Ineffective assistance of appellate counsel, in that
  - a. “Failing to brief on appeal the trial court judge denying the motion for directed verdict when the State failed to present evidence establishing venue in Spartanburg County.”
4. Denial of due process because of prosecutorial misconduct, in that
  - a. “Failing to disclose *Brady* information including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County.”
  - b. “Failing to disclose *Brady* information in a timely manner including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County.”
  - c. “Eliciting false testimony regarding venue.”
  - d. “Failing to correct false testimony regarding venue.”

### III.

Respondent submits Applicant’s allegations of ineffective assistance of counsel 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 (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 v. Washington, 466 U.S. 668. First, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624,

625 (1989). 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). The 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 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.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

#### IV.

Applicant also alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 L.Ed.2d 987 (1983)). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal

of vigorous and effective advocacy...” Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

## V.

Applicant also alleges prosecutorial misconduct, specifically that the State failed to provide discoverable information to the defense. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at the plea hearing or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised the alleged discovery violation on appeal. The failure to do so has waived this allegation as grounds for relief. Alabama v. Smith, 490 U.S. 794,

109 S. Ct. 2201 (1989).

To the extent Applicant is claiming prosecutorial misconduct has been discovered post-trial, and could not have been discovered, in the exercise of due diligence, prior to trial, in evaluating post-trial Brady<sup>1</sup> claims, the applicant must show (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10<sup>th</sup> Cir. 1988). The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct. App. 1998) (citing Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963)). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375 (1985).

“Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). “A ‘reasonable probability’ of a different result is accordingly shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial.’” Bagley, 473 U.S. at 678, 105 S.Ct. at 3381. A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. See Clark, 315 S.C. 385.

## VI.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the

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<sup>1</sup> Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963).



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

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits, witnesses, and materials used to produce potential expert witness testimony be provided to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

*[Signature Block on Following Page]*

## VII.

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

## VIII.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claim of ineffective assistance of trial and appellate counsel and prosecutorial misconduct.

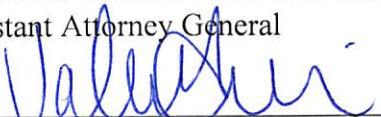
Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI  
Assistant Attorney General

By:   
ATTORNEYS FOR RESPONDENT

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

January 8, 2018

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

2017-CP-42-2372

DANIEL SPADE, #358974,

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** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**E. Charles Grose, Jr., Esquire**  
**Grose Law Firm**  
**404 Main Street**  
**Greenwood, South Carolina 29646**

DATED this the 8<sup>th</sup> day of January, 2018.

  
Lindsey McCoy, Legal Assistant  
For Respondent



ALAN WILSON  
ATTORNEY GENERAL

July 10, 2018

The Honorable M. Hope Blackley  
Spartanburg County Clerk of Court  
Post Office Box 3483  
Spartanburg, South Carolina 29304-3483

**Re: Daniel Spade, #358974 v. State of South Carolina**  
**2017-CP-42-2372**

Dear Ms. Blackley:

Enclosed please find the original **Response and Affidavit of Service of Discovery Material Pursuant to Court's Order** in the above-captioned case for filing in your office.

Sincerely,

Megan Harrigan Jameson  
Senior Assistant Deputy Attorney General

MHJ/lm  
Enclosure

cc: E. Charles Grose, Jr., Esquire

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

Daniel Spade, SCDC #358974,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2017-CP-42-2372

**RESPONSE AND AFFIDAVIT OF  
SERVICE OF DISCOVERY MATERIAL  
PURSUANT TO COURT'S ORDER**

By order filed February 8, 2018, the court ordered a review by the counsel of record from Attorney General's Office, the Circuit Solicitor, and Special Prosecutor Brannon of "all relevant files relating to this matter for the purpose of determination as to whether all information which was subject to discovery during the criminal process pursuant to the South Carolina Rules of Criminal Procedure, Brady v. Maryland, and any other applicable rule or case law, has been previously provided to the applicant's trial counsel and, if not, then such shall be provided to applicant's post-conviction relief counsel."

A review of these files pursuant to the court order was conducted by Senior Assistant Deputy Attorney General Megan Harrigan Jameson, Seventh Circuit Solicitor Barry Barnette, and Special Prosecutor Brannon. After a review of these files, the following email is being produced in response:

-Email dated April 23, 2012 from Andrea Moore to Doug Brannon and Libby Ridings.

As evidence below by the signature of counsel for Respondent and notarization, this email, attached hereto, was served on counsel for Applicant, E. Charles Grose, Jr.

  
Megan Harrigan Jameson  
Senior Assistant Deputy Attorney General

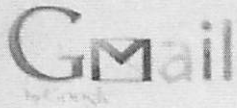
Sworn to before me this 10 day of July, 2018.

  
Notary Public for South Carolina  
My Commission Expires: 10/1/2025



/23/12

Gmail - Jolley update



## Jolley update

Andrea Moore <andreaamoore@gmail.com>

Mon, Apr 23, 2012 at 10:48 AM

To: Doug Brannon <doug.tblaw@gmail.com>, Libby Ridings <libby.tblaw@gmail.com>

Kim R's depo went very well. Mostly very positive for our case, with the only negative being the unfortunate timing of **Minor Victim** disclosure just 3 days after Kim talked to Heather about doing a co-parenting session with Danny Spade. I ordered a copy of the transcript.

Ken is going to draft a consent protective order for Kim's file, with no dissemination, even to clients, other than in a court proceeding. He is also going to send us an informal discovery request for some audio tapes our clients made of **Minor Victim** and Spade on the phone right before all this broke. I'll get that to him right away so there will be no argument that discovery should delay setting the trial.

Talk to you soon.

—

Andrea A. Moore  
Children First Legal Services, LLC  
*mailing address:*  
PO Box 324  
Fairforest, SC 29336  
*physical address:*  
503 W. 2nd Street  
Spartanburg, SC 29301  
office: (864) 576-1920  
cell: (864) 237-5790  
fax: (864) 752-1015  
[www.childrenfirstlegal.com](http://www.childrenfirstlegal.com)  
[childrenfirstlegal@gmail.com](mailto:childrenfirstlegal@gmail.com)

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

2017-CP-42-2372

DANIEL SPADE, #358974,

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 **Response and Affidavit of Service of Discovery Material Pursuant to Court's Order** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**E. Charles Grose, Jr., Esquire**  
**Grose Law Firm**  
**404 Main Street**  
**Greenwood, South Carolina 29646**

DATED this the 10<sup>th</sup> day of July, 2018.

  
Lindsey McCoy, Legal Assistant  
For Respondent

## Spartanburg County

Spartanburg County Court House  
180 Magnolia Street  
P. O Box 3483  
Spartanburg, SC 29304-3483



Phone (864) 596-2591  
Fax (864) 596-2239

M. Hope Blackley  
Clerk of Court

*July 16, 2018*

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

*David Spade #358974*

Applicant

7<sup>TH</sup> JUDICIAL CIRCUIT

CASE # *2017CP42-2372*

CERTIFICATE OF SERVICE

VS  
*State*  
Respondent

I certify that, on this date, I served a copy of the  
In this action dated 7-10, 2018 on 7-16-18

*Response & Affi. & Service of Discovery*  
*Material*

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

*Megan Jameson*  
*E. Charles Crose Jr.*

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2018 JUL 16 PM 12:00  
M. HOPE BLACKLEY

7-16-18  
(Date)

*Conita Lee*  
(Signature)



STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS )

COUNTY OF Spartanburg )

7th JUDICIAL CIRCUIT )

CASE NO.: 2017-CP-42-02372 )Daniel W. Spade )**MOTION AND ORDER INFORMATION  
FORM AND COVERSHEET**

Plaintiff, )

vs. )

State of South Carolina )

Defendant. )

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                                   |                                                        |                                                                                                                |                                                                                                                                                           |  |                               |  |                                       |  |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------|--------------------------------------------------------------|--------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------|----------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------|--|-------------------------------|--|---------------------------------------|--|
| <b>Plaintiff's Attorney:</b><br><u>Charles Grose</u> , Bar No. <u>66063</u><br>Address:<br><u>404 Main Street, Greenwood, SC 29646</u><br>Phone: <u>864-538-4466</u> Fax <u>864-538-4405</u><br>E-mail: <u>charles@groselawfirm.com</u> Other: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | <b>Defendant's Attorney:</b><br><u>SC Attorney General's Office</u> , Bar No. _____<br>Address:<br><u>PO Box 11549, Columbia, SC 29211-1549</u><br>Phone: _____ Fax _____<br>E-mail: _____ Other: _____ |                                                                         |                                                              |                                                                                                  |                                                                                                                   |                                                        |                                                                                                                |                                                                                                                                                           |  |                               |  |                                       |  |
| <input checked="" type="checkbox"/> <b>MOTION HEARING REQUESTED</b> (attach written motion and complete SECTIONS I and III)<br><input type="checkbox"/> <b>FORM MOTION, NO HEARING REQUESTED</b> (complete SECTIONS II and III)<br><input type="checkbox"/> <b>PROPOSED ORDER/CONSENT ORDER</b> (complete SECTIONS II and III)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                                   |                                                        |                                                                                                                |                                                                                                                                                           |  |                               |  |                                       |  |
| <b>SECTION I: Hearing Information</b><br>Nature of Motion: <u>Motion for Status Conference and Date Certain</u><br>Estimated Time Needed: <u>15 min</u> Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                                   |                                                        |                                                                                                                |                                                                                                                                                           |  |                               |  |                                       |  |
| <b>SECTION II: Motion/Order Type</b><br><input type="checkbox"/> Written motion attached<br><input type="checkbox"/> Form Motion/Order<br>I hereby move for relief or action by the court as set forth in the attached proposed order.<br><div style="text-align: center; margin-top: 20px;"> <br/>         Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant       </div> <div style="text-align: right; margin-top: 10px;">         Oct. 4, 2017<br/>         Date submitted       </div>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                                   |                                                        |                                                                                                                |                                                                                                                                                           |  |                               |  |                                       |  |
| <b>SECTION III: Motion Fee</b><br><input type="checkbox"/> PAID – AMOUNT: \$ _____<br><input type="checkbox"/> EXEMPT: (check reason) <table style="width: 100%; margin-top: 5px;"> <tr> <td><input type="checkbox"/> Rule to Show Cause in Child or Spousal Support</td> <td><input type="checkbox"/> Domestic Abuse or Abuse and Neglect</td> </tr> <tr> <td><input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party</td> <td><input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief</td> </tr> <tr> <td><input type="checkbox"/> Motion for Stay in Bankruptcy</td> <td><input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP)</td> </tr> <tr> <td colspan="2"><input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions</td> </tr> <tr> <td colspan="2">Name of Court Reporter: _____</td> </tr> <tr> <td colspan="2"><input type="checkbox"/> Other: _____</td> </tr> </table> |                                                                                                                                                                                                         | <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support | <input type="checkbox"/> Domestic Abuse or Abuse and Neglect | <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party | <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief | <input type="checkbox"/> Motion for Stay in Bankruptcy | <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) | <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions |  | Name of Court Reporter: _____ |  | <input type="checkbox"/> Other: _____ |  |
| <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | <input type="checkbox"/> Domestic Abuse or Abuse and Neglect                                                                                                                                            |                                                                         |                                                              |                                                                                                  |                                                                                                                   |                                                        |                                                                                                                |                                                                                                                                                           |  |                               |  |                                       |  |
| <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief                                                                                       |                                                                         |                                                              |                                                                                                  |                                                                                                                   |                                                        |                                                                                                                |                                                                                                                                                           |  |                               |  |                                       |  |
| <input type="checkbox"/> Motion for Stay in Bankruptcy                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP)                                                                                          |                                                                         |                                                              |                                                                                                  |                                                                                                                   |                                                        |                                                                                                                |                                                                                                                                                           |  |                               |  |                                       |  |
| <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                                   |                                                        |                                                                                                                |                                                                                                                                                           |  |                               |  |                                       |  |
| Name of Court Reporter: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                                   |                                                        |                                                                                                                |                                                                                                                                                           |  |                               |  |                                       |  |
| <input type="checkbox"/> Other: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                                   |                                                        |                                                                                                                |                                                                                                                                                           |  |                               |  |                                       |  |
| <b>JUDGE'S SECTION</b><br><input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br><input type="checkbox"/> Other: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | JUDGE CODE _____<br>Date: _____                                                                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                                   |                                                        |                                                                                                                |                                                                                                                                                           |  |                               |  |                                       |  |
| <b>CLERK'S VERIFICATION</b><br>Collected by: _____ Date Filed: _____<br><input type="checkbox"/> MOTION FEE COLLECTED: \$ _____<br><input type="checkbox"/> CONTESTED – AMOUNT DUE: \$ _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                                   |                                                        |                                                                                                                |                                                                                                                                                           |  |                               |  |                                       |  |

|                             |   |                                              |
|-----------------------------|---|----------------------------------------------|
| THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS                 |
|                             | ) | FOR THE SEVENTH JUDICIAL CIRCUIT             |
| COUNTY OF SPARTANBURG       | ) |                                              |
|                             | ) | Case No. 2017-CP-42-02372                    |
| Daniel W. Spade,            | ) |                                              |
| Applicant,                  | ) |                                              |
|                             | ) | <b>Motion for Status Conference and Date</b> |
| vs.                         | ) | <b>Certain</b>                               |
|                             | ) |                                              |
|                             | ) |                                              |
| State of South Carolina,    | ) |                                              |
| Respondent.                 | ) |                                              |
| _____                       | ) |                                              |

Daniel W. Spade moves the Court for a status conference and an order setting this post-conviction relief (“PCR”) case for a date certain. *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012) (circuit courts control order of court’s business). Specifically, Mr. Spade will request this case be set for the November 5, 2018 Term of Court for PCR cases. Counsel for Mr. Spade had preliminary conversations with counsel for the State about the possibility of scheduling this case for November. These conversations were prior to Hurricane Florence causing cancellation of most of the September term of court.<sup>1</sup> Mr. Spade has two out-of-state experts that are available during this term of court. Even though there is a discovery order for out of state depositions, these depositions are for use at the evidentiary hearing rather than for traditional discovery. As courts have done in other cases, the record can be held open for submission of these depositions.

IT IS SO MOVED.

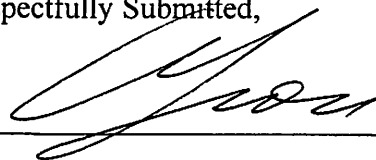
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<sup>1</sup> Other circuits convene roster meetings which allows counsel for the PCR applicants to have input on scheduling of cases. For example, the Honorable Robert E. Hood is convening a “scheduling and status conference” at 10:30 a.m. on Tuesday, October 30, 2018 “to reschedule the December roster from scratch to accommodate the continuances from September” resulting from Hurricane Florence.

Respectfully Submitted,

By



E. Charles Grose, Jr.  
S.C. Bar Number 66063  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 29646  
(864) 538-4466  
(864) 538-4405 (fax)  
Email: [charles@groselawfirm.com](mailto:charles@groselawfirm.com)

*Attorney for the Applicant*

October 4, 2018  
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT

COUNTY OF SPARTANBURG )

Case No. 2017-CP-42-02372

Daniel W. Spade, )

Applicant, )

vs. )

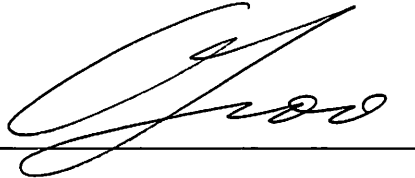
State of South Carolina, )

Respondent. )  
\_\_\_\_\_ )

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Megan Harrigan Jameson, Esquire  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549

By



E. Charles Grose, Jr.  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 29646  
(864) 538-4466

October 3, 2018  
Greenwood, South Carolina

**The Grose Law Firm, LLC**  
404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.  
Phone: 864-538-4466 Fax: 864-538-4405  
E-mail: [charles@groselawfirm.com](mailto:charles@groselawfirm.com)  
Web: [GroseLawFirm.com](http://GroseLawFirm.com)

October 4, 2018

The Honorable M. Hope Blackley  
Clerk of Court, Spartanburg County  
PO Box 3483  
Spartanburg, SC 29304-3483

Re: *Daniel W. Spade v. State of South Carolina*  
Case Number 2017-CP-42-02372

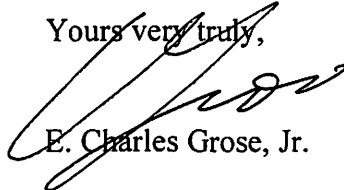
Dear Ms. Blackley:

Enclosed please find Mr. Spade's Motion for a Status Conference and Order Setting a Date Certain.

Thank you for your attention to this matter. If you have any questions or require additional information, please contact me.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Mr. Daniel W. Spade (via US Mail)  
Megan Harrigan Jameson, Esquire (via Email and US Mail)

|                             |   |                                  |
|-----------------------------|---|----------------------------------|
| THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS     |
|                             | ) | FOR THE SEVENTH JUDICIAL CIRCUIT |
| COUNTY OF SPARTANBURG       | ) |                                  |
|                             | ) | Case No. 2017-CP-42-02372        |
| Daniel W. Spade,            | ) |                                  |
|                             | ) | <b>Order</b>                     |
| Applicant,                  | ) |                                  |
|                             | ) |                                  |
| vs.                         | ) |                                  |
|                             | ) |                                  |
|                             | ) |                                  |
| State of South Carolina,    | ) |                                  |
|                             | ) |                                  |
| Respondent.                 | ) |                                  |
| _____                       | ) |                                  |

This matter came before the Court on November 6, 2018 on Daniel W. Spade's motion for a status conference and request this case be set for a date certain during the January 14, 2019 term of court for post-conviction relief cases. Charles Grose represented Mr. Spade. Jordan Cox represented the State. By written order dated February 8, 2028, the Honorable J. Derham Cole granted Mr. Spade's request to take depositions of out of state lay witnesses that otherwise would be unavailable for the evidentiary hearing. The parties agreed these depositions should be taken on December 19 or 20, 2018. Mr. Spade has two out of state expert witnesses that will be traveling to the evidentiary hearing. The parties anticipate needing two days to try this case and agreed it should be set for Thursday, November 17 and Friday, November 18, 2019. Counsel for Mr. Spade also informed the Court that the record indicates the Department of Social Services might have been involved in this case. Counsel for the parties plan to discuss this matter further this week and will let the Court know if its intervention is necessary to assist in obtaining those records.

Therefore, it is ordered as follows:

- 1) The out of state depositions shall be taken on December 19 or 20, 2018;
- 2) This PCR case is set for a date certain evidentiary hearing on Thursday, November 17 and Friday, November 18, 2019;

*[Handwritten signature]*

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CLERK OF COURT  
SPARTANBURG COUNTY  
M. HOPE BLAKEY

JANUARY 11  
2019  
*[Handwritten signature]*

3) The parties shall inform the Court if its intervention is necessary to assist in obtaining Department of Social Services records.

IT IS SO ORDERED.

11/6, 2018  
Spartanburg, South Carolina

  
\_\_\_\_\_  
J. Mark Hayes, II  
Presiding Judge, Seventh Judicial Circuit

CLERK OF COURT  
SPARTANBURG COUNTY  
2018 NOV -7 AM 11:40  
M. HOPE BLACKLEY

COUNTY OF SpartanburgDaniel W. Spade, SCDC # 358974

## CIVIL ACTION COVERSHEET

Plaintiff(s) )

vs. )

2017-CP - 42- 02372State of South Carolina

Defendant(s) )

Submitted By: Charles GroseAddress: 404 Main Street, Greenwood, SC 29646SC Bar #: 66063Telephone #: 864-538-4466Fax #: 864-538-4405

Other: \_\_\_\_\_

E-mail: charles@groselawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

## DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.  
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.  
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.  
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

## NATURE OF ACTION (Check One Box Below)

- |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Contracts</b><br><input type="checkbox"/> Constructions (100)<br><input type="checkbox"/> Debt Collection (110)<br><input type="checkbox"/> General (130)<br><input type="checkbox"/> Breach of Contract (140)<br><input type="checkbox"/> Fraud/Bad Faith (150)<br><input type="checkbox"/> Failure to Deliver/Warranty (160)<br><input type="checkbox"/> Employment Discrim (170)<br><input type="checkbox"/> Employment (180)<br><input type="checkbox"/> Other (199) _____ | <b>Torts - Professional Malpractice</b><br><input type="checkbox"/> Dental Malpractice (200)<br><input type="checkbox"/> Legal Malpractice (210)<br><input type="checkbox"/> Medical Malpractice (220)<br>Previous Notice of Intent Case #<br>20 ____ -NI- ____ - ____<br><input type="checkbox"/> Notice/ File Med Mal (230)<br><input type="checkbox"/> Other (299) _____                                | <b>Torts - Personal Injury</b><br><input type="checkbox"/> Conversion (310)<br><input type="checkbox"/> Motor Vehicle Accident (320)<br><input type="checkbox"/> Premises Liability (330)<br><input type="checkbox"/> Products Liability (340)<br><input type="checkbox"/> Personal Injury (350)<br><input type="checkbox"/> Wrongful Death (360)<br><input type="checkbox"/> Assault/Battery (370)<br><input type="checkbox"/> Slander/Libel (380)<br><input type="checkbox"/> Other (399) _____                                                                                                                                               | <b>Real Property</b><br><input type="checkbox"/> Claim & Delivery (400)<br><input type="checkbox"/> Condemnation (410)<br><input type="checkbox"/> Foreclosure (420)<br><input type="checkbox"/> Mechanic's Lien (430)<br><input type="checkbox"/> Partition (440)<br><input type="checkbox"/> Possession (450)<br><input type="checkbox"/> Building Code Violation (460)<br><input type="checkbox"/> Other (499) _____                                                                                                                                                  |
| <b>Inmate Petitions</b><br><input checked="" type="checkbox"/> PCR (500)<br><input type="checkbox"/> Mandamus (520)<br><input type="checkbox"/> Habeas Corpus (530)<br><input type="checkbox"/> Other (599) _____                                                                                                                                                                                                                                                                 | <b>Administrative Law/Relief</b><br><input type="checkbox"/> Reinstate Drv. License (800)<br><input type="checkbox"/> Judicial Review (810)<br><input type="checkbox"/> Relief (820)<br><input type="checkbox"/> Permanent Injunction (830)<br><input type="checkbox"/> Forfeiture-Petition (840)<br><input type="checkbox"/> Forfeiture-Consent Order (850)<br><input type="checkbox"/> Other (899) _____ | <b>Judgments/Settlements</b><br><input type="checkbox"/> Death Settlement (700)<br><input type="checkbox"/> Foreign Judgment (710)<br><input type="checkbox"/> Magistrate's Judgment (720)<br><input type="checkbox"/> Minor Settlement (730)<br><input type="checkbox"/> Transcript Judgment (740)<br><input type="checkbox"/> Lis Pendens (750)<br><input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760)<br><input type="checkbox"/> Confession of Judgment (770)<br><input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780)<br><input type="checkbox"/> Other (799) _____ | <b>Appeals</b><br><input type="checkbox"/> Arbitration (900)<br><input type="checkbox"/> Magistrate-Civil (910)<br><input type="checkbox"/> Magistrate-Criminal (920)<br><input type="checkbox"/> Municipal (930)<br><input type="checkbox"/> Probate Court (940)<br><input type="checkbox"/> SCDOT (950)<br><input type="checkbox"/> Worker's Comp (960)<br><input type="checkbox"/> Zoning Board (970)<br><input type="checkbox"/> Public Service Comm. (990)<br><input type="checkbox"/> Employment Security Comm (991)<br><input type="checkbox"/> Other (999) _____ |
| <b>Special/Complex /Other</b><br><input type="checkbox"/> Environmental (600)<br><input type="checkbox"/> Automobile Arb. (610)<br><input type="checkbox"/> Medical (620)<br><input type="checkbox"/> Other (699) _____<br><input type="checkbox"/> Sexual Predator (510)<br><input type="checkbox"/> Permanent Restraining Order (680)                                                                                                                                           | <input type="checkbox"/> Pharmaceuticals (630)<br><input type="checkbox"/> Unfair Trade Practices (640)<br><input type="checkbox"/> Out-of State Depositions (650)<br><input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660)<br><input type="checkbox"/> Pre-Suit Discovery (670)                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |

Submitting Party Signature: \_\_\_\_\_

Date: December 24, 2018



**Note:** Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**Effective January 1, 2016**, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

**Pursuant to the ADR Rules, you are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

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**Please Note:** You must comply with the Supreme Court Rules regarding ADR.  
 Failure to do so may affect your case or may result in sanctions.

|                             |   |                                             |
|-----------------------------|---|---------------------------------------------|
| THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS                |
|                             | ) | FOR THE SEVENTH JUDICIAL CIRCUIT            |
| COUNTY OF SPARTANBURG       | ) |                                             |
|                             | ) | Case No. 2017-CP-42-02372                   |
| Daniel W. Spade,            | ) |                                             |
|                             | ) |                                             |
| Applicant,                  | ) |                                             |
|                             | ) | <b>Second Amended Application for Post-</b> |
| vs.                         | ) | <b>Conviction Relief</b>                    |
|                             | ) |                                             |
|                             | ) |                                             |
| State of South Carolina,    | ) |                                             |
|                             | ) |                                             |
| Respondent.                 | ) |                                             |
|                             | ) |                                             |

Pursuant to the Uniform Post-Conviction Relief Act, S.C. Code Ann. § 17-27-10 *seq.*,  
the applicant, Daniel W. Spade, amends his application for post-conviction relief.<sup>1</sup>

- 1) Mr. Spade is confined at the Lee Correctional Institution.
- 2) The Honorable R. Keith Kelly, Presiding Judge, Court of Generals Sessions  
Spartanburg County, imposed sentence.
- 3) There were not any co-defendants.
- 4) The sentence was imposed on indictment number 2011-GS-42-04171 for first-  
degree criminal sexual conduct with a minor.
- 5) On February 26, 2014, Judge Kelly sentenced Mr. Spade to thirty-five years  
imprisonment.
- 6) The sentence was imposed following a trial by jury.
- 7) Mr. Spade appealed to the South Carolina Court of Appeals. On July 6, 2016, the  
Court of Appeals affirmed Mr. Spade's conviction and sentence. *State v. Spade*, Unpublished  
Op. No. 2016-UP- 352 (Appellate Case No. 2014-000448), 2016 WL 3670561 (S.C. Ct. App.

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<sup>1</sup> This pleading is based on Form 5, Revised 3/2003, which can be found on the South Carolina Judicial Department website. Mr. Spade reserves the right to further amend his application for post-conviction relief. *See* S.C. Code Ann. § 17-27-90 (expressly contemplating supplemental or amended PCR application).

July 6, 2016). On June 16, 2017, the South Carolina Supreme Court denied Mr. Spade's petition for writ of *certiorari*, Appellate Case No. 2016-001965.

8) Please see number 7 above for courts, opinion, order citations, and dates of decisions.

9) Not applicable because Mr. Spade appealed.

10) Statement of grounds for relief:

a) Mr. Spade was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during the guilt/innocence phase of his jury trial.

b) Mr. Spade was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during his sentencing hearing.

c) Mr. Spade was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during his direct appeal.

d) Mr. Spade was denied due process of law during his jury trial because of prosecutorial misconduct. U.S Const. Am. V and XIV; S.C. Const. Art. I, § 3; *Roviaro v. U.S.*, 353 U.S. 53 (1957); *Brady v. Maryland*, 373 U.S. 83, (1963); *Kyles v. Whitley*, 514 U.S. 419, (1995); *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); and Rule 5, SCRCrimP.

11) Statement of facts supporting grounds for relief:

a) Trial counsel's performance was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

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CLERK OF COURT  
CHARLESTON COUNTY

1) Failing to request a continuance in order to have time to review and evaluate the child's mental health records that were disclosed for the first time four days prior to trial, when those records contained exculpatory information.

2) Not only failing to object to the trial judge instructing the jurors that their role is to "search for the truth" and make sure "justice is done," which impermissibly diminishes and shifts the burden of proof, but also adopting that language in closing argument, thereby diminishing and shifting the burden of proof.

3) Failing to call available lay, character, and expert witnesses that would have established the unreliability of the child's allegations.

4) Failing to investigate, develop and present evidence that the Special Prosecutor, N. Douglas Brannon, had a conflict of interest and, therefore, was disqualified from prosecuting this case.

5) Failing to request a ruling on Mr. Spade's contention that the Private Prosecutor, N. Douglas Brannon, was unqualified to serve as a special prosecutor because the Solicitor failed to produce a governor's commission pursuant to S.C. Code Ann. 7-470.

6) Failing to move for disclosure of exculpatory information in the possession of the Mr. Spade's Private Prosecutor, N. Douglas Brannon.

7) Failing to investigate, develop, and present evidence that would have established that testimony about the child's panic attacks were not related to Mr. Spade, which would have led to the trial court excluding that testimony or, if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony.

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SPARTANBURG COUNTY  
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8) Failing to object to and move for a mistrial because of inadmissible testimony that vouched for the child's credibility.

9) Failing to object to Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. In the alternative, failing to impeach Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. *See, e.g., S.C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011).

10) Failing to admit the videotaped interview from the Children's Advocacy Center that contained exculpatory information.

11) Failing to investigate, develop, and present evidence that venue was not in Spartanburg County.

12) Failing to support the directed verdict motion with evidence that venue was not in Spartanburg County.

13) Failing to request a jury instruction on venue.

14) Failing to object to the Special Prosecutor's improper closing argument that appealed the jurors' emotions and improperly vouched for the complaining witness when he recounted a conversation with his daughter discussing how the police arrest "bad people," he (as Special Prosecutor) tells the complaining witness' story, and "the jury takes care of the good people." Tr. 305-07.

15) Failing to object to evidence that the Family Court action involving the same allegations resulted in termination of Mr. Spade's parental rights.

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CLERK OF COURT  
SPARTANBURG COUNTY

16) Advising Mr. Spade not to present any evidence, including but not limited to his own testimony.

17) Excluding evidence from the forensic computer examination that was exculpatory.

18) The cumulative effect of trial counsel's errors denied Mr. Spade his right to a fair trial.

19) Failing to obtain through discovery, by subpoena, or court order relevant Department of Social Services records.

20) Failing to move to exclude the testimony of the child complaining witnesses because her testimony was tainted, unreliable, and inadmissible because of the improper techniques used to obtain the testimony.

21) Failing to cross-examine witnesses presented by the State to demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony.

22) Failing to present expert testimony to confront the State's witnesses and demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony.

b) Trial counsel's performance was both unreasonable and prejudicial during sentencing. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

1) Failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing.

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CLERK OF COURT  
SPARTANBURG COUNTY

2) Failing to present any information or evidence to the trial judge in order to mitigate the sentence imposed.

c) Appellate counsel's performance was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984); see also *Smith v. Robbins*, 528 U.S. 259 (2000); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002); and *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). Counsel's acts or omissions included, but are not limited to, the following: Failing to brief on appeal the trial court judge denying the motion for directed verdict when the State failed to present evidence establishing venue in Spartanburg County.

d) The prosecutors' misconduct was prejudicial and denied Mr. Spade his right to a fair trial. The misconduct included, but is not necessarily limited to, the following:

1) Failing to disclose *Brady* information including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County.

2) Failing to disclose *Brady* information in a timely manner including, but not necessarily limited to, statements by the child demonstrating that venue was not Spartanburg County.

3) Eliciting false testimony regarding venue.

4) Failing to correct false testimony regarding venue.

5) Filing to disclose relevant Department of Social Services records obtained by Spartanburg County Sheriff Officer Investigator Nikki Cantrell.

12) Prior to filing this application, Mr. Spade has not filed any petition in state court under South Carolina law, and petition in state or federal court for habeas corpus or post-

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SPARTANBURG COUNTY  
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conviction relief, any petition in the United States Supreme Court for certiorari, or any other petitions, motions, or applications in this or any other court, except for the direct appeal identified in number 7 above.

13) Not applicable because Mr. Spade has not filed any petitions for relief with the exception of his direct appeal and the original petition in this post-conviction relief case.

14) No ground set forth in paragraph 10 has been presented to this or any other court.

15) Not applicable because no prior petitions have been filed in any other court.

16) The grounds set forth in paragraph 10 have not been presented to any other court because this is the first opportunity to raise ineffective assistance of counsel.

17) Mr. Spade was represented at his jury trial, sentencing, and on appeal by the attorneys identified in paragraph 18. The undersigned counsel assisted Mr. Spade in preparing this amended application.

18) Prior Representation.

a) Trial Counsel:

- 1) Kenneth P. Shabel, Esquire  
Kennedy & Brannon, P.A.  
PO Box 3254  
Spartanburg, SC 29304
- 2) Shawn M. Campbell, Esquire  
Campbell Law Offices  
1451 E Main St, Ste. 1A  
Spartanburg, SC 29307

b) Appellate Counsel:

- 1) C. Rauch Wise, Esquire  
305 Main St.  
Greenwood, SC 29646

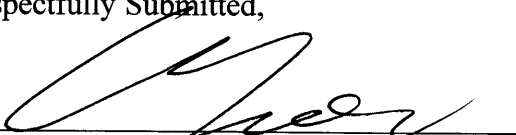
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CLERK OF COURT  
SPARTANBURG COUNTY



- 2) Kenneth P. Shabel, Esquire<sup>2</sup>  
Kennedy & Brannon, P.A.  
PO Box 3254  
Spartanburg, SC 29304
- 19) Mr. Spade respectfully requests this Court to order a new trial.
- 20) Mr. Spade is not under the sentence of any other court that she has not challenged.

Respectfully Submitted,

By



E. Charles Grose, Jr.  
S.C. Bar Number 66063  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 29646  
(864) 538-4466  
(864) 538-4405 (fax)  
Email: charles@groselawfirm.com

*Attorney for the Applicant*

December 24, 2018  
Greenwood, South Carolina

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SPARTANBURG COUNTY  
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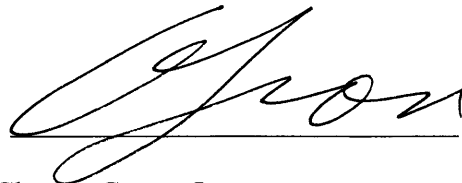
<sup>2</sup> Mr. Shabel withdrew from representing Mr. Spade on appeal when he joined the same law firm as Mr. Brannon, who had been Mr. Spade's special prosecutor.

|                             |   |                                  |
|-----------------------------|---|----------------------------------|
| THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS     |
|                             | ) | FOR THE SEVENTH JUDICIAL CIRCUIT |
| COUNTY OF SPARTANBURG       | ) |                                  |
|                             | ) | Case No. 2017-CP-42-02372        |
| Daniel W. Spade,            | ) |                                  |
|                             | ) |                                  |
| Applicant,                  | ) |                                  |
|                             | ) |                                  |
| vs.                         | ) |                                  |
|                             | ) |                                  |
|                             | ) |                                  |
| State of South Carolina,    | ) |                                  |
|                             | ) |                                  |
| Respondent.                 | ) |                                  |
| _____                       | ) |                                  |

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Megan Harrigan Jameson, Esquire  
Jordan A. Cox, Esquire  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549

By



E. Charles Grose, Jr.  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 29646  
(864) 538-4466

December 24, 2018  
Greenwood, South Carolina

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SPARTANBURG COUNTY  
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# The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.  
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December 24, 2018

The Honorable M. Hope Blackley  
Clerk of Court, Spartanburg County  
PO Box 3483  
Spartanburg, SC 29304-3483

Re: *Daniel W. Spade v. State of South Carolina*  
Case Number 2017-CP-42-02372

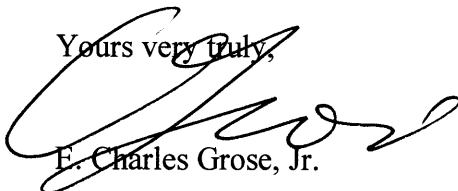
Dear Ms. Blackley:

Enclosed please find Mr. Spade's Second Amended Application for Post-Conviction Relief, along with a certificate of service.

Thank you for your attention to this matter. If you have any questions or require additional information, please contact me.

With kindest regards, I am

Yours very truly,

  
E. Charles Grose, Jr.

cc: Mr. Daniel W. Spade (via US Mail)  
Megan Harrigan Jameson, Esquire (via Email and US Mail)  
Jordan A. Cox, Esquire (via Email and US Mail)

2018 DEC 28 AM 9:07  
CLERK OF COURT  
SPARTANBURG COUNTY

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SpartanburgDaniel W. Spade, SCDC # 358974

## CIVIL ACTION COVERSHEET

Plaintiff(s)

2017-CP - 42- 02372

vs.

State of South Carolina

Defendant(s)

Submitted By: Charles GroseAddress: 404 Main Street, Greenwood, SC 29646SC Bar #: 66063Telephone #: 864-538-4466Fax #: 864-538-4405

Other:

E-mail: charles@groselawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

## DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

## NATURE OF ACTION (Check One Box Below)

- |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
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| <b>Contracts</b><br><input type="checkbox"/> Constructions (100)<br><input type="checkbox"/> Debt Collection (110)<br><input type="checkbox"/> General (130)<br><input type="checkbox"/> Breach of Contract (140)<br><input type="checkbox"/> Fraud/Bad Faith (150)<br><input type="checkbox"/> Failure to Deliver/Warranty (160)<br><input type="checkbox"/> Employment Discrim (170)<br><input type="checkbox"/> Employment (180)<br><input type="checkbox"/> Other (199) _____ | <b>Torts - Professional Malpractice</b><br><input type="checkbox"/> Dental Malpractice (200)<br><input type="checkbox"/> Legal Malpractice (210)<br><input type="checkbox"/> Medical Malpractice (220)<br>Previous Notice of Intent Case #<br>20 ____-NI-_____<br><input type="checkbox"/> Notice/ File Med Mal (230)<br><input type="checkbox"/> Other (299) _____                                        | <b>Torts - Personal Injury</b><br><input type="checkbox"/> Conversion (310)<br><input type="checkbox"/> Motor Vehicle Accident (320)<br><input type="checkbox"/> Premises Liability (330)<br><input type="checkbox"/> Products Liability (340)<br><input type="checkbox"/> Personal Injury (350)<br><input type="checkbox"/> Wrongful Death (360)<br><input type="checkbox"/> Assault/Battery (370)<br><input type="checkbox"/> Slander/Libel (380)<br><input type="checkbox"/> Other (399) _____                                                                                                                                               | <b>Real Property</b><br><input type="checkbox"/> Claim & Delivery (400)<br><input type="checkbox"/> Condemnation (410)<br><input type="checkbox"/> Foreclosure (420)<br><input type="checkbox"/> Mechanic's Lien (430)<br><input type="checkbox"/> Partition (440)<br><input type="checkbox"/> Possession (450)<br><input type="checkbox"/> Building Code Violation (460)<br><input type="checkbox"/> Other (499) _____                                                                                                                                                  |
| <b>Inmate Petitions</b><br><input checked="" type="checkbox"/> PCR (500)<br><input type="checkbox"/> Mandamus (520)<br><input type="checkbox"/> Habeas Corpus (530)<br><input type="checkbox"/> Other (599) _____                                                                                                                                                                                                                                                                 | <b>Administrative Law/Relief</b><br><input type="checkbox"/> Reinstate Drv. License (800)<br><input type="checkbox"/> Judicial Review (810)<br><input type="checkbox"/> Relief (820)<br><input type="checkbox"/> Permanent Injunction (830)<br><input type="checkbox"/> Forfeiture-Petition (840)<br><input type="checkbox"/> Forfeiture-Consent Order (850)<br><input type="checkbox"/> Other (899) _____ | <b>Judgments/Settlements</b><br><input type="checkbox"/> Death Settlement (700)<br><input type="checkbox"/> Foreign Judgment (710)<br><input type="checkbox"/> Magistrate's Judgment (720)<br><input type="checkbox"/> Minor Settlement (730)<br><input type="checkbox"/> Transcript Judgment (740)<br><input type="checkbox"/> Lis Pendens (750)<br><input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760)<br><input type="checkbox"/> Confession of Judgment (770)<br><input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780)<br><input type="checkbox"/> Other (799) _____ | <b>Appeals</b><br><input type="checkbox"/> Arbitration (900)<br><input type="checkbox"/> Magistrate-Civil (910)<br><input type="checkbox"/> Magistrate-Criminal (920)<br><input type="checkbox"/> Municipal (930)<br><input type="checkbox"/> Probate Court (940)<br><input type="checkbox"/> SCDOT (950)<br><input type="checkbox"/> Worker's Comp (960)<br><input type="checkbox"/> Zoning Board (970)<br><input type="checkbox"/> Public Service Comm. (990)<br><input type="checkbox"/> Employment Security Comm (991)<br><input type="checkbox"/> Other (999) _____ |
| <b>Special/Complex /Other</b><br><input type="checkbox"/> Environmental (600)<br><input type="checkbox"/> Automobile Arb. (610)<br><input type="checkbox"/> Medical (620)<br><input type="checkbox"/> Other (699) _____<br><input type="checkbox"/> Sexual Predator (510)<br><input type="checkbox"/> Permanent Restraining Order (680)                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <input type="checkbox"/> Pharmaceuticals (630)<br><input type="checkbox"/> Unfair Trade Practices (640)<br><input type="checkbox"/> Out-of State Depositions (650)<br><input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660)<br><input type="checkbox"/> Pre-Suit Discovery (670)                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |

Submitting Party Signature: \_\_\_\_\_

Date: May 14, 2019

**Note:** Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**Effective January 1, 2016,** Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

**Pursuant to the ADR Rules, you are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

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|                             |   |                                            |
|-----------------------------|---|--------------------------------------------|
| THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS               |
|                             | ) | FOR THE SEVENTH JUDICIAL CIRCUIT           |
| COUNTY OF SPARTANBURG       | ) |                                            |
|                             | ) | Case No. 2017-CP-42-02372                  |
| Daniel W. Spade,            | ) |                                            |
| Applicant,                  | ) |                                            |
|                             | ) | <b>Third Amended Application for Post-</b> |
| vs.                         | ) | <b>Conviction Relief</b>                   |
|                             | ) |                                            |
| State of South Carolina,    | ) |                                            |
| Respondent.                 | ) |                                            |
|                             | ) |                                            |

Pursuant to the Uniform Post-Conviction Relief Act, S.C. Code Ann. § 17-27-10 *et. seq.*, the applicant, Daniel W. Spade, amends his application for post-conviction relief.<sup>1</sup>

- 1) Mr. Spade is confined at the Lee Correctional Institution.
- 2) The Honorable R. Keith Kelly, Presiding Judge, Court of General Sessions, Spartanburg County, imposed sentence.
- 3) There were not any co-defendants.
- 4) The sentence was imposed on indictment number 2011-GS-42-04171 for first-degree criminal sexual conduct with a minor.
- 5) On February 26, 2014, Judge Kelly sentenced Mr. Spade to thirty-five years imprisonment.
- 6) The sentence was imposed following a trial by jury.
- 7) Mr. Spade appealed to the South Carolina Court of Appeals. On July 6, 2016, the Court of Appeals affirmed Mr. Spade's conviction and sentence. *State v. Spade*, Unpublished Op. No. 2016-UP- 352 (Appellate Case No. 2014-000448), 2016 WL 3670561 (S.C. Ct. App.

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<sup>1</sup> This pleading is based on Form 5, Revised 3/2003, which can be found on the South Carolina Judicial Department website. Mr. Spade reserves the right to further amend his application for post-conviction relief. *See* S.C. Code Ann. § 17-27-90 (expressly contemplating supplemental or amended PCR application).

July 6, 2016). On June 16, 2017, the South Carolina Supreme Court denied Mr. Spade's petition for writ of *certiorari*, Appellate Case No. 2016-001965.

8) Please see number 7 above for courts, opinion, order citations, and dates of decisions.

9) Not applicable because Mr. Spade appealed.

10) Statement of grounds for relief:

a) Mr. Spade was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during the guilt/innocence phase of his jury trial.

b) Mr. Spade was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during his sentencing hearing.

c) Mr. Spade was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during his direct appeal.

d) Mr. Spade was denied due process of law during his jury trial because of prosecutorial misconduct. U.S. Const. Am. V and XIV; S.C. Const. Art. I, § 3; *Roviaro v. U.S.*, 353 U.S. 53 (1957); *Brady v. Maryland*, 373 U.S. 83, (1963); *Kyles v. Whitley*, 514 U.S. 419, (1995); *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); and Rule 5, SCRCrimP.

11) Statement of facts supporting grounds for relief:

a) Trial counsel's performance was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

1) Failing to request a continuance in order to have time to review and evaluate the child's mental health records that were disclosed for the first time four days prior to trial, when those records contained exculpatory information.

2) Not only failing to object to the trial judge instructing the jurors that their role is to "search for the truth" and make sure "justice is done" and the prosecutor embracing this language in the its opening statement, which impermissibly diminishes and shifts the burden of proof, but also adopting that language in Mr. Spade's opening statement and closing argument, thereby diminishing and shifting the burden of proof.

3) Failing to call available lay, character, and expert witnesses that would have established the unreliability of the child's allegations.

4) Failing to investigate, develop and present evidence that the Special Prosecutor, N. Douglas Brannon, had a conflict of interest and, therefore, was disqualified from prosecuting this case.

5) Failing to request a ruling on Mr. Spade's contention that the Private Prosecutor, N. Douglas Brannon, was unqualified to serve as a special prosecutor because the Solicitor failed to produce a governor's commission pursuant to S.C. Code Ann. § 1-7-470.

6) Failing to move for disclosure of exculpatory information in the possession of the Mr. Spade's Private Prosecutor, N. Douglas Brannon.

7) Failing to investigate, develop, and present evidence that would have established that testimony about the child's panic attacks were not related to Mr. Spade, which would have led to the trial court excluding that testimony or, if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony.



8) Failing to object to and move for a mistrial because of inadmissible testimony that vouched for the child's credibility.

9) Failing to object to Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. In the alternative, failing to impeach Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. *See, e.g., S.C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011).

10) Failing to admit the videotaped interview from the Children's Advocacy Center that contained exculpatory information.

11) Failing to investigate, develop, and present evidence that venue was not in Spartanburg County.

12) Failing to support the directed verdict motion with evidence that venue was not in Spartanburg County.

13) Failing to request a jury instruction on venue.

14) Failing to object to the Special Prosecutor's improper closing argument that appealed the jurors' emotions and improperly vouched for the complaining witness when he recounted a conversation with his daughter discussing how the police arrest "bad people," he (as Special Prosecutor) tells the complaining witness' story, and "the jury takes care of the good people." Tr. 305-07.

15) Failing to object to evidence that the Family Court action involving the same allegations resulted in termination of Mr. Spade's parental rights.

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- 16) Advising Mr. Spade not to present any evidence, including but not limited to his own testimony.
- 17) Excluding evidence from the forensic computer examination that was exculpatory.
- 18) The cumulative effect of trial counsel's errors denied Mr. Spade his right to a fair trial.
- 19) Failing to obtain through discovery, by subpoena, or court order relevant Department of Social Services records.
- 20) Failing to move to exclude the testimony of the child complaining witnesses because her testimony was tainted, unreliable, and inadmissible because of the improper techniques used to obtain the testimony.
- 21) Failing to cross-examine witnesses presented by the State to demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony.
- 22) Failing to present expert testimony to confront the State's witnesses and demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony.
- 23) Failing to investigate, develop, and present evidence that law enforcement in South Carolina and Virginia investigation allegations that Cara Lintner witnessed and/or participated in child sexual abuse perpetrated by Danny Spade with his daughter P.J. Law enforcement determined these allegations by P.J. to be unfounded. This ground is based on the deposition testimony of Cara Lintner. Exonerating Ms. Lintner on these allegations also exonerated Mr. Spade.

b) Trial counsel's performance was both unreasonable and prejudicial during sentencing. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

1) Failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing.

2) Failing to present any information or evidence to the trial judge in order to mitigate the sentence imposed.

c) Appellate counsel's performance was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *see also Smith v. Robbins*, 528 U.S. 259 (2000); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002); and *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). Counsel's acts or omissions included, but are not limited to, the following: Failing to brief on appeal the trial court judge denying the motion for directed verdict when the State failed to present evidence establishing venue in Spartanburg County.

d) The prosecutors' misconduct was prejudicial and denied Mr. Spade his right to a fair trial. The misconduct included, but is not necessarily limited to, the following:

1) Failing to disclose *Brady* information including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County.

2) Failing to disclose *Brady* information in a timely manner including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County.

3) Eliciting false testimony regarding venue.

- 4) Failing to correct false testimony regarding venue.
- 5) Filing to disclose relevant Department of Social Services records obtained by Spartanburg County Sheriff Officer Investigator Nikki Cantrell.
- 6) Failing disclosed evidence that law enforcement in South Carolina and Virginia investigation allegations that Cara Lintner witnessed and/or participated in child sexual abuse perpetrated by Danny Spade with his daughter P.J. Law enforcement determined these allegations by P.J. to be unfounded. This ground is based on the deposition testimony of Cara Lintner. Exonerating Ms. Lintner on these allegations also exonerated Mr. Spade.
- 12) Prior to filing this application, Mr. Spade has not filed any petition in state court under South Carolina law, and petition in state or federal court for habeas corpus or post-conviction relief, any petition in the United States Supreme Court for certiorari, or any other petitions, motions, or applications in this or any other court, except for the direct appeal identified in number 7 above.
- 13) Not applicable because Mr. Spade his not filed any petitions for relief with the exception of his direct appeal and the original petition in this post-conviction relief case.
- 14) No ground set forth in paragraph 10 has been presented to this or any other court.
- 15) Not applicable because no prior petitions have been filed in any other court.
- 16) The grounds set forth in paragraph 10 have not been presented to any other court because this is the first opportunity to raise ineffective assistance of counsel.
- 17) Mr. Spade was represented at his jury trial, sentencing, and on appeal by the attorneys identified in paragraph 18. The undersigned counsel assisted Mr. Spade in preparing this amended application.

18) Prior Representation.

a) Trial Counsel:

- 1) Kenneth P. Shabel, Esquire  
Kennedy & Brannon, P.A.  
PO Box 3254  
Spartanburg, SC 29304
- 2) Shawn M. Campbell, Esquire  
Campbell Law Offices  
1451 E Main St, Ste. 1A  
Spartanburg, SC 29307

b) Appellate Counsel:

- 1) C. Rauch Wise, Esquire  
305 Main St.  
Greenwood, SC 29646
- 2) Kenneth P. Shabel, Esquire<sup>2</sup>  
Kennedy & Brannon, P.A.  
PO Box 3254  
Spartanburg, SC 29304

19) Mr. Spade respectfully requests this Court to order a new trial.

20) Mr. Spade is not under the sentence of any other court that she has not challenged.

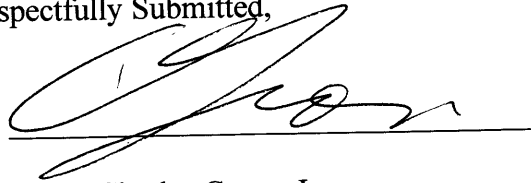
(signature on next page)

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<sup>2</sup> Mr. Shabel withdrew from representing Mr. Spade on appeal when he joined the same law firm as Mr. Brannon, who had been Mr. Spade's special prosecutor.

Respectfully Submitted,

By



E. Charles Grose, Jr.  
S.C. Bar Number 66063  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 29646  
(864) 538-4466  
(864) 538-4405 (fax)  
Email: charles@groselawfirm.com

*Attorney for the Applicant*

May 14, 2019  
Greenwood, South Carolina

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|                             |   |                                                 |
|-----------------------------|---|-------------------------------------------------|
| THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS                    |
|                             | ) | FOR THE SEVENTH JUDICIAL CIRCUIT                |
| COUNTY OF SPARTANBURG       | ) |                                                 |
|                             | ) | Case No. 2017-CP-42-02372                       |
| Daniel W. Spade,            | ) |                                                 |
|                             | ) |                                                 |
| Applicant,                  | ) |                                                 |
|                             | ) | <b>Memorandum in Support of Application for</b> |
| vs.                         | ) | <b>Post-Conviction Relief</b>                   |
|                             | ) |                                                 |
|                             | ) |                                                 |
| State of South Carolina,    | ) |                                                 |
|                             | ) |                                                 |
| Respondent.                 | ) |                                                 |
|                             | ) |                                                 |

Daniel W. Spade submits the following pre-hearing memorandum in support of his application for post-conviction relief ("PCR").

### I. PROCEDURAL HISTORY.

On June 29 and 30, 2009, the Honorable Georgia C. Anderson convened a hearing in the Family Court for Spartanburg County regarding Heather and David Jolley's petition to terminate Dany Spade's parental rights. This action was not successful. Judge Anderson issued a final order on January 13, 2010. This order was supplemented on June 29, 2010.

Heather Jolley filed another Family Court Action on November 23, 2010.

On May 3, 2011, Investigator Nikki Cantrell and officers of the Prince William County Police Department arrested Mr. Spade in Virginia, charging him with first-degree criminal sexual conduct with a minor involving his daughter P.J.<sup>1</sup>

On January 9, 2012, the Jolleys amended the November 2010 complaint to petition to terminate Mr. Spade's parental rights and to allow David Jolley to adopt P.J. Beginning on October 15, 2012, the Honorable James F. Farley, Jr. convened a hearing in the Family Court for

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<sup>1</sup> The child's name may also appear as P.S., which was her initials prior to the Family Court terminating Mr. Spade's parental rights and her being adopted by David Jolley.

Spartanburg County. Judge Farley ultimately terminated Mr. Spade's parental rights and allowed Mr. Jolley to adopt P.J.

The State tried Mr. Spade before the Honorable R. Keith Kelly and a jury on February 24-26, 2014. Barry J. Barnett, Jennifer A.J. Jordan, Kimberly L. Leskanic, and N. Douglas Brannon represented the State. Kenneth P. Shabel and Shawn M. Campbell represented Mr. Spade. On February 26, 2014, the jurors found Mr. Spade guilty of first-degree criminal sexual conduct with a minor. Judge Kelly sentenced Mr. Spade to thirty-five years imprisonment.

Mr. Spade appealed to the Court of Appeals. C. Rauch Wise and Mr. Shabel represented Mr. Spade. On February 11, 2016, the Court of Appeals convened an oral argument. While the decision was still pending, Mr. Shabel joined Mr. Brannon's law firm and, accordingly, moved to be relieved as counsel by petition dated March 11, 2016. On July 6, 2016, the Court of Appeals affirmed Mr. Spade's conviction and sentence. *State v. Spade*, Unpublished Op. No. 2016-UP-352 (Filed July 6, 2016). On August 18, 2016, the Court of Appeals denied Mr. Spade's petition for rehearing.

On October 6, 2016, Mr. Spade filed a petition for writ of *certiorari* to the South Carolina Supreme Court. Mr. Wise represented Mr. Spade. On June 16, 2017, our Supreme Court denied Mr. Spade's petition for a writ of *certiorari*.

On July 13, 2017, Mr. Spade filed a *pro se* PCR application. With the assistance of undersigned counsel, Mr. Spade amended his PCR application on October 2, 2017, December 24, 2018, and May 14, 2019.



## II. FACTUAL BACKGROUND.

### A. Evidence Presented at the Termination of Parental Rights Hearing.

At the evidentiary hearing, Mr. Spade will offer the transcript of the second Family Court termination of parental rights trial. This section of this pleading identifies significant, relevant testimony from that hearing.

#### 1. Investigator Nikki Cantrell.

At Family Court hearing, Investigator Cantrell testified she referred P.J. to the Children's Advocacy Center and scheduled the appointments. TRP Tr. 334.

She also testified Mr. Spade's Computer had been "wiped clean." TPR Tr. 357.

#### 2. Alex Wolf.

Alex Wolf, the court-appointed guardian ad litem, testified at the Family Court hearing. On direct examination, she testified it would not be in P.J.'s best interest to testify at the hearing. TPR Tr. 170.

On cross-examination, Ms. Wolf testified that the Jolleys sent her recordings of telephone calls between Mr. Spade and P.J. Ms. Wolf did not sense any fear by P.J. in those calls; nor did she hearing anything from Mr. Spade that would have invoked fear. The last call she received was dated March 31, 2011, the day prior to P.J.'s maternal grandfather appearing at her office, unannounced, to make allegations of sexual abuse. On March 30, 2011, Ms. Wolf had been provided with information that Kimberly Rosborough intended "to have Heather, David, Danny, and P.J. in a group setting. TPR Tr. 172-75.

Prior to March 31, 2011, the Jolleys were "120 percent" cooperative with Ms. Wolf. From April 2011 to August 2012, the Jolleys provided "zero" cooperation, despite Ms. Wolf's efforts. The timing of this lack of cooperation concerned Ms. Wolf because she knew Ms.

Rosborough making “arrangements” that would bring everyone together, and all of a sudden there are allegations of sexual abuse. Ms. Wolf’s next contact from Mr. Jolley “was a rather terse e-mail,” followed by a lack of cooperation. Every move Ms. Wolf made “seemed to be followed up by some problem that caused the [Jolleys] counsel to call [her] and complain, or try to correct what [she] had done.” Tr. 175-77.

In August 2012, when the Family Court hearing was approaching, Ms. Wolf wanted to conduct a home visit. Ms. Wolf was aware of a statement by the Jolley’s counsel about “a wolf mask,” and Ms. Wolf, because of her last name, “didn’t want anything having to do with [her] of [her] name being associated with something negative this child may or may not have experienced.” When Ms. Wolf made the home visit, “Mr. Jolley was hypervigilant, clearly uncomfortable when [she] tried to speak with the child.” When Mr. Jolley was present, “he answered all of [Ms. Wolf’s] questions for” P.J., including “[s]illy questions like what’s the name of the bunny rabbit. Everything he had an answer for. And he would not let [Ms. Wolf] pursue anything further.” When P.J. mentioned seeing a wolf at the zoo earlier that day, Mr. Jolley said, “[W]e don’t talk about those things around here.” TPR Tr. 177-83.

During her investigation, Ms. Wolf did not personally observe any fear by P.J. of Mr Spade. TPR Tr. 183.

On re-direct, Mr. Brannon accused Ms. Wolf, “Isn’t it true that you were given some information during your investigation of this case that you then went directly to Mr. Spade or his attorney and gave him the same information to assist him in his criminal defense? Isn’t that true?” Ms. Wolf responded, “That is absolutely not true.” The Family Court Judge prevented further badgering of this witness. Ms. Wolf, however, notified counsel for the Jolleys, left a

message for Mr. Spade's counsel, and notified Mr. Spade that she was "recommending that the phone conversations cases, that a disclosure had been made." TPR Tr. 186-87, 196-98.

### **3. David Jolley.**

David Jolley claimed he heard about the allegations of sexual abuse "on a Friday" from his in-laws. He did not report the allegations to the police. He and Heather Jolley called Kimberly Rosborough, who referred them to the Children's Advocacy Center. TPR. Tr. 479.

Mr. Jolley acknowledged he and Heather Jolley stopped cooperating with the guardian ad litem, Alex Wolf, because "[w]e were told by the Solicitor and our counsel not to have any further contact." He alleged Ms. Wolf damaged the criminal investigation and gave Mr. Spade "a two-week head start to make moves to and to erase computers." TPR. 482-83, 486.

Mr. Jolley disputed Ms. Wolf's testimony about P.J. initiating a discussion about wolves after having seen one at the zoo. Mr. Jolley testified he and Heather do not discuss wolves because of P.J.'s disclosure of "the disclosure with the wolf mask and what happened to her." On cross-examination by Ms. Wolf, Mr. Jolley acknowledged he might have made a mistake and all the Ms. Wolf had done was notify Mr. Spade that she was stopping he contact with P.J. because P.J. had made allegations. TPR Tr. 484-85, 505-07; *and see* R. 386.

## **B. Evidence Presented at Trial.**

### **1. Pre-trial Motions.**

On the morning of trial, Solicitor Barnette notified the trial court and counsel that Mr. Brannon would be "working as a volunteer, as a special prosecutor for the Seventh Judicial Circuit beginning Monday, February 24<sup>th</sup>, 2014." R. 472. Trial counsel did not "have any evidence under Section 1-7-470 of the South Carolina Code that [Mr. Brannon's] appointment as

a special prosecutor has been in any way, shape or form commissioned by the Governor's Office." Trial counsel added:

But more importantly, Your Honor, in addition to the lack of the formal notice, Mr. Brannon, as we think the testimony and our arguments will reveal, this case involves to a significant degree a lot of Family Court matters. Mr. Brannon served as counsel for the mother and now father of the victim in the Family court trial that took place in October of 2012. We believe that creates an inherent conflict of interests and would ask that he not be allowed to serve as special prosecutor.

Tr. 8.

Solicitor Barnette countered, "[T]he Solicitor has the right to appoint a special prosecutor." He argued, "Mr. Brannon has been involved in this case almost from the beginning in Family Court." The Solicitor pointed out "how complicated" the Family Court issues are. Tr. 9.<sup>2</sup>

Trial counsel responded:

Your Honor, the other big issue we have is, again, during that Family Court proceeding when Mr. Brannon served as the attorney for the victim's parents, it came across as evidence that we think is admissible in this trial today that the victim's parents were advised by the Seventh Circuit Solicitor's Office, as well as law enforcement, not to cooperate with the court-appointed guardian ad litem. So I think he may have been given advice to his clients at the time that is indirect contradiction to what they would be presenting today.

Tr. 9-10.

The trial judge did not "see a conflict" with Mr. Brannon serving as a special prosecutor. The trial judge never ruled on the section 1-7-470 issue. Tr. 10, 53; *see also* Court's Exhibit No. 2, R. 472.

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<sup>2</sup> Solicitor Barnette additionally informed the trial court the Mr. Brannon can be a "third person involved," as the Solicitor was preparing for *State v. Blackwell*, a death penalty case scheduled to begin the following week. Tr. 10-11.

Trial counsel noted “[T]here is long history involving my client and the mother of the alleged victim in this case; ultimately the [] termination of my client’s parental rights by a court order filed in November of 2012,” pursuant to section 63-7-2570(1), based on allegations of harm to the child that cannot be cured within twelve months. Trial counsel observed, “We believe the results of that termination would be extremely prejudicial to my client and outweigh any probative value that order may have.” Trial counsel was “not necessarily asking the jury be excluded from hearing the fact that his rights had been terminated,” but for the jurors to know that the Family Court trial was under a “much different evidentiary standard and statutory guidelines.” Mr. Brannon and the “parents filed a 19-1-180 motion so the child did not have to take the stand and my client did not have the opportunity to cross-examine his biological daughter at” the Family Court Hearing. Trial counsel concluded, “No jury instruction could cure that and we believe it would be extremely prejudicial for this jury to hear why his rights were terminated.” Trial counsel sought “to exclude any reference as to why his rights were terminated, to prevent the jury from having any information that any other court ruled on at any level of burden of proof the facts that are before the jury today.” Tr. 11-13.

Solicitor Barnette responded, pointing out there were “two TPR actions” by the Jolleys. The first one was not successful. The second one was successful based “on the ground that this action is based off if in criminal court.” The Solicitor argued, “I think the problem is they’ve got to introduce it all or none.” The Solicitor acknowledged Mr. Spade would be “arguing [the Family Court litigation] as part of the motive,” and argued this trial should be about what happened to this child “not about what occurred in Family Court.” Tr. 14-15.

Acknowledging the potential “prejudicial effect and considering the completeness of the record,” the trial judge suggested, “I think would allow if you are going to say a TPR action was

brought and they were unsuccessful, and then the allegations arose and a second TPR action arose or was brought and they were successful. Then you don't get into what some other judge says." Tr. 15-16.

Trial counsel responded:

Ultimately we are just looking at a timeline, and for the record I can just basically summarize what that timeline is, as far as the Family Court proceedings are concerned.

August of 2007, my client, after already having begun a child support obligation in Virginia, files an action here in the State of South Carolina to seek visitation with his daughter.

In July of 2008, the Jolleys filed an action to terminate his parental rights.

They go to trial in July of 2009.

Judge Anderson issues an order in January of 2010 denying the termination of parental rights.

My client continues to exercise visitation at that point.

In November of 2010, before these allegations have arisen, they filed an action to suspend his visitation. It's granted. There are some discussions. The guardian is appointed. It appears that visitation may resume again and these allegations come up.

They file an action, a second action at that point to terminate his parental rights, and the action is successful.

Tr. 17-18.

Mr. Branon agreed, "Mr. Shabel is accurate in his timeline and description." He argued presenting evidence of "a failed TRP" opens the door to "the fact that there was this successful TRP." Solicitor Barnette suggested a proffer. Trial counsel noted a proffer would include Kim Rosborough, Heather Jolley, David Jolley, and potentially P.J. and Alex Wolf. Trial counsel offered to end the timeline with the "court order from November of 2012 terminating Mr.

Spade's parental rights as to" P.J. without getting "into why anything was filed or for what purpose." Solicitor Barnette agreed with that limitation. Tr. 18-23.

Trial counsel directed the trial judge to the discovery order of the Honorable J. Mark Hayes, II, dated February 27, 2013, ruling:

The State shall not be required to turn over any mental health records of the alleged victim from Meredith Thompson-Loftis at this time. However, if the State intends to call her as a witness in their case, they must turn over all such records within a reasonable time prior to trial of this case."

Tr. 24-25. Trial counsel then stated:

My first motion is to exclude any testimony of Meredith Thompson-Loftis.

After this order was issued, I did receive on October 31st of 2013 records from **Minor Victim** counseling with Meredith Thompson-Loftis that spanned May 17th, 2011, through February 16th of 2012. It was not until Thursday morning of last week, February 20th of 2014, that the State turned over records from February 23rd of 2012, through December 30th of 2013. No records have been turned over since December 30th – from dates since December 30th of 2013. But, in essence, Your Honor four days before this trial was to begin they handed over the last twenty-two months of counseling records. I believe that is contradictory to Judge Hayes' ruling. I don't believe they turned over her records within a reasonable time. Therefore, I would ask that any testimony of Meredith Thompson-Loftis be excluded under the terms of Judge Hayes' order, which were issued and filed with the court on February 27th of 2013.

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Tr. 25-26.

Ms. Jordan argued, "[W]e do believe that it was in a reasonable amount of time that these records were turned over to the defense." The counseling records included twenty-five pages. Ms. Jordan argued trial counsel had "access to the majority of [] Ms. Loftis' records prior to this." She claimed P.J. had "made no new allegations, as far as the disclosures that came forth."

Tr. 26-28.

Trial counsel was concerned about not only "the volume," but also "the legibility" of the records that prosecution is requiring the defense "to translate her handwriting in four days." Counsel further argued, "[T]he fact that we got it [late] prevents us from being able to have any

experts, should we have wanted to have an expert look [at] it.” The prosecutor argued there is “no shock” to the defense about “what Meredith Loftis is going to testify about” as trial counsel had already cross-examined her in Family Court. When the trial judge asked, “[H]ave you learned anything in [the records] you didn’t learn in the whole case?,” trial counsel responded, “We have learned the number of appointments this child had with Meredith Thompson-Loftis in the year, plus, since the hearing, but nothing of major significance *that I could see or that I could translate in the four days that I have had a chance to look at it.*” The trial judge denied the motion to exclude Ms. Thompson-Loftis as witness. Tr. 28-29 (emphasis added) ; *see also* Court’s Exhibit No. 1, R. 341-471.

Next, trial counsel pointed out the prosecution had not disclosed the forensic report from the search of Mr. Spade’s computer. He read from Judge Hayes’s order and argued:

“[A]t this time there is no forensic report from the search of the defendant’s computer. If the State intends to use the computer or search of the computer as evidence at trial, it must provide copies of all reports generated and documents obtained from that computer within a reasonable time prior to the trial of this case.” That was issued in February of 2013.

It was not until February of 2014 that the State of South Carolina turned over any of the forensic documentation, despite the fact that everything given to me indicates it was available to the State of South Carolina as early as May 31<sup>st</sup> of 2011. They had access to it, for two years two and a half years before turning it over to me. We ask that any forensic – any evidence obtained from my client’s computer be excluded.

Tr. 29-30.

Trial counsel pointed out that Detective Cantrell testified at the Family Court hearing “fifteen, sixteen months ago that she believed the computer has been wiped.” Trial counsel “asked her then if there was a forensic report about that and she said it’s my understanding there was.” Ms. Jordan conceded, “Your Honor, it was my understanding [that] Mr. Marquez’ report does not say it has been wiped.” The prosecution also acknowledged late disclosure of the



report. The trial judge excluded text messages in the State's case in chief but ruled that evidence could be used in cross or in reply. Tr. 30-33. The trial judge issued the same ruling regarding Mr. Spade's motion to exclude the forensic examination of the "blackberry telephone." Tr. 38.

Trial counsel also moved to exclude any evidence alleging Mr. Spade's computer had been wiped. Tr. 45.

Trial counsel also moved to exclude evidence of any internet sites Mr. Spade visited or his purchase of adult materials. Ms. Jordan responded the prosecution might want to cross-examine or introduce reply evidence about the purchase of "a penile enhancement device after speaking with his daughter on skype or via the computer." Trial counsel pointed out that would not be "relevant on cross-examination. The trial judge took the motion under advisement to see how the "testimony develops" but the trial court did not understand "what the relevance is on that at this point." Tr. 45-46.

Trial counsel raised the issue of P.J.'s medical records. Judge Hayes' February 2013 order memorialized the prosecution was not in the "possession of any medical records from Eastside Pediatrics and could not be compelled to release them," but the Court would be willing to address those medical records upon a motion served on P.J.'s mother. Trial counsel served such a motion on Mr. Brannon, "who appeared at a hearing on behalf of Heather Jolley in May of 2013." As a result of that motion and hearing, "[T]he State stipulate[d] that there is not medical evidence to support the allegations contained in the warrant." Also, "The State further stipulate[d] there is no medical evidence to support the allegations they will raise through their witnesses at trial." Trial counsel pointed out, "[O]ne of the witnesses at this trial is Dr. Nancy Henderson, who performed a medical evaluation of this child in April of 2011." Trial counsel argued the State's stipulation should be admitted. Trial counsel further argued Dr. Henderson's

testimony would be “incredibly prejudicial” when the defense had “been denied access to the Eastside Pediatric records.” Trial counsel moved to exclude the testimony of Dr. Henderson. Tr. 33-35.

Ms. Jordan argued the prosecution “believe[s] that Dr. Henderson’s testimony should be included as to the fact that she will, as the court may have heard in her previous testimonies at trial, talk about the fact that no physical evidence in a child abuse case does not necessarily rule in or rule out that the abuse occurred, that it’s not a definitive finding.” Ms. Jordan agreed the jurors should hear the stipulation that “there is no medical finding.” Tr. 35.

Trial counsel reminded the trial judge, “One of the reasons again we wanted the documentation from Eastside Pediatrics is because the medical evaluation done at Eastside Pediatrics were a lot closer to the time of these allegations, or to the time of when this incident allegedly occurred” than Dr. Henderson’s evaluation. Trial counsel, thus, would be able to cross-examine Dr. Henderson with the prior examinations. Tr. 36-37.

Ms. Jordan argued, “I don’t believe the stipulation in any way says [the prosecution] can’t call Dr. Henderson to explain the exam that she did.” Trial counsel countered, once again, “Without those records I can’t give proper cross-examination for Dr. Henderson to contradict her testimony to the jury.” The trial judge called for a sidebar and subsequently denied the motion to exclude Dr. Henderson as a witness, noting “Judge Hayes preliminarily has already tried to narrow the issues.” Tr. 37-38.

Ms. Jordan moved “to exclude third-party guilt or any reference to it by the defense during the trial.” Trial counsel did not object to this motion. Ms. Jordan responded, “Your Honor, I’m taking that to believe that they are not going to take the stand or have anyone to take

the stand and accuse the now adopted father in this case of any type of allegations or misconduct at all? Trial counsel agreed. Tr. 38-40.

Ms. Jordan also moved for compliance with the rape shield statute. Trial counsel did not object to that motion. Tr. 40.

Trial counsel also moved to exclude any evidence of Mr. Spade's prior sexual history. Ms. Jordan indicted the prosecution did not "intend to introduce any of that" in the case-in-chief but "depending upon what may come on cross and/or reply, [the prosecution] would like to have the opportunity to delve into them." The trial judge took the motion under advisement. Tr. 46-47-48.

Trial counsel moved to exclude any evidence of the investigation in Virginia. Solicitor Barnette and Ms. Jordan pointed out that some of the South Carolina investigation was done in Virginia, and P.J. had visited Mr. Spade in Virginia. They also acknowledged separate investigations in Virginia regarding criminal domestic violence between Mr. Spade and his fiancé, Cara Lintner, and a child the same age as P.J. Trial counsel pointed out criminal domestic violence charges are in "no way related" and not charges have been filed regarding the other child in Virginia. Trial counsel pointed out, "Your Honor, other than the forensic computer reports and the Blackberry reports, I don't know of what other information we have from Virginia." Solicitor Barnette maintained the prosecution should be allowed to go into the Virginia investigation as it related to the South Carolina charges. Tr. 48-51.

## **2. Trial Judge's Opening Remarks.**

During the opening remarks to the jurors, the trial judge stated:

This trial is a fundamental part of our democracy - a search for the truth in an effort to make sure that justice is done between the parties before the court. Searching for the truth and making sure that justice is done is often slow, deliberate and repetitive, the opposite of what you may have seen on television or in a movie or read in books. This courtroom is a place of honor dedicated to the

protection and preservation of citizen's rights through what many have called the greatest justice system ever created.

The attorneys appearing before you are advocates for the parties they represent, but first and foremost they are officers of this court, sworn to uphold the integrity and fairness of our judicial system and to help you in the search for the truth.

Tr. 110.

And, "In determining what the true facts are in this case you must decide whether or not the testimony of the witness is believable." Tr. 116.

And, "[A]fter the arguments of counsel and the charge on the law by the court you will then be in a position to determine what the true facts are and to apply the law to those facts and thus render a verdict." Tr. 116.

Trial counsel did not object.

### 3. Opening Statements.

Ms. Leskanic informed the jurors they would have to determine whether Mr. Spade "moleste[d] his daughter when she was four years old." She told the jurors, "You are going to hear a lot of things in this case about some Family Court actions that took place. The prosecution planned to prove that the sexual abuse occurred during unsupervised visitation "in a motel her in Spartanburg County." P.J. had anxiety after these visits. The Jolleys were concerned. They involved a counselor, Kim Rosborough, to address the anxiety. P.J. disclosed to her grandmother, "Mimi" "that she had been sexually assaulted." Tr. 117-19.

On the recommendation of Ms. Rosborough, the Jolleys take P.J. to the Children's Advocacy Center "and have a forensic interview done, forensic assessment, to try to find out exactly what had happened." The Solicitor stated P.J.

meets with Tabitha Webber at the Children's Advocacy Center and there Minor Victim also discloses that she's been sexually assaulted.

With that information the Children's Advocacy Center made contact with the Spartanburg County Sheriff's Department, who conducts an investigation, and brings us here today with the defendant charged with molesting his daughter.

Tr. 119-20. Spartanburg County Sheriff's Office Investigator Nikki Cantrell began the investigation "[t]hat brought us here today." Tr. 120.

Ms. Leskanic concluded the prosecution's opening:

As Judge Kelly advised you, this is a search for the truth. And as representing the State of South Carolina that's what we are here to do is ask you to listen to the testimony. You are going to hear from the officer.

You are going to hear from a seven year old little girl. And I don't know if any of you were nervous when you had to stand up yesterday and give information in front of a group of people, but we are going to ask a seven year old to do that in the courtroom today.

You are going to hear from the counselors.

You are going to hear from her mother.

I believe that will lead you all to the truth of what happened in this case, and this is that the defendant is guilty of criminal sexual conduct with [P.J.].

Tr. 120-21.

Trial counsel not only did not object to the State's opening, but also adopted the truth-seeking language, telling the jurors they must search for the truth:

[A]s Judge Kelly said, .a search for the truth. The key word in that statement, ladies and gentlemen, is the word search. That means that you have to look for. It's not just handed to you. It's not just thrown at you. You have to find it. Take that into consideration as every witness takes that stand and as every document comes before you. It's a search. You have to look for it.

Tr. 121.

Trial counsel informed the jurors that Mr. Spade wanted to be a father "under the most difficult of circumstances," but the Jolleys "wanted to terminate his parental rights." He concluded:

2019 MAY 15 AM 9:01

So, I'll ask you, ladies and gentlemen, over the course of the next several hours, potentially the next several days, to begin that search for the truth, with the understanding that it's the State's responsibility to prove that truth here.

I submit to you that when this search is over and the State has given you and handed everything that they want to hand you, the search will lead you to find Mr. Spade in snot guilty of the crime that he's been accused of. It's a horrible crime. It's a horrible act, but this isn't about the horrible act. It's about whether Daniel Spade, a man who wanted to be a dad, committed the act. I look forward to the journey for the truth with you. Thank you.

Tr. 121-23.

#### **4. Investigator Nikki Cantrell.**

Spartanburg County Sheriff's Office Investigator "investigate[s] all crimes that are sexually motivated and all crimes against children." The Children's Advocacy Center contacted her on April 8, 2011. The Children's Advocacy Center has "trained interviewers" and therapists. Law enforcement can send children to the Children's Advocacy Center "so that they are interviewed by one person and all of the entities that are investigating the case have access to either observe or view those interviews on CD at a later time so that everybody gets the same information and the child is put through the least amount of trauma possible." Kim Rosborough referred P.J. to the Children's Advocacy Center. Tabitha Webber of the Children's Advocacy Center contacted Investigator Cantrell. Tr. 123-25. Investigator Cantrell did not interview P.J. Tr. 129.

During the investigation, Heather Jolley provided Investigator Cantrell with the names of "some hotels" that Mr. Spade had stayed with P.J. Investigator Cantrell went to a Holiday Inn Express, in Duncan, South Carolina, which is in Spartanburg County. She obtained receipts from this hotel, photographed "those rooms," and photographed the pool area. The pool was an indoor pool, "open year around," with a bathroom in the pool area, which is "just a room with a toilet and a sink." Tr. 125- 29; see also State's Exhibits No. 1, 4, and 5.

Trial counsel cross-examined Investigator Cantrell with the transcript from Family Court where she testified she referred P.J. to the Children's Advocacy Center and scheduled the appointment. Tr. 130-33.

## 5. P.J.

P.J.'s direct testimony is only five pages of the 346-page trial transcript. She testified holding a teddy bear named, "Charley." Ms. Leskanic had P.J. tell the jurors she is in the first grade at Simpsonville Elementary School, her teacher is Ms. Pringle, her favorite class is Art, and her favorite type of dance is Hip Hop. Ms. Leskanic also established P.J. can identify colors. Tr. 135-37, 141, 148-49.

P.J. testified Danny D is "[a] bad guy." P.J. spent time with Mr. Spade at "his house and a hotel." His house is in Virginia. Ms. Leskanic asked, "And did you stay in a hotel with him in South Carolina?" She replied, "Yes." P.J. testified Mr. Spade "stuck his private part in my mouth . . . [a]t the pool. . . [i]n the bathroom." Ms. Leskanic asked, "At the motel in South Carolina?" The transcript reflects, "Shaking head yes." P.J. claimed Mr. Spade threatened not to take her home if she did not comply. Ms. Leskanic concluded the direct examination by asking, "Do you remember anything else happening at the motel in South Carolina?" P.J. responded, "No." Tr. 137-40.

On cross-examination, trial counsel asked P.J. if Mr. Spade was wearing a mask when he sexually assaulted her, or if she had ever told anyone that Mr. Spade was wearing a mask during the sexual assault. P.J. denied Mr. Spade was wearing a mask during the sexual assault or that she had ever told anyone that Mr. Spade was wearing a mask during the sexual assault. Tr. 146.

## 6. Heather Smith Jolley.

Heather Smith Jolley is P.J.'s biological mother. P.J. was born in 2006. Mr. Spade saw P.J., at Ms. Jolley's house, when P.J. was several months old. Mr. Spade's sister was also present. Mr. Spade filed a Family Court action in 2007. Ms. Jolley married David Jolley in December 2007. The Jolleys made decision that P.J. would call Mr. Jolley, "Daddy." The Jolleys also made the decision that P.J. would call Mr. Spade, "Danny D." In 2008, the Jolleys filed an action to terminate Mr. Spade's parental rights. This action was not successful, and a visitation schedule was established. Tr. 149-53.

Visitation typically occurred in South Carolina. Mr. Spade's fiancé, Cara,<sup>3</sup> would be present in the beginning. In the summer of 2010, P.J. went to Virginia for ten days. The exchange in South Carolina typically occurred at public places Haywood Mall or a Starbucks on Pelham Road. Tr. 153-157.

Ms. Jolley claimed P.J. was "not excited" about the visit in September 2010. Ms. Jolley claimed P.J.'s behavior changed after this visit. "She had wet herself in the car seat." Ms. Jolley testified P.J. was potty trained when she was two. She denied taking a bath during visitation, but had been in the pool that day. P.J. "started crying uncontrollably" and "pulled away" from Mr. Jolley. Tr. 153-158.

Mr. Spade also had a visit with P.J. in October 2010. Between the September and October visits, Ms. Jolley emailed Mr. Spade about P.J.'s "really high" anxiety levels. The exchange occurred at Haywood Mall. When P.J. returned, she was "terrified of the dark," complained "my stomach hurts," and "would just break down completely." One night P.J. slept under a play table covered by blankets. After the October 2010 visit, Ms. Jolley enrolled P.J. in

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<sup>3</sup> Her name appears as "Kara Brunner" in the trial transcript, at p. 154, line 6. She is the same person as Cara Lintner, who was deposed in Fairfax, Virginia.



counseling with Kim Rosborough. In November 2010, Ms. Jolley filed an action to suspend Mr. Spade's visitation rights because of P.J.'s anxiety. T. 158-66.

Ms. Jolley claimed she learned about the allegations of sexual abuse from her mother, Dale Smith (a/k/a "Mimi"), in April 2011. Rather than calling law enforcement, Ms. Jolley called the lawyers, who advised setting up an appointment with Tabitha Webber. Ms. Jolley talked to Investigator Cantrell after taking P.J. to the Children's Advocacy Center. The Jolleys filed a second termination of parental rights action that was successful. Tr. 166-69.

On cross-examination, trial counsel wanted to question Ms. Jolley about the history of her relationship with Mr. Spade to establish "motive as why this child was being asked to testify to these things" and "to establish the pattern trying to prevent [Mr. Spade] from exercising his rights and being a father that ultimately led to these allegations." Trial counsel thought it "important for the jury to know the history to show the contentious nature from the very beginning." The trial judge prohibited trial counsel from establishing that Ms. Jolley became pregnant with P.J. during a long-distance relationship of only a few months. Tr. 169-73.

Trial counsel established a time line. P.J. was born in 2006. In August 2007, Mr. Spade filed an action in Family Court for visitation. In July 2008, the Jolleys filed an action to terminate Mr. Spade's parental rights, which was denied by the Family Court in January 2010. From January 2010 to the summer of 2010, Mr. Spade had visitation in South Carolina. During July 2010, there was a ten day visitation period in Virginia. During September and October 2010, Mr. Spade had visitation in South Carolina. The Jolleys filed an action to suspend Mr. Spade's visitation. The Family Court suspended Mr. Spade's visitation in December 2010. In April 2010, P.J. alleges sexual abuse. The Jolleys file a second termination of parental rights action, which was ultimately successful in November 2012. Tr. 173-77.

Ms. Jolley took P.J. to Kim Rosborough from October 2010 to March 2011. During the last therapy session, Ms. Rosborouogh recommended “reach[ing] out to Danny” Spade about visitation.” Tr. 179-80.

Ms. Jolley acknowledged she was upset when Mr. Spade suggested P.J. could call him “daddy.” Tr. 180-85.

## **7. Kimberly Rosborough.**

The prosecution offered and trial judge qualified Kimberly Rosboroough as an expert in “child abuse therapy and treatment.” P.J. “was referred” to her practice, by Ruth Cate, an attorney in Spartanburg, in September 2010, and the “initial appointment was scheduled in October of 2010.” David Jolley provided the “background information and the paperwork.” Ms. Jolley attended P.J.’s first appointment. P.J. “was complaining of stomach aches and headaches.” The Jolleys “stated that she was having panic attacks and temper tantrums on the initial referral sheet.” Ms. Rosborough diagnosed P.J. “with having an adjustment disorder with anxiety.” The treatment goal “was to help her with her anxiety and some of the separation anxiety and the symptoms she had developed after beginning visitation with her biological father.” Ms. Rosborough saw P.J. “ten to twelve times.” Ms. Rosborough observed P.J. had “a lot of anxiety in terms of nervousness” and “would be very avoidant and not want to talk about” Mr. Spade. Tr. 196-202, 208- 09.

P.J.’s last visit with Ms. Rosborough was in March 2011. Sometime in March 2011, Ms. Rosborough became aware of P.J.’s disclosure of sexual abuse. She had been the child’s therapist for five months. “[W]hen there is an allegation of some type of abuse, it is preferable for the therapist to not be the person to interview the child. Based on the relationship you already

have with the child.” Ms. Rosborough referred P.J. to the Children’s Advocacy Center. She did no see P.J. any more after the disclosure. Tr. 202-05.

Ms. Jordan asked Ms. Rosborough about “coaching.” Ms. Roseborough testified:

Coaching. Coaching would be, in this particular example, would be if someone encourages the child to say something that's not true. If you tell the child something that didn't happen, you give them information and you ask or pressure them to say that it happened when it did not.

Tr. 205. When Ms. Jordan asked Ms. Rosborough, “Did you see any signs of coaching in” P.J., the trial judge sustained trial counsel’s objection to “bolstering.” Tr. 205-06.

Ms. Rosborough testified about disclosure, partial disclosure, the Child Sexual Abuse Accommodation Syndrome. P.J. never disclosed sexual abuse to Ms. Rosborough. Tr. 206-08.

On direct and re-direct examination, Ms. Roseborough testified she had “reached out” to Mr. Spade in October 2010 and had a conversation with him on March 24, 2011. Tr. 202-03, 216-17. On cross-examination, Ms. Rosborough talked about her last session with P.J. on March 28, 2011. Ms. Rosborough testified:

On March the 28th, what I was recommending on that date was that we had a session to meet with the parents, to meet with Mr. And Mrs. Jolley and Mr. Spade, to talk about where we go from here, to look at having a meeting to determine what steps we needed to take and then to start some therapeutic visitation with the biological father. At that point he was not visiting with her. And what I had said to Ms. Jolley was that I wanted to be planning for that. That was the goal and that I wanted to start planning for that, and that that meant that we needed to have that initial meeting. And then I wanted to see him with the child to look at her reactions and to look for attachment and to see, you know, how they interacted with each other, and that was going to be down the road.

Tr. 211-13.

On March 31, 2011, at 10:57 a.m., Ms. Rosborough’s staff recorded a message stating, “Mike Smith, [P.J.’s] grandfather would like to talk to you about a situation that tahyve; uncovered about” P.J. Tr. 213-16.

**8. Dale Smith (a/k/a "Mimi").**

Trial counsel proffered the testimony of Dale Smith. Ms. Smith is P.J.'s maternal grandmother. She sees her granddaughter on a regular basis. Ms. Smith witnessed P.J. having a panic attack in October 2012 when P.J. was alone with Ms. Smith. Prior to October 2012, Ms. Smith witnesses P.J. having a panic attack when P.J. was alone with Ms. Smith and her husband. Ms. Smith also witnessed P.J. having panic attacks when she, Heather Jolley, and David Jolley were alone together. David Jolley, Heather Jolley, Mike Smith, and were present with Ms. Smith for every panic attack Ms. Smith witnessed P.J. have prior to October 2012. Tr. 221-25.

Solicitor Barnette moved to exclude this testimony based on third-party guilt, arguing, "It could be any make person, or whatever, that could cause these panic attacks for tere, but there were other people available." The solicitor argued Ms. Smith's testimony was not reliable, relevant, and highly prejudicial. Trial counsel argued:

This is a situation where there are allegations the child is having panic attacks. That panic attacks in and of itself could or could not have anything to do with the fact that my client may have committed this act.

What we are trying to do is to give potentially other reasons, not-criminal reasons, why the panic attacks are occurring, not necessarily issue that she's having a panic attack to go as to what her biological father did.

We are not establishing third-party guilt. We are establishing explanation for symptoms, which the State of South Carolina is going to argue is a symptom of child sexual abuse and she's having panic attacks because of what her biological father did.

Tr. 225-28.

The trial judge excluded the testimony as "a back door to third-party guilt," but ruled the defense could "call an expert to testify otherwise as to the panic attacks could be caused by a number of things in a child's life." Tr. 228-30.

The prosecution called Ms. Smith to testify before the jurors. Ms. Smith is Heather Jolley's mother and P.J.'s grandmother. P.J. calls Ms. Smith "Mimi." In March 2011, P.J. stayed with Ms. Smith. When Ms. Smith was putting P.J. to bed, they "just started talking." Ms. Smith claims P.J. made disclosure of sexual abuse to her. Ms. Smith "just passed it around in [her] mind for a day or two and then went to [her] husband and told him." Tr. 236-41.

On cross-examination, Ms. Smith acknowledged that her husband did not inform Heather Jolley of the sexual abuse allegations until the "following Thursday." Her husband "went to the guardian ad litem," Alex Wolf, first. Tr. 241-43.

#### **9. Erica Gray.**

Erica Gray is employed as a "front desk clerk" at the Holiday Inn Express in Duncan, South Carolina, which is in Spartanburg County. She identified records showing Danny Spade rented rooms on September 10-11, 2010 and October 1-3, 2010. Tr. 232-35; State's Exhibits 4 and 5.

#### **10. Tabitha Weber.**

Pre-trial, Ms. Jordan asked the trial judge, "[I]f we are not seeking to introduce the [children's advocacy center] videos[,] [d]o they still want to have the motion" under Section 17-23-175 regarding admissibility. Solicitor Barnette stated:

Well, Your Honor, we are not going to introduce them. They can't introduce them, unless it comes out, you know, obviously on cross-examination from that standpoint. And my position would be I don't think we need to have a hearing on that if they are going to use them, you know, and then they were going to come in eventually, because - I mean, if you are going to introduce them, then it becomes relevant at that point. I mean, we are not going to introduce them, unless they bring it up, and then possibly we would introduce them, based off reply what they introduce.

Tr. 41. Trial counsel agreed a section 17-23-175 hearing was not necessary. Tr. 42.

The prosecution called Tabitha Webber to testify during the trial. Outside the presence of the jurors, Ms. Leskaic moved to limit any testimony about a child, Nathan, sexually assaulting P.J. The trial judge reaffirmed his ruling about third-party guilt. Tr. 243-46.<sup>4</sup>

With the jurors present, the prosecution called Ms. Webber, who is employed at the Children's Advocacy Center. The center "provides treatment for children" and does "assessments when there has been allegations of sexual abuse, physical abuse, or a child has witnessed a violent crime" The center also provides medical exams by a forensic pediatrician." The center has "multi-disciplinary team meetings" and "make[s] recommendations for the child."

Ms. Webber testified about her training education and experience:

I have a Bachelors Degree in Psychology, a Masters Degree in Social Work, and I'm a licensed independent social worker through the State of South Carolina. And I have extensive training in child development, child abuse, linguistics, developmental delays, pediatric psychotherapy, play therapy. Lots of issues surrounding children primarily.

Tr. 246-48.

Ms. Webber interviewed P.J. on April 4<sup>th</sup>, April 7<sup>th</sup>, April 12<sup>th</sup>, April 14<sup>th</sup>, and May 6<sup>th</sup>, all in 2011. The following exchange occurred between Ms. Leskanic and Ms. Webber:

Q. All right. During your forensic interviews with [P.J.], did she disclose to you a sexual assault occurring to her in South Carolina?

A. She did.

Q. Did she say where that happened?

A. She did.

Q. Where did she say that happened?

A. She said it happened at the hotel with a pool.

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<sup>4</sup> Apparently a portion of this argument took place in chambers without a court reporter. Tr. 245, lines 20-25.

Tr. 248-49.

Based on the interviews, which were not introduced into evidence, Ms. Webber contacted law enforcement and recommended P.J. begin therapy. Tr. 249-50

Trial counsel did not cross-examine Ms. Webber. Tr. 250.

#### **11. Meredith Thompson-Loftis.**

Mr. Brannon called Meredith Thompson-Loftis, who is “a licensed professional counselor in private practice in Greenville. Mr. Brannon offered Ms. Thompson-Loftis as an expert in “child abuse diagnosis, treatment, and therapy.” Trial counsel objected. The trial judge qualified her as an expert in “Family counseling and child therapy.” Tr. 250-58.

Ms. Thompson-Loftis treated P.J., beginning in May 2011, based on a referral from Ms. Webber. According to Ms. Thompson-Loftis, “Most forensic interviews result[] in therapy of further therapy.” She testified it is not “unusual” for a child to change therapists “in the typical case of abuse.” Tr. 258-60.

Ms. Thompson-Loftis testified about partial disclosure, delayed disclosure, and coaching. She testified age, the child personality, and other unspecified factors can impact the totality of the disclosure. Delayed disclosure can occur “a month, a year, or twenty years later.” Ms. Thompson-Loftis testified she has seen P.J. seventy-one times and P.J. is continuing as a patient of hers. Tr. 260-64.

Outside the presence of the jurors, trial counsel renewed Ms. Spade’s objection to Ms. Thompson-Loftis as a witness based on the State’s failure to comply with Judge Hayes’

discovery order. The trial judge excluded Ms. Thompson-Loftis records from January 2014 that had not been provided. Tr. 264-68.<sup>5</sup>

According to Ms. Thompson-Loftis, P.J.'s symptoms in May 2011 included nightmares, anxiety, anger, and bed wetting. She was shy, nervous, and had a fear of being alone. Ms. Thompson-Loftis observed "a lot of improvement" in P.J.'s behavior and symptoms. Tr. 268-70.

The following exchange occurred between Mr. Brannon and Ms. Thompson-Loftis:

Q. At any point during your treatment of [P.J.] up through December 30, 2013, did she make a disclosure of sexual abuse?

A. Yes, she did.

Q. Was she specific as to location?

A. She was.

Q. Was that location in South Carolina.

A. Yes, it was

Q. Was she specific as to time, the time period?

A. The time period, yes.

MR. BRANNON: I have not further questions.

Tr. 270.

Trial counsel's cross-examination took up only twelve lines of the trial transcript. Tr. 271.

## 12. Directed Verdict Motion.

The State rested. Tr. 273. Trial counsel moved for a directed verdict, pointing out that P.J. "was unable to testify to a specific time," "location, other than a hotel bathroom," or

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<sup>5</sup> Apparently, a porting of the argument about this objection occurred off the record. Tr. 265, lines 9-10.



“make an in court identification” of Mr. Spade. Trial counsel specifically noted that P.J. did not testify “that the hotel was in Spartanburg County.” The trial judge denied the motion. Tr. 273-76.

Trial counsel did not present a defense for Mr. Spade. Tr. 276, 280, 285-86.

### 13. Closing Arguments.

Mr. Brannon argued for the prosecution. He argued first-degree criminal sexual conduct applies in this case based upon “a sexual battery” and “the age of” P.J. He provided the definition of a sexual battery. For proof of the sexual battery, Mr. Brannon pointed to P.J.’s testimony “that he put his penis in her mouth.” Tr. 298-300.

Mr. Brannon also acknowledged the prosecution had to prove the sexual battery occurred in Spartanburg County. He stated, “I’m going to tell you that this Holiday Inn Express is in Duncan, South Carolina. And I can tell you that Duncan, South Carolina is in Spartanburg County, South Carolina.” Tr. 300-01.

Mr. Brannon then argued Danny Spade is a bad father:

What we also know, that the evidence has shown, is that Danny Spade made his first trip to meet his daughter when she was five months old. I don’t know. I’m a dad. I have been blessed with children, and I became a dad when I found out their momma was pregnant. I wanted to go to the doctor. I can’t remember – I remember the date I saw the ultrasound and I knew that my first baby was going to be a boy. Let me tell you something. I was a dad before he was born. I was a dad when I heard “she’s pregnant,” but in this case he was a father. He was on a journey to become a dad. He was a father.

Tr. 301-02. Trial counsel did not object.

Mr. Brannon relied on P.J.’s anxiety, the disclosure to Dale Smith, the interview by Tabitha Webber, P.J. telling Meredith Thompson-Loftis “a seminal story.” Tr. 303-05.

Mr. Brannon argued:

You know, several years ago – my daughter is now twenty years old. Several years ago she came home from school and she said “daddy, I know what you do.”

She said "I know you're a lawyer, daddy, and you tell people stories. That's what you do." And she said "daddy, I know what the police do. They arrest people." She said "but daddy, I'm really scared and I'm concerned." And I said "well, baby, what is it?" She said "daddy, who takes care of the good people?" And, you know, I'm a pretty well educated person. I have been a dad for a long time, but there are certain things that you cannot prepare for. That question was one of those things that I wasn't prepared for, because at that point my daughter was maybe five or six years old. And that question was so deep and so out of my perception of her ability to think. And so me, this well educated lawyer, kind of took a step back and I said "baby, that's a really great question, but you are going to have to give daddy a minute or two to think about that, because I want to give you the right answer." And I did, I thought for a few minutes. Then we sat down at the dinner table and it just came on me. And I said "baby, do you remember the question you asked me?" She said "yeah, daddy." I said "I think I have an answer." I said "you are right, baby. My job is to tell somebody a story," and I'm telling [P.J.'s] story today. And I said "you are right, the police, they arrest the bad people." And I said "but, baby, there is a group of people that take care of the good people." Ladies and gentlemen, that group of people is you. You take care of the good people. I told her "baby, the jury takes care of the good people."

Tr. 305-07. Trial counsel did not object. Mr. Brannon concluded, "Ladies and gentlemen, you are good people. You take care of the good people. [P.J.] is in your hands. He's guilty. Thank you." Tr. 308.

Referring to the prosecution and defense teams, trial counsel argued, "We want justice and we seek the truth." He continued, "Now, clearly we have different opinions on how that should end, or what justice is and what the truth is." And, "We began this case, as I have said in my opening, and I have said it several times already, on a search for the truth, a search for what has happened to lead us to this moment." Trial counsel continued to describe the trial as a "search," over and over again, when discussing the testimony of Investigator Cantrell and the referral to the Children's Advocacy Center. Trial counsel concluded, "A search for the truth, I submit to you, culminates in a verdict of not guilty." Tr. 308-16.

#### 14. Jury Charge.

The prosecution requested the trial judge instruct the jurors “that the testimony of the victim need not be corroborated in criminal sexual conduct prosecutions” pursuant to 16-3-657. The prosecution also requested the trial judge instruct “that time is not a material element of the crime of criminal sexual conduct,” relying on *State v. Wingo*, 304 S.C. 173, 403 S.E.2d 322 (Ct. App. 1991). Tr. 280-81. The State also requested the trial judge define “fellatio” as a sexual battery. Tr. 283-84.

Trial counsel argued time “is an important element in this case” based on the time allegations contained in the indictment and “because there has been testimony that this child stayed at a hotel with the defendant other than those two incidences.” The trial judge overruled trial counsel’s motion to omit the instruction. Tr. 296-97.

The trial judge charged the jurors. Tr. 316-30. The jury instruction included:

The South Carolina Code of Laws provides that the testimony of the victim in criminal sexual prosecutions need not be corroborated by other testimony or evidence.

Additionally, time is not a material element to the crime of criminal sexual conduct.

Tr. 327.

Other than renewing the objection to instruction “time is not a material element,” trial counsel did not object to the jury charge. Tr. 330-31.

#### C. The Direct Appeal.

Mr. Spade’s appealed to the Court of Appeals. C. Rauch Wise and Mr. Shabel represented Mr. Spade. By pleading dated March 11, 2016, Mr. Shabel petitioned to withdraw from Mr. Spade’s appeal on the grounds that he was “changing law firms, and such change shall create a conflict of interest preventing [him] from continuing to represent” Mr. Spade. Mr. Shabel, in fact, joined

Mr. Brannon's law firm. Mr. Spade's Final Brief of Appellant raised the following questions on appeal:

Question I: Did the trial court err in excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than Daniel Spade was present when the occurrence of panic attacks was used by the state to prove Mr. Spade had abused his daughter?

Question II: Did the trial court err in declaring that the attorney for Daniel Spade improperly struck Juror 199 based upon her gender strike when the attorney specifically stated the juror was struck for her age and being retired?<sup>6</sup>

Question III: Did the trial court err in permitting Douglas Brannon, a private attorney, to actively participate in the trial of this case when he had represented the mother and adoptive father of the minor child in the family court case?

Question IV: Did the trial court err in ruling that Doug Brannon had been properly appointed as required by S.C. Code § 1-7-4 70 when the solicitor failed to produce the commission from the governor as required by the statute?

Question V: Did the trial court err in failing to exclude the testimony of Meredith Thompson-Loftis when the state had been ordered to turn over to the defendant the file of Ms. Loftis if they intended to use her as a witness a reasonable time before trial and the state did not turn over substantial portions of the file until four days before trial and portions were not turned over until the day of trial?

The Court of appeals affirmed Mr. Spade's conviction and sentence in an unpublished opinion. Regarding the exclusion of Ms. Smith's observations regarding the P.J.'s panic attacks (Question I), the Court observed, "No context was provided as to the circumstances existing before and during the attacks, and there was no indication of whether the panic attacks did or did not occur around the time of Appellant's visits with Victim." Slip Opinion at 2. The Court also noted:

Notably, the trial court stated Appellant could call an expert to testify about the causes of the panic attacks, but Appellant did not present such expert testimony at trial. Appellant also asked for and received permission to cross-examine Grandmother about "what was going on" during the panic attacks as long as he

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<sup>6</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

did not mention specific individuals. However, Appellant did not pursue this line of questioning during Grandmother's cross-examination.

*Id.* at 2, fn. 4.

Regarding the *Batson* issue (Question II), the Court affirmed the trial judge. *Id.* at 3-4.

Regarding the appointment of Mr. Brannon as a special prosecutor, the Court found “no evidence Private Counsel either used his authority as a special prosecutor to gain an advantage for a civil client or otherwise compromised his neutrality,” meaning the trial judge did not commit error by allowing Mr. Brannon to participate (Question III). *Id.* at 4. The Court found “unpreserved Appellant's contention that Private Counsel was unqualified to serve as a special prosecutor because the solicitor failed to produce a governor's commission pursuant to section 1-7-470 of the South Carolina Code (2005)” (Question IV). *Id.*

Regarding the late disclosure of Meredith Thompson-Loftis' records (Question V), the Court held:

Although the State did not turn over these records until four days before trial, Appellant admitted that aside from learning the number of Victim's appointments with Thompson-Loftis, there was nothing of major significance that he could see or translate. Accordingly, Appellant cannot establish the requisite prejudice necessary to overturn the trial court's exercise of discretion in admitting the testimony.

*Id.* at 5. The Court further held, “[T]o the extent Appellant argues the trial court should have continued the case so that he could evaluate the records with an expert, we note Appellant did not request a continuance.” *Id.*

On October 6, 2016, Mr. Spade petitioned the Supreme Court of South Carolina for a writ of certiorari to review the Court of Appeal's opinion. Mr. Wise represented Mr. Spade. Mr. Spade raised the same issues he raised in the Court of Appeals, with the exception of the *Batson* issue. The Supreme Court denied Mr. Spade's petition for a writ of certiorari on June 16, 2016.

#### **D. Anticipated Evidence at the PCR Evidentiary Hearing.**

Witnesses at the evidentiary hearing will include the prosecutors, trial counsel, and appellate counsel. Mr. Spade anticipates calling Tabatha Webber and Meredith Thompson-Loftis. Mr. Spade will introduce expert testimony and the depositions from the Fairfax, Virginia.

##### **1. Expert Witnesses.**

Dr. Michael E. Lamb, PhD is a Professor of Psychology at the University of Cambridge. For nearly thirty years, most of Dr. Lamb's testimony has focused on children's testimony, especially when they are suspected victims of child abuse. His focus has been on understanding how best to elicit information that is most likely to be accurate, which involves avoiding suggestive and developmentally inappropriate questioning techniques. Dr. Lamb was the leader of the team that developed and validated an interview guide called the NICHD Investigative Interview Protocol. This protocol has been translated in to more than a dozen languages and endorsed or mandated by investigative agencies around the world. The importance of this protocol has been recognized by the Association for Psychological Science, the American Psychological Association, the American Association for Psychological-Law Society, and the International Investigative Interviewing Research Group.

Dr. Lamb's written report is attached to this pleading. The following is a synopsis of his opinion regarding the interviews in this case:

The five forensic interviews were poorly conducted and thus yielded information of very limited value. Below I briefly summarize the reasons for this conclusion, which rests on evidence that the interviewer was highly **suggestive** and elicited information that was **inconsistent, ambiguous, and confusing**, mostly using types of **questions and probes that elicit disproportionate amounts of inaccurate information**. The problems were exacerbated by the fact that the interviewer asked **developmentally inappropriate questions**, encouraged the child to engage in drawing which **distracted** her and made many responses uninterpretable, and failed to follow up on indications that the child's account might have been influenced and contaminated by **negative stereotyping**.

Because of these concerns, as detailed below, the forensic interviews do not provide reliable evidence that the child was abused by Mr. Spade (hereinafter DS). Further, the child never verbalized have DS's penis in her mouth as she later did at trial.

Lamb Report at p. 2 (emphasis original).

Dr. Maggie Bruck, PhD is a Professor of Psychiatry (part-time), at Johns Hopkins University School of Medicine in Baltimore, Maryland an an adjunct professor of psychology in the Department of Psychology at McGill University in Montreal, Quebec. She specializes in research in the fields of cognitive and developmental psychology. Her particular research concerns the accuracy and distortion of children's autobiographical memory.

Dr. Bruck's report is attached to this pleading. She is expected to testify the Child Advocacy Center interviews "did not follow most of the scientific guidelines issued by a number of agencies on the conduct of forensic interviews with children." She also reviewed the records of Ms. Thompson-Loftis and is expected to opine:

Despite the absence of electronic recordings or detailed notes of the 71 or more therapeutic sessions conducted by Ms. Loftis, one can still state that her procedures were highly unusual: in terms of their frequency, the reluctance of the child to make any statements of abuse until many months into therapy, the techniques used to get the child to disclose and the content of the actual disclosures. An expert would provide the court with scientific information on the suggestibility of the therapy itself and how it contributed to the child's numerous statements of abuse that extended to children and adults other than Danny.

Bruck Report at p. 4-5.

## **2. Fairfax, Virginia Depositions.**

Mr. Spade took the depositions of John Hall and in Fairfax, Virginia.

Mr. Hall discovered some emails "in a box" in his house. The box belonged to someone else, but Mr. Hall declined to identify that person because he believed he was "not permitted to answer the question because of the court order" in his domestic litigation with Cara Lintner. Mr.

Hall provided a copy of the emails to Christine Spade, who is Danny Spade's sister. Hall Deposition at pp. 13-15; Hall Deposition Exhibits No. 1 and 2.

Ms. Linter is Mr. Spade's former fiancé. They have three children together. Based on counseling records of Ms. Loftis-Thompson, P.J. alleged Ms. Lintner abused her and participated in sexual abuse allegedly perpetrated by Mr. Spade. Ms. Lintner denied abusing P.J., participating with Mr. Spade in abusing P.J., or witnessing Mr. Spade abuse P.J. Ms. Lintner was present with Mr. Spade in South Carolina during some of his visitation with P.J. Ms. Lintner was constantly with Mr. Spade and P.J. and did not witness any abuse by Mr. Spade.

These emails also establish that David and Heather Jolley were colluding with Ms. Lintner during their respective child custody litigation, that P.J. was an anxious child, and P.J. makes up stories to get attention.

Ms. Lintner and Mr. Spade are estranged. Ms. Lintner made wild, unsubstantiated allegations against Mr. Spade that would not be admissible in a General Sessions Court jury trial, pursuant to Rule 404, SCRE. Ms. Lintner, in fact, has a disturbing pattern of making wild allegations that cannot be corroborated or are refuted by other evidence. For example, Ms. Lintner accused Mr. Spade of manufacturing child pornography involving P.J. and J.S., despite never seeing it, and accusing Mr. Spade and his friend, Wallace Blunt, of wiping Mr. Spade's computer. This allegation is refuted by the Affidavit of Wallace Blunt, Jr., which will be introduced at the evidentiary hearing, and the representation of Mr. Jordan in the pre-trial hearing when she conceded, "Your Honor, it was my understanding [that] Mr. Marquez' report does not say it has been wiped." Tr. 30-33. Ms. Lintner claimed Virginia law enforcement threatened, if she ever called them again about domestic violence, then they would arrest both her and Mr. Spade, which she claims is the reasons why she did not report many of the allegations she made



during her deposition. Ms. Lintner is uncertain whether a Virginia investigator assigned to allegations of Mr. Spade mistreating J.S. sexually assaulted her. Mr. Lintner also claimed Mr. Hall and an unspecified South Carolina judge, both Freemasons, conspired to ensure that Mr. Spade's South Carolina appeals would be denied.

### 3. David and Heather Jolley.

Mr. Spade subpoenaed David and Heather Jolley to the evidentiary hearing. The Jolleys, through counsel, alleging:

In his Second Amended Application, not mention is made of David Jolley or Heather Smith Jolley by [Mr. Spade]. [Mr. Spade] seeks relief against his trial counsel, appellate counsel, and the special prosecutor. [Mr. Spade's' issuance of the two subpoenas the undersigned seeks to quash are merely his attempt to relitigate matters and place undue stress/burden on David Jolley and Heather Smith Jolley." They have no information relevant to the allegations made in Applicant's Second Amended Petition; David Jolley was not even present for the trial of this matter at which time [Mr. Spade] was convicted.

Motion at p. 1.

The Jolleys are needed to authenticate information in the emails between them and Sara Lintner about P.J.'s anxiety and propensity to make up stories to get attention.

Additionally, the Jolleys have a disturbing pattern of avoiding service of process or avoiding attendance at hearings. Recently, when Mr. Spade tried to serve the Jolleys for a Family Court hearing, the Jolleys placed a note on their front door representing they would be out of town on the dates of the hearing. Ms. Jolley, nevertheless, was in Spartanburg participating in a local "Dancing with the Stars" event. As a result, the Family Court Judge continued the hearing and ordered the Jolleys to be present at the re-scheduled hearing without the need for a subpoena.

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### III. STANDARD OF REVIEW.

Under the first prong of *Strickland v. Washington*, the defendant “must show that counsel’s representation fell below an objective standard of reasonableness,” which must be judged under “prevailing professional norms.” 466 U.S. 668, 688 (1984). “The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). “If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy.” *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). “Decisions made in ignorance of relevant, available information cannot be characterized as strategic.” *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014).

The second prong of *Strickland*, requires a defendant establish that this deficiency prejudiced him. “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* “In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial.” *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). “In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury.” *Id.* (citing *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (“In deciding whether Jones was prejudiced, we must bear in mind the

strength of the government's case ...," and "we must consider the totality of the evidence before the jury.")). "In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Id.* "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Id.* 422 S.C. at 189, 810 S.E.2d at 844. "[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability ... the factfinder would have had a reasonable doubt' cannot possibly be met." *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

In cases, like Mr. Spade's, where the case turns on the credibility of the witnesses, our appellate courts consistently find prejudice. *See e.g. State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) (prejudice found when case turned solely on credibility and there was "no physical evidence of sexual abuse"); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (prejudice found when "credibility was the most critical determination of this case"); *State v. Berry*, 332 S.C. 214, 503 S.E.2d 770 (1998) ("These credibility questions and inconsistencies in the witnesses' testimony make it impossible for this Court to conclude that, without reference to the Polite incident, the evidence of Berry's guilt is overwhelming or that Berry's guilt is the only rational conclusion that could be reached from the evidence presented.").

Due process requires a defendant receive effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under *Strickland*. *Smith v. Robbins*, 528 U.S. 259 (2000). Appellate counsel is ineffective for not

raising a meritorious issue entitling an appellant to relief. *See, e.g., Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002).

#### IV. PCR CLAIMS.

**A. Trial counsel's performance was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:**

- 1. Failing to request a continuance in order to have time to review and evaluate the child's mental health records that were disclosed for the first time four days prior to trial, when those records contained exculpatory information.**

As seen, the Court of Appeals did not consider whether the trial judge should have continued the case because of the late disclosure of the mental health records of Meredith Thompson-Loftis. Trial counsel, specifically, expressed surprise about the number of therapy sessions P.J. had with Ms. Thompson-Loftis. Trial counsel also raised the possibility of having those records reviewed by an expert witness.

At the evidentiary hearing, Mr. Spade will call Dr. Maggie Bruck. Dr. Bruck has reviewed these records. *See* Section II(D)(1), *supra*. Dr. Bruck's testimony, which should have been presented at trial, will establish deficient performance and prejudice pursuant to *Strickland*.

- 2. Not only failing to object to the trial judge instructing the jurors that their role is to "search for the truth" and make sure "justice is done" and the prosecutor embracing this language in its opening statement, which impermissibly diminishes and shifts the burden of proof, but also adopting that language in Mr. Spade's opening statement and closing argument, thereby diminishing and shifting the burden of proof.**

Our Supreme Court long ago disfavored instructions like the one involved in this case. In *State v. Manning*, the trial court instructed:

Beyond a reasonable doubt, in telling you that that is the degree of proof by which the State must prove, that phrase means exactly what it states in the English language, and *that is a doubt for which you can give a real reason*. That excludes a whimsical doubt, fanciful doubt. You could doubt any proposition if you wanted to. *A reasonable doubt is a substantial doubt for which honest people,*

*such as you, when searching for the truth can give a real reason.* So it's to that degree of proof that the State is required to establish the elements of a charge.

305 S.C. 413, 415, 409 S.E.2d 372, 374 (1991) (emphasis supplied by the court). The Court, accordingly, prohibited trial judges from telling jurors “to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant.” *Id.*, 305 S.C. at 416, 409 S.E.2d at 374. “Rather than conveying to the jury the principle that the State must affirmatively establish appellant’s guilt by probative evidence beyond a reasonable doubt, this charge could mislead a reasonable juror to focus exclusively on appellant’s explanation of the evidence to determine the existence of reasonable doubt.” *Id.* 305 S.C. at 417, 409 S.E.2d at 374-75. Our Supreme Court reaffirmed this analysis in *State v. Raffaldt*, 318 S.C. 110, 115-16, 456 S.E.2d 390, 393 (1995)<sup>7</sup> and *State v. Cherry*, 361 S.C. 588, 596, 606 S.E.2d 475, 479 (2004) (In *Manning* “we held that a circumstantial evidence charge which requires the jury to seek some reasonable explanation other than the defendant’s guilt ‘turns the State’s burden of proof on its head by requiring the jury to find a ‘reasonable explanation’ of the evidence inconsistent with appellant’s guilt before it can find him not guilty.’”).

In *State v. Needs*, the trial judge charged the jurors, “[Y]ou, the jury, must seek some other rational or logical explanation other than the guilt of the accused.” And, a “reasonable doubt is a doubt which makes an honest, sincere, conscientious juror in search of the truth in the case hesitate to act.” 333 S.C. 134, 151-52, 508 S.E.2d 857, 866 (1998). Our Supreme Court “strongly urge[d] the trial courts to avoid using” this language when instructing jurors about circumstantial evidence and reasonable doubt. 333 S.C. at 155, 508 S.E.2d at 867. In *Aleksey*, this Court again reminded, “Jury instructions on reasonable doubt which charge the jury to ‘seek

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<sup>7</sup> In *Raffaldt*, the trial judge instructed, “So in the consideration of circumstantial evidence, you must seek some reasonable explanation other than the guilt of the accused and if such reasonable explanation can be found, then you cannot convict upon circumstantial evidence alone.” 318 S.C. at 115, 456 S.E.2d at 393.

the truth’ are disfavored because they ‘[run] the risk of unconstitutionally shifting the burden of proof to a defendant.’” 343 S.C. at 26-27, 538 S.E.2d at 251 (citing *Needs*). More recently, in *State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012), this Court instructed trial judges to remove similar instructions from charge books. “Such a charge could effectively alter the jury’s perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State’s burden to prove the defendant’s guilt beyond a reasonable doubt.” *Id.* See also *State v. Beaty*, No. 2015-000718, 2018 WL 1938544 (S.C. Apr. 25, 2018) (trial judge’s preliminary remarks to the jury, that jury’s role was to “search for the truth,” determine “true facts,” and render a “just verdict,” were improper).

Although decided after Mr. Spade’s trial, *Beaty* did not articulate a new rule of law. *Daniels*, *Cherry*, *Manning*, *Needs*, *Raffaldt*, and *Aleksey* placed trial counsel on notice to object to this jury instruction, but trial counsel, apparently, was not aware of this line of cases, or he would not have implored the jurors to search for the truth. See *Weik*, *supra*. Additionally, in *Cage v. Louisiana*, 498 U.S. 39 (1990), a unanimous United States Supreme Court held that the jury instruction in that case was contrary to the “beyond a reasonable doubt” requirement articulated in *In Re Winship*, 397 U.S. 358 (1970) (holding that the accused is protected against conviction under the Fourteenth Amendment except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged). The words “substantial” and “grave” suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements were taken in conjunction with the court’s reference to a “moral” rather than evidentiary certainty, a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

“It is error to give instructions which may confuse or mislead the jury. The test is what a reasonable juror would understand the charge to mean.” *State v. Rothell*, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990) (citations omitted). “In order to make this determination, the challenged instruction must be examined in the context of the trial court’s entire charge to the jury and not in isolation.” *Lowry v. State*, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008). “Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity.” *Id.*, 376 S.C. at 506, 657 S.E.2d at 64 (quoting *Francis v. Franklin*, 471 U.S. 307, 322 (1965)). “Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge.” *State v. Buckner*, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000). “A jury charge is no place for purposeful ambiguity.” *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009).

Trial counsel, therefore, was ineffective for not objecting the trial judge’s opening remarks and the prosecutor’s opening statement. *See Gibson and Lowry, supra*. Trial counsel further compounded the prejudice by embracing the search for the truth in his opening statement and closing argument, actually imploring the jurors to engaging in a search rather than determining whether the prosecution met its the burden of proof.

These instructions prejudiced Mr. Spade. Reasonable jurors could have concluded they had to determine the “truth,” rather than applying the burden of proof. Because the State’s case against Mr. Spade was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings, and Berry, supra*, trial counsel’s ineffectiveness prejudiced Mr. Spade. This Court should order a new trial.

**3. Failing to call available lay, character, and expert witnesses that would have established the unreliability of the child's allegations.**

Mr. Sapde will present the testimony of Dr. Michael Lamb and Dr. Maggie Bruck. He will also all other lay witnesses that were available at the time of trial. Additionally, the deposition testimony of Cara Lintner undermines the credibility of the prosecution's case.

Trial counsel has "an obligation to conduct thorough **and independent** investigations." *Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007) (emphasis supplied by court). A new trial is warranted when trial counsel's failure to investigate prejudices and accused. *See, e.g., Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014) (trial counsel's failure to interview accused's former girlfriend as a potential alibi witness warranted a new trial); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (trial "counsel was ineffective in failing to investigate medical evidence contradicting the State's experts' testimony"); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (Trial counsel's failure to adequately investigate and present mitigating evidence during penalty phase was deficient performance); *Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (defendant convicted of forgery and burglary was denied effective assistance of counsel due to defense counsel's failure to investigate possible defenses); *Bagwell v. State*, 410 S.C. 259, 266, 763 S.E.2d 630, 634 (Ct. App. 2014) ("trial counsel's failure to conduct DNA testing on the glass prior to trial constituted ineffective assistance of counsel").

**4. Failing to investigate, develop and present evidence that the Special Prosecutor, N. Douglas Brannon, had a conflict of interest and, therefore, was disqualified from prosecuting this case.**

After Mr. Spade filed his PCR application, he requested the prosecutors, including Mr. Brannon, provide him with copies of their files. Mr. Brannon claimed privilege over his file because of his representation of David and Heather Jolley. The Honorable Derham J. Cole



convened a hearing and ruled that Mr. Brannon, by accepting the appointment as a special prosecutor, subjected himself to the obligations to Rule 5, SCRCrimP and *Brady v. Maryland*.

**5. Failing to request a ruling on Mr. Spade's contention that the Private Prosecutor, N. Douglas Brannon, was unqualified to serve as a special prosecutor because the Solicitor failed to produce a governor's commission pursuant to S.C. Code Ann. § 1-7-470.**

S.C. Code Ann. § 1-7-470 provides:

The circuit solicitor of the seventh judicial circuit may appoint a competent attorney, who is a resident of Spartanburg County, as assistant solicitor. He shall perform any and all of the duties and functions now or hereafter imposed by law upon the circuit solicitor in Spartanburg County, as the solicitor of the circuit shall authorize, designate and direct. The assistant solicitor shall be appointed by the solicitor of the seventh judicial circuit and shall after appointment be commissioned by the Governor; *provided, however*, the solicitor of the seventh judicial circuit shall have the right to remove the assistant solicitor from office at his pleasure, and in no event can the assistant solicitor be appointed for a period beyond the term of office of the circuit solicitor. The assistant solicitor shall receive from Spartanburg County as compensation for his services such sum per year as may be provided by the General Assembly, payable the first and fifteenth of each month, and eight hundred dollars per year for travel.

The assistant solicitor shall appear and represent the State in magistrates' courts when requested by the sheriff's department or the highway patrol located in Spartanburg County. He shall further prosecute appeals from magistrates' courts in that county.

To date, the Solicitor has not produced documentation showing that Mr. Brannon was "commissioned by the Governor." As seen, the Court of Appeals deemed this issue not preserved on appeal because trial counsel did not obtain a ruling from the trial judge.

**6. Failing to move for disclosure of exculpatory information in the possession of the Mr. Spade's Private Prosecutor, N. Douglas Brannon.**

As seen, the prosecution disclosed exculpatory information as a result of Judge Cole's discovery order.

7. **Failing to investigate, develop, and present evidence that would have established that testimony about the child's panic attacks were not related to Mr. Spade, which would have led to the trial court excluding that testimony or, if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony.**

Mr. Spade anticipates developing this evidence at the evidentiary hearing, including through the testimony of the Jolleys, who have moved to quash their subpoenas.

8. **Failing to object to and move for a mistrial because of inadmissible testimony that vouched for the child's credibility.**

The prosecution offered Kimberly Rosborough and Meredith Thompson-Loftis as expert witnesses. Both witnesses provided therapy for P.J. The testimony of both of these witnesses, as presented in this case, bolstered or vouched for the credibility of P.J. in violation of *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015); *State v. Kromah*, 401 S.C. 340, 37 S.E.2d, (2013); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011).

Additionally, the prosecution qualified Tabatha Webber as an expert witness, without actually asking the trial judge to qualify her and a expert witness. This tactic was a clever way to circumvent the prohibitions of *Kromah* and *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009).

As a result, the jurors were left with the impression that Mr. Webber has some special expertise in assessing the credibility of a child's allegations of sexual abuse and making appropriate recommendations.

9. **Failing to object to Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. In the alternative, failing to impeach Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. See, e.g., *S.C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011).**

As part of the trial court's gatekeeping function, the trial judge had an obligation to determine the reliability of Meredith Thompson-Loftis' testimony. *Watson v. Ford Motor Company*, 389 S.C. 434, 699 S.E.2d 169 (2010) (summarizing three-part procedure for qualifying expert witnesses); *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015) (state failed to show individual reliability of witness sufficient to allow her to testify as child abuse assessment expert); and *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009) (trial court's gatekeeping function in assuring reliability of expert testimony applies to nonscientific evidence)

**10. Failing to admit the videotaped interview from the Children's Advocacy Center that contained exculpatory information.**

Dr. Maggie Bruck will opine the Child Advocacy Center "videotapes should have been shown to the jury with scientific commentary by an expert witness." Bruck Report at p. 4. These tapes could have been admitted by the defense pursuant to section 17-23-175. *And see* Rule 801, SCRE.

**11. Failing to investigate, develop, and present evidence that venue was not in Spartanburg County.**

As seen, trial counsel correctly pointed out that P.J. did not testify that the sexual abuse occurred in Spartanburg County. Trial counsel was also aware that Mr. Spade stated with P.J. at hotels other than the one in Duncan, South Carolina.

The prosecutors cleverly crafted questions for P.J., Tabatha Webber, and Meredith Thompson-Loftis that the sexual assault occurred in South Carolina. The prosecutors did not ask any of these witnesses whether the abuse occurred in Spartanburg County.

Ms. Thompson-Loftis' counseling records document P.J. alleged that the oral sex happened in a bathroom at a pool of a hotel in Greenville. R. 385.

Trial counsel's performance was deficient and prejudicial pursuant to *Strickland*.

**12. Failing to support the directed verdict motion with evidence that venue was not in Spartanburg County.**

See Section IV(A)(11) above. Trial counsel had the information available to them that established venue was not proper in Spartanburg County. Our Supreme Court has held:

Although an accused has a right to be tried in the county in which the offense is alleged to have been committed, this right is not jurisdictional. Venue in a criminal case need not be affirmatively proved if there is sufficient evidence from which it can be inferred. Evidence of venue, though slight, is sufficient in the absence of conflicting evidence and may be proved by circumstantial as well as direct evidence. Where acts essential to the offense are committed in different counties, the accused may be tried in either county.

*State v. Brisbon*, 323 S.C. 324, 327, 474 S.E.2d 433, 435 (1996) (internal citations omitted).

In this case, the prosecution presented evidence of alleged a single sexual battery occurring at a hotel. Ms. Thompson-Loftis' counseling records are "conflicting evidence" sufficient to rebut the inference applied by the trial judge to allow the case to proceed to the jury. Although *Brisbon* holds the prosecution need not prove venue by proof beyond a reasonable doubt, the prosecution still has to prove venue. In this case, the prosecution did not prove venue by even the preponderance of the evidence.

**13. Failing to request a jury instruction on venue.**

See Sections IV(A)(11) and (12), *supra*.

**14. Failing to object to the Special Prosecutor's improper closing argument that appealed the jurors' emotions and improperly vouched for the complaining witness when he recounted a conversation with his daughter discussing how the police arrest "bad people," he (as Special Prosecutor) tells the complaining witness' story, and "the jury takes care of the good people." Tr. 305-07.**

As seen, Mr. Bannon made an emotionally charged closing argument that urged the jurors to decide the case based on an improper reason, which is to take care of P.J. as one of the "good people."

Our appellate courts consistently find error in closing arguments that appeal to the jurors to decide a case based on an improper reason. *See, e.g., Tappeiner v. State*, 416 S.C. 239, 252, 785 S.E.2d 471, 478 (2016) (“[T]he solicitor’s remarks regarding whether the jurors would want Tappeiner babysitting their children or relatives improperly appealed to the jurors’ emotions, rather than the evidence in the record.”); *Brown v. State*, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) (“trial counsel was deficient in failing to object to the challenged portion of the solicitor’s closing argument because it constituted a “Golden Rule” argument which impermissibly appealed to the passion of the jurors by asking them to “speak up” for the child victim”); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004) (trial counsel formed deficiently by failing to object to solicitor’s “golden rule argument” at penalty phase); *State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (prosecutor’s use of “you” some 45 times in closing argument, asking jury to put themselves in place of victim, constituted reversible error).

**15. Failing to object to evidence that the Family Court action involving the same allegations resulted in termination of Mr. Spade’s parental rights.**

**16. Advising Mr. Spade not to present any evidence, including but not limited to his own testimony.**

*See* Section IV(A)(3), *supra*.

**17. Excluding evidence from the forensic computer examination that was exculpatory.**

Based on questions asked during Cara Lintner’s deposition, Mr. Spade is concerned the State will continue to insinuate the computer was “wiped,” despite Ms. Jordan’s contrary representation to the trial judge.

**18. The cumulative effect of trial counsel’s errors denied Mr. Spade his right to a fair trial.**

This Court must also apply a cumulative prejudice analysis.<sup>8</sup> *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (the prejudice must be “considered collectively, not item-by-item”). The United States Supreme Court’s opinion in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), reveals that the Court considered “the entire postconviction record . . . as a whole and cumulative of mitigation evidence presented originally” in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence. “[A]s a whole” implies a cumulative analysis. Likewise, in *Strickland*, the Court stated, “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional *errors*, the result of the proceeding would have been different.” 466 U.S. at 694 (emphasis added).

**19. Failing to obtain through discovery, by subpoena, or court order relevant Department of Social Services records.**

During the Family Court termination of parental rights hearing, Investigator Cantrell testified she obtained records from the Greenville County office of the Department of Social Services (“DSS”). TPR Tr. 374. She further testified that she provided those records to the Solicitor’s Office.

Mr. Spade has subpoenaed DSS to bring a complete copy of their records to court for an *in camera* review.

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<sup>8</sup> The “cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial.” *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citing *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995)). The Court of Appeals applied the cumulative error doctrine in *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) (“[T]he cumulative effect of this error, when coupled with the exclusion of the previously discussed evidence, warrants reversal.”) *overruled on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002).

- 20. Failing to move to exclude the testimony of the child complaining witnesses because her testimony was tainted, unreliable, and inadmissible because of the improper techniques used to obtain the testimony.**

*See Sections II(D)(1) and IV(A)(3), supra.*

- 21. Failing to cross-examine witnesses presented by the State to demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony.**

*See Sections II(D)(1) and IV(A)(3), supra.*

- 22. Failing to present expert testimony to confront the State's witnesses and demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony.**

*See Sections II(D)(1) and IV(A)(3), supra.*

- 23. Failing to investigate, develop, and present evidence that law enforcement in South Carolina and Virginia investigation allegations that Cara Lintner witnessed and/or participated in child sexual abuse perpetrated by Danny Spade with his daughter P.J. Law enforcement determined these allegations by P.J. to be unfounded. This ground is based on the deposition testimony of Cara Lintner.**

The records of Meredith Thompson-Loftis document that P.J. alleged Cara Lintner physical abused her and that Cara Lintner witnessed and/or participated in the sexual abuse allegedly perpetrated by Danny Spade. Ms. Lintner testified that she was interrogated by law enforcement from South Carolina and Virginia on the day that Mr. Spade was arrested, May 5, 2011. Law enforcement never charged Ms. Lintner with abusing P.J. Thus, the allegations were deemed unfounded.

**B. Trial counsel's performance was both unreasonable and prejudicial during sentencing. See *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:**

- 1. Failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing.**
- 2. Failing to present any information or evidence to the trial judge in order to mitigate the sentence imposed.**

Addressing both allegations at once, there was virtually no sentencing hearing.

**C. Appellate counsel's performance was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984); see also *Smith v. Robbins*, 528 U.S. 259 (2000); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002); and *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). Counsel's acts or omissions included, but are not limited to, the following: Failing to brief on appeal the trial court judge denying the motion for directed verdict when the State failed to present evidence establishing venue in Spartanburg County.**

See Sections IV(D)(11)-(13), *supra*. This issue was preserved for appeal.

**D. The prosecutors' misconduct was prejudicial and denied Mr. Spade his right to a fair trial. The misconduct included, but is not necessarily limited to, the following:**

- 1. Failing to disclose *Brady* information including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County.**

See Sections IV(D)(11)-(13), *supra*.

- 2. Failing to disclose *Brady* information in a timely manner including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County.**

See Sections IV(D)(11)-(13), *supra*.

- 3. Eliciting false testimony regarding venue.**

See Sections IV(D)(11)-(13), *supra*.



**4. Failing to correct false testimony regarding venue.**

*See* Sections IV(D)(11)-(13) and *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006)

(State was obligated to correct co-defendant's false testimony at trial).

**5. Filing to disclose relevant Department of Social Services records obtained by Spartanburg County Sheriff Officer Investigator Nikki Cantrell.**

Mr. Spade has subpoenaed the DSS records custodians to the hearing and will ask the Court to conduct an in camera review of the records.

**6. Failing disclosed evidence that law enforcement in South Carolina and Virginia investigation allegations that Cara Lintner witnessed and/or participated in child sexual abuse perpetrated by Danny Spade with his daughter P.J. Law enforcement determined these allegations by P.J. to be unfounded. This ground is based on the deposition testimony of Cara Lintner.**

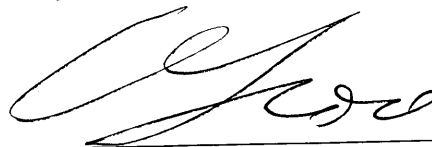
*See* Section IV(A)(23), *supra*.

**V. CONCLUSION.**

For the foregoing reasons, this Court should grant Danny Spade's application for post-conviction relief and enter an order directing a verdict of acquittal. In the alternative, this Court should remand this case to the Court of General Sessions for a new trial.

Respectfully Submitted,

By



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## I N D E X

| <u>WITNESS</u>                           | <u>PAGE</u> |
|------------------------------------------|-------------|
| ANNOUNCEMENT OF CASE<br>By The Court     | 5           |
| MOTION TO QUASH<br>By Mr. Tally          | 5           |
| REPLY TO MOTION TO QUASH<br>By Mr. Grose | 11          |
| FURTHER ARGUMENT<br>By Mr. Tally         | 20          |
| FINAL ARGUMENT<br>By Mr. Grose           | 22          |
| ORDER OF THE COURT                       | 27          |
| CERTIFICATE OF COURT REPORTER            | 37          |

|    | EXHIBITS                         |               |                |
|----|----------------------------------|---------------|----------------|
|    |                                  | <u>MARKED</u> | <u>ENTERED</u> |
| 1  |                                  |               |                |
| 2  |                                  |               |                |
| 3  |                                  |               |                |
| 4  | PETITIONER'S EXHIBIT NUMBER 1,   |               |                |
| 5  | 12/24/2010 E-mail Packet         | 5             |                |
| 6  | PETITIONER'S EXHIBIT NUMBER 2,   |               |                |
| 7  | 8/10/2007 E-mail                 | 5             |                |
| 8  | PETITIONER'S EXHIBIT NUMBER 3,   |               |                |
| 9  | 3/31/2011 Audio of Phone Call    | 5             |                |
| 10 | PETITIONER'S EXHIBIT NUMBER 4,   |               |                |
| 11 | Audio of Phone Call on 3/20/2011 | 5             |                |
| 12 | PETITIONER'S EXHIBIT NUMBER 5,   |               |                |
| 13 | Photograph of sign on door, was  |               |                |
| 14 | Marked for identification.       | 5             |                |
| 15 | PETITIONER'S EXHIBIT NUMBER 6,   |               |                |
| 16 | Order for Continuance            | 5             |                |
| 17 | PETITIONER'S EXHIBIT NUMBER 7,   |               |                |
| 18 | 12/11/2013 E-mail Dated          | 5             |                |
| 19 |                                  |               |                |
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| 25 |                                  |               |                |

1                   DANIEL SPADE VS. STATE OF SOUTH CAROLINA

2                   MOTION TO QUASH

3                   (Petitioner's Exhibit Number 1, 12/24/2010 E-mail  
4                   Packet, was marked for identification.)

5                   (Petitioner's Exhibit Number 2, 8/10/2007 E-mail,  
6                   was marked for identification.)

7                   (Petitioner's Exhibit Number 3, 3/31/2011 Audio  
8                   of Phone Call, was marked for identification.)

9                   (Petitioner's Exhibit Number 4, 3/20/2011 Audio  
10                  of Phone Call, was marked for identification.)

11                  (Petitioner's Exhibit Number 5, Photograph of  
12                  sign on door, was marked for identification.)

13                  (Petitioner's Exhibit Number 6, Order for  
14                  Continuance, was marked for identification.)

15                  (Petitioner's Exhibit Number 7, 12/11/2013  
16                  E-mail, was marked for identification.)

17                  THE COURT: All right. I've got -- thank you all  
18                  for getting together. I've got this is Daniel Spade  
19                  versus The State of South Carolina, 2017-CP-42-02372.

20                  We're here on a Motion to Quash that's been filed by, by  
21                  Mr. Tally on behalf of the Jolleys, David Jolley and  
22                  Heather Jolley. Be more than happy to hear from you.

23                  MR. TALLY: That's right, Your Honor. Thank you  
24                  very much. May it please the Court. I'm Scott Tally on  
25                  behalf of Mr. and Ms. Jolley, the moving parties in the

1 matter before you this afternoon. And, Your Honor, as  
2 spelled out in that motion, which we filed on May the  
3 6th, that they were served with subpoenas commanding  
4 their appearance as witnesses at the PCR trial set to  
5 commence tomorrow morning. That action was filed  
6 December 28th, of 2018.

7 That was the second amended application for  
8 postconviction relief. I understand that just this  
9 morning a third amended application for postconviction  
10 relief was filed on behalf of the applicant. I had not  
11 seen that but for briefly discussing it with counsel.  
12 But I think I can address the points I want to raise for  
13 the Court by doing so based on the second amended  
14 application for postconviction relief.

15 And I say that because my understanding of my  
16 brief review of the third application is that it does  
17 not make any additional allegations that would pertain  
18 to the Jolleys. It may make allegations to another  
19 witness, but I'll allow other counsel to address that at  
20 the appropriate time.

21 Your Honor, as the Court is well versed, a PCR is  
22 for the purpose of hearing and determining claims of  
23 which violations of federal constitutional guarantees.  
24 The focus is to be on errors, if any, made by trial or  
25 plea counsel, commonly referred to as the ineffective

1 assistance of counsel when dealing with issues of  
2 evidence, the violation of an individual's right or  
3 other errors in a proceeding. And that is set out in  
4 the *Drayton* case 312-SC-4. It's a 1993 case.

5 Your Honor, as we go through this I think it's  
6 important to keep in mind that issues that could have  
7 been raised before trial or at trial or even on a direct  
8 appeal are not necessarily proper before this Court in a  
9 PCR action. In looking at the second amended  
10 application for postconviction relief and upon receipt  
11 of the subpoenas, that is why we have filed this Motion  
12 to Quash. And frankly, Your Honor, we believe it is  
13 solely the applicant's goal to continue to harass Mr.  
14 and Ms. Jolly and abuse whatever process he may have in  
15 his hands through the civil court or through our local  
16 Family Courts to continue to have this nightmare  
17 relived.

18 Your Honor, we would submit to the Court, I  
19 think, a copy of the record that's already been handed  
20 up and was on the bench when you walked in by counsels  
21 to the PCR. I would just state for the record that we  
22 think that that record is sufficient to grant the Motion  
23 to Quash today.

24 Looking at the specific allegations set forth in  
25 the second amended application for postconviction



1 relief, beginning with paragraph 10 on page 2, where the  
2 applicant sets out his statements of grounds for relief,  
3 10(a) applies to his trial counsel. 10(b) applies to  
4 his sentencing counsel. 10(c) applies to his appellate  
5 counsel. And 10(d) speaks to an allegation of  
6 prosecutorial misconduct.

7 He then goes to lay out his factual allegations  
8 beginning in paragraph 11. Paragraph 11(a) speaks to  
9 trial counsel. In subparagraph 11(a)(1), his complaint  
10 is on failure to request a continuance, speaking to  
11 trial counsel. Subparagraph 2, he's speaking to trial  
12 counsel about an alleged failure to make an objection.  
13 Subparagraph 3, he's speaking to trial counsel's alleged  
14 failure to call available witnesses.

15 Subparagraph 4, he makes an allegation regarding  
16 trial counsel's failure to investigate, develop, and  
17 present evidence in regards to the special prosecutor  
18 attorney Doug Brannon. Subparagraph 5, speaks to trial  
19 counsel and his failure to raise allegation of unfitness  
20 or failure to qualify to act as special prosecutor.

21 Subparagraph 6, is for failure to make a motion  
22 regarding information that may have been available.  
23 Paragraph -- subparagraph 7, speaks to failure to  
24 investigate, develop or present evidence. Again,  
25 pointing to trial counsel. Subparagraph 8, is

1 allegation or failure to object. Again, directed to  
2 trial counsel.

3 Subparagraph 9 is for failure to object to a  
4 witness testimony. Again, in relation to trial counsel.  
5 Subparagraph 10 speaks to failure to admit a videotape  
6 into evidence. Again, speaking to trial counsel.

7 Subparagraph 11 deals with failure to investigate and  
8 present evidence in regards to venue. Again, speaking  
9 to trial counsel. Subparagraph 12 speaks to the venue  
10 issue and a motion. Again, directed to trial counsel.

11 Subparagraph 13 deals with failure to request a  
12 specific jury instruction on venue. Again, to trial  
13 counsel. Subparagraph 14 is in regards to an allegation  
14 over a failure to object to a closing argument made by  
15 the special prosecutor. Again, that's directed at trial  
16 counsel.

17 Subparagraph 15 is failure to object to evidence  
18 that was put in the record regarding a pending or  
19 already decided Family Court case, directed at trial  
20 counsel. Subparagraph 16 regards advice the applicants  
21 receives from trial counsel. So subparagraph 17 deals  
22 with the exclusion of certain evidence, again by trial  
23 counsel.

24 Subparagraph 18 is directed specifically at  
25 alleged errors of trial counsel. Subparagraph 19 is

1 directed at trial counsel in regards to certain records  
2 of Department of Social Services. Subparagraph 20 is  
3 for failure to make a motion regarding certain  
4 testimony. Again, directed at trial counsel.

5 Subparagraph 21 deals with an allegation over  
6 cross-examination of witnesses. Again, directed at  
7 trial counsel. And subparagraph 22 deals with an  
8 alleged failure to present expert testimony. Again,  
9 directed at trial counsel.

10 Your Honor, nowhere in those allegations is  
11 anything related to Mr. or Mrs. Jolley. I would also  
12 note for the record that Mr. Jolley was not present  
13 during the trial of this matter and was not a witness  
14 called by either party during the trial of this matter.  
15 Ms. Jolley did testify and was subject to  
16 cross-examination.

17 Your Honor, continuing in page 5 of the second  
18 amended application, at the bottom of page 5, B speaks  
19 to sentencing. And all of the subparagraphs there,  
20 subparagraphs 1 and 2 deal with allegations made against  
21 counsel in the sentencing phase.

22 Beginning on page 6, paragraph C deals with  
23 appellate counsel. On that same page 6 of the second  
24 amended application, paragraph D and its subparts,  
25 numbered one through five, speak to allegations against

1 the special prosecutor. Again, none of those issues are  
2 related to Mr. or Ms. Jolley.

3 Your Honor, I think you'll see, if you look  
4 through the, the application any effort to cause the  
5 Jolleys to testify is simply the applicant seeking to  
6 retry his case. I don't know any other way to put it.

7 All of the allegations that I have just gone  
8 through in the second amended application, and again  
9 based on my review, whether or not to proceed on the  
10 third application, do not speak to Mr. or Ms. Jolley.  
11 And I don't believe any of that testimony, one, would be  
12 relative to the issues before the Court and the PCR and  
13 certainly wouldn't go to any of the allegations that  
14 have been made by the applicant in the petition that I  
15 just referenced.

16 THE COURT: Okay. He says that he doesn't want  
17 the Jolleys to have to show up because they have nothing  
18 to do with the case.

19 MR. GROSE: Your Honor, if I may, I'd like to  
20 hand up what had been marked as identification only at  
21 this time, Petitioner's Exhibits 1 through 7.

22 And referring back to -- and I appreciate  
23 counsel, because that was probably a good way to give  
24 you an introduction to our, our case today. If you look  
25 at what should be on page 3 of the third amended

1 application would be paragraph 11(a), beginning with  
2 three. Failing to call available lay, character, and  
3 expert witnesses that could have established the  
4 unreliability of the child's allegations. That probably  
5 should say failing to call or question.

6 And then if you look at number 7, which is  
7 failing to investigate, develop and present evidence  
8 that would have established the testimony about the  
9 child's panic attacks were not related to Mr. Spade,  
10 which would have led to the trial court excluding the  
11 testimony or if the trial court did not exclude that  
12 testimony, would have allowed Mr. Spade to confront that  
13 testimony.

14 If you -- probably jumping ahead a little bit,  
15 but -- and Mr. Wise will be here tomorrow. He was  
16 appellate counsel. And one of the issues that was  
17 raised on appeal had to do with testimony about this  
18 little girl's panic attacks. And the Court of Appeals  
19 found that that issue was precluded on appeal because  
20 what I would contend is that trial counsel did not  
21 develop enough of a record to be able to show that the  
22 panic attacks could be attributed to another cause other  
23 than the abuse.

24 The prosecution in this case presented a very  
25 concise package to the jury that left out a lot of

1 important information. And part of what they told the  
2 jurors had to do with anxiety that this child was  
3 experiencing and they were attributing this anxiety to  
4 the sexual abuse.

5 One of the things that is not in that packet but  
6 I plan to introduce is the transcript from a termination  
7 of parental rights case where as a young child, you  
8 know, pretty much all of her life this child was having  
9 issues with her, her stomach. And to the point that she  
10 had to have a special formula that was part of what Mr.  
11 Jolley would bring as gifts to Heather Jolley and the  
12 child during the courting process.

13 What you have marked as Exhibit Number 1 for  
14 identification only is a package of e-mails that have  
15 been identified and discussed in depositions that we  
16 took in December and earlier this month in Fairfax,  
17 Virginia. And, unfortunately, they're not numbered, but  
18 there's an e-mail in there that's dated Thursday,  
19 December 9, 2010, at 1:47 p.m., and it reports to be --  
20 well, there's an e-mail in there that reports to be from  
21 the Jolley family and has an e-mail address that  
22 indicates that it might be David Jolley, but it appears  
23 to be a letter that was written by Heather Jolley. And  
24 it says:

25 "As for **Minor Victim** she has always been an anxious

1 child. However, this anxiety has been exacerbated by  
2 Danny D. The name [Minor Victim] decided for him or -- and when  
3 he calls or visits."

4 So those e-mails I have to, to be able to sort of  
5 complete the authentication of everything. I need to be  
6 able to ask Heather Jolley about that. There's also  
7 some other e-mails that establish some of the chronology  
8 that was leading up to the allegations. In looking at  
9 them, it looks like they were potentially written by  
10 both David Jolley and Heather Jolley.

11 The next exhibit that you have should be an  
12 e-mail from Heather Jolley when she was Heather Smith.  
13 And this would be -- should be marked as Exhibit 2,  
14 dated Friday, July 20th, of 2007. And this would have  
15 been very early in the relationship between the Jolleys  
16 and at the time Heather Smith and Mr. Spade beginning to  
17 have contact with this child. And in the third full  
18 paragraph it appears ---

19 THE COURT: Was at some point Heather Jolley and  
20 Mr. Spade husband and wife?

21 MR. GROSE: Yeah, let me back up. That's  
22 probably -- Heather Smith, as she was known at the time,  
23 lived here, I assume in this area, but certainly in the  
24 Upstate of South Carolina. I don't know the exact  
25 address. And Danny Spade lived in northern Virginia.

1           They worked for the same company, and so they  
2       would travel and some of the same meetings or  
3       conventions. I don't know the proper way to describe  
4       them, but they met through work. And through that they  
5       developed a relationship that never turned into them  
6       being married, but did result in **Minor Victim** as a child  
7       of the marriage. And there was tons of Family Court  
8       litigation involved in all of this.

9           And this e-mail would have been fairly early on.  
10      And in the third paragraph of this, Ms. Smith is talking  
11      about the pediatrician writing a statement to explain to  
12      you just how severe **Minor Victim** stranger anxiety is. And  
13      so that's establishing, I believe, anxiety. And, I  
14      believe, the evidence will show that that was at a  
15      period when Mr. Spade would not have had any  
16      unsupervised contact with his daughter **Minor Victim**

17           We get into there's an e-mail of March 31st.  
18      Actually, before we get to that there's -- it might be  
19      in the other order, but there's an e-mail of -- two  
20      e-mails that were sent on March 20th, and they're  
21      stapled together as one exhibit. And then some e-mails  
22      that were sent on March 31st of 2011. And these appear  
23      to be from David Jolley. And there are two people that  
24      were involved in the Family Court litigation.

25           These e-mails coincide when the allegations were



1 supposedly being made. And it's a little unclear  
2 because the -- when the allegations were exactly made  
3 because the testimony at trial was they were initially  
4 made to a grandmother, Heather Smith's mother, who did  
5 not report those to anybody for a couple of days.

6 And then instead of reporting it to the police,  
7 she reported it to her husband. Instead of reporting it  
8 to the police, her husband reported it to the guardian  
9 ad litem. They ultimately told then Heather Jolley and  
10 David Jolley about this several days later. Instead of  
11 reporting it to the police, they called a counselor and  
12 initiated their own investigation through the Child  
13 Advocacy Center.

14 But these e-mails coincide with some of that.  
15 And one of these e-mails is actually captioned regarding  
16 last name. And it's David Jolley expressing his concern  
17 that Danny Spade would not allow **Minor Victim** to use Jolley as  
18 her last name, which is ultimately what he got when  
19 these allegations were made and they terminated Danny's  
20 parental rights and David Jolley was able to adopt him  
21 -- adopt **Minor Victim**

22 You're gonna have some photographs, two pages of  
23 photographs and an Order of Continuance from the Family  
24 Court. I don't want to relitigate what's going on in  
25 the Family Court right now. I was not at this hearing

1     that happened, I guess, on March 26th of this year.

2             To kind of back up, Danny has filed, I believe  
3     it's a Rule 60 motion, but anyway it's one of the  
4     motions that you can file after trial in order to reopen  
5     Civil Court litigation. And the initial hearing on  
6     that, I believe was sometime last year. I did not and  
7     do not represent Danny in that, but I did attend the  
8     first hearing.

9             And at that time the court realized that they  
10    were gonna need more time to be able to conduct that  
11    hearing. And Danny wanted to be ensured that the  
12    Jolleys, who were parties in that action, would be at  
13    the hearing. The judge said we'll just send them a  
14    subpoena.

15            I wasn't at the next hearing, but I did assist  
16    Danny in trying to have a process server serve subpoenas  
17    for that hearing. And when the process server went to  
18    the Jollys' house, this is the note that they found on  
19    the door even though social media said that the Jolleys  
20    were in town that weekend participating in a local  
21    Spartanburg Dancing with the Stars.

22            And Judge Fraley, in his order continuing that  
23    case, again on Page 2 of that order actually hand wrote  
24    in there, referring to the unusual message on the door  
25    regarding the attempt to serve subpoena and ordered that

1 the Jolleys shall be present at the trial of the matter  
2 when it's rescheduled at a later date.

3 So they've already tried to avoid answering  
4 questions in the Family Court, which are likely similar  
5 to some of the things that would come up in here and the  
6 Family Court has already issued an order requiring them  
7 to be there. I also have, and I'm not sure what, this  
8 might be the last one, it's captioned: Forward New  
9 Address.

10 And on page 2 of that there's an e-mail that  
11 appears to be from Heather Smith to Danny Spade and some  
12 of his other family members, and this would have been in  
13 November of 2007, talking about how this young child  
14 has, quote, some anxiety sleeping at night. And so, we  
15 believe that these exhibits and the testimony that would  
16 probably be generated from these exhibits go to the  
17 allegations that are contained in paragraphs 11(a)(3)  
18 and 11(a)(7) of the complaint.

19 And while counsel points out they guess it is  
20 true that the vehicle of us entering into the court has  
21 to do with the effectiveness of trial counsel,  
22 sentencing counsel, appellate counsel, and prosecutorial  
23 misconduct, those are the vehicles that the Uniform  
24 Postconviction Relief Act gives us to be able to bring  
25 this into court.

1           I know I'm, you know, don't need to tell you  
2   this, but I probably need to have this on the record,  
3   that when there's allegations about not presenting  
4   testimony of witnesses in a postconviction relief case,  
5   while that may go to trial counsel's ineffectiveness,  
6   not only do we have to establish deficient performance,  
7   but we also have to establish prejudice. And our  
8   appellate courts are consistent in denying relief -- as  
9   well as the trial courts, in denying relief on the  
10  prejudice prong in which there is not some sort of  
11  proffer. Not always, but usually proffered as live  
12  testimony as to what that testimony would have been.

13           And so I do believe that the Jolleys remain  
14  witnesses in this case. Heather Jolley did testify at  
15  trial. David Jolley did testify at the termination of  
16  parental rights proceedings with regards to the same  
17  subject matter that's involved in this, this litigation.

18           I'm mindful that they might not want to be here.  
19  Certainly they have a right to be here. It's a public  
20  courtroom and they have specific rights under the South  
21  Carolina Victim's Bill of Rights.

22           You know, I don't remember what was in my cover  
23  letter to them, but I'm certainly willing to have  
24  witnesses on telephone standby, and it would be my  
25  desire to probably get to their testimony early tomorrow

1     afternoon, without knowing what time Your Honor would  
2     ultimately break for lunch. We may not even know that  
3     until tomorrow. I would just guess around 3 o'clock.

4             I don't think it would be very long for them to  
5     be on the witness stand. And I would certainly get them  
6     in and out of here as quickly as possible, assuming  
7     that's what they want, or they're welcome to stay,  
8     assuming that's what they want.

9             THE COURT: Yes, sir, or ma'am.

10            MS. JAMESON: For the record, Megan Jameson on  
11     behalf of the State. I'm representing the State of  
12     South Carolina in the postconviction relief proceeding  
13     and I don't have anything to add in regards to this  
14     motion.

15            MR. TALLY: Your Honor, focussing, since counsel  
16     did, on third paragraph about failure to call available  
17     witnesses, the seventh paragraph, that failure to  
18     investigate and present evidence, I'm certain Your Honor  
19     has picked up on that all of these e-mails that have  
20     been handed up by applicant's counsel predate the trial  
21     of this matter in 2014. And I hear what he's saying  
22     about this issue regarding anxiety and what should have  
23     been presented and may or may not have been presented as  
24     allegations today.

25            But he's also handed up an e-mail that was sent

1 directly to his client in 2007 where then Heather Smith,  
2 now Heather Jolley, points out, as counsel did, concerns  
3 about **Minor Victim** anxiety. That e-mail was three years  
4 before the Family Court action was filed. That was  
5 filed in 2010. It was resolved at the end of a  
6 multi-day trial in 2012.

7           So, to -- and he didn't say this, but it sounds  
8 like he wants to explore this anxiety issue and what may  
9 have been known or not known, but his own client was on  
10 record and knew about it seven years before he came to  
11 trial in the matter before the Court today.

12           I would also point out that the e-mails he  
13 referenced in March of 2011 were sent during the  
14 pendency of the Family Court action. Again, that was  
15 filed in 2010 and an order was issued in 2012. But  
16 these e-mails to Andrea Moore, who was counsel in the  
17 Family Court case, Alex Wolf, who was the guardian ad  
18 litem for this minor child in the Family Court case, and  
19 Kim Roseburg, who was the child's therapist in the  
20 Family Court case, again all predate the charges and the  
21 trial and conviction in this matter.

22           And lastly, Your Honor, the e-mail Mr. Grose  
23 referenced from Heather Smith to members of the Spade  
24 family dated November 26th of 2007, on December 31st  
25 2007, that was sent to Danny Spade. And the first page

1 of this is correspondence from Mr. Spade to his trial  
2 counsel in December of 2013, raising the issue of this  
3 anxiety. Again, that predates the trial of this matter,  
4 which, I believe was in February of 2014. So in  
5 December of 2013 that case was still pending.

6 My point is this, there's nothing new. The  
7 issues raised in what's been handed up and marked solely  
8 for identification now is nothing that's come about  
9 after 2014. In fact, it goes back many years prior to  
10 that. The photograph of the Jolly residence in part  
11 proves what I said at the beginning and that is that we  
12 believe this applicant just wants to harass and abuse  
13 them and let them know that he knows where they live and  
14 things of that nature.

15 So I don't see how if the exhibits handed up are  
16 what counsel and the applicant rely upon to attack trial  
17 counsel, as set forth in subparagraphs three and seven  
18 of the petition bears any relevant information that the  
19 Jolleys would provide to the Court in that regard.

20 MR. GROSE: He makes a very good argument for a  
21 deficient performance that for the exception of the  
22 photographs in the Family Court order all of this was  
23 available to trial counsel and appears to have been,  
24 some of it at least in trial counsel's possession prior  
25 to the trial. The, as you're aware, we judge trial

1 counsel based on what they knew, should have known,  
2 could have learned through investigation  
3 contemporaneously and not we had different avenues for  
4 something new that may have come up.

5           What you will find is, is that none of this  
6 information on these documents that I've handed up to  
7 you are contained in the trial record or the record on  
8 appeal in this case. And while, you know, I guess, you  
9 know, I know Mr. Tally's probably not had a chance to  
10 talk about these with his clients, but if his clients  
11 want to stipulate to the authenticity of those e-mails  
12 and that they did, in fact, make those statements we  
13 might have a different argument going on here right now;  
14 although, I do think it would lead into some other  
15 questions.

16           They are witnesses. And I think, you know, what  
17 is known to them goes to ultimately your determination  
18 as to whether or not trial counsel was deficient and  
19 whether or not that deficiency, if you so find, was  
20 prejudicial. Thank you.

21           THE COURT: Does he, on the authentication issue,  
22 your client is in position today to kind of just to  
23 stipulate to the authenticity of the documents?

24           MR. TALLY: I'll have to ask, Your Honor. I was  
25 just handed this stack when I walked into the courtroom.



1           THE COURT: That is true because I had just got  
2 them myself. Okay.

3           MR. TALLY: All right.

4           THE COURT: I mean, that was, to try to get it  
5 resolved, I was gonna -- that was gonna be one of the  
6 suggestions, that is just to authenticate the documents.  
7 I'm having a -- I'm struggling here because I know  
8 nothing about the underlying case, so I do have some  
9 concern, strong concern that victims of a case, of the  
10 underlying criminal matter are being simply being  
11 harassed as part of a PCR.

12           I don't think that's a wise thing to do, nor do I  
13 believe it's something that this Court wants to be in a  
14 position to where it promotes the use of a judicial  
15 proceeding simply to harass a witness. So I'm aware of  
16 that in a broad sense, based on what Mr. Tally's raised,  
17 I'm aware that that issue is out there. I do not even  
18 know what was, what was Mr. Spade charged with and found  
19 guilty of?

20           MR. GROSE: First-degree criminal sexual conduct  
21 with a minor.

22           THE COURT: Okay.

23           MR. GROSE: And ---

24           THE COURT: All right.

25           MR. GROSE: And part of it, this is a gross

1 over-simplification of the facts, but there was Family  
2 Court litigation going on, and there was an introduction  
3 to visitation, and there was a period of time where the  
4 child went to Virginia for ten days for visitation. And  
5 at the trial what was presented was, is that the child  
6 made a disclosure to the grandmother, who then shared it  
7 with family members.

8           It ultimately led to this investigation. And  
9 there was at least, I think, trial counsel was wanting  
10 to introduce some evidence about anxiety and anxiety  
11 occurring that was not related to this case. And there  
12 was some testimony the child goes to Virginia and then  
13 comes back and sleeps underneath sort of a tent or  
14 something that she made out of a table in the room. So  
15 there was some evidence of that.

16           And so I think that as part of presenting a full  
17 picture to Your Honor -- and, again, this was an issue,  
18 some of the evidence that trial counsel wanted to  
19 present was an issue on appeal and the Court of Appeals  
20 found that trial counsel didn't lay enough of a  
21 foundation. And trial counsel was trying to get that in  
22 through the grandmother and some of the observations  
23 that she made.

24           Well I have documents that go to observations,  
25 you know, that the mother made and talking about the

1 anxiety. And, again, I'm paraphrasing, but the Court of  
2 Appeals, one of the things that they said was that they  
3 didn't have enough information about the anxiety to know  
4 how it really fit in with the relation in time to being  
5 around Danny Spade, and this is gonna help complete that  
6 chronology.

7 I don't want to harass them. And I will tell you  
8 that, you know, I think Mr. Brannon has made this exact  
9 same argument in the Family Court and Judge Fraley has  
10 ordered that the Jolleys have to appear to be questioned  
11 in that case. So I think ---

12 THE COURT: Well, I'm sure that the purpose of  
13 the Family Court proceeding is far vastly different than  
14 the purpose of this proceeding.

15 MR. GROSE: But it does have to do with some of  
16 this evidence that wasn't presented either in the trial  
17 or at the, at the hearing, so, you know...

18 MR. TALLY: Well, Your Honor, just for the  
19 record, in the order of continuances in Family Court  
20 which was filed April the 10th, 2019, I can e-mail a  
21 copy if necessary, that motion was made under several  
22 grounds, but the order allowing petitioner, Mr. Spade,  
23 to question the respondents is limited to two very  
24 specific areas in that, so it's not a come in and answer  
25 whatever he wants to ask type exercise. But I can hand

1     this up.

2             MR. GROSE:   And, likewise, I'm presenting you,  
3     you know, documentation that goes to the, the areas that  
4     I want to ask questions about in this case.   You know,  
5     it also may be, Your Honor, that, you know, we've got  
6     this scheduled for two days.   Another suggestion, and  
7     I'd appreciate it if Mr. Tally would speak with his  
8     clients to see what they're willing to stipulate to, but  
9     I could save them for Thursday and then you would be in  
10    a position where you know a little bit more about the  
11    case and may be in a better position to rule on their  
12    request.

13            THE COURT:   It is difficult to make a ruling with  
14    the concerns I have that we're here dealing with, issues  
15    related to trial counsel and for sake of a better,  
16    prosecution and the appellate counsel when even Mr.  
17    Jolley did not even attend the hearing at all to say  
18    that somehow he's got information that can't just be  
19    stipulated to and that he's out the window.   You know,  
20    and then I've not -- Mrs. Jolly testified at the  
21    hearing.   I don't know what she testified to.   How  
22    important her own testimony is.

23            I still have the overriding concern is that, you  
24    know, I've been in private practice, I've been involved  
25    in these cases as a judge where, in fact, Family Courts

1 and the criminal system gets all muffed up and they have  
2 emotions involved with victims and with relationships.  
3 I always, especially as a judge, regret that the legal  
4 system can't act better in saving those relationships  
5 and preventing that from occurring.

6 Mr. Tally, how about speaking with your clients  
7 on the authentication issue to see if we can get by  
8 that. And I probably am gonna, unless the State feels  
9 that they were -- and I'm talking about the Attorney  
10 General, feels differently would probably say that we  
11 could wait on the determination of making this decision  
12 if the Jolleys have to appear or not until Thursday.  
13 Let's get by Wednesday, if that's suitable with the  
14 Attorney General. And then that way I'll have -- I will  
15 have received some information, I'll know. And so if  
16 that's okay with the State.

17 MS. JAMESON: That is okay with the State. And  
18 quickly, Your Honor, I did just want to put on the  
19 record, the stipulations might very well work for some  
20 of the other e-mails that were passed up to Your Honor  
21 for this hearing, but the State does have authentication  
22 objections and other objections in regard to Applicant's  
23 Number 1 and I don't think will be resolved via a  
24 stipulation, so I did want to put that on the record.

25 THE COURT: So you might need to have the Jolleys

1 here?

2 MS. JAMESON: No. No, Your Honor, but I just, I  
3 have underlying concerns. These are from a witness we  
4 deposed -- two witnesses we deposed in northern Virginia  
5 about five months ago and then two weeks ago, and so...

6 THE COURT: Oh, you've got other objections to it  
7 coming in?

8 MS. JAMESON: Yes, Your Honor. So we wouldn't be  
9 able to agree to a stipulation regarding the e-mails  
10 contained in packet number one.

11 THE COURT: And I was just asking Mr. Tally the  
12 stipulation as to the authentication of it, it's not as  
13 to their admissibility or anything. I'm not saying that  
14 you all have to agree to that at this point.

15 MS. JAMESON: Yes, sir. And if you'll look at  
16 Applicant's Number 1, part of the problem is, it's  
17 e-mails mainly from a Kara Litner. A lot of them don't  
18 even involve the Jolleys, and so the Jolleys wouldn't be  
19 able to stipulate to authenticity for a great deal of  
20 these e-mails because they're not party to any of the  
21 correspondence.

22 MR. GROSE: And I wouldn't, I wouldn't ask that.  
23 I would just ask that, you know, what they sent or  
24 received for them to stipulate to that because I, you  
25 know, I do feel like I have to close the loop on the

1 authenticity and a stipulation to, you know, to get us  
2 there.

3 THE COURT: Okay. And, and then, Mr. Grose, if,  
4 in fact, I felt the need for the Jolleys to appear,  
5 their questioning would be limited to that which you  
6 have referenced the Court hear, as opposed to -- we do  
7 only have two days and I would not want this proceeding  
8 to be used as an effort to relitigate issues that have  
9 already been heard probably by several courts already.  
10 Does that make any sense?

11 MR. GROSE: It would be limited to the  
12 questioning based on the exhibits that I've given to you  
13 today.

14 THE COURT: Yeah.

15 MR. GROSE: That's why -- and, again, those are  
16 not part of the record. Now, they do go to some of the  
17 facts that were litigated before. Of course, you're  
18 gonna have that record and be able to decide how this  
19 relates to that trial record.

20 THE COURT: All right. So you were gonna talk  
21 with your client?

22 MR. TALLY: Yes, sir. And just so I'm clear in  
23 what you're instructing me to do, as far as he said this  
24 or, yeah, we received this ---

25 THE COURT: Yeah, they can authenticate the fact

1     that, yeah, that was an e-mail we received or, yes,  
2     that's an e-mail we sent out.

3             MR. TALLY:    Okay.

4             THE COURT:    Yeah.   All right.

5             MR. GROSE:    And, again, I'm not asking for them  
6     to authenticate things in that larger package that they  
7     weren't parties to.

8             THE COURT:    Okay.

9             MR. TALLY:    And, I guess, Your Honor, just again  
10    so I'm clear, based on that stipulation if they, in  
11    fact, stipulate will somebody let me know sometime  
12    tomorrow afternoon whether they'll be expected to  
13    appear?

14            THE COURT:    Yeah.   You'll have to let Mr. Grose  
15    know what the results are of your conversations.

16            MR. TALLY:    Right.

17            THE COURT:    And then after probably, let's say,  
18    at the end of the -- what are you doing tomorrow  
19    afternoon?

20            MR. TALLY:    Well --

21            THE COURT:    I was gonna suggest --

22            MR. TALLY:    -- all day I would say it depends on  
23    your ruling.

24            THE COURT:    I was gonna suggest maybe if you  
25    wanted to come back.



1           All right. Mr. Grose, what I usually do is start  
2   at 9:30, run until, you know, 12:15, 12:30, take a  
3   break. If we stop at 12, we come back earlier.  
4   Usually, since we have staff and we're gonna have an  
5   inmate that's gotta be monitored and fed, I usually take  
6   an hour-and-a-half for lunch and then we come back and  
7   then try to end up, you know, as close to 5 o'clock or  
8   before that we can. I just do not believe that -- you  
9   know, I need to be making the clerk of court pay  
10   overtime to their staff and security staff, making  
11   sheriff pay overtime, so we will run until 5 o'clock.  
12   And so that's usually my schedule.

13           So I'd say, Mr. Tally, if you want to come back  
14   at maybe 4:30.

15           MR. TALLY: Okay.

16           THE COURT: And then we could see where we stand  
17   at that point.

18           MR. GROSE: That sounds very reasonable.

19           THE COURT: Okay. Now, Mr. Grose, since you  
20   marked these for identification, do you want to take  
21   these back for now?

22           MR. GROSE: Um, well...

23           THE COURT: Or I can give them to the court  
24   reporter.

25           MR. GROSE: I think you probably need to give

1       them to the court reporter --

2               THE COURT:   Okay.

3               MR. GROSE:   -- because I don't know how you're  
4       gonna rule and if I'm not happy with your ruling, then  
5       these will need to be part of the record at least as for  
6       this motion hearing.

7               THE COURT:   Okay.   I mean, but you're gonna use  
8       these as part of your case?

9               MR. GROSE:   Yes, sir, I am.   And I started  
10       numbering them as exhibits for the case.

11              THE COURT:   Okay.

12              MR. GROSS:   So I just would continue with that  
13       numbering scheme.

14              THE COURT:   All right.   Okay.   All right, thank  
15       you.   All right.   Now, while I have everybody here,  
16       somebody was supposed to have told you that Judge Knie  
17       had taken Friday away from us; that you all had thought  
18       about doing -- that if we needed a third day we could do  
19       Friday, but now Judge Knie took that away from us and  
20       I'm doing another case on Friday.   And so are we gonna  
21       be able to do this in two days?

22              MR. GROSE:   I think so.

23              THE COURT:   Okay.

24              MS. JAMESON:   That depends on how long Mr. Grose  
25       takes to put up his case.   I don't want the State to be

1     rushed in calling any of our witnesses or fully  
2     developing our response to the application, which often  
3     unfortunately happens in PCRs, so that will really  
4     depend on how long the applicant's case takes.

5             THE COURT:   All right.

6             MR. JAMES:   Your Honor, if I may remark on the  
7     scheduling, a single very short case has been added to  
8     the roster for Friday; i.e., it's expected it'll be more  
9     like the cases that we had yesterday where --

10            MR. ISENBURG:  It's off.

11            MR. JAMES:   Entirely?

12            MR. ISENBURG:  Yeah.

13            THE COURT:   Okay.

14            MR. JAMES:   But we need to be done with Mr.  
15     Urilov's PCR.

16            THE COURT:   Have we got the logistics figured  
17     out?

18            MR. JAMES:   My understanding is that Mr. Kappell  
19     is working with ICE officials in Georgia to arrange for  
20     remote testimony of the applicant.

21            THE COURT:   Yeah, but he hadn't done it yet.

22            MR. JAMES:   I last -- I've looked at my e-mail  
23     again this afternoon.  I saw where he sent an e-mail to  
24     the agent there earlier this week and he sounded as  
25     though he was making inroads.

1 THE COURT: Okay.

2 MR. JAMES: I just spoke with him on the phone  
3 yesterday.

4 THE COURT: All right. And he hasn't sent me  
5 anything either since yesterday. So if in the event ---

6 MS. JAMESON: Your Honor, is that matter going  
7 forward Friday? It was my understanding you just said  
8 Judge Knie cancelled PCRs for Friday.

9 THE COURT: No, that matter is going forward.

10 MS. JAMESON: Okay. That one from Friday is --

11 THE COURT: Yeah.

12 MS. JAMESON: -- not being pulled out?

13 THE COURT: Right.

14 MS. JAMESON: Okay.

15 THE COURT: Now, in the event that we do -- I  
16 mean, I'm not gonna work this in a way that prejudices  
17 the State from being able to present their case in full.  
18 In the event that we can't do it in two days, what would  
19 we do to reconvene at a later time? You know, and I'd  
20 try to do it as soon as possible because especially with  
21 PCRs I don't like just holding the record open.

22 As I explained to counsel earlier in the week, I  
23 learned very early in my career with PCRs I've left a  
24 record open and two years later I'd get something across  
25 my desk and it's where did this come from, so I try not

1 to just keep the record open for an extended period of  
2 time. I think it prejudices me on being able to make a  
3 decision. Okay. Well, I'll see you all. Anything else  
4 I can do to get the -- okay. Then we will see you all  
5 at 9:30.

6 MS. JAMESON: Thank you, Your Honor.

7 THE COURT: Thank you all.

8 MR. GROSE: Thank you, Judge.

9 (Hearing concluded at 2:51 p.m.)

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11

12 --- THIS ENDS REQUESTED HEARING ---

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## 1 COURT REPORTER CERTIFICATE

2  
3 I, the undersigned Julie A. Cendroski, Court  
4 Reporter for the Seventh Judicial Circuit Court of the  
5 State of South Carolina, do hereby certify that to the  
6 best of my ability the foregoing is a true, accurate,  
7 and complete transcript of record of all the proceedings  
8 and evidence introduced in the hearing and/or trial of  
9 the captioned case, relative to appeal, in the Court Of  
10 Common Pleas for Spartanburg County, South Carolina, on  
11 the 14th day of May, 2019.

12 I do further certify that I am neither of kin,  
13 counsel, nor interest to any party hereto.  
14  
15  
16  
17

18 s/Julie A. Cendroski  
19 Julie A. Cendroski  
20 Circuit Court Reporter  
21 Seventh Judicial Circuit  
22  
23  
24  
25

1     STATE OF SOUTH CAROLINA             )   IN THE COURT OF  
2                                             )   COMMON PLEAS  
3     COUNTY OF SPARTANBURG             )   OF THE SEVENTH  
4                                             )   JUDICIAL CIRCUIT  
5     DANIEL W. SPADE,                     )  
6                     Petitioner,             )   TRANSCRIPT OF RECORD  
7                     vs.                     )   2017-CP-42-02372  
8     STATE OF SOUTH CAROLINA,             )  
9                     Respondent.             )

10

11                                     May 15-17, 2019  
12                                     Spartanburg, South Carolina

13

14     B E F O R E:

15

16             HONORABLE J. MARK HAYES, II, Judge.

17

18     A P P E A R A N C E S

19

20     E. CHARLES GROSE, JR., ESQUIRE  
21         For The Petitioner

22

23     MEGAN HARRIGAN JAMESON, Assistant Attorney General  
24         For Respondent

25

26     JOHNNY E. JAMES, JR., Assistant Attorney General  
27         For Respondent

28

29

30

31                                     Julie A. Cendroski,  
32                                     Circuit Court Reporter  
33                                     Seventh Judicial Circuit

34

## I N D E X

|    |                                 |             |
|----|---------------------------------|-------------|
| 1  |                                 |             |
| 2  |                                 |             |
| 3  | <u>WITNESS</u>                  | <u>PAGE</u> |
| 4  | ANNOUNCEMENT OF CASE            |             |
| 5  | By Ms. Jameson                  | 4           |
| 6  | PRELIMINARY MATTERS             |             |
| 7  | By Mr. Grose                    | 11          |
| 8  | <u>MAGGIE BRUCK</u>             |             |
| 9  | DIRECT EXAMINATION              |             |
| 10 | By Mr. Grose                    | 19          |
| 11 | VOIR DIRE EXAMINATION           |             |
| 12 | By Mr. James                    | 36          |
| 13 | CONTINUED DIRECT EXAMINATION    |             |
| 14 | By Mr. Grose                    | 38          |
| 15 | CROSS-EXAMINATION               |             |
| 16 | By Mr. James                    | 110         |
| 17 | <u>MEREDITH THOMPSON-LOFTIS</u> |             |
| 18 | DIRECT EXAMINATION              |             |
| 19 | By Mr. Grose                    | 148         |
| 20 | CROSS-EXAMINATION               |             |
| 21 | By Ms. Jameson                  | 158         |
| 22 | REDIRECT EXAMINATION            |             |
| 23 | By Mr. Grose                    | 167         |
| 24 | <u>CLARENCE RAUCH WISE</u>      |             |
| 25 | DIRECT EXAMINATION              |             |
|    | By Mr. Grose                    | 170         |
|    | CROSS-EXAMINATION               |             |
|    | By Mr. James                    | 191         |
|    | <u>BARRY BARNETTE</u>           |             |
|    | DIRECT EXAMINATION              |             |
|    | By Mr. Grose                    | 200         |



## I N D E X

|    |                               |             |
|----|-------------------------------|-------------|
| 1  |                               |             |
| 2  |                               |             |
| 3  | <u>WITNESS</u>                | <u>PAGE</u> |
| 4  | <u>BARRY BARNETTE</u>         |             |
| 5  | CROSS-EXAMINATION             |             |
| 6  | By Ms. Jameson                | 203         |
| 7  | REDIRECT EXAMINATION          |             |
| 8  | By Mr. Grose                  | 212         |
| 9  | RECROSS-EXAMINATION           |             |
| 10 | By Ms. Jameson                | 217         |
| 11 | FURTHER REDIRECT EXAMINATION  |             |
| 12 | By Mr. Grose                  | 218         |
| 13 | END OF DAY ONE OF PCR HEARING | 219         |
| 14 | <u>DR. MICHAEL LAMB</u>       |             |
| 15 | DIRECT EXAMINATION            |             |
| 16 | By Mr. Grose                  | 220         |
| 17 | CROSS-EXAMINATION             |             |
| 18 | By Mr. James                  | 264         |
| 19 | REDIRECT EXAMINATION          |             |
| 20 | By Mr. Grose                  | 331         |
| 21 | <u>KENNETH SHABEL</u>         |             |
| 22 | DIRECT EXAMINATION            |             |
| 23 | By Mr. Grose                  | 339         |
| 24 | END OF DAY TWO OF PCR HEARING | 429         |
| 25 | <u>JOSHUA TRUMPTOWER</u>      |             |
|    | DIRECT EXAMINATION            |             |
|    | By Mr. Grose                  | 430         |
|    | CROSS-EXAMINATION             |             |
|    | By Ms. Jameson                | 438         |

## I N D E X

| <u>WITNESS</u>                       | <u>PAGE</u> |
|--------------------------------------|-------------|
| <u>ALEXANDRIA MARIE WOLF</u>         |             |
| DIRECT EXAMINATION<br>By Mr. Grose   | 441         |
| CROSS-EXAMINATION<br>By Ms. Jameson  | 458         |
| REDIRECT EXAMINATION<br>By Mr. Grose | 505         |
| <u>MICHAEL MIZAK</u>                 |             |
| DIRECT EXAMINATION<br>By Mr. Grose   | 521         |
| <u>KENNETH SHABEL</u>                |             |
| CROSS-EXAMINATION<br>By Ms. Jameson  | 523         |
| END OF DAY THREE OF PCR HEARING      | 588         |
| CERTIFICATE OF REPORTER              | 590         |

| EXHIBITS |                                                           |                   |                |
|----------|-----------------------------------------------------------|-------------------|----------------|
|          |                                                           | <u>MARKED</u>     | <u>ENTERED</u> |
| 1        |                                                           |                   |                |
| 2        |                                                           |                   |                |
| 3        |                                                           |                   |                |
| 4        | PETITIONER'S EXHIBIT NO. 1,<br>12-24-2020 E-mail Packet   | Motion<br>Hearing | 338            |
| 5        | PETITIONER'S EXHIBIT NO. 2,<br>8-10-2007 E-mail           | Motion<br>Hearing | 199            |
| 6        |                                                           |                   |                |
| 7        | PETITIONER'S EXHIBIT NO. 3,<br>Cellphone Audio 3/31/2011  | Motion<br>Hearing | 199            |
| 8        | PETITIONER'S EXHIBIT NO. 4,<br>3/20/11 Call on Sunday     | Motion<br>Hearing | 199            |
| 9        | Evening                                                   |                   |                |
| 10       | PETITIONER'S EXHIBIT NO. 5,<br>Photo of Sign on Door      | Motion<br>Hearing |                |
| 11       |                                                           |                   |                |
| 12       | PETITIONER'S EXHIBIT NO. 6,<br>Order For Continuance      | Motion<br>Hearing |                |
| 13       | PETITIONER'S EXHIBIT NO. 7,<br>12-11-13 E-mail            | Motion<br>Hearing | 199            |
| 14       |                                                           |                   |                |
| 15       | PETITIONER'S EXHIBIT NO. 8,<br>USB Drive                  | 8                 | 17             |
| 16       | PETITIONER'S EXHIBIT NO. 9,<br>Transcript of Minor Child  |                   |                |
| 17       | 4/7/11                                                    | 8                 | 17             |
| 18       | PETITIONER'S EXHIBIT NO. 10,<br>Transcript of Minor Child |                   |                |
| 19       | 4-8-11                                                    | 8                 | 17             |
| 20       | PETITIONER'S EXHIBIT NO. 11,<br>Transcript of Minor Child |                   |                |
| 21       | 4-12-11                                                   | 8                 | 17             |
| 22       | PETITIONER'S EXHIBIT NO. 12,<br>Transcript of Minor Child |                   |                |
| 23       | 4-14-11                                                   | 8                 | 17             |
| 24       | PETITIONER'S EXHIBIT NO. 13,<br>Transcript of Minor Child |                   |                |
| 25       | 5-6-11                                                    | 8                 | 17             |

|    |                              |               |                |
|----|------------------------------|---------------|----------------|
| 1  | EXHIBITS                     |               |                |
| 2  |                              |               |                |
| 3  |                              | <u>MARKED</u> | <u>ENTERED</u> |
| 4  | PETITIONER'S EXHIBIT NO. 14, |               |                |
| 5  | Family Court Transcript      |               |                |
| 6  | 10/15/2012                   | 8             | 17             |
| 7  | PETITIONER'S EXHIBIT NO. 15, |               |                |
| 8  | Curricular Vitae             | 32            | 33             |
| 9  | PETITIONER'S EXHIBIT NO. 16, |               |                |
| 10 | Dr. Bruck's Report           | 61            | 64             |
| 11 | PETITIONER'S EXHIBIT NO. 17, |               |                |
| 12 | Summary of Dr. Bruck         | 85            | 99             |
| 13 | PETITIONER'S EXHIBIT NO. 18, |               |                |
| 14 | Curriculum Vitae             | 223           | 224            |
| 15 | PETITIONER'S EXHIBIT NO. 19, |               |                |
| 16 | Lamb Report Summary          | 242           | 243            |
| 17 | PETITIONER'S EXHIBIT NO. 20, |               |                |
| 18 | Update Request E-mail        | 371           | 373            |
| 19 | PETITIONER'S EXHIBIT NO. 21, |               |                |
| 20 | E-mail dated 2/29/12         | 373           |                |
| 21 | PETITIONER'S EXHIBIT NO. 22, |               |                |
| 22 | E-mail dated 9/18/12         | 374           | 524            |
| 23 | PETITIONER'S EXHIBIT NO. 23, |               |                |
| 24 | E-mail dated 9/17/12         | 376           | 524            |
| 25 | PETITIONER'S EXHIBIT NO. 24, |               |                |
|    | E-mail dated 3/20/13         | 377           | 524            |
|    | PETITIONER'S EXHIBIT NO. 25, |               |                |
|    | E-mail dated 5/13/13         | 378           | 524            |
|    | PETITIONER'S EXHIBIT NO. 26, |               |                |
|    | E-mail dated 5/24/13         | 380           | 524            |
|    | PETITIONER'S EXHIBIT NO. 27, |               |                |
|    | E-mail dated 9/10/13         | 380           | 524            |

|    | EXHIBITS                     |               |                |
|----|------------------------------|---------------|----------------|
|    |                              | <u>MARKED</u> | <u>ENTERED</u> |
| 1  |                              |               |                |
| 2  |                              |               |                |
| 3  |                              |               |                |
| 4  | PETITIONER'S EXHIBIT NO. 28, |               |                |
| 5  | E-mail Dated 12/11/13        | 383           | 524            |
| 6  | PETITIONER'S EXHIBIT NO. 29, |               |                |
| 7  | E-mail Dated 2/11/14         | 385           | 524            |
| 8  | PETITIONER'S EXHIBIT NO. 30, |               |                |
| 9  | E-mail Dated 2/20/14         | 386           | 524            |
| 10 | PETITIONER'S EXHIBIT NO. 31, |               |                |
| 11 | Order on Defendant's Motion  | 588           |                |
| 12 | PETITIONER'S EXHIBIT NO. 32, |               |                |
| 13 | Order for Date Certain       | 588           |                |
| 14 | PETITIONER'S EXHIBIT NO. 33, |               |                |
| 15 | Order on Defendant's Motion  | 588           |                |
| 16 | PETITIONER'S EXHIBIT NO. 34, |               |                |
| 17 | Order for continuance        | 588           |                |
| 18 | PETITIONER'S EXHIBIT NO. 35, |               |                |
| 19 | E-mail Packet                | 588           |                |
| 20 | PETITIONER'S EXHIBIT NO. 36, |               |                |
| 21 | Affidavit                    | 588           |                |
| 22 | PETITIONER'S EXHIBIT NO. 37, |               |                |
| 23 | Letter Dated 9-11-17         | 588           |                |
| 24 | PETITIONER'S EXHIBIT NO. 38, |               |                |
| 25 | Letter Dated 9-13-17         | 588           |                |
|    | PETITIONER'S EXHIBIT NO. 39, |               |                |
|    | Transcript                   | 589           |                |
|    | PETITIONER'S EXHIBIT NO. 40, |               |                |
|    | Letter Dated 7-10-18         | 589           |                |

1        DANIEL W. SPADE VS. THE STATE OF SOUTH CAROLINA

2                (Petitioner's Exhibit Number 8, USB Drive, was  
3 marked for identification.)

4                (Petitioner's Exhibit Number 9, Transcript  
5 Interview of Minor, Dated 4/7/2011, was marked for  
6 identification.)

7                (Petitioner's Exhibit Number 10, Transcript  
8 Interview of Minor, Dated 4/8/2011, was marked for  
9 identification.)

10               (Petitioner's Exhibit Number 11, Transcript  
11 Interview of Minor, Dated 4/12/2011, was marked for  
12 identification.)

13               (Petitioner's Exhibit Number 12, Transcript  
14 Interview of Minor, Dated 4/14/2011, was marked for  
15 identification.)

16               (Petitioner's Exhibit Number 13, Transcript  
17 Interview of Minor, Dated 5/6/2011, was marked for  
18 identification.)

19               (Petitioner's Exhibit Number 14, Family Court  
20 Transcript, Dated 10/15/2012, was marked for  
21 identification.)

22               MS. JAMESON: May it please the Court?

23               THE COURT: (Nods head up and down.)

24               MS. JAMESON: Your Honor, this is the matter  
25 of -- Megan Jameson on behalf of the State of South

1 Carolina. Appearing with me is co-counsel Johnny James,  
2 also from the Attorney General's office. This is the  
3 matter of Daniel Spade versus the State of South  
4 Carolina, docket number 2017-CP-42-2372.

5 During the February 2014, term the Spartanburg  
6 County Grand Jury indicted Mr. Spade for first-degree  
7 criminal sexual conduct with a minor, based on the  
8 sexual assault of his four-year-old biological daughter.  
9 Ken Sabel and Shaun Campbell represented him. Solicitor  
10 Barry Barnette, assistant solicitors, Jennifer Jordan  
11 and Kim Leskanic and special prosecutor Doug Brannon  
12 represented the State.

13 Mr. Spade proceeded to a jury trial on  
14 February 24th, 2014, before Judge Kelly. The jury found  
15 Mr. Spade guilty as indicted and Judge Kelly sentenced  
16 him to 35 years imprisonment. Mr. Spade filed a timely  
17 notice of appeal and was represented on appeal by Rauch  
18 Wise and Ken Shabel.

19 On appeal, Mr. Spade argued that he was entitled  
20 to a new trial based on five specific instances of trial  
21 court error, as enumerated in the appellate briefs that  
22 are in the record before Your Honor. The South Carolina  
23 Court of Appeals affirmed his convictions in an  
24 unpublished opinion issued on July 6th, 2016.

25 Mr. Spade then petitioned for rehearing. And

1 after that was denied, filed a petition for a certiori  
2 with the South Carolina Supreme Court. On June 16th,  
3 2017, the South Carolina Supreme Court denied that  
4 petition for certiori, and the remittitur was returned  
5 to the Circuit Court on June 22nd, 2017.

6           Thereafter, on July 13th, 2017, Mr. Spade,  
7 through retained counsel, Charles Grose, filed the  
8 instant action before the court alleging ineffective  
9 assistance of counsel for two specific instances.

10           Thereafter, through retained counsel, he has filed three  
11 amended applications setting forth 25 allegations of  
12 ineffective assistance of trial counsel, one allegation  
13 of ineffective assistance of appellate counsel, and six  
14 allegations of prosecutorial misconduct.

15           The most recent amendment was filed yesterday and  
16 received by the State mid-day yesterday. It is in the  
17 packet before Your Honor. The State would object to the  
18 new allegations as set forth in the third amended  
19 application. Specifically, allegation 3(a)23 -- excuse  
20 me, 11(a)23 and 11(d)6, based on a lack of notice. The  
21 State just received those yesterday about mid-day. But  
22 it's my understanding they are proceeding forward on all  
23 of the grounds that's listed in the third allegation.

24           Additionally, I did want to put on the record  
25 that Your Honor has some pretrial involvement, although



1 it was not the presiding judge over the underlying  
2 General Sessions matter. And out of an abundance of  
3 caution, all parties had a telephone status and  
4 scheduling conference with Your Honor on February 25th  
5 of this year.

6 Neither side asked for your recusal, but did want  
7 to make Your Honor aware of the potential conflict.  
8 Neither side asserted you had a conflict. And Your  
9 Honor found there was no conflict, so I did want to put  
10 that on the record for clarity sake. And I'll turn it  
11 over to Mr. Grose at this time.

12 MR. GROSE: Can Mr. Spade have at least one hand  
13 undone so that he can go through papers and maybe take  
14 notes?

15 THE COURT: Yes, sir.

16 MR. GROSE: Judge, with regards to the last thing  
17 that she put on the record regarding a potential  
18 conflict, it was my position then and position now that  
19 there is no conflict. I'm glad we talked about it, but  
20 I think it's, you know, much about nothing.

21 With regards to the procedural history that she  
22 put on the record, I don't disagree with any of that.  
23 Although, I would add that while the case was pending in  
24 the Court of Appeals, I believe after the oral arguments  
25 took place but before an opinion was rendered,

1 Mr. Shabel withdrew as counsel because of a change in  
2 his law practice that ended up causing a conflict of  
3 interest and, and that was him going into practice with  
4 Mr. Brannon. And so from that point on it was just  
5 Mr. Wise that was doing the appellate representation.

6 With regards to the third amended application,  
7 there was actually, I guess, three amendments to that.  
8 One in paragraph 11(a)2. I broadened that, that  
9 allegation. A shorter version of that allegation was in  
10 there, but that was broadened. I understand that the  
11 State doesn't have any objection to it. And the  
12 broadening was to try to cover every point that the  
13 preceding language came up in the, either in arguments  
14 or jury instructions.

15 With regards to 11(a)23 and 11(d)6, those are  
16 companion allegations. And one of the, the depositions  
17 that we took in Fairfax, Virginia was of a lady by the  
18 name of Cara Flitner, who I think you'll probably hear  
19 testimony about. And at an appropriate point I would  
20 want to introduce her, her deposition.

21 And in those depositions -- or in her deposition  
22 she had testified that even as early as when Mr. Spade  
23 had been arrested, she was interrogated and treated as a  
24 suspect because there was allegations that either she  
25 individually had abused **Minor Victim** or that she had witnessed

1 Mr. Spade abusing Minor Victim or even participated in that  
2 abuse. And to the extent that she was exonerated of  
3 that, anything that was said that she witnessed and  
4 didn't report or that she participated with Mr. Spade  
5 would also have the effect of exonerating him, at least  
6 to those specific allegations.

7 And we believe that that was, I mean, either the  
8 State knew about it or they didn't. Either Mr. Shabel  
9 investigated it and discovered it or he didn't and those  
10 were things that we think, you know, would support  
11 Mr. Spade's innocence.

12 With regards to amendments, I know Your Honor's  
13 probably very aware of the *Mangal* case that came out of  
14 Spartanburg County. And in that case our Supreme Court  
15 urged all of us parties and the Court to, I guess, be  
16 creative in how we use the rule so that substantial  
17 allegations are presented, you know, during PCR.

18 So I, number one, I don't think there's any  
19 prejudice to the State and I think that we should be  
20 allowed to proceed on these allegations. However, to  
21 the extent that this was something that was discovered  
22 earlier this month in a deposition, there is a new  
23 statute of limitations regarding the discovery of that  
24 evidence that started running in May.

25 While I think it would be better to have it in

1    this application, we could also sever it and consider  
2    those separately. I realize that is not the most  
3    judicially economical way of doing it, but that is one  
4    possibility. And I don't think there's any prejudice.  
5    I think that the witnesses that the State has subpoenaed  
6    and we have subpoenaed could address these this week, so  
7    that would be our position.

8           MS. JAMESON: If I could briefly respond to that,  
9    Your Honor. I think we're gonna have to wait and see  
10   how the testimony plays out here, but I anticipate that  
11   I'll probably be asking to leave the record open. These  
12   are things that I would have loved to question Ms.  
13   Flitner on more in depth if I had known these were  
14   allegations.

15           Additionally, a lot of this investigation, as you  
16   will hear today and you can see in the record before  
17   Your Honor was in Virginia and we might need testimony  
18   or an affidavit from the investigator in Virginia to  
19   deal with these two new allegations, as Ms. Flitner  
20   lives up in Virginia and a lot of the investigation was  
21   intertwined.

22           So I do want to object for the record. I  
23   understand the *Mangal* case and the flexibility that all  
24   parties should strive for in postconviction relief, but  
25   there is also prejudice to the State when less than

1 24 hours before the hearing starts we're slammed with  
2 two new allegations. This case has been pending for  
3 well over a year. The deposition was two weeks ago.  
4 These are things that the State could have been put on  
5 notice yesterday, not directly before lead counsel was  
6 leaving to drive to Spartanburg to engage in motion  
7 hearings in this case. So that is a potential option to  
8 leave the record open to allow additional testimony.

9 THE COURT: All right. You all -- everybody  
10 should know my position on leaving the record open in  
11 PCR's, because as I told you all yesterday, I have been  
12 burned before on leaving the record open on PCR's and  
13 all of a sudden, you know, it's, it's -- we will do it  
14 only in rare situations. If by chance the State feels I  
15 have lacked performance during this PCR that they are  
16 prejudiced due to these specific allegations, you can  
17 argue that point of prejudice.

18 Out of all of the allegations that have been  
19 made, I don't, other than just reading the application,  
20 I would find it hard to believe that two isolated  
21 allegations that have been raised by the applicant at  
22 this juncture would actually make a difference in the  
23 outcome of this case. So we will hear all of the  
24 evidence and see where it goes.

25 MS. JAMESON: Thank you, Your Honor.

1           THE COURT: But we'll proceed in receiving that  
2 information.

3           MS. JAMESON: Thank you.

4           MR. GROSE: Thank you, Your Honor.

5           THE COURT: Yeah.

6           MR. GROSE: If I can approach the exhibits for a  
7 second?

8           THE COURT: Sure. So you all have already marked  
9 the exhibits?

10          MR. GROSE: Well, we've marked some more.  
11 Yesterday we've marked 1 through 7, and those were for  
12 the hearing yesterday. And at some point some of those  
13 may come in.

14          THE COURT: Okay.

15          MR. GROSE: Those were the stuff regarding the  
16 Jolleys. And I don't think we need to take that up  
17 before the first witness, but there has been some  
18 communications consistent with the solutions, possible  
19 solutions that we talked about yesterday.

20                This morning we marked Petitioner's Exhibit  
21 Number 8, which is a USB drive that has the five  
22 Children's Advocacy Center videotaped interviews on  
23 them. And then exhibits -- Exhibit Number 9 is a  
24 transcript -- all of these transcripts were done by  
25 court reporters -- transcript of the interview on

1 April 7, 2011.

2 Petitioner's Exhibit 10 is the April 8th, 2007,  
3 trans -- I mean, sorry, 2011, interview transcript.  
4 Petitioner's Exhibit 11 is the April 12, 2011, interview  
5 transcript. The Petitioner's Exhibit Number 12 is the  
6 April 14, 2011, interview transcript; and Petitioner's  
7 13 is the May 6th, 2011, transcript interview.

8 And then also, you heard some discussion  
9 yesterday and maybe in some of the pleadings that you've  
10 looked at, that there was a termination of parental  
11 rights hearing that took place in Family Court in  
12 2010-DR-42-03372, Heather Jolley and David Jolley versus  
13 Daniel Spade. That transcript is 532 pages and that's  
14 been marked as Petitioner's Exhibit 14.

15 And it's my understanding that Exhibits 8  
16 through 14, we have an agreement that those can come  
17 into evidence in this hearing.

18 MS. JAMESON: No objection from the State as to 8  
19 through 14.

20 THE COURT: All right. Do you have a list of  
21 those?

22 COURT REPORTER: Yes, sir.

23 (Petitioner's Exhibit Nos. 8-14 were entered into  
24 the record.)

25 MR. GROSE: And I'm ready to proceed. Do you

1 want opening statements or do you want to go straight  
2 into the evidence?

3 THE COURT: However -- I mean, I -- if you all  
4 feel opening statements will be of assistance to the  
5 Court then I'll receive them, if not, if you all want to  
6 we can go ahead and do the presentation of the evidence.

7 MR. GROSE: All right. I'm fine going into it,  
8 but I don't know if you need -- all right. The first  
9 expert that I'm gonna call is an expert witness, and I  
10 don't know if you need a little bit more background than  
11 what we gave you in the procedural history before we do  
12 that or not.

13 THE COURT: What kind of expert?

14 MR. GROSE: She will be offered as an expert in  
15 the areas of child sexual abuse disclosures, forensic  
16 interview techniques, treatment of children alleged to  
17 have been sexually abused and suggestibility.

18 THE COURT: Are you gonna challenge the areas of  
19 expertise?

20 MR. JAMES: The State has no objection to her  
21 qualifications as an expert witness, Your Honor.

22 THE COURT: I think we can just go ahead then and  
23 proceed.

24 MR. GROSE: Okay. All right. At this time I  
25 would call Dr. Maggie Bruck.



1 (Witness comes forward.)

2 THE COURT: Ma'am, just come right up here and  
3 place your left hand on the Bible and raise your right  
4 hand. (Complies.)

5 Do you solemnly swear that the testimony you're  
6 about to give the Court will be the truth, the whole  
7 truth, and nothing but the truth?

8 THE WITNESS: I do.

9 THE COURT: Thank you, ma'am. And just watch  
10 your step as you're stepping up.

11 THE WITNESS: Okay.

12 THE COURT: But just step up and have a seat in  
13 the red chair and pull the red chair up to the  
14 microphone.

15 THE WITNESS: Thank you.

16 THE COURT: Ma'am, if you will give us your name  
17 for us, please.

18 THE WITNESS: My name is Maggie Bruck, B-r-u-c-k.

19 THE COURT: Thank you.

20 DR. MAGGIE BRUCK,  
21 having been duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. GROSE:

24 Q. And, Dr. Bruck, what is your occupation?

25 A. I'm presently semi-retired, but I have the title

1 of full professor of child psychiatry at Johns Hopkins  
2 University and professor of psychology at McGill  
3 University in Montreal, Quebec.

4 Q. And can you review for Judge Hayes your  
5 educational background, I guess, beginning with your  
6 college degree?

7 A. Yes, it's very short. I got a Bachelor's in  
8 1967 at Wheaton College in Norton, Massachusetts. And  
9 then I went to McGill University where I got a Master's,  
10 and then a Ph.D. in psychology, in general psychology.

11 Q. Okay. And what year did you get the Ph.D.?

12 A. 1972.

13 Q. Okay. And since then have you been employed  
14 within your profession?

15 A. I have.

16 Q. Okay. And what are some of the academic and  
17 professional positions that you've held?

18 A. Well, when I graduated I, I held -- I was still  
19 in the psychology department at McGill University, but I  
20 specialized in children with learning disabilities and  
21 cognitive and emotional problems. And then I do a lot  
22 of work on dyslexia and bilingualism. And then at the  
23 end of the '80's I began focussing on issues that we  
24 call forensic developmental psychology about issues that  
25 arise when children are witnesses in the courtroom.

1 Q. Okay.

2 A. And I have stayed on that track for a long time.

3 Q. All right. Can you explain, I believe you used  
4 the term forensic developmental psychology?

5 A. Right.

6 Q. Can you explain what that means?

7 A. You know, it's a term that we made up, actually,  
8 to encompass many issues that many researchers in the  
9 field deal with that involve child witnesses, such as  
10 their comprehension of the legal setting; their memory  
11 of events; their generally, what we call, memory  
12 distortion.

13 A lot of these things are not specific to the  
14 courtroom, but they're issues that arise. So how well  
15 do children remember events? How quickly do they forget  
16 events? What are the techniques that help children to  
17 accurately remember events? What are the techniques  
18 that actually impair children's memory and that may  
19 result in false statements?

20 They also involve issues of child abuse in  
21 general, such as the issues of disclosure, the issues of  
22 recantation. The issues of what sexually abused  
23 children or victims, what their statements look like,  
24 how they come about. All of those are issues that we  
25 have put under scientific scrutiny and examine the

1 scientific literature. Done our own experiments to  
2 answer these issues and to write about them and talk  
3 about them.

4 Q. And when you say "put under scientific scrutiny"  
5 is that applying some sort of scientific method?

6 A. Yes.

7 Q. And can you give an example of how that's done?

8 A. Okay. So let me just say about the importance.  
9 I mean, really up until we began this work in the late  
10 1980's, very little was known about children's  
11 capabilities and their weaknesses and strengths, so all  
12 we had were witnesses or clinicians who came and said,  
13 you know, based on my experience, you know, I think  
14 children will make up a story out of nowhere, or I think  
15 children are always truthful and they never lie about  
16 sexual abuse. Or, you know, when children are sexually  
17 abused these are the symptoms that they always show.  
18 But there was no scientific evidence to back that up.

19 In other words, they were based on these people  
20 who were professionals and experts in their fields and  
21 treating children on their own intuitions. And there  
22 are problems with dealing with one's own intuitions  
23 because they're not systematically recorded. They're  
24 sort of like their general feelings but their not  
25 necessarily right. They describe negative evidence.

1 And we need something stronger to deal with.

2 And what science, you know, part of the  
3 scientific method is a systematic examination of an  
4 issue, such as, let's say, children's -- let's say  
5 sexually abused children's behavioral problems. This is  
6 one of the first ones that came up.

7 And, you know, what we were faced with and what  
8 these clinicians were telling us that one of the  
9 scientific strategies to deal with this was to, in fact,  
10 take children with no histories of sexual abuse to  
11 measure in some standardized way, such as checklists or  
12 whatever, what their symptoms are and then to compare  
13 those to the symptoms of children who have no histories  
14 of victimization or whatever with the same instruments  
15 or to compare them to children who had other kinds of  
16 behavioral problems who were just in general in  
17 psychiatric clinics.

18 And what's been found over the years is that  
19 there are no specific set of symptoms that are unique to  
20 sexually abused children; that a lot of these, depending  
21 on the age, are common among normal developing children.  
22 That these are common among children who have other  
23 kinds of psychiatric disorders. And so that's one form  
24 of the scientific method.

25 Q. All right. I want to go through some of the

1 areas that you may have some, I don't know, expertise or  
2 some participation in. Have you been involved or  
3 conducted research on children's memory?

4 A. I have.

5 Q. And can you tell the Court a little bit about  
6 that?

7 A. Yes. So, the research on children's memory had  
8 to do with how well can children remember events. Some  
9 of them pretty mundane. Some of them stressful, such as  
10 visits to the pediatrician or to a doctor and having  
11 genital examinations. Some of -- and what all -- not  
12 all, but parts of them were was really how much could  
13 they accurately remember by being asked, you know, did  
14 you go to the doctor recently, can you tell me what  
15 happened?

16 The other part of most of our studies have been  
17 to see what happens if we use certain kinds of  
18 procedures to interview or ask these children? And  
19 these are procedures that I am gonna call suggestive  
20 interviewing techniques, such as prompting children with  
21 information that might skew their memories.

22 So like you remember when you went to the doctor  
23 and there was a nurse who had a bow on her head and then  
24 later we'd come back and say, you know, tell me about  
25 the doctor's visit. Can you tell me what the nurse was

1 wearing? And we were interested in how many would  
2 report she was wearing a bow on her head. Now, that's a  
3 really simplistic thing, but just to give you a kind of  
4 idea. And so, that's been the majority of the research  
5 in children's memory.

6 But we've also done research on adult's memory  
7 that has importance to the forensic arena, and that  
8 concerns adult's memory of their conversations with  
9 children. How well do they remember these conversations  
10 and what kinds of errors do they tend to make?

11 Q. Okay.

12 A. Anyway, that's just a quick overview.

13 Q. Right. And this is research that you personally  
14 have actually been involved in?

15 A. Yes.

16 Q. Okay. And we know now that there's  
17 recommendations of recording interviews with children?

18 A. That's correct.

19 Q. And did that come out of some of the research  
20 that you participated in?

21 A. Well, I'd love to say yes.

22 Q. Okay.

23 A. Partially so. I think, you know, more and more  
24 jurisdictions are now requiring recordings. We, you  
25 know, suggested to judges that this be a requirement,

1 but it's very half hazard. But I think now more and  
2 more jurisdictions it's, it's the rule that they do  
3 recordings.

4 Q. Earlier you mentioned the term "memory  
5 distortion." Has any of your research involved that  
6 either with children or adults?

7 A. Yes. I mean, the, the research that I talked  
8 about in terms of suggestion is memory distortion. We  
9 have some research, I mean, and other people have about  
10 how beliefs result in memory distortion. So if you  
11 really believe something happened, how accurately are  
12 you going to remember the exact facts of what happened?  
13 So there are lots of different kinds of memory  
14 distortion.

15 Another kind of memory distortion that everyone  
16 studies is just forgetting. Is that over time you don't  
17 remember every single fact. You kind of, things fall  
18 away. Different events get congealed in memory. They  
19 get combined. They change over time. They get combined  
20 with newer memories.

21 And that's really the common view of memory now  
22 is that it's not like a tape recorder. It's not like a  
23 file box where you can pull it out. It's really an  
24 ongoing symphony where things get dropped off, things  
25 get put in.



1           And there are different reasons for this.  
2       Sometimes, you know, like studying, for example. The  
3       more you study, the more you're gonna know.

4       Q.   Right.

5       A.   And so there are lots of strategies we know that  
6       help enhance memory but we know there are other things  
7       that degrade memory.

8       Q.   Okay. We mentioned that you, or I talked about  
9       you have conducted research. Have you published any  
10      books or chapters to books?

11      A.   We did publish a book called Jeopardy in the  
12      Courtroom. That's our major. When I say "our", I have  
13      to say that a lot of my research has been done with Dr.  
14      Stephen Ceci, who's at Cornell University.

15           COURT REPORTER: I'm sorry, can you say the name  
16      again?

17           THE WITNESS: I'm sorry, Dr. Stephen Ceci,  
18      C-e-c-i, Cornell University. Ithaca, New York.

19           Okay, now I've -- Okay. So Steve and I, we wrote  
20      this book called Jeopardy in the Courtroom, which was  
21      really the initial attempt to try to put -- make a --  
22      set a scientific foundation for understanding the trials  
23      up until the 19 -- to the mid-century and up until 1995,  
24      which involved children as witnesses, where there was  
25      very little known about interviewing children. There

1 wasn't a lot of science.

2 And we put together what was known. And this  
3 field was starting to expand. And how to, in fact,  
4 raise issues or hypotheses about why children might have  
5 come to make the allegations they did. So that was the  
6 book. We've written many chapters, but we've also have  
7 written many, many peer review articles, which are the  
8 most widely read.

9 Q. Okay. And I was gonna ask you about that. You  
10 said many. How many peer review articles have you  
11 authored or been a co-author on?

12 A. Well, over my career over a 100. But in terms of  
13 the issue of child witnesses, 30, 35.

14 Q. Okay.

15 A. Growing.

16 Q. And have any of your works that you've published  
17 received any recognition?

18 A. Yes. Our first paper, which was the prelude to  
19 the book, which was published in a peer review journal,  
20 won the best articles on sexual abuse for the year.

21 Q. Was that 1993?

22 A. Yes.

23 Q. Okay. And what about the book?

24 A. Jeopardy in the Courtroom won an award by the  
25 American Psychological Association as the best book on

1 public policy, I forget what, but it was a book award.

2 Q. All right. Now, you mentioned the term "peer  
3 review". What does that mean?

4 A. Okay. So in the scientific world there are  
5 different standards for evaluating science. And I think  
6 that Nobel Prize is probably number one. But I think  
7 one of the most common standards is how many journals  
8 have published your articles and how many of these  
9 journals are peer reviewed?

10 Now, what peer review means is that experts -- I  
11 do a lot of peer review. People who write articles,  
12 things we're gonna talk about today, that I get sent to  
13 by these journals. And they ask me to carefully go  
14 through the article and comment on the scientific  
15 integrity, whether they followed the rules of science,  
16 whether this information is new, exciting, unimportant,  
17 so inconsistent with everything else, not replicating,  
18 whatever. And do I think that this is worthy of  
19 publication.

20 And so, and there's also a ranking of journals in  
21 terms of how scientifically meritorious there are --  
22 they are. So when you look at when someone says, yeah,  
23 I've published, you know, 40 articles and journals,  
24 well, the first thing you want to do is you want to look  
25 at the journals and see are these just, you know, notes

1 or whatever or do you see that these are, in fact, well  
2 known scientifically acceptable journals.

3 And so it's a rigorous standard whereby, you  
4 know, you -- that a lot of the stuff kind of gets pushed  
5 to the side that doesn't have any scientific merit to  
6 it. So we rely a lot when we look at people's records  
7 on the publication records.

8 Q. So obviously your work has been subject to being  
9 reviewed by peers. And are you also saying that you  
10 conduct peer review of other people?

11 A. All the time.

12 Q. Okay.

13 A. And the other thing I wanted to say is to be  
14 granted the rank of full professor, that probably is the  
15 primary standard of how many peer reviewed articles you  
16 have and how many times they've been cited by other  
17 experts in the field.

18 Q. Have you presented at seminars, either nationally  
19 or internationally on child sexual abuse disclosures?

20 A. I have.

21 Q. And can you give us some examples?

22 A. No.

23 Q. Okay.

24 A. I mean usually these are seminars that deal  
25 specifically with issues regarding child witnesses or a

1 child sexual abuse. These are usually seminars that  
2 involve practitioners or attorneys or judges. And  
3 sometimes they're national. Sometimes they're done  
4 internationally.

5 Q. There's one a lot of years in Las Vegas. Have  
6 you presented at that one?

7 A. Yes, I have.

8 Q. Okay. And have you ever been asked to consult as  
9 an expert witness on a case involving child abuse or  
10 sexual abuse allegations?

11 A. Yes, I have.

12 Q. Okay. And how many times do you estimate that  
13 you've done that?

14 A. How many times have I been asked?

15 Q. Well, how many times have you actually --

16 A. Have I done it? Gone through the process?

17 Q. Right.

18 A. Maybe a hundred.

19 Q. All right. Do you do it every time you're asked?

20 A. Never.

21 Q. All right.

22 A. I mean, I take a small percentage.

23 Q. Okay.

24 A. And I think I've only gone to court about 20  
25 times, 25 times.

1 Q. And that was going to be my next question.

2 A. I'm sorry.

3 Q. Have you -- so you've testified in court before?

4 A. I have.

5 Q. All right. And how many states have you  
6 testified in before?

7 A. I think about 15.

8 Q. This is your first time in South Carolina?

9 A. It is.

10 Q. Okay. And have you ever testified in any other  
11 country?

12 A. Yes.

13 Q. And can you tell us an example of that?

14 A. Ireland, England, Canada. There's more, but I  
15 can't -- I mean, I've worked on cases in Australia and  
16 most recently in India, so...

17 MR. GROSE: Can you mark this as the next  
18 exhibit, please.

19 (Petitioner's Exhibit Number 15, Dr. Bruck's  
20 Curriculum Vitae, was marked for identification.)

21 MR. JAMES: Your Honor, the State has no  
22 objection to Dr. Bruck's curriculum vitae coming in as  
23 an exhibit.

24 THE COURT: Is that what that is?

25 BY MR. GROSE:

1 Q. Well, I was just -- that is your CV?

2 A. It is.

3 Q. Okay.

4 THE COURT: All right, without objection.

5 MR. GROSE: Thank you.

6 (Petitioner's Exhibit Number 15 was entered into  
7 the record.)

8 BY MR. GROSE:

9 Q. Now, in the -- well, let me ask you this, what is  
10 the difference between being a researcher and being a  
11 clinician?

12 A. Well, you could be a researcher clinician also.  
13 The difference is that researchers, the enterprises is  
14 quite different. The researcher asks questions and  
15 investigates them in a scientific method. Now, they,  
16 they ask, depending on their field, they can ask  
17 questions of clinical importance and they can use  
18 clinical populations, but they don't treat their  
19 subjects. Often they're not trained to treat their  
20 subjects.

21 However, many of us, in fact, do research on the  
22 effects of different kinds of treatment on children  
23 using scientific methods. When I was at Hopkins, I was  
24 involved as a consultant in many studies that treated  
25 children who had anxiety disorders or depressive --

1 depression and so on, but I wasn't trained as a  
2 clinician in that I wouldn't be a -- I didn't have a  
3 specialty in terms of curing children or how to do the  
4 day-to-day treatments that require. Although, I know  
5 about those and I know about their scientific integrity.

6 Q. Okay.

7 A. And I also know about the major issues that  
8 arise.

9 Q. Okay. And ---

10 A. The clinician, on the other hand, most clinicians  
11 are not researchers.

12 Q. Okay. So in your experience as researcher, have  
13 you done research with regards to area -- of the area of  
14 child sexual abuse disclosures?

15 A. I have.

16 Q. And have you done research involving forensic  
17 interview techniques?

18 A. I have.

19 Q. And have you done research regarding treatment of  
20 children alleged to have been sexually abused?

21 A. Treatment? No, but I've reviewed the literature.

22 Q. Okay. So you're familiar. And that's peer  
23 reviewed literature?

24 A. Yeah. When available, yes.

25 Q. Okay.



1       A.    Yeah.

2       Q.    And the term suggestibility, do you have  
3 experience involving that?

4       A.    Yes.

5       Q.    And can you explain what that is?

6       A.    What suggestibility is?

7       Q.    Yes.

8       A.    Okay.   Suggestibility is you have a person who --  
9 involves usually two people but more -- where the person  
10 who is, let's say, an adult and a child.  It makes it  
11 easier -- where the adult is trying to get information  
12 from a child.  We call these interviews.  Interviews are  
13 anything that involve attempts to garner information.

14           And where the adult uses certain strategies that  
15 provide the child with information about what the adult  
16 is thinking, believes to be true, wants the child to  
17 say.  And there are many, many ways of doing this that  
18 most people are not aware of.  And so when those  
19 conditions arise, we call these suggestive interviews,  
20 suggestive techniques, whereby an adult is trying to get  
21 information from a child and uses a variety of  
22 techniques to extract that information.

23       Q.    All right.  And have your research and studies  
24 focused on that area?

25       A.    Mainly, yes.

1           MR. GROSE:   Okay.   At this time, Your Honor, I'd  
2   offer Dr. Bruck as an expert in the area of child sexual  
3   abuse disclosures, forensic interview techniques,  
4   treatment of children alleged to have been sexually  
5   abused, and suggestibility.

6           MR. JAMES:   Your Honor, I may have to walk back  
7   one of my early remarks.   She explicitly testified that  
8   she had not personally researched the issue of treatment  
9   of child sexual abuse, but simply that she had reviewed  
10   the literature.   So I'm not sure she's qualified for  
11   that.   As to all of the others I have no objection.

12           THE COURT:   Do you want to ask her questions on  
13   that?

14           MR. JAMES:   Yes.   I'll followup with a little bit  
15   of voir dire, if I may, Your Honor.

16           THE COURT:   Uh-huh.

17                         VOIR DIRE TESTIMONY

18   BY MR. JAMES:

19         Q.   Dr. Bruck, good morning.

20         A.   Good morning.

21         Q.   You indicated earlier that you had looked at the  
22   literature regarding the treatment of child sexual  
23   abuse.   In what context have you looked at that  
24   literature?

25         A.   I've reviewed the literature on different modes

1 of treating children with behavioral problems and  
2 specifically for two reasons. One is, when I was  
3 helping people put articles together on or grant  
4 proposals together or whatever. It was part of my job  
5 at Hopkins. But of specific importance was we have  
6 carefully looked at the techniques that therapists use  
7 when treating sexually abused children, who they think  
8 they're sexually abused, and try and have identified a  
9 number of elements of that treatment that are consistent  
10 with a good practice or a bad practice.

11 But when I mean -- I mean for me good practices  
12 that they're non-suggestive. And there are a number of  
13 techniques that in therapy that are highly suggestive.  
14 And this has been an issue in the memory community for a  
15 long time about extracting reports from clients, adults  
16 and children.

17 Q. So your research into the treatment of child  
18 abuse has not been with a mind to --

19 A. So treatment is good or bad?

20 Q. -- the treatment itself, but it has been the mind  
21 to the suggestibility that may result from that  
22 treatment?

23 A. Exactly.

24 Q. Okay.

25 A. Okay.

1 Q. Have you engaged in the treatment of child abuse  
2 victims?

3 A. No, I have not.

4 Q. Okay. Have you supervised anybody who has  
5 treated victims of child abuse?

6 A. No. But I've done some consulting.

7 Q. All right.

8 A. I'm not a clinician.

9 Q. Okay.

10 A. Okay. So we can put that aside.

11 Q. Going back to that researcher/clinician  
12 distinction, you're on the research side?

13 A. Right.

14 MR. JAMES: Okay. If I may beg a moment of the  
15 Court's indulgence.

16 THE COURT: (Nods head up and down.)

17 MR. JAMES: I have no further questions for this  
18 witness, Your Honor.

19 THE COURT: All right.

20 END OF VOIR DIRE EXAMINATION

21 CONTINUATION OF DIRECT EXAMINATION

22 BY MR. GROSE:

23 Q. I'll just followup on questions that he asked.  
24 You have done a lot of research on suggestibility,  
25 right?

1 A. Yes.

2 Q. And so, as part of your research -- well, strike  
3 that.

4 As part of the question that he asked you a  
5 minute ago, you talked about suggestibility in the  
6 context of treatment of children who have been sexually  
7 abused; is that right?

8 A. Correct.

9 Q. And is that something that your research or  
10 writing has focused on?

11 A. The writing has, yes.

12 Q. Okay. And specifically, has that focused on some  
13 of the problems that could arise if a treating clinician  
14 uses suggestive techniques?

15 A. That is correct.

16 MR. GROSE: Your Honor, I would renew my offer of  
17 this witness as an expert.

18 THE COURT: All right. I'll accept her as an  
19 expert in all of the areas that are offered and the area  
20 that the State raised the objection to, I'll take into  
21 account. I don't want to say limited role, but will  
22 take into account her specific role as a researcher  
23 versus clinician.

24 MR. JAMES: Thank you, Your Honor.

25 BY MR. GROSE:

1 Q. Now, obviously you wouldn't be here today if we  
2 didn't ask you to consult in this case; is that correct?

3 A. Yes.

4 Q. All right. And why -- you mentioned earlier that  
5 you don't accept every case. Why were you willing to  
6 accept this case?

7 A. When I quickly -- when I looked quickly -- when I  
8 looked through the record and I knew vaguely the facts  
9 of the case and I looked through the trial testimony, I  
10 want to say this unemotionally, it was -- the fact of --  
11 the fact that the forensic interviews were never  
12 introduced into the trial testimony was something I had  
13 rarely, rarely seen. And I saw that the jury was not  
14 given any background about the supposed allegations.

15 And I also felt that the experts who are what I  
16 call the clinicians, the two, the forensic interviewer  
17 and the therapist, really did not properly inform the  
18 jury about the child or the child's history or the  
19 child's allegations. And I thought, you know, if I had  
20 been called as an expert witness, what would I have  
21 done?

22 But the other thing was I saw that the defense  
23 had no expert witness. I mean, this is -- and I felt  
24 this is a case that just, you know, screeches expert  
25 witness needed. So on that basis, and when I saw the

1 forensic interviews, I decided that I would work on this  
2 case.

3 Q. And we talked earlier about suggestibility. Does  
4 -- and we may be getting a little bit ahead.

5 A. Okay.

6 Q. But does suggestibility play a role in what  
7 happened in this case?

8 A. To a large extent.

9 Q. Let me do this, I want to explore a little bit  
10 more about what suggestibility is. And is it fair to  
11 say that that's more than just asking misleading  
12 questions?

13 A. Yes. I think most people say, oh,  
14 suggestibility, that's like when you say: You saw that  
15 red cat, didn't you? One rarely sees that in  
16 interviews. I mean, some of them go I don't see any  
17 suggestions here.

18 But suggestibility is, is a concept -- first of  
19 all, when people are being suggestive, they don't  
20 necessarily -- they're not necessarily aware that they  
21 are. I mean, we all are to some degree. But there are  
22 a number of strategies or a number of devices that we  
23 call suggestion that are known through scientific  
24 research to bring children and sometimes adults to make  
25 statements that never really happened.

1           And I'll just start with some of the really  
2 simple ones if you want, but there's something that I  
3 call -- and as oppose -- and I have to oppose to -- so  
4 if you -- when you're interviewing someone, I mean one  
5 of the major rules with interviewing children, for  
6 example, the good rule is you make them feel  
7 comfortable, all that stuff, but you ask them open-ended  
8 questions.

9           You know, you say tell me about the last time you  
10 went to school, or tell me what you did with your mom  
11 this weekend. Or tell me about things you did with your  
12 dad. Tell me about things you like to do with your dad.  
13 And the child is then ready or is given the opportunity  
14 to express in her own words what happened.

15           And then you continue on by saying, you know, you  
16 just mentioned you just went to the park, can you tell  
17 me more about the park? So those are ways,  
18 opportunities that the child can say in their own words  
19 what happened that's uninfluenced by the person who  
20 they're talking to. So suggestive techniques are one  
21 where the way the child is asked to tell, helps the  
22 child -- directs the child to what to say in various  
23 ways.

24           So, for example -- I mean, these are the ways  
25 also that we evaluate forensic interviews or



1     conversations between clients or whatever, is you look  
2     to see, first of all, how often is that technique of  
3     open-ending questioning is, because that's good.

4             The second thing is that then we go to the most  
5     obvious ones, which we call specific questions where the  
6     person is asked questions like, did it -- did this  
7     happen. All they've got to say is yes or no and they're  
8     given information about what an event could be. Another  
9     example is, did he wear a red hat or a white hat? All  
10    the child has to do is pick something.

11            Another example is -- there's a third one -- what  
12    color was his hat? Now, that's a little bit different,  
13    but if the child's never mentioned a hat, then that's a  
14    very leading question. Okay. So those are kind of the  
15    specific kinds of questions where the child doesn't  
16    really have to do any work, just sit back and go yes,  
17    no, on, on top, whatever you say.

18            Then there are more implicit devices, which is we  
19    see repeated questions. Repeating the same question or  
20    repeating a question about the same piece of  
21    information. And what we know from these studies is  
22    that, first of all -- and we see it more in the -- well,  
23    in the forensic arena what we see is when the  
24    interviewer doesn't get the answer she wants, what  
25    she'll do is she'll repeat the question. It might not

1 be immediately after, but it might be several lines  
2 down. So that question gets repeated. And it might be  
3 that, you know, you'll say it's a check.

4 But what we know is that in the laboratory when  
5 we do this and we ask a repeated question or we rephrase  
6 it, children change their answers. And sometimes they  
7 change it to the right answer and sometimes they change  
8 it to the wrong answer, but the point is, is that they  
9 change their answers. So repeated questions are a sign  
10 of suggestibility.

11 Q. Okay. So if I could just go back for a second?

12 A. Uh-huh.

13 Q. The one-word answers are a problem?

14 A. One-word answers are a problem because they --  
15 they're not coming -- the child's -- it's in someone  
16 else's words.

17 Q. Okay.

18 A. Okay?

19 Q. And providing examples is a problem, from what  
20 you said?

21 A. Providing examples? No.

22 Q. Well, if the question -- well, not necessarily  
23 example, but if the question gives a choice?

24 A. Yes. We call those choice questions.

25 Q. Okay.

1 A. Yeah.

2 Q. And the repeated questions --

3 A. Right.

4 Q. -- you talk about that.

5 A. Yes.

6 Q. What about the use of drawings?

7 A. Drawings? So I've done some of this, some of  
8 this research using the kinds of drawings that are  
9 generally used in the forensic arena where we involve  
10 children in touching. They will play a touching game.  
11 Most recently we had children who actually had  
12 anal examinations or genital examinations and we  
13 interviewed them. And we interviewed them with the  
14 drawings asking them, first of all, did anyone touch you  
15 here, and we'd point to the place. Or at the beginning  
16 we say, show me all the places the doctor touched you.  
17 And then we'd go back, you know, did he touch you here?  
18 Show me on the drawing how that happened.

19 And what we found was that the drawings,  
20 especially with the younger children, provided many  
21 false statements, specifically about genital touching.  
22 And my colleague, Deb Pool, has written about this a  
23 lot. And she's found that when children are asked, are  
24 just given, you know, are asked to touch, she has bigger  
25 samples, that there are some children who will just

1 touch all over the place. Here, here, here, here, here,  
2 here, here. (Indicating.)

3 And so, drawings have actually been taken, have  
4 been excluded from scientific protocols because of this  
5 danger. And, and it's a non-verbal technique. And it's  
6 used because people feel that kids don't have their  
7 words, they don't know how to show them, all that.  
8 Maybe, maybe not, but this provides an extra risk.

9 Q. And when you mean extra risk, extra risk of a  
10 suggestibility?

11 A. Exactly.

12 Q. Okay. What about the atmospherics?

13 A. Okay. So, atmospherics is sort of a very vague  
14 term that encompasses many suggestive techniques, but  
15 essentially it's, it's a way of referring to an event, a  
16 person, a situation to the child in a negative way. I  
17 mean, sometimes it's a positive way. You know, we're  
18 going to a birthday party, it's going to be so much fun,  
19 everyone's gonna be there, you know, you'll get  
20 presents, whatever. The child has this expectation that  
21 they're going to a great place.

22 On the other hand, you can present these, what I  
23 call, also stereotypical -- stereotype inductions or  
24 negative cognitions about he's a bad man, you have to be  
25 careful around him, he does bad things, you shouldn't

1 let -- you shouldn't let him call you that. And what we  
2 know from those situations is that children then develop  
3 a belief or a feeling that this person does bad things.

4 So, you know, we call it atmospherics, we call it  
5 a stereotype induction. It can happen in one  
6 conversation. It can happen over years. It's, it's a  
7 more intangible situation, but we can, in fact, distill  
8 it in a laboratory situation.

9 Q. Now, earlier you talked about repeated questions.

10 A. Yeah.

11 Q. What about repeating --

12 A. Interviews.

13 Q. -- interviews?

14 A. Okay. So, often in forensic situations one has  
15 to re-interview a child because you need more  
16 information or you felt that the child was getting tired  
17 and so on. And what we know from so many of the  
18 educational literature and so on is that you will get  
19 more information sometimes in a second interview. Some  
20 of the things might not get repeated, but new  
21 information might be added. And that's okay as long as  
22 it's not a suggestive interview.

23 And, you know, sometimes we have to go back and  
24 say I forgot to ask you, can you tell me more about  
25 this. But when interviews are suggestive, what we see

1 is an increase in false statements, in false reports.

2 I mean, the child is learning that this is a  
3 place I go to where I have to tell them things and I  
4 don't have to pay attention to whether these things  
5 happen or not, they just want me to tell them a lot of  
6 things about the bad things that someone did. And what  
7 you see are early increase in disclosures but, you know,  
8 increase in accusations in the laboratory situation.

9 And in the forensic field, you know, it's  
10 recommended that there be one. But there are lots of us  
11 who feel one sometimes is not enough and you might have  
12 to do a second and you might have to take a break and go  
13 back, which is fine as long as you stick to the rules.  
14 But when you have three, four, or five and they're  
15 replete with suggestions, there's no way this child --  
16 if the child hasn't made a statement in the first  
17 interview or the second, you can't rely on anything that  
18 comes out after that just because they've been so  
19 inundated with suggestion and information.

20 Q. I want to pick up on that. When you use the term  
21 "rely" or "reliability", what does that mean?

22 A. Okay. So, and this is generally what I'm  
23 regarding to, are the statements -- are the child's  
24 statements reliable? It's can they be trusted? Did  
25 they come out and was the chain of custody healthy,

1 germ-free? Did the child's statements get handled in  
2 such a manner from the initial disclosure right up to  
3 the courtroom where we can trust that there was no  
4 interference?

5           Such as, and I always give the example of  
6 fingerprints on a weapon where a weapon is found. And  
7 the chain of custody of that weapon until it gets to the  
8 courtroom is of the utmost importance. And, you know,  
9 someone could say, well, I did, I did pick it up, but I  
10 kind of scrubbed it so it's okay now. Well, you know,  
11 that's not okay now.

12           But in terms of suggestibility in children, what  
13 we know from the science is that even one interview, a  
14 suggestive interview can, in fact, bring a child in a  
15 laboratory to make false statements. We don't know  
16 that, and what's false in the real world or what we do  
17 know in the controlled scientific world is, a, that they  
18 can be false statements. Those false statements grow  
19 over time. The child is more competent in those  
20 statements and someone will talk about that later.

21           But the point is that if there is evidence of  
22 suggestion, then by definition that child's -- those  
23 child -- that child's statements or time is tainted. It  
24 doesn't mean they're wrong. I mean, it could be right,  
25 but there's no way that we know if they're right or

1 wrong, but we do know that there's something wrong with  
2 the way that they came out and, therefore, they're  
3 unreliable.

4 Q. And you use the word "taint".

5 A. Right.

6 Q. What do you mean by that?

7 A. Well, I sometimes use it. I mean tainted  
8 statements are unreliable. I mean, they're tainted by  
9 the method by which they were extracted.

10 Q. Okay. How does reliability compare or contrast  
11 with the term credibility?

12 A. So these are orthogonal terms. Credibility is  
13 not allowed in the courtroom. But credibility is, you  
14 know, how -- does this child sound believable? Is there  
15 a ring of truth? And what we, we know about reliability  
16 -- I'm sorry, about suggestibility is that children  
17 sound highly credible.

18 You cannot judge whether there's been suggestion  
19 or coaching or whatever based on their statements  
20 because -- there's been a lot of research on this. That  
21 even experts cannot discern whether this child's words  
22 have been touched by another person.

23 So, credible, you can be 100 percent wrong and  
24 yet highly credible. And, in fact, you can, in fact, be  
25 very, very right and be un-credible. And so that's why



1 the term "reliability" in the search for the suggestion  
2 is above most important because credibility cannot be  
3 relied upon.

4 Q. And so when, when you consult with lawyers on a  
5 case, are you offering opinions about credibility?

6 A. No, I don't.

7 Q. Okay. But you are able to offer opinions about  
8 reliability?

9 A. I am.

10 Q. Okay. And we'll come back to that in a little  
11 bit. You used the term "coaching" a minute ago.

12 A. Yes.

13 Q. When you hear that term in your field, what does  
14 that mean?

15 A. Well, you know, for the uninitiated it might mean  
16 suggestion, but I don't think that those people really  
17 know what suggestion is. But, you know, I think the  
18 textbook or the dictionary term is deliberate,  
19 deliberate effort to have, talk in this point, the child  
20 make a statement with rehearsal.

21 Q. And when we're talking about suggestibility, is  
22 that the same or different than coaching?

23 A. It's different.

24 Q. Okay. Can you explain why?

25 A. Well, first of all, the techniques are very

1 different. I mean, it's really rare that you see, and  
2 certainly in a forensic interview, now I want you to  
3 say. I mean, interviewers know you don't do that. So I  
4 rarely see coaching at all.

5 Second of all, when children are coached often,  
6 certainly at the beginning, they know it's not true and  
7 they know that they're lying. I mean, the point of  
8 coaching -- now, you can coach to have someone tell the  
9 truth, right? That's one thing, but coaching is a way  
10 -- is deception, is to actively deceive somebody. And  
11 that's what a lie is, is that your intention is to  
12 deceive someone.

13 Now, in suggestibility children aren't lying.  
14 They -- what they're doing is, they're sometimes just  
15 bowing to the pressure that they see and trying to  
16 comply with their interviewer who has a position of  
17 power in one way or another and to go along with what  
18 the interviewer is saying. After all, they have high  
19 status, they know what they're talking about. I can't  
20 remember the event. I might as well say yes.

21 And after a while and, you know, for some  
22 children it can be minutes, for some children it can be  
23 weeks, actually they come to believe these statements.  
24 They'll say, no, this really happened. And their  
25 narratives look highly, highly truthful. I mean, filled

1 with details, all the kinds of things we think define a  
2 good narrative. So these children are not lying.  
3 They're not trying to deceive. They're trying to comply  
4 and they're trying to retrieve a memory.

5 Q. And so suggestibility can result in making false  
6 statements?

7 A. Well, false statements absolutely. I mean,  
8 that's what the studies usually are about. And some  
9 studies go on to see do these false statements become  
10 false memories?

11 Q. What do you mean by false memories?

12 A. That you really believe it happened.

13 Q. Okay. I want to switch gears and ask you about  
14 interviewer bias. What does that mean?

15 A. So, interviewer bias -- so interviews are  
16 conversations between two people or more where there's a  
17 goal to retrieve information about a certain subject.  
18 And interview -- interviewers with a bias -- and let me  
19 say interviewers can be trained interviewers, they can  
20 be mothers, they can be fathers, they can be teachers,  
21 they can be -- it doesn't matter. I mean, it can happen  
22 informally and formally.

23 But an interviewer has -- a bias interviewer has  
24 a primary hypothesis of an event where something went  
25 wrong. The purpose of that interview is to draw out

1 statements that are consistent with a primary  
2 hypothesis. And in doing so, biased interviewers ignore  
3 inconsistent evidence. They don't test other plausible  
4 hypotheses. You know, maybe she's really thinking about  
5 this. Maybe she doesn't really understand this.

6 And biased interviewers actually come to  
7 misinterpret what's going on in the interview that are  
8 consistent with their own biases. And so one of the  
9 things that is really hard to teach people is to be as  
10 unbiased as possible. We all have biases. And it all,  
11 you know, creeps into our conversation. It keeps them  
12 going.

13 But when you seek their -- there are certain  
14 kinds of interviews you see or situations where  
15 something is always a topic of conversation. And it  
16 doesn't matter what happened, it gets reinterpreted as  
17 this is symptomatic of or this happened. And that's  
18 because the person who's doing the investigation or the  
19 police only has one primary hypothesis. And that's an  
20 interview, a bias interview.

21 Now, why does that tie in with suggestion?  
22 Because bias interviewers use suggestive techniques to  
23 confirm their biases. I mean, that's the way to do it.  
24 You just don't sit there and say, you know, tell me what  
25 happened. I mean, you -- you see the biased

1 interviewers use this whole -- not all of them, but a  
2 whole array, and that's why they'll kind of re-ask  
3 questions, ask questions in a certain way because their  
4 belief is, is that this happened and we've got to get  
5 this information out.

6 Q. All right. And you said it was difficult to  
7 train interviewers in that.

8 A. Uh-huh.

9 Q. I mean, is this something that they can do  
10 without even realizing they're doing it?

11 A. Oh, we all do it.

12 Q. Um...

13 A. It's easier to train interviewers to follow  
14 protocols that say use this statement, not this  
15 statement. You know, here's -- you know, here's a  
16 protocol, follow these rules. And these are almost  
17 thoughtless in a way, but they certainly do avoid a lot  
18 of mistakes.

19 It's very hard when you're dealing with training  
20 people to interview at, you know, sort of the CPS level,  
21 for example, where they have a lot -- they don't have a  
22 lot of time for it, but how do you test hypotheses and  
23 how do you remain unbiased? I mean, it's a lot, a lot,  
24 a lot of work. It's easier just to do this protocol  
25 this way. If you follow the protocol, chances are you

1 can have a pretty clean interview.

2 Q. And what's the, the risk of a biased interviewer  
3 using suggestive techniques?

4 A. Well, the risk is if the child, you know, makes  
5 false statements and will come to believe these false  
6 statements. And that the interviewer, regardless of  
7 what the child says, will come out saying the child made  
8 a disclosure.

9 Q. And that goes to perceptions of the interviewer  
10 or can it?

11 A. Well, you know, we've done some of these studies  
12 perceptions, but it's their memory is.

13 Q. I'm sorry, say that again.

14 A. That their memory is that the child did this or  
15 said this.

16 Q. Yeah.

17 A. Yeah.

18 Q. Okay. And that gets back to the importance of  
19 videotaping, I guess.

20 A. Yes.

21 Q. Okay. So kind of shifting gears a little bit,  
22 I've been trying to talk about terms and concepts, and I  
23 think we've gotten a little bit into the science  
24 already, but what is the scientific evidence about the  
25 use of strategies that we've been talking about with

1        regards to interviewing children?    Before I do that --

2            A.    Uh-huh.

3            Q.    -- earlier you mentioned something about age.

4            A.    Right.

5            Q.    When the things that we're talking about -- and I  
6        -- and you said that adults can be suggestive.

7            A.    Uh-huh.

8            Q.    A lot of the concepts we're talking about, are we  
9        focusing your testimony or are you focusing it on  
10       younger children?

11          A.    Well, a lot of the studies have involved younger  
12       children, but there are a lot of studies that involve  
13       older children.    But it was the younger children who  
14       initially instigated this line of research.

15          Q.    And when you say "younger", what age group are  
16       we ---

17          A.    Under six, under seven.

18          Q.    Okay.    So getting back to the question about  
19       scientific evidence about the use of these strategies  
20       for children.

21          A.    So what is the evidence?

22          Q.    Yes.

23          A.    Okay.    So, I mean, I've mentioned a few.    But we  
24       know is when they're used, they bring children to make  
25       false reports.    False reports grow, increase in number

1 with repeated questions, with repeated interviews.

2 Q. And can you explain what you mean by "they grow"?

3 A. They increase.

4 Q. Okay.

5 A. They become more detailed. They become more  
6 frequent. Okay? They sound very credible. They are  
7 indistinguishable from reports that children make about  
8 real events. And sometimes, you know, in a way that  
9 feel more detailed. They bring in new information.  
10 They have more elaborative terms.

11 These, these initial statements sometimes --  
12 these initial statements might not automatically  
13 generate a false memory, but they might if the child has  
14 no memory of anything and says, well, you know, I guess  
15 that's what's happened and come to believe it. But the  
16 more that this goes on in time, the more that it becomes  
17 part of their autobiography and they incorporate that  
18 memory. And even when a suggestion stops, these  
19 memories can last for a really long time.

20 Q. What do you mean by a "really long time"?

21 A. Years, months. But usually, yeah, there's a  
22 whole story to that, but...

23 And, as I said, that, you know, the more  
24 suggestion there is -- I mean, you know, someone said,  
25 the question is, you know, is a four-year-old more



1 suggestive than an eight-year-old? Well, it depends.  
2 It depends on how long it's been since the propose --  
3 the suspected event and the interview and the length of  
4 time.

5 It depends on the number of times -- how  
6 suggestive. How many suggestive sessions. How many  
7 suggestive techniques are used. You know, one time  
8 doesn't necessarily do the trick. But, you know, with  
9 an eight-year-old you can, you can do highly suggestive  
10 interviews and they can flip over pretty quickly. So,  
11 so age is generally, in the studies that we do, the  
12 youngest children are most at risk for any of these  
13 things.

14 Q. All right. And how has the science in -- how has  
15 the scientific evidence influenced clinical and forensic  
16 practice and protocols?

17 A. Right. I can't remember if I said this, but it  
18 has. For -- it has in that what it's shown is these are  
19 things you do not want to do. These are bad things.  
20 And here -- and so find ways to question the child that  
21 don't involve any of these bad things and ask open-ended  
22 questions. Give the child time to, to use their own  
23 words. Don't, don't hurry up and interview.

24 I mean, we -- so a lot of the protocols have a  
25 lot of the don'ts in them, right? But what they've also

1 replaced them with are other techniques that may enhance  
2 the opportunity and the experience for the child that  
3 yields more reliable evidence. A lot of protocols now  
4 don't use drawings. Protocols that we did a lot of  
5 research on dolls that are no longer in these protocols.  
6 So it's kind of like it's had a profound experience.

7 MR. GROSE: Your Honor, we've been at it for  
8 about an hour-and-a-half. I could use a restroom break,  
9 and I think this is probably a good place to interrupt  
10 my examination.

11 THE COURT: All right. Ma'am, I will let you  
12 step down, but just remind you that you're in the  
13 process of giving your testimony, so do not have any  
14 discussion with anyone about the substance of your  
15 testimony, but you may step down.

16 THE WITNESS: Thank you.

17 THE COURT: We will take a short recess.

18 MR. GROSE: Thank you, Your Honor.

19 THE WITNESS: Thank you so much.

20 (Witness leaves witness stand.)

21 (Whereupon, a recess was had from 10:54 a.m. -  
22 11:06 a.m.)

23 (Witness resumes witness stand.)

24 THE COURT: Ma'am, I just need to remind you that  
25 you remain under oath.

1 MR. GROSE: May it please the Court?

2 THE COURT: (Nods head up and down.)

3 BY MR. GROSE:

4 Q. Now, when you work on cases or consulted by --  
5 well is it usually attorneys that consult you?

6 A. Always.

7 Q. Okay. And so when you consult with a lawyer, is  
8 it important for you to review the evidence in the case?

9 A. Absolutely.

10 Q. Okay. And by reviewing the evidence in the case,  
11 are you then able to offer opinions and advice to the  
12 lawyers?

13 A. I can offer an opinion, yes.

14 Q. Okay. All right.

15 A. And I can offer advice. It may not be what they  
16 want to hear, but...

17 Q. All right. And so in Mr. Spade's case, let me  
18 ask you this. You did a written report, didn't you?

19 A. I did.

20 MR. GROSE: Let's mark this as an exhibit,  
21 please.

22 (Petitioner's Exhibit Number 16, Dr. Report, was  
23 marked for identification.)

24 BY MR. GROSE:

25 Q. And I'm gonna hand you what's been marked as

1     Petitioner's Exhibit Number 16.

2             A.    Yes.    Okay.

3             Q.    Is that a copy of your report?

4             A.    Yes, it is.

5             Q.    And did it summarize some of your findings in  
6     this case?

7             A.    It does.

8             Q.    All right.   And did it summarize some of the  
9     information that you've reviewed in this case?

10            A.    Yes.

11            MR. GROSE:   Okay.   Your Honor, I would offer, I  
12     believe it was, Petitioner's Number 16 into evidence.

13            MR. JAMES:   I take issue with one small portion  
14     of Dr. Bruck's report.   I would direct everybody's  
15     attention to section E5.   It is the last point on the  
16     last page of the report towards the end of that section  
17     she indicates:   "It is my expert opinion that the  
18     child's courtroom statements are not reliable."   I  
19     believe that's objectionable as an explicit comment on  
20     the credibility of the victim, which would not be  
21     admissible in the state of South Carolina.   It's  
22     anti-~~false~~, if you will, Your Honor.

23            MR. GROSE:   And I would offer two responses to  
24     that, Your Honor.   First, she's already talked about the  
25     difference between reliability and credibility.   And

1 second, this is not the General Sessions trial. And  
2 it's my position that the scope of the evidence that's  
3 admissible in this hearing is broader than what might be  
4 admissible in a General Sessions trial because we're  
5 looking at the reasonableness of the attorney's  
6 decisions and what information that she could have  
7 communicated to the attorneys that could have affected  
8 their decisions to call an expert or and how to present  
9 the case to the jury.

10 MR. JAMES: Given that that opinion I do not  
11 believe would have been admissible in the General  
12 Sessions trial, I don't think it's relevant ultimately  
13 to the allegations that we have here, Your Honor. Now,  
14 certainly one way or another, because I understand  
15 Mr. Grose does have to present his PCR case, it will be  
16 ultimately proffered to the Court, so it will be part of  
17 the record, but the State's position is that it would  
18 not be admissible.

19 THE COURT: All right. I will allow it to be  
20 part of this record. I'll give it -- I'll take the  
21 State's position. I would have to expect that this  
22 witness to actually pass that opinion anyway based on  
23 the fact that she's called by the applicant.  
24 Understanding what the issues are before her, so I'm  
25 gonna allow it.

1 MR. GROSE: Thank you, Your Honor.

2 MR. JAMES: Thank you, Your Honor.

3 (Petitioner's Exhibit Number 16 was entered into  
4 the record.)

5 BY MR. GROSE:

6 Q. And so, did you review the interviews in this  
7 case?

8 A. I did.

9 Q. Okay. All right. When you reviewed those  
10 interviews, did you find any evidence of suggestion or  
11 suggestibility?

12 A. Yes.

13 Q. All right. And did you find any examples of  
14 interview bias?

15 A. Yes.

16 Q. Okay. And do you have an opinion as to whether  
17 or not Minor Victim was at risk regarding some of the things  
18 that you testified to earlier about suggestibility?

19 A. Yes.

20 Q. Okay. And can you explain why that is?

21 A. Why I think she was at risk?

22 Q. Yes, ma'am.

23 A. I mean, these were highly, highly suggestive  
24 interviews. I mean, they're casebook presentations of,  
25 you know, if you want all of the examples squished into

1 one, you can take any, any page and there's something  
2 there. This is a child who was dragged back time and  
3 time again. Kept saying she wanted to leave, wasn't  
4 allowed to leave. Who was asked question upon question  
5 upon question about abuse, who provided exculpatory or  
6 no evidence of anything wrong.

7 Once in a while she would say something, as  
8 anybody might because they're tired or they'll say,  
9 okay, just I'll say what you want, take me out of here.  
10 And then she recants. She recants many times throughout  
11 these interviews. It's never paid attention to. The  
12 only thing that they look at is I don't know what.

13 I mean, my opinion is that no one who was in  
14 charge here ever looked at the transcripts or the  
15 videotapes of these interviews, because based on my  
16 previous experience a prosecutor would not want these to  
17 be entered as evidence and a defense lawyer would use it  
18 as primary evidence.

19 Q. And, in fact, the prosecutor didn't enter them  
20 into evidence in this case, did she?

21 A. No. But then neither did the defense attorney,  
22 so okay fine. I mean...

23 MR. JAMES: Objection. There's no basis for that  
24 opinion.

25 THE WITNESS: Oh, I read it.

1 THE COURT: All right.

2 MR. JAMES: That the defense attorney never  
3 looked at it.

4 THE WITNESS: Oh, I don't know.

5 MR. GROSE: Well, the question was were they  
6 entered.

7 THE COURT: All right. Yeah, rephrase your  
8 question. If you got -- if that is an issue with  
9 something that she says, you can go into it through --

10 THE WITNESS: Cross.

11 THE COURT: -- cross-examination.

12 BY MR. GROSE:

13 Q. And the question was, were they ever introduced  
14 by either side?

15 A. No, they were not.

16 Q. Okay. And in your opinion should they have been  
17 introduced?

18 A. Oh, absolutely.

19 Q. All right. On -- in -- when you're reviewing the  
20 file, is it important to you to understand what the  
21 timeline is?

22 A. Yes.

23 Q. And why is that?

24 A. Oh, boy. Well, it's one of my basic procedures  
25 when I do a case is, you know, put everything in



1     chronological order that I've given. And if I see  
2     something missing I'll ask for it. And then to itemize  
3     what happened at every month, every year,  
4     pre-disclosure, so I can capture maybe are there  
5     rumblings of beginnings of unrest or anxiety or whatever  
6     to see what was it that preceded the allegation.

7             And then to understand what that first allegation  
8     was and then to see how it was handled until it got to  
9     trial and even after trial if necessary. That was, what  
10    was the chain of custody? Who -- when did new  
11    statements come in? Who did they come in with? How did  
12    they come in? So the timeline is really -- also tells  
13    me the space in between different kinds of events.

14            I mean, how much time was the child living maybe  
15    in an atmosphere where dad was not liked or whatever.  
16    How old was she? I mean, sometimes, you know, the age  
17    of the child makes a difference. Sometimes if they're  
18    two years old or three years old, their long-term memory  
19    isn't really that good.

20            So there are scientific reasons, just as well as  
21    investigative reasons. I mean, I know that I only come  
22    here to talk about scientific foundation, but I have to  
23    have a firm episodic understanding of the case in order  
24    to do this.

25            I mean, if I see a child makes an allegation

1 spontaneously and it's all full of stuff and whatever  
2 and then later on she's interviewed suggestively, it's  
3 not very interesting to me because it's all happened up  
4 there and there's nothing -- there's been nothing  
5 tainting before there. So it's the sequence of events  
6 and the length of time between events that's very  
7 important.

8 Q. Okay. You mentioned something about an  
9 atmosphere of ill will or something of that nature.

10 A. Yeah.

11 Q. And what do you mean by that?

12 A. Well, this is another form of atmospherics, of  
13 stereotype induction. Do we want to talk about the case  
14 or...

15 Q. Yeah. Well, that was gonna be my next question  
16 is --

17 A. Yeah.

18 Q. -- did you see evidence of that in this case?

19 A. Yes. I think that I saw that there was always  
20 tension and conflict around visits with the father. In  
21 one case there was with the mother present and father's  
22 partner present, there was screaming and crying. The  
23 child was crying. I see that there was always conflict  
24 or tension about phone calls, about what she should call  
25 her father.

1           And I see that the grandmother, I mean maybe for  
2   good intentions or what, was always made the middleman  
3   in order to keep the father at distance. And so I think  
4   that, my opinion is that all this goes to the point,  
5   good or bad, that the child has some attitude about her  
6   biological father.

7           Q. Well, and in this case there was a period of time  
8   where there was court ordered supervised visitation.

9           A. Right.

10          Q. And that supervisor, at least for part of that  
11   time, was the grandmother.

12          A. Right.

13          Q. Can -- does that factor into it, what you're  
14   talking about?

15          A. Well, yes. I mean, at times I thought, you know,  
16   we have the statements of the grandmother, more or less.  
17   I mean, at the very beginning, I mean, she was -- this  
18   was an infant and I thought she was being a pretty good  
19   sport to do this.

20          Q. Right.

21          A. And she really has -- it's really her child,  
22   having spent a lot of time with her. So I thought she  
23   did a lot of driving around and trying to facilitate.  
24   But as time went on, I thought that she put up barriers.

25          Q. And that can convey to a child that in this case

1 the natural father needs to be somebody you need to be  
2 protected from?

3 A. Right. And, I mean, at one point she did see  
4 screaming and yelling and people crying all about this  
5 visitation.

6 Q. Right.

7 A. I mean, not a good thing.

8 Q. Well, in fact, the grandmother was the first one  
9 that, according to the testimony, that a disclosure was  
10 made?

11 A. Yes.

12 Q. All right. And what do you understand about that  
13 disclosure?

14 A. Oh, boy. Well, I tried to pin it down exactly,  
15 but I think it occurred sometime around March 27th or  
16 maybe a week later. And she said to -- all we have --  
17 and we have very, very little information in the record  
18 about this. I was able to kind of pull out what -- pull  
19 out everything. And according to the grandmother she  
20 said -- she asked her: Has Danny ever said anything or  
21 done anything that you did not like? Now, I don't know  
22 why she asked that question, but it's pretty suggestive,  
23 right? It's talking about things she doesn't like. And  
24 according to her the child said yes.

25 Now at this point, and this is from the TPR

1 hearing, she doesn't say what the disclosure was, but  
2 what's interesting to me is that she did not tell her  
3 husband for one or two days. She said she was mulling  
4 it over.

5 Q. Okay.

6 A. Now, that, that's unusual. I mean, it's either  
7 -- I mean, it could be beneficial or she could have been  
8 protecting. It could have been maybe I didn't hear it  
9 right. Maybe it didn't mean anything. Maybe I  
10 shouldn't worry anyone, but it's her job to tell Heather  
11 and her husband. So we have two days there. And what  
12 happens in two days? I don't know. All I'm saying is  
13 that this is an opportunity for more questions. And  
14 then ---

15 Q. All right. And when there's more questioning  
16 does that relate to suggestibility also?

17 A. Okay. So now let's go back to how the allegation  
18 came out. So what was the allegation? So I found this  
19 in the record someplace. According to the grandmother,  
20 and I think this was at a TPR hearing, the child said:  
21 "He put a wiener in my face. Please don't tell mommy or  
22 daddy." And then she took it back, so she recanted.

23 Q. All right. And you had mentioned recantations  
24 once --

25 A. Right.

1 Q. -- or twice before.

2 A. Uh-huh.

3 Q. In your field, what is the importance of that?

4 A. Okay. So recantation is what in the field of  
5 Child Sexual Abuse? A child makes an accusation or  
6 statement and then either immediately or sometimes later  
7 says, no, that never happened.

8 So, the prevailing view was that this was really  
9 common among abused children because they didn't want to  
10 break up their family -- that's not gonna happen in  
11 this case -- because they were worried that the accuser  
12 would be really angry with her or hurt her. Not gonna  
13 happen in this case. I don't know that she's seen her  
14 father for a while. And that, you know, it was they  
15 felt guilty or whatever.

16 Now we, my colleague, Kennedy London, and I, have  
17 written a lot about disclosure and we've gone through  
18 records, the the published records of recantation in  
19 child abuse cases. And we've actually looked at  
20 recantation in cases where there, in fact, is evidence  
21 of child abuse. And we find the recantation rate  
22 really, really low where we find recantation rates are  
23 in cases where there have been false reports.

24 So the problem with recantation is that, you  
25 know, clinicians will look at this and say, oh, the

1 child was scared, we can't -- you can't do anything  
2 about this. I mean, the grandmother admitted that she  
3 took it back, so I don't know I think that -- and we'll  
4 see in the forensic interviews there's a lot of  
5 recantation. Saying the child, no, that never happened,  
6 nothing happened. It's not paid attention to.

7 Q. Again, in your field can there be issues with how  
8 an adult remembers a child's statement --

9 A. Right.

10 Q. -- or a disclosure?

11 A. Right. So my question here is this, what we know  
12 from the scientific literature is that when adults are  
13 asked to recall a child's statement and we have -- we'll  
14 have transcripts, we've done this, we have transcripts,  
15 whatever, that they make a lot of errors in what the  
16 child says. Sometimes they're substantive errors as to  
17 actual facts, but a lot of the errors come from the form  
18 of the child's statement.

19 So we have things like the grandmother, you know,  
20 makes the statement as though it were a spontaneous  
21 statement, just came out. What we know is that when  
22 adults question children, first of all, they use a lot  
23 of leading questions, a lot of yes/no questions. Was it  
24 this? Did he do this? And the child's going yes/no,  
25 yes/no. And when they're asked to recall what happened,

1 they put together the child's yes/no answers and say,  
2 you know, it just came out spontaneously. So we don't  
3 really know what the child actually said here.

4 And, in fact, when I've looked at the statement  
5 and then gone through the records, the forensic  
6 interview records, which are the ones that we really  
7 have, and even her courtroom record, that statement  
8 doesn't appear anywhere. And one of the things I try to  
9 do when I do these cases is I try to follow the form or  
10 the content of the initial statement and see how it gets  
11 repeated across time and into the courtroom. How  
12 sometimes you -- I do this because sometimes you see it  
13 change over time, which is important.

14 But sometimes when you see this is initial  
15 statement and it's nowhere, it's concerning. You  
16 wonder, you know, was the statement ever made? Or what  
17 was the form in which the statement was made? Why did  
18 she recant it? Why did the grandmother take so long to  
19 get to the grandmother -- father? Why did she never  
20 tell her mother, her daughter? I mean, there are just  
21 too many issues that come up with this, so that's,  
22 that's the initial statement of the initial.

23 Q. And going back to that, the initial statement:  
24 "He put a wiener in my face. Please don't tell mommy or  
25 daddy." Did you -- you had the videos of the ---



1 A. Yes.

2 Q. Okay. Did you also -- I've got exhibits that  
3 we've marked, transcripts. Did you have the  
4 transcripts --

5 A. I did.

6 Q. -- of the, of the interviews?

7 A. I did.

8 Q. Okay. Did you -- you said, you talked about  
9 timeline and that you wanted to follow sort of a  
10 disclosure over time.

11 A. Yes.

12 Q. Did you compare this initial report of what the  
13 disclosure was with what was in the five --

14 A. Yes.

15 Q. -- Child Advocacy Center --

16 A. Yes.

17 Q. -- interviews?

18 A. I said that. I found nothing. I didn't find any  
19 of these words --

20 Q. Okay.

21 A. -- in those interviews. The word "wiener" is not  
22 used and the word "face" is not used.

23 Q. Okay. Now, I want to talk about those  
24 interviews. And they were done by a lady named Tabitha  
25 Webber.

1 A. Right.

2 Q. If I'm saying her name correctly.

3 A. Uh-huh.

4 Q. And in what you've reviewed -- well, what did you  
5 -- did you also review the other materials that came  
6 with her report and the drawings and that sort of thing?

7 A. I did.

8 Q. Okay. And did -- was there any indication of the  
9 guidelines that Ms. Webber was supposed to be following?

10 A. Yes.

11 Q. And what was that?

12 A. So she said that she, she used the following  
13 guidelines. That the interviewer be non-suggestive.  
14 That the interviewer ask no leading questions. That the  
15 interviewer go at the child's pace. If the child shuts  
16 down or wants to go, finish the interview. I'd have to  
17 let them go. I don't know exact words, but that was it.

18 Q. Okay. And are, are those appropriate guidelines?

19 A. There are some, yes.

20 Q. Okay.

21 A. I mean, they're very basic.

22 Q. Okay. Well, in your review of the interviews did  
23 Ms. Webber follow those guidelines?

24 A. She broke every single one.

25 Q. Okay. And can you give some examples of what you

1 mean by that?

2 A. Well, she asked many leading, close-ended  
3 questions. She repeated questions. She repeated  
4 interviews. And that might not have been her choice.  
5 She -- the child was never allowed to go at her pace.  
6 She was bombarded with questions about Danny.

7 She kept saying she was through, she wanted to go  
8 now. A lot of times. I haven't seen an interview where  
9 a child does that a lot, but the interview is continued.  
10 I mean, I think at one time the child comes in the  
11 interview and says, I'm going soon, right? I mean,  
12 that's not a way to start.

13 Q. In your field, I mean, what is the significance  
14 of the child wanting to leave?

15 A. Well, it has many. I mean, it could be that she  
16 just, you know, I mean, here's the significance and you  
17 can then put the spin on it the way you want, but she  
18 feels uncomfortable and she doesn't want to be there.  
19 That's it.

20 Q. And how, if you're following appropriate  
21 procedures, how is that supposed to be handled?

22 A. You stop the interview. I mean, you might say  
23 well, you know, why don't you go -- I mean, it could be  
24 well we'll do it another day. Or another could be, you  
25 know, why don't you go out with mommy or something,

1    which is not a great idea in the middle of an interview  
2    but, you know, let's do something else for a while.  Let  
3    me leave, let you color, see how you feel.

4           And if the child was still noncompliant, I mean,  
5    the reason is because when the child says that they  
6    become noncompliant and you worry after that about  
7    whether the child is thinking I'll say anything, just  
8    get me out of here.

9           Q.  And so is it fair to say that you're trying to  
10   avoid the risk of there being false statements?

11          A.  Well, you know, on a higher level, yes.  But at a  
12   basic level you want to be kind to this child.  You  
13   know, this was like a little kid who's not having a good  
14   time here.

15          Q.  What were the most salient characteristics of the  
16   child's statements that you observed from the  
17   interviews?

18          A.  That -- I didn't count this, but I think that she  
19   made more denials than she made disclosures.  Her  
20   disclosures were generally one-word disclosures.  They  
21   were inconsistent.  They didn't make sense.

22                The many disclosures that seemed to bear some  
23   evidence in the court or these forensic interviews were  
24   her scribbling on drawings, which we can look at and  
25   make some sense of.  But the drawings were kind of not

1 very graphic and not very detailed. And it looked -- it  
2 was hard to see on the video, so I had to look at these  
3 drawings. It looked like the child was just randomly  
4 pointing, kind of doodling around. At times she's  
5 scribbling a lot.

6 I mean, those are not ways to get disclosures. I  
7 mean this is, we know what the dangers of these are.  
8 And after a while, you know, she learned where she was  
9 supposed to be pointing to. I mean, this was -- this is  
10 the other thing about the suggestive techniques, people  
11 say, well, how would children even know about this?  
12 This is how they know about it, they're shown drawings  
13 and they're asked, you know, what are things you can do  
14 with the drawings and then they do them. But I just  
15 think that the use of the drawings were really  
16 unforgiveable in the way that they were used.

17 Q. And then that goes to suggestibility, as I  
18 believe the word.

19 A. I think it was suggestive in the way that it  
20 prompted the child to make a response that she would not  
21 ordinarily make. I mean, she never -- it was rare for  
22 her to make any verbal responses. They were -- and when  
23 she did, they were recantations. I mean, go through the  
24 interview and see how many times, no, this never  
25 happened. No, I like Danny, he was nice to me.

1           So, again, here through all this you can see  
2 interviewer bias. Go through these transcriptions and  
3 see how many times the child says something and you  
4 should have gone, wow, it never happened. You know, it  
5 never happened or no, it was just followed up by more.

6           Q. Right.

7           A. And that was never shown to the jury. I mean,  
8 had the jury been pointed out the number of times the  
9 child had denied and then had been brought back in. I  
10 think it was very important to show them that evidence.

11          Q. And if they had seen the videos, they would have  
12 seen that evidence?

13          A. If they had seen the interviews? Yes. It would  
14 have been a long -- it takes a long time, but they could  
15 have been given parts of the transcriptions. And then,  
16 you know, if someone objected they could have showed  
17 more of the interviews.

18          Q. And because in the testimony did you see -- did  
19 the testimony from Ms. Webber include the fact that  
20 there had been recantations and denials?

21          A. No.

22          Q. Okay. Now, you talked about interviewer bias and  
23 I was gonna ask about that.

24          A. Yeah.

25          Q. And I think you were beginning to say or already

1 had given some evidence of that that you saw in this  
2 case?

3 A. Right.

4 Q. And what specifically did you see in this case?

5 A. Well, I saw that when the child made confusing  
6 statements, for example, she never tried to figure it  
7 out, which I give her points for because it was just, it  
8 was all so hard to figure out what the child was doing.

9 Q. Uh-huh.

10 A. When the child denied consistently or changed her  
11 answers, I mean the only thing was if she, you know, we  
12 wanted were assents, not denials. So when you got  
13 denials you got this. The whole issue about how the  
14 interviewer got her to say that the abuse happened in a  
15 hotel in North Carolina -- in South Carolina, that whole  
16 stream of questioning is -- reflects that that's what  
17 the hypothesis was, was that there was a hotel and  
18 that's where the abuse took place.

19 So you see when she starts talking about Virginia  
20 or any other things, it's really not taken up. The  
21 questions, the people sometimes use this thing of a  
22 funnel. When you don't get the answer you want, you  
23 keep funneling, funneling, funneling down until you get  
24 the answer you want. So, I mean, her whole notion of  
25 where it took place is really not clear at all.

1 Q. And what about testing alternate hypotheses?

2 A. Well, you know, I want to tell you something.

3 Well, I just want to say something else about  
4 interviewer bias. I mean, there are a lot of times  
5 throughout this interview that she says Danny did  
6 nothing wrong. She's -- and also, there's the whole  
7 issue about Nathan.

8 Q. Okay.

9 A. Now, the judge might not know who Nathan is. In  
10 the first interview she's asked about wrongdoing and she  
11 talks about a little -- I mean, we're pulling this  
12 together. A little boy called Nathan, who was in her  
13 class, and he did bad touching. And that's all that  
14 happened. There's no mention of her father.

15 And I think Nathan came up again in the second  
16 interview. And then it gets confused with who was doing  
17 the touching, her father or Nathan. But then in a later  
18 interview it comes out that it's really Nathan who's  
19 doing it. Now ---

20 Q. And at one point she says that Nathan put his  
21 hand inside of her.

22 A. His foot, his hand, his foot.

23 Q. Yeah.

24 A. His foot. Whatever. And, I mean, that should  
25 have been such a red flag. I mean, you know, I guess



1 people can say she's trying to avoid the issue. But at  
2 some point I think she says, you know, it wasn't my dad,  
3 it was Nathan. So if you look through these interviews,  
4 at the end of it I don't think you have to be really  
5 that trained.

6 I mean, I can actually put labels on what's  
7 happening and explain what the devices are and how the  
8 child talks about it. But you get a very strong feeling  
9 that this child is not accusing her father of abuse.  
10 And certainly of not putting a wiener in her mouth, her  
11 face. And that the accusations are as yes and no  
12 answers, inconsistent, changing her mind, scribbling on  
13 pieces of paper in nonverbal ways.

14 Q. Did you prepare a document with some examples of  
15 things that you found problematic?

16 A. I did.

17 MR. GROSE: Can I mark this, please.

18 THE WITNESS: Now, I think I should preface this.  
19 This is, this is a summary of what I've taken out of  
20 maybe 100 pages. And, you know, I put in the good and  
21 the bad, I think. I mean, I put in, you know, her  
22 statements and how they came about. It's long. I don't  
23 know if I'd want to go through it all in this courtroom,  
24 but you have it to look at. And I think tomorrow's  
25 witness might elaborate more.

1 THE COURT: Is she referring to Applicant's 16?

2 MR. GROSE: Well, actually, this is the one I'm  
3 getting ready to mark.

4 THE COURT: The thing she's holding in her hand?

5 MR. GROSE: Yes. I think that's a copy of  
6 what ---

7 THE WITNESS: Yes. Right.

8 MR. JAMES: Your Honor, I'm uncertain as to how  
9 this particular exhibit is necessary in that it's  
10 overwhelmingly excerpts from the transcripts that's  
11 already a part of the record before the Court. It's  
12 divided portions of the transcript.

13 THE WITNESS: No, it's not in the transcript.

14 MR. GROSE: But it's the transcripts of the ---

15 THE WITNESS: Well, right. Right.

16 MR. GROSE: It's not the trial transcripts.

17 MR. JAMES: Of the forensic interviews?

18 THE WITNESS: Yes.

19 MR. GROSE: Of the forensic interviews.

20 MR. JAMES: Okay.

21 MR. GROSE: Yeah.

22 THE WITNESS: So maybe I can just go through some  
23 of them and then people can look at them and then I  
24 think Dr. Lamb would fill it in because really you'll  
25 get tired of my talking.

1 MR. GROSE: Let's go ahead and get this marked.  
2 If we can give her just a break to do that.

3 THE WITNESS: But I can just go through a few  
4 to give you ---

5 THE COURT: You have to stop talking because  
6 she's got to write down.

7 THE WITNESS: I'm sorry.

8 (Petitioner's Exhibit Number 17, Summary, was  
9 marked for identification.)

10 BY MR. GROSE:

11 Q. Just so we're clear on the record, what's been  
12 marked is Petitioner's Exhibit Number 17 is what we're  
13 talking about?

14 A. Right.

15 Q. And you have a copy of that?

16 A. I do.

17 Q. Okay.

18 A. So the gray lines are actually my yellow lines.

19 Q. Okay.

20 A. And, actually, these were all my yellow lines in  
21 my original when I went through the transcripts  
22 themselves.

23 Q. Okay.

24 A. I mean, could have just entered the whole  
25 transcript. So this is the first interview and this is

1 an example of multiple questions about Danny, about her  
2 dad bad touching.

3 MR. GROSE: Your Honor, I can hand you this, if  
4 that would help.

5 THE WITNESS: Yeah.

6 MR. GROSE: This is the marked exhibit. I'm  
7 sorry.

8 THE WITNESS: And so: "Any big people do  
9 anything with that part right there?"

10 I think she's talking -- she's pointing to the  
11 picture and she says: "No."

12 And then she says: "I was sitting at the table  
13 drawing", which is what she was doing actually. And  
14 then she went, "under the table."

15 "Did he touch you on top of your clothes or  
16 under?" Choice question.

17 "Under."

18 "Okay. Did your pants stay on or something  
19 else?"

20 "On." And then ---

21 BY MR. GROSE:

22 Q. Let me interrupt you there.

23 A. Uh-huh.

24 Q. I've seen interviews where a lot of times the  
25 interviewer will give a choice was it A or B or was it

1 something else.

2 A. Yes. So the scientific evidence shows that the  
3 something else doesn't make a difference.

4 Q. And why?

5 A. Because they're more likely to take one of the  
6 choices.

7 Q. Okay. All right. And so that, that use of that  
8 can be suggestive then?

9 A. It is. It's giving a -- I mean, what is she  
10 doing? She's taking her word under. Now, here actually  
11 she says: "When he touched you there, did he touch you  
12 on top -- on top of your pants or somewhere else?" So  
13 she picks somewhere else. And then, okay, and now it's  
14 inside of my pants. Before it was under, now it's  
15 outside. And then she says: "He did it on my pants."

16 And then we can just go through this here, but  
17 there are just a lot of these questions.

18 "Is there somebody you don't want to talk about?"

19 And she said: "It's about my friend."

20 "Is there a person you don't want to talk about?"

21 And she says: "No."

22 Things that are redacted here are the child's  
23 name, so it's not any information.

24 "There's not?"

25 And she said: "His name is Danny D and I don't

1 want to talk about him."

2 Now, this is really important. She says: "He  
3 calls hisself daddy and he is not my father. And I  
4 don't like it when he calls me that."

5 So when there's anger here. I mean, what the  
6 child has incorporated is that she doesn't have to call  
7 him daddy. It makes her angry when he insists on being  
8 called daddy and he's not her father. And you see  
9 throughout this interview that that's the bad thing  
10 that's involved with it and why she gets upset on the  
11 phone calls is because this whole thing with Danny "D".

12 Q. And that gets back to what you talked about  
13 earlier about the stereotyping or the atmospherics --

14 A. Right.

15 Q. -- surrounding --

16 A. Right.

17 Q. -- you know...

18 A. And for a lot of reasons she might not but, you  
19 know, it's that part. But then: "When we talked here  
20 in the picture that you helped me with right here, was  
21 that about Danny D?"

22 And she says: "No."

23 "Danny D did what?"

24 "Nothing."

25 Okay. So this child is being brought in for a

1 forensic interview and she now says nothing and that's  
2 the end. There are a lot of repeated questions about  
3 Danny D after that and nothing comes out.

4 So the next day there's a second interview. And  
5 if you look at the pictures, there's an annotation on  
6 top of one that says: "Danny "D". touched with his  
7 hands." And it says: "She pointed to the private and  
8 said inside it hurt." But there's no inside it hurt in  
9 this transcript, so I don't know where the interviewer  
10 got to put that in.

11 So here again you see at the beginning just  
12 issues about why he's bad.

13 And she says: "What does he do that you like?"

14 Now, that's a really good question. And, you  
15 know, let -- that's a really good question.

16 And he (sic) says: "He gets me Easter stuff."  
17 And she says: "I don't like it."

18 Now, I think what she's referring to is the fact  
19 that he would send her packages and the mother would  
20 return it, and I'm surprised the child knew about it.  
21 So I think that's another thing about why he's bad. And  
22 then again we have this thing about calling him Daddy  
23 Dan. Hanging up on the phone call.

24 And: "But are there things he did that you don't  
25 like?"

1           And she says: "I don't know."

2           Then: "Hotel and his house, did he do something  
3 bad?"

4           And what did he do bad? He wrote on her hand.

5           "And anything else?"

6           Denial. That's it. I'm gonna go down the end to  
7 this page. By the end of this page, this interview  
8 should have been stopped. This child is not giving  
9 information. But the idea is, you know, if we keep at  
10 her long enough she will. But you have to be careful  
11 because the more suggestion there is, the more the child  
12 is probably gonna say, okay, I'll tell you something and  
13 I'll make it worse than it actually is. A lot of  
14 details. I mean, we know that from these kinds of  
15 interviews.

16           "Who pushes you?"

17           "Nathan."

18           And here she says -- she's drawing and  
19 distracted: "I'm ready to go. When am I going to go?"

20           And what happened? She says: "Does anybody give  
21 you teaches -- touches you don't like?"

22           "Someone gives me hugs."

23           And who does -- and she doesn't like the hugs  
24 that Nathan gives her. And here she is talking about  
25 she peed in her pants. And then: "My shoes were wet."



1 I don't know if that happened.

2 So now we get to something. Let's wait to see  
3 what happened.

4 She says: "What did Danny do?"

5 "He (sic) said: "He just pulled my panties and  
6 pulled them down. It made me sad." And then she says:  
7 "When do I get out of here?"

8 "Did he touch you on the top or under or both?"

9 She goes "both".

10 "Did anything go inside of you?" And she nods.

11 "What went inside of you?"

12 "Nathan's hand."

13 Q. So this is a point where it's not really clear  
14 who she's really talking about?

15 A. Well, I don't even know who -- first of all,  
16 there are a lot, there are a lot of things here, as we  
17 were talking about he. And young children sometimes  
18 have problems with pronouns. So a lot of the times is  
19 she really talking about Danny or is she talking about  
20 Nathan? And a lot of times the interviewer asks about  
21 it and who knows what it is? So there's no clear  
22 reference.

23 And then she says -- I want to come back to  
24 what's at the top of the page -- "Nathan's hand."

25 "Now, yesterday we were talking about Nathan. He

1 touched you on top of your clothes."

2 "He went outside."

3 "Well, what about Danny D? What went inside of  
4 you?"

5 "Nothing."

6 Now, if you look at the previous page where --  
7 well, she just said it hurt inside. I don't know. And  
8 so there's a recantation.

9 Q. Okay. Let me, let me interrupt and ask you a  
10 question about Nathan. The fact that we're talking  
11 about him, does that necessarily mean that we're  
12 accusing him of a crime or anything?

13 A. Not at all. Not at all.

14 Q. Okay.

15 A. Young children, you know, there are always kids  
16 in the class that people find annoying, little girls.  
17 You know, they're touching them, they're hitting them,  
18 they're whatever. Could be a good friend. She could be  
19 doing that with him. I mean, who knows?

20 Q. But from a standpoint of analyzing these  
21 interviews it's kind of significant?

22 A. It's significant that she talks about Nathan,  
23 yes.

24 Q. Okay. All right.

25 A. And then just at the top here I just put, if you

1 look at the tape she's, she's drawing vicariously.

2 She's asking: "When am I ready to go?"

3 And then she said: "He uses his hand."

4 "That's it?"

5 And then later on it says that she denies that  
6 her pants came off. They didn't come off.

7 "Did they come down?"

8 "Yes."

9 And then she says: "They came down, up and  
10 down." So who knows?

11 Q. All right. Instead of necessarily going through  
12 all of these --

13 A. Right.

14 Q. -- these were ---

15 A. I just want to go through the many things here.  
16 The next page you (sic) said: "Nathan didn't do  
17 anything? What about Danny D?"

18 "Let me think. No."

19 So, again, we have another denial. You know,  
20 "Danny "D" touched you with his feet?" Further on she  
21 says: "What else?"

22 "I guess I don't know."

23 "Show me what he put inside you."

24 She shakes her hand negatively.

25 And all these things are what Danny "D" put

1 inside her. And then we get to this whole conversation  
2 about Virginia.

3 And here ---

4 MR. JAMES: Your Honor, I'm going to respectfully  
5 object at this point. This isn't responsive to any  
6 particular questions from Mr. Grose. And I believe he  
7 indicated a moment ago a desire to followup from it.

8 THE WITNESS: Okay. Cool.

9 THE COURT: Go ahead Mr. Grose.

10 BY MR. GROSE:

11 Q. Well, instead of basically going through all of  
12 these --

13 A. Uh-huh.

14 Q. -- and I think this is what you were doing, first  
15 of all, this -- the exhibit are things that you found  
16 significant that should probably be looked at as far as  
17 evaluating this case. Is that --

18 A. Absolutely.

19 Q. -- right?

20 A. But there's one -- can I just move one more thing  
21 because it had to do with mouth. Because that was the  
22 -- I mean, it wasn't the initial allegation but it was  
23 fixed, right?

24 And so he (sic) asked: "You were telling me  
25 about mouth. Did Danny "D" use his mouth for anything?"

1           She said: "He used his mouth to bother me."

2           "Where?"

3           "On my chin."

4       Q.   Okay.

5       A.   So...

6       Q.   You indicated, and I think this document brings  
7   it out, that there was a number of recantations.

8       A.   Yes.

9       Q.   And in the -- in your profession, in your field  
10   of study, what is the significance about that?

11      A.   Well, I mean, the significance is that the child  
12   denies previous disclosures and what does that mean? In  
13   this case there are so many denials and so many  
14   recantations that it just -- that the child is not  
15   willing to make a disclosure. And one has to say why is  
16   she not willing? Well, is it because she's embarrassed?  
17   I don't think so. Maybe. Is it because she's afraid of  
18   Danny? Not really. She says she likes Danny. Is it  
19   she's worried that it's gonna break up the family? No,  
20   it's not gonna break up the family.

21           So what I think that this child is highly  
22   resistant to suggestion really. I mean, what they're  
23   doing is cherry picking because there's more evidence of  
24   her resistance later on.

25      Q.   Okay. And what do you mean by that?

1 A. Not in these interviews.

2 Q. Okay. And in subsequent counsel?

3 A. Uh-huh.

4 Q. All right. Is that a "Yes" for the ---

5 A. Yes, in subsequent counsel.

6 Q. Okay. All right. And we'll get to that in a  
7 minute. Did you also find evidence of leading in these  
8 interviews?

9 A. Well, everything I talked about is leading. It's  
10 leading in that she's asking her yes/no choice  
11 questions. Repeating questions, that's all leading.

12 Q. Uh-huh. And there were also some questions that  
13 you found significant that had to do with a hotel and a  
14 swimming pool.

15 A. Right.

16 Q. What can you tell us about that and what you  
17 found significant?

18 A. Well...

19 Q. I think I'm looking at the fourth interview.

20 A. No, I know. I know.

21 Q. Yeah.

22 A. Well, what I find significant is that she keeps  
23 talking about it happening in Virginia. And at trial  
24 she talks about a bathroom and there's no mention of it  
25 here in any way.

1 Q. And then there's also talk of a swimming pool.

2 A. And she says -- and she said: "No, it was in  
3 Virginia. It was at the hotel."

4 And then she says: "Did it happen the first time  
5 you were at the hotel?" So what's "it"? And there were  
6 a lot of leading questions here.

7 Q. And at one point do they ask her about did  
8 something happen in a swimming pool?

9 A. Here? At the beginning? It's in here if I saw  
10 it. It was a sun room.

11 Q. A little bit before that.

12 A. Before. Did the hotel have a -- skipping a page.  
13 Okay. "A Virginia hotel. It was in the swimming pool."

14 "Did something happen in the swimming pool?"

15 She goes: "No".

16 So a swimming pool comes up but she says it was  
17 in Virginia.

18 Q. All right. And then she also recants.

19 A. And then she recants. She says it was in the sun  
20 room.

21 Q. Okay.

22 A. But she doesn't really say what it was. And --

23 Q. And the only ---

24 A. -- you know, how many times? And then she  
25 denies.

1           "Last time you were telling me you had to use  
2 your mouth for something."

3           I don't know that she actually said that. I  
4 mean, someone would have to go back, but I think that's  
5 pretty leading.

6           And she says: "I don't know."

7           And then she denies that he used his mouth.  
8 Second denial about using the mouth. And she still  
9 keeps questioning her about a mouth.

10          Q. And let me, let me ask, you talked about the use  
11 of the word "it" --

12          A. Uh-huh.

13          Q. -- and not knowing what that means.

14          A. It is, yes. What is "it"?

15          Q. Okay. Are there considerations that come into  
16 play with regard to a child's developmental stages and  
17 the use of words like that?

18          A. Well, it's an ambiguous program -- pronoun. I  
19 mean, I know, you know, sometimes you talk to people and  
20 you say well tell me about it and you go what's "it"?  
21 You know?

22          Q. Uh-huh.

23          A. And so, there's no context here. She hasn't made  
24 an allegation. You know, she's never, she's never said  
25 anything that could say tell me about, you know, when he



1 put his mouth on you because she said that never  
2 happened. So what -- how, how do you ask the question?  
3 Or if she just doesn't -- just use the word it. She's  
4 not being careful about how she's questioning this  
5 child.

6 Q. And you also talked about pronouns like he and  
7 she can give children problems.

8 A. Yes. Like he could -- was it Nathan or was it  
9 Danny or was it someone else?

10 MR. GROSE: Right. Yeah. I don't know that I've  
11 offered Exhibit 17 and I'd do that at this time, Your  
12 Honor.

13 MR. JAMES: No objection at this time, Your  
14 Honor.

15 THE COURT: All right. It will be admitted as  
16 17.

17 (Petitioner's Exhibit Number 17 was entered into  
18 the record.)

19 BY MR. GROSE:

20 Q. And I want to transition a little bit. Did you  
21 also look at records of some therapists?

22 A. I did.

23 Q. Was one of those Kim Rosborough?

24 A. Yes.

25 Q. Or Kimberly Rosborough?

1 A. Yes.

2 Q. And what did you find, if anything, significant  
3 about those?

4 A. Well, let me just look at my timeline here. So  
5 she went to see -- okay. Well, anyway she went to see  
6 Rosborough. You had a timeline. Here we go. She went  
7 to see Rosborough in 2011. Oh, she started October  
8 10th. And she went to see her through ---

9 Q. Was that 2011 or 2010?

10 A. She started March 28th, October 10th. I think.  
11 Oh, no, and she finished. She finished seeing her on  
12 March -- in March 2011.

13 Q. Okay.

14 A. Is what I know.

15 Q. So from October ---

16 A. Ten visits, yeah.

17 Q. Okay.

18 A. To March, yes. So she went to her for anxiety or  
19 maybe. I think the parents were concerned. She went to  
20 her for anxiety.

21 MR. JAMES: Objection, speculation.

22 THE COURT: I'll sustain the objection.

23 THE WITNESS: This was an anxious child. The  
24 grandmother talked about anxiety separation when she was  
25 very young. And there are examples of her anxiety in

1 Rosborough's report.

2 BY MR. GROSE:

3 Q. Okay.

4 A. Saw her for ten sessions. And she felt much  
5 better. Mother reported that she got much better. She  
6 was cheery. The teacher was happy with her. She was  
7 socializing in school. She was doing much better, so  
8 really a happy child.

9 Q. And that was happening from October of 2010  
10 through --

11 A. Right.

12 Q. -- March of 2011?

13 A. Ten visits, so probably like less than once a  
14 week.

15 Q. And so Ms. Rosborough is reporting improvement  
16 and these visits somewhat coincide with the timeframe of  
17 the allegations in the indictment?

18 A. That's right. And the mother is reporting it.  
19 And her mother writes an e-mail to Rosborough saying,  
20 you know, how happy she is with her child. This is  
21 during a time where stuff was going on.

22 Q. All right. And did you also review records from  
23 a therapist named Meredith Thompson-Loftis?

24 A. As best I could.

25 Q. Okay. And why do you say as best you could?

1       A. Well, it was very hard to read. But I looked at  
2 her testimony and I was able to look at the records as  
3 best I could up to the time of the trial.

4       Q. Okay. And did you consider her records to be a  
5 good forensic record?

6       A. No. But to be honest, I don't know if these were  
7 forensic. I think that she was there for therapy.

8       Q. Okay.

9       A. Okay?

10      Q. Was there any things -- well, let me withdraw  
11 that.

12               Did you get a sense of the number of times that  
13 Minor Victim went to sessions with Ms. Thompson-Loftis?

14      A. Well, I know that by the time she got to trial,  
15 so that was between -- so it started after the forensic  
16 interviews ended, which was about October. Around May  
17 11th to the trial in 2014. She had seen her 71 times.

18      Q. Okay. And is there any -- in your field, is  
19 there any significance regarding those numbers of  
20 sessions?

21      A. In my field in terms of suggestibility?

22      Q. Yes.

23      A. Or just in terms of child development?

24      Q. Or both.

25      A. It's a large number of times.

1 Q. Okay.

2 A. It's a large number of times.

3 Q. Well, in particular with regards to  
4 suggestibility.

5 A. Well, the one thing I noted was that it took her  
6 months to make any disclosures. I mean, what this woman  
7 did was she noticed her high anxiety. I mean, she was  
8 an anxious child, but at that point she probably did  
9 have a lot to be anxious about. And she attributed ---

10 MR. JAMES: Objection, speculating.

11 THE COURT: I'll sustain the objection.

12 THE WITNESS: Oh, sustained, okay. She had just  
13 gone through these CAC interviews that she didn't want  
14 to be there for and now she was seeing this other woman.  
15 And it took about five months for her to get her to make  
16 an allegation.

17 BY MR. GROSE:

18 Q. Okay.

19 A. But her, her diagnosis was that there was sexual  
20 abuse. And so her therapy was to get a disclosure of  
21 sexual abuse.

22 Q. All right. And when you say her therapy, did she  
23 use a particular type of therapy?

24 A. She said she used trauma-focused therapy.

25 Q. All right. And what is trauma-focused therapy

1 mean?

2 A. Trauma-focused therapy is used when there was a  
3 known trauma and there are real signs of worry,  
4 illumination, anxiety, due to things about that. And  
5 the idea is to have the child -- well, it's often, it  
6 can be used a lot with adults with PTSD, whatever. It  
7 really is. To have them recognize or to relive the  
8 trauma and to relive it by drawing pictures, by writing  
9 a journal. And the idea is that if you rehearse it  
10 enough and talk about it enough, it will blunt it and  
11 you will learn ways to deal with those feelings.

12 Q. Okay. And do you have concerns about whether or  
13 not there was a known trauma in this case?

14 A. No. We don't know there was a known trauma.

15 Q. Okay. And ---

16 A. But, you know, she decided there was because they  
17 found the child guilty. She never read any records  
18 before that.

19 Q. Okay. And is there a risk of suggestibility  
20 coming into this type of treatment?

21 A. Yes. Because you have to, you have to pick a  
22 trauma.

23 Q. And did you -- and I think you've already kind of  
24 touched on this, but did you see any evidence of  
25 interviewer bias in these records?

1       A. Well, you know, to be -- the records were just  
2 really one, one sentence is about what she was doing,  
3 what the child said.

4       Q. Uh-huh.

5       A. There's really, I mean, you know, a child -- I  
6 mean, at a point she says the child not doing better. I  
7 mean, the child is clearly not getting better. But I  
8 find that a lot of times here, and I don't know what the  
9 rules are, it's really more to refresh the therapist's  
10 memory.

11      Q. Okay.

12      A. And, you know, what notes don't have is the full  
13 -- you know, she doesn't talk about any denials. She  
14 only includes evidence that is useful for her. So I  
15 don't think that they're much use except for what is  
16 abuse is that the child never -- it took a long time.  
17 That's why I'm saying that I think this child is highly  
18 resistant to suggestion to get her to make allegations.

19             And once she makes allegations, this is the other  
20 thing I noticed, she goes way off board. She starts  
21 making allegations about her stepbrothers, about abuse  
22 by them or with them or for them. Things that were  
23 never mentioned before. And you see this a lot in  
24 children who are being forced or confronted to talk  
25 about and tell me more and tell me more.

1 I mean, what they learn is I can say anything I  
2 want. There's no, there's no limit. The sky is the  
3 limit. And that's why these narratives people say look  
4 so credible because they have so much detail on them. I  
5 mean, no one's ever gonna call them on it, and so they  
6 learn that they can do this and it's very concerning.

7 Q. All right. And on making allegations about other  
8 people, there's also allegations made about Cara.

9 A. That's right.

10 Q. And is that consistent with what you're talking  
11 about?

12 A. Yes.

13 Q. About the allegations expanding --

14 A. Yeah.

15 Q. -- through these therapies?

16 A. Yes.

17 Q. Okay. I want to transition out of that and talk  
18 about anxiety for a minute, because you've mentioned  
19 that, that this was an anxious child.

20 A. Right.

21 Q. And you saw evidence of that in the records, I  
22 guess.

23 A. Right.

24 Q. And as well as some of the testimony.

25 A. Uh-huh.



1 Q. From a scientific standpoint regarding child  
2 sexual abuse, what does the, the evidence show, teach  
3 us?

4 A. Well, I mean, anxiety can be -- is found in  
5 children who have been sexually abused, but it's no more  
6 common. It's not a distinctive diagnostic feature.  
7 There are lots of children who suffer anxiety who have  
8 not been abused.

9 There are a lot of children who are -- there are  
10 a lot of children who are anxious who are not abused.  
11 This could be part of normal development where, you  
12 know, you go through stages you're afraid of clowns,  
13 you're clingy, you don't want to leave your mom. Or it  
14 can, in fact, be a pure anxiety disorder which is  
15 treatable.

16 Q. Okay. And you said, I think you used the term --  
17 I don't remember the term you used, but anxiety in and  
18 of itself be the diagnostic factor.

19 A. Right.

20 Q. It's not a diagnostic factor by itself for sexual  
21 abuse?

22 A. No. There is none.

23 Q. Okay. And ---

24 A. Well, some people might, might argue that  
25 sexualized behavior is one, but there's also some slight

1 interludes to that. But in terms of, you know,  
2 depression, anxiety, aggression, all those things,  
3 they're not specific to children who have been abused.

4 Q. All right. And asking the question another way,  
5 can anxiety be -- is it a symptom of other disorders?

6 A. Yes.

7 Q. Okay. And can you give us a couple examples?

8 A. Well, you know, there's a childhood anxiety  
9 disorder --

10 Q. Okay.

11 A. -- which can be all kinds of things. It's  
12 associated with depression, so...

13 Q. Okay.

14 A. Associated with a lot of childhood disorders.

15 Q. Okay.

16 A. I think, you know, that this child, I mean, Kim,  
17 the doctor, Ms. Kim, she, she thought she had primary  
18 anxiety disorder.

19 Q. And you mentioned the interviews. Can, can  
20 anxiety come from going through interviews?

21 A. I guess.

22 Q. It can come from a lot of things?

23 A. Right. I mean, I'm anxious now after going  
24 through this interview, so...

25 Q. So to kind of summarize -- well, not necessarily

1 summarize, but we've already talked about this. Do you  
2 think it was important for the jurors in this case to  
3 see the -- or at least be exposed to either video or the  
4 transcripts of the interviews?

5 A. I think it was the prime evidence that the  
6 defense had.

7 Q. Okay. And if you were consulted, had been  
8 consulted by the defense, would you have advised them  
9 that the jurors needed to see that prime evidence?

10 A. Absolutely.

11 Q. And if you had been consulted by the defense,  
12 would you have advised them that the jurors could  
13 benefit from testimony of an expert in your field?

14 A. Yes. I would do that all the time.

15 Q. And particularly to convey to the jurors a lot of  
16 the information that we went over before we took a break  
17 a little while ago?

18 A. Yes.

19 MR. GROSE: Okay. Judge, I think I'm wrapping it  
20 up. Could I have a couple minutes just to consult and  
21 make sure I don't have anything else?

22 THE COURT: Yes, sir.

23 MR. GROSE: Okay. Thank you. That's all I have  
24 at this time. So, Dr. Bruck, if you can answer any  
25 questions that the State might have, please.

1 THE COURT: Lawyers approach a moment.

2 (A bench conference was held off the record.)

3 THE COURT: All right. We're going to take a  
4 lunch break, Doctor. Again, you may step down but don't  
5 have any discussions about the substance of your  
6 testimony. We're going to reconvene at quarter till  
7 two. All right.

8 (Lunch break was had from 12:17 p.m. - 1:50 p.m.)

9 THE COURT: Is the State ready for their  
10 cross-examination?

11 MR. JAMES: Yes, Your Honor, the State is.

12 THE COURT: Ma'am, I just need to remind you that  
13 you remain under oath.

14 CROSS-EXAMINATION

15 BY MR. JAMES:

16 Q. Good afternoon, Dr. Bruck.

17 A. Good evening. Good evening, good afternoon.

18 Q. It feels like evening, doesn't it?

19 A. Oh, please. Sorry.

20 Q. My name is Johnny Ellis James, Jr. I am one of  
21 the attorneys for the State who is representing our side  
22 of this postconviction relief action. For the first  
23 start of this cross I want to go over some of the high  
24 concept ideas and research around forensic interviewing,  
25 explore your knowledge of the research on that subject

1 before --

2 A. Okay.

3 Q. -- we get back to the specific facts of this  
4 case. Forensic interviewing is a relatively new process  
5 and field of research, is it not?

6 A. More than 25 years old.

7 Q. More than 25 years old, but it's comparable to my  
8 age, I'm about 30.

9 A. Okay.

10 Q. Is there at this time in the United States a  
11 standardized universal practice for the conducting of  
12 forensic interviews?

13 A. No.

14 Q. Okay. In fact, right now there is a wide variety  
15 of different protocols that are followed in the  
16 different states?

17 A. Yes.

18 Q. Okay.

19 A. They all have common principles.

20 Q. And what would those common principles be?

21 A. With children?

22 Q. Okay, yes.

23 A. Make the child relaxed. Have the child practice  
24 making -- giving narratives on unrelated things that are  
25 filled with details and require little prompting.

1 Asking mainly open-ended questions. Not using leading  
2 questions. Not repeating questions. Minimizing the  
3 number of interviews. Taking into account the child's  
4 developmental level. Okay.

5 Q. My understanding is that taking into account the  
6 child's developmental level is actually arguably the  
7 first and most important aspect of conducting a forensic  
8 interview. Would you agree with that?

9 A. No.

10 Q. No?

11 A. Well, I mean, I think the most important part is  
12 keeping it non-suggestive.

13 Q. Okay.

14 A. But, you know, certainly a lot of these  
15 interviews begin with trying to assess the child's  
16 developmental level but they're not true developmental  
17 examinations. Give them an idea.

18 Q. In what way is a forensic interviewer supposed to  
19 engage the child's developmental level?

20 A. Well, sometimes, you know, they ask them their  
21 colors, they ask them to count, they ask them their  
22 alphabet. They see -- they're supposed to listen to  
23 their language. There, there is no standard way.

24 Q. In going back to that absence of a standard  
25 procedure nationwide, in fact in many circumstances

1 forensic interviewers will blend a variety of approaches  
2 and protocols, correct?

3 A. It depends on the state.

4 Q. Okay. And so to a certain extent the approach  
5 that's taken in the forensic interview is governed by  
6 the law of the state in which the interview is taking  
7 place?

8 A. I don't know if it's the law or just the general  
9 agreement among whoever. I really don't know that much  
10 about it. Tomorrow's witness will.

11 Q. Okay. And when you say "it", are you referring  
12 to forensic interviewing?

13 A. Yes.

14 Q. Okay. Would you agree with me that some of the  
15 research into the best practices for forensic  
16 interviewing is still in development, it's still in  
17 flux?

18 A. Yes.

19 Q. Okay. And as a consequence would you agree with  
20 me that there are certain issues in the field of  
21 forensic interviewing over which there remains some  
22 disagreement upon researchers?

23 A. Among researchers, some, yes.

24 Q. Okay. Were you aware that there is at least some  
25 research that differs as to the appropriateness of the

1 use of simple media, such as paper and crayons or  
2 markers in the course of a forensic interview?

3 A. Disagreement about like the use of drawings?

4 Q. Disagreement as to whether the presence of  
5 crayons and markers --

6 A. Right.

7 Q. -- is appropriate and the best practices in --

8 A. Right.

9 Q. -- a forensic interview.

10 A. Right. So Debra Poole has recently written an  
11 article about letting a child draw during an interview  
12 does not interfere with the quality of their answers.  
13 And I actually did the similar study but didn't publish  
14 it because she had done it already.

15 Q. Some of the travails of academia.

16 A. Oh, well, you know, anyway, so...

17 Q. Are you referring to Dr. Poole's 2014 work? If I  
18 can find the title of it quickly.

19 A. Anyway, she -- go on.

20 Q. My apologies. If I can beg just a moment of  
21 indulgence. The publication in child use and neglect.  
22 Comfort drawing --

23 A. Yes.

24 Q. -- during investigative interviews. Evidence of  
25 the safety of a popular practice?



1 A. That's correct.

2 Q. Okay. And that was alongside Dr. Dickinson?

3 A. Yeah. Jason Dickinson, yes.

4 Q. Okay. And in that publication she actually went  
5 so far as to suggest that it may be helpful to the child  
6 in the forensic interview?

7 A. Yes.

8 Q. Would you agree that every child's development  
9 proceeds at a different pace?

10 A. Yes.

11 Q. Okay. So some four-year-old might be more  
12 capable of verbalizing their thoughts and feelings than  
13 other four-year-olds?

14 A. Absolutely.

15 Q. Okay. Would you agree that some young children  
16 in the course of their development when they are  
17 subjected to a forensic interview may not be capable of  
18 or comfortable with verbalizing their memories?

19 A. Verbalizing their memories or answering questions  
20 or what?

21 Q. Well, that perhaps they can answer their  
22 questions, but is it possible that a child could go into  
23 a forensic interview and can converse but lacks the  
24 language necessary to describe what happened in the  
25 past?

1 A. Well, but they might lack the memory.

2 Q. Okay.

3 A. So it's hard to tell. If the question is asked  
4 in the right way they should be able to. And if they  
5 can't, the interviewer usually notices, so they can't do  
6 this interview if this child is not at the developmental  
7 stage.

8 Q. Is it possible that a child might not be able to  
9 articulate their memory but might be able to communicate  
10 that there is a memory there in some other way, either  
11 in their body language or by drawing?

12 A. Not in body -- there's no evidence about a body  
13 language.

14 Q. Okay.

15 A. And the evidence about drawing, I can't answer  
16 that question.

17 Q. Okay. When should the forensic interviewers do  
18 the forensic interview?

19 A. I didn't -- what's the first part?

20 Q. My apologies. When should a forensic interviewer  
21 endeavor --

22 A. Yeah.

23 Q. -- to conduct the first forensic interview?

24 A. As soon -- as close as possible to the initial  
25 allegation.

1 Q. And why is that?

2 A. Because there's less time for forgetting and  
3 there's less time for interference or rehearsal or  
4 suggestion. You want as close, you want it off the  
5 burner as close as possible.

6 Q. So it's in order to reduce the possibility of  
7 tainting?

8 A. Yes.

9 Q. Okay.

10 A. And forgetting.

11 Q. For how long should a forensic interview be  
12 conducted?

13 A. Well, I think Dr. Lamb has more of that  
14 information than I do, but for this age child 40  
15 minutes, probably. You know, it depends. If the child  
16 is comfortable and there are still things to do, I guess  
17 you could push it further, but try to keep it within  
18 their attention span.

19 Q. So you try to be flexible to the child, but also  
20 you want to keep it relatively short?

21 A. Right.

22 Q. Okay. Well, you don't want to keep it so short  
23 that you're not -- I mean, you want to make sure you've  
24 got the information you need, right?

25 A. Okay.

1 Q. And it's also important to commit time,  
2 especially in that initial forensic interview to allow  
3 the child to familiarize themselves with the  
4 interviewer, correct?

5 A. Yes. But in normal interviews that's part of --  
6 that's part of the package.

7 Q. So regardless of the particular protocol, this  
8 agency or that agency may follow, generally, universally  
9 there's an effort to familiarize at the outset of the  
10 first forensic interview, correct?

11 A. I would hope so.

12 Q. Okay. Could be a little intense if the child  
13 went in there and --

14 A. Precisely, yeah.

15 Q. -- started peppering them --

16 A. Did your father touch you, yeah.

17 Q. -- with questions. Correct me if I am  
18 mischaracterizing your testimony.

19 A. Okay.

20 Q. But my understanding from your testimony on  
21 direct examination is that you are of the position and  
22 opinion and that research bears out that there should be  
23 as few forensic interviews as possible?

24 A. That's correct.

25 Q. Okay. But you would agree that there is some

1 research to show that certain severely traumatized  
2 children may benefit from multiple non-duplicate  
3 interviews?

4 A. I know some of that research and I think it's not  
5 very good at all.

6 Q. Okay. So you disagree with it?

7 A. Well, I think two is a start. If you can do it  
8 in two, and if you can't then you've got to discuss it  
9 further. But the problem -- okay, that's my opinion.

10 Q. When you say "discuss it further", what do you  
11 mean?

12 A. You discuss with your peers or whatever about,  
13 you know, how the child's doing, what do you think you  
14 could get out of the third interview? How would the  
15 third interview be non-duplicative of how we could rule  
16 a suggestion? I mean, it's very difficult. I don't  
17 really have an answer to that question, okay? I think  
18 it's very difficult.

19 Q. It's very difficult for prevailing to ---

20 A. It's a difficult issue. But my opinion is there  
21 should not be multiple interviews that are suggestive.

22 Q. Some children are going to be reluctant to  
23 disclose the abuse that they have suffered, correct?

24 A. Some children are going to be reluctant to  
25 disclose?

1 Q. Their abuse in a forensic interview.

2 A. Some children are.

3 Q. Okay. Are there specific factors that would  
4 cause a child to be more reluctant to disclose abuse?

5 A. Well, the ones that have been looked at in  
6 relationship to the abuser. There are a number, but  
7 that's usually the one that's brought up.

8 Q. That's the number one that appears?

9 A. That pops into my mind, yes.

10 Q. Okay. And what is the nature of that factor? Is  
11 it that the closer the relationship of the abuser the  
12 less likely they are to disclose?

13 A. Yes. I mean, usually it's interfamilial that,  
14 you know, if they can disclose the mother will be mad,  
15 it'll break up the family. There are ties to the  
16 abuser, positive ties. That's it. You know, it's  
17 usually these emotional familial-able attachments. What  
18 it would do to the family.

19 Q. It's also common for victims of child abuse to  
20 delay in disclosing their abuse, correct?

21 A. Delay? Delay is a very ambiguous term because,  
22 you know, it can be days or it could be months or it  
23 could be years. And I don't think there's any argument  
24 that there is delay in disclosure. It is very rare for  
25 a child to come running in and say, hey, this just

1 happened to me. It happens, but...

2 Q. I think I've seen instant disclosure once.

3 A. You've seen it once?

4 Q. Once.

5 A. Uh-huh.

6 MR. JAMES: Beg a moment of the Court's  
7 indulgence.

8 BY MR. JAMES:

9 Q. Are you aware that there is some research that  
10 found and asserted that as many as 60 to 80 percent of  
11 children and adolescents who are subject to sexual abuse  
12 do not disclose until adulthood?

13 A. Okay. So, I know that research because we  
14 reviewed it.

15 Q. Okay.

16 A. But who knows what the number is. There's a lot  
17 of data about whether in fact they didn't disclose  
18 earlier. Those are based on much earlier studies, but  
19 we all know -- I think it is common. It's common, it  
20 occurs.

21 Q. Okay. Given that it is common and that it does  
22 occur, is there any particular commonality in what  
23 causes victims of sexual abuse to actually come forward  
24 and disclose their sexual abuse?

25 A. You know I don't, I don't really know.

1 Q. Okay.

2 A. I really don't know. I mean, I could guess. I  
3 think -- I've been asked -- I've asked whether this is  
4 true and with time, you know, it's become easier to  
5 disclose. What we know is that rapes of sexual abuse  
6 have declined over the decades, but I don't -- we don't  
7 -- there really are not any good data that we could ever  
8 find to answer your question.

9 I mean, sometimes it's because a lot of times  
10 it's adolescents. A lot of times, you know, kids don't  
11 really understand what's happening to them. And then  
12 you could think of all the usual, no one's ever asked  
13 them.

14 Plus the other thing that we found is that, you  
15 know, these rates of nondisclosure, they don't really  
16 answer the question of when children are asked how many  
17 people denied. I mean, that's the thing. These rates  
18 of nondisclosure may involve times when no one ever  
19 asked them and so they never told. But I think the  
20 relevant question is once the children are asked how  
21 many deny?

22 Q. I think the key thing that you emphasized in your  
23 direct examination testimony and then again here on  
24 cross-examination is the crucial importance that a  
25 forensic interviewer use open-ended questions, correct?



1 A. Correct.

2 Q. As the interview progresses --

3 A. Uh-huh.

4 Q. -- is it then appropriate to narrow the scope of  
5 the questions as the child presents information to the  
6 forensic interviewer?

7 A. Well, I think that -- I mean, Michael Lamb's  
8 protocol, which is one of the one most used, the NIH, I  
9 mean, their rule is you stay with open-ended questions  
10 and you use the child's statements to ask other  
11 questions, but you keep them pretty flexibly open-ended.  
12 And you delay as much as possible the use of specific  
13 questions. You may want to ask them at the very end.

14 And, although, he's never written about it, I  
15 think the feeling is but you draw a line when you do  
16 that, when you realize what the risks might be of  
17 answers to those questions, which might be at the end of  
18 an interview. But you really try your best to stay in  
19 this open dialogue and, you know, focusing in with more  
20 open-ended questions, but based upon what the child has  
21 already said.

22 Q. What things should a forensic interviewer look  
23 for in determining when it is that they need to cross  
24 that line and go into more specific questions?

25 A. I don't know.

1 Q. Okay.

2 A. I think that if they've had a lot of training  
3 they know where the line is. And I think they certainly  
4 should be aware of what the consequences are.

5 Q. But you would agree at some point it may be  
6 necessary to ask a specific question?

7 A. It might be necessary. A specific question.

8 Q. You've indicated your disapproval of the use of  
9 drawing. Is there anything to be concerned about, about  
10 the use of other aids in the course of a forensic  
11 interview? So, for example, maybe a small picture book?  
12 So for example, in this case, just to be clear in the  
13 question, I believe Tabitha used a book with pictures of  
14 children where she said this one says it's a dog and  
15 this one says it's a cat, which one's lying?

16 A. So that one was at the beginning.

17 Q. Yes.

18 A. And it was sort of a competence exercise.

19 Q. Okay.

20 A. In order to know that the child knows the  
21 difference between a truth and a lie.

22 Q. Okay.

23 A. Which, in fact, doesn't correlate with children's  
24 suggestibility, as it turns out, so it's not used very  
25 much.

1 Q. So that sort of exercise to confirm that they  
2 know the difference between a truth and a lie doesn't  
3 impact on whether or not the statements they're  
4 providing are accurate?

5 A. Yeah.

6 Q. I apologize.

7 A. Yeah. You're right it doesn't correlate with it  
8 at all.

9 Q. Okay. What about telling children that they have  
10 to tell the truth or this is the truth, things of that  
11 nature?

12 A. Well, some people do that and they say, you know,  
13 I want you to tell me things that you've seen. I've  
14 rarely seen this actually. You know, when we talk here,  
15 we only talk about things that we know that we have seen  
16 happen. We don't talk about things that people have  
17 told you or that you've made up. This is something that  
18 happened, that you have been there when it happened. I  
19 rarely see people do that, but sometimes it makes a  
20 difference, sometimes it doesn't.

21 No -- the things people use that were not used  
22 here is no guessing. If you don't know the answer, say  
23 I don't know the answer. If you don't understand the  
24 question, tell me you don't understand the question. If  
25 you don't understand a word, tell me and I'll use

1 another word. And then they have exercises that they go  
2 through. Again, I think those are good, but they're not  
3 practiced throughout. Anyway, I'm just saying. Those  
4 are common.

5 Q. Okay. So the -- and to clarify for my own notes  
6 here, you are stating that it's common to tell the child  
7 that there's no guessing, things of that nature?

8 A. Right. And tell me if you don't understand.

9 Q. Okay. And did I hear you correctly when you  
10 asserted that that was not done in this case?

11 A. I didn't see that.

12 Q. Would it surprise you if I told you that in the  
13 first interview --

14 A. Uh-huh.

15 Q. -- Tabitha did tell --

16 A. Right.

17 Q. -- the victim --

18 A. Uh-huh.

19 Q. -- if you don't understand something, say Ms.  
20 Tabitha I don't understand or something to that effect?

21 A. Okay, good.

22 Q. Okay.

23 A. Okay.

24 Q. Does the use of human figure drawings present any  
25 problems to suggestibility for essentially changing the

1 child's remarks?

2 A. Yes.

3 Q. Okay. How so?

4 A. Well, first of all, the focus is the child.

5 Parts of the body that are of interest. I talked about  
6 this in my direct testimony. It makes children randomly  
7 point to places. And from the research, especially with  
8 young children, it's associated with many false reports  
9 of touching.

10 Q. Okay.

11 A. When no touching occurred.

12 Q. Is there ---

13 A. And it doesn't increase children's reports of  
14 truth. It doesn't recruit -- increase true reports,  
15 which is the point.

16 Q. Is there a more advisable method by which  
17 forensic interviewers could work with children to figure  
18 out what words they use for the different parts of their  
19 body?

20 A. That's a good one. There's a good one. I mean,  
21 usually they have to name parts of the body.

22 Q. Okay.

23 A. Just to make sure. They want to understand what  
24 names they use.

25 Q. Okay. And would it be more appropriate just to

1 use -- to point to ones own body --

2 A. You can do that.

3 Q. -- as opposed to pointing at the drawing?

4 A. You can do that. Uh-huh.

5 Q. Okay.

6 A. But other people do use the drawings just to get  
7 the names of the buttocks and the genitals. The only  
8 problem is it then tells the child this is gonna be the  
9 focus of this interview, so there are other ways to deal  
10 with it.

11 Q. Would you agree that depending on their stage of  
12 development, children have different capacities for  
13 describing location?

14 A. Location on their bodies or location  
15 geographically?

16 Q. Location of say where things occur, say at home  
17 or at school or in this place or that place?

18 A. Yeah. I guess it makes sense. I don't know of  
19 any studies that have looked at that. But surely by  
20 four years old. I mean, to tell you the truth, I don't  
21 know. But, you know, we all mess after time we also all  
22 we -- adults even mess up location, right? Remember ---

23 Q. Oh, I do it all the time.

24 A. Exactly. So I don't know if it's a developmental  
25 issue.

1 Q. But you would agree that a younger child is less  
2 likely to provide as much detail about a location as  
3 would, for example, an older child, let alone an adult?

4 A. Yes.

5 Q. Okay.

6 A. Well, I don't know. Sorry, I don't know.

7 Q. Is there a particular kind of reaction that we  
8 should expect or look for from a child when they are  
9 asked about potential abuse or suspected abuse from a  
10 parent or other authority figure?

11 A. I know that there have been studies about  
12 children's demeanor during -- children's demeanor while  
13 disclosing abuse or being interviewed about abuse, and  
14 there's a huge variety of reactions. I don't know of  
15 any one reaction that people will say uh-huh that's it.

16 Q. Children react in different ways?

17 A. Yes.

18 Q. Okay. Do you agree that some children who have  
19 been sexually abused may deny that abuse?

20 A. Yes.

21 Q. Would you agree that some children may wish to  
22 avoid talking about abuse when confronted with it by  
23 denying that it occurred?

24 A. Well, I know that they don't talk about it.

25 Q. Would you agree that children may endeavor to

1     avoid talking about abuse by changing the subject or  
2     deflecting?

3         A.    I don't know.

4         Q.    Would you agree that a child's concept of time  
5     and the concept of a sequence of events is noticeably  
6     different from that of an adult?

7         A.    Yes.

8         Q.    Okay.

9         A.    Your concept of time, in other words.

10        Q.    Okay.  In what way might a child's concept of  
11     time differ from an adult?

12        A.    Well, they don't really understand, you know, the  
13     concept of a few years ago versus a few weeks ago or,  
14     you know, as they get older they know yesterday, they  
15     know the days of the week, but they don't have a good  
16     concept of time until eight or nine years old or older.

17        Q.    Well, even adults may have a bad concept of time  
18     if they're late to work everyday.

19        A.    (Laughs.)

20        Q.    If I recall correctly, one of the issues that you  
21     zeroed in on during your direct examination and in your  
22     report was the need for the forensic interview to  
23     terminate the forensic interviews when the child  
24     indicated that she was ready to, to go?

25        A.    Yes.



1 Q. All right. What should a forensic interviewer do  
2 when she receives from the child a partial disclosure of  
3 abuse or perhaps even a full disclosure of abuse --

4 A. Uh-huh.

5 Q. -- And that is followed by the child expressing I  
6 want to go, I want to leave?

7 A. Okay. Well, there was no full disclosure of  
8 abuse in these interviews.

9 Q. Okay.

10 A. So the point is moot.

11 Q. What about a partial disclosure of abuse?

12 A. What, he touched me? And then by a recantation  
13 and it's in all kinds of interviews? I don't think  
14 that's a question relevant to these interviews.

15 Q. Well, it is a little relevant because it's the  
16 circumstances of where we were in the interviews, what  
17 the forensic interviewer had heard from the child, which  
18 you described in your way, and then she's confronted  
19 with the child indicating that she wishes to terminate  
20 the forensic interview.

21 A. I don't, I don't want to really spend a lot of  
22 time on this because I have a plane to catch, but --

23 Q. Okay.

24 A. -- you can go through the transcripts yourself  
25 and decide about that, about when the child asks to

1 leave and what -- what's directly happened before that  
2 or after that and how many times she does it. I don't  
3 think that that is relevant to what's happening here.

4 Q. Okay.

5 A. But you can do the research if you want. When I  
6 go home I'm glad to do it. I think it's an interesting  
7 question.

8 Q. I apologize. I'm trying to think of a good way  
9 to frame my next question here. It sounds to me that  
10 you would put little value or observe little correlation  
11 between **Minor Victim** requests to terminate the interview and  
12 the broaching of the topic of Danny "D"; is that  
13 correct?

14 A. No.

15 Q. Okay.

16 A. No.

17 Q. Is there value to the forensic interviewer in  
18 recognizing that when she approaches the topic of Danny  
19 "D" that **Minor Victim** shortly thereafter seeks to leave the  
20 interview?

21 A. Okay. Let's put it this way, the interviewer is  
22 always broaching the topic of Danny "D". I mean, it's  
23 not like, you know, every time the question comes up the  
24 child says I want to leave. That's not what happens.

25 Q. Well, you would agree that the forensic

1 interviewer spoke with [Minor Victim] about completely  
2 unrelated, perhaps even mundane things, correct? For  
3 example, they spoke about Flopsy the rabbit.

4 A. Yeah, at the beginning.

5 Q. Spoke about -- right.

6 A. Yeah.

7 Q. Spoke about her father, Mr. Jolley, building a  
8 pond or pool or something like that.

9 A. Yeah, at the beginning. In the first interview.

10 Q. Okay.

11 A. Yeah.

12 Q. And they would talk about her drawings?

13 A. Sort of, yeah.

14 Q. And they would talk about Spring Fling?

15 A. I don't remember, but it's all in there.

16 Q. That one was very brief.

17 A. Okay.

18 Q. Easy to miss. Are there particular tools or  
19 methods that a forensic interviewer should use to try  
20 and keep the child's attention or is that part of just  
21 the entire setting that they have to establish ahead of  
22 time?

23 A. You'll have to ask Dr. Lamb that question.

24 Q. Okay. I earlier asked you if there was a common  
25 way in which children might react when they are abused

1 and asked about it. Is there a common way in which  
2 children might react if they were asked about abuse and  
3 they were, in fact, not abused?

4 A. Ah-hah. That's an interesting question. I don't  
5 know. I mean, many children who are asked about abuse  
6 who falsely claim yes, some of them cry, some of them  
7 sound flippant. I mean, I've, I've seen everything. So  
8 I don't think that there is a common way for either.

9 Q. You indicated that this is your first time  
10 getting to visit the great state of South Carolina,  
11 correct, and testify?

12 A. And testify, yes.

13 Q. I had to backtrack there for a minute because I  
14 didn't know if you've been to Charleston or anywhere  
15 else.

16 A. Oh, I've been to Charleston.

17 Q. Oh, wonderful.

18 A. Yeah.

19 Q. Glad to have you. Are you familiar with the law  
20 in the state of South Carolina as it relates to forensic  
21 interviews and their admissibility and courts in General  
22 Sessions?

23 A. I am not.

24 Q. All right. Are you familiar with the law in the  
25 state of South Carolina as it relates to the admission

1 of hearsay of prior disclosures of sexual abuse?

2 A. Vaguely, but not enough. I leave all that for  
3 the lawyers.

4 Q. Okay. Were you aware that when admitting hearsay  
5 of prior disclosures of sexual abuse that they have to  
6 be limited very strictly to time and place and no other  
7 details?

8 A. No.

9 MR. GROSE: I'm gonna object to that question as  
10 that's a misleading question, Your Honor.

11 THE COURT: Restate the question, if you would.

12 MR. JAMES: I'm having some difficulty. I'm not  
13 certain what it is I said that was misleading.

14 THE COURT: And I'm not saying it was, I'm just  
15 saying if you would restate it.

16 MR. GROSE: Well, he asked a question that goes  
17 to a rule, but he is ignoring the separate statute and  
18 which -- so it's a tricky misleading question. And  
19 she's already testified she leaves that stuff to the  
20 lawyers. So I...

21 BY MR. JAMES:

22 Q. Well, I'll ask this question instead then.

23 A. Okay.

24 Q. You leave that stuff to the lawyers.

25 A. Uh-huh.

1 Q. But your position here today is that the lawyer  
2 in this case absolutely, positively should have admitted  
3 the forensic interview videos?

4 A. Absolutely.

5 Q. Okay. But so you wouldn't leave that to the  
6 lawyers?

7 A. I mean, unless there was a statute that said he  
8 couldn't admit them.

9 Q. Okay. But you agreed earlier in this examination  
10 that to a certain extent the nature of the forensic  
11 interview is governed by the laws and practices of each  
12 state, correct?

13 A. Okay. So I don't know about that, but what I can  
14 tell you is this. Is that if -- I don't really care  
15 what the positions are. An interview is leading  
16 regardless of what the laws are. I mean, it's still  
17 leading. And so, you know, if someone says well, we use  
18 it because they say it's okay to do it, I say it doesn't  
19 matter that they say it's okay to do it. It's what the  
20 scientific evidence is. And it's still gonna have the  
21 same effect on the child regardless of the statutes, the  
22 paradigms and the law. So, you know, that's too bad.  
23 And then it's up to the lawyers to argue about that.

24 Q. As we so often do.

25 A. Okay.

1 MR. JAMES: Beg a moment of the Court's  
2 indulgence.

3 BY MR. JAMES:

4 Q. Earlier you indicated that that -- I'm stumbling  
5 over my own tongue right now.

6 A. Okay.

7 Q. I apologize.

8 A. Take your time.

9 Q. Earlier you indicated that there are studies  
10 based on verified examples of sexual abuse, correct?

11 A. Right.

12 Q. How is it that the example of sexual abuse in  
13 those cases is verified?

14 A. Well, okay. So, it's not -- the way they do this  
15 is that these are clinical studies where they'll have a  
16 bunch of kids who come into a clinic and they're  
17 interviewed and they look at, you know, whether the kid  
18 disclosed during an interview, yes or no. And then what  
19 the researchers or even the clinicians do is that they  
20 go through the file to see is there medical evidence, is  
21 there eye witness evidence to rule out sexual abuse or  
22 to rule in, even to rule in sexual abuse and a couple of  
23 other things.

24 So, I mean, it's kind of wobbly. But, you know,  
25 you just can't take a group of kids who have disclosed

1 or not disclosed and all you can do is put them in a  
2 disclosure and a no disclosure group. You can't put  
3 them into an abused group and a non-abused group. But  
4 you can kind of stuff, file it away a little bit more.

5 So there are a number of studies where we know  
6 something about the population. And, for example, there  
7 was a daycare case where there was a lot of suggestion,  
8 but they count that as children making disclosures.  
9 Well, they were making false disclosures.

10 And there are other kinds of studies where we  
11 know something about the population or about the methods  
12 used to interview the children. And we say these are  
13 not good studies to include if you want to calculate  
14 rates of true disclosures. It's, it's a difficult  
15 subject.

16 Q. You indicated you have been consulted on a number  
17 of occasions about providing expert testimony, correct?

18 A. Yes.

19 Q. Okay. Have you ever provided expert testimony on  
20 the behalf of any prosecutorial authority?

21 A. Once.

22 Q. Once, okay. May I ask which one?

23 A. Twice, for the same -- no, it was an armed  
24 services case.

25 Q. Okay.



1           A.   I have consulted with prosecutors but not  
2 specifically to take it any further than phone  
3 conversations and stuff like that.

4           Q.   Going back to the studies where we are confirming  
5 sexual abuse, these would be based on actual case files  
6 of actual children of actual alleged abuse?

7           A.   Yes.

8           Q.   And so it wouldn't be sort of a research setting  
9 where we're artificially creating some semblance of  
10 abuse?

11          A.   That's correct.

12          Q.   Okay.  Are there studies that attempt to  
13 approximate abuse?

14          A.   In a more controlled study?

15          Q.   In a more controlled environment, dangerous game  
16 though that may be to play?

17          A.   Yeah.  Well, I don't really know.  I mean,  
18 Michael Lamb will talk about all his studies where  
19 they've used, you know, very stringent interview  
20 protocols and they come up, you know, very similar rates  
21 of disclosure among them.  I don't know how many of  
22 those they think are true cases or whatever.  I can't  
23 answer that question.

24          Q.   All right.

25          A.   Are we almost finished?

1 Q. I am closing in on the end, I believe.

2 A. Okay. Because otherwise I have to leave and  
3 cancel my plane.

4 Q. You indicated that it is preferable for forensic  
5 interviews to be electronically reported, correct?

6 A. Yes.

7 Q. All right. Is that absolutely necessary in the  
8 therapeutic context where there might not be anticipated  
9 litigation?

10 A. It's not necessary. It would be lovely but I  
11 don't know who has time to transcribe them, you know.

12 Q. In the event that more than one forensic  
13 interview is necessary --

14 A. Okay.

15 Q. -- and so we get to a second one --

16 A. Uh-huh.

17 Q. -- how is it that the forensic interviewer should  
18 resume in that second interview, or should they start  
19 over anew like a ---

20 A. I don't know.

21 Q. Okay.

22 A. I really don't know.

23 Q. Okay. You indicated that an interviewer has bias  
24 or is subject to bias if they proceed into the forensic  
25 interviewer interview with a primary hypothesis driving

1     them; is that correct?

2           A.    That's correct.

3           Q.    But most forensic interviews are prompted by some  
4     disclosure of abuse, correct?

5           A.    Yes.

6           Q.    Okay.  So is it -- are you saying that all  
7     forensic interviewers are subject to those bias?

8           A.    All forensic interviewers know that there's  
9     concern that there was sexual abuse and they know that  
10    their job is to somehow provide evidence for or against  
11    that claim.  But their bias goes when, you know, the  
12    child says something that they think is indicative of  
13    and that they then pay attention only to confirmatory  
14    evidence and they don't try to test an alternative  
15    hypothesis or they actually neglect disconfirmatory.

16           Also, in the case of forensic interviewers, I  
17    think it is also the case that most of the cases that  
18    they see -- actually, it's not true in Baltimore, it  
19    wasn't most of the cases.  But a lot of the cases they  
20    see are sexually abused children.  So it's not as though  
21    they're looking for a rare disease.  So it's on their  
22    mind but, you know, there's a probability that this  
23    child is abused.  And...

24           Q.    You indicated that there were a great number of  
25    denials and recantations by Minor Victim --

1 A. Uh-huh.

2 Q. -- in the course of the forensic interviews.

3 A. Right.

4 Q. What are you including in your determination of  
5 what is a denial? Are you including when she says I  
6 don't know?

7 A. Yeah. I don't know or no, that never happened or  
8 I don't know. It's not a disclosure. I guess we can  
9 count a don't know, disclosures, and denials are off  
10 topic. That's it? Okay.

11 COURT REPORTER: I didn't hear the end.

12 THE WITNESS: Okay. Huh?

13 COURT REPORTER: I didn't hear the end of what  
14 you said.

15 THE WITNESS: I didn't say anything.

16 MR. JAMES: I believe she was just asking me if  
17 that was the extent of my question.

18 Beg a moment of the Court's indulgence. I'm  
19 going through a number of questions, and as I do I'm  
20 identifying some of them as potentially more appropriate  
21 topic relating to Dr. Lamb. I'm trying to save you a  
22 bit of time.

23 THE WITNESS: Okay, thank you.

24 BY MR. JAMES:

25 Q. Nathan was brought up at least during the first,

1 second, and third forensic interviews, correct?

2 A. I remember first and second, yes.

3 Q. Okay. You would agree that the forensic  
4 interviewer, at least for a little bit, explored her  
5 stories about Nathan, correct?

6 A. I don't know if she explored, it's just that  
7 Nathan kept coming up. It was never tell me about  
8 Nathan. Who is Nathan?

9 Q. Well, she did elicit that Nathan was a classmate,  
10 correct?

11 A. Okay. There we go. That was good.

12 Q. Am I correct or do I misremember?

13 A. I don't have the whole thing before me here.

14 Q. Okay.

15 A. I don't. You'll have to go back and look.

16 Q. You indicated earlier in your review of Kim  
17 Rosborough's notes that **Minor Victim** started to receive  
18 therapy at around October 2010 and that continued until  
19 around March 2011; is that correct?

20 A. That's my understanding.

21 Q. All right. And that she improved over the course  
22 of that therapy?

23 A. Yes.

24 Q. All right. And I cannot recall if you expressed  
25 a belief as to why she improved over the course of that

1 therapy.

2 A. I would hope it was the therapy.

3 Q. Okay. Were you aware that at that time or at  
4 about that same period of time the visitations with the  
5 applicant, Mr. Spade, had been suspended?

6 A. No. Uh, maybe.

7 Q. Okay. Were you aware that it was in November of  
8 2010, very shortly after the therapy began, that the  
9 Jolleys sought to achieve a protective order such that  
10 visitation was suspended?

11 A. Yes.

12 Q. And do you have copies of the video or  
13 transcripts of the forensic interviews or both?

14 A. Both.

15 Q. Okay, great. And would you agree that each of  
16 the interviews lasted between 25 and 45 minutes?

17 A. No. There was one that was an hour and 15  
18 minutes.

19 Q. Would you be surprised if I told you that none of  
20 them are quite that long?

21 A. Yeah.

22 Q. Okay.

23 A. Anyway. I just took it off the meter. Might  
24 have taken -- maybe it took ten minutes for them to come  
25 in and get settled.

1 Q. Do you recall why it is that the grandmother  
2 asked [Minor Victim] about Danny "D", about Mr. Spade?

3 A. No, I don't.

4 Q. Okay. Did you have a transcript of the  
5 termination of parental rights hearing?

6 A. I did.

7 Q. Okay. Do you recall testimony in that proceeding  
8 that the grandmother asked [Minor Victim] about Danny "D"  
9 because she overheard [Minor Victim] on the phone with him  
10 telling him that he's bad and does bad things?

11 A. Oh, okay. There was a phone call and there was  
12 concern about the phone call.

13 Q. Okay. Do you recall in your review of the record  
14 testimony that indicated the applicant threatened cannot  
15 let [Minor Victim] see the parents if she was not compliant with  
16 his requests and demands?

17 A. Well, that's what she said.

18 MR. JAMES: Okay. Beg a moment of the Court's  
19 indulgence.

20 BY MR. JAMES:

21 Q. Going back in time briefly to our discussion  
22 about the clinical studies and confirming sexual abuse  
23 through corroborating evidence, how often is it that  
24 sexual abuse can be confirmed through corroborating  
25 evidence?

1           A.   Well, sometimes there is medical evidence.  
2           Sometimes there are eyewitnesses.   Sometimes there are  
3           confessions.

4           Q.   But all so often there is not any medical  
5           evidence due to delay, correct?

6           A.   Sometimes there is.   I mean, you know, there's  
7           not always delay.

8           Q.   Right.   And oftentimes there's not eyewitnesses  
9           because --

10          A.   No.   I wouldn't ---

11          Q.   -- crimes are committed in private?

12          A.   Yeah.   I'm saying mostly it's on -- mostly it's  
13          on the basis of the child's word, but also with other  
14          facts coming in.   But the child's part -- if the child  
15          says no, it didn't happen, you're not gonna bring my  
16          case to court.

17               MR. JAMES:   I have no further questions for this  
18          witness.   Thank you very much for your patience and  
19          cooperation.

20               THE WITNESS:   Thank you.

21               THE COURT:   Any redirect limited to what he went  
22          into?

23               MR. GROSE:   No, sir, no questions.   I know Dr.  
24          Bruck is wanting to catch her plane.

25               THE COURT:   All right, ma'am, thank you very



1 much. Watch your step as you're stepping down.

2 THE WITNESS: Okay, thanks for the advice.

3 THE COURT: Any reason why this witness cannot be  
4 excused?

5 MR. JAMES: She can be excused.

6 THE COURT: All right. Thank you, ma'am.

7 MR. JAMES: Wish her a smooth and easy flight  
8 back home.

9 THE WITNESS: Well, thank you.

10 (Witness leaves witness stand and courtroom.)

11 THE COURT: All right. Let's just step down for  
12 about five minutes and be right back.

13 MR. JAMES: Thank you, Your Honor.

14 (A recess was had from 2:55 p.m. - 3:01 p.m.)

15 THE COURT: Lawyers approach.

16 (Bench conference was held off the record.)

17 THE COURT: Is the applicant ready to call their  
18 next witness?

19 MR. GROSE: Yes, sir. I call Meredith  
20 Thompson-Loftis.

21 THE COURT: Ma'am, just come right up here.

22 (Witness comes forward.)

23 MR. GROSE: Judge, she was qualified as an expert  
24 in trial. I'm not planning to go through all of that  
25 since you already have that.

1 THE COURT: Just place your right hand on the  
2 Bible and raise your left hand. (Complies.)

3 Do you solemnly swear that the testimony you're  
4 about to give the Court will be the truth, the whole  
5 truth, and nothing but the truth?

6 THE WITNESS: I do.

7 THE COURT: All right, thank you. Watch your  
8 step as you're stepping up, but have a seat in the red  
9 chair. Pull the red chair up to the microphone.

10 Tell me her areas of expertise.

11 MR. GROSE: She is the counselor that treated  
12 **Minor Victim** beginning -- and I'm gonna cover the dates, but  
13 beginning roughly March or April of 2011 up to and  
14 possibly beyond the trial. Although I don't know that  
15 answer.

16 THE COURT: Okay.

17 MEREDITH THOMPSON-LOFTIS,  
18 having been duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. GROSE:

21 Q. Can you state your full name for the record,  
22 please?

23 A. Meredith Thompson-Loftis.

24 Q. And how are you employed?

25 A. I'm self-employed. I'm a licensed professional

1 counselor in Greenville.

2 Q. Okay. And did you treat **Minor Victim** who was  
3 formerly known as **Minor Victim**

4 A. Yes, I did.

5 Q. Okay. And what days -- when did you begin  
6 treating her?

7 A. I started seeing her in May of 2011.

8 Q. Okay. And how long -- when did your treatment of  
9 her end?

10 A. I believe it was in the latter part of '14.

11 Q. Okay. And do you have a date on that?

12 A. Oh, I'm gonna say it was May of '14. It was  
13 right around -- it was almost -- it was April or May, I  
14 believe.

15 Q. So it wasn't very long after the trial?

16 A. No. Not terribly long, no.

17 Q. Okay. And between when you started treating her  
18 in May until the time of trial, do you recall the number  
19 of visits that you had with her?

20 A. I believe -- I believe it was about 71 sessions.

21 Q. Okay.

22 A. Roughly.

23 Q. And you made at least some notes or kept some  
24 records of your meetings with **Minor Victim**

25 A. I did.

1 Q. Okay. And in the time that she was -- that you  
2 were treating her, did she talk to you about anybody  
3 named Cara?

4 A. Yes, sir.

5 Q. Okay. And if I could have you look at your notes  
6 from February 23rd of 2012. Beginning about there.

7 A. Could you repeat that date?

8 Q. February 23rd of 2012.

9 A. Okay.

10 Q. Okay. And did she make any statements to you?  
11 When I say "she", did [Minor Victim] make any statements to you  
12 about Cara?

13 A. One moment. I believe from my notes it says that  
14 the mother had told me about something that [Minor Victim] had  
15 said, but she, at that time she had not made a  
16 disclosure to me --

17 Q. Okay.

18 A. -- about Cara.

19 Q. All right. And did you talk to [Minor Victim] about  
20 Cara?

21 If I could approach?

22 THE COURT: (Nods head up and down.)

23 THE WITNESS: I believe I did, yes.

24 BY MR. GROSE:

25 Q. Okay. I'm looking at that. And then I'm looking

1 at some of these notes.

2 A. Certainly. I have those, too.

3 Q. Okay.

4 MS. JAMESON: Can I see what ---

5 MR. GROSE: Yeah.

6 MS. JAMESON: Is it 24 and 25?

7 MR. GROSE: Yes. And also 27. It actually goes  
8 to something else, but yes.

9 MS. JAMESON: Okay, thank you.

10 BY MR. GROSE:

11 Q. All right. So what did Minor Victim tell you about  
12 Cara?

13 A. February 23rd of 2012, in her trauma book she  
14 reported that Cara was laughing. Do you want me to read  
15 it to you?

16 Q. Yeah. Please, please do.

17 A. Sure. Starting on page 24 of her trauma book she  
18 reported: "One time Danny "D" told Jaden to sit in the  
19 bathtub with him. He talked to Jaden and he made him  
20 sit there and touch his own private part. He told him  
21 what to do to it. Danny "D" put soap in the tub and on  
22 their private parts."

23 And then on page 25: "And then he put soap on my  
24 private part and tried to put his, Danny "D", private in  
25 my private part." And she's referring to her bottom.

1 "Cara was laughing at me crying. I was crying because  
2 Danny "D" was trying to put it in my bottom."

3 Q. Okay. So is it fair to say that [Minor Victim] was  
4 reporting that Cara was a witness to potential sexual  
5 abuse?

6 A. Well, I don't believe at that time that I  
7 inferred that. She was not specific at that time as to  
8 why Cara was laughing. At that time she wasn't.

9 Q. Okay. But he said -- [Minor Victim] said that Cara was  
10 in the room when that was happening.

11 A. I believe that's what she said, yes.

12 Q. Okay. As a mandatory reporter, did you report  
13 that to any authorities?

14 A. Well, I believe that wasn't a disclosure at that  
15 time. She reported being in a hotel room, if I'm not  
16 mistaken, but wasn't sure about being in the same room.

17 Q. Okay. Well, but looking at the trauma  
18 narrative --

19 A. Uh-huh.

20 Q. -- this is disclosure of Cara being in the room  
21 when Danny "D" is trying to penetrate [Minor Victim] is that  
22 correct?

23 A. I have to go back and read it again. I'm sorry.

24 Q. Okay. I mean, it says: "And then he put soap on  
25 my private part and tried to put his -- and it has Danny

1 D. in parentheses -- private part in my private part,  
2 bottom. Cara was laughing at me crying. I was crying  
3 because Danny "D" was trying to put it in my bottom."

4 A. Well, in my experience and in my expert opinion,  
5 I would say that a child, who at the time I believe was  
6 four, maybe five, you have to look at a lot of different  
7 things. You have -- you can't infer that a child saying  
8 -- cause she didn't say Cara -- I don't see her saying  
9 right there that Cara was -- she said she was laughing  
10 at me crying, but she didn't say when she was crying  
11 around Cara.

12 Q. Okay. Well, did you followup on that and get  
13 more clarity?

14 A. I'll have to read forward. I'm sorry. On page  
15 29 of the narrative she talks again about Cara laughing.  
16 And on page 31 she says: She -- Cara in parentheses --  
17 is laughing at me cause she thought -- or Cara thought  
18 Danny D. was doing funny things. She saw it but it was  
19 not funny, is what she said.

20 Q. Okay.

21 A. But it doesn't say what "it" is.

22 Q. All right.

23 A. If that's the funny things or -- I mean, I don't  
24 think it was very clear.

25 Q. Okay. And that was on a different day then,

1 right?

2 A. Correct.

3 Q. I mean, page 31 of the trauma narrative  
4 corresponds with May 10 of 2012; is that right?

5 A. I believe so, yes.

6 Q. All right. So **Minor Victim** it's fair to say, has made  
7 multiple disclosures about Cara?

8 A. She had -- she did make multiple disclosures with  
9 Cara's name in reference, yes.

10 Q. Okay. And so the question that I have is with  
11 these multiple disclosures about Cara, did you ever  
12 report that to anyone?

13 A. No. Because I don't believe at that point that  
14 would have been a reportable, based upon what I'm even  
15 reading now, that's not a reportable offense. There's  
16 not a, a disclosure that implicates that she touched  
17 private parts or that she was definitely in the room or  
18 saw specifically what it was.

19 Q. Right. And so this is a potential witness to  
20 sexual abuse, possibly, from what we have in these  
21 reports; is that correct?

22 A. It's possible.

23 Q. Okay. And certainly somebody can be charged, at  
24 least in South Carolina, if it were to happen here with  
25 abuse and negligent for not reporting something of that



1 nature; is that correct?

2 A. I don't understand your question, sir.

3 Q. Well if you witness, if you are an eyewitness to  
4 child abuse and don't report it, the person who's an  
5 eyewitness could be charged with negligent of a child.

6 A. I believe so.

7 Q. Okay. All right. And I want to ask you to go to  
8 your treatment record for November 3rd of 2011.

9 A. Okay.

10 Q. Okay. And if you could read it and tell us  
11 what's in your treatment notes there.

12 A. Under treatment notes section?

13 Q. Yeah, at the bottom of the page.

14 A. "Reviewed sexual behavior rules, trauma book page  
15 19, 20, 21, 22, 23. See attached. Client reported via  
16 father making client perform oral sex to him in the  
17 bathroom at pool of hotel in Greenville."

18 Q. Okay. And so you wrote down Greenville; is that  
19 correct?

20 A. That's what I wrote, yes.

21 Q. Okay. And I want to ask you to take a look at  
22 your trial testimony. And if you could look at page 270  
23 of the transcript beginning on line 11 and read through  
24 line 21 just to refresh your memory.

25 A. Out loud or to myself?

1 Q. Just read it to yourself for a moment.

2 THE COURT: I'm sorry, what line, Mr. Grose?

3 MR. GROSE: And there's two numbering systems.  
4 I'm looking at the transcript number and beginning at  
5 line 11.

6 THE COURT: Where it's "at any point"?

7 BY MR. GROSE:

8 Q. Okay. And in there you were asked as to whether  
9 or not **Minor Victim** was specific to a location?

10 A. Yes.

11 Q. And the question was asked, "is that location in  
12 South Carolina?" Is that correct?

13 A. Yes.

14 Q. And you said it was?

15 A. Yes.

16 Q. You did not testify that you had a treatment  
17 record with **Minor Victim** saying that it had happened at a  
18 hotel in Greenville, did you?

19 A. I don't believe from what I'm reading that I was  
20 asked that question.

21 Q. Okay. Did you have -- in preparing for trial,  
22 did you have any conversations with the prosecution team  
23 about how this line of questioning about location was  
24 gonna be handled?

25 A. I don't remember. It was too long ago. I don't

1 remember. I know I had conversations with the  
2 prosecution, but I don't remember specific as to what  
3 they were.

4 Q. Okay. When you say you had conversations with  
5 the prosecution, was that in preparing your testimony  
6 for trial?

7 A. I'm speculating. I don't remember. I know I was  
8 told to fax records. I know I was told what time to be  
9 here. I was told -- I mean, these would be normal  
10 things that I would have done on a regular basis with  
11 the prosecution.

12 Q. Okay. And do you ever have conversations with  
13 the prosecution about what the substance of your  
14 testimony is gonna be at trial?

15 A. I don't -- I mean, I don't know specific to this,  
16 but I don't believe that I do. Typically it's a matter  
17 of, you know, we're gonna go through your work and, you  
18 know, what I've reported.

19 Q. It's ---

20 A. If there was clarification, but that would have  
21 been an answer.

22 Q. Right.

23 A. I mean, for a question.

24 Q. All right. And so if, if you had been asked a  
25 question as to where Minor Victim said the hotel was, you

1 would have to have, based on your notes, from November  
2 3rd of 2011, said that that was at a hotel room in  
3 Greenville; is that correct?

4 A. If I was asked that question?

5 Q. Yeah.

6 A. I believe so, yes.

7 Q. Beg the Court's indulgence for a moment. That's  
8 all the questions I have of this witness. Thank you.

9 CROSS-EXAMINATION

10 BY MS. JAMESON:

11 Q. Good afternoon, Ms. Thompson-Loftis. I'm Megan  
12 Jameson. I work for the attorneys representing the  
13 State in this case. You testified at the TPR hearing,  
14 second TPR hearing in 2012, correct?

15 A. Yes, I did.

16 Q. Have you had an opportunity to review your  
17 testimony or transcript of that?

18 A. No, ma'am.

19 MS. JAMESON: Your Honor, may I approach the  
20 witness?

21 THE COURT: (Nods head up and down.)

22 BY MS. JAMESON:

23 Q. I'm handing you the transcript from the Family  
24 Court hearing in 2012, that has been admitted into the  
25 record in this case. If you'll review page 142 to

1     yourself, specifically lines 16 through the end of the  
2     page.

3             A.    Okay.

4             MR. GROSE:  I'm sorry, could you say the page  
5     number again, please.

6             MS. JAMESON:  Yes.  I apologize.  Page 142 of the  
7     2012 TPR hearing.

8             MR. GROSE:  Thank you.

9             THE WITNESS:  Okay.

10    BY MS. JAMESON:

11            Q.    At that time were you asked by Mr. Shabel where  
12    the hotel abuse in South Carolina occurred?

13            A.    I believe, according to that, yes, I was.

14            Q.    And you responded with Greenville somewhere,  
15    Greenville area.  I don't know a specific area, correct?

16            A.    Correct.

17            Q.    And you said that Minor Victim had disclosed here, so  
18    you were assuming the Greenville area, correct?

19            A.    Correct.

20            Q.    Do most four-year-olds have the ability to  
21    differentiate between Greenville and Spartanburg?

22            A.    As far as approximate location, like whether  
23    you're in Spartanburg County or Greenville, no,  
24    absolutely not.  If it's something along the lines of  
25    we're in Greenville having fun at the park, she may

1 refer to that as being told Greenville, you know, or  
2 where she lives is in Spartanburg.

3 Q. And she had also lived in Anderson, correct, at a  
4 certain point in time?

5 A. I believe so.

6 Q. So she lived in various areas around the Upstate  
7 and Greenville region, correct?

8 A. Correct.

9 Q. So do you have any specific recollection that she  
10 specifically at four years old in 2011 told you the  
11 hotel was in Greenville?

12 A. I honestly don't have a specific recollection.  
13 It could have been that when she said here I assumed  
14 Greenville and that's where -- I don't. It's just so  
15 long ago.

16 Q. And that's what you testified to in 2012,  
17 correct?

18 A. Correct.

19 Q. Which is much more contemporaneous than now eight  
20 years later?

21 A. Correct.

22 Q. Is Minor Victim the first four year old you've worked  
23 with?

24 A. No. No.

25 Q. Is it common for four year old's to have trouble

1 describing specific geographic locations?

2 A. Is it common for them to have trouble?

3 Absolutely, yes.

4 Q. And it's not your job to investigate where the  
5 hotel was, correct? That's something that law  
6 enforcement and the prosecution would investigate,  
7 correct?

8 A. That is correct.

9 Q. And **Minor Victim** came to see you almost immediately  
10 after her forensic interview at the Child Advocacy  
11 Center, correct?

12 A. Correct.

13 Q. What information did you -- did you get any  
14 information from the Child Advocacy Center based on her  
15 referral?

16 A. The only information, I believe, I'd have to go  
17 back and double check for sure -- I used to work at the  
18 Children's Advocacy Center in Spartanburg for about  
19 five-and-a-half years. And when I went into complete  
20 private practice, I did receive a good amount of  
21 referrals because I practice trauma therapy. Let's see.  
22 Per my notes, it just says referral from the Advocacy  
23 Center.

24 Q. So you didn't receive any specific details of  
25 disclosures or partial disclosures that **Minor Victim** had made?

1       A. No. I typically don't. A lot of times I don't  
2 ask for forensic assessments when I receive referrals  
3 like this, mainly because I think it keeps it cleaner  
4 that way. I mean, whatever **Minor Victim** tells me, she would  
5 have told me independent of what she had told the  
6 Advocacy Center.

7       Q. You were seeing **Minor Victim** in a therapeutic session,  
8 correct, not a forensic role?

9       A. Correct. Uh-huh.

10      Q. What type of -- was there a particular field of  
11 therapy that you employed with **Minor Victim**

12      A. We did. We did the trauma focus, cognitive  
13 behavioral therapy, which was the treatment protocol.  
14 Still is.

15      Q. And why did you select that?

16      A. That's what I was trained in through the Advocacy  
17 Center. When I worked with victims at the Advocacy  
18 Center, that's the protocol that we used.

19      Q. So you didn't receive any specific information  
20 from the Child Advocacy Center, what about from the  
21 Jolleys?

22      A. The information I would have gotten from the  
23 Jolleys would have been a normal family assessment just  
24 asking about what the reasons are for her to be here.  
25 And I did know she was -- when I got a referral from the



1 Advocacy Center, it's typically, unless specific it's  
2 because there's either been a disclosure of sexual abuse  
3 or some sort of concern for sexual abuse.

4 Q. Could it have been physical?

5 A. Absolutely. Physical as well.

6 Q. When you said the Jolleys did a normal family  
7 assessment, did they disclose any sexual abuse in that  
8 family assessment?

9 A. I, I don't remember. Honestly I'm not sure. I  
10 don't have it written down.

11 Q. And she started seeing you almost eight years ago  
12 to the very month, correct?

13 A. Right. In May of, May 17th of 2011.

14 Q. And it looks like from review of the various  
15 transcripts your first meeting was just with the  
16 Jolleys, correct, to get background information?

17 A. I believe so, yes.

18 Q. And were either Heather or David Jolley present  
19 in **Minor Victim** therapeutic counseling sessions with you?

20 A. No. I mean, they would transport her, but there  
21 was -- there might have been one or two where **Minor Victim** I  
22 think, if I believe I remember correctly, **Minor Victim** had  
23 presented her trauma book to her mom and step dad, but I  
24 don't recall. I mean, typically my work was directly  
25 and individually with **Minor Victim**

1 Q. And the trauma book that we've looked at a few  
2 pages of, is that a standard part of that cognitive  
3 focused trauma therapy that you used?

4 A. It is one part, yes.

5 Q. What are some other parts of that therapy  
6 approach?

7 A. Well, it depends on the child's age. You know,  
8 obviously I would not do a trauma book with a 15 or a  
9 16-year-old. You know, it would be more talk therapy or  
10 some other things. You know, we can work on coping  
11 skills, breathing exercises, relaxation exercises. We  
12 did a lot of art work, expressive feelings for art. I'm  
13 Looking back to see what else I did. We reviewed sexual  
14 behaviorals and boundaries. That was something we did a  
15 lot.

16 Q. And it looks like most of your notes from the  
17 counseling sessions and from the trauma book include  
18 pictures that she's drawn, correct?

19 A. That is correct, yes.

20 Q. Did Minor Victim feel more comfortable discussing the  
21 trauma with you when she was given the ability to draw?

22 A. Yes. And that's typical with most four-and-a  
23 half, five-year-olds. And they're able to express  
24 themselves through their pictures.

25 Q. Do you recall how long into therapy it was before

1 she made her first disclosure of sexual abuse to you?

2 A. I would have to go back and look.

3 Q. If the transcripts reflect it was a month or two  
4 in, does that sound accurate?

5 A. That sounds about right, yes.

6 Q. The therapy pages 24, 25, and 27 discussing Cara,  
7 this was all Cara laughing at abuse or potentially  
8 observing abuse, not her actually abusing **Minor Victim**  
9 correct?

10 A. I believe so, yes.

11 Q. And I believe you testified it's not clear  
12 whether Cara was laughing while the abuse was going on  
13 or at some later time, correct?

14 A. That's my interpretation looking at it this many  
15 years later. I believe so, yes.

16 Q. And do you recall from reviewing your notes  
17 anything about Cara giving **Minor Victim** a bath and turning the  
18 bath water green or something like that?

19 A. I did. That was later on in her book.

20 Q. Do you recall any, any portions of that  
21 discussion with **Minor Victim**

22 A. I would have to look back and see what I wrote.

23 Q. So it's possible this could have been Cara trying  
24 to soothe **Minor Victim** when she was visiting with her,  
25 correct?

1 A. I think that is quite possible, yes.

2 Q. Thank you. Are you aware of whether [Minor Victim] ever  
3 went to Virginia to visit Mr. Spade and Cara?

4 A. I, I don't remember. I'm sorry. I want to say  
5 yes, but at the same time everything I remember about  
6 this was South Carolina.

7 Q. And there's nothing in these therapy notes to  
8 indicate that Cara ever abused [Minor Victim] alone, correct?

9 A. No. I, I didn't see any of that.

10 Q. So you don't have any specific notes referencing  
11 abuse that occurred in Virginia?

12 A. I can go back and look. I want to say no, but I  
13 don't want to answer incorrectly. I just don't -- it's  
14 been so long, I just don't remember. If it's in here  
15 and I said it, then it happened, but I don't remember  
16 off hand.

17 Q. One of those pages, I believe 24, 25, references  
18 someone named Jason, correct?

19 A. Jaden?

20 Q. Yes.

21 A. Yes. Uh-huh.

22 Q. Who is Jaden?

23 A. I believe that is, if I remember correctly, that  
24 is [Minor Victim] stepbrother or it was Cara's son.

25 Q. Or half brother perhaps?

1           A.   Half brother maybe.   That sounds about right.

2           Q.   And if you'll look at page 24, that appears to be  
3 a reference that [Minor Victim] is disclosing from sexual abuse  
4 that occurred to Jaden while she was there, correct?

5           A.   Yes.

6           Q.   Were you aware of any reports of abuse of [Minor Victim]  
7 in Virginia?

8           A.   I don't know.   I don't remember.   And I hate to  
9 even say.   I just don't remember.   I don't believe so.

10          Q.   And those pages in the trauma book reference Mr.  
11 Spade bathing with the children, correct?

12          A.   Yes.

13          Q.   And touching their private parts, correct?

14          A.   Correct.

15               MS. JAMESON:   A moment of indulgence.   No further  
16 questions.

17               THE COURT:   Any redirect limited to what she went  
18 into?

19               MR. GROSE:   Yeah, I do.   It'll be fairly brief.

20                         REDIRECT EXAMINATION

21               BY MR. GROSE:

22           Q.   You were aware of when you first -- let me back  
23 up.   The referral was from the Child Advocacy Center; is  
24 that correct?

25           A.   Yes.

1 Q. And as part of the initial assessment or the  
2 initial intake, you filled out paperwork indicating that  
3 SOVA was gonna be paying for the treatment; is that  
4 correct?

5 A. I believe so, yes.

6 Q. Okay. And SOVA -- well, let me just -- I'm  
7 looking at pages -- well, one page I'm looking at on the  
8 record on appeal is for 400 and -- I'm sorry, 335, Your  
9 Honor.

10 Actually, if we turn back a page. So we've got  
11 records filled out on May 17th, right?

12 A. Yes.

13 Q. And then on your intake you're indicating that  
14 SOVA is going to be the one paying for the services; is  
15 that right?

16 A. Correct.

17 Q. And you have a release -- and I'm looking at page  
18 348 of the record, Your Honor.

19 You have a release that's allowing you to talk,  
20 release information to the Child Advocacy Center to  
21 Nikki Cantrell who's with, at the time, the Spartanburg  
22 sheriff's office and Kim Rosborough; is that correct?

23 A. That's correct.

24 Q. All right. And then by the first time -- was the  
25 May 24th of 2011, the first time that you saw Minor Victim

1           A.    If that's what it says, then yes.

2           Q.    Okay.   And certainly by May 24th you were already  
3 listing sexual abuse of a child as the reason for  
4 treatment?

5           A.    That would have been the referral, yes.

6           Q.    All right.   So the referral was based on sexual  
7 abuse?

8           A.    Correct.

9           MR. GROSE:   That's all the questions I have, Your  
10 Honor.

11          MS. JAMESON:   Nothing else, Your Honor.

12          THE COURT:   Thank you, ma'am.   You may step down.  
13 Watch your step as you're stepping down.   Any reason why  
14 the witness cannot be excused?

15          MR. GROSE:   Not from our perspective.

16          MS. JAMESON:   No, Your Honor.

17          THE COURT:   Thank you, ma'am.   You may be excused  
18 as well.   Thank you for coming.

19               (Witness leaves witness stand and courtroom.)

20          Applicant ready to call their next witness?

21          MR. GROSE:   I am.   I call Rauch Wise.

22               (Witness comes forward.)

23          THE COURT:   Just come right up here and place  
24 your left hand on the Bible and raise your right hand.

25               (Complies.)

1           Do you solemnly swear that the testimony you're  
2   about to give the Court will be the truth, the whole  
3   truth, and nothing but the truth?

4           THE WITNESS:   I do.

5           THE COURT:   Watch your step as you're stepping up  
6   and have a seat in the red chair and pull the red chair  
7   up to the microphone.

8                       CLARENCE RAUCH WISE,  
9   having been duly sworn, testified as follows:

10                      DIRECT EXAMINATION

11   BY MR. GROSE:

12       Q.   Can you state your name for the record and, I  
13   guess, spell your first name for the court reporter?

14       A.   Full name is Clarence Rauch, R-a-u-c-h, Wise.

15       Q.   Okay.   And are you an attorney here in South  
16   Carolina?

17       A.   I am.

18       Q.   And I know that Judge Hayes is familiar with you,  
19   but for the record if you could summarize your  
20   education, beginning with college, and your experience  
21   practicing law.

22       A.   Graduated Wofford College in 1966.   Went directly  
23   to law school.   Graduated law school in 1969.   Entered  
24   private practice right after that and have been  
25   extensively involved in criminal trials over the years.



1 And probably the last 10, 15 years more extensively  
2 involved in appellate work.

3 Q. Okay. And did you represent Danny Spade at some  
4 point?

5 A. Yes, I did. Represented him on the appeal.

6 Q. Okay. And then have you had a chance to review  
7 the transcripts and some of the pleadings and the  
8 opinion in the case?

9 A. I have.

10 Q. Okay. And what issues did you raise on appeal?

11 A. We raised on appeal the issue of the panic  
12 attacks, prohibiting testimony about panic attacks that  
13 we thought would hurt the defense pretty good. We  
14 raised the issue of a private attorney coming in at the  
15 last minute and being who he represented, the family at  
16 the termination for parental rights hearing, being  
17 involved in the case. We raised -- let me get the file  
18 out. I want to make sure I get all of them.

19 That's an issue that we raised at the initial  
20 appeal that we did not raise at -- on petition for cert.  
21 We raised the issue of excluding the testimony of  
22 Meredith Thompson-Loftis on the grounds that some  
23 discovery had been turned over just a few days before  
24 trial.

25 Q. Okay. And with regard to the issue about the

1 anxiety and the panic attacks, what specifically were  
2 you trying to raise with the Court of Appeals on that?

3 A. There was some testimony out of the presence of  
4 the jury that the grandmother had observed a panic  
5 attack by the child in the presence of the stepfather.  
6 Somehow or another that got, to me, in the record  
7 confused as an indication of third-party guilt.

8 The defense lawyer had raised the issue of well,  
9 if you don't let me bring it in, the government -- the  
10 State's gonna argue that because of the panic attack was  
11 the abuse by Mr. Spade. The judge denied it and, of  
12 course, in the closing argument the State raised that  
13 exact issue.

14 Q. Okay. And did you necessarily think that that  
15 was a third-party guilt issue?

16 A. It wasn't presented to me in the third-party  
17 guilt because it was never an allegation, from what I  
18 read in the transcript, that the stepfather had  
19 committed any abuse. There was some sort of third-party  
20 guilt involving Nathan that's been testified to earlier,  
21 but that wasn't involved in the appeal.

22 Q. Okay. And what would be the importance of being  
23 able to show that a panic attack occurred that might not  
24 be associated with Danny Spade?

25 A. The child could simply would be afraid of males,

1 adult males, and have panic attacks around adult males  
2 and, therefore, a panic attack around Danny Spade would  
3 mean nothing more than a panic attack around the  
4 stepfather.

5 Q. Of course there could be lots of explanations for  
6 panic attacks.

7 A. There sure could be, be but for purposes of  
8 appeal that was just kind of to show that it happens  
9 around adult males.

10 Q. Okay. And was there any, any prejudice that you  
11 saw to Danny from having that evidence excluded?

12 A. I thought it was because of the fact that the  
13 closing argument basically said there's only one reason  
14 for the panic attacks and that's the fact that Danny  
15 abused the child.

16 Q. Did the Court of Appeals address that issue on  
17 the merits?

18 A. I'd have to get the order out.

19 Q. I have it.

20 A. I thought they addressed most of that issue on  
21 the merits. And I think, yeah, they pretty much  
22 addressed that issue on the merits.

23 Q. If you would ---

24 A. I've got it here.

25 Q. If you could look at those two paragraphs,

1 including the footnote paragraph.

2 MR. JAMES: I have no indication of what he's  
3 looking at or what paragraph. I assume it's the  
4 opinion.

5 MR. GROSE: It's the opinion.

6 THE WITNESS: It's the opinion.

7 MR. JAMES: Okay.

8 THE WITNESS: Yeah. It's the ---

9 MR. GROSE: Section on the grandmother's  
10 testimony.

11 THE WITNESS: Yes. And it's the last paragraph  
12 of the section of the grandmother's testimony.

13 MR. JAMES: Okay.

14 THE WITNESS: Well, they do say "no context was  
15 provided as the circumstances existing before and during  
16 the attacks. And there was no indication whether the  
17 panic attacks did or did not occur around the time of  
18 appellate's visits." I thought I adequately pointed  
19 out, but obviously did not, in my petition for rehearing  
20 and gave, I thought, context to it, but that was, of  
21 course, denied.

22 BY MR. GROSE:

23 Q. Well, and so whether it was a trial error or an  
24 appellate error, the Court of Appeals was saying they  
25 wanted more context to be able to analyze that issue.

1       A.   They wanted a better record.   That would be  
2 correct.

3       Q.   Okay.   And on the copy that I printed out,  
4 there's that footnote -- my memory says it was footnote  
5 four, but don't hold me to that -- that had to do with  
6 the panic attacks?

7       A.   Yes.   And it talked about the appellate could  
8 call an expert to testify because of panic attacks, but  
9 the appellate did not present any such testimony at  
10 trial.   Appellate was also asked for and received  
11 permission to cross-examine grandmother about what was  
12 going on during the panic attacks as long as he did not  
13 mention specific individuals, but didn't pursue that  
14 line of cross-examination.

15       Q.   All right.   And what it was referring to there  
16 was information, or not necessarily information but the  
17 trial judge's rulings that if they had expert testimony  
18 he might rule differently.

19       A.   That may be one interpretation.   My  
20 interpretation was if you can bring in an expert  
21 testimony to testify as to cause of panic attacks.

22       Q.   Right.   Okay.   And he would consider that  
23 testimony --

24       A.   Right.

25       Q.   -- possibly being admissible?

1 A. Correct.

2 Q. All right. And he also, that footnote reflects  
3 the judge, you know, gave trial counsel some limitations  
4 as to what they could explore.

5 A. That's correct.

6 Q. Okay. And so if there had been a different  
7 record made on those two issues, expert testimony and  
8 the followup that the judge did allow, could that have  
9 made a difference on the appeal?

10 MR. JAMES: Objection; calls for speculation.

11 THE COURT: I think he's qualified to answer that  
12 one.

13 THE WITNESS: It certainly would have made a  
14 stronger appellate issue. I thought it was a good  
15 appellate issue as it was, but it certainly would have  
16 made it much, much stronger.

17 BY MR. GROSE:

18 Q. All right. I want to shift gears and talk about  
19 the directed verdict issue that we've raised. You've  
20 seen the application that has been issued in this?

21 A. Actually I have not.

22 Q. Okay. And this is on page 6 of the third amended  
23 application and it would be paragraph C.

24 A. Okay. All right. Okay.

25 Q. All right.

1       A.   We discussed that issue and I had not read the  
2       specific issue.

3       Q.   Okay.   And I had asked you to go back and look at  
4       some specific testimony, didn't I?

5       A.   Yes, you did.

6       Q.   All right.   And was some of that testimony  
7       Minor Victim testimony?

8       A.   Some of it was Minor Victim testimony, correct.

9       Q.   Okay.   And if you could go to page 137 of the  
10       transcript.   It would be 141 on the record on appeal.

11       A.   All right.   I got it.

12       Q.   Okay.   If you could look at page 137 and 138.

13       A.   Okay.

14       Q.   All right.   Did, in Minor Victim testimony, did they  
15       ever -- did she ever identify a particular hotel?

16       A.   She was never able to identify a particular hotel  
17       other than a hotel with a pool and a bathroom on the  
18       level with the pool.   She did not identify a specific  
19       hotel.

20       Q.   All right.

21       A.   She also testified that the room at the hotel, I  
22       think, it was on the third floor.

23       Q.   And did she ever identify -- did they ever  
24       establish a county, a venue through her?

25       A.   They never established a county venue through her

1 testimony, no.

2 Q. Okay. Did I also ask you to review in your order  
3 some of Tabitha Webber's testimony?

4 A. What page is that?

5 Q. It's gonna be around 248 of the transcript.

6 A. Yes, you did.

7 Q. Okay. And in her testimony did Ms. Webber ever  
8 testify as to venue as far as the county was concerned?

9 A. I don't remember her testifying to anything about  
10 venue at all remotely.

11 Q. All right. If you could look at page 248 --

12 A. Okay.

13 Q. At line 19.

14 A. Yes.

15 Q. The question was: "All right. During your  
16 forensic interview" -- and it's redacted, but we're  
17 talking about Minor Victim -- "did she disclose to you a  
18 sexual assault occurring to her in South Carolina?"

19 A. Well, she and one other witness testified in  
20 South Carolina, but that certainly is not very -- it's a  
21 little broad on venue.

22 Q. All right. And when you "the other witness",  
23 would that other witness have been Ms. Loftis?

24 A. That's correct.

25 Q. And you were in the courtroom when I reviewed her



1 testimony regarding venue?

2 A. That's correct.

3 Q. Okay. And then if you could turn to page 273 of  
4 the transcript. I believe that's where the directed  
5 verdict motion begins.

6 A. Okay, yes. I'm familiar with that.

7 Q. Okay. And was there some discussion with --  
8 between trial counsel and the judge regarding whether or  
9 not there had been testimony establishing that it had  
10 occurred at a specific hotel in Spartanburg County?

11 A. Yeah, there was. And I did not remove them. You  
12 had brought it to my attention. And the judge said the  
13 testimony was that the hotel for which a receipt had  
14 been entered was in Spartanburg County.

15 Q. All right. But was there any testimony actually  
16 linking, saying that the abuse happened at the hotel for  
17 which that receipt was entered?

18 A. There was no direct testimony. It's basically, I  
19 think I would say, an assumption. And it's a  
20 questionable assumption, in my opinion, from reviewing  
21 it due to the fact that the testimony from the minor  
22 child was that they stayed on the third floor. And the  
23 receipt from the hotel was they stayed on the ---

24 Q. The child's ---

25 A. The testimony was she stayed on the first floor.

1 The receipt said they stayed on the third floor.

2 Q. Right.

3 A. That's what it was.

4 Q. And at page 276 of the transcript, at line 4 --  
5 actually, going back to page 275, again at line 25 with  
6 trial counsel, trial counsel did note to the trial judge  
7 specifically: "I would just simply add for the record  
8 that I don't believe this child testified that the hotel  
9 was in Spartanburg County."

10 A. That's correct.

11 Q. Okay. And so, was this an issue that you  
12 addressed on appeal?

13 A. We did not address that issue on appeal.

14 Q. Okay. Is it an issue that was preserved that  
15 could be addressed on appeal?

16 A. It was an issue that could have been preserved.  
17 Ken Shabel and I talked at some length about the appeal.  
18 I don't recall us talking specifically about the venue  
19 issue. But upon reflection and looking back at the  
20 record, it is an issue that definitely could have been  
21 briefed.

22 Q. Okay. And one of the issues that you did brief  
23 was about the late production of at least a portion of  
24 Ms. Thompson-Loftis' record; is that right?

25 A. That's correct.

1 Q. Okay. And if you look at page 385 of the record  
2 on appeal, which was the same page that I showed her  
3 earlier.

4 A. Okay.

5 Q. All right. And let me just take a side track  
6 there for a second. There was two productions of her  
7 records; is that right?

8 A. There were.

9 Q. All right. And the particular page that we're  
10 looking at looks like it was a production on October  
11 31st of 2013; is that correct?

12 A. I would have to take your word for it because I  
13 -- yes, I see that at the top, yes.

14 Q. At the top. And if, for example, you look at  
15 page -- and this is just by way of example, page 433 of  
16 the record.

17 MR. JAMES: Your Honor, I must respectfully  
18 object at this point. This goes to an issue that Mr.  
19 Wise actually did raise on appeal, and so I don't see  
20 how this testimony is relevant to the allegations to --

21 MR. GROSE: I'm gonna tie it ---

22 MR. JAMES: -- ineffective assistance of  
23 appellate counsel.

24 MR. GROSE: So I'm gonna tie it together in just  
25 a second. Well, actually this goes to the record and

1    how the record could have been more complete, but I'll  
2    tie it together with this issue.

3           MR. JAMES:   In that context, Your Honor, counsel  
4    is essentially offering Mr. Wise as a lawyer expert  
5    which is prohibited by Greenburg's stay.  He hasn't  
6    subsequently qualified him as one, but he is essentially  
7    treating him as one for all the issues that he did raise  
8    on appeal.

9           MR. GROSE:   Well...

10          THE COURT:   All right.  I'm gonna let him go  
11    through it.  It is actually helpful to the Court with  
12    the directions that are given.  I think I understand the  
13    limitations of Mr. Wise's testimony.  And if not, please  
14    point those out to me.

15          Yes, sir.

16          MR. JAMES:   Thank you, Your Honor.

17    BY MR. GROSE:

18          Q.   All right.  So, for example, on page 433, that  
19    looks like that was a production in February -- on  
20    February 20th of 2014?

21          A.   That's correct.  I had forgotten those two  
22    productions were actually dated at the time.

23          Q.   Okay.  And just so that we're clear, we're  
24    talking about Ms. Thompson-Loftis' records that you  
25    included in the record on appeal with regards to that

1 issue?

2 A. That's correct.

3 Q. Okay. And on page 385 there was where there was  
4 a reference to the bathroom at a pool of a hotel in  
5 Greenville.

6 A. Yes. Yes.

7 Q. Okay. Given the way this issue developed at  
8 trial, was that information on page 385 something you  
9 could have made use or could not have made use with  
10 regard to the venue issue, if you had raised it?

11 A. I think if you probably say we attempted to make  
12 use of it in regard to the venue issue because it was in  
13 the record. It was not called to any trial judge's  
14 attention about Ms. Loftis saying that it occurred in  
15 Greenville County. Whether our Appellate Court would  
16 then say it's in the record and, therefore, we're gonna  
17 address it or trial counsel failed to bring it to the  
18 attention of the trial judge and, therefore, we're not  
19 gonna address it, is probably an interesting question.

20 Q. And that's an interesting question because this,  
21 this directed verdict issue on venue actually goes to  
22 the authority of the courts in Spartanburg to even be  
23 able to handle the case?

24 A. That's correct.

25 Q. Okay.

1       A.   If the crime allegedly occurred in Greenville  
2   County, it could not be tried in Spartanburg County.

3       Q.   Okay.

4       A.   And under the for what it's worth issue, it's  
5   also an argument that the venue issue could have been  
6   made a jury issue in the trial.

7       Q.   All right.  And if -- I'm gonna come back to that  
8   in a second.  If at the directed verdict stage or even  
9   in Ms. Loftis' testimony, let's do that, that there was  
10   two --

11           I'm gonna start over because that's a bad  
12   question.  Would you agree that there was two  
13   opportunities that trial counsel could have used to call  
14   the information about Greenville on page 385 of the  
15   record, to the attention of the Court, one of those  
16   would have been during the testimony of Ms.  
17   Thompson-Loftis?

18       A.   That would be correct.

19           MR. JAMES:  Respectfully.  Objection; same as  
20   before.  Inappropriate expert testimony, lawyer expert  
21   testimony.  He's explicitly commenting on what trial  
22   counsel could have or should have done.

23           THE COURT:  All right.  The way the question was  
24   phrased, I would have to overrule the question.  Do you  
25   want to try it again?

1 MR. GROSE: Okay.

2 THE WITNESS: That would be one opportunity to  
3 bring it to the attention of the trial court.

4 MR. JAMES: Objection. He's still answering the  
5 same question.

6 By Mr. Grose?

7 Q. All right. Well, let me ask you this, would it  
8 have been a stronger issue on appeal if he had  
9 questioned Ms. Loftis about that?

10 A. If the issue of whether he -- it would be the  
11 stronger issue on appeal if he had cross-examined her  
12 about it, yes.

13 Q. Would it have been a stronger issue on appeal if  
14 he had -- he, trial counsel, had pointed to page 385 of  
15 the record in the directed verdict motion?

16 A. It would be a stronger issue because the issue of  
17 the fact that testimony from the child was it occurred  
18 in Greenville County, would have been in the record,  
19 brought to the attention of the trial judge, and the  
20 trial judge would have ruled on that issue and,  
21 therefore, would have been preserved for appeal.

22 Q. And if he had done both that would have been even  
23 stronger?

24 A. Do both is always better.

25 Q. Okay. And I said we would come back to you

1 raised the issue that venue could have been made a jury  
2 issue?

3 A. Yes.

4 Q. What did you mean by that statement?

5 A. There are cases that I've found that say in a  
6 close case that the jury has a right to determine  
7 whether venue is proper if it's a factual issue.

8 MR. JAMES: Object, Your Honor. Same as before.  
9 I think he's testifying as a lawyer expert.

10 THE COURT: All right. All right. I'm gonna  
11 allow it. Go ahead.

12 MR. GROSE: Okay.

13 MR. JAMES: Your Honor, if I may, just for the  
14 interests of time, sound my continuing objection to this  
15 course of testimony.

16 THE COURT: I don't think you can have continuing  
17 objections and be protected on the record.

18 MR. GROSE: And that's fine. It's really a moot  
19 point because I'm not gonna ask any other questions  
20 about that.

21 THE COURT: All right. He said he's not gonna  
22 ask any other questions, so if he does object to his  
23 going back on his promise.

24 MR. GROSE: Beg the Court's indulgence for a  
25 moment.



1 BY MR. GROSE:

2 Q. I'm almost done, but before I let you go you had  
3 briefed two issues with regards to the special  
4 prosecutor; is that correct?

5 A. That's correct.

6 Q. All right. And what were those two issues?

7 A. One, that it's an inherit conflict for someone  
8 who represented the family of the child in the Family  
9 Court case to then, so to speak, walk across the hall  
10 and become part of the State prosecution. As set forth  
11 in my brief, I still believe it's an inherent conflict  
12 because as soon as you sit down at a prosecution table  
13 you almost have an obligation to take your civil file  
14 and hand it to the defense lawyer.

15 Q. And why is that?

16 A. Because the prosecutor has an ethical violation  
17 to basically disclose every bit of bad information in a  
18 file to the defendant, which does not exist in the  
19 Family Court case.

20 Q. All right. And when you say disclose, you're  
21 talking about exculpatory information?

22 A. Correct.

23 Q. As well as all the information covered by Rule 5?

24 A. Correct.

25 Q. And the due process clause --

1 A. Correct.

2 Q. -- for necessary and assistance for preparing a  
3 defense?

4 A. And as pointed out in the brief, there is no way  
5 for a defendant in a criminal case to get to the  
6 information in the file of a civil lawyer without a  
7 waiver of the attorney/client privilege.

8 Q. And, of course, you briefed that issue.

9 A. Yes.

10 Q. And the Court ruled on that issue and the opinion  
11 would speak for itself?

12 A. That's correct.

13 Q. All right. There was a second issue that you  
14 raised with regard to the special prosecutor.

15 A. Yes. We raised the issue of the fact that there  
16 was no appointment by the governor, as required by South  
17 Carolina law.

18 Q. Okay. And the statute is, is mentioned in the  
19 brief and in the opinion; is that correct?

20 A. Yes. It's 1-7-470. It's a specific statute  
21 dealing with the Seventh Judicial Circuit.

22 Q. All right. Anything -- and I take it that you  
23 have that in front of you --

24 A. That's correct.

25 Q. -- on your magic tablet there?

1 A. That's correct.

2 Q. All right. And can you read what that statute  
3 says?

4 A. The circuit solicitor of the Seventh Judicial ---

5 MR. JAMES: Objection; relevance again.

6 MR. GROSE: Well...

7 MR. JAMES: He raised this issue.

8 THE COURT: I think, I think it's in his  
9 petition.

10 MR. GROSE: Yeah. This was on -- in the appeal.

11 MR. JAMES: If it's in his petition, he is once  
12 again using him as an expert to supplement one of his  
13 other allegations as a lawyer expert when it's  
14 inappropriate.

15 MR. GROSE: And, you know, he keeps coming back  
16 to that case, but that case is not a blanket prohibition  
17 of being able to ask lawyers questions about things that  
18 are relevant to the case. Mr. Wise is a fact witness in  
19 this case, and so...

20 THE COURT: So far all he's asked Mr. Wise is to  
21 read the statute, so I'm gonna let him read the statute.

22 MR. JAMES: Thank you, Your Honor.

23 THE COURT: Yeah.

24 THE WITNESS: "The circuit solicitor of the  
25 Seventh Judicial Circuit may appoint a competent

1 attorney who is a resident of Spartanburg County as  
2 assistant solicitor. He shall perform any and all of  
3 the duties and functions now and hereafter imposed by  
4 law upon the circuit solicitor in Spartanburg County as  
5 the solicitor of the circuit shall authorize, designate,  
6 and direct.

7 The assistant solicitor shall be appointed by the  
8 solicitor of the Seventh Judicial Circuit and shall  
9 after appointment be commissioned by the governor  
10 provided, however, the solicitor of the Seventh Judicial  
11 Circuit shall have the right to remove the assistant  
12 solicitor from the office at his pleasure. And in no  
13 event can the assistant solicitor be appointed for a  
14 period beyond the term of office of the circuit  
15 solicitor.

16 The assistant solicitor shall receive from  
17 Spartanburg County as compensation for his services such  
18 sum per year as may be provided by the general assembly  
19 payable the first and 15th of each month, and \$800 per  
20 year for travel."

21 BY MR. GROSE:

22 Q. Okay. And is that statute still good law, in  
23 your opinion?

24 A. As far as I know it has not been repealed.

25 Q. Okay. And that was the basis of the second issue

1 on appeal regarding special prosecutors?

2 A. Correct. That was a letter from Barry Barnette  
3 appointing Doug Brannon as special assistant solicitor,  
4 but there was no corresponding approval by the governor.

5 Q. Okay. And did the Court of Appeals address that  
6 issue on the merits?

7 A. They said it was not preserved.

8 Q. Okay. All right. And why did they say it wasn't  
9 preserved?

10 A. They said that he didn't -- that trial counsel  
11 did not obtain a ruling from the trial judge on that  
12 very specific issue.

13 Q. Okay. So they didn't address it because of  
14 issues with error of preservation?

15 A. That was what the Court of Appeals said, yes.

16 MR. GROSE: That's all the questions that I have,  
17 Your Honor.

18 CROSS-EXAMINATION

19 BY MR. JAMES:

20 Q. Mr. Wise?

21 A. Yes.

22 Q. Thank you for sticking around with us this  
23 afternoon.

24 A. Okay.

25 Q. Do you recall in the testimony at trial, the

1 testimony of Nikki Cantrell, the investigator?

2 A. Not -- oh, is that the one that went to the hotel  
3 and obtained the room receipt?

4 Q. That is correct?

5 A. Okay, yes.

6 Q. Do you recall that she testified at trial that  
7 she went to that hotel, that Holiday Inn Express in  
8 Duncan?

9 A. That's correct.

10 Q. All right. And do you recall if she said it was  
11 in Spartanburg County?

12 A. Yes.

13 Q. All right.

14 A. I think she said it was in Duncan, which is in  
15 Spartanburg County.

16 Q. If I may, as to the specifics, would it refresh  
17 your memory to see the transcript?

18 A. Sure.

19 MR. JAMES: If I may approach the witness  
20 briefly?

21 THE COURT: (Nods head up and down.)

22 THE WITNESS: Or you can give me the page, I can  
23 look it up, either one.

24 BY MR. JAMES:

25 Q. I've already got it flipped open, so it might be

1 quicker.

2 A. Okay.

3 Q. Looking at page 126.

4 THE COURT: All right. Where are you looking?

5 MR. JAMES: In the trial transcript, 126, lines  
6 14 and 15.

7 THE WITNESS: Okay. Yeah. He said Spartanburg  
8 County.

9 BY MR. JAMES:

10 Q. Okay. And do you recall the testimony of Erica  
11 Gary at trial?

12 A. Tell me the role and I may be able to tell you.

13 Q. Clerk at the hotel that we were just talking  
14 about.

15 A. Yes. Yes.

16 Q. All right.

17 A. She produced -- she was the one that actually  
18 produced the room reservation receipt.

19 Q. Okay. Do you recall testimony to the effect that  
20 narrowed down that the applicant, Mr. Spade, was alone  
21 during his stays at the Holiday Inn in Duncan?

22 A. No, I do not. I remember the testimony was that  
23 was a hotel he stayed in when he was on one of his trips  
24 down here.

25 Q. Okay.

1           A. I don't know if there was any testimony beyond  
2 that.

3           Q. Do you recall testimony in the record to the  
4 effect that when the abuse occurred against Minor Victim that  
5 she was alone with Mr. Spade?

6           A. Oh, yes. Yes.

7           MR. JAMES: Beg a moment of the Court's  
8 indulgence. I have no further questions, Your Honor.

9           THE COURT: Any redirect limited to what he went  
10 into?

11          MR. GROSE: No, sir.

12          THE COURT: Thank you, sir. You may step down.  
13 Any reason why the witness cannot be excused?

14          MR. JAMES: Yes, Your Honor.

15          THE COURT: Yes, you don't want him excused?

16          MR. JAMES: Oh, no, he can go.

17          THE COURT: Okay. Thank you, sir, you can go.

18          THE WITNESS: Thank you.

19          THE COURT: Lawyers approach for a brief second.

20          MR. JAMES: Absolutely.

21               (Witness leaves witness stand and courtroom.)

22               (Bench conference was held off the record.)

23          THE COURT: All right, Mr. Tally.

24               You might want to tell Mr. Barnette the situation  
25 we're looking at.



1 Mr. Tally?

2 MR. TALLY: Yes, sir.

3 THE COURT: Let's take care of your issue, if we  
4 can. Where do we stand with that?

5 MR. TALLY: Your Honor, after we were here  
6 yesterday afternoon I did as instructed and I shared the  
7 exhibits that were presented as you instructed and then  
8 I notified your clerk and both counsel with the response  
9 I received.

10 THE COURT: All right.

11 MR. GROSE: I know the e-mail correspondence that  
12 I was just gonna ask that that be a part of the record.

13 THE COURT: Okay.

14 MR. GROSE: It's two-sided. It printed on front  
15 and back.

16 THE COURT: So you would not need to call them?

17 MR. GROSE: I would not need to call them as long  
18 as the Attorney General's office is satisfied that based  
19 on that the e-mails that they sent or received can come  
20 in. There are in Petitioner's Exhibit Number 1, as we  
21 discussed yesterday, some e-mails that don't pertain to  
22 them. We will handle those separately. We may actually  
23 be able to agree on what comes in and what doesn't come  
24 in, but we can handle those separately. Not today,  
25 since we're under a little bit of a time...

1 MS. JAMESON: Yes. The State has no objection.  
2 And I apologize, I don't know exactly what numbers. I  
3 can look. But the e-mails that the Jolleys sent were  
4 received other than Applicant 1 for I.D. only, there's  
5 no objection to. I believe it's a Hotmail e-mail and an  
6 e-mail titled "Call on Sunday Evening." And e-mail  
7 titled "Audio from Phone Call." And then an e-mail  
8 titled "Forward New Address." The State has no  
9 objection to those coming in.

10 MR. GROSE: Well, and I thought we didn't have an  
11 objection to the ones that they sent or received in ---

12 MS. JAMESON: Well, they don't, but I'm not going  
13 to blanketly object. I want to go through on the record  
14 with you, possibly tomorrow, and to look at them. I'm  
15 not just gonna blanketly ---

16 MR. GROSE: Okay.

17 MS. JAMESON: We need to go through and agree on  
18 them.

19 MR. GROSE: Okay. Then I would ask that those  
20 set of e-mails be made a next exhibit and number for the  
21 record. And, apparently, we're gonna have to revisit  
22 that as far as Petitioner's Exhibit Number 1 is  
23 concerned. And so at this point I wouldn't want the  
24 Jolleys released from the subpoena unless we can reach  
25 an agreement on that.

1 MS. JAMESON: Do you -- if you're prepared to  
2 tell me which ones don't involve them being sent or  
3 received, we can take care of it, but there's quite a  
4 few that are wholly irrelevant to the Jolleys that I  
5 don't think should come in and I have authentication  
6 concerns on them.

7 THE COURT: My understanding is that Mr. Grose is  
8 saying that only the ones that related to the Jolleys  
9 receiving or sending ---

10 MS. JAMESON: Yeah. So we can reserve these  
11 coming in as an exhibit right now until Mr. Grose and I  
12 have the time to go through ---

13 THE COURT: All right. Will you let me finish?

14 MS. JAMESON: Yes.

15 THE COURT: All right. Mr. Grose's position, as  
16 I understand it, and Mr. Tally's position is that as to  
17 the e-mails that the Jolleys sent or received, they will  
18 not contest the authentication of those e-mails and that  
19 they would come into evidence. Any of the e-mails that  
20 do not involve the Jolleys that are part of one of the  
21 exhibits, we're not addressing those right now; is that  
22 correct?

23 MR. GROSE: That's correct. And I think what  
24 she's saying is that -- and it would probably be better  
25 if she and I got together when you're not here and see

1     what we can agree to in this packet and then we'll  
2     probably -- I think we're more likely gonna agree than  
3     not.

4             THE COURT:    Okay.

5             MR. GROSE:    But, I don't know.

6             THE COURT:    I guess the best thing to tell your  
7     clients, Mr. Tally, is that most likely they would not  
8     be needed, bu we can't give them a positive right now,  
9     so just to be available in the event we do need them,  
10    but it sounds like we're not gonna need them.

11            MR. GROSE:    Very good.

12            MR. TALLY:    And at some point will there be an  
13    official ruling on that motion?

14            THE COURT:    As soon as they tell me?

15            MR. TALLY:    Yes, sir.

16            THE COURT:    Yeah.

17            MR. GROSE:    If we reach an agreement, I'll  
18    withdraw.

19            THE COURT:    Thank you.

20            MR. GROSE:    Withdraw the subpoena or whatever i  
21    technically correct.

22            THE COURT:    All right.   Okay.   Mr. -- thank you,  
23    Mr. Tally.

24            Mr. Barnette.

25            MR. BARNETTE:  Yes, sir.

1 THE COURT: We -- Mr. Grose can finish your  
2 direct, but the State does not believe that they can  
3 finish their cross by 5 o'clock. We're going both  
4 tomorrow and Friday. Would those be options, any of  
5 those times?

6 MR. BARNETTE: May I approach?

7 THE COURT: Uh-huh.

8 (Bench conference was held off the record.)

9 (Petitioner's Exhibits 2, 3, 4 and 7 were entered  
10 into the record.)

11 THE COURT: Mr. Barnette, just place your left  
12 hand on the Bible and raise your right hand.

13 (Complies.)

14 MS. JAMESON: Can we have a brief break real  
15 quick?

16 THE COURT: Okay, we'll take a quick break.

17 (Recess was had from 4:10 p.m. - 4:17 p.m.)

18 THE COURT: All right. You ready to call your  
19 next witness?

20 MR. GROSE: I call Solicitor Barry Barnette.

21 THE COURT: Sir, please raise your right hand.  
22 (Complies.)

23 Solemnly swear that the testimony you're about to  
24 give the Court be the truth, the whole truth, and  
25 nothing but the truth?

1 THE WITNESS: Yes, sir.

2 THE COURT: Watch your step. Just have a step up  
3 and have a seat in the red chair.

4 THE WITNESS: Thank you, Your Honor.

5 THE COURT: Yes, sir.

6 SOLICITOR BARRY BARNETTE,  
7 having been duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY MR. GROSE:

10 Q. Can you please state your name for the record.

11 A. Barry Barnette.

12 Q. All right. And you are the duly elected  
13 solicitor for the Seventh Judicial Circuit?

14 A. Yes, sir.

15 Q. Okay. And you were at the time of Mr. Spade's  
16 trial in February of 2014?

17 A. Yes, sir, I was.

18 Q. Okay. And I want to show you what is page 472 of  
19 the record on appeal, Your Honor. Solicitor, do you  
20 recognize that letter?

21 A. Yes, I do.

22 Q. And what is that document?

23 A. It's a document where Doug Brannon was appointed  
24 as a special prosecutor by me in the Seventh Circuit.

25 Q. Okay. And in there it indicates that he wanted

1 to do some pro bono work.

2 A. Yes, sir.

3 Q. And that he was gonna begin on the day of Mr.  
4 Spade's trial?

5 A. Yes, sir.

6 Q. Has Mr. Brannon worked on any other cases other  
7 than Mr. Spade's?

8 A. He has not.

9 Q. And are you familiar with the statute that Mr.  
10 Wise testified about regarding appointment of assistant  
11 solicitors for the Seventh Circuit and requiring a  
12 governor's commission?

13 A. I'm familiar with the statute, yes, sir.

14 Q. Okay. And did you get a governor's commission  
15 for Mr. Brannon?

16 A. No, sir, I did not.

17 Q. Okay.

18 A. Can I explain that?

19 Q. I'm certain that they're gonna allow you to  
20 explain, so go ahead.

21 A. Yes, sir. Basically the governor appoints me to  
22 the commission once elected from that standpoint. To me  
23 it gives the inherent ability to hire assistant  
24 solicitors. Every solicitor's got that. So, therefore,  
25 we hire the assistant solicitors. We're not given a

1 commission from the governor or anything from that  
2 standpoint. It's done through us internally from that  
3 standpoint.

4 And it's just like on conflict cases, we have  
5 situations where there's a conflict in our circuits we  
6 contact the Attorney General's office about that. We do  
7 not contact the governor's office. So, therefore, the  
8 special ability is done through that. That's my  
9 position concerning that statute.

10 Q. All right. And so that's your, that's your  
11 practice?

12 A. Yes, sir.

13 Q. And that is how you follow that statute?

14 A. Yes, sir. And I think it's throughout the whole  
15 state. I think everybody does it that way.

16 Q. All right. But you would agree that the statute  
17 says that the commission for the assistants has to come  
18 from the governor?

19 A. Well, the statute also says they have to be paid  
20 every 1st and 15th day of the month or 16th. And, for  
21 example, in our county they're paid every two weeks.

22 Q. Okay. So if the statute requires strict  
23 compliance, you may not be in strict compliance with it?

24 A. Well, my position I believe we are.

25 Q. Okay. But you may not be in literal compliance



1 with it?

2 A. I would disagree with you there. I think the  
3 inheritability is given through the governor to us to  
4 appoint our assistant solicitors.

5 Q. All right. And you would agree that would  
6 ultimately be a question of law for a court to decide?

7 A. Yes, sir, possibly.

8 MR. GROSE: All right. Thank you, Solicitor.  
9 That's all the questions I have.

10 CROSS-EXAMINATION

11 BY MS. JAMESON:

12 Q. Solicitor Barnette, that statute that you were  
13 just asked about, Section 1-7-470, that deals with the  
14 appointment of assistant solicitors for the Seventh  
15 Judicial Circuit, correct?

16 A. Yes, ma'am.

17 Q. And Doug Brannon wasn't an assistant solicitor,  
18 correct?

19 A. He was, no not at that time, he was appointed.

20 Q. He never has been an assistant solicitor, right?

21 A. No, ma'am.

22 Q. He was appointed by you as a special prosecutor,  
23 correct?

24 A. Yes, ma'am.

25 Q. In a pro bono capacity, correct?

1 A. Yes, ma'am.

2 Q. So he was never paid for any of his work?

3 A. That's correct.

4 Q. And your testimony is that the governor gives you  
5 authority and then you have the inherent power to hire  
6 assistant solicitors, correct?

7 A. Yes, ma'am.

8 Q. And, to the best of your knowledge, that's the  
9 practice throughout the whole state of South Carolina?

10 A. Yes, ma'am. As far as I know from talking to  
11 other solicitors in our solicitor's office, as well as  
12 the Attorney General's office.

13 Q. And you equated it to conflict cases where you  
14 actually contact the Attorney General's office, correct?

15 A. We did. When we have a conflicted case from our  
16 circuit or we get a conflict from another circuit it has  
17 to be approved by the Attorney General's office.

18 Q. Not by the governor?

19 A. That's correct.

20 Q. And your office and your assistant solicitors  
21 have asked to prosecute cases from outside the Seventh  
22 Circuit, correct?

23 A. And I, myself, I've been throughout the whole  
24 state on conflict cases myself when I was a deputy  
25 solicitor, as well as solicitor.

1 Q. And did you get a governor's permission for that?

2 A. No, ma'am.

3 Q. To your knowledge do -- have any solicitors  
4 gotten governor's permissions in these situations?

5 A. Not to my knowledge.

6 Q. Did you ever have a personal involvement in this  
7 case?

8 A. I did initially. What happened was, a Susan  
9 Reese was gonna be the solicitor that tried -- or  
10 assistant solicitor who was gonna try it. Susan left.  
11 She adopted two children. She left right before. We  
12 actually had a trial date and I was gonna help work with  
13 it from that standpoint, but then we had the Ricky  
14 Blackwell case, which was a death penalty case.

15 It was reset the following week after this case  
16 to be tried, so I asked Jennifer Jordan, as well as Kim  
17 Leskanic, to help work on it. Like I said, I would help  
18 initially handle the motions, which I did at the  
19 beginning of the trial. They actually had to try it.

20 The problem is bringing them in so quickly with  
21 the short period of time we had. Doug Brannon, I knew  
22 Doug obviously through him being a defense attorney. He  
23 had knowledge of the case. And that's the reason we  
24 asked him to be involved also from there.

25 Q. How soon before trial did you start discussing

1 bringing Doug Brannon in as a special prosecutor?

2 A. It might have been within the month before. I  
3 can't, I can't give a specific date, but I know it was a  
4 short period of time.

5 Q. Did you discuss this with either of defense  
6 counsels, Ken Shabel or Shawn Campbell?

7 A. I did. We did discuss that with them. Of  
8 course, Ken and Shawn had both been Family Court  
9 attorneys for Mr. Spade in his action in Family Court  
10 with Mr. Brannon.

11 Q. So this letter dated February 21st, 2014, which  
12 is page 472 in the record on appeal, that was not the  
13 first notice that Shawn and Ken would have had that Doug  
14 was gonna possibly be a special prosecutor?

15 A. I verbally probably told them ahead of time that  
16 it was coming so that way -- I did an obviously in  
17 documentation to make sure that it was official.

18 Q. And you said that once you realized you couldn't  
19 have any direct involvement due to that capital case,  
20 you assigned this to Jennifer Jordan and Kim Leskanic,  
21 correct?

22 A. I did.

23 Q. Why was Doug brought on?

24 A. Doug had some knowledge in the case. He's  
25 obviously been on it before that. The family, the

1 Jolley family was very comfortable with him, obviously.  
2 And here I was introducing two attorneys that really  
3 they had never met before in this short period of time.  
4 Therefore, obviously I care much about victims and their  
5 families. Obviously I want to make sure they're as  
6 comfortable as they can be. And, of course, Doug had  
7 knowledge of some parts of the case from that  
8 standpoint.

9 Q. So Doug's primary role was to interact with the  
10 victims. Would that be a correct characterization?

11 A. He came through. Obviously he was able to work  
12 with us through them and everything, make them more  
13 comfortable because obviously they were very concerned  
14 when Susan left, the person they've been dealing with  
15 and was very comfortable with. And now bringing two new  
16 attorneys that they'd never met before.

17 Q. And you were there for portions of the trial  
18 arguing motions and, and whatnot, correct?

19 A. I kept checking in on it, yes. And I did most,  
20 several of the motions at the beginning of the trial.

21 Q. The vast majority of this case was tried by  
22 Jennifer Jordan and Kim Leskanic, correct?

23 A. Yes, ma'am.

24 Q. So Doug had more of a minimal third chair role,  
25 would you agree?

1       A.   He was involved -- I mean, obviously involved  
2       with the third chair.  And I think he did handle a  
3       witness.  And maybe I think he was involved with the  
4       closing argument.

5       Q.   Did you ever have access to Doug's Family Court  
6       file in this case?

7       A.   I did not until ordered by Judge Cole.

8       Q.   Can you elaborate for Judge Hayes and the record  
9       what you mean when you say ordered by Judge Cole?

10      A.   What happened was I think Mr. Grose filed a  
11      motion.  Judge Cole heard that previous motion.  And  
12      then we met and Judge Cole's position was we needed to  
13      review it with the Attorney General's office and the  
14      pertinent stuff would be turned -- anything that was  
15      pertinent to the criminal case, the Family Court case  
16      would be turned over to Mr. Grose.

17      Q.   And that was the first time you ever looked at  
18      that file, correct?

19      A.   Yes, ma'am.

20      Q.   Do you have any knowledge as to whether Doug used  
21      that file in the criminal prosecution?

22      A.   To my knowledge he did not.  I mean, nothing was  
23      really done out of that because everything was  
24      discussed.  Obviously Ken and Shawn were the Family  
25      Court attorneys, they knew everything that he knew.

1 Q. Were you familiar with the timeline of any of the  
2 Family Court proceedings involving the Jolleys and Mr.  
3 Spade?

4 A. Not really.

5 Q. But the case, the Family Court case wasn't going  
6 on at the time of the criminal trial or ramping up to  
7 the criminal trial in 2013 and 2014, correct?

8 A. From my knowledge it was not.

9 Q. Because Mr. Spade's rights had already been  
10 terminated in late 2012, correct?

11 A. That's my understanding.

12 Q. At that time are you aware of whether he'd been  
13 representing the Jolleys?

14 A. You mean Mr. Brannon?

15 Q. Yes, I'm sorry.

16 A. At that point, you know, until we got really  
17 involved in it, until Susan left I really didn't get too  
18 much involved in who represented who from that  
19 standpoint.

20 Q. When did Susan leave, approximately? Do you have  
21 any idea?

22 A. I want to say either end of 2013 or January of  
23 2014. And I'm not sure, to be frank with you, but I  
24 know it's from that period of time.

25 Q. Were you involved in any of the pretrial

1 investigation into this case?

2 A. I did go out to the hotel in Duncan where the  
3 information or the evidence showed that he was by  
4 herself (sic) with him by herself at the hotel, so...

5 Q. What evidence showed that Mr. Spade was by  
6 himself with the victim in Duncan?

7 A. Well, through the investigation. And Kim can  
8 probably answer this better than I can because they got  
9 more involved in it once I got Conard Blackwell. But  
10 all the evidence pointed to that being at the hotel, but  
11 he was one by himself at the hotel and everything from  
12 there.

13 Q. And Nikki Cantrell was the lead investigator in  
14 this case, correct?

15 A. She was.

16 Q. With the Spartanburg County Sheriff's Department?

17 A. Yes, ma'am.

18 Q. Were there any discovery issues that arose prior  
19 to this trial?

20 A. The only thing I remember is Mary Loftis filed,  
21 and we asked to turn everything over at that point.  
22 Later on I think there was another disclosure. We  
23 immediately released that information, but I understand  
24 Judge Kelly said the motion would be dealt with from  
25 there. Shawn and Ken was obviously given that



1 information as quickly they could be from that  
2 standpoint. But we did have a meeting. That was one  
3 discovery issue that I know of that came up.

4 Q. Do you recall the case originally being scheduled  
5 for trial in November of 2013?

6 A. I know it was scheduled before and it got  
7 continued.

8 Q. To allow the defense additional time to look at  
9 Meredith Thompson-Loftis's records, correct?

10 A. And I think I said that was the reason why.

11 Q. And then more records were turned over about a  
12 week before trial?

13 A. That's my understanding. Now, I wasn't directly  
14 involved in that, but I do understand there was more  
15 items.

16 Q. So anything involving that later discovery would  
17 have been more appropriately handled by Jennifer and  
18 Kim?

19 A. That's correct.

20 Q. Have you looked at your criminal case file in  
21 this case recently?

22 A. No, I have not.

23 Q. Do you know if you ever received any records from  
24 DSS in this case?

25 A. No. To my knowledge we did not.

1 Q. And pursuant to Judge Cole's order you reviewed  
2 your file and Doug Brannon's file with Mr. Brannon,  
3 correct?

4 A. Yes, ma'am.

5 MS. JAMESON: Moment's indulgence. No further  
6 questions for this witness.

7 THE COURT: Any redirect limited to what she went  
8 into?

9 MR. GROSE: Yeah, but I think it will be brief,  
10 Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. GROSE:

13 Q. Did I understand you to testify that the decision  
14 to bring Mr. Brannon on as a special prosecutor had been  
15 made weeks or even a month in advance?

16 A. I don't know quite the timeline, I'm just trying  
17 to remember from memory from that standpoint. I know  
18 the letter was written here. I know I talked to Shawn  
19 and, you know, Ken about it to make sure they knew it  
20 was gonna happen. So I didn't want no surprises or  
21 anything from there.

22 Q. And, of course, they objected to that?

23 A. They did at trial, yes, sir.

24 Q. Okay. Do you remember when you had those  
25 conversations with Ken and Shawn?

1           A.   I cannot remember the timeline and whatever from  
2           that time period. I just remember exactly around this  
3           time in a letter, give or take.

4           Q.   Well, the letter was pretty much  
5           contemporaneously with the start of the trial.

6           A.   Well, I know it was before that.

7           Q.   Okay. All right. Do you know how long before  
8           that?

9           A.   I can't remember the exact timeline.

10          Q.   Okay. She asked you some questions about  
11          discovery. And you talked about some issues with Ms.  
12          Thompson-Loftis's records, right?

13          A.   Yes, sir.

14          Q.   All right. There was also discovery issues with  
15          regards to medical records, do you recall that?

16          A.   Well, the way I looked at it was it was her  
17          records was the main discussion that was involved with  
18          us.

19          Q.   Do you recall issues about there being discovery  
20          issues regarding the computer forensics examinations  
21          that were done in Virginia?

22          A.   Well, do you want me to answer that question?

23          Q.   Well, there were issues about that, weren't  
24          there?

25          A.   Well, there was. Your client erased his

1 computer.

2 Q. You also were aware that Ms. Jordan said that the  
3 expert said that it hadn't been erased? It's in the  
4 record.

5 A. I don't know about that. My position -- what I  
6 heard was that it was erased, from what information I  
7 received.

8 Q. Okay. All right. And if there's something in  
9 the transcript that contradicts that, you would go with  
10 the transcript?

11 A. I'm just going on the information I received from  
12 that standpoint.

13 Q. But with regards to production of the report,  
14 were there issues with regards to that?

15 A. To Meredith Loftis' report?

16 Q. No, the computer or forensics report. Were there  
17 discovery issues involved in that, that you recall?

18 A. I don't have any knowledge of that.

19 Q. Okay. And you said -- testified with regards to  
20 Mr. Brannon that trial counsel, Ken and Shawn, knew  
21 everything in the Family Court case that Mr. Brannon  
22 did. Do you recall saying that?

23 A. Yes, sir. My, my understanding was that it would  
24 be that.

25 Q. All right. Well, you also were, I'm sure, aware

1 of, because you have to take into account what you do  
2 the ethical obligations, as far as a lawyer interviewing  
3 a client that's represented; is that correct?

4 A. Yes, sir.

5 Q. All right. And so you would agree that Ken and  
6 Shawn could not interview David and Heather Jolley  
7 because they were represented by Doug Brannon and others  
8 in the Family Court case?

9 A. Yes, sir.

10 Q. And you're aware, as a prosecutor with a lot of  
11 years experience, with regards to obligations and  
12 turning over exculpatory statements that are made to you  
13 during conversations with witnesses, right?

14 A. Yes, sir. But I understand criminal cases, you  
15 know, those witnesses are available to both sides.

16 Q. But if you interview a witness and they say  
17 something exculpatory to you, do you have an obligation  
18 to disclose that?

19 A. Yes, sir, I do.

20 Q. All right. And ordinarily somebody who's in a  
21 Family Court representing somebody, they would not have  
22 that Brady obligation in a Family Court domestic custody  
23 litigation under Brady?

24 A. Under Brady, but the problem is that obviously an  
25 attorney can't mislead or, you know, even in a Family

1 Court proceeding.

2 Q. Right. But, but you would agree that there are  
3 special duties of prosecutors that don't apply to  
4 lawyers in general that come from either Rule 3.8 or the  
5 due process clause?

6 A. Yes, sir.

7 Q. Okay. And so in a Family Court context I think  
8 you would also agree that Mr. Brannon had a certain  
9 amount of access to David Jolley and Heather Jolley and  
10 even **Minor Victim** that Ken and Shawn did not have?

11 A. I don't know about that because obviously, you  
12 know, you talk to witnesses as you take them from that  
13 standpoint.

14 Q. Right. But if they were represented, normally  
15 you can't -- a lawyer can't talk to a represented  
16 person.

17 A. Generally, but in criminal cases that's a little  
18 bit different.

19 Q. Right. Well, when you said that everybody has  
20 access, but you don't have access to the defendant  
21 unless ---

22 A. No, I don't.

23 Q. Right. And that would be kind of similar in  
24 Family Court?

25 A. Yeah.

1 Q. I mean a lawyer wouldn't have access to the other  
2 lawyer's client in Family Court.

3 A. Well, it depends. If they test -- I mean, I know  
4 we're playing semantics here but, I mean, it depends on  
5 the situation.

6 Q. All right. Outside of a deposition or outside of  
7 courtroom testimony, generally they ---

8 A. Generally not, no, sir.

9 Q. They couldn't go knock on their door and say I  
10 want to interview them?

11 A. No.

12 Q. And you testified that you thought Mr. Brannon's  
13 representation in Family Court had come to a conclusion?

14 A. At that point, yes. I understand there's been  
15 another hearing since then.

16 MR. GROSE: Okay. That's all I have.

17 MS. JAMESON: Very briefly, Your Honor.

18 RECROSS-EXAMINATION

19 BY MS. JAMESON:

20 Q. The Jolleys weren't defendants in this case,  
21 correct?

22 A. Correct.

23 Q. And at that time, to the best of your knowledge,  
24 Mr. Brannon's representation had ceased because Mr.  
25 Spade's parental rights were terminated, correct?

1 A. That's correct.

2 Q. Okay. So duties and ethical concerns against  
3 talking to represented criminal defendants wouldn't  
4 apply to the Jolleys, correct?

5 A. It would not.

6 Q. So Ken and Shawn could have attempted to talk and  
7 interview the Jolleys, correct?

8 A. They could.

9 Q. No further questions.

10 A. That's what I was mentioning the difference  
11 between family and criminal court. The family matter is  
12 done so, therefore, that would not apply in this  
13 situation.

14 Q. Thank you.

15 FURTHER REDIRECT EXAMINATION

16 BY MR. GROSE:

17 Q. And just as a brief followup. Do you know  
18 whether or not Mr. Brannon claimed attorney/client  
19 privilege with regard to my request for his file?

20 A. At the hearing, that was what the hearing was  
21 about at the time. And that's when Judge Cole ordered  
22 us to tip through you the file.

23 Q. All right, thank you.

24 A. Thank you.

25 THE COURT: Thank you, sir, you may step down.



1 Any reason why the witness cannot be excused?

2 MR. GROSE: Not from us.

3 MS. JAMESON: No, Your Honor.

4 THE COURT: Thank you, sir. You may be excused  
5 as well.

6 THE WITNESS: Thank you, Your Honor.

7 (Witness leaves witness stand and courtroom.)

8 THE COURT: All right. See the lawyers for a  
9 moment.

10 (A bench conference was held off the record.)

11 (Court ended at 4:48 p.m.)

12

13 --- END OF DAY ONE OF PCR HEARING ---

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1           DANIEL SPADE VS. STATE OF SOUTH CAROLINA, DAY 2

2           THE COURT: My understanding is that the doctor  
3 took one of her reports with her and we were working on  
4 getting a substitute; is that correct?

5           MR. GROSE: I have a copy here.

6           THE COURT: Okay. Is the applicant ready to call  
7 their next witness?

8           MR. GROSE: Yes, sir.

9           THE COURT: Yes, sir.

10          MR. GROSE: At this time I call Dr. Michael Lamb.  
11 (Witness comes forward.)

12          THE COURT: Doctor, just come right up here and  
13 place your left hand on the Bible and raise your right  
14 hand and let me swear you in. (Complies.)

15          Solemnly swear that the testimony you're about to  
16 give the Court will be the truth, the whole truth, and  
17 nothing but the truth?

18          THE WITNESS: I do.

19          THE COURT: Thank you. Watch your step as you're  
20 stepping up, but just have a seat in the red chair and  
21 pull the red chair up to the microphone.

22                       DR. MICHAEL E. LAMB,  
23 having been duly sworn, testified as follows:

24                       DIRECT EXAMINATION

25 BY MR. GROSE:

1 Q. Good morning. Can you please state your full  
2 name for the record.

3 A. My name is Michael Lamb.

4 Q. And what is your profession?

5 A. I'm a psychologist.

6 Q. Okay. And if I could, can I have you summarize  
7 your educational background, beginning with college?

8 A. I completed my first degree in psychology and  
9 economics at the University of Natal in South Africa. I  
10 then moved to the U.S. and did a master's degree at  
11 Johns Hopkins University in Baltimore. Another masters  
12 degree and Ph.D. at Yale University. Yeah, that was the  
13 end of my formal education.

14 Q. Okay. And have you practiced in your field?

15 A. I have, yes.

16 Q. All right. And could you describe your  
17 professional experience for the Court?

18 A. I had worked at several universities in this  
19 country. My first academic position was at the  
20 University of Wisconsin. I then worked at the  
21 University of Michigan and the University of Utah.

22 From there I moved to a position as a section  
23 chief at the National Institutes of Child Health and  
24 Human Development in the Washington D.C. suburbs and  
25 remained there for 17 years. In 2004 I moved to the

1 University of Cambridge in the United Kingdom, where I  
2 am now a professor.

3 Q. Okay. And you mentioned that you -- the job that  
4 you had for 17 years at -- in the Washington area. What  
5 was that again?

6 A. I was head of the section on social and emotional  
7 development at the National Institute of Child's Health  
8 and Human Development. It was a research position, so I  
9 lead a research unit with 20 or 25 employees. Our focus  
10 was on understanding children's testimony and developing  
11 ways of enhancing the quality of testimony that we were  
12 able to elicit from children.

13 Q. Okay. And as a result of that, was a protocol  
14 developed?

15 A. Yes. We developed a, an interview protocol as a  
16 way of showing interviewers how to conduct high quality  
17 interviews that elicited good information from children.

18 Q. Okay. And I'm gonna come back to that a little  
19 bit later. Have -- well, before I move on, has that  
20 protocol been published?

21 A. It has, yes. The initial versions were published  
22 in the 1990's. We've continued to work and refine it  
23 over the years. The last year we published a revised  
24 version in a book that summarized all of the research  
25 that had been conducted since the mid-1990's on its use

1 and value.

2 Q. All right. And have you been published in any  
3 peer review publications?

4 A. Yes. All of our associates have been published  
5 in peer review publications.

6 Q. Okay. And have you presented on topics at  
7 conferences, scientific conferences about interviewing  
8 children?

9 A. Yes.

10 MR. GROSE: Okay. Can we mark this as the next  
11 exhibit in order, please?

12 COURT REPORTER: Eighteen.

13 (Petitioner's Exhibit Number 18, Dr. Lamb's  
14 Curriculum Vitae, was marked for identification.)

15 BY MR. GROSE:

16 Q. I'm gonna hand you -- did you say 18?

17 COURT REPORTER: Yes, sir.

18 BY MR. GROSE:

19 Q. -- what's been marked as Petitioner's Exhibit  
20 Number 18. Do you recognize that?

21 A. Yes, I do.

22 Q. And what is that?

23 A. It's my curriculum vitae.

24 Q. Okay. And does that include a list of  
25 publications where you've been published?

1 A. Yes.

2 Q. As well as professional presentations that you've  
3 made?

4 A. It does, yes.

5 Q. Okay. And I'm not sure exactly what to offer you  
6 as an expert in, but I -- would it be fair to say that  
7 you are a psychologist with a specialty in interviewing  
8 children?

9 A. Yes.

10 MR. GROSE: And I would tender him as an expert  
11 at this time, Your Honor.

12 MR. JAMES: He's clearly imminently qualified in  
13 that, Your Honor, so there's no objection from the  
14 State.

15 THE COURT: All right. You may proceed in the  
16 questioning.

17 MR. GROSE: And I'll move the CV into evidence if  
18 I -- I don't know that I formally made that motion  
19 either.

20 MR. JAMES: No objection from the State, Your  
21 Honor.

22 THE COURT: Without objection, it'll be  
23 Applicant's 18.

24 (Petitioner's Exhibit Number 18 was entered into  
25 the record.)