FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

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CLERK OF COURT
DORCHESTER COUNTY

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP1802007

Jonathan Brown		**South Carolina State of**	
PLAINTIFF(S)		**DEFENDANT(S)**	
Submitted by:		**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

D. Craig Brown	2160	11/21/2018
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **11/21/2018**, and a copy mailed first class or placed in the appropriate attorney's box on **11/21/2018**, to attorneys of record or to parties (when appearing pro se) as follows:

Jonathan Brown Pci Q-2-B-222 #360660 430 Oaklann Rd Pelzer, SC 29669
Leslie Therese Sarji 230 Congress Street Charleston, SC 29403

Christian Saville PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

Cheryl Graham - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS IN THE FIRST JUDICIAL CIRCUIT
Jonathan M. Brown, #360660, Applicant, v. State of South Carolina, Respondent.	)	2016-CP-18-2007 **ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on October 17, 2016. An evidentiary hearing into the matter was convened on October 1, 2018, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by Leslie T. Sarji, Esquire. Respondent was represented by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office.

Before this Court were the records of the Dorchester County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the record on appeal, Applicant's appellate records, the State's return, and Applicant's PCR application. Based on these records and the testimony presented, the Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Dorchester County. In May 2014, the Dorchester County Grand Jury for two counts of criminal sexual conduct with a minor under eleven years of age—first degree (2013-GS-18-1408, 2013-GS-18-1409). Applicant was subsequently indicted in the July 2014 term for an additional count of criminal sexual conduct with a minor under eleven years of age—first degree (2013-GS-18-1410). John M. Loy, Esquire,

and Pierce L. Wehman, Esquire, represented Applicant at trial. Mr. Loy ("Trial Counsel") served as lead counsel. Assistant Solicitors Glenn P. Justis and Kyle L. Ward prosecuted the case. Applicant proceed to a jury trial before the Honorable Maite Murphy. The jury found Applicant guilty as indicted of all three charges. On July 16, 2014, Judge Murphy sentenced Applicant to life imprisonment for each charge, to be served concurrently.

Thereafter, Applicant filed a timely notice of appeal. Appellate Defender Lara M. Caudy ("Appellate Counsel") perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). Appellate Counsel briefed the issue of whether the trial court erred in denying Applicant's motion to suppress the photographs and videos found on his cellular telephone where law enforcement seized the telephone from his residence without a warrant and without consent in violation of the Fourth Amendment. The South Carolina Court of Appeals dismissed Applicant's appeal and granted counsel's motion to be relieved on June 1, 2016. State v. Jonathan Brown, Op. No. 2016-UP-244 (Ct. App. 2016). The remittitur was returned on June 17, 2016. Applicant subsequently filed a second notice of appeal with the Supreme Court of South Carolina. The Court construed the notice of appeal as a petition for writ of certiorari and dismissed the petition on procedural grounds on June 22, 2016.

II. ALLEGATIONS

Applicant raises the following allegations in his PCR application:

1. Ineffective Assistance of Trial Counsel
    a. "Failure to raise and preserve all issues involving the phone seized during the arrest of Applicant."
    b. "Failure to object to perjury and inconsistent statements made by the officer and the Solicitor at the pretrial hearing held June 3-4, 2014, and at trial July 14-16, 2014."
    c. "Failure to request jury instruction regarding the lesser-included offense."
    d. "Failure to request that evidence be narrowed to the charge it was alleged to support."

e. "[Trial Counsel] argued ineffectively to support a directed verdict motion and abandoned argument for the -1409 charge."
f. "Failure to argue the admissibility of evidence #11 as constituting an illegal seizure."
g. "Failure to request that evidence be excluded for its potential to confuse and draw sympathy from the jury."

2. Ineffective Assistance of Appellate Counsel
   a. "Failure to address warrantless seizure."

However, at the PCR hearing, Applicant enumerated the following as the allegations on which he was proceeding:

1. Ineffective Assistance of Trial Counsel
   a. "Failure to object to State's use of phone application to extract previously deleted videos."
   b. "Failure of Trial Counsel to challenge the search warrant of the phone because of hearsay in affidavit supporting the search warrant."
   c. "Trial Counsel failed to properly argue issues related to identification."
   d. "Failure to conduct thorough cross-examination on Gebhart and minor child."
   e. "Solicitor mischaracterized evidence."
   f. "Failure to object to law enforcement perjury."
   g. "Trial Counsel should have requested lesser-included offense."
   h. "Failure to challenge the admission of the tie-dye shirt."

2. Ineffective Assistance of Appellate Counsel
   a. "Should have argued seizure of phone and directed verdict issue."

III. SUMMARY OF TESTIMONY PRESENTED

Applicant testified on his own behalf at the PCR hearing. Trial Counsel was present and testified. Appellate Counsel testified by telephone with the consent of both parties.

Applicant

Applicant testified he was aware his charges carried a possible sentence of life imprisonment. Applicant testified there were several failings on the part of Trial Counsel to include pretrial motions and failure to contact witnesses including character witnesses. Applicant alleged there were differing descriptions of the room where the incidents were alleged to have

occurred. Applicant did not feel Trial Counsel thoroughly-cross examined the witnesses and should have objected to inconsistent statements by the Solicitor in closing arguments.

Applicant testified he did not consent to the officers taking his cell phone and asserted the testimony by the officers was contradictory. Applicant recalled Trial Counsel did raise the issue of the warrantless seizure when attempting to suppress evidence, but alleged Trial Counsel did not raise other issues pertaining to the cell phone including the issue that one victim alleged the phone used to take pictures of Applicant raping her was multicolored while the phone seized was not.

Applicant alleged Victim Minor 1, his daughter, did not testify and therefore the two charges pertaining to her should have been dismissed. According to Applicant, there was no evidence at all for indictments -1409 and -1410.

Applicant also asserted he should have received a charge for the lesser-included offense of assault and battery of a high and aggravated nature ("ABHAN") especially on indictment -1409, as Applicant alleged there was no proof of sexual battery.

As to his tie-dye shirt seen in the video-recorded of the sexual battery, Applicant testified police came into his house two or three times with search warrants after he was apprehended, and Detective Mosher contacted Applicant's now-ex-wife who gave him the shirt.

Applicant testified Appellate Counsel stated in her brief that the argument was without legal merit but should not have done that because it was undoubtedly a warrantless seizure. Applicant also recalled he told Appellate Counsel she raise an issue about the contradictory testimony by law enforcement. Applicant also opined Appellate Counsel should have raised an issue regarding the denied directed verdict motion for indictment -1408.

Trial Counsel

Trial Counsel explained this was a case of overwhelming evidence against Applicant. Unsurprisingly, there were no plea offers. This evidence included video and photographs pulled from Applicant's cell phone which showed someone in Applicant's living room wearing Applicant's tie-dye shirt committing various sexual batteries on his daughter, ("Minor 1"), and his niece ("Minor 2"). One video showed what appeared to be Applicant digitally penetrating Minor 1's vagina in Applicant's living room. Another video showed what appeared to be Applicant penetrating his daughter Minor 1's anus with his penis. There were various other incriminating photographs and videos found on the phone. This includes pictures of what appears to be Applicant pulling down his niece Minor 2's underwear to display her vagina as well as Minor 1 performing fellatio on what appears to be Applicant in the same aforementioned tie-dye shirt. Trial Counsel recalled Applicant's now-ex-wife volunteered the tie-dye shirt to law enforcement.

Trial Counsel recalled there were forensic interviews conducted with each of the two victims, and he was actually successful in suppressing the forensic interview of Applicant's daughter Minor 1 as she was unable to be cross-examined when she became nonresponsive on the witness stand. However, despite his efforts, he was unable to suppress the forensic interview of Applicant's niece Minor 2. Minor 2 also testified however that Applicant digitally violated her and made Minor 1 demonstrate acts such as fellatio which Minor 2 refused to do.

Trial Counsel testified he challenged the seizure of Applicant's cell phone but was unsuccessful as the trial judge ruled Applicant consented to the seizure of his phone, which was supported by the testimony of law enforcement officers. Trial Counsel recalled Applicant's version of events was he did not consent to the seizure of his phone but law enforcement's testimony was he consented to them taking the phone to the station when they were securing the

home. Trial Counsel recalled the Solicitor also argued inevitable discovery in support of the seizure, notwithstanding, but Trial Counsel was not sure if that would have been successful without the consent. Trial Counsel also recalled that after the seizure, law enforcement did obtain a search warrant for the contents of the phone before they searched the phone. Trial Counsel recalled the phone was initially set to airplane mode and secured in a locked drawer since the evidence room was not open during the weekend.

Trial Counsel testified he met with Applicant numerous times prior to trial and Applicant had a very fantastical theory that law enforcement used a phone app to place the video and photographs of Applicant sodomizing and committing other sexual batteries on his niece and daughter on his phone while it was in law enforcement custody. Of course, this footage from Applicant's cell phone also showed the crimes were committed by someone in Applicant's living room and wearing Applicant's distinctive tie-dye shirt. In actuality, law enforcement used an app that recovers deleted files.

Trial Counsel testified Applicant had changed his appearance dramatically from the time of the incident to the time of trial.

As to lesser-included offenses, Trial Counsel testified there was no doubt in anyone's mind that Victim's daughter was sodomized and, of course, he characterized the evidence against Applicant as overwhelming.

Appellate Counsel

Appellate Counsel testified by telephone she filed an Anders brief in this case. She testified her procedure was to look through the record for appealable errors and she found no valid issues. She testified she chose the issue of the seizure of Applicant's cell phone because she felt it was the best issue, but she qualified, it still was not a meritorious issue.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). However, it is incumbent upon Applicant to likewise show performance by appellate counsel was deficient and he was prejudiced by the deficiency. Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005).

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

First, this Court finds the testimony of both Trial Counsel and Appellate Counsel to be credible and persuasive. By contrast, this Court finds the testimony of Applicant to be self-serving and lack credibility.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

This Court finds Applicant has failed to prove he is entitled to post-conviction relief on any of his allegations of ineffective assistance of trial counsel. This Court finds Trial Counsel rendered competent and calculated representation against a remarkably strong case for the State and a difficult case to try before a jury, and Applicant has furthermore failed to satisfy his burden of proving prejudice from any alleged deficiencies in Trial Counsel's performance.

The trial record and testimony reflects Trial Counsel thoroughly challenged the seizure of Applicant's cell phone from which the incriminating videos and photographs of various sexual batteries were extracted. ROA p. 66, l. 19; p. 100, l. 23. Trial Counsel moved to suppress these materials as fruit of the poisonous tree as the phone was seized without a warrant and argued the facts did not give rise to an exception of the warrant requirement because Applicant did not consent. However, as Trial Counsel testified, the trial judge believed law enforcement who testified Applicant did consent to them taking possession of his phone and found the State met its burden of proving proper consent. ROA p. 106, l. 12. This Court finds Trial Counsel acted well within the standard of reasonable professional norms in moving to suppress the evidence based

on a warrantless seizure and lack of consent. Therefore, Applicant has failed to meet his burden of proving Trial Counsel was deficient as to this allegation. Moreover, Applicant has failed to demonstrate that but for Trial Counsel's alleged deficiencies, the evidence would have been suppressed or the outcome would have been any different, as the trial judge simply and properly found Applicant consented to the seizure of his phone based on testimony from law enforcement.

Failure to object to State's use of phone application to extract previously deleted videos

Applicant alleges Trial Counsel was ineffective for failing to object to the State's use of a phone application to extract previously deleted videos. This Court finds this allegation to be meritless. Trial Counsel testified that during his representation Applicant was preoccupied with a theory the State somehow implanted the incriminating materials onto his cell phone. Now, Applicant appears to concede they were previously deleted videos but argues Trial Counsel should have objected to their extraction.

As the record reflects and Trial Counsel testified, law enforcement did use a forensic program known as Secure View 3 by Susteen to recover the deleted videos and photographs appearing to show various instances of Applicant sexually penetrating his daughter and niece in various manners. ROA p. 369, l. 11. Furthermore, the record reveals and Trial Counsel testified the phone was seized then securely stored in a locked drawer and placed on airplane mode, which prevents signal from leaving the device or being received by the device, over the weekend following Applicant's arrest. ROA p. 97, l. 6. To the extent Applicant claims law enforcement fabricated these materials or transmitted them from another device to Applicant's phone, this claim is, as Trial Counsel testified, fantastical. This Court observes a warrant is generally required before a search of information stored on a cell phone, even when the cell phone is seized incident to arrest. Riley v. California, 134 S.Ct. 2473, 2493 (2014). Here however, the

phone was seized at Applicant's home pursuant to Applicant's consent. ROA p. 81, l. 12. Later, *after* obtaining a search warrant for the contents of the phone, and only then, law enforcement used the forensic program to retrieve the deleted incriminating materials. ROA p. 367. There was nothing illegal about law enforcement's retrieval of the incriminating materials on Applicant's cell phone by way of the forensic program. Accordingly, there was nothing objectionable about this issue and Trial Counsel cannot be held deficient for failing to object. Furthermore, Applicant has failed to prove prejudice from the alleged deficiency because even if Trial Counsel had objected, there was no legal basis on which to object, and therefore there is no reasonable probability the outcome of the proceedings would have been different had Trial Counsel objected. This allegation is accordingly dismissed with prejudice.

Failure of Trial Counsel to challenge the search warrant of the phone because of hearsay in affidavit supporting the search warrant."

Applicant also alleges Trial Counsel was ineffective for failing to challenge the search warrant of the phone due to hearsay in the affidavit supporting the search warrant. Applicant presented no probative evidence to support this allegation other than this bare allegation. Nevertheless, this Court finds the record reveals ample basis for probable cause to support a search warrant of Applicant's phone. Testimony from trial revealed the seized phone belonging to Applicant was red and black, which does coincide with the victim's description of Applicant's phone as multicolored, which she described as being involved in the crime as Applicant used the phone to film the sexual acts. ROA p. 365, l. 12. This Court also observes both victims had incriminated Applicant in this crime at that time as the latest of incidents occurred on July 28, 2013, and the victims' forensic interviews were conducted July 29, 30, and 31, of 2013. Law enforcement already had probable cause to support an arrest warrant of Applicant before even

seizing the phone. ROA p. 80, l. 1. Notwithstanding Applicant's failure to present any evidence as to how the search warrant was unsupported by probable cause and objectionable, this Court finds the search warrant was comfortably supported by probable cause in consideration of disclosures by both Minor 1 and Minor 2 as well as findings of vaginal irritation by a doctor who examined Minor 2. ROA p. 252, l. 10. As there is nothing in the record to suggest the search warrant supporting the search of Applicant's phone was objectionable, this Court finds Trial Counsel was not ineffective for not objecting to this search warrant. Furthermore, this Court finds Applicant was not prejudiced by Trial Counsel's lack of objection because there is no reasonable probability an objection to this constitutional search would have changed the outcome of the proceedings. This allegation is therefore dismissed with prejudice.

Trial Counsel failed to properly argue issues related to identification.

Applicant alleges Trial Counsel failed to properly argue issues related to identification. This Court finds this allegation to be meritless. Again, Applicant failed to provide any probative evidence to support his establishment of deficiency or prejudice regarding this allegation. This Court observes the obvious point that the two victims in this case were Applicant's daughter and niece and therefore possessed independent ability to identify Applicant as the perpetrator. This Court does note Applicant's niece Minor 2 was unable to identify Applicant in the courtroom during trial, though she was able to identify the man who sexually violated her as her uncle Jon. ROA p. 173, l. 19. This is explained by the fact Applicant had dramatically changed his appearance from the time of the incident to the time of trial, as Trial Counsel credibly testified. Applicant had a long, curly beard and long, curly hair at the time of the incident but not at trial. ROA p. 190, l. 22. After reviewing the record in its entirety and passing upon the testimony of witnesses at the PCR hearing, this Court finds no meritorious issues which Trial Counsel could

have successfully raised at trial and therefore finds Applicant has failed to satisfy his burden of proving deficiency of Trial Counsel regarding this allegation. Moreover, Applicant has offered no testimony or probative evidence of how he was conceivably prejudiced by Trial Counsel's performance in this regard. Accordingly, this allegation is dismissed with prejudice.

Failure to conduct thorough cross-examination on Gebhart and minor child.

Applicant alleges Trial Counsel failed to conduct thorough cross-examination of Detective Gebhart and Minor 2. This Court finds these allegations to be meritless.

This Court observes Trial Counsel asked no questions of Detective Gebhart on cross-examination at trial. ROA p. 377, l. 3. First, this Court recognizes the difficult position of Trial Counsel following Detective Gebhart's direct examination which included the presentation of substantial video and photographic evidence of Applicant sodomizing and otherwise sexually assaulting his niece and daughter. During Detective Gebhart's testimony, he was able to point out articles of clothing found on the victims and Applicant which were recovered during the investigation of this case. Detective Gebhart also testified about the legitimate and legal means by which he extracted the deleted videos and photographs from Applicant's cell phone with a forensic program. This Court finds nothing in the record from which to infer there was anything beneficial to the defense to be gained by further questioning Detective Gebhart regarding his involvement in the case. Trial Counsel's opportunity for cross-examination occurred after the jury had witnessed disturbing footage of explicit sexual acts being committed upon Applicant's niece and daughter. This Court finds Trial Counsel's decision not to cross-examine Detective Gebhart at that time reasonable as not only would it have been ill-advisable to reference the photographs and videos any longer, but also Detective Gebhart had already thoroughly explained

the means by which the evidence was obtained. Accordingly, this Court finds Applicant has failed to prove Trial Counsel was deficient as to this allegation.

Furthermore, the nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). At the PCR hearing, Applicant failed to present any questions Trial Counsel allegedly failed to ask, and failed to present any testimony showing the answers at trial would have benefited Applicant. The likely result would have been keeping the disturbing materials in the forefront of the jury's minds for even longer than necessary while allowing Detective Gebhart to go into further detail about the materials or the legitimate means by which he recovered them. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. This Court finds there is no reasonable probability the outcome of the proceeding would have been any different had Trial Counsel cross-examined Detective Gebhart differently, and this allegation is dismissed with prejudice.

Applicant also alleges Trial Counsel failed to thoroughly cross-examine the minor victim in this case. This Court finds this allegation to be meritless. While Applicant presented no testimony as to what should have been asked of the minor victim in this case, this Court interprets this allegation to relate to Minor 2, as Minor 1 was unable to be cross-examined because she was nonresponsive and Trial Counsel cannot conceivably held ineffective for failing to cross-examine a witness who was unresponsive.

During direct-examination, Minor 2 testified to watching a movie with Minor 1 and Applicant but when she tried to leave to go to bed, Applicant stopped her and made him touch his "boy part," and eventually touching her in "both girl parts," to include "in" her "girl parts." ROA p. 166, l. 19 – p. 168, l. 3. Minor 2 also identified the shorts she was wearing during the assault which were of course later displayed in photographs found on Applicant's cell phone. ROA p. 172, l. 17. On cross-examination, Trial Counsel was able to question Minor 2 as to how such an assault could occur in a "little house" without someone else hearing or finding out what was happening. ROA p. 175, l. 19. Trial Counsel was also able to raise the issue of the possibility that Minor 2's conversations with Minor 1 had "planted the seed" of these allegations against Applicant prior to her forensic interview. ROA p. 183, l. 24. Trial Counsel also questioned Minor 2 regarding possible inconsistencies in her recollection recited to the Solicitor and her statements in the forensic interview. ROA p. 186, l. 13.

This Court finds Trial Counsel thoroughly cross-examined Minor 2 despite the inherently delicate situation of cross-examining a nine year-old criminal sexual conduct accuser in front of a jury. This Court finds Trial Counsel asked questions reasonably calculated to aid Applicant's defense. Accordingly, Applicant has failed to satisfy his burden of proving Trial Counsel was deficient in his cross-examination of Minor 2. Moreover, as noted above, Applicant has failed to present any probative evidence as to how further cross-examination or different questions of Minor 2 would have benefited him at trial. Accordingly, this allegation is dismissed with prejudice.

Mischaracterization of evidence by the Solicitor.

Applicant alleges Trial Counsel should have objected to mischaracterization of evidence by the Solicitor in this case. This Court finds this allegation to be meritless. This Court finds

nothing in the Solicitor's statement problematically mischaracterized evidence or was otherwise objectionable. Furthermore, the Solicitor's arguments were based upon reasonable inferences from the record and did not represent the statements and testimony by the victims or the physical evidence in this case. Moreover, Trial Counsel thoroughly challenged the State's evidence in his own closing argument by raising the issue of how the conduct could have occurred while others were in the home and challenged the physical evidence in this case such as Applicant's DNA sample. ROA p. 425. Trial Counsel also effectively challenged the redness in Minor 2's vaginal area which the Solicitor referenced in his closing argument by suggesting the irritation was caused by sand from the beach where they had been playing earlier. ROA p. 426. Therefore, Applicant has failed to prove Trial Counsel was deficient for challenging the alleged mischaracterization of evidence by the solicitor as this Court finds there was no instance of such mischaracterization and Trial Counsel thoroughly attacked the State's evidence against Applicant in his closing argument. Furthermore, Applicant has also failed to establish prejudice by this alleged deficiency as there was ample evidence upon which to convict Applicant regardless, including video footage and photographs of what appears to be him sodomizing and violating his daughter and niece in various instances, semen found in Minor 2's vaginal area, and testimony from both victims. Accordingly, this allegation is dismissed with prejudice.

Failure to object to law enforcement perjury.

Applicant alleges Trial Counsel was ineffective for failing to object to law enforcement perjury. Specifically, Applicant theorized law enforcement witnesses lied as to who was present at the time of his arrest and whether Applicant gave consent for law enforcement to take his phone at that time. This Court finds the allegation to be meritless. First, this Court finds Applicant has presented no evidence of perjury by law enforcement other than his own

testimony, which this Court finds not credible. There is no documented record of the testimony by law enforcement at the preliminary hearing, where it is the norm for court reporters not to be present. As Trial Counsel testified, law enforcement's version of events and Applicant's version of events differed as to how his phone was seized. Officers present at Applicant's house testified Applicant consented to them taking the phone while they were securing the residence. ROA p. Applicant's version of events was law enforcement were looking were the phone, he motioned towards the phone, and law enforcement took the phone without asking permission, noting, "That's the phone in question, we're taking it." ROA pp. 74-75. All parties agreed Applicant asked law enforcement into his home when they arrived on his front porch. ROA p. 71, l. 11; p. 80, l. 16.

Detective Mosher, who went to Applicant's home with numerous other officers with the arrest warrant, testified pretrial Applicant asked if they could all step inside so as not to "air his business" where neighbors could see. ROA p. 80, l. 16. Prior to leaving the residence to go to the station, law enforcement was securing Applicant's residence and ensuring he had the property he wanted with him to take to jail and asked if he wanted them to take his cell phone and keys, to which Applicant affirmed he did. ROA p. 81, ll. 6-10. In fact, Detective Mosher testified pretrial the reason he did not prepare a search warrant for the phone before responding to the home was because the apprehension of Applicant was more important than recovering the phone at that point anyway, evidencing the fact Detective Mosher had no plan to take the phone absent Applicant's consent. ROA p. 86, ll. 11-22. Detective Mosher's testimony at trial was consistent with his pretrial testimony, reiterating the fact Applicant asked law enforcement to bring some of his belongings including his cell phone. ROA p. 381, l. 14. As Trial Counsel summarized, it was law enforcements'

This Court finds Applicant has failed to satisfy his burden of proving Trial Counsel was deficient regarding this allegation as Applicant has presented no credible evidence of perjury on the part of law enforcement and there was nothing to give rise to a valid objection. Furthermore, Applicant has failed to prove prejudice from this allegation as there is no reasonable probability that if Trial Counsel objected on the basis of perjury, the outcome would have been any different. This Court also notes Trial Counsel nevertheless adequately cross-examined law enforcement and argued at length against the validity of the search and seizure Applicant alleges law enforcement lied about. Accordingly, this allegation is dismissed with prejudice.

Trial Counsel should have requested the lesser included offense.

At the PCR hearing, Applicant alleged Trial Counsel should have requested the lesser-included offense of ABHAN, "especially as to -1409." This Court finds this allegation to be meritless. First, Trial Counsel was not deficient for failing to request a lesser included offense because it would have been frivolous to do so. For a defendant to be entitled to a jury instruction on a lesser-included offense, there must be some evidence in the record that would tend to show that the defendant is guilty of the lesser rather than the greater offense. State v. Fields, 356 S.C. 517, 589 S.E.2d 792 (Ct. App. 2003); State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976). The possibility that the jury might believe some of the State's case and not the rest is an insufficient argument for a lesser-included offense instruction. Id. However, the trial court should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense. State v. Smith, 315 S.C. 547, 549, 446 S.E.2d 411, 413 (1994).

In this case, all evidence indicated Applicant was, barring any imaginable possibility misidentification, guilty of criminal sexual conduct with a minor, first-degree. Applicant was

charged with criminal sexual conduct with a minor under S.C. Code § 16-3-655:

> A person is guilty of criminal sexual conduct with a minor in the first degree if (1) the actor engages in sexual battery with a victim who is less than eleven years of age...
>
> "Sexual battery" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, *however slight*, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes. S.C. Code § 16-3-651(h) (emphasis added).

Applicant was indicted for three counts of criminal sexual conduct with a minor, first-degree. Indictment -1408 alleged Applicant made his daughter Minor 1, who was under eleven years of age, perform fellatio on him. Minor 1 did not testify substantively about the abuse at trial. However, Minor 2 testified at trial and stated in her forensic interview that Applicant made Minor 1 perform fellatio on him as a demonstration to Minor 2 who refused. ROA p. 168, l. 12 – p. 169, l. 2. This was the evidence at trial presented as to this indictment, and there was no testimony that Minor 1 was violated any less than by way of sexual battery, specifically as to this indictment, fellatio. Therefore, there was no reason to request a lesser included offense for ABHAN as to this indictment, and there is no reasonable probability Applicant would have been found guilty of ABHAN rather than CSC with a minor, first-degree as to this indictment. It follows Applicant has failed to prove both deficiency and prejudice regarding this allegation. Accordingly, this allegation is dismissed with prejudice.

As to Indictment -1409, there was likewise no reason to request the lesser included offense of ABHAN and again no reasonable probability such a strategy would have changed the outcome of the proceedings. Indictment -1409 alleged Applicant digitally penetrated his niece Minor 2, who was under eleven years of age at the time, in her vagina. This is precisely what the evidence and testimony at trial indicated. Minor 2 testified at trial and disclosed in her forensic

interview that Applicant touched her in "both girl parts" with his hands. ROA p. 167, l. 19. When asked whether Applicant touched her "on" or "in" her "girl parts," Minor 2 clarified "both." ROA p. 167, l. 25 – p. 168, l. 3. Minor 2's testimony was corroborated by Dr. Busch's medical examination of Minor 2. Dr. Busch observed Minor 2 to have inflammation and redness on the labia majora and labia minora. ROA p. 252, ll. 10-17. Minor 2 was also very tender in that area. ROA p. 250, l. 10. All this, in conjunction with photographic evidence of Applicant pulling down Minor 2's underpants to expose her vaginal area for the camera, provided more than ample basis for the jury to convict Applicant of CSC with a minor, first-degree as to this indictment. Trial Counsel was not deficient for failing to frivolously and pointlessly request this charge. Moreover, Applicant was not prejudiced by Trial Counsel's failure to do so because there is no reasonable probability the charge would have been granted or Applicant would have been convicted of ABHAN rather than CSC with a minor, first-degree. Accordingly, this allegation is dismissed with prejudice.

As to Indictment -1410, this Court also finds there was no basis to request the lesser-included offense of ABHAN and likewise no probability such an avenue would have been successful. Indictment -1410 alleged Applicant anally penetrated his daughter Minor 1, who was less than eleven years of age at the time. Trial Counsel credibly testified there was "no doubt" to anyone in the courtroom that Minor 1 had been sodomized. This charge was evidenced by multiple items of explicit video and photographic evidence extracted from Applicant's cell phone and presented at trial of what appeared to be Applicant anally penetrating his daughter Minor 1 with his penis in Applicant's living room. ROA p. 374, l. 20; p. 375, l. 12. Clearly, this evidence supported only the charge of CSC with a minor, first-degree. Trial Counsel was therefore not deficient for failing to request the charge, and Applicant has failed to prove he was prejudiced by

Trial Counsel's to request a charge which would not have been granted or successful. Accordingly, this allegation is dismissed with prejudice.

This Court also notes it is apparent a theory of Applicant's defense was this was a case of misidentification, as evidenced by the closing argument. ROA p. 427, ll. 7-12. Notwithstanding the fact the evidence in this case in no way called for a lesser-included offense, the inclusion of a lesser-included offense would not have been consistent with such a trial strategy.

Failure to challenge the admission of the tie-dye shirt (State's #11).

Applicant alleges Trial Counsel was ineffective for failing to challenge the admission of the tie-dye shirt. This Court finds this allegation to be meritless. First, this Court observes Trial Counsel did object to the admission of the tie-dye shirt on the basis of relevance when the State first moved to introduce it during testimony from Applicant's now-ex-wife that it was one of Applicant's "most favorite shirts." ROA p. 221, l. 10. The State agreed to hold off on introducing the shirt. ROA p. 221, l. 15. Later, of course, the relevance of the shirt was apparent as it appeared to be the shirt worn by the perpetrator of the sexual batteries recorded on Applicant's cell phone.

This Court finds no legal basis to challenge the admissibility of the shirt, and therefore Trial Counsel was not deficient regarding this allegation. Applicant's then-wife voluntarily offered the shirt to investigators in this case. There were no legitimate Fourth Amendment issues regarding this evidence, nor any other reason to challenge its admissibility.

Furthermore, this court notes that regardless of the admission of the actual shirt, a photograph of Applicant wearing the shirt was also admitted. ROA p. 223, ll. 1-5. Therefore, even if the shirt was kept out of evidence successfully, the jury would have been well aware Applicant had worn such a shirt. Furthermore, the shirt was a relatively minor point considering

the explicit materials depicting the sexual batteries of both *Applicant's* niece and daughter in *Applicant's* living room were found on *Applicant's* phone. There is no reasonable probability, absent Trial Counsel's alleged deficiencies regarding this allegation, the outcome of the proceeding would have been different. Accordingly, this allegation is dismissed with prejudice.

Failure to request that evidence be narrowed to the charge it was alleged to support.

While the allegation "failure to request that evidence be narrowed to the charge it was alleged to support" was not one of the allegations enumerated by Applicant as an allegation upon which he was proceeding, this Court nevertheless address the allegation as it was raised in his original PCR application. This Court finds this allegation to be meritless. Applicant has failed to establish his burden of proving Trial Counsel was deficient regarding this allegation or how Trial Counsel should have performed as to this allegation. This Court observes Trial Counsel was able to keep one forensic interview from being presented in court and argued vigorously against the admission of all forensic interviews as well as the incriminating materials from Applicant's cell phone. This Court finds no deficiency in Trial Counsel's performance regarding the framing of the evidence in this case. Moreover, Applicant has failed to present any evidence as to how he was prejudiced by Trial Counsel in this regard. As previously noted in this Order, the State presented ample evidence upon which to base a conviction for each charge of CSC with a minor, first-degree, to include testimony, videos, photographs, forensic interviews, and physical evidence. This Court finds Applicant has failed to satisfy his burden of proving both deficiency and prejudice as to this allegation. Accordingly, this allegation is dismissed with prejudice.

Trial Counsel argued ineffectively to support a directed verdict motion and abandoned argument for the -1409 charge.

While the allegation "Trial Counsel argued ineffectively to support a directed verdict motion and abandoned argument for the -1409 charge" was not one of the allegations

enumerated by Applicant as an allegation upon which he was proceeding, this Court nevertheless address the allegation as it was raised in his original PCR application. This Court finds the allegation to be meritless. A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). At the PCR hearing, Trial Counsel reasonably described this as a case of overwhelming evidence. This is a reasonable conclusion considering the conclusiveness of the photo and video evidence, Minor 2's testimony and forensic interview, and other physical evidence.

Indictment -1408 was supported by Minor 2's testimony as well as forensic interview detailing Applicant forcing his daughter Minor 1 to perform fellatio on him as a demonstration to Minor 2. Indictment -1409 was supported by Minor 2's forensic interview and statement that Applicant used his hand to touch both "on" and "in" her "girl parts." This was corroborated by the physical evidence of inflammation and tenderness in Minor 2's vaginal area as well as the picture from Applicant's phone showing what appears to be Applicant pulling down Minor 2's underwear to display her vaginal area. Indictment -1410 was supported by the video and photographic evidence from Applicant's cell phone showing what appears to be Applicant sodomizing Minor 1 in his living room.

Clearly, the State presented ample evidence to support a conviction on each of the three counts of CSC with a minor, first-degree. Therefore, Trial Counsel was not deficient as Trial Counsel is not ineffective for failing to raise a frivolous argument. Notwithstanding, in light of the evidence, there is no reasonable likelihood the court would have granted the motion for directed verdict had Trial Counsel argued differently. Accordingly, this allegation is dismissed with prejudice.

Failure to request that evidence be excluded for its potential to confuse and draw sympathy

from the jury.

Again, this allegation was not one of the allegations enumerated by Applicant as an allegation upon which he was proceeding. Nevertheless, this Court will address the allegation as it was raised in his original PCR application. This Court finds the allegation to be meritless. While Applicant provided no probative evidence or testimony to support this allegation, this Court notes Trial Counsel exercised reasonable professional judgment and effectively represented Applicant in this regard. The record reveals Trial Counsel did argue against the admissibility of irrelevant and prejudicial comments made by the victims in their forensic interviews. ROA p. 38, l. 21. Trial Counsel took issue with comments such as "My uncle's in jail now," "He's kind of a mean person," and "I wish there was a machine to take away bad memories." ROA pp. 40-42. Pursuant to Trial Counsel's argument, various portions were redacted. ROA p. 44. The trial judge ruled the second and third forensic interviews met the statutory requirements for admissibility but would have to be redacted to show only the material pertinent to the charged conduct of Applicant. ROA p. 64, l. 24.

This Court finds no evidence in the record or from the PCR hearing that Trial Counsel's conduct was deficient regarding evidence with potential to mislead or confuse the jury. Applicant has therefore failed to satisfy his burden of proving deficiency. Moreover, this Court finds Applicant has failed to prove prejudice from this allegation in light of the tremendous amount of evidence against Applicant, the lack of evidence with potential to mislead or confuse the jury in this case, as well as the redactions to the forensic interviews successfully obtained by Trial Counsel. Accordingly, this allegation is dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Applicant alleges Appellate Counsel was ineffective for failing to argue regarding the

warrantless seizure of Applicant's cell phone as well as the directed verdict issue. This Court finds this allegation to be meritless.

Appellate Counsel did brief the issue regarding the warrantless seizure of Applicant's cell phone, albeit in an Anders brief. During the PCR hearing, Appellate Counsel testified she reviewed the record and believed this to be the best issue, although still not a meritorious one. The South Carolina Court of Appeals agreed after review of the record and Applicant's pro se brief. Both were correct that Applicant did not have a meritorious issue regarding the seizure of his cell phone. "Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (1990) (citing Mincey v. Arizona, 437 U.S. 385, 390 (1978)). Recognized exceptions to the warrant requirement include plain view, exigent circumstances, and *consent*. Wright, 391 S.C. at 442 (emphasis added). Following a lengthy suppression hearing a trial, the trial judge found the State met its burden in proving proper consent based on the officer testimony Applicant consented to bringing the phone with him to the police department, and the Fourth Amendment does not require the police to inform him he can refuse the consent. Moreover, the trial judge ruled it was certainly reasonable to seize the phone at the police department in order to preserve evidence as it could be wiped remotely. ROA p. 106, l. 12 – p. 107, l. 9. There is nothing in the record to suggest the trial judge abused her discretion regarding this issue, rather the testimony of law enforcement and the nature of evidence on cell phones supports her determination of both consent and reasonableness of law enforcement's conduct regarding Applicant's cell phone. As this was not a meritorious issue, Appellate Counsel was not deficient for failing to raise these arguments in a merits brief. Furthermore, as also evidenced by the Court of Appeals' review of the record and dismissal pursuant to Anders, there is no reasonable probability these arguments

would have been successful if raised in a merits brief. Accordingly, Applicant has failed to establish both deficiency and prejudice and this allegation is dismissed with prejudice.

Likewise, Appellate Counsel was not ineffective for challenging the denial of a directed verdict. On appeal from the denial of a directed verdict, an appellate court must review the evidence in the light most favorable to the State. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. Id. In this case, there was substantial evidence of Applicant's guilt as to every indictment, and therefore, Appellate Counsel was not deficient for failing to challenge the denial of directed verdict on appeal. As this Court has already observed, Indictment -1408 was supported by Minor 2's testimony as well as forensic interview detailing Applicant forcing his daughter Minor 1 to perform fellatio on him as a demonstration to Minor 2. Indictment -1409 was supported by Minor 2's forensic interview and statement that Applicant used his hand to touch both "on" and "in" her "girl parts." This was corroborated by the physical evidence of inflammation and tenderness in Minor 2's vaginal area as well as the picture from Applicant's phone showing what appears to be Applicant pulling down Minor 2's underwear to display her vaginal area. Indictment -1410 was supported by the video and photographic evidence from Applicant's cell phone showing what appears to be Applicant sodomizing Minor 1 in his living room. As Trial Counsel testified, there was no doubt Minor 1 was sodomized.

Clearly, the State presented ample evidence to support a conviction on each charge of CSC with a minor, first-degree. Appellate Counsel was not deficient for failing to raise this frivolous issue. Moreover, Applicant has failed to prove prejudice from Appellate Counsel's

failure to raise this issue because this argument would not have been successful on appeal. Accordingly, Applicant's allegation of ineffective assistance of appellate counsel is dismissed with prejudice.

VI. CONCLUSION

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

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

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice in regard to all allegations; and

2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 16 day of Nov, 2018.

D. CRAIG BROWN
Presiding Judge
First Judicial Circuit

Florence, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
FILED-RECORDED FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER)
) CASE NO.: 2016-CP-18-2007
2018 NOV 21 PM 3:02
JONATHAN M. BROWN, #340901) **MOTION AND ORDER INFORMATION**
Plaintiff,) **FORM AND COVERSHEET**
vs.) CLERK OF COURT DORCHESTER COUNTY
STATE OF SOUTH CAROLINA)
Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
Leslie T. Sarji, Bar No. _____	Christian Saville, Bar No. _____
Address:	Address:
230 Congress Street	Post Office Box 11549
Charleston, South Carolina 29403	Columbia, South Carolina 29211
Phone: _____ Fax _____	Phone: _____ Fax_____
E-mail: _____ Other: _____	E-mail: _____ Other: _____

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: _____
Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☒ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Christian Saville
Signature of Attorney for ☐ Plaintiff /☒ Defendant

November 9, 2018
Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ 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: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other: _____	Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)