

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Saluda County

Honorable Kristi F. Curtis, Circuit Court Judge

KYLE WAYNE WAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000547

APPENDIX

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KYLE WAY - CROSS-EXAMINATION BY MR. McNAIR

1 knew her?

2 A. She had put some friends -- her friends on there.

3 Q. Oh, Princess. One?

4 A. I meant, she had access to it.

5 Q. One friend. And you ---

6 A. She's the -- she's the one who put the profile picture on
7 it and took both of our pictures and put them together.

8 Q. You created this site.

9 A. I did ---

10 Q. You ---

11 A. --- create it.

12 Q. --- created this site.

13 A. I did, yes, sir.

14 Q. All right. And you put that marriage date on there of
15 March 13th, 2015.

16 A. I don't remember putting the marriage date on there.

17 Q. And the birthdate of [REDACTED], which is your birthday,
18 right?

19 A. Yes.

20 Q. And 2001, which is [REDACTED] s birthdate.

21 A. Yes, because we were sharing it. And she told me to put
22 2001.

23 Q. Oh, she told you.

24 A. Yes, because we had talked about this before I did it.
25 She had called me from that phone.

KYLE WAY - CROSS-EXAMINATION BY MR. McNAIR

1 Q. On November 17th concerning this Facebook stuff, you said
2 tomorrow get your friends off and delete your old one, and I
3 will, too. No lies from now on, okay? Promise.

4 A. I told her to delete hers and I was going ---

5 Q. No lies. No lies. What ---

6 A. I didn't want nobody to think that I was her brother
7 because I told you nobody at the time but a couple of people
8 knew I was her brother. So that's why I deleted my Facebook.

9 Q. The lies were concerning what she said about her
10 relationship with Tanner, right? You were jealous about
11 Tanner.

12 A. I was not jealous.

13 Q. So you wanted ---

14 A. Why would I personally be jealous? I'm not jealous.

15 Q. Do you want someone else like Tanner? Just wondering.
16 I've been feeling like lately you like someone else at school.
17 I hope not. You and me are engaged. That's not jealousy?

18 A. Not from me. But, yes, it does sound jealous. But ---

19 Q. I'm going to be scared ---

20 A. --- I was not jealous.

21 Q. I'm going to be scared about your exes at school. What
22 if you start to like them? That sound jealous?

23 A. Yes. It can from the text, yeah.

24 Q. I can't believe you started to like Tanner. You told me
25 you didn't. I just want the truth. As long as you leave him

KYLE WAY - CROSS-EXAMINATION BY MR. McNAIR

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1 alone now and promise it's only me. That sound like jealousy?

2 A. Yeah, but that wasn't me as her brother saying all this.

3 This was supposed to be the 17 year old that had started in

4 April.

5 Q. So who am I talking to? Am I talking to Kyle Way or this

6 -- some 17 year old?

7 A. I mean, you're talking to Kyle Way right now. Yes, I did

8 send those, but there's the reason for why I sent all that.

9 I've been there before. I've been in that house. I know how
10 it is.

11 Q. Why did it make you feel better to share a Facebook
12 account with her?

13 A. That is something that she wanted to do with me.

14 Q. Why did that make you feel better?

15 A. That didn't make me feel better.

16 Q. Why did you text her, sharing Facebook is awesome, it
17 makes me feel better?

18 A. That was not -- I told you, that was the way we was
19 portraying it as a relationship.

20 Q. It made you feel better because you could see who all her
21 friends were and you could monitor all her communications,
22 right?

23 A. No. I told her she could add whoever she wanted to on
24 it. So, no, that is not what I meant.

25 Q. But then whoever she added you could see what she said to

KYLE WAY - CROSS-EXAMINATION BY MR. McNAIR

1 them because you shared a Facebook account. So if she ---

2 A. I mean, we ---

3 Q. --- talked to Tanner ---

4 A. --- could see what we both said. So technically, yes.

5 Q. Correct. And you wanted her to move with you to

6 Greenwood and homeschool her.

7 A. Well, that was the 17 year old that ---

8 Q. No, no, no.

9 A. That was not me.

10 Q. No, no. Seventeen year olds don't move out by themselves

11 and homeschool other 13 year olds. On October 9th she told

12 you she was ready to move out. And you said, me, too. Just

13 think, lay down by you, hold you, cuddle, going to be awesome.

14 Just got to find out about homeschooling and how to do it.

15 A. I told you that was ---

16 Q. So you're saying that -- this is the 17 year old boy

17 you're portraying that ---

18 A. It started in April, yes, the same person that she was

19 supposed to be dating.

20 Q. 'Cause that's going to be real cool now for a 17 year old

21 to move a 13 year old to Greenwood and homeschool her.

22 A. She's the one who said -- telling her friends -- what she

23 had told me that she was telling her friends that she was

24 going to move out in three years.

25 Q. Well, if you move her to Greenwood to homeschool her

KYLE WAY - CROSS-EXAMINATION BY MR. McNAIR

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1 nobody would see her at that point, would they?

2 A. (No response).

3 Q. She wouldn't go to school. She wouldn't have any
4 friends.

5 A. (Negative nod).

6 Q. She'd be just with you.

7 A. That isn't what I wanted personally.

8 Q. And you told her you wanted to have kids.

9 A. That was the 17 -- yeah. That message was in there.

10 Q. And that was so she'd be cool, too?

11 A. But what else did it say, though?

12 Q. You said, this is our poem, our love story. We want to
13 sit down one day and tell our kids about our story, what we
14 went through. And they're going to be amazed. That's pretty
15 sick, isn't it, Kyle?

16 A. That is sick, yes.

17 Q. You said it.

18 A. But not me being a 28 year old, no. I told you this all
19 started in April.

20 Q. And you admit you bought her that LG phone.

21 A. I did. Yes, sir. She had asked me to because her mom
22 wouldn't give her one or she was going to give her a iPhone.
23 And she wasn't going to give her time. And she said that she
24 was going to run away or hurt herself.

25 Q. At the time you got her that phone you knew law

KYLE WAY - CROSS-EXAMINATION BY MR. McNAIR

1 enforcement was involved?

2 A. Yes, but I was protecting my sister because she said she
3 was going to hurt herself, or kill herself, or run away. And
4 I did not want that.

5 Q. You knew law enforcement was involved, right?

6 A. I did.

7 Q. All right. And you start texting this phone that you
8 bought her from a different number?

9 A. I did.

10 Q. You used a different number?

11 A. I did.

12 Q. Okay. And you were scared she would get caught with that
13 phone?

14 A. I did say that a couple of times, yes, because if I was
15 portraying myself as this 17 year old and they had saw my
16 picture or something, they would know it was me.

17 Q. Well, you were scared somebody would see those messages,
18 weren't you?

19 A. Well, yeah, because they could have led back to me, yes.

20 Q. You told her, don't get caught. I love you so much. Be
21 careful where you hide the phone. Texting on the way to
22 dance. You said, don't get caught. She told you, I'm letting
23 my phone charge all night. You said, just don't get caught,
24 please. You said, you can call, I don't care, just please
25 don't get caught.

KYLE WAY - CROSS-EXAMINATION BY MR. McNAIR

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1 So if this is all just a ploy to make her popular at
2 school why are you so scared that she'd be caught with that
3 phone that you bought her that you're texting her on using a
4 different number?

5 A. 'Cause I -- when I was portraying myself as a 17 year old
6 that started out in April, like I said, if it would have got
7 caught, from the picture, they would have knew exactly that it
8 was me, her family. But Laura and **MINOR2** knew about the phone
9 and knew that it was mine that I had gave her.

10 Q. What is the significance of age 16 to you?

11 A. What is the significance at age what? 16?

12 Q. Age 16?

13 A. (Negative nod).

14 Q. Do you know it's the age of consent in South Carolina?

15 A. No, sir.

16 Q. You didn't know that?

17 A. No, sir.

18 Q. But you repeatedly tell her to wait three years ---

19 A. She said ---

20 Q. --- when she was 13.

21 A. She said she was going to run away in three years. She
22 was almost 14 then, I'm assuming. So she said she was going
23 to run away when she turned 17 because she couldn't live where
24 she wanted to live with her parents because of what was going
25 on.

KYLE WAY - CROSS-EXAMINATION BY MR. McNAIR

1 Q. Look at your text to her. You said you were scared you'd
2 lose her if you lived in Greenwood without her because three
3 years is too long.

4 A. Yes, that is it.

5 Q. You said it on October 9th, I'm just scared I'm going to
6 lose you. Three years is too long. Again, November 17th, I
7 know we won't be able to see each other. It's going to be a
8 long three years. But after those three years me and you
9 together forever.

10 A. Yeah. It's like I had said, though, she said that she
11 was moving out in three years with this guy that was 17
12 because she didn't want to be with her parents because of what
13 was going on.

14 Q. Kyle, if this was all a ploy to make her seem cool why
15 would you go behind closed doors at her house around her
16 family?

17 A. I've never been behind closed doors.

18 Q. Why would you sit real close to her and snuggle up at her
19 house around her family?

20 A. I wouldn't say we would snuggle, but, yes, we would sit
21 close. She would come and sit right beside me in the recliner
22 and stuff. And if I went places, she would want to go, yes.

23 Q. Why would you kiss her every day at home?

24 A. I did not kiss her.

25 Q. You texted you did.

KYLE WAY - CROSS-EXAMINATION BY MR. McNAIR

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1 A. I did, but I was portraying myself as a 17 year old, not
2 me personally as Kyle.

3 Q. Why would you want her to move to Greenwood where you
4 could homeschool her?

5 A. Actually, initially she had -- I don't know why I would
6 text that to be honest. But she had told the caseworker after
7 all -- when they had got took, she, **MINOR2**, and Laura told
8 them -- and **MINOR3** told them that if they couldn't go back to
9 their mom's house they would want to come live with me. But
10 Laura said she -- Laura and **MINOR3** said they would rather go
11 stay with their grandma.

12 Q. And she would text you from that phone at school and you
13 told her not to get caught.

14 A. Yes.

15 Q. Why were you scared of that phone getting taken?

16 A. Because I had told you, I was portraying myself as a 17
17 year old. And they would lead it back to me.

18 Q. But you wanted her to show that phone to people at her
19 school, right, because that's how she was being ---

20 A. I didn't ---

21 Q. --- cool. So why were you scared ---

22 A. I didn't tell her to show it. That's what she was doing.
23 That's what she said she was doing.

24 **MR. McNAIR:** That's all -- that's all I have, Your Honor.

25 **THE COURT:** Redirect.

KYLE WAY - REDIRECT EXAMINATION BY MR. BISHOP1 REDIRECT EXAMINATION BY MR. BISHOP:

2 Q. Kyle, I just want to clarify a few things. I know you're
3 nervous. Are you getting confused a little bit?

4 A. I did on my -- on my birthday, yeah.

5 Q. How old are you right now?

6 A. Thirty-two.

7 Q. Okay. I want to clarify your work schedule. Do you work
8 on Fridays?

9 A. I do work on Fridays.

10 Q. But it's different ---

11 A. It is ---

12 Q. --- from other days of the week?

13 A. --- different time from Monday through Thursday, correct.

14 Q. Okay. I believe the solicitor was saying that you were
15 portraying this as some 28 year old in a relationship with a
16 13 year old. This fake relationship, were you acting like a
17 17 year old?

18 A. Texting-wise, yes. But there were some things that I did
19 say that we shouldn't have said about getting married and
20 stuff like that.

21 Q. Probably a lot of things that shouldn't have been said,
22 would you say that?

23 A. Yes, sir.

24 Q. I mean, do you regret going along with this?

25 A. Now, yes, sir. But I didn't want her to get picked on.

KYLE WAY - REDIRECT EXAMINATION BY MR. BISHOP

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1 And I didn't -- she was cutting herself. And I was in that
2 house, and I know ---

3 Q. Did you ---

4 A. --- how it was.

5 Q. Did you think you were doing the right thing at that
6 time?

7 A. Yes, sir.

8 Q. Did this relationship ever cross over from what you guys
9 were talking about into real life?

10 A. No, sir.

11 **MR. BISHOP:** No further questions.

12 **THE COURT:** Any re-cross?

13 **MR. McNAIR:** No, sir, Your Honor.

14 **THE COURT:** The witness may step down.

15 **MR. BISHOP:** Your Honor, I have one additional witness.
16 I'm not sure if he is here yet or not. May I step out?

17 **THE COURT:** Very briefly. If you think it's going to
18 take a few minutes, I'll -- we'll take a break, but ...

19 (Pause)

20 **MR. BISHOP:** Your Honor, can we take a short ---

21 **THE COURT:** Yeah. Let us locate our next witness and
22 we'll get you back out here as soon as possible. Please don't
23 discuss the case in the jury room.

24 (Whereupon the jury exited the courtroom at 4:12 pm)

25 **THE COURT:** As soon as you find him we'll get started.

MYRON JONES - DIRECT EXAMINATION BY MR. BISHOP

1 Or her, whoever it is. We'll be at ease.

2 (Whereupon court was in recess at 4:13 pm)

3 (Whereupon court reconvened at 4:18 pm)

4 **THE COURT:** Ready? All right. Come to order, please.

5 (Whereupon the jury entered the courtroom at 4:18 pm)

6 **THE COURT:** All right. Mr. Foreman, ladies and gentlemen
7 of the jury, we're ready to continue. Next witness, sir.

8 **MR. BISHOP:** The defense calls Myron Pressley Jones to
9 the stand.

10 **THE COURT:** Very well.

11 **MYRON JONES,** being duly
12 sworn testified as follows;

13 **DIRECT EXAMINATION BY MR. BISHOP:**

14 Q. Would you state your name for the record.

15 A. Myron Pressley Jones.

16 Q. What do you go by?

17 A. PJ.

18 Q. Do you mind if I call you that?

19 A. Don't mind at all.

20 Q. PJ, where do you work?

21 A. Velux.

22 Q. Where is that?

23 A. It's Greenwood.

24 Q. How long have you worked there?

25 A. I've been working there for 17 years.

MYRON JONES - DIRECT EXAMINATION BY MR. BISHOP

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1 Q. Seventeen?

2 A. Yes.

3 Q. What is your job title now?

4 A. I'm a team leader on the FCM Line, assembly line at
5 Velux.

6 Q. Can you explain what that means or what that job entails?

7 A. FCM line, FCM means fixed curb mount. It's a skylight.
8 We make roof windows. And they are fixed -- fixed windows.
9 We've got different types of windows. Like what we call a
10 VCM, like they open and close. The windows that we make, they
11 don't open.

12 Q. How many people work under you?

13 A. About 15.

14 Q. PJ, you might want to back off the microphone a little
15 bit just for clarity just so the jury can hear you. Is Kyle
16 one of those people?

17 A. Yes.

18 Q. How long have you known Kyle?

19 A. Probably seven or eight years. I think I met him in 2011
20 or '12.

21 Q. Okay. And has he worked on your crew or with you the
22 entire time?

23 A. Yes, the entire time.

24 Q. Is he a pretty good worker?

25 A. Yes, a great worker.

MYRON JONES - DIRECT EXAMINATION BY MR. BISHOP

1 Q. Never had any trouble with him at work?

2 A. Not at all.

3 Q. What's his work schedule like?

4 A. We work Monday through Fridays. Our schedules are 8.75
5 hours. On Thursdays we got 35 hours and on Fridays we work
6 five. That'll make it 40 hours for the week.

7 Q. So sometimes the hours are different on Fridays than they
8 are ---

9 A. Every now and then. The summer months the hours could be
10 a little bit longer.

11 Q. Did you and Kyle ever spend time together outside of
12 work?

13 A. Ever so often we may go out to eat lunch or something
14 after work.

15 Q. Would y'all hang out as friends?

16 A. Kinda sorta.

17 Q. Okay. Did Kyle ever talk about his upbringing and his
18 family to you?

19 A. He did, yeah.

20 Q. What ---

21 **MR. McNAIR:** Objection as to what he told him.

22 Q. Did you perceive this to be a rough upbringing?

23 A. Yes.

24 Q. Kyle ever mention having half siblings in Saluda?

25 A. He have told me that.

MYRON JONES - DIRECT EXAMINATION BY MR. BISHOP

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1 Q. Do you remember Kyle ever moving down to Saluda?

2 A. Yes. I don't know exactly when. Probably six, seven
3 years ago ---

4 Q. Um-hum (affirmative).

5 A. --- he moved from Greenwood to Saluda.

6 Q. So you don't know what year it was?

7 A. No, not exactly.

8 Q. And you knew about Kyle's half siblings and family there?

9 A. Yes.

10 Q. Did he talk about them?

11 A. He did.

12 Q. To your knowledge he did eventually move to Saluda?

13 A. He did.

14 Q. And he was still working at Velux ---

15 A. Yes.

16 Q. --- during that time?

17 A. Yes.

18 Q. Did he just drive from Saluda to ---

19 A. Yes.

20 Q. --- Greenwood? All right. Did he talk about his home
21 life and his family?

22 A. He did. He told me coming up ---

23 **MR. McNAIR:** Objection to anything he would testify as to
24 what the defendant told him.

25 **THE COURT:** You may proceed.

MYRON JONES - DIRECT EXAMINATION BY MR. BISHOP

1 Q. Did you know about any relationships with his siblings?

2 A. He was -- he told me that ---

3 **MR. McNAIR:** Objection.

4 **THE COURT:** Let me speak to y'all real quick.

5 (Whereupon a bench conference was held off the record in
6 the presence of the jury, but out of their hearing)

7 (Whereupon the bench conference was ended)

8 Q. During 2015, I know this is about three years ago, or
9 sorry, four years ago, during that summer was Kyle still
10 productive at work?

11 A. Yes.

12 Q. Did his demeanor change at work?

13 A. Yes, kinda sorta.

14 Q. How so?

15 A. He was -- I mean, he get charged with a crime, he was
16 upset about it, you know. He was kind of depressed a lot.

17 Q. This was later on in 2015 or 2016?

18 A. Yes.

19 Q. Did you suspect or see anything weird going on?

20 A. No.

21 Q. Is Kyle still under you at Velux?

22 A. Yes.

23 Q. No further questions. Please answer any questions the
24 State may have.

25 **THE COURT:** Cross-examination.

MYRON JONES - CROSS-EXAMINATION BY MR. McNAIR

1 **MR. McNAIR:** Very briefly.

2 **CROSS-EXAMINATION BY MR. McNAIR:**

3 Q. Hey PJ. How you doing?

4 A. Good. How you doing?

5 Q. So you don't know about -- anything about anything about
6 what happened in Saluda at the Way household, right? You just
7 know him from work? You just know Kyle Way from work? You
8 have no personal knowledge of anything to do really with this
9 case, right?

10 A. Well, I know what he told me when he ---

11 Q. All right. We're not talking about anything he told you.
12 You didn't see, hear, ---

13 A. No.

14 Q. --- witness anything ---

15 A. No.

16 Q. --- personally?

17 A. No.

18 Q. All right. Now how far is Velux -- you said Kyle
19 initially lived in Greenwood, right?

20 A. Yes.

21 Q. And at some point he moved to Saluda?

22 A. Yes.

23 Q. And how far away is Velux from Saluda?

24 A. I would say maybe 25 miles.

25 Q. About an hour?

MYRON JONES - CROSS-EXAMINATION BY MR. McNAIR

1 A. Maybe 35 minutes or so.

2 Q. All right. How far is it from Greenwood?

3 A. How far is Saluda from Greenwood?

4 Q. How far is Velux from where Kyle stayed in Greenwood?

5 A. Six minutes, five or six minutes.

6 Q. Five or six minutes?

7 A. Yes.

8 Q. All right. Thank you.

9 **THE COURT:** Any redirect?

10 **MR. BISHOP:** No, Your Honor.

11 **THE COURT:** All right. You may step down, sir.

12 **MR. BISHOP:** That's the defendant's case.

13 **THE COURT:** Resting?

14 **MR. BISHOP:** Yes, sir.

15 **THE COURT:** All right. Ladies and gentlemen, I've got

16 some matters I've got to take up with the attorneys.

17 Obviously we're not going to finish today. I'll have you come

18 back tomorrow morning once again at 9:15. I appreciate you

19 guys being on time today. I had to start a little bit later,

20 but please know I appreciate you being on time for the last

21 few days.

22 Once again, please don't discuss this case with anyone

23 when you leave this courtroom today. Please don't do any

24 independent research of your own of the parties or law itself.

25 Otherwise, have a good safe night and we'll see you back here

MOTIONS

1 tomorrow morning about 9:15. Thank you.

2 (Whereupon the jury exited the courtroom at 4:27 pm)

3 **THE COURT:** All right. Mr. Bishop, you renew?

4 **MR. BISHOP:** Yes, Your Honor, I would renew my motion.

5 **THE COURT:** All right. Same grounds?

6 **MR. BISHOP:** Same argument as the directed verdict stage,
7 Your Honor.

8 **THE COURT:** All right. Again, State's, excuse me,
9 defendant's motion for directed verdict is again denied. Are
10 we ready to talk about charges? Or do you want to talk with
11 counsel for a minute?

12 **MR. McNAIR:** I tell you what, do you have a copy of your
13 proposed charges? Or maybe if we could just get a copy of it
14 and look at it tonight.

15 **THE COURT:** Sure. We'll get that for you now.

16 **MR. McNAIR:** All right. Thank you.

17 **THE COURT:** Anything else for the record today?

18 **MR. McNAIR:** No, sir, Your Honor.

19 **MR. BISHOP:** No, Your Honor.

20 **THE COURT:** See y'all tomorrow. We can talk in chambers.

21 (Hearing Ended at 4:29 pm)

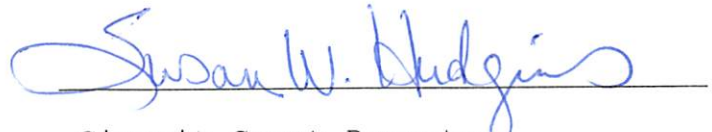
22 (End of Requested Transcript of Record)

Certificate of Reporter

I, the undersigned, Susan W. Hudgins, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Saluda County, South Carolina, on the 20th day of November 2019.

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

January 4, 2021


Circuit Court Reporter

STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS

COUNTY OF SALUDA

STATE)
)
)
 V.)
)
 KYLE WAYNE WAY)
)
 _____ DEFENDANT.)

TRANSCRIPT OF RECORD
2017-GS-41-01175

NOVEMBER 21, 2019
SALUDA, SOUTH CAROLINA

B E F O R E:

THE HONORABLE WALTON J. MCLEOD, IV, JUDGE; AND
A JURY.

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

ROBBIE MCNAIR, ASSISTANT SOLICITOR
MELANIE DARKO, ASSISTANT SOLICITOR
ATTORNEY FOR THE STATE

ANDREW BISHOP, ESQUIRE
ATTORNEY FOR THE DEFENDANT

BETHANIE K. CREPPON
CIRCUIT COURT REPORTER

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1 P R O C E E D I N G S

2 * * *

3 THE COURT: All right. Good morning, ladies
4 and gentlemen. I appreciate everyone's patience. I
5 was just trying to get some final preparations done.

6 All right. When we left yesterday, the Defense
7 had rested and we completed the directed verdict
8 motions. We had a charge conference in chambers
9 this morning, and we made several revisions. And I
10 provided the latest, greatest, up-to-date jury
11 instructions to the State and the Defendant.

12 Any issues with the charges?

13 MS. DARKO: Your Honor, I'm just begging the
14 Court's indulgence for, like, a minute and a half.

15 THE COURT: A minute? Okay.

16 And, just to be clear, we've got a verdict form
17 that -- it's one page, but it represents both
18 indictments. Is that suitable to you, Mr. McNair?

19 MR. MCNAIR: Yes, Your Honor.

20 THE COURT: Okay. Let me ask y'all a few quick
21 questions while she's reading that.

22 (Sidebar conference.)

23 MS. DARKO: Thank you, Your Honor. The State
24 has no objections to the charges.

25 THE COURT: Okay. Anything else before we

1 bring the jury out for closing arguments?

2 MR. MCNAIR: No, sir, Your Honor.

3 THE COURT: Defense, are you ready to proceed?

4 MR. BISHOP: Yes, Your Honor. No objections to
5 the charges.

6 THE COURT: Thank you.

7 All right. Let's bring the jury out.

8 (The jury enters the courtroom at 10:07 AM.)

9 THE COURT: Mr. Foreman, ladies and gentlemen
10 of the jury, welcome back. I hope you had a nice
11 evening. Sorry we're getting started later than I
12 said we'd start yesterday, but I had some matters
13 that I had to take care of first this morning while
14 you waited. So I appreciate your patience.

15 Ladies and gentlemen, the parties have
16 presented their evidence in this case. It is now
17 time for the attorneys to make their closing
18 arguments. The arguments of the attorneys are not
19 evidence in this case. The statements and arguments
20 are meant to help you understand the evidence and
21 apply the law to the evidence. You should disregard
22 any remark, statement, or argument which is not
23 supported by the evidence presented during the trial
24 or the law that I will explain to you after the
25 arguments.

1 Now, at this time, please give your complete
2 attention to the attorneys while they make their
3 closing arguments. Thank you.

4 MR. MCNAIR: Thank you, Your Honor. May it
5 please the Court?

6 THE COURT: Yes, sir.

7 MR. MCNAIR: What do you see? A loving brother
8 who just wanted to move in to take care of his
9 siblings that he had just met or a wolf in sheep's
10 clothing?

11 In the summer of 2014, he saw this
12 eighth-grader at the lake and he saw something he
13 wanted. And, just like the predator he is, he
14 sensed weakness in **MINOR1**; a young 13-year-old girl
15 with a troubled home life, an alcoholic father who
16 was away at rehab, a girl desperate for love and
17 attention. And, in the midst of that turmoil in her
18 life, he saw an opportunity, and he found a way to
19 get into that house, and he feasted on it.

20 He's not a murderer, but he took a part of her
21 life that she will never get back. He stole her
22 innocence; he stole her youth; he stole the
23 meaningfulness of a first love. He took her trust
24 and he twisted it into something sick and perverted.

25 And the one thing he didn't lie to you about

1 from the stand was that he was bad about stealing.
2 That's the truth. He's into stealing really bad.
3 At a time when [REDACTED] should be thinking about her
4 first kiss or going to a middle school dance, he has
5 convinced her that she is his wife. In 21 days, he
6 goes from Bubba, her brother, to Baby; brother to
7 husband; protector to predator.

8 In that first Facebook communication on
9 February 20th, he is Bubba, her brother. By March
10 13th of 2015, she is his child bride. This isn't a
11 love story; this is all about his control and his
12 manipulation to achieve his own perverted sexual
13 desires.

14 Look at those text messages. On one hand, he's
15 telling her how much he loves her and they're meant
16 to be to make this seem right to her; but, on the
17 other hand, he gets mad if he doesn't know where she
18 is or if she's talking to guys at her school. He
19 promises her a little girl's fairy tale, doesn't he?
20 A life of love, breakfast in bed, kisses every day,
21 puppies.

22 But he knows that's not how the real world is,
23 doesn't he? He's a 28-year-old man with three kids
24 who just broke up with his fiancée, got a full-time
25 job, paying child support. He's just trying to

1 trick her.

2 And just because he may have been successful in
3 tricking her, in making her think she wanted this,
4 it doesn't matter. Consent is not a defense in this
5 case. A 13-year-old cannot consent to sex with an
6 adult. Remember that.

7 Even if you think she wanted this relationship,
8 too, it doesn't matter; if she asked him to have sex
9 and he agreed, it doesn't matter. She's 13; he's
10 28. A 13-year-old cannot consent. I can't say that
11 enough. The Judge is going to tell you that. Pay
12 attention. That's not a defense at all.

13 Can you imagine if it were a defense? It would
14 allow people like him to promise little girls a life
15 ever after, puppies, breakfast in bed, to convince
16 them to have sex and then say, oh, she wanted it;
17 I'm not guilty; she consented. That's not the law
18 and that's not what the law should be.

19 We're not here to point fingers at **MINOR1**. We
20 don't blame children for the crimes of adults. What
21 **MINOF1** did took courage. Do you think she wanted to
22 get up there as a 19-year-old woman and admit to
23 you, strangers, that she had sex with her brother?
24 Do you think she wanted to do that? She's ashamed
25 and embarrassed about that. What motive does she

1 have to lie?

2 She may have had a motive to lie when she was
3 13 or 14 and didn't understand what was going on
4 before her forensic interview, when she's getting
5 ridiculed at school for having a relationship with
6 her brother and DSS is breathing down their necks
7 and she thinks if they find out that this happened
8 in her parents' home, she may wind up in foster
9 care.

10 But what motive does she have now as a
11 19-year-old woman, looking back on this, opening up
12 to you, telling you everything about how it was
13 because now she understands it? The only thing she
14 did was subject herself to public humiliation. She
15 has no motive to lie.

16 And, make no mistake, witness testimony is
17 evidence. You get to decide who you believe and who
18 you don't. You can believe one witness over all the
19 others. If you believe **MINORI**'s testimony, that,
20 alone, is sufficient for you to convict Kyle Way.
21 But you don't have to just believe **MINORI**'s
22 testimony, because what she says is consistent with
23 all the other evidence.

24 She says the first time they had sex was March
25 13th, 2015. Well, you've seen all those texts from

1 him about that being their wedding date. He created
2 this Kanda Way Facebook site, put the wedding date
3 on there, March 13th, 2015. The e-mail associated
4 with that account had March 13th, 2015 in it. Then
5 he sends her that text message about getting a
6 necklace that he was going to get engraved with
7 their names with 3/13/15 forever.

8 What do people do on their wedding night? Are
9 we to believe that after being married for seven
10 months, they didn't have sex? Is that what he wants
11 you to believe? Why would he even -- why would he
12 even elevate their relationship to say they were
13 married in the first place? Why would you do that?
14 He's just trying to make her think it's okay; to try
15 and justify the sex with her and make her think it's
16 okay because they're married. That's sick.

17 You heard about April 20th, **MINOR2**'s
18 confirmation. Everybody sees them all over in the
19 church, acting like they're boyfriend and
20 girlfriend. I didn't hear about any other school
21 children being there that **MINOR1** was friends with.
22 That was mainly family; they all saw it. Shortly
23 after that, Donna catches them in bed together early
24 one morning, around **MINOR1**'s birthday on **██████**.

25 Laura says when she went over there about three

1 times per week, she'd see them go into the bedroom
2 and close the door, and Kyle would tell her, leave
3 us alone; don't bother us. Three times a week.

4 **MINOR2**, who lived there, says it happened more
5 than that. She saw **MINOR1** on the bed in her
6 underwear with Kyle under the covers. She said
7 every night, she'd hear that door open and close
8 and, in her gut, she knew what was going on; she
9 knew it. So, one night, when she got up to check,
10 lo and behold, Kyle wasn't on the couch; he was in
11 that bedroom. He was going in that bedroom every
12 night.

13 And then how about him asking **MINOR2** what type
14 of underwear **MINOR1** wears or liked? How sick is
15 that? Do y'all think she's making that up? Do you
16 think Laura and **MINOR2** are making that up? If they
17 were going to make up a story, they would tell you
18 they saw them having sex, right? They're not
19 embellishing anything; they're just telling you the
20 truth about what they saw. That, alone, is bad
21 enough.

22 October 12th, that's when Kyle was caught in
23 bed with **MINOR1** in the camper at Angela Rogers'
24 property. And they called Kyle into the house, and
25 Angela and Julia and Dana and David had that

1 conversation with him where they said what you're
2 doing is inappropriate. And they said Kyle didn't
3 deny it. He didn't say it's not appropriate; I'm
4 just doing this because she's getting bullied at
5 school; I'm just trying to help her. Wouldn't that
6 be the moment when you would say that, if that was
7 the reason that you were doing it? But he didn't
8 say that. He just bolted. He left.

9 This boyfriend -- this story about the bullying
10 and pretending to be her boyfriend, that came up
11 after he knew law enforcement had his text messages.
12 So now he knows he's got to explain it. And how do
13 you explain it? You get up there and lie is what
14 you do. You just lie, and that's what he did to
15 y'all's face.

16 He told you **MINOR1** messaged him that Donna had
17 slapped her, and that's why he went over there to
18 get her. That's not in any of those records.
19 That's a bold-faced lie that he told to y'all
20 yesterday, among others. He said **MINOR1** was texting
21 him, messaging him about being bullied. Nowhere in
22 there; a lie that he told to your face after
23 swearing before God to tell the truth.

24 That night that he left Angela's house, he went
25 to Donna's house that night, tells her they accused

1 him of having sex with **MINOR1** and asked how can they
2 prove it? Do you think they're going to send her to
3 a doctor to prove it? I don't know what to say
4 about that, other than it's like he got so
5 comfortable being in that house and knew Donna
6 needed him so bad to be there so her husband could
7 stay there, that it's like he thought she knew; that
8 she was a co-conspirator or something.

9 And if you want a glimpse -- well, before we
10 get there -- and just the text messages, we don't
11 need to go through those. Y'all have heard those
12 numerous times. But his texting her about not
13 kissing her every day is awful; he admits in a text
14 that **MINOR1**'s dad caught us all over one another in
15 bed. He didn't have a good answer for that, did he?
16 When I asked him about that, he couldn't explain it,
17 could he?

18 He Facebook messages Dakota about being in bed
19 with **MINOR1**; he Facebook messages Tanner about being
20 in bed with **MINOR1**. He admits to Captain Price that
21 he developed feelings for **MINOR1** that were more than
22 brother and sister and that he kissed her on two
23 occasions, but then he gets up here yesterday and
24 says that's not true. Now Captain Price is lying?
25 If he would admit to that, to kissing his sister,

1 what do you think really happened? If he's willing
2 to admit to that, how bad do you think it really
3 was?

4 And if you want a glimpse into who the real
5 Kyle Way is, the savvy grown man who knew exactly
6 what he was doing, look at his actions after he left
7 Angela Rogers' property that night. He gets a new
8 phone that he sneaks to her, and then he starts
9 communicating with that phone from a different
10 number. He changes his number. Why? Why do that?

11 He never texts her Motorola phone again; he
12 never sends her another Facebook message on her
13 Facebook account again. He's savvy; he knows. And
14 then, the very first call that he has with her on
15 that new phone that he got her, his first question
16 is: Did you tell them we had sex?

17 Then he starts sending her messages after that:
18 I love you, Baby. Don't get caught. We're married
19 now, Baby. Don't get caught. Sends her a picture
20 of himself with his shirt off. Delete it. Don't
21 get caught, or they'll know now.

22 He ain't pretending to be anything other than
23 what he is. He's a predator. Then immediately, the
24 same day that he gets her that phone, he tells her
25 to delete her Facebook account with all her friends.

1 Why is that? To delete all the communications he
2 had with her on Facebook; to now make her share a
3 Facebook account with him so he can monitor all of
4 her communications; he can see all of her friends
5 and who she's talking to. This is all about
6 protecting him and controlling her.

7 And then, when the school takes away that
8 phone, he really freaks out. That's when the real
9 Kyle Way comes out. He calls her from her friend's
10 phone -- or she calls him from her friend's phone to
11 tell her [sic] what had happened. He says: You
12 better not tell or I'll kill you. He knows he's
13 toast.

14 He's charged with CSC with a minor in the
15 second degree and CSC with a minor in the third
16 degree. The Judge will read the law to you. But,
17 just very simply, CSC second with a minor just means
18 the victim -- the elements are the victim is between
19 11 and 14 -- that's well-established, she was 13 at
20 the time and then she turned 14 while this was going
21 on -- and that a sexual battery occurred.

22 A sexual battery, all that means is an
23 intrusion of her body, however slight. It can be
24 intercourse, oral sex, digital penetration. Those
25 are all sexual batteries.

1 CSC third, that's a separate and distinct
2 offense. It encompasses things that happened prior
3 to the sexual battery, such as touching, fondling,
4 or kissing in a sexual manner. The elements of that
5 are that the defendant is over 14 -- no doubt about
6 that; he was 28 at the time -- the victim is under
7 16, no doubt about that -- and that he touched any
8 part of her body with the intent to arouse himself
9 or her.

10 So, if he kissed her in a sexual manner, he's
11 guilty of criminal sexual conduct with a minor in
12 the third degree. But, make no mistake, ladies and
13 gentlemen, these aren't either/or indictments; he's
14 guilty of both of these offenses, both.

15 Now, these are crimes that happen in secret,
16 and that's by his design. Okay? We don't need DNA
17 to prove a case like this. You heard that unless
18 you have evidence of a sexual assault and you send
19 somebody for a medical exam within 72 hours, you're
20 not going to find DNA or semen. And we know, in
21 this case, she had lived with her aunt for about a
22 week prior to it ever being report ed to law
23 enforcement. And she didn't have sex in that
24 week-long period where she was living with her aunt.
25 So, you know, we aren't going to have DNA or semen

1 or anything like that in this case.

2 And then you heard from Dr. Chapel that just
3 because a virgin has sex or whatever, you're not
4 going to see evidence of physical trauma or tearing.
5 Okay? So just dispel that notion that just because
6 somebody is a virgin, you would know that they had
7 sex. That's not true. Her testimony was, in 95
8 percent of the cases, even in cases involving
9 victims way younger than **MINOR1**, that even after
10 they're examined within days of a known sexual
11 assault, in 95 percent of the cases, you don't see
12 evidence of tearing or physical trauma. So that
13 doesn't prove anything. Okay?

14 Just because there wasn't evidence of that in
15 this case, that doesn't prove she didn't have sex.
16 It would be highly unlikely to ever see evidence of
17 that in a sexual assault case.

18 And we don't have to have an eyewitness to have
19 witnessed them having sex. If that was required,
20 how could we ever prove cases like this that
21 happened behind closed doors and in secret? The law
22 allows us to rely on what's called circumstantial
23 evidence. What circumstantial evidence is, it
24 allows you to use your common sense to connect the
25 dots.

1 The best analogy I have for it is to describe
2 it like snow. If you go to bed one night and it's
3 cold outside and there's no snow on the ground, and
4 you wake up the next morning and the ground is
5 covered in snow, you don't have to have seen a
6 snowflake fall to know it snowed, right? You don't
7 have a doubt that it snowed. And that's how this
8 case is, isn't it?

9 Look at what you do have: Married for seven
10 months. He admits to being all over her in bed.
11 Donna and **MINOR2** see them in bed together. He texts
12 about kissing her every day; he doesn't want her
13 talking to other guys; he won't let her be alone;
14 he's buying her secret phones; he's buying her
15 clothes; he's asking about what underwear she likes.
16 Do you have a doubt that it snowed? You can connect
17 those dots.

18 Reasonable doubt is our burden of proof. I'm
19 sure y'all all have heard about reasonable doubt. A
20 lot of people have misconceptions about what
21 reasonable doubt really means, and that's why I'll
22 talk about it now. It does not mean that we have to
23 prove to you things to an absolute certainty. That
24 does not exist in this world. Okay?

25 We do not have to prove things to you beyond

1 any doubt or every doubt you may have. What it
2 means and what the Judge will instruct you, it means
3 you're firmly convinced that he's guilty; you're
4 firm in your belief that he's guilty. Aren't you?

5 Lots of people have failed **MINOR1**. At the top
6 of that list are her mother and her father, and her
7 mother admitted that to you. They saw the signs of
8 the wolf and they failed to act. Dana saw it;
9 Angela saw it; David saw it. They all saw the
10 signs. But their failure to act doesn't mean that
11 we don't get justice today.

12 We're not going to fail **MINOR1**; we're not going
13 to blame children for the crimes of adults. He is a
14 grown man and he is accountable for his actions.
15 Did you pick up what his ultimate goal was, to move
16 her to Greenville and home-school her and isolate
17 her from everybody? Can you imagine where this
18 would have ended up?

19 We have carried this case as far as we can.
20 I'm about to sit down and I'm going to entrust it to
21 you. And you are about to have the opportunity to
22 do justice and speak the truth. Don't silence
23 **MINOR1**. Find him guilty.

24 MR. BISHOP: Mr. Foreman, ladies and gentlemen
25 of the jury, this is the last time I'll speak with

1 you during this trial. As the Solicitor said, the
2 burden of proof is on the State to prove guilt
3 beyond a reasonable doubt. This is a high burden
4 and the highest burden in the law. What is guilt
5 beyond a reasonable doubt? Nothing more than doubt
6 for which you can give a reason.

7 Now let's look at reasons that raise doubt.
8 Not one person witnessed any sexual activity between
9 Kyle and **MINOR1**. The only one that testified to
10 this was **MINOR1**; **MINOR1**, who admitted to lying in
11 her forensic interview she gave, both within the
12 year after these incidents allegedly happened. She
13 said she lied about things to protect her mom; said
14 she lied for other reasons; she even said she lied
15 just to do it.

16 **MINOR1** did not go into too much detail about
17 these alleged sexual encounters. But she did say
18 that Kyle was having sex with her two to three times
19 a week; two to three times a week in a small mobile
20 home where five other people are living, yet no one
21 else saw or heard anything; two to three times a
22 week during the time in which Kyle was working
23 full-time in Greenwood.

24 She also said Kyle hit her, threatened her, and
25 that she was scared of him; that she and her

1 siblings would continue to hang out and have fun
2 with him, as seen in some of the pictures in
3 evidence.

4 She would also continue to communicate with him
5 and even asked him to get her after he moved out,
6 which he did not do. She also said it was her idea
7 for Kyle to move in, yet no one else has
8 corroborated this. I'd ask you to remember all of
9 this when considering her testimony.

10 Another witness that raises doubt is **MINOR2**.
11 **MINOR2**, that also admitted to not mentioning
12 anything inappropriate that she saw between Kyle and
13 **MINOR1** when she gave her forensic interview in the
14 year after this happened, yet vividly remembers now
15 that she saw Kyle in the same bed as **MINOR1**; **MINOR2**
16 that said Kyle would ask about **MINOR1**'s bras, yet
17 **MINOR1** testified she was not wearing bras at the
18 time he was living there; **MINOR2** that said she was
19 uncomfortable around Kyle, yet would go out and have
20 fun with him and the family after she said she felt
21 uncomfortable. I'd ask you to remember all this
22 when considering her testimony.

23 Another issue that raises doubt is when Kyle
24 moved into the Way home. We've heard testimony from
25 more than one witness that Kyle moved in to appease

1 DSS because they required another adult in the home
2 when Kerry got out of rehab. We know this happened
3 in June of 2015. Why would he move in during the
4 month of March and why is this important? Well,
5 because the State wants you to believe he moved in
6 during March so that it connect -- it could connect
7 it with the March 13th, 2015 date. He was not there
8 at that time.

9 Not one other witness testified to seeing
10 anything sexual going on between Kyle and **MINOR1**,
11 nothing that would even rise to criminal sexual
12 conduct with a minor in the third degree.

13 Let's talk about Donna Way's testimony, the
14 mother of **MINOR1**. Mrs. Way appears to be a loving
15 mother, was grateful to have Kyle in the house to
16 help her with the children. I just don't buy that
17 she knew or assumed something inappropriate was
18 going on between Kyle and **MINOR1** and did not report
19 or do anything about this. I hope you also feel the
20 same.

21 Let's also talk about who you didn't hear from.
22 Julia Roberts, the grandmother of **MINOR1**, this is
23 the grandmother that allegedly thought that Kyle's
24 actions were so inappropriate while he and the kids
25 were watching a movie in the camper that she kicked

1 him out of the house. Why did we not hear from her?
2 Is this because nothing was going on? Is this
3 because, as you heard through testimony, they were
4 simply watching a movie and Kyle was in there with
5 multiple other people?

6 Let's get to the accused. Kyle, who has
7 experienced a much similar and relatable upbringing
8 to **MINOR1** and his siblings; Kyle, who moved in to
9 help with the kids to appease DSS; Kyle, who is a
10 loving brother and family man who has a big heart;
11 Kyle, who testified that he did not move in until
12 the middle of May -- or until middle to late May
13 testified that he slept in his own room. He even
14 offered testimony that he, at times, would allow
15 **MINOR1** and **MINOR2** to sleep in his room with him for
16 fear of their father; Kyle, who talked about the
17 close relationship he had with his siblings, mainly
18 **MINOR1** and **MINOR2**; Kyle, who had denied any type of
19 sexual relationship with **MINOR1** and whose
20 recollection of the events has not wavered over
21 time.

22 He also denies any inappropriate touching or
23 kissing of her. Kyle, who admitted to forming an
24 online relation with some 17-year-old boy with
25 **MINOR1** to law enforcement, but did this for what he

1 thought was a legitimate purpose; Kyle, who admitted
2 to giving his sister a phone and creating the
3 Facebook account but, once again, he thought he was
4 doing this for a legitimate purpose. Why would Kyle
5 have sex with his sister? That's incest. He has
6 stronger morals than that.

7 His testimony should not be given any less
8 weight than anyone else, not even law enforcement.
9 He did admit to kissing his sister to law
10 enforcement; he admitted this was a peck, kind of a
11 good-bye kiss. He didn't say that he had stronger
12 feelings, more than a brother and sister.

13 I do want to briefly talk about what I would
14 consider the elephant in the room, which is the
15 Facebook relationship and the text relationship.
16 You'll have time to go through all of these that
17 have been admitted into evidence. I think you'll
18 see that sex or any type of sexual relationship was
19 not mentioned in these messages and no explicit
20 images were sent or received.

21 Yes, this was weird; yes, my client should have
22 not done this. But nothing ever transgressed from
23 this fake relationship to the real world. I would
24 ask that you look at the elements of the crime when
25 considering these messages.

1 Ladies and gentlemen, thank you again for your
2 time and attention during this trial. I hope you
3 will find that there was reasonable doubt that my
4 client committed criminal sexual conduct with a
5 minor and find him not guilty.

6 MR. MCNAIR: The State has no reply, Your
7 Honor.

8 THE COURT: All right.

9 All right. Members of the jury, it is now my
10 duty, as the trial judge, to instruct you on the law
11 applicable to this case. And, in that regard, it is
12 your duty, as jurors, to accept and apply the law as
13 I now state it to you. Furthermore, it is your
14 exclusive duty to decide all the issues of fact in
15 this case and to determine the effect, value,
16 weight, and truth of the evidence.

17 All the parties have the right to expect that
18 you'll carefully consider and evaluate the evidence
19 and apply the law of this case to it so that, in the
20 end, all parties receive a fair and impartial trial.

21 Now, during this trial, you and I have separate
22 duties to perform. As the trial judge, it is my
23 responsibility to preside over this trial and to
24 rule on the admissibility of evidence offered during
25 the trial. In that regard, you're to consider only

1 the evidence before you; thus, you are to consider
2 only the testimony which has been presented from the
3 witness stand together with any exhibits admitted
4 into the record of this case.

5 If you have any preconceived ideas as to what
6 the law is or what you think the law ought to be and
7 it does not agree with what I tell you the law is,
8 you are obligated, under your oath, to abandon these
9 preconceptions because you are sworn to accept the
10 law as I now state it to you.

11 In this trial, you're the sole and exclusive
12 judge of the facts. Do not infer that I have any
13 opinion about the facts in this case from anything
14 that I have said or done during the course of this
15 trial. In this regard, the law simply does not
16 permit me to have an opinion about the facts.

17 As jurors, it is your duty alone to determine
18 the effect, value, weight, and truth of the evidence
19 presented during the course of this trial.

20 Furthermore, it is your job, as jurors, to determine
21 the credibility or believability of the witnesses
22 who have testified in this case. You must evaluate
23 the evidence and determine which evidence convinces
24 you of its truth.

25 In determining the believability of witnesses

1 who have testified in this case, you may believe one
2 witness over many or many over one; you may believe
3 a part of the testimony of a witness and reject the
4 remaining part; you may believe the testimony of a
5 witness in its entirety or reject it in full; you
6 may consider whether the witness has an interest in
7 the result of the trial, whether the witness is
8 prejudiced towards either party, the opportunity for
9 the witness to have seen the matters and things
10 about which the witness may testify and the way the
11 witness acts on the witness stand.

12 Furthermore, evidence may be direct or
13 circumstantial. Direct evidence is testimony by a
14 witness about what the witness personally saw,
15 heard, or did. Circumstantial evidence is indirect
16 evidence. In other words, it is proof of one or
17 more facts which can find another fact. You may
18 consider both direct and circumstantial evidence
19 equally.

20 Crimes may be proven by circumstantial
21 evidence. The law makes no distinction between the
22 weight and value to be given to either direct or
23 circumstantial evidence. However, to the extent
24 that the State relies on circumstantial evidence,
25 all of the circumstances must be consistent with

1 each other and, when taken together, point
2 conclusively to the guilt of the accused beyond a
3 reasonable doubt. If these circumstances merely
4 portray the defendant's behavior as suspicious, the
5 proof has failed.

6 The State has the burden of proving the
7 defendant guilty beyond a reasonable doubt. The
8 burden rests with the State, regardless of whether
9 the State relies on direct or circumstantial
10 evidence or a combination of the two.

11 The evidence which you are to decide the facts
12 consists of this case are, one, the sworn testimony
13 of the witnesses on both direct and
14 cross-examination; two, exhibits which have been
15 admitted into evidence; and, three, any facts which
16 the attorneys have agreed could be stipulated.

17 Now, the rules of evidence ordinarily do not
18 permit witnesses to testify to opinions or
19 conclusions. An exception to this rule exists for
20 witnesses we call expert witnesses. A witness who,
21 by education and experience, has become an expert in
22 some art, science, or profession may give an opinion
23 as to the subject the witness claims to be an expert
24 in and may also give the reasons for that opinion.

25 You should consider any expert opinion given by

1 a witness like any other evidence: Give it the
2 weight you think it deserves. If you decide that an
3 expert's opinion is not based on sufficient
4 education or experience or if you decide that the
5 reasons given in support of the opinion are not
6 sound or that the opinion is outweighed by other
7 evidence, you may disregard the opinion entirely.

8 An expert's testimony is to be given no greater
9 weight than that of other witnesses simply because
10 the witness is an expert. And you do not have to
11 accept an expert's opinion even though it's
12 uncontradicted.

13 The defendant in this case is presumed
14 innocent. This is no mere legal theory; it is a
15 fundamental and substantial right to which everyone
16 is entitled. It is like a robe of righteousness
17 placed around the defendant that remains with him
18 through every stage of the trial and continues with
19 him after you retire to your jury room to deliberate
20 and continues to exist so the defendant is presumed
21 innocent unless and until you, the jury, have
22 determined that the State has proved the guilt of
23 the defendant beyond a reasonable doubt.

24 A defendant is not required to prove he is
25 innocent; he's not required to prove anything. The

1 burden is upon the State to prove the guilt of the
2 defendant beyond a reasonable doubt and it is
3 required that every essential element of an offense
4 charged be proven by the State beyond a reasonable
5 doubt. The State is not required to prove the guilt
6 of the defendant beyond all doubt or beyond every
7 doubt. The appropriate standard of proof is beyond
8 a reasonable doubt.

9 Now, the State has the burden of proving the
10 defendant guilty beyond a reasonable doubt. Some of
11 you may have served as jurors in civil cases where
12 you were told that it is only necessary to prove
13 that a fact is more likely true than not true, such
14 as by the greater weight or the preponderance of the
15 evidence.

16 In criminal trials, the State's proof must be
17 more powerful than that. It must be beyond a
18 reasonable doubt. Proof beyond a reasonable doubt
19 is proof that leaves you firmly convinced of the
20 defendant's guilt. There are very few things in
21 this world that we know with absolute certainty.
22 And, in criminal cases, the law does not require
23 proof that overcomes every possible doubt.

24 If, based on your consideration of the
25 evidence, you are firmly convinced that the

1 defendant is guilty of the crime charged, you must
2 find the defendant guilty. If, on the other hand,
3 you think there is a real possibility that the
4 defendant is not guilty, you must give the defendant
5 the benefit of the doubt and find him not guilty.

6 Testimony has been given about a statement
7 allegedly made by this defendant to law enforcement.
8 In evaluating the alleged statement, you first need
9 to determine if the State has proven that the
10 defendant, in fact, made the statement. If not,
11 then you cannot consider that alleged statement in
12 any way against that defendant.

13 If you find that the defendant made the
14 statement, the next thing you're going to have to
15 evaluate is whether the defendant was properly
16 advised of his rights prior to being interrogated
17 and giving his statement. If a person is in
18 custody, he must be given his Miranda warnings prior
19 to any interrogation by the police.

20 Miranda warnings are that you have the right to
21 remain silent; that any statement made can and will
22 be used against you in court; that you have the
23 right to an attorney, and if you do not have the
24 resources to hire an attorney, the Court will
25 appoint one at no expense; that you have the right

1 to consult a lawyer before answering any questions
2 or making any statement; that you have the right to
3 have a lawyer present at all times during all
4 interviews and all interrogations and that you may
5 stop answering questions at any time. While these
6 exact words do not have to be used, the substantial
7 equivalent must be communicated in order to
8 constitute Miranda warnings.

9 If the State proves that it gave Miranda
10 warnings prior to interrogating the defendant while
11 in custody, the State must then prove that the
12 defendant knowingly and intelligently waived his
13 constitutional rights and made the statement to
14 police.

15 The final requirement is that the statement in
16 question must have been given voluntarily. The
17 State must prove that the statement was the
18 expression of the defendant's own free will and was
19 not improperly induced by compulsion, duress, force,
20 or fear, or by the promise of some reward or hope of
21 reward.

22 Unless the statement was given freely and
23 voluntarily, you may not consider it against the
24 defendant. If a statement was made while in custody
25 of law enforcement in response to the officer's

1 questions, I instruct you that you cannot use that
2 statement against the defendant unless you are
3 satisfied that statement has proven, beyond a
4 reasonable doubt, every requirement about which I
5 have instructed you.

6 Now, the defendant in this case is charged with
7 two separate and distinct offenses, each of which
8 must be evaluated on its own merit or lack of merit.
9 In one indictment, the defendant is charged with
10 criminal sexual conduct with a minor in the second
11 degree. It is alleged that in Saluda County, on or
12 between the dates of March 1st, 2015 and October
13 13th, 2015, the defendant engaged in a sexual
14 battery with the alleged victim who is alleged to
15 have been born on [REDACTED] 2001; she being 14 years
16 or less, but at least 11 years of age, and the
17 defendant being older than the alleged victim.

18 On the other indictment, the defendant is
19 charged with criminal sexual conduct with a minor in
20 the third degree. It is alleged that in Saluda
21 County, on or between the dates of March 1st, 2015
22 and October 13th, 2015, the defendant committed a
23 lewd or lascivious act on the alleged victim's body
24 or its parts with the intent of arousing, appealing,
25 or gratifying the defendant's lust, passion, or

1 sexual desires or the lust, passions, or sexual
2 desires of the alleged victim who is alleged to have
3 been born on [REDACTED] 2001; she being 14 years of
4 age or less, but at least 11 years of age, and the
5 defendant being older than the alleged victim. I
6 remind you that the indictments themselves are not
7 evidence.

8 To prove the defendant guilty of a crime, the
9 State must prove, beyond a reasonable doubt, that
10 the defendant acted with criminal intent. The
11 criminal intent required in this case is that the
12 defendant must be proven to have acted knowingly.
13 To act knowingly means to act with knowledge, to act
14 consciously, not accidentally. It is an intentional
15 act, a willful act. Intent is a mental state and
16 must be shown by acts and conduct of the defendant
17 and other circumstances from which you may naturally
18 and reasonably infer intent. But the State must
19 establish the necessary criminal intent beyond a
20 reasonable doubt in order for the defendant to be
21 convicted of a crime.

22 Criminal sexual conduct with a minor in the
23 second degree. Now I'm going to explain to you the
24 law as it applies to the charges against the
25 defendant. A person commits criminal sexual conduct

1 with a minor in the second degree when he engages in
2 sexual battery with a person who is 14 years of age
3 or less, but who is at least 11 years of age.

4 Sexual battery is a defined term. The
5 definition of a sexual battery includes sexual
6 intercourse, cunnilingus, fellatio, anal
7 intercourse, or any intrusion, however slight, of
8 any part of a person's body or of any object into
9 the genital openings of another person's body.

10 So, to prove the defendant guilty of criminal
11 sexual conduct with a minor in the second degree,
12 the State must first prove, beyond a reasonable
13 doubt, that the alleged incident occurred in Saluda
14 County, on or between the dates alleged in the
15 indictment, and, one, that the defendant engaged in
16 a sexual battery with the alleged victim, and that
17 the alleged victim was 14 years of age or less, but
18 at least 11 years old at the time.

19 To prove sexual battery, the State must prove,
20 beyond a reasonable doubt, that, at the time and
21 place alleged, the defendant caused part of his body
22 to be inserted, however slightly, into the genital
23 openings of the alleged victim.

24 Any consent, willingness, indifference, or
25 ignorance on the part of the minor is not a defense

1 to criminal sexual conduct with a minor in the
2 second degree. In South Carolina, an unmarried
3 woman under the age of 14 cannot legally consent to
4 have sexual intercourse.

5 Criminal sexual conduct with a minor in the
6 third degree. A person commits criminal sexual
7 conduct in the third degree -- with a minor in the
8 third degree when he willfully and lewdly commits or
9 attempts to commit the lewd and lascivious act upon
10 or with the body or its parts of a child under 16
11 years of age with the intent of arousing, appealing
12 to, or gratifying the lusts, passions, or sexual
13 desires of the actor or the child.

14 Lewd means obscene, lustful, indecent,
15 lecherous, tending to moral impurity. Lascivious
16 means tending to incite lust, indecent, obscene,
17 tending to deprave the morals and respect of sexual
18 relations.

19 So, to prove the defendant guilty of criminal
20 sexual conduct with a minor in the third degree, the
21 State must first prove, beyond a reasonable doubt,
22 that the alleged incident occurred in Saluda County,
23 on or between the dates alleged in the indictment,
24 and, one, that the defendant willfully and lewdly
25 committed or attempted to commit a lewd or

1 lascivious act upon the alleged victim's body or its
2 parts; that the defendant committed or attempted to
3 commit said act with the intent of arousing,
4 appealing to, or gratifying the lusts, passions, or
5 sexual desires of the defendant or the alleged
6 victim, and the alleged victim was under 16 years of
7 age at the time.

8 Any consent, willingness, indifference, or
9 ignorance on the part of the minor is not any
10 defense to criminal sexual conduct with a minor in
11 the third degree. Consent, willingness,
12 indifference, or ignorance on the part of the minor,
13 if any, as to what was taking place does not in any
14 way affect the charge of the criminal sexual conduct
15 with a minor because an unmarried woman under the
16 age of 14 cannot legally consent to sexual
17 intercourse.

18 Now, the defendant is accused of having
19 committed the crimes of criminal sexual conduct with
20 a minor in the second degree and criminal sexual
21 conduct with a minor in the third degree in
22 violation of Code Section 16-3-655(b) (1) and Section
23 16-3-655(c) on or about the period of time between
24 March 1st, 2015 and October 13th, 2015.

25 In order to find the defendant guilty of either

1 of these crimes, it is necessary for the prosecution
2 to prove, beyond a reasonable doubt, the commission
3 of acts constituting the crime within the period
4 alleged. And, in order to find the defendant
5 guilty, you must unanimously agree upon the
6 commission of the same specific act or acts
7 constituting the crime within the period alleged.
8 It is not necessary that the particular act or acts
9 committed and agreed upon be stated in the verdict.

10 The defendant is entitled to every reasonable
11 doubt arising in the whole case. If, upon any issue
12 of fact essential to a conviction, you have a
13 reasonable doubt as to how that issue should be
14 resolved, you must resolve that doubt in favor of
15 the defendant. If, upon reviewing an entire case,
16 you have a reasonable doubt as to whether the State
17 has proven the defendant guilty of the offense
18 charged, the defendant is entitled to that
19 reasonable doubt and a verdict of not guilty on that
20 charge.

21 On the other hand, upon reviewing an entire
22 case, if you find the State has proven every element
23 of the crime charged against the defendant beyond a
24 reasonable doubt, it is equally your duty to find
25 the defendant guilty of that charge.

1 The indictments in this case allege two
2 different offenses against the defendant. The
3 defendant is charged -- the charges are criminal
4 sexual conduct with a minor in the second degree and
5 criminal sexual conduct with a minor in the third
6 degree. Each indictment charges a separate and
7 distinct offense. You must decide each indictment
8 separately on the evidence and the law applicable to
9 it, uninfluenced by your decision as to any other
10 indictment.

11 The defendant may be convicted or acquitted on
12 any or all of the offenses charged. You will be
13 asked to write a separate verdict of guilty or not
14 guilty for each indictment.

15 Now let me say something about your
16 deliberations. Deliberation is defined as careful
17 consideration weighing up with a view to decision.
18 The genius of our jury system is that it allows 12
19 good men and women from 12 different backgrounds,
20 life experiences, perspectives to consider the
21 evidence, talk about it, and, ultimately, reach a
22 verdict.

23 We call them deliberations for a reason. You
24 are to consider the evidence in this case carefully
25 and deliberately and discuss it in a calm, thorough,

1 and courteous manner. Listen to the views of all of
2 your fellow jurors, consider other people's points
3 of view, and talk through and discuss the evidence.
4 And, remember, if you're doing something
5 deliberately, you're not in any hurry. And you
6 should not be in a hurry here. This case is very
7 important to both sides and this is their only day
8 in court.

9 When you retire to your jury room, you should
10 discuss the case with your fellow jurors to reach --
11 to reach agreement, if you can do so. Your verdict
12 must be unanimous. Each of you must decide the case
13 for yourself, but you should do so only after you
14 have impartially considered all the evidence,
15 discussed it fully with the other jurors, and
16 listened to the views of your fellow jurors.

17 Do not be afraid to change your opinion if the
18 discussion persuades you that you should, but do not
19 come to a decision simply because other jurors think
20 it is right. It is important that you attempt to
21 reach a unanimous verdict, but, of course, only if
22 each of you can do so after having made your own
23 decision.

24 Do not change an honest belief without the
25 weight and effect of the evidence simply to reach a

1 verdict. In other words, do not change your opinion
2 solely for the sake of reaching a unanimous verdict.
3 I will give you a copy of these instructions in
4 written form. During your deliberations, you may
5 refer to the instructions to guide your
6 decision-making.

7 You must consider the instructions as a whole
8 and not follow some and ignore others. Please
9 return the instructions to the Court at the time
10 your verdict is rendered.

11 There are two possible verdicts which you may
12 find in this case: Guilty or not guilty. There's
13 no significance whatsoever in the order in which I
14 state the possible verdicts; it's simply one must be
15 stated first. Ladies and gentlemen, your verdict
16 must be unanimous.

17 Mr. Foreman, when the jury agrees on the
18 verdict, you will write the verdict on the verdict
19 form, then knock on the door of the jury room, and
20 the inform the bailiff that you have reached a
21 verdict. At that time, we will receive you back
22 into the courtroom.

23 I ask that you now return to your jury room,
24 but do not begin deliberations until you are told by
25 the clerk or the bailiff to do so. There are some

1 matters which must be discussed with the attorneys
2 before you begin your deliberations. At this time,
3 I will have you go back to your jury room and await
4 further instructions. Thank you.

5 (The jury exits the courtroom at 10:59 AM.)

6 THE COURT: Counsel, any issues with the
7 charge?

8 MS. DARKO: Nothing from the State, Your Honor.

9 MR. BISHOP: Nothing from the Defendant.

10 THE COURT: All right. I'll ask the attorneys
11 to get with the Court Reporter. Let's get all the
12 evidence together, and we'll send the evidence and
13 the charge and the verdict form back at the same
14 time.

15 (Brief pause in the proceedings.)

16 THE COURT: Let's bring the alternate out,
17 please.

18 (Alternate Juror enters the courtroom.)

19 THE COURT: Mr. Rogers, good morning. Thank
20 you for your service this week. We've reached the
21 point where they're ready to begin their
22 deliberations. And I can't allow the alternate to
23 stay in here while they're deliberating. So we all
24 want to thank you for being here this week and for
25 listening attentively. You're free to go at this

1 time. You're welcome to stay, but you're certainly
2 free to go. Thank you.

3 (Alternate Juror exits the courtroom at
4 11:06 AM.)

5 (The jury begins deliberations at 11:06 AM.)

6 THE COURT: I understand we have a verdict. Is
7 that correct?

8 THE BAILIFF: Yes, Your Honor.

9 THE COURT: Anything we need to put on the
10 record before we bring the jury out?

11 MR. MCNAIR: No, Your Honor.

12 MR. BISHOP: No, Your Honor.

13 THE COURT: All right. Let's bring them out,
14 please.

15 (The jury enters the courtroom at 11:38 AM.)

16 THE COURT: Mr. Foreman, have you reached a
17 verdict?

18 THE FOREMAN: Yes, sir.

19 THE COURT: Is your verdict unanimous?

20 THE FOREMAN: Yes, it is.

21 THE COURT: Please hand the verdict form to the
22 bailiff.

23 Madam Clerk, please publish the verdict.

24 THE CLERK: The State of South Carolina, County
25 of Saluda versus Kyle Wayne Way, the defendant,

1 Indictments 2017-GS-41-01175 and 2019-GS-41-00344.

2 Indictment 2017-GS-41-01175, as to the charge
3 of criminal sexual conduct with a minor in the
4 second degree, we, the jury, unanimously find the
5 defendant not guilty.

6 Indictment 2019-GS-41-00344, as to the charge
7 of criminal sexual conduct with a minor in the third
8 degree, we, the jury, unanimously find the defendant
9 guilty of criminal sexual conduct with a minor in
10 the third degree. Signed by the foreperson -- jury
11 foreperson and dated 11/21/2019.

12 THE COURT: Anything from counsel before I
13 dismiss the jury?

14 MR. MCNAIR: No, sir.

15 MR. BISHOP: No, sir.

16 THE COURT: Ladies and gentlemen, again, I want
17 to thank you for your service this week on the jury
18 here in Saluda County. I appreciate your
19 attentiveness in listening throughout the entire
20 trial. Our justice system simply wouldn't function
21 without the assistance of citizens like you coming
22 in and giving your time to serve on the jury, like
23 you've done this week. You're free to go at this
24 time. But, please, on behalf of all of us, thank
25 you for your service.

1 (The jury exits the courtroom at 11:42 AM.)

2 Once we get those indictments signed, are we
3 prepared to go into mitigation and sentencing?

4 MR. MCNAIR: May I approach, Your Honor?

5 THE COURT: Yes, sir.

6 (Sidebar conference.)

7 THE COURT: All right. Are we ready to
8 proceed?

9 THE CLERK: Yes, sir.

10 THE COURT: All right. Mr. Bishop, y'all want
11 to approach?

12 MR. BISHOP: Yes, Your Honor.

13 THE COURT: All right. Well, we've just
14 completed a jury trial where the Saluda County jury
15 found that you're guilty beyond a reasonable doubt
16 and convicted you of criminal sexual conduct with a
17 minor in the third degree. You understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Okay. Mr. Solicitor, anything you
20 want to put on the record before I allow Mr. Bishop
21 to go into any mitigation?

22 MR. MCNAIR: I do have a statement from the
23 victim that I'd like to read at the appropriate
24 time. But --

25 THE COURT: Okay. I think that's now.

1 MR. MCNAIR: All right. This is from the
2 victim, **MINOR1**: The last thing I'd like
3 everyone to know is that I was scared, but overcame
4 being scared. He tried to ruin my life, but I
5 overcame that, not only by facing him in court
6 today, but by being the person I am right now.

7 I want him to know I am not scared anymore. I
8 am the person he would never be. I can now put this
9 completely behind me, continue life. I don't want
10 to be seen as the victim. I want to be known as a
11 survivor. He wanted me to be scared of him for the
12 rest of my life. But, after all this, after I
13 testified, I proved him wrong.

14 I'm not a girl he can run over anymore. Yes, I
15 lied on many occasions, but my testimony and what
16 I've said here in court is nothing but the truth.
17 You did rape me, yet you still want to hide. You
18 know that 13-year-old girl you thought you could
19 control is now a woman who faces life head-on and
20 isn't scared anymore?

21 After this, I know I spoke up and I only tried
22 my best to try to protect my siblings from you.
23 But, hopefully now, every child is now protected
24 from you. Your kids now know what and who you truly
25 are. I'd like to tell you to rot in hell, but that

1 would be too glorious for someone like you. You're
2 not family; you never have been. You're a coward
3 who thought he'd get away with something he did.

4 Your Honor, from the State, it's our position,
5 I think, you know, obviously, we felt there was
6 sexual intercourse going on for a long period of
7 time, and that CSC with the minor in the second
8 degree was the appropriate charge. We would ask for
9 the maximum sentence in this case, based on this --
10 his course of behavior over that whole period of
11 time. That's all from the State, Your Honor.

12 THE COURT: Very well.

13 Mr. Bishop?

14 MR. BISHOP: Thank you, Your Honor. First, I'd
15 just ask that you not take the criminal sexual
16 conduct with a minor second into consideration since
17 he was not found guilty of that.

18 My client has no criminal record. He's been a
19 standup employee, as some testimony showed, in a
20 shop. He's been there since 2009. He has a
21 2-year-old with medical issues and he also has
22 another child on the way, both with his fiancée.
23 He's the only income producer in the family. We'd
24 just ask for a reasonable sentence so he can get out
25 and get back to taking care of his family and his

1 children.

2 THE COURT: Does your client wish to speak?

3 MR. BISHOP: No, Your Honor.

4 THE COURT: Does your client understand this is
5 a sexually violent offense?

6 MR. BISHOP: Yes, Your Honor.

7 THE COURT: He's aware of the future risks that
8 could entail?

9 MR. BISHOP: Yes, Your Honor.

10 THE COURT: The registry is mandatory on this
11 charge, is it not?

12 MR. MCNAIR: That's correct.

13 THE COURT: Mr. Bishop, does your client
14 understand this is a violent offense?

15 MR. BISHOP: Yes, Your Honor.

16 THE COURT: Does he understand the future
17 ramifications if he were to receive a conviction
18 after this sentence here for other violent or
19 serious offenses?

20 MR. BISHOP: He does, Your Honor. I don't
21 foresee that happening.

22 THE COURT: He hasn't spent any time in the
23 county jail, correct?

24 MR. BISHOP: One night.

25 THE COURT: One night.

1 I'm going to take a short break and I'll get
2 right back to you.

3 (Brief recess.)

4 THE COURT: Obviously, this was a tough trial
5 to hear. I'd use the word tragic. A family that
6 was already in a -- frankly, already had some tragic
7 circumstances as it was, made much worse. Tragic
8 for you. This conviction is -- will affect your
9 character for the rest of your life, will affect
10 your freedom, starting today, and your very liberty.

11 The jury heard two full days of testimony, a
12 lot of evidence. I heard it as well. You know,
13 I -- I think the evidence showed, number one, not
14 just one incident, but months of incidents; I mean,
15 really, a totality-of-circumstance-type situation
16 where this is not a one-time manipulation. This
17 appears to be a manipulation of a girl, a little
18 girl, that went on for a period of months.

19 We heard testimony from various family members
20 theirselves. Obviously, you had the opportunity and
21 testified at length yesterday. The evidence also,
22 in my opinion, showed a conduct that was very
23 coercive and manipulative of a vulnerable child.

24 What's further tragic is, obviously, that you
25 have additional children of your own who,

1 undoubtedly, are going to need you, but you're not
2 going to be there. And I, frankly, hurt for them.

3 To **MINORI** and everyone who testified: I
4 don't begin to understand what you have gone
5 through. But I want to commend you for being here.
6 And, like you said in your statement, you have to
7 keep moving forward. I don't know if this sentence
8 will bring you any sort of closure, but I do hope
9 that you'll exit this building today and put this
10 behind you as best you can. I wish that for you.

11 It's my hope, Mr. Way, that, after you complete
12 your active sentence, assuming you have good
13 behavior while you're in the department of
14 corrections, you'll have an opportunity to seek
15 parole. And I hope that when you get out, I hope
16 you never offend against the law again.

17 All right. Mr. Way, on the charge of criminal
18 sexual conduct with a minor in the third degree, you
19 are to be committed to the department of corrections
20 for a period of 15 years. Good luck, sir.

21 MR. BISHOP: Thank you, Your Honor.

22 -- END OF TRANSCRIPT OF RECORD --

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal in the Criminal Court for Saluda County, South Carolina, on the 21st of November, 2019.

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

February 1, 2021

s/ *Bethanie K. Creppon*

Bethanie K. Creppon
Circuit Court Reporter

2020 MAY 6 PM 11:25
FILED Clerk of Court, Saluda Co.

STATE OF SOUTH CAROLINA)
)
County of Saluda)
)
Kyle Wayne Wyl #3928333)
Full name and prison number (if any) of Applicant)

IN THE COURT OF COMMON PLEAS

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

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

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

1. Place of detention Saluda County

2. Name and location of Court which imposed sentence Saluda County Court
DE General Session 100 East Church Street Courthouse

3. Name(s) of co-defendant(s) (if any) NONE

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2017GS-4101175A
 - (b) 2019GS4100344

- (c) _____
- 5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) November 21, 2019
 - (b) _____
 - (c) _____
- 6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty _____
 - (b) after a plea of not guilty
 - (c) after a plea of nolo contendere _____
- 7. Did you appeal from the judgment of conviction or the imposition of sentence?
NO my Attorney did not File Notice of Appeal both and 14th Violation
- 8. If you answered "yes" to (7), list:
 - (a) the name of each Court to which you appealed:
 - i. _____
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. _____
 - ii. _____
 - 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) Trial Attorney Refuse And intentionally let the 10 days Window expired to File Appeal in Violation of my 14th, 14th, And 1st, Amendment Constitutional rights
 - (b) _____

(c) _____

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

(a) Invalid Arrest Warrants / 4th Amendment

(b) Constitutional Violation

(c) _____

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

(a) WARRANTS WAS NOT ISSUED UNDER SECTION 17-13-140

(b) NO COMMITMENT ORDER TO BE DETAIN TO DETENTIONAL

(c) CENTER UNDER SECTION 24-5-10.

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

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____

(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. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

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

(d) the date of each such disposition:

- i. _____
- 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) _____
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes _____
- (c) your sentencing? _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

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. John Andrew Bishop
200 Pinckney Street
Abbeville S.C. 29620
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. _____
 - ii. _____
 - iii. _____

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

A New trial

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

NO

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Saluda)

I, Kyle Way, 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.

Kyle Way 4/9/2020

SWORN to and subscribed before me this 9th
day of April, _____.

[Signature] (L.S.)

Notary Public

My Commission Expires: 2/17/24

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

I, Kyle Way, 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.

Kyle Way 4/9/2020
Applicant

SWORN or affirmed to and subscribed before me this

9th day of April.

J. Ombro
Notary Public

My Commission Expires: 2/17/24

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SALUDA	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
)	
)	
Kyle Wayne Way, SCDC #382833,	)	Case No. 2020-CP-41-0093
)	
Applicant,)	
)	
v.	)	RETURN, PARTIAL MOTION TO
	)	DISMISS, AND MOTION FOR A
	)	MORE DEFINITE STATEMENT
State of South Carolina,	)	(COUNSEL APPOINTED)
)	
Respondent.)	
)	
)	

In response to the post-conviction relief (PCR) action commenced by Kyle Wayne Way (Applicant) on May 8, 2020,¹ the State makes this return:

I. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Saluda County Clerk of Court. Applicant was arrested on March 16, 2017, following an investigation into allegations Applicant sexually abused his thirteen-year-old biological sister over a period of several months.

During its May 2017 term, the Saluda County Grand Jury indicted Applicant for second-degree criminal sexual conduct (CSC) with a minor (2017-GS-41-1175). On November 18, 2019, Applicant proceeded to a jury trial before the Honorable Walton J. McLeod, IV. Andrew Bishop, Esquire (Counsel) represented Applicant. Assistant Solicitors Robbie McNair and Melanie Darko prosecuted the case. On November 21, 2019, the jury convicted Applicant of the lesser-included

¹ The State received the application on October 19, 2020.

offense of third-degree with a minor. Judge McLeod sentenced Applicant to fifteen years' imprisonment. Applicant did not appeal.

II. CURRENT APPLICATION

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following (excerpted verbatim):

- (10) State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 - (a) "Invalid arrest warrants/4th Amendment"
 - (b) "Constitutional violation"

- (11) State concisely and in the same order the facts which support each of the grounds set out in (10):
 - (a) "Warrants was[sic] not issued under section 17-13-140"
 - (b) "No commitment order to be detain[sic] to detentional[sic] center under section 24-5-10"

Applicant requests relief in the form of a new trial.

Attached to this return and incorporated by reference are the Saluda County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; the trial transcript; and the records of the current PCR action. The State reserves the right to amend this return upon receipt of any relevant materials.

III. PARTIAL MOTION TO DISMISS

Applicant's allegations regarding sections 17-13-140² and 24-5-10³ should be summarily

² S.C. Code Ann. § 17-13-140 provides generally for the issuance of a search warrant based on probable cause. To the extent Applicant alleges a constitutional violation associated with the search warrants obtained and executed in his case, the State requests Applicant, through PCR counsel, amend this allegation accordingly.

³ S.C. Code Ann. § 24-5-10 provides that "[t]he sheriff shall have custody of the jail in his county and, if he appoint a jailer to keep it, the sheriff shall be liable for such jailer and the sheriff or jailer shall receive and safely keep in prison any person delivered or committed to either of them, according to law."

dismissed for failure to state a cognizable claim under the Uniform Post-Conviction Procedure Act⁴ (the Act). An applicant may commence a post-conviction relief action on the following grounds:

1. United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20(A).

However, because an application for post-conviction relief is not a substitute for a direct appeal, and because of the modern simplification of criminal jurisdiction jurisprudence in South Carolina, the *overwhelming* majority of cognizable claims fall under the broad umbrella of “ineffective assistance of counsel,” a contention under the Sixth Amendment to the Constitution of the United States. *See Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (noting that allegations of trial court error are not cognizable on PCR); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975) (finding that alleged trial errors and sufficiency of evidence are direct appeal issues that are not cognizable PCR claims); *Stepney v. State*, 278 S.C. 47, 292 S.E.2d 41

⁴ S.C. Code Ann. § 17-27-10 to -160.

(1982) (explaining that issues that could have been raised on direct appeal cannot be considered on PCR application absent claims of ineffective assistance of appellate counsel).

None of Applicant's claims are properly before this Court. *See, e.g., Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (“[PCR] is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.”). Accordingly, the State moves to dismiss these allegations pursuant to Rule 12(b)(6), SCRCPP, for failure to state a cognizable claim. The State further moves for summary dismissal of this claim pursuant to § 17-27-70 because there is no genuine issue of material fact which would necessitate an evidentiary hearing and these allegations should be dismissed as a matter of law.

IV. MOTION FOR A MORE DEFINITE STATEMENT

In response to question nine as to why he did not pursue a direct appeal, Applicant states “trial attorney refuse[sic] and intentionally let the 10 days[sic] window expired[sic] in violation of my 6th, 14th, and 1st amendment constitutional rights.” Applicant further states in question six that “my attorney did not filed[sic] notice of appeal 6th and 14th violation.” Based on these responses and Applicant's failure to state this as an enumerated ground for relief, it is unclear whether Applicant is seeking belated appellate review pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) (finding that a defendant who did not knowingly and voluntarily waive his right to direct appeal of his conviction is entitled to a belated review of direct appeal issues). Accordingly, the State moves for Applicant, through counsel, to amend his application to provide a more definite statement of his allegations pursuant to Rule 12(e), SCRCPP and the Post-Conviction Procedure Act. *See* S.C. Code Ann. § 17-27-50 (2014) (requiring an applicant to “specifically set forth the grounds upon which the application is based”); *see also Welch v. MacDougall*, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (stating it is incumbent upon an applicant to make at least a prima

facie showing entitling him to relief before an evidentiary hearing will be scheduled and held); *Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR application “alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court”); Rule 8(a)(2), SCRCPP (requiring all civil pleadings to include “a short and plain statement of the facts showing that the pleader is entitled to relief”); Rule 71.1(d), SCRCPP (“Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.”).

V. ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY PROCESS

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCPP. *Pro se* filings will not be considered at the PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to *Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019), or, alternatively, the State will request a continuance in the matter. *Id.*, 428 S.C. at 245, 834 S.E.2d at 203 (Kittredge, J., dissenting) (“If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.”).

If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, the State reserves the right to move to dismiss this allegation or claim. S.C. Code Ann. §§ 17-27-10 to -160; Rule 71.1, SCRCPP; *see also* Rules 15(a)-(b), SCRCPP. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State. *See* Rule 15(a), SCRCPP.

Pursuant to S.C. Code Ann. § 17-27-150, 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, the State requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State well in advance of the evidentiary hearing. The State 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 the State.

VI. GENERAL DENIAL

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

[Conclusion and signature on following page]

VII. CONCLUSION

WHEREFORE, the State respectfully requests this Court grant its partial motion to dismiss as set forth in section III and motion for a more definite statement as set forth in section IV. Until Applicant files an amended application, Applicant has not shown sufficient cause to warrant an evidentiary hearing on this application. The State respectfully requests this Court to only schedule a hearing after an amended application is so filed.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

LILLIAN L. MEADOWS
Assistant Attorney General

By: 

ATTORNEYS FOR THE STATE
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

May 26, 2021

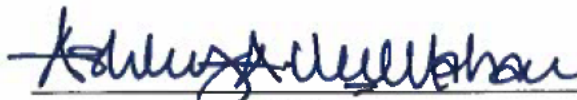
STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOR THE 11 TH JUDICIAL CIRCUIT
COUNTY OF SALUDA	)	Case No.: 2020-CP-41-00093
)	
Kyle Wayne Way, #382833)	
)	
Applicant,	)	AMENDED POST-CONVICTION
	)	RELIEF APPLICATION
v.)	
)	
State of South Carolina.)	
_____)	

The Applicant, by and through his undersigned attorney, hereby amends his PCR application filed on June 2, 2021 to add the following:

1. Ineffective assistance of counsel – John A. Bishop
 - a. Failure to file a direct appeal

Furthermore, Applicant requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006); see also Love v. State of South Carolina, 428 S.C. 231, 834 S.E.2d 196 (2019); SCRCP Rule 15(b).

Respectfully submitted,



ASHLEY A. MCMAHAN, ESQUIRE

MCMAHAN LAW^{LLC}

PO Box 50536

Columbia, SC 29250

803-219-1110

ashley@mcmahantaylor.com

SC Bar No. 71676

ATTORNEY FOR APPLICANT

October 4, 2022

CERTIFICATE OF SERVICE

I certify that I have served this document via email to:

Samantha J. Weidauer
Assistant Attorney General
sammieweidauer@scag.gov

This 4th Day of October, 2022.



ASHLEY A. MCMAHAN
Attorney for Applicant

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOR THE 11 TH JUDICIAL CIRCUIT
COUNTY OF SALUDA	)	Case No.: 2020-CP-41-00093
Kyle Wayne Way, #382833)	
)	
Applicant,	)	AMENDED POST-CONVICTION
	)	RELIEF APPLICATION
v.)	
)	
State of South Carolina.)	
_____)	

The Applicant, by and through his undersigned attorney, hereby amends his PCR application filed on June 2, 2021 to add the following:

1. Ineffective Assistance of Counsel

- a. Erroneously advised Applicant as to parole eligibility. See Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997).

Furthermore, Applicant requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006); see also Love v. State of South Carolina, 428 S.C. 231, 834 S.E.2d 196 (2019); SCRPC Rule 15(b).

Respectfully submitted,



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SC Bar No. 71676

ATTORNEY FOR APPLICANT

March 22, 2023

CERTIFICATE OF SERVICE

I certify that I have served this document via email to:

Taylor Smith
Assistant Attorney General
taylorsmith@scag.gov

This 22nd Day of March, 2023


ASHLEY A. MCMAHAN
Attorney for Applicant

I N D E X

<u>WITNESS (ES)</u>	<u>PAGE</u>
Kyle Wayne Way Examination by Ms. McMahan	5
John Andrew Bishop Examination by Mr. Jones	20
Cross Examination by Ms. McMahan	27
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E X H I B I T S

(There were no exhibits marked during this hearing)

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1 THE COURT: Okay, Ms. McMahan this is Kyle Way.

2 MS. MCMAHAN: Yes, ma'am. This is docket number
3 2020CP4100093. It's a Saluda County case.

4 THE COURT: Okay and have you discussed with Mr. Way
5 the consequences of going forward with the application
6 today?

7 MS. MCMAHAN: I have, Your Honor. If you would like to
8 review that with him.

9 THE COURT: Okay, Mr. Way, I need to go over a few
10 things with you before we go forward with your application.
11 There's one of two things that can happen as a result of
12 your PCR action. The first is that I can grant your
13 application and grant relief or I can deny it. I cannot go
14 back and change your sentence. I cannot make the charges go
15 away. So you were indicted for criminal sexual conduct in
16 the second degree. I understand as a result of a jury trial
17 the jury found you not guilty of second degree but found
18 you guilty of third degree. The trial judge sentenced you
19 to 15 years. What is the maximum for CSC with a minor third
20 degree.

21 MR. JONES: Your Honor, it is 15 years.

22 THE COURT: Okay. So tell me what y'all's position is.
23 I have had different people tell me different things. As to
24 whether or not having been found not guilty of a CSC second
25 degree if I grant his PCR application, can he be retried

Kyle Wayne Way vs. The State of South Carolina

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1 for CSC second degree with a minor?

2 MS. MCMAHAN: No, Your Honor because he was found
3 guilty of that. My position is he couldn't be retried on a
4 CSC.

5 THE COURT: You're saying he could not be retried on
6 the second degree?

7 MS. MCMAHAN: No because he was found not guilty of
8 the CSC second but he was found guilty of the CSC third. So
9 it would go back.

10 THE COURT: To CSC third?

11 MS. MCMAHAN: Or CSC first, you know, if there was
12 evidence that showed that. But the CSC second with a minor
13 would be ...

14 MR. JONES: That's my understanding as well. If he was
15 acquitted ...

16 THE COURT: It's always been my understanding but I
17 had a very similar issue not too long ago and both the
18 state and the defendant thought the defendant could be
19 retried after the jury found the person not guilty of one
20 of the offense.

21 MS. MCMAHAN: I think that would be double jeopardy.

22 THE COURT: I would agree. Okay. So you understand I
23 cannot change your sentence in this matter, that things
24 would go back for a retrial and I cannot reduce your
25 sentence in any way shape or form. The state is not obliged
26 to offer you any plea agreements on retrial. You understand

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1 that?

2 MR. WAY: I understand.

3 THE COURT: And understanding that, is it your desire
4 to go forward with the action today?

5 MR. WAY: Yes, Your Honor.

6 THE COURT: Okay. Anything from the State before we go
7 forward?

8 MR. JONES: Nothing, Your Honor. Thank you.

9 MS. MCMAHAN: Judge at this time, the applicant would
10 call Mr. Way.

11 CLERK: If you would raise your right hand for me.
12 You can sit down.

13 MR. WAY: All right.

14 CLERK: Do you solemnly swear or affirm the
15 statements you're about to give will be the truth, the
16 whole truth and nothing but the truth so help you God?

17 MR. WAY: Yes ma'am I do.

18 MS. MCMAHAN: Would you state your name for the
19 record?

20 MR. WAY: Kyle Wayne Way.

21 **Mr. Kyle Way - Direct Examination by Ms. McMahan**

22 Q: Did you fill this PCR application?

23 A: I had some help.

24 Q: But it's your application?

25 A: Yes ma'am.

26 Q: And who was ...

Kyle Wayne Way vs. The State of South Carolina

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1 MR. JONES: Your Honor, could I ask Mr. Way to pull
2 down his mask? Thank you so much.

3 THE COURT: Thank you.

4 Q: Who was your attorney that represented you?

5 A: John Andrew Bishop.

6 Q: Okay. Was he appointed or retained?

7 A: I went and seen him. So ...

8 Q: Did you pay money for him or was he ...

9 A: I paid a little bit. Yes ma'am, a retainer fee.

10 Q: Were you in the detention center the whole time your
11 charges were pending?

12 A: No ma'am.

13 Q: You were out on bond?

14 A: Yes ma'am.

15 Q: How many times do you think you went and spoke to Mr.
16 Bishop?

17 A: Just a couple. It wasn't too many. I know before
18 trial he met with me three days before trial.

19 Q: So the three days before trial you guys met pretty
20 extensively?

21 A: Yes ma'am.

22 Q: What did you guys talk about before you went to
23 trial?

24 A: I went through some DVDs, text messages and stuff and
25 he asked me to look over them and see if there was anything

Kyle Wayne Way vs. The State of South Carolina

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1 that caught my eye. And we discussed them a little bit.

2 Q: Was there any plea offers that you were given?

3 A: After trial had started, he had told me one.

4 Q: What was that?

5 A: Assault and battery.

6 Q: Was it assault and battery high and aggravated or
7 assault and battery first degree?

8 A: I have no idea.

9 Q: You just remember assault and battery?

10 A: Yes ma'am.

11 Q: Do you remember what the range of the sentence was or
12 was it just to plead straight?

13 A: 0 to 10 I believe.

14 Q: And did you want to take a guilty plea?

15 A: I would've if he would've explained it.

16 Q: Okay. So how did he explain it to you?

17 A: We sat at the picnic table during I don't know what
18 day it was of the trial but one of the days we went out
19 there and he had told me about it. But what I think
20 should've happened was --- they initial gave me second
21 degree and they found me not guilty on that. Well. several
22 days before trial they added on a new charge, which he did
23 tell me about, which was what I was found guilty of, third
24 degree. So what I think should've happened was that if
25 there was a plea offer, and if he denied it before the new

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1 charges were added, he should've went back and seen if it
2 was available when the third degree was added because he
3 changed the whole nature of, you know, my crime.

4 Q: Explain that for me a little bit better. So you said
5 your initial --- you said there was an A and B, assault and
6 battery charge of some kind that was given to you during
7 the trial?

8 A: That's what he had told me.

9 Q: Okay. And you had sat at the picnic tables outside of
10 the courthouse?

11 A: That's where he was explaining it. Yes ma'am.

12 Q: So he explained to you what that ...

13 A: Assault and battery.

14 Q: In exchange for what? CSC with a minor second?

15 A: Second. Yes ma'am.

16 Q: And that they would dismiss the CSC third?

17 A: That was before. I'm assuming the plea bargain was
18 before the third was ever ...

19 Q: Presented?

20 A: ... presented. That's what I'm assuming.

21 Q: Okay. When did you find out about the CSC with a
22 minor third being added?

23 A: It was probably a couple of weeks before trial.

24 Q: So a couple of weeks before you're going to trial,
25 you find out they've added additional charges of CSC with a

Kyle Wayne Way vs. The State of South Carolina

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1 minor third?

2 A: Third, yes ma'am.

3 Q: What did Mr. Bishop tell you about that?

4 A: He had sent me a text message and told me to call
5 him. So I called him and we talked about it a little bit.
6 And he had told me that we might be in some trouble because
7 they added on a new charge.

8 Q: So what was his explanation just because you could
9 get more time or?

10 A: He didn't really explain why. He just told me that
11 they added on a new charge and it was CSC with a minor
12 third.

13 Q: So when we're going back to talking about your plea
14 offer, what would Mr. Bishop needed to explain to you in
15 order for you to have taken it? What was missing from your
16 conversation with Mr. Bishop as to why you wouldn't taken
17 that conversation?

18 A: I mean if he would have explained to me that it was a
19 non-violent charge or whatever it was. If he could have
20 explained to me that it could have been lesser time
21 anything like that, I would've took it.

22 Q: So if he explained to you the A and B, assault and
23 battery, assuming it wasn't high and aggravated was a non-
24 violent charge and that you would get less than what you
25 would have gotten if you were convicted of either on these

1 charges?

2 A: Yes ma'am.

3 Q: When did you learn about that?

4 A: About assault and battery?

5 Q: About non-violent and you would have gotten less than
6 what you were charged with.

7 A: I meant he had told me about the assault and battery
8 was 0 to ten. So I know the max for third would have bene
9 15. The max for second would have been, I believe, 20. So
10 with knowing that, I would've ...

11 Q: But you didn't know that at the time?

12 A: I didn't.

13 Q: When did you find out about it?

14 A: When I got incarcerated and other inmates would tell
15 me a little bit about it.

16 Q: So he never explained to you really that this was a
17 lesser offense than the two that you were indicted for?

18 A: No ma'am. I didn't know about the lesser offense
19 until I got my. There's a paper I got from the court that
20 said the lesser offense included was third degree.

21 Q: Okay. By papers of the court, are you talking about
22 records from the clerk or something?

23 A: The clerk. The Clerk of Court.

24 Q: Okay. After trial, did you ever have a conversation
25 with him about an appeal or anything?

Kyle Wayne Way vs. The State of South Carolina

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1 A: No ma'am.

2 Q: When you were talking with him before the trial, did
3 you ever tell him you wanted an appeal?

4 A: I didn't know anything about an appeal or nothing.

5 Q: So the concept of an appeal never came up?

6 A: No ma'am.

7 Q: In conversation?

8 A: No ma'am.

9 Q: When did you learn what an appeal was?

10 A: After I got to Kirkland.

11 Q: Did you want a direct appeal from your trial?

12 A: I would've. I would've, yes ma'am.

13 Q: You would if you would've known about it?

14 A: Yes ma'am.

15 Q: By the time you learned about it, it was too late to
16 file one?

17 A: Yes ma'am. And that's when people were telling me
18 about the PCR.

19 Q: You still want that direct appeal today?

20 A: Yes ma'am.

21 Q: Did Mr. Bishop ever send you letters or anything
22 after you got to prison?

23 A: Yes ma'am, he did.

24 Q: Is that one of them right there?

25 A: Yes ma'am.

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1 Q: Is this the actual letter that you received from him?

2 A: Yes ma'am.

3 Q: Does this letter discuss --- I'll come over here by
4 the microphone. Does this letter discuss parole issues with
5 you?

6 A: It does, yes ma'am.

7 Q: Okay. Did he instruct you on how to get the
8 transcripts as well in this letter?

9 A: He did.

10 Q: So how long were you at SCDC before you received this
11 letter?

12 A: It was a while.

13 Q: A couples of months or?

14 A: Something like that probably. I know I was at
15 Kirkland and I didn't get that until I was at Evans.

16 Q: How long were you at Kirklands?

17 A: 92 days.

18 Q: So about four months after you got there is when you
19 got this letter?

20 A: Yes ma'am.

21 Q: Okay. What did he tell you about your sentence and
22 parole in this letter?

23 A: He told me that I was parole eligible. You would be
24 parole eligible after serving four years of your sentence.

25 Q: Were you parole eligible after serving four years of

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1 your sentence?

2 A: Yes ma'am.

3 Q: And what else did you want Judge to know today about
4 your PCR?

5 A: Kind of what you already explained about the lack of
6 explanation about the offer plea.

7 Q: Y'all talked about --- Do you mean the offered plea?
8 O-F-F-E-R Plea or the alford plea A-L-F-O-R-D?

9 A: All I know is he had told me at the picnic table that
10 they had offered assault and battery. Yeah offered.

11 Q: There's a plea called an Alford plea and I couldn't
12 distinguish what you were saying.

13 A: My bad. I'm sorry.

14 Q: Okay, an Alford plea.

15 A: Yes ma'am. Another thing is the failure of the state
16 to keep the evidence. They had a recording of when I first
17 went of me and they said they had lost it. So some of the
18 stuff the police officer said that I had told him wasn't
19 true.

20 Q: Did you feel like Mr. Bishop adequately cross
21 examined that officer about some of those statements?

22 A: Not on that one.

23 Q: Which particular officer was it? Do you remember?

24 A: Officer Price.

25 Q: Was he the one that took your initial statement?

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1 A: Him and Mr. Horne I believe the other one was.

2 Q: Was that the statement, the recording that they lost?

3 A: Yes ma'am.

4 Q: So some of the stuff he was testifying to was
5 incorrect?

6 A: Yes ma'am.

7 Q: And you do not feel like Mr. Bishop adequately
8 addressed discrepancies in that?

9 A: Yes ma'am.

10 Q: When he was cross examining him in that?

11 A: Yes ma'am.

12 Q: Okay is there anything else you want Judge Curtis to
13 know?

14 A: Some of the effectiveness for not objecting I'm
15 assuming for that too. For when he would claim that they
16 lost the recording or whatever and some of the stuff that
17 he said was ... let's see here.

18 Q: Did y'all have a hearing at the beginning of the
19 trial to discuss that outside of the presence of the jury
20 about your statement you gave to the police?

21 A: A written statement?

22 Q: Both, the written and the oral statement.

23 A: The only thing they used was the written statement.

24 Q: Okay. So they didn't talk about the recording that
25 they lost?

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1 A: No.

2 Q: Okay.

3 A: They had mentioned that they didn't have the
4 recording. That they had lost it.

5 Q: Okay.

6 A: I guess moving or something. I don't really know. But
7 some of the stuff that he did say wasn't true. Such as he
8 claimed that I had told him that I kissed the victim twice
9 mouth to mouth and had more feelings than a brother and
10 sister which was not true. I never said that.

11 Q: Okay.

12 A: And I felt like he should've impeached the victim
13 more on the text messages.

14 Q: Okay.

15 A: He didn't ask why she was sending them and stuff.

16 Q: So she sent a bunch of text messages. What were the
17 text messages about that she sent that you felt like he
18 should've used more?

19 A: She kept saying no I was the one that did this to her
20 and I did this. But I think he should have went more and
21 asked her why, why she sent them in the first place.

22 Q: What kind of text messages were they?

23 A: I mean some of them were pretty bad. They were
24 talking about you know, can't wait to kiss you. Stuff like
25 that. But she kept saying I was the one doing this. I was

1 the one doing it all the time.

2 Q: But she's also sending text messages of a romantic
3 nature is that what you mean?

4 A: Yes ma'am.

5 Q: And he didn't really ...

6 A: He should've - Yes ma'am.

7 Q: ... discuss that with the victim very well?

8 A: Yes ma'am.

9 Q: Okay is there anything else?

10 A: The changing stories of the victim and the other
11 witnesses.

12 Q: She had some inconsistent statements that she had
13 given?

14 A: Yes ma'am. I have a bunch of them actually. So my
15 older sister Laura, they all did interviews and her
16 interview was on 04/25/2016. And it stated that I slept in
17 the smaller bedroom and **MINOR2** and **MINOR1** slept up in the
18 bigger room. But two years later when we went to court by
19 the transcripts it changed. It said that I was supposed to
20 sleep in the living room and **MINOR1** had her own room and
21 **MINOR2** had her own room.

22 Q: Okay.

23 A: All right and then she was also asked this was in the
24 interview did she see anything that made her think that me
25 and **MINOR2** were having sex or doing any sexual activity.

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1 She said no. But when trial started, she changed her story
2 completely. MINOR2's interview was on 10/23/2015. The
3 interviewer asked if there was any physical relationship
4 that she seen between me and MINOR1 that was more than a
5 brother and sister and she said no. And she said that I had
6 my own room and her and MINOR2 were sleeping in her room.
7 And two years the transcript said that I was supposed to be
8 sleeping on the couch. So there was a lot of un-
9 consistencies.

10 Q: Inconsistencies?

11 A: Yeah. Inconsistences.

12 Q: Mr. Bishop, he didn't ask them about that at the
13 trial?

14 A: He went a little bit into it but I felt like he
15 should've did a little bit more. A little better job. And
16 for --- let's see here. I felt like for the direct verdict
17 he didn't really. He asked for it but he really didn't
18 explain why he was asking for it.

19 Q: So he didn't tell you the reason behind for why he
20 was asking for a directed verdict?

21 A: No ma'am.

22 Q: Did you ask him at the trial?

23 A: I didn't. No ma'am. This is my first time ever being
24 in trouble so.

25 Q: But he didn't turn around to you and say you why he

1 was doing that or nothing like that?

2 A: No ma'am.

3 Q: Is that everything that you wanted to tell Judge
4 Curtis?

5 A: All the witnesses that took the stand were all asked
6 if they ever seen anything sexual going on or anything and
7 all of them said no. So I felt like with the CSC third with
8 it being a separate offense than the second which I was
9 found not guilty on. You know, it's things like things that
10 that happened prior to the sexual battery such as touching,
11 fondling, kissing in sexual manner. With all of them saying
12 they never seen anything sexual going on, and in text
13 messages nothing sexual was ever said, that's what Mr.
14 Price said when he looked through them because he was asked
15 that. I felt like they didn't really have enough that
16 showed that I committed CSC with a minor third.

17 Q: Okay. So did you feel that Mr. Bishop then was sort
18 of ineffective I guess in dealing with those witnesses on
19 the stand and asking about how they didn't see anything?

20 A: Yes ma'am.

21 Q: Did he explain to you that since you were charged
22 with CSC with a minor second that you could still be found
23 guilty of CSC with a minor third which as a lesser offense
24 regardless of that extra charge?

25 A: I didn't know in that way but he told me they were

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1 going to charge me for both at the same time.

2 Q: Okay. But before they charged you with both, did you
3 have a conversation about how that CSC with a minor third
4 is a lesser included offense than the second degree?

5 A: He didn't ever say lesser.

6 Q: Okay.

7 A: I didn't know it was a lesser offense until I got the
8 letter from the Clerk of Court.

9 Q: Anything else you want Judge Curtis to know about
10 your PCR today?

11 A: I think that's pretty much it.

12 MS. MCMAHAN: Answer any questions Mr. Jones may
13 have.

14 MR. JONES: No questions, Your Honor.

15 THE COURT: Thank you. You can step down.

16 MR. WAY: All right. Thank you.

17 MS. MCMAHAN: Judge that completes the applicant's
18 case.

19 MR. JONES: Thank you, Your Honor. The state would
20 call John Andrew Bishop.

21 CLERK: Do you solemnly swear or affirm the
22 statements you give before the court will be the truth, the
23 whole truth and nothing but the truth so help you God?

24 MR. BISHOP: I do.

25 CLERK: Thank you. You may be seated.

1 Mr. John Andrew Bishop - Direct Examination by Mr. Jones

2 Q: Thank you Mr. Bishop. By way of background, how long
3 have you been practicing law?

4 A: I've been practicing law since 2016.

5 Q: How much of your practice has been criminal?

6 A: I have a general practice with my father. I would say
7 about half of the practice is criminal.

8 Q: Do you recall how you were initially retained to
9 represent Mr. Way?

10 A: Yes. I believe he was referred by a prior CSC with a
11 minor client and that case actually went to jury trial as
12 well.

13 Q: All right. And can you just explain briefly the
14 charges he was facing and the state's evidence behind those
15 charges?

16 A: So Mr. Way came to me I believe. I did not represent
17 him in a bond hearing. He came to me shortly after he was
18 charged because we requested a preliminary hearing. I
19 represented him at the preliminary hearing and then
20 throughout the case. He was initially charged in 2017. The
21 case did not go to trial until 2019. The allegations were
22 that he was in a sexual relationship with his half sister
23 who was, at the time of the allegations, I believe, between
24 11 and 14 possibly around 15. There was a wide span of
25 time. He was initially charged with two counts of criminal

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1 sexual conduct with a minor in the second degree. Closer to
2 trial, the one CSC with second he was reindicted with CSC
3 with a minor third. So, when we went to trial he was facing
4 one count of CSC with a minor second, one count of CSC with
5 a minor third.

6 Q: All right. Do you recall how many times you met with
7 him?

8 A: I met with him quite a few times. We met early on. We
9 met before the preliminary hearing. You know, he was
10 adamant throughout the entire case that no criminal, no
11 crime had occurred. That he had done no wrong doing. So our
12 position was that, you know, either they nolle prose it or
13 we go to trial. We met kind of throughout. The case kind of
14 moved slowly. I think it changed hands a couple of times
15 within the solicitor's office. But then closer to trial,
16 obviously when we knew we were going to trial, we spent a
17 lot of time preparing. I can't give you the exact number of
18 times we met.

19 Q: Okay. During those meetings, did you discuss the
20 state's evidence?

21 A: I did. The state --- there was an abundance of
22 evidence. There were lots of Facebook post, lots of
23 transcripts of text messages that were subpoenaed, forensic
24 interviews. So we had a lot of evidence to go through. We
25 met --- there was never one time where we could go through

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1 it all so we met multiple times to kind of go over
2 everything.

3 Q: Let's talk about some of that evidence. The text
4 messages, were they from Mr. Way or to Mr. Way or both?

5 A: They were both.

6 Q: And what was the content generally?

7 A: Generally the content was of a romantic relationship
8 between a boyfriend and a girlfriend. Now, our defense was
9 that this was a fabricated relationship and it was just to
10 protect her from being bullied because her friends did not
11 know that he was her step brother or half brother. So they
12 kind of put on this front of a romantic relationship but
13 there was really actually no relationship going on.

14 Q: And were there Facebook messages as well?

15 A: There were Facebook messages as well. I believe there
16 was a Facebook account that showed them as husband and
17 wife. And they kind of, I believe, both of them kind of
18 managed and worked on that account.

19 Q: You mentioned the forensic interviews. Were there
20 multiple forensic interviews?

21 A: If I recall, I think there were two with the victim
22 and the there were two sisters as well that were
23 interviewed.

24 Q: And do you recall the statements being inconsistent
25 in any of those interviews and the testimony at trial?

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1 A: I do. I do. I recall them being inconsistent and also
2 being inconsistent with what was testified at trial.

3 Q: And did you exploit that inconsistency in your cross
4 examination?

5 A: I did.

6 Q: Mr. Way mentioned a plea offer, excuse me, from zero
7 to 10 years for some kind of assault and battery charge.
8 Can you talk about that?

9 A: That's correct. So the state offered, and this was a
10 few months before trial and I know this because in
11 preparing for this hearing I went back and checked my
12 emails. They offered assault and battery straight up and I
13 believe leaving the sex offender registry open. I looked --
14 -- and in my reply to the State I said that I discussed this
15 with Mr. Way. We discussed the offer of the evidence at
16 length and at this point in time, he's not willing to plead
17 to anything because adamant that no wrong doing had
18 occurred. I believe that was around September 10th of 2019.

19 Q: And did that --- did his conviction that nothing I'm
20 sorry his personal view that nothing criminal had occurred,
21 did that remain the same up throughout trial?

22 A: That remained the same and including his testimony.
23 And this was a case where yes the state had a lot of
24 evidence but we had an explanation for that evidence. There
25 was one where it was I thought it was important so did Mr.

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1 Way for him to testify in trial to kind of clear that up.

2 Q: And ultimately he was acquitted of the CSC second?

3 A: That's correct. And to kind of clear up some early
4 testimony, he was facing two indictments, CSC second and
5 CSC third. The jury was not instructed as any lesser
6 included on the CSC second. So they were two separate
7 indictments.

8 Q: Right. Now the CSC third. Did you discuss the
9 different elements of CSC second vs. CSC third with Mr.
10 Way?

11 A: I did. I don't recall exactly when we did but I
12 always discuss the elements and the punishments of any
13 charges that a client is facing with them.

14 Q: Did you discuss the difference in what he could be
15 facing in the CSC charges verses the zero to 10 years he had
16 been offered for the assault and battery?

17 A: Yes. It is my understanding I believe I made it clear
18 that the CSC third is zero to 15, second was zero to 20 and
19 then with the offer it was the assault and battery straight
20 up which would be zero to 10.

21 Q: Did he request an appeal from you?

22 A: He did not.

23 Q: Did you see any monetarist issues for appeal that had
24 occurred in the trial?

25 A: I did not.

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1 Q: Regarding the parole eligibility, do you recognize
2 the letter that they mentioned in his testimony?

3 A: I do. I believe it was sent in a response to a letter
4 Mr. Way sent me from SCDC. He was asking for I think his
5 Rule 5 and some other documents. And I attached those to
6 that letter. He asked about the transcript. I instructed
7 him on how to get a transcript and then I did mention about
8 parole eligibility. I was not able to after the trial and
9 that's why I added it into the letter.

10 Q: All right. And your understanding at that time was
11 that he would be parole eligible within four years of his
12 conviction?

13 A: That's correct. That was my understanding.

14 Q: Is that your current understanding as well?

15 A: It is my current understanding.

16 Q: Do you recall anything about a lost recording?

17 A: I do not. I do not. I recall the interview he gave
18 with Detective Price. That was before my representation. I
19 recall cross examination of Mr. Price. I don't recall a
20 lost tape but I know there was a statement, a written
21 statement that Mr. Way gave along with an interview that he
22 gave which Mr. Price testified to.

23 Q: And because I know you brought up the kiss between
24 Mr. Way and the victim in your closing argument. Can you
25 explain why that was brought up?

1 A: Yeah. So, I think that Mr. Way's comments were taken
2 out of context in his written statement and in the
3 statement he gave to Mr. Price. You know Kyle mentioned
4 that he kissed her. He didn't deny a kiss but our --- we
5 said it was more like a peck. You know it was not to arouse
6 him, not for any sexual purposes. You know he stated it was
7 as a sibling would kiss another sibling, a peck on the
8 cheek or a peck on the lips. You know they were harping on
9 that so we had to clarify. I did clarify that Kyle's
10 statement's never changed from the time he gave the first
11 interview through his testimony at trial. That he didn't
12 come to say I never kissed her but that is was not a sexual
13 kiss or anything like that. It was a peck or just a kiss
14 from family member to family member.

15 Q: So you brought it up to conceptualize it?

16 A: Correct.

17 Q: And also to portray Mr. Way as a credible witness?

18 A: Correct.

19 Q: Do you recall making the motion for directed verdict?

20 A: I do.

21 Q: Was that more of a pro forma motion?

22 A: Correct. It was more of just to you know preserve it
23 on the record. And there was, once again, there was an
24 abundance of evidence. But you know, our defense was mainly
25 to conceptualize the evidence and kind of clarify it. So I

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1 would say that was more of a formality.

2 Q: All right. Beg the Court's indulgence for one minute.

3 Did Mr. Way tell you anything about a lost recording?

4 A: I don't recall anything about a lost recording.

5 Q: The plea offer. After that plea offer was rejected,
6 did the State offer any new plea offers?

7 A: That was the only offer we received.

8 Q: And finally, apart from directly requesting an appeal
9 did Mr. Way make any other indications to you that he might
10 want to in some way want to challenge?

11 A: He did not.

12 Q: All right. Thank you. Thank you sir. I'll turn it
13 over to Ms. McMahan now.

14 **Mr. John Andrew Bishop - Cross Examination by Ms. McMahan**

15 Q: Did you have a discuss with him about the direct
16 appeal process?

17 A: I did not.

18 Q: So you didn't sit down with him and say hey here's
19 what happens after if you lose your trial or anything?

20 A: I don't believe we did.

21 Q: Is it common for someone in a general sessions trial
22 to not have a direct appeal?

23 A: I mean I didn't think there were any basis for appeal
24 in this case.

25 Q: Are you an appellant lawyer?

1 A: I'm not.

2 Q: So you've not done any appeals?

3 A: No general session appeals. No.

4 Q: What have you done appeals from?

5 A: Administrative appeals.

6 Q: So in magistrates court you have to file your issues
7 on appeal when you're appealing the circuit court?

8 A: Correct.

9 Q: In general sessions, you don't do that?

10 A: Correct.

11 Q: Have you filed a notice of appeal before?

12 A: No not in a general sessions case.

13 Q: But you never had a conversation with him like hey
14 here's the whole process, you have a right to a directed
15 appeal?

16 A: I did not.

17 Q: So you heard Mr. Way talk about something about an
18 offer being given after the trial had started and you guys
19 were talking outside on the picnic tables. Do you recall
20 anything about that?

21 A: No there was no offer given after the trial had
22 started. The only offer given was that assault and battery
23 and that was, well my response to that offer was in
24 September of 2019. The only reason I remember that date was
25 because I have an email that was sent in response to that

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1 offer to the solicitor's office.

2 Q: Do you recall what your conversations was about at
3 the picnic tables though?

4 A: If I recall, you know, we sat throughout the trial
5 because he was out on bond and discussed the case sometimes
6 outside on the picnic tables. I don't recall exactly what
7 those conversations entailed.

8 Q: Okay. I've only been to the Saluda County Courthouse
9 a few times.

10 A: So there's a little grassy area right outside of the
11 court house and there's some tables there so during lunch
12 or sometimes after court we would sit and talk.

13 Q: How close is that to your office?

14 A: It's about an hour. I work in Abbeville.

15 Q: Okay. Not close. Abbeville has a square.

16 A: Correct. Yeah. Yeah.

17 Q: So you would sit sometimes on a break as you were
18 saying and discuss what was going on?

19 A: Discuss what was going on, yeah, any concerns he may
20 have had, any questions.

21 Q: Do you any concerns he had during the trial?

22 A: Not particularly. Obviously it was a stressful time.
23 Anyone who's a defendant in a case is going to be stressed
24 out. I think he was kind of nervous throughout. But I don't
25 remember any specific concerns.

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1 Q: You said he was referred to you by a prior CSC
2 client. Do you recall how many CSC clients you've had?

3 A: Maybe 10 to 15?

4 Q: You also said that you've been licenced since 2016.
5 Were you a law clerk anywhere or anything before then?

6 A: I was not. I was not.

7 Q: Your dad didn't let you work for him?

8 A: What was that?

9 Q: Your dad didn't even let you work for him?

10 A: No he was retired. He retired then he got bored and
11 went into private practice. So. So I graduated law school
12 in 2015. I did not know what state, I didn't know if I was
13 going to stay in South Carolina so I did not apply for the
14 bar timely. So, I didn't take the bar until February of
15 2016. So.

16 Q: So did you sit down and have a conversation with him
17 that even though there was this additional third out there
18 that the jury could still find him if the solicitor or
19 someone had asked for a lesser on that second that they
20 could still find him guilty on a lesser on that?

21 A: I'm not sure if I discussed that with him or not.

22 Q: How old was the victim? Do you remember?

23 A: At the time of the trial or at the time of the
24 allegations?

25 Q: Before trial.

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1 A: I believe 14.

2 Q: So there wasn't a forensic interview that could've
3 been used because she wasn't under 12, right?

4 A: That's correct.

5 Q: And she was what, 16 or 17 at the time of the trial?

6 A: I believe so.

7 Q: Did you ever have a chance to reach out and try to
8 talk to her?

9 A: I never I think possibly early on I tried to make a
10 phone call but never got a response. Other than that, I
11 don't think I made any attempts.

12 Q: Did you try to reach out to any I guess other
13 siblings about what had been going on?

14 A: I don't believe so.

15 Q: Did you guys discuss a possible case you may present
16 or any witnesses or anything that you could present?

17 A: We did. Mr. Way was going to be obviously our main
18 witness. We called one additional witness who was his
19 supervisor at the time these allegations occurred. Other
20 than that, there were no other witnesses that I could think
21 that would be helpful to the case.

22 Q: Where did this incident allegedly take place? In the
23 residence?

24 A: In the residence in Saluda County. I believe also
25 possibly in a camper at the back of the residence. There

1 were some allegations there as well.

2 Q: So besides Mr. Way were there was any of his parents
3 or anyone living there or step parents or anything?

4 A: Yes. I believe his father and his step mother were
5 living there and then maybe three other siblings. And I
6 think either a grandmother or an aunt lived next door or
7 near there.

8 Q: So did the step father, I mean did the mom. Sorry did
9 the step mom and the father talk to you at all about Mr.
10 Way's case?

11 A: No. And the step mother testified for the state. His
12 father did not testify.

13 Q: So when you were dealing with Mr. Way, were there any
14 other family members you were in communication with?

15 A: No. He was, when I was dealing with him,
16 unfortunately he was he was kind of black balled and
17 ostracized from his family.

18 Q: So he wasn't staying with them?

19 A: No.

20 Q: Do you know where he was staying?

21 A: He was living with his fiancé and their child. I
22 believe at that time, it might have been in Greenwood
23 County.

24 Q: Did you go back and ask the solicitor if there were
25 any other offers available after that third was added in?

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1 A: I did not. It was my understanding that --- they
2 never gave me a dead line on the assault and battery first.
3 So I assumed that offer was still open until we went to
4 trial.

5 MS. MCMAHAN: Court's indulgence, Your Honor. I have
6 no further questions, Your Honor.

7 THE COURT: Okay. You can step down sir.

8 MR. BISHOP: Thank you.

9 MR. JONES: The state rest, Your Honor.

10 THE COURT: Okay. Anything from either side in the way
11 of closing?

12 MS. MCMAHAN: Judge we just ask that you review the
13 record as a whole before issuing your decision.

14 THE COURT: Anything from the state?

15 MR. JONES: Thank you, Your Honor. We submit that Mr.
16 Way has failed to met his burden to establish any grounds
17 for post conviction relief. The main grounds here in the
18 amended applications that were filled with this court were
19 regarding first the failure to follow direct appeal. That,
20 of course, he testified, Mr. Way, testified that he did not
21 request a direct appeal and Mr. Bishop confirmed that
22 direct appeal was never requested and he did not see any
23 meritorious issues. As to the most recent amendment to the
24 application regarding erroneous advice as to parole
25 eligibility, everything that we've heard here today suggest

1 that the advice was correct and remains correct that he was
2 parole eligible and is still parole eligible. So we submit
3 that there was no error and therefore no deficiency or any
4 other kind of ineffective assistance. Thank you, Your
5 Honor.

6 MS. MCMAHAN: Judge may I address the direct appeal
7 issue real fast?

8 THE COURT: Sure.

9 MS. MCMAHAN: Mr. Way testified that he had no idea
10 that he even had a right to a direct appeal until he got to
11 prison and learned about it. Mr. Bishop testified that he
12 never had a conversation with him about the direct appeal
13 process or what could come after general sessions. He also
14 testified that he's never done an appeal so he's also never
15 filed a general sessions notice of appeal. So how could Mr.
16 Way ask for a direct appeal if he had no way of knowing it
17 existed? So I submit that he's still preserved his right
18 for direct appeal and that should be granted.

19 THE COURT: Did the trial court advise him of the
20 right to appeal?

21 MR. JONES: Your Honor, I don't see that in the
22 transcript. I'm not sure if it's there or not but I don't
23 recall reading it when I reviewed the transcript.

24 MS. MCMAHAN: Judge I didn't see it in there. I did
25 see some indication that he could request parole but

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1 nothing about a direct appeal.

2 THE COURT: Okay thank you. I will certainly take a
3 close look at the materials before I issue a ruling and I
4 will email you of my decision.

5 MR. JONES: Thank you, Your Honor.

6 THE COURT: Thanks.

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Kyle Wayne Way vs. The State of South Carolina

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1 STATE OF SOUTH CAROLINA)
 2) CERTIFICATE
 3 COUNTY OF SALUDA)
 4

5 Be it known that I, the undersigned Melissa R.
 6 Singletary, Certified Verbatim Reporter, for the State of
 7 South Carolina, do hereby certify that the foregoing
 8 transcript represents a true, accurate and complete
 9 transcript of record of the testimony and evidence
 10 introduced in during this testimony of the captioned case,
 11 before the Circuit Court for Berkeley County, South
 12 Carolina, so given on March 11, 2024, by way of Digital
 13 Monitor, to the best of my skill and ability;

14 That I am not related to nor an employee of any of
 15 the parties hereto, nor a relative or employee of any
 16 attorney or counsel employed by the parties hereto, nor
 17 interested in the outcome of this action.

18 IN WITNESS WHEREOF I have here unto set my hand this
 19 16th day of June, 2024. ■

20 *Melissa R. Singletary*

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Melissa R. Singletary, CVR

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Certified Verbatim Reporter

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2024 FEB 28 PM 7:02
SHERIFF OF COUNTY SALUDA, SC

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF SALUDA	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
)	
Kyle Wayne Way, #382833	)	Case No.: 2020-CP-41-00093
)	
Applicant,)	
)	
v.)	
	)	ORDER OF DISMISSAL
State of South Carolina,)	
)	
Respondent.)	
)	
)	
)	

This matter comes before the Court by way of an application for post-conviction relief (“PCR”) filed by Kyle Wayne Way (“Applicant”) on May 8, 2020, and amended on October 7, 2022, and again on March 27, 2023. The Court convened an evidentiary hearing into the matter on April 4, 2023, at the Lexington County Courthouse. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Zachary W. Jones, of the South Carolina Attorney General’s Office, represented Respondent. After reviewing all records and evidence before the Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections. Applicant was arrested on March 16, 2017, following an investigation into allegations Applicant sexually abused his thirteen-year-old biological sister over a period of several months.

During its May 2017 term, the Saluda County Grand Jury indicted Applicant for second-degree criminal sexual conduct (CSC) with a minor (2017-GS-41-1175). During its November

2019 term, the Saluda County Grand Jury indicted Applicant for third-degree CSC with a minor. (2019-GS-41-344). On November 18, 2019, Applicant proceeded to a jury trial before the Honorable Walton J. McLeod, IV. Andrew Bishop, Esquire (Counsel) represented Applicant. Assistant Solicitors Robbie McNair and Melanie Darko prosecuted the case. On November 21, 2019, the jury convicted Applicant of third-degree CSC with a minor and acquitted him of second-degree CSC with a minor. Judge McLeod sentenced Applicant to fifteen years' imprisonment. Applicant did not appeal.

II. CURRENT APPLICATION

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

1. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 - (a) "Invalid arrest warrants/4th Amendment"
 - (b) "Constitutional violation"

2. State concisely and in the same order the facts which support each of the grounds set out in (10):
 - (a) "Warrants was [*sic*] not issued under section 17-13-140"
 - (b) "No commitment order to be detain [*sic*] to detentional [*sic*] center under section 24-5-10."

Applicant requests relief in the form of a new trial.

Applicant amended his application on October 7, 2022, raising the following allegations:

1. Ineffective assistance of Counsel – John A. Bishop
 - a. Failure to file a direct appeal.

Applicant amended his application on October 7, 2022, raising the following allegations:

2. Ineffective Assistance of Counsel
 - a. Erroneously advised Applicant as to parole eligibility. *See Smith v. State*, 329 S.C. 280, 494 S.E.2d 626 (1997).

Applicant also asked to be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing. Based on Applicant's testimony during the hearing, the Court deems the following additional issues presented:

1. Ineffective Assistance of Counsel

- a. Failure to adequately explain Applicant's plea options after Applicant was indicted for third-degree CSC with a minor;
- b. Failure to adequately cross-examine Victim as to the reason for the incriminating text messages between her and Applicant;
- c. Failure to challenge Captain Price's testimony that Applicant had admitted to kissing Victim and had said his feelings for Victim were more than those of a brother;
- d. Failure to expose witnesses' changing stories:
 - i. Victim gave inconsistent statements during her forensic interviews and at trial;
 - ii. Older Sister's trial testimony differed from her earlier statement;
 - iii. Younger Sister's trial testimony differed from her earlier statement;
- e. Failure to adequately argue the directed verdict motion.

No evidence was presented at the evidentiary hearing concerning the allegations raised in Applicant's initial PCR application. Therefore, the Court deems those allegations abandoned, and will address only the allegations raised in the two amended applications or presented at the hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, and weighed the testimony accordingly. Before the Court are Applicant's records from the South Carolina Department of Corrections, the transcript of Applicant's trial, the records of the Saluda County Clerk of Court regarding the subject convictions, and the original and amended applications for post-conviction relief. This Court has reviewed the records submitted to it by the parties, the legal arguments made by the attorneys, and

the pleadings. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

Ineffective Assistance of Trial Counsel

Applicant's allegations of ineffective assistance of Trial 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). Applicant must prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690).

The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough*, 540 U.S. at 6; *see also* *Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”).

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

A: Failure to file direct appeal

Applicant argues Counsel was ineffective for failing to file a direct appeal or to consult with Applicant about the possibility of appeal. The Court finds this allegation to be without merit.

Counsel has a constitutionally imposed duty to consult with a defendant about an appeal *only* when there is reason to think (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). In addition, to prove prejudice, an applicant must demonstrate a reasonable probability that he would have timely appealed but for counsel's deficiency. *Id.* at 484. Evidence that there were nonfrivolous grounds for appeal or that the defendant promptly expressed a desire to appeal is highly relevant to this determination. *Id.* at 485.

At the evidentiary hearing, Applicant admitted he never asked Counsel to pursue an appeal. Counsel also testified that Applicant neither requested an appeal nor made any other indication that he wanted to challenge the conviction. Counsel further testified he did not see a basis for filing a notice of appeal because he could not see any meritorious issues for appeal. Applicant did not present any nonfrivolous grounds that would have justified an appeal. As "evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal" is "highly relevant" to the prejudice analysis, the Court finds Applicant has failed to meet his burden of proving prejudice from Counsel's failure to consult with him about filing an appeal. *Flores-Ortega*, 528 U.S. at 485. As the failure to prove prejudice is dispositive, the Court need not reach the deficiency prong. *Strickland*, 466 U.S. at 697.¹ Accordingly, this allegation is denied and dismissed with prejudice.

¹ Even where the post-conviction relief court finds an applicant was denied the right to a direct appeal due to the ineffective assistance of counsel, the court may not grant post-conviction relief on that basis. *Davis v. State*, 288 S.C. 290, 291 n.1, 342 S.E.2d 60, 60 n.1 (1986). Instead, the proper remedy is for the applicant to petition for belated review of direct appeal issues pursuant to the procedure set forth in *Davis*. *Id.* Therefore, even if Applicant had met his burden as to this allegation, the remedy he requested—a new trial—would not be available.

B: Erroneous advice regarding parole eligibility

Applicant argues Counsel provided erroneous advice regarding his parole eligibility. The Court finds this allegation is without merit. At the evidentiary hearing, Applicant testified Counsel sent him a letter after he went to prison telling him he would be eligible for parole after four years. Counsel recalled sending the letter, and he testified that he still believed Applicant would be parole eligible after four years. The SCDC records for Applicant, which were among the materials provided to the Court, reflect Applicant's projected parole date as "8/23/2023." This would, in fact, be slightly less than four years after Applicant's conviction. The Court finds Counsel gave correct advice regarding Applicant's parole eligibility and, therefore, was not deficient as to this allegation. Furthermore, since Applicant testified he received Counsel's letter after he had already been convicted, the Court finds this advice could not possibly have affected the outcome of the trial. Accordingly, this allegation is denied and dismissed with prejudice.

C: Failure to reevaluate Applicant's plea options after CSC 3rd charge

Applicant argues Counsel was ineffective for failing to renew discussions regarding pleading guilty after Applicant was charged with third-degree CSC with a minor. The Court finds this allegation is without merit.

Applicant testified he was initially charged with second-degree CSC with a minor and was offered the option of pleading to assault and battery instead for a sentencing range of 0–10 years. He rejected that offer. Shortly before trial, he was charged with third-degree CSC with a minor. Applicant testified that Counsel warned him that he might be in some trouble because of the new charge. Applicant argued Counsel should have explained the plea offer better and should have attempted to revive it after the third-degree CSC with a minor charge was added.

Counsel testified that Applicant was offered a straight-up plea to assault and battery, with the sex offender registry left open, rather than proceeding to trial on the CSC charges. Counsel further testified he explained the differences between the assault and battery plea offer and the CSC charges Applicant was facing if he continued to trial. Counsel testified Applicant refused to plead guilty because he maintained his innocence.

The Court finds Counsel's testimony credible as to this issue. Accordingly, Applicant has failed to prove that Counsel's discussions regarding the plea offer were inadequate or that Applicant's decision not to accept the offer was based on Counsel's advice, as opposed to Applicant's own refusal to admit guilt.²

Accordingly, Counsel's performance was not deficient, and this allegation must be denied and dismissed with prejudice.

D: Failure to cross-examine Victim regarding text messages

Applicant argues Counsel was ineffective for failing to adequately cross-examine Victim about the reasons for the romantic text messages between her and Applicant. The Court finds this allegation is without merit.

At trial, the State introduced as evidence multiple text messages Applicant sent to Victim, where he described himself as her "boyfriend" or "husband," described Victim as his "girlfriend"

² In addition, the only "prejudice" that resulted from this alleged deficiency is that Applicant received a trial. "It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977); see *Strickland*, 466 U.S. at 684 ("[T]he Sixth Amendment right to counsel exists . . . in order to protect the fundamental right to a fair trial."); see also *id.* at 686 (holding the purpose of the "constitutional requirement of effective assistance" is "to ensure a fair trial."). Absent any impropriety in Applicant's trial, the mere allegation that Applicant was prevented from bargaining away his trial rights cannot, by itself, amount to prejudice justifying a grant of PCR.

or “wife,” and expressed a longing to hold and kiss Victim and distress at being parted from her. Victim also sent similar messages to Applicant. (Nov. 20, 2019, Tr.pp.76–91).

At the evidentiary hearing, Counsel testified the defense strategy was to explain that Applicant and Victim did not really mean the things they were texting to each other. Rather, they created a false persona, pretending that Applicant was a boy in love with Victim, so that Victim would not be bullied at school. The text messages were, ostensibly, an elaborate ruse so that Victim could show her friends that her “boyfriend” was communicating with her. Applicant gave this explanation for the text messages on direct examination. (Nov. 20, 2019, Tr.p.161, line 4–p.162, line 20). Counsel elicited from Victim on cross-examination that she was being bullied at school and that Applicant had decided to text her friends, pretending to be her boyfriend. (Nov. 18–19, 2019, Tr.p.160, lines 12–18). At closing argument, Counsel argued Applicant had participated in this “fake relationship” for a legitimate reason, and that “nothing ever transgressed from the fake relationship to the real world.” (Nov. 20, 2019, Tr.p.23, line 23–p.24, line 23).

Applicant now claims Counsel should have more thoroughly cross-examined Victim about the reasons for the incriminating texts between her and Applicant. The Court finds, however, that Counsel acted reasonably in presenting the defense strategy, both by eliciting the purportedly legitimate purpose of the texts from Applicant on direct examination and by arguing to the jury that the text relationship never carried over into real life. Furthermore, there is no reason to believe that Victim would have testified favorably if Counsel had pressed her on this point. On the contrary, Victim testified that she and Applicant genuinely considered each other boyfriend and girlfriend and that Applicant eventually considered her his wife, as reflected in the text conversations. (Nov. 18–19, 2019, Tr.p.88, line 25–p.90, line 13.)

Applicant bears the burden of proving that, had Counsel more thoroughly cross-examined Victim on this issue, Victim's testimony would have been helpful to the defense. However, Applicant has presented no evidence to support that conclusion. Therefore, the Court finds Applicant has failed to prove either deficiency or prejudice as to this allegation; accordingly, this allegation is denied and dismissed with prejudice.

E: Failure to challenge Captain Price's testimony about Applicant's statement

Applicant argues Counsel did not adequately challenge the testimony of Captain Price, who testified at trial that Applicant had verbally admitted kissing Victim on the mouth and having feelings for Victim that were more than those of a normal brother-and-sister relationship. Applicant denies that he ever gave such a statement. The Court finds this allegation is without merit.

At the outset of Applicant's trial, the trial court conducted a hearing outside the presence of the jury to determine the admissibility of Applicant's verbal statement to Captain Price pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964). (Nov. 18–19, 2019, Tr.pp.34–47). Captain Price testified at that hearing that Applicant was read his rights and gave a written statement³ during an interview on March 3, 2017. (Nov. 18–19, 2019, Tr.pp.38–40). Captain Price further testified that Applicant gave a verbal statement admitting “that he did have feelings for his sister that were more than what a—what would be a normal brother-and-sister relationship” and that he had kissed the Victim on the mouth on two different occasions. (Nov. 18–19, 2019, Tr.p.43, lines 8–18; p.44, lines 8–13). The court asked Counsel whether he was contesting the admissibility of the statement,

³ The written statement was read during Applicant's trial. The substance of the statement was that Applicant denied any wrongdoing and claimed he sent texts to Victim pretending to be her boyfriend, and later husband, so that she wouldn't be bullied at school. (Nov. 20, 2019, Tr.pp.62–64).

and Counsel replied, “I wasn’t contesting the admissibility of the written statement. We have some issues with what was verbally said outside of his written statement.” (Nov. 18–19, 2019, Tr.p.44, line 20–p.45, line 2). Ultimately, the trial court ruled “that the statement was voluntarily made after *Miranda*. Whether the jury believes it or not will be up to them at a later date. But I’ll certainly hold that it’s voluntary and admissible for *Jackson v. Denno* purposes.” (Nov. 18–19, 2019, Tr.p.47, lines 3–8).

During the evidentiary phase of the trial, the State called Captain Price to testify before the jury about Applicant’s statements. Captain Price again testified that Applicant had given a written statement, and he read that statement to the jury. (Nov. 20, 2019, Tr.pp.62–64). He then testified that Applicant had made a verbal statement admitting that he had kissed the Victim on the mouth on two occasions and had feelings for her that were more than a normal brother-and-sister relationship. (Nov. 20, 2019, Tr.pp.64–66). On cross-examination, Captain Price testified Applicant had described the kiss as a “peck.” (Nov. 20, 2019, Tr.p.68, lines 9–13).

Applicant testified during his trial. He admitted that he had kissed Victim “on the side of the lips” and that he had described it to Captain Price as a “peck.” (Nov. 20, 2019, Tr.p.171, line 24–p.172, line 6). Applicant testified he never kissed Victim in a sexually arousing way. (Nov. 20, 2019, Tr.p.174, lines 18–20). On cross-examination, Applicant denied telling Captain Price he had kissed Victim directly on the mouth, and he also denied telling Captain Price he had held hands with Victim at the track at school. (Nov. 20, 2019, Tr.p.193, lines 2–24). During closing arguments, Counsel argued to the jury that Applicant did admit to giving Victim a “peck” but that he did not say his feelings for Victim were more than those of a brother and sister. (Nov. 21, 2019, Tr.p.24, lines 9–12).

The Court finds Counsel's performance as to this issue was not deficient. Counsel challenged the admissibility of Applicant's verbal statement at a *Jackson v. Denno* hearing outside the presence of the jury. Although he was unsuccessful in keeping the statement out of evidence, he was able to elicit from both Captain Price and Applicant that the kiss was described as a "peck," as opposed to a kiss of a sexual nature. Applicant was able to deny or minimize aspects of the verbal statement as related by Captain Price. Furthermore, Counsel argued to the jury that Applicant had only admitted to giving Victim a "peck" and denied telling Captain Price about having inappropriate feelings for Victim. The Court finds Counsel made reasonable efforts to exclude, minimize, or rebut Captain Price's recollection of Applicant's verbal statement. Moreover, Applicant has not presented any other arguments, evidence, or strategies Counsel could have pursued in challenging Price's testimony that might have obtained a different result. Therefore, Applicant has not met his burden of proving Counsel was deficient in this respect, nor has he proved the outcome of his trial would probably have been different but for Counsel's conduct. Therefore, this allegation of ineffective assistance is denied and dismissed with prejudice.

F: Victim's inconsistent statements

Applicant argues Counsel failed to adequately expose the inconsistencies between the Victim's forensic interviews and her testimony at trial. The Court finds this allegation is without merit.

On direct examination, Victim testified she gave two forensic interviews. She admitted that, in her first interview, she told the forensic interviewer that "nothing happened" between her and Applicant. (Nov. 18–19, 2019, Tr.p.137, line 23–p.138, line 6). She also admitted later telling the interviewer that she had been forced or drugged every time she had sexual contact with

Applicant, which was not true. (Nov. 18–19, 2019, Tr.p.138, lines 8–14). Counsel cross-examined Victim about the inconsistencies between her testimony and the statements she had made to the forensic interviewer, and Applicant admitted she had lied to the forensic interviewer because she thought her parents would go to jail if she told the truth. (Nov. 18–19, 2019, Tr.pp.145–46).

In his closing statement, Counsel capitalized on Victim’s admission by arguing to the jury that “[n]ot one person witnessed any sexual activity between [Applicant] and [Victim]. The only one who testified to this was [Victim] . . . who admitted to lying in her forensic interview.” (Nov. 21, 2019, Tr.p.20, lines 7–15).

The Court finds that the inconsistencies between Victim’s statements in her forensic interviews and her testimony at trial were exposed both on direct examination and on Counsel’s cross-examination of Victim. Counsel was able to use those inconsistencies to impeach Victim’s credibility during his closing argument to the jury. Applicant has not demonstrated any additional inconsistencies that were not addressed. For these reasons, the Court finds Applicant has failed to prove Counsel was deficient in this regard, and this allegation is denied and dismissed with prejudice.

G: Older Sister’s inconsistent statements

Applicant argues Counsel failed to adequately expose the inconsistencies between the Victim’s older sister’s testimony and her earlier statement she gave on April 25th of 2016. The Court finds this allegation is without merit. At the evidentiary hearing, Applicant testified Older Sister gave a statement on April 25th of 2016, but that her testimony at trial differed from her statement with regard to the sleeping arrangements of Victim and her siblings and whether Older Sister ever saw indications of sexual activity. However, Applicant did not produce this alleged statement, nor did he explain specifically what the purported inconsistency was or how it was

material to his case. There is no reference to any prior statement by Older Sister, inconsistent or otherwise, in the transcript of her testimony at trial. Therefore, the Court finds Applicant has not met his burden of proving either deficiency or resulting prejudice as to this allegation.

H: Younger Sister's inconsistent statements

Applicant argues Counsel failed to adequately expose the inconsistencies between the Victim's younger sister's forensic interview and her testimony at trial. The Court finds this allegation is without merit.

On direct examination at Applicant's trial, Younger Sister testified she once walked in on Applicant and Victim in Victim's bedroom when Victim was not wearing any pants. Victim told Younger Sister not to tell anyone. At other times, Applicant would ask Younger Sister about Victim's undergarments or whether she was talking to any boys at school. Younger Sister testified Applicant was supposed to be sleeping on the couch, but she would sometimes hear him going into Victim's bedroom at night. (Nov. 20, 2019, Tr.pp.94–98).

On cross-examination, Counsel asked Younger Sister about a forensic interview she had given. Younger Sister admitted that she told the interviewer she did not see or suspect that anything was going on between Applicant and Victim. She also admitted she lied about the sleeping arrangements in that interview. Younger Sister testified she lied to the interviewer because she was scared for Victim. (Nov. 20, 2019, Tr.p.102). In his closing statement, Counsel brought up these inconsistencies in Younger Sister's testimony and argued to the jury that Younger Sister "admitted to not mentioning anything inappropriate that she saw between [Applicant] and [Victim] when she gave her forensic interview" (Nov. 21, 2019, Tr.p.21, lines 10–22).

The Court finds that Counsel did, in fact, expose the inconsistencies between Younger Sister's statements in her forensic interview and her testimony at trial. Counsel was able to use

those inconsistencies to impeach Younger Sister's credibility during his closing argument to the jury. Applicant has not demonstrated any additional inconsistencies that were not addressed. For these reasons, the Court finds Applicant has failed to prove Counsel was deficient in this regard, and this allegation is denied and dismissed with prejudice.

I: Directed verdict motion

Applicant argues Counsel failed to adequately argue the directed verdict motion at trial. The Court finds this allegation is without merit. Counsel testified at the evidentiary hearing that he made the directed verdict motion merely to preserve it on the record; he believed there was an abundance of evidence in the record to support the charges, so the motion was not likely to succeed. The Court agrees with Counsel's assessment of the evidence and finds that Applicant has failed to prove Counsel was deficient or that a directed verdict motion would probably have been granted but for Counsel's failure to more vigorously argue for it. Therefore, the Court finds Applicant has not met his burden of proving either deficiency or prejudice as to this issue. Accordingly, this allegation is denied and dismissed with prejudice.

IV. CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) 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, 409 S.E.2d 395 (1991), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice; and
2. The Applicant be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 2nd day of February, 2024.

Kristi Curtis
KRISTI F. CURTIS
Presiding Judge
Eleventh Judicial Circuit

Sumter, South Carolina

WITNESSES

Saluda County Sheriff's Department

Josh Price

Law Enforcement Case #: 201510-1511

REM

ARREST WARRANT NUMBER

319-STR-0052

ACTION OF GRAND JURY

Tracy D. Price
Foreperson of Grand Jury

Date: NOV 5 2019

VERDICT

Guilty

[Signature]
Foreperson of Petit Jury

Date: 11/21/2019

DOCKET NO. 2019GS4100344

The State of South Carolina

County of Saluda

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2019

THE STATE

vs.

Kyle Wayne Way

CDR #: 3661

Indictment for

**CRIMINAL SEXUAL CONDUCT WITH A
MINOR - THIRD DEGREE**

§ 16-03-655(C)

S.R. Hubbard III, SOLICITOR

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SALUDA)
)

INDICTMENT FOR
 CRIMINAL SEXUAL CONDUCT WITH A
 MINOR - THIRD DEGREE

§ 16-03-655(C)

At a Court of General Sessions, convened on NOVEMBER 2019, the Grand Jurors of Saluda County present upon their oath:

That **Kyle Wayne Way**, a person over fourteen years of age, did in Saluda County, South Carolina, between March 1, 2015 and October 13, 2015, willfully and lewdly commit or attempt to commit a lewd and lascivious act upon or with the body, or its parts, of a child under sixteen years of age, to wit: **MINOR 1**, date of birth **2001**, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of himself or of said child, in violation of Section 16-3-655(C), Code of Laws of South Carolina, 1976, as amended, and previously codified as S.C. Code Section 16-15-140, 1976, as amended.

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


 ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

0-15 or fine 645
IN THE COURT OF GENERAL SESSIONS

COUNTY OF Saluda
STATE VS.
Kyle Wayne Way

INDICTMENT/CASE#: 2019GS4100344
A/W#: S19-STR-0052
Date of Offense: 1/1/2015
S.C. Code § : 16-03-0655(C)
CDR Code #: 3661

AKA:
Race: White Sex: M Age: 32
DOB: [redacted]-1987 SS# [redacted]
Address: [redacted]
City, State, Zip: Saluda, SC 29138
DL#: [redacted]

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS TO: CSC with Minor Third Degree

in violation of § 16-3-655(C) of the S.C. Code of Laws, bearing CDR Code # 3661
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS §17-25-45
(CSC w/minor 1st or CSC w/minor 3rd)

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

ATTEST: [Signature] 72860
Solicitor SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 15 days/months/years or under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the SCDOC.

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

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

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

Set by SCDPPPS _____

Recipient: _____

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso (Public Def/Probation)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)		\$ 3.75

TOTAL \$ 128.75

Clerk of Court/ Deputy Clerk: Sheri C. Coleman

Court Reporter: Bethanne Creppon

PTUP _____

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling

Random Drug/Alcohol testing

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

\$ _____ paid to Public Defender Fund

Other: SEE OFFENDER @ REGISTRY REQ'D

Appointed PD or appointed other counsel, § Proviso requires \$500 be paid to Clerk during probation and shall be collected before any other fees.

Presiding Judge: [Signature]

Judge Code: 2765

Sentence Date: 11-21-2019