

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

R. Ferrell Cothran, Jr., Circuit Court Judge

RECEIVED

MAR 27 2014

S.C. Supreme Court

JOHN KITTRELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLANT CASE NO. 2013-002059

A P P E N D I X

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ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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INDICTMENT91

State of South Carolina)	
County of Aiken)	Court of General Sessions
		09-GS-02-0336

The State of South Carolina)	
Plaintiff)	
vs.)	Transcript of Record
John Kittrell)	
Defendant)	

April 29, 2009
Aiken, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

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

Brenda Brisbin, Assistant Solicitor
Attorney for the Plaintiff

M. Justin Mims, Esq.
Attorney for the Defendant

Lisa H. Davenport
Official Court Reporter

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John Kittrell,

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
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(None offered)

1 (Whereupon, on April 29, 2009 the following
2 proceedings were held:)

3 JOHN KITTRELL, after being duly sworn, testified
4 as follows:

5 THE COURT: All right. This is the matter of the
6 State versus John Kittrell, K-I-T-T-R-E-L-L, age 32.
7 Where do you live, sir?

8 THE DEFENDANT: Excuse me?

9 THE COURT: Where do you live?

10 THE DEFENDANT: I was at [REDACTED],
11 Belvedere, South Carolina.

12 THE COURT: Belvedere. Thank you. This is
13 indictment 2009-GS-02-336, an indictment that's been
14 true-billed by the Aiken County Grand Jury on March 5 of
15 2009. He has been indicted for criminal sexual conduct
16 with a minor in the first degree.

17 Mr. Justin Mims, do you represent Mr. Kittrell?

18 MR. MIMS: Yes, Your Honor.

19 THE COURT: Have you advised him that these charges
20 carry a minimum of 25 years in the State Department of
21 Corrections to life in the discretion of the court?

22 MR. MIMS: Yes, sir, I have.

23 THE COURT: Have you further advised him that it's
24 classified as violent which may have some effect on where
25 he's housed and some effect on his conditions while

1 incarcerated?

2 MR. MIMS: I have.

3 THE COURT: And you have further advised him that it
4 is classified as most serious and the ramifications of the
5 enhancement laws and what most serious means?

6 MR. MIMS: Yes, Your Honor, I have.

7 THE COURT: Have you further advised him that this is
8 a no-parole sentence and that whatever sentence I impose
9 he'll do 85 percent of the sentence before being eligible
10 for release, and once released he'll be released into a
11 community supervision program?

12 MR. MIMS: Yes, Your Honor, I have.

13 THE COURT: Have you further advised him that it
14 requires mandatory GPS monitoring as well as registration
15 on the sex offender registry?

16 MR. MIMS: Yes, sir.

17 THE COURT: Have you further advised him of his right
18 to trial by jury?

19 MR. MIMS: Yes, sir.

20 THE COURT: How does he wish to plead, not guilty or
21 guilty?

22 MR. MIMS: Guilty.

23 THE COURT: Mr. Mims, after having reviewed all of
24 the material provided to you by the solicitor's office and
25 going over it with your client are you in agreement with

1 his decision to enter a plea of guilty?

2 MR. MIMS: Yes, sir, I am.

3 THE COURT: I noticed on the sentence sheet that it
4 is a negotiated sentence. Would you please tell me what
5 the negotiations are?

6 MR. MIMS: The negotiation is for the statutory
7 minimum of 25 years.

8 THE COURT: Registration and mandatory GPS?

9 MR. MIMS: Yes, Your Honor.

10 THE COURT: Madam Solicitor, is there any other
11 negotiations other than what we've just discussed?

12 MS. BRISBIN: We are agreeing to dismiss the other
13 charges that were pending which relate to this victim in
14 Aiken County. He does have a hold, I believe, from
15 Florida. The State of Florida has 18 warrants pending for
16 similar charges which we are not negotiating in this plea.

17 THE COURT: How does that work? If I go along with
18 the negotiation, do we send him to Florida for those
19 dispositions or do we incarcerate him and upon release
20 then he goes to Florida?

21 MS. BRISBIN: I am not exactly sure, Your Honor. I
22 think he'll have to serve his 25 years before they have
23 any --

24 THE COURT: I would think that's the way they would
25 do it. They don't want to incur the cost of housing him.

1 All right. As a result of the negotiations, ma'am, have
 2 you discussed that with the victim and the victim's
 3 family, her parents, guardian, legal custodians, et
 4 cetera?

5 MS. BRISBIN: Yes, Your Honor. The victim is a
 6 5-year-old boy. He's living with his grandmother and his
 7 mother. His mother has mental deficits and his
 8 grandmother did ask not to be here today but asked that
 9 Your Honor would order a no-contact order as part of this
 10 plea.

11 THE COURT: But is she --

12 MS. BRISBIN: She is in agreement with the 25-year
 13 mandatory minimum.

14 THE COURT: Mr. Kittrell, good morning.

15 THE DEFENDANT: Good morning.

16 THE COURT: You stand before me on this indictment
 17 for criminal sexual conduct with a minor in the first
 18 degree. That carries a minimum -- mandatory minimum of 25
 19 years up to life in prison at the discretion of the judge.
 20 Do you understand those charges?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Do you understand the possible
 23 punishment?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: The crime is classified as violent which

1 may have some effect on where you're housed and how you're
2 housed in the Department of Corrections. It may also have
3 other ramifications. Do you understand that?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: It is also classified as most serious
6 which means that upon release from incarceration that if
7 you become involved in law -- unlawful activity that is
8 classified as most serious that would be two strikes
9 against you and you would be subjecting yourself to life
10 in prison without the possibility of parole?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Do you understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Also, if you become involved in activity
15 that's classified as serious and you get -- you have the
16 most serious and then two serious that would be three
17 strikes there and likewise you would be subjecting
18 yourself to the possibility of life in prison without
19 parole. Do you understand that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: You also understand that under this
22 particular statutory offense that it requires a mandatory
23 GPS ground position system monitoring upon release?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: You also understand that this is what is

1 known as a no-parole sentence and whatever sentence I give
2 you you'll do 85 percent of that sentence before being
3 eligible for release and once released you'll be released
4 into a community supervision program? Do you understand
5 that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: You further understand that it requires
8 registration on the sex offender registry?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And that has certain limitations and
11 requirements on you --

12 THE DEFENDANT: Yes, sir.

13 THE COURT: -- on release. Do you understand all of
14 that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you have any questions you want to ask
17 me about what you're charged with, the sentence, what
18 violent and most serious means, what no parole means, what
19 85 percent means, what mandatory GPS means or any of that?

20 THE DEFENDANT: No, sir.

21 THE COURT: Understanding everything that we've just
22 talked about -- the offense, the possible punishment, the
23 classifications, and the GPS and registration
24 requirements -- how do you wish to plead, sir, guilty or
25 not guilty?

1 THE DEFENDANT: Guilty.

2 THE COURT: Mr. Kittrell, when you plead guilty you
3 give up certain constitutional rights. One of those is
4 your right to remain silent. You'll have to admit your
5 offense. Do you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: The other is you give up your right to
8 trial by jury. Obviously, if you requested a trial the
9 state would give you one at which time you would have the
10 right through your lawyer to confront and cross examine
11 everybody who testified against you. You would have the
12 right to present your own defense by calling witnesses on
13 your behalf, introducing relevant exhibits on your behalf,
14 and even testifying in your own defense if you chose to do
15 so. If you chose to exercise your constitutional right to
16 remain silent, then I would tell the jury they couldn't
17 hold your failure to testify against you in any manner
18 whatsoever, and, in fact, I would instruct them that they
19 could not even consider the fact that you did not testify
20 when they deliberated your guilt or innocence.

21 You would be presumed to be innocent throughout the
22 trial and the State of South Carolina would have the
23 burden of proving your guilt beyond a reasonable doubt to
24 a jury of 12 people, and in order for that jury to convict
25 you all 12 people would have to unanimously agree that you

1 were, in fact, guilty, and even if you were convicted you
2 would still have the right to an appeal.

3 Now, sir, do you understand your rights to trial by
4 jury?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Understanding those rights to trial by
7 jury, do you still wish to plead guilty or do you wish for
8 me to convene a jury for a jury trial?

9 THE DEFENDANT: Plead guilty.

10 THE COURT: Mr. Kittrell, has anyone promised you
11 anything, held out any hope of reward, or threatened you
12 other than the negotiation --

13 THE DEFENDANT: No, sir.

14 THE COURT: -- in order to make you plead guilty?

15 THE DEFENDANT: No, sir.

16 THE COURT: Do you understand that I will listen to
17 the entire presentation and if I can go along with the
18 negotiation I will? If I feel that the court cannot, then
19 I will advise you and your lawyer and you will have
20 certain options at that time.

21 THE DEFENDANT: Yes, sir.

22 THE COURT: You're represented by Mr. Justin Mims of
23 the Public Defender's Office. Are you satisfied with his
24 representation?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: In your opinion has he had enough time to
2 spend with you, enough time to research the law, and
3 investigate the facts so that he can properly and fully
4 defend you here today?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Mr. Kittrell, is there anything else that
7 you wish for Mr. Mims to do for you today before we move
8 forward other than speak up on your behalf?

9 THE DEFENDANT: No, sir.

10 THE COURT: And I ask you again, sir, are you
11 totally, completely, and fully satisfied with his legal
12 representation, his legal advice, and what he's done for
13 you in his defense of you in this case?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Sir, are you today under the influence of
16 any alcoholic beverages, drugs, or prescription
17 medication?

18 THE DEFENDANT: No, sir.

19 THE COURT: Sir, are you aware today of any mental,
20 nervous, or emotional condition which would keep you from
21 understanding what we're doing here today?

22 THE DEFENDANT: No, sir.

23 THE COURT: Sir, have you understood all of my
24 questions?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Have you understood your conversations
2 with your lawyer this morning?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Do you have any questions at all that you
5 want to ask me about these proceedings?

6 THE DEFENDANT: No, sir.

7 THE COURT: Do you have any complaints you want to
8 make against anyone about these proceedings?

9 THE DEFENDANT: No, sir.

10 THE COURT: Any complaints about how you've been
11 treated in the jail?

12 THE DEFENDANT: No, sir.

13 THE COURT: Mr. Kittrell, are you pleading guilty of
14 your own free will and accord?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Mr. Kittrell, did you here in Aiken
17 County on or between July 14 of 2008 and August 14 of 2008
18 have or commit a sexual battery; in other words, anal
19 penetration with one ^{Minor} , a child who was
20 5 years old at the time of the incident which constitutes
21 criminal sexual conduct with a minor? Did you do that as
22 alleged in the complaint?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Strike that. In the indictment.

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Pleading guilty because you are guilty?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Pleading guilty because you broke the
4 law?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Pleading guilty because you committed
7 criminal sexual conduct -- criminal sexual battery with
8 one ^{Minor} ?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: All right. Mr. Kittrell, I find your
11 decision to plead guilty to be freely, voluntarily, and
12 intelligently made. You've had the advice of a lawyer
13 Mr. Mims with whom you tell me you're satisfied with and I
14 will accept your plea. If you disagree with my sentence
15 here today or these proceedings you have 10 days from
16 today's date to file an appeal. Do you understand your --
17 Do you understand your rights to an appeal?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Madam Solicitor?

20 MS. BRISBIN: Thank you, Your Honor. On August 15,
21 2008 Aiken County Sheriff's Office was called to the Aiken
22 Regional Medical Center Emergency Department for a report
23 of a sexual assault.

24 THE COURT: Hold on a second. Ma'am, hand him some
25 Kleenex, please.

1 MS. BRISBIN: The medical staff there reported that
2 5-year-old ^{Minor} who was the stepson of Mr. Kittrell
3 had disclosed while being treated for a sexually
4 transmitted disease at the emergency department that
5 Mr. Kittrell had stuck his penis in his rectum.
6 Mr. Kittrell initially denied having done anything to
7 ^{Minor} . However, after being offered a polygraph exam
8 which deception was found he admitted in a written
9 statement to law enforcement officers that he had anal
10 penetration as well as digital and oral sex with his
11 5-year-old stepson, and the child had an interview at the
12 Children's Advocacy Center in which he reported that this
13 had happened numerous times and that his stepfather was
14 the person who had done this to him.

15 His -- Mr. Kittrell's prior record includes one
16 charge for lewd act in Florida where he previously lived
17 and that was plead down to battery, and, so, he's not on
18 the sex offender registry at this time. Of course, this
19 charge will require that, and as I said Florida also has
20 18 warrants pending on him for --

21 THE COURT: For similar type of conduct?

22 MS. BRISBIN: -- with the same victim because they
23 used to live in Florida as well as his brother, I believe.

24 THE COURT: The victim's brother?

25 MS. BRISBIN: Who is Mr. Kittrell's son, if I

1 understand it correctly.

2 THE COURT: How old is that child?

3 MS. BRISBIN: I think he is three. Four. His other
4 prior convictions are for larceny in '95, battery in '95,
5 and I don't know what -- This was all in Florida so I
6 don't know the details on that one. Burglary in '97.

7 THE COURT: Where did you live in Florida?

8 THE DEFENDANT: Orlando.

9 MS. BRISBIN: I believe those are the convictions on
10 his record.

11 THE COURT: Thank you. Mr. Mims?

12 MR. MIMS: Thank you, Your Honor. Mr. Kittrell is 32
13 years old. He graduated high school down in Florida and,
14 basically, grew up there until coming to Aiken right
15 before these charges came about. He also did two years at
16 a technical college there for hospital -- not hospital --
17 hospitality management.

18 He met the victim's mother Ms. Kerri Self when she
19 was pregnant with the victim ^{Minor} and they began
20 seeing each other. She is on disability. Mr. Kittrell is
21 the only father that the victim has ever known. As you
22 know they also had another child together, ^{Minor 2} who is
23 4 years old now.

24 THE COURT: Please bear with me one second. I got to
25 take this phonecall from another judge.

1 (Whereupon, a break was taken.)

2 THE COURT: All right. Mr. Mims, I apologize. Judge
3 Cooper and I had a matter I had to discuss with him.

4 MR. MIMS: Just to briefly backtrack I was just
5 telling you that the mother of the victim was pregnant
6 with ^{Minor} when Mr. Kittrell met her. He is now six
7 and they also have a 4-year-old son together. The
8 4-year-old actually lives with Mr. Kittrell's parents down
9 in Florida. The victim lives with his mother and her
10 parents here in South Carolina.

11 I know that it's possible to hurt the ones you love,
12 and Mr. Kittrell certainly hurt his son, but I know for a
13 fact that he also cares for him very deeply and this is --
14 His actions have really torn him apart and he can't
15 explain why it happened. You know, they did a lot of
16 positive things together, too. He taught him how to fish.
17 They used to go to this wood park down in Florida where
18 everything was made like a pirate ship with old tires and
19 wood. His best friend worked at Disney World and they had
20 a silver pass that could get them in free and they would
21 do nice and healthy things together.

22 I don't know if it was Mr. Kittrell's mental
23 history -- and he also had a lot of prior sexual abuse.
24 When he was 14 he spent two weeks in a mental facility
25 down in Longwood, Florida for depression. He had a very

1 tumultuous relationship with his father, mainly his fault
2 he says, where he was combative and constantly out on the
3 street. He spent another stint in a mental hospital when
4 he was 17 because he attempted suicide and they held him
5 for 72 hours to evaluate him him.

6 After he left home he joined this volunteer search
7 and rescue operation down there where he shared a room
8 with five other individuals and tells me that he was raped
9 by two of those folks when he was 18. One of those guys
10 is in jail in Florida now for a similar thing -- breaking
11 into a hotel room and raping a boy. I don't know about
12 the other one, but he also had a similar experience in
13 prison.

14 When Ms. Brisbin mentioned his record and talked
15 about the burglary he did six years in jail at several
16 different yards in Florida and was also the victim of
17 sexual abuse twice during those years, and I am not
18 offering it as an excuse, but I do think that those
19 encounters skewed his perception of what a normal sexual
20 relationship is.

21 He obviously regrets his actions. I think that in
22 talking to him the thing that he's the the most devastated
23 about is never seeing Kerri again and never seeing his two
24 children again. It's not the 25 years or the loss of his
25 freedom. It is really that my family is gone. The mother

1 at least has continued to write him a few times since he's
2 been in jail, and I have actually seen the letters and
3 they're pretty -- they're pretty elementary. She's kind
4 of functioning on a lower level, but she does wish him
5 well, and, obviously, he wishes the family well, and in
6 watching the child advocacy center video of ^{Minor}, I
7 mean, he is a precious kid. They did -- other than this
8 sexual abuse, it seems like he's got a really bright
9 future ahead of him, and Mr. Kittrell hopes that the
10 damage that he's caused that ^{Minor} can get past that
11 and be the man that he's not, and we're in agreement with
12 the negotiation and we hope that you accept it. He has
13 been in jail 257 days now.

14 THE COURT: Anything else?

15 MR. MIMS: Not from me, Your Honor.

16 THE COURT: Mr. Kittrell, anything you want to tell
17 me? All right. Mr. Kittrell, the sentence of this court
18 is that you be committed to the State Department of
19 Corrections for a period of 25 years. I'll give you
20 credit for your time served to date. You'll be required
21 mandatory GPS upon release. You must register on the sex
22 offender registry. You shall have absolutely no contact
23 with the victim ^{Minor}. Good luck to you.

24 (End of Transcript of Record.)

25

CERTIFICATE OF REPORTER

1

2

3

State of South Carolina)

4

County of Aiken)

5

6

I, Lisa H. Davenport, Official Court Reporter for the

7

Second Judicial Circuit of the State of South Carolina, do

8

hereby certify that the foregoing is a true, accurate and

9

complete Transcript of Record of the proceedings had and

10

evidence introduced in the trial of the captioned case,

11

relative to appeal, in the Court of Common Pleas for Aiken

12

County, South Carolina, on the 29th day of April, 2009.

13

I do further certify that I am neither of kin,

14

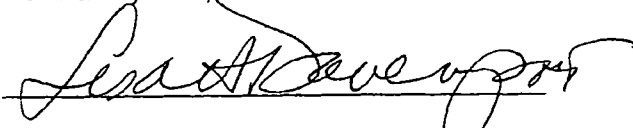
counsel nor interest to any party hereto.

15

16

February 15, 2010

17



18

Lisa H. Davenport, Court Reporter

19

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24

25

FORM 5

STATE OF SOUTH CAROLINA)
County of A. Low)

K-201730
IN THE COURT OF COMMON PLEAS
Filed: 1/17/09

2009-02-00447
2009-02-00336
C.C.C. & G.L. Allen County
Deputy Clerk
Trial Judge
Trial Atty. N. Justice
Court Reporter LAG
Sec. PCR Petitioner
General Sessions
Solicitor
Atty. Gen.
Appointed Atty.

John K. Hrell # 334595
Full name and prison number (if any) of Applicant)

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 Lieber Corr. Inst. P.O. Box 205
Ridgeville, SC 29472
2. Name and location of Court which imposed sentence A. Low County General
Sessions
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) ~~unknown number~~ CSC 1st degree
2009-GS-02-00336

(b) _____
(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) Approx. April 24 2009
(b) _____
(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty plea 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?

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

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

i. NO
ii. _____
iii. _____

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

i. N/A
ii. _____
iii. _____

(c) the date of each such result:

i. N/A
ii. _____
iii. _____

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

i. N/A
ii. _____
iii. _____

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

(a) Counsel did not file appeal

- (b) _____
- (c) _____

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

- (a) Ineffective Assistance of Counsel
- (b) Involuntary Plea
- (c) ERRONEOUS Advice of Counsel

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

- (a) Counsel failed to do any pretrial investigation.
- (b) Counsel failed to discuss defenses available
- (c) Counsel advise me to plea without ~~any~~ investigation

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? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. N/A
 - ii. _____
 - iii. _____

- iv. _____
- (c) the disposition thereof:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____

- (d) the date of each such disposition:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____

- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. N/A
 - 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/first filing

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:
 - i. N/A
 - ii. _____
 - iii. _____

- (b) the proceedings in which each ground was raised:
 - i. N/A
 - 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) first PCR filing
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? yes
- (b) your trial, if any? _____
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. Justin Mimmis Esq.
Public Defender
 - ii. SAME AS ABOVE
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. plea, Sentencing
 - ii. _____
 - iii. _____

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

VACATE Sentence AND conviction

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

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)
County of Dorchester)

VERIFICATION

I, John Kitter, 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.

John Kitter

SWORN to and subscribed before me this 30th day of July, 2009.

Virginia Fubler (L.S.)
Notary Public

My Commission Expires: 4/4/2017

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

I, John K. Theil, 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.

John K. Theil
Applicant

SWORN or affirmed to and subscribed before me this
30th day of July, 2005

Bernard J. Walker
Notary Public

My Commission Expires: 4/4/2017

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN)	
)	2009-CP-02-2417
)	
John Kittrell, #334595,)	
)	
Applicant,)	
)	
v.)	RETURN
)	(Appointment of Counsel Requested)
State of South Carolina,)	
)	
Respondent.)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed October 14, 2009, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. The Applicant was indicted at the March 2009 term of the Aiken County Grand Jury for Criminal Sexual Conduct ("CSC") with a Minor - First Degree (2009-GS-02-0336). He was represented by M. Justin Mims, Esquire. On April 29, 2009, the Applicant pled guilty to before the Honorable Doyet A. Early, III. He was sentenced to twenty-five (25) years imprisonment. The Applicant did not appeal his guilty plea or sentence.

Attached herewith and incorporated herein are the records of the Aiken County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina

FILED 12-18
[Signature]
 Aiken County Clerk
 Deputy Clerk

Department of Corrections, and the guilty plea transcript.¹ The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective assistance of counsel.
 - a. "Counsel failed to do any pretrial investigation."
2. Involuntary guilty plea.
 - a. "Counsel failed to discuss defense available."
3. "Erroneous advice of counsel."
 - a. "Counsel [advised] me to plea without investigation."

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

Respondent interprets Applicant's first and third allegations to be allegations of ineffective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

¹As of the date of this Return, the guilty plea transcript has been ordered but not yet received. The same will be

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

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

forwarded upon receipt.

IV.

Respondent submits that the Applicant's allegation that his guilty plea was involuntary is without merit. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

Respondent submits that the record fully supports the knowing and voluntary nature of the Applicant's plea. However, allegations regarding ineffective assistance of counsel and the voluntariness of the plea may raise a question of fact which is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing on this allegation. Sharper v. State, 305 S.E.2d 247.

V.

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

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MARY S. WILLIAMS
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

Dec. 13, 2009.

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State of South Carolina)
County of Aiken)

In the Court
Of Common Pleas

Docket No. 2009-CP-02-2417

John Kitrell,)
Applicant)

vs.)

Transcript of Record

State of South Carolina,)
Respondent)

July 10, 2013
Aiken, South Carolina

B E F O R E:

The Honorable R. Ferrell Cothran, Judge.

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

Sonja R. Tate, Esquire
Attorney for the Applicant

Megan Harrigan, Assistant Attorney General
Attorney for the State

Brenda J. Sigwald, Circuit Court Reporter
For R. Knox McMahon
P.O. Box 206, Jackson, South Carolina 29831

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20	during this hearing.)	
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POST-CONVICTION RELIEF

1
2 **MS. HARRIGAN:** John Kitrell.

3 May it please the Court?

4 **THE COURT:** Yes, ma'am.

5 **MS. HARRIGAN:** Megan Harrigan on behalf of the
6 State.

7 The next matter is John Kitrell versus The State of
8 South Carolina, Docket No. 2009-CP-02-2117.

9 Applicant was indicted during the March 2009 term
10 of the Aiken Grand Jury for criminal sexual conduct with a
11 minor in the first-degree. He was represented by Justin
12 Mims. On April 29, 2009, he appeared before the Honorable
13 Doyet A. Early, III and pled guilty as indicted.

14 Pursuant to negotiations between applicant and the
15 State, Judge Early sentenced the applicant to the mandatory
16 minimum sentence of 25 years imprisonment. Additionally
17 several other charges related to the same minor child were
18 dismissed pursuant to the plea.

19 Applicant did not appeal his guilty plea or
20 sentence. He did file a timely motion for post conviction
21 relief on October 14, 2009, alleging that he's being
22 unlawfully held in custody based on the following claims:
23 Ineffective assistance of counsel; for failure to any
24 pretrial investigation or counsel's failure to discuss
25 possible defenses with him; and involuntary guilty plea.

John Kitrell - Direct Examination by Ms. Tate

1 And he's represented in this action by Sonja Tate.

2 THE COURT: Okay.

3 MS. TATE: Good morning, Your Honor.

4 We'd call John Kitrell.

5 THE COURT: Okay. If you could come forward,
6 please, sir.

7 JOHN KITRELL,

8 having been duly sworn, testified as follows:

9 THE CLERK: Have a seat in the witness box and
10 state your full name for the Court.

11 THE WITNESS: John Pearce Kitrell.

12 DIRECT EXAMINATION

13 BY MS. TATE:

14 Q Mr. Kitrell, you are going to have to speak up so
15 that we can hear you.

16 Mr. Kitrell, you pled guilty to criminal sexual
17 conduct with a minor in the first degree; is that right?

18 A Yes, ma'am.

19 Q And you were represented by Justin Mims from the
20 public defender's office?

21 A That's correct.

22 Q And you've alleged ineffective assistance of
23 counsel?

24 A That's correct.

25 Q And before we talk about the hearing, I just want

John Kitrell - Direct Examination by Ms. Tate

1 to clarify that I actually gave a written statement,
2 allegedly confessing to this offense?

3 A That's true.

4 Q Right? How long had you been in jail before you
5 met Mr. Mims?

6 A The first time?

7 Q Yes, sir.

8 A Probably close to four or five months because they
9 had originally sent me another attorney who was coming to
10 see me and I asked to be reassigned.

11 Q The first attorney that was appointed to you, did
12 you ever see that attorney?

13 A Not once, no.

14 Q So then you eventually spoke to Mr. Mims?

15 A Yes.

16 Q Now, about how long had you been in jail by the
17 time you gave this written statement?

18 A Probably going on six -- six, seven months.

19 Q Okay. Now, on the day that you gave the written
20 statement, you had taken a polygraph test, is that right?

21 A That's correct.

22 Q Whose idea was it that you take the polygraph test?

23 A I had been asking for it since the day I was
24 arrested.

25 Q All right. And had you talked to Mr. Mims about

John Kitrell - Direct Examination by Ms. Tate

1 taking the polygraph?

2 A Yes.

3 Q Did you eventually find out that the polygraph had
4 been scheduled?

5 A I didn't know about it until they showed up at the
6 county jail to actually take me to it.

7 Q But you voluntarily went and wanted to go take the
8 polygraph?

9 A Yes.

10 Q Did you understand that Mr. Mims would be there
11 when you took the polygraph?

12 A Yes.

13 Q Was he there when you took the polygraph?

14 A No.

15 Q Where did you take the polygraph?

16 A SLED, in Columbia.

17 Q SLED in Columbia. And about what time did they
18 pick you up that morning?

19 A Probably about -- somewhere around 6 a.m.

20 Q And it was about 5 o'clock in the afternoon when
21 you gave the written statement?

22 A Correct.

23 Q During that time, how many times did you take the
24 polygraph?

25 A Four.

John Kitrell - Direct Examination by Ms. Tate

1 Q And when you arrived in Columbia, did you ask for
2 Mr. Mims?

3 A Yes.

4 Q And what were you told?

5 A I was told originally when I was at the jail I
6 asked for him and they said he would meet me there. When I
7 got there, they told me he was on his way and that he would
8 be there. And not once did he ever show up.

9 Q But you took the polygraph four times.

10 A Yes.

11 Q And then you eventually wrote a statement?

12 A Yes.

13 Q And that statement confesses to the crime?

14 A Correct.

15 Q Was that statement accurate?

16 A No.

17 Q Why did you write it?

18 A Because I was basically forced to.

19 Q How were you forced to write that statement?

20 A I was threatened by both the -- one of the
21 detectives and the lieutenant that was proctoring the test.
22 I was coerced into it by -- they literally manhandled me
23 and everything else. They kept -- they told me they
24 wouldn't let me use the bathroom, they weren't going to
25 give me anything to eat or drink. They wouldn't do

John Kitrell - Direct Examination by Ms. Tate

1 anything but sit there.

2 I sat on a couch for hours at the time and then
3 they would take me back and redo the test again and then
4 they'd come out and I'd sit there and they were just up in
5 my face all the time, pushing me around and telling me that
6 they were going to get a conviction one way or another. I
7 was told that -- by the detective, that he had never lost a
8 case -- a major case like this in ten years. I was not
9 going to be his first. All kind of things.

10 Q Now, after you gave the statement, you eventually
11 spoke to Mr. Mims again?

12 A A day or two following the -- following my trip to
13 SLED. He showed up at the County jail to see me. Yes, I
14 did see him.

15 Q Did you talk to him about taking the polygraph and
16 giving the statement?

17 A Eventually, yes. But when he first got there, the
18 first thing he said was, so I see you signed a confession.
19 And I tried to explain to him what happened and everything
20 and he goes -- he tells me it's my word against theirs that
21 all the Court was going to look at was the fact that I had
22 signed the confession and that basically, for lack of a
23 better term, I was screwed.

24 Q What did you tell him had happened?

25 A I told him exactly what had happened. I was asking

John Kitrell - Direct Examination by Ms. Tate

1 for him and he never showed up and that they basically
2 forced me to write it. And they told me basically what
3 they wanted me to write and made me -- I did it one time
4 and they said it wasn't good enough and made me rewrite it
5 again.

6 Q And you told all that to Mr. Mims?

7 A Yes, ma'am.

8 Q Anything else that you told him specifically with
9 regards to the circumstances surrounding your writing and
10 signing that confession?

11 A Well, I told him that if he had been there, that
12 would have never happened. Because they -- I don't think
13 they would have treated me like that in front of him.

14 Q If Mr. Mims had been there, would you have written
15 that confession?

16 A No.

17 Q Was that confession accurate?

18 A No.

19 Q What was inaccurate about it?

20 A Well, to start off with, the date that I claimed
21 that the incident happened, was weeks from the time that --
22 that even the victim said it happened.

23 Q Anything else about the statement that was not
24 true?

25 A The circumstances surrounding it. Everything -- I

John Kitrell - Direct Examination by Ms. Tate

1 mean everything I put in that statement he told me -- the
2 lieutenant had told me that he wanted dates, times, the
3 full surrounding of the incident, everything. And
4 everything that I wrote in that statement and could be
5 proven to be false.

6 Q And you told that to Mr. Mims?

7 A Yes.

8 Q Did you tell Mr. Mims how it could be proven to be
9 false?

10 A Yes.

11 Q How was -- how should he have been able to prove
12 that that statement was false?

13 A Well, for one, based on the statements that the
14 victim was writing. The victim had told the detectives or
15 some victim's advocate and all that. And two, just the
16 timeline. The timeline of when we moved up there and when
17 we got -- when we took custody of the victim and everything
18 else.

19 Q Did you tell Mr. Mims any specific witnesses that
20 he should speak with?

21 A I really didn't have a chance to go into that much
22 depth with him because all he kept telling me was, you
23 signed it. It's basically over. He basically told me
24 there was nothing that he could do, that he could try to
25 get it suppressed, but it wasn't going to happen.

John Kitrell - Direct Examination by Ms. Tate

1 Q And why did he tell you that it could be
2 suppressed?

3 A He didn't.

4 Q And you eventually pled guilty; is that right?

5 A Yes.

6 Q How soon after you gave that written confession did
7 you plead guilty?

8 A Two -- two and a half, maybe up to three months.

9 Q Okay. After that visit with Mr. Mims after you had
10 written the confession, how many times did you speak with
11 him?

12 A I think I actually spoke with him -- physically
13 spoke with him the day of the Court date when he told me --
14 when he talked to me. I had tried to contact him both by
15 the inmate telephone system and by writing letters to him.
16 He was always either out of the office, unavailable, or on
17 the phone with somebody else or whatever and I never heard
18 back from him until it came time for me to come to court.
19 And then he saw me for about ten minutes -- five or ten
20 minutes prior to me coming -- walking into the Court.

21 He told me, well this is what's happening -- here's
22 what's happening and I -- he told me that I had the choice.
23 I could take the plea and have a release date or I could go
24 to the jury trial and they were going to find me guilty
25 because of the statement and I was going to end up with

John Kitrell - Direct Examination by Ms. Tate

1 life in prison.

2 Q Prior to the day you entered your guilty plea, had
3 you discussed potentially pleading with Mr. Mims?

4 A When he came to visit me after the written
5 confession, he told me, this is what they're offering. And
6 he told me they were offering 25 years. I asked him if
7 they would go down on it and he said no.

8 Q And when did you tell him that you would enter a
9 plea of guilty?

10 A I didn't make the final decision until the day we
11 were in court. We were getting ready to go into court and
12 there was 10 minutes and he told me I had the choice of
13 taking that 25 and having a release date or give me life.
14 Do I take it by going to trial and I'd end up getting life.

15 Q And you were present when you gave the guilty plea,
16 weren't you?

17 A Correct.

18 Q And judge asked you if you were doing it freely,
19 knowingly and voluntarily?

20 A Yes.

21 Q And did you respond yes?

22 A Yes.

23 Q Was that true?

24 A I was taking the plea deal voluntarily, yes,
25 because I felt I didn't have a choice unless I wanted to

John Kitrell - Direct Examination by Ms. Tate

1 end up for life in prison, so I was voluntarily saying yes,
2 I would take the plea deal because like I said, I had no
3 choice.

4 Q Why didn't you have a choice?

5 A Because I was told that if I took it to trial I
6 would lose and based on that statement, I was going to end
7 up with natural life in prison.

8 Q So if you had not written that confession, would
9 you have pled guilty?

10 A No.

11 Q Are there other things that you believe Mr. Mims
12 did or didn't do that were ineffective?

13 A Yes.

14 Q What?

15 A When I got my discovery, I went through it page by
16 page and I came up with 26 items that would help prove my
17 innocence and I tried to convey that to Mr. Mims, that I
18 had things that could be investigated to prove my innocence
19 and nothing was ever done about it.

20 Q Was that before or after you gave a written
21 statement?

22 A That was before.

23 Q Okay. Did you ever discuss those items with
24 Mr. Mims after you gave the written statement?

25 A No, because like I said, the day he came to the

John Kitrell - Direct Examination by Ms. Tate

1 jail and told me -- well, I guess you signed a confession.
2 Here's what they're offering. It was a dead issue by then.
3 I asked him -- all he kept telling me was if I take a
4 trial, I'm going to lose because it was written on the
5 statement -- based on the written statement.

6 Q Had you given him names of witnesses that he needed
7 to speak with?

8 A Yes.

9 Q Who had you asked him to speak with?

10 A Off the top of my mind I can't recall the actual
11 names and things. I know I had told him to talk to -- to
12 talk to Carrie.

13 Q And who is Carrie?

14 A Carrie, at the time, was my girlfriend, the mother
15 of the victim.

16 Q Other than Carrie, were there any other witnesses
17 that you asked to speak with?

18 A Carrie's mother.

19 Q Who's Carrie's mother?

20 A Kathy Sell (phonetic). The neighbor. The neighbor
21 we spent all our time with, Travis and Melissa. I believe
22 that was the basic bulk of who I had asked him to go
23 physically speak to.

24 Q But you gave him those names prior to you giving a
25 written -- providing that written statement?

John Kitrell - Cross-Examination by Ms. Harrigan

1 A Yes. Within days of him given the copy of my
2 discovery, right after I had gone through it, I started
3 trying to talk about witnesses, and trying to bring up the
4 different points that would prove my innocence.

5 Q After you gave that written statement, did you talk
6 to Mr. Mims anymore about talking to these witnesses or any
7 other witnesses?

8 A I asked him if we were going to be able to do any
9 of this and he said, it's really not going to matter
10 because of the written statement. That written statement
11 is going to -- you're going to -- it's going to get a
12 conviction.

13 Q Anything else that you believe Mr. Mims did or
14 didn't do that was ineffective?

15 A It was mostly investigator stuff, investigator
16 stuff and then him not being there when they did the
17 polygraph and in the end caused me to write the statement
18 and everything else. That was the bulk of it, yes.

19 Q All right. Answer any questions that the attorney
20 general may have.

21 MS. HARRIGAN: May it please the Court?

22 THE COURT: Yes, ma'am.

23 CROSS-EXAMINATION

24 BY MS. HARRIGAN:

25 Q How many times did you meet with Mr. Mims before

John Kitrell - Cross-Examination by Ms. Harrigan

1 your guilty plea?

2 A Three, maybe four.

3 Q Total?

4 A Total.

5 Q The entire investigation?

6 A Total.

7 Q Did you -- I believe you testified on direct that
8 you also wrote letters and talked to him by phone?

9 A Yes.

10 Q Do you recall approximately how many times?

11 A I talked to him on the phone two or three times.
12 We really didn't talk about the case, but every time I did
13 talk to him, I was asking him to come see me.

14 Q And I believe you testified you did review your
15 discovery with him?

16 A No, I reviewed the discovery myself.

17 Q He provided you with a copy, correct?

18 A He provided me the copy.

19 Q And you never went over that discovery material
20 with your attorney?

21 A Not that I recall, no. Well, I tried to mention
22 certain points to him and everything, when he was there to
23 see me at the jail, he had a list of other guys he had to
24 see, so we didn't spend a lot of time talking. Ten,
25 fifteen, maybe twenty minutes at a time.

John Kitrell - Cross-Examination by Ms. Harrigan

1 Q Twenty minutes each of these four meetings?

2 A At max.

3 Q Do you recall discussing possible defenses with
4 him?

5 A No.

6 Q But you testified before you had given him
7 witnesses, correct?

8 A I told -- when I went through the discovery -- when
9 we sat down and talked one time, I did -- I told him some
10 names that we needed to talk to and that was about it. We
11 never -- we never really went over any discussions on
12 strategy, on defenses, nothing like that. No.

13 Q And you voluntarily took the polygraph, correct?

14 A Yes, I'd been asking for it since the day I was --
15 I got arrested.

16 Q So it was your idea to take the polygraph?

17 A Yes.

18 Q And law enforcement has a written statement that
19 you made, correct?

20 A Correct.

21 Q Okay. And that includes various types of sexual
22 assault, not just the one charge that you pled guilty to,
23 correct?

24 A No. The --

25 Q The statement doesn't allege other acts of sex

John Kitrell - Cross-Examination by Ms. Harrigan

1 crimes on this minor child?

2 A No.

3 Q Would you disagree if the transcript says that the
4 statement does talk about various sexual acts performed on
5 this five-year-old child?

6 A Yes.

7 MS. HARRIGAN: The record will speak for itself,
8 Your Honor, in regards to that.

9 BY MS. HARRIGAN:

10 Q And the minor victim was your girlfriend's son,
11 correct?

12 A Yes.

13 Q Who you had raised.

14 A Yes.

15 Q He was five years old, correct?

16 A Yes.

17 Q Did you make a verbal confession?

18 A No.

19 Q You didn't make a confession on the way back from
20 your SLED polygraph?

21 A No. The confession was one that was written and
22 signed while at SLED.

23 Q And you're claiming now that you signed it under
24 duress.

25 A Yes.

John Kitrell - Cross-Examination by Ms. Harrigan

1 Q Did you bring that up to Judge Early during your
2 guilty plea, that this was under duress?

3 A No, I was not given -- I was -- he asked me -- by
4 the time -- Judge Early asked me if I had anything to say
5 and by then, and I'm sure Mr. Mims can tell you this, I had
6 broke down and was crying so hard, I couldn't get a word in
7 edgewise. I couldn't stop crying.

8 Q You were crying because you were emotional?

9 A Yes.

10 Q Okay.

11 A I had written a short statement that I wanted to
12 read to the Court and I had shown it and given it to
13 Mr. Mims. He said he would handle it. Throughout the
14 plea, he did touch on a few things here and there that were
15 in the statement, but the statement was never read and like
16 I said by the time it got time where I could say something,
17 I was too emotional to say anything.

18 Q So you never told Judge Early during your guilty
19 plea that this statement was coerced and it was under
20 pressure and duress and it was false?

21 A No.

22 Q And this was your guilty plea, correct?

23 A Yes.

24 Q Mr. Mims wasn't going to be doing the 25 years?

25 A Correct.

John Kitrell - Cross-Examination by Ms. Harrigan

1 Q And Mr. Mims told you the State's offer was for a
2 negotiated 25 years, correct?

3 A Yes.

4 Q Did he explain to you that this was the mandatory
5 minimum for this charge?

6 A No.

7 Q Did you know you could be taking up to life on this
8 charge?

9 A He had told me if I took it to trial, I was going
10 to get found guilty based on the statement and I was going
11 to get life.

12 Q The State also dismissed several other charges
13 involving this same minor victim, correct?

14 A Correct.

15 Q And that was part of your negotiated plea deal?

16 A Correct.

17 Q Did you know you were getting 25 years when you
18 walked into court that day?

19 A Yes.

20 Q You vol --

21 A When I walked into the courtroom because Mr. Mims
22 had discussed it with me and I went back and forth right
23 before we walked in the Court, yes.

24 Q So it was your decision to plead guilty?

25 A Yes.

John Kitrell - Cross-Examination by Ms. Harrigan

1 Q And you testified before on direct that you
2 voluntarily took the plea to avoid life in prison, correct?

3 A Correct.

4 Q And you pled to avoid a harsher sentence?

5 A Yes.

6 Q Do you recall telling Judge Early you wanted to
7 plead guilty?

8 A I recall that when I was standing in front of him
9 that he -- that my attorney told him that I had agreed to
10 a -- to change my statement -- change my plea from not
11 guilty to guilty and to take the negotiated plea.

12 Q Do you recall telling Judge Early that you were, in
13 fact, guilty of this crime?

14 A Yes.

15 Q And you were under oath then, correct?

16 A Correct.

17 Q And you knew that you were under a duty to tell the
18 truth to the Court?

19 A Yes.

20 Q So you were guilty?

21 A No.

22 Q You're under oath today, correct?

23 A Correct.

24 Q So were you lying then or are you lying now?

25 A I'm lying then.

John Kitrell - Cross-Examination by Ms. Harrigan

1 Q Okay. So just to be clear, you're admitting you
2 lied to the Court during your guilty plea?

3 A Yes.

4 Q Okay. Do you recall agreeing with the facts
5 presented by the State during your guilty plea proceeding?

6 A I don't recall that, no. I don't recall them
7 saying that.

8 Q You don't recall the State going over the facts
9 giving rise to these charges and you agreeing with that?

10 A No, because it was a negotiated plea based on that
11 statement.

12 Q Do you recall waiving your constitutional rights
13 during your guilty plea?

14 A I don't remember word for word what was said.

15 Q Over all though that you were --

16 A Yes.

17 Q -- waiving your rights; and Mr. Mims had advised
18 you of these rights?

19 A Yes.

20 Q Do you remember telling Judge Early you were
21 satisfied with Mr. Mims' representation during your plea?

22 A I'm sure I did, otherwise he wouldn't have accepted
23 the plea.

24 Q Do you recall Judge Early specifically asking you
25 had you had enough time to spend with Mr. Mims, had enough

John Kitrell - Cross-Examination by Ms. Harrigan

1 time for him to research the law and that he fully
2 investigated the facts to properly and fully defend your
3 case?

4 A No, I do not remember him asking that.

5 Q You don't recall answering --

6 A I don't remember -- I don't remember --

7 Q -- yes to that?

8 A -- at all. I remember him asking if I was
9 satisfied with Mr. Mims representation. I don't remember
10 him going into any specifics saying are you satisfied with
11 his investigation or anything like that.

12 MS. HARRIGAN: May I approach, Your Honor?

13 THE COURT: Yes.

14 MS. HARRIGAN: I'm going hand you a copy of your
15 guilty plea proceeding. If you would, please, read for the
16 Court, starting on page 10, line 22 through 11 line 14, the
17 highlighted portion, please.

18 A You're represented by Mr. Justin Mims of the public
19 defender's office. Are you satisfied with his
20 representation?

21 Yes, sir.

22 In your opinion, has he had enough time to spend
23 with you; enough time to research the law, investigate the
24 facts so that he could properly and fully defend you here
25 today?

John Kitrell - Cross-Examination by Ms. Harrigan

1 Yes, sir.

2 Mr. Kitrell, is there anything else you wish for
3 Mr. Mims to do for you today before we move forward, other
4 than speak on your behalf?

5 No, sir.

6 And I ask you again, sir, are you totally and
7 completely and fully satisfied with his legal
8 representation, his legal advice and what he's done for you
9 in his defense of you in this case? Yes, sir.

10 Q Thank you. And again you were the one pleading
11 guilty, not Mr. Mims, correct?

12 A Correct.

13 Q And you were the one who was going to have to serve
14 those 25 years, not him, correct?

15 A Correct.

16 Q And you knew you were getting 25 years when you
17 walked in there, correct?

18 A Yes, correct.

19 Q And under oath you admitted you were guilty,
20 correct?

21 A Correct.

22 Q But you admitted today that you were lying, right?

23 A Correct.

24 Q You've been charged with similar crimes in Florida,
25 correct?

John Kitrell - Redirect Examination by Ms. Tate

1 A Based on -- afterwards -- the day I was sentenced,
2 I was told that Florida was holding charges on me on the
3 same case.

4 Q Have those charges been resolved in Florida?

5 A Yes.

6 Q What sentences did you receive?

7 A Nineteen natural life sentences.

8 Q Okay. And were they for similar charges?

9 A Yes.

10 MS. HARRIGAN: No further questions, Your Honor.

11 THE COURT: Okay.

12 REDIRECT EXAMINATION

13 BY MS. TATE:

14 Q Mr. Kitrell, you understand that you stood in front
15 of Judge Early and voluntarily pled guilty?

16 A Correct.

17 Q Why did you do that if you weren't guilty?

18 A Because based on that statement that had been
19 written. If I did not say that, then I was going to have
20 to take it to trial and I was told I was going to lose a
21 trial and end up with natural life.

22 Q So if you had not given that statement, would you
23 have pled guilty?

24 A No.

25 Q Had Mr. Mims been present on that day would you

John Kitrell - Redirect Examination by Ms. Tate

1 have given that statement?

2 A No.

3 Q Thank you.

4 THE COURT: Did -- the Florida charges, did you
5 receive those after you pled guilty here.

6 THE WITNESS: Yes, sir.

7 THE COURT: Did you go to Florida?

8 THE WITNESS: Yes, sir.

9 THE COURT: Did you go to trial or plead guilty?

10 THE WITNESS: I went to trial. They used the
11 evidence from up here to help convict me down there. The
12 sentence up here.

13 THE COURT: So you got life in Florida?

14 THE WITNESS: Yes, sir.

15 THE COURT: Whenever you finish serving this
16 sentence, you've got to return to the State of Florida?

17 THE WITNESS: Yes, sir.

18 THE COURT: Did you appeal or file any post
19 conviction relief in Florida?

20 THE WITNESS: I'm on direct appeal down there, sir.

21 THE COURT: Okay. Thank you, sir. You can step
22 down.

23 Anything else?

24 MS. TATE: Nothing from the applicant, Your Honor.

25 THE COURT: Okay. Anything from the State?

Justin Mims - Direct Examination by Ms. Harrigan

1 **MS. HARRIGAN:** The State would call, please.
2 Counsel, Justin Mims.

3 **THE COURT:** Okay.

4 **JUSTIN MIMS,**
5 having been duly sworn, testified as follows:

6 **THE CLERK:** My name is Michael Justin Mims.

7 **DIRECT EXAMINATION**

8 **BY MS. HARRIGAN:**

9 **Q** Good morning, Mr. Mims. How long have you been
10 practicing law?

11 **A** Since 2007.

12 **Q** Were you retained or appointed on this case?

13 **A** I was appointed.

14 **Q** And was this in your capacity with the Aiken County
15 Public Defender's Office or the second circuit public
16 defender's office?

17 **A** Yes, ma'am.

18 **Q** Do you recall the approximate date of when you were
19 appointed?

20 **A** I know originally David Mauldin from our office was
21 in on the case. And then when he left our office,
22 Mr. Kitrell's case was transferred to me. As far as a
23 date, I'm not sure offhand when that was.

24 **Q** Was it several months prior to his guilty plea?

25 **A** I think it would have been pretty early on after

Justin Mims - Direct Examination by Ms. Harrigan

1 the charges because I had some notes from the preliminary
2 hearing. I want to say that Mr. Mauldin might have only
3 represented him for a bond hearing.

4 Q Do you recall how many times you met with
5 Mr. Kitrell prior to his guilty plea?

6 A I think it was pretty consistent with what he said,
7 probably, you know, three or four. Three, four, five
8 visits at the jail. I'm not sure how many phone calls or
9 letters.

10 Q Did you file any Brady or Rule 5 motions in this
11 case?

12 A We did.

13 Q Do you believe you received all the required
14 materials from the State?

15 A I believe so.

16 Q Did you review the discovery material with your
17 client?

18 A Yes.

19 Q Did you provide him with a copy of it?

20 A Yes.

21 Q Did you also go over it in detail with him?

22 A We discussed -- you know, he -- as he stated
23 before, he pointed out things in the discovery and then I
24 had some questions and so I'm not really not sure if it was
25 line by line, but the parts that he thought were worth

Justin Mims - Direct Examination by Ms. Harrigan

1 discussing, and the same for me, we talked about those.

2 Q And you did discuss the points he brought to your
3 attention?

4 A Yes.

5 Q Did he ask you if he could do a polygraph test as
6 he testified before?

7 A Yes, he did. My understanding -- and this might
8 have happened when Mr. Mauldin was still representing him,
9 Solicitor Brisbin had told me that Mr. Kitrell was
10 originally offered a polygraph by them and had declined to
11 take it; and then when I began representing him, he wanted
12 to take the polygraph, and they told me that that
13 opportunity had come and went. And I asked probably two or
14 three times before they eventually agreed to do it.

15 Q And are you aware that he did go to Columbia to the
16 SLED headquarters and take his polygraph?

17 A Yes.

18 Q What were the results of this polygraph test?

19 A Indicated deception.

20 Q And were you present for this polygraph test?

21 A I was not.

22 Q Why not?

23 A From what I remember, when they finally agreed to
24 take the polygraph, it was pretty short notice on the day
25 and the time that they were going to be able to perform it

Justin Mims - Direct Examination by Ms. Harrigan

1 and I know that I couldn't be there at that particular day
2 and time. There weren't any other -- it was sort of like,
3 This is when we can do it, or, We're not going to do it.

4 I don't know if we had general sessions that week,
5 but I had told Mr. Kitrell that I couldn't be there and did
6 he want to go forward and do it any way, we might can get
7 it rescheduled, we might can't. They're indicating that we
8 can't. And he indicated that he didn't want to do it.

9 Q So he was well aware prior to going to Columbia
10 that you weren't going to be present for the polygraph?

11 A Right. There was no discussion about me being at
12 the jail or going up there.

13 Q And he voluntarily wanted to perform the polygraph,
14 knowing that his counsel couldn't be there?

15 A Yes.

16 Q Following the polygraph, are you aware of any
17 verbal statements that he gave to investigators pertaining
18 to the crime?

19 A Just secondhand from -- from -- I don't know if it
20 was Investigator Patterson or if it was Ms. Brisbin, but I
21 do remember somebody telling me that there was a discussion
22 in the van on the way back from Columbia, which I guess was
23 after the written statement.

24 Q This is after the written statement, you believe.

25 A I believe so.

Justin Mims - Direct Examination by Ms. Harrigan

1 Q Could you summarize for the Court what's in his
2 written statement that he gave?

3 A I want to say that it talked about some stuff that
4 had happened to him in the past where he was the victim
5 himself and just sort of, I don't know, regret in making a
6 mistake.

7 Q Did he admit to several different types of sex acts
8 on this minor child?

9 A Yes.

10 Q And during the guilty plea, did the solicitor also
11 discuss with the Court that the victim had to be treated
12 for sexually transmitted diseases at the area hospital
13 based on these allegations?

14 A During the plea?

15 Q Yes. Do you recall that?

16 A I don't recall that. I would be surprised if she
17 didn't.

18 Q And you wouldn't -- you wouldn't dispute if the
19 record indicates that?

20 A No, I would not dispute it.

21 Q Did Mr. Kitrell ever indicate to you that his
22 written statement was false?

23 A Not that the written statement was false, but
24 everything prior to the written statement was that he
25 completely maintained his innocence up until the polygraph

Justin Mims - Direct Examination by Ms. Harrigan

1 and the statement.

2 Q So before the polygraph, which he failed, your
3 testimony is that he denied any involvement, but afterwards
4 in the written statement that he admitted to the facts to
5 you?

6 A After the written statement, the discussion did a
7 complete 180 where there wasn't really anymore discussion
8 about investigating. I don't know, it was sort of a --
9 sort of kind of giving up at that point. But prior --

10 Q He -- would you categorize -- you said giving up,
11 he was giving up? He admitted these crimes to you?

12 A No, he did not admit to the crime to me, but he did
13 not state that the -- there was no discussion about the
14 statement being coerced or untrue.

15 Q And you discussed the statement with him?

16 A Right.

17 Q Prior to his guilty plea, did you discuss with him
18 the various charges he was facing?

19 A Yes.

20 Q Do you recall what pending charges he had prior to
21 his guilty plea?

22 A I believe there were several criminal sexual
23 conducts in the first-degree with a minor. I'm not sure if
24 there were any accompanying lewd acts or smaller charges.
25 I know that the most severe was the CSC first.

Justin Mims - Direct Examination by Ms. Harrigan

1 Q And he had several of those, correct?

2 A Yes.

3 Q Did you discuss the elements of these charges with
4 him and what the State would be required to prove at trial?

5 A Yes.

6 Q Did you discuss possible defenses with him?

7 A Yes.

8 Q Would you briefly characterize the State's evidence
9 against him in this case?

10 A Well, the gist of it was that the victim's
11 statement, the boy ^{Minor}, there were -- they conducted
12 an interview with him, a video taped interview with him at
13 the child advocacy center or wherever it was that he was
14 basically recounting, in pretty good detail, you know, when
15 these -- when these incidents had happened, where they had
16 happened, pretty specific time frames, where they were at.
17 Nobody -- other than the victim, nobody really had any
18 direct firsthand knowledge.

19 Q Did Mr. Kitrell give you any potential witnesses he
20 wanted you to speak with on his behalf?

21 A I'm not sure about that. I do remember some
22 discussion about borrowing movies from the neighbors and
23 some of these movies were discussed by the victim, you
24 know, having watched those with Mr. Kitrell during some of
25 these incidents. I can't tell you specifically -- I don't

Justin Mims - Direct Examination by Ms. Harrigan

1 remember what the -- what these witnesses would have been
2 able to offer or what he had wanted to uncover.

3 Q What sort of investigation did you do to prepare
4 for this specifically?

5 A Well, up until the polygraph, most of the work on
6 the case was going through the victim's statement and sort
7 of mapping out a timeline and discussing -- I don't know,
8 trying to poke holes in the victim's story, looking for
9 inconsistencies and looking for things that didn't add up
10 or things that we could work with.

11 Q Did Mr. Kitrell ask you to enter into plea
12 negotiations with the State on his behalf?

13 A I'm not sure if he asked me or if it was discussed
14 with me and then I took it to him.

15 Q Did he ever indicate he wanted to go to trial?

16 A After the -- after the polygraph and the
17 confession, we did discuss, you know, what we would be up
18 against if we were to go to trial and so, you know, the
19 discussion -- we had had that discussion prior to the
20 polygraph as well, just dealing with what the State had
21 given us from -- in discovery. After the polygraph, I
22 think we just sort of talked about what we had against this
23 and there was never an indication that he wanted to go to
24 trial after that.

25 Q What offer did the State make?

Justin Mims - Direct Examination by Ms. Harrigan

1 A They were going to -- it was a negotiated plea to
2 one of the criminal sexual conduct counts with a mandatory
3 minimum of 25 and then all the other charges would be
4 dismissed.

5 Q And did you communicate this offer to your client?

6 A Yes.

7 Q Did he indicate he wanted to accept it?

8 A Yes.

9 Q Did you discuss the substantial advantages in
10 regards to sentence exposure of accepting this negotiated
11 sentence?

12 A Yes.

13 Q Did you inform of the consequences of his plea?

14 A Yes.

15 Q Did you go over his constitutional rights prior to
16 his guilty plea with him?

17 A Yes.

18 Q Did he ever tell you he didn't understand any of
19 these rights or what he was doing entering a guilty plea?

20 A No.

21 Q Did you explain the difference between the straight
22 up and a negotiated plea with him?

23 A Yes.

24 Q Did he understand this was a negotiated sentence?

25 A Yes.

Justin Mims - Cross-Examination by Ms. Tate

1 Q Or the mandatory minimum of 25 years?

2 A Right.

3 Q Did you explain to him the sentence exposure of up
4 to life if he was convicted at trial on the one count?

5 A Yes.

6 Q Whose decision was it for him to plead guilty?

7 A His.

8 MS. HARRIGAN: No further questions, Your Honor.

9 THE COURT: Okay.

10 CROSS-EXAMINATION

11 BY MS. TATE:

12 Q Mr. Mims, you testified that up until the date that
13 Mr. Kitrell took the polygraph and he gave a statement, he
14 was very consistent with his insistence of his innocence;
15 is that right?

16 A Yes.

17 Q And after that written statement was given, things
18 just turned around 180 degrees?

19 A Yes.

20 Q So clearly that statement made a difference?

21 A Yes.

22 Q Prior to that time, you had discussed the discovery
23 with him?

24 A Yes.

25 Q And you said that you had spent the bulk of that

Justin Mims - Cross-Examination by Ms. Tate

1 time looking for inconsistencies in the victim's statement?

2 A Right.

3 Q Because other than the victim, there was no one
4 else with any direct knowledge?

5 A Right.

6 Q So the only other evidence against Mr. Kitrell was
7 the victim's statements?

8 A Basically.

9 Q In discussing the discovery with Mr. Kitrell and
10 the potential inconsistencies, poking holes, I think you
11 said, did he point out to you inconsistencies that he had
12 found?

13 A I think there were -- yeah, I'm sure that he did.

14 Q And did you investigate those inconsistencies?

15 A I'm not sure that they were investigatable and sort
16 of -- I can't really give a specific example, but it wasn't
17 really something that you could check out or prove. They
18 were -- they would be something that you would ask on
19 cross-examination, for example, something like that.

20 Q And this was of the victim who was a five-year-old
21 child?

22 A Yes.

23 Q For example, did Mr. Kitrell point out to you the
24 question about the date when this incident allegedly
25 occurred? Where the child may have been?

Justin Mims - Cross-Examination by Ms. Tate

1 A I'm not sure.

2 Q Do you recall that?

3 A I don't.

4 Q Okay. Do you recall any other examples of
5 inconsistencies that he may have pointed out to you?

6 A I don't.

7 Q Do you recall some questions about the child giving
8 inconsistent statements about specifically him giving
9 statements about where he was and what movies they may have
10 been watching or television shows they may have been
11 watching at the time these incidents supposedly occurred?

12 A Like I said before, I do remember some kind of
13 discussion about borrowing movies from the neighbors, but
14 not really -- I don't remember what the importance of that
15 was or anything more specific on that.

16 Q You felt that they weren't things that you could --
17 I don't want to put words in your mouth, but things that
18 you could necessarily go out and prove, only things you
19 bring up on examination?

20 A Right. Correct.

21 Q After -- well, let me ask you: How did you learn
22 about the written statement?

23 A The confession?

24 Q Yes, sir.

25 A I'm not sure. I don't know if it was -- it would

Justin Mims - Cross-Examination by Ms. Tate

1 have either been -- I want to say that it was either from
2 the investigator calling me or maybe the assistant
3 solicitor. I don't think it was Mr. Kitrell because I
4 remember visiting him after that and saying something like
5 what happened, you know.

6 Q And did he tell you what happened?

7 A Yeah, I think so.

8 Q Did he tell you that he was forced, essentially,
9 into writing the statement and he wrote it under duress?

10 A No, I don't remember anything about -- any kind of
11 discussion about coercion or duress.

12 Q He didn't tell you that he was manhandled by the
13 officers?

14 A No.

15 Q Did he ask you why you weren't there that day?

16 A I don't think so.

17 Q Why weren't you there that day?

18 A I don't know if it was -- there was some kind of
19 prior engagement, whether it was having general sessions
20 that week -- and it wasn't necessarily something that I
21 could have gotten out of, but the -- the way that the
22 opportunity for the polygraph was presented to me was it's
23 this day at this time and if you can't do it, it might not
24 necessarily be available on another day and time. And it
25 was pretty short notice on when it was going to occur, like

Justin Mims - Cross-Examination by Ms. Tate

1 not even a week. And so we discussed whether or not we
2 wanted to do it. I won't be able to be there the way
3 things are now, do you want to do it or do you want to try
4 to postpone it. And we decided to do it.

5 Q Are you typically present when polygraphs are
6 given?

7 A Well, prior to this one with Mr. Kitrell, I only
8 had one other occasion and it didn't occur at SLED, it was
9 here in Aiken at the sheriff's office, and I was there.

10 Q So in your experience, prior to the polygraph that
11 was given to Mr. Kitrell, you had been --

12 A Well, I was there, but I wasn't -- I think I wasn't
13 in the room with them, I was listening from another room
14 with the solicitor.

15 Q But surely if you were there, you would not have
16 permitted the officers to manhandle him or things of that
17 nature?

18 A Right.

19 Q When did you speak with him -- prior to the
20 polygraph, when did you speak with him specifically about
21 him going forward with the polygraph without your
22 attendance?

23 A When did I speak to him about the polygraph?

24 Q Once you knew that it had been scheduled, but you
25 knew that you had a conflict, you testified that you

Justin Mims - Cross-Examination by Ms. Tate

1 discussed that with him --

2 A There was all -- I'm sorry.

3 Q -- and he decided to go forward with it, when did
4 you have that discussion?

5 A That was all at the same time, like when I found
6 out that the polygraph was now available, I looked at my
7 calendar at the same time, knew that I wasn't available, so
8 when I discussed being able to do the polygraph at the same
9 time, I discussed me not being able to be there.

10 Q Did you go to the jail to meet with him and have
11 that discussion or how did that take place? Do you have
12 any notes about that discussion?

13 A I'm not sure if I have notes but my memory is that
14 that was what it was.

15 Q But you don't have any notes about that?

16 A I -- I don't think so. I doubt it.

17 Q So you don't know exactly when this discussion
18 happened with him?

19 A It would have -- it would have been within two
20 weeks of the polygraph occurring. And I would say more
21 like a week.

22 Q And that's just based on your recollection?

23 A Right. I remember it being very short notice from
24 being given the opportunity and the date that it would
25 actually occur.

Justin Mims - Cross-Examination by Ms. Tate

1 MS. TATE: Can I beg the Court's indulgence for
2 just a moment?

3 THE COURT: Okay.

4 (WHEREUPON there was a pause in the proceedings.)

5 BY MS. TATE:

6 Q I'm sorry Mr. Mims, just one more thing. Do you
7 recall Mr. Kitrell talking to you about being tested for
8 STD's?

9 A I do.

10 Q And he wanted to be tested, didn't he?

11 A I think so.

12 Q All right. Did you agree for that to happen?

13 A I'm not sure. For some reason -- for some reason,
14 I remember that test occurring, but I'm not positive.

15 Q Do you have any notes in your file regarding that
16 test occurring?

17 A No.

18 Q And Mr. -- the victim was found to have an STD, is
19 that right?

20 A Right.

21 Q Mr. Kitrell was asking to be tested for STD's in
22 order to prove that he did not have an STD, right?

23 A Right.

24 Q But you don't know if that -- you believe that test
25 happened, but you don't have any notes about it?

Justin Mims - Redirect Examination by Ms. Harrigan

1 A Well, the reason I say that is -- I thought I
2 remembered getting something positive, but the solicitor's
3 office, facilitated something through the jail and the
4 results were negative and -- because I remember having the
5 discussion with Ms. Brisbin that she couldn't have just
6 dismissed it. It didn't change what she was doing with the
7 case.

8 Q So your recollection is that he tested negative for
9 STD's?

10 A Sort of, yeah, that's kind of what I remember.

11 Q So it would be difficult for a person who tested
12 negative for STD's to give a child an STD?

13 A I'm not sure -- common sense could tell you that,
14 yes.

15 Q Thank you.

16 MS. HARRIGAN: Very briefly, Your Honor.

17 REDIRECT EXAMINATION

18 BY MS. HARRIGAN:

19 Q Mr. Mims, your testimony was that Mr. Kitrell never
20 told you he was manhandled by SLED, correct?

21 A Right.

22 Q And me never told you he was coerced?

23 A Right.

24 Q And he never told you he was under duress?

25 A Right.

1 Q And he never told you that the confession was
2 false?

3 A Right.

4 MS. HARRIGAN: No further questions.

5 THE COURT: What date was this polygraph and
6 confession given? Do you have that information, sir? Or
7 does somebody know?

8 MS. TATE: Your Honor, I believe it was January
9 21st, 2009.

10 THE COURT: All right. Which was prior to the
11 indictment.

12 Okay. Thank you.

13 MS. TATE: Thank you, Your Honor.

14 MS. HARRIGAN: The State has no further witnesses
15 to call.

16 THE COURT: Anything else? Either side?

17 MS. TATE: Nothing, Your Honor.

18 THE COURT: All right. I will review the file and
19 let y'all know. Thank you.

20 MS. HARRIGAN: Thank you, Your Honor.

21 * * * * * END OF TRANSCRIPT * * * * *

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State of South Carolina)
County of Aiken) **Certificate of Reporter**

I, THE UNDERSIGNED, Brenda J. Sigwald,
Official Court Reporter for the Fifth Judicial Circuit of
the State of South Carolina, do hereby certify that I
reported the proceedings in the captioned case in the Court
of Common Pleas in and for the State of South Carolina on
10th of July, 2013.

I FURTHER CERTIFY that the foregoing pages,
numbered 3 through 44 constitute a true, accurate and
complete transcript of said hearing.

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

IN WITNESS WHEREOF, I have hereunto set my hand and
seal at Aiken County, this the 16th day of December, 2013.

Brenda J. Sigwald
Brenda J. Sigwald,
Court Reporter and Notary Public
For the State of South Carolina
My commission expires
January 4, 2020.

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN)	FOR THE SECOND JUDICIAL CIRCUIT
John Kitrell, #334595,)	Case No. 2009-CP-02-2417
Applicant,)	
v.)	ORDER OF DISMISSAL
State of South Carolina,)	
Respondent.)	

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed October 14, 2009. The Respondent made its Return on December 13, 2009. An evidentiary hearing into the matter was convened on July 10, 2013, at the Aiken County Courthouse. The Applicant was present at the hearing and was represented by Sonja Tate, Esquire. The Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was indicted during the March 2009 term of the Aiken County Grand Jury for Criminal Sexual Conduct with a Minor in the First Degree (2009-GS-02-336).¹ He was represented by Justin M. Mims, Esquire, on all charges.

On January 7, 2010, Applicant appeared before the Honorable Doyet A. Early, III, where he pled guilty as indicted. Pursuant to negotiations between Applicant and the State, Judge Early sentenced Applicant to the mandatory minimum sentence of twenty-five years

¹ Applicant was also indicted for several other related offenses involving the same minor victim, these charges were dismissed pursuant to the plea based on negotiations between the State and Applicant.

FILED 823.13
 J. J. Anderson
 J.C.C.P. & G.S.
 Shannon G. Galloway
 Deputy Clerk

imprisonment. Several other charges involving the same minor victim were also dismissed pursuant to negotiations with the State. Applicant did not appeal his guilty plea or sentence.

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

1. Ineffective Assistance of Counsel.
 - a. "Counsel failed to do any pre-trial investigation."
2. Involuntary Guilty plea;
 - a. "Counsel failed to discuss defenses available:
3. Erroneous advice of counsel
 - a. "Counsel [advised] me to plea without investigation."

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from plea counsel, Justin M. Mims, Esquire (herein "Counsel"). This Court also had before it a copy of the Applicant's guilty plea transcript, the records of the Aiken County Clerk of Court, and the Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified that he met with Counsel three or four times before his guilty plea, as well as corresponded by telephone and letter. He testified that Counsel was appointed to represent him and that Counsel was his second attorney. He elaborated that he asked for a new attorney because his prior counsel did not visit him enough. He testified that he reviewed his discovery with Counsel and that Counsel gave him an entire copy of his discovery. He testified that based on this discovery, he discussed possible defenses with Counsel, including potential witnesses for trial.

Applicant testified that he gave a statement to law enforcement following a polygraph test. He testified that it was his idea to take a polygraph test and that he took the polygraph

voluntarily. He testified that he had been asking Counsel and law enforcement to give him a polygraph test for months. He testified that he left Aiken at six o'clock in the morning to be transported to the South Carolina Law Enforcement Division headquarters in Columbia. He testified that Counsel was not present during testing and that he was not aware Counsel would be absent beforehand. He testified that he ask for Counsel several times throughout the day of testing. He testified that he was given a polygraph test four separate times. He testified that following the testing, he gave a written confession at approximately five o'clock in the evening. He testified that he was "forced" to make a statement after he was "manhandled" and "threatened by detectives." He testified that the statement was "not accurate." He testified that law enforcement made him write the statement over and over again and that he signed the statement. He acknowledged on cross examination that the statement admitted to various sexual acts with the minor victim, who was his girlfriend's minor son that he had raised since birth.

He testified that he met with Counsel twice following the written statement, and that he discussed the statement with Counsel. He testified that "[Counsel] told me I was screwed" and it was "[his] word against law enforcement." He testified that after the statement, Counsel presented him with a negotiated plea offer from the State. He elaborated that the State's offer was for a negotiated twenty five year sentence, which was the mandatory minimum sentence he could receive for Criminal Sexual Conduct with a Minor in the First Degree. He testified that he was aware that the negotiation was that the State would also dismiss several other charges involving the same minor victim. He testified that it was his decision alone to accept the State's plea offer and that he voluntarily took the plea to avoid the possibility of life in prison.

He testified that he recalled telling the plea judge that he wanted to plead guilty and that he was in fact guilty. He testified he agreed with the facts presented by the solicitor during his

plea. He testified that he told the plea court that he was satisfied with his attorney's representation, that he had enough time to discuss the case and available defenses with Counsel, and that Counsel had investigated the case to his satisfaction. He testified that he is serving nineteen natural life sentences for similar crimes in Florida against his son.

Following Applicant's testimony, Respondent called Counsel to testify. Counsel testified that he has been practicing law since 2007 and that at the time of his representation of Applicant, he was employed by the Second Circuit Public Defender's office. He testified that he was the second public defender assigned to the case and that David Mauldin originally represented Applicant. He testified that he met with Applicant as many as five times, as well as spoke to Applicant by phone. He testified that he reviewed the elements of the charges that Applicant faced, as well as the potential sentences with Applicant. He testified that he filed the necessary discovery motions and reviewed all discovery materials with Applicant. He testified that Applicant pointed out several areas in discovery that he wanted Counsel to investigate further and that he followed up per Applicant's request. He testified that the discovery included a forensic interview with the victim, where the minor gave good detail, including specific time frames and locations.

He testified that from the beginning of representation, Applicant requested a polygraph test several times. Counsel testified he asked law enforcement to test Applicant, and after months of asking, the solicitor's office informed him that Applicant could be tested on a particular date with short notice. Counsel testified that he was unavailable on this date due to prior commitments and asked for the test to be rescheduled. He testified that he was told this was the only date offered, and if Applicant turned it down, he might not be able to be tested at a later date. He testified that he informed Applicant of the testing date, but informed him that he

would not be present for the testing due to prior commitments and the short notice given. He testified that Applicant fully understood that Counsel would not be at the testing, but that he still wished to proceed with the polygraph testing in Counsel's absence. He testified that shortly after the polygraph, he received the results indicating deception. He testified that he also learned that Counsel gave an oral statement admitting his guilty on the way back to Aiken from the testing in Columbia. He testified that Applicant also gave a signed, written statement admitting his guilt. He testified that in the written statement, Applicant admitted to performing various sex acts on the minor victim. He testified that he met with Applicant shortly after the statement was given and that Applicant never told him the statement was made under coercion or duress. He testified that Applicant never told him the statement was involuntary or false.

Counsel testified that prior to Applicant's confession, his approach was to thoroughly review the victim's statement and try to poke as many holes as possible by identifying inconsistencies. He testified that following Applicant's confession, he advised Applicant that the statement would likely be used against him at trial and would likely result in confession. He testified that he believed the statement would be admissible and would likely be deemed voluntary. He testified that Applicant asked him to negotiate a plea offer on his behalf. He testified that the State offered to allow Applicant to plead guilty to Criminal Sexual Conduct with a Minor in the First Degree for the mandatory minimum of twenty-five years, as well as the dismissal for several related offenses involving the same minor victim. He testified that he informed Applicant of the plea offer, the consequences and benefits of the offer, and advised him of his constitutional rights. He testified that Applicant appeared to understand the terms of the offer and never indicated that he did not understand something. He testified that it was Applicant's decision to plead guilty and receive the benefit of the State's plea offer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Specifically: this Court finds that Counsel's testimony is very credible while Applicant's testimony is not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, an applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, an applicant must prove that counsel's performance was deficient. Under this

prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

After careful review based on the standard discussed above, Applicant has failed to carry his burden in this action. Specifically, this Court finds that Counsel's testimony is credible while Applicant's testimony is not credible. This Court finds that Applicant's allegations that he was denied effective assistance of plea counsel are without merit. This Court finds that the extensive guilty plea record, as well as the testimony from both Counsel and Applicant, reveals the proficient competency of counsel. Counsel testified that upon receiving discovery, he reviewed the materials and highlighted inconsistencies in the victim's statements. Applicant and Counsel both testified that Applicant repeatedly asked for a polygraph test, which Applicant voluntarily took. Counsel's credible testimony reveals that he fully advised Applicant that he was unable to be present for the polygraph and that Applicant elected to proceed with the test without Counsel present. Following Applicant's confession, which Counsel believed would be admissible at trial, Counsel was able to negotiate an extremely favorable plea deal for the mandatory minimum sentence and the dismissal of several related charges. This Court finds that the Applicant's attorney demonstrated a normal degree of skill, knowledge and professional judgment that is expected of an attorney who practices criminal law. Additionally, this Court finds that the

Applicant has not met the burden of proof with respect to the prejudice requirement, as Applicant stated that he pled guilty to avoid the possibility of a harsher punishment if convicted at trial. Therefore, this Court finds this application must be denied and dismissed with prejudice.

CONCLUSION

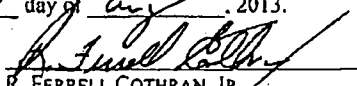
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

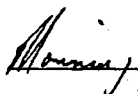
This Court notes that that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right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

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 19 day of Aug, 2013.


R. FERRELL J. COTHRAN, JR.
Presiding Judge
Second Judicial Circuit

 South Carolina

DOCKET NO. 2009-GS-42- 336

WITNESSES

M. Patterson, A.C.S.O.

FILED March 5 2009

By: Michael

CLERK

Sherry J. Dandley
Deputy Clerk

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

MARCH 9, TERM 2009

ARREST WARRANT NUMBER

K-207730

THE STATE

vs.

JOHN PIERCE KITTRELL

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date: March 5, 2009

VERDICT

Indictment for

CRIMINAL SEXUAL CONDUCT
WITH MINOR-FIRST DEGREE

SC Code: 16-3-655(1)

CDR Code: 385

Class FEL-A(V)

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT

At a Court of General Sessions, convened on March 9, 2009, the Grand Jurors of Aiken County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR-FIRST DEGREE

That JOHN PIERCE KITTRELL did in Aiken County at divers times on or between July 14, 2008 and August 14, 2008, commit the crime of Criminal Sexual Conduct With A Minor In The First Degree, in that the Defendant did commit a sexual battery, to wit: anal penetration upon [REDACTED] a minor who was five (5) years of age at the time of the incident. All in violation of §16-3-655, Code of Laws of South Carolina (1976), as amended.

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


J STROM THURMOND, SOLICITOR