

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2010-CP-07-2396
Appellate Case No. 2013-001885

RECEIVED

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S.C. Supreme Court

SUSAN TAPPEINER, 338050,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

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* Petitioner has requested that this Exhibit be transported to the Supreme Court of South Carolina for the Court's convenience in reviewing this Exhibit.

STATE OF SOUTH CAROLINA
14TH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT
COURT OF COMMON PLEAS
CASE NO. 2010-CP-07-02396

SUSAN TAPPEINER

APPLICANT

VERSUS

APRIL 4, 2013

TRANSCRIPT OF POST-CONVICTION

RELIEF HEARING

BEAUFORT, SOUTH CAROLINA

STATE OF SOUTH CAROLINA

DEFENDANT

B E F O R E:

HON. PERRY M. BUCKNER, JUDGE.

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

ON BEHALF OF THE STATE:

HON. ASHLEIGH R. WILSON

ON BEHALF OF APPLICANT:

HON. TARA DAWN SHURLING

WANDA H. ROWE, CVR-M
OFFICIAL COURT REPORTER

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1 BEGINNING 10:20 A.M.

2 BY THE COURT:

3 THE COURT: Thank you. Please be seated.

4 MS. SHURLING: The counsel for the respondent has
5 stepped out of the courtroom for a moment, your Honor.

6 THE COURT: Ms. Wilson?

7 MS. SHURLING: I'll go tell them, your Honor.

8 THE COURT: Tell them I'm on the Bench. It's time
9 to fish or cut bait now.

10 All right. I had a brief. Turned into longer than
11 I anticipated. It's run me 20 minutes behind, but
12 meeting with the lawyers in this next hearing.

13 This is 2010 at 2396, in Beaufort, Wanda. The
14 applicant is present, along with her attorney, Tara
15 Shurling. Present for the State of South Carolina is
16 Ashleigh Wilson.

17 Now, first thing that I was advised of in the
18 meeting in chambers was that Mrs. Shurling has decided
19 to amend her application with what she considers to be
20 simple matters. Of course, Ms. Shurling knows that
21 where the State has done that in the past -- and she
22 decided to do that last night -- where the State has
23 amended it's return and thrown Ms. Shurling into a
24 position where she had to go forward on a new motion to
25 dismiss, I have always given Ms. Shurling additional

1 time in order to adequately prepare.

2 Now, Ms. Wilson, the first thing I need to know,
3 since I was advised of that in chambers, and I don't
4 know what these matters are, haven't seen it, although,
5 Ms. Shurling assures me that she believes them to be
6 simple, and I'm sure she does. Although, I also know
7 how thorough she is. What's the State's position on
8 allowing her to amend the application last night and
9 hand it to you today?

10 MS. WILSON: Well, your Honor, could you please give
11 the State an opportunity to even read the allegations?
12 I just got them five minutes ago.

13 THE COURT: I will. I hadn't seen them myself. And
14 since I'm going to be the one hearing this matter, it
15 would be nice if somebody gave me a copy.

16 MS. WILSON: Your Honor, if I could just have five
17 minutes to talk to Mr. Macloskie.

18 THE COURT: Yes, you can have five minutes.

19 MS. SHURLING: Your Honor, may I ask that my
20 client's wrists be uncuffed?

21 THE COURT: That's a security issue for the
22 Department of Corrections. You all have any problem
23 with unrestraining her hands for the purposes of this
24 hearing?

25 DEPARTMENT OF CORRECTIONS: No, your Honor.

1 THE COURT: Then, do it for me.

2 MS. SHURLING: Thank you very much, your Honor.

3 THE COURT: Ms. Wilson?

4 MS. WILSON: Your Honor, it's the State's position
5 that Ms. Tappeiner not be allowed to proceed on the
6 basis of the allegations in her second amendment filed
7 April 4th. Ms. Tappeiner also filed, I guess -- this
8 would be the third amendment, because she filed another
9 amendment March 29th of 2013, that included 27
10 allegations. And so, while we reviewed this one last
11 week, as well, she could have put these three --

12 THE COURT: The one I have is dated April 4th, now,
13 and it does say *second amended*. I don't know whether
14 this is third amended application or --

15 MS. WILSON: It's a second amended, your Honor, but
16 it's a third application altogether.

17 THE COURT: I understand.

18 MS. WILSON: Okay.

19 THE COURT: From the original application, then.

20 MS. WILSON: And your Honor, --

21 THE COURT: Take a seat, Ms. Shurling. One lawyer.
22 stands in my courtroom at a time, one lawyer speaks at a
23 time. Go ahead, Ms. Wilson. You have the floor.

24 MS. WILSON: Thank you, your Honor. It's the
25 State's position that we -- Ms. Tappeiner not be

1 allowed to proceed on these. And if she is allowed to
2 proceed --

3 THE COURT: Well, I'm very concerned, because Ms.
4 Shurling is a very, very thorough PCR lawyer. I don't
5 have to tell you that. The Court has great respect for
6 her, as I do you. However, I can clearly understand
7 that you don't want to have to have a hearing where you
8 haven't had any time to prepare in response to an
9 allegation.

10 MS. WILSON: Yes, your Honor.

11 THE COURT: Now, Ms. Shurling also told me in
12 chambers -- I have two concerns here. First concern is
13 that, in an effort to try to accommodate -- I didn't
14 think she was going to be a witness, but Ms. Shurling
15 tells me she is going to be a witness, Mrs. Ballard, who
16 cannot physically appear here, who can only appear by
17 telephone, because of her busy schedule. And it's very
18 difficult for the Court to judge the credibility of a
19 witness by telephone. And Ms. Shurling assures me she
20 is going to call her as a witness. I was not aware of
21 that until about 15 minutes ago. I thought Mr.
22 Macloskie was going to be a witness. I did not realize
23 Ms. Ballard was. I thought she was appellate counsel,
24 but according to Ms. Shurling, she was trial counsel,
25 also. So, I got two problems now.

1 One, you don't want to proceed on this. Number two,
2 I'm concerned about the fact that I have only
3 availability of a witness via telephone.

4 Now, Ms. Shurling told me in chambers she'd withdraw
5 all of these allegations and proceed just on what she'd
6 amended so far. You understand that's a whole different
7 matter now, if you don't have to address new
8 allegations. Although, I still have a problem with the
9 fact that I've got a telephone witness. You understand
10 that, Ms. Wilson?

11 MS. WILSON: Yes, your Honor.

12 THE COURT: And you're ready to proceed, other than
13 what you were just given last night or today?

14 MS. WILSON: Yes, your Honor. And if it's -- if
15 it's your decision that you don't want to hear Ms.
16 Ballard by telephone, we can -- I mean, --

17 THE COURT: Well, I didn't think she was going to be
18 a witness, but --

19 MS. WILSON: Okay.

20 THE COURT: Counsel approach on this, and let me
21 make sure I understand it.

22 OFF-THE-RECORD BENCH CONFERENCE;

23 PRESENT: THE COURT, MS. WILSON,²

24 MS. SHURLING.

25 BACK ON THE RECORD.

1 THE COURT: All right. Let the record reflect that
2 I've had a lengthy conference at the Bench, because I,
3 wanted to ascertain from Ms. Shurling -- first of all,
4 the reason I called them up here is to ascertain whether
5 or not -- I had informed my law clerk that I would
6 permit Ms. Ballard to testify by telephone under the
7 assumption that, when I looked at the transcript, Ms.
8 Ballard was not trial counsel. I have since learned
9 from Ms. Shurling this morning, when I ask her at the
10 Bench, she was actually present at sentencing. She was
11 not just appellate counsel.

12 Ms. Shurling has advised me she wants Ms. Ballard
13 present for this hearing. In the meantime, the Attorney
14 General's Office is now advising me that they will not
15 agree to the amendments that were just handed to them in
16 the courtroom today, and that they now wish to move for
17 a continuance of this hearing so that Ms. Ballard can be
18 physically present, which Ms. Shurling wants, and also,
19 so that they have time to respond to the amendments,
20 which were done, in an effort that Ms. Shurling wants to
21 be completely thorough, that she raises every issue on
22 behalf of her client.

23 Have I accurately stated what occurred?

24 Ms. Shurling, you'll get a chance.

25 Have I accurately stated what occurred at the Bench,

1 Ms. Wilson?

2 MS. WILSON: Yes, your Honor.

3 THE COURT: Have I accurately stated what occurred
4 at the Bench, Ms. Shurling?

5 MS. SHURLING: With the --

6 THE COURT: Just yes or no. I'm going to give you a
7 chance to argue. I know you're anxious to.

8 MS. SHURLING: For the most part, but there's one
9 thing that's not accurate.

10 THE COURT: All right. Tell me what I said that
11 wasn't accurate, Ms. Shurling.

12 MS. SHURLING: That I had agreed, prior to today, to
13 accept Ms. Ballard's testimony by telephone.

14 THE COURT: Oh, I never said you did.

15 MS. SHURLING: And I still --

16 THE COURT: I reviewed a call from my law clerk who
17 had reviewed a call from Ms. Wilson that Ms. Ballard
18 told Ms. Wilson she could not be available today, and
19 wanted to know if she could testify by telephone. I
20 made the mistake there of assuming she was appellate
21 counsel. And I didn't think she was actually going to
22 be a witness. I thought Mr. Macloskie would be the
23 witness, because at that time, I was looking at an
24 application that dealt with trial errors.

25 MS. SHURLING: Yes, sir.

1 THE COURT: I was not aware that she was at
2 sentencing, so that's entirely my issue. However, the
3 issue of your amending today, is your issue.

4 MS. SHURLING: I understand, your Honor. If I may,
5 for the record. I was trying --

6 THE COURT: You want to be heard on the motion for
7 continuance?

8 MS. SHURLING: Yes, sir.

9 THE COURT: I'll let you be heard on the motion for
10 continuance.

11 MS. SHURLING: Thank you, your Honor. Prior to
12 today's proceeding, I think it was actually a good two
13 or maybe three weeks ago, my paralegal came to me and
14 informed me that the Attorney General had sent us an
15 email, I believe, saying that Desa Ballard would be
16 unavailable for today's date, but that we could take her
17 testimony by telephone. I had never done that before.
18 I've certainly taken --

19 THE COURT: Nor have I in a PCR hearing.

20 MS. SHURLING: I've done it by deposition many
21 times, but never by telephone in a courtroom. I asked
22 my paralegal to communicate and find out if that was
23 something they had done before. She came back and said,
24 yes, they --

25 THE COURT: I'm very aware of that now.

1 MS. SHURLING: Okay.

2 THE COURT: And I told you what the situation was
3 there.

4 MS. SHURLING: And I --

5 THE COURT: Move on to the continuance.

6 MS. SHURLING: I agreed to accept her testimony by
7 telephone then, and I do now. With regard to the
8 amendments that were given to the State this morning, I
9 freely admit that they were just given to the State this
10 morning. I asked, as a consideration from the Court,
11 that since they are issues that could easily be
12 addressed by the State in a memorandum after the
13 hearing, that I be allowed to present them. But I also,
14 your Honor, want to make it very clear, it cost this
15 family nearly \$5,000.00 when this case was scheduled for
16 a hearing previously.

17 THE COURT: Now, Ms. Shurling, I'm letting you put
18 that on the record, but that is no fault of this Court
19 or the State, other than the fact that the Department of
20 Corrections did not transport your client when I was
21 ready, willing, and able to hear this at the last term
22 of court.

23 MS. SHURLING: I understand, your Honor. I'm not
24 putting this on the Court.

25 THE COURT: And I understand that there's cost

1 . involved in that, but there was nothing I could do to
2 change that.

3 MS. SHURLING: Your Honor, if I can just please put
4 my concerns on the record.

5 THE COURT: You've told me that three times now.
6 I'm aware of that, but that is not a factor in your
7 handing a brand new pleading to Counsel this morning.

8 MS. SHURLING: And I want the record to reflect that
9 I have told the Court that, because this was previously
10 scheduled, your Honor's aware of the circumstances and
11 the cost to my client, that rather than necessitate a
12 continuance, I'll simply withdraw those issues that I
13 submitted this morning, and we'll go forward.

14 THE COURT: And you're willing to take Ms. Ballard
15 by telephone.

16 MS. SHURLING: I am, indeed.

17 THE COURT: Because you told me at the Bench that
18 you would rather have her live.

19 MS. SHURLING: When your Honor expressed concern
20 about that procedure, --

21 THE COURT: I am expressing concern because you are
22 not -- of course, one thing we could do is we could
23 amend that and do it by deposition, and which might
24 solve the same problem, Ms. Wilson. Now, she's willing
25 to withdraw her -- okay, Ms. Shurling, take a seat.

1 MS. SHURLING: Thanks.

2 THE COURT: I've heard you. Ms. Wilson, what about
3 in reply? She's willing to proceed only on the
4 amendment that you were ready to go on; withdraw what
5 she tried to hand you this morning; and she is
6 concerned, but she's willing to even take it by
7 telephone or by deposition of Ms. Ballard if we proceed
8 today to try to minimize the cost to the family, because
9 this is the second time they've been here. What's your
10 position?

11 MS. WILSON: Well, your Honor, it's the State's
12 position, we will accept if Ms. Tappeiner chooses to
13 withdraw this second amended application that we
14 received today. However, we would not consent to having
15 Ms. Ballard available for a deposition, because that's
16 at a cost to the State. And if we could just request a
17 continuance, because Ms. Shurling has indicated that Ms.
18 Ballard's testimony is key. And we'd just request that
19 if she -- as the Court has indicated, and as Ms.
20 Shurling has indicated, have concerns about her
21 testimony.

22 THE COURT: Now, Ms. Wilson, you agreed that you
23 would take her testimony by telephone. I'm the one that
24 just suggested deposition, because we've done that in
25 the past, and it would be less intrusive, I believe,

1 than doing it by phone.

2 MS. WILSON: Yes, your Honor. We just request that
3 that not be at the cost of the State.

4 THE COURT: Ms. Ballard, I don't know where she is.
5 Do you know where she is?

6 MS. WILSON: Your Honor, it's my understanding that
7 she is in route out of town today, traveling, so that
8 she would be available just by telephone.

9 MS. SHURLING: Your Honor, I'm not backing down from
10 my original position. I will accept her testimony by
11 telephone if that's what your Honor orders. However, I
12 think there's wisdom in your Honor's suggestion that we
13 do it by deposition, because if she --

14 THE COURT: Are you willing -- the State is
15 concerned that that is costing them, after they agreed
16 to do it by telephone. Are you willing to bear the cost
17 of the deposition if you want to do it by deposition?

18 MS. SHURLING: No, sir, your Honor. We've already
19 borne so much expense in this case.

20 THE COURT: Here's my ruling. I'm either going to
21 continue this to -- I'm the judge at the next term of
22 PCR, and both of you know that. And I'm more than
23 willing to hear this case. I was more than willing to
24 hear it when I was here for the last term, and couldn't,
25 because they didn't transport her. And I've got a

1 number more to hear, including four more tomorrow. So
2 my time is you all -- Ms. Shurling, sit down. That's
3 it. I've heard enough, now.

4 My time is your all's. I will agree to go forward
5 on this only on the -- with no amendments. They're
6 withdraw by Ms. Shurling. And you are not surprised
7 now. And we take the telephone testimony of Ms.
8 Ballard, since you all can't agree on a deposition. You
9 understand, Ms. Wilson?

10 MS. WILSON: Yes, your Honor.

11 THE COURT: You understand, Ms. Shurling?

12 MS. SHURLING: Absolutely.

13 THE COURT: That's my ruling. All right. I've read
14 it. Call your first witness.

15 MS. SHURLING: Thank you, your Honor. At this time
16 I would call trial counsel, Mr. Macloskie.

17 THE COURT: Come around to be sworn by the clerk.

18 MADAM CLERK: Place your hand on the Bible, and
19 raise your right hand. Do you solemnly swear or affirm
20 that the testimony you give to the Court in this trial
21 shall be the truth, so help you God?

22 MR. MACLOSKIE: I do.

23 THE COURT: Watch your step, Michael, on that step
24 right there. I've had people slip right there. Have a
25 seat. Make yourself comfortable. Use the microphone.

1 State your full name and spell your last name for the
2 court reporter.

3 MR. MACLOSKIE: My full name is Charles B.
4 Macloskie, spelled M/a/c/l/o/s/k/i/e.

5 THE COURT: Very well. Your witness, Counsel.
6 Direct examination.

7 MS. SHURLING: Thank you.

8 HON. CHARLES B. MACLOSKIE

9 DIRECT EXAMINATION, MS. SHURLING:

10 Q Mr. Macloskie, thank you for being here. Do you
11 recall representing Susan Tappeiner?

12 A Certainly, I do.

13 Q And by whom were you originally hired? By Susan
14 herself or her father?

15 A Her father.

16 Q Okay. And at the time you were hired, was it fairly
17 contemporaneous with when the young man in this case had
18 reported the incident? Do you remember the timing of
19 your retainer?

20 A It was immediately after Susan was arrested.

21 Q Okay. And you represented her straight through the
22 process from that time through sentencing, correct?

23 A I did.

24 Q Okay. Can you tell us -- your client was on bond
25 while she awaited trial. Is that correct?

1 A That's correct.

2 Q Let's back up for just a second, and tell us very
3 briefly, you've been practicing law for a long time;
4 haven't you?

5 A Since April of 1967.

6 Q So, at the time of this trial proceeding, can you
7 give us an approximation of what percentage -- and just
8 to refresh your recollection, we are talking about
9 October 2009. During that time period, approximately
10 what percentage of your practice involved criminal
11 defense?

12 A Probably 60.

13 Q Okay. And had criminal defense represented that
14 large a percentage of your practice for all the years
15 before, or had you just started doing more criminal
16 defense in recent years? What had been your practice
17 since you went into the practice of law back in '67?

18 A Initially, it was probably somewhere closer to 20
19 percent. Gradually, through the years, it became
20 greater. It's probably been 60 percent of my practice
21 for the last 25 years.

22 Q Okay. And were there any plea negotiations in this
23 case?

24 A There were, but not of any real substance. The
25 assistant solicitor assigned to this case was not one

1 prone to negotiate meaningfully.

2 Q I understand. So, prior to the time when you began
3 gearing up for trial, so to speak, there had not been
4 any offers that were something your client was willing
5 to seriously entertain.

6 A That's correct.

7 Q Okay. And were there any --

8 A Nor were there any offers that I had felt reasonable
9 enough to suggest.

10 Q Thank you. No offers that you felt reasonable
11 enough to suggest in terms of reasonable enough for you
12 to recommend --

13 A That's correct.

14 Q -- and take them seriously and consider?

15 A That's correct. Yeah.

16 Q Okay. But you did convey any offers that were made
17 to your client.

18 A As I recall.

19 Q Were there any eleventh-hour, sort of Hail Mary
20 offers when this case was getting ready to go to trial,
21 as there so often are?

22 A Not as I recall.

23 Q Okay. As you began to prepare for this case, did
24 you meet with Ms. Tappeiner and review discovery
25 materials?

1 A I did, as I recall.

2 Q And did you discuss with her a strategy for her
3 defense if the case went to trial?

4 A Well, I didn't announce the thing as a strategy. I
5 think everybody knew that what we were dealing with here
6 is primarily one witness who claimed to be a victim
7 against Mrs. Tappeiner. And one of the problems was,
8 there were no other witnesses, with the exception of
9 Mrs. Tappeiner's husband.

10 Q In your opening remarks to the jury, -- one moment,
11 your Honor. In your opening remarks to the jury, do you
12 recall telling the jury that, before it was over, they
13 might decide the wrong person was on trial, and that
14 they might should be in a different courtroom, trying a
15 different person?

16 A Where are you in the transcript, Ms. Shurling?

17 Q I will find it for you right now. Let's see. I
18 apologize, your Honor. One moment. Wrong volume. No
19 wonder. Sorry. Okay. If you could look at Page 151,
20 starting on about Line 10. You've just suggested to the
21 jury, or argued to the jury, that it's going to be kind
22 of a two-step process. First, they've got to decide if
23 they think something happened. And then, and you're
24 referring to the -- on the other hand, starting at Line
25 11.

1 A The transcript is accurate.

2 Q Okay. And how would you characterize the defense
3 that that was giving the jury a preview in your opening?
4 What were you telling them they were likely to hear?

5 A Ms. Tappeiner's position was -- first of all, she
6 didn't remember the -- the incident at all. Second of
7 all, I came to think that it might have been completely
8 different than the allegations in the indictment; that
9 truly, this young boy was the one who made the advances,
10 not Mrs. Tappeiner.

11 Q And so, these statements were reflective of your
12 position that the evidence might would show that she was
13 the victim, not the perpetrator?

14 A That's correct.

15 Q And was that the theme that you hoped to pursue
16 throughout this trial?

17 A Not necessarily exclusively. Not to the mutual
18 exclusion of others.

19 Q Okay.

20 A This was a -- this was a credibility trial.

21 Q I understand. Well, for example, at the time of the
22 trial -- and your Honor, the record will reflect that --
23 I'm sorry, I don't know the line off the top of my head
24 -- but that your client weighed approximately 109
25 pounds. Does that sound right?

1 A That's probably accurate.

2 Q And the young man in this case, at trial, described
3 himself in his testimony as weighing 116 pounds?

4 A I can't recall that, but the transcript, I'm sure,
5 is accurate.

6 Q Your Honor, if I can be given just a little bit of
7 latitude here. All of this is directed from the
8 transcript. I promise.

9 And you, in fact, cross-examined him concerning the
10 weight that he had given to law enforcement when he was
11 interviewed right after he reported the incident; didn't
12 you?

13 A I don't recall that, but I probably did.

14 Q Okay. And then, -- moment's indulgence, your Honor.

15 If you look at Page 170 of the trial transcript, you
16 will see that victim described himself as -- and
17 I apologize. I misspoke. It wasn't 116, it was 115.
18 At the time of trial. You see that?

19 A I do.

20 Q And then, after he said that, the solicitor asked
21 what at Lines 9 and 10?

22 A Well, the transcript reveals that she asked:

23 *Okay, you weighed less than that last*
24 *year, obviously.*

25 The answer is: Yes.

1 Q Did you consider objecting to that question?

2 A I did not object to it.

3 Q In reviewing that question here today, would you
4 agree that it's leading?

5 A I would -- it was leading, and I should have
6 objected to it.

7 Q Thank you. And then, on cross-examination, --

8 THE COURT: Page and line number?

9 MS. SHURLING: Pardon? 191, Line 23 -- or her cross
10 begins, your Honor. Okay. Let's see.

11 BY MS. SHURLING:

12 Q On Page 196, Lines 5 through 7, you cross-examine
13 him concerning the fact that he had previously reported
14 his weight, according to the police report, as 125 at
15 the time of the incident, correct?

16 A That's correct.

17 Q So, this young man was at least a few pounds
18 heavier, if you take the weight he reported to police,
19 he would have been 125; and she, ballpark, 109.
20 Correct?

21 A That's what the transcript says.

22 Q Okay.

23 A And I have no reason to say otherwise.

24 Q I understand. Okay. Did you ask this young man at
25 any point, physically, how, exactly, he tried to get

1 away from Ms. Tappeiner?

2 A I don't recall that.

3 Q If we go back to the beginning of the trial for just
4 a few minutes. I was getting the cart before the horse
5 a little bit. There's was a *Jackson v. Denno* hearing in
6 this case; wasn't there?

7 A There was..

8 Q And there was a statement that had been given by Ms.
9 Tappeiner. Excuse me. *While taking prescription*
10 *medications that, ultimately, Judge Mullen ruled in --*

11 MS. WILSON: Objection, your Honor. Leading the
12 witness.

13 THE COURT: Sustained. Direct examination, Counsel.
14 I've been giving you some latitude. We're now going to
15 ask direct questions, and you're not going to testify,
16 the witness is. Proceed.

17 BY MS. SHURLING:

18 Q What was the outcome of the *Jackson v. Denno*
19 hearing?

20 A The trial judge did not allow her statement in. She
21 excluded it.

22 Q How many statements were there?

23 A At least one. I recall one.

24 Q Do you recall the State's desire to introduce a
25 video tape from the jail cell? An audio tape, rather.

1 Excuse me. From when she was in the jail cell?

2 A I do not recall that.

3 Q Okay. We'll rely on the record for that one, then.

4 But Judge Mullen excluded from evidence statements.

5 A That's correct.

6 Q Okay. Now, what was one of the tools you used in
7 the *Jackson v. Denno* hearing to get -- to convince Judge
8 Mullen that the statements were not voluntarily made?

9 A I used the services of a clinical psychologist who
10 specialized in -- in drug abuse and the effects of
11 pharmacological substances.

12 Q And can you describe for us, generally, what her
13 testimony addressed during the in-camera proceeding.

14 A The -- the -- the crux of it was that there was no
15 way that Mrs. Tappeiner's statement -- she did not have
16 the capacity to understand what was going on. It had
17 something to do with her voluntary nature. And all this
18 is outside the transcript, as I recall. The transcript
19 accurately describes that.

20 Q I understand. The question in the *Jackson v. Denno*
21 hearing was her ability to give a reliable statement at
22 the time she gave the statement, though, right?

23 A That's correct.

24 Q Did you address with Dr. Nolan anything concerning
25 how the same operative question, the prescription drugs

1 and the alcohol, would have affected Ms. Tappeiner at
2 the time of the alleged incident?

3 A I do not recall that.

4 Q Did you consider using Dr. Nolan, or some other
5 expert, to address that fact; to address what effect the
6 prescription medications your client was taking,
7 combined with alcohol, would have had on her capacity
8 to consent?

9 A No. I did not.

10 Q Okay. Now, if an adult has sex with someone under
11 the age of consent, what's the result?

12 A I'm sure you're talking about legally?

13 Q Yes.

14 A Well, a crime has been committed.

15 Q Okay. And if the adult has sex with someone under
16 the age of consent, it really doesn't matter whether the
17 child's on board for it or not; does it? The child can
18 be willfully taking part in it, and it's still criminal
19 because of the age of the child versus the adult.

20 A I believe that's a correct recitation of the law.

21 Q Okay. What if an adult is unconscious or close to
22 unconscious or incapacitated for any reason, and an
23 adolescent takes advantage of the adult?

24 MS. WILSON: Objection, your Honor. She's leading
25 the witness.

1 MS. SHURLING: Posing a hypothetical, your Honor.

2 THE COURT: I'll let her ask a hypothetical.

3 Overruled.

4 MS. SHURLING: Thank you.

5 THE COURT: If you can answer the question, Mr.

6 Macloskie.

7 BY MS. SHURLING:

8 A Well, obviously, that would have something to do
9 with criminal culpability.

10 Q And I'm not being a smart aleck, but who's criminal
11 culpability?

12 A The person who is alleged to have committed the act.
13 In this case, Ms. Tappeiner.

14 Q Okay. But under my hypothetical, where an -- if an
15 adolescent, hypothetically, engaged in sexual activity
16 with someone who was unconscious or incapable of
17 consenting or participating, would that not also be
18 criminal with regard to the adolescent?

19 A It would.

20 Q And that is sort of the crux of the opening argument
21 that you touched on with the jury that we went over when
22 we started out, right?

23 A Yes.

24 Q Okay. So, in camera, Judge Mullen heard about the
25 prescription medications that your client was taking,

1 correct?

2 A Um-hmm.

3 THE COURT: You have to say yes or no.

4 A Yes, sir. Yes, ma'am.

5 Q Judge Mullen also heard about her unfortunate
6 historical pattern of drinking a lot, even though she
7 was on prescription meds?

8 A Yes.

9 Q And Dr. Nolan then gave an opinion about how that
10 affected her competency to give a reliable statement,
11 voluntary statement, at the time the statement was
12 given, correct?

13 A That's correct.

14 Q What witnesses did you put up at trial to tell this
15 jury about the fact that Susan Tappeiner was taking
16 heavy doses of prescription medication and drinking at
17 the same time?

18 A None, as I recall.

19 Q And what historical testimony did you put up from
20 even lay people concerning her pattern of alcohol abuse
21 and mixing alcohol with prescription medications?

22 A None, as I recall.

23 Q Absent such testimony, how was the jury supposed to
24 have the foundation for your theory that she was the
25 victim, not the perpetrator?

1 A They didn't.

2 Q Why not?

3 A Cause I didn't put it up.

4 Q Why didn't you put it up?

5 A I cannot explain that.

6 Q Okay. Let's go through -- my office sent you a copy
7 of the amended application that I filed in this case?

8 A I got that, yeah.

9 Q Thank you. Let's go along -- I think you
10 essentially just answered Number 2. You didn't present
11 any evidence concerning what prescription medications
12 your client was taking at the time of the alleged
13 incident; did you?

14 A Not at trial.

15 Q And nor did you present any evidence, historically,
16 to establish her pattern of drinking while on
17 prescription meds.

18 A Not at trial.

19 Q Okay. Did you consider using Dr. Nolan, whom you'd
20 already hired, you had her there for the in-cam, did you
21 consider using her as a witness for the defense to
22 address your client's competence at the time of the
23 incident, during the case in --

24 THE COURT: Hold on. Direct examination, now. Ease
25 up a little bit. You're back to testifying again, Ms.

1 Shurling.

2 MS. SHURLING: I'll break it up.

3 THE COURT: Ask a direct question.

4 BY MS. SHURLING:

5 Q Did you consider using Dr. Nolan as a witness in
6 front of the jury?

7 A No.

8 Q Did you consider using any other either psychiatric
9 or medical doctor to present testimony concerning the
10 question of Ms. Tappeiner's ability to consent to
11 anything under the circumstances of the evening in
12 question.

13 A The answer to that is, likewise, no.

14 Q Okay. And was that a tactical or strategic reason,
15 or you just didn't do it?

16 A I just didn't do it.

17 Q Okay.. Moving right along. Throughout this trial --
18 and your Honor, the references are literally in passim.
19 I'll be happy to do a memo for the Court at some point.

20 BY MS. SHURLING:

21 Q But throughout the trial, it is -- there are
22 references to the fact that your client was not charged
23 until after her two-hour interview with the police. You
24 remember that?

25 A I don't recall that specifically.

1 Q Okay. Well, let's take a look, for starters, at
2 Page 280.

3 A If it's in the transcript, I'm not going to deny it.

4 Q I understand. Sergeant Gonzales is being directly
5 examined by Ms. Burke, Assistant Solicitor Burke. And
6 the question is put to her, Lines 18 through Page 281,
7 Line 2. You see that?

8 A Starting on Page --

9 Q 280.

10 A -- 280, at Line 18?

11 Q Line 18.

12 A Got it.

13 Q Moving on along to the top of Page 281.

14 A Okay.

15 Q Would you agree that this testimony emphasizes the
16 fact that she was not charged until after that two-hour
17 interview?

18 A Well, that's what it says.

19 Q Okay. Let's look at Page 283. Let's look at 283,
20 Lines 4 through 10. Can you summarize that little bit
21 of testimony for us, as well?

22 A Well, it speaks for itself. It's basically the same
23 -- it goes in the same direction as the prior entry in
24 the transcript.

25 Q Okay. And then, let's look quickly at 341, Line 25,

1 while we're on this subject.

2 MS. WILSON: What page, again?

3 Q 341, Line 25. Particularly, 342, Line 6 through 17.
4 Where the solicitor refers to her two-hour, eye-to-eye,
5 face-to-face interview; and that she wasn't charged till
6 after that. You see that?

7 A I see that.

8 Q Did you consider objecting to any of these page
9 references -- there are others, your Honor, in the
10 record, but these are three I have marked -- where the
11 State emphasizes the fact that she wasn't charged until
12 after this two-hour-long interview, did you consider
13 objecting to those?

14 A No, I did not, and that was a mistake.

15 Q This --

16 A And while we're at it, there was another area in the
17 closing argument that was a mistake. I didn't object to
18 some other things the solicitor argued, and I should
19 have.

20 Q Thank you. I appreciate that. We'll get to those
21 in a minute. I'm just trying to close out one subject
22 area at a time, if that's okay. Thank you.

23 MS. SHURLING: Did your Honor have something you
24 wanted to direct me?

25 THE COURT: Direct examination, Ms. Shurling.

1 Proceed.

2 MS. SHURLING: Thank you, your Honor.

3 BY MS. SHURLING:

4 Q At trial, there was discussion about the victim
5 having previously been the victim of a sexual assault.

6 Is that correct?

7 A As I recall.

8 Q Did you attempt to introduce any evidence concerning
9 his prior report of sexual abuse?

10 A I recall I did not.

11 Q As a matter of fact, there came a point in this
12 trial where the prosecution even made a point out of the
13 fact that you could have chosen to do that if you wanted
14 to, and you didn't, right?

15 A I don't recall that, but the transcript speaks for
16 itself.

17 MS. SHURLING: I'll find it, your Honor. Moments
18 indulgence, your Honor.

19 BY MS. SHURLING:

20 Q This would have been during the testimony of State
21 witness Mary Beth Hefner, which began at Page 200 --
22 okay. Page 244. My apologies for the delay, your
23 Honor.

24 Page 244, during the testimony of Witness Hefner,
25 there was a lengthy legal debate. Do you recall that?

1 A I have no specific recollection of it. I'm looking
2 at it now.

3 Q Do you recall Ms. Hefner's testimony on the subject
4 of delayed reporting?

5 A No.

6 Q Have you had a moment to look at the -- the
7 argument, rather, of the prosecution on Page 244?

8 A Do you want me to read the whole thing?

9 Q To yourself, just to refresh your recollection, if
10 you would, please.

11 A Okay. Sure. How far do you want me to go, Ms.
12 Shurling?

13 Q Just on 244, where the solicitor is addressing the
14 rape shield law.

15 A Okay.

16 Q And the fact that you could have chosen to come in
17 under one of the exceptions. You see that reference?

18 A I see that.

19 Q Okay. Did you ever consider the potential value of
20 having the information about this young man having
21 previously reported a sexual assault come in?

22 A I discussed it, I recall, but I didn't attach all
23 that much importance to it.

24 Q Throughout this trial, this young man is referred to
25 as being 13 years old.

1 A Um-hmm.

2 Q Do you recall that?

3 A I do.

4 Q And while he was on the witness stand, he said he
5 had just turned 15 on August 15, 2009.

6 A Uh-huh.

7 Q Do you recall that?

8 A No.

9 Q By simple extrapolation, that would mean that he was
10 seven weeks away from his 14th birthday at the time of
11 the trial.

12 A I'll --

13 Q Did you --

14 A I'll take your statement for the truth.

15 Q Did you consider objecting to the repeated
16 references to him as a 13-year-old, when the record
17 before the court, in fact, indicated that he was very
18 close to 14, as opposed to 13?

19 A No.

20 Q And are there -- and I realize you're not an M.D.,
21 but in your everyday life experience, are there,
22 similarly, fairly substantial changes in a young man
23 between the ages of 13 and 14, 14 and 15?

24 MS. WILSON: Objection, your Honor.

25 THE COURT: Sustained. The witness isn't qualified

1 to give a medical opinion. Unless you want to ask him
2 of his own personal experience as a man. Proceed,
3 Counsel.

4 A And I would object to that.

5 BY MS. SHURLING:

6 Q Well, in your personal experience with children in
7 your family or children of close friends and relatives,
8 have you observed marked physical changes in them during
9 that time period, say, between 13 and 14, 14 and 15?

10 Do --

11 THE COURT: Ho, ho, one at a time, Counsel. One
12 question at a time. Proceed.

13 Q I'll stop right there. Have you noticed such
14 changes?

15 THE COURT: Then, stop. Answer the question, Mr.
16 Macloskie, if you can.

17 A Raising two sons is kind of like raising two
18 puppies. It is hard to define when certain changes take
19 place with any kind of reliable accuracy. I can't tell
20 you that, based on my experience with my own two sons.
21 Obviously, changes take place. Obviously, that age that
22 you're talking about, changes take place more rapidly
23 than they would in maybe some other stage in life.

24 Q Thank you.

25 A But that's all. I mean, I just -- I can't be more

1 accurate than that, Ms. Shurling. I'm sorry.

2 Q And your answer is all I was looking for. Thank
3 you. Moving on. What about -- although I believe you
4 noted earlier it wouldn't change the legality of the
5 act, but do you think it was -- well, let me rephrase.

6 Would it be important to the defense to have his
7 level of maturity accurately conveyed to the jury?

8 A I obviously didn't think so at the time, because,
9 again, we're in the parameters of the statutory
10 authority, whether he's seven days, seven weeks, seven
11 months away from his 14th birthday.

12 Q I understand. Again, you acknowledge in your
13 opening remarks, laying the foundation for she might
14 have been the victim, not the --

15 THE COURT: Ask a question, Counsel. Don't make an
16 argument.

17 MS. SHURLING: Okay.

18 BY MS. SHURLING:

19 Q You agree that you made that argument.

20 A I agreed I made that argument. And I'll also state
21 that I don't recall taking it any further than that
22 argument.

23 Q I understand. I understand. My question is, would
24 the alleged victim's maturity be something that you
25 would want to have accurately conveyed to the jury?

1 A I -- I don't recall doing that.

2 Q Okay. We'll move on. Did you ever talk to your
3 client about introducing character witnesses?

4 A No, I don't believe I did.

5 Q Did she have a prior criminal record?

6 A No, not that I'm aware of.

7 Q As you were preparing for trial, what kind of
8 support did she have?

9 A She had tremendous support from her parents.

10 Q And --

11 A And her husband.

12 Q From her husband and her parents?

13 A Yes.

14 Q How about from the community?

15 A I'm not aware of that.

16 Q Did you ask for the names of people in their circle
17 of friends that you could interview concerning their
18 life experiences with Susan Tappeiner?

19 A I'm not aware that I did.

20 Q Okay. Did you discuss with Ms. Tappeiner the
21 potential benefits and risks of testifying in her trial?

22 A I'm sure I did. I don't have a specific
23 recollection of it. But I can tell you this. If -- if
24 I put her on the stand, what had previously been
25 excluded from coming in through the front door, may have

1 come in through the back. If she testified contrary to
2 the statement given to Gonzales, it might have opened a
3 door.

4 Q Okay. Let's go backwards for a minute, then, and
5 look at Judge Mullen's ruling at the conclusion of the
6 *Jackson v. Denno* hearing. And I will find that, your
7 Honor. One moment.

8 The *Jackson v. Denno* hearing begins, your Honor, on
9 Page 38, Line 16. And her Honor took the matter under
10 advisement at Page 125, Line 17 through 127, Line 3.
11 Her ruling on the statements is found at 128, Line 21,
12 going over --

13 THE COURT: Ask a question, counsel.

14 MS. SHURLING: Pardon me?

15 THE COURT: Just go ahead and ask. I'm aware of
16 where it is. Ask a question.

17 MS. SHURLING: Thank you.

18 BY MS. SHURLING:

19 Q What was the basis for Judge Mullen's ruling that
20 the statements were inadmissible?

21 A What does the transcript say? Where are you, and
22 I'll read it?

23 Q Starting at 128, Line 121. If you'll look
24 specifically at Page 130, beginning at Line 123. Going
25 all the way over, 133, Line 5.

1 THE COURT: You want him to read that to himself,
2 Counsel? Ask a question.

3 Q What were the two bases for Judge Mullen's ruling
4 that the statement was inadmissible?

5 A That Mrs. Tappeiner's will was overborne, and the
6 conduct of the officer.

7 Q Thank you. So, with given that ruling, you were
8 still concerned that the statement could be used for
9 impeachment if she testified?

10 A I was.

11 Q Did you tell her that?

12 A Did I tell Ms. Tappeiner that?

13 Q That, if she testified, it might bring her statement
14 back up.

15 A I don't recall doing that.

16 Q Okay. You have no recollection as to whether or not
17 you told her the statement could be used for
18 impeachment?

19 A I do not recall that conversation. I may have, I
20 may not have.

21 Q Okay. All right. Let's move along to something
22 else. Other than the statement, were there any other
23 reasons why you did not want to present testimony from
24 Ms. Tappeiner?

25 A Yeah. It -- her position to me, as I recall, all

1 along was, she really had no recollection of any of
2 these events. Period. The end.

3 Q Ms. Tappeiner was and is a college-educated woman;
4 isn't she?

5 A As I recall, she is.

6 Q Did you consider introducing testimony from her to
7 establish her pattern of mixing alcohol and drugs?

8 A No, I did not.

9 Q Did you consider introducing testimony from her
10 concerning her employment of the victim's sisters as
11 babysitters?

12 A No, I did not.

13 Q Did you consider confirming through her or some
14 other witness the fact that this young man did not
15 report this alleged incident until after she fired the
16 sister?

17 A I recall conversations about that, but I did not do
18 that at trial.

19 Q Okay. Was that a strategic or tactical reason?

20 A I don't believe that was a strategic or tactical
21 reason. I didn't do it.

22 Q Okay. Throughout this trial, there are references
23 to statements made by the boy, the young man, the
24 victim, about the incident. Do you recall --

25 A I recall --

1 Q -- that pattern of testimony?

2 A I do.

3 Q Did you consider objecting to hearsay statements
4 concerning things the boy had said, the young man had
5 said, rather -- I don't mean to be disrespectful, your
6 Honor -- things that the victim had said to various
7 people on the grounds that it exceeded the scope of such
8 testimony permitted under the *Munn* decision?

9 MS. WILSON: Objection, your Honor.

10 THE COURT: Sustained. Ms. Shurling, I realize that
11 you have thoroughly prepared, and I realize that you
12 have, even in your second amended application, have
13 allegations, 27, which you are dealing with now in his
14 testimony. But you cannot testify in this hearing. And
15 you are doing so with every question you ask. This is
16 direct examination.

17 MS. SHURLING: Yes, sir, your Honor.

18 THE COURT: Not cross. You cannot lead. You cannot
19 testify. The objection is sustained. You will only ask
20 direct questions in this hearing.

21 MS. SHURLING: Yes, sir.

22 THE COURT: Proceed.

23 BY MS. SHURLING:

24 Q Did you raise any hearsay objections to that
25 testimony?

1 A I did not.

2 Q Why not?

3 A I can't answer that. I didn't do it.

4 Q Was it a tactical or strategic reason? Was there a
5 tactical or strategic reason for not objecting to that
6 testimony?

7 A Not that I recall.

8 Q Did you introduce any evidence at the trial that
9 established your client's height and weight, for the
10 record?

11 A I don't recall that I did. What does the -- I don't
12 recall. If it's in the transcript, it's there.

13 Q I understand. Did you consider the relevance of
14 that to your defense?

15 A I don't recall that I did.

16 Q Okay. Moving along. You presented Mike Tappeiner
17 as the only witness for the defense, correct?

18 A As I recall, I did. That's it.

19 Q Did -- I'm sorry.

20 A That's all right.

21 Q Did you interview him prior to putting him up as a
22 witness?

23 A Yes, I did.

24 Q Did you interview him concerning the specific
25 subject areas you intended to cover on your direct

1 examination?

2 A Maybe not in those terms, but obviously, I -- I was
3 -- we had an understanding about what he was going to
4 testify to and the value of it.

5 Q Did you establish with him prior to trial whether he
6 had -- well, did you discuss the incident with the
7 camera battery with him prior to trial?

8 A The camera battery?

9 Q Yes.

10 A I don't recall that.

11 Q Did you verify his ability to accurately determine
12 the date of the last time the young man had been at the
13 house?

14 A I don't recall that either.

15 Q Did you ever tell your client that presenting any
16 evidence would result in her losing the last argument
17 before the jury?

18 A I don't recall that I did.

19 Q Can you describe for us what you were looking for
20 when you put up Mike Tappeiner as a witness.

21 A What I was looking for is, is he was upstairs, as I
22 recall, and whether he was sleeping or awake, is a
23 matter of concern. I -- I still have no grasp on that.
24 He did not hear anything that would be sufficient enough
25 to wake him, or if he was awake, cause concern with

1 regard to any struggle.

2 He told me that his dogs would have responded to any
3 kind of situation that as was alleged by barking. He
4 would have heard that. He heard nothing of that
5 concern.

6 He testified about the boy staying there, and he
7 fixing breakfast for him the next morning, and every --
8 the boy had showed no concern, no worry about anything.
9 Just very calm, like nothing had ever happened.

10 Q Did you additionally question him about the victim's
11 pattern of visitation to their home?

12 A I don't recall that.

13 Q Did you consider presenting any non-familial
14 witnesses on the points that you have just summarized
15 for us concerning the dog and the other matters?

16 A No.

17 Q Did you interview any non-familial witnesses who
18 might have been able to give historical testimony
19 concerning her drug and alcohol use?

20 A No.

21 Q Any neighbors or friends that could have testified
22 to the habits of the dogs with regard to barking and so
23 forth?

24 A No. No.

25 Q Was there any particular reason why you did not

1 present such testimony?

2 A No.

3 Q Okay. Did you ask Mike Tappeiner questions about
4 his wife's alcohol and drug habits?

5 A Are you talking about on trial?

6 Q Yes.

7 A I don't recall. What does the transcript say? If
8 the transcript reveals that I did not, I, obviously, did
9 not.

10 Q Okay. Did you question -- did you consider
11 questioning him about her personal habits with regard to
12 mixing alcohol and drugs?

13 A No.

14 Q Did you question him about how drinking and alcohol
15 affected her motor skills, her coordination, or other
16 physical factors?

17 A Well, if I didn't ask him any questions about her
18 mixing drug and alcohol, I certainly wouldn't have asked
19 him anything about the effects of it.

20 Q Thank you. Did you consider asking him those
21 questions?

22 A I don't recall that I did.

23 Q Was that a subject area you deliberately stayed away
24 from, or you just didn't think to do it?

25 A I don't -- I didn't do it.

1 Q Okay. Let us go back to the State's witness, Mary
2 Beth -- and I apologize, your Honor, the woman's name
3 just left my brain.

4 A Hefner.

5 Q Mary Beth Hefner. After the legal debate during her
6 testimony, do you recall how the State was limited in
7 the presentation of evidence from that witness?

8 A No, I do not.

9 Q She was qualified as an expert at trial; was she
10 not?

11 A I don't recall that.

12 Q Okay. Can you tell us -- well, --

13 A Well, obviously, on Page 250, starting with the
14 direct examination on Line 14, Mrs. Burke announced that
15 she's already been qualified as an expert. So
16 obviously, she was.

17 Q Yes, sir. Are you familiar with the standard expert
18 witness jury instruction that's given when an expert is
19 presented at a trial by either side?

20 A I'm familiar with it, but I couldn't quote it to you
21 right now.

22 Q That's okay. But you're familiar with the
23 instructions jurors are given concerning how to treat
24 expert witness testimony, if any?

25 A Correct.

1 Q Okay. And such an instruction was given in this
2 case, correct?

3 A As far as I remember, it was.

4 Q Did you consider objecting to that jury instruction?

5 A No.

6 Q Would such an instruction be proper if the witness,
7 in fact, didn't end up giving any expert witness
8 testimony?

9 A I can't answer that.

10 Q I'll move on. We discussed early on the fact that
11 if an adult has sex with a young person, it's illegal.
12 Okay.

13 A We discussed that.

14 Q Let me rephrase that, which my bad, Judge. I'm
15 sorry.

16 If an adult has consensual sex with someone under
17 age, --

18 THE COURT: State the age for this example, Counsel.

19 MS. SHURLING: Okay.

20 BY MS. SHURLING:

21 Q If an adult has consensual sex with someone under
22 the age of 14, it's a crime in South Carolina, correct?

23 A That's correct.

24 Q If a young person under the age of 14 has sex with
25 someone who is not mentally competent at the time of the

1 sexual activity to consent to or volitionally
2 participate in the sex, it's also illegal; isn't it?

3 A I believe that the law uses the word *incapacitated*,
4 but yes, it's illegal.

5 Q Correct. And only in that scenario, who would be
6 the illegal actor?

7 A In this case, the alleged victim.

8 Q Thank you. Did you consider asking for a jury
9 instruction that would have advised this jury that; in
10 order to find your client guilty, they had to determine
11 that she had been, at the time of the incident,
12 competent to knowing, willfully have sex with the boy?

13 A No, I did not.

14 Q Isn't that kind of the crux of your theory of
15 defense?

16 A It could be viewed that way. Yes.

17 Q You already said you didn't consider asking for such
18 an instruction?

19 A That's correct.

20 Q Okay. Did you consider arguing that point to the
21 jury at trial?

22 A I don't recall arguing that to the jury.

23 Q What testimony had been introduced during this trial
24 that would have given you a foundation for such an
25 argument?

1 A I don't know that there was.

2 Q Because the jury hadn't heard anything about her
3 prescription meds.

4 A That's correct.

5 Q Hadn't heard about her drinking. Or at least not
6 about her historical pattern of mixing alcohol and
7 drugs.

8 A That's correct.

9 Q Did you consider -- well, let's move on for a minute
10 to something else. During the State's closing argument,
11 they made -- and you mentioned earlier that there were a
12 number of problems with the closing argument. Let's
13 look at those for a moment.

14 The closing argument of the State begins, your
15 Honor, on Page 325. You got your copy up there with
16 you, Mr. Macloskie, still?

17 A I do.

18 THE COURT: Proceed.

19 MS. SHURLING: All right. Thank you.

20 BY MS. SHURLING:

21 Q Let's take a look -- I'm sorry, your Honor. That
22 was 335. Your Honor, the first cite I gave you was on
23 the law.

24 THE COURT: Well, they actually begin on 325. You
25 were right the first time, Ms. Shurling.

1 MS. SHURLING: Thank you. Sorry.

2 THE COURT: Ask a question.

3 MS. SHURLING: All right. Thank you, Judge.

4 BY MS. SHURLING:

5 Q Take a look at Page 341, Lines 18 through 22.

6 A Okay.

7 Q Did this witness testify to her history of forensic
8 interviews in the presence of the jury?

9 A I don't believe she did.

10 Q Would an argument informing the jury of the number
11 of interviews that she discussed outside the presence of
12 the jury been present -- proper, I mean?

13 A No, it would not have been. Should have been
14 objected to.

15 Q Then moving along to Lines 20 through 22, the quote:

16 *Folks, these are people who can detect*
17 *when someone is making something up or if*
18 *there is nothing there. Okay?*

19 Did you consider that being objectionable?

20 A I should have. I didn't.

21 Q All right. Let's move along. We've already
22 addressed how, on Page 342 of his closing argument, the
23 solicitor --

24 THE COURT: Ask a question, Counsel. Don't give a
25 history.

1 Q Look at Page 344. Actually, 343, beginning at Line
2 25, moving along to 344, going through Line 12.

3 A All right.

4 Q Did you consider objecting to that as a personal
5 comment on the credibility of a witness?

6 A No, I did not.

7 Q Reviewing that portion of the closing argument
8 today, do you recognize it as objectionable?

9 A It should have been objected to.

10 Q Thank you. Moving along to Line -- Page 345, Line 9
11 and 10, specifically where the solicitor refers to Mr.
12 Tappeiner's previous problems with alcohol. Did you
13 consider objecting to that?

14 A There was no evidence of that, and that should have
15 been objected to, too.

16 Q Thank you. Moving along to Page 346, Lines 17
17 through 19. You think about the eye-to-eye, face-to-
18 face, interviews that victim has had with law
19 enforcement and the experts, plural. Did the State
20 present more than one expert in this case?

21 A Not that I recall.

22 Q Did you consider objecting to this portion of the
23 closing argument?

24 A I did not.

25 Q And lastly, at the very end, 346:

1 I want to also think, in -- in making
2 that decision, would you let her babysit
3 your kids, your grandkids, nieces and nephews?

4 I think the answer to that is why you
5 should find her guilty.

6 You see that?

7 A I should have objected to that.

8 Q Are you familiar with a line of cases that prohibit
9 solicitors from doing what they call staking a jury?

10 A I am.

11 Q And in your opinion, did that argument stake this
12 jury?

13 A That's exactly what it did.

14 Q Thank you. All right. There were inconsistencies
15 in --

16 MS. WILSON: Objection, your Honor. Is this a
17 question?

18 MS. SHURLING: I'll rephrase.

19 BY MS. SHURLING:

20 Q Were there inconsistencies between the victim's
21 statement to law enforcement and his trial testimony?

22 A I don't recall with any degree of accuracy if there
23 were. I'm sure there were. There always is.

24 Q Okay. One moment, your Honor. Mr. Macloskie, do
25 you recall a time, well over a year ago now, that I came

1 to your office and reviewed your file?

2 A I do.

3 Q And did you give me full access to all the discovery
4 materials --

5 A I did.

6 Q -- that had been provided to you?

7 A I did.

8 MS. SHURLING: May I approach, your Honor.

9 THE COURT: You may.

10 Q If you can look through this and tell me if you can
11 identify it as part of the discovery package.

12 A It is.

13 Q If you look at the statement of -- one moment, your
14 Honor. The statement of the young man, the victim, is
15 toward the back of this package. On Page 2 -- moment's
16 indulgence, your Honor.

17 Does he describe --

18 THE COURT: Ask a question.

19 Q How does he indicate the sex act ended, in his
20 statement?

21 A In his written statement?

22 Q Right.

23 A He states that when she -- this is verbatim:

24 *When she left --*

25 Quote:

1 *When she left, I quickly ran out of*
2 *the house and went straight to my house.*

3 Q During his trial testimony, what did he claim about
4 how the act ended?

5 A I can't answer that. I don't recall.

6 Q If his trial testimony reflects that he pushed her
7 off of him, would that be inconsistent with his
8 statement?

9 A Yes, it would.

10 Q Is there any particular reason why you did not
11 question him concerning that inconsistency?

12 A There is no reason.

13 Q Okay. Your Honor, I would move to introduce a copy
14 of these materials as Plaintiff's 1.

15 THE COURT: Show it to Ms. Wilson. Any objection?

16 MS. WILSON: No, objection, your Honor.

17 THE COURT: Applicant's Number 1, without objection.

18 COPY OF BLUFFTON POLICE DEPARTMENT

19 INCIDENT REPORT MARKED APPLICANT'S

20 EXHIBIT NUMBER 1, ENTERED INTO EVIDENCE.

21 BY MS. SHURLING:

22 Q Okay. Let's take a look at Page 254 and 255 or the
23 transcript going back to Ms. Hefner.

24 THE COURT: Ask a question, Counsel.

25 MS. SHURLING: Your Honor, I was looking for the

1 page reference.

2 BY MS. SHURLING:

3 Q Specifically, if you would take a look for me at
4 Page 252, Lines 7 through 14, with specific reference
5 to the percentages, the statistical -- I can't say that
6 word, I apologize -- statistical reference --

7 THE COURT: 252, Line 7 through 14, Counsel?

8 MS. SHURLING: Correct, your Honor.

9 THE COURT: Ask a question. You want him to read
10 it?

11 BY MS. SHURLING:

12 Q Do you recall her making the statistical
13 references in this portion of the transcript?

14 A I don't recall that, but it's obviously there.

15 Q Why did you not cross-examine her concerning what
16 authority she had for those statistics?

17 A I can't answer that. I didn't cross-examine her.

18 Q You didn't cross-examine her?

19 A I didn't cross-examine her about that particular
20 part of the transcript, as I recall.

21 Q Well, did you consider cross-examining her about the
22 source of her authority for these representations?

23 A No.

24 Q Okay. Moving along. She's asked additional
25 hypothetical questions about how boys and girls differ

1 on the subject of delayed reporting. Do you recall
2 that portion of her testimony?

3 A I don't recall it specifically.

4 Q I assume -- I'm just trying to make a record -- same
5 answer -- did you consider questioning her about what
6 authority she had or the representation she was making
7 about boys delaying --

8 A I don't recall --

9 Q -- reporting more than girls?

10 A I don't recall cross-examining her about the
11 authority she had for any of the opinions she stated.

12 Q Do you recall at all the big debate between the
13 prosecution and the Bench over the scope of this
14 witness's permissible testimony?

15 A No, I do not. I don't have any independent
16 recollection of that, other than the transcript.

17 Q Do you recall what the basic subject matter of her
18 testimony ended up being?

19 A Not without referring to the transcript.

20 Q Okay. Was there any strategic or tactical reason
21 why you did not cross-examine her on the topic of
22 delayed reporting?

23 A Not that I recall.

24 Q Okay. I'll move on. Did you go to the house where
25 this supposedly happened?

1 A I did.

2 Q Can you describe the little neighborhood it was in.

3 A As I recall, it was -- it's a cul-de-sac. The
4 Tappeiner's house was on the left-hand side, prior to
5 reaching the cul-de-sac. A modest, but very nicely
6 appointed neighborhood.

7 Q Did you go inside the house?

8 A I did.

9 Q Is it a new neighborhood?

10 A Fairly new, as I recall.

11 Q New construction.

12 A Yes.

13 Q Did you examine first hand the proximity of the
14 various areas of the house that were testified to by the
15 witness?

16 A I remember going in the house. I remember meeting
17 Mr. Tappeiner there. I remember, I think accurately,
18 that the subject matter was the -- the service of a
19 search warrant. I don't recall going upstairs, but I
20 may have. And I don't recall staying there for a long
21 time.

22 Q You don't recall going upstairs?

23 A I don't have any specific recollection of going
24 upstairs.

25 Q And where was this --

1 A Upstairs.

2 Q Upstairs was where the assault was alleged to have
3 occurred.

4 A That's correct.

5 Q Okay. Did you consider obtaining or developing any
6 sort of demonstrative evidence that would have
7 illustrated for the jury just what close quarters these
8 people were in at the time of this incident?

9 A No.

10 Q When you personally visited the house, did it impact
11 your view of the credibility of the young man's
12 statement?

13 A I don't know that I viewed the house for that
14 purpose. But as I recall, Mr. Tappeiner testified about
15 the proximity of things in the house.

16 Q After viewing the actual house, as a result of
17 viewing the site itself, would your estimation of the
18 credibility of the young man's story have been different
19 from before you saw the house?

20 A Well, I didn't think it was credible anyway, but I
21 -- I don't know that it would have changed because of
22 that.

23 Q I realize you were not on the jury, but having been
24 in the house, did it make it more or less probable in
25 your mind --

1 MS. WILSON: Object, your Honor. Asked and
2 answered.

3 THE COURT: Sustained Move along, Counsel.

4 BY MS. SHURLING:

5 Q You mentioned the search warrant in this case.

6 A Um-hmm. Yes, ma'am.

7 Q There was also a tape made of the police when they
8 were conducting the search warrant, right?

9 A I don't recall that.

10 Q You don't recall testimony about them taping it?

11 A No.

12 Q Okay. Your Honor, one moment's indulgence.

13 THE COURT: Anything further on direct, Counsel?

14 MS. SHURLING: Yes.

15 THE COURT: Proceed.

16 BY MS. SHURLING:

17 Q The underwear that was addressed -- I am not
18 approaching the issue, your Honor.

19 THE COURT: You're not going to raise allegations
20 that you decided to raise today in this hearing.

21 MS. SHURLING: I am not, your Honor.

22 THE COURT: Proceed.

23 BY MS. SHURLING:

24 Q Your client, Ms. Tappeiner, worked at Family Photo
25 Shop. Is that right?

1 A That's correct.

2 Q Okay. And you were aware the testimony reflects
3 that she had another job working for some kind of
4 clothing company. Is that correct?

5 A That's correct. Um-hmm.

6 Q Did you consider presenting testimony concerning
7 that clothing line and the merchandise that would have
8 been in the Tappeiner house at the time the boy was
9 coming and going with his sisters?

10 A I don't recall that I did.

11 Q Would that have been helpful at trial?

12 A I don't know that it would.

13 MS. SHURLING: Okay. No further questions.

14 THE COURT: Counsel approach.

15 OFF-THE-RECORD BENCH CONFERENCE;

16 PRESENT: THE COURT, MS. SHURLING,

17 MS. WILSON.

18 THE COURT: Ladies and gentlemen, we're going to
19 break at this point for lunch so that the court reporter
20 and you can all get a lunch break. We're going to start
21 back at 2:00 o'clock. It's now 1:00 o'clock.

22 Mr. Macloskie, you're in the middle of your
23 testimony. It would be improper, as you know, to
24 discuss your testimony with anyone, since you have not
25 been subjected to cross-examine or released by the

1 Court. I hope you have a pleasant lunch. Please don't
2 discuss your testimony. This Court will start back at
3 2:00 o'clock this afternoon. We're in recess for lunch.

4 MS. WILSON: Thank you, your Honor.

5 OFF THE RECORD 1:00 P.M.

6 BACK ON THE RECORD 2:00 P.M.

7 BY THE COURT:

8 THE COURT: Thank you. Please be seated. I can't
9 delay any longer. I've already delayed. We'll see if
10 the cell phone works. If it doesn't, I'll have to hold
11 the record open.

12 Mr. Macloskie, you're on the witness stand. Cross-
13 examination.

14 THE COURT: Wanda, you ready?

15 COURT REPORTER: Yes, sir.

16 THE COURT: You ready?

17 MR. MACLOSKIE: (Nodded head.)

18 THE COURT: Cross-examination, Ms. Wilson.

19 MS. WILSON: Thank you, your Honor.

20 HON. CHARLES B. MACLOSKIE

21 CROSS-EXAMINATION, MS. WILSON:

22 Q Mr. Macloskie, can you tell us again about how long
23 you've been practicing law.

24 A Since April the 12th, 1967.

25 Q And you said about 60 percent of your practice has

1 been criminal for some time?

2 A It has.

3 Q And were you appointed, or were you retained to
4 represent --

5 A No, I was retained.

6 Q Okay. And you said that you had testified that you
7 were retained shortly after she was arrested?

8 A Susan was still in jail when -- when I was retained.
9 As I recall.

10 Q And how many times do you recall meeting with her
11 prior to trial?

12 A Oh, I can't recall.

13 Q You don't recall?

14 A I don't know.

15 Q Was it frequently?

16 A I wouldn't say it was frequent. It wasn't regular.
17 We met when I thought we needed to meet.

18 Q And did you file *Brady* or *Rule 5* motions for Ms.
19 Tappeiner?

20 A I did.

21 Q And you reviewed material from the State?

22 A I did.

23 Q Okay. And can you tell us what type of things you
24 reviewed from the State.

25 A I know I received the incident report that's already

1 been introduced. I received a video recording of her
2 interview at the Bluffton Police Department. And
3 reading through the transcript, I'm pretty sure I
4 received the audio of the interview in the jail. I
5 could be mistaken about that.

6 Q And before you went to trial, did you discuss the
7 elements of the case against Ms. Tappeiner with her?

8 A I did.

9 Q And did you discuss what the State had to prove?

10 A I did.

11 Q Did she tell you her version of the facts?

12 A She was not able to be much assistance, because she
13 really didn't remember too much about what went on.

14 Q And did you discuss any possible defenses that you
15 could put up on her behalf?

16 A The whole thing was -- was the credibility of this
17 alleged victim.

18 Q So that's the main thing that you wanted to
19 challenge.

20 A And -- and getting rid of her statement. Her
21 recorded statement.

22 Q And were you able to successfully able to get the
23 statement excluded?

24 A I was.

25 Q Were you able to challenge the credibility of the

1 victim?

2 A Obviously, not sufficiently enough.

3 Q But you attempted to.

4 A Yes.

5 Q And can you briefly characterize the State's
6 evidence against Ms. Tappeiner. What did they present
7 at trial?

8 A It was primarily the testimony of -- of the alleged
9 victim.

10 Q Did Ms. Tappeiner give you any witnesses to
11 investigate, anybody to go talk to?

12 A No, but outside, as far as -- as the -- the incident
13 itself, the only witnesses were, possible witnesses,
14 were, again, the alleged victim, Ms. Tappeiner, and her
15 husband.

16 Q Did you do any type of investigation in this case?

17 A Well, as -- as much as I could.

18 Q Do you recall what that entailed?

19 A No, I -- no, I don't have a specific recollection of
20 that. I'm sorry.

21 Q Sorry. Did you think you had ample time to prepare
22 for her trial?

23 A I did.

24 Q And can you possibly articulate to the Court what
25 type of strategy you had when you went into the case?

1 A Again, it was -- it was a credibility thing, as I've
2 told Mrs. Shurling.

3 Q Did you question the victim on his weight at the
4 time of the incident? Do you recall that?

5 A Did I do what?

6 Q Do you recall questioning the victim about his
7 weight at the time of the incident?

8 A I didn't have a specific recollection of it, but
9 it's in the transcript. And I had no reason to
10 challenge what's in the transcript as being inaccurate.

11 Q And you didn't present any evidence about Ms.
12 Tappeiner's weight. Is that correct?

13 A I don't recall that I did.

14 Q But Ms. Tappeiner was present at trial for the jury
15 to see her.

16 A She was. She was.

17 Q Okay. And was her weight a significant issue at
18 trial?

19 A I didn't make it a significant issue. And you've
20 got to understand that Susan was a lot lighter than she
21 is now.

22 Q And you challenged Ms. Tappeiner's testimony at a
23 *Jackson v. Denno* hearing. Is that correct?

24 A Her statement, yes.

25 Q Sorry about that. Her statement. And were you

1 successful?

2 A Yes, I was.

3 Q And you also got excluded a statement or a video of
4 a jail cell conversation?

5 A An audio.

6 Q And is consent a defense for criminal sexual conduct
7 with a minor?

8 A No, Ms. Wilson, it's not.

9 Q And do you have any questions about Ms. Tappeiner's
10 criminal culpability?

11 A I didn't have any questions about her criminal
12 culpability in this. I had serious questions about how
13 I could successfully defend her.

14 Q And why did you have questions about that? What
15 made you think that you had problems defending her?

16 A She -- because she -- she was not a witness. I
17 mean, she was -- she was there, but I mean, because she
18 didn't recall these events with any degree of clarity,
19 she was of limited value in her own defense.

20 Q Did you consider putting before the jury that the
21 victim could have overpowered Ms. Tappeiner because she
22 was incapacitated?

23 A I don't think I did that to a sufficient degree.

24 Q Did you consider putting in testimony about her
25 prescription drug use?

1 A No, I did not.

2 Q Is that something that would have been useful to
3 tell the jury that Ms. Tappeiner had been using drugs?

4 A That -- that's a two-edge sword, but I think, as I'm
5 sitting here today reflecting back on it, yeah, I think
6 it would have been useful.

7 Q You just didn't think it was useful at the time
8 during trial.

9 A I don't know that I really thoroughly considered
10 that. Except for the -- except for the suppression
11 hearing.

12 Q Do you think that the testimony about Ms. Tappeiner
13 being arrested after an interview was objectionable?

14 A Yeah, I do. Yes, ma'am, I do.

15 Q Is it your understanding that the victim was 13
16 years old at the time of the offense?

17 A Yes.

18 Q Do you think the fact that the State said he was 13
19 throughout the trial was objectionable?

20 A No.

21 Q You didn't advise Ms. Tappeiner to take the stand.
22 Is that correct?

23 A We -- we discussed it. And that -- that decision is
24 never mine. But I more likely than not advised pretty
25 strongly against it.

1 Q So, what was the basis for that advice?

2 A She -- she had no clear enough recollection of the
3 events to help herself. I didn't want her subjected to
4 cross-examine, because of the fear that what had been
5 excluded by way of the suppression hearing might come in
6 via the back door. You can't tell what happens at a
7 trial or, with all due deference, to the judiciary, how
8 an individual judge might view the idea of opening the
9 door.

10 Q And do you recall eliciting testimony from Mr.
11 Tappeiner about the fact that they had a dog, and he
12 would bark if he had heard a disturbance?

13 A I remember that.

14 Q Do you also recall testimony from -- eliciting
15 testimony from Ms. Tappeiner about the fact that he was
16 a light sleeper, and if he'd heard a struggle, he
17 probably would have woken up?

18 A I remember that.

19 Q I believe Ms. Tappeiner [sic] presented to you, in
20 her direct, she showed you exactly where it was. So,
21 Ms. Hefner was qualified as a expert. Is that correct?

22 A Pardon?

23 Q Ms. Hefner, she was qualified as an expert?

24 A I don't recall that, but obviously, the transcript
25 shows that she was.

1 Q Okay. Was there any testimony about the victim
2 being the aggressor in this case?

3 A Not to my knowledge.

4 Q And did you attempt to bring out inconsistencies in
5 the victim's testimony at trial?

6 A I don't -- excuse me. I don't have a specific
7 recollection of that, but obviously, if I did, those
8 efforts were not successful.

9 Q And you elicited testimony from Mr. Tappeiner about
10 the size of his home. Is that correct?

11 A I don't have a specific recollection of that either,
12 but I believe I did.

13 Q And do you also recall referring to the modest size
14 of the home during your closing argument?

15 A I don't recall that, but if it's in the transcript,
16 I did it.

17 Q Did you speak to Dr. Martin about the use of his
18 testimony during sentence before you had him evaluate
19 Ms. Tappeiner?

20 A I believe that -- and again, I have no specific
21 recollection of this, Ms. Wilson, but I believe that I
22 spoke with Ms. Ballard, and Ms. Ballard did that, but I
23 could be mistaken about that. I know that I talked to
24 Dr. Martin. But I think that it was in response to him
25 asking me some -- for some information. I think that he

1 was already aware of what his testimony was going to be
2 used for.

3 Q And can you recall what evidence you presented
4 during the sentencing proceeding in mitigation.

5 A Not with any degree of clarity or specific --
6 specificity.

7 Q You presented Dr. Martin's testimony. Is that
8 correct?

9 A That's correct.

10 Q And did you think the testimony that he presented
11 had an impact on Judge Mullen's decision in sentencing?

12 A I think it did.

13 Q Voluntary intoxication, did you consider that as a
14 defense in this case?

15 A No.

16 Q Did you consider diminished capacity a defense in
17 this case?

18 A No.

19 Q Did you have any evidence of mental illness that you
20 wanted to present to the jury?

21 A I don't recall any -- any information of that nature
22 that was available.

23 MS. WILSON: Nothing further from the State, your
24 Honor.

25 THE COURT: Re-direct.

1 MS. SHURLING: Very briefly.

2 HON. CHARLES B. MACLOSKIE

3 RE-DIRECT EXAMINATION, MS. SHURLING:

4 Q Mr. Macloskie, you said you don't think the
5 references to the victim as 13 were objectionable,
6 correct?

7 A That's correct.

8 Q Okay. But do you recall during his testimony -- and
9 I'm looking at Page 170 of the transcript -- when he
10 says that he had just turned 15 on October 15, 2009?

11 A I'm sorry, Ms. Shurling. Tell me what page again.

12 Q 170. Page 170, sir.

13 A How old are you right now, Victim? Fifteen?

14 Q Yes, sir. And he said that he had just had a
15 birthday a couple weeks ago. Yes, sir, the 15th. You
16 see that?

17 A Yes, I do.

18 Q Okay. Which means he had just turned 15 on October
19 15.

20 A Um-hmm. Yes, ma'am.

21 Q Did you consider at that point clarifying that that
22 would mean that this incident allegedly happened on
23 August 15th of '08, and that that means that he was --
24 turned 14 October 15th of '08; that he was almost 14 at
25 the time of this incident, as opposed to 13?

1 A Even though I think I've already answered that, my
2 -- my --

3 THE COURT: You have.

4 A -- my answer is the same. No, I did not.

5 Q Okay. I apologize. I was trying to do something
6 responsive to what she got into.

7 Voluntary intoxication would not be a defense to
8 criminal sexual conduct with a minor, correct?

9 A As far as I'm -- I know, it wouldn't.

10 Q Okay. And neither would diminished capacity.

11 A That's correct.

12 Q Would it be a defense if someone was passed out or
13 sufficiently incapacitated that they could not
14 themselves consent to sexual conduct with a minor?

15 A Would it be a defense if someone was intoxicated to
16 the point where they could not consent to some type of
17 sexual activity with a minor?

18 Q Correct.

19 A For -- for the person who's passed out?

20 Q Correct.

21 A Yes.

22 Q Okay. Thank you. You were asked about mitigation
23 in the sentencing phase. During the sentencing
24 proceeding, you pointed out that the -- according to the
25 pre-sentence report, that the young man's mother had

1 even said she didn't think lengthy incarceration would
2 be of value. You remember that portion?

3 A I -- I don't have a specific recollection of that,
4 Ms. Shurling.

5 Q The pre-sentence report in this matter -- moments
6 indulgence, your Honor.

7 Your Honor, just a moment. I apologize. Oh, okay.

8 THE COURT: Would you like to approach the witness,
9 Ms. Shurling?

10 MS. SHURLING: Thank you.

11 THE COURT: Then, ask the Court for permission.

12 MS. SHURLING: May I approach the witness?

13 THE COURT: Hand him the document, and step back and
14 ask a question.

15 BY MS. SHURLING:

16 A Thank you, ma'am.

17 Q Do you recognize that document?

18 A I think this is an accurate copy of the pre-sentence
19 investigation report.

20 Q On Page 10, when it references the view of the
21 victim's mother with regard to punishment, what does it
22 say?

23 A It's on Page 7. The 10 --

24 Q 7, pardon me.

25 A The report is ten pages long. It reads:

1 Concerning sentencing, Mrs. Victim's mom
2 recommends that Ms. Tappeiner should receive
3 a sentence of at least two years in prison,
4 followed by community supervision that should
5 include some type of intensive psychotherapy.

6 Q Thank you. Did you consider pointing out that
7 portion of the pre-sentence report to her Honor during
8 the sentencing to emphasize the fact that the victim's
9 mother was even talking about a sentence of two years or
10 at least two years?

11 A I don't have a specific recollection of that. I'm
12 sure the judge had a copy of this.

13 Q Certainly.

14 A And I trust her to have read it.

15 Q Thank you.

16 A But I don't have a --

17 MS. SHURLING: May I approach and get it, your
18 Honor?

19 THE COURT: You may.

20 MS. SHURLING: Your Honor, I would ask that this be
21 made part of the record.

22 THE COURT: That's your copy, isn't it, Ms. Wilson?

23 MS. SHURLING: No.

24 THE COURT: Any objection?

25 MS. WILSON: It was her copy. I don't have a copy.

1 THE COURT: You don't have a copy? Any objection.
2 Let her see it, Ms. Shurling.

3 MS. WILSON: My only objection is that it's not a
4 signed copy, so, I mean, it's not --

5 THE COURT: Is there an objection to this document?
6 She's offering this document.

7 MS. SHURLING: I think I have another signed copy
8 somewhere.

9 THE COURT: Are you objecting on the basis that it's
10 not signed, after this witness has verified that it
11 appears to be the copy of the pre-sentence
12 investigation?

13 MS. WILSON: Your Honor, I'm just voicing my
14 concern. I have no objection.

15 THE COURT: Very well. Applicant's Number what,
16 Wanda?

17 COURT REPORTER: Number 2, your Honor.

18 THE COURT: Number 2, without objection.

19 COPY OF PRE-SENTENCE REPORT MARKED
20 APPLICANT'S EXHIBIT NUMBER 2, AND
21 ENTERED AS EVIDENCE.

22 THE COURT: Please proceed. Re-direct, Ms.
23 Shurling. Move along.

24 BY MS. SHURLING:

25 Q Who hired Dr. Martin? Was it you or Ms. Ballard?

1 A I think it was Ms. Ballard.

2 Q In your meetings with Dr. Martin, did you have
3 discussions about the scope of his testimony -- on
4 presentation, I'm not sure whether you'd call it
5 testimony -- what the scope of his testimony at
6 sentencing would be?

7 A I'm sure we did, but I -- I don't have any specific
8 recall of that, the content.

9 MS. SHURLING: Thank you. No further questions.

10 THE COURT: Re-cross limited to re-direct, Ms.
11 Wilson.

12 MS. WILSON: Yes, your Honor.

13 HON. CHARLES B. MACLOSKIE

14 RE-CROSS-EXAMINATION, MS. WILSON:

15 Q Mr. Macloskie, could you please turn to Page 285 in
16 the transcript. Ms. Shurling asked you about whether
17 you objected to the age of the victim and tried to find
18 out for sure if he was 13 or 14 at the time. Can you
19 review, on Page 285, Lines 8 through 24, on Page 285.

20 Have you had a chance to review it?

21 A Yes, ma'am.

22 Q And does it appear to you that you had some concern
23 about the defendant's age in that section?

24 A Well, I -- I pointed it out.

25 Q And after you pointed it out, it was resolved that

1 the defendant was 13. Is that correct?

2 A That's correct.

3 MS. WILSON: Okay. Nothing further, your Honor.

4 BY THE COURT:

5 THE COURT: You may step down, Mr. Macloskie. Call
6 your next witness.

7 MS. SHURLING: Does your Honor wish to go ahead and
8 get the telephone testimony?

9 THE COURT: I'm not interfering with your case, Mr.
10 Shurling. It's not what his Honor wishes. You're the
11 one that advised me you need to do that. Do you want to
12 call her at this time or not?

13 MS. SHURLING: I want to call her as a witness, your
14 Honor. I was trying to bow to --

15 THE COURT: You want to call her at this time.

16 MS. SHURLING: Certainly.

17 THE COURT: All right. Let's see if we can get her
18 on the phone. I understand you're going to use a cell
19 phone, right?

20 MADAM CLERK: Yes, sir.

21 THE COURT: Did you need the television to help you
22 with a speaker? Is that why you all asked Bob to bring
23 it in?

24 MADAM CLERK: I don't know why she asked for it,
25 Judge. I don't.

1 THE COURT: Do you know why you were asked to bring
2 the television in?

3 BAILIFF: No, your Honor, I do not.

4 THE COURT: One of you request a television?

5 MS. SHURLING: Yes, sir.

6 THE COURT: I should have known. All right.

7 MR. MACLOSKIE: If your Honor please, do you want me
8 to stay here? I'm ten minutes away by telephone.

9 THE COURT: Any objection to this witness being
10 excused from counsel for the applicant?

11 SHURLING: I thank you for being here.

12 THE COURT: Any objection to this witness being
13 excused from counsel for the State of South Carolina?

14 MS. WILSON: No, your Honor.

15 THE COURT: You're excused.

16 REPORTER'S NOTE: Madam Clerk is attempting
17 to call Hon. Desa Allen Ballard via telephone.

18 THE COURT: Can't get her?

19 MADAM CLERK: They're looking for her.

20 MS. SHURLING: Your Honor, my hearing is not the
21 best. May -- I said my hearing is not very good. May I
22 come and stand closer to the --

23 THE COURT: Let's first get her on the phone, Ms.
24 Shurling.

25 MS. SHURLING: Okay.

1 THE COURT: Desa A. Ballard. I'll remind you, Ms.
2 Shurling, of what you told me during the lunch break in
3 chambers about the length of your direct examination of
4 Ms. Ballard.

5 MS. SHURLING: I accept that as a personal
6 challenge, your Honor.

7 MADAM CLERK: All right. Go ahead.

8 HON. DESA ALLEN BALLARD: I'm here.

9 THE COURT: Ms. Ballard, this is Judge Buckner.
10 We're in the courtroom with the court reporter. We
11 have, in the courtroom, obviously, the applicant for a
12 post-conviction relief, represented by Tara Shurling.
13 The State of South Carolina is represented by Ashleigh
14 Wilson.

15 I'm going to ask the assistant clerk of court to
16 swear you at this time. You're being called as a
17 witness by Ms. Shurling on behalf of the applicant.

18 MS. BALLARD: Thank you, your Honor.

19 MADAM CLERK: Ms. Ballard, do you solemnly swear or
20 affirm that the testimony you give to the Court in this
21 trial shall be the truth, so help you God?

22 MS. BALLARD: I do.

23 THE COURT: State your full name for the record,
24 please.

25 MS. BALLARD: It's Desa, D/e/s/a. Middle name

1 Allen, A/l/l/e/n. Last name Ballard, B/a/l/l/a/r/d.

2 THE COURT: Very well. Your witness, Ms. Shurling.

3 Direct examination. Can you hear all right, Ms.

4 Shurling?

5 MS. SHURLING: I'm going to approach a little closer
6 if it's okay, your Honor.

7 THE COURT: All right.

8 HON. DESA ALLEN BALLARD

9 DIRECT EXAMINATION, MS. SHURLING:

10 Q Ms. Ballard, can you hear me adequately?

11 A I can.

12 Q This is Ms. Shurling.

13 A Yes.

14 Q At what stage in Ms. Tappeiner's case did you become
15 involved in her defense?

16 A Mike Macloskie called me after the conviction and
17 prior to the sentencing.

18 Q And were you involved in formulating a strategy and
19 mitigation for the sentencing phase?

20 A I was.

21 Q Did you hire the expert who presented opinion
22 testimony during the sentencing phase, Dr. Tom Martin?

23 A Yes, I contacted Tom Martin as a result of my
24 conversation with Mr. Macloskie, and discussed with Dr.
25 Martin what we wanted to present in terms of mitigation.

1 Q Prior to Dr. Martin's presentation and the
2 sentencing, did you go over with him the evidence that
3 had been presented during the guilt of innocence phase
4 of this trial?

5 A To the extent I had it. I did not get half a
6 transcript. All I had was the summary of the evidence
7 that had been provided to me by Mike.

8 Q And was that reviewed with Dr. Martin?

9 A Yes.

10 Q Did you discuss with Dr. Martin a framework for his
11 desired testimony during the sentencing proceeding?

12 A Yes, I did. I went back through my records last
13 night, and I -- I located a time entry where Dr. Martin
14 and Mike and I met at my office on a Saturday prior to
15 his first meeting with -- to then discuss how we wanted
16 to present the testimony. I believe this was prior to
17 his first meeting with Susan. And that meeting lasted
18 about an hour and a half.

19 Q After reviewing this case with Dr. Martin -- I
20 realize the client had already been convicted, but after
21 reviewing the case with Dr. Martin, was it your opinion
22 that the testimony of Dr. Martin would have been
23 beneficial if it had been offered during the trial?

24 MS. WILSON: Your Honor, I'm going to object. Ms.
25 Ballard said that she didn't have any information about

1 what happened at trial other than the summary.

2 THE COURT: Sustained. There's no basis to ask that
3 question in this post-conviction relief. Move along,
4 Ms. Shurling.

5 BY MS. SHURLING:

6 Q With regard to the direct appeal, Ms. Ballard, did
7 you advise Ms. Tappeiner against pursuing a direct
8 appeal in this matter?

9 A Yes. It took us several months to get the
10 transcript of the trial proceedings. We actually got
11 the transcript of the sentencing proceeding quicker than
12 we got the transcript of the trial proceedings. And I
13 reviewed those in an effort to find some -- some ground
14 which I thought an acceptable appeal could be taken.
15 And I could find nothing.

16 I spoke with both Susan and with her father, Mr.
17 Sanders about the lack of merit on taking an appeal, and
18 we felt that an appeal would not have a sufficient legal
19 basis and likely would not be successful.

20 MS. SHURLING: Thank you very much. I have no
21 further questions, Ms. Ballard.

22 A Thank you.

23 THE COURT: Cross-examination, Ms. Wilson.

24 MS. WILSON: Thank you, your Honor.

25 THE COURT: Please feel free to come up to the

1 microphone, as Ms. Shurling did.

2 MS. WILSON: Thank you, your Honor.

3 A Please do. I'm having a little trouble hearing you.

4 THE COURT: If you can't hear, you let me know,
5 Desa.

6 A I will. I promise. Thank you, your Honor.

7 THE COURT: I guarantee you, you can hear me, can't
8 you?

9 A I certainly can.

10 THE COURT: Very good. All right, Ms. Wilson, speak
11 up. Cross-examination.

12 MS. WILSON: Thank you, your Honor.

13 HON. DESA ALLEN BALLARD

14 CROSS-EXAMINATION, MS. WILSON:

15 Q Ms. Ballard, can you kind of review for us what
16 mitigation evidence you were able to present before the
17 Court in Ms. Tappeiner's sentencing phase.

18 A Well, we called Dr. Martin as a witness, and he, of
19 course, had met with Susan twice prior to the sentencing
20 proceeding. So, Dr. Martin's testimony was the -- the
21 gist of what we -- what we were looking for was
22 testimony that would establish that Susan would not
23 benefit from a custodial setting, as well as testimony
24 that she was not dangerous; she was not a sexually
25 violent predator; and therefore, the Court, Judge

1 Mullen, I believe it was, could have a comfort level in
2 not ordering a custodial sentence.

3 Q Do you think that your strategy of mitigation
4 evidence that you presented had some level of success?

5 A It didn't seem to, no.

6 Q Did you present any other evidence in mitigation
7 about maybe her family structure and that type of thing?

8 A No.

9 Q And could you recall again when, exactly, you were
10 hired. Was it a few weeks after trial or immediately
11 after?

12 A The first call came into my office on October 30,
13 2009, which I think was a couple days after the
14 conviction.

15 MS. WILSON: Thank you, Ms. Ballard.

16 A Thank you.

17 MS. SHURLING: No re-direct

18 THE COURT: Very well. Ms. Ballard, I understand.
19 there is no re-direct. Thank you very much. This
20 concludes your testimony. We're now terminating the
21 telephone call.

22 A Thank you so much, your Honor, for letting me
23 testify by telephone. It was -- it was much
24 appreciated.

25 THE COURT: Happy to accommodate your busy schedule,

1 Ms. Ballard. Call your next witness.

2 MS. SHURLING: The applicant calls Dr. Tom Martin.

3 THE COURT: Dr. Martin, come around and be sworn by
4 the clerk.

5 MS. SHURLING: Your Honor, may I approach.

6 THE COURT: You may.

7 MS. SHURLING: I need to hand you up a copy of Dr.
8 Martin's curriculum vitae.

9 MADAM CLERK: Do you solemnly swear or affirm that
10 the testimony you give to the Court in this trial shall
11 be the truth, so help you God?

12 DR. MARTIN: I do.

13 THE COURT: Have a seat. Make yourself comfortable,
14 Dr. Martin.

15 DR. MARTIN: Thank you.

16 THE COURT: And use that microphone to amplify your
17 voice, and begin, if you would, by stating your full
18 name, spelling your last name for the court reporter.

19 DR. MARTIN: My name is Thomas Victor Martin,
20 M/a/r/t/i/n.

21 DR. THOMAS VICTOR MARTIN

22 DIRECT EXAMINATION, MS. SHURLING:

23 Q Dr. Martin, --

24 THE COURT: Before we begin, Ms. Shurling, I want to
25 make sure you understand that we're here for a PCR and

1 not a trial.

2 MS. SHURLING: I'm well aware of that, your Honor.

3 THE COURT: Very well. I want to make sure I've
4 reminded you before we begin. Proceed.

5 BY MS. SHURLING:

6 Q Dr. Martin, you've just heard testimony from Desa
7 Ballard about hiring you in connection with this case.
8 Do you recall when you were approached about becoming
9 involved in Susan Tappeiner's case?

10 A Yes. I have a letter from Mr. Macloskie that is
11 dated October 29th. It is, essentially, addressing my
12 evaluation of Ms. Tappeiner after, apparently, she was
13 convicted the day before.

14 Q And when you were retained in this matter, what were
15 you told the purpose was for obtaining your services?

16 A I was asked to perform a psychiatric evaluation, and
17 I was told that Ms. Tappeiner was convicted of a
18 criminal sexual offense against a minor. And since my
19 practice, about a third of my practice, deals with the
20 assessment of such individuals, for me to evaluate any
21 major mental illness and perform a risk assessment, and
22 make any type of psychiatric treatment recommendations,
23 and whether or not those would be able to be
24 accommodated in the Department of Corrections.

25 Q What, if anything, were you told or provided in

1 terms of a summary of the evidence that had been
2 introduced at the trial?

3 A Well, I first actually met -- I had a couple of
4 telephone conversations. One was with Mr. Macloskie
5 right after the trial. Before conviction, but right
6 after the -- the 28th of October. And on the same day,
7 I had a telephone conversation with Ms. Ballard, as I
8 had learned that she was, apparently, a part of this
9 case, as well.

10 I was then asked to go meet with Ms. Tappeiner,
11 which was on November 3rd, with the knowledge that
12 sentencing was scheduled November 16th of 2009. I
13 actually met with Ms. Tappeiner on the 3rd, and only one
14 time prior to sentencing, and it was for about five-and-
15 a-half hours.

16 We then met in Ms. Ballard's office, as she just
17 testified, on the 14th of November. And I believe the
18 trial -- or the sentencing phase began on that Monday.

19 Q Thank you.

20 MS. SHURLING: Your Honor, -- and I am mindful that
21 we're in a PCR proceeding, but to the extend that I am
22 going to ask Dr. Martin for expert opinion in the field
23 of forensic psychiatry at junctures in his testimony
24 here today, --

25 THE COURT: You're going to have to convince this

1 Court how it bears on the issue of effective assistance
2 of counsel, not in regards to the qualifications of Dr.
3 Martin, whose C.V. you've handed to me, but how it bears
4 relevance to the issues raised by your pleadings.

5 MS. SHURLING: I have pled an allegation that says
6 that either Dr. Martin or someone of equal credentials
7 should have been presented as a witness for the defense
8 during the trial.

9 THE COURT: And you have examined Mr. Macloskie at
10 length about that. But Dr. Martin is not a lawyer. And
11 that is an issue, a legal issue. And to the extent that
12 you plan on asking him whether or not he thinks he
13 should have been called in this trial; -- well, I don't
14 know what you're planning on doing, but I could assure
15 you, you're not going there. So, you're going to have
16 to give me more than you've just told me if you're going
17 to proceed with this line of questioning.

18 MS. SHURLING: Certainly.

19 THE COURT: Yes, ma'am.

20 MS. SHURLING: The prejudice prong of *Strickland*
21 *versus Washington*. I can argue --

22 THE COURT: I'm very aware of *Strickland*.

23 MS. SHURLING: I can argue error all day long, but
24 if I don't demonstrate the prejudice arising therefrom,
25 I can't win on the issue.

1 THE COURT: Are you going to qualify Dr. Martin as a
2 jury expert that the result would have been different
3 with the jury if such testimony had been presented?

4 MS. SHURLING: No, sir. I am going to introduce
5 testimony, if allowed, to demonstrate the prejudice to
6 my client from the defense not presenting him or a
7 similar expert in the case in chief.

8 THE COURT: That issue has already been raised and
9 is before the Court through your examination of Mr.
10 Macloskie. How will this help the Court on that issue,
11 since you've raised it, and I'm very aware of it, with
12 Dr. Martin?

13 MS. SHURLING: I cannot demonstrate prejudice unless
14 I make a proffer --

15 THE COURT: Exactly how do you plan to do so, Ms.
16 Shurling?

17 MS. SHURLING: To make a proffer as to what his
18 testimony would have been.

19 THE COURT: I'll let you proffer his testimony
20 briefly on this issue.

21 MS. SHURLING: Thank you.

22 BY MS. SHURLING:

23 Q Dr. Martin, we're going to go backwards for just a
24 minute. With regard to the sentencing proceeding, prior
25 to the sentencing proceeding, you knew that Ms.

1 Tappeiner had already been convicted, correct?

2 A Correct.

3 Q Do you have a copy of the sentencing transcript from
4 November 16, 2009?

5 A Yes, ma'am.

6 Q I'm going to ask you, if you will, to review a
7 couple of portions of your presentation before the
8 Court. If I could first get you to look at Page 12,
9 Lines 13 through 16.

10 It says:

11 *Actually, she has essentially been able*
12 *to come to grips with some --*

13 THE COURT: You don't need to read it. He's got a
14 copy, Counsel. Ask a question.

15 You told him Page 12, 13 through 19 [sic]. Ask a
16 question.

17 BY MS. SHURLING:

18 Q Have you located that portion of the testimony, Dr.
19 Martin?

20 A Yes, and I've read it.

21 Q Can you explain for us what you meant by that.

22 A I was being asked about treatment after my
23 assessment of Ms. Tappeiner. And I said I that believed
24 that she has come to grips with some of the horror of
25 what has happened. Her fragmentation of memory about

1 what has happened, I think, is already in the record. I
2 can support that that is true, from my assessment. But
3 what she's come to learn is that something has happened
4 while she was watching kids at her house, due to her use
5 of alcohol and some addictive medications, that may have
6 compromised her ability as an adult in the scenario that
7 was depicted on August 15th of 2008.

8 Q Was that statement intended to reflect that she had
9 admitted culpability of the crime to you?

10 A Ms. Tappeiner never admitted to any type of
11 aggression towards anyone else. What she admitted is
12 that she had fragments of memory that included some
13 sexual activity.

14 Q Thank you. If you could go back to Page 10, Lines
15 21 through 24.

16 A Yes, ma'am.

17 Q Specifically, if you can tell us what you meant by
18 she acknowledged responsibility for inappropriate sexual
19 behavior.

20 A She was telling me that she was essentially -- I
21 don't want to say babysitting, but she was the adult
22 that was at their house who was the person watching
23 movies with the kids and having pizza. And that she had
24 become, essentially, inebriated or intoxicated by the
25 substance I just described. And that she acknowledged

1 that, in her fragmented memory, that there was some
2 sexual activity going on and believed it to be
3 inappropriate. And she felt responsible for not being a
4 better parent, if you will, or parent surrogate in that
5 scenario.

6 Q And once again, that was not an admission of
7 being --

8 MS. WILSON: Your Honor.

9 THE COURT: Yes, ma'am. What's your objection, Ms.
10 Wilson?

11 MS. WILSON: Asked and answered.

12 BY MS. SHURLING:

13 Q Did she ever --

14 THE COURT: Let her ask a question, and then I can
15 rule on an objection. Ask a question, Ms. Shurling.

16 BY MS. SHURLING:

17 Q Did she ever admit to being the aggressor in the
18 situation with this young man?

19 A No.

20 Q Let's take a look at another statement you made
21 during sentencing on Page 13, Lines 4 through 9.

22 A Yes, ma'am.

23 is this a proffer?

24 Q Can you explain to us what you were trying to convey
25 in that portion of your remarks to the court.

1 A Yes. As we discussed early, with -- meaning Mr.
2 Macloskie and Ms. Ballard and I, is that there was a
3 concern about Ms. Tappeiner's risk to the community, for
4 example, which is, essentially, a sex offender risk
5 assessment, which I perform on, typically, a regular
6 basis. I said in that statement there, in my testimony,
7 that I did not believe she was a sexually violent
8 predator; she wasn't predatory; that this was
9 essentially an opportunity that was laid out due to her
10 intoxication with medications and inappropriate sexual
11 activity, to the best of her recollection, had taken
12 place. Not that she had taken advantage of the
13 opportunity, but an opportunity was there where she
14 believed that she was not of the frame of mind to have
15 perhaps been the parent or the guardian or the adult to
16 have drawn a line with the kind of behavior that was
17 alleged against her.

18 Q Moving on, again, to the bottom of Page 16, going
19 over to 17. Specifically, if you'd pay attention to the
20 statements made at the bottom of 16, starting on Line
21 22.

22 A Yes, ma'am.

23 Q When you say that she was concerned about damage or
24 scarring that she may have inflicted by her behavior,
25 can you clarify for us what you meant by that.

1 A That's still a reflection on what I've just
2 testified about. In terms of her behavior at this
3 gathering at her house, she should not have been
4 intoxicated with alcohol and Klonopin, and if there was
5 any inappropriate activity that was going on, she wasn't
6 of the mind set to have been able to monitor it, and
7 essentially, straighten it out as she should have. And
8 she --

9 What she has learned, I believe, from the trial or
10 from this investigation, is that she's heard from this
11 young man that he was harmed by this, and she is not
12 typically of the character of harming others.

13 Q So, when you referenced the damage she may have
14 inflicted, once again, that was not a reference to an
15 admission by her to being the aggressor or the actor in
16 the event?

17 A No, Ms. Shurling, she's never told me that she
18 actually perpetrated the crime.

19 Q Did she discuss with you what memories she did have
20 of the alleged event?

21 A Yes, ma'am.

22 Q Can you describe those to us.

23 A Yes. She remembered being at the house. That the
24 young man, the young lad in question, was there. His
25 two sisters, I believe, were there. Maybe some other

1 young folks were there. They were watching scary
2 movies. Her husband was there. They had ordered pizza.
3 She remembers having taken her medication.. She also
4 remembers having several glasses of alcohol.

5 She remembers that the movies that they were
6 watching were, apparently, horror-type films, and that
7 was making several of the children uncomfortable. And
8 so, a number of them left and went next door, back home,
9 to their home, or to somebody else's home nearby. And
10 that her husband went to bed -- had gone to bed
11 upstairs.

12 She remembers being downstairs, still watching
13 movies and eating, I think, pizza with the alleged
14 victim in this case. And as the evening grew on, it was
15 becoming more fragmented; that she believed that she saw
16 him on top of her, and wasn't really sure, but it seemed
17 like this was becoming very sexual.

18 I actually confronted her about what her activities,
19 aggression towards him, may have been. She could give
20 me none. And she was very upset and distraught by the
21 fact she couldn't remember exactly what may have
22 happened to her, and what he was actually doing with
23 her. And I approached, then, as I do in all my
24 evaluations, what I have been told. And she could not
25 confirm that anything that she had done would have

1 enabled or aggressed towards this young individual. And
2 so, the rest of it was pretty much fragmented, and those
3 are the major fragments that she could recall.

4 Q Would you take a look at Page 25 for me, Lines 11
5 through 14. Actually, 11 and 12. *While ingesting*
6 *alcohol, she demonstrated inappropriate behavior.*

7 A Yes, ma'am.

8 Q This is becoming somewhat redundant, but it's the
9 last one. When you said that she demonstrated redundant
10 -- I mean, inappropriate behavior, once again, was it
11 your intent to advise the court that she acknowledged
12 having acted inappropriately?

13 THE COURT: Yes, ma'am.

14 MS. WILSON: Objection, your Honor. Asked and
15 answered. He said himself that he's answered the
16 question two or three times.

17 THE COURT: I'll sustain that objection. Ask
18 another question, Counsel. I'm allowing you this
19 proffer.

20 MS. SHURLING: Thank you.

21 BY MS. SHURLING:

22 Q At this point, we're going to shift to -- your
23 evaluation of Ms. Tappeiner included a review of some of
24 her medical history. Is that correct?

25 A Yes, ma'am.

1 Q And -- your Honor, may I?

2 THE COURT: Just a moment, Counsel. Is there an
3 objection?

4 MS. WILSON: Yes, your Honor, there's an objection
5 to the mis --

6 THE COURT: Counsel approach.

7 OFF-THE-RECORD BENCH CONFERENCE;

8 PRESENT: THE COURT, MS. WILSON,

9 MS. SHURLING.

10 THE COURT: Step back. Proceed..

11 MS. SHURLING: Your Honor, may I approach?

12 THE COURT: You approach the witness.

13 BY MS. SHURLING:

14 Q Dr. Martin, would you identify this document.

15 A Yes, ma'am. This is a prescription record from
16 Walgreens Drugstore pharmacy, dated January 2005 through
17 August 2009, for Ms. Susan Tappeiner.

18 Q And did you, in fact, provide me this record from
19 the contents of your file?

20 A Yes, ma'am, I did.

21 Q Do you have any recollection here today where you
22 obtained these records?

23 A The only records I obtained for this entire case
24 came from either Mr. Macloskie or from Ms. Ballard.

25 Q Okay. And can you review for us, essentially, the

1 pharmaceuticals that are described as having been filled
2 by Walgreens pharmacy.

3 A Yes. In -- in 2008, she was getting Clonazepam,
4 which is Klonopin, one milligram, and 90 pills per
5 month, on the average, for a number of months there.
6 That eventually segued, let's see, to other sedatives to
7 include Lunesta and Ambien CR. And then, in 2009,
8 Alprazolam, which is also Xanax.

9 Q Thank you. Your Honor, I would state for the record
10 what I've already told the Court in chambers. I had
11 subpoenaed these records directly from Walgreens. They
12 were to be here, hopefully, by today. They did not
13 arrive until --

14 THE COURT: I'll allow you to leave the record open.
15 I understand from Ms. Shurling, who is an officer of
16 this Court, that she plans on getting authentic records
17 from Walgreens, pursuant to a subpoena, although, she
18 has not received them as of today. And she intends to
19 ask this Court to leave the record open to receive the
20 records, which she receives from Walgreens pursuant to a
21 subpoena. Is there any objection from the State of
22 South Carolina?

23 MS. WILSON: No, your Honor, there's no objection to
24 the evidence --

25 THE COURT: The record will remain open. Please

1. proceed.

2. MS. SHURLING: Thank you.

3. MS. WILSON: Excuse me, your Honor.

4. THE COURT: She does object to the introduction of
5. the unauthenticated record, which you have used with the
6. witness. So proceed with the understanding that,
7. ultimately, I'm leaving the record open when you get the
8. records from Walgreens to be admitted into the record.

9. MS. SHURLING: I understand. Thank you.

10. BY MS. SHURLING:

11. Q Tell us what kind of a drug Klonopin is.

12. A It's a --

13. Q Excuse me, first. I misspoke. This actually says
14. Clona -- Clonazepam. Is that the same thing as
15. Klonopin?

16. A Yes, that's the generic name.

17. Q Okay. And would you please describe for us what
18. kind of drug Klonopin is.

19. A Klonopin is in a family of medications that are
20. benzodiazepines, which are sedative hypnotics. They're
21. controlled substances that are monitored by the DEA, and
22. in South Carolina, by DHEC.

23. Q As a licensed psychiatrist, do you have a DEA
24. license to prescribe medications such as Klonopin?

25. A Yes, I do.

1 Q And in the course of your practice, you're familiar
2 with the dosages and treatment protocols for various
3 sedatives like Klonopin?

4 A Yes, ma'am.

5 Q Okay. For a 109-pound female, can you tell us what
6 kind of a dosage three a day of one milligram would be.
7 Is that a light dosage, a heavy dosage? What kind of
8 dosage is that for a 109-pound individual?

9 MS. WILSON: Your Honor, can I object to the
10 relevance. I'm not really sure what this has anything
11 to do with the allegations.

12 THE COURT: I've been wondering when that objection
13 was going to be made. Mrs. Shurling, you want to tell
14 us the relevance of this question on the issue of
15 effective assistance of counsel? It appears that you
16 want to qualify Dr. Martin not only as a forensic
17 psychiatrist, but as a pharmacologist. Tell me.

18 MS. SHURLING: Your Honor, he's a forensic
19 psychiatrist who prescribes Klonopin.

20 THE COURT: I understand he prescribes medicine.

21 MS. SHURLING: I am making a proffer to demonstrate
22 what the value of his testimony or of the testimony of
23 someone similarly credentialed would be at trial.

24 THE COURT: I'm going to put you on a short leash,
25 Ms. Shurling. You may answer this question, and let's

1 proceed.

2 MS. SHURLING: Thank you.

3 THE COURT: I'm going to be watchful on the
4 relevance, Counsel. I understand you're objection.

5 MS. WILSON: Thank you, your Honor.

6 THE COURT: Dr. Martin, you may answer this
7 question.

8 A Yes, sir.

9 BY MS. SHURLING:

10 A Three milligrams a day, which is what Ms. Tappeiner
11 also told me that was her average dose of Klonopin, I
12 would say was at least a medium dose. She would, on
13 occasion, take more than that.

14 Q What is the effect of combining Klonopin with
15 alcohol?

16 A There's an exacerbation or a worsening of the
17 sedative, hypnotic effects. There's an exponential
18 increase in intoxication. And alcohol and Klonopin
19 actually affect the same receptors in the brain. And
20 so, that is one reason why there is a potentiation of
21 effects.

22 Q What physical effect would the combination of
23 Klonopin and alcohol have on an individual?

24 MS. WILSON: Your Honor, --

25 THE COURT: Sustained. Move along, Counsel. And

1 that is sustained on the basis of relevance for this PCR
2 hearing. Now, let's proceed.

3 MS. SHURLING: Note my objection for the record,
4 your Honor.

5 THE COURT: You got an objection for the record.
6 Anything else?

7 BY MS. SHURLING:

8 Q Dr. Martin, would an individual under the effect of
9 Klonopin and alcohol experience symptoms that would
10 affect their motor skills?

11 MS. WILSON: Objection, your Honor, she's leading.
12 this is exactly the same question that she just asked.

13 THE COURT: Sustained on the grounds of leading.

14 BY MS. SHURLING:

15 Q Describe for us some of the physical symptoms you
16 would expect to see from someone impaired by the
17 combination of alcohol and this drug.

18 MS. WILSON: Objection, your Honor.

19 THE COURT: I'll allow him to answer that, but
20 Counsel, I want you to understand, you're asking him
21 such open-ended question now without dosages or
22 anything, that it becomes really unclear how this
23 affects effective assistance of counsel. I'm going to
24 allow this answer, and then we're going to move along.

25 You may answer that question, if you know, Dr.

1 Martin, in light of the way it was asked.

2 BY MS. SHURLING:

3 A As I understand the question, to a degree of
4 impairment, which would be an excessive dose of Klonopin
5 with alcohol, which should never be taken in
6 combination, and it says so on the bottle, that there is
7 going to be sedation. There is going to be
8 disorientation possibilities. There is going to be
9 memory loss. Benzodiazepines are very well known for
10 loss of memory, as well as inability to walk. Motor
11 skills are going to be impaired. If one were to drive,
12 this would clearly be a DUI.

13 Q Thank you. Had you been asked to become involved in
14 this case prior to the sentencing phase, would you have
15 been available as an expert witness in this case?

16 A Yes.

17 Q And would you have testified, if called upon to do
18 so, consistently with the testimony you have provided
19 here today?

20 A Yes.

21 MS. SHURLING: Thank you. No further questions.

22 THE COURT: Cross-examination.

23 DR. THOMAS VICTOR MARTIN

24 CROSS-EXAMINATION, MS. WILSON:

25 Q Please state for us what the understanding of your

1 testimony was in Ms. Tappeiner's case.

2 A I was asked, after the conviction, if I would do a
3 psychiatric evaluation and provide any type of
4 psychiatric diagnoses to Mr. Macloskie, which I did.
5 And that include anxiety disorder and a polysubstance
6 dependence. And I was also asked, after being told that
7 she was convicted of a sexual offense, whether or not
8 she would be a risk to the community as a convicted sex
9 offender. And I was also asked whether or not she were
10 to receive treatment, if she needed any treatment. And
11 if so, would that treatment be provided in prison. And
12 I was able to address all of those things.

13 Q You did everything you were asked. That's correct?

14 A I believe so.

15 Q And you testified to such at the sentencing hearing.
16 Is that correct?

17 A I believe I did.

18 MS. WILSON: Thank you.

19 THE COURT: Re-direct..

20 DR. THOMAS VICTOR MARTIN

21 RE-DIRECT EXAMINATION, MS. SHURLING:

22 Q When you were preparing for your role in this
23 sentencing, were you made aware that your client, or the
24 client, had not admitted her guilt?

25 MS. WILSON: Objection, your Honor. It's outside

1 the scope of our cross-examination.

2 MS. SHURLING: She asked him about --

3 THE COURT: Ho. Ho. I didn't ask for argument.
4 The objection's overruled. I'll allow him to answer
5 that question.

6 BY MS. SHURLING:

7 A I'm sorry. What was it, again?

8 Q When you were preparing for your presentation for
9 sentencing, were you made aware that the client, Ms.
10 Tappeiner, had not admitted committing these acts in the
11 presence of the jury?

12 A I believe she told me that before we went to
13 sentencing. But -- and I -- I had no way of knowing one
14 way or another, cause she couldn't confirm that she had
15 done it. She said she hadn't done it, and her memory
16 that she reported to me did not substantiate that she
17 had done anything wrong, except for, perhaps, being
18 inebricated. If that's what you're asking.

19 Q Thank you. And would the combination of drugs, this
20 drug and alcohol, in your professional judgment, affect
21 someone's competence?

22 MS. WILSON: Your Honor.

23 THE COURT: Asked and answered. Sustained.
24 Anything else, Counsel?

25 MS. SHURLING: No further questions, your Honor.

1 MS. WILSON: Nothing from the State, your Honor.

2 THE COURT: Dr. Martin, I assume that you are
3 interested in leaving the courtroom, unlike others
4 present. Any objection to this witness being excused
5 from counsel for the applicant?

6 MS. SHURLING: I would appreciate him being excused,
7 your Honor.

8 THE COURT: How about it, Ms. Wilson?

9 MS. WILSON: Nothing from the State.

10 THE COURT: Dr. Martin, you may step down from the
11 witness stand, and you're excused from the hearing in
12 connection with this matter.

13 A Thank you, sir.

14 THE COURT: Please call your next witness.

15 MS. SHURLING: Jim Perkins, please, your Honor.

16 MADAM CLERK: Please place your left hand on the
17 Bible and raise your right hand. Do you solemnly swear
18 or affirm that the testimony you give to the Court in
19 this trial shall be the truth, so help you God?

20 MR. PERKINS: I do.

21 THE COURT: Watch your step for me, there, please.

22 MR. PERKINS: Yes, sir.

23 THE COURT: Step up, have a seat, get comfortable,
24 pull the chair up. Use the microphone. State your full
25 name, spell your last name for the record, please.

1 MR. PERKINS: James Perkins, P/e/r/k/i/n/s.

2 MS. SHURLING: Thank you. Your Honor, before we
3 begin, I apologize. I lost track of where we were. Did
4 we get a copy of Dr. Martin's C.V. marked as an exhibit?

5 THE COURT: No, we did not, Counsel. Let's proceed,
6 now. There was no objection to his qualifications.
7 Let's proceed.

8 Direct exam --

9 MS. WILSON: Is that coming into the record?

10 THE COURT: It's not part of the record. It wasn't
11 offered. We're proceeding. If the court reporter wants
12 to mark it as to what she's referring to, that's fine.
13 There was no objection to qualification.

14 Direct examination, Ms. Shurling. Let's proceed.

15 COPY OF CURRICULUM VITAE OF
16 DR. THOMAS VICTOR MARTIN MARKED
17 APPLICANT'S EXHIBIT NUMBER 4,
18 FOR PURPOSES OF IDENTIFICATION.
19 JAMES PERKINS

20 DIRECT EXAMINATION, MS. SHURLING:

21 Q Mr. Perkins, how do you know Susan Tappeiner?

22 A I met Susan and Mike in, I think, '06. They worked
23 at the photo shop.

24 Q And did you at some point have business dealings
25 with Ms. Tappeiner?

1 A I did.

2 Q Can you describe those for us.

3 A We -- we used to travel to motorcycle weeks in
4 Daytona, Myrtle Beach, Panama City, a 24-foot trailer.
5 We had women's apparel, as well as men's apparel. And
6 on occasion, we contracted with Susan to go along with
7 another girl, and they were sales agents.

8 Q And the women's apparel that you have described, can
9 you describe for us what type of apparel we're talking
10 about.

11 A Well, we had evening gowns. We also had some
12 provocative bikini bottoms, halter tops. Shorts. We
13 had any number of tops that in fluorescent-type colors
14 with motorcycles, with rhinestones.

15 Q Okay. And in the course of her employment with you,
16 did she receive quantities of the merchandise that
17 you're describing at her home?

18 MS. WILSON: Your Honor, I'm going to object. I
19 believe this has something to do with the fact Ms.
20 Tappeiner sold provocative underwear, and that is one of
21 the allegations in this amended application that Ms. --

22 MS. SHURLING: I'm --

23 MS. WILSON: Ms. --

24 THE COURT: Just a moment. Ms. Shurling, don't
25 interrupt when someone else is speaking. I don't let

1 her interrupt you. I expect you to be civil to your
2 opponent. And don't shake your head and argue unless
3 the Court asks you for argument.

4 The objection at this point is sustained to the
5 extent that you're objecting that she has withdrawn
6 any allegation of ineffective assistance of counsel that
7 she tried to serve on you today. Now, I'm still waiting
8 to understand the relevance of this testimony.

9 MS. WILSON: Thank you, your Honor.

10 THE COURT: Proceed, Ms. Shurling.

11 MS. SHURLING: My question was not, your Honor, for
12 the record, directed to any of the allegations I
13 withdrew.

14 THE COURT: Ms. Shurling, I'm not asking you for a
15 comment. Ask a question.

16 BY MS. SHURLING:

17 Q Did you at various junctures provide Ms. Tappeiner
18 with quantities of the clothing that you marketed?

19 A Yes.

20 Q Did that clothing line include panties?

21 A Yes.

22 MS. WILSON: Your Honor, --

23 MS. SHURLING: That's all I wanted to get in the
24 record.

25 THE COURT: Then, sit down.

1 MS. SHURLING: On that point.

2 THE COURT: Cross-examination.

3 MS. SHURLING: No, sir, your Honor.

4 THE COURT: Oh, I thought you were finished.

5 MS. SHURLING: I meant on that point.

6 THE COURT: Oh. Proceed.

7 BY MS. SHURLING:

8 Q Mr. Perkins, were you in the Tappeiner home on a
9 regular basis during that time period?

10 A Not a regular basis, but on occasion, yes.

11 Q And were you there for any other reason other than
12 the clothing line?

13 A I'm a contractor in Hilton Head Island. Mike had
14 contracted with me to pressure wash their home at one
15 point in time. We painted the interior of the house.
16 And I also assisted Mike in laying hardwood floors.

17 Q Do you have any recollection here today of the time
18 period when you would have been pressure washing the
19 house?

20 A That was in June or July of '08.

21 Q And is there anything in particular about your
22 involvement in pressurizing the house that you recall
23 with reference to the victim in this case?

24 A Yes.

25 Q Can you share that with the Court, please.

1 A I had two of my employee's with me. We had our
2 pressure washers, ladder, so on and so forth. The first
3 thing that I do when I approach a complex, I look for
4 the water bibs, water outlets. We pulled up out front.
5 The fellow started to unload the -- the vehicle. When I
6 walked around the back side the house, the alleged
7 victim ran out of their back porch.

8 Q Did you know the victim by sight at that time?

9 A By sight, yes.

10 Q Had you had occasion to see him at the Tappeiner
11 residence on previous occasions?

12 A Not at his -- well, at the residence, a couple
13 times, yes. When I was painting, he was there. I
14 believe that him and his sisters come in one night when
15 Mike and I were doing hardwood floors.

16 Q On the occasion you've just described when you were
17 power washing, you said he came out of where from the
18 house? Where was that?

19 A They had a sunroom attached to the back of the
20 house, and he come out of that.

21 Q Okay. And did you see anyone else at the residence
22 on that occasion?

23 A No.

24 Q And Mike and Susan Tappeiner were not home.

25 A No.

1 Q Okay. Thank you. Are you familiar with the
2 Tappeiner dogs, their pets?

3 A Yes.

4 Q How many of them were there?

5 A Three, I believe. Possibly four, but I think three.

6 Q In your experience, were they noisy pets?

7 A Upon disruptions, yes.

8 Q Can you describe their behavior when non-family
9 members were on the property?

10 A Well, even when I went into the home, you know, I'm
11 a non-family member, but I mean, they -- they barked all
12 the time. You know, they were hyper.

13 Q You said you traveled with Susan.

14 A She come to Myrtle Beach twice, Daytona Beach twice,
15 and Panama City once.

16 Q Can you describe for us, based on your personal
17 observations, what her patterns were with regard to
18 drinking alcohol.

19 MS. WILSON: Objection, your Honor. I don't see how
20 this is relevant.

21 THE COURT: Counsel approach.

22 OFF-THE-RECORD BENCH CONFERENCE;

23 PRESENT: THE COURT, MS. WILSON,

24 MS. SHURLING.

25 THE COURT: The objection as to relevance is

1 sustained. Ask a question, Ms. Shurling.

2 MS. SHURLING: Your Honor, I need to put my
3 objection on the record.

4 THE COURT: The objection from the State is on the
5 record. They're objecting to the testimony of this
6 witness as to relevance. I sustained that objection.

7 MS. SHURLING: I understand, your Honor, and I'd
8 like to object to your ruling on the record.

9 THE COURT: Go ahead and proceed. You called the
10 witness. Just ask a question.

11 MS. SHURLING: Your Honor, I need to put my
12 objection to your Honor's previous ruling on the record.

13 THE COURT: My ruling was to sustain the State's
14 objection as to relevance.

15 MS. SHURLING: And you didn't let me make an
16 argument as to why it was relevant.

17 THE COURT: Because I don't need an argument. When
18 the Court asks for argument, I'll let you argue. I'm
19 not asking for argument. Proceed and ask a question of
20 this witness.

21 MS. SHURLING: Your Honor, I am asking to be allowed
22 to proffer for the record --

23 THE COURT: And I'm allowing you to proffer this
24 witness. Proceed.

25 MS. SHURLING: Okay.

1 THE COURT: I've sustained her objection as to
2 relevance.

3 MS. SHURLING: But you will allow me to proffer.

4 THE COURT: I'm allowing you to proffer this
5 witness. Let's proceed.

6 MS. SHURLING: Thank you.

7 BY MS. SHURLING:

8 Q Were you personally familiar with Susan's drinking
9 habits?

10 MS. WILSON: Objection, your Honor. This is just
11 what I objected to and you sustained it. Same question.

12 MS. SHURLING: He just --

13 THE COURT: I understand. I'm going to allow her to
14 proffer it for the record.

15 MS. WILSON: Okay.

16 THE COURT: You may answer the question.

17 BY MS. SHURLING:

18 A Are you asking in regard to like when we were on
19 those five locations?

20 Q My question was, based on your personal experience
21 and observations, --

22 A Yes. Yes.

23 Q -- are you familiar with her drinking patterns?

24 A Yes.

25 Q Can you describe for us what kind of drinker she was

1 in your experience, based on your personal observations.

2 A When we made those five trips, you know, we would
3 conclude our business at like 8:00 o'clock in the
4 evening. All right. We would go out -- or go to the
5 rooms. All right. Or a lounge. Maybe have two, three
6 drinks, and that was it. Around Hilton Head, there was
7 occasions where her and Mike would sit down and have one
8 or two drinks with us, always controlled. Always
9 controlled.

10 Q Thank you. With regard to your relationship with
11 Ms. Tappeiner in general, are you familiar with her
12 general reputation in the community for veracity? For
13 truthfulness.

14 A I've always known her as a very, very truthful
15 woman.

16 Q Have you ever heard anyone in the community express
17 a view that she was not a truthful person?

18 A No.

19 Q If you had been called upon to be a witness on
20 behalf of Ms. Tappeiner at her trial, would you have
21 been willing to appear and would you have testified
22 consistently with the testimony you've presented here
23 today?

24 A Absolutely.

25 MS. SHURLING: Thank you. No further questions.

1 THE COURT: Cross-examination.

2 MS. WILSON: Nothing from the State.

3 THE COURT: You may step down. As to this witness,
4 may he be excused?

5 MS. SHURLING: Sorry, your Honor.

6 THE COURT: Any objection from you, Ms. Wilson?

7 MS. WILSON: No objection.

8 THE COURT: You're excused from the trial of this
9 case.

10 A Thank you.

11 THE COURT: Call your next witness.

12 MS. SHURLING: Dave Sanders.

13 THE COURT: Please come around and be sworn by the
14 clerk of court.

15 MADAM CLERK: Right here, sir. Please place your
16 left hand on the Bible. Raise your right hand. Do you
17 solemnly swear or affirm that the testimony you give to
18 the Court in this trial shall be the truth, so help you
19 God?

20 MR. DAVID CLIFTON SANDERS: I do.

21 THE COURT: Watch your step for me right there,
22 please, sir.

23 MR. SANDERS: Um-hmm.

24 THE COURT: Step up and pull that chair back and
25 have a seat. Make yourself comfortable. Adjust the

1 microphone in the chair to your comfort and the
2 microphone to your height. State your full name, spell
3 your last name for the court reporter.

4 MR. SANDERS: My name is David Clifton Sanders,
5 S/a/n/d/e/r/s.

6 THE COURT: Your witness, Counsel. Direct
7 examination.

8 DAVID CLIFTON SANDERS

9 DIRECT EXAMINATION, MS. SHURLING:

10 Q Mr. Sanders, what is your relationship to the
11 applicant, Susan Tappeiner?

12 A I'm her father.

13 Q And did you hire Mr. Macloskie?

14 A Yes, I did.

15 Q Did you participate in pre-trial preparations of
16 your daughter's defense?

17 A We went to some infrequent meetings, but primarily,
18 the -- the lawyer, Macloskie, would -- would speak to
19 Susan in privacy. With us, it was a lot of homilies and
20 discussions that were really irrelevant to her being on
21 trial.

22 Q During the time period of this alleged incident back
23 in the summer of 2008, were you aware of your daughter's
24 prescription medications?

25 A Susan worked for us for two or three years; and

1 there was a period of time approaching that alleged
2 incident that her behavior was different to us, but we
3 did not understand the drugs that she was taking and the
4 effect, apparently, that they had in combination with
5 the alcohol. She was -- she had panic attacks. She was
6 just not herself.

7 Q You've said that she worked in your business. She
8 and your son-in-law also lived in the same community
9 that you live in?

10 A Well, they lived in Bluffton. And at the time, we
11 were living on Spring Island.

12 Q Would it be fair to say you saw your daughter on an
13 almost daily basis?

14 A Yes. Yes.

15 Q We're you familiar with her drinking patterns?

16 A Well, I -- not in excessive. It was, you know, the
17 two or three drinks at a party or two or three drinks
18 when she came over to our house, but we never saw her in
19 an excessive situation.

20 Q Did you have any concerns back in the summer of '08
21 that your daughter was mixing prescription medications
22 and alcohol?

23 A We just noticed the change in behavior, which we
24 couldn't understand. And it didn't -- we didn't
25 understand until after the incident of the combination

1 of the drugs that she was taking and alcohol, the impact
2 it could have.

3 Q Thank you. Did you share those concerns with
4 Attorney Macloskie?

5 A Yes, we did.

6 Q Okay. Thank you. And prior to trial, were you
7 aware of any plea negotiations in this case?

8 A Was not aware of any plea negotiations. The -- the
9 trial came eight months after the alleged incident, and
10 we were made aware of very little. And we were made
11 aware that it was coming to a trial the day before. The
12 lawyer called us for a meeting Sunday, the day before
13 the trial Monday. And it was obvious to me that
14 preparation was just -- was just not there.

15 Q Your daughter and son-in-law's home that's been
16 discussed here today, did you assist them in purchasing
17 that house?

18 A Yes, I did. I co-signed the note and helped them
19 purchase the home.

20 Q And were you involved -- did they build it, or did
21 they buy it already built?

22 A It was already built. It was -- it was a -- it was
23 not a custom home. It was a spec home. And it was one
24 of several models that they purchased.

25 Q When you were processing the closing of this house

1 and the loan, which you were co-signing, were you
2 provided copies of a floor plan of the residence?

3 A Yes, we obtained those directly from the builder.
4 And that model was exactly the -- the same as in the
5 brochure on that -- on that model.

6 Q And at my request, have you provided me with a copy
7 of what you were given by the builder during --

8 A Yes, I did. Yes, I did.

9 Q -- the closing of the house.

10 A Right.

11 MS. WILSON: Thank you. Oh, you want it back.

12 MS. SHURLING: No, I want you -- read the page. I'm
13 sorry. I don't have but one copy.

14 MS. WILSON: Okay.

15 MS. SHURLING: I'll get another.

16 May I approach, your Honor?

17 THE COURT: You may.

18 BY MS. SHURLING:

19 Q If you would take a look at that for me and identify
20 it, if you can.

21 A Yeah. Yes, as you can see, I even initialed it on
22 -- in '04. And this was a Centex home. They -- they
23 were the developer of the division. And that is the
24 home that they bought.

25 Q Thank you. And for the record, the second page of

1 this document, the floor plan contains dimensions for
2 the various rooms on the floor plan?

3 A And that home was built exactly as that drawing
4 portrays.

5 Q And those dimensions were on this document when it
6 was given to you by the builder. That's not something
7 you put on there.

8 A No. No, that was correct.

9 MS. SHURLING: Your Honor, I would move to introduce
10 this as an applicant's exhibit.

11 THE COURT: Any objection?

12 MS. WILSON: No objection, your Honor.

13 THE COURT: What number, Wanda?

14 COURT REPORTER: We're up to Number 5, your Honor.

15 THE COURT: Applicant's Number 5, without objection.

16 COPY OF DOCUMENT REFERRED TO AS

17 FLOOR PLAN MARKED APPLICANT'S

18 EXHIBIT 5, AND ENTERED AS EVIDENCE.

19 THE COURT: Proceed, Counsel. Ask a question.

20 MS. SHURLING: I have no further questions of Mr.
21 Sanders.

22 THE COURT: Very well. Cross-examination.

23 MS. WILSON: No question, your Honor. I just
24 request a five-minute break so that I can use the
25 restroom.

1 THE COURT: Very well. We'll take five minutes.

2 You may step down, Mr. Sanders.

3 A Thank you, Judge.

4 OFF THE RECORD 3:30 P.M.

5 BACK ON THE RECORD 3:35 P.M.

6 BY THE COURT:

7 THE COURT: Thank you. Please be seated. Call your
8 next witness.

9 MS. SHURLING: Your Honor, Todd Oomens, please.

10 THE COURT: Please come around and be sworn by the
11 clerk of court.

12 MADAM CLERK: Put your left hand on the Bible.
13 Raise your right hand. Do you solemnly swear or affirm
14 that the testimony you give to the Court in this trial
15 shall be the truth, so help you God?

16 MR. TODD OOMENS: Yes.

17 THE COURT: Watch your step for me on that step-up.
18 Have a seat and make yourself comfortable. Pull the
19 chair up. Adjust the microphone. State your full name,
20 spell your last for the court reporter.

21 MR. OOMENS: My name is Todd Oomens, your Honor.

22 T/o/d/d, O/o/m/e/n/s.

23 TODD OOMENS

24 DIRECT EXAMINATION, MS. SHURLING:

25 Q Mr. Oomens, what is your profession?

1 A I'm a videographer. I have a production company on
2 Hilton Head Island.

3 Q And what is that company called?

4 A It's Snemoo Productions. It's my last name spelled
5 backwards.

6 Q Thank you. And at my request, did you go with me to
7 the Tappeiner home and create a video of the interior of
8 the residence?

9 A Correct.

10 Q And have you just now handed me the original of that
11 C.D.?

12 A Yes.

13 Q Thank you.

14 MS. SHURLING: Your Honor, I would ask that the
15 clerk of court staff assist me in playing this.

16 THE COURT: Just a moment. Is there -- have you
17 shown this to Counsel for the State of South Carolina?

18 MS. SHURLING: I have. I'm sor --

19 MS. WILSON: I haven't seen the contents of the
20 video, but I know there is a video.

21 THE COURT: I see. Is there an objection?

22 MS. WILSON: Your Honor, I would object to
23 relevance. That's about it.

24 THE COURT: Well, it's a little hard for me to rule
25 on this when I haven't seen the video, so I'm going to

1 allow her -- how long is the video, Ms. Shurling?

2 MS. SHURLING: I would say six or seven minutes.

3 THE COURT: Put it in the television and let's look
4 at it, and I'll rule, then, on the admissibility.

5 MADAM CLERK: Are you wanting to play it for the
6 witness, or do you just want to play it?

7 MS. SHURLING: Your Honor, --

8 THE COURT: Counsel.

9 MS. WILSON: I can stand up here.

10 THE COURT: No, you come around here so you can see
11 it, too, since, apparently, nobody's seen it.

12 REPORTER'S NOTE: Video was played.

13 BY THE COURT:

14 THE COURT: Very well. Ms. Shurling, you want to
15 share with the Court why you think this is relevant.

16 MS. SHURLING: Your Honor, we had alleged in our
17 application that defense counsel should have requested
18 either a view of the scene by the jury, or in the
19 alternative, --

20 THE COURT: I'm aware of that from the questions you
21 asked Mr. Macloskie.

22 MS. SHURLING: Or alternatively, presented
23 demonstrative evidence from which the jury could have
24 gleaned the same benefit as they would have by attending
25 the scene.

1 THE COURT: And while I do not believe a PCR hearing
2 is an attempt to re-try a case on what counsel should
3 have done, I realize that you look at the second prong
4 of *Strickland*. The objection as to relevance is
5 sustained. I will allow her to proffer the video as
6 part of the record of this hearing. Hand it to the
7 court reporter. It is not admitted into evidence. The
8 objection is sustained. However, I'll allow you to
9 proffer it so the appellate court can see what you
10 offer.

11 MS. WILSON: Thank you, your Honor.

12 THE COURT: Please proceed with this witness.

13 BY MS. SHURLING:

14 Q For the record, --

15 THE COURT: Let the court reporter mark that,
16 please. Did she get it out of the -- is that the one
17 that you --

18 MS. SHURLING: It's --

19 THE COURT: Is that your copy or is that the one she
20 played?

21 MS. SHURLING: It's the one she played, your Honor.

22 THE COURT: Mark it as Applicant's, for
23 identification, since I sustained the objection.
24 Proceed.

25 MS. WILSON: Did that fix -- for I.D.?

1 MS. SHURLING: I was waiting for the court reporter
2 to finish marking the exhibit.

3 THE COURT: Just hold it. Hold it. I.D. only. One
4 at a time. Tell me when you're ready, Wanda.

5 COURT REPORTER: This is Applicant's 6.

6 THE COURT: No, it's not Applicant -- well, if you
7 want consecutive numbers, it'll be Applicant's 6 for
8 identification only.

9 COURT REPORTER: Yes.

10 THE COURT: It's the first one for I.D. only. All
11 right, Ms. Shurling.

12 VIDEO OF APPLICANT'S HOME MARKED

13 APPLICANT'S EXHIBIT NUMBER 6, FOR

14 PURPOSES OF IDENTIFICATION.

15 BY MS. SHURLING:

16 Q Mr. Oomens, This video that we just viewed here in
17 the courtroom, is that the entirety of the video that
18 you took from beginning to end?

19 A Yes, it is, from start to finish, and the time codes
20 burned onto the DVD, so there's no editing involved.

21 Q That was my next question. So was not edited in any
22 way.

23 A No, it wasn't.

24 Q And did you use any kind of special lenses that
25 would magnify through the viewfinder or anything that

1 would alter or distort the image on this video?

2 A No, I did not.

3 MS. SHURLING: No further question.

4 THE COURT: Cross-examination.

5 MS. WILSON: Nothing from the State.

6 THE COURT: As to this witness, Ms. Shurling, may he
7 be excused?

8 MS. SHURLING: I would ask that he be excused, your
9 Honor.

10 THE COURT: Any objection, Ms. Wilson?

11 MS. WILSON: No objection.

12 THE COURT: You may step down and you are excused.
13 Call your next witness.

14 MS. SHURLING: I would ask for Elizabeth Sanders to
15 come to the stand, please.

16 THE COURT: You come around, please, and be sworn by
17 the clerk.

18 MADAM CLERK: Place your left hand on the Bible.
19 Right here. Raise your right hand. Do you solemnly
20 swear or affirm the testimony you give to the Court in
21 this trial shall be the truth, so help you God?

22 MS. ELIZABETH W. AUERBACH: Yes.

23 THE COURT: Watch your step right here. Step up.
24 Move that chair. Have a seat. Adjust the chair.
25 Adjust the microphone to your height. It's going to

1 amplify your voice. State your full name. Spell your
2 last name for the record.

3 MS. AUERBACH: Elizabeth W. Auerback.

4 MS. SHURLING: I apologize. I thought you'd gone
5 back to your maiden name.

6 MS. WILSON: Could you spell that one more time?
7 I'm sorry.

8 MS. AUERBACH: A/u/e/r/b/a/c/h.

9 MS. WILSON: Thank you.

10 MS. AUERBACH: You're welcome.

11 ELIZABETH W. AUERBACH

12 DIRECT EXAMINATION, MS. SHURLING:

13 Q Will you pronounce it for me.

14 A Auerbach.

15 Q Lizzie.

16 A Um-hmm.

17 Q I'm sorry. I can't say that last name. I
18 apologize. It's fairly apparent, but will you state for
19 the record your relationship to the applicant.

20 A My twin sister.

21 Q Your identical twin sister.

22 A Identical twin sister.

23 Q I hate to do this to any woman, any time, anywhere,
24 but are you and your sister the same height?

25 A She's maybe half-inch taller.

1 Q And how much do you weigh?

2 A 108.

3 Q 108. Were you working at your father's photography
4 store at the same time your sister was in the summer of
5 '08?

6 A No. No.

7 Q You were not.

8 A No.

9 Q Did you frequently see your sister during that
10 summer?

11 A Yes.

12 Q Were you married at that time?

13 A Yes.

14 Q And who is your husband?

15 A Claude Eric Auerbach.

16 Q And did you and your husband socialize frequently
17 with your sister and her husband?

18 A Quite often. Dinner parties.

19 Q Were you familiar with your sister's drinking habits
20 during that summer?

21 A Yes.

22 Q Can you describe them for the Court.

23 A She and I would drink a couple glasses of wine.
24 Enjoy. I had a home with a pool. We'd sit around the
25 pool, have a couple glasses of wine. Maybe a mixed

1 vodka drink here and there.

2 Q Were you aware that she was taking prescription
3 medications at the same time?

4 A Yes.

5 Q Did you ever have occasion to express concern to
6 your sister about her mixing those two substances?

7 A Yes.

8 Q Did you ever have occasion to see your sister when
9 she'd had more than a couple glasses of wine and taken
10 her medication?

11 A Yes.

12 Q Can you describe, based on your own personal
13 observations, what effect it would have on her when she
14 drank on top of her prescription meds.

15 MS. WILSON: Your Honor, objection.

16 THE COURT: Sustained. She's not qualified to give
17 an opinion about this. Counsel, I'll allow you to
18 proceed. I understand the allegation. We're dealing
19 with effective assistance of counsel. Proceed.

20 BY MS. SHURLING:

21 Q I'm not asking for your medical opinion. I'm asking
22 your personal observations.

23 THE COURT: Give her a date, Counsel.

24 Q During the summer of 2008, when your sister would
25 drink heavily --

1 A She would get very -- very loopy.

2 Q -- on top of her medications, describe for us your
3 personal observations concerning how it affected her.

4 A She would get very loopy and very almost out of it,
5 and she was not able to communicate very well at all.
6 And it really upset me.

7 Q Can you describe any other physical symptoms that
8 appeared as a result of that combination.

9 A She just seemed to get kind of sloppy, and just not
10 able to really communicate well.

11 Q Did you ever see her have difficulty walking?

12 A Um-hmm. Yep. I've seen her fall into the wall.
13 Clumsy.

14 Q Pardon me.

15 A Clumsy.

16 Q I did not mean to interrupt you. Have you ever seen
17 your sister pass out?

18 A Not really pass out, but when she'd go to bed, she
19 would just be out, and you couldn't even wake her.

20 Q You could not wake her?

21 A Huh-um.

22 COURT REPORTER: Is that no?

23 A You could not wake her. She would be out, like
24 passed out. Almost like a zombie state.

25 Q And were you, on occasions, at your sister's home?

1 A Yes.

2 Q Did you ever have occasion to see the alleged victim
3 in this case over at her house?

4 A No.

5 MS. SHURLING: No further questions.

6 THE COURT: Cross-examination.

7 MS. WILSON: Nothing from the State.

8 THE COURT: As to this witness?

9 MS. SHURLING: Nothing further, your Honor.

10 THE COURT: May she be excused if she desires to do
11 so?

12 MS. SHURLING: She can, your Honor.

13 THE COURT: Any objection, Ms. Wilson?

14 MS. WILSON: No objection.

15 THE COURT: You may step down, and you're excused.
16 If you want to remain with us, that'll be fine. Call
17 your next witness.

18 MS. SHURLING: Your Honor, I would call the
19 applicant, Susan Tappeiner.

20 THE COURT: Please come around and be sworn by the
21 clerk of court.

22 MADAM CLERK: Please place your left hand on the
23 Bible. Raise your right hand. Do you solemnly swear or
24 affirm that the testimony you give to the Court in this
25 trial shall be the truth, so help you God?

1 APPLICANT TAPPEINER: I do.

2 THE COURT: Has she got on leg chains? Will you
3 help her right there. She's got on leg chains. I don't
4 want her on that step with them.

5 APPLICANT TAPPEINER: Thank you.

6 THE COURT: State your full name.

7 APPLICANT TAPPEINER: Susan Tappeiner.

8 T/a/p/p/e/i/n/e/r.

9 THE COURT: Your witness, Counsel. Direct
10 examination.

11 APPLICANT SUSAN TAPPEINER

12 DIRECT EXAMINATION, MS. SHURLING:

13 Q Susan, we have to lay a couple of things to rest
14 right up front. Okay?

15 A Okay.

16 Q When you first came to me as a potential lawyer, you
17 had not yet withdrawn your direct appeal. Is that
18 correct?

19 A Correct.

20 Q And I advised you, did I not, that if you withdrew
21 your direct appeal, that you would effectively be
22 waiving the right at a later date to raise allegations
23 of ineffective assistance of appellate counsel against
24 me if I was going to be your PCR lawyer?

25 A Yes, you did.

1 Q Now, I explained to you, did I not, that ineffective
2 assistance of appellate counsel was one of the areas
3 that you had a right to raise in a PCR?

4 A Yes.

5 Q And that if you had any questions about the advise I
6 had given you with regard to a direct appeal, you would
7 need to get a different lawyer to be your PCR lawyer.

8 A Yes.

9 Q You understood that.

10 A Yes, I did.

11 Q Okay. And do you feel anyone's coerced or in any
12 other way forced you to give up your direct appeal?

13 A No, I do not.

14 Q You received a sentence of ten years, suspended of
15 service of five.

16 A Yes.

17 Q On a lesser-included offense, which carried a
18 maximum penalty of how much? How much could you have
19 gotten on the five?

20 A Twenty years.

21 Q Pardon?

22 A Are you saying the extent of the --

23 Q What was the exposure? How much could the judge
24 have given you, maximum?

25 A Twenty years.

1 Q Twenty years.

2 A Right.

3 Q And you are currently scheduled to maximum out your
4 sentence when?

5 A February 1, 2014. Ten months.

6 Q Okay. And you and I have discussed that fact at
7 great length; haven't we?

8 A Yes, we have.

9 Q Have I explained to you the risks of going forward
10 with this PCR?

11 A Yes, you have.

12 Q Did I tell you that, under South Carolina law, if
13 you were to win a new trial, and go back and be re-
14 convicted, that the presiding judge would not be in any
15 way bound or restricted by the penalty that Judge Mullen
16 gave you at this trial?

17 A Yes, you have explained that.

18 Q And that, theoretically, the judge could give you up
19 to 20 years.

20 A Yes.

21 Q And again, you're scheduled to max out in February.

22 A Yes.

23 Q Have I also explained to you that if we were to be
24 blessed with a favorable outcome from Judge Buckner,
25 that there is a high degree of probability that that

1 State would appeal his Honor's decision?

2 A Yes, you have.

3 Q And what have I told you with regard to the length
4 of a PCR appeal?

5 A Six months to a year. It's just unpredictable.

6 Q And I explained to you that we could ask for an
7 appellate bond during the PCR appeal, but there was no
8 guarantee you'd get one; didn't I?

9 A Yes.

10 Q So, realistically, you could win a new trial, and
11 end up not having this PCR resolved until after you
12 would have maxed out anyway.

13 A Yes.

14 Q You understand that.

15 A Yes, I do.

16 Q With all that being true, why do you want to do this
17 PCR?

18 A Because I want the truth to come out.

19 Q And you understand the risk.

20 A Yes, I do.

21 Q You understand that, at the end of the day, you
22 could get convicted again and still be on the registry
23 for the rest of your life.

24 A Yes, I do.

25 Q Okay. And you understand that, as much as you're

1 looking forward to going home and being with your family
2 in February, doing this and trying to get another day in
3 court could delay that.

4 A Yes.

5 Q Are you sure you want to go forward with this?

6 A Yes, I'm sure.

7 Q No reservations.

8 A No reservations whatsoever.

9 MS. SHURLING: Does your Honor have any questions on
10 that?

11 THE COURT: I have no questions of this witness on
12 that matter. Proceed.

13 MS. SHURLING: Thank you, your Honor.

14 BY MS. SHURLING:

15 Q As your trial date was approaching, did you have
16 meetings with Mr. Macloskie about planning for your
17 trial?

18 A Actually, he told me that there was not going to
19 move -- probably most likely not going to go to trial.
20 I never was told we were going to trial.

21 Q Well, at some point, it had to become apparent it
22 was going to go to trial.

23 A The weekend prior to. That Friday, I believe he
24 told us that we were going to trial the following
25 Monday.

1 Q Okay. When you say he told you it wasn't going to
2 go to trial, probably was --

3 A He just --

4 Q The nice lady in front of you has to write down
5 every word we say. I'm bad about doing it. I'm the
6 worst. I'm the pot calling the kettle black. But try
7 not to talk until I finish.

8 A Um-hmm.

9 Q Did he, when he said it was probably not going to go
10 to trial, did he say why he didn't think it was going to
11 go to trial?

12 A He didn't think that he would lose, I would assume.

13 Q Pardon?

14 A He didn't think he was going to lose. I mean, he
15 was very confident in the outcome of the case for me,
16 because of the circumstances and the lack of evidence.

17 Q He was confident in the outcome at a trial? I
18 thought you said he said there wasn't going to be a
19 trial.

20 A Which is, I guess, in the outcome of the whole
21 situation.

22 Q Okay. Did he ever come to you with any plea offers
23 from the State?

24 A No, never.

25 Q Did he ever ask you for your permission to approach

1 the State about an offer or for you to offer to plead to
2 something?

3 A No, never.

4 Q Okay. Did you have discussions with Mr. Macloskie
5 about putting up a defense at your trial?

6 A Not that I recall.

7 Q Did Mr. Macloskie discuss with you the decision of
8 calling your husband, Mike, as a witness?

9 A I know we had discussed it, but not to great length.
10 Not that I knew to a fact that he was going to be
11 called.

12 Q Did he ever discuss with you the fact that if you
13 put up any evidence at all you would lose the right to
14 the final jury argument?

15 A No, he did not.

16 Q Did Mr. Macloskie ever discuss with you taking the
17 offense, so to speak, and introducing evidence of your
18 prescription drug use and your drinking and how that
19 affected you with regard to the evening in question?

20 A No, he did not.

21 Q Did you discuss your recollections of that evening
/ 22 with Mr. Macloskie?

23 A Yes, I did.

24 Q You met with Dr. Nolan, I believe it was?

25 A Yes.

1 Q Prior to trial.

2 A Yes.

3 Q Did Mr. Macloskie ever discuss with you using that
4 witness as a witness in the presentation of the case
5 before the jury as a witness for the defense?

6 A No, he did not.

7 Q After you were convicted and they brought in Dr. Tom
8 Martin, do you recall having meetings with Dr. Martin?

9 A We had one long, extended meeting.

10 Q And you heard his testimony earlier today.

11 A Yes.

12 THE COURT: You have to say yes or no.

13 A Yes.

14 Q And to do this the short way, did you hear Dr.
15 Martin say anything that you're not in complete
16 agreement with?

17 A No, I did not.

18 Q Okay. And what did Mr. Macloskie tell you, if
19 anything, with regard to your statement that had been
20 kept out by the trial judge?

21 A I don't recall that we discussed it at great length.
22 I think after it was dismissed, it was just put to the
23 side. All right. So.

24 Q If that's all you remember, that's all you remember.
25 That there were no further discussions that you recall

1 concerning that statement. Okay.

2 COURT REPORTER: Is that no?

3 A Yes,, no.

4 Q If your lawyer had told you he thought it was
5 necessary to the defense, would you have authorized him
6 to introduce evidence in open court about your
7 prescription drug problems and your drinking habits?

8 A Absolutely.

9 Q How much do you weight now, Susan?

10 A 138 pounds.

11 Q That's 30 pounds more than you weighed back then.

12 A Yes.

13 Q Are you healthier today than you were then?

14 A Yes.

15 Q Can you describe for us on average how much you were
16 drinking on a daily basis during the summer of 2008.

17 A I would average probably about three to five drinks
18 a night. And sometimes it was mixed drinks. Sometimes
19 it was -- could be a bottle of wine.

20 Q And we've heard the discussion today that fact that
21 you were thinking Klonopin three times a day?

22 A Yes.

23 Q Were you ever taking any other medications on top of
24 the Klonopin?

25 A There was some sleeping medications. There was

1 Ambien, Lunesta, then sometimes just the over-the-
2 counter sleeping medication. And Tylenol P.M.

3 Q Okay. Did you have blackouts at all during this
4 time period?

5 A Yes.

6 Q Was it uncommon for you to have episodes where you
7 had poor memory or no memory?

8 A Yes. Yes. [sic]

9 Q Did you explain all of that to Mr. Macloskie prior
10 to your trial?

11 A Yes, I did.

12 Q Would you have been willing to testify to these
13 matters at trial if Mr. Macloskie had advised you to do
14 so?

15 A Yes, I would have.

16 Q Did you have any prior criminal record?

17 A No.

18 Q Prior to this incident, had there ever been any
19 occasion when you had had any problems or inappropriate
20 fantasies or anything involving minor children?

21 A Absolutely not.

22 Q How long have you and Michael been married?

23 A It's been almost 14 years.

24 Q And how old are your daughters now?

25 A Well, Isabelle will be ten on April 18, so she's

1 nine right now, going on ten. And then Alexander is 13.

2 Q Okay. We're almost done. Breathe deep. During the
3 summer of 2008, were you already employing this young
4 man, the victim, -- I'm going to call him the victim
5 just generically, okay? Were you already employing his
6 sisters as babysitters?

7 A Yes.

8 Q In what capacity were you employing them then? I
9 mean, was it all day, every day, or explain?

10 A They would meet the bus, which was just at the
11 corner around from our houses. They live two doors
12 away. They would meet the bus, because I was usually
13 driving home from Hilton Head from the business, and it
14 took about an hour. So they would watch over the girls
15 for approximately from 4:30 to about 5:30, until I came
16 home.

17 Q Okay. And you're saying meeting the bus. Are you
18 talking about after school started?

19 A The after-school bus.

20 Q Okay.

21 A Correct.

22 Q Before school started, in the summer of 2008, were
23 they caring for the girls all day during the day?

24 A No, they weren't doing much babysitting during the
25 summer. This was just during the school year. But they

1 came over frequently.

2 Q Did they episodically babysit?

3 A Yeah.

4 Q Okay.

5 A Yes.

6 Q They began -- when did they being regularly keeping
7 the girls, as you say, picking them up after the bus?

8 A That would have begun September, when school began.

9 Q In 2008?

10 A Yes, 2008.

11 Q So, at the time of this alleged incident, they had
12 not yet begun the after-school care for you.

13 A Right.

14 Q How long did they do that before you had to fire
15 them?

16 A I would say I fired them probably the end -- I know
17 it was around Halloween. It was right around the end of
18 October.

19 Q In 2008?

20 A Um-hmm.

21 Q Okay. And after that, did you have any kind of
22 altercation, confrontation with the girls' mother
23 concerning your decision to terminate them?

24 A Yes, absolutely.

25 Q Can you describe that for the Court.

1 A She was not happy that we let her girls go, or fired
2 them, because we had been told by neighbors that, not
3 only the girls, but the boy had been entering our house,
4 using our hide-a-key. So we had to change the locks.
5 And we stopped using those services as babysitters. And
6 it did not go over well with her.

7 Q So both the girls --

8 A Um-hmm.

9 Q -- the sisters and the boy had gone in and out of
10 your home without permission.

11 A Yes.

12 Q Okay. Had there been times when those children had
13 pretty much free reign in your house?

14 A Yes. Mike and I are just, you know, we're loving
15 parents, and we were, you know, we welcomed these kids
16 over. They came over on their own sometimes just to
17 play with the kids. We just were, you know, pleasant
18 people to be around, and I think they enjoyed our
19 company.

20 Q The clothing line that you sold for from Jim
21 Perkins, did you, on occasion, have boxes or bags or
22 whatever of that merchandise in your home?

23 A Yes.

24 Q And where would that have been stored?

25 A Sometimes what I did was, when I came home from one

1 of the model shoots, I would handwash some of the
2 underwear, because I didn't --

3 MS. WILSON: Your Honor, I'm going to object,
4 because this has to do with the panties, and that's in
5 the allegations that were withdrawn.

6 THE COURT: I understand. The objection is
7 sustained. Let's proceed, Counsel,

8 MS. SHURLING: Your Honor, according to the --

9 THE COURT: I understand that you -- you know I've
10 ruled on it and --

11 MS. SHURLING: I understand.

12 THE COURT: -- I understand that that issue's been
13 raised in a peripheral area, but as to the issues you
14 tried to raise today for the first time, the objection's
15 sustained. Please proceed.

16 MS. SHURLING: And for the record, I was not
17 addressing the applications that you're talking about,
18 your Honor.

19 THE COURT: Well, it can certainly be inferred that
20 you are, and I don't blame Counsel for objecting to it.
21 Please proceed.

22 MS. SHURLING: Note my objection for the record,
23 your Honor.

24 THE COURT: Proceed.

25 BY MS. SHURLING:

1 Q Was there merchandise from that company in your home
2 in August of 2008?

3 A Absolutely, yes.

4 Q Was there merchandise from that company in your home
5 throughout the summer?

6 A Yes.

7 Q Thank you. During the summer of 2008 -- or going
8 back to January 1, 2008, where did you fill your
9 prescriptions?

10 A At the Walgreens.

11 Q And what was the location of that Walgreens?

12 A It was on Simmonsville Road, just down the road from
13 us.

14 MS. SHURLING: Thank you. No further questions.

15 THE COURT: Cross-examination.

16 MS. WILSON: Briefly, your Honor.

17 APPLICANT SUSAN TAPPEINER

18 CROSS-EXAMINATION, MS. SHURLING:

19 Q Ms. Tappeiner, do you recall about how many times
20 you met with Mr. Macloskie or talked to him about your
21 case?

22 A I'm going to guess maybe around six or seven times.

23 Q And did he go over any paperwork that he'd received
24 from the State with you when he received it?

25 A We did some brief discussions.

1 Q And did he discuss maybe some defenses that he could
2 put on, on your behalf?

3 A What he said was exactly what we discussed. It was
4 just the believability of the victim.

5 Q And did you give him any witnesses or, I guess,
6 leads to investigate; anybody to talk to about this?

7 A I was never asked to give him any.

8 Q And was it your decision to go to trial?

9 A Absolutely not.

10 Q And Mr. Macloskie testified that you didn't
11 recollect a lot from that evening. Is that still
12 correct?

13 A Correct.

14 Q And with that in mind, he advised you not to take
15 the stand. Is that correct?

16 A Correct.

17 Q And based on that, it was your decision not to take
18 the stand.

19 A I ready didn't have a decision. I was pretty much
20 told that it would be in my best interest.

21 Q And based on that, you chose not to.

22 A Yes.

23 Q And do you recall Mr. Macloskie presenting evidence
24 to the jury about you having to fire the girls? Do you
25 recall that at trial?

1 A I do not recall that.

2 Q Do you recall him eliciting testimony at the trial
3 about the victim entering the home without you being
4 there, without your permission?

5 A No, but he was told that by me, and he should have.

6 MS. WILSON: Okay. You just don't recall that he
7 elicited it. Nothing further from the State.

8 THE COURT: Re-direct examination.

9 MS. SHURLING: Nothing further, your Honor.

10 THE COURT: Very well. You may step down. Watch
11 your step.

12 APPLICANT TAPPEINER: Thank you, your Honor.

13 THE COURT: Call your next witness.

14 MS. SHURLING: Mike Tappeiner, please. And this
15 will, for the record, your Honor, be my last one.

16 THE COURT: Very well. How many witnesses do you
17 plan on calling, Ms. Wilson?

18 MS. WILSON: No witnesses, your Honor.

19 THE COURT: Very well. Come around and be sworn by
20 the clerk.

21 MADAM CLERK: Please place your left hand on the
22 Bible. Raise your right hand. Left hand. Thank you.
23 Do you solemnly swear or affirm that the testimony you
24 give to the Court in this there shall be the truth, so
25 help you God?

1 MR. MICHAEL TAPPEINER: I do.

2 MADAM CLERK: Please be seated.

3 THE COURT: Watch your step for me right there.
4 Step up. Have a seat in the chair and get comfortable.
5 Adjust that microphone and that chair to your comfort
6 and microphone to your height. State your full name,
7 spell your last, please, for the record.

8 MR. TAPPEINER: Michael Tappeiner,
9 T/a/p/p/e/i/n/e/r.

10 THE COURT: Your witness, Counsel.

11 MICHAEL TAPPEINER

12 DIRECT EXAMINATION, MS. SHURLING:

13 Q Mr. Tappeiner, for the record, what's your
14 relationship to the applicant?

15 A Susan's my wife.

16 Q And how long have you been married?

17 A For 14 years, I think.

18 Q And how many children do you have?

19 A Two girls.

20 Q And I believe Susan just said, but my short-term
21 memory's gone bad on me. How old are they now?

22 A Nine and 13.

23 Q Okay. And have I had discussions with you about the
24 pros and cons of proceeding with this PCR?

25 A I don't recall having that conversation.

1 Q We'll move on to something else. It really doesn't
2 matter.

3 You were called as a witness as your wife's trial,
4 correct?

5 A Yes.

6 Q Prior to being called as a witness, did you have a
7 meeting with Mr. Macloskie or some other opportunity to
8 discuss with him why he was putting you up as a witness?

9 A We were sequestered, so I wasn't privy to the trial
10 itself. But he said that he may, well, you know, call
11 me to the stand.

12 Q And I'm not suggesting that he told you what to say.
13 I would never do that. He's a fine man. But did he
14 ever share with you why he wanted you as a witness?
15 What the purpose of calling you was.

16 A No. I -- I don't recall. I mean, it was probably
17 to corroborate what happened that evening.

18 Q With regard to the portion of your testimony
19 concerning an incident where the victim allegedly came
20 to your home and enlisted your assistance with getting
21 assistance for a battery for his camera, at trial, it
22 became apparent -- well, let me ask you. At trial, did
23 you testify that you knew when that had happened?

24 A No, I didn't recall the exact dates, but it was
25 weeks or months after the alleged incident.

1 Q Did you testify to that at trial?

2 A I don't think that was brought up.

3 Q Okay. Did Mr. Macloskie ever ask you whether or not
4 you could verify with any certainty when that event
5 occurred before you took the witness stand?

6 A No.

7 Q Okay. During the summer of 2008, were you aware of
8 the prescription medications that your wife was taking?

9 A Yes.

10 Q Were you -- well, let me back up for a second. Can
11 you describe for us, based on your personal observations
12 as her spouse, and you did live with her during that
13 time period, correct?

14 A Yes.

15 Q How much was she drinking the summer of '08?

16 A She would drink, you know, three to five drinks a
17 night, mostly -- usually wine. Sometimes a bottle of
18 wine.

19 Q And that was on top of her prescription medication?

20 A Which she took for -- mainly for sleeping and
21 anxiety.

22 Q Okay. And what effect did the combination of
23 alcohol and those prescription drugs have on your wife,
24 based on your personal observations only?

25 A It -- it inhibited her motor skills, walking, stuff

1 like that. Decision making. I don't think it's a very
2 good combination.

3 Q Did you ever express your concern to her about that
4 pattern?

5 A Yes.

6 Q Okay. Did you discuss your wife's pattern of
7 drinking on top of prescription medications with her
8 defense attorney, Mr. Macloskie?

9 A I mean, what he -- anything that he wanted to know,
10 I will tell him and fill him in to the best of my
11 abilities.

12 Q Okay. Did he ever discuss with you the possibility
13 of presenting testimony concerning those matters in the
14 presence of the jury?

15 A I don't recall if he would say that he would request
16 that information or -- or ask me those questions.

17 MS. SHURLING: Thank you. No further questions.

18 THE COURT: Cross-examination.

19 MS. WILSON: Thank you, your Honor.

20 MICHAEL TAPPEINER

21 CROSS-EXAMINATION, MS. WILSON:

22 Q Mr. Tappeiner, do you recall being questioned by Mr.
23 Macloskie about the dogs in your home?

24 A No.

25 Q Do you recall him asking you about the size of your

1 home and the layout; how many bedrooms it had; things
2 like that?

3 A No.

4 Q And you testified that you felt the purpose of your
5 testimony was to corroborate the events of that night?

6 A Right.

7 Q And was that your understanding from Mr. Macloskie?

8 A Yes.

9 Q And do you also recall testifying that your wife,
10 after the fact, told her that she didn't remember, and
11 you testified that she wasn't in a good frame of mind
12 from drinking and probably taking her sleeping pills?
13 Do you recall that?

14 A Yes.

15 MS. WILSON: Nothing further, your Honor.

16 MS. SHURLING: No re-direct examination, your Honor.

17 THE COURT: You may step down.

18 MICHAEL TAPPEINER: Thank you. Thank you.

19 BY THE COURT:

20 THE COURT: It's my understanding the applicant
21 rests?

22 MS. SHURLING: The applicant rests, your Honor, with
23 the exception of --

24 THE COURT: Very well. Ms. Wilson, you may call
25 your first witness.

1 MS. WILSON: No witnesses from the State, your
2 Honor.

3 THE COURT: Very well. All right, Ms. Shurling, is
4 there something you'd like to tell the Court, because
5 I'm not interested in hearing argument.

6 MS. SHURLING: That was my assumption, your Honor.
7 I was going to ask you --

8 THE COURT: I'm going to give you some additional
9 time, though, because we have an exhibit that has not
10 been entered in the record today, which I have not been
11 able to review, and that is your subpoena of the
12 Walgreens records, even though you had a photocopy,
13 which was objected to by counsel for the State.

14 Please, both of you, take notes. This is what I'd
15 like for you to do. I'm going to give you 30 days to
16 submit your proposed orders in this case. Please submit
17 them to me at P.O. Drawer 407, Walterboro 29488. Please
18 copy opposing counsel on your transmittal of those
19 orders.

20 Ms. Shurling, because you put in this evidence, I'll
21 expect you to Xerox the exhibit. The original goes to
22 the court reporter, Wanda.

23 APPLICANT'S WALGREENS PRESCRIPTION
24 RECORD TO BE MARKED APPLICANT'S
25 EXHIBIT NUMBER 3, AND ENTERED AS

1 EVIDENCE UPON APPLICANT'S ATTORNEY
2 FILING ORIGINAL WITH CIRCUIT CLERK.

3 MS. SHURLING: Yes.

4 THE COURT: And when you send me your proposed
5 order, send me the exhibit with your proposed order.

6 MS. SHURLING: Yes, sir.

7 THE COURT: Please include a self-addressed, stamped
8 envelope, with sufficient postage affixed thereto for
9 the return of your proposed order.

10 I would appreciate it, because I'm going to have to
11 take the transcript with me, which I have not -- I've
12 read the entire sentencing transcript. I have not read
13 the entire trial transcript. I have that in my packet,
14 which you both have, which I will do.

15 I'm going to ask you to send my law clerk a working
16 copy of your proposed order. His mailing address is the
17 same as mine. His name is Camden Hodge. So, when you
18 mail me your proposed orders and copy opposing counsel,
19 and send me a self-addressed, stamped envelope, with
20 sufficient postage affixed thereto, please also send him
21 a working copy, so that he will have a copy of the order
22 to work off of, as does the Court.

23 If you want to email me your order, you can.
24 pbucknerj@sccourts.org. Please send my law clerk a
25 working copy, pbucknerlc@sccourts.org.

1 Obviously, if you email me any communication to the
2 Court, you must copy opposing counsel, whether it be by
3 email or United States mail.

4 If you email me, you will still need to United
5 States mail me an envelope with sufficient postage
6 affixed thereto for the return of our proposed order.

7 I will expect the exhibits with your order, Ms.
8 Shurling, so that I can review that. I'm going to go
9 ahead and review the transcript, but that I'll have that
10 completed before I get your order. That's why I'm
11 giving you the 30 days' time enough to prepare the
12 order, and also, time enough to get the exhibit to the
13 court reporter, and forward a copy of the exhibit to the
14 Court.

15 Any questions about the proposed order procedure
16 from counsel for the applicant?

17 MS. SHURLING: With regard to the working copy,
18 would your Honor like it sent in Word format?

19 THE COURT: He would prefer it in Word, rather than
20 WordPerfect, and that suits me fine. Any questions
21 about the proposed order procedure from counsel for the
22 State of South Carolina?

23 MS. WILSON: Nothing from the State, your Honor.

24 THE COURT: Very well. All right. Now, so that --
25 and I know people have been waiting all day. The record

1 in this case is closed, other than the introduction,
2 which was unobjected to, Ms. Wilson, of the Walgreens
3 records, which were subpoenaed by Ms. Shurling, which
4 were not produced today.

5 Now, Wanda, you have how many exhibits for the
6 applicant that were admitted into evidence? So both of
7 you take notes if you want to put it in your proposed
8 orders. Applicant's Number 1 was what?

9 COURT REPORTER: Bluffton Police Department Incident
10 Report.

11 THE COURT: I can't hear you, Wanda.

12 COURT REPORTER: The Bluffton Police Department
13 Incident Report. That was entered.

14 THE COURT: All right. Applicant's Number 2?

15 COURT REPORTER: Pre-sentence Investigation, dated
16 11-11-09. That was entered.

17 THE COURT: All right. That would be Probation's
18 Pre-sentencing Investigation, I believe, Counsel.
19 Applicant's Number 3?

20 COURT REPORTER: Is the Walgreens applicant's
21 prescription record. *Judge holding record open.*

22 THE COURT: That was not admitted into evidence.
23 What you have is not in evidence, but what you will
24 receive will be admitted into evidence without
25 objection.

1 Applicant's Number 4?

2 COURT REPORTER: C.V. of Thomas V. Martin, I.D.'d.

3 THE COURT: That was not admitted into evidence in
4 the trial of this case. Mrs. Shurling walked up to you
5 and handed it to you after the witness had left the
6 courtroom. And that is not in evidence.

7 COURT REPORTER: Right.

8 THE COURT: Applicant's Number 5?

9 COURT REPORTER: Floor plan of applicant's home
10 entered as evidence.

11 THE COURT: That was admitted into evidence, and
12 that's the floor plan, without objection. Applicant's
13 Number 6 was marked for identification only, and that
14 was?

15 COURT REPORTER: Video of home.

16 THE COURT: Very well. Everybody got that, so you
17 all know what the court reporter has?

18 MS. WILSON: Yes, your Honor.

19 THE COURT: Ms. Shurling, you got that, too?

20 MS. SHURLING: I do.

21 THE COURT: I made her -- all right. In that case,
22 I want to thank you very much. This concludes the
23 hearing in connection with this matter. I'm taking my
24 packet with me. Thank you very much. This hearing is
25 now concluded, and the record is closed.

MS. WILSON: Thank you, your Honor.

ENDING 4:25 P.M.

CERTIFICATE OF REPORTER

APRIL 4, 2013 TRANSCRIPT OF

POST-CONVICTION RELIEF HEARING

STATE OF SOUTH CAROLINA

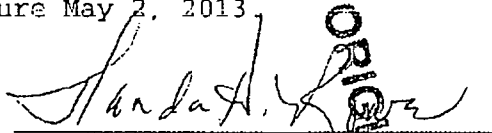
COUNTY OF BEAUFORT

I, Wanda H. Rowe, CVR-M, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing April 4, 2013 Transcript of Post-Conviction Relief hearing is a true, accurate, and complete record of the proceedings had and evidence introduced and/or admitted at said proceeding in the case of State versus Susan Tappeiner, Beaufort County, Court of Common Pleas, Case Number 2010-CP-07-02396.

I further certify that I am of neither kin, counsel, or interest to any party hereto.

The original of this transcript, nor any copy of same, is not certified, nor authorized for use by me, to be true, accurate, and complete without my original signature and stamp affixed hereto.

Witness my signature May 2, 2013.


Wanda H. Rowe, CVR-M
Official Court Reporter

AGENCY I.D.
SC0070200

BLUFFTON POLICE DEPARTMENT
INCIDENT REPORT

CASE NUMBER

631

NCIC

200900000653

INQ. ☒ ENT. ☐

E V E N T	INCIDENT TYPE				COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM			
	1. 36B - CRIMINAL SEXUAL CONDUCT WITH A MINOR				☒ YES ☐ NO	☐ YES ☐ NO	20		☒ Individual ☐ Business ☐ Financial Inst. ☐ Government ☐ Relig. Orgn. ☐ Soc./Public ☐ Other ☐ Unknown ☐ Police Off.			
	2.				☐ YES ☐ NO	☐ YES ☐ NO						
	3.				☐ YES ☐ NO	☐ YES ☐ NO						
V I C T I M	INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER)						ZIP CODE	WEAPON TYPE				
	, BLUFFTON SC						29910					
	INCIDENT DATE	24 HR. CLOCK	TO	DATE	24 HR. CLOCK	DISP. DATE	DISP. TIME	TIME ARRIVED	DEPART. TIME			
	07/28/2008	0030		08/04/2008	0300	02/23/2009	1000	1000	1135			
S U B J E C T	COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)			RELATIONSHIP TO SUBJECT		RESIDENT	RACE	SEX	AGE	ETH	DAYTIME PHONE	EVENING PHONE
	Victim			AQ		☒ SOU	W	M	14	N	(843)	
	ADDRESS			CITY		STATE	ZIP CODE	LOCATION NO.				
				BLUFFTON		SC	29910	6104				
N A R R A T I V E	VICTIM'S NAME (LAST, FIRST, MIDDLE)			RELATIONSHIP TO SUBJECT		RESIDENT	RACE	SEX	AGE	ETH	DAYTIME PHONE	EVENING PHONE
				NE		☒ SOU	W	M	14	N	(843)	
	HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.							
	5-6	125	BLN	BLU								
#	ADDRESS			CITY		STATE	ZIP CODE	LOCATION NO.				
				BLUFFTON		SC	29910	6104				
	VISIBLE INJURY (VICT. 1) ☐ YES ☒ NO EXPLAIN -											
	VICTIM (NO. 1) USING: ALCOHOL: ☐ YES ☒ NO ☐ UNK. DRUGS: ☐ YES ☒ NO ☐ UNK.											
#	☐ TWO-MAN VEH. ☐ ONE-MAN VEH. ☐ DETECTIVE/SPLASMT. ☐ OTHER ☐ ALONE ☐ ASSISTED J - This Jurisdiction S - State O - Out of State U - Unknown											
	SUBJECT NAME (LAST, FIRST, MIDDLE)											
	TAPPEINER, SUSAN SANDERS											
	RACE W SEX F AGE 42 ETH N DATE OF BIRTH 1/1966 HEIGHT 5-8 WEIGHT 117 HAIR BLN EYES BLU											
#	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.											
	ADDRESS											
	CITY BLUFFTON STATE SC ZIP CODE 29910 LOCATION NO.											
	SUBJECT (NO. 1) USING: ALCOHOL: ☐ YES ☐ NO ☒ UNK. ARRESTED NEAR OFFENSE SCENE ☐ YES ☒ NO DATE/TIME OF OFFENSE 07/28/2008 0030 DATE/TIME OF ARREST 02/27/2009 1630											
#	DRUGS: ☐ YES ☐ NO ☒ UNK. TYPE: TOTAL # ARRESTED 1											
	SYNOPSIS:											
	On February 23, 2009 (Monday) I was dispatched to 250 H.E. McCracken Circle, Bluffton, SC 29910 in reference to a report of a sexual assault. Upon my arrival I found the following information.											

ORIGINAL



JUVENILE

EAE

JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY				JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY				
P	TYPE (GROUP)						TOTAL VALUE	
R	Burned							
O	Count/Forged							
P	Dist./Damaged							
E	Recovered							
R	Seized							
T	Stolen							
Y	Unknown							
A D M I N I S	SUBJECT IDENTIFIED		SUBJECT LOCATED		ACTIVE		ADM. CLOSED	
	☒ YES ☐ NO		☐ YES ☒ NO		☐ UNFOUNDED		☐ ARRESTED UNDER 18	
							☐ EX-CLEAR UNDER 18	
							☐ EX-CLEAR 18 AND OVER	
REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ JUVENILE - NO CUSTODY								
REPORTING OFFICER(S)		DATE	UNIT NUMBER	APPROVING OFFICER		DATE	UNIT NUMBER	
PTL. M. CREASON		02/23/2009	C4255	LT. A. TUBBS		02/23/2009	T1941	
FOLLOW-UP INVESTIGATION OFFICER								

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AGENCY I.D.
SC0070200

BLUFFTON POLICE DEPARTMENT
INCIDENT REPORT

CASE NUMBER

2 0 0 9 0 0 0 0 0 6 5 3

633

NCIC

INO. X ENTD

OBSERVATION OF SCENE: N/A

INTERVIEW OF COMPLAINANT / VICTIM:

Victim DOB: 1994, 14 yrs of age.
Bluffton, SC 29910

843

Victim was interviewed in the SRO's office.

Victim reported that last year approx. 2-3 weeks before the beginning of the 2008-2009 school year he spent the night at a neighbors (Susan Tappeinor, Bluffton, SC 29910) house along with his two sisters. Victim stated that his parents were gone for the night. Victim stated that he was in the livingroom lying on the floor watching television. The other kids were asleep on the couches. Victim stated that Tappeinor came into the living room and layed down next to him. Victim stated that Tappeinor put her hands inside of his pants and played with his penis. Victim stated that he told her to stop several time but she kept on doing it. Victim stated that Tappeinor finally stopped and went into the kitchen. Victim stated that Tappeinor came back into the livingroom and grabbed him by the arm and brought him to one of Tappeinors daughters bedrooms on the second floor. Once inside Tappeinor closed and locked the door. Tappeinor then took Victim pants off then Tappeinor took off her dress and panties. Victim stated that Tappeinor then grabbed ahold of him and brought him to the bed. Victim stated that he tried to get away but Tappeinor hit in the head and told him to perform oral sex on her. Victim stated that Tappeinor layed on the bed and grabbed Victim by the head and put his face between her legs and ordered him to perform oral sex. Victim stated that he didn't want to and tried to stop but Tappeinor kept slapping him in the head. Victim stated that he finally performed oral sex on Tappeinor. Victim stated that when Tappeinor had had enough she got up and had him lay on the bed and then Tappeinor got on top of him and inserted his penis into her vagina and had regular intercourse with him. Victim stated that Tappeinor got off of him before he ejaculated. Victim stated that he did not enjoy what happened and was scared and embarrassed to say anything. Victim stated that after Tappeinor finished with him she told him not to say anything and Victim related that he ran out of the house and went home and climbed into a window that was unsecure because the doors were locked and his parents were not home. Victim stated that this incident has weighed heavily on his mind and related that he wanted to tell someone and went to the SRO (Ofc. Creason) and told him.

INJURIES / MEDICAL ATTENTION OF VICTIM: N/A

INTERVIEW OF SUSPECT: N/A

INJURIES / MEDICAL ATTENTION OF SUSPECT: N/A

CRIME SCENE PROCESSING: N/A

EVIDENCE: N/A

WITNESSES: N/A

NEIGHBORHOOD CANVASS: N/A

STOLEN PROPERTY: N/A

RECOVERED PROPERTY: N/A

NCIC ENTRY: N/A

ORIGINAL

				JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY		JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY	
P	TYPE (GROUP)						TOTAL VALUE
R	Burned						
O	Count/Forged						
P	Dest./Damaged						
E	Recovered						
R	Seized						
T	Stolen						
Y	Unknown						
A	SUBJECT IDENTIFIED ☒ YES ☐ NO		SUBJECT LOCATED ☐ YES ☒ NO		☐ ACTIVE ☐ ADM. CLOSED	☐ ARRESTED UNDER 18 ☐ EX-CLEAR UNDER 18	
D					☐ UNFOUNDED	☒ ARRESTED 18 AND OVER ☐ EX-CLEAR 18 AND OVER	
M	REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ JUVENILE - NO CUSTODY						
I	REPORTING OFFICER(S)		DATE		UNIT NUMBER	APPROVING OFFICER	DATE
N	PTL. M. CREASON		02/23/2009		C4255	LT. A. TUBBS	02/23/2009
S							T1941
S	FOLLOW-UP INVESTIGATION OFFICER						

AGENCY I.D.
SC0070200

BLUFFTON POLICE DEPARTMENT
INCIDENT REPORT

CASE NUMBER

634

NCIC

2 0 0 9 0 0 0 0 6 5 3

INQ. X
ENTO

CRIMINAL CHARGES: N/A

TICKET / COURT INFORMATION: N/A

OFFICERS ACTIONS / FINAL ACTIONS / FURTHER INVESTIGATION:

Upon being contacted by Lanter of the incident I asked him to write me a brief statement and I contacted Lt. Tubbs. Upon Lt. Tubbs arrival the investigation was turned over to her.

ATTACHMENTS: N/A

ORIGINAL

				JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY		JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY	
P	TYPE (GROUP)						TOTAL VALUE
R	Burned						
O	Count/Forged						
P	Dest./Damaged						
E	Recovered						
R	Seized						
T	Stolen						
Y	Unknown						
A	SUBJECT IDENTIFIED		SUBJECT LOCATED		ACTIVE		ADM. CLOSED
D	☒ YES ☐ NO		☐ YES ☒ NO		☐ UNFOUNDED		
M	REASON FOR EXCEPTIONAL CLEARANCE:		1. ☐ OFFENDER DEATH		2. ☐ NO PROSECUTION		3. ☐ EXTRADITION DENIED
N	REPORTING OFFICER(S)		DATE		UNIT NUMBER		APPROVING OFFICER
I	PTL. M. CREASON		02/23/2009		C4255		LT. A. TUBBS
S							DATE
							UNIT NUMBER
							T1941

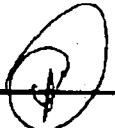
INCIDENT REPORT SUPPLEMENTAL

Page #: 1

Case Number: 200900000653

Officer: T1941 TURBS, A.

Date Entered/Changed: 02/23/2009

Reviewer: 

Review Date:

DETAILED STATEMENT OF INVESTIGATION:

On 02/23/2009 (Monday) I was advised of a possible CSC with a Minor. I arrived at McCracken Middle school and met with Officer Creason. Upon entering his office, I met a white male Victim.

I introduced myself to Victim and asked him if it was ok if we talked. Victim stated, "Yes".

Interview with Victim:

Victim

Bluffton, SC 29910
W, M (13) 1 /1994

ORIGINAL

Interview was at H.E McCracken Middle school in the SRO's Office

Victim stated that last year 2-3 weeks before school started (around July 2008-August 2008), he spent the night at a neighbors house. He stated he did not know "Susan" last name but the house was 2 houses on the left from his. Victim stated that his sisters (13, and 11) were over at Susan's house and they were going to spend the night. He stated his mom and dad had to leave and asked if I wanted to go over to Susan's with the girls. Victim stated he said ok and went over to the house. Victim stated that he was in the living room lying on the floor watching television. The other kids were asleep on the couches. Victim stated that (Mike) Susan's husband went upstairs to bed. Victim stated after the movies were over it was around 12:30am-1:00am. Victim stated he had his blanket and pillow and fell asleep on the floor. Victim stated that "Susan" came into the living room and laid down next to him. Victim stated that Susan put her hands inside of his pants and played with his penis. Victim stated that he told her to stop several time but she kept on doing it. Victim stated that Susan stopped and went into the kitchen for about 5 minutes and then came back to the living room. She then grabbed him by the arm and took him upstairs to one of her daughters rooms, (the end room on the left). Victim stated as he was going up the stairs and passed the master bedroom, he yelled for "Mike" but he never woke up. Victim stated in the room was a computer, a dresser with a TV on it and a full size bed with a yellow blanket. Victim stated that once inside the room, "Susan" closed and locked the door. Susan then took his pants off and took off her dress and panties. Victim stated that Susan then grabbed him and pulled him to the bed. Victim stated that he tried to get away but Susan hit him in the head with her hand and told him to perform oral sex on her. Victim stated that Susan laid on the bed and grabbed him by the head and pulled his face between her legs and made him perform oral sex by licking her private area.

Victim stated that he didn't want to and tried to stop but Susan kept slapping him in the head. Victim stated that he finally performed oral sex on Susan and when she had enough, she got up and made him lay on the bed. Victim stated that Susan then got on top of him and put his penis into her vagina. Victim stated that she then finished and got off of him. Victim stated that Susan got off of him before he ejaculated because she told him she did not want to get pregnant. Victim stated that he did not enjoy what happened and was scared and embarrassed to say anything. Victim stated that after Susan finished with him she told him not to say anything. Victim stated he ran out of the house and went home and climbed into a window that was unsecure because the doors were locked and his parents were not home.

I asked Victim if he had told anyone about the incident and he said "No". I asked him if he wanted to go with me to his house and talk to his mother. Victim stated, he did want to be there when his mom was told.

Myself and Victim left the school (McCracken Middle School) and went to his house. Drive, upon arrival I met with his mother (). I introduced myself and we went into the kitchen area and sat at the kitchen table. I informed Mother what her son Victim had stated and advised her that an investigation would be started. Mother was clearly upset.

Mother informed me the only night that Victim stayed over at Susan's was on Aug 15, 2008.

I advised Mother that an appointment would be set up at Hope Haven for an interview with Victim and after the interview we would continue the investigation.

I left the house and saw the suspect house was

Drive and the suspect was Susan Tappeiner

Suspect information:

Susan Sanders Tappeiner
43 Lakeside Drive
Bluffton, SC 29910
SCDL# 11679322

INCIDENT REPORT SUPPLEMENTAL

Page #: 2

Case Number: 200900000653

Officer: T1941 TUBBS, A.

Date Entered/Changed: 02/23/2009

Reviewer:

Review Date:

DOB: 12/24/1966

W, F (42)

I arrived back to the office and assigned the case to Sgt. Gonzales.

ORIGINAL

INCIDENT REPORT SUPPLEMENTAL

Page #: 1

Case Number: 200900000653

Officer: G1928 GONZALES, C.

Date Entered/Changed: 03/02/2009

Reviewer:

Review Date:

DETAILED STATEMENT OF INVESTIGATION:

SYNOPSIS:

ON 02-23-09 AT APPROXIMATELY 1300 I WAS ASSIGNED INVESTIGATIVE AUTHORITY OVER CASE NUMBER 200900000653 IN REFERENCE TO CRIMINAL SEXUAL CONDUCT.

ORIGINAL

DETECTIVES NOTES:

SEE LIEUTENANT TURBS SUPPLEMENTAL REPORT FOR INITIAL INVESTIGATION AND INTERVIEW WITH VICTIM

1. ON 02-23-09 AT APPROXIMATELY 1310 I CALLED HOPE HAVEN TO SCHEDULE AN APPOINTMENT FOR VICTIM TO BE INTERVIEWED FOR THE SECOND TIME WITH HOPE HAVEN STAFF. THE AGREED TIME AND DATE IS SET FOR 02-27-09 AT 0900.
2. ON 02-23-09 AT APPROXIMATELY 1320 I CALLED VICTIM'S MOTHER AT PHONE NUMBER (843) AND PHONE NUMBER (843). MOM STATED THAT THE INCIDENT HAPPENED ON 08-15-08. MOM STATED SHE FOUND OUT THE DAY THIS INCIDENT OCCURRED BECAUSE VICTIM WENT TO SUSAN'S HOUSE ON THE SAME DAY SHE AND (HUSBAND) WENT TO ROCK CITY FOR HIS JOB, WHICH HE VERIFIED THROUGH HIS SCHEDULE.
3. ON 02-24-09 AT APPROXIMATELY 1957 I CALLED BEAUFORT COUNTY DETENTION CENTER TO RUN A CRIMINAL HISTORY CHECK ON SUSAN SANDERS TAPPEINER. SEE ATTACHED CRIMINAL HISTORY CHECK
4. ON 02-27-09 AT APPROXIMATELY 0900 I MET VICTIM AND HIS MOTHER AT HOPE HAVEN FOR THE SCHEDULED APPOINTMENT. HOWEVER, WHILE SITTING IN THE LOBBY WITH VICTIM HE ADVISED ME THAT SUSAN WAS WEARING A RED IN COLOR SUN DRESS WITH WHITE IN COLOR DOTS ALL OVER IT. VICTIM ALSO STATED THAT SUSAN HAD ON BLACK IN COLOR UNDERWEAR WITH SOME WHITE IN COLOR WORDING ON THE FRONT, CLOSE TO HER VAGINAL AREA. VICTIM ALSO STATED THAT AFTER SUSAN WAS DONE HAVING SEX WITH HIM SHE GOT OFF OF HIM AND STATED THAT "I KNOW PEOPLE AND I CAN GET AWAY WITH IT". VICTIM STATED HE WENT TO WAKE HIS SISTER UP, WHICH SHE DID NOT GET UP, SO HE RAN HOME AND ENTERED HIS HOUSE THROUGH A WINDOW AND TOOK A SHOWER. VICTIM STATED HE WAS RAPED AND DID NOT SAY ANYTHING UNTIL NOW BECAUSE HE HAS BEEN SCARED AND THIS HAS HAPPENED BEFORE BY HIS FORMER BABYSITTER IN KENTUCKY WHEN HE WAS A CHILD 5 OR 6 AND NOTHING HAPPENED TO THE PERSON.

DETECTIVE NOTES:

HOPE HAVEN PERSONNEL MARY BETH HEFNER WHO IS A FORENSIC INTERVIEWER CONDUCTED THE INTERVIEW ON VICTIM. SEE REPORT FROM HOPE HAVEN AND VIDEO OF INTERVIEW.

5. ON 02-27-09 AT APPROXIMATELY 1400 I CALLED ISLAND DIGITAL PHOTOGRAPH TO SPEAK WITH SUSAN TAPPEINER AT PHONE NUMBER (843). HOWEVER, SHE WAS NOT THERE AND I SPOKE WITH MIKE TAPPEINER WHO GAVE ME SUSAN'S CELL PHONE NUMBER (843). I CALLED SUSAN AND REQUESTED SHE COME DOWN TO THE POLICE DEPARTMENT SO I COULD SPEAK WITH HER ABOUT AN INCIDENT I AM INVESTIGATING. SUSAN AGREED SHE WOULD BE AT THE POLICE DEPARTMENT IN APPROXIMATELY THIRTY MINUTES.

DETECTIVE NOTES:

I PLACED MY DUTY WEAPON INTO A WEAPONS SECURING CABINET BEFORE STARTING THE INTERVIEW.

6. ON 02-27-09 AT APPROXIMATELY 1440 I READ SUSAN SANDERS TAPPEINER HER STATEMENT OF MIRANDA RIGHTS, WHICH SHE STATED SHE UNDERSTOOD. SUSAN INITIALED BY LINES ONE THROUGH FIVE AND WAIVER OF RIGHTS SECTION AGREEING TO SPEAK WITH ME AND SIGNED THE MIRANDA RIGHTS FORM. SEE VIDEO RECORDING OF MIRANDA RIGHTS

7. INTERVIEW WITH SUSAN SANDERS TAPPEINER:

DE DR.

BLUFFTON, SC 29910

PHONE NUMBER (843)

CELL PHONE NUMBER (843)

LOCATION OF INTERVIEW: BLUFFTON POLICE DEPARTMENT INTERVIEW ROOM

ON 02-27-09 AT APPROXIMATELY 1445 SUSAN STATED SEVERAL MONTHS BACK THAT SHE DID HAVE SEXUAL INTERCOURSE WITH VICTIM AND HE DID PERFORM ORAL SEX ON HER. SUSAN STATED THAT SHE WAS UNDER THE INFLUENCE OF ALCOHOL AND PRESCRIPTION

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Officer: G1928 GONZALES, C.

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CREATURE AND ALLOWED HERSELF TO GET FLATTERED BY A KID. SUSAN STATED HER HUSBAND, ~~Victim~~ HIS TWO SISTERS AND HER TWO DAUGHTERS WERE WATCHING MOVIES IN THE LIVING ROOM AND GOT SCARED AND SUSAN LET ~~Victim~~ SIT WITH HER IN THE CHAIR. SUSAN STATED THAT ~~Victim~~ CAME AND SAT WITH HER AND STARTED RUBBING HER LEG AND AFTER HER HUSBAND WENT TO BED AND THE GIRL'S WENT TO SLEEP IN THE LIVING ROOM SHE AND ~~Victim~~ WENT UP TO HER DAUGHTERS ROOM WHERE THE COMPUTERS WERE AND SHE GOT UNDRESSED AND LIED ON THE BED AND ~~Victim~~ PERFORMED ORAL SEX ON HER. SUSAN THEN STATED THAT SHE AND ~~Victim~~ HAD SEX IN MANY DIFFERENT POSITION, WHICH ENDED UP WITH HER BEING ON TOP OF HIM AND UNTIL HE EJACULATED. SUSAN STATED HE DID NOT EJACULATED INSIDE OF HER AND HE ONLY EJACULATED ONCE. SUSAN STATED I LET IT HAPPEN ITS MY FAULT AND MY KIDS WERE IN THE HOUSE. I ASKED SUSAN WHAT SHE WAS WEARING THE NIGHT OF THE INCIDENT AND SHE REPLIED YES TO WEARING HER RED IN COLOR SUMMER DRESS WITH WHITE IN COLOR DOTS ON IT AND YES TO WEARING BLACK IN COLOR UNDERWEAR WITH WHITE IN COLOR WRITING ON THE FRONT OF THEM. SUSAN STATED THAT SHE HAS A LOT OF THEM AND THEY ARE PROBABLY WASHED BY NOW. SUSAN ALSO STATED THAT SHE TOLD ~~Victim~~ TO GO DOWN TO THE COUCH WHEN THEY WERE DONE. SUSAN ADVISED ME SHE IS MATURE ENOUGH TO KNOW BETTER THAN TO LET A THIRTEEN YEAR OLD GET IN BED WITH HER. SEE AUDIO OF INTERVIEW FOR MORE DETAILS.

8. I THEN PLACED SUSAN SANDERS TAPPEINER UNDER ARREST FOR CRIMINAL SEXUAL CONDUCT WITH A MINOR SECOND DEGREE. LIEUTENANT TUBBS SEARCHED AND PLACED SUSAN INTO THE BLUFFTON POLICE DEPARTMENT HOLDING CELL AWAITING TO BE TRANSPORTED TO BEAUFORT COUNTY DETENTION CENTER FOR PROCESSING.

9. I OBTAINED AND SERVED AN ARREST WARRANT FOR CRIMINAL SEXUAL CONDUCT WITH A MINOR SECOND DEGREE, WARRANT NUMBER J-350739. I ISSUED SUSAN A STATE OF SOUTH CAROLINA TOWN OF BLUFFTON TICKET 06453 WITH A GENERAL SESSIONS COURT DATE SET FOR 03-27-09 AT 0900. SEE OFFICER MARION SUPPLEMENTAL REPORT FOR TRANSPORTATION PROCEDURES.

10. ON 02-27-09 AT APPROXIMATELY 1615 I FILLED OUT A BLUFFTON POLICE DEPARTMENT VICTIM NOTIFICATION FORM AND CALLED THE VICTIMS MOTHER AT PHONE NUMBER (843) : AND ADVISED HER OF THE ARREST. MRS. I STATED THAT SHE WANTED TO BE AT THE BOND HEARING AND WANTS TO BE NOTIFIED WHEN SUSAN IS RELEASED FROM JAIL. I THEN CONTACTED THE VICTIMS ADVOCATE (OFFICER HEBDA) FOR THE POLICE DEPARTMENT AND REQUESTED SHE BE PRESENT AT THE BOND HEARING ON 02-28-09 AT 0830.

11. ON 03-02-09 AT APPROXIMATELY 1300 I OBTAINED A SEARCH WARRANT FOR DR. TO SEIZE THE UNDERWEAR AND SUN DRESS WORN BY SUSAN ON THE DATE AND TIME OF THE INCIDENT THAT WAS DESCRIBED BY :

12. ON 03-02-09 AT APPROXIMATELY 1402 I MET WITH MIKE TAPPEINER AT DR. TO EXECUTE THE SEARCH WARRANT. DETECTIVE HEBDA VIDEO RECORDED THE HOUSE BEFORE SERGEANT JACKSON, DETECTIVE BABKIEWICZ, AND I CONDUCTED THE SEARCH. ONCE THE ITEMS WERE LOCATED IN THE MASTER BEDROOM, I HAD DETECTIVE HEBDA COME UP STAIRS AND RECORD WITH THE CAMERA WHERE THE ITEMS WERE INSIDE THE RESIDENCE BEFORE SEIZING THEM. DETECTIVE HEBDA REMAINED OUTSIDE WITH MIKE TAPPEINER WHILE THE SEARCH WAS BEING CONDUCTED FOR OFFICER SAFETY. SEE VIDEO OF SEARCH WARRANT

13. I PROPERLY PACKAGED ALL EVIDENCE AND FILLED OUT THREE BLUFFTON POLICE DEPARTMENT FORMS AND PLACED ALL EVIDENCE INTO THE EVIDENCE LOCKER.

DETECTIVE NOTES:

I SPOKE WITH THE DEPARTMENT OF SOCIAL SERVICES (SARA MCKENNA) WHO STATED SHE WOULD LIKE TO HAVE HOPE HAVEN CONDUCT AN INTERVIEW ON SUSAN TAPPEINER'S CHILDREN (TAPPEINER AND : TAPPEINER).

ATTACHED DOCUMENTS:

- (3) EVIDENCE SUBMITTAL FORMS
- (1) COPY OF ARREST WARRANT
- (3) PAGE VOLUNTARY STATEMENT FROM JOSHUA LANTER
- (1) COPY OF SEARCH WARRANT
- (1) PROPERTY RECEIPT
- (1) BOOKING REPORT
- (1) COPY OF TICKET NUMBER 06453
- (1) VICTIMS NOTIFICATION FORM
- (1) MIRANDA RIGHTS FORM

ORIGINAL

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Officer: G1928 GONZALES, C.

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(1) HOPE HAVEN REPORT

ORIGINAL

INCIDENT REPORT SUPPLEMENTAL

Page #:

Case Number: 200900000653

Officer: MI978 MARION, L.

Date Entered/Changed: 02/28/2009

Reviewer:

Review Date:

DETAILED STATEMENT OF INVESTIGATION: Synopsis: On February 27, 2009 (Friday) I was contacted by Det. Gonzalez to transport S. Tappeiner to the Beaufort County Detention Center. Officer Whitney handcuffed and searched S. Tappeiner prior to transport.

Search and Transport of Arrestee:

Suspect S. Tappeiner was arrested on a warrant with the Bluffton Police Department. Upon placing suspect in the back seat of my marked patrol unit, the back seat was checked for any contraband, suspect S. Tappeiner was searched incident to arrest nothing was found. Suspect S. Tappeiner was handcuffed behind her back and placed in the back seat of my marked patrol unit. Suspect S. Tappeiner was secured by the safety belt. Upon arrival at Beaufort County Detention Center, suspect S. Tappeiner was taken from the back of my marked patrol unit and the seat was searched for any contraband. Nothing was found.

ORIGINAL

INCIDENT REPORT SUPPLEMENTAL

Page #: 1

Case Number: 200900000653

Officer: J6723 JACKSON, D.

Date Entered/Changed: 03/02/2009

Reviewer:

Review Date:

DETAILED STATEMENT OF INVESTIGATION: ON 3-02-09 I WAS ASSISTING DET GONZALES ON A SEARCH WARRANT AT 4 IR BLUFFTON SOUTH CAROLINA. I HELP SEARCH THE MASTER BEDROOM WALK IN CLOSET. I LOCATED A RED SUNDRESS WITH WHITE FLOWERS ON A HANGER IN THE FAR BACK OF THE CLOSET. I THEN NOTIFIED SGT GONZALES WHO HAD OFC HEBDA VIDEO THE DRESS IN PLACE AND WHERE IT WAS REMOVED FROM. THE DRESS WAS GIVEN TO SGT GONZALES TO BE TAKEN AS EVIDENCE.

OFFICER'S NOTES:

I OVER HEARD MIKE TAPPEINER TALKING WITH A FEMALE ON HIS CELL PHONE WHILE WE WERE WAITING FOR DET HEBDA TO VIDEO THE RESIDENCE. THE FEMALE ASKED MIKE WHAT WAS GOING ON. HE REPLIED THEY HAVE A SEARCH WARRANT. SHE ASKED WHAT FOR. HE STATED THAT THEY ARE LOOKING FOR A RED SUN DRESS, SHE THEN REPLIED GOOD LUCK I DON'T HAVE ONE. MIKE THEN SAID THEY ARE ALSO LOOKING FOR BLACK PANTIES, SHE LAUGHED AND SAID I HAVE PLENTY OF THOSE.

EVIDENCE COLLECTED:

(1) RED SUN DRESS WITH WHITE FLOWERS

ORIGINAL

INCIDENT REPORT SUPPLEMENTAL

Page #: 1

Case Number: 200900000653

Officer: B9709 BABKIEWICZ, J. Date Entered/Changed: 03/04/2009 Reviewer: Review Date:

DETAILED STATEMENT OF INVESTIGATION: ON 3-02-09 I WAS ASSISTING DET GONZALES ON A SEARCH WARRANT AT DR BLUFFTON SOUTH CAROLINA. I HELPED SEARCH THE MASTER BEDROOM DRESSER DRAWERS. SGT. GONZALES LOCATED A BLACK PAIR OF UNDERWEAR WITH WHITE LETTERING ON IT IN THE TOP DRESSER DRAWER. SGT GONZALES HAD OFC HERDA VIDEO THE UNDERWEAR IN PLACE AND WHERE IT WAS REMOVED FROM. THE UNDERWEAR WAS SEIZED BY SGT GONZALES TO BE TAKEN AS EVIDENCE.

AS SGT. GONZALES AND I WERE SEARCHING THROUGH THE DRESSER DRAWERS, SGT. JACKSON SEARCHED THROUGH A WALK IN CLOSET LOCATED IN THE SAME ROOM. SGT. JACKSON FOUND A RED SUN DRESS WITH WHITE FLOWERS ON IT. DETECTIVE HERDA TOOK A PHOTOGRAPH OF THE DRESS AND SGT. GONZALES LATER SEIZED IT AS EVIDENCE.

SGT. GONZALES AND I WENT OVER TO (VICTIM) HOUSE AND SHOWED HIM THE ITEMS THAT WE SEIZED FROM THE HOUSE. VICTIM STATED THAT WAS THE UNDERWEAR AND SUNDRESS THAT SUSAN WAS WEARING ON THE NIGHT OF THE INCIDENT.

ORIGINAL

INCIDENT REPORT SUPPLEMENTAL

Page #: 1

Case Number: 200900000653

Officer: H7379 HEBDA, C.

Date Entered/Changed: 03/04/2009

Reviewer:

Review Date:

DETAILED STATEMENT OF INVESTIGATION: ON 3-02-09 I ASSISTED DET. GONZALES SERVE A SEARCH WARRANT AT (HIDDEN LAKES) BLUFFTON, SOUTH CAROLINA. BEFORE THE SEARCH BEGAN, I VIDEOTAPED THE ENTIRE HOUSE TO INCLUDE A GARAGE AND THE UPSTAIRS. AFTER I VIDEOTAPED, I WAITED OUTSIDE WITH MIKE TAPPEINER WHILE SGT. GONZALES, SGT. JACKSON, AND DET. BABKIEWICZ SEARCHED THE RESIDENCE. SGT. GONZALES THEN CALLED ME TO SHOW ME THE LOCATION OF THE BLACK UNDERWEAR WITH WHITE WRITING ON THE CROTCH AREA. IT WAS LOCATED IN THE MASTER BEDROOM, IN A DRESSER DRAWER. I THEN VIDEOTAPED THE UNDERWEAR AND WHERE IT WAS LOCATED. SGT. JACKSON THEN SHOWED ME THE LOCATION WHERE HE FOUND A RED SUNDRESS WITH WHITE FLOWERS ON IT. IT WAS LOCATED IN THE MASTER BEDROOM. HANGING IN THE WALK IN CLOSET, I THEN VIDEOTAPED THE DRESS AND THE LOCATION.

ORIGINAL



Date: 23/Feb/2009 Page 1 of 3.

My Sisters and I were at our neighbors that lived two doors down from us watching a movie. I was at home with my parents that night. My parents had to leave so they asked if I could stay with them at the neighbors house. Our neighbor Susan said yes. We watched a couple of movies and then around 12:30 ^{AM} ~~PM~~ to 1:30 ^{AM} ~~PM~~ we all layed down to sleep. My Sisters and Susans two daughters were asleep on the couches and Her husband was in his bed up stairs. I was laying on the floor in front of the tv. Before I fell asleep She layed down beside me and started touching me. I pushed her hands away and she kept trying to touching ~~ing~~ ^{up} me. When she stopped touching me she went in to the kitchen. She came back and grabbed my arm and ~~took~~ ^{took} me up stairs. I Halted for her Husband but he

Signature of person giving statement: Victim



BLUFFTON POLICE DEPARTMENT

Date: Feb/23/2009 Page 2 of 3STATEMENT OF: VICTIM

Did not wake up. She Slaped me and told me to be quiet. She took me into her daughters room and Shut and locked the door behind us. She Took my pants off and I pulled her dress and panties off. She forced me to perform oral sex ~~I~~^I did not want to and I pulled away and tried to go home. She caught me and hit me in the head and pushed me down and pushed my head toward her vagina and told me to perform oral sex ~~I~~^I once again tried to get away. Then she kept hitting me in the head until I did it. When she had had enough of that she layed on top of me and put my penis in her vagina and started raping me. We were in the room for about an hour and a half. When she left I quickly ran out of the house and went straight to my house. I had to climb in the back window because the doors were locked. I went up to my room and layed down in my bed.

I have read each page of this statement consisting of _____ page(s), each of which bears my signature, and corrections if any bear my initials, and I certify that the facts contained herein are true and correct.

Dated this 23 day of Feb, 2009 at 10:54 am pm

WITNESS: Michelle Crum SPO

WITNESS: _____

Signature of person giving statement: VICTIM



20900000646

BLUFFTON POLICE DEPARTMENT

Date: Feb/23/2004 Page 3 of 3

STATEMENT OF: Victim

The next day I told my sisters to not go in their house anymore. I don't remember the date but it was two to three weeks before school started.

I have read each page of this statement consisting of 3 page(s), each of which bears my signature, and corrections if any bear my initials, and I certify that the facts contained herein are true and correct.

Dated this 23 day of Feb, 2004 at 10:54 am pm

WITNESS: Michael Cross SPO

WITNESS: _____

Signature of person giving statement: Victim

SUSAN SANDERS TAPPEINER

Pre-Sentence Investigation

November 11, 2009

On February 27, 2009, Susan Sanders Tappeiner was arrested for Criminal Sexual Conduct with a Minor Second Degree that occurred on August 15, 2008 in Beaufort County, South Carolina. On October 28, 2009, she was found guilty of this crime in Beaufort County General Sessions Court. That same day, Hon. Carmen T. Mullen ordered that a pre-sentence investigation be completed. The victim of this crime is victim who was 13 years old at the time of the crime.

Information for this report was obtained from the following sources: Bluffton Police Department Incident Report Case number 200900000653; an interview of Ms. Tappeiner that occurred on November 3, 2009 at the Beaufort Co Detention Center; an interview of her husband, Mike Tappeiner, that occurred at their home in Bluffton on November 4, 2009; an interview of her parents at their home on Spring Island that same morning; from a conversation with the victim's mother, on November 10, 2009; and from several telephone conversations with friends and associates of Ms. Tappeiner. Following is a summary of all data collected.

Defendant Information

Full Name	Susan Sanders Tappeiner
Date of Birth	, 1966
Place of Birth	Wilmington, Delaware
Social Security Number	
SC State Identification Number	SC01869642
FBI Number	149218DD2
SC Drivers License Number	011679322
Current Address	Bluffton, SC 29910
Sex	Female
Race	White
Height	508
Weight	111
Eye Color	Hazel
Hair Color	Brown



Official Version of the Crime

The incident report for this offense is almost fifty pages long. Following is a summary.

On the morning of February 23, 2009, Victim (14 years of age) reported to the School Resource Officer at H. E. McCracken Middle School, 250 H. E. McCracken Circle, Bluffton, Beaufort County, that he had been sexually assaulted by Susan Sanders Tappeiner (42 years of age). He said the assault occurred during the previous Summer two or three weeks before the school year begun at Susan Tappeiner's home, which was at _____ in Bluffton. Victim was 13 years old when he was assaulted. He said he had not told anyone about the incident, however, it "weighed heavily on his mind . . . and he wanted to tell someone. . . ." On that day and during the days that followed, Victim provided a statement to law enforcement, his mother was advised of the incident, and he was interviewed by Hope Haven of the Lowcountry. Victim's mother, _____, reported that the assault had to have occurred on the night of August 15, 2008. She and her husband had been away from home on that Friday night, and Victim went to the Tappeiner's residence to spend the night.

In summary, Victim reported that on August 15, 2008, his parents were going to be out of town for the evening, and his mother asked him to spend the night at the Tappeiner's home, where his sisters had already made arrangements to stay. The Tappeiner's lived at (_____), which was two houses away from his home: (_____). Victim contacted Susan and she agreed for him to stay. That night they watched scary movies for several hours. Victim said the movies frighten him, and Susan invited him to sit in a chair with her. As they continued watching the movies, his sisters fell asleep on the sofas, and he lay down to go to sleep on the floor in the living room. After he lay down, Susan lay down beside him and began touching him by putting her hand inside his pants and touching his penis. He said he told her to stop several times. She finally stopped and went to the kitchen. She then returned to the living room, grabbed him by the arm, and made him go upstairs. Victim said as he was being forced upstairs, he tried to wake his sisters, but they would not wake up. As they neared Susan's bedroom, Victim yelled for her husband, Mike, but he did not wake up. Susan forced him to go into one of her daughter's bedroom, and then she shut and locked the door. She took Victim's pants and underwear off, and then she took her dress and panties off. She then made Victim perform oral sex on her by pushing his head between her legs and telling him to lick her genitals. When he resisted, she would slap him in the head, so he did what she told him. After several minutes, she pulled him up by his arm and made him lie on the bed. Susan then got on top of him, put his penis in her vagina and had sex with him. Before Victim ejaculated, she got off of him and said she did not want to get pregnant. When she was finished, Victim ran out the house and went home. When he got home he had to enter the house through a back window, after which he took a shower.

On February 27, 2009, after the Hope Haven interview, the investigating officers contacted Susan Tappeiner and requested she come to the Bluffton Police Department. After being interviewed she was arrested and charged with Criminal Sexual Conduct with a Minor Second Degree.

Defendant's Version of the Crime

On November 3, 2009 during an interview at the Beaufort County Detention Center, Susan Tappeiner was asked to describe the events of August 15, 2008.

She said on that evening some girls from the neighborhood were going to spend the night at her house, and they were going to watch movies and eat pizza. She identified these young girls as being neighbors who watched her two daughters after school until she or her husband got home.

Before she went home she attended a work related function, during which she consumed three glasses of wine. She also said that she was taking Clonazepam, which was prescribed by her family doctor for anxiety attacks. She said after the arrest, she learned that the dose of Clonazepam she was taking (3 mg per day) was probably three times the safe level of the drug. She also said she should NOT have been consuming alcohol with this medication.

When Susan got home, those present in the residence were her two daughters (8 years old at the time) and (4 years old); Victim (13 years old) and his two sisters, (12 years old) and (11 years old). In addition, there was another girl, (age not known), who was a friend who also lived in the neighborhood. They planned to watch scary movies and eat pizza. Pizza was delivered about 10 p.m. Susan could not remember what movies they watched, but thinks they were what she referred to as "Gore-Fest Movies," and "Shudder."

At about 11:00 p.m., and got scared and did not want to watch any more movies. took and went to her home to sleep. Susan said that Victim then sat with her in a large double chair and covered up with a blanket. Susan described their relationship as being no more than just friends. She said that there was some playful teasing by Victim as if he were frightened by the movie, and he would grab her leg or arm, but she said that there was nothing sexual in what was going on, and it all seemed to be in playful fun.

She does not remember much of what happened thereafter. Just before providing her statement for this investigation, she had just concluded a very lengthy interview with Dr. Thomas Martin, who she identified as a psychotherapist, which she said was very helpful for her to begin to grasp what happened on that night. She said, "I know something happened..." but she does not know much of the details. She said, "I remember going upstairs," and "I remember Victim front of me." But she does not remember what happened once they got upstairs. She seemed genuinely devastated to begin to understand and accept that she could have sexually assaulted a minor in her home. She does not believe she struck Victim in the head as he claims. She said that to strike someone is so out of her character, that she believes that if she had hit him she would remember.

Criminal History

Susan Tappeiner does not have a criminal history other than the current conviction.

Social History

Family History

Susan Tappeiner was born on [redacted], 1966 in Wilmington, Delaware. Her parents are David and Diane Sanders. Susan's only sibling is a twin sister, Elizabeth Sanders Auerbach (Liz). Susan's father was an executive with DuPont, and later with Johnson's Wax, and they moved several times during her childhood. Susan said that between birth and eight years old, her family moved from Delaware to Connecticut to Texas, and then back to Delaware. She remained in Delaware until 1994, when she moved to Hawaii. While in Hawaii she met Mike Tappeiner, and they married in November 1998. On November 25, 1999 she gave birth to their first daughter, [redacted]. In 2002, she and her family moved to Beaufort County, South Carolina to work in a photography store on Hilton Head Island that her father had purchased. On April 18, 2003 she gave birth to their second daughter, [redacted].

Education

As a child, Susan attended *Wilmington Friends School* in Wilmington, Delaware, which she described as a private, college preparatory school. She graduated in 1985, and then attended Denison University in Granville, Ohio until 1987. She then transferred to the University of Delaware, from where she graduated in 1991 with a B.A. in English. She described herself as a "B" student, and she said her interests and talents leaned more toward the "creative side" and the arts.

Employment

Susan has experience in sales and marketing. She has also done some modeling for local magazines on Hilton Head Island, and for a friend who had a clothing line. She said around 2001 her father purchased the *One Hour Photo* on Hilton Head Island, and she and her husband moved from Hawaii to Beaufort County to run the store. She said her title is Marketing Coordinator. With the increased use of digital cameras, the photograph developing business declined. Rather than close the business, they chose to make some changes in the operation of their store, hoping to keep up with current trends in photography. They changed the name of the business a couple of times, and they moved to a better location. The current business, *Island Photo and Camera*, which she said is the only camera store in Hilton Head Island, is currently located at 890 William Hilton Parkway. Susan said her husband manages the technical side of the business, and she manages sales and customer relations. She estimated that their family income from the business is currently about \$4,000.00 per month.

In 2005 and 2006, with the downturn of the economy, Susan began working for the Marriott selling time shares. She said the first year she made approximately \$100,000.00, and the second year she made about \$65,000.00.

She said she has a friend who tried to sell clothing at biker rallies, and he hired her to model and

sell the clothing. Jim Perkins, who was one of her character references, said the clothing business, which he referred to as *Sikworld*, did not do well. He said the clothing items included halter tops, hot pants, and underwear. Susan said she earned no more than \$5,000.00 from this venture.

Military

Susan has never been in the military.

Abuse / Discipline as a Child

There were no indications of violence or mistreatment as a child within the immediate family, other than possible neglect. For punishment, she said her parents took away privileges. There was an incident that occurred outside the home in which Susan was sexually assaulted. Rather than provide proper support and treatment for Susan, her parents chose to cover it up.

Health

Susan was asked to describe her health. She described herself as being in good health, except for problems she has experienced with anxiety attacks. She said she suffers from anxiety and depression. She was asked to describe her condition, who made the diagnosis, and if she had ever attended counseling or any other mental health professional for her condition. She stated that she had an anxiety attack while undergoing a medical procedure during which she had to enter an MRI machine. She said the experience had a significant effect on her, and she said she has never been the same. Since then she has had other similar attacks, and her family doctor diagnosed the condition and prescribed *Clonazepam*. She said that over time her doctor increased the dosage to 3 mg's per day.

A review of several medical websites state that Clonazepam is a medicine used to treat persons who suffer from seizures and anxiety attacks. Clonazepam belongs to a group of medicines called benzodiazepines, and it works by regulating, or slowing, overactive electrical signals in the nerves in the brain. The general dose prescribed for anxiety attacks is 1 mg per day or less, although a patient suffering from seizures could be prescribed as much as 20 mg per day. There are several possible side effects of this medicine, including drowsiness, confusion, muscle weakness, restlessness, dizziness, difficulty concentrating, and loss of memory following a seizure. Some of the warnings about this medication are that it is habit forming, and the persons to whom it is prescribed must not use alcohol. One publication stated that if alcohol is consumed while taking Clonazepam, the possible reactions are "Drowsiness, dizziness; increased risk of overdose; slowed or difficulty breathing; impaired motor control; unusual behavior; and memory problems." (*National Institute of Health Publication Harmful Interactions: Mixing Alcohol with Medications*).

Dr. Yola Nolan, PhD, of Counseling Services of Beaufort, was identified as a counselor who had worked with Susan since the arrest. On November 10, 2009, during a telephone conversation, Dr. Nolan was asked for her observations of Susan. She said that she worked with Susan for only three hours during two or three counseling sessions, and that she would like to have met with her a few more times before she could make a definitive diagnosis. However, having said this, she said that Susan exhibited several behavior characteristics that indicated she is most

likely bipolar. The medications she was taking and the abuse of alcohol appear to be attempts to self-medicate, and to slow the mania associated with bipolar disorder. She pointed to the fact that when Susan was interviewed, she was hyper, talked very fast, and seemed to aimlessly jump from topic to topic. She had a difficult time staying focused, and she seemed to place greater importance on events that a normal person would find insignificant. Dr. Nolan said all of this behavior can be associated with someone diagnosed with bipolar disorder. She also said that she believes that the sexual assault that occurred when she was a child was the trigger to much of her current behavior. Dr. Nolan stated that in a large proportion of cases in which a female suffers from panic attacks, sexual abuse was often present during childhood.

Substance abuse

Susan stated that she has a history of drug use and cocaine is her drug of choice. She first used cocaine in 1996 or 1997 when she lived in Hawaii, and she abused on a regular basis until 1998. During that year, before she married Mike, she stated she admitted herself to a two to four week treatment program in Hawaii. She claims she successfully completed the program. She claims she did not abuse cocaine again until 2005 when she was working for Marriott selling time shares. She said the use of cocaine was part of the high pressure life style of many of those in real estate sales.

Concerning alcohol, she said that she drank socially. One person who was questioned during a telephone conversation stated that his observation was that alcohol seemed to play an important role in the family dynamic, and alcohol seemed to be involved in all aspects of their lives. On August 15, 2008, Susan said she had three glasses of wine during a function before going home. After getting home, she said she had more to drink. Her husband, who was not questioned about his drinking habits, voluntarily stated during the interview that he did not think he drank too much on the night of the incident, but he did "have maybe five or six beers" that night.

Sexual Abuse as a Child

Susan stated that her experience in the private school was negative. She said her class was small, and there was a lot of teasing of her and her twin sister, Liz, by other students. She said she did everything with Liz, and they sought to make friends with students from the public school. One night she and Liz were at a friend's house. During the night, the friend's older brother, who she estimated was 17 or 18 years old, raped her, which resulted in her getting pregnant. She never told anyone, however, after three months, there was no hiding it. She said her parents took her to have an abortion. She appeared to be disturbed and remorseful about how the matter was handled, and that she had an abortion. She was asked if the man who assaulted her was ever charged with any crimes, and she said he was not. She was asked if she ever received any counseling following this event, and she said she did not.

Her parents were asked to describe the events surrounding the sexual assault on Susan. Susan's mother, Diane Sanders, said that when Susan was 13 or 14 years old, she was raped by one of her girlfriend's older brothers, who was about 18 years old. She said Susan was at the friend's house, and the kids were drinking White Russians before the sexual assault. She said Susan never had sex before the assault, and they would never have found out, except that she got pregnant. They were asked if they pursued charges against the young man, and Ms. Sanders said

they did not. "Wanted to keep it quiet." Mr. Sanders, who was very vocal about Susan's general social history, added very little to the discussion about the sexual assault. He then said, "I blotted that out." I observed that both parents appeared to be regretful in how they handled this incident.

Financial – Income / Assets / Debt

Susan and her husband live at _____, Bluffton, SC. Beaufort County Real Property Lookup reveals that this property is owned by Susan and her father, David Sanders. The house was purchased on February 6, 2004 for \$182,654.00. Susan was uncertain of the equity in the home, but estimated it to be approximately \$170,000.00. As stated previously, Susan estimates that the family income from the camera store is about \$4,000.00 per month. She said that there are no significant debts.

Religious Interests

Susan stated that she is Presbyterian. Since this incident she has become more interested in God, and she feels that she needs to make some changes. She said that she is attending a Bible study at the detention center.

Victim

The victim of this crime is **VICTIM** who lived at _____ Bluffton, with his mother, _____ and his step-father, _____. Also at the residence were **VICTIM'S** sisters, _____ and _____. On November 10, 2007, during a telephone conversation, Ms. _____, discussed the incident and the affect it had on her son. After the assault and before Ms. _____ became aware of it, she observed that **VICTIM** attitude was more depressed, and his school performance had declined. Since disclosure, she said that **VICTIM** has progressed in a positive fashion, and that he has benefitted primarily because of the counseling that has been provided by Hope Haven. She said that he has progressed from not being able to discuss it at all when the incident was first revealed, to being able to talk about it openly with her on a daily basis. She said that Hope Haven recommended that **VICTIM** receive individual counseling that should last at least until he is 18 years-old. Ms. _____ said that she is greatly indebted to Hope Haven for their services to **VICTIM** however, after this case is over, the type of therapy that is recommended will be very expensive. She said that neither she nor her husband have health insurance at the present, and she is concerned that she will not be able to provide the counseling he needs.

Concerning sentencing, Ms. _____ recommends that Ms. Tappeiner should receive a sentence of at least two years in prison, followed by community supervision that should include some type of intensive psychotherapy, possibly in an in-house treatment facility. Ms. _____ stated that even though she would like to recommend more time in prison, she realizes that a very long prison sentence would most likely do more harm to Susan than good. She would also like for the Court to consider ordering that Ms. Tappeiner pay restitution to her son specifically to pay for counseling.

Statement of the Investigating Officer

Sgt. Christian Gonzales' office was contacted by phone and a message left. His statement will be entered/forwarded to the Court upon receipt.

Character References

In the course of gathering information for this report, several names were provided to this investigator to be contacted as character references for Susan. For most of these people, messages were left on answering machines and their information was collected if they called back. Most of those who called back provided fairly consistent statements. Following is a general summary. A list of those contacted is attached to this report.

Several of those contacted seemed to not understand or be able to accept the fact that Susan has been found guilty of this crime, and they tended to believe that there was some possibility that she could still be found innocent. All of them described Susan as being a very loving and outgoing person, and a very devoted mother. Almost all do not believe she committed this crime. Several stated that they believe that if there was a problem with Susan, it would have been evident in her children, who they described as well adjusted. (During the home visit, this investigator met and and they appear to be well adjusted, pleasant children. Mike presented their report cards, which indicated that they made good grades.) Several of those contacted pointed out Susan's services to some of the local non-profit agencies for which she has worked to help raise money. Some said that they believe that the victim of this crime was actually the aggressor. They said they think he was infatuated with Susan, although no one was able to provide any factual information to support their claim.

Two of those contacted had a good grasp of the fact that she has been found guilty of this crime, and that sentencing is the next step in the process. One of those was Tom Schmidt, who lives at Drive in Bluffton. He said he has known the Tappeiner's for about two years, and his children have visited in their home. He also identified himself as a minister, and he said he has had some training in counseling. He described the Tappeiner's as being very friendly, open, decent people. However, he observed that alcohol played a predominant roll in the house. He also said that Susan seemed to have some type of emotional issues that he described as "needy-ness," or a need to be liked. He also said she was very flirtatious with men. He said he cannot, however, comprehend her being assaultive and striking the victim. He said whatever the court orders, he recommends that substance abuse counseling and mental health treatment be part of the sentence.

Dr. Nolan, who's comments are addressed under *Health*, said she is having difficulty believing that Susan committed this crime, and she does not believe that Susan physically struck the victim. As I discussed the case with Dr. Nolan, she was advised of the comments that Susan made during the interview on November 3, 2009 when Susan was beginning to remember some

of the events of that evening. Dr. Nolan responded by stating that she believes that as more of the facts of the crime come to light in Susan's memory, Susan will become increasingly depressed and suicidal. Dr. Nolan does not believe incarceration is appropriate for Susan, for she does not believe Susan will be able to live through it. She further stated that she believes Susan should be under suicide watch now and for some time into the future.

Summary

On August 15, 2008 Susan Sanders Tappeiner, 42 years old, sexually assaulted 13-year-old VICTIM, who was a guest in her home. VICTIM kept the incident to himself until February 2009, when he told a school resource officer. The crime was investigated, and Susan was arrested four days later. At the time, Susan was under the influence of alcohol and Clonazepam, and she states that she remembers very little of the incident, although she admits that something happened that night in her home for which she is regretful. In the limited amount of counseling that has occurred since she was arrested, it appears that she suffers from depression and anxiety attacks, and she exhibits many of the symptoms of bipolar disorder, for which for many years she has self-medicated with cocaine, prescription medications, and alcohol.

Recommendation

Susan Sanders Tappeiner has been convicted of Criminal Sexual Conduct with a Minor Second Degree, § 16-3-655(B)(1). The Code of Laws states that "A person convicted of a violation of subsection (B) is guilty of a felony and, upon conviction, must be imprisoned for not more than twenty years according to the discretion of the court."

The following circumstances were taken into consideration in developing a recommendation:

Aggravating Circumstances

1. The victim, who was thirteen years old, resisted the sexual assault, but his resistance was overcome by force. Several of Ms. Tappeiner's supporters have pointed to the victim as being large in stature, and Susan as being very small. However, the facts are that at the time of the crime, there was only between 10 and 20 pounds difference between the two, and she was the 42-year-old adult. In his mind, she was the authority figure, regardless of size, and she was able to control him by force and/or intimidation.
2. The victim suffered protracted mental and emotional distress from the assault for which he will require mental health treatment for several years to come.

Mitigating Circumstances

1. Susan Tappeiner has no prior criminal convictions of any kind.
2. It appears that when Susan Tappeiner committed this crime, she did not have the capacity to appreciate the criminality of her conduct, or her ability to conform her conduct to the

requirements of the law was substantially impaired.

3. From conversations with most of those involved, including the victim's mother, it appears that a lengthy period of incarceration would be detrimental, both physically and mentally, to Susan Tappeiner.

Therefore, based on all of the above, the recommendation of the Department is that Susan Sanders Tappeiner be sentenced a period of incarceration within the guidelines of the law. The offense for which she is convicted is a "no-parole" offense, and her release from SCDC will be followed by two (2) years of Community Supervision.

The Department recommends the Court order the following Special Conditions to be applied to incarceration and Community Supervision:

1. Mental health treatment and counseling.
2. Substance Abuse treatment and counseling.
3. Restitution to the victim to pay for his counseling.

For the Court's consideration in sentencing, the Department's policy regarding any sex offender being released on Community Supervision is that the offender will monitored by GPS (Global Positioning Satellite) for not less that six (6) months beginning upon release.

Respectfully submitted,

s/

Date: _____

Patrick N. Rowell
Veteran Agent 1 / Investigator
SC Dept Probation, Parole, and Pardon Services
1905 Duke Street-Rm 230
Post Office Box 37
Beaufort, South Carolina 29901-0037
843-470-4723

Approved by:

s/

Date: _____

Lisa D. Alston, Agent in Charge
Beaufort County Operations

AFFIDAVIT OF CUSTODIAN OF RECORDS
WALGREEN COMPANY, PO BOX 4039, MS #735, DANVILLE, IL 61834

Patient Name: SUSAN TAPPEINER Date of Birth: 12/24/1966

AKA: _____

I, the undersigned, being the duly authorized Custodian of Records or other qualified witness for Walgreen Co., and having the authority to certify the records declare the following: The copies of records for which this Affidavit is made are true and correct copies of the original records; The original records were prepared in the ordinary course of business at or near the time of the act, condition, or event by a person with knowledge of the facts recorded; and That:

A) CERTIFICATION OF RECORDS:



Paper print outs of information for our retail drug stores and mail order facilities electronically stored in Walgreen Co.'s Pharmacy system responsive to the subpoena or authorization and reasonably accessible are provided and total 4 page(s).

B) CERTIFICATION OF NO RECORDS:

A thorough search of our files, carried out under my direction revealed no documents, records or other materials called for in the subpoena or authorization.



All records for the time period in question have been destroyed in accordance with our document retention policy.



A thorough search of the requested date range _____ to _____ has been performed and, understanding that such records could exist under another spelling, name, or other classification but with the information furnished to our office and to the best of our knowledge, no such records exist.

I declare under penalty of perjury under the laws of the State of Illinois that the foregoing is true and correct.

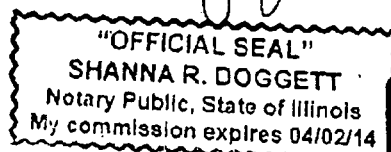
Executed on 04/09/2013 at Danville, Illinois.

Jill Bosch
(Print Name)

Signature: Jill Bosch

Subscribed and sworn to before me this 9 day of Apr, 2013

S. Doggett
Notary Public



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 05/10/2008 NRA/NRA 90 RFL002 15.00 11.25 05/12/2008 A8085311172331 RXEDO

**THOMAS V. MARTIN, M.D.
MARTIN PSYCHIATRIC SERVICES, PC**

Curriculum Vitae

March 1, 2009

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(803) 960-3597/Fax (803) 696-1081

CREDENTIALS

- American Board of Psychiatry and Neurology, Diplomate, Forensic Psychiatry, Board Certified.
- Clinical Examiner, Association for the Treatment of Sexual Abusers (ATSA).
- National Board of Addiction Examiners, Doctoral Addictions Counselor.
- American Board of Forensic Medicine, Diplomate, Board Certified.
- American Board of Forensic Examiners, Diplomate, Psychiatry, Board Certified, Fellow of the College.
- American Board of Psychiatry and Neurology, Diplomate, General Psychiatry, Board Certified.
- Medical Licensure: South Carolina, Georgia, Texas, and Maryland.

EDUCATION

- Fellowship: Forensic Psychiatry, Palmetto Health Alliance, and the University of South Carolina School of Medicine, Columbia, SC, 1999-2000.
- Residency: Psychiatry, Wilford Hall Medical Center, San Antonio, TX, 1988-92.
- Medical School: Uniformed Services University of the Health Sciences School of Medicine, Bethesda, MD; 1984-88; Doctor of Medicine.
- Graduate: Hood College, Frederick, MD; 1980-84; Masters of Science, Biomedicine.
- Undergraduate: University of Maryland, College Park, MD; 1974-79; Bachelor of Science, Clinical Psychology.

PROFESSIONAL EXPERIENCE

- Martin Psychiatric Services, PC, Columbia, SC, private practice, individual and group psychotherapy, medication management, independent medical evaluations in the General and Forensic (criminal and civil) Psychiatric assessment and treatment of juveniles and adults, sexual and criminal offenders, and child custody evaluations, 2000-present.
- Courtesy Staff Psychiatrist, Palmetto Health Baptist/Richland Hospitals, Columbia, SC, 2002-present.
- New Hope Carolinas Treatment Centers, Rock Hill, SC, Medical and Psychiatric Director, Clinical Nursing Supervisor, and Professional Staff Instructor, for a total of 135 beds in a multidisciplinary treatment High Maintenance Residential Treatment Facility for adolescent males and females with serious mental illnesses, developmental delays, sex offending and other violent behaviors, 2001-2006.
- Forensic Psychiatrist, SC Department of Juvenile Justice, Columbia, SC, psychiatric assessment, medication management and Court Ordered evaluations, University of South Carolina School of Medicine, 2000-2001.
- Medical Director, Southbridge Center, Columbia, SC, assessment, diagnosis, and treatment of forensic and sexually violent juvenile patients in a residential facility, 2000-2001.
- Senior Psychiatrist, Behavioral Disorders Treatment Program, SC Department of Mental Health, Columbia, SC, Clinician and Case Manager Supervisor in charge of assessment, diagnosis, and treatment of Sexually Violent Predators, forensic evaluations and consultations, 1999-2001.

Thomas V. Martin, M.D.
Curriculum Vitae



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ID
only

MARTIN PSYCHIATRIC SERVICES, PC

- Senior Psychiatrist, Columbia Area Mental Health Center, Columbia, SC, outpatient diagnostic and medication practice for indigent psychiatric patients, supervised a multi-disciplinary treatment team, 2000-2001.
- Clinical Instructor, Department of Neuropsychiatry, University of South Carolina School of Medicine, Columbia, SC, 1999-2000.
- Psychiatric Consultant, The Ethos Foundation, College Park, MD, providing initial psychiatric evaluation, mediation assessment and maintenance and therapeutic treatment recommendations to federal offenders, 1998-1999.
- Clinical Director, Tri-Service Addiction Recovery Center, Inpatient, Partial hospitalization and Outpatient Services, Malcolm Grow Medical Center, Camp Springs, MD, fifteen-twenty five patient capacity, supervising psychiatric consultation, treatment team management, intense outpatient group facilitation and medication management and professional staff, psychiatric resident, physician assistant and medical student instruction, 1996-1999.
- Chief, Tri-SARC Consultation-Liaison Service, Malcolm Grow Medical Center, Camp Springs, MD, 200-inpatient medical, surgical, and intensive care service, supervising psychiatric/family practice residents, physician-assistant and medical students, 1996-98.
- Medical Services Security Clearance Officer, Malcolm Grow Medical Center, Camp Springs, MD, 1996-1999.
- Forensic Psychiatrist, Malcolm Grow Medical Center, Camp Springs, MD, Consultant to the Legal Services Agency, 1992-1999.
- Staff Attending Psychiatrist, Malcolm Grow Medical Center, Camp Springs, MD, responsible for the evaluation, treatment, and management of psychiatric inpatients on a 25-bed ward; in addition to psychiatric resident, medical student and psychology intern teaching and supervision, 1992-96.
- Chief Resident in Psychiatry, Wilford Hall Medical Center, San Antonio, TX, 1992.
- Psychiatric Technician with administrative, teaching and research responsibilities, Research Assistant, Chestnut Lodge Hospital, Rockville, MD, 1977-80.
- Health Lodge Director, Boy Scouts of America, National Capital Area Council, 1976-79.

COMMITTEE ACTIVITIES

- Medical Services Team Chairman, New Hope Treatment Centers, Rock Hill, SC, 2005-2006.
- Performance Improvement Committee, New Hope Treatment Centers, Rock Hill, SC, 2005-2006.
- Physician's Advisory Committee, New Hope Treatment Centers, Charleston, SC, 2002-2006.
- Program Implementation Team, Justice Resource Institute, Southbridge Center, Columbia, SC, 2001.
- Senior Staff Committee, Behavioral Disorders Treatment Program, South Carolina Department of Mental Health, Columbia, SC, 2000-2001.
- Environment of Care Committee, Behavioral Disorders Treatment Program, South Carolina Department of Mental Health, Columbia, SC, 2000-2001.
- Credentials Committee, Psychiatry Representative, Malcolm Grow Medical Center, Camp Springs, MD, 1997-1999.
- Medical Ethics Committee, Psychiatry Representative, Malcolm Grow Medical Center, Camp Springs, MD, 1995-1999.
- Drug Usage Evaluation Committee, Chairman, Psychiatry Representative, Malcolm Grow Medical Center, Camp Springs, MD, 1993-1999.
- Pharmacy and Therapeutics Committee, Psychiatry Representative, Malcolm Grow Medical Center, Camp Springs, MD, 1993-1999.
- Health Records Review Committee, Psychiatry Representative, Malcolm Grow Medical Center, Camp Springs, MD, 1993-1999.
- Pharmaceutical Representative Coordinator, Malcolm Grow Medical Center, Camp Springs, MD, 1993-1999.
- Test Utilization Committee, Psychiatry Representative, Malcolm Grow Medical Center, Camp Springs, MD, 1998.
- TRI-SARC Partial Hospitalization Service Integration Task Force, Malcolm Grow Medical Center, Camp Springs, MD, 1996-1997.

MARTIN PSYCHIATRIC SERVICES, PC

- Psychiatry Grand Rounds/Continuing Medical Education Coordinator, Department of Psychiatry, Malcolm Grow Medical Center, Camp Springs, MD, 1993-1997.
- Multi-Disciplinary Psychiatric Treatment Team Working Group, Chairman, Department of Psychiatry, Malcolm Grow Medical Center, Camp Springs, MD, 1995.
- American Medical Association, Medical Student Branch, District of Columbia, 1984-1987.

PROFESSIONAL ORGANIZATIONS

- Association for the Treatment of Sexual Abusers, Clinical Member, 2000-present.
- American Academy of Psychiatry and the Law, 1995-present.
- American College of Forensic Psychiatry, 1995-present.
- American Board of Forensic Examiners, 1995-2007.
- American Psychiatric Association, 1988-present.
- American Medical Association, 1984-2008.
- Society of Uniformed Services Psychiatrists, American Psychiatric Association, 1994-1999.
- National Board of Addiction Examiners, 1997-1999.
- American Academy of Psychoanalysis, 1992-1998.
- Washington Psychiatric Society, American Psychiatric Association, 1992-1994.
- Texas Society for Psychiatric Physicians, 1988-1992.
- Bexar County, Texas Psychiatric Society, 1988-1992.

PUBLICATIONS/PRESENTATIONS

- Martin, Thomas V., McKee, Geoffrey, and Holland, Lori A., Juvenile Sex Offenses: Predicting Multiple Victims, American Academy of Psychiatry and the Law meeting (2001), Boston presentation.
- Martin, Thomas V. and Terris, James, Methods for long-term metabolism studies, chronic blood collection, and blood pressure measurements in conscious swine. Swine in Biomedical Research; June 1985; p. 52.
- Terris, James and Martin, Thomas V., Plasma and aortic renin activity in the DOCA hypertensive pig. Presented at the American Physiological Society fall meeting, 1985.
- Martin, Thomas V., The development of a vascular renin extraction procedure and method of radioimmunoassay to measure changes in vascular renin-like activity following DOCA administration in the pig, Masters' Thesis, 1984.

RESEARCH COLLABORATION

- Chestnut Lodge Follow-Up Study, Clinical Research Assistant, Thomas H. McGlashan, Clinical Director, Chestnut Lodge Hospital, Rockville, MD, 1997-1980.
- McGlashan, Thomas H., Schizotypal personality disorder, Chestnut Lodge Follow-Up Study: VII, Long-term follow-up perspectives; Archives of General Psychiatry, 43: 329-34, 1986.
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- McGlashan, Thomas H., The Chestnut Lodge Follow-Up Study, III: Long-term outcome of borderline personalities, Archives of General Psychiatry, 43: 20-30, 1986.
- McGlashan, Thomas H., The Chestnut Lodge Follow-Up Study, II: Long-term outcome of schizophrenia and affective disorders, Archives of General Psychiatry, 41: 586-601, 1984.
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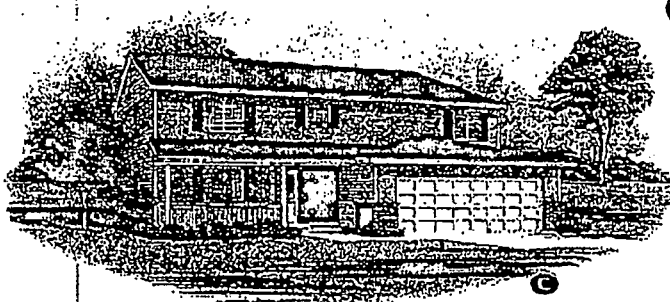
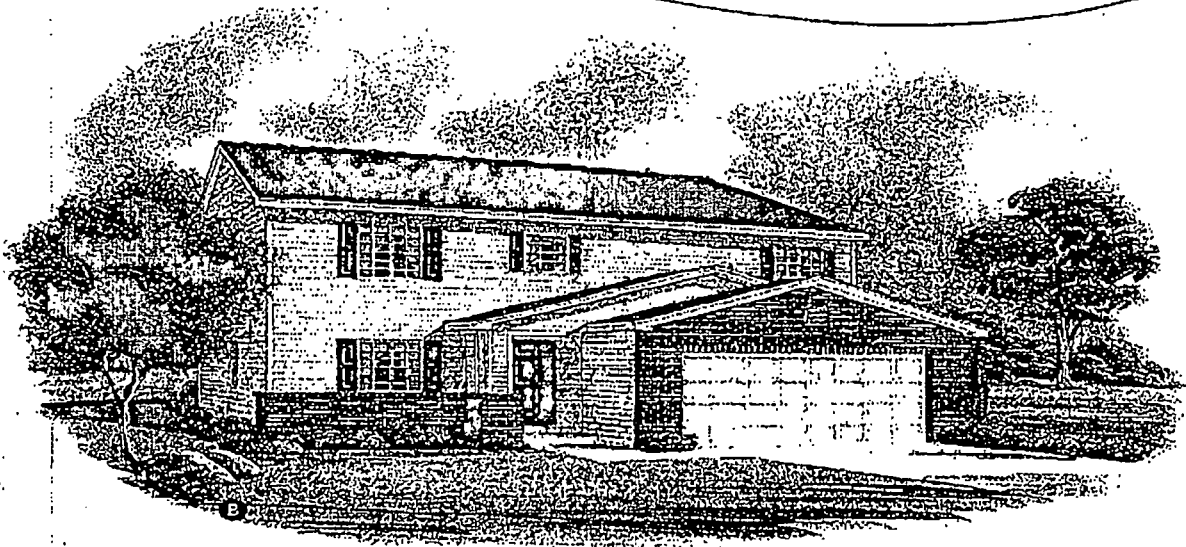
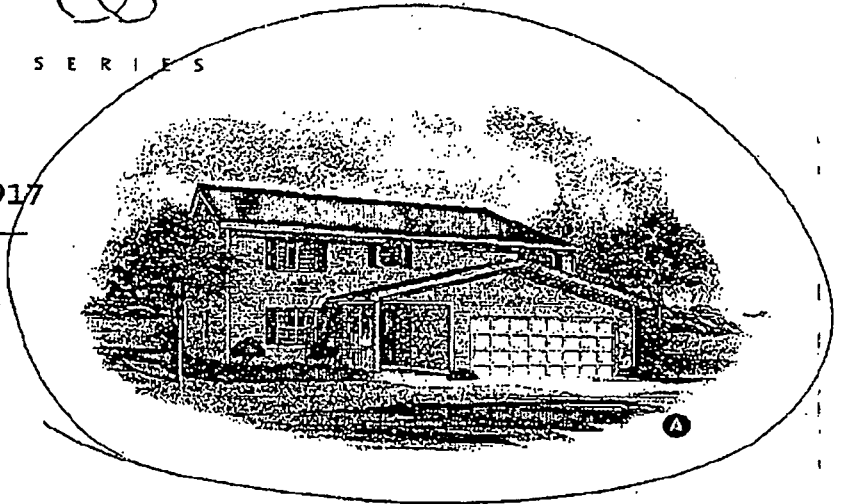
LG
S E R I E S

LOT 102

Yorkshire No. 1917

- 4 bedrooms, 2-1/2 baths or 3 bedrooms and loft
- 2-car garage
- Optional screened porch

1,951 square feet



Step through the welcoming entrance of the Yorkshire and into a family home with all the features you've dreamed of. On the first floor of this two-story plan, an expansive great room, with optional fireplace, opens into a casual dining area and large kitchen with optional island. There is also a large bedroom with a walk-in closet and a powder room with optional shower. Upstairs is a generous owners suite with its own pampering bath, plus two additional bedrooms and a bath. Or if you prefer, an optional loft may be chosen to replace one of the bedrooms.



LOT 102

S E R I E S

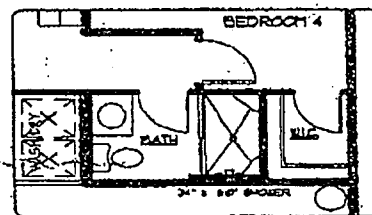
[illegible]

2ND FLOOR

THE Yorkshire

[illegible]

1ST FLOOR



OPTIONAL SHOWER
IN POWDER ROOM

CENTEX HOMES

Elevations shown are artist's concepts. Floor plans may vary per elevation. Room sizes vary per elevation. Center Homes reserves the right to make changes without notice or prior obligation. ©2002 Center Homes.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

2010-CP-07-2396

Susan Tappeiner, #338050,)

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

13 JUN 18 PM 12:45
 BEAUFORT COUNTY
 CLERK OF COURT
 S.C.

PROCEDURAL HISTORY

#1
 PMS

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 17, 2010. The Respondent made its Return on August 25, 2010. An evidentiary hearing on the matter was convened on April 4, 2013 at the Beaufort County Courthouse. The Applicant was present at the hearing and was represented by Tara Dawn Shurling, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Testifying at the hearing was Charles Macloskie, Esquire ("Defense Counsel"), Desa Ballard, Esquire, the Applicant, Mike Tappeiner, Elizabeth Sanders, Todd Oomens, Dave Sanders, Jim Perkins, and Dr. Tom Martin. The Court had before it the trial transcript, the Beaufort County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application and amendments, the Applicant's exhibits presented during the hearing, the Respondent's Return, and the appellate records.

DISCUSSION

#2
PMB

The Applicant alleges she received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). For the Applicant to be granted PCR as a result of ineffective assistance of counsel, she must show both: (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove trial counsel was ineffective, the applicant for PCR must show counsel's performance was deficient and the deficient performance prejudiced the defense. Humphries v. State, 351 S.C. 362, 570 S.E.2d 160, *rehearing denied* (2002). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. 668 (1984)).

At trial, Judge Mullen ruled that Applicant's statement to the police was inadmissible, explaining that "[Applicant's] will was overborne. I [Judge Mullen] don't think she has [sic] a clue what she was doing....I do not believe that her statement was voluntary. It certainly wasn't intelligent. And I don't think it was knowingly made."¹ (Trial Transcript, p. 132:16 – 134:12).

¹ The "statement" that Judge Mullen excluded was relayed to the court by Sergeant Gonzales of the Bluffton Police Department. Gonzales testified at the *Jackson v. Denno* hearing as follows: "...she [Applicant] told me that she did

Despite this ruling, the prosecutor made references to the fact that Applicant was not charged until after her two hour interview with the police. (*Id.* at 280:14 – 281:2; 282:17 – 283:10). Defense Counsel did not object. Defense Counsel's performance was deficient in that respect. However, that deficiency did not prejudice the defense in that this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

#3
R.B.
Applicant asserts that Defense Counsel was "ineffective for failing to fully discuss potential risks and benefits of testifying at trial." After reviewing the trial transcript and the testimony of Defense Counsel, I find that it was part of Defense Counsel's trial strategy to not have Applicant testify during trial. The trial record reflects that Judge Mullen advised Applicant she had the right to testify and Applicant had discussed that right with Defense Counsel. Further, the record indicates that Defense Counsel believed having Applicant testify would be harmful to her case. (PCR Transcript, p. 70:21 – 71:9). Applicant's argument is without merit.

Applicant next argues that Defense Counsel was "ineffective for failing to object to repeated references to hearsay statements from the victim which went beyond a report of the time and place of the alleged assault." It is well established in South Carolina that in criminal sexual conduct cases, when the victim testifies, evidence from other witnesses that she complained of the sexual assault is admissible in corroboration—but only when it is limited to the time and place of the assault and excludes details or particulars. *Simpkins v. State*, 303 S.C. 364, 367, 401 S.E.2d 142, 143 (1991). In more than one instance, testimony from witnesses exceeded a report of the incident limited to the time and place of the assault. See Trial Transcript, p. 258: 2 – 5; 275: 6 – 24. Defense Counsel's failure to object to these references

have sexual intercourse with [victim], and that she was kind of flattered by a kid, and that [victim] performed oral sex on her and that [victim] did not ejaculate inside her, and that — that she — she made a mistake, that she should know better than to have sex with a 13 year old." (Trial Transcript, p. 48: 12-17).

constitutes a deficiency. Based on a preponderance of the evidence, I find that but for counsel's deficiency, there is insufficient evidence to find that the result of the trial would have been different.

#4
RB
Applicant also argues that Defense Counsel failed to object to improper statements made by the State in closing arguments where said remarks (1) personally vouched for the credibility of Victim's testimony; (2) personally staked the jury in the outcome of the trial; and (3) were calculated to imply the Applicant had confessed where her statements had been ruled inadmissible.² As noted above, the trial court excluded Applicant's statement to the police from evidence, but Defense Counsel failed to object to questions designed to imply that Applicant had given an incriminating statement that resulted in her arrest. See Trial Transcript, p. 280:14 - 281:2; 282:17 - 283:10; 341:25 - 342:16). This Court found that this failure constituted a deficiency. Likewise, the State's attempt to repeat its behavior during closing arguments to the jury was improper, and Defense Counsel's failure to object is again a deficiency. That being said, this Court does not believe from the evidence presented there exists a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different.

As to all other allegations raised in the application and at the hearing that are not specifically addressed in this Order, the Court finds that Defense Counsel was not deficient.

CONCLUSION

The Court finds that Applicant has not established any constitutional violations or deprivations before or during her trial and sentencing proceedings. Applicant was not prejudiced

² Applicant is referring to Trial Transcript, p. 341:25 - 342:16

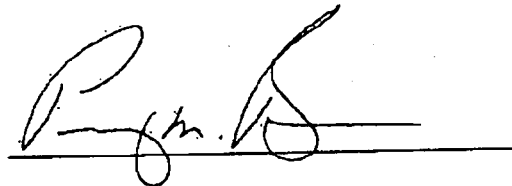
by Defense Counsel's representation. Accordingly, this PCR application is DENIED and dismissed with prejudice.

It is therefore ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

June 11, 2013

Walterboro, SC

A handwritten signature in dark ink, appearing to read "Perry M. Buckner", is written over a horizontal line.

The Honorable Perry M. Buckner

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	2010-CP-07-2396
	)	
Susan Tappeiner, #338050,	)	
	)	
Applicant,	)	
	)	
v.	)	MOTION TO ALTER OR AMEND
	)	PURSUANT TO RULE 59(e), SCRCP
State of South Carolina,	)	
	)	
Respondent.	)	

1. This matter comes before the Court by way of the Respondent's Motion pursuant to Rule 59(e), SCRCP, in which it asks the Court to alter or amend its Order dismissing this Applicant's application for post-conviction relief (PCR). The Respondent (the State) would submit the following:
2. With regard to Applicant's failure to carry his burden of proving ineffective assistance of counsel, the Order of Dismissal signed by the Honorable Perry M. Buckner, dated June 11, 2013, contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976), and Rule 52(a) SCRCP. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). However, the State submits this Court should amend its ruling as to whether counsel provided deficient performance. The State submits counsel's performance was not deficient and did not result in any prejudice to the Applicant at trial.
3. The State requests that this Court alter its ruling that counsel's performance was deficient for failing to object to the Solicitor's reference to the decision to arrest the Applicant being made after her two hour police interview. The State submits

the Applicant failed to meet her burden of proving counsel should have objected to references to the fact that the Applicant was arrested after a two hour police interview. The statement made by Solicitor was not objectionable. Simply stating the Applicant was arrested after an interview lasting two hours does not implicate the Applicant's excluded statement or that the Applicant even gave a statement to police. The record reflects the testimony of Sergeant Christian Gonzales was that he met with the Applicant, had a two hour discussion with the Applicant, and placed her under arrest based on the statements from the victim and Hope Haven's forensic interviewer. (T. 280:9-281:8). The State submits further the Applicant failed to provide any basis for this objection. This Court should amend the Order of Dismissal to reflect that counsel's performance was not deficient for his failure to object to the Solicitor's reference to the decision to arrest the Applicant being made after her two hour police interview.

4. The State also request that this Court alter its ruling that counsel's performance was deficient for failing to object to hearsay statements from the victim that went beyond time and place of the alleged assault. The State submits the testimony alleged by the Applicant to be inadmissible and objectionable based on Rule 801(d)(1)(D), SCRE, is not hearsay because it was offered for the limited purpose of explaining why a government investigation was undertaken. "Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted. An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003). The

testimony given by Officers Creason, Tubbs, and Gonzales during trial with regard to statements made by the victim was not offered for the truth of the matter asserted, but rather to explain why certain steps took place in their investigation of the Applicant. Officer Creason's testimony about the victim's statement was offered to explain why he contacted his supervisor Lieutenant Tubbs and requested that he come to investigate the victim's allegation. (T. 155:17-25). Officer Tubbs' testimony about the victim's statement was offered to explain how he became involved in questioning the Applicant at the police station. (T. 258:10-15). Officer Gonzales' testimony about the victim's statement was offered to explain why he obtained a search warrant for the Applicant's home. (T. 276:21-25). This Court should amend the Order of Dismissal to reflect that counsel's performance was not deficient for failing to object to alleged hearsay statements.

5. Lastly, the State requests that his Court amend its ruling that counsel's performance was deficient for failing to object to improper statements made by the State in its closing argument. The State submits the Applicant failed to carry her burden of proving the State's closing was objectionable. A closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. After all the evidence is in, counsel for the parties are in the position to present their respective versions of the case as a whole." Herring v. New York, 422 U.S. 853 (1975). "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content

should stay within the record and reasonable inferences that may be drawn therefrom.” Id. at 609–10, 602 S.E.2d at 744. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009). The State submits the Solicitor's closing in no way deprived the Applicant of a fair trial and any statements made by the Solicitor were cured by the Solicitor's statement to the jury at the beginning of the closing statement that “You know, she said when we talked about opening arguments, these are my opinions -- the opinion of myself and Mr. Macloskie. Nothing that we say to you is evidence. Evidence is what was entered – and you have that to see and to review.” (T. 326:20-25). The State submits the Solicitor's statements did not infect the trial with unfairness and were not objectionable. This Court should amend the Order of Dismissal to reflect that counsel's performance was not deficient for his failure to object to the Solicitor's closing argument.

6. WHEREFORE, having made this motion, the State requests that this Court amend its ruling as to counsel's deficiency and find counsel did not provide deficient performance. The State also requests that this Court not modify its ultimate ruling that the Applicant failed to carry her burden of proving ineffective assistance of counsel.

[Signature on the following page.]

Respectfully submitted,

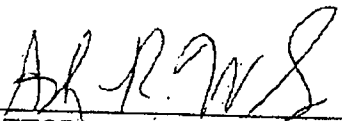
ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

BY:


ATTORNEYS FOR RESPONDENT

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

Columbia, South Carolina
June 24, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

2010-CP-07-2396

SUSAN TAPPEINER, #338050)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

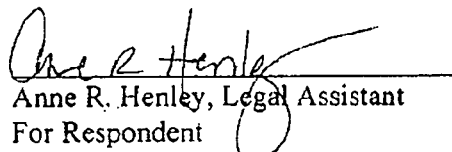
STATE OF SOUTH CAROLINA,)

Respondent.)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Motion to Alter or Amend Pursuant to Rule 59(e), SCRC** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tara D. Shurling, Esquire
 3614 Landmark Drive, Suite A
 Columbia, SC 29204

DATED this 24th day of June, 2013


 Anne R. Henley, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

SUSAN TAPPEINER, 338050,
Applicant,
v.
THE STATE OF SOUTH CAROLINA,
Respondent.

2013 JUL -8 PM 3:08
2010-CP-07-2396

BEAUFORT COURTHOUSE
CLERK OF COURT
RULE 59(e) SCRPC, MOTION TO
ALTER OR AMEND

NOW COMES the Applicant in the above-captioned case, acting by and through undersigned counsel, respectfully moving this Court pursuant to Rule 59(e), SCRPC, to alter or amend its Order of Dismissal filed June 18, 2013. The Application for Post-Conviction Relief in this matter was filed on May 17, 2010 and an Amended Application filed on April 4, 2013. A Second Amended Application for Post-Conviction Relief filed also filed on April 4, 2013 and was withdrawn at the evidentiary hearing held on that same date. The State filed its Return on August 18, 2010. An evidentiary hearing was convened on April 4, 2013, in which the State was represented by Assistant Attorney General, Ashleigh Wilson and the Applicant was represented by Tara Dawn Shurling, Esquire. In support of this motion, the Applicant would show unto this Honorable Court the following:

The Order of Dismissal filed by the Court on June 18, 2013 fails to make findings of fact and conclusions of law on all the issues raised by the Applicant in her PCR Application, and in her subsequent Amended Application for Post-Conviction Relief, as are required by S.C. Ann. §17-27-80 (2003). The failure to specifically rule on each issue precludes appellate review of those issues. *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). Counsel for the Applicant has an obligation file a motion pursuant to Rule 59(e), SCRPC, addressing any omissions in an order where an order fails to set forth the findings and the reasons for those findings as required by §17-27-80 and Rule 52(a), SCRPC, *Pruitt*, at 310 S.C. 256, 423 S.E.2d 128. The catch all

paragraph employed in the order issued in this matter is not sufficient to preserve the Court's ruling on the numerous issues raised by the Applicant which are not even mentioned in the Court's order of Dismissal. Our Supreme Court has expressly found that such language should not be used in a PCR Order unless it is used to address issues "about which absolutely no evidence is presented." *Marlar v. State*, 375 S.C. 407, 409, 653 S.E.2d 266, 267 (2007).

Counsel for the Applicant submitted a detailed proposed order addressing the many issues raised and argued by the Applicant in her PCR Application, her Amended Application and at her PCR hearing. Likewise, Counsel for the Respondent submitted a lengthy Proposed Order as well. With all due respect, the Applicant would now submit that the Order of Dismissal filed by the Court neglects to fully address, and in some instances fails to even mention, many issues developed by the Applicant, through her Counsel, in her PCR action. The Order of Dismissal signed by the Court and filed on June 18, 2013, specifically only touches on a handful of the twenty-seven (27) allegations raised by the Applicant. The Order of Dismissal entered by the Court in this case arguably addresses Applicant's allegations number 7, 10, 12 and 21(c) as set forth in the Applicant's Amended Application for Post-Conviction relief. With regard to allegation number 21, the Order of Dismissal mentions the three portions of the State's closing argument which the Applicant has asserted should have been objected to by Trial Counsel. The order, however, only makes findings of fact and a ruling of law on one of the three; the portion of the State's closing argument addressed in Allegation 21 (c) of the Applicant's Amended Application for Post-Conviction Relief.

The Order of Dismissal entered by the Court in the Applicant's case fails to address the issues raised by the remainder of the allegations raised by the Applicant in her applications and at the evidentiary hearing held in this matter. *See, Attachment A*. The Applicant specifically notes that the Order of Dismissal filed in this matter fails to address her Allegations

1,2,3,4,5,6,8,9,11¹,13,14,15,16,17,18,19,20, 21 (a), 21 (b), 22, 23, 24, 25, 26 and 27. Each of these allegations was raised by the Applicant in her PCR applications, at her PCR hearing and in the Proposed Order submitted by the Applicant prior to the Order of Dismissal being entered in this matter.² A copy of the Applicant's Proposed Order is attached hereto as *Attachment B*.

The Applicant subsequently submitted an edited version of her Proposed Order for the Court's review as well. That version of the Applicant's Proposed Order made no substantive additions to the original submission and merely corrected some errors found in a subsequent proofing of the document. That edited version of the Applicant's Proposed Order has now been sent to the Beaufort County Clerk of Court's Office for filing as a Memorandum in Support of PCR Application in the Form of a Proposed Order. *See, Attachment C*.

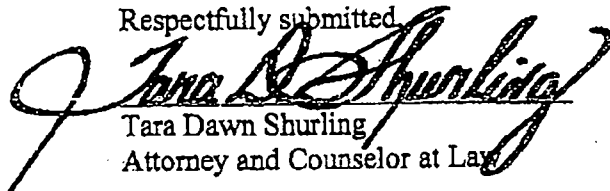
With regard to the issues which are addressed by the Order of Dismissal, the Court found Trial Counsel's performance to be deficient with regard to several failures addressed therein. The Order of Dismissal, however, provides no basis for the Court's conclusion that the outcome of the Applicant's trial would not have been different but for the errors and omissions of Trial Counsel recognized within the language of the Order. The facts in this case demonstrate that the Applicant's case rested almost exclusively on the credibility of the complaining witness. The errors recognized by the Court in its Order of Dismissal improperly bolstered the version of the facts advanced by this adolescent by inviting the jury to infer, from evidence that had been excluded by the Court, that the Applicant had confessed to this crime. It further bolstered his version of the events with testimony which was highly improper pursuant to *Jolly v. State*, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994) and related cases.

¹ With regard to Allegation No. 11, the Order of Dismissal not only fails to address the underlying issue presented on behalf of the Applicant, but, in addition, it fails to address PCR Counsel's objection to the PCR Court's ruling that an exhibit in support of that issue, a video of the interior of the small home where alleged incident was said to have occurred, would not be permitted into evidence.

² Each of these allegations was addressed by the Applicant in her applications and in the testimony and evidence presented during her PCR hearing. They were also argued in the proposed Order submitted on her behalf by PCR Counsel. PCR Counsel herein, does not repeat each of the arguments made with regard to these issues inasmuch as the Applicant's arguments on each issue are thoroughly addressed in the attachments to this motion.

For all the above reasons, the Applicant now prays that this Court might amend its Order pursuant to Rule 59(e), SCRPC, grant relief and remand the Applicant's case to the Beaufort County Court of General Sessions for a new trial. In the alternative the Applicant would respectfully request that the Court issue an Amended Order of Dismissal including the omitted allegations and arguments which were not addressed in the Order of Dismissal filed June 18, 2013. The Applicant would assert that her request for an Amended Order is necessary in order to preserve these claims for appellate review.

Respectfully submitted,


Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Dr., Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 (fax)
tdslaw@shurlinglaw.com

This 6th day of July, 2013.

ATTORNEY FOR THE APPLICANT


Naki Bax
Attorney at Law

The Bax Law Firm, PA
69 Robert Smalls Pkwy, Ste. 3C
Beaufort, SC 29902

**ATTORNEY ASSOCIATED FOR THE
LIMITED PURPOSE OF FILING THIS
RULE 59(e) MOTION WITH THE
OFFICE OF THE CLERK OF COURT**

This 8th day of July, 2013.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF BEAUFORT)

SUSAN TAPPEINER, 338050,)
 Applicant,)

2010-CP-07-2396

v.)

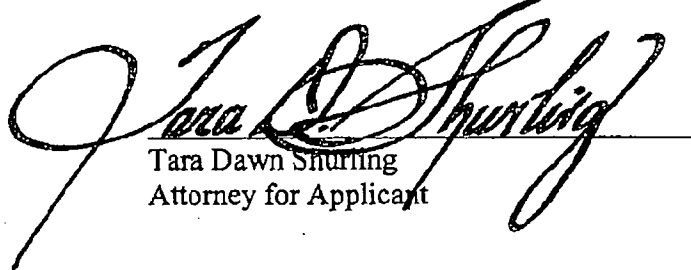
CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA,)
 Respondent.)

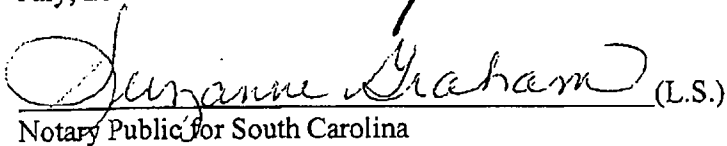
The undersigned hereby certifies that a true copy of the Rule 59(e) Motion to Alter or Amend in the above matter has been served on opposing counsel this the 6th day of July, 2013, by mailing one (1) copy in a stamped envelope properly addressed to:

Ashleigh Wilson
 Assistant Attorney General
 Office of the Attorney General
 P. O. Box 11549
 Columbia, SC 29211

The original having been sent to the Beaufort County Clerk of Court for filing.


 Tara Dawn Shurling
 Attorney for Applicant

SWORN TO BEFORE ME this 6th day of
 July, 2013.

 (L.S.)
 Notary Public for South Carolina

My Commission Expires: 2/28/2023

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF BEAUFORT)

SUSAN TAPPEINER, 338050,) 2010-CP-07-2396
 Applicant,)

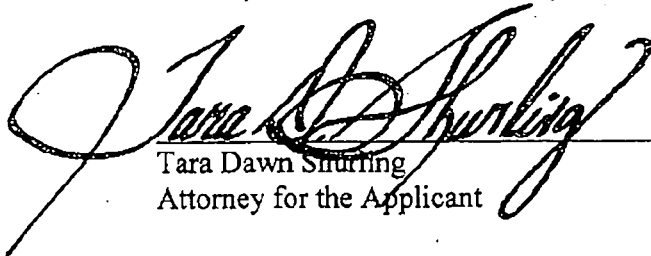
v.) CERTIFICATE OF SERVICE
)
)
)

THE STATE OF SOUTH CAROLINA,)
 Respondent.)
 _____)

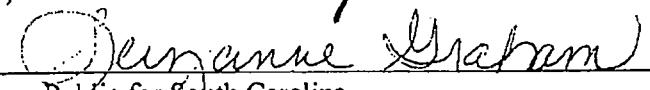
The undersigned hereby certifies that a true copy of the Rule 59(e) Motion to Alter or Amend in the above matter has been served on the Honorable Perry M. Buckner, III, presiding judge, this 6th day of July, 2013, by mailing one (1) copy in a stamped envelope properly addressed to:

The Honorable Perry M. Buckner, III
 Circuit Court Judge for the Fourteenth Circuit
 P. O. Drawer 470
 Walterboro, SC 29488

The original having been sent to the Beaufort County Clerk of Court for filing.


 Tara Dawn Shurling
 Attorney for the Applicant

SWORN TO BEFORE ME this 6th day of
 July, 2013.

 (L.S.)
 Notary Public for South Carolina

My Commission Expires: 2/28/2023

ATTACHMENT A

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP0702396

Susan Tappeiner

State Of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

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

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

Order of Dismissal

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

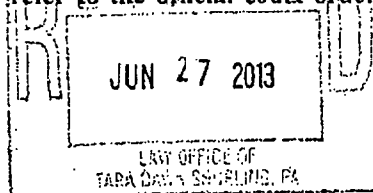
INFORMATION FOR THE JUDGMENT INDEX

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

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

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.



s/ P. M. Buckner
Circuit Court Judge

2122
Judge Code

6/11/2013
Date

For Clerk of Court Office Use Only

This judgment was entered on June 18, 2013, and a copy mailed first class or placed in the appropriate attorney's box on June 25, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Tara Dawn Shurling 3614 Landmark Drive Suite A
Columbia, SC 29204

Ashleigh R. Wilson Po Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

____ Melissa Kilby _____

Court Reporter

Jerri Ann Roseneau - Clerk of Court

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

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

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

2010-CP-07-2396

Susan Tappeiner, #338050,)

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

13 JUN 18 PM 12:45
 BEAUFORT COUNTY COURT
 CLERK OF COURT

PROCEDURAL HISTORY

#1
 PMS
 This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 17, 2010. The Respondent made its Return on August 25, 2010. An evidentiary hearing on the matter was convened on April 4, 2013 at the Beaufort County Courthouse. The Applicant was present at the hearing and was represented by Tara Dawn Shurling, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Testifying at the hearing was Charles Macloskie, Esquire ("Defense Counsel"), Desa Ballard, Esquire, the Applicant, Mike Tappeiner, Elizabeth Sanders, Todd Oomens, Dave Sanders, Jim Perkins, and Dr. Tom Martin. The Court had before it the trial transcript, the Beaufort County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application and amendments, the Applicant's exhibits presented during the hearing, the Respondent's Return, and the appellate records.

DISCUSSION

#2
PMB

The Applicant alleges she received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). For the Applicant to be granted PCR as a result of ineffective assistance of counsel, she must show both: (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove trial counsel was ineffective, the applicant for PCR must show counsel's performance was deficient and the deficient performance prejudiced the defense. Humphries v. State, 351 S.C. 362, 570 S.E.2d 160, *rehearing denied* (2002). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. 668 (1984)).

At trial, Judge Mullen ruled that Applicant's statement to the police was inadmissible, explaining that "[Applicant's] will was overborne. I [Judge Mullen] don't think she has [*sic*] a clue what she was doing....I do not believe that her statement was voluntary. It certainly wasn't intelligent. And I don't think it was knowingly made."¹ (Trial Transcript, p. 132:16 – 134:12).

¹ The "statement" that Judge Mullen excluded was relayed to the court by Sergeant Gonzales of the Bluffton Police Department. Gonzales testified at the *Jackson v. Denno* hearing as follows: "...she [Applicant] told me that she did

Despite this ruling, the prosecutor made references to the fact that Applicant was not charged until after her two hour interview with the police. (*Id.* at 280:14 – 281:2; 282:17 – 283:10). Defense Counsel did not object. Defense Counsel's performance was deficient in that respect. However, that deficiency did not prejudice the defense in that this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

#3
RB
Applicant asserts that Defense Counsel was "ineffective for failing to fully discuss potential risks and benefits of testifying at trial." After reviewing the trial transcript and the testimony of Defense Counsel, I find that it was part of Defense Counsel's trial strategy to not have Applicant testify during trial. The trial record reflects that Judge Mullen advised Applicant she had the right to testify and Applicant had discussed that right with Defense Counsel. Further, the record indicates that Defense Counsel believed having Applicant testify would be harmful to her case. (PCR Transcript, p. 70:21 – 71:9). Applicant's argument is without merit.

Applicant next argues that Defense Counsel was "ineffective for failing to object to repeated references to hearsay statements from the victim which went beyond a report of the time and place of the alleged assault." It is well established in South Carolina that in criminal sexual conduct cases, when the victim testifies, evidence from other witnesses that she complained of the sexual assault is admissible in corroboration—but only when it is limited to the time and place of the assault and excludes details or particulars. *Simpkins v. State*, 303 S.C. 364, 367, 401 S.E.2d 142, 143 (1991). In more than one instance, testimony from witnesses exceeded a report of the incident limited to the time and place of the assault. See Trial Transcript, p. 258: 2 – 5; 275: 6 – 24. Defense Counsel's failure to object to these references

have sexual intercourse with [victim], and that she was kind of flattered by a kid, and that [victim] performed oral sex on her and that [victim] did not ejaculate inside her, and that – that she – she made a mistake, that she should know better than to have sex with a 13 year old." (Trial Transcript, p. 48: 12-17).

constitutes a deficiency. Based on a preponderance of the evidence, I find that but for counsel's deficiency, there is insufficient evidence to find that the result of the trial would have been different.

#4
RB
Applicant also argues that Defense Counsel failed to object to improper statements made by the State in closing arguments where said remarks (1) personally vouched for the credibility of Victim's testimony; (2) personally staked the jury in the outcome of the trial; and (3) were calculated to imply the Applicant had confessed where her statements had been ruled inadmissible.² As noted above, the trial court excluded Applicant's statement to the police from evidence, but Defense Counsel failed to object to questions designed to imply that Applicant had given an incriminating statement that resulted in her arrest. See Trial Transcript, p. 280:14 - 281:2; 282:17 - 283:10; 341:25 - 342:16). This Court found that this failure constituted a deficiency. Likewise, the State's attempt to repeat its behavior during closing arguments to the jury was improper, and Defense Counsel's failure to object is again a deficiency. That being said, this Court does not believe from the evidence presented there exists a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different.

As to all other allegations raised in the application and at the hearing that are not specifically addressed in this Order, the Court finds that Defense Counsel was not deficient.

CONCLUSION

The Court finds that Applicant has not established any constitutional violations or deprivations before or during her trial and sentencing proceedings. Applicant was not prejudiced

² Applicant is referring to Trial Transcript, p. 341:25 - 342:16

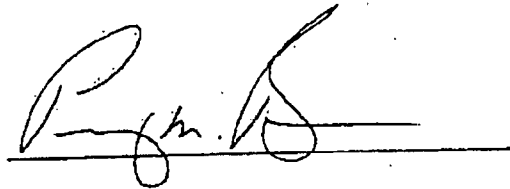
by Defense Counsel's representation. Accordingly, this PCR application is DENIED and dismissed with prejudice.

It is therefore ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

June 11, 2013

Walterboro, SC

A handwritten signature in black ink, appearing to read "Perry M. Buckner", is written over a horizontal line.

The Honorable Perry M. Buckner

ATTACHMENT B

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF BEAUFORT)

SUSAN TAPPEINER, 338050,) 2010-CP-07-2396
 Applicant,)

v.)

ORDER

THE STATE OF SOUTH CAROLINA,)
 Respondent.)

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed on May 17, 2010 and an Amended Application filed on April 4, 2013. A Second Amended Application for Post-Conviction Relief filed also filed on April 4, 2013 was withdrawn at the evidentiary hearing held on that same date. The State filed its Return on August 18, 2010. An evidentiary hearing was convened on April 4, 2013, during which the Applicant was present and represented by Tara Dawn Shurling, Esquire and the State was represented by Assistant Attorney General, Ashleigh Wilson.

I.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Beaufort County Clerk of Court's orders of commitment. The Applicant was indicted at the March 2009 term of the Beaufort County Grand jury for criminal sexual conduct (CSC) with minor (victim age 11-14) (2009-GS-07-703). Charles B. Macloskie, Esquire, and Desa Ballard, Esquire represented the Applicant. On October 26-28, 2009, the Applicant proceeded to trial, after which a jury found her guilty of 2nd degree CSC with a minor (victim age 11-14). On November 16, 2009, the Honorable

Jackson V. Gregory sentenced the Applicant to confinement for ten (10) years, suspended upon the service of five (5) years plus three (3) years of probation.

A timely Notice of Appeal was filed on Applicant's behalf. Desa Ballard, Esquire, and Tara Dawn Shurling, Esquire represented Applicant on appeal. The Applicant submitted an Affidavit in Support of Motion to Withdraw Direct Appeal. The South Carolina Court of Appeals dismissed Applicant's appeal by Order of Dismissal and Remittitur dated May 11, 2010.

II.

ALLEGATIONS RAISED

The Applicant has alleged generally that she received ineffective assistance of counsel prior to and during her trial in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14, of the South Carolina Constitution. In support of that claim she has raised the following specific allegations:

1. Trial Counsel was ineffective in failing to develop and employ a clear theory of defense.
2. Trial Counsel was ineffective for failure to present evidence concerning what prescription medications the Applicant was taking during time of incident.
3. Trial Counsel was ineffective for failing to introduce testimony from Dr. Nolan in case for defense.
4. Trial Counsel was ineffective for failure to hire Dr. Martin, or an expert of equal credentials, to testify during the case in chief.
5. Trial Counsel was ineffective for failing to adequately prepare Dr. Tom Martin for his role in the sentencing phase of the Applicant's trial.
6. Trial Counsel was ineffective for failing to introduce evidence concerning the medications the Applicant was taking during the operative time period, and the effect of those medications when combined with alcohol.
7. Trial Counsel was ineffective for failing to object to repeated references

throughout trial to the fact that the decision to arrest the Applicant was not made until after her two hour police interview where the statements made by the Applicant had been ruled inadmissible.

8. Trial Counsel was ineffective for failing to seek introduction of evidence that the victim had previously reported being raped at age 8 where that evidence was material to the defense.
9. Trial Counsel was ineffective for failing to discuss use of character witnesses with the Applicant and failed to produce such witnesses at trial.
10. Trial Counsel was ineffective for failing to fully discuss potential risks and benefits of testifying at trial.
11. Trial Counsel was ineffective for failing to request a jury view of the scene, or in the alternative, to introduce evidence demonstrating the size and layout of the Applicant's home.
12. Trial Counsel was ineffective for failing to object to repeated references to hearsay statements from the victim which went beyond a report of the time and place of the alleged assault.
13. Trial Counsel failed to object to repeated references to the victim as 13 years old at the time of the alleged assault where the victim was two months away from his 14th birthday at the time of the alleged assault.
14. Trial Counsel failed to establish his client's height and weight at trial.
15. Trial Counsel failed to provide the Applicant effective assistance of counsel when he called the Applicant's husband as a witness, and questioned him concerning an incident when the victim had asked the Applicant to help him get a camera battery, without ascertaining whether the husband had an accurate recollection of the timing of that request.
16. Trial Counsel failed to provide the Applicant effective assistance of counsel when he failed to question the Applicant's husband, when he testified at trial, concerning the victim's pattern of visitation in their home during the time period prior to the accusations by the victim.
17. Trial Counsel was ineffective when he failed to adequately question the Applicant's husband on the witness stand concerning his observations concerning the Applicant's coordination and general physical condition when she mixed alcohol with her prescription medications.
18. Trial counsel was ineffective for failing to fully discuss with the Applicant the fact that she would retain the right for him to make the final argument to the jury if the defense presented no evidence at trial.
19. Trial Counsel failed to object to a jury charge concerning expert opinion

testimony where the sole expert witness proffered by the State was not asked to provide an expert opinion at trial.

20. Trial Counsel failed to request a jury charge relating to consent and competence as those concepts applied to the Applicant as opposed to the victim.
21. Trial Counsel failed to object to numerous highly improper and inflammatory statements made by the State in closing arguments where said remarks;
 - a. personally vouched for credibility of Victim's testimony;
 - b. personally staked the jury in the outcome of this trial;
 - c. were calculated to imply the Applicant had confessed where her statements had been ruled inadmissible.
22. Trial Counsel failed to adequately cross-examine the Victim concerning inconsistencies between his statements pre-trial and his testimony at trial.
23. Trial Counsel failed to produce testimony relevant to the Victim's frequent presence in the Applicant's home when neither she nor her husband was home.
24. Trial Counsel failed to introduce from neutral witnesses evidence concerning the reaction of the Applicant's dogs to any activity in her home.
25. Trial Counsel failed to argue in closing that it would not be Criminal Sexual Conduct by the Applicant if the complaining witness in fact assaulted her while she was incompetent to consent.
26. Trial Counsel failed to request jury charge on the fact that South Carolina law allows minors under the age of 14 to be charged with Criminal Sexual Conduct.
27. Trial Counsel failed to adequately cross-examine the State's expert witness concerning the known reasons for delayed reporting of sexual assaults.

III.

STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Thompson v. State, 340 S.C. 112,

531 S.E.2d 294 (2000); Rule 71.1(e), SCRPC. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that Defense Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where Defense Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that

Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

IV.

EVIDENCE BEFORE THE COURT

In deciding this collateral action this Court has before it a copy of the trial record, a copy of the sentencing record dated November 16, 2009, a transcript of the PCR

hearing held on April 4, 2013 and all exhibits introduced during that proceeding, the Applicant's records from the South Carolina Department of Corrections and the records of the Beaufort County Clerk of Court regarding the subject conviction and sentence. What follows below are this Court's findings of fact and rulings of law as required by S.C. Ann. §17-27-80.¹

V.

DISCUSSION

In this case, the Applicant alleges generally that trial counsel failed in multiple regards in his preparation for trial and in his representation of her during that trial. On the facts of this case, this Court is constrained to agree. The Applicant has met her burden of proof concerning multiple errors and omissions of Defense Counsel which acted to deprive her of a fair trial. Having evaluated each of these allegations, this Court finds that there exists a reasonable probability that the result at trial would have been different but for these errors and omissions by Counsel. In order to demonstrate both the nature of Counsel's errors and omissions, and the prejudice to the Applicant arising therefrom, it is necessary and helpful to consider the following summary of portions of the trial, sentencing and PCR hearings records.

VI.

RELEVANT TESTIMONY

Defense Counsel Charles B. Macloskie, testified that the evidentiary hearing held in this matter. His testimony establishes the following. He was hired by Applicant's father immediately after Applicant was arrested. PCR Tr. p. 19, l. 10. She was on bond pending trial. PCR Tr. p. 20, l. 1. Prior to trial there were no serious plea negotiations

¹ For purposes of supporting this Order on appeal, the finding of fact and rulings of law contained herein may be viewed as interchangeable as may be necessary to affirm the ruling of this Court on any appeal which may follow.

in this case. Defense Counsel recalled that no offers that he could recommend were ever offered by the prosecutor handling the case. PCR Tr. p. 20, l. 22. There were no last minute offers just before trial. PCR Tr. p. 21, l. 22.

During his opening argument at trial, Defense Counsel argued that after hearing the evidence the jury might conclude Applicant was the victim and the wrong person was on trial. Trial Tr. p. 151 ll. 10-14. Defense Counsel testified that although Applicant couldn't remember what happened on the night in question, he came *"to think that it might have been completely different than the allegations in the indictment; that, this young boy was the one who made the advances, not Mrs. Tappeiner."* PCR Tr. p. 23, ll. 7-10.

The Applicant weighed approx 109 at the time of the trial. PCR Tr. p. 23 l. 21- p. 24, l. 1. In his trial testimony, the Victim described himself as weighing 115 lbs. The Solicitor responded to this assertion by asking, *"Okay, you weighed less than that last year, obviously."* Victim responded "yes" Trial Tr. p. 170, ll. 9-10. Defense Counsel did not object to this leading question and at the PCR hearing he acknowledged that he should have. PCR Tr. p. 24, l. 2- p. 25, l. 6. At trial Defense Counsel cross-examined the Victim about the fact that in the police report in this case it is noted that he reported his weight as 125 pounds. PCR Tr. p. 25, l. 9-23.

In the *Jackson v. Denno* hearing held in this trial, Trial Tr. p. 38, l. 16 – p. 134, l. 12, Defense Counsel used a clinical psychologist, Dr. Yola Nolan, to establish the effect of drugs and alcohol on the Applicant's ability to give a voluntary and reliable statement. PCR Tr. p. 27, l. 6- p. 28 l. 9. At the PCR hearing Defense Counsel admitted that he never considered using, Dr. Nolan, or some other expert, to address the effect the prescription drugs she was taking combined with alcohol, would have had on her capacity to consent.

In his PCR testimony, Defense Counsel agreed that if an adult has sex with a child it is a crime regardless of whether the child consents or not. PCR Tr. p. 28, ll. 10-20. He acknowledged however, that whether or not the adult had any criminal culpability would be affected by whether the adult was incapacitated at the time of the sex act. He likewise admitted that if the adult was unconscious, or otherwise incapable of consenting or participating in the act, the sex act would be criminal with regard to the adolescent but not the adult. PCR Tr. p. 28, l. 21 – p. 29, l. 19. Defense Counsel acknowledged that this was the premise set forth in his opening statement to the jury. PCR Tr. p. 29, ll. 20-23. Despite this fact, he admitted that he introduced no witnesses, in the presence of the jury, to establish that the Applicant was taking heavy doses of prescription medications and drinking at the same time. He introduced no testimony concerning the Applicant's pattern of mixing alcohol with prescription medication. PCR Tr. p. 30, ll. 14-22.

Defense Counsel acknowledged that he introduced no evidence concerning what prescription medications his client was taking on the night of the alleged event. Defense Counsel admitted that absent such testimony, he established no foundation for the defense theory he advanced in opening arguments. He forthrightly conceded that he had no explanation for failing to introduce this evidence at trial. PCR Tr. p. 30, l. 23- p. 31, l. 18. Defense Counsel testified that he did not consider using Dr. Nolan, the expert he successfully used to support his position during the *Jackson v. Denno*² hearing, or any other psychiatric or medical doctor, to present testimony concerning the question of the Applicant's ability to consent to anything under the circumstances of the evening in question. During the *Jackson v. Denno* hearing, Sergeant Gonzales agreed that at the time he interviewed the Applicant she did not smell of alcohol, she did not have slurred speech or "anything like that." He verified that she had no trouble walking into the

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interview on her own. Trial Tr. p. 41, ll. 5 –16. Sergeant Gonzales also acknowledged that at one point during the interview phase of his two hour meeting with the Applicant she stated, “*maybe he did this to me.*” Trial Tr. p. 50, ll. 5 – 13. Defense Counsel had no explanation for his failure to introduce similar evidence in the presence of the jury and in no way claimed that this omission was a tactical or strategic decision. PCR Tr. p. 32 l. 5-16. Following the *Jackson v. Denno* hearing, the Applicant’s pre-trial statements were excluded from evidence. Trial Tr. p. 38 l. 16- p. 125 l. 17.

The Trial Judge specifically ruled that,

Based on the totality of the circumstances, - - - I truly think that her will was overborne. I don’t think she has a clue what she was doing. - - - I am not going to allow the statement, that interview. - - - so, again, based on the totality of the circumstances, I do believe that her will was overborne. And I do not believe her statement was voluntary. It certainly wasn’t intelligent. And I don’t think it was knowingly made.

Trial Tr. p. 132, l. 16 - p. 134, l. 12.

Throughout the trial however, the prosecutor made repeated references to the fact that the Applicant was not charged until after her two-hour interview with the police. During the direct examination of Sergeant Gonzales, the following colloquy took place without objection,

- Q. Okay. And how long a discussion did you have with the Defendant?
- A. Approximately 2 hours.
- Q. Okay. At the end of your discussion with the Defendant, what action did you take?
- A. I placed her under arrest for Criminal Sexual Conduct with a minor.

Trial Tr. p. 280 l. 14 – p. 281 l.2.

Later during the testimony of Sergeant Gonzales, the prosecution returned to this topic without objection. The Solicitor asked this witness to confirm his earlier testimony

that he had interviewed the Applicant for 2 hours and that only then, after speaking with her for that amount of time, was the decision made to arrest her. Trial Tr. p. 282, l. 17 p. 283, l. 10. Later, the Solicitor chose to once again emphasize this point in his closing argument. Trial Tr. p. 341 l. 25- 342 l. 17. In his PCR testimony, Defense Counsel admitted that it was a mistake not to have objected to this line of testimony and closing argument. PCR Tr. p. 32, l. 21 - p. 34 l. 14. On cross-examination he reiterated his admission that testimony concerning the fact that Applicant wasn't arrested until after her interview by the police was objectionable and should have been objected to.

Defense Counsel testified that he didn't want to put the Applicant on the stand because he was afraid of opening the door for the statements that had been excluded from evidence coming to impeach her testimony. PCR Tr. p. 40, l. 20 - p. 42, l. 20. He admitted that he may or may not have told the Applicant that her statements, although excluded from evidence, could be used to impeach her. PCR Tr. p. 42, ll. 11-20. Defense Counsel indicated that the other reason he didn't call the Applicant as a witness in her own defense was the fact that she had no recollection of any of the events of the evening in question. PCR Tr. p. 42 l. 21 43 l. 2. He confirmed on cross-examination that he *"more likely than not advised pretty strongly against"* the Applicant testifying at trial. He repeated his recollection that this advice was based upon the fear that her testimony might open the door to the introduction of statements which had previously been ruled inadmissible. PCR Tr. p. 70 l. 21- p. 71, l. 9. On cross-examination, Defense Counsel also noted that one of the problems he had defending the Applicant was that she did not recall the events with any degree of clarity. PCR Tr. p. 69 ll. 14-19.

Defense Counsel acknowledged that he did not consider using testimony from the Applicant to establish her pattern of mixing alcohol and drugs. Nor did he think about using her to establish the history of her employment of the victim's sisters or the fact that

she wasn't accused of these acts until after she fired the sisters. He didn't consider using any other witness to establish these points either. PCR Tr. p. 43, ll. 3-21.

During the Applicant's trial the complaining witness was referenced as being thirteen (13) years old at the time of the incident. At trial, the young man stated that he had just turned 15 on August 15, 2009. Therefore, on the date of the incident in question, on or about August 15, 2008, the boy would have been approximately seven (7) weeks away from his fourteenth (14) birthday. Defense Counsel did not consider objecting to the repeated references to him as a thirteen (13) year old when he was in fact very close to turning fourteen (14); nor did Counsel argue that the complaining witness was in fact nearly 14 during his arguments to the jury. PCR Tr. p. 36 l. 24- p. 40, l. 1. Despite the importance of this young man's maturity to the defense theory he advanced in his opening statement to the jury, Defense Counsel did not consider raising this issue at trial.

Defense Counsel specifically stated that he did not believe he ever discussed the possibility of introducing character witnesses with the Applicant. PCR Tr. p. 40, ll. 2-4. During the PCR hearing, the Applicant presented testimony from a non-familial witness who indicated that the Applicant had a positive reputation for veracity and that he would believe her under oath. He also verified that he would have been willing to testify on the Applicant's behalf at trial had he been asked to do so. Perkins, PCR Tr. 118, ll. 10 - 24;

Throughout the Applicant's trial references were made to statements the complaining witness had made concerning the alleged incident. Defense Counsel acknowledged that he did not object to any of this hearsay testimony. He testified that he could not recall any strategic or tactical reason for not doing so. PCR Tr. p. 43 l. 22- p. 45, l. 7.

Defense Counsel introduced no evidence to establish the Applicant's height and weight. He testified that he could not recall considering the relevance of this information

to the defense. PCR Tr. p. 45, ll 8-15. At the PCR proceeding, the Applicant presented testimony from her sister, Elizabeth W. Auerback. Auerback testified that she weighed 108 pounds at the time of the hearing and that she is approximately a half inch shorter than the Applicant. PCR Tr. p. 131, l. 11 – p.132, l. 2. As previously noted, the Applicant weighed approximately 109 pounds at the time of the trial. PCR Tr. p. 23 l. 21- p. 24, l. 1. On cross-examination, Defense Counsel once again admitted that he did not make a significant issue of the Applicant's weight at the time of the incident and he emphasized that she *"was a lot lighter than she is now."* PCR Tr. p. 68 ll. 3-21. On cross-examination, Defense Counsel acknowledged that he did not put before the jury the fact that this young man could have overpowered the Applicant "to a sufficient degree." He further admitted that he didn't put up any evidence before the jury concerning her prescription drug use and acknowledged that such evidence would have been useful to the defense. PCR. Tr. p. 69 l. 24- p. 70 l. 11.

Defense Counsel presented the Applicant's husband, Mike Tappeiner, as the sole witness for the defense. During his testimony it became obvious that he could not pinpoint exactly when the victim had come to their home in search of a camera battery. Trial Tr. p. 297, l. 20 – p. 298, l. 7; Trial Tr. p. 299, l. 11 – p. 301, l. 4. In his PCR testimony, Defense Counsel could not recall interviewing the husband about this point prior to his testimony. PCR Tr. p. 46, ll. 5-14. Defense Counsel did not recall ever telling the Applicant that introducing her husband's testimony, or any evidence for that matter, would result in her losing the right to make the last argument to the jury. PCR Tr. p. 46 ll. 15-18.

Defense Counsel did not consider introducing any non-familial witnesses to testify about the family dogs and their reaction to activity at the residence. He did not interview any friends or family members who might have presented testimony about the

Applicant's habits concerning drugs and alcohol or about the family dogs. PCR Tr. p. 47, l. 13-24. Defense Counsel recalled husband testifying that victim staying there that night and fixing breakfast for him the next morning. He recalled that in his trial testimony the husband described the young man as acting very calm, like nothing had happened. PCR Tr. p. 47, ll. 6-9.

When asked why he didn't ask the husband about Applicant's pattern of mixing drugs and alcohol, and the impact of that combination on her coordination, motor skills, and other physical factors, Defense Counsel simply confirmed that he couldn't recall considering asking those questions. He didn't offer any explanation for this omission, admitting plainly that he just "*didn't do it.*" PCR TR. p. 48, ll. 3-25.

Mary Beth Hefner was offered as an expert in delayed reporting in child sexual assaults, at the Applicant's trial. A lengthy *in camera* hearing was held concerning the State's intended use of this witness. Ms. Hefner testified, *in camera*, that the Victim told her that one of the reasons he didn't report this alleged incident for six months was the fact that he has been molested before, reported the assault and nothing was done about it. The Court found that if the State asked her for her expert opinion as to why the Victim waited to report this incident, the State would be opening the door to the Defense questioning her on cross-examination about this offered by the boy in his interview with Ms. Hefner. Ms. Hefner was qualified as an expert in forensic interviewing. Trial-Tr. p. 199, l. 25 – p. 249, l. 11. She subsequently testified concerning the fact that children often delay reporting sexual abuse and various reasons why children delay reporting such incidents. She did not offer an expert opinion as to why the Victim in this case delayed making the accusations which were the basis for the charges against the Applicant. Trial Tr. p. 250, l. 13 – p. 254, l. 4.

On cross-examination, Defense Counsel did not question this witness concerning what other reasons might exist for a child to delay reporting such an incident. He did not ask her whether a past negative experience with reporting such an incident might affect a child's decision not to report a later incident. Likewise, he did not ask her questions concerning whether a child's delayed reporting might be motivated by some animus toward the adult that did not manifest itself until well after the time an event occurred. Likewise, he did not ask her if an adolescent might report an alleged sexual assault as a preemptive measure to protect himself from allegations that he was in fact the aggressor in a situation with an adult that was passed out or otherwise incapacitated. His cross-examination of this witness did not address the subject matter for which she was offered by the State, delayed reporting, in any manner. Trial Tr. 254, l. 10 – p. 255, l. 25. As previously noted, Ms. Hefner ultimately did not offer any expert opinion testimony. Despite this fact, the trial court never the less gave a standard jury charge on expert witness testimony. Trial Tr. p. 353, l. 7 – p. 354, l. 1. Defense Counsel testified that he never considered objecting to that charge. PCR TR. p. 49, l. 1-p. 50, l. 5.

Defense Counsel agreed that the crux of the defenses' theory of the case was that the Applicant was incapacitated at the time of this incident and therefore, was not competent to knowingly and willfully have sex with the victim. Despite this fact, Defense Counsel admitted that he did not argue this position to the jury and he did not consider asking for a jury instruction supporting that defense. PCR Tr. p. 50, l. 21- p. 51, l. 22. Defense Counsel then conceded that he had actually failed to introduce any testimony that would have laid a foundation for such a charge. PCR Tr. p. 51 l. 22 – p. 52, l. 8. Defense Counsel acknowledged that, although neither consent (by the child) or diminished capacity are defenses to a charge of Criminal Sexual Conduct with a minor, a valid defense would arise if the adult was passed out, or sufficiently incapacitated, to a

degree that they could not consent to sexual activity initiated by a minor. PCR Tr. 75, ll. 7-21.

Early in his PCR testimony, Defense Counsel volunteered that there were some problems with some of the things the prosecutor argued during the State's closing argument. PCR Tr. p. 34, ll. 16-19. In the course of the PCR hearing, the Applicant demonstrated that the following closing arguments had been made, without objection, by Defense Counsel.

Despite the fact that the Applicant's pre-trial statements were excluded from evidence at trial, during its closing arguments to the jury, the Solicitor stated the following,

Before the search warrant is served, he called in the Defendant to talk to her. Right? You don't just go arresting people. —She came down the testimony said around 2:00 o'clock in the afternoon and talked to the police. That was her face to face, eye to eye. VICTIM had his turn. She had her turn. She was not under arrest. She was not under arrest. She voluntarily came in to speak. I want to make that clear. This was still an investigation. After the face to face, eye to eye a determination was made. She was charged that day with criminal sexual conduct second degree.

Trial Tr. 341, l. 25 – p. 342, l. 16. As previous noted, Defense Counsel admitted that it was a mistake not to object to this line of argument by the State. PCR Tr. 34, ll.3 – 14.

During the State's closing arguments the Solicitor references his expert's history of over 200 forensic interviews. He then went on to state, *"Folks, these are people who can detect when someone is making something up or if there is nothing there. Okay?"* Trial Tr. 341, ll. 19-22. In her testimony before the jury, Ms. Hefner in fact never stated that she had interviewed the Victim in this case. Trial. Tr. 254, l. 10 – p. 255, l. 25. Defense Counsel testified that he should have objected that that argument as well. PCR Tr. p. 53, ll. 15-20.

Defense Counsel likewise conceded that he should have objected to another portion of the State's closing in which the prosecution personally commented on the credibility of the sole witness offered for the defense. Trial Tr. p. 343, l. 25- p. 344 l. 12. PCR Tr. p. 43, ll. 1-9. During his closing, the prosecution also commented on the Mr. Tappeiner's previous problems with alcohol. Defense counsel testified that there had been no evidence supporting that argument and, that it should have been objected to. Trial Tr. p. 345 ll. 9-10. PCR Tr. p. 54, ll. 10-15. During the testimony of the Applicant's husband he acknowledged having one prior DUI fifteen years earlier. Trial Tr. 307, ll. 3 – 5.

During his closing argument the prosecutor also asked the jury to consider *"the eye-to-eye, face-to-face, interviews that [the victim] has had with law enforcement and the experts."* (Emphasis added) Trial Tr. p. 346, ll. 17-19. The State only presented one expert witness at trial and that expert did not testify to having interviewed the Victim in this case. Once again, Defense Counsel acknowledged that he did not consider objecting to this portion of the prosecutor's closing argument. PCR Tr. p. 54 ll. 16-24.

Near the very end of the State's closing argument, the prosecutor made the following argument,

I want you to also think in –in—in making that decision, would you let her babysit your kids? Your grand kids? Nieces and nephews? I think the answer to that is why you should find her guilty. Trial Tr. 346 ll. 20 – 24.

Defense Counsel testified that he should have objected to this portion of the prosecutor's closing argument which he acknowledged, was improper because it "staked" the jury. PCR Tr. p. 55, ll. 7-13.

In the Bluffton Police Department incident report, which included a statement from the victim, the victim says *"when she left, I quickly ran out of the house and went*

straight to my house." In the Incident Report the Officer quoted the Victim as reporting that the Applicant *"got off of him before he ejaculated."* Defense Counsel acknowledged that this report was part of the discovery material he received from the State. That report, with the Victim's statement, was introduced during the PCR proceeding as Applicant's Exhibit No. 1, without objection. At trial the victim testified that the sex act ended when he pushed her off of him. Trial Tr. p. 184, ll. 3 – 6. During the PCR hearing Defense Counsel stated that he had no reason for failing to question the victim about this inconsistency at trial. PCR Tr. p. 56 l. 10- p. 57 l. 20.

At trial, State expert witness Hefner testified to certain percentages in statistical references to the occurrence of delayed reporting of sexual abuse by children. Trial Tr. p. 252 ll. 7-16. She also asserted, without citing to authority, that boys delay reporting more often than boys. Trial Tr. p. 252, ll. 17 – 20. Defense Counsel acknowledged in his PCR testimony that he never considered cross-examining this witness concerning her authority for these assertions. PCR Tr. 58 ll. p. 3-23. Neither did he consider cross-examining this witness concerning their authority for her claim that the literature shows that boys delayed reporting sexual abuse more frequently than girls. PCR Tr. p. 58 l. 24- p. 59 l. 11. Likewise Defense Counsel admitted that he had no strategic or tactical reason that he could recall why he did not cross-examine this witness on the topic of delayed reporting. PCR Tr. p. 59, ll. 17-23.

In his PCR testimony, Defense Counsel stated that he went to the Tappeiner residence where this incident allegedly occurred prior to the Applicant's trial. He recalled meeting the Applicant's husband there and indicated that he *thought "that the subject matter was the — the service of a search warrant."* He testified that he did not recall being there for a long time and he had no recollection of going upstairs where the incident supposedly took place. PCR Tr. p. 59 l. 24- 61 l. 4. Defense Counsel admitted

that he never considered either obtaining or developing any demonstrative evidence to illustrate for the jury just what close quarters the parties were in at this house on the night of the alleged incident. PCR Tr. p. 61, ll. 5-9.

Defense Counsel recalled on cross-examination that he although spoke with Dr. Martin to answer some questions before the sentencing proceeding, it was Ms. Ballard who spoke with Dr. Martin about the use of his testimony during the sentencing proceeding. PCR Tr. p. 72, l. 17- p. 73, l. 12.

In the pre-sentence report issued the Applicant's case, it noted that the victim's mother wanted the Applicant to be sentenced to at least two years followed by community supervision with some type of intensive psychotherapy. See, Applicant's Exhibit No. 2; p. 7. Defense Counsel testified that he did not recall considering pointing that portion of the report out to the Court, but he felt certain the Court read it. PCR Tr. p. 76, l 17, p. 78, l. 21.

Testimony was taken from Desa Allen Ballard, Esquire, by telephone during the Applicant's PCR hearing. She was hired after the Applicant's conviction, but before her sentencing. She assisted Attorney Macloskie with developing a strategy and evidence in mitigation for the sentencing phase. She hired Dr. Thomas Victor Martin to assist with presenting mitigation during the sentencing phase. PCR Tr. p. 83, ll 10-25. Attorney Ballard testified that she reviewed a summary of the evidence presented at trial that was provided to her by Attorney Macloskie. She reviewed that information with Dr. Martin. PCR Tr. p. 84 l. 1-9. Attorney Ballard reviewed the trial record for a potential direct appeal sometime after the sentencing proceeding. She testified that she advised against a direct appeal based upon her opinion that there was no meritorious basis for an appeal. PCR Tr. p. 85 ll. 6-19.

Dr. Thomas Victor Martin, a forensic psychiatrist, testified at the Applicant's PCR hearing. During his testimony he was asked to clarify portions of his testimony during the sentencing proceeding in this case. For example, he recalled that at the sentencing proceeding he stated that Applicant had *"come to grips with some of the horror of what has happened."* PCR Tr. p. 93, ll. 6-25. Sentencing Tr. p. 12 ll. 13-16.

In his PCR testimony he clarified that Applicant had never admitted to any type of aggression towards anyone else. He explained that what she did admit was that she had fragments of memory that included some sexual contact with the Victim. PCR Tr. p. 94, ll 8-13. At an earlier point in the sentencing proceeding, Dr. Martin advised the Court that the Applicant *"acknowledged responsibility for inappropriate sexual behavior."* Sentencing Tr. p. 10 ll. 21-24. In this PCR proceeding Dr. Martin, explained that Applicant never admitted being the aggressor in this incident, but felt responsible for what, in her fragmented memory, was some sexual activity that was inappropriate. He explained that she recognized that her use of alcohol and addictive drugs had compromised her ability to function properly as a parent and an adult in the incident in question. PCR Tr. P. 94 l. 14 – p. 95 l. 19. Dr. Martin's PCR testimony confirmed that the Applicant told him *"she hadn't done it, and her memory that she reported to me did not substantiate that she had done anything wrong, except for perhaps, being inebriated."* PCR Tr. 108, ll. 15-18.

At the sentencing proceeding Dr. Martin described this incident as one of *"opportunity"* and opined that Applicant was not a sexual predator. Sentencing Tr. p. 13, ll. 4-9. In his PCR testimony, Dr. Martin explained that he did not mean by that statement the Applicant had taken advantage of an opportunity but rather, that her

intoxication with medications created the opportunity for the inappropriate sexual contact to happen. PCR Tr. p. 96, ll. 1-17.

At the sentencing Dr. Martin advised the Court that Applicant was concerned about damage or scarring she may have inflicted by her behavior. Trial Tr. p. 16 l. 22- p. 17, l. 1. Once again, in his PCR testimony, Dr. Martin clarified that what Applicant conveyed to him was her realization that her intoxication with alcohol and Klonopin resulted in her inability to properly monitor and control inappropriate activity that took place. He indicated that she had been told the young man was harmed by what transpired and *"she is not typically of the character of harming others."* PCR Tr. p. 97, ll. 1-12. Dr. Martin emphasized that the Applicant never told him she perpetrated this crime. PCR Tr. p. 97, ll13-18.

Dr. Martin explained that this patient had some memories of the activities at her home on the date in question from the earlier part of that night. Her memories become more fragmented when she tries to recall the events later in the evening. She conveyed a fragmented memory of the young man being on top of her. She expressed the feeling that the contact was sexual. Dr. Martin testified that *"she was very upset and distraught by the fact that she couldn't remember exactly what may have happened to her, and what he was actually doing with her. ... She could not confirm that anything that she had done would have enabled or aggressed towards this individual."* PCR Tr. p. 97 l. 19- p. 99 l. 3.

During his PCR testimony Dr. Martin testified copies of records from Walgreens pharmacy concerning the prescription record of the Applicant from January 2005 through August 2009. He indicated that all the records he had available for review came from

Attorney Macloskie or Attorney Ballard.³ According to his PCR testimony, those records showed that Defendant was being prescribed an average of 90, one milligram, tablets of Klonopin a month in 2008. They also showed other sedatives prescribed to Applicant including Lunesta and Ambien CR. According to these records, by 2009 she was being prescribed Xanax. PCR Tr. p. 101, ll. 3-8. Dr. Martin described Klonopin as in the family of benzodiazepines, which are sedative hypnotics. PCR Tr. 102, ll. 19-20. His PCR testimony indicates that the dosage of Klonopin taken by the Applicant during the operative time period *"was at least a medium dose."* He further provided that, *"She would, on occasion, take more than that."* PCR Tr. 104, ll. 10-13. His testimony indicates that the combination of alcohol and Klonopin results in an exacerbation, or worsening of, the sedative, hypnotic effects of this medication. He described the effect of the combination as causing an exponential increase in intoxication. PCR Tr. 104, ll. 14-21. He further provided that an individual impaired by the combination of these substances would experience disorientation, memory loss, inability to walk and impaired motor skills. PCR Tr. p. 105, l. 15- p. 106, l. 11. Dr. Martin testified that he would have been available as an expert witness during the Applicant's trial had he been asked. PCR Tr. p. 106, l. 13-20. Dr. Martin asserted on cross-examination that he did everything he was asked to do when he was hired. PCR Tr. p. 106, l. 24- p. 107, l. 17.

Witness James Perkins met the Applicant and her husband at their photo shop. He ultimately employed Applicant in his business selling a clothing line which include women's apparel. Perkins testified that during this time period he was in the Tappeiner home on occasion. He stated that he is a contractor on Hilton Head Island. He had done work on the interior of the Tappeiner house and in June or July of 2008 he contracted with the Applicant's husband to power wash their house. One day when he and his

³ The record of this case was held open for the Applicant's counsel to submit a copy of the Applicant's records from Walgreens Pharmacy as they were supplied to her directly by virtue of subpoena.

employees were setting up to perform that task, Perkins saw the victim coming out of a sunroom attached to the back of the residence. He did not see anyone else at the house that day. The Applicant and her husband were not at home. He knew the victim by sight and had seen him at the Tappeiner residence before. PCR Tr. P. 113, l. 13- p. 114, l. 25. The Victim testified at trial that he was never in the Applicant's home when she and her husband were not there. Trial Tr. p. 192, l. 18 – p. 193, l. 2.

Perkins additionally testified that he was familiar with Applicant's dogs. He described them as hyper dogs that barked when he came into the home. He stated that they became noisy in response to any disruption in the Tappeiner home. PCR Tr. P. 115, ll. 1-12. Perkins also presented testimony concerning the Applicant's positive reputation for veracity. PCR Tr. P. 118, ll. 10-18. He indicated that he would have been willing to testify for the defense at trial. PCR Tr. P. 118, ll. 19-24.

The Applicant's father, Dave Sanders, testified at the PCR hearing. According to his PCR testimony, around the summer of 2008, he noticed a change in his daughter's behavior. She was not herself. He did not discover the problems she was having from mixing her prescription drugs and alcohol until after the incident that led to her charge. Defense Counsel did not discuss his observations concerning his daughter's problems with mixing drugs and alcohol with him. PCR Tr. p. 120, l. 22- p. 122, l. 5. The Applicant's father testified that he co-signed the note on the purchase of her house. He identified a floor plan of the house that he received during the closing of that house. That floor plan contained the measurements of all the rooms in the house. It was introduced as Applicant's Exhibit No. 5. PCR Tr. p. 122, l. 15-p. 124, l. 18.

The Applicant presented testimony from videographer Todd Oomens. He testified to his production of a brief video of the interior of the house where the incident

allegedly occurred. He verified that the video was not edited in any way and that no special lenses were used to alter or distort the image. The State's objection to the introduction of the video was sustained by this Court. The Applicant argued that this video was relevant to her allegation that Defense Counsel should have either asked for a jury view of the scene or should have introduced demonstrative evidence illustrating the interior of the house. The CD of this video was marked as Applicant's Exhibit No. 6, for identification only. PCR Tr. p. 125, l. 23- p. 130, l. 2.

As previously noted, the Applicant's identical twin sister, Elizabeth W. Auerback, testified at this PCR proceeding. She testified that during the summer of 2008 she observed her sister drinking heavily on top of her prescription medications. She had expressed her concerns about her sister missing these drugs with alcohol. She recalled that when Applicant drank heavily in conjunction with her medications she could not communicate very well, she had difficulty walking, she sometimes fell and when she went to bed you could not wake her up. PCR Tr. p. 132, l. 19- p. 134, l. 24.

The Applicant testified that she fully understood all the risks associated with going forward with her PCR action. She also waived any claims she might have raised against her PCR counsel for her involvement in the Applicant's decision to withdraw her direct appeal. PCR Tr. p. 136, l. 12- p. 140, l. 13. She testified that Defense Counsel had advised her that her case was most likely not going to go to trial. She was notified on a Friday that her case was going to trial on Monday. PCR Tr. p. 140, ll. 15-25.

The Applicant asserted that Defense Counsel never discussed putting up a defense with her prior to trial. He discussed calling her husband as a possible witness wither her, but she never knew for certain he was going to be called. Defense Counsel never told her that if she put up any evidence at all she would lose the right to the final jury argument. PCR Tr. p. 142, ll. 4-15. Defense Counsel never discussed the possibility of introducing

evidence before the jury of her drug use and her drinking and how they affected her on the evening in questions. PCR Tr. p. 142, ll. 16-20.

The Applicant testified that she discussed her recollections of that evening with Defense Counsel. She also met with Dr. Nolan prior to trial. Defense Counsel never discussed the possibility of using Dr. Nolan as a witness before the jury. PCR Tr. p. 142, l. 21- p 143, l. 6. The Applicant asserted however, that if Defense Counsel had told her it was necessary to establish her defense, she would have authorized him to introduce evidence concerning her problems with prescription drugs and alcohol. PCR Tr. p. 144, ll. 4-8. At her PCR hearing, the Applicant testified that she currently weighed 138 pounds. She acknowledged she was about thirty (30) pounds lighter at the time of the incident. She admitted that in the summer of 2008 she was drinking three (3) to five (5) drinks a night. She recalled that sometimes she drank mixed drinks and sometimes she would drink a bottle of wine. She testified that she was taking Klonopin three times a day at the time of the alleged assault. In addition to the Klonopin she was taking sleeping medications including Ambien, Lunesta, over the counter sleeping medications or Tylenol PM. PCR Tr. p. 144, l. 9- p. 145, l. 2.

The Applicant testified that she told Defense Counsel that during this time period she sometimes experienced blackouts and that there were times when she had no memory of certain episodes. She would have been willing to testify to these matters had she been advised to do so. PCR Tr. p. 145, ll. 3-15. She confirmed that she had no prior criminal record. She denied having ever had any problems with or fantasies about, minor children. She testified that she had been married nearly fourteen (14) years and that she and her husband have two daughters ages nine (9) and thirteen (13). PCR Tr. p. 145, l. 16- p. 146, l. 1.

The Applicant's PCR testimony established that during the summer of 2008 she was already employing the victim's sisters as babysitters episodically. The sisters began providing regular after school care for her daughters in September, 2008, after the alleged incident with their brother; the victim. The Applicant fired the sisters in late October, 2008 around Halloween. PCR Tr. p. 146, l. 2- p. 147, l. 20. The Applicant testified that she had an altercation with the victim's mother concerning her decision to terminate her daughters. Applicant indicated that she had fired the girls because she had been told that the girls and their brother had been using their hide-a-key to enter the house without permission. PCR Tr. p. 147, l. 21- p. 148, l. 11.

The Applicant's testimony also verifies that from January, 2008 through the summer of 2008 she filled her prescriptions at the Walgreens on Simmonville Road near their home. PCR Tr. p. 150, ll. 7-13.

The Applicant's husband testified at her PCR hearing. Mike Tappeiner's testimony verifies that Defense Counsel never discussed with him whether he could verify when the victim came to their home asking for help getting a camera battery before he called him as a witness at his wife's trial. He couldn't recall Defense Counsel ever discussing the purpose behind calling him as a witness for the defense before he was actually called to the stand. PCR Tr. p. 154, l. 3- p. 155, l. 6. In his PCR testimony, the Applicant's husband verified that in the summer of 2008 she was drinking 3 to 5 drinks a night on top of her prescription medications. PCR Tr. p. 155, l. 7- p. 156, l. 5. He expressed the opinion that the combination of alcohol and her prescription medications affecting her ability to walk as well as her other motor skills and her decision making. He admitted that he had expressed concern about his wife's pattern of mixing alcohol with her medications. PCR Tr. p. 156, ll. 3-5.

VII.

FINDINGS OF THE COURT

The Applicant's allegations fall into two categories. The first group of allegations address themselves generally to the failure of Defense Counsel to prepare and present a defense at the Applicant's trial. See, Allegations 1,2,3,4,5,6,9,10, 11,14,18,20,24 and 26. As discussed below, the Applicant has met her burden of proof with regard to her claim that Defense Counsel failed to develop and employ a clear theory of defense at her trial. In addition, she has demonstrated that readily available evidence existed which could have been offered in support of her theory of defense. She has successfully shown that her decision not to testify in her own behalf was negatively impacted by erroneous legal advice from Defense Counsel concerning the possible consequences of testifying at her trial. For these reasons, as discussed in further detail below, this Court finds that the Applicant's judgment and sentence should be set aside and her case should be remanded to the Court of General Sessions for a new trial.

In his opening argument to the jury Defense Counsel gave the jury a preview of the Applicant theory of defense; that she was the victim of a sexual assault as opposed to the perpetrator. Having set the stage for this defense, Defense Counsel did not prepare to present evidence at trial which would have supported that theory. Ironically, Defense Counsel did present evidence supporting the notion that the Applicant's prescriptions medications negatively affected her ability to make a knowing, voluntary and intelligent statement to the police. Successfully using the testimony of expert witness Nolan, Defense Counsel was able to convince the trial judge that the Applicant did not know what she was doing at the time she gave her statement to police. That strategy was

effective even where the challenge was based purely upon the impact of her prescription medications on her ability to issue a reliable statement in the face of certain interview techniques. As noted in the summary above, the officer conducted the interview in question acknowledged that, at the time the statement was taken, there was no evidence that the Applicant had been drinking on top of her medications. The Applicant has demonstrated that Defense Counsel could have used the same expert he used in the *Jackson v. Denno* proceeding, or an expert of similar credentials, to testify as to the effect the combination of alcohol with those same prescription medications would have had on the Applicant on the evening when she allegedly drug an unwilling young man of never 14 years of age up a flight of stairs to sexually molest him.

In the *Jackson v. Denno* hearing, Dr. Nolan relied exclusively on historical information concerning the Applicant's prescription drug use during the time period when this statement was taken. Fortunately for the Applicant, the Court did not question the fact that there was no evidence before the Court to corroborate her claim that she was taking powerful prescription medications at the time her statement was taken approximately six months after the event that formed the basis for the charge in question. The Applicant has now demonstrated that there was readily available evidence and testimony which could have established the prescription drugs she was taking at the time of this event and the dosages at which they were prescribed. See, *Applicant's Exhibit No. 3*. Likewise she has demonstrated that expert testimony from Dr. Martin, or another similar expert, could have established for the jury the dire consequences of mixing alcohol with these powerful medications. As the Applicant has shown, testimony was available which would have established that the Applicant had a pattern of mixing her prescription medications with alcohol during the operative time period. The testimony of Dr. Martin illustrated that the mixture of these prescription drugs with alcohol would

have affected her motor skills, her balance, her ability to walk and her capacity to communicate effectively. The testimony of her husband confirmed that the Applicant experienced such physical problems when she combined alcohol with her regular prescription medication. Testimony from her twin sister also supported the fact that the Applicant had a problem with mixing alcohol with her prescription medications.

Likewise, the Applicant has established that Defense Counsel could and should have developed testimony to establish the Applicant's height and weight at the time of the incident. While it is true that the jury had the opportunity to see the Applicant at trial, that opportunity for observation was no substitute for being advised of her shockingly low weight at the time of the incident. The jury had no way of knowing whether she had perhaps lost a significant amount of weight between the time of the incident and her trial. In addition, since the Applicant did not testify, the jury's opportunity to view the Applicant would have been limited to seeing her either sitting or standing behind a table in the courtroom. Her testimony at her PCR hearing established that she weighed 138 pounds at the time of the hearing but, she had weighed about 30 pounds less than that at the time of the incident. The fact that this assertion was credible was highlighted by the appearance of her identical twin sister who, at the PCR hearing testified that she weighed 109 pounds and was around one-half inch shorter than the Applicant.

The testimony proffered during the PCR hearing clearly could have been presented to create reasonable doubt as to whether the Applicant would have been physically capable of forcing the young man in question up a flight of stairs and violently forcing sex acts on an unwilling teenage boy who was, according to the police incident reports, approximately 17 pounds heavier than her. Having suggested the theory of defense to the jury that the Applicant was the victim, not the perpetrator, trial counsel

was ineffective for failing to develop this line of evidence which would clearly have supported that theory.

The Applicant has alleged that Defense Counsel should have discussed the advantages and disadvantages of testifying with the Applicant in more detail prior to this trial. On the unique facts of this case, this Court finds that this is particularly true. While the Applicant's memories of the evening in question are admittedly sketchy, they are not damning and her testimony concerning them would have been consistent with the defense that the Applicant was so under the influence of prescription medications and alcohol at the time of this event that she was not capable of the acts described by the complaining witness. Once this trial was under way, Defense Counsel's concern that the Applicant's testimony might open the door to the introduction of that statement, which had been excluded from evidence by the trial Court, was unfounded. A confession is inadmissible for all purposes, including impeachment, where it is involuntarily made. *State v. White*, 311 S.C. 289, 294, 428 S.E.2d 740, 743 (Ct. App. 1993). An involuntary, incriminating statement is inadmissible for any purpose including impeachment. *State v. Victor*, 300 S.C. 220, 221, 387 S.E.2d 248, 249 (S.Ct. 1989); *State v. Hook*, 348 S.C. 401, 416-417, 559 S.E.2d 856, 864 (S.Ct. 2001). Defense Counsel should have accurately discussed with the Applicant the possible pros and cons of calling her as a witness in her own defense at trial even if the Court saw fit to suppress her statement to the police. Based on Defense Counsel's own PCR testimony it is clear that Defense Counsel gave his client erroneous advice on this crucial point. The Applicant also alleges that trial counsel was ineffective for failing to discuss the possible use of character witnesses with her in preparation for trial. Once again, had Defense Counsel presented a defense on behalf of the Applicant, including testimony from her, the possible use of character witnesses may have been an important consideration. The record below establishes that the Applicant

was a college educated women with no prior criminal history whatsoever. The Applicant should have been advised that if she took the stand and the State elected to attack her character, she would have had the option of presenting character witnesses. She has demonstrated that at least one such, non-familial witness would have been available to testify on her behalf at trial. Likewise, since Defense Counsel was not prepared to fully present evidence in support of the Applicant's theory of Defense, she alleges that he should have advised her that she would lose the right to make the final argument to the jury if she introduced any evidence at trial. The Applicant's testimony indicates that Defense Counsel never discussed this important consideration with her prior to or during trial. Defense Counsel did not recall ever advises her on this point.

Similarly, Defense Counsel failed to present witnesses who were not related to the Applicant to establish that the family dogs would have reacted excitedly to any disruption in the home. The Applicant's husband, whose testimony might have been viewed as suspect because of his relationship to the Applicant, was the only defense witness presented on this critical point. Even if Defense Counsel did not plan to introduce evidence on this crucial point prior to trial, once the State made an issue of how much the husband had been drinking on the night in question, Defense Counsel should have been prepared to present a non-familial witness to establish the fact that the family dogs would have sounded an alarm if they had heard the boy screaming as he claimed.

The Applicant has also asserted that Defense Counsel was ineffective for seeking to introduce evidence concerning the fact that the complaining witness had previously reported being the victim of a sexual assault. In a vacuum there may appear to be no advantage to the introduction of such evidence at trial. Had Defense Counsel been prepared to fully present the defense he merely hinted at during his opening remarks to the jury however, it would have been advantageous for the Defense to establish that there

was in fact a reasonable explanation for how this adolescent boy was so familiar with a range of sex acts at such a young age. As noted above, at trial, even he Solicitor acknowledged that Defense Counsel could have taken appropriate measure to seek the introduction of this type evidence and simply did not do so. *See, S.C. Code Ann. §16-3-659.1*. As will be discussed *infra*, once the trial was underway, other powerful reasons for the introduction of this evidence developed and Defense Counsel still did not seek to establish that the facts warranted an exception to the Rape Shield Statute.

As would have been clear to Defense Counsel from the discovery materials in this case, the complaining witness claimed that he had screamed for help while he was being sexually assaulted and no one came to his aide. The Applicant has alleged that Defense Counsel should have been prepared to introduce demonstrative evidence to establish the setting in which this incident occurred and the unlikelihood that the boy could have in fact screamed as he claimed without being heard by the victim's husband who was asleep in the next room. In support of this allegation, the Applicant has introduced a floor plan of the house where this event occurred which contains dimensions of all the rooms in the house and common areas in the house. *See, Applicant's Exhibit No. 5*. This floor plan establishes that the room where this assault allegedly happened was only a few feet away from where the Applicant's husband lay sleeping. Had Defense Counsel introduced evidence in support of the defense theory suggested by his opening argument, this floor plan would have supported the Applicant's claim that the version of the facts put forth by the complaining witness was not credible.

As noted in the PCR testimony, Defense Counsel admitted that he did not present any evidence to support the theory of defense he advanced in his opening argument and further, that absent such evidence he was left with no foundation for requesting jury instructions which would have supported the Applicant's theory of Defense. This Court

finds that if Defense Counsel had presented readily available evidence in support of the theory that the Applicant was the victim of this sexually precocious adolescent, as opposed to the aggressor as he claimed, the Applicant would have been entitled to jury instructions which advised the jury that the Applicant could not be found criminally liable for having been involved in sex acts with a minor if they concluded that at the time of the acts she was either unconscious, so incapacitated as to be unable to willfully engage in the activity in question or that she was physically helpless to fend off sexual advances made against her by another. In other words, the Applicant would have been entitled to have the jury instructed on the law reflected in S.C. Code Ann. § 16-3-654, which defines Criminal Sexual Conduct in the Third Degree as occurring when a person to commits a sexual battery upon a person the actor knows, or has reason to know, is *"mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish the battery."* Likewise, as the Applicant asserts, she would be entitled to a jury charge that informed the jury that a juvenile, even one under the age of fourteen, may be prosecuted for committing the crime of criminal sexual conduct pursuant to South Carolina Law. See, S.C. Code §16-3-659.

The second category of allegations made by the Applicant in support of her Sixth Amendment claims, address the failures of trial counsel at trial. See, Allegations 5, 7, 12, 15, 17, 19, 21, 22, 23, 25 and 27.

Allegation 5

Trial Counsel was ineffective for failing to adequately prepare Dr. Tom Martin for his role in the sentencing phase of the Applicant's trial.

The testimony of Dr. Martin during the PCR hearing held in this matter clearly illustrates that he was not adequately prepared to testify at the Applicant's sentencing proceeding. Multiple statements made by Dr. Martin during the sentencing proceeding would indicate to the listener that the Applicant had in fact admitted culpability in the

alleged sexual battery against the victim. Dr. Martin is a well experience forensic psychiatrist. The testimony he presented at the Applicant's sentencing proceeding would lead any reasonable listener to conclude that the Applicant admitted her culpability for the charged offense to this doctor. Yet, it is clear from Dr. Martin's PCR testimony that she did not. His clarification of his conversations with the Applicant in his interview with her about this incident paints a very different picture from that presented by his testimony during the sentencing proceeding. Given the wide latitude the trial judge had in sentencing in this case, it is impossible to know with any certainty what if any difference this misleading testimony may have made in the court's ultimate decision regarding the penalty to be imposed. This Court finds however, that Defense Counsel, and Attorney Ballard, obviously failed to adequately prepare this witness for presentation of testimony in the sentencing phase. Inasmuch as this Court finds that a new trial is warranted on other grounds, any further discussion as to prejudice is unnecessary.

Allegation 7

Trial Counsel was ineffective for failing to object to repeated references throughout trial to the fact that the decision to arrest the Applicant was not made until after her two hour police interview where the statements made by the Applicant had been ruled inadmissible.

As previously discussed, the trial judge ruled that the Applicant's statement to the police was not knowingly, voluntarily or intelligently entered and excluded it from evidence at trial. Notwithstanding this ruling, the State repeatedly made reference to the fact that the Applicant had been interviewed by law enforcement for 2 hours before she was arrested on the charge of Second Degree Criminal Sexual Conduct. In the prosecution's closing arguments the Solicitor chose to emphasize this point to the jury. Defense Counsel has acknowledged that he should have objected to any such reference by the prosecution during this trial. This Court agrees.

As previously stated, an involuntary statement is inadmissible and may not be used for any purpose, even impeachment, at trial. Here, the trial judge could not have been clearer in her ruling. Nevertheless, the State repeatedly attempted to do through the back door what the trial judge had expressly blocked them from doing directly; tell the jury the Applicant had confessed. Where the Court had ruled that the statement in question was not voluntarily, knowingly and intelligently entered, the prosecution should not have been allowed to invite the jury to infer that he Applicant had confessed by repeatedly inferring as much through their questioning of law enforcement witnesses and in their closing argument. Defense Counsel clearly erred in failing to object to this line of questioning and argument. The fact that the Applicant was prejudiced by this improper line of testimony and argument is readily apparent. At this trial, there was no physical evidence proving this incident even happened. The victim waited six months to make this allegation and did not do so until the Applicant fired his sisters from her employment. The version of the facts told by the complaining witnesses may have been viewed by the jury as suspect on its face in light of these factors as well as the size of the house where the assault allegedly occurred, the fact that no one else heard him cry out and the fact that the Applicant was extremely thin and had been drinking. Any reasonable doubt the jury may have had concerning the veracity of this adolescent's story may well have been negated by the Solicitor's questions and argument which implied that the Applicant's statements to the police during her interview caused them to conclude she was guilty and place her under arrest. Defense Counsel's failure to object the first and every time the State offered this line of testimony and argument constituted ineffective assistance of counsel and warrant's the grant of a new trial.

Allegations 8 and 27

Trial Counsel was ineffective for failing to seek introduction of evidence that the victim had previously reported being raped at age 8 where that evidence was material to the defense and failed to adequately cross-examine the State's expert witness concerning reasons why the

complaining witness may have delayed reporting his alleged assault by the Applicant.

As detailed in the factual summary above, after a lengthy debate at trial, the testimony of State expert Mary Beth Hefner was significantly restricted at trial. This witness revealed in camera that the complaining witness had told her one of the reasons he waited to report the alleged assault was that he had previously reported another sexual assault against him and nothing was done about it. Ultimately the State was allowed to present testimony through this witness concerning various reasons why a child might delay reporting a sexual assault. She did not testify concerning any interviews she conducted with the complaining witness nor did she opine as to why he waited six months to report his alleged assault by the Applicant.

As noted above, Defense Counsel did not cross-examine this witness at all concerning other possible explanations for why a child might delay reporting such an incident including the one reason he had clearly provided this witness in her interview with him. Despite the fact the trial judge made it perfectly clear that the State was risking opening the door to testimony about the prior incident, Defense Counsel did seek leave of Court to introduce evidence about the prior incident as an exception to the Rape Shield Law. In fact, Defense Counsel did not cross-examine this witness concerning any alternative explanations for why the young man may have waited six months to make these claims against the Applicant. Defense Counsel's failure to seek leave to introduce testimony concerning the reason this young man gave for his delayed report of this incident resulted in the jury hearing only other explanations for delayed report of a sexual assault which were more favorable to the prosecution. Despite the fact that this young man told this witness exactly why he didn't report the incident earlier, all the jury heard were hypothetical explanations for such behavior. In addition, Defense Counsel did not

question this witness as to whether this young man's late allegations may have simply been motivated by his anger over the Applicant having fired his sisters and upset his mother. He similarly didn't ask this witness whether the young man may have taken the offensive and reported his assault by the Applicant out of fear that she would eventually remember what he had done to her and report him.

While the provisions of the Rape Shield Law provide some much needed protections and serve a worthy purpose, on the facts of this case, Defense Counsel should have sought a ruling that the testimony of the State's expert witness necessitated a finding that testimony concerning what reason this young man actually gave for the delayed report of this alleged assault was exempt from the prohibitions of the law. In addition, this Court finds that Defense Counsel was ineffective for neglecting to cross-examine this witness about other possible explanations for the delayed report in this case which were potentially more beneficial to the defense than those proposed by this witness. In addition, Defense Counsel was ineffective for failing to cross-examine this witness concerning her assertions of statistical data concerning the subject of delayed reporting where she provided no authority for the percentages she testified to. Defense Counsel also neglected to cross-examine this witness about her claim that boys more frequently delay reporting sexual assaults where she provided the Court no authority for that assertion. In this case, the fact that this young man waited six months to raise these claims may have created reasonable doubt in the minds of the jury however, the State was allowed to explain away the delay with one sided testimony which failed to explore potential explanations for the delay that were not as innocent as those put for by this witness and which was allowed to deliberately omit a known reason for the delay in this case which had been asserted by the young man himself.

Allegation 19

Trial Counsel failed to object to a jury charge concerning expert opinion testimony where the sole expert witness proffered by the State was not asked to provide an expert opinion at trial.

The Applicant asserts that Defense Counsel should have objected to the jury charge given at the Applicant's trial concerning expert opinion testimony where the State's sole expert witness in this case ultimately did not present any opinion testimony. She asserts that the affect of this instruction was to give undue weight to the testimony of this witness when she in fact had not presented expert opinion testimony which warranted the charge in questions. As discussed above, the failure of Defense Counsel to adequately cross-examine this witness had already allowed the State to present very favorable and one sided testimony on the subject of delayed reporting of sexual abuse by a child. The jury charge in question would have tended to give this testimony undue weight and should have been objected to where the witness did not actually give opinion testimony tied to the facts in this case.

Allegation 12

Trial Counsel was ineffective for failing to object to repeated references to hearsay statements from the victim which went beyond a report of the time and place of the alleged assault.

Throughout the Applicant's trial, the State was permitted to introduce hearsay testimony concerning details of the alleged sexual assault which went beyond the report of the time and place of the alleged incident. It is well established in South Carolina that the rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991). Our Court's have recognized three exceptions to the rule against hearsay that allows prior consistent statements of a witness

to be admitted. First, in criminal sexual conduct cases, when the victim testifies, evidence from other witnesses that she complained of the sexual assault is admissible in corroboration, limited to the time and place of the assault and excluding details or particulars. *Id.* at 367, 401 S.E.2d at 143. Second, the *res gestae* or excited utterance exception allows corroborative rape testimony without the time/place exception. *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993). Third, when a witness has been impeached by proof that the witness has made a prior inconsistent statement, proof is allowed that the witness made a prior consistent statement, provided that the prior consistent statement must have been made before the “existence of [the] relation of [the witness] to the cause.” *Burns v. Clayton*, 237 S.C. 316, 117 S.E.2d 300 (1960). See, *Jolly v. State*, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994). The Applicant has alleged that trial counsel was ineffective for failing to object to several instances of hearsay testimony. Since no objections to the testimony were actually levied at trial, both this Court and the Applicant have been left to guess as to which hearsay exception the State would have argued that the testimony fell within. On the facts of this case, the error is clear. The complaining witness did not make the allegations in question until six months after the alleged incident and therefore, the statements would obviously not fall under the *res gestae* or excited utterance exception. This testimony was not offered as a prior consistent statement in response to impeachment on some aspect of the testimony of the alleged victim. And, in numerous instances, this testimony far exceeded a report of the incident limited to the time and place of the assault. See, Trial Tr. p. 258, ll. 2 – 5; Trial Tr. p. 275, ll. 6 – 24.

The inherent prejudice arising from such testimony was recently discussed by our Court of Appeals in the case of *Vail v. State*, ___ S.C. ___, ___ S.E.2d ___ (Ct. App. 2013). Defense Counsel provided the Applicant with ineffective assistance of counsel by

neglecting to object the first and every time the State introduced hearsay testimony which exceeded the well established boundaries for such evidence.

Allegation 16

Defense Counsel failed to provide the Applicant effective assistance of counsel when he failed to question the Applicant's husband, when he testified at trial, concerning the victim's pattern of visitation in their home during the time period prior to the accusations by the victim

When the Applicant's husband testified at the Applicant's trial, he recalled an incident which occurred sometime after the evening when the Victim was allegedly assaulted by his wife. Specifically, he testified about getting a phone call from the Applicant at the family camera shop asking him to bring a camera battery home for the young man in question. According to his testimony, the Applicant told him that the boy had come to their door asking for their help in getting battery for his camera. He remembered bringing the battery home for the young man but reported that he never came back by to get it. In response to this testimony, the prosecutor cross-examined the husband about whether this incident occurred before or after the young man had made the allegations against his wife. The husband's testimony on this point was less than clear and opened the door for the prosecutor to argue in closing that the husband's testimony was some kind of plan to try and help his wife and that the testimony had essentially backfired. Trial Tr. p. 297, l. 20 – p. 298, l. 7; Trial Tr. 299, l. 7 – p. 301, l. 4; Trial Tr. p. 343, l. 25- p. 344 l. 12.

It is apparent from the PCR testimony of the husband that he wasn't sure what he was being called to testify concerning at trial. The incident with the camera battery was not discussed with him in advance of his testimony. Given the significance of any attempt to show that this young man continued to come to the Tappenier residence even after the date of the alleged rape, it was crucial that Defense Counsel know for certain

what the husband's testimony on this point would be if he was called to testify for the defense. The obvious failure of Defense Counsel to interview this witness concerning his potential testimony at trial resulted in the presentation of testimony that appeared to be equivocal at best and manufactured at worst. Defense Counsel was ineffective for neglecting to adequately interview the husband in advance of his trial testimony. His failure to do so resulted in the presentation of his testimony in a manner which cast doubt on the credibility of the rest of his testimony. Given the fact that he was the only witness for the defense, this error was particularly prejudicial to the Applicant.

Allegation 13

Trial Counsel failed to object to repeated references to the victim as 13 years old at the time of the alleged assault where the victim was two months away from his 14th birthday at the time of the alleged assault.

The Applicant has alleged that Defense Counsel was ineffective for neglecting to point out that the young man making the accusations against the Applicant was actually within weeks of his fourteenth birthday at the time of the alleged incident. This Court finds that Defense Counsel was not, on the record of the trial as it exists, ineffective for neglecting to object to these references. The young man in question was thirteen years old at the time of this incident. He had not yet reached his fourteenth birthday. More importantly, other than a passing reference in his opening argument, Defense Counsel had presented no evidence tending to support the theory of defense that the Applicant was the victim not the offender in this situation. Thus, the question of whether the young man was mature enough to have potentially assaulted the Applicant was not clearly before the jury. Had it been, then the Applicant's point concerning the significance of him being nearly 14 as opposed to 13 might have merit. Defense Counsel's failures with regard to presenting available evidence in support of that theory of defense are discussed elsewhere herein. Absent the presentation of evidence that the complaining witness was the likely perpetrator as opposed to a victim,

Defense Counsel's failure to make this point at trial does not constitute ineffective assistance of counsel.

Allegation 22

Trial Counsel failed to adequately cross-examine the Victim concerning inconsistencies between his statements pre-trial and his testimony at trial.

As discussed in the summary of testimony set forth above, Defense Counsel neglected to use incident report contained in the discovery materials in this case, as well as the victim's statement included in that report, to impeach the complaining witness concerning critical portions of his trial testimony. At trial he claimed the sex act ended when he pushed the Applicant off of him and fled the scene. In his statement to the police he says he fled the Tappeiner house after the Applicant left. In the incident report the young man is quoted as claiming that the Applicant got off of him after she was finished and that she told him she got off of him before he ejaculated because she did not want to get pregnant. Given how crucial the issue of the Victim's credibility was to the Applicant's trial, this Court finds that Defense Counsel was ineffective for neglecting to use the information contained in the discovery materials to impeach him. A more thorough cross-examination of the complaining witness concerning these points may well have convinced the jury that his story was not truthful.

Allegations 21 and 7

Trial Counsel failed to object to numerous highly improper and inflammatory statements made by the State in closing arguments.

This Court is particularly concerned with Defense Counsel's failure to object to numerous improper and prejudicial statements made by the prosecution during the State's closing arguments to the jury. Defense Counsel has freely admitted that he failed to raise

objections to several portions of the State's closing argument which were improper. This Court now finds that the arguments in questions, as outlined above, were indeed improper and prejudicial to the Applicant's ability to receive a fair trial.

As previously noted, in this trial the State repeatedly attempted to imply that the Applicant had confessed by drawing attention to the fact that she was not arrested until after she was questioned by the police for approximately two hours. Where the trial court had excluded her statement to the police from evidence, questions designed to imply she had given an incriminating statement that resulted in her arrest were clearly improper. Likewise, the State's attempt to drive this point home during their closing arguments to the jury was equally improper. Trial Tr. 341, l. 25 – p. 342, l. 16. The prejudice arising from this argument is obvious. In a case where the credibility of the victim's story was crucial to the State's case, the implication that the Applicant had actually implicated herself in her interviews with the police was highly prejudicial.

In still another portion of the State's closing argument the prosecutor effectively vouched for the credibility of the complaining witness in a manner that was clearly improper. Defense Counsel's failure to object to this line of argument constituted ineffective assistance of counsel as well. In his closing argument to the jury the prosecutor talked about the 200 forensic interviews his expert witness had conducted in her career and then stated, *"Folks, these are people who can detect when someone is making something up or if there is nothing there. Okay?"* Trial Tr. 341, ll. 19-22. In this portion of his closing argument the Solicitor essentially vouched for the credibility of the Victim based on the implied opinion of his expert witness that the Victim was being truthful. This line of argument was improper for two reasons. First, in her testimony before the jury, Ms. Hefner never stated that she had interviewed the Victim in this case. Trial. Tr. 254, l. 10 – p. 255, l. 25. Therefore, the prosecution was inviting the jury to

draw an inference from matters not on record in this trial. A Solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. . *Matthews v. State*, 350 S.C. 272, 565 S.E.2d 766 (2002); *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816(1990). He may not however, vouch for the credibility of a witness based on personal knowledge or other information outside the record; *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001). Secondly, this argument invited the jury to substitute the opinion of a State witness for their own on the crucial issue of the credibility of the victim. It is improper for the State to assure the jury of a witness' credibility because it is the role of the jury to assess the credibility of the witnesses at trial. *Id.* Defense Counsel testified that he should have objected to this argument. PCR Tr. p. 53, ll. 15-20.

Defense Counsel likewise conceded that he should have objected to another portion of the State's closing in which the prosecution personally commented on the credibility of the sole witness offered for the defense. Trial Tr. p. 343, l. 25- p. 344 l. 12. PCR Tr. p 43, ll. 1-9. The prosecution also commented on the Mr. Tappeiner's previous "problems with alcohol." Defense counsel has acknowledged that there had been no evidence supporting that argument and, that it should have been objected to. Trial Tr. p. 345 ll. 9-10. PCR Tr. p. 54, ll. 10-15. During the testimony of the Applicant's husband he acknowledged having one prior DUI fifteen years earlier. Trial Tr. 307, ll. 3 – 5. Once again, it is improper for the prosecution to personally comment on the credibility of any witness and he is confined to the record when advancing arguments in favor of the State.

During his closing argument the prosecutor also asked the jury to consider "*the eye-to-eye, face-to-face, interviews that [the victim] has had with law enforcement and the experts.*" (Emphasis added) Trial Tr. p. 346, ll. 17-19. As asserted by the

Applicant, the State only presented *one* expert witness at trial and that expert did not testify to having interviewed the Victim in this case. Defense Counsel admitted that he did not consider objecting to this portion of the prosecutor's closing argument. PCR Tr. p. 54 ll. 16-24. This argument by the State was misleading and commented on facts not in evidence. These statements to the jury obviously sought to bolster the State's case by arguing that multiple experts had interviewed the complaining witness and found him to be credible. Defense Counsel clearly should have objected to this argument as well. Here the State was once again arguing matters not in evidence to bolster the credibility of its key witness.

As previously observed, near the very end of the State's closing argument, the prosecutor made the following argument,

I want you to also think in —in—in making that decision, would you let her babysit your kids? Your grand kids? Nieces and nephews? I think the answer to that is why you should find her guilty. Trial Tr. 346 ll. 20–24.

In his PCR testimony, Defense Counsel testified that he should have objected to this portion of the prosecutor's closing argument which he acknowledged, was improper because it "staked" the jury. PCR Tr. p. 55, ll. 7-13. This Court agrees.

In light of the above, the Applicant has met her burden of proof with regard to her claim that Defense Counsel failed to provide her reasonable professional assistance of counsel when he failed to object to multiple improper arguments made during the prosecution's closing statement to the jury. The operative question in reviewing an argument by the prosecution which is allegedly improper is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *U.S.C.A. Cont. Amend 14*. It is the finding of this Court that the arguments addressed herein were fundamentally unfair and should have been objected to Defense Counsel. Accordingly, this Court finds that the Applicant has demonstrated

that she was prejudiced by Defense Counsel's failure to object to these portions of the State's closing argument. *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004).

VIII.

CONCLUSION

For all the foregoing reasons, this Court now finds that the Applicant has met her burden of proof with regard to her claim that her right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, was violated prior to and during her jury trial. Accordingly, the Applicant's judgment and sentence are hereby reversed and her case is remanded to the Beaufort County Court of General Sessions for a new trial.

IT IS SO ORDERED.

Perry M. Buckner
Presiding Circuit Judge
Fourteenth Judicial Circuit

This ____ day of _____, 2013.

ATTACHMENT C

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	
SUSAN TAPPEINER, 338050,	)	2010-CP-07-2396
	)	APPLICANT'S MEMORANDUM IN
	)	SUPPORT OF PCR APPLICATION
	)	IN THE FORM OF A
	)	PROPOSED ORDER
	)	
v.	)	
THE STATE OF SOUTH CAROLINA,	)	
Respondent.	)	
_____	)	

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed on May 17, 2010 and an Amended Application filed on April 4, 2013. A Second Amended Application for Post-Conviction Relief, also filed on April 4, 2013 was withdrawn at the evidentiary hearing held on that same date. The State filed its Return on August 18, 2010. An evidentiary hearing was convened on April 4, 2013, during which the Applicant was present and represented by Tara Dawn Shurling, Esquire and the State was represented by Assistant Attorney General, Ashleigh Wilson.

I.**PROCEDURAL HISTORY**

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Beaufort County Clerk of Court's orders of commitment. The Applicant was indicted at the March 2009 term of the Beaufort County Grand jury for criminal sexual conduct (CSC) with minor (victim age 11-14) (2009-GS-07-703). Charles B. Macloskie, Esquire, represented the Applicant at trial. Attorney Macloskie¹ and Desa Ballard, Esquire represented the Applicant at sentencing. On October 26-28, 2009, the

¹ Hereafter, Defense Counsel.

Applicant proceeded to trial, after which a jury found her guilty of 2nd degree CSC with a minor (victim age 11-14). On November 16, 2009, the Honorable Jackson V. Gregory sentenced the Applicant to confinement for ten (10) years, suspended upon the service of five (5) years plus three (3) years of probation.

A timely Notice of Appeal was filed on Applicant's behalf. Desa Ballard, Esquire, and Tara Dawn Shurling, Esquire represented Applicant on appeal. The Applicant submitted an Affidavit in Support of Motion to Withdraw Direct Appeal. The South Carolina Court of Appeals dismissed Applicant's appeal by Order of Dismissal and Remittitur dated May 11, 2010.

II.

ALLEGATIONS RAISED

The Applicant has alleged generally that she received ineffective assistance of counsel prior to and during her trial in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14, of the South Carolina Constitution. In support of that claim she has raised the following specific allegations:

1. Trial Counsel was ineffective in failing to develop and employ a clear theory of defense.
2. Trial Counsel was ineffective for failure to present evidence concerning what prescription medications the Applicant was taking during time of incident.
3. Trial Counsel was ineffective for failing to introduce testimony from Dr. Nolan in case for defense.
4. Trial Counsel was ineffective for failure to hire Dr. Martin, or an expert of equal credentials, to testify during the case in chief.

5. Trial Counsel was ineffective for failing to adequately prepare Dr. Tom Martin for his role in the sentencing phase of the Applicant's trial.
6. Trial Counsel was ineffective for failing to introduce evidence concerning the medications the Applicant was taking during the operative time period, and the effect of those medications when combined with alcohol.
7. Trial Counsel was ineffective for failing to object to repeated references throughout trial to the fact that the decision to arrest the Applicant was not made until after her two hour police interview where the statements made by the Applicant had been ruled inadmissible.
8. Trial Counsel was ineffective for failing to seek introduction of evidence that the victim had previously reported being raped at age 8 where that evidence was material to the defense.
9. Trial Counsel was ineffective for failing to discuss use of character witnesses with the Applicant and failed to produce such witnesses at trial.
10. Trial Counsel was ineffective for failing to fully discuss potential risks and benefits of testifying at trial.
11. Trial Counsel was ineffective for failing to request a jury view of the scene, or in the alternative, to introduce evidence demonstrating the size and layout of the Applicant's home.
12. Trial Counsel was ineffective for failing to object to repeated references to hearsay statements from the victim which went beyond a report of the time and place of the alleged assault.
13. Trial Counsel failed to object to repeated references to the victim as 13 years old at the time of the alleged assault where the victim was two months away from his 14th birthday at the time of the alleged assault.
14. Trial Counsel failed to establish his client's height and weight at trial.
15. Trial Counsel failed to provide the Applicant effective assistance of counsel when he called the Applicant's husband as a witness, and questioned him concerning an incident when the victim had asked the Applicant to help him get a camera battery, without ascertaining whether the husband had an accurate recollection of the timing of that request.
16. Trial Counsel failed to provide the Applicant effective assistance of counsel when he failed to question the Applicant's husband, when he testified at trial, concerning the victim's pattern of visitation in their home during the time

period prior to the accusations by the victim.

17. Trial Counsel was ineffective when he failed to adequately question the Applicant's husband on the witness stand concerning his observations concerning the Applicant's coordination and general physical condition when she mixed alcohol with her prescription medications.
18. Trial counsel was ineffective for failing to fully discuss with the Applicant the fact that she would retain the right for him to make the final argument to the jury if the defense presented no evidence at trial.
19. Trial Counsel failed to object to a jury charge concerning expert opinion testimony where the sole expert witness proffered by the State was not asked to provide an expert opinion at trial.
20. Trial Counsel failed to request a jury charge relating to consent and competence as those concepts applied to the Applicant as opposed to the victim.
21. Trial Counsel failed to object to numerous highly improper and inflammatory statements made by the State in closing arguments where said remarks;
 - a. personally vouched for credibility of Victim's testimony;
 - b. personally staked the jury in the outcome of this trial;
 - c. were calculated to imply the Applicant had confessed where her statements had been ruled inadmissible.
22. Trial Counsel failed to adequately cross-examine the Victim concerning inconsistencies between his statements pre-trial and his testimony at trial.
23. Trial Counsel failed to produce testimony relevant to the Victim's frequent presence in the Applicant's home when neither she nor her husband was home.
24. Trial Counsel failed to introduce from neutral witnesses evidence concerning the reaction of the Applicant's dogs to any activity in her home.
25. Trial Counsel failed to argue in closing that it would not be Criminal Sexual Conduct by the Applicant if the complaining witness in fact assaulted her while she was incompetent to consent.
26. Trial Counsel failed to request jury charge on the fact that South Carolina law allows minors under the age of 14 to be charged with Criminal Sexual Conduct.

27. Trial Counsel failed to adequately cross-examine the State's expert witness concerning the known reasons for delayed reporting of sexual assaults.

III.

STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rule 71.1(e), SCRPC. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that Defense Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where Defense Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain

away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness. (Emphasis added).

IV.

EVIDENCE BEFORE THE COURT

In deciding this collateral action this Court has before it a copy of the trial record, a copy of the sentencing record dated November 16, 2009, a transcript of the PCR hearing held on April 4, 2013 and all exhibits introduced during that proceeding, the Applicant's records from the South Carolina Department of Corrections and the records of the Beaufort County Clerk of Court regarding the subject conviction and sentence. What follows below are this Court's findings of fact and rulings of law as required by S.C. Ann. §17-27-80.²

V.

DISCUSSION

In this case, the Applicant alleges generally that trial counsel failed in multiple regards in his preparation for trial and in his representation of her during that trial. On the facts of this case, this Court is constrained to agree. The Applicant has met her burden of proof concerning multiple errors and omissions of Defense Counsel which

² For purposes of supporting this Order on appeal, the findings of fact and rulings of law contained herein may be viewed as interchangeable as may be necessary to affirm the ruling of this Court on any appeal which may follow.

acted to deprive her of a fair trial. Having evaluated each of these allegations, this Court finds that there exists a reasonable probability that the result at trial would have been different but for these errors and omissions by Counsel. In order to demonstrate both the nature of Counsel's errors and omissions, and the prejudice to the Applicant arising there from, it is necessary and helpful to consider the following summary of portions of the trial, sentencing and PCR hearings records.

VI.

RELEVANT TESTIMONY

Defense Counsel Charles B. Macloskie, testified at the evidentiary hearing held in this matter. His testimony establishes the following. He was hired by Applicant's father immediately after Applicant was arrested. PCR Tr. p. 19, l. 10. She was on bond pending trial. PCR Tr. p. 20, l. 1. Prior to trial there were no serious plea negotiations in this case. Defense Counsel recalled that no offers that he could recommend were ever offered by the prosecutor handling the case. PCR Tr. p. 20, l. 22. There were no last minute offers just before trial. PCR Tr. p. 21, l. 22.

During his opening argument at trial, Defense Counsel argued that after hearing the evidence the jury might conclude Applicant was the victim and the wrong person was on trial. Trial Tr. p. 151 ll. 10-14. Defense Counsel testified that although Applicant couldn't remember what happened on the night in question, he came *"to think that it might have been completely different than the allegations in the indictment; that, this young boy was the one who made the advances, not Mrs. Tappeiner."* PCR Tr. p. 23, ll. 7-10.

The Applicant weighed approx 109 at the time of the trial. PCR Tr. p. 23 l. 21- p. 24, l. 1. In his trial testimony, the Victim described himself as weighing 115 lbs. The Solicitor responded to this assertion by asking, "*Okay, you weighed less than that last year, obviously.*" Victim responded "yes" Trial Tr. p. 170, ll. 9-10. Defense Counsel did not object to this leading question and at the PCR hearing he acknowledged that he should have. PCR Tr. p. 24, l. 2- p. 25, l. 6. At trial Defense Counsel cross-examined the Victim about the fact that in the police report in this case it is noted that he reported his weight as 125 pounds. PCR Tr. p. 25, l. 9-23.

In the *Jackson v. Denno*³ hearing held in this trial, Trial Tr. p. 38, l. 16 – p. 134, l. 12, Defense Counsel used a clinical psychologist, Dr. Yola Nolan, to establish the effect of drugs and alcohol on the Applicant's ability to give a voluntary and reliable statement. PCR Tr. p. 27, l. 6- p. 28 l. 9. At the PCR hearing, Defense Counsel admitted that he never considered using, Dr. Nolan, or some other expert, to address what effect the prescription drugs the Applicant was taking combined with alcohol, would have had on her capacity to consent.

In his PCR testimony, Defense Counsel agreed that if an adult has sex with a child it is a crime regardless of whether the child consents or not. PCR Tr. p. 28, ll. 10-20. He acknowledged however, that whether or not the adult had any criminal culpability would be affected by whether the adult was incapacitated at the time of the sex act. He likewise admitted that if the adult was unconscious, or otherwise incapable of consenting or participating in the act, the sex act would be criminal with regard to the adolescent but not the adult. PCR Tr. p. 28, l. 21 – p. 29. l. 19. Defense Counsel acknowledged that this was the premise set forth in his opening statement to the jury. PCR Tr. p. 29, ll. 20-

³ 378 U. S. 368, 84 S.Ct. 1774 (1964).

23. Despite this fact, he admitted that he introduced no witnesses, in the presence of the jury, to establish at the time of the alleged incident that the Applicant was taking heavy doses of prescription medications and was drinking. He introduced no testimony concerning the Applicant's pattern of mixing alcohol with prescription medication. PCR Tr. p. 30, ll. 14-22.

Defense Counsel acknowledged that he introduced no evidence concerning what prescription medications his client was taking on the night of the alleged event. Defense Counsel admitted that absent such testimony, he established no foundation for the defense theory he advanced in opening arguments. He forthrightly conceded that he had no explanation for failing to introduce this evidence at trial. PCR Tr. p. 30, l. 23- p. 31, l. 18. Defense Counsel testified that he did not consider using Dr. Nolan, the expert he successfully used to support his position during the *Jackson v. Denno* hearing, or any other psychiatric or medical doctor, to present testimony concerning the question of the Applicant's ability to consent to anything under the circumstances of the evening in question. During the *Jackson v. Denno* hearing, Sergeant Gonzales agreed that at the time he interviewed the Applicant she did not smell of alcohol, she did not have slurred speech or "anything like that." He verified that she had no trouble walking into the interview on her own. Trial Tr. p. 41, ll. 5 -16. Sergeant Gonzales also acknowledged that at one point during the interview phase of his two hour meeting with the Applicant she stated, "*maybe he did this to me.*" Trial Tr. p. 50, ll. 5 - 13. Defense Counsel had no explanation for his failure to introduce evidence in the presence of the jury that at the time of the alleged incident the Applicant was under the combined influence of alcohol and her prescription medications, and he in no way claimed that this omission was a

tactical or strategic decision. PCR Tr. p. 32 l. 5-16. Following the *Jackson v. Denno* hearing, the Applicant's pre-trial statements were excluded from evidence. Trial Tr. p. 38 l. 16- p. 125 l. 17.

In excluding the statement from evidence, the Trial Judge specifically ruled that,

Based on the totality of the circumstances, - - - I truly think that her will was overborne. I don't think she has a clue what she was doing. - - - I am not going to allow the statement, that interview. - - - so, again, based on the totality of the circumstances, I do believe that her will was overborne. And I do not believe her statement was voluntary. It certainly wasn't intelligent. And I don't think it was knowingly made.

Trial Tr. p. 132, l. 16 - p. 134, l. 12.

Throughout the trial however, the prosecutor made repeated references to the fact that the Applicant was not charged until after her two-hour interview with the police. During the direct examination of Sergeant Gonzales, the following colloquy took place without objection,

Q. Okay. And how long a discussion did you have with the Defendant?

A. Approximately 2 hours.

Q. Okay. At the end of your discussion with the Defendant, what action did you take?

A. I placed her under arrest for Criminal Sexual Conduct with a minor.

Trial Tr. p. 280 l. 14 - p. 281 l. 2.

Later during the testimony of Sergeant Gonzales, the prosecution returned to this topic without objection. The Solicitor asked this witness to confirm his earlier testimony that he had interviewed the Applicant for 2 hours and that only then, after speaking with her for that amount of time, was the decision made to arrest her. Trial Tr. p. 282, l. 17 p.

283, l. 10. Later, the Solicitor chose to once again emphasize this point in his closing argument. Trial Tr. p. 341 l. 25- 342 l. 17. In his PCR testimony, Defense Counsel admitted that it was a mistake not to have objected to this line of testimony and closing argument. PCR Tr. p. 32, l. 21 - p. 34 l. 14. On cross-examination he reiterated his admission that testimony concerning the fact that Applicant wasn't arrested until after her interview by the police was objectionable and should have been objected to.

Defense Counsel testified that he didn't want to put the Applicant on the stand because he was afraid of opening the door for the statements that had been excluded from evidence coming to impeach her testimony. PCR Tr. p. 40, l. 20 - p. 42, l. 20. He admitted that he may or may not have told the Applicant that her statements, although excluded from evidence, could be used to impeach her. PCR Tr. p. 42, ll. 11-20. Defense Counsel indicated that the other reason he didn't call the Applicant as a witness in her own defense was the fact that she had no recollection of any of the events of the evening in question. PCR Tr. p. 42 l. 21 43 l. 2. He confirmed on cross-examination that he *"more likely than not advised pretty strongly against"* the Applicant testifying at trial. He repeated his recollection that this advice was based upon the fear that her testimony might open the door to the introduction of statements which had previously been ruled inadmissible. PCR Tr. p. 70 l. 21- p. 71, l. 9. On cross-examination, Defense Counsel also noted that one of the problems he had defending the Applicant was that she did not recall the events with any degree of clarity. PCR Tr. p. 69 ll. 14-19.

Defense Counsel acknowledged that he did not consider using testimony from the Applicant to establish her pattern of mixing alcohol and drugs; nor did he think about using her to establish the history of her employment of the victim's sisters or the fact that

she wasn't accused of these acts until after she fired the sisters. He didn't consider using any other witnesses to establish these points either. PCR Tr. p. 43, ll. 3-21.

During the Applicant's trial the complaining witness was referenced as being thirteen (13) years old at the time of the incident. At trial, the young man stated that he had just turned 15 on August 15, 2009. Therefore, on the date of the incident in question, on or about August 15, 2008, the boy would have been approximately seven (7) weeks away from his fourteenth (14) birthday. Defense Counsel did not consider objecting to the repeated references to him as a thirteen (13) year old when he was in fact very close to turning fourteen (14); nor did Counsel argue that the complaining witness was in fact nearly 14 during his arguments to the jury. PCR Tr. p. 36 l. 24- p. 40, l. 1. Despite the importance of this young man's maturity to the defense theory he advanced in his opening statement to the jury, Defense Counsel did not consider raising this issue at trial.

Defense Counsel specifically stated that he did not believe he ever discussed the possibility of introducing character witnesses with the Applicant. PCR Tr. p. 40, ll. 2-4. During the PCR hearing, the Applicant presented testimony from a non-familial witness who indicated that the Applicant had a positive reputation for veracity and that he would believe her under oath. He also verified that he would have been willing to testify on the Applicant's behalf at trial had he been asked to do so. Perkins, PCR Tr. 118, ll. 10 – 24;

Throughout the Applicant's trial, references were made to statements the complaining witness had made concerning the alleged incident. Defense Counsel acknowledged that he did not object to any of this hearsay testimony. He testified that he could not recall any strategic or tactical reason for not doing so. PCR Tr. p. 43 l. 22- p. 45, l. 7.

Defense Counsel introduced no evidence to establish the Applicant's height and weight. He testified that he could not recall considering the relevance of this information to the defense. PCR Tr. p. 45, ll 8-15. At the PCR proceeding, the Applicant presented testimony from her sister, Elizabeth W. Auerback. Auerback testified that she weighed 108 pounds at the time of the hearing and that she is approximately a half inch shorter than the Applicant. PCR Tr. p. 131, l. 11 – p.132, l. 2. As previously noted, the Applicant weighed approximately 109 pounds at the time of the trial. PCR Tr. p. 23 l. 21- p. 24, l. 1. On cross-examination, Defense Counsel once again admitted that he did not make a significant issue of the Applicant's weight at the time of the incident and he emphasized that she *"was a lot lighter than she is now."* PCR Tr. p. 68 ll. 3-21. On cross-examination, Defense Counsel acknowledged that he did not put before the jury the fact that this young man could have overpowered the Applicant "to a sufficient degree." He further admitted that he didn't put up any evidence before the jury concerning her drinking and prescription drug use and acknowledged that such evidence would have been useful to the defense. PCR. Tr. p. 69 l. 24- p. 70 l. 11.

Defense Counsel presented the Applicant's husband, Mike Tappeiner, as the sole witness for the defense. During his testimony it became obvious that he could not pinpoint exactly when the victim had come to their home in search of a camera battery. Trial Tr. p. 297, l. 20 – p. 298, l. 7; Trial Tr. p. 299, l. 11 – p. 301, l. 4. In his PCR testimony, Defense Counsel could not recall interviewing the husband about this point prior to his testimony. PCR Tr. p. 46, ll. 5-14. Defense Counsel did not recall ever telling the Applicant that introducing her husband's testimony, or any evidence for that

matter, would result in her losing the right to make the last argument to the jury. PCR Tr. p. 46 ll. 15-18.

Defense Counsel did not consider introducing any non-familial witnesses to testify about the family dogs and their reaction to activity at the residence. He did not interview any friends or family members who might have presented testimony about the Applicant's habits concerning drugs and alcohol or about the family dogs. PCR Tr. p. 47, l. 13-24. Defense Counsel recalled the Applicant's husband testifying that the Victim stayed at their home that night and that he fixed breakfast for him the next morning. He testified that in his trial testimony the husband described the young man as acting very calm, like nothing had happened. PCR Tr. p. 47, ll. 6-9.

When asked why he didn't ask the husband about Applicant's pattern of mixing drugs and alcohol, and the impact of that combination on her coordination, motor skills, and other physical factors, Defense Counsel simply confirmed that he couldn't recall considering asking those questions. He didn't offer any explanation for this omission, admitting plainly that he just "*didn't do it.*" PCR Tr. p. 48, ll. 3-25. He did not assert any strategic or tactical reason for this omission.

Mary Beth Hefner was initially offered as an expert in delayed reporting in child sexual assaults, at the Applicant's trial. A lengthy *in camera* hearing was held concerning the State's intended use of this witness. Ms. Hefner testified, *in camera*, that the Victim told her that one of the reasons he didn't report this alleged incident for six months was the fact that he has been molested before, reported the assault and nothing was done about it. The Court found that if the State asked her for her expert opinion as to why the Victim waited to report this incident, the State would be opening the door to the

Defense questioning her on cross-examination about the explanation offered by the boy in his interview with Ms. Hefner. Ms. Hefner was ultimately qualified as an expert in forensic interviewing. Trial Tr. p. 199, l. 25 – p. 249, l. 11. She subsequently testified concerning the fact that children often delay reporting sexual abuse and various reasons why children delay reporting such incidents. She did not offer an expert opinion as to why the Victim in this case delayed making the accessions which were the basis for the charges against the Applicant. Trial Tr. p. 250, l. 13 – p. 254, l. 4. She did not testify concerning her interview of the young man in question.

On cross-examination, Defense Counsel did not question this witness concerning what other reasons might exist for a child to delay reporting such an incident. He did not ask her whether a past negative experience with reporting such an incident might affect a child's decision not to report a later incident. Likewise, he did not ask her questions concerning whether a child's delayed reporting might be motivated by some animus toward the adult that did not manifest itself until well after the time an event occurred. Likewise, he did not ask her if an adolescent might report an alleged sexual assault as a preemptive measure to protect himself from allegations that he was in fact the aggressor in a situation with an adult that was passed out or otherwise incapacitated. Defense Counsel's cross-examination of this witness did not address the subject matter for which she was offered by the State, delayed reporting, in any manner. Trial. Tr. 254, l. 10 – p. 255, l. 25. As previously noted, Ms. Hefner ultimately did not offer any expert opinion testimony. Despite this fact, the trial court gave a standard jury charge on expert witness testimony. Trial Tr. p. 353, l. 7 – p. 354, l. 1. Defense Counsel testified that he never considered objecting to that charge. PCR TR. p. 49, l. 1-p. 50, l. 5.

Defense Counsel agreed that the crux of the defenses' theory of the case was that the Applicant was incapacitated at the time of this incident and therefore, was not competent to knowingly and willfully have sex with the victim. Despite this fact, Defense Counsel admitted that he did not argue this position to the jury and he did not consider asking for a jury instruction supporting that defense. PCR Tr. p. 50, l. 21- p. 51, l. 22. Defense Counsel then conceded that he had actually failed to introduce any testimony that would have laid a foundation for such a charge. PCR Tr. p. 51 l. 22 – p. 52, l. 8. Defense Counsel acknowledged that, although neither consent (by the child) or diminished capacity are defenses to a charge of Criminal Sexual Conduct with a minor, a valid defense would arise if the adult was passed out, or sufficiently incapacitated, to a degree that they could not consent to sexual activity initiated by a minor. PCR Tr. 75, ll. 7-21.

Early in his PCR testimony, Defense Counsel volunteered that there were some problems with some of the things the prosecutor argued during the State's closing argument. PCR Tr. p. 34, ll. 16-19. In the course of the PCR hearing, the Applicant demonstrated that the following closing arguments had been made, without objection, by Defense Counsel.

Despite the fact that the Applicant's pre-trial statements were excluded from evidence at trial, during its closing arguments to the jury, the Solicitor stated the following,

Before the search warrant is served, he called in the Defendant to talk to her. Right? You don't just go arresting people. —She came down the testimony said around 2:00 o'clock in the afternoon and talked to the police. That was her face to face, eye to eye. Victim had his turn. She had her turn. She was not under arrest. She was not under arrest. She voluntarily came in to speak. I want to make that clear. This was

still an investigation. After the face to face, eye to eye a determination was made. She was charged that day with criminal sexual conduct second degree.

Trial Tr. 341, l. 25 – p. 342, l. 16. As previous noted, Defense Counsel admitted that it was a mistake not to object to this line of argument by the State. PCR Tr. 34, ll. 3 – 14.

During the State's closing arguments the Solicitor references his expert's history of over 200 forensic interviews. He then went on to state, *"Folks, these are people who can detect when someone is making something up or if there is nothing there. Okay?"* Trial Tr. 341, ll. 19-22. In her testimony before the jury, Ms. Hefner never stated that she had interviewed the Victim in this case. Trial. Tr. 254, l. 10 – p. 255, l. 25. Defense Counsel testified that he should have objected to this argument as well. PCR Tr. p. 53, ll. 15-20.

Defense Counsel likewise conceded that he should have objected to another portion of the State's closing in which the prosecution personally commented on the credibility of the sole witness offered for the defense; the Applicant's husband. Trial Tr. p. 343, l. 25- p. 344 l. 12. PCR Tr. p 43, ll. 1-9. During his closing, the prosecution also commented on the Mr. Tappeiner's previous "problems with alcohol." Defense counsel testified that there had been no evidence introduced supporting that argument, and that it should have been objected to. Trial Tr. p. 345 ll. 9-10. PCR Tr. p. 54, ll. 10-15. During the testimony of the Applicant's husband he acknowledged having *one prior DUI fifteen years earlier*. Trial Tr. 307, ll. 3 – 5.

During his closing argument the prosecutor also asked the jury to consider *"the eye-to-eye, face-to-face, interviews that [the victim] has had with law enforcement and*

the experts." (Emphasis added) Trial Tr. p. 346, ll. 17-19. The State only presented one expert witness at trial and that expert did not testify to having interviewed the Victim in this case. Once again, Defense Counsel acknowledged that he did not consider objecting to this portion of the prosecutor's closing argument. PCR Tr. p. 54 ll. 16-24.

Near the very end of the State's closing argument, the prosecutor made the following argument,

I want you to also think in -in—in making that decision, would you let her babysit your kids? Your grand kids? Nieces and nephews? I think the answer to that is why you should find her guilty. Trial Tr. 346 ll. 20 - 24.

Defense Counsel testified that he should have objected to this portion of the prosecutor's closing argument which he acknowledged, was improper because it "staked" the jury. PCR Tr. p. 55, ll. 7-13.

In the Bluffton Police Department incident report, which included a statement from the victim, the victim says "*when she left, I quickly ran out of the house and went straight to my house.*" In the Incident Report the Officer quoted the Victim as reporting that the Applicant "*got off of him before he ejaculated.*" Defense Counsel acknowledged that this report was part of the discovery material he received from the State. That report, with the Victim's statement, was introduced during the PCR proceeding as Applicant's Exhibit No. 1, without objection. At trial the Victim testified that the sex act ended when he pushed the Applicant off of him. Trial Tr. p. 184, ll. 3 - 6. During the PCR hearing Defense Counsel stated that he had no reason for failing to question the Victim about this inconsistency at trial. PCR Tr. p. 56 l. 10- p. 57 l. 20.

At trial, State expert witness Hefner testified to certain percentages in statistical references to the occurrence of delayed reporting of sexual abuse by children. Trial Tr. p. 252 ll. 7-16. She also asserted, without citing to authority, that boys delay reporting sexual abuse more often than girls. Trial Tr. p. 252, ll. 17 - 20. Defense Counsel acknowledged in his PCR testimony that he never considered cross-examining this witness concerning her authority for these assertions. PCR Tr. 58 ll. p. 3-23. Neither did he consider cross-examining this witness concerning their authority for her claim that the literature shows that boys delayed reporting sexual abuse more frequently than girls. PCR Tr. p. 58 l. 24- p. 59 l. 11. Likewise Defense Counsel admitted that he had no strategic or tactical reason that he could recall why he did not cross-examine this witness on the topic of delayed reporting. PCR Tr. p. 59, ll. 17-23.

In his PCR testimony, Defense Counsel stated that he went to the Tappeiner residence where this incident allegedly occurred prior to the Applicant's trial. He recalled meeting the Applicant's husband there and indicated that he thought "that the subject matter was the --- the service of a search warrant." He testified that he did not recall being there for a long time and he had no recollection of going upstairs where the incident supposedly took place. PCR Tr. p. 59 l. 24- 61 l. 4. Defense Counsel admitted that he never considered obtaining or developing any demonstrative evidence to illustrate for the jury just what close quarters the parties were in at this house on the night of the alleged incident. PCR Tr. p. 61, ll. 5-9.

Defense Counsel recalled on cross-examination that he although spoke with Dr. Martin to answer some questions before the sentencing proceeding, but asserted that it

was Ms. Ballard who spoke with Dr. Martin about the use of his testimony during the sentencing proceeding. PCR Tr. p. 72, l. 17- p. 73, l. 12.

In the pre-sentence report issued in the Applicant's case, it noted that the Victim's mother wanted the Applicant to be sentenced to at least two years followed by community supervision with some type of intensive psychotherapy. See, Applicant's Exhibit No. 2; p. 7. Defense Counsel testified that he did not recall considering pointing that portion of the report out to the Court, but he felt certain the Court read it. PCR Tr. p. 76, l. 17, p. 78, l. 21.

Testimony was taken from Desa Allen Ballard, Esquire, by telephone during the Applicant's PCR hearing. She was hired after the Applicant's conviction, but before her sentencing. She assisted Attorney Macloskie with developing a strategy and evidence in mitigation for the sentencing phase. She hired Dr. Thomas Victor Martin to assist with presenting mitigation during the sentencing phase. PCR Tr. p. 83, ll 10-25. Attorney Ballard testified that she reviewed a summary of the evidence presented at trial that was provided to her by Attorney Macloskie. She reviewed that information with Dr. Martin. PCR Tr. p. 84 l. 1-9. Attorney Ballard reviewed the trial record for a potential direct appeal sometime after the sentencing proceeding. She testified that she advised against a direct appeal based upon her opinion that there was no meritorious basis for an appeal. PCR Tr. p. 85 ll. 6-19.

Dr. Thomas Victor Martin, a forensic psychiatrist, testified at the Applicant's PCR hearing. During his testimony he was asked to clarify portions of his testimony during the sentencing proceeding in this case. For example, he recalled that at the

sentencing proceeding he stated that Applicant had *"come to grips with some of the horror of what has happened."* PCR Tr. p. 93, ll. 6-25. Sentencing Tr. p. 12 ll. 13-16. In his PCR testimony he clarified that Applicant had never admitted to any type of aggression towards anyone else. He explained that what she did admit was that she had fragments of memory that included some sort of sexual contact with the Victim. PCR Tr. p. 94, ll 8-13. At an earlier point in the sentencing proceeding, Dr. Martin advised the Court that the Applicant *"acknowledged responsibility for inappropriate sexual behavior."* Sentencing Tr. p. 10 ll. 21-24. In this PCR proceeding Dr. Martin, explained that Applicant never admitted being the aggressor in this incident, but rather felt responsible for what, in her fragmented memory, was some sexual activity that was inappropriate. He explained that she recognized that her use of alcohol and addictive drugs had compromised her ability to function properly as a parent and an adult on the night in question. PCR Tr. P. 94 l. 14 – p. 95 l. 19. Dr. Martin's PCR testimony confirmed that the Applicant told him *"she hadn't done it"* and her memory that she reported to me did not substantiate that she had done anything wrong, except for perhaps, being inebriated." PCR Tr. 108, ll. 15-18.

At the sentencing proceeding Dr. Martin described this incident as one of *"opportunity"* and opined that Applicant was not a sexual predator. Sentencing Tr. p. 13, ll. 4-9. In his PCR testimony, Dr. Martin explained that he did not mean by that statement the Applicant had taken advantage of an opportunity but rather, that her intoxication with medications created the opportunity for the inappropriate sexual contact to happen. PCR Tr. p. 96, ll. 1-17.

At the sentencing hearing Dr. Martin advised the Court that Applicant was concerned about damage or scarring she may have inflicted by her behavior. Trial Tr. p. 16 l. 22- p. 17, l. 1. Once again, in his PCR testimony, Dr. Martin clarified that what Applicant conveyed to him was her realization that her intoxication with alcohol and Klonopin resulted in her inability to properly monitor and control inappropriate activity that took place. He indicated that she had been told the young man was harmed by what transpired and *"she is not typically of the character of harming others."* PCR Tr. p. 97, ll. 1-12. Dr. Martin emphasized that the Applicant never told him she perpetrated this crime. PCR Tr. p. 97, ll13-18.

Dr. Martin explained that this patient had some memories of the activities at her home on the date in question from the earlier part of that night. Her memories become more fragmented when she tries to recall the events later in the evening. She conveyed a fragmented memory of the young man being on top of her. She expressed the feeling that the contact was sexual. Dr. Martin testified that *"she was very upset and distraught by the fact that she couldn't remember exactly what may have happened to her, and what he was actually doing with her. ... She could not confirm that anything that she had done would have enabled or aggressed towards this individual."* PCR Tr. p. 97 l. 19- p. 99 l. 3.

During his PCR testimony Dr. Martin testified that in his evaluation of the Applicant he reviewed copies of records from Walgreens Pharmacy concerning the prescription record of the Applicant from January 2005 through August 2009. He indicated that all the records he had available for review came from either Attorney

Macloskie or Attorney Ballard.⁴ According to his PCR testimony, those records showed that Defendant was being prescribed an average of 90, one milligram, tablets of Klonopin a month in 2008. They also showed other sedatives prescribed to Applicant including Lunesta and Ambien CR. According to these records, by 2009 she was being prescribed Xanax. PCR Tr. p. 101, ll. 3-8. Dr. Martin described Klonopin as in the family of benzodiazepines, which are sedative hypnotics. PCR Tr. 102, ll. 19-20.

His PCR testimony indicates that the dosage of Klonopin taken by the Applicant during the operative time period *"was at least a medium dose."* He further provided that, *"She would, on occasion, take more than that."* PCR Tr. 104, ll. 10-13. His testimony establishes that the combination of alcohol and Klonopin results in an exacerbation, or worsening of, the sedative, hypnotic effects of this medication. He described the effect of the combination as causing an exponential increase in intoxication. PCR Tr. 104, ll. 14-21. He further provided that an individual impaired by the combination of these substances would experience disorientation, memory loss, inability to walk and impaired motor skills. PCR Tr. p. 105, l. 15- p. 106, l. 11. Dr. Martin testified that he would have been available as an expert witness during the Applicant's trial had he been asked. PCR Tr. p. 106, l. 13-20. Dr. Martin asserted on cross-examination that he did everything he was asked to do when he was hired. PCR Tr. p. 106, l. 24- p. 107, l. 17.

Witness James Perkins met the Applicant and her husband at their photo shop. He ultimately employed Applicant in his business selling a clothing line which include women's apparel. Perkins testified that during this time period he was in the Tappeiner

⁴ The record of this case was held open for the Applicant's counsel to submit a copy of the Applicant's records from Walgreens Pharmacy as they were supplied to her directly by virtue of subpoena. Those records have subsequently been filed with the Beaufort County Clerk of Court's Office as Applicant's Exhibit No. 3.

home on occasion. He stated that he is a contractor on Hilton Head Island. He had done work on the interior of the Tappeiner house and in June or July of 2008 he contracted with the Applicant's husband to power wash their house. One day when he and his employees were setting up to perform that task, Perkins saw the Victim coming out of a sunroom attached to the back of the residence. He did not see anyone else at the house that day. The Applicant and her husband were not at home. He knew the Victim by sight and had seen him at the Tappeiner residence before. PCR Tr. P. 113, l. 13- p. 114, l. 25. The Victim testified at trial that he was never in the Applicant's home when she and her husband were not there. Trial Tr. p. 192, l. 18 – p. 193, l. 2.

Perkins additionally testified that he was familiar with Applicant's dogs. He described them as hyper dogs that barked when he came into the home. He stated that they became noisy in response to any disruption in the Tappeiner home. PCR Tr. P. 115, ll. 1-12. Perkins also presented testimony concerning the Applicant's positive reputation for veracity. PCR Tr. P. 118, ll. 10-18. He indicated that he would have been willing to testify for the defense at trial. PCR Tr. P. 118, ll. 19-24.

The Applicant's father, Dave Sanders, testified at the PCR hearing. According to his PCR testimony, around the summer of 2008, he noticed a change in his daughter's behavior. She was not herself. He did not discover the problems she was having from mixing her prescription drugs and alcohol until after the incident that led to her charge. Defense Counsel did not discuss his observations concerning his daughter's problems with mixing drugs and alcohol with him. PCR Tr. p. 120, l. 22- p. 122, l. 5. The Applicant's father testified that he co-signed the note on the purchase of her house. He identified a floor plan of the house that he received during the closing of that house. That

floor plan contained the measurements of all the rooms in the house. It was introduced as Applicant's Exhibit No. 5. PCR Tr. p. 122, l. 15-p. 124, l. 18.

The Applicant presented testimony from videographer Todd Oomens. He testified to his production of a short video of the interior of the house where the incident allegedly occurred. He verified that the video was not edited in any way and that no special lenses were used to alter or distort the image. The State's objection to the introduction of the video on grounds of relevance was sustained by this Court. The Applicant argued that this video was relevant to her allegation that Defense Counsel should have either asked for a jury view of the scene or should have introduced demonstrative evidence illustrating the interior of the house. The CD of this video was marked as Applicant's Exhibit No. 6, for identification only. PCR Tr. p. 125, l. 23- p. 130, l. 2.

As previously noted, the Applicant's identical twin sister, Elizabeth W. Auerback, testified at this PCR proceeding. She testified that during the summer of 2008 she observed her sister drinking heavily on top of her prescription medications. She had expressed her concerns about her sister mixing these drugs with alcohol. She recalled that when Applicant drank heavily in conjunction with her medications she could not communicate very well, she had difficulty walking, she sometimes fell and when she went to bed you could not wake her up. PCR Tr. p. 132, l. 19- p. 134, l. 24.

The Applicant testified that she fully understood all the risks associated with going forward with her PCR action. She also waived any claims she might have raised against her PCR counsel for her involvement in the Applicant's decision to withdraw her direct appeal. PCR Tr. p. 136, l. 12- p. 140, l. 13. She testified that Defense Counsel

had advised her that her case was most likely not going to go to trial. She was notified on a Friday that her case was going to trial on Monday. PCR Tr. p. 140, ll. 15-25.

The Applicant asserted that Defense Counsel never discussed putting up a defense with her prior to trial. He discussed calling her husband as a possible witness with her, but she never knew for certain whether he was going to be called. Defense Counsel never told her that if she put up any evidence at all she would lose the right to the final jury argument. PCR Tr. p. 142, ll. 4-15. Defense Counsel never discussed the possibility of introducing evidence before the jury of her drug use and her drinking and how they affected her on the evening in question. PCR Tr. p. 142, ll. 16-20.

The Applicant testified that she discussed her recollections of that evening with Defense Counsel. She also met with Dr. Nolan prior to trial. Defense Counsel never discussed the possibility of using Dr. Nolan as a witness before the jury. PCR Tr. p. 142, l. 21- p 143, l. 6. The Applicant asserted however, that if Defense Counsel had told her it was necessary to establish her defense, she would have authorized him to introduce evidence concerning her problems with prescription drugs and alcohol. PCR Tr. p. 144, ll. 4-8. At her PCR hearing, the Applicant testified that she currently weighed 138 pounds. She acknowledged she was about thirty (30) pounds lighter at the time of the incident. She admitted that in the summer of 2008 she was drinking three (3) to five (5) drinks a night. She recalled that sometimes she drank mixed drinks and sometimes she would drink a bottle of wine. She testified that she was taking Klonopin three times a day at the time of the alleged assault. In addition to the Klonopin she was taking sleeping medications including Ambien, Lunesta, over the counter sleeping medications or Tylenol PM. PCR Tr. p. 144, l. 9- p. 145, l. 2.

The Applicant testified that she told Defense Counsel that during this time period she sometimes experienced blackouts and that there were times when she had no memory of certain episodes. She would have been willing to testify to these matters had she been advised to do so. PCR Tr. p. 145, ll. 3-15. She confirmed that she had no prior criminal record. She denied having ever had any problems with the law or having fantasies about minor children. She testified that she had been married nearly fourteen (14) years and that she and her husband have two daughters ages nine (9) and thirteen (13). PCR Tr. p. 145, l. 16- p. 146, l. 1.

The Applicant's PCR testimony established that during the summer of 2008 she was already employing the Victim's sisters as babysitters episodically. The sisters began providing regular after school care for her daughters in September, 2008, after the alleged incident with their brother, the Victim. The Applicant fired the sisters in late October, 2008 around Halloween. PCR Tr. p. 146, l. 2- p. 147, l. 20. The Applicant testified that she had an altercation with the Victim's mother concerning her decision to terminate her daughters. Applicant indicated that she had fired the girls because she had been told that the girls and their brother had been using their hide-a-key to enter the house without permission. PCR Tr. p. 147, l. 21- p. 148, l. 11.

The Applicant's testimony also verifies that from January, 2008 through the summer of 2008 she filled her prescriptions at the Walgreens on Simmonville Road near their home. PCR Tr. p. 150, ll. 7-13.

The Applicant's husband testified at her PCR hearing. Mike Tappeiner's testimony verifies that Defense Counsel never discussed with him whether he could verify exactly when the Victim came to their home asking for help getting a camera

battery before he called him as a witness at his wife's trial. He couldn't recall Defense Counsel ever discussing the purpose behind calling him as a witness for the defense before he was actually called to the stand. PCR Tr. p. 154, l. 3- p. 155, l. 6. In his PCR testimony, the Applicant's husband verified that in the summer of 2008 she was drinking 3 to 5 drinks a night on top of her prescription medications. PCR Tr. p. 155, l. 7- p. 156, l. 5. He expressed the opinion that the combination of alcohol and her prescription medications affecting her ability to walk as well as her other motor skills and her decision making. He admitted that he had expressed concern about his wife's pattern of mixing alcohol with her medications. PCR Tr. p. 156, ll. 3-5.

VII.

FINDINGS OF THE COURT

The Applicant's allegations fall into two categories. The first group of allegations address themselves generally to the failure of Defense Counsel to prepare and present a defense at the Applicant's trial. See, Allegations 1,2,3,4,5,6,9,10, 11,14,18,20,24 and 26. As discussed below, the Applicant has met her burden of proof with regard to her claim that Defense Counsel failed to develop and employ a clear theory of defense at her trial. In addition, she has demonstrated that readily available evidence existed which could have been offered in support of her theory of defense. She has successfully shown that her decision not to testify in her own behalf was negatively impacted by erroneous legal advice from Defense Counsel concerning the possible consequences of testifying at her trial. For these reasons, as discussed in further detail below, this Court finds that the Applicant's judgment and sentence should be set aside and her case should be remanded to the Court of General Sessions for a new trial.

In his opening argument to the jury Defense Counsel gave the jury a preview of the Applicant theory of defense; that she was the victim of a sexual assault as opposed to the perpetrator. Having set the stage for this defense, Defense Counsel did not prepare to present evidence at trial which would have supported that theory. Ironically, Defense Counsel did present evidence supporting the notion that the Applicant's prescription medications negatively affected her ability to make a knowing, voluntary and intelligent statement to the police. Successfully using the testimony of expert witness Nolan, Defense Counsel was able to convince the trial judge that the Applicant did not know what she was doing at the time she gave her statement to police. That strategy was effective even where the challenge was based purely upon the impact of her prescription medications on her ability to issue a reliable statement in the face of certain interview techniques. As noted in the summary above, the officer conducted the interview in question acknowledged that, at the time the statement was taken, there was no evidence that the Applicant had been drinking on top of her medications. The Applicant has demonstrated that Defense Counsel could have used the same expert he used in the *Jackson v. Denno* proceeding, or an expert of similar credentials, to testify as to the effect the combination of alcohol with those same prescription medications would have had on the Applicant on the evening when she allegedly pulled an unwilling young man of nearly 14 years of age up a flight of stairs to sexually molest him.

In the *Jackson v. Denno* hearing, Dr. Nolan relied exclusively on historical information concerning the Applicant's prescription drug use during the time period when this statement was taken. Fortunately for the Applicant, the Court did not question the fact that there was no evidence before the Court to corroborate her claim that she was

taking powerful prescription medications at the time her statement was taken approximately six months after the event that formed the basis for the charge in question. The Applicant has now demonstrated that there was readily available evidence and testimony which could have established the prescription drugs she was taking at the time of this event, the frequency with which they were prescribed, and the dosages at which they were prescribed. *See, Applicant's Exhibit No. 3.* Likewise she has demonstrated that expert testimony from Dr. Martin, or another similar expert, could have established for the jury the dire consequences of mixing alcohol with these powerful medications. As the Applicant has shown, testimony was available which would have established that the Applicant had a pattern of mixing her prescription medications with alcohol during the operative time period. The testimony of Dr. Martin illustrated that the mixture of these prescription drugs with alcohol would have affected her motor skills, her balance, her ability to walk and her capacity to communicate effectively. The testimony of her husband confirmed that the Applicant experienced such physical problems when she combined alcohol with her regular prescription medication. Testimony from her twin sister also supported the fact that the Applicant had a problem with mixing alcohol with her prescription medications. This testimony could have been used to create reasonable doubt as to whether the Applicant would have been physically and mentally capable of the acts alleged by the Victim.

Likewise, the Applicant has established that Defense Counsel could and should have developed testimony to establish the Applicant's height and weight at the time of the incident. While it is true that the jury had the opportunity to see the Applicant at trial, that opportunity for observation was no substitute for being advised of her shockingly

low weight at the time of the incident. The jury had no way of knowing whether she had perhaps lost a significant amount of weight between the time of the incident and her trial. In addition, since the Applicant did not testify, the jury's opportunity to view the Applicant would have been limited to seeing her either sitting or standing behind a table in the courtroom. Her testimony at her PCR hearing established that she weighed 138 pounds at the time of the hearing, but that she had weighed about 30 pounds less than that at the time of the incident. The credibility of that assertion was highlighted by the appearance of her identical twin sister who, at the PCR hearing testified that she weighed 109 pounds and was around one-half inch shorter than the Applicant.

The testimony proffered during the PCR hearing clearly could have been presented to create reasonable doubt as to whether the Applicant would have been physically capable of forcing the young man in question up a flight of stairs and violently forcing sex acts on an unwilling teenage boy who was, according to the police incident reports, approximately 17 pounds heavier than her. Having suggested the theory of defense to the jury that the Applicant was the victim, not the perpetrator, trial counsel was ineffective for failing to develop this line of evidence which would clearly have supported that theory.

The Applicant has alleged that Defense Counsel should have discussed the advantages and disadvantages of testifying with the Applicant in more detail prior to this trial. On the unique facts of this case, this Court finds that this is particularly true. While the Applicant's memories of the evening in question are admittedly sketchy, they are not damning and her testimony concerning them would have been consistent with the defense that the Applicant was so under the influence of prescription medications and alcohol at

the time of this event that she was not capable of the acts described by the complaining witness. Once this trial was under way, Defense Counsel's concern that the Applicant's testimony might open the door to the introduction of that statement, which had been excluded from evidence by the trial Court, was unfounded. A confession is inadmissible for all purposes, including impeachment, where it is involuntarily made. *State v. White*, 311 S.C. 289, 294, 428 S.E.2d 740, 743 (Ct. App. 1993). An involuntary, incriminating statement is inadmissible for any purpose including impeachment. *State v. Victor*, 300 S.C. 220, 221, 387 S.E.2d 248, 249 (S.Ct. 1989); *State v. Hook*, 348 S.C. 401, 416-417, 559 S.E.2d 856, 864 (S.Ct. 2001). This Court finds that Defense Counsel should have accurately discussed with the Applicant the possible pros and cons of calling her as a witness in her own defense at trial even if the Court saw fit to suppress her statement to the police. Based on Defense Counsel's own PCR testimony, it is clear that he gave his client erroneous advice on this crucial point, and therefore was ineffective in his representation on this crucial trial decision. The Applicant also alleges that trial counsel was ineffective for failing to discuss the possible use of character witnesses with her in preparation for trial. Once again, had Defense Counsel presented a defense on behalf of the Applicant, including testimony from her, the possible use of character witnesses may have been an important consideration. The record below establishes that the Applicant was a college educated woman with no prior criminal history whatsoever. The Applicant should have been advised that if she took the stand, and the State elected to attack her character, she would have had the option of presenting character witnesses. She has demonstrated that at least one such, non-familial character witness would have been available to testify on her behalf at trial. Likewise, since Defense Counsel was not

prepared to fully present evidence in support of the Applicant's theory of Defense, she alleges that he should have advised her that she would lose the right to make the final argument to the jury if she introduced any evidence at trial. The Applicant's testimony indicates that Defense Counsel never discussed this important consideration with her prior to or during trial. Defense Counsel did not recall ever advising her on this point. Given the limited value of the husband's testimony to the defense, this Court agrees that Defense Counsel was ineffective for failing to advise the Applicant of this important consideration.

Similarly, Defense Counsel failed to present witnesses who were not related to the Applicant to establish that the family dogs would have reacted excitedly to any disruption in the home. The Applicant's husband, whose testimony might have been viewed as suspect because of his relationship to the Applicant, was the only defense witness presented on this critical point. Even if Defense Counsel did not plan to introduce evidence on this crucial point prior to trial, once the State made an issue of how much the husband had been drinking on the night in question, Defense Counsel should have been prepared to present a non-familial witness to establish the fact that the family dogs would have sounded an alarm if they had heard the boy screaming as he claimed.

The Applicant has also asserted that Defense Counsel was ineffective for seeking to introduce evidence concerning the fact that the complaining witness had previously reported being the victim of a sexual assault. In a vacuum there may appear to be no advantage to the introduction of such evidence at trial. Had Defense Counsel been prepared to fully present the defense he merely hinted at during his opening remarks to the jury however, it would have been advantageous for the Defense to establish that there

was in fact a reasonable explanation for how this adolescent boy was so familiar with the various sex acts alleged at such a young age. As noted above, at trial, even the Solicitor acknowledged that Defense Counsel could have taken appropriate measures to seek the introduction of this type evidence and simply did not do so. See, S.C. Code Ann. §16-3-659.1. As will be discussed *infra*, once the trial was underway, other powerful reasons for the introduction of this evidence developed and Defense Counsel still did not seek to establish that the facts warranted an exception to the Rape Shield Statute.

As should have been clear to Defense Counsel from the discovery materials in this case, the complaining witness claimed that he had screamed for help while he was being sexually assaulted and no one came to his aid. The Applicant has alleged that Defense Counsel should have been prepared to introduce demonstrative evidence to establish the setting in which this incident occurred and the unlikelihood that the boy could have in fact screamed as he claimed without being heard by the victim's husband who was asleep in the next room. In support of this allegation, the Applicant has introduced a floor plan of the house where this event occurred which contains dimensions of all the rooms in the house and common areas in the house. See, Applicant's Exhibit No. 5. This floor plan establishes that the room where this assault allegedly happened was only a few feet away from where the Applicant's husband lay sleeping. Had Defense Counsel introduced evidence in support of the defense theory suggested by his opening argument, this floor plan would have supported the Applicant's claim that the version of the facts put forth by the complaining witness was not credible. This Court agrees that Counsel should have been prepared to demonstrate the size and layout of the house where this sexual assault allegedly occurred. This evidence may well have had an impact on the

jury's judgment concerning the credibility of the Victim's story. While this Court does not agree that a physical jury view of the scene was necessary, it finds that Defense Counsel was ineffective for failing to introduce evidence which would have demonstrated the size and layout of the house.

As noted in the PCR testimony, Defense Counsel admitted that he did not present any evidence to support the theory of defense he advanced in his opening argument and further, that absent such evidence he was left with no foundation for requesting jury instructions which would have supported the Applicant's theory of defense. This Court finds that if Defense Counsel had presented readily available evidence in support of the theory that the Applicant was the victim of a sexually precocious adolescent, as opposed to the aggressor as he claimed, the Applicant would have been entitled to jury instructions which advised the jury that the Applicant could not be found criminally liable for having been involved in sex acts with a minor if they concluded that at the time of the acts she was either unconscious, so incapacitated as to be unable to willfully engage in the activity in question or that she was physically helpless to fend off sexual advances made against her by another. In other words, the Applicant would have been entitled to have the jury instructed on the law reflected in S.C. Code Ann. § 16-3-654, which defines Criminal Sexual Conduct in the Third Degree as occurring when a person to commits a sexual battery upon a person the actor knows, or has reason to know, is *"mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish the battery."* Likewise, as the Applicant asserts, she would have been entitled to a jury charge that informed the jury that a juvenile, even one under the age of fourteen, may be prosecuted for committing the crime

of criminal sexual conduct pursuant to South Carolina Law. *See, S.C. Code §16-3-659.*

Therefore, this Court finds that Defense Counsel's failure to introduce available evidence in support of her theory of defense, deprived her of the opportunity to have charges in support of that defense. For all the reasons set forth above, this Court finds that Defense Counsel failed to provide the Applicant reasonable professional assistance of counsel prior to and during her jury trial in that he neglected to prepare and present readily available evidence which would have supported the theory of defense he put forth in his opening argument. The Applicant has demonstrated that the evidence in question may well have generated reasonable doubt concerning the veracity of the complaining witness. Therefore, the Applicant has established that there exists a reasonable probability that the outcome of her trial would have been different but for the errors and omissions of Defense Counsel in preparing and presenting her defense at trial.

The second category of allegations made by the Applicant in support of her Sixth Amendment claims, address the failures of trial counsel during her trial. *See, Allegations 5, 7, 12, 15, 17, 19, 21, 22, 23, 25 and 27.*

Allegation 5

Trial Counsel was ineffective for failing to adequately prepare Dr. Tom Martin for his role in the sentencing phase of the Applicant's trial.

The testimony of Dr. Martin during the PCR hearing held in this matter clearly illustrates that he was not adequately prepared to testify at the Applicant's sentencing proceeding. Multiple statements made by Dr. Martin during the sentencing proceeding would indicate to any listener that the Applicant had in fact admitted culpability in the alleged sexual battery against the Victim. Dr. Martin is a well experience forensic psychiatrist. The testimony he presented at the Applicant's sentencing proceeding would

lead any reasonable listener to conclude that the Applicant admitted her culpability for the charged offense to this doctor. Yet, it is clear from Dr. Martin's PCR testimony that she did not. His clarifications concerning conversations with the Applicant about this incident paint a very different picture from that presented by his testimony during the sentencing proceeding. This Court finds that Defense Counsel, and Attorney Ballard, obviously failed to provide the Applicant effective assistance of counsel prior to and during her sentencing hearing in that they neglected to adequately prepare this witness for presentation of testimony at the sentencing hearing. Given the wide latitude the trial judge had in sentencing in this case, it is impossible to know with any certainty what if any difference this misleading testimony may have made in the Court's ultimate decision regarding the penalty to be imposed. Inasmuch as this Court finds that a new trial is warranted on other grounds, any further discussion as to prejudice on this issue is unnecessary.

Allegation 7

Trial Counsel was ineffective for failing to object to repeated references throughout trial to the fact that the decision to arrest the Applicant was not made until after her two hour police interview where the statements made by the Applicant had been ruled inadmissible.

As previously discussed, the trial judge ruled that the Applicant's statement to the police was not knowingly, voluntarily or intelligently entered and excluded it from evidence at trial. Notwithstanding this ruling, the State repeatedly made reference to the fact that the Applicant had been interviewed by law enforcement for 2 hours before she was arrested on the charge of Second Degree Criminal Sexual Conduct. In the prosecution's closing arguments the Solicitor chose to emphasize this point to the jury. Defense Counsel has

acknowledged that he should have objected to any such reference by the prosecution during this trial. This Court agrees.

As previously stated, an involuntary statement is inadmissible and may not be used for any purpose, even impeachment, at trial. Here, the trial judge could not have been clearer in her ruling. Nevertheless, the State repeatedly attempted to do through the back door what the trial judge had expressly blocked them from doing directly; tell the jury the Applicant had confessed. Where the Court had ruled that the statement in question was not voluntarily, knowingly and intelligently entered, the prosecution should not have been allowed to invite the jury to infer that the Applicant had confessed by repeatedly implying as much through their questioning of law enforcement witnesses and in their closing argument. Defense Counsel clearly erred in failing to object to this line of questioning and argument. The fact that the Applicant was prejudiced by this improper line of testimony and argument is readily apparent. At this trial, there was no physical evidence proving the sexual battery alleged even happened. The Victim waited six months to make this allegation and did not do so until the Applicant had fired his sisters from her employment. The version of the facts told by the complaining witness may have been viewed by the jury as suspect on its face in light of these factors, as well as the size of the house where the assault allegedly occurred, the fact that no one else heard him cry out and the fact that the Applicant was extremely thin and had been drinking.⁵ Any reasonable doubt the jury may have had concerning the veracity of this adolescent's story may well have been negated by the Solicitor's questions and argument which implied that the Applicant's statements to the police during her interview caused them to conclude she was guilty and place her under arrest. Defense

⁵ As previously noted, the jury heard no evidence concerning the Applicant's prescription drug use. They did however hear testimony that the Applicant had been drinking on the night in question.

Counsel's failure to object the first and every time the State offered this line of testimony and argument constituted ineffective assistance of counsel and warrants the grant of a new trial.

Allegations 8 and 27

Trial Counsel was ineffective for failing to seek introduction of evidence that the victim had previously reported being raped where that evidence was material to the defense and failed to adequately cross-examine the State's expert witness concerning reasons why the complaining witness may have delayed reporting his alleged assault by the Applicant.

As detailed in the factual summary above, after a lengthy debate at trial, the testimony of State expert Mary Beth Hefner was significantly restricted at trial. This witness revealed *in camera* that the complaining witness had told her one of the reasons he waited to report the alleged assault was that he had previously reported another sexual assault against him and nothing was done about it. Ultimately the State was allowed to present testimony from this witness concerning various reasons why a child might delay reporting a sexual assault. She did not testify concerning any interviews she conducted with the complaining witness nor did she opine as to why he waited six months to report his alleged assault by the Applicant.

As noted above, Defense Counsel did not cross-examine this witness at all concerning other possible explanations for why a child might delay reporting such an incident including the one reason he had clearly provided this witness in her interview with him. Despite the fact the trial judge made it perfectly clear that the State was risking opening the door to testimony about the prior incident, Defense Counsel did seek leave of Court to introduce evidence about the prior incident as an exception to the Rape Shield Law. In fact, Defense Counsel did not cross-examine this witness concerning *any*

alternative explanations for why the young man may have waited six months to make these claims against the Applicant. Defense Counsel's failure to seek leave to introduce testimony concerning the reason this young man gave for his delayed report of this incident resulted in the jury hearing only other explanations for the delayed report of a sexual assault which were more favorable to the prosecution. Despite the fact that this young man told this witness exactly why he didn't report the incident earlier, all the jury heard were hypothetical explanations for such behavior. In addition, Defense Counsel did not question this witness as to whether this young man's late allegations may have simply been motivated by his anger over the Applicant having fired his sisters and upset his mother. He similarly didn't ask this witness whether the young man may have taken the offensive and reported his assault by the Applicant out of fear that she would eventually remember what he had done to her and report him.

The provisions of the Rape Shield Law provide some much needed protections and serve a worthy purpose. On the facts of this case however, this Court agrees that Defense Counsel should have sought a ruling that the testimony of the State's expert witness necessitated a finding that testimony concerning what reason this young man actually gave for the delayed report of this alleged assault was exempt from the prohibitions of the law. In addition, this Court finds that Defense Counsel was ineffective for neglecting to cross-examine this witness about other possible explanations for the delayed report in this case which were potentially more beneficial to the defense than those proposed by this witness. In addition, Defense Counsel was ineffective for failing to cross-examine this witness concerning her assertions of statistical data concerning the subject of delayed reporting where she provided no authority for the percentages she testified to. Defense Counsel also

neglected to cross-examine this witness about her claim that boys more frequently delay reporting sexual assaults where she provided the Court no authority for that assertion. In this case, the fact that this young man waited six months to raise these claims may have created reasonable doubt in the minds of the jury however, the State was allowed to explain away the delay with one sided testimony which failed to explore potential explanations for the delay that were not as innocent as those put forth by this witness. The failure of Defense Counsel to adequately cross-examine this witness allowed the State to deliberately omit a known reason for the delay in this case which had been asserted by the young man himself. Where the Victim's delay in making these accusations was a factor which the defense could argue should be considered in evaluating the truthfulness of his claims, Defense Counsel's failure to sufficiently cross-examine this witness was prejudicial to the Applicant.

Allegation 19

Trial Counsel failed to object to a jury charge concerning expert opinion testimony where the sole expert witness proffered by the State was not asked to provide an expert opinion at trial.

The Applicant asserts that Defense Counsel should have objected to the jury charge given at the Applicant's trial concerning expert opinion testimony where the State's sole expert witness in this case ultimately did not present any opinion testimony. She asserts that the affect of this instruction was to give undue weight to the testimony of this witness when she in fact had not presented expert opinion testimony which warranted the charge in question. As discussed above, the failure of Defense Counsel to adequately cross-examine this witness had already allowed the State to present very favorable and one sided testimony on the subject of delayed reporting of sexual abuse by a child. The jury charge in question would have tended to give this testimony undue weight and should have been objected to

where the witness did not actually give opinion testimony tied to the facts in this case.

Allegation 12

Trial Counsel was ineffective for failing to object to repeated references to hearsay statements from the victim which went beyond a report of the time and place of the alleged assault.

Throughout the Applicant's trial, the State was permitted to introduce hearsay testimony concerning details of the alleged sexual assault which went beyond the report of the time and place of the alleged incident. It is well established in South Carolina that the rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991). Our Court's have recognized three exceptions to the rule against hearsay that allow prior consistent statements of a witness to be admitted. First, in criminal sexual conduct cases, when the victim testifies, evidence from other witnesses that she complained of the sexual assault is admissible in corroboration, limited to the time and place of the assault and excluding details or particulars. *Id.* at 367, 401 S.E.2d at 143. Second, the *res gestae* or excited utterance exception allows corroborative rape testimony without the time/place exception. *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993). Third, when a witness has been impeached by proof that the witness has made a prior inconsistent statement, proof is allowed that the witness made a prior consistent statement, provided that the prior consistent statement must have been made before the "existence of [the] relation of [the witness] to the cause." *Burns v. Clayton*, 237 S.C. 316, 117 S.E.2d 300 (1960). See, *Jolly v. State*, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994).

The Applicant has alleged that trial counsel was ineffective for failing to object to several instances of hearsay testimony. Since no objections to the testimony were actually levied at trial, both this Court and the Applicant have been left to guess as to which hearsay exception the State would have argued that the testimony fell within. On the facts of this case, the error is clear. The complaining witness did not make the allegations in question until six months after the alleged incident and therefore, the statements would obviously not fall under the *res gestae* or excited utterance exception. This testimony was not offered as a prior consistent statement in response to impeachment on some aspect of the testimony of the alleged victim. And, in more than one instance, this testimony far exceeded a report of the incident limited to the time and place of the assault. See, Trial Tr. p. 258, ll. 2 – 5; Trial Tr. p. 275, ll. 6 – 24.

The inherent prejudice arising from such testimony was recently discussed by our Court of Appeals in the case of *Vail v. State*, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013). This Court finds that Defense Counsel provided the Applicant with ineffective assistance of counsel by neglecting to object the first and every time the State introduced hearsay testimony which exceeded the well established boundaries for such evidence.

Allegation 16

Defense Counsel failed to provide the Applicant effective assistance of counsel when he failed to question the Applicant's husband, when he testified at trial, concerning the victim's pattern of visitation in their home during the time period prior to the accusations by the victim

When the Applicant's husband testified at the Applicant's trial, he recalled an incident which occurred sometime after the evening when the Victim was allegedly assaulted by his wife. Specifically, he testified about getting a phone call from the

Applicant at the family camera shop asking him to bring a camera battery home for the young man in question. According to his testimony, the Applicant told him that the boy had come to their door asking for their help in getting a battery for his camera. He remembered bringing the battery home for the young man but reported that he never came back by to get it. In response to this testimony, the prosecutor cross-examined the husband about whether this incident occurred before or after the young man had made the allegations against his wife. The husband's testimony on this point was less than clear and opened the door for the prosecutor to argue in it's closing arguments that the husband's testimony was some kind of plan to try and help his wife and that the testimony had essentially backfired. Trial Tr. p. 297, l. 20 – p. 298, l. 7; Trial Tr. 299, l. 7 – p. 301, l. 4; Trial Tr. p. 343, l. 25- p. 344 l. 12.

It is apparent from the PCR testimony of the husband that he wasn't sure what he was being called to testify concerning at trial. The incident with the camera battery was not discussed with him in advance of his testimony. Given the significance of any attempt to show that this young man continued to come to the Tappenier residence even after the date of the alleged rape, it was crucial that Defense Counsel know for certain what the husband's testimony on this point would be if he was called to testify for the defense. The obvious failure of Defense Counsel to interview this witness concerning his potential testimony at trial resulted in the presentation of testimony that appeared to be equivocal at best and manufactured at worst. Defense Counsel was ineffective for neglecting to adequately interview the husband in advance of his trial testimony. His failure to do so resulted in the presentation of his testimony in a manor which cast doubt on the credibility of the rest of his testimony. Given the fact that he was the only witness for the defense, this error was particularly prejudicial to the Applicant.

Allegation 13

Trial Counsel failed to object to repeated references to the victim as 13 years old at the time of the alleged assault where the Victim was two months away from his 14th birthday at the time of the alleged assault.

The Applicant has alleged that Defense Counsel was ineffective for neglecting to point out that the young man making the accusations against the Applicant was actually within weeks of his fourteenth birthday at the time of the alleged incident. This Court finds that Defense Counsel was not, on the record of the trial as it exists, ineffective for neglecting to object to these references. The young man in question was thirteen years old at the time of this incident. He had not yet reached his fourteenth birthday. More importantly, other than a passing reference in his opening argument, Defense Counsel had presented no evidence tending to support the theory of defense that the Applicant was the victim not the offender in this situation. Thus, the question of whether the young man was mature enough to have potentially assaulted the Applicant was not clearly before the jury. Had it been, then the Applicant's point concerning the significance of him being nearly 14 as opposed to 13 might have merit. Defense Counsel's failures with regard to presenting available evidence in support of that theory of defense are discussed elsewhere herein. Absent the presentation of evidence that the complaining witness was the likely perpetrator as opposed to a victim, Defense Counsel's failure to make this point at trial does not constitute ineffective assistance of counsel.

Allegation 22

Trial Counsel failed to adequately cross-examine the Victim concerning inconsistencies between his statements pre-trial and his testimony at trial.

As discussed in the summary of testimony set forth above, Defense Counsel neglected to use incident report contained in the discovery materials in this case, as well as the Victim's statement included in that report, to impeach the complaining witness concerning critical portions of his trial testimony. At trial he claimed the sex act ended when he pushed the Applicant off of him and fled the scene. In his statement to the police he says he fled the Tappeiner house after the Applicant left. In the incident report the young man is quoted as claiming that the Applicant got off of him after she was finished and that she told him she got off of him before he ejaculated because she did not want to get pregnant. See, Applicant's Exhibit No. 1. Given how crucial the issue of the Victim's credibility was to the Applicant's trial, this Court finds that Defense Counsel was ineffective for neglecting to use the information contained in the discovery materials to impeach him. A more thorough cross-examination of the complaining witness concerning these points may well have convinced the jury that his story was not truthful.

Allegations 21 and 7

Trial Counsel failed to object to numerous highly improper and inflammatory statements made by the State in closing arguments.

This Court is particularly concerned with Defense Counsel's failure to object to numerous improper and prejudicial statements made by the prosecution during the State's closing arguments to the jury. Defense Counsel has freely admitted that he failed to raise objections to several portions of the State's closing argument which were improper. This Court now finds that the arguments in question, as outlined above, were indeed improper and prejudicial to the Applicant's ability to receive a fair trial.

As previously noted, in this trial the State repeatedly attempted to imply that the Applicant had confessed by drawing attention to the fact that she was not arrested until after she was questioned by the police for approximately two hours. Where the trial court had excluded her statement to the police from evidence, questions designed to imply she had given an incriminating statement that resulted in her arrest were clearly improper. Likewise, the State's attempt to drive this point home during their closing arguments to the jury was equally improper. Trial Tr. 341, l. 25 – p. 342, l. 16. The prejudice arising from this argument is obvious. In a case where the credibility of the Victim's story was crucial to the State's case, the implication that the Applicant had actually implicated herself in her interviews with the police was highly prejudicial.

In still another portion of the State's closing argument the prosecutor effectively vouched for the credibility of the complaining witness in a manner that was clearly improper. Defense Counsel's failure to object to this line of argument constituted ineffective assistance of counsel as well. In his closing argument to the jury the prosecutor talked about the 200 forensic interviews his expert witness had conducted in her career and then stated, *"Folks, these are people who can detect when someone is making something up or if there is nothing there. Okay?"* Trial Tr. 341, ll. 19-22. In this portion of his closing argument the Solicitor essentially vouched for the credibility of the Victim based on the implied opinion of his expert witness that the Victim was being truthful. This line of argument was improper for two reasons. First, in her testimony before the jury, Ms. Hefner never stated that she had interviewed the Victim in this case. Trial Tr. 254, l. 10 – p. 255, l. 25. Therefore, the prosecution was inviting the jury to draw an inference from matters not on record in this trial. A Solicitor may argue the

credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. *Matthews v. State*, 350 S.C. 272, 565 S.E.2d 766 (2002); *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990). He may not however, vouch for the credibility of a witness based on personal knowledge or other information outside the record; *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001). Secondly, this argument invited the jury to substitute the opinion of a State witness for their own on the crucial issue of the credibility of the Victim. It is improper for the State to assure the jury of a witness' credibility because it is the role of the jury to assess the credibility of the witnesses at trial. *Id.* Defense Counsel testified that he should have objected to this argument. PCR Tr. p. 53, ll. 15-20.

Defense Counsel likewise conceded that he should have objected to another portion of the State's closing in which the prosecution personally commented on the credibility of the sole witness offered for the defense. Trial Tr. p. 343, l. 25- p. 344 l. 12. PCR Tr. p. 43, ll. 1-9. The prosecution also commented on Mr. Tappeiner's previous "problems with alcohol." Defense counsel has acknowledged that there had been no evidence supporting that argument and, that it should have been objected to. Trial Tr. p. 345 ll. 9-10. PCR Tr. p. 54, ll. 10-15. During the testimony of the Applicant's husband he acknowledged having one prior DUI fifteen years earlier. Trial Tr. 307, ll. 3 - 5. Once again, it is improper for the prosecution to personally comment on the credibility of any witness and he is confined to the record when advancing arguments in favor of the State.

During his closing argument the prosecutor also asked the jury to consider "*the eye-to-eye, face-to-face, interviews that [the victim] has had with law enforcement and*

the experts." (Emphasis added) Trial Tr. p. 346, ll. 17-19. As asserted by the Applicant, the State only presented *one* expert witness at trial and that expert did not testify to having interviewed the Victim in this case. Defense Counsel admitted that he did not consider objecting to this portion of the prosecutor's closing argument. PCR Tr. p. 54 ll. 16-24. This argument by the State was misleading and commented on facts not in evidence. These statements to the jury obviously sought to bolster the State's case by arguing that *multiple experts* had interviewed the complaining witness and found him to be credible. Defense Counsel clearly should have objected to this argument as well where the State was once again arguing matters not in evidence to bolster the credibility of its key witness.

As previously observed, near the very end of the State's closing argument, the prosecutor made the following argument,

I want you to also think in —in—in making that decision, would you let her babysit your kids? Your grand kids? Nieces and nephews? I think the answer to that is why you should find her guilty. Trial Tr. 346 ll. 20–24.

In his PCR testimony, Defense Counsel testified that he should have objected to this portion of the prosecutor's closing argument which he acknowledged, was improper because it "staked" the jury. PCR Tr. p. 55, ll. 7-13. This Court agrees.

In light of the above, the Applicant has met her burden of proof with regard to her claim that Defense Counsel failed to provide her reasonable professional assistance of counsel when he failed to object to multiple improper arguments made during the prosecution's closing statement to the jury. The operative question in reviewing an argument by the prosecution which is allegedly improper is whether the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a

denial of due process. *U.S.C.A. Cont. Amend 14*. It is the finding of this Court that the arguments addressed herein were fundamentally unfair and should have been objected to by Defense Counsel. Accordingly, this Court finds that the Applicant has demonstrated that she was prejudiced by Defense Counsel's failure to object to these portions of the State's closing argument. *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004).

VIII.

CONCLUSION

For all the foregoing reasons, this Court now finds that the Applicant has met her burden of proof with regard to her claim that her right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, was violated prior to and during her jury trial. Accordingly, the Applicant's judgment and sentence are hereby reversed and her case is remanded to the Beaufort County Court of General Sessions for a new trial.

IT IS SO ORDERED.

Perry M. Buckner
Presiding Circuit Judge
Fourteenth Judicial Circuit

This ____ day of _____, 2013.

Document above submitted as a Memorandum in Support of the PCR Application, addressed herein, submitted to the Court in the form of a Proposed Order.

This 6th day of July, 2013

Tara Dawn Shurling SC Bar # 50998
ATTORNEY FOR APPLICANT

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IT IS SO ORDERED.

Perry M. Buckner
Presiding Circuit Judge
Fourteenth Judicial Circuit

This ____ day of _____, 2013.

Document above submitted as a Memorandum in Support of the PCR Application, addressed herein, submitted to the Court in the form of a Proposed Order.

Tara Dawn Shurling SC Bar # 8099
ATTORNEY FOR APPLICANT

This 14th day of July, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

SUSAN TAPPEINER, 338050,)

2010-CP-07-2396

) APPLICANT'S MEMORANDUM
) SUPPORT OF PCR APPLICATION
) IN THE FORM OF A
) PROPOSED ORDER

v.)

THE STATE OF SOUTH CAROLINA,)
Respondent.)

13 JUL 10 PM 3:32
CLERK OF COURT
BEAUFORT COUNTY, S.C.

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed on May 17, 2010 and an Amended Application filed on April 4, 2013. A Second Amended Application for Post-Conviction Relief, also filed on April 4, 2013 was withdrawn at the evidentiary hearing held on that same date. The State filed its Return on August 18, 2010. An evidentiary hearing was convened on April 4, 2013, during which the Applicant was present and represented by Tara Dawn Shurling, Esquire and the State was represented by Assistant Attorney General, Ashleigh Wilson.

I.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Beaufort County Clerk of Court's orders of commitment. The Applicant was indicted at the March 2009 term of the Beaufort County Grand jury for criminal sexual conduct (CSC) with minor (victim age 11-14) (2009-GS-07-703). Charles B. Macloskie, Esquire, represented the Applicant at trial. Attorney Macloskie¹ and Desa Ballard, Esquire represented the Applicant at sentencing. On October 26-28, 2009, the

¹ Hereafter, Defense Counsel.

Applicant proceeded to trial, after which a jury found her guilty of 2nd degree CSC with a minor (victim age 11-14). On November 16, 2009, the Honorable Jackson V. Gregory sentenced the Applicant to confinement for ten (10) years, suspended upon the service of five (5) years plus three (3) years of probation.

A timely Notice of Appeal was filed on Applicant's behalf. Desa Ballard, Esquire, and Tara Dawn Shurling, Esquire represented Applicant on appeal. The Applicant submitted an Affidavit in Support of Motion to Withdraw Direct Appeal. The South Carolina Court of Appeals dismissed Applicant's appeal by Order of Dismissal and Remittitur dated May 11, 2010.

II.

ALLEGATIONS RAISED

The Applicant has alleged generally that she received ineffective assistance of counsel prior to and during her trial in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14, of the South Carolina Constitution. In support of that claim she has raised the following specific allegations:

1. Trial Counsel was ineffective in failing to develop and employ a clear theory of defense.
2. Trial Counsel was ineffective for failure to present evidence concerning what prescription medications the Applicant was taking during time of incident.
3. Trial Counsel was ineffective for failing to introduce testimony from Dr. Nolan in case for defense.
4. Trial Counsel was ineffective for failure to hire Dr. Martin, or an expert of equal credentials, to testify during the case in chief.

5. Trial Counsel was ineffective for failing to adequately prepare Dr. Tom Martin for his role in the sentencing phase of the Applicant's trial.
6. Trial Counsel was ineffective for failing to introduce evidence concerning the medications the Applicant was taking during the operative time period, and the effect of those medications when combined with alcohol.
7. Trial Counsel was ineffective for failing to object to repeated references throughout trial to the fact that the decision to arrest the Applicant was not made until after her two hour police interview where the statements made by the Applicant had been ruled inadmissible.
8. Trial Counsel was ineffective for failing to seek introduction of evidence that the victim had previously reported being raped at age 8 where that evidence was material to the defense.
9. Trial Counsel was ineffective for failing to discuss use of character witnesses with the Applicant and failed to produce such witnesses at trial.
10. Trial Counsel was ineffective for failing to fully discuss potential risks and benefits of testifying at trial.
11. Trial Counsel was ineffective for failing to request a jury view of the scene, or in the alternative, to introduce evidence demonstrating the size and layout of the Applicant's home.
12. Trial Counsel was ineffective for failing to object to repeated references to hearsay statements from the victim which went beyond a report of the time and place of the alleged assault.
13. Trial Counsel failed to object to repeated references to the victim as 13 years old at the time of the alleged assault where the victim was two months away from his 14th birthday at the time of the alleged assault.
14. Trial Counsel failed to establish his client's height and weight at trial.
15. Trial Counsel failed to provide the Applicant effective assistance of counsel when he called the Applicant's husband as a witness, and questioned him concerning an incident when the victim had asked the Applicant to help him get a camera battery, without ascertaining whether the husband had an accurate recollection of the timing of that request.
16. Trial Counsel failed to provide the Applicant effective assistance of counsel when he failed to question the Applicant's husband, when he testified at trial, concerning the victim's pattern of visitation in their home during the time

period prior to the accusations by the victim.

17. Trial Counsel was ineffective when he failed to adequately question the Applicant's husband on the witness stand concerning his observations concerning the Applicant's coordination and general physical condition when she mixed alcohol with her prescription medications.
18. Trial counsel was ineffective for failing to fully discuss with the Applicant the fact that she would retain the right for him to make the final argument to the jury if the defense presented no evidence at trial.
19. Trial Counsel failed to object to a jury charge concerning expert opinion testimony where the sole expert witness proffered by the State was not asked to provide an expert opinion at trial.
20. Trial Counsel failed to request a jury charge relating to consent and competence as those concepts applied to the Applicant as opposed to the victim.
21. Trial Counsel failed to object to numerous highly improper and inflammatory statements made by the State in closing arguments where said remarks;
 - a. personally vouched for credibility of Victim's testimony;
 - b. personally staked the jury in the outcome of this trial;
 - c. were calculated to imply the Applicant had confessed where her statements had been ruled inadmissible.
22. Trial Counsel failed to adequately cross-examine the Victim concerning inconsistencies between his statements pre-trial and his testimony at trial.
23. Trial Counsel failed to produce testimony relevant to the Victim's frequent presence in the Applicant's home when neither she nor her husband was home.
24. Trial Counsel failed to introduce from neutral witnesses evidence concerning the reaction of the Applicant's dogs to any activity in her home.
25. Trial Counsel failed to argue in closing that it would not be Criminal Sexual Conduct by the Applicant if the complaining witness in fact assaulted her while she was incompetent to consent.
26. Trial Counsel failed to request jury charge on the fact that South Carolina law allows minors under the age of 14 to be charged with Criminal Sexual Conduct.

27. Trial Counsel failed to adequately cross-examine the State's expert witness concerning the known reasons for delayed reporting of sexual assaults.

III.

STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rule 71.1(e), SCRCP. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that Defense Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where Defense Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain

away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that

Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness. (Emphasis added).

IV.

EVIDENCE BEFORE THE COURT

In deciding this collateral action this Court has before it a copy of the trial record, a copy of the sentencing record dated November 16, 2009, a transcript of the PCR hearing held on April 4, 2013 and all exhibits introduced during that proceeding, the Applicant's records from the South Carolina Department of Corrections and the records of the Beaufort County Clerk of Court regarding the subject conviction and sentence. What follows below are this Court's findings of fact and rulings of law as required by S.C. Ann. §17-27-80.²

V.

DISCUSSION

In this case, the Applicant alleges generally that trial counsel failed in multiple regards in his preparation for trial and in his representation of her during that trial. On the facts of this case, this Court is constrained to agree. The Applicant has met her burden of proof concerning multiple errors and omissions of Defense Counsel which

² For purposes of supporting this Order on appeal, the findings of fact and rulings of law contained herein may be viewed as interchangeable as may be necessary to affirm the ruling of this Court on any appeal which may follow.

acted to deprive her of a fair trial. Having evaluated each of these allegations, this Court finds that there exists a reasonable probability that the result at trial would have been different but for these errors and omissions by Counsel. In order to demonstrate both the nature of Counsel's errors and omissions, and the prejudice to the Applicant arising there from, it is necessary and helpful to consider the following summary of portions of the trial, sentencing and PCR hearings records.

VI.

RELEVANT TESTIMONY

Defense Counsel Charles B. Macloskie, testified at the evidentiary hearing held in this matter. His testimony establishes the following. He was hired by Applicant's father immediately after Applicant was arrested. PCR Tr. p. 19, l. 10. She was on bond pending trial. PCR Tr. p. 20, l. 1. Prior to trial there were no serious plea negotiations in this case. Defense Counsel recalled that no offers that he could recommend were ever offered by the prosecutor handling the case. PCR Tr. p. 20, l. 22. There were no last minute offers just before trial. PCR Tr. p. 21, l. 22.

During his opening argument at trial, Defense Counsel argued that after hearing the evidence the jury might conclude Applicant was the victim and the wrong person was on trial. Trial Tr. p. 151 ll. 10-14. Defense Counsel testified that although Applicant couldn't remember what happened on the night in question, he came *"to think that it might have been completely different than the allegations in the indictment; that, this young boy was the one who made the advances, not Mrs. Tappeiner."* PCR Tr. p. 23, ll. 7-10.

The Applicant weighed approx 109 at the time of the trial. PCR Tr. p. 23 l. 21- p. 24, l. 1. In his trial testimony, the Victim described himself as weighing 115 lbs. The Solicitor responded to this assertion by asking, "*Okay, you weighed less than that last year, obviously.*" Victim responded "yes" Trial Tr. p. 170, ll. 9-10. Defense Counsel did not object to this leading question and at the PCR hearing he acknowledged that he should have. PCR Tr. p. 24, l. 2- p. 25, l. 6. At trial Defense Counsel cross-examined the Victim about the fact that in the police report in this case it is noted that he reported his weight as 125 pounds. PCR Tr. p. 25, l. 9-23.

In the *Jackson v. Denno*³ hearing held in this trial, Trial Tr. p. 38, l. 16 - p. 134, l. 12, Defense Counsel used a clinical psychologist, Dr. Yola Nolan, to establish the effect of drugs and alcohol on the Applicant's ability to give a voluntary and reliable statement. PCR Tr. p. 27, l. 6- p. 28 l. 9. At the PCR hearing, Defense Counsel admitted that he never considered using, Dr. Nolan, or some other expert, to address what effect the prescription drugs the Applicant was taking combined with alcohol, would have had on her capacity to consent.

In his PCR testimony, Defense Counsel agreed that if an adult has sex with a child it is a crime regardless of whether the child consents or not. PCR Tr. p. 28, ll. 10-20. He acknowledged however, that whether or not the adult had any criminal culpability would be affected by whether the adult was incapacitated at the time of the sex act. He likewise admitted that if the adult was unconscious, or otherwise incapable of consenting or participating in the act, the sex act would be criminal with regard to the adolescent but not the adult. PCR Tr. p. 28, l. 21 - p. 29. l. 19. Defense Counsel acknowledged that this was the premise set forth in his opening statement to the jury. PCR Tr. p. 29, ll. 20-

³ 378 U. S. 368, 84 S.Ct. 1774 (1964).

23. Despite this fact, he admitted that he introduced no witnesses, in the presence of the jury, to establish at the time of the alleged incident that the Applicant was taking heavy doses of prescription medications and was drinking. He introduced no testimony concerning the Applicant's pattern of mixing alcohol with prescription medication. PCR Tr. p. 30, ll. 14-22.

Defense Counsel acknowledged that he introduced no evidence concerning what prescription medications his client was taking on the night of the alleged event. Defense Counsel admitted that absent such testimony, he established no foundation for the defense theory he advanced in opening arguments. He forthrightly conceded that he had no explanation for failing to introduce this evidence at trial. PCR Tr. p. 30, l. 23- p. 31, l. 18. Defense Counsel testified that he did not consider using Dr. Nolan, the expert he successfully used to support his position during the *Jackson v. Denno* hearing, or any other psychiatric or medical doctor, to present testimony concerning the question of the Applicant's ability to consent to anything under the circumstances of the evening in question. During the *Jackson v. Denno* hearing, Sergeant Gonzales agreed that at the time he interviewed the Applicant she did not smell of alcohol, she did not have slurred speech or "anything like that." He verified that she had no trouble walking into the interview on her own. Trial Tr. p. 41, ll. 5-16. Sergeant Gonzales also acknowledged that at one point during the interview phase of his two hour meeting with the Applicant she stated, "*maybe he did this to me.*" Trial Tr. p. 50, ll. 5-13. Defense Counsel had no explanation for his failure to introduce evidence in the presence of the jury that at the time of the alleged incident the Applicant was under the combined influence of alcohol and her prescription medications, and he in no way claimed that this omission was a

tactical or strategic decision. PCR Tr. p. 32 l. 5-16. Following the *Jackson v. Denno* hearing, the Applicant's pre-trial statements were excluded from evidence. Trial Tr. p. 38 l. 16- p. 125 l. 17.

In excluding the statement from evidence, the Trial Judge specifically ruled that,

Based on the totality of the circumstances, - - - I truly think that her will was overborne. I don't think she has a clue what she was doing. - - - I am not going to allow the statement, that interview. - - - so, again, based on the totality of the circumstances, I do believe that her will was overborne. And I do not believe her statement was voluntary. It certainly wasn't intelligent. And I don't think it was knowingly made.

Trial Tr. p. 132, l. 16 - p. 134, l. 12.

Throughout the trial however, the prosecutor made repeated references to the fact that the Applicant was not charged until after her two-hour interview with the police. During the direct examination of Sergeant Gonzales, the following colloquy took place without objection,

- Q. Okay. And how long a discussion did you have with the Defendant?
- A. Approximately 2 hours.
- Q. Okay. At the end of your discussion with the Defendant, what action did you take?
- A. I placed her under arrest for Criminal Sexual Conduct with a minor.

Trial Tr. p. 280 l. 14 - p. 281 l. 2.

Later during the testimony of Sergeant Gonzales, the prosecution returned to this topic without objection. The Solicitor asked this witness to confirm his earlier testimony that he had interviewed the Applicant for 2 hours and that only then, after speaking with her for that amount of time, was the decision made to arrest her. Trial Tr. p. 282, l. 17 p.

283, l. 10. Later, the Solicitor chose to once again emphasize this point in his closing argument. Trial Tr. p. 341 l. 25- 342 l. 17. In his PCR testimony, Defense Counsel admitted that it was a mistake not to have objected to this line of testimony and closing argument. PCR Tr. p. 32, l. 21 - p. 34 l. 14. On cross-examination he reiterated his admission that testimony concerning the fact that Applicant wasn't arrested until after her interview by the police was objectionable and should have been objected to.

Defense Counsel testified that he didn't want to put the Applicant on the stand because he was afraid of opening the door for the statements that had been excluded from evidence coming to impeach her testimony. PCR Tr. p. 40, l. 20 - p. 42, l. 20. He admitted that he may or may not have told the Applicant that her statements, although excluded from evidence, could be used to impeach her. PCR Tr. p. 42, ll. 11-20. Defense Counsel indicated that the other reason he didn't call the Applicant as a witness in her own defense was the fact that she had no recollection of any of the events of the evening in question. PCR Tr. p. 42 l. 21 - 43 l. 2. He confirmed on cross-examination that he *"more likely than not advised pretty strongly against"* the Applicant testifying at trial. He repeated his recollection that this advice was based upon the fear that her testimony might open the door to the introduction of statements which had previously been ruled inadmissible. PCR Tr. p. 70 l. 21- p. 71, l. 9. On cross-examination, Defense Counsel also noted that one of the problems he had defending the Applicant was that she did not recall the events with any degree of clarity. PCR Tr. p. 69 ll. 14-19.

Defense Counsel acknowledged that he did not consider using testimony from the Applicant to establish her pattern of mixing alcohol and drugs; nor did he think about using her to establish the history of her employment of the victim's sisters or the fact that

she wasn't accused of these acts until after she fired the sisters. He didn't consider using any other witnesses to establish these points either. PCR Tr. p. 43, ll. 3-21.

During the Applicant's trial the complaining witness was referenced as being thirteen (13) years old at the time of the incident. At trial, the young man stated that he had just turned 15 on August 15, 2009. Therefore, on the date of the incident in question, on or about August 15, 2008, the boy would have been approximately seven (7) weeks away from his fourteenth (14) birthday. Defense Counsel did not consider objecting to the repeated references to him as a thirteen (13) year old when he was in fact very close to turning fourteen (14); nor did Counsel argue that the complaining witness was in fact nearly 14 during his arguments to the jury. PCR Tr. p. 36 l. 24- p. 40, l. 1. Despite the importance of this young man's maturity to the defense theory he advanced in his opening statement to the jury, Defense Counsel did not consider raising this issue at trial.

Defense Counsel specifically stated that he did not believe he ever discussed the possibility of introducing character witnesses with the Applicant. PCR Tr. p. 40, ll. 2-4. During the PCR hearing, the Applicant presented testimony from a non-familial witness who indicated that the Applicant had a positive reputation for veracity and that he would believe her under oath. He also verified that he would have been willing to testify on the Applicant's behalf at trial had he been asked to do so. Perkins, PCR Tr. 118, ll. 10 - 24;

Throughout the Applicant's trial, references were made to statements the complaining witness had made concerning the alleged incident. Defense Counsel acknowledged that he did not object to any of this hearsay testimony. He testified that he could not recall any strategic or tactical reason for not doing so. PCR Tr. p. 43 l. 22- p. 45, l. 7.

Defense Counsel introduced no evidence to establish the Applicant's height and weight. He testified that he could not recall considering the relevance of this information to the defense. PCR Tr. p. 45, ll 8-15. At the PCR proceeding, the Applicant presented testimony from her sister, Elizabeth W. Auerback. Auerback testified that she weighed 108 pounds at the time of the hearing and that she is approximately a half inch shorter than the Applicant. PCR Tr. p. 131, l. 11 – p.132, l. 2. As previously noted, the Applicant weighed approximately 109 pounds at the time of the trial. PCR Tr. p. 23 l. 21- p. 24, l. 1. On cross-examination, Defense Counsel once again admitted that he did not make a significant issue of the Applicant's weight at the time of the incident and he emphasized that she *"was a lot lighter than she is now."* PCR Tr. p. 68 ll. 3-21. On cross-examination, Defense Counsel acknowledged that he did not put before the jury the fact that this young man could have overpowered the Applicant "to a sufficient degree." He further admitted that he didn't put up any evidence before the jury concerning her drinking and prescription drug use and acknowledged that such evidence would have been useful to the defense. PCR. Tr. p. 69 l. 24- p. 70 l. 11.

Defense Counsel presented the Applicant's husband, Mike Tappeiner, as the sole witness for the defense. During his testimony it became obvious that he could not pinpoint exactly when the victim had come to their home in search of a camera battery. Trial Tr. p. 297, l. 20 – p. 298, l. 7; Trial Tr. p. 299, l. 11 – p. 301, l. 4. In his PCR testimony, Defense Counsel could not recall interviewing the husband about this point prior to his testimony. PCR Tr. p. 46, ll. 5-14. Defense Counsel did not recall ever telling the Applicant that introducing her husband's testimony, or any evidence for that

matter, would result in her losing the right to make the last argument to the jury. PCR Tr. p. 46 ll. 15-18.

Defense Counsel did not consider introducing any non-familial witnesses to testify about the family dogs and their reaction to activity at the residence. He did not interview any friends or family members who might have presented testimony about the Applicant's habits concerning drugs and alcohol or about the family dogs. PCR Tr. p. 47, l. 13-24. Defense Counsel recalled the Applicant's husband testifying that the Victim stayed at their home that night and that he fixed breakfast for him the next morning. He testified that in his trial testimony the husband described the young man as acting very calm, like nothing had happened. PCR Tr. p. 47, ll. 6-9.

When asked why he didn't ask the husband about Applicant's pattern of mixing drugs and alcohol, and the impact of that combination on her coordination, motor skills, and other physical factors, Defense Counsel simply confirmed that he couldn't recall considering asking those questions. He didn't offer any explanation for this omission, admitting plainly that he just "*didn't do it.*" PCR Tr. p. 48, ll. 3-25. He did not assert any strategic or tactical reason for this omission.

Mary Beth Hefner was initially offered as an expert in delayed reporting in child sexual assaults, at the Applicant's trial. A lengthy *in camera* hearing was held concerning the State's intended use of this witness. Ms. Hefner testified, *in camera*, that the Victim told her that one of the reasons he didn't report this alleged incident for six months was the fact that he has been molested before, reported the assault and nothing was done about it. The Court found that if the State asked her for her expert opinion as to why the Victim waited to report this incident, the State would be opening the door to the

Defense questioning her on cross-examination about the explanation offered by the boy in his interview with Ms. Hefner. Ms. Hefner was ultimately qualified as an expert in forensic interviewing. Trial Tr. p. 199, l. 25 – p. 249, l. 11. She subsequently testified concerning the fact that children often delay reporting sexual abuse and various reasons why children delay reporting such incidents. She did not offer an expert opinion as to why the Victim in this case delayed making the accessions which were the basis for the charges against the Applicant. Trial Tr. p. 250, l. 13 – p. 254, l. 4. She did not testify concerning her interview of the young man in question.

On cross-examination, Defense Counsel did not question this witness concerning what other reasons might exist for a child to delay reporting such an incident. He did not ask her whether a past negative experience with reporting such an incident might affect a child's decision not to report a later incident. Likewise, he did not ask her questions concerning whether a child's delayed reporting might be motivated by some animus toward the adult that did not manifest itself until well after the time an event occurred. Likewise, he did not ask her if an adolescent might report an alleged sexual assault as a preemptive measure to protect himself from allegations that he was in fact the aggressor in a situation with an adult that was passed out or otherwise incapacitated. Defense Counsel's cross-examination of this witness did not address the subject matter for which she was offered by the State, delayed reporting, in any manner. Trial. Tr. 254, l. 10 – p. 255, l. 25. As previously noted, Ms. Hefner ultimately did not offer any expert opinion testimony. Despite this fact, the trial court gave a standard jury charge on expert witness testimony. Trial Tr. p. 353, l. 7 – p. 354, l. 1. Defense Counsel testified that he never considered objecting to that charge. PCR TR. p. 49, l. 1-p. 50, l. 5.

Defense Counsel agreed that the crux of the defenses' theory of the case was that the Applicant was incapacitated at the time of this incident and therefore, was not competent to knowingly and willfully have sex with the victim. Despite this fact, Defense Counsel admitted that he did not argue this position to the jury and he did not consider asking for a jury instruction supporting that defense. PCR Tr. p. 50, l. 21- p. 51, l. 22. Defense Counsel then conceded that he had actually failed to introduce any testimony that would have laid a foundation for such a charge. PCR Tr. p. 51 l. 22 - p. 52, l. 8. Defense Counsel acknowledged that, although neither consent (by the child) or diminished capacity are defenses to a charge of Criminal Sexual Conduct with a minor, a valid defense would arise if the adult was passed out, or sufficiently incapacitated, to a degree that they could not consent to sexual activity initiated by a minor. PCR Tr. 75, ll. 7-21.

Early in his PCR testimony, Defense Counsel volunteered that there were some problems with some of the things the prosecutor argued during the State's closing argument. PCR Tr. p. 34, ll. 16-19. In the course of the PCR hearing, the Applicant demonstrated that the following closing arguments had been made, without objection, by Defense Counsel.

Despite the fact that the Applicant's pre-trial statements were excluded from evidence at trial, during its closing arguments to the jury, the Solicitor stated the following,

Before the search warrant is served, he called in the Defendant to talk to her. Right? You don't just go arresting people. --She came down the testimony said around 2:00 o'clock in the afternoon and talked to the police. That was her face to face, eye to eye. Victim had his turn. She had her turn. She was not under arrest. She was not under arrest. She voluntarily came in to speak. I want to make that clear. This was

still an investigation. After the face to face, eye to eye a determination was made. She was charged that day with criminal sexual conduct second degree.

Trial Tr. 341, l. 25 – p. 342, l. 16. As previous noted, Defense Counsel admitted that it was a mistake not to object to this line of argument by the State. PCR Tr. 34, ll. 3 – 14.

During the State's closing arguments the Solicitor references his expert's history of over 200 forensic interviews. He then went on to state, *"Folks, these are people who can detect when someone is making something up or if there is nothing there. Okay?"*

Trial Tr. 341, ll. 19-22. In her testimony before the jury, Ms. Hefner never stated that she had interviewed the Victim in this case. Trial. Tr. 254, l. 10 – p. 255, l. 25. Defense Counsel testified that he should have objected to this argument as well. PCR Tr. p. 53, ll. 15-20.

Defense Counsel likewise conceded that he should have objected to another portion of the State's closing in which the prosecution personally commented on the credibility of the sole witness offered for the defense; the Applicant's husband. Trial Tr. p. 343, l. 25- p. 344 l. 12. PCR Tr. p 43, ll. 1-9. During his closing, the prosecution also commented on the Mr. Tappeiner's previous "problems with alcohol." Defense counsel testified that there had been no evidence introduced supporting that argument, and that it should have been objected to. Trial Tr. p. 345 ll. 9-10. PCR Tr. p. 54, ll. 10-15. During the testimony of the Applicant's husband he acknowledged having *one prior DUI fifteen years earlier*. Trial Tr. 307, ll. 3 – 5.

During his closing argument the prosecutor also asked the jury to consider *"the eye-to-eye, face-to-face, interviews that [the victim] has had with law enforcement and*

the experts." (Emphasis added) Trial Tr. p. 346, ll. 17-19. The State only presented one expert witness at trial and that expert did not testify to having interviewed the Victim in this case. Once again, Defense Counsel acknowledged that he did not consider objecting to this portion of the prosecutor's closing argument. PCR Tr. p. 54 ll. 16-24.

Near the very end of the State's closing argument, the prosecutor made the following argument,

I want you to also think in—in—in making that decision, would you let her babysit your kids? Your grand kids? Nieces and nephews? I think the answer to that is why you should find her guilty. Trial Tr. 346 ll. 20-24.

Defense Counsel testified that he should have objected to this portion of the prosecutor's closing argument which he acknowledged, was improper because it "staked" the jury. PCR Tr. p. 55, ll. 7-13.

In the Bluffton Police Department incident report, which included a statement from the victim, the victim says *"when she left, I quickly ran out of the house and went straight to my house."* In the Incident Report the Officer quoted the Victim as reporting that the Applicant *"got off of him before he ejaculated."* Defense Counsel acknowledged that this report was part of the discovery material he received from the State. That report, with the Victim's statement, was introduced during the PCR proceeding as Applicant's Exhibit No. 1, without objection. At trial the Victim testified that the sex act ended when he pushed the Applicant off of him. Trial Tr. p. 184, ll. 3-6. During the PCR hearing Defense Counsel stated that he had no reason for failing to question the Victim about this inconsistency at trial. PCR Tr. p. 56 l. 10- p. 57 l. 20.

At trial, State expert witness Hefner testified to certain percentages in statistical references to the occurrence of delayed reporting of sexual abuse by children. Trial Tr. p. 252 ll. 7-16. She also asserted, without citing to authority, that boys delay reporting sexual abuse more often than girls. Trial Tr. p. 252, ll. 17 - 20. Defense Counsel acknowledged in his PCR testimony that he never considered cross-examining this witness concerning her authority for these assertions. PCR Tr. 58 ll. p. 3-23. Neither did he consider cross-examining this witness concerning their authority for her claim that the literature shows that boys delayed reporting sexual abuse more frequently than girls. PCR Tr. p. 58 l. 24- p. 59 l. 11. Likewise Defense Counsel admitted that he had no strategic or tactical reason that he could recall why he did not cross-examine this witness on the topic of delayed reporting. PCR Tr. p. 59, ll. 17-23.

In his PCR testimony, Defense Counsel stated that he went to the Tappeiner residence where this incident allegedly occurred prior to the Applicant's trial. He recalled meeting the Applicant's husband there and indicated that he thought "that the subject matter was the --- the service of a search warrant." He testified that he did not recall being there for a long time and he had no recollection of going upstairs where the incident supposedly took place. PCR Tr. p. 59 l. 24- 61 l. 4. Defense Counsel admitted that he never considered obtaining or developing any demonstrative evidence to illustrate for the jury just what close quarters the parties were in at this house on the night of the alleged incident. PCR Tr. p. 61, ll. 5-9.

Defense Counsel recalled on cross-examination that he although spoke with Dr. Martin to answer some questions before the sentencing proceeding, but asserted that it

was Ms. Ballard who spoke with Dr. Martin about the use of his testimony during the sentencing proceeding. PCR Tr. p. 72, l. 17- p. 73, l. 12.

In the pre-sentence report issued in the Applicant's case, it noted that the Victim's mother wanted the Applicant to be sentenced to at least two years followed by community supervision with some type of intensive psychotherapy. See, Applicant's Exhibit No. 2; p. 7. Defense Counsel testified that he did not recall considering pointing that portion of the report out to the Court, but he felt certain the Court read it. PCR Tr. p. 76, l. 17, p. 78, l. 21.

Testimony was taken from Desa Allen Ballard, Esquire, by telephone during the Applicant's PCR hearing. She was hired after the Applicant's conviction, but before her sentencing. She assisted Attorney Macloskie with developing a strategy and evidence in mitigation for the sentencing phase. She hired Dr. Thomas Victor Martin to assist with presenting mitigation during the sentencing phase. PCR Tr. p. 83, ll 10-25. Attorney Ballard testified that she reviewed a summary of the evidence presented at trial that was provided to her by Attorney Macloskie. She reviewed that information with Dr. Martin. PCR Tr. p. 84 l. 1-9. Attorney Ballard reviewed the trial record for a potential direct appeal sometime after the sentencing proceeding. She testified that she advised against a direct appeal based upon her opinion that there was no meritorious basis for an appeal. PCR Tr. p. 85 ll. 6-19.

Dr. Thomas Victor Martin, a forensic psychiatrist, testified at the Applicant's PCR hearing. During his testimony he was asked to clarify portions of his testimony during the sentencing proceeding in this case. For example, he recalled that at the

sentencing proceeding he stated that Applicant had *"come to grips with some of the horror of what has happened."* PCR Tr. p. 93, ll. 6-25. Sentencing Tr. p. 12 ll. 13-16.

In his PCR testimony he clarified that Applicant had never admitted to any type of aggression towards anyone else. He explained that what she did admit was that she had fragments of memory that included some sort of sexual contact with the Victim. PCR Tr. p. 94, ll 8-13. At an earlier point in the sentencing proceeding, Dr. Martin advised the Court that the Applicant *"acknowledged responsibility for inappropriate sexual behavior."* Sentencing Tr. p. 10 ll. 21-24. In this PCR proceeding Dr. Martin, explained

that Applicant never admitted being the aggressor in this incident, but rather felt responsible for what, in her fragmented memory, was some sexual activity that was inappropriate. He explained that she recognized that her use of alcohol and addictive drugs had compromised her ability to function properly as a parent and an adult on the night in question. PCR Tr. P. 94 l. 14 – p. 95 l. 19. Dr. Martin's PCR testimony confirmed that the Applicant told him *"she hadn't done it"* and her memory that she reported to me did not substantiate that she had done anything wrong, except for perhaps, being inebriated." PCR Tr. 108, ll. 15-18.

At the sentencing proceeding Dr. Martin described this incident as one of *"opportunity"* and opined that Applicant was not a sexual predator. Sentencing Tr. p. 13, ll. 4-9. In his PCR testimony, Dr. Martin explained that he did not mean by that statement the Applicant had taken advantage of an opportunity but rather, that her intoxication with medications created the opportunity for the inappropriate sexual contact to happen. PCR Tr. p. 96, ll. 1-17.

At the sentencing hearing Dr. Martin advised the Court that Applicant was concerned about damage or scarring she may have inflicted by her behavior. Trial Tr. p. 16 l. 22- p. 17, l. 1. Once again, in his PCR testimony, Dr. Martin clarified that what Applicant conveyed to him was her realization that her intoxication with alcohol and Klonopin resulted in her inability to properly monitor and control inappropriate activity that took place. He indicated that she had been told the young man was harmed by what transpired and *"she is not typically of the character of harming others."* PCR Tr. p. 97, ll. 1-12. Dr. Martin emphasized that the Applicant never told him she perpetrated this crime. PCR Tr. p. 97, ll13-18.

Dr. Martin explained that this patient had some memories of the activities at her home on the date in question from the earlier part of that night. Her memories become more fragmented when she tries to recall the events later in the evening. She conveyed a fragmented memory of the young man being on top of her. She expressed the feeling that the contact was sexual. Dr. Martin testified that *"she was very upset and distraught by the fact that she couldn't remember exactly what may have happened to her, and what he was actually doing with her. ... She could not confirm that anything that she had done would have enabled or aggressed towards this individual."* PCR Tr. p. 97 l. 19- p. 99 l. 3.

During his PCR testimony Dr. Martin testified that in his evaluation of the Applicant he reviewed copies of records from Walgreens Pharmacy concerning the prescription record of the Applicant from January 2005 through August 2009. He indicated that all the records he had available for review came from either Attorney

Macloskie or Attorney Ballard.⁴ According to his PCR testimony, those records showed that Defendant was being prescribed an average of 90, one milligram, tablets of Klonopin a month in 2008. They also showed other sedatives prescribed to Applicant including Lunesta and Ambien CR. According to these records, by 2009 she was being prescribed Xanax. PCR Tr. p. 101, ll. 3-8. Dr. Martin described Klonopin as in the family of benzodiazepines, which are sedative hypnotics. PCR Tr. 102, ll. 19-20.

His PCR testimony indicates that the dosage of Klonopin taken by the Applicant during the operative time period *"was at least a medium dose."* He further provided that, *"She would, on occasion, take more than that."* PCR Tr. 104, ll. 10-13. His testimony

establishes that the combination of alcohol and Klonopin results in an exacerbation, or worsening of, the sedative, hypnotic effects of this medication. He described the effect of the combination as causing an exponential increase in intoxication. PCR Tr. 104, ll. 14-21. He further provided that an individual impaired by the combination of these substances would experience disorientation, memory loss, inability to walk and impaired motor skills. PCR Tr. p. 105, l. 15- p. 106, l. 11. Dr. Martin testified that he would have been available as an expert witness during the Applicant's trial had he been asked. PCR Tr. p. 106, l. 13-20. Dr. Martin asserted on cross-examination that he did everything he was asked to do when he was hired. PCR Tr. p. 106, l. 24- p. 107, l. 17.

Witness James Perkins met the Applicant and her husband at their photo shop. He ultimately employed Applicant in his business selling a clothing line which include women's apparel. Perkins testified that during this time period he was in the Tappeiner

⁴ The record of this case was held open for the Applicant's counsel to submit a copy of the Applicant's records from Walgreens Pharmacy as they were supplied to her directly by virtue of subpoena. Those records have subsequently been filed with the Beaufort County Clerk of Court's Office as Applicant's Exhibit No. 3.

home on occasion. He stated that he is a contractor on Hilton Head Island. He had done work on the interior of the Tappeiner house and in June or July of 2008 he contracted with the Applicant's husband to power wash their house. One day when he and his employees were setting up to perform that task, Perkins saw the Victim coming out of a sunroom attached to the back of the residence. He did not see anyone else at the house that day. The Applicant and her husband were not at home. He knew the Victim by sight and had seen him at the Tappeiner residence before. PCR Tr. P. 113, l. 13- p. 114, l. 25. The Victim testified at trial that he was never in the Applicant's home when she and her husband were not there. Trial Tr. p. 192, l. 18 - p. 193, l. 2.

Perkins additionally testified that he was familiar with Applicant's dogs. He described them as hyper dogs that barked when he came into the home. He stated that they became noisy in response to any disruption in the Tappeiner home. PCR Tr. P. 115, ll. 1-12. Perkins also presented testimony concerning the Applicant's positive reputation for veracity. PCR Tr. P. 118, ll. 10-18. He indicated that he would have been willing to testify for the defense at trial. PCR Tr. P. 118, ll. 19-24.

The Applicant's father, Dave Sanders, testified at the PCR hearing. According to his PCR testimony, around the summer of 2008, he noticed a change in his daughter's behavior. She was not herself. He did not discover the problems she was having from mixing her prescription drugs and alcohol until after the incident that led to her charge. Defense Counsel did not discuss his observations concerning his daughter's problems with mixing drugs and alcohol with him. PCR Tr. p. 120, l. 22- p. 122, l. 5. The Applicant's father testified that he co-signed the note on the purchase of her house. He identified a floor plan of the house that he received during the closing of that house. That

floor plan contained the measurements of all the rooms in the house. It was introduced as Applicant's Exhibit No. 5. PCR Tr. p. 122, l. 15-p. 124, l. 18.

The Applicant presented testimony from videographer Todd Oomens. He testified to his production of a short video of the interior of the house where the incident allegedly occurred. He verified that the video was not edited in any way and that no special lenses were used to alter or distort the image. The State's objection to the introduction of the video on grounds of relevance was sustained by this Court. The Applicant argued that this video was relevant to her allegation that Defense Counsel should have either asked for a jury view of the scene or should have introduced demonstrative evidence illustrating the interior of the house. The CD of this video was marked as Applicant's Exhibit No. 6, for identification only. PCR Tr. p. 125, l. 23- p. 130, l. 2.

As previously noted, the Applicant's identical twin sister, Elizabeth W. Auerback, testified at this PCR proceeding. She testified that during the summer of 2008 she observed her sister drinking heavily on top of her prescription medications. She had expressed her concerns about her sister mixing these drugs with alcohol. She recalled that when Applicant drank heavily in conjunction with her medications she could not communicate very well, she had difficulty walking, she sometimes fell and when she went to bed you could not wake her up. PCR Tr. p. 132, l. 19- p. 134, l. 24.

The Applicant testified that she fully understood all the risks associated with going forward with her PCR action. She also waived any claims she might have raised against her PCR counsel for her involvement in the Applicant's decision to withdraw her direct appeal. PCR Tr. p. 136, l. 12- p. 140, l. 13. She testified that Defense Counsel

had advised her that her case was most likely not going to go to trial. She was notified on a Friday that her case was going to trial on Monday. PCR Tr. p. 140, ll. 15-25.

The Applicant asserted that Defense Counsel never discussed putting up a defense with her prior to trial. He discussed calling her husband as a possible witness with her, but she never knew for certain whether he was going to be called. Defense Counsel never told her that if she put up any evidence at all she would lose the right to the final jury argument. PCR Tr. p. 142, ll. 4-15. Defense Counsel never discussed the possibility of introducing evidence before the jury of her drug use and her drinking and how they affected her on the evening in question. PCR Tr. p. 142, ll. 16-20.

The Applicant testified that she discussed her recollections of that evening with Defense Counsel. She also met with Dr. Nolan prior to trial. Defense Counsel never discussed the possibility of using Dr. Nolan as a witness before the jury. PCR Tr. p. 142, l. 21- p 143, l. 6. The Applicant asserted however, that if Defense Counsel had told her it was necessary to establish her defense, she would have authorized him to introduce evidence concerning her problems with prescription drugs and alcohol. PCR Tr. p. 144, ll. 4-8. At her PCR hearing, the Applicant testified that she currently weighed 138 pounds. She acknowledged she was about thirty (30) pounds lighter at the time of the incident. She admitted that in the summer of 2008 she was drinking three (3) to five (5) drinks a night. She recalled that sometimes she drank mixed drinks and sometimes she would drink a bottle of wine. She testified that she was taking Klonopin three times a day at the time of the alleged assault. In addition to the Klonopin she was taking sleeping medications including Ambien, Lunesta, over the counter sleeping medications or Tylenol PM. PCR Tr. p. 144, l. 9- p. 145, l. 2.

The Applicant testified that she told Defense Counsel that during this time period she sometimes experienced blackouts and that there were times when she had no memory of certain episodes. She would have been willing to testify to these matters had she been advised to do so. PCR Tr. p. 145, ll. 3-15. She confirmed that she had no prior criminal record. She denied having ever had any problems with the law or having fantasies about minor children. She testified that she had been married nearly fourteen (14) years and that she and her husband have two daughters ages nine (9) and thirteen (13). PCR Tr. p. 145, l. 16- p. 146, l. 1.

The Applicant's PCR testimony established that during the summer of 2008 she was already employing the Victim's sisters as babysitters episodically. The sisters began providing regular after school care for her daughters in September, 2008, after the alleged incident with their brother, the Victim. The Applicant fired the sisters in late October, 2008 around Halloween. PCR Tr. p. 146, l. 2- p. 147, l. 20. The Applicant testified that she had an altercation with the Victim's mother concerning her decision to terminate her daughters. Applicant indicated that she had fired the girls because she had been told that the girls and their brother had been using their hide-a-key to enter the house without permission. PCR Tr. p. 147, l. 21- p. 148, l. 11.

The Applicant's testimony also verifies that from January, 2008 through the summer of 2008 she filled her prescriptions at the Walgreens on Simmonville Road near their home. PCR Tr. p. 150, ll. 7-13.

The Applicant's husband testified at her PCR hearing. Mike Tappeiner's testimony verifies that Defense Counsel never discussed with him whether he could verify exactly when the Victim came to their home asking for help getting a camera

battery before he called him as a witness at his wife's trial. He couldn't recall Defense Counsel ever discussing the purpose behind calling him as a witness for the defense before he was actually called to the stand. PCR Tr. p. 154, l. 3- p. 155, l. 6. In his PCR testimony, the Applicant's husband verified that in the summer of 2008 she was drinking 3 to 5 drinks a night on top of her prescription medications. PCR Tr. p. 155, l. 7- p. 156, l. 5. He expressed the opinion that the combination of alcohol and her prescription medications affecting her ability to walk as well as her other motor skills and her decision making. He admitted that he had expressed concern about his wife's pattern of mixing alcohol with her medications. PCR Tr. p. 156, ll. 3-5.

VII.

FINDINGS OF THE COURT

The Applicant's allegations fall into two categories. The first group of allegations address themselves generally to the failure of Defense Counsel to prepare and present a defense at the Applicant's trial. See, Allegations 1,2,3,4,5,6,9,10, 11,14,18,20,24 and 26. As discussed below, the Applicant has met her burden of proof with regard to her claim that Defense Counsel failed to develop and employ a clear theory of defense at her trial. In addition, she has demonstrated that readily available evidence existed which could have been offered in support of her theory of defense. She has successfully shown that her decision not to testify in her own behalf was negatively impacted by erroneous legal advice from Defense Counsel concerning the possible consequences of testifying at her trial. For these reasons, as discussed in further detail below, this Court finds that the Applicant's judgment and sentence should be set aside and her case should be remanded to the Court of General Sessions for a new trial.

In his opening argument to the jury Defense Counsel gave the jury a preview of the Applicant theory of defense; that she was the victim of a sexual assault as opposed to the perpetrator. Having set the stage for this defense, Defense Counsel did not prepare to present evidence at trial which would have supported that theory. Ironically, Defense Counsel did present evidence supporting the notion that the Applicant's prescription medications negatively affected her ability to make a knowing, voluntary and intelligent statement to the police. Successfully using the testimony of expert witness Nolan, Defense Counsel was able to convince the trial judge that the Applicant did not know what she was doing at the time she gave her statement to police. That strategy was effective even where the challenge was based purely upon the impact of her prescription medications on her ability to issue a reliable statement in the face of certain interview techniques. As noted in the summary above, the officer conducted the interview in question acknowledged that, at the time the statement was taken, there was no evidence that the Applicant had been drinking on top of her medications. The Applicant has demonstrated that Defense Counsel could have used the same expert he used in the *Jackson v. Denno* proceeding, or an expert of similar credentials, to testify as to the effect the combination of alcohol with those same prescription medications would have had on the Applicant on the evening when she allegedly pulled an unwilling young man of nearly 14 years of age up a flight of stairs to sexually molest him.

In the *Jackson v. Denno* hearing, Dr. Nolan relied exclusively on historical information concerning the Applicant's prescription drug use during the time period when this statement was taken. Fortunately for the Applicant, the Court did not question the fact that there was no evidence before the Court to corroborate her claim that she was

taking powerful prescription medications at the time her statement was taken approximately six months after the event that formed the basis for the charge in question. The Applicant has now demonstrated that there was readily available evidence and testimony which could have established the prescription drugs she was taking at the time of this event, the frequency with which they were prescribed, and the dosages at which they were prescribed. *See, Applicant's Exhibit No. 3.* Likewise she has demonstrated that expert testimony from Dr. Martin, or another similar expert, could have established for the jury the dire consequences of mixing alcohol with these powerful medications. As the Applicant has shown, testimony was available which would have established that the Applicant had a pattern of mixing her prescription medications with alcohol during the operative time period. The testimony of Dr. Martin illustrated that the mixture of these prescription drugs with alcohol would have affected her motor skills, her balance, her ability to walk and her capacity to communicate effectively. The testimony of her husband confirmed that the Applicant experienced such physical problems when she combined alcohol with her regular prescription medication. Testimony from her twin sister also supported the fact that the Applicant had a problem with mixing alcohol with her prescription medications. This testimony could have been used to create reasonable doubt as to whether the Applicant would have been physically and mentally capable of the acts alleged by the Victim.

Likewise, the Applicant has established that Defense Counsel could and should have developed testimony to establish the Applicant's height and weight at the time of the incident. While it is true that the jury had the opportunity to see the Applicant at trial, that opportunity for observation was no substitute for being advised of her shockingly

low weight at the time of the incident. The jury had no way of knowing whether she had perhaps lost a significant amount of weight between the time of the incident and her trial. In addition, since the Applicant did not testify, the jury's opportunity to view the Applicant would have been limited to seeing her either sitting or standing behind a table in the courtroom. Her testimony at her PCR hearing established that she weighed 138 pounds at the time of the hearing, but that she had weighed about 30 pounds less than that at the time of the incident. The credibility of that assertion was highlighted by the appearance of her identical twin sister who, at the PCR hearing testified that she weighed 109 pounds and was around one-half inch shorter than the Applicant.

The testimony proffered during the PCR hearing clearly could have been presented to create reasonable doubt as to whether the Applicant would have been physically capable of forcing the young man in question up a flight of stairs and violently forcing sex acts on an unwilling teenage boy who was, according to the police incident reports, approximately 17 pounds heavier than her. Having suggested the theory of defense to the jury that the Applicant was the victim, not the perpetrator, trial counsel was ineffective for failing to develop this line of evidence which would clearly have supported that theory.

The Applicant has alleged that Defense Counsel should have discussed the advantages and disadvantages of testifying with the Applicant in more detail prior to this trial. On the unique facts of this case, this Court finds that this is particularly true. While the Applicant's memories of the evening in question are admittedly sketchy, they are not damning and her testimony concerning them would have been consistent with the defense that the Applicant was so under the influence of prescription medications and alcohol at

the time of this event that she was not capable of the acts described by the complaining witness. Once this trial was under way, Defense Counsel's concern that the Applicant's testimony might open the door to the introduction of that statement, which had been excluded from evidence by the trial Court, was unfounded. A confession is inadmissible for all purposes, including impeachment, where it is involuntarily made. *State v. White*, 311 S.C. 289, 294, 428 S.E.2d 740, 743 (Ct. App. 1993). An involuntary, incriminating statement is inadmissible for any purpose including impeachment. *State v. Victor*, 300 S.C. 220, 221, 387 S.E.2d 248, 249 (S.Ct. 1989); *State v. Hook*, 348 S.C. 401, 416-417, 559 S.E.2d 856, 864 (S.Ct. 2001). This Court finds that Defense Counsel should have accurately discussed with the Applicant the possible pros and cons of calling her as a witness in her own defense at trial even if the Court saw fit to suppress her statement to the police. Based on Defense Counsel's own PCR testimony, it is clear that he gave his client erroneous advice on this crucial point, and therefore was ineffective in his representation on this crucial trial decision. The Applicant also alleges that trial counsel was ineffective for failing to discuss the possible use of character witnesses with her in preparation for trial. Once again, had Defense Counsel presented a defense on behalf of the Applicant, including testimony from her, the possible use of character witnesses may have been an important consideration. The record below establishes that the Applicant was a college educated woman with no prior criminal history whatsoever. The Applicant should have been advised that if she took the stand, and the State elected to attack her character, she would have had the option of presenting character witnesses. She has demonstrated that at least one such, non-familial character witness would have been available to testify on her behalf at trial. Likewise, since Defense Counsel was not

prepared to fully present evidence in support of the Applicant's theory of Defense, she alleges that he should have advised her that she would lose the right to make the final argument to the jury if she introduced any evidence at trial. The Applicant's testimony indicates that Defense Counsel never discussed this important consideration with her prior to or during trial. Defense Counsel did not recall ever advising her on this point. Given the limited value of the husband's testimony to the defense, this Court agrees that Defense Counsel was ineffective for failing to advise the Applicant of this important consideration.

Similarly, Defense Counsel failed to present witnesses who were not related to the Applicant to establish that the family dogs would have reacted excitedly to any disruption in the home. The Applicant's husband, whose testimony might have been viewed as suspect because of his relationship to the Applicant, was the only defense witness presented on this critical point. Even if Defense Counsel did not plan to introduce evidence on this crucial point prior to trial, once the State made an issue of how much the husband had been drinking on the night in question, Defense Counsel should have been prepared to present a non-familial witness to establish the fact that the family dogs would have sounded an alarm if they had heard the boy screaming as he claimed.

The Applicant has also asserted that Defense Counsel was ineffective for seeking to introduce evidence concerning the fact that the complaining witness had previously reported being the victim of a sexual assault. In a vacuum there may appear to be no advantage to the introduction of such evidence at trial. Had Defense Counsel been prepared to fully present the defense he merely hinted at during his opening remarks to the jury however, it would have been advantageous for the Defense to establish that there

was in fact a reasonable explanation for how this adolescent boy was so familiar with the various sex acts alleged at such a young age. As noted above, at trial, even the Solicitor acknowledged that Defense Counsel could have taken appropriate measures to seek the introduction of this type evidence and simply did not do so. See, S.C. Code Ann. §16-3-659.1. As will be discussed *infra*, once the trial was underway, other powerful reasons for the introduction of this evidence developed and Defense Counsel still did not seek to establish that the facts warranted an exception to the Rape Shield Statute.

As should have been clear to Defense Counsel from the discovery materials in this case, the complaining witness claimed that he had screamed for help while he was being sexually assaulted and no one came to his aid. The Applicant has alleged that Defense Counsel should have been prepared to introduce demonstrative evidence to establish the setting in which this incident occurred and the unlikelihood that the boy could have in fact screamed as he claimed without being heard by the victim's husband who was asleep in the next room. In support of this allegation, the Applicant has introduced a floor plan of the house where this event occurred which contains dimensions of all the rooms in the house and common areas in the house. See, *Applicant's Exhibit No. 5*. This floor plan establishes that the room where this assault allegedly happened was only a few feet away from where the Applicant's husband lay sleeping. Had Defense Counsel introduced evidence in support of the defense theory suggested by his opening argument, this floor plan would have supported the Applicant's claim that the version of the facts put forth by the complaining witness was not credible. This Court agrees that Counsel should have been prepared to demonstrate the size and layout of the house where this sexual assault allegedly occurred. This evidence may well have had an impact on the

jury's judgment concerning the credibility of the Victim's story. While this Court does not agree that a physical jury view of the scene was necessary, it finds that Defense Counsel was ineffective for failing to introduce evidence which would have demonstrated the size and layout of the house.

As noted in the PCR testimony, Defense Counsel admitted that he did not present any evidence to support the theory of defense he advanced in his opening argument and further, that absent such evidence he was left with no foundation for requesting jury instructions which would have supported the Applicant's theory of defense. This Court finds that if Defense Counsel had presented readily available evidence in support of the theory that the Applicant was the victim of a sexually precocious adolescent, as opposed to the aggressor as he claimed, the Applicant would have been entitled to jury instructions which advised the jury that the Applicant could not be found criminally liable for having been involved in sex acts with a minor if they concluded that at the time of the acts she was either unconscious, so incapacitated as to be unable to willfully engage in the activity in question or that she was physically helpless to fend off sexual advances made against her by another. In other words, the Applicant would have been entitled to have the jury instructed on the law reflected in S.C. Code Ann. § 16-3-654, which defines Criminal Sexual Conduct in the Third Degree as occurring when a person to commits a sexual battery upon a person the actor knows, or has reason to know, is *"mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish the battery."* Likewise, as the Applicant asserts, she would be entitled to a jury charge that informed the jury that a juvenile, even one under the age of fourteen, may be prosecuted for committing the crime

of criminal sexual conduct pursuant to South Carolina Law. *See, S.C. Code §16-3-659.*

Therefore, this Court finds that Defense Counsel's failure to introduce available evidence in support of her theory of defense, deprived her of the opportunity to have charges in support of that defense. For all the reasons set forth above, this Court finds that Defense Counsel failed to provide the Applicant reasonable professional assistance of counsel prior to and during her jury trial in that he neglected to prepare and present readily available evidence which would have supported the theory of defense he put forth in his opening argument. The Applicant has demonstrated that the evidence in question may well have generated reasonable doubt concerning the veracity of the complaining witness.

Therefore, the Applicant has established that there exists a reasonable probability that the outcome of her trial would have been different but for the errors and omissions of Defense Counsel in preparing and presenting her defense at trial.

The second category of allegations made by the Applicant in support of her Sixth Amendment claims, address the failures of trial counsel during her trial. *See, Allegations 5, 7, 12, 15, 17, 19, 21, 22, 23, 25 and 27.*

Allegation 5

Trial Counsel was ineffective for failing to adequately prepare Dr. Tom Martin for his role in the sentencing phase of the Applicant's trial.

The testimony of Dr. Martin during the PCR hearing held in this matter clearly illustrates that he was not adequately prepared to testify at the Applicant's sentencing proceeding. Multiple statements made by Dr. Martin during the sentencing proceeding would indicate to any listener that the Applicant had in fact admitted culpability in the alleged sexual battery against the Victim. Dr. Martin is a well experience forensic psychiatrist. The testimony he presented at the Applicant's sentencing proceeding would

lead any reasonable listener to conclude that the Applicant admitted her culpability for the charged offense to this doctor. Yet, it is clear from Dr. Martin's PCR testimony that she did not. His clarifications concerning conversations with the Applicant about this incident paint a very different picture from that presented by his testimony during the sentencing proceeding. This Court finds that Defense Counsel, and Attorney Ballard, obviously failed to provide the Applicant effective assistance of counsel prior to and during her sentencing hearing in that they neglected to adequately prepare this witness for presentation of testimony at the sentencing hearing. Given the wide latitude the trial judge had in sentencing in this case, it is impossible to know with any certainty what if any difference this misleading testimony may have made in the Court's ultimate decision regarding the penalty to be imposed. Inasmuch as this Court finds that a new trial is warranted on other grounds, any further discussion as to prejudice on this issue is unnecessary.

Allegation 7

Trial Counsel was ineffective for failing to object to repeated references throughout trial to the fact that the decision to arrest the Applicant was not made until after her two hour police interview where the statements made by the Applicant had been ruled inadmissible.

As previously discussed, the trial judge ruled that the Applicant's statement to the police was not knowingly, voluntarily or intelligently entered and excluded it from evidence at trial. Notwithstanding this ruling, the State repeatedly made reference to the fact that the Applicant had been interviewed by law enforcement for 2 hours before she was arrested on the charge of Second Degree Criminal Sexual Conduct. In the prosecution's closing arguments the Solicitor chose to emphasize this point to the jury. Defense Counsel has

acknowledged that he should have objected to any such reference by the prosecution during this trial. This Court agrees.

As previously stated, an involuntary statement is inadmissible and may not be used for any purpose, even impeachment, at trial. Here, the trial judge could not have been clearer in her ruling. Nevertheless, the State repeatedly attempted to do through the back door what the trial judge had expressly blocked them from doing directly; tell the jury the Applicant had confessed. Where the Court had ruled that the statement in question was not voluntarily, knowingly and intelligently entered, the prosecution should not have been allowed to invite the jury to infer that the Applicant had confessed by repeatedly implying as much through their questioning of law enforcement witnesses and in their closing argument. Defense Counsel clearly erred in failing to object to this line of questioning and argument. The fact that the Applicant was prejudiced by this improper line of testimony and argument is readily apparent. At this trial, there was no physical evidence proving the sexual battery alleged even happened. The Victim waited six months to make this allegation and did not do so until the Applicant had fired his sisters from her employment. The version of the facts told by the complaining witness may have been viewed by the jury as suspect on its face in light of these factors, as well as the size of the house where the assault allegedly occurred, the fact that no one else heard him cry out and the fact that the Applicant was extremely thin and had been drinking.⁵ Any reasonable doubt the jury may have had concerning the veracity of this adolescent's story may well have been negated by the Solicitor's questions and argument which implied that the Applicant's statements to the police during her interview caused them to conclude she was guilty and place her under arrest. Defense

⁵ As previously noted, the jury heard no evidence concerning the Applicant's prescription drug use. They did however hear testimony that the Applicant had been drinking on the night in question.

Counsel's failure to object the first and every time the State offered this line of testimony and argument constituted ineffective assistance of counsel and warrants the grant of a new trial.

Allegations 8 and 27

Trial Counsel was ineffective for failing to seek introduction of evidence that the victim had previously reported being raped where that evidence was material to the defense and failed to adequately cross-examine the State's expert witness concerning reasons why the complaining witness may have delayed reporting his alleged assault by the Applicant.

As detailed in the factual summary above, after a lengthy debate at trial, the testimony of State expert Mary Beth Hefner was significantly restricted at trial. This witness revealed *in camera* that the complaining witness had told her one of the reasons he waited to report the alleged assault was that he had previously reported another sexual assault against him and nothing was done about it. Ultimately the State was allowed to present testimony from this witness concerning various reasons why a child might delay reporting a sexual assault. She did not testify concerning any interviews she conducted with the complaining witness nor did she opine as to why he waited six months to report his alleged assault by the Applicant.

As noted above, Defense Counsel did not cross-examine this witness at all concerning other possible explanations for why a child might delay reporting such an incident including the one reason he had clearly provided this witness in her interview with him. Despite the fact the trial judge made it perfectly clear that the State was risking opening the door to testimony about the prior incident, Defense Counsel did seek leave of Court to introduce evidence about the prior incident as an exception to the Rape Shield Law. In fact, Defense Counsel did not cross-examine this witness concerning any

alternative explanations for why the young man may have waited six months to make these claims against the Applicant. Defense Counsel's failure to seek leave to introduce testimony concerning the reason this young man gave for his delayed report of this incident resulted in the jury hearing only other explanations for the delayed report of a sexual assault which were more favorable to the prosecution. Despite the fact that this young man told this witness exactly why he didn't report the incident earlier, all the jury heard were hypothetical explanations for such behavior. In addition, Defense Counsel did not question this witness as to whether this young man's late allegations may have simply been motivated by his anger over the Applicant having fired his sisters and upset his mother. He similarly didn't ask this witness whether the young man may have taken the offensive and reported his assault by the Applicant out of fear that she would eventually remember what he had done to her and report him.

The provisions of the Rape Shield Law provide some much needed protections and serve a worthy purpose. On the facts of this case however, this Court agrees that Defense Counsel should have sought a ruling that the testimony of the State's expert witness necessitated a finding that testimony concerning what reason this young man actually gave for the delayed report of this alleged assault was exempt from the prohibitions of the law. In addition, this Court finds that Defense Counsel was ineffective for neglecting to cross-examine this witness about other possible explanations for the delayed report in this case which were potentially more beneficial to the defense than those proposed by this witness. In addition, Defense Counsel was ineffective for failing to cross-examine this witness concerning her assertions of statistical data concerning the subject of delayed reporting where she provided no authority for the percentages she testified to. Defense Counsel also

neglected to cross-examine this witness about her claim that boys more frequently delay reporting sexual assaults where she provided the Court no authority for that assertion. In this case, the fact that this young man waited six months to raise these claims may have created reasonable doubt in the minds of the jury however, the State was allowed to explain away the delay with one sided testimony which failed to explore potential explanations for the delay that were not as innocent as those put forth by this witness. The failure of Defense Counsel to adequately cross-examine this witness allowed the State to deliberately omit a known reason for the delay in this case which had been asserted by the young man himself. Where the Victim's delay in making these accusations was a factor which the defense could argue should be considered in evaluating the truthfulness of his claims, Defense Counsel's failure to sufficiently cross-examine this witness was prejudicial to the Applicant.

Allegation 19

Trial Counsel failed to object to a jury charge concerning expert opinion testimony where the sole expert witness proffered by the State was not asked to provide an expert opinion at trial.

The Applicant asserts that Defense Counsel should have objected to the jury charge given at the Applicant's trial concerning expert opinion testimony where the State's sole expert witness in this case ultimately did not present any opinion testimony. She asserts that the affect of this instruction was to give undue weight to the testimony of this witness when she in fact had not presented expert opinion testimony which warranted the charge in question. As discussed above, the failure of Defense Counsel to adequately cross-examine this witness had already allowed the State to present very favorable and one sided testimony on the subject of delayed reporting of sexual abuse by a child. The jury charge in question would have tended to give this testimony undue weight and should have been objected to

where the witness did not actually give opinion testimony tied to the facts in this case.

Allegation 12

Trial Counsel was ineffective for failing to object to repeated references to hearsay statements from the victim which went beyond a report of the time and place of the alleged assault.

Throughout the Applicant's trial, the State was permitted to introduce hearsay testimony concerning details of the alleged sexual assault which went beyond the report of the time and place of the alleged incident. It is well established in South Carolina that the rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991). Our Court's have recognized three exceptions to the rule against hearsay that allow prior consistent statements of a witness to be admitted. First, in criminal sexual conduct cases, when the victim testifies, evidence from other witnesses that she complained of the sexual assault is admissible in corroboration, limited to the time and place of the assault and excluding details or particulars. *Id.* at 367, 401 S.E.2d at 143. Second, the *res gestae* or excited utterance exception allows corroborative rape testimony without the time/place exception. *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993). Third, when a witness has been impeached by proof that the witness has made a prior inconsistent statement, proof is allowed that the witness made a prior consistent statement, provided that the prior consistent statement must have been made before the "existence of [the] relation of [the witness] to the cause." *Burns v. Clayton*, 237 S.C. 316, 117 S.E.2d 300 (1960). See, *Jolly v. State*, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994).

The Applicant has alleged that trial counsel was ineffective for failing to object to several instances of hearsay testimony. Since no objections to the testimony were actually levied at trial, both this Court and the Applicant have been left to guess as to which hearsay exception the State would have argued that the testimony fell within. On the facts of this case, the error is clear. The complaining witness did not make the allegations in question until six months after the alleged incident and therefore, the statements would obviously not fall under the *res gestae* or excited utterance exception. This testimony was not offered as a prior consistent statement in response to impeachment on some aspect of the testimony of the alleged victim. And, in more than one instance, this testimony far exceeded a report of the incident limited to the time and place of the assault. See, Trial Tr. p. 258, ll. 2 – 5; Trial Tr. p. 275, ll. 6 – 24.

The inherent prejudice arising from such testimony was recently discussed by our Court of Appeals in the case of *Vail v. State*, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013). This Court finds that Defense Counsel provided the Applicant with ineffective assistance of counsel by neglecting to object the first and every time the State introduced hearsay testimony which exceeded the well established boundaries for such evidence.

Allegation 16

Defense Counsel failed to provide the Applicant effective assistance of counsel when he failed to question the Applicant's husband, when he testified at trial, concerning the victim's pattern of visitation in their home during the time period prior to the accusations by the victim

When the Applicant's husband testified at the Applicant's trial, he recalled an incident which occurred sometime after the evening when the Victim was allegedly assaulted by his wife. Specifically, he testified about getting a phone call from the

Applicant at the family camera shop asking him to bring a camera battery home for the young man in question. According to his testimony, the Applicant told him that the boy had come to their door asking for their help in getting a battery for his camera. He remembered bringing the battery home for the young man but reported that he never came back by to get it. In response to this testimony, the prosecutor cross-examined the husband about whether this incident occurred before or after the young man had made the allegations against his wife. The husband's testimony on this point was less than clear and opened the door for the prosecutor to argue in it's closing arguments that the husband's testimony was some kind of plan to try and help his wife and that the testimony had essentially backfired. Trial Tr. p. 297, l. 20 - p. 298, l. 7; Trial Tr. 299, l. 7 - p. 301, l. 4; Trial Tr. p. 343, l. 25- p. 344 l. 12.

It is apparent from the PCR testimony of the husband that he wasn't sure what he was being called to testify concerning at trial. The incident with the camera battery was not discussed with him in advance of his testimony. Given the significance of any attempt to show that this young man continued to come to the Tappenier residence even after the date of the alleged rape, it was crucial that Defense Counsel know for certain what the husband's testimony on this point would be if he was called to testify for the defense. The obvious failure of Defense Counsel to interview this witness concerning his potential testimony at trial resulted in the presentation of testimony that appeared to be equivocal at best and manufactured at worst. Defense Counsel was ineffective for neglecting to adequately interview the husband in advance of his trial testimony. His failure to do so resulted in the presentation of his testimony in a manor which cast doubt on the credibility of the rest of his testimony. Given the fact that he was the only witness for the defense, this error was particularly prejudicial to the Applicant.

Allegation 13

Trial Counsel failed to object to repeated references to the victim as 13 years old at the time of the alleged assault where the Victim was two months away from his 14th birthday at the time of the alleged assault.

The Applicant has alleged that Defense Counsel was ineffective for neglecting to point out that the young man making the accusations against the Applicant was actually within weeks of his fourteenth birthday at the time of the alleged incident. This Court finds that Defense Counsel was not, on the record of the trial as it exists, ineffective for neglecting to object to these references. The young man in question was thirteen years old at the time of this incident. He had not yet reached his fourteenth birthday. More importantly, other than a passing reference in his opening argument, Defense Counsel had presented no evidence tending to support the theory of defense that the Applicant was the victim not the offender in this situation. Thus, the question of whether the young man was mature enough to have potentially assaulted the Applicant was not clearly before the jury. Had it been, then the Applicant's point concerning the significance of him being nearly 14 as opposed to 13 might have merit. Defense Counsel's failures with regard to presenting available evidence in support of that theory of defense are discussed elsewhere herein. Absent the presentation of evidence that the complaining witness was the likely perpetrator as opposed to a victim, Defense Counsel's failure to make this point at trial does not constitute ineffective assistance of counsel.

Allegation 22

Trial Counsel failed to adequately cross-examine the Victim concerning inconsistencies between his statements pre-trial and his testimony at trial.

As discussed in the summary of testimony set forth above, Defense Counsel neglected to use incident report contained in the discovery materials in this case, as well as the Victim's statement included in that report, to impeach the complaining witness concerning critical portions of his trial testimony. At trial he claimed the sex act ended when he pushed the Applicant off of him and fled the scene. In his statement to the police he says he fled the Tappeiner house after the Applicant left. In the incident report the young man is quoted as claiming that the Applicant got off of him after she was finished and that she told him she got off of him before he ejaculated because she did not want to get pregnant. See, Applicant's Exhibit No. 1. Given how crucial the issue of the Victim's credibility was to the Applicant's trial, this Court finds that Defense Counsel was ineffective for neglecting to use the information contained in the discovery materials to impeach him. A more thorough cross-examination of the complaining witness concerning these points may well have convinced the jury that his story was not truthful.

Allegations 21 and 7

Trial Counsel failed to object to numerous highly improper and inflammatory statements made by the State in closing arguments.

This Court is particularly concerned with Defense Counsel's failure to object to numerous improper and prejudicial statements made by the prosecution during the State's closing arguments to the jury. Defense Counsel has freely admitted that he failed to raise objections to several portions of the State's closing argument which were improper. This Court now finds that the arguments in question, as outlined above, were indeed improper and prejudicial to the Applicant's ability to receive a fair trial.

As previously noted, in this trial the State repeatedly attempted to imply that the Applicant had confessed by drawing attention to the fact that she was not arrested until after she was questioned by the police for approximately two hours. Where the trial court had excluded her statement to the police from evidence, questions designed to imply she had given an incriminating statement that resulted in her arrest were clearly improper. Likewise, the State's attempt to drive this point home during their closing arguments to the jury was equally improper. Trial Tr. 341, l. 25 – p. 342, l. 16. The prejudice arising from this argument is obvious. In a case where the credibility of the Victim's story was crucial to the State's case, the implication that the Applicant had actually implicated herself in her interviews with the police was highly prejudicial.

In still another portion of the State's closing argument the prosecutor effectively vouched for the credibility of the complaining witness in a manner that was clearly improper. Defense Counsel's failure to object to this line of argument constituted ineffective assistance of counsel as well. In his closing argument to the jury the prosecutor talked about the 200 forensic interviews his expert witness had conducted in her career and then stated, *"Folks, these are people who can detect when someone is making something up or if there is nothing there. Okay?"* Trial Tr. 341, ll. 19-22. In this portion of his closing argument the Solicitor essentially vouched for the credibility of the Victim based on the implied opinion of his expert witness that the Victim was being truthful. This line of argument was improper for two reasons. First, in her testimony before the jury, Ms. Hefner never stated that she had interviewed the Victim in this case. Trial Tr. 254, l. 10 – p. 255, l. 25. Therefore, the prosecution was inviting the jury to draw an inference from matters not on record in this trial. A Solicitor may argue the

credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. *Matthews v. State*, 350 S.C. 272, 565 S.E.2d 766 (2002); *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990). He may not however, vouch for the credibility of a witness based on personal knowledge or other information outside the record; *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001). Secondly, this argument invited the jury to substitute the opinion of a State witness for their own on the crucial issue of the credibility of the Victim. It is improper for the State to assure the jury of a witness' credibility because it is the role of the jury to assess the credibility of the witnesses at trial. *Id.* Defense Counsel testified that he should have objected to this argument. PCR Tr. p. 53, ll. 15-20.

Defense Counsel likewise conceded that he should have objected to another portion of the State's closing in which the prosecution personally commented on the credibility of the sole witness offered for the defense. Trial Tr. p. 343, l. 25- p. 344 l. 12. PCR Tr. p. 43, ll. 1-9. The prosecution also commented on Mr. Tappeiner's previous "problems with alcohol." Defense counsel has acknowledged that there had been no evidence supporting that argument and, that it should have been objected to. Trial Tr. p. 345 ll. 9-10. PCR Tr. p. 54, ll. 10-15. During the testimony of the Applicant's husband he acknowledged having one prior DUI fifteen years earlier. Trial Tr. 307, ll. 3 - 5. Once again, it is improper for the prosecution to personally comment on the credibility of any witness and he is confined to the record when advancing arguments in favor of the State.

During his closing argument the prosecutor also asked the jury to consider "*the eye-to-eye, face-to-face, interviews that [the victim] has had with law enforcement and*

the experts." (Emphasis added) Trial Tr. p. 346, ll. 17-19. As asserted by the Applicant, the State only presented *one* expert witness at trial and that expert did not testify to having interviewed the Victim in this case. Defense Counsel admitted that he did not consider objecting to this portion of the prosecutor's closing argument. PCR Tr. p. 54 ll. 16-24. This argument by the State was misleading and commented on facts not in evidence. These statements to the jury obviously sought to bolster the State's case by arguing that *multiple experts* had interviewed the complaining witness and found him to be credible. Defense Counsel clearly should have objected to this argument as well where the State was once again arguing matters not in evidence to bolster the credibility of its key witness.

As previously observed, near the very end of the State's closing argument, the prosecutor made the following argument,

I want you to also think in -in—in making that decision, would you let her babysit your kids? Your grand kids? Nieces and nephews? I think the answer to that is why you should find her guilty. Trial Tr. 346 ll. 20-24.

In his PCR testimony, Defense Counsel testified that he should have objected to this portion of the prosecutor's closing argument which he acknowledged, was improper because it "staked" the jury. PCR Tr. p. 55, ll. 7-13. This Court agrees.

In light of the above, the Applicant has met her burden of proof with regard to her claim that Defense Counsel failed to provide her reasonable professional assistance of counsel when he failed to object to multiple improper arguments made during the prosecution's closing statement to the jury. The operative question in reviewing an argument by the prosecution which is allegedly improper is whether the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a

denial of due process. *U.S.C.A. Cont. Amend 14*. It is the finding of this Court that the arguments addressed herein were fundamentally unfair and should have been objected to by Defense Counsel. Accordingly, this Court finds that the Applicant has demonstrated that she was prejudiced by Defense Counsel's failure to object to these portions of the State's closing argument. *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004).

VIII.

CONCLUSION

For all the foregoing reasons, this Court now finds that the Applicant has met her burden of proof with regard to her claim that her right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, was violated prior to and during her jury trial. Accordingly, the Applicant's judgment and sentence are hereby reversed and her case is remanded to the Beaufort County Court of General Sessions for a new trial.

IT IS SO ORDERED.

Perry M. Buckner
Presiding Circuit Judge
Fourteenth Judicial Circuit

This ____ day of _____, 2013.

Document above submitted as a Memorandum in Support of the PCR Application, addressed herein, submitted to the Court in the form of a Proposed Order.

This th 6 day of July, 2013

Tara Dawn Shurling SC Bar # 5099
ATTORNEY FOR APPLICANT

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Susan Tappeiner, #338050,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS

) 2010-CP-07-2396

) MOTION TO ALTER OR AMEND
) PURSUANT TO RULE 59(e), SCRPC

1. This matter comes before the Court by way of the Respondent's Motion pursuant to Rule 59(e), SCRPC, in which it asks the Court to alter or amend its Order dismissing this Applicant's application for post-conviction relief (PCR). The Respondent (the State) would submit the following:
2. With regard to Applicant's failure to carry his burden of proving ineffective assistance of counsel, the Order of Dismissal signed by the Honorable Perry M. Buckner, dated June 11, 2013, contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976), and Rule 52(a) SCRPC. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). However, the State submits this Court should amend its ruling as to whether counsel provided deficient performance. The State submits counsel's performance was not deficient and did not result in any prejudice to the Applicant at trial.
3. The State requests that this Court alter its ruling that counsel's performance was deficient for failing to object to the Solicitor's reference to the decision to arrest the Applicant being made after her two hour police interview. The State submits

the Applicant failed to meet her burden of proving counsel should have objected to references to the fact that the Applicant was arrested after a two hour police interview. The statement made by Solicitor was not objectionable. Simply stating the Applicant was arrested after an interview lasting two hours does not implicate the Applicant's excluded statement or that the Applicant even gave a statement to police. The record reflects the testimony of Sergeant Christian Gonzales was that he met with the Applicant, had a two hour discussion with the Applicant, and placed her under arrest based on the statements from the victim and Hope Haven's forensic interviewer. (T. 280:9-281:8). The State submits further the Applicant failed to provide any basis for this objection. This Court should amend the Order of Dismissal to reflect that counsel's performance was not deficient for his failure to object to the Solicitor's reference to the decision to arrest the Applicant being made after her two hour police interview.

4. The State also request that this Court alter its ruling that counsel's performance was deficient for failing to object to hearsay statements from the victim that went beyond time and place of the alleged assault. The State submits the testimony alleged by the Applicant to be inadmissible and objectionable based on Rule 801(d)(1)(D), SCRE, is not hearsay because it was offered for the limited purpose of explaining why a government investigation was undertaken. "Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted. An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003). The

testimony given by Officers Creason, Tubbs, and Gonzales during trial with regard to statements made by the victim was not offered for the truth of the matter asserted, but rather to explain why certain steps took place in their investigation of the Applicant. Officer Creason's testimony about the victim's statement was offered to explain why he contacted his supervisor Lieutenant Tubbs and requested that he come to investigate the victim's allegation. (T. 155:17-25). Officer Tubbs' testimony about the victim's statement was offered to explain how he became involved in questioning the Applicant at the police station. (T. 258:10-15). Officer Gonzales' testimony about the victim's statement was offered to explain why he obtained a search warrant for the Applicant's home. (T. 276:21-25). This Court should amend the Order of Dismissal to reflect that counsel's performance was not deficient for failing to object to alleged hearsay statements.

5. Lastly, the State requests that this Court amend its ruling that counsel's performance was deficient for failing to object to improper statements made by the State in its closing argument. The State submits the Applicant failed to carry her burden of proving the State's closing was objectionable. A closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. After all the evidence is in, counsel for the parties are in the position to present their respective versions of the case as a whole." Herring v. New York, 422 U.S. 853 (1975). "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content

should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609-10, 602 S.E.2d at 744. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009). The State submits the Solicitor's closing in no way deprived the Applicant of a fair trial and any statements made by the Solicitor were cured by the Solicitor's statement to the jury at the beginning of the closing statement that "You know, she said when we talked about opening arguments, these are my opinions -- the opinion of myself and Mr. Macloskie. Nothing that we say to you is evidence. Evidence is what was entered -- and you have that to see and to review." (T. 326:20-25). The State submits the Solicitor's statements did not infect the trial with unfairness and were not objectionable. This Court should amend the Order of Dismissal to reflect that counsel's performance was not deficient for his failure to object to the Solicitor's closing argument.

6. WHEREFORE, having made this motion, the State requests that this Court amend its ruling as to counsel's deficiency and find counsel did not provide deficient performance. The State also requests that this Court not modify its ultimate ruling that the Applicant failed to carry her burden of proving ineffective assistance of counsel.

[Signature on the following page.]

Respectfully submitted,

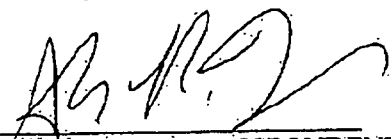
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ASHLEIGH R. WILSON
Assistant Attorney General

BY:


ATTORNEYS FOR RESPONDENT

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Columbia, South Carolina
July 11, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

Susan Tappeiner, #338050,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2010-CP-07-2396

AMENDED ORDER OF DISMISSAL

13 AUG -2 1:13:04
 BEAUFORT COUNTY CLERK OF COURT S.C.

PROCEDURAL HISTORY

#1
 PmB This matter comes before the Court by way of Applicant's Rule 59(e), SCRCP, Motion to Alter or Amend the undersigned's June 11, 2013 Order of Dismissal.

The Applicant filed for post-conviction relief (PCR) May 17, 2010. The Respondent made its Return on August 25, 2010. An evidentiary hearing on the matter was convened on April 4, 2013 at the Beaufort County Courthouse. The Applicant was present at the hearing and was represented by Tara Dawn Shurling, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Testifying at the hearing was Charles Macloskie, Esquire ("Defense Counsel"), Desa Ballard, Esquire, the Applicant, Mike Tappeiner, Elizabeth Sanders, Todd Oomens, Dave Sanders, Jim Perkins, and Dr. Tom Martin. The Court had before it the trial transcript, the Beaufort County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application and amendments, the Applicant's exhibits presented during the hearing, the Respondent's Return, and the appellate records.

DISCUSSION

#2
P.B.

The Applicant alleges she received ineffective assistance of counsel. In a PCR action, “the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). For the Applicant to be granted PCR as a result of ineffective assistance of counsel, she must show both: (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove trial counsel was ineffective, the applicant for PCR must show counsel’s performance was deficient and the deficient performance prejudiced the defense. Humphries v. State, 351 S.C. 362, 570 S.E.2d 160, *rehearing denied* (2002). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. 668 (1984)).

At trial, Judge Mullen ruled that Applicant’s statement to the police was inadmissible, explaining that “[Applicant’s] will was overborne. I [Judge Mullen] don’t think she has [*sic*] a clue what she was doing....I do not believe that her statement was voluntary. It certainly wasn’t intelligent. And I don’t think it was knowingly made.”¹ (Trial Transcript, p. 132:16 – 134:12).

¹ The “statement” that Judge Mullen excluded was relayed to the court by Sergeant Gonzales of the Bluffton Police Department. Gonzales testified at the *Jackson v. Denno* hearing as follows: “...she [Applicant] told me that she did have sexual intercourse with [victim], and that she was kind of flattered by a kid, and that with performed oral sex

Despite this ruling, the prosecutor made references to the fact that Applicant was not charged until after her two hour interview with the police. (*Id.* at 280:14 – 281:2; 282:17 – 283:10). Defense Counsel did not object. Defense Counsel's performance was deficient in that respect. However, that deficiency did not prejudice the defense in that this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

#3
PMB
Applicant asserts that Defense Counsel was "ineffective for failing to fully discuss potential risks and benefits of testifying at trial." After reviewing the trial transcript and the testimony of Defense Counsel, I find that it was part of Defense Counsel's trial strategy to not have Applicant testify during trial. The trial record reflects that Judge Mullen advised Applicant she had the right to testify and Applicant had discussed that right with Defense Counsel. Further, the record indicates that Defense Counsel believed having Applicant testify would be harmful to her case. (PCR Transcript, p. 70:21 – 71:9). Applicant's argument is without merit.

Applicant next argues that Defense Counsel was "ineffective for failing to object to repeated references to hearsay statements from the victim which went beyond a report of the time and place of the alleged assault." It is well established in South Carolina that in criminal sexual conduct cases, when the victim testifies, evidence from other witnesses that she complained of the sexual assault is admissible in corroboration—but only when it is limited to the time and place of the assault and excludes details or particulars. *Simpkins v. State*, 303 S.C. 364, 367, 401 S.E.2d 142, 143 (1991). In more than one instance, testimony from witnesses exceeded a report of the incident limited to the time and place of the assault. See Trial Transcript. p. 258: 2 – 5; 275: 6 – 24. Defense Counsel's failure to object to these references

on her and that ~~Victim~~ did not ejaculate inside her, and that – that she – she made a mistake, that she should know better than to have sex with a 13 year old." (Trial Transcript, p. 48: 12-17).

constitutes a deficiency. Based on a preponderance of the evidence, I find that but for counsel's deficiency, there is insufficient evidence to find that the result of the trial would have been different.

#4
PmB
Applicant also argues that Defense Counsel failed to object to improper statements made by the State in closing arguments where said remarks (1) personally vouched for the credibility of Victim's testimony; (2) personally staked the jury in the outcome of the trial; and (3) were calculated to imply the Applicant had confessed where her statements had been ruled inadmissible.² As noted above, the trial court excluded Applicant's statement to the police from evidence, but Defense Counsel failed to object to questions designed to imply that Applicant had given an incriminating statement that resulted in her arrest. See Trial Transcript, p. 280:14 – 281:2; 282:17 – 283:10; 341:25 – 342:16). This Court found that this failure constituted a deficiency. Likewise, the State's attempt to repeat its behavior during closing arguments to the jury was improper, and Defense Counsel's failure to object is again a deficiency. That being said, this Court does not believe from the evidence presented there exists a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different.

Applicant raises numerous other allegations in her proposed Order (Applicant's Proposed Order, 2-5). I will refer to these allegations by the numbers used by Applicant in her proposed Order and Rule 59(e) Motion to Alter or Amend.

1. Trial Counsel was ineffective in failing to develop and employ a clear theory of defense.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance. Further, even if this Court were to find a deficiency in Defense Counsel's representation, any such deficiency did not prejudice the defense in that this

² Applicant is referring to Trial Transcript, p. 341:25 – 342:16

Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

2. Trial Counsel was ineffective for failure to present evidence concerning what prescription medications the Applicant was taking during time of incident.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

3. Trial Counsel was ineffective for failing to introduce testimony from Dr. Nolan in case for defense.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

- #5
PnB
4. Trial Counsel was ineffective for failure to hire Dr. Martin, or an expert of equal credentials, to testify during the case in chief.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

5. Trial Counsel was ineffective for failing to adequately prepare Dr. Tom Martin for his role in the sentencing phase of the Applicant's trial.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

6. Trial Counsel was ineffective for failing to introduce evidence concerning the medications the Applicant was taking during the operative time period, and the effect of those medications when combined with alcohol.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

8. Trial Counsel was ineffective for failing to seek introduction of evidence that the victim had previously reported being raped at age 8 where that evidence was material to the

defense.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

9. Trial Counsel was ineffective for failing to discuss use of character witnesses with the Applicant and failed to produce such witnesses at trial.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

11. Trial Counsel was ineffective for failing to request a jury view of the scene, or in the alternative, to introduce evidence demonstrating the size and layout of the Applicant's home.

#6

Pmb

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

13. Trial Counsel failed to object to repeated references to the victim as 13 years old at the time of the alleged assault where the victim was two months away from his 14th birthday at the time of the alleged assault.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

14. Trial Counsel failed to establish his client's height and weight at trial.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

15. Trial Counsel failed to provide the Applicant effective assistance of counsel when he called the Applicant's husband as a witness, and questioned him concerning an incident when the victim had asked the Applicant to help him get a camera battery, without ascertaining whether the husband had an accurate recollection of the timing of that request.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably

effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

16. Trial Counsel failed to provide the Applicant effective assistance of counsel when he failed to question the Applicant's husband, when he testified at trial, concerning the victim's pattern of visitation in their home during the time period prior to the accusations by the victim.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

17. Trial Counsel was ineffective when he failed to adequately question the Applicant's husband on the witness stand concerning his observations concerning the Applicant's coordination and general physical condition when she mixed alcohol with her prescription medications.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

18. Trial counsel was ineffective for failing to fully discuss with the Applicant the fact that she would retain the right for him to make the final argument to the jury if the defense presented no evidence at trial.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

19. Trial Counsel failed to object to a jury charge concerning expert opinion testimony where the sole expert witness proffered by the State was not asked to provide an expert opinion at trial.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

20. Trial Counsel failed to request a jury charge relating to consent and competence as those concepts applied to the Applicant as opposed to the victim.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably

effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

21. Trial Counsel failed to object to numerous highly improper and inflammatory statements made by the State in closing arguments where said remarks;

- A. personally vouched for credibility of Victim's testimony;
- B. personally staked the jury in the outcome of this trial;

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

22. Trial Counsel failed to adequately cross-examine the Victim concerning inconsistencies between his statements pre-trial and his testimony at trial.

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Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

23. Trial Counsel failed to produce testimony relevant to the Victim's frequent presence in the Applicant's home when neither she nor her husband was home.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

24. Trial Counsel failed to introduce from neutral witnesses evidence concerning the reaction of the Applicant's dogs to any activity in her home.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

25. Trial Counsel failed to argue in closing that it would not be Criminal Sexual Conduct by the Applicant if the complaining witness in fact assaulted her while she was incompetent to consent.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence

that by a preponderance of the evidence the result of the trial would have been different.

26. Trial Counsel failed to request jury charge on the fact that South Carolina law allows minors under the age of 14 to be charged with Criminal Sexual Conduct.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

27. Trial Counsel failed to adequately cross-examine the State's expert witness concerning the known reasons for delayed reporting of sexual assaults.

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

CONCLUSION

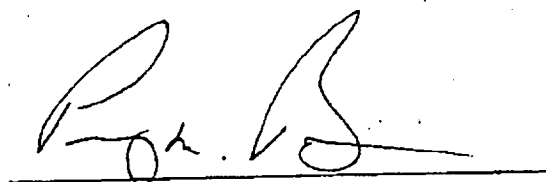
The Court finds that Applicant has not established any constitutional violations or deprivations before or during her trial and sentencing proceedings. Applicant was not prejudiced by Defense Counsel's representation. Accordingly, this PCR application is DENIED and dismissed with prejudice.

It is therefore ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

July 31, 2013
2013

Walterboro, SC



The Honorable Perry M. Buckner

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF BEAUFORT)

SUSAN TAPPEINER, 338050,)
 Applicant,)

2010-CP-07-2396

v.)

SECOND RULE 59(e) SCRCPE
 MOTION TO ALTER OR AMEND

THE STATE OF SOUTH CAROLINA,)
 Respondent.)

13 AUG 16 PM 3:11
 JERIN AHH ROSENEAU
 BEAUFORT COUNTY CLERK
 S.C.

The Order of Dismissal in the above captioned PCR matter was filed June 18, 2013. Applicant served and filed a timely Motion pursuant to Rule 59(e), SCRCPE, on July 9, 2013. As noted in the original 59(e) Motion, the Court's original Order of Dismissal fails to address the Applicant's Allegations numbers 1, 2, 3, 4, 5, 6, 8, 9, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21 (a), 21 (b), 22, 23, 24, 25, 26 and 27. This Court subsequently issued an order captioned as an Amended Order of Dismissal on July 31, 2013 and filed on August 2, 2013. This Order contains the rulings of the Court found in the original Order of Dismissal.

The Amended Order filed by the Court is response to the Applicant's 59(e) Motion additionally contains the same brief ruling on each of the allegations omitted from the original Order of Dismissal. With regard to each of the omitted Sixth Amendment allegations, the only rulings provided by the Court in its Amended Order of Dismissal states:

Applicant fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this Court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been different.

The Applicant would respectfully submit that the amended order issued by this Court fails to comply with S.C. Ann. § 17-27-80 which provides:

The application shall be heard in, and before any judge of, a court of competent jurisdiction in the county in which the conviction took place. A record of the proceedings shall be made and preserved. All rules and statutes applicable in civil proceedings are available to the parties. The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing. If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence or other matter that may be necessary and proper. *The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.* This order is a final judgment. (emphasis added)

Our Supreme Court has consistently declined to review issues on their merits in a Post-Conviction Relief appeal unless the Order of Dismissal contains the findings of fact and rulings of law required by section § 17-27-80 for the issue in question. The requirement of a detailed Post-Conviction Relief Order was emphasized by the Supreme Court in *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007). The Applicant means no disrespect to this Court, however she cannot fail to bring the insufficiency of this order to the Court's attention without risking a subsequent finding, by the Supreme Court or the Court of Appeals, that she has waived her right to be heard on the merits of most of the issues raised during her circuit court Post-Conviction Relief action.

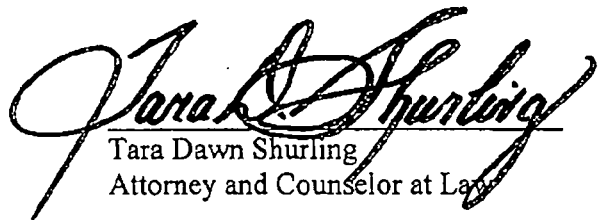
In addition to the Sixth Amendment allegations addressed herein, the Amended Order neglects to document the Court's ruling which excluded from evidence a video of the alleged crime scene proffered by the Applicant in support of her Post-Conviction Relief Application. The omission of a ruling on this issue in the original Order of Dismissal was brought to the Court's attention in the Applicant's original 59(e) Motion. The Amended Order of Dismissal issued by this Court makes no mention of this issue. The Applicant reserved her objection to the Court's ruling on this issue during her Post-

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Conviction Relief hearing in order to preserve her right to appeal that ruling. Accordingly, the Applicant now once again notes that the Amended Order issued by the Court neglects to document the Court's ruling on the admissibility of this evidence and the Court's reasoning for that holding.

Inasmuch as the Applicant's time limits for filing a Notice of Appeal are not automatically stayed by the filing of a *second* Rule 59(e) Motion, the Applicant asks for this Court's ruling on this Second 59(e) Motion as quickly as possible. In the event the Court does not issue an order on the current 59(e) Motion prior to the deadline for filing a Notice of Appeal in this matter, the Applicant will file a Notice of Appeal in the Supreme Court and will then seek to have that appeal stayed and the matter remanded for an order on this Second 59(e) Motion.

Respectfully submitted,


Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Dr., Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 (fax)
tdslaw@shurlinglaw.com

Attorney for the Applicant

This 15th day of August, 2013.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

SUSAN TAPPEINER, 338050,
Applicant,

2010-CP-07-2396

v.

CERTIFICATE OF SERVICE

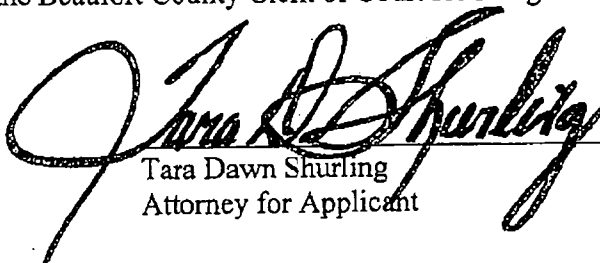
THE STATE OF SOUTH CAROLINA,
Respondent.

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JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

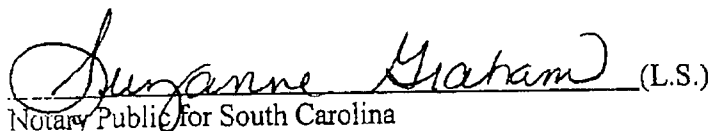
The undersigned hereby certifies that a true copy of the Second Rule 59(e) Motion to Alter or Amend in the above matter has been served on opposing counsel this the 15th day of August, 2013, by mailing one (1) copy in a stamped envelope properly addressed to:

Ashleigh Wilson
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

The original having been sent to the Beaufort County Clerk of Court for filing.


Tara Dawn Shurling
Attorney for Applicant

SWORN TO BEFORE ME this 15th day of
August, 2013.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: 2/28/23

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

SUSAN TAPPEINER, 338050,)
 Applicant,)

2010-CP-07-2396

v.)

CERTIFICATE OF SERVICE

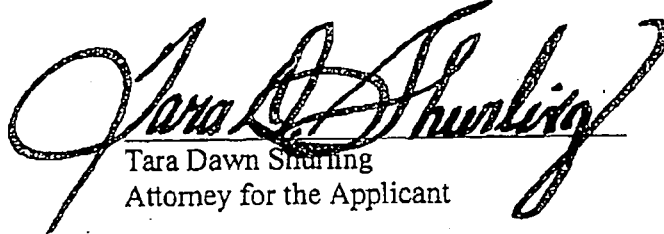
THE STATE OF SOUTH CAROLINA,)
 Respondent.)

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 JEREMY M. ROSENEAU
 BEAUFORT COUNTY S.C.
 CLERK OF COURT

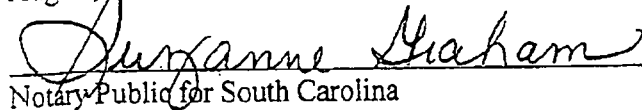
The undersigned hereby certifies that a true copy of the Second Rule 59(e) Motion to Alter or Amend in the above matter has been served on the Honorable Perry M. Buckner, III, presiding judge, this 15th day of August, 2013, by mailing one (1) copy in a stamped envelope properly addressed to:

The Honorable Perry M. Buckner, III
 Circuit Court Judge for the Fourteenth Circuit
 P. O. Drawer 470
 Walterboro, SC 29488

The original having been sent to the Beaufort County Clerk of Court for filing.


 Tara Dawn Shurling
 Attorney for the Applicant

SWORN TO BEFORE ME this 15th day of
 August, 2013.

 (L.S.)
 Notary Public for South Carolina

My Commission Expires: 2/28/23

STATE OF SOUTH CAROLINA
 13 SEP -9 PM 2:45
 COUNTY OF BEAUFORT
 JEROME A. ROSENEAU
 BEAUFORT COUNTY, S.C.
 SUSAN TAPPEINER, #998050
 CLERK OF COURT

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
 FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-07-2396

ORDER DENYING APPLICANT'S
 MOTION TO ALTER OR AMEND
 AMENDED ORDER OF
 DISMISSAL

Before the Court is Applicant's Second Rule 59(e) Motion to Alter or Amend. On June 18, 2013, the Court entered its Order of Dismissal in the above-captioned Post-Conviction Relief matter. The Applicant served and filed a Motion to Alter or Amend on July 9, 2013. The Court subsequently issued an Amended Order of Dismissal on July 31, 2013, which was filed on August 2, 2013. Thereafter, the Applicant served and filed a Second Motion to Alter or Amend the Amended Order of Dismissal.

It is so ORDERED that Applicant's Second Motion to Alter or Amend the Amended Order of Dismissal is respectfully DENIED.

IT IS SO ORDERED.


 Perry M. Buckner, III
 Judge, Fourteenth Judicial Circuit

August 29, 2013
 Walterboro, SC

STATE OF SOUTH CAROLINA
In The Supreme Court

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SEP - 5 2013

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Perry M. Buckner, Presiding Judge

S.C. Supreme Court

2010-CP-07-2396

SUSAN TAPPEINER, #338050,

Applicant,

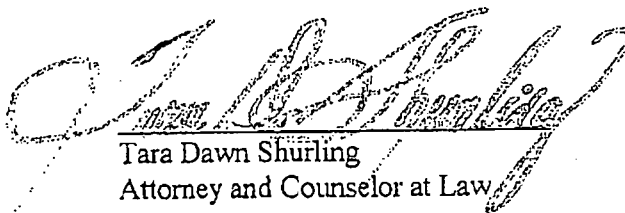
v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through her undersigned counsel, giving notice of her appeal from the Order of Dismissal denying her Post-Conviction Relief filed June 18, 2013, and the Order Denying the Applicant's First Motion to Alter or Amend pursuant to Rule 59(e) SCRPC which was filed with the Beaufort County Clerk of Court on August 2, 2013. An Order Denying the Applicant's Second Motion to Alter or Amend pursuant to Rule 59(e) SCRPC was signed by the Honorable Perry Buckner on August 29, 2013, received by Counsel on September 3, 2013 and has been sent to the Beaufort County Clerk of Court for filing.



Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

ATTORNEY FOR APPLICANT

This 4th day of September, 2013.

Other Counsel of Record:
Ashleigh R. Wilson, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-4037

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Perry M. Buckner, Presiding Judge

2010-CP-07-2396

RECEIVED

SEP - 5 2013

S.C. Supreme Court

SUSAN TAPPEINER, #338050,

Applicant,

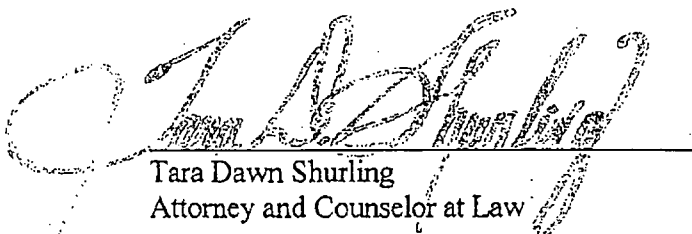
v.

THE STATE OF SOUTH CAROLINA,

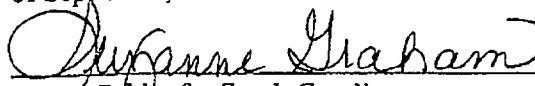
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Ashleigh R. Wilson, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 4th day of September, 2013.


Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE me this 4th day
of September, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/23/2023

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Perry M. Buckner, Circuit Court Judge

Appellate Case No. Appellate Case No. 2013-001885

SUSAN TAPPEINER, 338050,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED

MAR 24 2014

S.C. Supreme Court

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Appendix in the above-entitled case has been served upon opposing counsel this the 24th day of March, 2014, by mailing one (1) copy in a stamped envelope properly addressed to:

Ashleigh R. Wilson
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

Sharon McCollister

Sharon McCollister

Paralegal to:

TARA DAWN SHURLING

Attorney and Counselor at Law

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 24th day
of March, 2014.

Dunnette Yalaw (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/28/2024