

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

DEC 17 2014

Appeal from Aiken County

Michael G. Nettles, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

BARRY EUGENE LAFAVOR,

APPELLANT.

APPELLATE CASE NO. 2013-000568

MOTION TO REMAND TO
RECONSTRUCT COURT'S EXHIBIT

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Appellant, by and through undersigned counsel, respectfully moves this Court to remand this case to the circuit court to reconstruct Court's Exhibit No. 2 (Department of Social Services records pertaining to the minor alleged victims), which was destroyed pursuant to the order of the Honorable Doyet A. Early on or about July 9, 2013.

In accordance with Rule 240(c), SCACR, undersigned counsel submits the following documents to support her motion: Exhibit #1 (redacted trial transcript pages 1, 28-33, 184-185, and 299-306 pertaining to a motion for a continuance), Exhibit #2 (Affidavit of Aiken County Deputy Clerk of Court Cheryl Westall), Exhibit #3 (Motion to Transport and Unseal Exhibit), Exhibit #4

(Return to Motion to Transport and Unseal Court Exhibit), and Exhibit #5 (Protective Order for DSS Records).

Appellant was indicted at the April 4, 2013 term of General Sessions by an Aiken County Grand Jury for second degree criminal sexual conduct with a minor, criminal solicitation of a minor, and three counts of third degree criminal sexual conduct with a minor.

In March 2013, Appellant's trial counsel, Michael D. Routzong, subpoenaed the DSS records pertaining to the family of the two minor alleged victims. Exhibit #1 at Tr. 28, ll. 23-25. About a week later, a representative of DSS moved to quash the subpoena in Family Court. Exhibit #1 at Tr. 28, l. 25 – 29, l. 2. On May 21, 2013, a hearing was held before Judge Early in the Court of General Sessions. Exhibit #1 at Tr. 29, l. 3. During this hearing, Judge Early ordered all the records be given to him to determine whether the records were relevant or material to Appellant's defense. Exhibit #1 at Tr. 29, ll. 4-6.

On Wednesday, June 19, 2013, Judge Early issued a Protective Order for DSS Records stating, "[I]t appears that certain DSS records should be turned over to the Defense pursuant to . . . subpoena." Exhibit #5 at P. 1. The court also ordered that all copies of the DSS records be returned to the Clerk of Court after trial to be maintained and sealed "in a manner protecting the confidentiality of the records." Exhibit #5 at P. 2. At noon on Thursday, June 20, 2013, less than four days before Appellant's trial began on Monday, June 24, 2013, a copy of the records were given to Appellant's trial counsel and the solicitor.¹ Exhibit #1 at Tr. 29, ll. 9-13.

At the beginning of trial before the Honorable Michael G. Nettles, defense counsel moved for a continuance to allow trial counsel adequate time to investigate the contents of the records and

¹ Upon information and belief, Judge Early turned over *all* of the DSS records to trial counsel and the solicitor.

possibly hire an expert witness. Exhibit #1 at Tr.28, ll. 20-21. Judge Nettles denied the motion and ordered the DSS records be made part of the record as Court's Exhibit No. 2 and held under seal by the Clerk of Court for appellate purposes. Exhibit #1 at Tr. 32, l. 15 – 33, l. 6. Trial counsel renewed his motion for a continuance several times throughout the course of the trial. Exhibit #1 at Tr. 184, l. 10 -185, l. 21 and Tr. 299, l. 1 – 306, l. 4.

On November 3, 2014, undersigned appellate counsel filed a motion to transport and unseal Court's Exhibit No. 2 (the DSS records) to allow for inspection of the exhibit by counsel to determine whether any issue related to the exhibit and the motion for a continuance should be filed as part of Appellant's direct appeal. Exhibit #3.

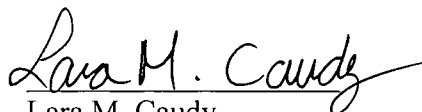
Respondent filed a return to this motion on November 14, 2014. Exhibit #4. In her motion, Senior Assistant Deputy Attorney General Salley W. Elliott said "it appears the exhibit in question (DSS records) was destroyed after trial by the Aiken County Clerk of Court pursuant to a subsequent order issued by Judge Early on July 9, 2013." Exhibit #4 at P. 3.

Based on this information, undersigned counsel verified with the Aiken County Clerk of Court that all copies of the DSS records were in fact destroyed by that office on July 9, 2013 and the original records were returned to a representative of DSS on or about July 9, 2013 pursuant to Judge Early's subsequent order. See Exhibit #2 and Exhibit #5 at P. 2.

Appellant now respectfully requests this Court to remand the case to the circuit court to reconstruct Court's Exhibit No. 2, require the trial court to issue a subpoena or court order for all the DSS records pertaining to the family of the minor alleged victims up to the date of Appellant's trial, and hold any hearings necessary to properly reconstruct the exhibit. Without this exhibit, Appellant will be unable to have meaningful appellate review of the issue regarding the denial of his motion for a continuance. See State v. Ladson, 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007) (finding

record must allow for meaningful appellate review); see also Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). Further, Appellant respectfully requests the timelines for filing the Initial Brief of Appellant and Designation of Matter be held in abeyance pending resolution of this motion.

Respectfully submitted,

A handwritten signature in black ink that reads "Lara M. Caudy". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Lara M. Caudy
Attorney for Appellant

December 17, 2014

EXHIBIT #1

1 there a lot of documentary evidence in this case?

2 MS. AGNEW: There's not a lot, Your Honor. The state
3 anticipates about three pictures and one other piece of
4 evidence.

5 THE COURT: Okay. Before we leave today, if it doesn't
6 take too long, I'm going to ask you to show that to the
7 defense and if there's something y'all can stipulate to,
8 let's do that.

9 MS. AGNEW: Absolutely.

10 THE COURT: And if there's not then we can address that
11 at 2:30 as far as admissibility to the extent we can.

12 Anything from defense?

13 MR. ROUTZONG: No, sir.

14 THE COURT: We'll stand at ease until 2:30, 2:30 sharp.

15 (Court in recess for lunch at 1:06 p.m.)

16 (Court in session after lunch at 2:30 p.m.)

17 THE COURT: All right. I understand we have some
18 matters we'd like to place on the record. I know the
19 defense has some matters and you're recognized.

20 MR. ROUTZONG: That's correct, Your Honor. We move for
21 a motion for continuance.

22 THE COURT: Yes, sir.

23 MR. ROUTZONG: Your Honor, back in March of this year I
24 requested from DSS via subpoena to receive all the DSS
25 records pertaining to this family, the accusers. About a

1 week later DSS moved in family court to quash the subpoena.
2 Amanda Whittle representing DSS.

3 We had a hearing here in General Sessions Court, May 21
4 and at that time, Judge Early ordered that all the records
5 be given to him for his review to see if there was anything
6 material or relevant. Around June 17, actually June 18, I
7 think I spoke with Adam Ness, his clerk. We reviewed what
8 had been found in the record. I mentioned to them at that
9 time I intended to ask for a continuance. The records
10 weren't actually made available to me, I believe that was a
11 Tuesday, so the records were made available to me, I think,
12 the following Thursday. I think Mr. Thompson from our
13 office picked them up around Noon on Thursday.

14 Your Honor, this is the file -- furnished to me. As
15 the Court can see that's a substantial amount of material.
16 I don't think that it's fair to the defendant or of the
17 Court for me to actually say that I've had time to review
18 these records. I've only skimmed the surface of them in the
19 last couple of days as I've been preparing for two trials
20 that were scheduled for this week.

21 Your Honor, normally, that's why I requested back in
22 March to give myself time to actually review and
23 investigate. This is a very superficial reviewing of these
24 records, Your Honor, I count pages missing. There's one
25 page that says one of three, but nothing following. I don't

1 know if there's anything relevant there or not. Certainly,
2 I can't determine what's relevant or material and I don't
3 think the Court should rely on Judge Ness's (sic) law clerk
4 or Ms. Agnew to determine whether or not something is
5 relevant. I think that's in the purview of the defense to
6 determine that and at least present it to the Court or --

7 THE COURT: Well, you've had an opportunity. You've
8 have at least Thursday to read those documents, most of
9 which don't apply to the individual victims and none of it
10 applies to the defendant, does it?

11 MR. ROUTZONG: I have no idea, Your Honor.

12 THE COURT: Oh, you haven't read them?

13 MR. ROUTZONG: No, sir, I've only scratched the surface
14 of them. I started --

15 THE COURT: Well, you've had since Thursday to do it.
16 I'll be glad to hear from the solicitor.

17 MS. AGNEW: Thank you, Your Honor. On March 14 of this
18 year we had a bond hearing in this case in front of Judge
19 Early. At that time he declined to modify bond, but at the
20 defense's request he did say that it would be revisited if
21 this case was not tried by the June term. So essentially,
22 we had a date certain for this term. After the In Camera
23 hearing of the DSS records those were determined to be
24 discoverable, not relevant or material. Those were turned
25 over to both our office and the public defender's office on

1 Thursday morning. Having gone through those records, the
2 vast majority of them are doctor's records where various
3 children in this family, only two of them were involved in
4 this case, went to the doctor. There's also a lot of
5 consent to release medical records. The defendant is not
6 listed anywhere in those records. This case has already
7 been continued the week of June 10 in front of Judge Cole,
8 as well.

9 THE COURT: Okay. All right. Yes, sir.

10 MR. ROUTZONG: Your Honor, in response, as far as this
11 being a date certain. That was a bond hearing and that's
12 not -- I wouldn't consider that -- denominate that as a date
13 certain. The continuance was not the defense's fault. I did
14 not ask for a continuance. The only thing I've ever asked
15 for were the records. I believe, Your Honor, under the
16 statute that they would have been discoverable the state --
17 we could have bypassed this altogether if the state has
18 requested these records to begin with. I don't know, Your
19 Honor, it's hard for me to guess. It's pretty much over 500
20 pages. I don't think it's reasonable for anyone to think
21 that I can go through all these pages when I've just gone
22 through the first couple and found discrepancies that Mr.
23 Ness didn't even point out.

24 THE COURT: All right. Have you had an opportunity to
25 review the documents?

1 MS. AGNEW: Yes, Your Honor.

2 THE COURT: All right. Although it does appear to be a
3 stack of papers, it doesn't require that you read all of
4 them in detail once you find out what the document is, isn't
5 that correct?

6 MS. AGNEW: That's correct, Your Honor.

7 THE COURT: And you've read all of them in its entirety?

8 MS. AGNEW: Yes, sir.

9 THE COURT: All right. Very good. How long did it take
10 you to do that?

11 MS. AGNEW: Probably took me a few hours.

12 THE COURT: All right.

13 MR. ROUTZONG: I wonder if Ms. Agnew realized that there
14 were pages missing.

15 THE COURT: Well, what I'm going to do is, I'm going to
16 make -- allow you to make those documents part of the record
17 in your motion for continuance is noted but denied, but
18 you're protected on the record.

19 I'm going to ask that these documents be placed under
20 seal by the Clerk's office and made a part of the record.

21 THE CLERK: Can we just make a copy of what Mr. --

22 THE COURT: Certainly.

23 MS. AGNEW: Your Honor, if I may, I think the Clerk's
24 office has the original --

25 THE CLERK: We have the original in our office.

1 THE COURT: Very good. We will make the original a part
2 of the record and keep it sealed and it will be there for
3 appellate review, if necessary.

4 Anything further?

5 (Court's Exhibit No. 2, two
6 packages sealed by Order of the Court.)

7 MR. ROUTZONG: There was a motion, Your Honor, to
8 require Minor 1 to be evaluated.

9 I know Your Honor has already gotten a copy of the
10 motion and basically I think in the interest of -- the Court
11 adopt the Delaney Guidelines in West Virginia verses
12 Delaney. Those guidelines are the nature of the examination
13 requested and intrusiveness inherent in that examination of
14 victims result in physical and/or emotional effects of the
15 examination on the victim, the probative value of the
16 examination to the issue before the Court, remoteness in
17 time of the examination to the alleged criminal act, and the
18 evidence already available for the defendants use and that's
19 cited in that case, Your Honor.

20 Just go down, my response to each one of those
21 guidelines, Your Honor, Minor 1 has been involved in
22 mental health counseling and expressed a desire to continue.
23 I found that out by viewing one of the videos. She's in her
24 early teens. The accuser was six at the time of the trial.
25 That means she would be (inaudible) the nature of any

1 resume cross-examination.

2 MR. ROUTZONG: If you'll bear with me I have a motion.

3 THE COURT: Mr. Foreman, ladies and gentlemen of the
4 jury, we have one legal matter. I notice jury duty almost
5 seems like an aerobic activity going back and forth.

6 I'm going to ask if you could excuse yourselves to the
7 jury room just for one moment. We'll be back momentarily.

8 (Jury out at 2:04 p.m.)

9 THE COURT: Defense, you're recognized.

10 MR. ROUTZONG: Your Honor, at this time I wanted to
11 renew -- the defense renews it's motion for a continuance or
12 a recess to allow us, Your Honor, to explore some of the
13 things we may be able do discovery by being able to fully
14 investigate DSS records. A good example, Your Honor, was
15 this issue of fire starting, the fact that she's playing
16 with fire and now she's, as the Court has pointed out, we
17 don't have an expert here nor would we have gotten one,
18 assuming I could have gotten -- I think it's not reasonable
19 to expect us to be able to fully investigate, find an
20 expert, get the expert here, find out what they say; any of
21 those things, Your Honor. Including the fact, Your Honor,
22 there's prior allegations here in the DSS records and I know
23 the Court's allowed me to go into that, but some of these
24 other issues, Your Honor, could have been more fully
25 explored. In one instance I know there's a presumption that

1 Mr. Gerald Carlyle, his name actually comes up in the
2 records early on in the incident reports, not just DSS
3 record, but some of this stuff, Your Honor, there is no way
4 I could have known but for having the DSS records.

5 In addition, Your Honor, we've heard testimony today
6 the Children's Place is associated with DSS or connected
7 with them or acts at their direction and I don't have any
8 records associated with Children's Place. There is a note
9 in the incident report where Marilyn -- her name escapes me
10 right now. Marilyn Harris. Marilyn Harris was going to
11 turn over some records to Investigator Sievers. My
12 understanding those records never turned over. Those things
13 could have discoverable potentially, Your Honor.

14 It's breathtaking that Mr. Lafavor's name doesn't show
15 up importantly in these records, if we have all of them. As
16 I said, Your Honor, some of them are missing, I believe,
17 according to my brief review.

18 THE COURT: Your motion is noted, but denied pursuant to
19 reasons stated previously.

20 MR. ROUTZONG: Thank you, Your Honor.

21 THE COURT: But you're protected on the record.

22 Are we ready for the jury.

23 (Jury in at 2:07 p.m.)

24 THE COURT: I notice that clearly we have some Baptist
25 on the jury because you like to sit in the same spot. I

1 MR. ROUTZONG: Your Honor, in addition we'd ask that a
2 new trial be granted based on prior motions and objections.
3 We believe, Your Honor, the defendant ought to be entitled
4 to a new trial because the Court did not grant a continuance
5 on the basis that the defendant did not have an opportunity
6 to fully examine DSS records. I know Your Honor has heard
7 some of the arguments on this, but some things came out at
8 trial as well and I think it should be place on the record.
9 I know that the Court heard from the solicitor as to her
10 opinion as to whether or not there was relevant material and
11 additionally, I think, Judge Early's review of it was
12 mentioned as well.

13 Your Honor, I don't think that's sufficient enough
14 information for the Court to rely on to determine whether
15 what is relevant and how much relevant material -- I that's
16 in the purview of the defense and then defense gets to
17 investigate the case and present evidence if they can and
18 Your Honor has the, of course, has the right or
19 responsibility to admit it or not admit it, and just to be
20 more specific, Your Honor, I believe -- I discovered that
21 there were missing pages. I'm not sure if the solicitor or
22 Judge Early in his review makes any notes of that. That's
23 not definitive, they could have been misplaced, as Your
24 Honor knows. I didn't have the opportunity -- I didn't feel
25 like I had the opportunity to fully go through all that.

1 THE COURT: When did you discover there were -- when did
2 you come about this revelation there were pages missing?

3 MR. ROUTZONG: I began --

4 THE COURT: Was it Thursday?

5 MR. ROUTZONG: No, sir. I began to actually look at the
6 DSS records on Sunday night.

7 THE COURT: But you had the papers on Thursday, correct?

8 MR. ROUTZONG: That's correct, Your Honor, but I wanted
9 to ask the Court to consider the fact that I had two trials
10 to prepare for. As the Court knows there's always thing to
11 be done, there's always last minute things to be done and I
12 had the first two trials on the docket for this term, and
13 even in spite of that, Your Honor, if I did find relevant
14 information -- information that could have required expert
15 testimony or even just a DSS person. To require defense
16 counsel in one and a-half days, that would be the remainder
17 of Thursday, Thursday afternoon and Friday to make that
18 determination, get a subpoena, get it filed and then served.
19 An expert -- an expert would have been out of the question
20 because an expert, as the Court knows, can't be gotten in
21 that amount of time. And in this particular case, Your
22 Honor, in the DSS records there's some evidence of Minor1
23 burned her sister with a lighter. Our experience in
24 juvenile court, as the Court probably already knows sexual
25 abuse and playing with fire, those things often go hand in

1 hand.

2 THE COURT: Is that exculpatory in inculpatory?

3 MR. ROUTZONG: Well, Your Honor, it would be exculpatory
4 in this case because those events happened before Mr.
5 Lafavor had made any contact with them. In addition, Your
6 Honor, as the Court knows, allegations there was prior
7 sexual abuse.

8 THE COURT: Do you think an expert can look at the
9 behavior of a child and say by preponderance of the evidence
10 that sexual abuse caused them to play with fire?

11 MR. ROUTZONG: Your Honor, that would be precisely why
12 the defense would rely on an expert because I'm not
13 qualified to make that determination.

14 THE COURT: Okay. All right.

15 You know, you mentioned the logistics of getting the
16 DSS person here. Didn't -- were you here when I -- I'm sure
17 you were because the comment was directed to you. That is
18 you wanted DSS here I would send one of these deputies with
19 a subpoena when the subject came up. I told you I would get
20 them here.

21 MR. ROUTZONG: That's correct, Your Honor.

22 THE COURT: That is correct?

23 MR. ROUTZONG: Yes, sir.

24 THE COURT: We do know that according to the state she
25 said that she saw these documents although they're

1 voluminous, most of it has absolutely nothing to do with
2 this case or the allegation, and you can look at the
3 groupings of papers and tell what's relevant as to this case
4 and after you take out all of the obviously irrelevant
5 documents the states indicates it only took a couple of
6 hours to go through it and you had it on Thursday didn't
7 you?

8 MR. ROUTZONG: Yes, sir.

9 THE COURT: All right. Very good.

10 Anything further?

11 MR. ROUTZONG: In that context, Your Honor, some
12 evidence came out in trial, for example, Children's Place,
13 an agent or a branch of DSS now. What we've heard from the
14 state is there was no mention of Mr. Lafavor in any of these
15 records. That's somewhat breathtaking Your Honor because
16 DSS took these children, at least the latter part of June,
17 the first part of July and these allegations had already
18 been made. And that calls into question, Your Honor,
19 whether or not we've actually gotten all the records. And
20 there is mention in the police incident report that Marilyn
21 Harris had -- who had been working with these children had
22 information and was going to turn it over to Investigator
23 Sievers and it's my understanding that she never did that.

24 THE COURT: All right. What do you have to say about
25 that?

1 MS. AGNEW: Your Honor, with regard to that, Mr.
2 Routzong did subpoena Children's Place, if he's wanting
3 those records. These DSS records were taken in their
4 entirety, brought over from DSS by DSS's attorney, given
5 directly to the judge who then gave them directly to the
6 clerk's office to be sealed and copied. So he's got all the
7 records that exist in this case.

8 With regards to whether or not Mr. Lafavor's name was
9 mentioned in these records, the children weren't taken
10 because of Mr. Lafavor, they were taken because of the
11 health situation of the mother. That's why he wasn't listed
12 in those records.

13 With regard to the missing pages, that's an issue that
14 I guess he would have to take up with DSS. Intentionally
15 not giving all the records, would the judge -- I'm not sure,
16 but he's had these records since Thursday. The only thing
17 that became relevant at all during this case, the state
18 stipulated to and he was allowed to read it in evidence
19 directly from the DSS record.

20 THE COURT: All right.

21 Anything further, Mr. Routzong?

22 MR. ROUTZONG: In addition, Your Honor, in that context,
23 I would like to point out I actually had these things --
24 actually asked DSS by subpoena in early March -- I did that
25 precisely because I know it takes a long time and this delay

1 was not the fault of the defendant. I believe the first
2 week of March I subpoenaed these records. The following
3 week DSS moved to quash the subpoena in family court. A
4 hearing was not held until May 21. Via email I received an
5 email from Adam Ness, Judge Early's clerk, saying that he
6 would not be finished with his review until June 17. We
7 didn't have the status conference until June 18, and then
8 copies were made by the clerk of court. This -- I'm going
9 through all this particularly, Your Honor, to demonstrate
10 that this is not my fault. This is prior -- this is a week
11 prior to this term of court. In addition, Your Honor,
12 there as some talk about this was a date certain. Your
13 Honor, June 10 was the date we had talked about doing this
14 trial and that arose out of a bond court hearing. I'm sorry
15 -- out of a hearing to reduce bond for Mr. Lafavor. Mr.
16 Lafavor would gladly have waived that right, waived that
17 particular day if that were a date certain. My argument,
18 Your Honor, is that it wasn't a date certain. And the state
19 also told the Court that I got a continuance on June 17,
20 which was the next term of court. Obviously, Your Honor,
21 June 17 was the day that Judge Early's clerk told us we were
22 going to actually review the records and that's a non-jury
23 term of court. I didn't receive them until the 18. That
24 can't be in any way construed as me or the defendant asking
25 and getting a continuance.

1 THE COURT: Anything further?

2 MR. ROUTZONG: In addition, Your Honor, I did make a
3 motion to have Minor1 evaluated by the Court. I know the
4 Court did find her to be competent. However, Your Honor, I
5 believe that out of this court and out of this testimony
6 there were other potential issues that the defendant could
7 have discovered pursuant to the evaluation that would be
8 evidence of prior abuse problems with veracity and the
9 indication that there were prior abuse and remember the
10 house belonging to these children and the mother --

11 THE COURT: Don't you think that it was brought out in
12 evidence that there was prior abuse? I think everybody
13 conceded to that. I think there were allegations of prior
14 abuse.

15 MR. ROUTZONG: Yes, Your Honor, but without expert
16 testimony that may have --

17 THE COURT: I think everybody including the relatives of
18 the children said they lie and stole.

19 MR. ROUTZONG: Your Honor, the issue would have been
20 what an expert could have told us that the effect the prior
21 abuse, clearly that happened before Mr. Lafavor had any
22 contact with these children, the effects on Minor1 that
23 might have motivated her to, frankly, tell untruths in
24 court.

25 And lastly, Your Honor, I believe the failure to grant

1 a continuance hampered our ability to fully build the
2 defense and to fully be prepared.

3 THE COURT: And you're protected on the record in all
4 respects.

5 Anything further from the state?

6 MS. AGNEW: No, Your Honor.

7 THE COURT: Anything further from defense?

8 MR. ROUTZONG: No, Your Honor.

9 THE COURT: All right. Your motions are noted. You're
10 protected on the record, however, they are denied. Good
11 luck to you.

12 (This proceeding was concluded.)

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EXHIBIT #2

STATE OF SOUTH CAROLINA)
)
 COUNTY OF AIKEN)
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 THE STATE,)
)
 Respondent,)
)
 v.)
)
 BARRY EUGENE LAFAVOR)
)
 Appellant.)

IN THE SOUTH CAROLINA COURT OF APPEALS

2013-GS-02-00593 (2012A0210200607)
 2013-GS-02-00589 (2012A0210900069)
 2013-GS-02-00587 (2012A0210900068)
 2013-GS-02-00584 (2012A0210900067)

AFFIDAVIT OF
 CHERYL WESTALL

STATE OF SOUTH CAROLINA
 COUNTY OF AIKEN
 I, Liz Gooden, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this _____ day of _____ 2014.
 Cheryl Westall / CSW
 Deputy Clerk

PERSONALLY appeared before me, Cheryl Westall, who being duly sworn, deposes and says:

1. I am the Deputy Clerk of Court for General Sessions in Aiken County.
2. The order signed by the Honorable Doyet A. Early, III on June 19, 2013 stated, "That upon final resolution of the case, all DSS records shall be collected, sealed, and maintained by the Aiken County Clerk of Court in a manner protecting the confidentiality of the records and opened only upon Order of this Court for good cause shown."
3. However, on July 9, 2013, Judge Early amended this order and required the Clerk of Court to destroy all copies of the DSS records and to return the original copies of their records to a representative of DSS.
4. All copies of the DSS records were destroyed by the Clerk of Court on July 9, 2013.
5. The original DSS records were returned to a representative of DSS on or about July 9, 2013.
6. The Aiken County Clerk of Court does not have any DSS records pertaining to this case at this time.

Cheryl Westall
 Cheryl Westall

SUBSCRIBED AND SWORN TO before me this 19 day of November, 2014

Shannon D. Rosenkrantz (L.S.)
 Notary Public for South Carolina
 My Commission Expires: March 25, 2018

Copys - Indigent defense

November 19 2014
Liz Gooden
Cheryl Westall / CSW

EXHIBIT #3

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County

Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BARRY EUGENE LAFAVOR,

APPELLANT.

APPELLATE CASE NO. 2013-000568

MOTION TO TRANSPORT AND UNSEAL EXHIBIT

Appellant moves this Court to transport and unseal Court's Exhibit No. 2, Department of Social Services (DSS) records pertaining to the family of the two minor alleged victims, to allow for inspection of the exhibit by counsel for Appellant to determine whether any issue related to the exhibit should be filed as part of Appellant's direct appeal. In support of Appellant's motion, Appellant provides this Court with the following exhibit: Exhibit #1 (redacted trial transcript pages 1, 28-33, 184-185, and 299-306 pertaining to a motion for a continuance).

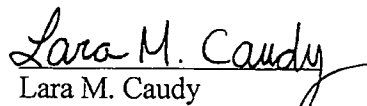
Appellant was indicted at the April 4, 2013 term of General Sessions by an Aiken County Grand Jury for second degree criminal sexual conduct with a minor, criminal solicitation of a minor, and three counts of third degree criminal sexual conduct with a minor. In March 2013, Appellant's trial counsel, Michael D. Routzong, subpoenaed the DSS records pertaining to the family of the two minor alleged victims. Exhibit #1. About a week later, a representative of DSS moved to quash the subpoena in Family Court. Exhibit #1. On May 21, 2013, a hearing was held before the Honorable

Doyet A. Early, III in the Court of General Sessions. Exhibit #1. Judge Early ordered all the records be delivered to him to determine whether the records were relevant or material. At noon on Thursday, June 20, 2013, less than four days before Appellant's trial began on Monday, June 24, 2013, Judge Early released a copy of the records to Appellant's trial counsel and the solicitor.¹ Exhibit #1. At the beginning of the trial, Appellant moved for a continuance to allow trial counsel adequate time to investigate the contents of the records and possibly hire an expert witness. This motion was denied. Exhibit #1. Trial counsel renewed this motion several times throughout the course of the trial. Exhibit #1.

In order to determine whether to argue that the denial of the motion for a continuance was an abuse of discretion as an issue in her brief, counsel for Appellant needs to review the records to determine whether the issue is meritorious. It is in the best interest of all parties to have Appellant's counsel review the records prior to deciding whether to raise the issue on appeal. Raising a clearly non-meritorious issue wastes the time of all parties involved.

Appellant respectfully requests the sealed documents be transported to the Court of Appeals and unsealed for inspection and review by Appellant's counsel. Further, Appellant respectfully requests the timelines for filing the Initial Brief of Appellant and Designation of Matter be held in abeyance pending resolution of this motion.

Respectfully submitted,


Lara M. Caudy
Attorney for Appellant

November 3, 2014

¹ It is unclear from the record whether Judge Early released all of the records or only the documents the court found to be relevant or material.

EXHIBIT #1

1 there a lot of documentary evidence in this case?

2 MS. AGNEW: There's not a lot, Your Honor. The state
3 anticipates about three pictures and one other piece of
4 evidence.

5 THE COURT: Okay. Before we leave today, if it doesn't
6 take too long, I'm going to ask you to show that to the
7 defense and if there's something y'all cans stipulate to,
8 let's do that.

9 MS. AGNEW: Absolutely.

10 THE COURT: And if there's not then we can address that
11 at 2:30 as far as admissibility to the extent we can.

12 Anything from defense?

13 MR. ROUTZONG: No, sir.

14 THE COURT: We'll stand at ease until 2:30, 2:30 sharp.

15 (Court in recess for lunch at 1:06 p.m.)

16 (Court in session after lunch at 2:30 p.m.)

17 THE COURT: All right. I understand we have some
18 matters we'd like to place on the record. I know the
19 defense has some matters and you're recognized.

20 MR. ROUTZONG: That's correct, Your Honor. We move for
21 a motion for continuance.

22 THE COURT: Yes, sir.

23 MR. ROUTZONG: Your Honor, back in March of this year I
24 requested from DSS via subpoena to receive all the DSS
25 records pertaining to this family, the accusers. About a

1 week later DSS moved in family court to quash the subpoena.
2 Amanda Whittle representing DSS.

3 We had a hearing here in General Sessions Court, May 21
4 and at that time, Judge Early ordered that all the records
5 be given to him for his review to see if there was anything
6 material or relevant. Around June 17, actually June 18, I
7 think I spoke with Adam Ness, his clerk. We reviewed what
8 had been found in the record. I mentioned to them at that
9 time I intended to ask for a continuance. The records
10 weren't actually made available to me, I believe that was a
11 Tuesday, so the records were made available to me, I think,
12 the following Thursday. I think Mr. Thompson from our
13 office picked them up around Noon on Thursday.

14 Your Honor, this is the file -- furnished to me. As
15 the Court can see that's a substantial amount of material.
16 I don't think that it's fair to the defendant or of the
17 Court for me to actually say that I've had time to review
18 these records. I've only skimmed the surface of them in the
19 last couple of days as I've been preparing for two trials
20 that were scheduled for this week.

21 Your Honor, normally, that's why I requested back in
22 March to give myself time to actually review and
23 investigate. This is a very superficial reviewing of these
24 records, Your Honor, I count pages missing. There's one
25 page that says one of three, but nothing following. I don't

1 know if there's anything relevant there or not. Certainly,
2 I can't determine what's relevant or material and I don't
3 think the Court should rely on Judge Ness's (sic) law clerk
4 or Ms. Agnew to determine whether or not something is
5 relevant. I think that's in the purview of the defense to
6 determine that and at least present it to the Court or --

7 THE COURT: Well, you've had an opportunity. You've
8 have at least Thursday to read those documents, most of
9 which don't apply to the individual victims and none of it
10 applies to the defendant, does it?

11 MR. ROUTZONG: I have no idea, Your Honor.

12 THE COURT: Oh, you haven't read them?

13 MR. ROUTZONG: No, sir, I've only scratched the surface
14 of them. I started --

15 THE COURT: Well, you've had since Thursday to do it.
16 I'll be glad to hear from the solicitor.

17 MS. AGNEW: Thank you, Your Honor. On March 14 of this
18 year we had a bond hearing in this case in front of Judge
19 Early. At that time he declined to modify bond, but at the
20 defense's request he did say that it would be revisited if
21 this case was not tried by the June term. So essentially,
22 we had a date certain for this term. After the In Camera
23 hearing of the DSS records those were determined to be
24 discoverable, not relevant or material. Those were turned
25 over to both our office and the public defender's office on

1 Thursday morning. Having gone through those records, the
2 vast majority of them are doctor's records where various
3 children in this family, only two of them were involved in
4 this case, went to the doctor. There's also a lot of
5 consent to release medical records. The defendant is not
6 listed anywhere in those records. This case has already
7 been continued the week of June 10 in front of Judge Cole,
8 as well.

9 THE COURT: Okay. All right. Yes, sir.

10 MR. ROUTZONG: Your Honor, in response, as far as this
11 being a date certain. That was a bond hearing and that's
12 not -- I wouldn't consider that -- denominate that as a date
13 certain. The continuance was not the defense's fault. I did
14 not ask for a continuance. The only thing I've ever asked
15 for were the records. I believe, Your Honor, under the
16 statute that they would have been discoverable the state --
17 we could have bypassed this altogether if the state has
18 requested these records to begin with. I don't know, Your
19 Honor, it's hard for me to guess. It's pretty much over 500
20 pages. I don't think it's reasonable for anyone to think
21 that I can go through all these pages when I've just gone
22 through the first couple and found discrepancies that Mr.
23 Ness didn't even point out.

24 THE COURT: All right. Have you had an opportunity to
25 review the documents?

1 MS. AGNEW: Yes, Your Honor.

2 THE COURT: All right. Although it does appear to be a
3 stack of papers, it doesn't require that you read all of
4 them in detail once you find out what the document is, isn't
5 that correct?

6 MS. AGNEW: That's correct, Your Honor.

7 THE COURT: And you've read all of them in its entirety?

8 MS. AGNEW: Yes, sir.

9 THE COURT: All right. Very good. How long did it take
10 you to do that?

11 MS. AGNEW: Probably took me a few hours.

12 THE COURT: All right.

13 MR. ROUTZONG: I wonder if Ms. Agnew realized that there
14 were pages missing.

15 THE COURT: Well, what I'm going to do is, I'm going to
16 make -- allow you to make those documents part of the record
17 in your motion for continuance is noted but denied, but
18 you're protected on the record.

19 I'm going to ask that these documents be placed under
20 seal by the Clerk's office and made a part of the record.

21 THE CLERK: Can we just make a copy of what Mr. --

22 THE COURT: Certainly.

23 MS. AGNEW: Your Honor, if I may, I think the Clerk's
24 office has the original --

25 THE CLERK: We have the original in our office.

1 THE COURT: Very good. We will make the original a part
2 of the record and keep it sealed and it will be there for
3 appellate review, if necessary.

4 Anything further?

5 (Court's Exhibit No. 2, two
6 packages sealed by Order of the Court.)

7 MR. ROUTZONG: There was a motion, Your Honor, to
8 require Minor1 to be evaluated.

9 I know Your Honor has already gotten a copy of the
10 motion and basically I think in the interest of -- the Court
11 adopt the Delaney Guidelines in West Virginia verses
12 Delaney. Those guidelines are the nature of the examination
13 requested and intrusiveness inherent in that examination of
14 victims result in physical and/or emotional effects of the
15 examination on the victim, the probative value of the
16 examination to the issue before the Court, remoteness in
17 time of the examination to the alleged criminal act, and the
18 evidence already available for the defendants use and that's
19 cited in that case, Your Honor.

20 Just go down, my response to each one of those
21 guidelines, Your Honor, Minor1 has been involved in
22 mental health counseling and expressed a desire to continue.
23 I found that out by viewing one of the videos. She's in her
24 early teens. The accuser was six at the time of the trial.
25 That means she would be (inaudible) the nature of any

1 resume cross-examination.

2 MR. ROUTZONG: If you'll bear with me I have a motion.

3 THE COURT: Mr. Foreman, ladies and gentlemen of the
4 jury, we have one legal matter. I notice jury duty almost
5 seems like an aerobic activity going back and forth.

6 I'm going to ask if you could excuse yourselves to the
7 jury room just for one moment. We'll be back momentarily.

8 (Jury out at 2:04 p.m.)

9 THE COURT: Defense, you're recognized.

10 MR. ROUTZONG: Your Honor, at this time I wanted to
11 renew -- the defense renews it's motion for a continuance or
12 a recess to allow us, Your Honor, to explore some of the
13 things we may be able do discovery by being able to fully
14 investigate DSS records. A good example, Your Honor, was
15 this issue of fire starting, the fact that she's playing
16 with fire and now she's, as the Court has pointed out, we
17 don't have an expert here nor would we have gotten one,
18 assuming I could have gotten -- I think it's not reasonable
19 to expect us to be able to fully investigate, find an
20 expert, get the expert here, find out what they say; any of
21 those things, Your Honor. Including the fact, Your Honor,
22 there's prior allegations here in the DSS records and I know
23 the Court's allowed me to go into that, but some of these
24 other issues, Your Honor, could have been more fully
25 explored. In one instance I know there's a presumption that

1 Mr. Gerald Carlyle, his name actually comes up in the
2 records early on in the incident reports, not just DSS
3 record, but some of this stuff, Your Honor, there is no way
4 I could have known but for having the DSS records.

5 In addition, Your Honor, we've heard testimony today
6 the Children's Place is associated with DSS or connected
7 with them or acts at their direction and I don't have any
8 records associated with Children's Place. There is a note
9 in the incident report where Marilyn -- her name escapes me
10 right now. Marilyn Harris. Marilyn Harris was going to
11 turn over some records to Investigator Sievers. My
12 understanding those records never turned over. Those things
13 could have discoverable potentially, Your Honor.

14 It's breathtaking that Mr. Lafavor's name doesn't show
15 up importantly in these records, if we have all of them. As
16 I said, Your Honor, some of them are missing, I believe,
17 according to my brief review.

18 THE COURT: Your motion is noted, but denied pursuant to
19 reasons stated previously.

20 MR. ROUTZONG: Thank you, Your Honor.

21 THE COURT: But you're protected on the record.

22 Are we ready for the jury.

23 (Jury in at 2:07 p.m.)

24 THE COURT: I notice that clearly we have some Baptist
25 on the jury because you like to sit in the same spot. I

1 MR. ROUTZONG: Your Honor, in addition we'd ask that a
2 new trial be granted based on prior motions and objections.
3 We believe, Your Honor, the defendant ought to be entitled
4 to a new trial because the Court did not grant a continuance
5 on the basis that the defendant did not have an opportunity
6 to fully examine DSS records. I know Your Honor has heard
7 some of the arguments on this, but some things came out at
8 trial as well and I think it should be place on the record.
9 I know that the Court heard from the solicitor as to her
10 opinion as to whether or not there was relevant material and
11 additionally, I think, Judge Early's review of it was
12 mentioned as well.

13 Your Honor, I don't think that's sufficient enough
14 information for the Court to rely on to determine whether
15 what is relevant and how much relevant material -- I that's
16 in the purview of the defense and then defense gets to
17 investigate the case and present evidence if they can and
18 Your Honor has the, of course, has the right or
19 responsibility to admit it or not admit it, and just to be
20 more specific, Your Honor, I believe -- I discovered that
21 there were missing pages. I'm not sure if the solicitor or
22 Judge Early in his review makes any notes of that. That's
23 not definitive, they could have been misplaced, as Your
24 Honor knows. I didn't have the opportunity -- I didn't feel
25 like I had the opportunity to fully go through all that.

1 THE COURT: When did you discover there were -- when did
2 you come about this revelation there were pages missing?

3 MR. ROUTZONG: I began --

4 THE COURT: Was it Thursday?

5 MR. ROUTZONG: No, sir. I began to actually look at the
6 DSS records on Sunday night.

7 THE COURT: But you had the papers on Thursday, correct?

8 MR. ROUTZONG: That's correct, Your Honor, but I wanted
9 to ask the Court to consider the fact that I had two trials
10 to prepare for. As the Court knows there's always thing to
11 be done, there's always last minute things to be done and I
12 had the first two trials on the docket for this term, and
13 even in spite of that, Your Honor, if I did find relevant
14 information -- information that could have required expert
15 testimony or even just a DSS person. To require defense
16 counsel in one and a-half days, that would be the remainder
17 of Thursday, Thursday afternoon and Friday to make that
18 determination, get a subpoena, get it filed and then served.
19 An expert -- an expert would have been out of the question
20 because an expert, as the Court knows, can't be gotten in
21 that amount of time. And in this particular case, Your
22 Honor, in the DSS records there's some evidence of Minor 1
23 burned her sister with a lighter. Our experience in
24 juvenile court, as the Court probably already knows sexual
25 abuse and playing with fire, those things often go hand in

1 hand.

2 THE COURT: Is that exculpatory in inculpatory?

3 MR. ROUTZONG: Well, Your Honor, it would be exculpatory
4 in this case because those events happened before Mr.
5 Lafavor had made any contact with them. In addition, Your
6 Honor, as the Court knows, allegations there was prior
7 sexual abuse.

8 THE COURT: Do you think an expert can look at the
9 behavior of a child and say by preponderance of the evidence
10 that sexual abuse caused them to play with fire?

11 MR. ROUTZONG: Your Honor, that would be precisely why
12 the defense would rely on an expert because I'm not
13 qualified to make that determination.

14 THE COURT: Okay. All right.

15 You know, you mentioned the logistics of getting the
16 DSS person here. Didn't -- were you here when I -- I'm sure
17 you were because the comment was directed to you. That is
18 you wanted DSS here I would send one of these deputies with
19 a subpoena when the subject came up. I told you I would get
20 them here.

21 MR. ROUTZONG: That's correct, Your Honor.

22 THE COURT: That is correct?

23 MR. ROUTZONG: Yes, sir.

24 THE COURT: We do know that according to the state she
25 said that she saw these documents although they're

1 voluminous, most of it has absolutely nothing to do with
2 this case or the allegation, and you can look at the
3 groupings of papers and tell what's relevant as to this case
4 and after you take out all of the obviously irrelevant
5 documents the states indicates it only took a couple of
6 hours to go through it and you had it on Thursday didn't
7 you?

8 MR. ROUTZONG: Yes, sir.

9 THE COURT: All right. Very good.
10 Anything further?

11 MR. ROUTZONG: In that context, Your Honor, some
12 evidence came out in trial, for example, Children's Place,
13 an agent or a branch of DSS now. What we've heard from the
14 state is there was no mention of Mr. Lafavor in any of these
15 records. That's somewhat breathtaking Your Honor because
16 DSS took these children, at least the latter part of June,
17 the first part of July and these allegations had already
18 been made. And that calls into question, Your Honor,
19 whether or not we've actually gotten all the records. And
20 there is mention in the police incident report that Marilyn
21 Harris had -- who had been working with these children had
22 information and was going to turn it over to Investigator
23 Sievers and it's my understanding that she never did that.

24 THE COURT: All right. What do you have to say about
25 that?

1 MS. AGNEW: Your Honor, with regard to that, Mr.
2 Routzong did subpoena Children's Place, if he's wanting
3 those records. These DSS records were taken in their
4 entirety, brought over from DSS by DSS's attorney, given
5 directly to the judge who then gave them directly to the
6 clerk's office to be sealed and copies. So he's got all the
7 records that exist in this case.

8 With regards to whether or not Mr. Lafavor's name was
9 mentioned in these records, the children weren't taken
10 because of Mr. Lafavor, they were taken because of the
11 health situation of the mother. That's why he wasn't listed
12 in those records.

13 With regard to the missing pages, that's an issue that
14 I guess he would have to take up with DSS. Intentionally
15 not giving all the records, would the judge -- I'm not sure,
16 but he's had these records since Thursday. The only thing
17 that became relevant at all during this case, the state
18 stipulated to and he was allowed to read it in evidence
19 directly from the DSS record.

20 THE COURT: All right.

21 Anything further, Mr. Routzong?

22 MR. ROUTZONG: In addition, Your Honor, in that context,
23 I would like to point out I actually had these things --
24 actually asked DSS by subpoena in early March -- I did that
25 precisely because I know it takes a long time and this delay

1 was not the fault of the defendant. I believe the first
2 week of March I subpoenaed these records. The following
3 week DSS moved to quash the subpoena in family court. A
4 hearing was not held until May 21. Via email I received an
5 email from Adam Ness, Judge Early's clerk, saying that he
6 would not be finished with his review until June 17. We
7 didn't have the status conference until June 18, and then
8 copies were made by the clerk of court. This -- I'm going
9 through all this particularly, Your Honor, to demonstrate
10 that this is not my fault. This is prior -- this is a week
11 prior to this term of court. In addition, Your Honor,
12 there as some talk about this was a date certain. Your
13 Honor, June 10 was the date we had talked about doing this
14 trial and that arose out of a bond court hearing. I'm sorry
15 -- out of a hearing to reduce bond for Mr. Lafavor. Mr.
16 Lafavor would gladly have waived that right, waived that
17 particular day if that were a date certain. My argument,
18 Your Honor, is that it wasn't a date certain. And the state
19 also told the Court that I got a continuance on June 17,
20 which was the next term of court. Obviously, Your Honor,
21 June 17 was the day that Judge Early's clerk told us we were
22 going to actually review the records and that's a non-jury
23 term of court. I didn't receive them until the 18. That
24 can't be in any way construed as me or the defendant asking
25 and getting a continuance.

1 THE COURT: Anything further?

2 MR. ROUTZONG: In addition, Your Honor, I did make a
3 motion to have Minor1 evaluated by the Court. I know the
4 Court did find her to be competent. However, Your Honor, I
5 believe that out of this court and out of this testimony
6 there were other potential issues that the defendant could
7 have discovered pursuant to the evaluation that would be
8 evidence of prior abuse problems with veracity and the
9 indication that there were prior abuse and remember the
10 house belonging to these children and the mother --

11 THE COURT: Don't you think that it was brought out in
12 evidence that there was prior abuse? I think everybody
13 conceded to that. I think there were allegations of prior
14 abuse.

15 MR. ROUTZONG: Yes, Your Honor, but without expert
16 testimony that may have --

17 THE COURT: I think everybody including the relatives of
18 the children said they lie and stole.

19 MR. ROUTZONG: Your Honor, the issue would have been
20 what an expert could have told us that the effect the prior
21 abuse, clearly that happened before Mr. Lafavor had any
22 contact with these children, the effects on Minor1 that
23 might have motivated her to, frankly, tell untruths in
24 court.

25 And lastly, Your Honor, I believe the failure to grant

1 a continuance hampered our ability to fully build the
2 defense and to fully be prepared.

3 THE COURT: And you're protected on the record in all
4 respects.

5 Anything further from the state?

6 MS. AGNEW: No, Your Honor.

7 THE COURT: Anything further from defense?

8 MR. ROUTZONG: No, Your Honor.

9 THE COURT: All right. Your motions are noted. You're
10 protected on the record, however, they are denied. Good
11 luck to you.

12 (This proceeding was concluded.)

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

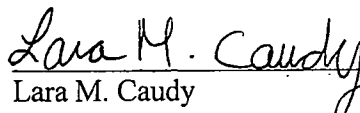
BARRY EUGENE LAFAVOR,

APPELLANT.

APPELLATE CASE NO. 2013-000568

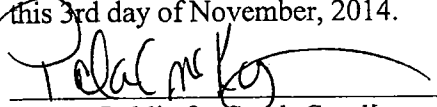
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion to Transport and Unseal Exhibit in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, S.C. 29201, and Barry Eugene Lafavor, #142183 at Allendale Correctional Institution, P.O. Box 1151, Highway 47, Fairfax, SC 29827, this 3rd day of November, 2014.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of November, 2014.


Notary Public for South Carolina

(L.S.)

My Commission Expires: July 24, 2022.

EXHIBIT #4

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2013-000568

STATE OF SOUTH CAROLINA

Respondent,

v.

BARRY EUGENE LAFAVOR,

Appellant.

RETURN TO MOTION TO TRANSPORT AND UNSEAL COURT EXHIBIT

Respondent, by and through undersigned counsel, making return to the motion to transport and unseal a sealed court exhibit would respectfully show unto this Court:

1. Appellant was charged with second degree criminal sexual conduct with a minor, two counts of third degree criminal sexual conduct with a minor, and criminal solicitation of a minor. He was represented by Michael Routzong, Esquire, in the circuit proceedings.
2. Appellant proceeded to trial on June 26, 2013. However prior to trial, Appellant subpoenaed the records of the South Carolina Department of Social Services (DSS) respecting the child victims. It also appears that DSS moved to quash the subpoena. A pretrial hearing respecting

Appellant's access to the DSS records was held on May 21, 2013, before the Honorable Doyet A. Early, III. At the conclusion of the hearing, Judge Early ordered the DSS records to be provided to him for review. Appellant thereafter inquired about access to the records on June 18, 2013, and the records were made available to him on June 20, 2013. (See Appellant's Exhibit 1, pp. 28 – 29; Respondent's Exhibit 1). Judge Early issued a protective order filed June 19, 2013, allowing the records to be turned over but, due to the sensitive and confidential nature of personal information contained in the records, restricted access to counsel for the parties and counsel's employees, investigators and experts. Judge Early also restricted use of the DSS records to Appellant's trial only and prohibited public display or possession of the records by the defendant or any other lay person. (Respondent's Exhibit 1). Judge Early further ordered that the records be collected after trial, sealed, and maintained by the clerk of court to protect the confidentiality of the records. Id. Judge Early additionally ordered that the records be opened only upon order of the court upon a showing of good cause. Id.

4. Appellant moved for a continuance when the case was called for trial asserting that he had insufficient time to conduct a review of the DSS documents. The Honorable Michael G. Nettles denied the motion for continuance but placed the documents under seal and made them part of the record for purposes of any later appeal. (Appellant's Exhibit 1, pp. 29 – 33; 184 - 185; 299 - 303).

3. Appellant now moves for an order requiring the sealed DSS documents to be unsealed and transported to this Court. Appellant's counsel asserts the need to inspect the DSS records to determine whether any issue related to the DSS records should be filed as part of Appellant's appeal.

4. Respondent, upon obtaining a copy of Judge Early's order to respond to this motion, notes for the Court that it appears the exhibit in question (DSS records) was destroyed after trial by the Aiken County Clerk of Court pursuant to a subsequent order issued by Judge Early on July 9, 2013, as indicated on the bottom of the original Order of Protection. (See Respondent's Exhibit 1). Therefore, it is likely the exhibit is no longer available.

5. If the exhibit (DSS records) is available from the Clerk of Court, Respondent does not oppose the request to have the records transported to this Court but asserts the records must remain under seal due to the personal information contained therein, including personal identifying information as outlined in Judge Early's order. (Respondent's Exhibit 1). The content of the DSS records should not be released to C-Track or the public in any manner.

6. The State also requests that the exhibit (DSS records) be maintained by the Court of Appeals under seal, with the exception of permitting this Court and counsel for the parties to review the contents of the records at the Court of Appeals. Also, in order to maintain the confidentiality of the DSS records, the State requests that any portion of briefs or other written documents filed by the parties be placed under seal if reference is made in whole or part to information taken from the DSS records.

WHEREFORE, Respondent does not oppose the motion to transport the exhibit (DSS records) but opposes the request to unseal the exhibit with the exception of allowing this Court and counsel for the parties the ability to review the contents of the exhibit at the Court of Appeals. Respondent asks this Court to order the exhibit be maintained under seal with the exception of counsel for the parties and the Court and asks that this Court require the parties to file portions of any brief or other written document referencing any information contained in the DSS records

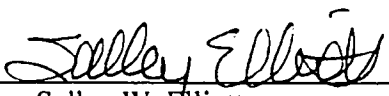
under seal to protect the confidential nature of the information in the records.

Respectfully submitted

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

J. STROM THURMOND
Solicitor, Second Judicial Circuit

BY: 
Salley W. Elliott
S.C. Bar No. 1871

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Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

November 14, 2014

RESPONDENT'S EXHIBIT 1

Certified copies
original ~~with~~ ~~sub~~ ~~5~~ ~~not used~~
July 14, 2013

STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF AIKEN)	SECOND JUDICIAL CIRCUIT
State of South Carolina,)	
vs.)	PROTECTIVE ORDER FOR DSS RECORDS
Barry Eugene Laffavor,)	2013GS0200586 - 2013GS0200587
Defendant.)	2013GS0200589 - 2013GS0200593

FILED June 19 2013
 Liz Godard
 C.C.C.P. & G.S.
 Cheryl J. Venturi
 Deputy Clerk
 2013-65-02-587, 2013-65-02-589, 2013-65-02-593

The above-captioned matter came before this Court upon Motion of the State, by and through, Assistant Solicitor Ashley L. Agnew, requesting an in camera hearing to determine disclosure of certain DSS records subpoenaed by the Defendant's attorney, Michael Routzong. The said DSS records were reviewed in camera by the Court. Following the hearing, it appears that certain DSS records should be turned over to the Defense pursuant to said subpoena, with the following restrictions:

Due to the sensitive and confidential nature of DSS records, which depict the juvenile victims' personal information, including but not limited to social security numbers, home addresses, dates of birth and telephone numbers, the following restrictions shall be applicable to all such records:

1. Counsel for the Defense may view the DSS records and/or make copies of them in preparation for trial.
2. The said DSS records shall not be used for any purpose other than to prepare for the resolution of the case to which these records pertain.
3. The said DSS records shall not be publicly displayed, or used in any other fashion, except in judicial proceedings in the case to which the records pertain.
4. The said DSS records may be viewed only by counsel and counsel's employees, investigators, experts, and those determined by counsel to be necessary in the preparation of the case. No DSS records shall be divulged to any person not authorized to view said records pursuant to this Order.
5. Counsel shall not allow the DSS records to be in the Defendant's or any other layperson's custody. Counsel for the State and/or the Defense are responsible for making any

STATE OF SOUTH CAROLINA
 COUNTY OF AIKEN
 I, Liz Godard, clerk of Court, of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

NOV 13 2014

Liz Godard
 C.C.C.P. & G.S., Aiken County, SC
Deborah M. Bell
 Deputy Clerk

Copies - Ashley Agnew
Michael Routzong

DAK
#1

individual aware of the terms of this Order, prior to granting such individual possession of the DSS records.

- 6. That upon final resolution of the case, all DSS records shall be collected, sealed, and maintained by the Aiken County Clerk of Court in a manner protecting the confidentiality of the records and opened only upon Order of this Court for good cause shown. Likewise, any recipient of the DSS records shall surrender said records to the attorney who provided it so that it may be maintained in accordance with this Order.

IT IS SO ORDERED, that the said DSS records shall be turned over to the Defense for inspection and copying, pursuant to the protective order.

[Handwritten Signature]

Doyet A. Early, III
Resident Circuit Court Judge
Second Judicial Circuit

Aiken, SC

June 19, 2013

I received A copy of DSS Records for my file.

~~X *[Signature]* Date: 6/20/13~~
Returned copies: *Stephanie Powers*
Date: 7/2/2013 *[Signature]* /CSW

I received A copy of DSS Records for my file.

~~X *[Signature]* for~~ Date: 6/20/13
For Michael Routzong,
Public Defenders Office
Returned copies: *[Signature]*
Date: 27 June 13
(Shannon D. Rosenkranz)

All copies of records are to be destroyed. *[Signature]*

Copies of DSS records returned to clerk's office have been destroyed. *Shannon D. Rosenkranz* Aiken, SC July 9, 2013
D.A. Early, III

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2013-000568

STATE OF SOUTH CAROLINA

Respondent,

v.

BARRY EUGENE LAFAVOR,

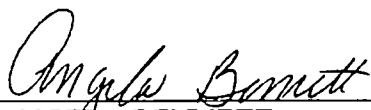
Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Motion to Transport and Unseal Court Exhibit on appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, Lara M. Caudy, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 14th day of November, 2014.



ANGELA BENNETT
Administrative Assistant

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

EXHIBIT #5

~~Certified copies~~
~~original with attachments~~
~~July 14, 2013~~
not used
CSW

STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF AIKEN)	SECOND JUDICIAL CIRCUIT
State of South Carolina,)	
vs.)	PROTECTIVE ORDER FOR DSS RECORDS
Barry Eugene Lafflor,)	2013GS0200586 - 2013GS0200587
Defendant.)	2013GS0200589 - 2013GS0200593

FILED June 19 2013
 Liz Godard
 Clerk, C.C.P. & G.S.
 Cheryl J. Hentley
 Deputy Clerk
 2013-GS-02-589, 2013-GS-02-587, 2013-GS-02-593

The above-captioned matter came before this Court upon Motion of the State, by and through, Assistant Solicitor Ashley L. Agnew, requesting an in camera hearing to determine disclosure of certain DSS records subpoenaed by the Defendant's attorney, Michael Routzong. The said DSS records were reviewed in camera by the Court. Following the hearing, it appears that certain DSS records should be turned over to the Defense pursuant to said subpoena, with the following restrictions:

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 COUNTY OF AIKEN
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NOV 13 2014

Liz Godard
 C.C.P. & G.S., Aiken County, SC
 Deputy Clerk
Deborah M. Bell

Copies - Ashley Agnew
 Michael Routzong

JAC
 #1

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Doyet A. Early, III
Doyet A. Early, III
Resident Circuit Court Judge
Second Judicial Circuit

Aiken, SC

June 19, 2013

I received A copy of DSS Records for my file.

~~X Anthony D. Ayers~~ Date: 6/20/13
Returned copies: Stephanie Parsons
Date: 7/2/2013 CSW

I received A copy of DSS Records for my file.

~~X Ben Thompson~~ for Date: 6/20/13
For Michael Routzong,
Public Defenders Office Returned copies: [Signature]
Date: 27 June 13

All copies of records are to be destroyed. [Signature]
Copies of DSS records returned to clerk's office have been
destroyed. Shannon D. Rosenkranz D.A. Early, III
Aiken, SC July 9, 2013
07-09-13

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

DEC 17 2014

SC Court of Appeals

Appeal from Aiken County
Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

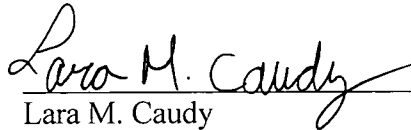
BARRY EUGENE LAFAVOR,

APPELLANT.

APPELLATE CASE NO. 2013-000568

CERTIFICATE OF SERVICE

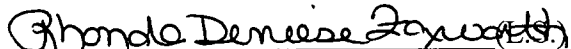
The undersigned attorney hereby certifies that a true copy of the Motion to Remand to Reconstruct Court's Exhibit in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, S.C. 29201, and Barry Eugene Laffavor, #142183 at Allendale Correctional Institution, P.O. Box 1151, Highway 47, Fairfax, SC 29827, this 17th day of December, 2014.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of December, 2014.



Notary Public for South Carolina
My Commission Expires: October 17, 2021.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED

DEC 17 2014

SC Court of Appeals

December 17, 2014

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: State v. Barry Eugene Lafavor
Appellate Case No. 2013-000568

Dear Ms. Kitchings:

Enclosed is a Motion to Remand to Reconstruct Court's Exhibit in the above case. Thank you for your assistance in this matter.

Sincerely,

Lara M. Caudy
Appellate Defender

LMC/pcm

cc: Salley W. Elliott, Esquire
Barry Eugene Lafavor