

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Orangeburg County

Honorable Benjamin H. Culbertson, Circuit Court Judge

JOSHUA DAVID SHAW CROSBY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002402

APPENDIX

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

RUSTON NEELY
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

RECEIVED
JUL 21 2017
S.C. SUPREME COURT

INDEX

INDEX.....	i
GUILTY PLEA TRANSCRIPT	1
APPLICATION FOR POST-CONVICTION RELIEF - MAY 18, 2015	23
RETURN AND PARTIAL MOTION TO DISMISS	32
APPLICATION FOR POST-CONVICTION RELIEF – NOVEMBER 12, 2015	39
ORDER FOR MERGER.....	49
POST-CONVICTION RELIEF HEARING TRANSCRIPT	51
ORDER OF DISMISSAL	100
INDICTMENT	108

State of South Carolina) In the Court of General Sessions
) First Judicial Circuit
 County of Orangeburg) 2014-GS-38-00524

State of South Carolina,)
)
 Plaintiff,)
)
 vs.) Transcript of Record
)
 Joshua David Crosby,)
)
 Defendant.)
)
 _____)

January 5, 2015
 Orangeburg, South Carolina

B e f o r e:

The Honorable Edgar W. Dickson, Judge

A p p e a r a n c e s:

Ashley Cornwell, Esquire
 Attorney for the Plaintiff

Breen Stevens, Esquire
 Attorney for the Defendant

Bonnie H. Kelly, CVR
 Circuit Court Reporter

I N D E X

<u>WITNESS/DESCRIPTION</u>	<u>PAGE NO.</u>
Case Called/Ms. Cornwell	4
Examination by the Court/Defendant	5
Recitation of Facts/Ms. Cornwell	13
Examination by the Court/Defendant	16
Mitigation/Mr. Stevens	18
Sentence by the Court	20
Certificate Page	22

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EV.</u>
------------	--------------------	-------------	------------

-- NO EXHIBITS ENTERED --

1 MS. CORNWELL: The State calls Joshua David Crosby.
2 May it please the Court?

3 THE COURT: Yes, ma'am.

4 MS. CORNWELL: Before you is Joshua David Crosby with
5 his attorney Mr. Stevens. Mr. Crosby is indicted under
6 true-billed indictment 2014-GS-38-0524, that is criminal
7 sexual conduct in the first degree.

8 The State is allowing him to plead to criminal sexual
9 conduct in the second degree for a negotiated 15 years,
10 suspended to 8 years, and five years probation. Part of
11 the probation, the Court -- or the State would ask for no
12 contact with the victim. Also no contact with anybody
13 under the age of 18 outside of a family court order.

14 This is a sexual crime, so he would be subjected to
15 the Sex Offender Registry, and all of the things that that
16 entails.

17 THE COURT: Okay.

18 JOSHUA DAVID CROSBY, having been
19 first duly sworn, testifies as follows:

20 THE COURT: All right. Mr. Stevens, you represent Mr.
21 Crosby?

22 MR. STEVENS: I do, Judge. If I could just have one
23 moment ---

24 THE COURT: Oh, yeah.

25 MR. STEVENS: --- with my client, please?

1 THE COURT: Yeah. Take your time.

2 MR. STEVENS: I appreciate it.

3 THE COURT: I'm sorry.

4 (Brief pause as Mr. Stevens confers with the
5 defendant.)

6 MR. STEVENS: Thank you, Judge.

7 THE COURT: You ready?

8 MR. STEVENS: Yes, sir, Your Honor.

9 THE COURT: All right. Mr. Stevens, you -- you
10 represent Mr. Crosby?

11 MR. STEVENS: I do, Your Honor.

12 THE COURT: And you have had an opportunity to review
13 with him the evidence that the State has against him
14 regarding this criminal sexual conduct charge?

15 MR. STEVENS: Yes, sir. David and I've been over all
16 the facts and details of the case, Judge.

17 THE COURT: All right, sir. And you have explained to
18 him the law that applies in this situation?

19 MR. STEVENS: I have, Your Honor.

20 THE COURT: Advised him of his constitutional rights?

21 MR. STEVENS: Yes, sir, Judge.

22 THE COURT: In your discussions with him, you -- you
23 believe he is aware of the charges and the law?

24 MR. STEVENS: Yes, sir, Your Honor.

25 THE COURT: Okay. It's my understanding that he is

DIRECT EXAMINATION BY THE COURT - JOSHUA DAVID CROSBY 6

1 going to plead guilty to criminal sexual conduct in the
2 second degree?

3 MR. STEVENS: Yes, sir, Judge.

4 THE COURT: There's a negotiated settlement?

5 MR. STEVENS: Yes, sir.

6 THE COURT: Okay. And you believe it's in his best
7 interest to go forward as -- as it has been explained to me
8 by the solicitor?

9 MR. STEVENS: I do, Your Honor.

10 THE COURT: Okay. All right.

11 DIRECT EXAMINATION BY THE COURT:

12 Q And Mr. Crosby, my sentencing sheet indicates that you
13 are 34 years old; is that correct?

14 A Yes, sir.

15 Q Okay. And Mr. Crosby, before you were arrested, were
16 you working somewhere?

17 A Yes, sir.

18 Q Where?

19 A Dibble, Dibble Landscape.

20 Q Oh. Dibble Landscaping. Okay. How long have you
21 worked there?

22 A I just started there.

23 Q Okay. All right, sir. And where -- where did you
24 work before then?

25 A Whitman's Iron Work -- Whitman's Construction.

DIRECT EXAMINATION BY THE COURT - JOSHUA DAVID CROSBY

7

- 1 Q How long did you worked there?
- 2 A A year.
- 3 Q Okay. What kind of construction skills you got?
- 4 A Iron working, hanging iron, welding.
- 5 Q Okay. So you got some good skills.
- 6 A Yes, sir.
- 7 Q Okay. How far did you go in school?
- 8 A Eighth grade.
- 9 Q Where were you going?
- 10 A Edisto.
- 11 Q Why did you stop in the eighth grade?
- 12 A To raise my child.
- 13 Q Okay. So in eighth grade you already had a child?
- 14 A Yes, sir.
- 15 Q Okay. How many you got now?
- 16 A Four.
- 17 Q Four? Okay. How old's the oldest one now?
- 18 A 17.
- 19 Q Okay. And where is he -- what's he doing? He or she?
- 20 A She.
- 21 Q What's she doing?
- 22 A She is the victim supposedly.
- 23 Q No. No. Well, yeah. But I mean was she -- is she in
- 24 school or ...
- 25 A I believe so.

1 Q Okay. All right, sir. All right. Mr. Crosby, have
2 you ever been treated for any mental health issues?

3 A No, sir.

4 Q Okay. Have you ever been treated for any drug or
5 alcohol dependency?

6 A No, sir.

7 Q Okay. Today are you taking any kind of medication?

8 A No, sir.

9 Q Are you under the influence of any alcohol or illegal
10 drugs today?

11 A No, sir.

12 Q So you are thinking clearly today.

13 A Yes, sir.

14 Q You know exactly what you're doing here.

15 A Yes, sir.

16 Q Okay. Mr. Stevens has indicated that he has met with
17 you and reviewed with you the evidence that the State has
18 against you regarding this charge.

19 A Yes, sir.

20 Q And my understanding, you were originally indicted for
21 criminal sexual conduct in the first degree. The State's
22 allowing you to plead to criminal sexual conduct in the
23 second degree; is that your understanding?

24 A Yes, sir.

25 Q Okay. Mr. Stevens also explained to you the law that

1 applies in this situation?

2 A Yes, sir.

3 Q You understand the sentence that you're facing?

4 A Yes, sir.

5 Q You -- and he explained to you your constitutional
6 rights?

7 A Yes, sir.

8 Q Have you understood everything he's told you?

9 A Yes, sir.

10 Q Are you satisfied with his services as your attorney?

11 A Yes, sir.

12 Q Do you need any more time to talk with him?

13 A No, sir.

14 Q All right, sir. You understand that by pleading
15 guilty, you give up your right to confront witnesses at a
16 trial or to present a defense of your own to these
17 allegations. You understand that?

18 A Yes, sir.

19 Q Okay. All right, sir. Do you want to go forward with
20 -- with the plea, or you want a jury trial?

21 A I want to go forward with the plea, sir.

22 Q All right, sir. You've heard what I have been told
23 about this is a negotiated plea. You understand that?

24 A Yes, sir.

25 Q My -- the only thing I can do is except it or reject

DIRECT EXAMINATION BY THE COURT - JOSHUA DAVID CROSBY 10

1 it.

2 A Yes, sir.

3 Q Okay. And you are aware of the terms of -- of the
4 plea ---

5 A Yes, sir.

6 Q --- that is stated in the record. You've talked that
7 over with your attorney.

8 A (No audible response.)

9 Q You got any questions about the -- the sentence?

10 A No, sir.

11 Q No? Okay. All right, sir. Other than what's been
12 told to me, has anybody promised you anything else to get
13 you to plead guilty?

14 A No, sir.

15 Q Has anyone threatened you or forced you in any way to
16 get you to plead guilty?

17 A No, sir.

18 Q So you're doing this freely and voluntarily?

19 A Yes, sir.

20 Q Okay.

21 THE COURT: Ms. Cornwell.

22 MS. CORNWELL: Thank you, Your Honor. For purposes of
23 the record, criminal sexual conduct in the second degree is
24 considered a most serious and violent offense. It is also
25 subjected to the Sexually Violent Predator Act, and also

1 the Court may impose a GPS monitoring as a result of this
2 plea ---

3 THE COURT: Okay.

4 MS. CORNWELL: --- once he gets out. I will state
5 that ---

6 THE COURT: And before you -- and thank you again for
7 reminding of that, Ms. Cornwell.

8 THE COURT: Mr. Crosby, you are aware of all those
9 things that -- and how it affects you as strikes and like
10 that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Okay. You've talked -- I know you've
13 talked -- I know Mr. Stevens has talked to you about that.

14 THE DEFENDANT: I had a question about the monitor
15 part. How long do I have to wear the monitor.

16 THE COURT: Well, I don't make that decision right
17 now. Okay. Do you understand that? That's something that
18 will come up at a -- I'm assuming when he gets released.

19 MS. CORNWELL: Your Honor, and that's what I was going
20 to put on the record. Part of the probationary sentence
21 we're leaving up to ---

22 THE COURT: Uh-huh.

23 MS. CORNWELL: --- the Court's discretion as
24 probation. I believe that the statute states that Your
25 Honor may imposed GPS monitoring as part of the sentencing

1 --

2 THE COURT: Uh-huh.

3 MS. CORNWELL: -- which would be a part of that
4 probation. So that would be up to Your Honor.

5 He would be subjected to the Sexually Violent Predator
6 Act regardless of this sentence today though, and they
7 could, again, impose that through their course of the
8 Sexually Violent Predator Act as well.

9 MR. STEVENS: And obviously, our position, Judge,
10 would be that -- should more properly be before a later
11 Court at a later time.

12 THE COURT: And -- and I -- and I'm inclined to wait
13 until we have a hearing at that time on -- on that issue,
14 rather than make a ruling right now. And that's -- that's
15 my take on that.

16 MS. CORNWELL: Okay.

17 THE COURT: Okay.

18 MS. CORNWELL: As long as we can put that on the
19 record ---

20 THE COURT: Okay. All right. Did that answer your
21 question?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Okay. All right. Go ahead, Ms. Cornwell.

24 MS. CORNWELL: Thank you, Your Honor. May it please
25 the Court.

1 THE COURT: Yes, ma'am.

2 MS. CORNWELL: On February 27 of 2014, officers met
3 with the victim in reference to a criminal sexual conduct
4 that occurred the prior day in the Orangeburg area of
5 Orangeburg County.

6 The victim, child , who is the daughter --
7 the oldest daughter of this defendant, was staying at her
8 grandmother's house the day before. There was an
9 altercation at the house, and the grandmother kicked her
10 out.

11 The victim met her father, this defendant, at a
12 residence. The defendant asked the victim to help give her
13 sister a bath. When she entered the bathroom, the
14 defendant kissed her with an open mouth. He then removed
15 her clothes and placed his penis on her back. After a few
16 minutes, the defendant began to have sex with her, against
17 her will, in the bathroom.

18 The victim stated they heard somebody coming and she
19 tried to run, but the defendant caught her and continued to
20 have sex with her.

21 After a short time, he told her she needed to get into
22 the shower and then re-dress.

23 The victim stated that she and the defendant then went
24 to her grandfather's residence next, where the defendant
25 again tried to assault her on the floor in the den;

1 however, she was able to fight him off at that time.

2 The next morning the victim called her aunt to come
3 get her and take her back to her grandmother's house. When
4 she got to her grandmother's house, she told what happened,
5 and her grandmother called the Orangeburg County Sheriff's
6 Office.

7 Officers then took the victim to the Regional Medical
8 Center where officers were speaking with the victim and she
9 said that the defendant had been assaulting her since she
10 was four years old.

11 The officers also spoke with this defendant who stated
12 that this was not the first time the victim had accused him
13 of sexually assaulting her. He said once, when she was
14 four years old, she accused him; and he went to Alabama
15 until things cooled off. So he never faced any charges on
16 that.

17 When asked to take a polygraph, the defendant stated
18 that he would fail because of his nerves. The defendant
19 was supposed to turn himself into custody, but never did.

20 On March 7 of 2014, the officers received a phone call
21 from the victim stating that the defendant was calling her
22 and threatening her.

23 On March 8 of 2014, the officers did receive notice
24 that the defendant finally did turn himself in on his own
25 accord.

1 There was a medical exam done, and that exam showed
2 redness in the vaginal area. There were no external
3 injuries seen, but the victim was very tender to the touch.

4 A rape kit was done. We did get SLED to test the rape
5 kit and swabs. No semen was collected; however, there was
6 saliva found in the rape kit that belonged to this
7 defendant. It was a mixture of at least two individuals.
8 The major contributor was this defendant.

9 Paternal male relatives of Mr. Crosby could not be
10 excluded from the -- as a contributor to the profile.

11 DSS is familiar with the family. They stated that the
12 victim was once pregnant, but lost the child before they
13 were able to do any testing. They were unsure if this
14 defendant was involved in that as well.

15 His prior record, he's got a 2012 burglary in the
16 second and a cruelty to children.

17 The victim has been notified in this. She's been --
18 she's appeared at his bond hearings. She also testified
19 against him in a family court setting. She is a mentally
20 vulnerable child, in the State's opinion. She has had some
21 hardships through this. She was committed to MUSC
22 psychiatric unit at one point, as a result of this
23 incident, where she had attempted to commit suicide.

24 So given her fragile state, both mentally and
25 emotionally, the State feels that it is in the best

DIRECT EXAMINATION BY THE COURT - JOSHUA DAVID CROSBY 16

1 interest of the child to go forward with this plea, and to
2 -- to get it done this way, as opposed to putting the child
3 through a trial, which is the only reason that the State
4 has agreed to this negotiated sentence.

5 THE COURT: Okay.

6 DIRECT EXAMINATION BY THE COURT:

7 Q All right. Mr. Crosby, you heard -- the solicitor
8 told me about the allegations that are -- that -- that they
9 would present at trial -- the evidence they would present
10 at trial?

11 MR. STEVENS: If I may, Judge. I apologize.

12 THE COURT: That's okay.

13 MR. STEVENS: Just to briefly interject. He is aware
14 of potential what we call "404(b)" evidence, the State
15 might have sought to put in there.

16 THE COURT: Right.

17 MR. STEVENS: He doesn't agree or allocute to any
18 other potential offenses that were out there, specifically
19 refutes what allegedly occurred when the child was four.

20 THE COURT: Uh-huh.

21 MR. STEVENS: Especially since other investigations --

22 -

23 THE COURT: Right.

24 MR. STEVENS: --- had shown otherwise. David's here
25 today to plead to the present offenses -- the present

DIRECT EXAMINATION BY THE COURT - JOSHUA DAVID CROSBY 17

1 offense, I should say ---

2 THE COURT: Right.

3 MR. STEVENS: --- and that's, I believe, what he wants
4 to address.

5 DIRECT EXAMINATION BY THE COURT:

6 Q And that's what I was talking about, the present. You
7 understand that that's the evidence they're going to
8 present regarding the present offense, not any of the other
9 comments that were made by the Solicitor's Office.

10 A Yeah. I think it was kind of rude of her saying that
11 this ---

12 Q Well -- well, and I -- I -- I -- but you -- you did
13 understand what she said about the present offense.

14 A Yes, sir.

15 Q And you understand that, after talking with your
16 attorney, if you went to trial on this, there's a
17 substantial likelihood that you'd be found guilty of this
18 charge; is that correct?

19 A Yes, sir.

20 Q So you want to take advantage of this plea offer; is
21 that correct?

22 A Yes, sir.

23 Q All right, sir. So how do you plead to the charge of
24 criminal sexual conduct second degree, guilty or not
25 guilty?

DIRECT EXAMINATION BY THE COURT - JOSHUA DAVID CROSBY 18

1 A Guilty.

2 Q All right, sir. Mr. Crosby, you understand that if I
3 accept your guilty plea, that this is a violent and a most
4 serious offense.

5 A Yes, sir.

6 Q Okay. You understand that if I accept your guilty
7 plea, it will be a conviction on your record.

8 A Yes, sir.

9 Q You understand the terms of a negotiated sentence.

10 A Yes, sir.

11 Q Do you want me to accept your guilty plea?

12 A Yes, sir.

13 Q Okay.

14 THE COURT: Mr. Crosby, I find that your decision to
15 plead guilty to this charge is freely, voluntarily,
16 intelligently made. I find you've had the advice and
17 counsel of a competent lawyer. I find you're satisfied
18 with the services of your lawyer. I find there's a factual
19 basis for you to plead guilty to this charge, and I am
20 going to accept your guilty plea.

21 Mr. Stevens.

22 MR. STEVENS: Thank you, Judge. May it please the
23 Court.

24 THE COURT: Yes, sir.

25 MR. STEVENS: As you've heard, Judge, David is 34

1 years of age. Although is -- he is divorced, he does have
2 four children. Obviously there's -- the present victim in
3 the case is 17 years of age. He also has two boys, ages 12
4 and 5, plus his two-year-old daughter.

5 He's lived in Orangeburg most of his life. He was a
6 resident of Cope until he turned himself into law
7 enforcement. They didn't have to go out and break down any
8 doors. He willingly and willfully turned himself in, to go
9 ahead and address the charges, Judge.

10 His parents live in Orangeburg. Unfortunately, his
11 mother is disabled. She was recently released from the
12 hospital. It's my understanding, after speaking with
13 David, that she presently is afflicted with both lung
14 cancer and diabetes.

15 He does have four siblings, all here in Orangeburg as
16 well, Judge. One brother owns a remodeling business;
17 another's in construction. He has two sisters. One of
18 them is a cashier and the other is also, unfortunately,
19 disabled. In addition, he has extended family.

20 In short, Judge, he does have a lot of family ties to
21 the community, and based upon those family ties, as well as
22 his length in the community living here, we do feel he
23 would be a decent candidate for probation as well.

24 Although he only did achieve the eighth grade in high
25 school, his reasons for leaving were actually quite noble.

1 It was to help try and raise his child.

2 His work history, he's not afraid of work either,
3 Judge. He's worked at Dibble Landscaping here in
4 Orangeburg. Before that, he worked hanging iron at
5 Whitman's Construction in Columbia, and before that, he's
6 informed me he was even in the -- working for Mr. Mark
7 Beacham, doing car repossession here in Orangeburg. So
8 it's not that he's scared of working whatsoever, Judge.

9 He has strong family ties to the community; he's not
10 afraid to work. His priors, even though he does have a
11 couple of priors, none of them have anything to do with
12 sexual conduct, Judge.

13 Accordingly, Judge, we do respectfully request the
14 Court accept the negotiated sentence, and allow him to go
15 forward and address this and -- and continue forward and
16 reintegrate with society, according to specific conditions.

17 THE COURT: Okay.

18 MR. STEVENS: Thank you, Judge.

19 THE COURT: Thank you.

20 (Brief pause.)

21 THE COURT: All right. Mr. Crosby, I'm going to go
22 along with the negotiated plea. The sentence of this Court
23 is you are committed to the State Department of Corrections
24 for a period of 15 years. I'm going to suspend that upon
25 the service of 8 years and 5 years probation. I give you

1 credit for the time that you've served.

2 You're to have no contact with the victim and no
3 contact with children under 18 without a order from the
4 Family Court.

5 Future GPS monitoring shall be determined after your
6 release, and you are to be placed on the Sex Offender
7 Registry.

8 Good luck to you.

9 MR. STEVENS: Thank you, Judge.

10 THE COURT: Thank you, sir.

11 MS. CORNWELL: Thank you, Your Honor.

12

13

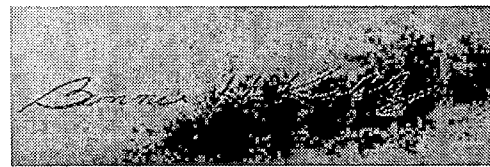
14

-- END OF TRANSCRIPT RECORD --

CERTIFICATE

I, the undersigned Bonnie H. Kelly, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the First Circuit Court for Orangeburg County, South Carolina, on the 5th day of January, 2015.

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

A rectangular box containing a handwritten signature in cursive script, which appears to read "Bonnie H. Kelly". The signature is dark and somewhat smudged.

Bonnie H. Kelly, CVR

Official Court Reporter

Columbia, South Carolina

August 3, 2015

2015CP3800647²³

FORM 5

STATE OF SOUTH CAROLINA)

County of Orangeburg)Joshua David Shaw Crosby 362588)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention EVANS Correctional
2. Name and location of Court which imposed sentence Orangeburg County
3. Name(s) of co-defendant(s) (if any) Nolle
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2014GS38-0524

(b) _____

ATTEST: TRUE COPY
 Winnifia B. Clark
 CLERK OF COURT
 ORANGEBURG COUNTY, SC

2015 MAY 18 P 12:15

FILED
 CLERK
 ORANGEBURG COUNTY, SC

CW

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 1-5-15, 15 year suspended upon the service of 8 with 5 years probation
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty a guilty plea was a negotiated sentence
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
appealed the sentence
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. Orangeburg County J.S. Court
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Not enough merit to come back to court
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. 3-1-15
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

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

(a) DNA results were inconclusive

(b) ineffective counsel

(c) _____

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

(a) My public defender did not tell me the dangers of pleading guilty

(b) The DNA could not exclude male family members of the same gene

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? NO

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO

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

(d) any other petitions, motions or applications in this or any other Court? NO

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

(a) the specific nature thereof:

i. appealed sentence

ii. _____

iii. _____

iv. _____

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

i. Orangeburg County

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i.

not enough merit to come back

ii.

iii.

iv.

(d) the date of each such disposition:

i.

1/9/15

ii.

iii.

iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i.

None

ii.

iii.

iv.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

None

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

(a) which grounds have been presented:

i.

ii.

iii.

(b) the proceedings in which each ground was raised:

i.

ii.

iii.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) I didn't have help around law library
 (b) I just reviewed PCR application
 (c) _____

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

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

PCR pro se

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

(a) the name and address of each attorney who represented you:

i. Breen Stevens Office of the public defender first
Judicial circuit, 190 Gibson st. room 110, PO Box 1112
Orangeburg SC 29116-1112

iii. _____

(b) the proceedings at which each such attorney represented you:

i. at plea
 ii. at negotiated sentence
 iii. at appeal

iii. _____

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

A new TRA.

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

NO

STATE OF SOUTH CAROLINA)

County of Orangeburg)

VERIFICATION

I, Iskha Burch, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Iskha Burch

SWORN to and subscribed before me this 15th
day of May, 2015

S. Outlaw (L.S.)
Notary Public

My Commission Expires: 2/24

2015 MAY 18 P 12:15

ATTEST: TRUE COPY
Winnifia B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC.

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

I, *Joshua Crayley*, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

+ *Joshua Crayley*
Applicant

SWORN or affirmed to and subscribed before me this
15th day of May, 2015.

S. Sullivan
Notary Public

My Commission Expires: 2/24

2015 MAY 18 P 12:16

ATTEST: TRUE COPY
Winnifia B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

2014-65-38-06524

CLERK OF COURT

5-1-2015

Winnita B. Clark,

I'm told I have to right the
 CLERK OF COURT for my p.c.f.
 form. And my transcript
 to my Case: NO: 2014A381070059
 Were I plead guilty on Jan 5 2015
 Please I need that paper work.
 thank you

Ashua Crosby #362588

Evans C.T. 610

Highway 9 west Bennettsville

SC 29512

ATTEST: TRUE COPY
 Winnita B. Clark
 CLERK OF COURT
 ORANGEBURG COUNTY, SC

Orangeburg County Clerk of Court Office

WINNIFA B. CLARK
CLERK OF COURT

YOJUANA T. CREWS
DEPUTY CLERK OF COURT

SANDRA P. OWEN
DEPUTY CLERK OF COURT



PO Box 9000
ORANGEBURG, SC 29116-9000
PHONE: (803) 533-6260
FAX: (803) 534-3848

PCR APPLICATION

PLEASE BE ADVISED OF THE FOLLOWING WHEN FILING YOUR PCR APPLICATION:

1. To receive a copy of your application you must provide a copy with your original application and a self addressed stamped envelope for its return.
2. If you request any information by mail you must send a self addressed stamped envelope for the response to your question to be returned to you. This includes: Case number/warrant number; attorney's name; charge(s); previous address; date of birth, etc.

ATTEST: TRUE COPY
Winnifa B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Joshua Crosby, #362588,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2015-CP-38-0647

**RETURN AND PARTIAL
MOTION TO DIMISS**

Respondent, making its Return to the Application for Post-Conviction Relief filed May 18, 2015, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. In May 2014, the Orangeburg County Grand Jury indicted Applicant for criminal sexual conduct, first degree (2014-GS-38-0524). Breen Stevens, Esquire, represented Applicant. On January 5, 2015, Applicant pleaded guilty to a negotiated sentence. The Honorable Edgar M. Dickson accepted the negotiations and sentenced Applicant to fifteen (15) years' imprisonment, provided upon the service of eight (8) years', the balance is suspended with probation for five (5) years.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals dismissed Applicant's appeal on March 31, 2015¹. The remittitur was returned to the circuit court on May 06, 2015.

¹ Applicant failed to provide a sufficient explanation required by Rule 203(d)(1)(B)(iv), thus matter was dismissed.

II.

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

1. "Ineffective Counsel"
 - a. "My public defender did not tell me the dangers of pleaing guilty [sic]"
2. "DNA results were inconclusive"

Respondent denies Applicant is entitled to relief on any of these claims, and demands strict proof thereof. Any claims not specifically enumerated in the application or amendments thereto will be opposed by Respondent at the evidentiary hearing.

Attached to this return and incorporated herein are the records of the Orangeburg County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this return upon receipt of any relevant materials.

III.

Respondent submits Applicant's allegation of ineffective assistance of plea counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of plea counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be

relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the Applicant must prove plea counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of plea counsel probably raises questions of fact the

record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant alleges in claim 2 that the “DNA results were inconclusive.” Respondent asserts that the claim is not cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160 (2003). An Applicant may commence a post-conviction relief action on the following grounds:

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

(Emphasis in original) S.C. Code Ann. § 17-27-20 (1976).

V.

Respondent therefore requests that this Court convene an evidentiary hearing on the issue of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary

dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

Applicant must specify any claims he intends to raise at the PCR hearing. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VII.

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

[SIGNATURE BLOCK ON NEXT PAGE]

VIII.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

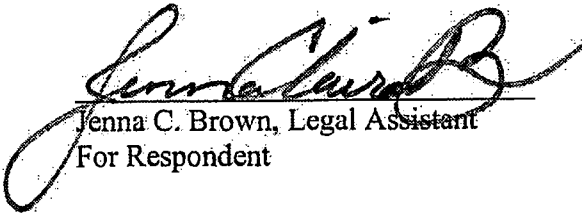
9/29, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
	)	
JOSHUA CROSBY, #362588	)	2015-CP-38-00647
	)	
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 **Return and Partial Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. Jonathan Waller, Esquire
1315 Blanding Street
Columbia, SC 29201

DATED this 29th day of September, 2015.


 Jenna C. Brown, Legal Assistant
 For Respondent

FORM 5

STATE OF SOUTH CAROLINA)

County of Orangeburg)Joshua David Shaw Crosby #362588)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2015 - CP - 38 - 01426

APPLICATION FOR
POST-CONVICTION RELIEFFILED FOR RECORD
MINISTER B. CLARK
2015 JUL 12 A 11:51
CLERK OF COURT
ORANGEBURG, SC

CW

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Evans Correctional
2. Name and location of Court which imposed sentence Orangeburg County
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2014 GS 38-0524
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 1-5-15, 15 years suspended upon the service of 8 yrs with 5 years probatio
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty a guilty plea was a Negotiated sentence
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
appealed the sentence
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. Orangeburg County G.S. Court
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Not enough merit to come back to court
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. 3-1-15
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) ineffective Counsel
- (b) DNA results were not consistant and were inconclusive
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) The DNA could not exclude male family members of the same genes
- (b) pubic Defender refused to gave me evidence in my motion
- (c) Pubic Defender presured me in to the guilty plea when ^{Rape Kit} I repeatedly told him to go to trail.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? appealed sentence, PCR
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. appealed sentence
- ii. PCR ed one time but not mericts on the last on
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Orangburg County
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. not enough merit to come back
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. 1/7/15, appeal
- ii. 9/29/2015 PCR
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

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

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

yes

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

(a) which grounds have been presented:

- i. My public defender did not tell me the dangers of pleading guilty
- ii. The DNA couldn't exclude male family members of the same gene.
- iii. _____

(b) the proceedings in which each ground was raised:

- i. DNA in conclusive
- ii. ineffective Counsel
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) Need more insite of my law and better understandi
 (b) I just got my per and my ~~has~~ meriet on the
~~per~~ other per I filed saying they motion to dismiss.

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

- (a) your arraignment and plea? Breen Steven Orangburg County public defender
 (b) your trial, if any? _____
 (c) your sentencing? Breen Steven Orangburg County public defender
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Breen Stevens Orangburg County pubic defender
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
per pro SC

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

- (a) the name and address of each attorney who represented you:

- i. Breen Stevens Office of the public defender
first Judicial circuit, 190 Gibson St. room 110, PO
~~Box~~ 1112 Orangeburg SC 29116-1112

iii. _____

- (b) the proceedings at which each such attorney represented you:

- i. at plea

- ii. at Negotiated sentence

- iii. at appeal

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

new trial

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

NO

STATE OF SOUTH CAROLINA)

County of Orangeburg)

VERIFICATION

FILED FOR RECORD
WINNIE B. CLARK
2015 NOV 12 A 11:57
CLERK OF COURT
ORANGEBURG, SC

I, Joshua Crosby, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Joshua Crosby

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

Notary Public (L.S.)

My Commission Expires: _____

This paper falls with 10-11 questions on the per.

proof of - ineffective counsel.

1. Counsel failed to show all evidence in Brady v. Maryland motion. When asked for evidence He told nothing rape kit examination.

FILED FOR RECORD
WINNIE B. CLARK
2015 NOV 12 AM 11:57
CLERK OF COURT
ORANGEBURG, SC

2. Failed to discover and present witnesses to testify to her character. There was two people who weren't talk to or got a statment from that was at the house were the inccadent allegeally accured.

3. I also ask him to file a motion to Releat Counsel, he told me the judge wouldn't approve and I would be forced to defend my self with him as a back up.

4. Also said he would challenge the presistancey of the test and when it came down to ^{he} said, the State wouldn't allow. the test nor did he do a

① § 17-28-90 Preservation of test reports

For any physical evidence or biological material previously subjected to DNA testing whether by the applicant or the solicitor or Attorney General, as applicable, the Court shall order the production of all written reports and laboratory reports in prepared in connection with the DNA testing including the underlying date and laboratory notes History: 2008 Act 110:413, § 1, eff. January 1, 2009.

⌈ Criminal Law 641.13 (5)

Two party standard adopted in Strickland v. Washington applies to guilty plea challenges based on ineffective assistance of Counsel's representation fell below objective standard or reasonableness and that there is reasonable probability that, but for Counsel's unprofessional errors, result of proceeding would have been different U.S.C.A. Const. Amend. 6]

⌈ The evidence must show the actual use of aggravated force occurred near the time and place to the assault, such that the effect of the aggravated force caused the victim to submit to the assault State v. Brown (SC 2004) 360 SC 581, 602 S.E. 2nd 392 Rape 6.]

Sincerely

Evan C. I.

Sworn to and subscribed
before me this 14th day of November, 2015

[Signature of Notary public for S. C.]

My Commission Expires: 2/2014

X
[Signature of Clerk or Deputy Clerk]

Date X

Dear Clerk,

2009-CP-38-0117⁴/_{2/15}

I write to check on a PCR I filed on May 12, 2014. I was told several months ago that your office is waiting to hear back from the Attorney General's office. It's been 18 teen months.

I write at this time to see if you could give me some kind of time frame to when my PCR may be placed on the Court docket?

I Thank you in advance for your time concerning this matter.

Sincerely,

~~William D. Allen, Sr.~~
William D. Allen, Sr.

MAILED

FILED FOR RECORD
WINNIE B. CLARK
2015 NOV 12 A 11:56
CLERK OF COURT
ORANGEBURG, SC

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
Joshua David Shaw Crosby, #362588)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

2015-CP-38-00647
2015-CP-38-01426

ORDER FOR MERGER

Applicant in the above-captioned matters has filed two separate applications for post-conviction relief. Each application challenges the same conviction and makes similar allegations in regards to the subject convictions (2015-CP-38-00647 & 2015-CP-38-01426). Since an applicant is not generally permitted to have multiple post-conviction relief proceedings in regards to the *same convictions* (See Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); S.C. Code Ann. § 17-27-90), this Court hereby orders that the two proceedings be merged. The second application for post-conviction (2015-CP-38-01426) will be considered an *amendment* to the initial application for post-conviction relief (2015-CP-38-00647).

The Orangeburg County Clerk of Court is therefore ordered to merge the two cases, with docket number 2015-CP-38-00647 being the surviving case. Hereafter, the word "Application" will refer to docket number 2015-CP-38-00647, and the word "Amendment" will refer to docket number 2015-CP-38-01426, which will be considered an amendment to the application for post-conviction relief.

IT IS THEREFORE ORDERED that the Orangeburg County Clerk of Court merge docket number 2015-CP-38-01426 into docket number 2015-CP-38-00647, with file 2015-CP-

38-00647 being the surviving file and all future pleadings bearing docket number 2015-CP-38-00647. Docket number 2015-CP-38-01426 will be dismissed upon the merger.

AND IT IS SO ORDERED this 22nd day of Feb., 2016.


 THE HONORABLE EDGAR W. DICKSON
Chief Administrative Judge
First Judicial Circuit

Orangeburg, South Carolina.

In the Court of Common Pleas
First Judicial Circuit
2015-CP-38-0647

Joshua David Shaw Crosby,
Applicant,
vs.
State of South Carolina,
Respondent.

Transcript of Record

May 18, 2016
St. George, South Carolina

B E F O R E:

The Honorable Benjamin H. Culbertson, Judge

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

Jonathan D. Waller, Esquire
Attorney for the Applicant

J. Clayton Mitchell, III, Esquire, Assistant Attorney General
Attorney for the Respondent

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

I N D E X

<u>Witness/Description</u>	<u>Page No.</u>
Joshua Crosby	
Direct Examination by Mr. Waller	8
Cross-examination by Mr. Mitchell.	17
Redirect Examination by Mr. Waller	23
Breen R. Stevens	
Direct Examination by Mr. Mitchell	25
Cross-examination by Mr. Waller.	37
Ruling of the Court	47
Certificate Page.	49

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Page No.</u>
	No Exhibits Introduced.	

1 THE COURT: All right, this is 2015-CP 38-647, *Joshua*
2 *David Crosby vs. State of South Carolina*. The matter comes
3 before the court on an application for post-conviction
4 relief. Please give the court reporter your name and who
5 you represent.

6 MR. MITCHELL: Clay Mitchell for the state.

7 MR. WALLER: Jonathan Waller for Mr. Crosby.

8 THE COURT: All right. Now, I understand from the
9 application and packet from the attorney general's office
10 that Mr. Crosby pled guilty to criminal sexual conduct in
11 the second degree, which was a lesser-included offense of
12 criminal sexual conduct in the first degree. The
13 sentencing sheet shows that he waived presentment to the
14 grand jury but he didn't initial it. Was this a
15 lesser-included offense of an indicted charge?

16 MR. WALLER: It was, Your Honor.

17 THE COURT: Okay. All right. So, he was indicted on
18 criminal sexual conduct in the first degree, and he pled
19 guilty to criminal sexual conduct in the second degree.

20 MR. WALLER: That's ---

21 THE COURT: Is that correct?

22 MR. WALLER: That's correct.

23 THE COURT: All right. He received a negotiated
24 sentence of fifteen years. Is that correct?

25 MR. WALLER: Fifteen years suspended on the service of

1 eight years and five years' probation to follow.

2 THE COURT: All right. Were there any other charges
3 that were dismissed, reduced, or nolle prossed?

4 MR. WALLER: I think there was a filing false police
5 report that was also nolle prossed pursuant to this plea,
6 Your Honor.

7 THE COURT: All right, and do we know what the
8 sentence is on filing a false police report?

9 MR. WALLER: I think it might be up to five.

10 THE COURT: Filing false police report, five years
11 and/or \$1000 fine if it's -- was it a false report of a
12 felony or a misdemeanor?

13 MR. WALLER: Yes, sir, a felony.

14 THE COURT: Okay. All right. So, that's five years
15 and/or \$1000.

16 All right, Mr. Crosby, if you would please stand.
17 Raise your right hand while the clerk places you under
18 oath.

19 CLERK OF COURT: Please state your full name for the
20 record.

21 APPLICANT: Joshua David Shaw Crosby.

22 JOSHUA DAVID SHAW CROSBY, BEING
23 DULY SWORN, TESTIFIES AS FOLLOWS:

24 THE COURT: Sir, your name is Joshua David Crosby?

25 APPLICANT: Yes, Your Honor. Yes, sir.

1 THE COURT: All right, sir, you can put your hand
2 down. Thank you, Mr. Crosby. Now, you have filed an
3 application seeking post-conviction relief from your guilty
4 plea and sentence for criminal sexual conduct in the second
5 degree.

6 APPLICANT: Yes, sir.

7 THE COURT: Now before we proceed on this matter, I've
8 got to go over some information with you to make sure that
9 you understand what's happening here today and the
10 consequences of proceeding with this application for
11 post-conviction relief.

12 Now, first of all, if I deny your application and I
13 find that you are not entitled to any post-conviction
14 relief, then you will be returned to the Department of
15 Corrections or whatever facility you are now serving your
16 sentence to complete the sentence that has been imposed on
17 you. Do you understand that?

18 APPLICANT: Yes, sir.

19 THE COURT: All right. If I grant your application
20 for post-conviction relief, then I can set aside your
21 conviction, I can set aside the sentence, or I can set
22 aside both of them. Do you understand that?

23 APPLICANT: Yes, sir.

24 THE COURT: All right. If I set aside both the
25 conviction and the sentence, or if I set aside your

1 conviction, then that goes along with setting aside your
2 sentence. Your case will be sent back for further
3 proceedings; the case will start all over. It will begin
4 from the very beginning of the proceedings against you. If
5 any charges against you were reduced, dropped, dismissed,
6 or nolle prossed, they could be brought back against you,
7 and you could be facing the original charges again. Do you
8 understand that?

9 APPLICANT: Yes, sir.

10 THE COURT: All right. So, if I grant your request
11 for post-conviction relief, I grant what you're asking for
12 in this case, the case could be remanded and the state
13 could seek -- or prosecute you for criminal sexual conduct
14 in the first degree, which carries up to thirty years in
15 prison.

16 APPLICANT: Yes, sir.

17 THE COURT: They could also prosecute you on the
18 filing a false police report, which carries five years and
19 a \$1000 fine. So, even if you prevail at this
20 post-conviction relief hearing, if you are convicted on
21 both of those charges, you could wind up receiving a
22 sentence of thirty-five years in prison and a fine of
23 \$1000. Do you understand ---

24 APPLICANT: Yes, sir.

25 THE COURT: --- that? Do you understand?

1 APPLICANT: Yes, sir.

2 THE COURT: All right. Knowing that, do you still
3 wish to proceed ---

4 APPLICANT: Yes, sir.

5 THE COURT: --- with your application for
6 post-conviction relief?

7 APPLICANT: Yes, sir.

8 THE COURT: All right, anything further you want
9 placed on the record in that regard, Mr. Waller?

10 MR. WALLER: Nothing further, Your Honor.

11 THE COURT: Anything further the state wants placed on
12 the record in that regard?

13 MR. MITCHELL: No, Your Honor.

14 THE COURT: All right, anything before we call the
15 first witness?

16 MR. WALLER: Nothing, Your Honor.

17 THE COURT: All right, Mr. Waller, you can call your
18 first witness.

19 MR. WALLER: Call Joshua Crosby.

20 THE COURT: All right.

21 (A PAUSE.)

22 THE COURT: All right, sir, go ahead.

23 MR. WALLER: Thank you, Your Honor. May it please the
24 court?

25 THE COURT: Yes.

J. CROSBY - DIRECT EXAMINATION BY MR. WALLER

8

1 DIRECT EXAMINATION BY MR. WALLER:

2 Q. Good morning, Mr. Crosby. How are you today?

3 A. Could have been better.

4 Q. Okay. Mr. Crosby, I want to take you back. You were
5 arrested in early 2014 on criminal sexual conduct in the
6 first degree. Is that right?

7 A. Yes, sir.

8 Q. Okay. When were you arrested on the filing a false
9 police report?

10 A. I was arrested in 2013.

11 Q. Okay. So, that was pending when you were arrested on
12 the CSC?

13 A. Correct.

14 Q. Okay. Who was your lawyer on the filing false police
15 report?

16 A. Breen Stevens.

17 Q. Okay. Was he also your lawyer on the CSC charge?

18 A. Yes, sir.

19 Q. Okay. Had you met with him on the filing false police
20 report prior to being arrested?

21 A. If I can remember, I had him as my lawyer, and I never
22 got a chance to talk to him, to go in his office, and when
23 I turned myself in on March the 8th 2014, I didn't get to
24 talk to him until after that.

25 Q. Okay, until after you were arrested?

J. CROSBY - DIRECT EXAMINATION BY MR. WALLER

9

1 A. Yes.

2 Q. Turned yourself in? Were you able to make bond, or
3 were you locked up during the ---

4 A. I, I was able to make bond on the filing false police
5 report, a felony violation, but denied on the CSC first.

6 Q. Okay. When you turned yourself in March 8th, how long
7 after that was it before you met with Mr. Stevens?

8 A. I believe, I want to say between -- man. I want to
9 say between May and April.

10 Q. Okay.

11 A. I want to say.

12 Q. When y'all met for that first time, do you remember
13 what y'all talked about?

14 A. He explained me the nature of the charges, and told me
15 that it carries up from zero to thirty, and told me that he
16 was my lawyer, and that -- I don't think he had the motion
17 at that time.

18 Q. Okay. Do you know, and you may not know, whether he
19 filed a motion for discovery?

20 A. He filed for a motion to discovery. I found that out
21 after I got all the motion when I was in Evans lockup.

22 Q. Okay. At some point, did y'all discuss the evidence
23 the state had against you, particularly about the CSC
24 charge?

25 A. We, we, we discussed it a couple of times, and then I

1 asked him for the rape kit, and he told me that the jail
2 wouldn't allow me to have it, and then he showed one part
3 to me, and then I couldn't examine the rest myself. And
4 then I asked him again further on down at another meeting,
5 and his exact words was it don't mean nothing.

6 Q. Okay. When you say you examined one part of it, do
7 you recall what part you examined?

8 A. The part where they said that the walls were red and
9 irritated, and they found white lubricant stuff, and that
10 was no external injuries seen, but the P.T. was tender to
11 the touch.

12 Q. Okay. Do you know what was contained in the part that
13 you weren't allowed to examine?

14 A. The part to where she was examined, where they said
15 that she had a bruise on the elbow, where she had said that
16 she ain't had sex with nobody within seven days, and her,
17 her full statement that she gave on the rape kit.

18 Q. Okay. Have you, since you've been incarcerated, have
19 you gotten copies of all that stuff?

20 A. Yes. Now.

21 Q. Okay, and it's not what you had?

22 A. It's not what I had when I was in the county.

23 Q. Okay.

24 A. I didn't to get it, get it when I was in the county.

25 Q. Did you, did you get to see it and go over it with Mr.

J. CROSBY - DIRECT EXAMINATION BY MR. WALLER

11

1 Stevens?

2 A. I just went over that one page. I didn't go over the
3 rest of it with Mr. Breen Stevens.

4 Q. Did you ask him if you could ---

5 A. I asked him several and wrote several letters asking
6 for it at the same time.

7 Q. Okay.

8 A. For all my motion. Even wrote the solicitor.

9 Q. Okay. Was there some DNA testing done in your case
10 that you're aware of?

11 A. Yes, sir.

12 Q. Okay. Did you have a chance to discuss the DNA
13 testing with Mr. Stevens?

14 A. Yes, I did. He told me that we would challenge
15 persistency of the test, and then when it came down to it,
16 him and Ms. Peggy Hines, he told me that, that the judge
17 would not allow it, the funds, to, to challenge the
18 persisty [sic] of the test.

19 Q. Okay. So, you, you requested that it be challenged?

20 A. Yes, sir.

21 Q. But you were told that there wasn't funding?

22 A. That the judge wouldn't fund it.

23 Q. Okay. Do you know if any motions for funding were
24 filed?

25 A. After I got the motion, I didn't see none.

1 Q. Okay. Other than that, do you know, though?

2 A. No, sir.

3 Q. Okay. How many times do you think you met with Mr.
4 Stevens?

5 A. I met with Mr. Breen Stevens a lot because I'm a
6 person that likes to stay on things; I'm kind of
7 aggravating.

8 Q. Okay. Were you -- outside of, of the rape kit that
9 you, you referred to earlier, were you given a copy of the
10 discovery motion?

11 A. I was given a copy of some, some of the evidence.

12 Q. Okay.

13 A. Not all of it.

14 Q. Do you know since you've, since you've received the
15 complete copy, do you know what was missing?

16 A. What was missing was the rape kit. The rape kit was
17 the main thing missing and a couple of the indict -- things
18 that where he had filed a motion for reconsideration of
19 bond, and that's pretty much, pretty much it.

20 Q. Okay. When you met with Mr. Stevens, did y'all
21 discuss any potential defenses that you might have?

22 A. He pretty much told me that when we had our last
23 discussion, he said that he couldn't beat it through the
24 prependerance [sic] of the evidence.

25 Q. Okay.

J. CROSBY - DIRECT EXAMINATION BY MR. WALLER

13

1 A. Preponderance of whatever.

2 Q. Okay.

3 A. But other than that, I asked him, also asked him about
4 a lie detector test, a polygraph test, which the sheriff
5 had wanted me to take, but when I went in to talk to the
6 sheriff on the 28th, the -- I ended up getting hold of
7 another lawyer name Mr. Glenn Walters, who told me not to
8 take the polygraph test, not to implicate myself any
9 further. To come straight to his office, and it's exactly
10 what I did, and I told Mr. Breen Stevens about that. Mr.
11 Breen Stevens told me that he would arrange it and he would
12 see to arrange it, but if it did us any good, that he would
13 keep it. If didn't do any good, he'd throw it away.

14 Q. Okay.

15 A. That there was not done.

16 Q. Okay. I want to back up just a bit. You said that
17 Mr. Stevens told you that he wouldn't be able to provide an
18 adequate defense of your case beyond the preponderance of
19 the evidence. Did y'all discuss the fact that that is not
20 on the burden -- the level of burden of proof required in
21 criminal cases?

22 A. At one point in time, if I can remember because I was
23 going through a DSS case as well, he had told me that a DSS
24 case is more or less won through preponderance. In other
25 words, circumstantial evidence, which is a common case, but

1 in the case of general sessions it has to be within a
2 shadow of a doubt. But at that time, no, he didn't talk to
3 me about that, but he had talked to me before about that,
4 and I could remember he talking to me before about that.

5 Q. Okay. At the time you entered your plea, were you
6 aware of the burden, of the level of proof the state would
7 have to -- beyond a reasonable doubt the state would have
8 to prove?

9 A. At that time, all I could -- main thing I could think
10 about was wanting to get home to my kids, and at the same
11 point in time not being able to see everything and clear,
12 and I couldn't talk to nobody to find out what was going on
13 or anything else. At that time, I really wasn't satisfied
14 with it, but I just wanted to get out of the county and get
15 away.

16 Q. Okay. When you and Mr. Stevens met, did y'all discuss
17 any other witnesses that might be able to help with the
18 defense?

19 A. I discussed with him the fact that the two -- the
20 three boys that was in -- the three men that was in the
21 house at the time, as well as the one that transferred us
22 from -- my friend Shane Wingard transferred us from there
23 to the other point, and he said that their testimony would
24 be no good for the simple fact is they wasn't in, in the
25 bathroom, but yet they were also in the house at the same

J. CROSBY - DIRECT EXAMINATION BY MR. WALLER

15

1 point in time.

2 Q. Okay. Do you know if -- did, did you provide Mr.
3 Stevens with the names of those people?

4 A. I provided him with the names of them people and also
5 gave them to his investigator.

6 Q. Okay. Do you know if anything was done to try to
7 locate them?

8 A. From what I gather, the sheets that I required -- and
9 talking with the investigator, he said he went over there
10 and talked to them and left numbers and phone calls. But
11 at the same point in time, when I got a hold of them on the
12 phone from the county jail, they said that they had not
13 heard or seen of the investigator.

14 Q. Okay. Were you able to meet with the investigator on
15 your own?

16 A. I met with him at the county jail, and his attitude
17 was poor.

18 Q. Okay. Were you able to talk with him after he
19 provided the names?

20 A. He really, he really more or less told me it was his
21 way, and there wasn't nothing else he -- he had a attitude
22 on his shoulders from the minute that I walked in and to
23 the minute that I left, which was no more than ten minutes,
24 and then he got up and left.

25 Q. Okay. When you and Mr. Stevens met -- the, the victim

1 in this case gave a statement. Is that right?

2 A. Gave a statement? Yes, sir.

3 Q. Did, did she provide more than one statement?

4 A. She provided a statement to the police, and then a
5 statement for the rape kit itself, and as well as on the
6 stand as DSS -- for DSS court
7 as court.

8 Q. Okay. Did you and Mr. Stevens talk about those, I
9 guess, three statements?

10 A. Yes, sir.

11 Q. Okay. Did y'all compare the three?

12 A. I'm really not sure how much he compared it, but I
13 know how much I compared it, and they, they more or less
14 told the same story, but there were, there were, there
15 were, there were a lot of small things that would bring a
16 lot, bring a lot of good to the case itself and defense on
17 my case.

18 Q. Okay.

19 A. And as well as whole -- from after me viewing the rape
20 kit when I was in lockup at Evans Correctional Institution
21 after I finally got the rape kit, I seen that it would
22 actually been a lot of -- better for our defense going to
23 trial period.

24 Q. Okay. If you had been able to review all of the
25 discovery in your case -- the rape kit, the DNA testing

J. CROSBY - DIRECT EXAMINATION / CROSS-EXAMINATION

17

1 result, the victim's statements -- would you have still
2 pled guilty, or would you have gone to trial?

3 A. No, I sure wouldn't have.

4 Q. You would have gone to trial?

5 A. I'd have took it all the way, like twelve of them.

6 Q. Mr. Crosby, I have no further questions for you. Is
7 there anything you think I've left out that the court needs
8 to be aware of Mr. Stevens's representation of you?

9 A. Pretty much I think, I think he didn't, he didn't want
10 to do the job all the way. So, pretty much to me, the way
11 I see it, other than that, that's it.

12 Q. Okay.

13 MR. WALLER: Please answer any questions Mr. Mitchell
14 has.

15 WITNESS: No problem.

16 THE COURT: Cross-examination?

17 CROSS-EXAMINATION BY MR. MITCHELL:

18 Q. Good morning, Mr. Crosby.

19 A. Good morning.

20 Q. So, this was a negotiated sentence, right?

21 A. Yes, sir.

22 Q. So, you knew exactly what you were going to get if
23 Judge Dickson accepted, right?

24 A. Actually, half of it was supposed to be a negotiated
25 sentence, but then the negotiation changed when we got on

1 the stand itself. It was supposed to be fifteen suspended
2 to eight, probation discretion up to the judge, but when we
3 got up there, the state recommended five years' probation,
4 which I said something to my lawyer about, Mr. Breen
5 Stevens, and he pulled me to the side and said that since
6 the state has already recommended it, the judge was going
7 to go with it anyway. I was still upset with the fact at
8 that part right there.

9 Q. Okay, but you understood the fifteen and you'd be
10 serving eight, though, right?

11 A. I understood that, yeah.

12 Q. And it was down on CSC first to CSC second?

13 A. Yes, sir.

14 Q. Okay. You talked a little bit about the witnesses, so
15 Mr. Stevens had a private investigator on the case. Is
16 that right?

17 A. I believe they all got one, the public defenders.

18 Q. Okay. So, he tried to track down the witnesses that
19 you gave to Mr. Stevens, right?

20 A. The investigator?

21 Q. Right.

22 A. I suppose so.

23 Q. Okay, and there was nothing came -- nothing came of
24 that, though? He, he said he was unable to find them ---

J. CROSBY - CROSS-EXAMINATION BY MR. WALLER

19

1 A. He said he was unable to find them, and they said that
2 he -- they was unable to talk to him.

3 Q. Okay.

4 A. Because they tried to call him back as well as Mr.
5 Breen Stevens, and Mr. Breen Stevens wouldn't return their
6 phone calls.

7 Q. Okay. So, Mr. Stevens was ignoring the witnesses?

8 A. From what they tell me.

9 Q. Okay. Now, the DNA results came kind of late leading
10 up to the plea. Isn't that, isn't that right?

11 A. Came right the day of plea.

12 Q. The day of the plea, you got DNA results?

13 A. The day of the plea.

14 Q. Okay.

15 A. And also he didn't have none of his notes that day
16 neither because he come in and I asked him where the rape
17 kit was, and his exact words was I don't have it. It's in
18 my office.

19 Q. Okay.

20 A. Ms. Peggy Hines was with him.

21 Q. So, the DNA was a match on your saliva, right?

22 A. So they say.

23 Q. Okay. So, that was the result that came out the day
24 of the plea. Is that right?

25 A. Correct.

1 Q. Okay. Now, Mr. Stevens reviewed the evidence that he
2 had with him -- with you at the jail. Is that right?

3 A. At the jail? He never come see me at no jail now.

4 Q. Well, when you, when you met with him ---

5 A. He was at the courthouse.

6 Q. At the courthouse. You went over the evidence that
7 the state was going to put up, right? I mean ---

8 A. Some of the evidence, yes.

9 Q. So, you knew about the statements from the victim?

10 A. I knew about the statements from the victim, the
11 statement that Mr. Jason Osborn gave. I knew about the
12 statement that Mr. Shane Wingard stated. There was two
13 victims in there -- two of the witnesses -- my bad. Not
14 victim, witnesses that were at the house at the time that
15 could have made a big deal -- made a big difference if
16 they'd got a hold of them. And they were trying to come
17 forth, but at some point in time nobody would give them a
18 phone call back.

19 Q. Okay.

20 A. And those were what they told me on the phone, and I
21 talked to them frequently on the phone.

22 Q. So, they were at the house, but they couldn't do
23 anything to really dispel what happened in the bathroom.

24 Is that kind of what Mr. Stevens told you?

25 A. Kind of what, kind of what he said.

J. CROSBY - CROSS-EXAMINATION BY MR. WALLER

21

1 Q. Okay, that it may not be helpful even if we get in
2 touch with them because they can't testify as to what was
3 going on ---

4 A. They can't testify ---

5 Q. --- in the ---

6 A. --- to what was going, but they could testify to the
7 fact of where she came out the bathroom.

8 Q. Kind of the circumstances of what happened, right?

9 Now, you agreed with -- when you pled guilty, you
10 agreed with the facts as the way the state presented them,
11 didn't you?

12 A. Presented it? Could you explain?

13 Q. You know how the state went through at the plea
14 hearing and explained what they intend to prove, and you
15 essentially agreed with that?

16 A. At that point in time, I really wasn't -- I was told
17 if I disagreed with anything, that they would automatically
18 turn the negotiation down.

19 Q. Okay, and the plea might be turned down, too, right?

20 A. That's right. So, I had to -- so, it was either agree
21 with everything or...

22 Q. So, it was lie to the judge or ---

23 A. Lie to the judge or take the sentence.

24 Q. Okay. So, you didn't think to clarify anything in
25 there?

J. CROSBY - CROSS-EXAMINATION / REDIRECT EXAMINATION 22

1 A. At that time, I hesitated a couple times, but as I can
2 remember and as I tell you and as I told you before, it's
3 either agree with everything or lose the, lose the plea.

4 Q. Okay. So, you took advantage of the plea?

5 A. I took advantage of what I was supposed to take
6 advantage of.

7 Q. Okay, and that was your choice, I mean?

8 A. Not really but at the same point in time -- at that
9 time, yeah, but coming to find out, I wouldn't have took
10 that plea regardless.

11 Q. Okay.

12 A. They could have took it and choked on it for all I
13 care.

14 Q. So, your testimony is today if you had other evidence
15 reviewed with you, that you would have taken the case to
16 trial?

17 A. Right. I'd have let all twelve of them.

18 Q. Okay. What other evidence are you talking about?

19 A. The evidence being the rape kit, being the persistency
20 of the DNA, as well as the other witnesses.

21 Q. Okay. Mr. Stevens talked about the stuff with you,
22 though, right?

23 A. Yeah, but, you know what I'm saying, little things
24 that's -- I'm not no idiot, so please don't sit here and
25 concept me as one. And after being in Evans Correctional

J. CROSBY - CROSS-EXAMINATION / REDIRECT EXAMINATION

23

1 Institution and going through the law library reading a
2 lot, you know what I'm saying, I learned a lot. Number
3 one, the witnesses hold a lot of weight as well as
4 everything else, too. And the way she came out the
5 bathroom also holds a lot of weight.

6 Q. But you knew all this at the time you pled, right?

7 A. Somewhat.

8 Q. Okay.

9 A. Far as most the other charges, I'm pretty good at
10 really getting by and beating them, but as far as the rape
11 charge, my first rape charge, I'm, I'm not going to lie. I
12 didn't rape that girl. So, therefore -- and even -- I also
13 told Ms. Peggy Hines and her exact words was prison has a
14 lot of innocent people in prison. There's a lot of
15 innocent people in prison, and that was her exact words
16 when I told her I didn't rape this -- what do I do?

17 Q. Okay, but you told the judge you did do it, right?

18 A. I had no choice but tell the judge.

19 MR. MITCHELL: All right, no further questions.

20 THE COURT: Redirect?

21 MR. WALLER: Just briefly, Your Honor.

22 REDIRECT EXAMINATION BY MR. WALLER:

23 Q. Mr. Crosby, talking about the, the two witnesses, you
24 don't really know what the private investigator did to try
25 to locate them, do you?

1 A. No, sir, I don't.

2 Q. You just know from talking to them that he never got
3 in touch with them?

4 A. He, he supposedly never got in touch with them. They
5 -- I talked to them several times, and I still talk to them
6 right now to this day.

7 Q. But you don't know what he did to try or if he tried
8 at all?

9 A. No, sir.

10 MR. MITCHELL: No further questions.

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

12 (THE WITNESS EXITS THE STAND.)

13 THE COURT: Call the next witness.

14 MR. WALLER: Your Honor, the applicant has no further
15 witnesses.

16 THE COURT: All right. State wish to call any
17 witnesses?

18 MR. MITCHELL: State calls Mr. Breen Stevens.

19 THE COURT: All right.

20 CLERK OF COURT: Please raise your right hand. State
21 your full name for the record.

22 WITNESS: Breen Richard Stevens.

23 BREEN R. STEVENS, BEING DULY

24 SWORN, TESTIFIES AS FOLLOWS:

25 DIRECT EXAMINATION BY MR. MITCHELL:

B. STEVENS - DIRECT EXAMINATION BY MR. MITCHELL

25

1 Q. Good morning, Mr. Stevens.

2 A. Good morning.

3 Q. How long have you been practicing law?

4 A. Oh, going on six years now, I believe.

5 Q. Okay. What did you do out of law school?

6 A. Well, I, I clerked full time for Judge Pieper on the
7 Court of Appeals even while I was in law school, and I did
8 that when I was going to law school at night. And then
9 right out of law school, I worked in criminal defense at --
10 the law firm at the time was named Savage and Savage out of
11 Charleston, South Carolina. Did that for over a year, and
12 then I was hired by Bob Dudek out of Appellate Defense, and
13 I worked there for just shy of two and half years. And
14 then I believe it's my wife who wanted to move back to the
15 Lowcountry, and I enjoy being married more than I did an
16 appellate defender, so, so we took the job at the
17 Orangeburg public defender's office working for Mr. Mark
18 Linedecker, who was good enough to employ us, and that's
19 where I've been ever since.

20 Q. Okay, and how did you become involved with Mr.
21 Crosby's case?

22 A. I was appointed to Mr. Crosby's case -- well, his CSC
23 case, which is the one which I have the file on today.
24 Let's see here. When did that -- I believe it was in
25 March. Mid March was when I appointed on that case, but I

1 did previously have an earlier case on -- which I
2 represented him on which, frankly, I was able to get that
3 dismissed at preliminary hearing first, but I think the
4 state brought the charge back during the course of the CSC
5 case.

6 Q. Okay. So, you had known Mr. Crosby from that previous
7 representation?

8 A. Yes, sir.

9 Q. All right. So, then this case, CSC is a pretty
10 serious charge. When, when you met with him, did you
11 discuss the elements of each charge and the preliminary
12 advice like that?

13 A. Yes, sir. Generally speaking with almost all my
14 clients, I, I go through almost all the basics of
15 confidentiality. I go through decision-making in a general
16 sessions case, the process, who makes what decisions. For
17 example, a client and only a client can determine if they
18 want to be represented or if they want to represent
19 themselves. A client and only the client can make the
20 choice to either continue forward toward trial or accepts
21 an offer for a plea, et cetera, and if they go to trial, if
22 they want to testify or not, all the way through. So, I
23 discussed that. I discussed attorney-client privilege and
24 confidentiality.

B. STEVENS - DIRECT EXAMINATION BY MR. MITCHELL

27

1 I implore them not to talk about the case with
2 anybody, especially if they're inside the detention center
3 where the calls are monitored, and there are a lot of
4 people all around them with reasons to cut time off their
5 own problems. I also went over the law, as well as the
6 exposure, and I did that all on April 21, 2014, according
7 to my notes.

8 Q. So, you did not have discovery at that point?

9 A. I went over the discovery that we had at that point.

10 Q. Okay.

11 A. Yes. We got -- we had a lot of it. So, when I spoke
12 with him after -- that was the 25th of April where we
13 finished talking about all the discovery that we did have
14 at the time. And according to my notes, it indicates I did
15 give him a copy of the discovery at that time, and let me
16 look here. Beg the court's indulgence. I believe I have a
17 piece of paper that I asked him to sign I did give him a
18 copy as well, if that would help.

19 (A PAUSE.)

20 A. Yes, I have it right here.

21 Q. Okay.

22 A. On our letterhead.

23 Q. Is that part of your normal practice?

24 A. Typically, yes. I mean, when we have a file with a
25 large amount of discovery, I want to make sure that the

1 client can acknowledge that he did, indeed, receive it.
2 Sometimes we'll mail it to them in the jail; other times if
3 I'm meeting with them, I'll ask my legal assistant to go
4 ahead and print off a copy. We'll have a manila envelope
5 and I'll have them sign a piece of paper.

6 Q. Okay. Do you know what at that point the discovery
7 response consisted of? You don't have to get into ---

8 A. Yeah.

9 Q. --- the detail. Just kind of ---

10 A. It should have consisted of pretty much everything
11 except for the SLED reports. So, it would not have had the
12 serology report; it would not have had the DNA report. It
13 would have had incident reports. Let me go through this
14 here. Warrants. Warrant anyway on this one. Excuse me.
15 Statements, including his own. I'm sorry. That must be
16 Sanders.

17 Q. Now, you mentioned the DNA. The DNA testing took a
18 little while to get results back on that?

19 A. That's correct.

20 Q. Okay.

21 A. Oh, and the initial discovery should have included the
22 SANE kit as well. Well, not the kit itself but notes taken
23 from the hospital. And with my clients, whenever we go
24 over discovery, we go over every single page of discovery.

B. STEVENS - DIRECT EXAMINATION BY MR. MITCHELL

29

1 That's why it took at least two meetings to actually go
2 over it with him.

3 Q. Okay. So, you would have reviewed everything you had
4 in your possession with him in great detail?

5 A. Absolutely.

6 Q. Okay. What was your advice on whether this case --
7 whether Mr. Crosby should consider a plea offer or whether
8 he should take the case to trial?

9 A. Well, I mean, at varying points in the case -- because
10 it did take a little while before we could get it resolved.
11 You know, it just depends on what evidence and facts we
12 have. For example, he gave me the names of several folks
13 who were in the mobile home at the time of the -- or home
14 at the time of the -- around the time of the alleged
15 incident. I wanted to track down those witnesses because
16 if they had good things to say, that would be great. Even
17 according to one of their statements that we did go over
18 discovery, one of those folks in that statement that was
19 given to police indicated that he believed that if he was
20 there while it occurred, he would have heard it. There was
21 also some gap in time when some folks left; it would have
22 been just Mr. Crosby there with his daughters. So, I mean,
23 there's, there's evidence it could have gone either way.

24 But what I did do was also get my private
25 investigator, Mr. Danny McDaniel, with whom we have a

1 contract -- so, we do sometimes have to work around his
2 schedule, but we did get him involved, and he did make a
3 couple attempts to contact these folks. And a couple of
4 the letters that he actually sent me, responses that he
5 attempted to contact them, and they've all been
6 unsuccessful. It indicated he also went and spoke with Mr.
7 Crosby at the jail. Doesn't look like that conversation
8 went well because -- well, it didn't. And then he also
9 went back again to try and talk with some other folks, the
10 same folks: Shane Wingard, Jason Oliver. There's a person
11 named Darren, last name unknown, as well as, I believe,
12 Christie Hay. He made attempts to contact all these folks,
13 and it was all documented what he tried to do. We did, we
14 tried to find out as much information as we could about it
15 in the pretrial phase.

16 We also -- at his request I attended his DSS hearing,
17 which was held on July 22, 2014, in front of Judge McGee in
18 Orangeburg County. He was represented by Lakesha Jeffries
19 at that hearing, and obviously he had a right to go ahead
20 and challenge DSS's findings regarding that. He did. He
21 asserted his rights to make sure there was a full hearing
22 on the matter. We were able to obtain a transcript, which
23 I also have here in my file we can make available if you'd
24 like, but it also did give us a window into the expected
25 testimony from at least some of the witnesses, including

B. STEVENS - DIRECT EXAMINATION BY MR. MITCHELL

31

1 the victim of the case. That was eye-opening because we
2 got an opportunity to see, you know, some of the strengths
3 of her testimony, some of the weaknesses of her testimony,
4 so it was fruitful.

5 We also found out a lot of 404(b) information that
6 would have come in had we gone to trial for -- as the state
7 threatened, if we did go to trial, they were going to
8 likely indict on some other charges as well. So, it
9 wouldn't be just for criminal sexual conduct first degree
10 carrying up to thirty. It would also be for incest, as
11 well as other potential charges based on the testimony of
12 the victim at the DSS hearing.

13 Q. And the victim was his daughter, correct?

14 A. That's correct.

15 Q. And these witnesses that we're talking about, were you
16 -- you had the opportunity to hear Mr. Crosby's testimony
17 earlier, correct?

18 A. Yes, sir.

19 Q. Did those witnesses attempt to contact you directly?

20 A. I believe I spoke with at least Mr. Shane Wingard on
21 the phone personally. I tried to arrange it so he could
22 meet with us or meet with the private investigator, but
23 that never came to fruition. I can't, you know, strong-arm
24 a person to walk into my office, and if they don't respond

1 to our inquiries, especially by my private investigator,
2 then I don't know what more I can do.

3 Q. You weren't ignoring phone calls from these potential
4 witnesses, were you?

5 A. No, sir.

6 Q. Okay. So, how did this plea offer come about?

7 A. Well, we were still in a wait and see pattern when it
8 came to results from serology as well as DNA out of SLED.
9 Typically my experience is that whenever there's a SANE
10 kit, they'll first put it through serology and then
11 serology will typically forward it to the DNA lab. And it
12 takes time because, you know, I mean, they've got a lot of
13 law-enforcement agencies they have to work with in the
14 entire state of South Carolina.

15 So, in the meantime I understand he wasn't happy where
16 or comfortable where he was at. We tried multiple times to
17 get in front of the judge for bond reconsideration; it was
18 denied. All that said and told, he wanted me to actually
19 seek an offer for plea. I think I've got at least one
20 offer here dated November 20th. He has indicated he wanted
21 to talk to me about pleading out.

22 He indicated that -- you know, he said get me a CSC
23 ten years suspended to five years' prison and five years'
24 probation, keep it 65 percent, I'll plead. It's a portion
25 of what he was indicating to me.

B. STEVENS - DIRECT EXAMINATION BY MR. MITCHELL

33

1 Obviously he wasn't happy where he was at. I don't
2 pretend anybody would be happy waiting in the detention
3 center. Mr. Crosby, he does have a colorful personality.
4 Yeah, I'll definitely say that. You know, his belief is
5 that everybody was colluding against him and that he
6 couldn't beat everybody. So, that's why he wanted to take
7 a charge, but regardless that's what he did indicate, and
8 we did to seek it. Upon occasion he would vacillate.
9 Sometimes he'd want to take a plea. Sometimes he'd want to
10 go to trial, back and forth.

11 The initial offer from the state was criminal sexual
12 conduct first degree, which is, of course, violent, most
13 serious, and carries up to thirty years, and to plead
14 guilty with the state recommendation a solid ten years.
15 Obviously, that would still expose him to potentially more
16 if the judge wanted to go higher or possibly less if the
17 judge wanted to go lower, but that was the initial offer.

18 After further negotiations, pushing back and forth
19 with the prosecution, we were able to get it down to the
20 lesser-related charge -- not lesser included but less
21 related -- of CSC second degree for a negotiated fifteen
22 suspended to eight plus probation.

23 I don't remember -- I'd have to see the original
24 indictment itself that was put before the court, but what I
25 think on the -- I made sure that the sentencing sheet did

B. STEVENS - DIRECT EXAMINATION BY MR. MITCHELL

34

1 not have the box checked off for lesser-included offense
2 because I could be wrong, but my understanding of the case
3 law in South Carolina is that CSC second was not a true
4 lesser included, but it was certainly a lesser-related
5 offense, which also I had to explain to him not only for
6 that but also the prospectives if it went to trial. And we
7 did cover this because he did ask if we went to trial,
8 could he get, you know, a jury to consider CSC third based
9 on, you know, the defense of consent. And, of course, my
10 explanation, I had to say no. It's not likely because my
11 understanding of the law was that it was a lesser-related
12 offense, not a lesser-included offense.

13 Q. Did Mr. Crosby write letters to the solicitor trying
14 to solicit an offer?

15 A. Oh, yes.

16 Q. Okay.

17 A. And after each one, I always cautioned him again to
18 not speak with anybody about it because it can and would be
19 used against him, including about that. I don't know if
20 you want me to keep going or no.

21 Q. Sure.

22 A. Okay. We also had to counter mounting evidence, right
23 or wrong, of jailhouse snitches who were getting ready to
24 line up against him because apparently -- and like I said,
25 right or wrong, I don't know, but I was informed by at

B. STEVENS - DIRECT EXAMINATION BY MR. MITCHELL

35

1 least one attorney that my client was talking in jail while
2 some inmates were playing a game called Casino. I have no
3 idea what that was; I've never played it. Regardless, he
4 was apparently saying things which would have been highly
5 detrimental to his case to them. And so I knew that we had
6 to have this conversation about confidentiality and over
7 and over and over again because he would write the
8 prosecutor. He would talk to folks in jail, and that hurt
9 our chances and prospects as we went forward to trial -- or
10 if he wanted to choose trial, excuse me, which would have
11 been his choice.

12 Q. So the jailhouse talks, did that revolve around that
13 he believed he would beat the DNA? That he would not be a
14 match for the DNA?

15 A. Yes. My understanding, like I said right or wrong, is
16 that the jailhouse snitch, at least one of them that I was
17 aware of because the attorney approached me, indicated he
18 was bragging in jail that they would not match. The DNA
19 wasn't going to come back to him because he used a condom.
20 Now, had we gone to trial, and we spoke about this together
21 as well. I mean, we would have tried and contrast that
22 with statements made by the victim in the case which might
23 indicate that no, no condom was purportedly used according
24 to the victim, but regardless it was -- it would be likely
25 testimony we would have had to face had it gone to trial.

B. STEVENS - DIRECT EXAMINATION BY MR. MITCHELL

36

1 Q. Is it your standard practice to go through a guilty
2 plea checklist before the plea?

3 A. It is.

4 Q. Did you do that with Mr. Crosby here?

5 A. Yes, sir, I did.

6 Q. And in that, you try to hit what the judge would go
7 over and all of the rights that he'd be waiving by pleading
8 guilty?

9 A. Yeah. I, I try and go over a guilty plea checklist
10 for clients who choose to plead guilty instead of choosing
11 to go forward with the trial, not only to help them
12 understand everything that really is involved with their
13 rights, but also to help them kind of expect potential
14 questions that they might have to field by the judge. I
15 mean, not many clients will be rattle off the top of their
16 head, you know, all of what their rights are whether they
17 know them. So, I make sure I, I go through all of them
18 well in advance, and like I said, that way it gives a level
19 of understanding even before we set foot in a courtroom of
20 what's likely to happen.

21 MR. MITCHELL: I don't have any further questions.
22 Please answer anything Mr. Waller has.

23 WITNESS: Thank you, sir.

24 THE COURT: Cross-examination?

25 MR. WALLER: Thank you, Your Honor.

B. STEVENS - CROSS-EXAMINATION BY MR. WALLER

37

1 CROSS-EXAMINATION BY MR. WALLER:

2 Q. Mr. Stevens, you testified that you provided Mr.
3 Crosby with the full copy of the discovery packet that you
4 had at the time.

5 A. Yes, sir.

6 Q. Okay. Did you remove anything from that at all?

7 A. I would not have removed anything from there, no.

8 Q. Okay. That's -- maybe not in this case, but in
9 certain situations there are things that a person is not
10 allowed to have at, at the jail. Is that right?

11 A. Honestly, I don't specifically know what the
12 Orangeburg County detention center's rules are. I know
13 when I practiced in Charleston private practice at Savage
14 and Savage, there were different rules of federal clients
15 compared to state clients even though they might be in the
16 same facility, and so he was not a federal client. He was
17 a state client, so we would likely just give a full copy of
18 it.

19 Now, to be true, I didn't go page by page in the copy
20 that was handed to him, but it should have been in there,
21 full copy of what I had at that point. We don't just do
22 front pages in order to save paper and ink. We do front
23 and back of everything when we give them a copy of what was
24 previously provided to us in discovery.

1 Q. He wouldn't have been allowed, he wouldn't have been
2 allowed to have pictures, though, would he?

3 A. Well, I don't think there would be nude photos in --
4 or nude and lascivious photos in the discovery that we had.
5 I believe there were pictures of his daughter; I believe
6 there were pictures of the scene. There -- in the SANE kit
7 itself they've got drawings, but drawings are drawings.
8 They're about as benign as you can make them, given the
9 nature of that -- of the sheets.

10 Q. Okay. How about the statements that were given? Were
11 they all written statements, or were they recorded at all?

12 A. Oh, the statements from law enforcement regarding
13 other witnesses?

14 Q. Or the statements from any of the witnesses, the
15 victim. Were any statements ---

16 A. Certainly.

17 Q. --- that were recorded but not memorialized?

18 A. I'm sorry. Yeah, the statements from all the victims
19 -- not victims, I'm sorry, all the witnesses were
20 memorialized, as were the statements of the victim herself.

21 Now, there was a forensic interview video of the
22 victim herself. We tried to watch a portion of that on my
23 computer together and that one, if my memory serves
24 correct, the, the video disk we had, we could never get it
25 to work. I tried to get other copies; those copies didn't

B. STEVENS - CROSS-EXAMINATION BY MR. WALLER

39

1 work. When it does come to that, to do -- if we did end up
2 in trial, I would demand, just go down there and sit and
3 watch it in the prosecutor's office to see if there was any
4 value to it for cross-examination. However, being that the
5 victim was sixteen at the time, I don't think the video
6 itself, the forensic interview video would be admissible,
7 pursuant to South Carolina law anyway, and that's why if
8 anything, the value it would have had, if any, would have
9 been for impeachment purposes at a trial if she gave
10 statements or testimony contrary to what she said in the
11 forensic video, I think.

12 Q. But you never saw the complete version?

13 A. Not the complete video, no.

14 Q. And Mr. Crosby never saw a complete version?

15 A. Neither one of us did, no.

16 Q. So, you don't know what was contained -- there was no
17 transcript of that interview?

18 A. That's correct.

19 Q. Okay. If you had a disk that, that worked, Mr. Crosby
20 wouldn't have been allowed to have a disk at the jail,
21 would he?

22 A. That's correct. Whenever it comes to electronic
23 sources of material, we go over that, you know, with our
24 own clients on laptop computers.

1 Q. Okay, and your testimony is that, that the disk that
2 you had did not work. You tried to get another disk. That
3 one didn't work also?

4 A. To my understanding, yes, sir. What I will also say
5 is we were fortunate to have the DSS hearing in full where
6 we got, I mean, everything. It was, it was pretty
7 extensive.

8 Q. Okay. Speaking of the DSS hearing, you testified that
9 you obtained a transcript from that hearing?

10 A. Yes, sir. I have it right here.

11 Q. Did you and Mr. Crosby discuss the transcript compared
12 to -- the testimony or statements from that hearing versus
13 statements that witnesses had given prior?

14 A. Yeah. We, we discussed after the hearing obviously.
15 We went over notes that I made obviously. I still have
16 those here as well and compared, you know, the good, the
17 bad, and the ugly. I mean, I guess you could say it was a
18 Clint Eastwood moment. We went over it all -- good, bad,
19 and ugly -- you know, where we thought there were, you
20 know, some gaps from what she said before. And then also
21 some of the things that were highly consistent that -- from
22 what she said before, and also some things that, you know,
23 we'd never heard before until that point because they were,
24 I thought, unrelated to the precedents in there. She was
25 talking about prior incidents and everything where either

B. STEVENS - CROSS-EXAMINATION BY MR. WALLER

41

1 (a) the state would indict or (b) they would seek to use as
2 404(b) information. Additionally, I provided him with a
3 full copy of the transcript after I obtained it as well. I
4 have another piece of paper, I think, showing that, too,
5 but I'm sorry. Go ahead.

6 Q. You testified that you sent him a copy of the
7 discovery packet that you had at the, at the time.

8 A. I, I handed it to him.

9 Q. You were missing DNA, serology. What else were you
10 missing?

11 A. I think that's largely it, to my knowledge, and like
12 you said, just the gap in the video from forensics.

13 Q. Did you supplement what you had sent him when you
14 received initial testing reports?

15 A. I did. In fact, I got -- he signed another piece of
16 paper when he got -- when we got the serology report. We
17 received that October 8, 2014, and I handed him a copy of
18 it regarding the serology report on October 17, 2014.

19 Q. Okay. Mr. Crosby mentioned wanting to take a
20 polygraph test. Do you recall that?

21 A. I don't recall it specifically, but I wouldn't be
22 surprised if he did. My problem with polygraphs is that
23 obviously I can't use it in court. Prosecutors can't use
24 it in court. Nobody can use it in court. The main value
25 it may have is if I can use it as leverage to try and

1 convince a prosecutor to dismiss a charge or whatnot to try
2 and show my client is, is truthful. I can tell you right
3 now with this prosecutor on the case, it wouldn't have had
4 any value at all regardless of the result.

5 Q. Mr. Stevens, you testified that Mr. Crosby vacillated
6 on whether he wanted to take a plea or to go to trial.

7 A. Yes. That's true.

8 Q. What, what preparations had you made as far as getting
9 ready for trial or leading up to him entering his plea?

10 A. Certainly. I had my private investigator try and
11 verify what witnesses would or would not say, especially
12 those indicated to me by my client. I went through and I
13 obtained copies of the transcript of the DSS hearing so I
14 could be prepared to use information from that either on
15 cross-examination or to push back opposing 404(b) motions.

16 What else did we do? See here. Had he wanted to go
17 to trial, I would likely have obtained the services of a
18 DNA expert. We typically try and use Dr. Ostrowski out of
19 North Carolina -- he's exceptional at what he does -- to go
20 over the SLED information and try and verify or dispel
21 whatever that was there. We did not do that because it was
22 actually late in the game when I obtained a copy of the DNA
23 report. It was sometime between January 2nd and January
24 5th; it was very late in the game. We finally obtained a
25 copy of it. I mean, I literally was handed a copy of it by

B. STEVENS - CROSS-EXAMINATION BY MR. WALLER

43

1 the prosecutor in the courtroom when I was walking on back
2 to go speak with my client.

3 We sat down. We went over all of it word by word. I
4 think my boss, Ms. Peggy Hines, was there as well when we
5 covered it and, I mean, it was, it was there and yes, it
6 was -- they went over the information which was previously
7 in serology, and they had suspected saliva swabs taken from
8 the SANE kit. And the DNA analysis indicated it was
9 essentially YSTR profile, which indicated major, major
10 contributors to his, my client's, YSTR profile. Now, that
11 would also include potential paternal male relatives of
12 him, and we covered all of that information verbatim and
13 also what that meant, and he still choose to go forward
14 with the state's negotiated offer.

15 Q. So, the, the offer was already agreed to? Mr. Crosby
16 signed the paperwork at that point?

17 A. I don't know what time he signed the paperwork. But I
18 make it clear to just about all my clients that I'm aware
19 of that I've counseled before, that, you know, nothing's
20 final until the gavel drops. Even if somebody signs a
21 piece of paper, that's not the plea. Even if somebody is
22 simply standing in front of a judge, that's not the end of
23 a plea. The plea is a plea once he actually says and -- or
24 admits that that's what he wants to do in front of the

1 judge and the judge accepts it and sentence is imposed.

2 Then it's final.

3 Q. But the negotiations were already complete at that
4 point.

5 A. Yeah. I couldn't get the prosecutor to budge any
6 further.

7 Q. Okay. Is the DNA report and also the forensic video
8 important pieces of evidence?

9 A. I think the DNA most certainly is. The forensic
10 interview report, I'm not certain it's a significant piece
11 of evidence because it would not -- I don't think it would
12 have been admissible in court by the prosecution. I think
13 the way the statute reads is that the victim is under a
14 certain age. I think it's twelve, and at the time of the
15 alleged incident and the done -- the taking of the forensic
16 interviews, they have -- they're, they're questioned by
17 an experienced forensic interviewer and then that's also
18 videotaped. If they do that and then they lay the proper
19 foundation pursuant to the statute, then the videotape
20 itself is admissible.

21 Here the victim was sixteen at the time of the
22 offense, and I think around sixteen at the time she was
23 interviewed as well. So, my understanding is I don't think
24 the video itself would have been admissible as evidence,
25 and we did have a great opportunity to hear everything that

B. STEVENS - CROSS-EXAMINATION BY MR. WALLER

45

1 she would have said likely at the DSS hearing in family
2 court on the 22nd of July 2014.

3 Q. What if during her video or her interview she had
4 informed the forensic interviewer that she made the whole
5 thing up? Would that changed your ---

6 A. Oh, that would have ---

7 Q. --- attitude?

8 A. --- been great. That would have been ideal.

9 Q. Well, my question is, is how can you counsel Mr.
10 Crosby if you don't know what that video contains?

11 A. Yes. Well, all the information before that video
12 would have been taken was already collected by police. All
13 of the information about her statements afterwards was also
14 consistent with what she said before to police, as well as
15 what she said generally speaking to medical folks when she
16 was actually taken in and tested. And that's all like --
17 it's all very consistent with what she testified to at the
18 DSS hearing.

19 In other words, I had zero indication that she would
20 have changed her course, language, tact and totally say she
21 made everything up. There was absolutely zero indication
22 that that would have occurred, number one. Number two,
23 like I said, had we gone to trial, yeah, I would have tried
24 to see if there was any, you know, indication on there

B. STEVENS - CROSS-EXAMINATION BY MR. WALLER

46

1 myself. But like I said, I had no indication of any change
2 in what her position was from day one.

3 Q. Was that video available to you if you had wanted to
4 go view it at wherever she was interviewed?

5 A. You mean if I went to the -- like the children's
6 center?

7 A. Sure. You got two disks. Neither one of them worked.
8 Could you have gone down there and viewed it there on their
9 equipment?

10 A. I suppose I could have tried to do that.

11 Q. Okay. Was there a report done by the forensic
12 interviewer, forensic interviewer at all?

13 A. Not that was provided to me.

14 MR. WALLER: Beg the court's indulgence.

15 THE COURT: All right.

16 (A PAUSE.)

17 BY MR. WALLER:

18 Q. Mr. Stevens, was there any consistencies in any of the
19 statements versus -- and not even statements. Any of the
20 discovery provided to you and what was testified to at the
21 DSS hearing?

22 A. I think there were some minor consistencies, yes.

23 Q. Okay.

24 A. My problem is the major points were all there in
25 spades.

1 Q. And obviously that's a different burden of proof at a
2 DSS hearing, but it's still a statement under oath. Is
3 that correct?

4 A. Yes, that's correct.

5 Q. Would you have been able to use that transcript if you
6 had proceeded to trial to impeach any of these witnesses if
7 their testimony had changed?

8 A. I most certainly would have asked them about that,
9 yes, on cross-examination.

10 MR. WALLER: No further questions. Thank you.

11 THE COURT: Redirect?

12 MR. MITCHELL: No further questions. Thank you.

13 THE COURT: Thank you very much. You may step down.

14 WITNESS: Thank you, Judge.

15 (THE WITNESS EXITS THE STAND.)

16 THE COURT: The state may call your next witness.

17 MR. MITCHELL: The state has no further witnesses.

18 THE COURT: All right, anything in reply?

19 MR. WALLER: Nothing in reply, Your Honor.

20 (A PAUSE.)

21 RULING OF THE COURT:

22 THE COURT: All right, Mr. Mitchell, if you would
23 please prepare an order that denies the applicant's request
24 for post-conviction relief. I don't see anything where Mr.
25 Steven's representation fell below the norm for attorneys

1 in similar positions representing the applicant at his
2 guilty plea. Nor is there anything to indicate that there
3 was a deficient performance to the degree that results --
4 that the proceedings would have been different. I've
5 reviewed the transcript. He was questioned. It was a
6 voluntary plea. I don't see where Mr. Stevens did anything
7 that would have altered that. All right.

8 MR. MITCHELL: Thank you.

9 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR ORANGEBURG COUNTY, SOUTH CAROLINA,
ON THE 18TH DAY OF MAY, 2016.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

FEBRUARY 18TH, 2017

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Joshua David Shaw Crosby, #264678,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2014-CP-38-0647

ORDER OF DISMISSAL

FILED FOR RECORD
WINNIE B. CLARK
2016 NOV - 7 P 12:58
CLERK OF COURT
ORANGEBURG, SC

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed May 18, 2015. Respondent filed a Return and Partial Motion to Dismiss requesting that a hearing be held only on Applicant's allegations of ineffective assistance of counsel. Applicant filed a second application on November 12, 2015 (2015-CP-38-1426). On March 15, 2016, the Court issued an Order dismissing the second application, treating it as an amendment, and merging it into the initial action. Jonathan D. Waller, Esquire, was appointed by the Orangeburg County Clerk of Court to represent Applicant. An evidentiary hearing was held on May 18, 2016, at the Dorchester County Courthouse. Applicant was present and represented by Counsel Waller. J. Clayton Mitchell, of the South Carolina Attorney General's Office, represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's plea counsel, Breen R. Stevens, Esquire. This Court had before it the Orangeburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the appellate records, the PCR application, the Return, and the guilty plea transcript.

CLERK OF COURT
ORANGEBURG COUNTY, SC

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. In May 2014, the Orangeburg County Grand Jury indicted Applicant for criminal sexual conduct, first degree (2014-GS-38-0524). Counsel Stevens represented Applicant. On January 5, 2015, pursuant to negotiations, Applicant pleaded guilty to criminal sexual conduct, second degree. The Honorable Edgar M. Dickson accepted the negotiations and sentenced Applicant to fifteen (15) years' imprisonment, provided upon the service of eight (8) years', the balance is to be suspended with probation for five (5) years.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals dismissed Applicant's appeal on March 31, 2015¹. The remittitur was returned to the circuit court on May 06, 2015.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Plea not knowingly and voluntarily entered because Counsel failed to fully review discovery and failed to give proper advice.

II. APPLICABLE LAW

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

¹ Applicant failed to provide a sufficient explanation required by Rule 203(d)(1)(B)(iv), thus, the matter was dismissed.

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Unintelligent and Involuntary Guilty Plea

Applicant alleges he did not plead guilty knowingly and voluntarily. Specifically, Applicant argues that Counsel failed to review with him the State's evidence, which included the DNA report that concluded Applicant was a major contributor to the saliva found on the victim. This Court finds Applicant's guilty plea was entered freely and voluntarily entered. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

Applicant claims he did not plead guilty voluntarily because Counsel did not review with him the evidence the State planned to present if the case were to go to trial. Applicant also makes a general allegation of ineffective assistance of counsel in that Counsel failed to properly investigate the facts and circumstances of the case thus rendering his plea involuntary and unintelligent. This Court finds these contentions meritless. This Court finds the record reflects Applicant was fully advised of the State's evidence. The plea court's thorough colloquy with Applicant demonstrates that he understood the charges, penalties, and the waiver of his rights. The record further reflects Applicant fully admitted his guilt to the plea court.

Applicant testified that Counsel did not adequately review the discovery materials with him. This Court finds Applicant's testimony not credible. Applicant presented no credible evidence as to why he should be able to depart from his statements at the plea hearing that he had reviewed the evidence and did not need more time to discuss matters with Counsel. (Plea Tr. p. 5; 8; 9). This Court finds very credible Counsel's testimony regarding his preparation and advice concerning the case, specifically that he reviewed the evidence with Applicant and discussed with him that it would be in his best interests to accept the negotiated plea offer. Counsel gave Applicant a copy of discovery that Applicant signed for to acknowledge his receipt. An investigator was hired to interview potential witnesses that Applicant thought would be helpful to his defense. In addition, Counsel discussed the forensic interview conducted with the victim and advised him that the interview itself would likely not be admissible. Applicant also claims he was not adequately advised of the DNA testing results. Counsel explained that although he received the results from the State the day of the plea, he felt that he adequately advised Applicant that the DNA was a match to the saliva found on the victim. Counsel also noted the State would likely be able to introduce Applicant's statement that no DNA would be found

because he used protection and would likely introduce evidence of prior allegations made by the victim. Considering this all, Counsel acted reasonably and within the professional norms in advising Applicant to plead guilty to a negotiated plea deal. Therefore, this Court finds Applicant's plea was freely, voluntary, and intelligently made.

All Other Allegations

As to any and all allegations that were raised in the application and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 27 day of October, 2016.



BENJAMIN H. CULBERTSON
Presiding Judge

Conway, South Carolina

WITNESSES

Lori Garrison

Orangeburg County Sheriff

2014001747

ARREST WARRANT NUMBER

2014A3810700159

Arrested: March 8, 2014

**ACTION OF GRAND JURY
TRUE BILL**

Winniford B. Clark

MAY 07 2014

Foreperson of Grand Jury

Date: May 7, 2014

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2014GS38-0524

The State of South Carolina

County of ORANGEBURG

COURT OF GENERAL SESSIONS

May 12, 2014 TERM

**THE STATE
vs.**

Joshua David Shaw Crosby

Indictment for

**CRIMINAL SEXUAL CONDUCT - FIRST
DEGREE**

SC Code: 16-3-652

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury. ✓

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

ATTEST: TRUE COPY
Winniford B. Clark
CLERK OF COURT
ORANGEBURG COUNTY SC

FILED FOR RECORD
CLERK OF COURT
ORANGEBURG COUNTY SC

2014 MAY -7 PM 11:21

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

INDICTMENT
2014GS38-0524

At a Court of General Sessions, convened on May 12, 2014 the Grand Jurors of Orangeburg County present upon their oath:

CRIMINAL SEXUAL CONDUCT - FIRST DEGREE

That in Orangeburg County, South Carolina, on or about February 26, 2014, the Defendant, Joshua David Shaw Crosby, did commit a sexual battery upon the victim, child [REDACTED] and the victim did submit to sexual battery under aggravated force, and/or the victim was subjected to forcible confinement, kidnapping, robbery, extortion, burglary or any other similar offense or act, and/or the victim was rendered physically helpless by a controlled substance in that the defendant did sexually assault the victim. This offense in violation of Section 16-03-652 of the South Carolina Code of Laws, as amended.

ATTEST TRUE COPY

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



Ashley B. Cornwell, Solicitor