STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO DARLINGTON COUNTY
Court of Common Pleas
Roger E. Henderson, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2017-000100

KRISTOPHER WILMONT BERRY, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUES PRESENTED

Did the PCR judge properly deny post-conviction relief where trial counsel timely objected and argued against the admission of certain prior bad acts, where the prior acts would have validly come in under Rule 608(b), SCRE, where the prior acts at issue were not comparable to the acts for which Petitioner was being prosecuted, where the conviction clearly rested upon other substantial evidence, and where the jury was clearly not tainted given Petitioner's acquittal on one of his two charges?

STATEMENT OF THE CASE

Summary of Procedural History

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. Applicant was indicted at the September 2010 term of the Darlington County Grand Jury for criminal solicitation of a minor (2010-GS-16-01364) and lewd act on a minor (2010-GS-16-01363). Paul V. Cannarella, Esq. represented Applicant at trial. Kendal Burch, Esq., Patti McKenzie-Parker, Esq., and John Holt, Esq., each of the Fourth Circuit Solicitor's Office, prosecuted the case. On July 18, 2011, Applicant proceeded to trial before the Honorable J. Michael Baxley and a jury. The jury acquitted Applicant of lewd act on a minor, but found Applicant guilty of criminal solicitation of a minor on July 21, 2011. Judge Baxley sentenced Applicant to imprisonment for a term of 10 years, suspended to five years of incarceration and five years of probation.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Dayne C. Phillips, Esq., who raised the following issues:

1. Did the trial court abuse its discretion in admitting a naked photograph of Appellant with his genitalia partially covered by not allowing the State to crop the photograph above Appellant's waist or defense counsel to stipulate to Appellant's ownership of the cell phone that contained the photograph at Appellant's trial for lewd act upon a minor and criminal solicitation of a minor when the photograph was not sent to the minor child, thereby making the prejudicial photograph inflame the emotions of the jury and establish that Appellant had a general sexually deviant disposition?

2. Did the trial court err in finding the acts which led to Appellant's other than honorable discharge from the military admissible under Rule 609(a)(2), SCRE, when: Appellant's actions were not prosecuted criminally; Appellant's military discharge constituted as an administrative separation and not as a conviction under Rule 609; and the trial court failed to conduct any Rule 404(b), SCRE, analysis?

The parties proceeded to oral arguments on September 12, 2013. By unpublished opinion decided October 30, 2013, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Berry, Op. No. 2013-UP-396 (S.C. Ct. App. filed Oct. 30, 2013). The Remittitur was issued on November 18, 2013.

Applicant filed his application for post-conviction relief on December 19, 2013 (2013-CP-16-01002). He alleged the following grounds for relief in his application:

1. "Ineffective assistance of counsel"
2. "Rule 5 violations by State"
3. "Brady and progeny violations by State"
4. "Criminal Violations of SC Code of Law § 16-9-10 Perjury and Subornation of perjury by the State as well as Rules 407(8.4) and 402(k) violations."
5. "Rule 403 violation of Rules of Evidence."
6. "Rule 609(b) violation of Rules of Evidence."
7. "Sentencing guidelines violation."

Applicant expanded upon his allegations in an 18 page handwritten attachment. Respondent made its return on November 19, 2014, and an evidentiary hearing into the matter was convened on January 11, 2016, before the Honorable Roger E. Henderson. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esq. Jessica E. Kinard, Esq., of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and Paul V. Canarella, Esq., also testified. By written order dated November 10, 2016, and filed November 28, 2016, Judge Henderson denied and dismissed the application.

This appeal follows.

Summary of Facts Adduced at Trial

Petitioner, who was the fourteen-year-old victim's gymnastics coach, purchased a prepaid cell phone for the victim so that he and the victim could secretly send private text messages to one another. (Appx. 129-30; 168-70). The victim's parents had previously prohibited her from

exchanging texts with Petitioner for any reason. (Appx. 149, ll. 10-17). Petitioner told the victim that he and his wife had an "open relationship" and at one point sent a text message stating that he wanted to get the victim "out of her panties." (Appx. 169, ll. 2-10; p. 178-79, 408-09). There were also several text messages from Petitioner regarding setting up a time and location for a sexual encounter with the victim and asking if they could "take pics when we play." (Appx. 178-80). Petitioner also texted that he would try to get the victim alone at the gym that week so that he could kiss her, and he warned her that his hands would "wander" when they kissed. (Appx. 180-81, 215, 223). In one text message, Petitioner stated, "I can see us having sex, but the kiss should be interesting." (Appx. 180-81, 414-15). The victim testified that Petitioner kissed her in the gym the day before the secret phone was discovered by the victim's father and the matter reported to law enforcement. (Appx. 173-76). The victim further explained Petitioner propositioned to teach her a gymnastic maneuver, a double-back, in exchange for sex. (Appx. 183-84).

Petitioner also gave the victim a digital camera and instructed her to take naked pictures of herself and provide them to him. (Appx. 169-70; p. 176-77; p. 219-22). At one point, Petitioner texted the victim the following: "Do I get my camera full of good pics tomorrow?" (Appx. 235, ll. 21-23). Petitioner assured the victim that no one would see the pictures except him. (Appx. 176-77). When Petitioner learned that the victim's father had found the prepaid phone containing the incriminating material and requests for pictures, Petitioner told the victim to go along with his cover story that he was requesting pictures of the victim's ex-boyfriend so that he could identify him if he came to the gym looking for the victim. (Appx. 172-73).

Prior to Petitioner's testimony, Counsel brought to the trial court's attention the State's intention to impeach Petitioner by way of acts detailed in a number of military records. (Appx.

341-46). In particular, Counsel noted three acts: (1) misappropriation of the computer, construed by Counsel as "use of a computer without permission;" (2) falsifying government documents; and (3) trespassing. (Appx. 342, ll. 3-12). The solicitor argued all three "[made] a difference" regarding "truth and veracity," and argued they constituted convictions. (Appx. 343, ll. 3-17). When the trial court prompted the solicitor to argue under Rule 609, SCRE, the solicitor replied "I was looking at Rule 608" before arguing all three acts involved dishonesty or false statement such that they could be admitted under Rule 609(a)(2), SCRE. (Appx. 344, ll. 5-15). The trial court found all three acts involved dishonesty and admitted under Rule 609, but excluded any reference to the adulterous purpose for the trespass. (Appx. 345-46).

Towards the end of Petitioner's direct examination, Counsel preemptively addressed the circumstances of Petitioner's separation from the United States Marine Corps. (Appx. 382-86). Petitioner testified he "left by choice" because as a recruiter he "was instructed on the proper ways to lie, and didn't like it, because it is not the way the Marine Corp. is founded." (Appx. 383, ll. 6-9). Petitioner admitted to misrepresenting an unqualified recruit's weight and medical history, to misappropriating a computer in order to facilitate a "close combat program" he was teaching in the Corps, and to trespassing at a recruiting office at a mall while suspended. (Appx. 384-86). On cross-examination, upon questioning by the State, Petitioner further explained he "chose to leave the Marine Corp. rather than facing a court-martial and hurting my family." (Appx. 390, ll. 1-8). The State segued away from the subject shortly thereafter. The extrinsic military records were not introduced to the jury, but admitted only as a court exhibit.

Relevant Facts Adduced at Evidentiary Hearing

Petitioner testified at the evidentiary hearing that he received an "other than honorable" administrative discharge in lieu of facing a court martial for adultery, for which he could present

no defense. (Appx. 586, ll. 6-15). Petitioner opined Counsel was not prepared to deal with the adverse elements of his military service and that, since the discharge was not a conviction, its use for impeachment should have been objected to. (Appx. 586-87). Petitioner asserted Counsel did not object. (Appx. 587, ll. 8-11). Petitioner conceded he was convicted for wrongfully appropriating a computer "in 1994-95,"[1] but asserted the State was obligated to inform him ahead of time that the conviction would be used for impeachment and that he had no written information regarding that intent. (Appx. 587-88). Petitioner again asserted Counsel did not object. (Appx. 588, ll. 3-4). On cross-examination, Petitioner denied remembering any argument by Counsel, at which point Respondent pointed out Counsel's argument. (Appx. 598-99 (citing Appx. 341-46)).

Counsel testified he could not recall whether Petitioner's military records were provided as part of discovery. Counsel testified "I think the week before trial we might've been provided with the military stuff or even before that or the day of trial. I don't remember." (Appx. 609, ll. 18-20). Upon refreshing his memory, Counsel recalled arguing at trial that the prior acts were not "crimes of dishonesty" and that the issue went to Petitioner's credibility. (Appx. 623-25).

[1] Petitioner's military records, which were a part of the record before the PCR court as part of the appellate records provided with Respondent's return, include a "Record of Conviction by Court-Martial." (Supp. Appx. 6). That record indicates Petitioner stole a computer, monitor, and keyboard, between February 1999 and May 1999. That record further indicates a finding of guilt on July 7, 1999. Id.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, __ S.C. __, 810 S.E.2d 836, 389 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

I. THE PCR COURT PROPERLY DENIED RELIEF BECAUSE TRIAL COUNSEL COMPETENTLY ARGUED TO SUPPRESS THE PRIOR BAD ACT EVIDENCE, THE PRIOR BAD ACT EVIDENCE WOULD HAVE COME IN ON OTHER GROUNDS, AND BECAUSE THE PRIOR BAD ACT EVIDENCE WAS OF MINIMAL IMPACT AS COMPARED TO THE SUBSTANTIVE EVIDENCE AGAINST PETITIONER

The PCR Court's Order of Dismissal meets the "any evidence" standard because record shows that, although Counsel did not make the argument advanced on appeal, Counsel did object to and argue against the use of Petitioner's prior military history for impeachment purposes. The record further shows that Petitioner suffered no conceivable prejudice because the records would have been validly admitted under the grounds originally advanced by the State, and because even if they had been excluded, Petitioner's guilt as to solicitation and utter lack of credibility were fully established by other evidence.

a. Counsel objected and advanced a colorable argument against the use of the prior bad acts for impeachment, and cannot be held deficient by some higher standard than that which is applied to the appellate counsel who selected an argument not preserved for appeal.

The record demonstrates evidence sufficient to support the Court's finding that Counsel was not deficient because Counsel did object to the use of Petitioner's prior bad military acts and advanced an argument in support of that objection. It is a well-established point of law that, in the appellate setting, counsel is not required to raise every nonfrivolous issue presented by the record. See Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990); Hill v. State, 415 S.C. 421, 430-31, 782 S.E.2d 414, 419 (Ct. App. 2016); Smith v. State, 375 S.C. 507, 525, 654 S.E.2d 523, 532 (2007) (abrogated on other grounds by Smalls v. State, __ S.C. __, 810 S.E.2d 836 (2018)); Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005); Jones v. Barnes, 463 U.S. 745, 753-54 (1983) ("For judges to second-guess reasonable professional judgments

and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies Anders."). Less clearly repeated, but no less prevailing law, is that the same principle applies in the trial and plea settings: "[t]he law does not require counsel to raise every available nonfrivolous defense." Knowles v. Mirzayance, 556 U.S. 111, 127 (2009) (citing Jones at 751). The overarching concern that a defendant be afforded reasonable professional assistance is satisfied when counsel objects when appropriate and advances a reasonable argument in support of that objection; that another argument could have been made is of no consequence. To conclude otherwise would hold trial counsel, who must manage a smorgasbord of facts and argument in a hostile and public setting involving shifting circumstances, to a higher standard than appellate counsel, who may more patiently and monastically consider with some benefit of hindsight the best arguments available and focus narrowly upon them.

Here, Counsel objected. Counsel argued the acts were not dishonest, which was the crux of the issue given the State's original intention of impeaching Petitioner by way of Rule 608(b), not Rule 609(a)(2). Therefore, Petitioner was afforded the counsel that fell within the wide range of reasonable professional assistance, and the PCR court was well within its prerogative to conclude that Petitioner failed to meet his burden of showing any deficiency of counsel.

b. No probative evidence exists to support Petitioner's argument that Counsel impermissibly failed to object to the use of the computer theft under Rule 609(b).

Petitioner's only argument on this ground is that he did not see written notice provided in the discovery provided to him. Counsel's testimony on this ground was somewhat inconclusive, but indicated receiving notice of the intent to use the military records up to a week before trial. Though the written notice was not produced at the hearing, Counsel's testimony that he was

provided noticed up to a week in advance provides the "any evidence" upon which the PCR court may rest its ruling.

c. Petitioner suffered no prejudice because the prior bad acts were either admissible under Rule 608(b) or utterly inconsequential, and the military records were never admitted to the jury.

The PCR court was further justified in denying relief because *had* Counsel argued the acts resulting in Petitioner's other-than-honorable discharge did not constitute convictions,[2] the course of argument would have returned to the question of whether the specific instances of conduct concerned Petitioner's character for truthfulness, as indicated by the State's remark to that effect. (See Appx. 344, line 9: "I was looking at Rule 608."). "Under Rule 608(b), SCRE, specific instances of the conduct of a witness may be inquired into on cross-examination if probative of the witness's character for truthfulness or untruthfulness." State v. Kelsey, 331 S.C. 50, 75, 502 S.E.2d 63, 75 (1998).

Falsifying federal documents is an offense in the nature of *crimen falsi*, and even if the act did not result in a conviction, such falsification remains probative for untruthfulness under Rule 608(b). As for the computer theft, at the time of the 2011 trial, prior larceny still reflected upon credibility. State v. Vaughn, 268 S.C. 119, 124, 232 S.E.2d 328, 330 (1977) (citing State v. Reggen, 214 S.C. 370, 374, 52 S.E.2d 708, 709 (1949) ("Guilt of larceny goes to the credibility of a witness and may be properly proved in order to discredit the witness.")). The probative value of larceny for truthfulness or untruthfulness was not firmly rejected until State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015). As such, the State could have inquired about the acts during cross-examination without the introduction of extrinsic evidence under Rule 608(b). As the military records were never admitted to the jury, the case functionally proceeded

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[2] They do not.

as though the impeachment were admitted under Rule 608(b).[3]

As for the "unlawful entry," it would not appear to be probative of truthfulness or untruthfulness in and of itself. However, the prior act was presented to the jury in a light so favorable to Petitioner as to appear to be a military technicality, rather than an act in conjunction with adultery, and could not be said to have prejudiced Petitioner in any material way. (See Appx. 385, ll. 1-5).

To the extent that any of the acts would *not* have been valid subjects for cross-examination under Rule 608(b), Counsel's argument preserved the issue for appeal by arguing that they were not probative of untruthfulness. Furthermore, Petitioner suffered no prejudice from the examination on the prior acts because they were in no way similar to the offenses for which Petitioner was on trial. Compare State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006) (admission of prior convictions is highly prejudicial where the offenses are similar to the ones for which the defendant is on trial). Additionally, Petitioner suffered no prejudice from the examination on the prior acts because Counsel pre-emptively addressed them during the direct examination of Petitioner, at which time Petitioner provided his all-too-convenient explanations that he was always well-intended, but that the military wanted him to lie.

d. Petitioner suffered no prejudice because his guilt and total lack of credibility was absolutely established by other evidence.

To whatever extent Counsel could have or should have objected or argued differently, there is no reasonable probability that, but for the alleged deficiency, the jury would have had a reasonable doubt respecting guilt. The evidence summarized in the statement of the case is provides that Petitioner secretly gave the victim a phone and camera without telling her parents,

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[3] That the military records *were not* put before the jury, as would have been allowed given the trial court's admission under Rule 609(a)(2), is no small benefit to Petitioner. The charges to which Petitioner pled in exchange for his non-conviction includes an admission that his story that he was coached to lie by superiors (see Appx. 383, ll. 6-9; p. 421, ll. 17-25) was a complete fabrication and known to be a fabrication by Petitioner. (Supp. Appx. 18, 25-26).

by which Petitioner communicated to the victim in over fifty text messages a desire to get her out of her panties, get pictures of her naked, take pictures when they "played," that he wanted to kiss the victim and that his hands would wander when he did, and that he could see having sex with the victim. Petitioner tried to coax the victim into adopting the same cover story Petitioner deployed at trial, to wit: that he very secretly wanted pictures of a boy on whom the victim had a crush. Petitioner's explanations ranged from merely self-serving claims of typos, to conspiratorial claims of mysteriously missing texts, to entirely implausible claims that his most explicit messages were simply jokes. Petitioner's story was internally inconsistent, at once condemning gymnastic "play" and arguing he merely wanted pictures of the victim's gymnastic "play." Petitioner never denied sending the texts. Petitioner denied the phone presented at trial was his, which was revealed to be plainly untrue through the introduction of a nude photograph of Petitioner pulled from the phone in question.

Finally, the jury did not blindly convict Petitioner. The jury acquitted Petitioner of his charge for lewd act on a minor despite the examination on the prior acts. It cannot be said that the jury was improperly "lured" to convict based upon Petitioner's military offenses where Petitioner was found not guilty of the more serious offense. To the contrary, Petitioner was convicted because the considerable and incontrovertible evidence showed him grooming a minor gymnastics student for a sexual encounter.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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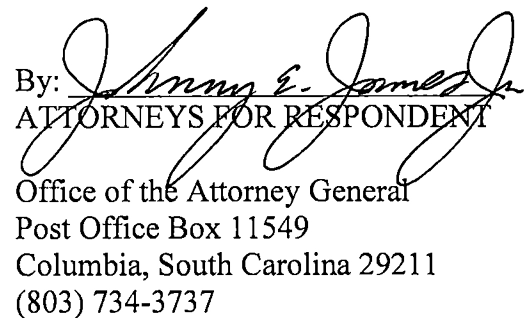

By: ______________________
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2 May, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO DARLINGTON COUNTY
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Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2017-000100

KRISTOPHER WILMONT BERRY, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

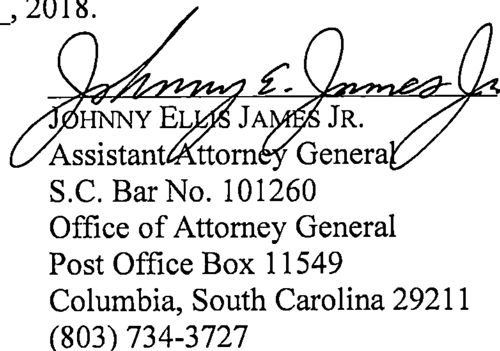
PROOF OF SERVICE

I, Johnny Ellis James Jr., certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
P.O. Box 11589
Columbia, South Carolina 29211-1589

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

This 2nd day of May, 2018.



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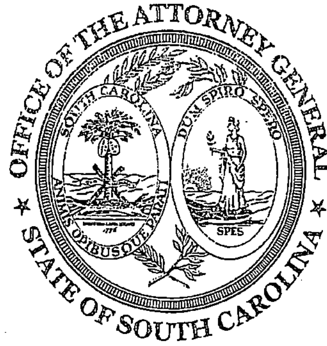

ALAN WILSON
ATTORNEY GENERAL

May 2, 2018

RECEIVED
MAY 02 2018
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Kristopher Berry v. State of South Carolina**
Appellate Case No. 2017-000100
Lower Court Case No. 2013-CP-16-1002

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/mm
Enclosures

cc: Kathrine H. Hudgins, Esquire