

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County

Honorable Edgar W. Dickson, Circuit Court Judge

ALAN BRUCE CARRUTHERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000685

APPENDIX

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INDEX

INDEX.....	i
GUILTY PLEA TRANSCRIPT	1
APPLICATION FOR POST-CONVICTION RELIEF	36
RETURN	43
POST-CONVICTION RELIEF HEARING TRANSCRIPT.....	50
AMENDED PCR APPLICATION.....	131
ORDER OF DISMISSAL	139
59 (e) MOTION.....	153
RETURN TO 59 (e) MOTION	186
59 (e) HEARING TRANSCRIPT	191
ORDER DENYING 59 (e) MOTION	202
INDICTMENT	204

ORIGINAL

STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON)

State of South Carolina,)
)
) PLAINTIFF,)
)
) -VS-) GUILTY PLEA
)
) 2006-GS-32-3422-3423
Alan Bruce Carruthers,)
)
)
) DEFENDANT.)
_____)

BEFORE THE HONORABLE G. THOMAS COOPER, JR., JUDGE
FEBRUARY 28, 2008
LEXINGTON, SOUTH CAROLINA

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

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I N D E X

PAGE NO.

Exhibit List	3
Sentence of the Court	32
Court Reporter's Certification	33

E X H I B I T S

PAGE NO.

Court's Exhibit Number One, Letter	31
Court's Exhibit Number Two, Notebook	31

1 (The defendant, together
2 with counsel, was personally present in the
3 courtroom.)

4 CLERK OF COURT: Alan Carruthers.
5 Indictment 2006-GS-32-3422, State versus Alan Bruce
6 Carruthers, indicted for criminal sexual conduct
7 with a minor, first degree. He is pleading as
8 charged. The indictment has been true billed, and
9 he is represented by Mr. Kennedy.

10 (Whereupon, the witness was
11 sworn.)

12 THE COURT: Mr. Kennedy, you have
13 explained to Mr. Carruthers the nature of these
14 charges, the significance of his guilty plea to a
15 most serious, no-parole offense of this nature, the
16 possible sentence he can receive, and his
17 constitutional rights, including that of a trial.
18 Does he seem to understand all those things, as far
19 as you know?

20 MR. KENNEDY: Your Honor, I believe that
21 he does. I've explained them to him many times.
22 They have been explained in full.

23 THE COURT: All right.

24 MR. KENNEDY: Mr. Carruthers impresses me
25 as a very intelligent individual.

5

1 THE COURT: All right, sir, thank you very
2 much.

3 Okay, Mr. Carruthers, how old are
4 you?

5 MR. CARRUTHERS: I'm 56 years old, Your
6 Honor.

7 THE COURT: Fifty-six. How much education
8 do you have?

9 MR. CARRUTHERS: I have fourteen years of
10 education.

11 THE COURT: What sort of work were you
12 doing before you were arrested?

13 MR. CARRUTHERS: In South Carolina -- we
14 just moved here -- I was not working. Prior to
15 living here, I worked as a security officer in
16 Worcester, Massachusetts.

17 THE COURT: Are you married?

18 MR. CARRUTHERS: Yes, sir.

19 THE COURT: Okay. Do you have any
20 children?

21 MR. CARRUTHERS: Yes, sir, I have one
22 daughter.

23 THE COURT: What's her age?

24 MR. CARRUTHERS: She'll be in 22 on March
25 3rd.

1 THE COURT: Have you ever been treated for
2 alcohol abuse, or drug abuse, or for any mental
3 illness?

4 MR. CARRUTHERS: Mental illness.

5 THE COURT: Okay. What sort of mental
6 illness?

7 MR. CARRUTHERS: Nervous condition,
8 emotional problems --

9 THE COURT: And how long ago --

10 MR. CARRUTHERS: -- depression.

11 THE COURT: Excuse me, I'm sorry. I
12 didn't hear you.

13 MR. CARRUTHERS: Depression and emotional
14 problems.

15 THE COURT: How long ago did you undergo
16 that treatment?

17 MR. CARRUTHERS: In the eighties and
18 nineties.

19 THE COURT: Was that an ongoing type of
20 treatment and counseling?

21 MR. CARRUTHERS: I was a patient in
22 psychotherapy and medication.

23 THE COURT: All right. Are you today
24 under any medication or drug that would make it
25 difficult for you to understand what we're doing

1 here?

2 MR. CARRUTHERS: No, sir -- heart
3 medication and cholesterol.

4 THE COURT: Sir?

5 MR. CARRUTHERS: Heart and cholesterol
6 medication.

7 THE COURT: All right, sir. But nothing
8 that impacts your reasoning and your ability to
9 understand?

10 MR. CARRUTHERS: That's correct.

11 THE COURT: Mr. Kennedy, you've already
12 indicated that, in spite of the difficulty he's had
13 in the past, there's nothing in your dealings with
14 him, I take it, that would lead you to believe that
15 he has difficulty understanding this process.

16 MR. KENNEDY: Not at all, Your Honor.
17 We've had many conversations with him, both in the
18 jail, the Solicitor's Office, in the court, and he
19 seems to be very clear and understanding all aspects
20 of the case. In fact, he was very articulate in the
21 things that he wanted me to do, the defenses he
22 wanted to pursue, etc.

23 THE COURT: I understand. Thank you very
24 much.

25 Mr. Carruthers, do you understand,

1 then, that when you enter a plea to criminal sexual
2 conduct with a minor in the first degree that you
3 can get up to 30 years in prison?

4 MR. CARRUTHERS: Yes, sir.

5 THE COURT: That whatever sentence you
6 receive, you have to serve at least 85 percent of it
7 before you will even be considered to be released in
8 the community, do you understand that?

9 MR. CARRUTHERS: Yes, sir, I do.

10 THE COURT: And that you must undergo
11 community supervision thereafter --

12 MR. CARRUTHERS: Yes, sir.

13 THE COURT: -- as a result?

14 MR. CARRUTHERS: Yes, sir.

15 THE COURT: This is classified in the eyes
16 of the law as a most serious offense. That means
17 that you use up today one of the two strikes that
18 you have under the law for a most serious offense,
19 Mr. Carruthers.

20 When you complete this sentence,
21 whenever that is, and get out, if you ever commit
22 another most serious offense, you would go to jail
23 for the rest of your life. You would die in jail.
24 Do you understand?

25 MR. CARRUTHERS: Yes, sir.

1 THE COURT: You will be required, when you
2 get out, whenever that is, to register as a sex
3 offender for the rest of your life as a result of
4 your plea here today. Do you understand that?

5 MR. CARRUTHERS: Yes, sir, I do.

6 THE COURT: When you enter this plea, Mr.
7 Carruthers, you have to give up certain important
8 constitutional rights. You have to give up, first
9 of all, your right to remain silent, that is, your
10 right to say nothing at all.

11 Under our law, no one can make you
12 testify against yourself. No one can force you to
13 admit that you're guilty. But if you plead guilty,
14 you have to tell me you're guilty. You give up your
15 right to remain silent. Do you understand that?

16 MR. CARRUTHERS: Yes, sir.

17 THE COURT: You have a right to a jury
18 trial, to let a jury decide whether you're guilty of
19 the charge or not. You don't have to try to
20 convince a jury that you're not guilty.

21 The State has to convince a jury that
22 you are guilty. But if you plead guilty, you don't
23 get a jury trial. You give up that right. Do you
24 understand that?

25 MR. CARRUTHERS: Yes, I do.

1 THE COURT: Mr. Kennedy has indicated to
2 me that you have suggested or talked with him about
3 certain defenses. You might have defenses to these
4 charges. I don't know whether you do or not.

5 I don't know anything about it. But
6 do you understand that if you plead guilty, you give
7 up any defenses that you might have?

8 MR. CARRUTHERS: Yes, sir, I do.

9 THE COURT: You have a right to call
10 witnesses to testify for you. You have the right to
11 have Mr. Kennedy cross-examine the witnesses who
12 would testify against you in a jury trial.

13 But if you plead guilty, you don't
14 get to question or call witnesses. You give up that
15 right. Do you understand?

16 MR. CARRUTHERS: Yes, I do, sir.

17 THE COURT: Mr. Carruthers, have you
18 understood the things that I've just gone over with
19 you?

20 MR. CARRUTHERS: Yes, sir.

21 THE COURT: Do I need to go over any of
22 these things with you again?

23 MR. CARRUTHERS: No, sir.

24 THE COURT: You understand that if you
25 plead guilty, you admit the truth of these charges

11

1 against you. You understand that?

2 MR. CARRUTHERS: Yes, I do.

3 THE COURT: Is that what you want to do?

4 MR. CARRUTHERS: Yes, sir.

5 THE COURT: The indictment accuses you
6 here in Lexington County between May 1, 2004, and
7 June 1, 2004, of committing sexual battery upon a
8 victim who is named in the indictment, who was less
9 than 11 years of age at the time.

10 Specifically, you are accused of
11 having sexual intercourse with her by inserting your
12 penis into her vagina, in violation of the law, or
13 penetrating her body in some way with part of your
14 body or an object, in violation of the law.

15 You are therefore charged with
16 criminal sexual conduct with a minor in the first
17 degree. Do you understand that charge?

18 MR. CARRUTHERS: Yes, sir.

19 THE COURT: How do you plead to the
20 charge?

21 MR. CARRUTHERS: I plead guilty.

22 THE COURT: Has anybody promised you
23 anything or held out any hope of reward to get you
24 to plead guilty to these charges?

25 MR. CARRUTHERS: No, sir.

1 THE COURT: Has anyone threatened you in
2 any way or forced you to make you plead guilty?

3 MR. CARRUTHERS: No, sir.

4 THE COURT: Are you pleading guilty freely
5 and voluntarily --

6 MR. CARRUTHERS: Yes, sir.

7 THE COURT: -- of your own will and
8 accord?

9 MR. CARRUTHERS: Yes, sir, I am.

10 THE COURT: Are you satisfied with
11 everything that Mr. Kennedy has done for you as your
12 lawyer?

13 MR. CARRUTHERS: Yes, I am, sir.

14 THE COURT: Has he done everything that
15 you've asked him to do?

16 MR. CARRUTHERS: Yes, sir, he has.

17 THE COURT: Have you had enough time to
18 talk with him about this?

19 MR. CARRUTHERS: Yes, sir, I did.

20 THE COURT: And have you understood the
21 talks you've had with him?

22 MR. CARRUTHERS: Yes, sir.

23 THE COURT: Do you need any more time
24 right now to talk with him any more?

25 (Whereupon, a negative response was

1 received from the defendant.)

2 You have ten days from today's date
3 to appeal this plea to a higher court, but you have
4 to file a paper with this Court within ten days if
5 you wish to appeal. Do you understand this, Mr.
6 Carruthers?

7 MR. CARRUTHERS: Yes, sir.

8 THE COURT: All right.

9 All right, Mr. Hubbard, tell me about
10 it.

11 MR. HUBBARD: May it please the Court,
12 Your Honor.

13 THE COURT: Yes, sir.

14 MR. HUBBARD: Your Honor, before I begin,
15 I'd like to point out for Your Honor that the
16 parents of the victim are present in the courtroom,
17 April and Thomas Davis. They're seated right here
18 on the pew, Your Honor, with the red shirt and green
19 shirt.

20 Also, a cousin and an uncle of the
21 victim, Wayne Keisler, is here. He's seated next to
22 them on the pew as well.

23 THE COURT: All right.

24 MR. HUBBARD: Your Honor, this happened
25 back in May of 2004. Specifically in the indictment

1 on the specific charge before you is May 1, 2004.
2 The victim was right at about seven years old at the
3 time.

4 She lived in a house with her folks,
5 next door to Mr. Carruthers, who had his wife and
6 his daughter living there. During the time that Mr.
7 Carruthers lived next door to the Davises, he
8 befriended this little girl and had her over and
9 then at some point was able to lure her to an
10 abandoned -- I call it a house, but it's more of an
11 abandoned building that was kind of like a frame
12 facility, but it was like a little house.

13 And it was back behind where the
14 defendant and the victims live, and no one lived
15 there. And in that building, Your Honor, we found
16 quite a few things. There were dolls, sex dolls.
17 There was a mattress and other items.

18 What he would do with the victim is
19 he slowly but surely won over her trust, her
20 confidence in him. He took photos of her. At first
21 in these photos, this young lady -- this young girl
22 -- was clothed, but eventually he was able to talk
23 her into taking her clothes off and pose, very
24 explicit poses.

25 And then at some point, Your Honor,

15

1 he started touching her as well. And if we had gone
2 to trial, Your Honor, we would have more than one
3 charge of sexual battery. We would have multiple
4 because of what this young lady revealed.

5 And I call her a young lady, Your
6 Honor. She's going to be 11 in March. She grew up
7 a lot faster than the rest of the kids her age. And
8 she's went through puberty now, and, in talking with
9 the parents, it's been a horrible time for her.

10 She did not disclose until some time
11 in June of 2004. Initially, what she did, she told
12 her cousins, who are a little bit older than her.
13 And her cousins knew right off the bat this was
14 wrong, this was bad. And her parents needed to
15 know.

16 So the oldest of her cousins went in
17 and told April Davis, the mother. Ms. Davis just
18 was floored and devastated. She called another
19 family member, "What do I do?," tried to reach her
20 husband.

21 Finally, she called law enforcement.
22 They said, "Take your daughter to the hospital," and
23 they met her at the hospital with her daughter. Law
24 enforcement did the appropriate thing.

25 We have a place called the Dickerson

1 Center where we send young victims who are assaulted
2 in this manner to be interviewed by a professional
3 forensic interviewer. In that interview, Your
4 Honor, this young girl admitted that she had
5 simulated anal sex. She was forced to appear in
6 nude photos and pose for photographs.

7 She spoke about something most girls
8 her age wouldn't know anything about, about the
9 defendant ejaculating in her presence, that they
10 looked at porn photographs. The defendant had a
11 slew of them on his computer, and he printed them
12 out.

13 He made her touch his penis. And
14 then, Your Honor, she spoke of penetration --
15 digital, penal -- over a period of time. When
16 investigators did a search warrant on -- they
17 searched both the facility, the abandoned house he
18 was using, and also his residence -- the abandoned
19 facility, they went in there, and, Your Honor, it's
20 a grungy place.

21 There's a mattress there, and on the
22 mattress were -- there were these dolls that for a
23 child would be something to play with, but they
24 meant something else to the defendant. And they
25 found items in his home -- a black trunk with what

17

1 appeared to be items used for sex, or for performing
2 sex, or for getting a child prepared for sex.

3 They did a search warrant on his
4 computer and found a host of things on his computer.
5 He had downloaded a lot of pornography. And, Your
6 Honor, the feds got involved in this. In fact, Mr.
7 Carruthers has pled guilty to charges arising out of
8 this case in Federal Court as to the computer
9 charges, items found on that computer.

10 He's awaiting sentence. They told us
11 they're going to wait for the sentence in this case.
12 And in investigating Mr. Carruthers, they found out
13 he wasn't originally from here. He's from
14 Massachusetts. Back in 1999, he was arrested in
15 Massachusetts for disseminating obscene material to
16 minors.

17 One of them was his daughter. He was
18 convicted in 2000 of that charge. The State of
19 Massachusetts gave him a one-year probationary
20 sentence. He packed his bags and moved down here,
21 next door to the Davises.

22 Your Honor, one thing I have done for
23 the Court and I talked to Mr. Kennedy about it, I've
24 prepared I think it's about 17 photos of items,
25 photos taken of the victim by the defendant and some

1 other items of evidence. I'd like to present that
2 to Your Honor.

3 And, Your Honor, at the appropriate
4 time, I would ask that Your Honor make this a
5 Court's exhibit, should this matter be reviewed
6 later on down the road for whatever purpose, just so
7 there is a record kept of some of the material.

8 THE COURT: All right.

9 Mr. Kennedy, of course, you've seen
10 this?

11 MR. KENNEDY: Yes, sir, Your Honor, I've
12 seen it.

13 MR. HUBBARD: And, Your Honor, I'll kind
14 of walk through what you see there. That first page
15 is the victim in this case. She was seven at the
16 time. You'll see her on page two and three and even
17 four. She's with a doll on a bed.

18 THE COURT: Right.

19 MR. HUBBARD: And that doll is important.
20 You'll see that later. It's important. There are
21 several photographs on page six. You'll see several
22 photographs of her. You'll see a hand touching her
23 private parts.

24 Mr. Carruthers admits that that's his
25 hand. You'll see her exposing her vaginal area.

1 Again, Mr. Carruthers took these photographs. In
2 the seventh photograph, you'll see her exposing
3 herself from behind.

4 On the eighth and ninth photographs,
5 you'll see her with a rope. And in the ninth
6 photograph, she's actually posing in a bondage-type
7 position. The tenth photograph -- and, Your Honor,
8 I did not number the exact pages. I should have
9 done that.

10 THE COURT: Okay.. I'm keeping up with you
11 now.

12 MR. HUBBARD: The tenth photograph is a
13 picture of that bed.

14 THE COURT: Right.

15 MR. HUBBARD: The defendant took that bed
16 and put those words on there. Those dolls are
17 there. Those are the ones he provided. These were
18 not the victim's dolls.

19 You'll see in the next photograph
20 there are cue cards when he would take photos of
21 her. Some of them would say "Open you legs,"
22 "Spread your legs," "Smile," "Play like a dog on all
23 fours." But these were not fun photographs for this
24 child, Your Honor.

25 In the twelfth one, again, she's

1 shown exposing her vaginal area. In the thirteenth
2 photograph, you'll see some items there. Those are
3 items seized from the defendant, from his house.
4 They were kept in a black trunk, which,
5 interestingly enough, in the case in Massachusetts,
6 everything was kept in a black trunk.

7 I don't know if it's the same one or
8 not, Your Honor. But the items are very similar to
9 the items seized up there. In some of those, you'll
10 see it looks like a cigar case and other items, and
11 they go from small to larger.

12 We would have had testimony that
13 those are commonly used by pedophiles. Prior to
14 molesting a child, they use those items to, for lack
15 of a better word, prime a child. You'll see what
16 appears to be a diary, or actually it's a photo
17 diary.

18 The title on it, Your Honor, on the
19 inside is this child's -- her first name. And it's
20 basically the child's first --

21 THE COURT: I see it.

22 MR. HUBBARD: It's the "F" word, Your
23 Honor. That was basically a coffee book table for
24 him, photos of the victim. We also found something
25 that often find with pedophiles. We found a

1 journal.

2 But unlike most journals, this was
3 one that was specifically for his interaction with
4 this child. And it had to do with him priming this
5 child for sexual relations. You'll see one photo,
6 and it's the very last one -- well, it's not the
7 last one, excuse. It should be right near where the
8 diary is, the photo journal.

9 You'll see one of a sexual act. That
10 photograph is on the inside of the journal, on the
11 inside cover. That journal only dealt with this one
12 victim. You'll see him, coming back to the
13 sixteenth photograph, the second-to-last one. He's
14 got a doll, and he's basically having sex with that
15 doll.

16 It's the same doll you see at the
17 beginning of those photographs, him having sex with.
18 And the final photograph is a doll he has ejaculated
19 on. Your Honor, I've been doing this a while.
20 Rarely do we have this much evidence that's so
21 graphic in its nature.

22 Your Honor, I can't help but think
23 this is probably one of the worst ones I've ever
24 had. The things that this child went through, Your
25 Honor, it pales compared to what she's going through

1 now.

2 As I mentioned, she'll be 11 next
3 month. Her parents have told me she's going through
4 puberty and is having a very difficult time. She's
5 got anger issues. She's has to seek counseling.

6 In fact, last summer, in June, she
7 was admitted to the Baptist psychiatric ward for
8 almost a month, a child, because of this. She has
9 two siblings, a younger sister. Her relationship
10 with that sister is one of almost fear. She doesn't
11 want to hurt her younger sister.

12 Her older sister she argues with all
13 the time. It's some unexplicable anger issues that
14 this young girl cannot express and her older sibling
15 is having to deal with.

16 Your Honor, I've talked to the
17 parents and the uncle of this victim to see if they
18 want to speak. And at the time I spoke to them,
19 they weren't sure. I don't know if this is the
20 appropriate time.

21 THE COURT: Yes, sir, it is.

22 MR. HUBBARD: Would y'all like to speak?

23 Your Honor, this is Ms. Davis.

24 THE COURT: Ms. Davis, I'll be glad to
25 hear from you, ma'am.

23

1 MS. DAVIS: I am April Davis. I'm her
2 mother. I try to be friendly with people and help
3 them. But it's not good, because I made a mistake.
4 I trusted him with my daughter, and I thought they
5 were good people.

6 I welcomed them into my church and my
7 home. And to have him do this, it's totally
8 devastating. My daughter is not the same now. As
9 far as her puberty, she spent a week -- a month in
10 the hospital because she tried to kill herself
11 because of what this gentleman has done.

12 I don't understand why he done it.
13 How could anyone do this to a child, you know?
14 We've gone through a lot of changes in our home. It
15 almost ruined my husband and my marriage. I thought
16 I failed as a mother to take care of her. I tried
17 to watch her as much as I could, and now I can't
18 leave her alone at all with my four-year-old because
19 they're just scared she may try to do something to
20 her.

21 It's just been totally devastating to
22 all of our family. It's affected us all. And I
23 just pray that -- I know God will punish him as he
24 needs to be. But I just pray that he'll be put away
25 so he don't hurt anyone else and he doesn't hurt any

1 more children.

2 THE COURT: Thank you, Ms. Davis.

3 MR. HUBBARD: Your Honor, I've explained
4 to this family that a Judge such as yourself never
5 has an easy job, and you have to hear both sides,
6 and that often part of your job is looking for mercy
7 as well, if there's any basis for it. And,
8 obviously, I told them the defense will present
9 whatever information for that matter.

10 I did talk to them and told them that
11 I would relay to you, as far as mercy is concerned,
12 we would remind Your Honor that he was charged in
13 Massachusetts and came to South Carolina. He had a
14 second chance then, and he's facing multiple
15 charges, already indicted, and charges that we could
16 have brought in this matter that would have amounted
17 probably to well over a hundred years.

18 THE COURT: Right.

19 MR. HUBBARD: I'd ask that Your Honor
20 consider that. And as far as a sentence, Your
21 Honor, I don't usually ask for a sentence, but today
22 I do. I ask for every day of that 30 years. I ask
23 that for the family, and I ask that for this little
24 girl, and I ask it for the State.

25 THE COURT: Thank you, Mr. Hubbard.

1 MR. HUBBARD: Thank you.

2 THE COURT: Mr. Kennedy, I'll be glad now
3 to hear from you and from Mr. Carruthers and anyone
4 on his behalf.

5 MR. KENNEDY: Thank you, Your Honor, may
6 it please the Court.

7 THE COURT: Yes, sir.

8 MR. KENNEDY: Your Honor, initially, when
9 this case first arose, the Public Defender Agency
10 was representing Mr. Carruthers. Apparently, the
11 attorney representing him left the agency, and the
12 Clerk of Court here in Lexington County appointed me
13 from the private bar to represent him in his
14 defense.

15 Since that time, Your Honor, I have
16 been appointed for some time now. I've spent many,
17 many hours working on this case, evaluating it,
18 going to the jail, talking with Mr. Carruthers,
19 reviewing all of the evidence and the documents.
20 That's part of my file. But the rest was
21 voluminous, and I didn't bring it today.

22 THE COURT: All right.

23 MR. KENNEDY: The Public Defender provided
24 their entire file to me also, but it was very
25 voluminous. Your Honor, the State made all the

1 evidence available both to Mr. Carruthers and I to
2 review.

3 And, in fact, one time -- I believe
4 it was in October -- we came over to the courthouse
5 and spent most of the day reviewing huge amounts of
6 evidence. It was voluminous, to say the least. And
7 Mr. Carruthers, after reviewing that evidence,
8 confided in me that he felt as though the best thing
9 for him was to enter a guilty plea.

10 And I concurred with his decision
11 wholeheartedly. The evidence was overwhelming. My
12 opinion, as an attorney for over 20 years, was that
13 it was very, very, very likely that a jury would
14 convict Mr. Carruthers, not only this count but of
15 many other counts which the prosecution could have
16 chose to indict him for.

17 Your Honor, he was prosecuted by the
18 Federal Government, and Mr. Langdon Long of the
19 Federal Public Defender represented him in that
20 prosecution. Mr. Long has worked with me, has
21 coordinated this with me, and has kept me informed
22 on how that prosecution went.

23 Mr. Carruthers pled guilty in Federal
24 Court to that. A goal was to see that Mr.
25 Carruthers served concurrent time, and the State

1 agreed to that goal. Your Honor, I would like to
2 pass up a letter from Mr. Long, dated January 10,
3 2008, which basically states that by Mr. Carruthers'
4 coming today, pleading guilty and being sentenced in
5 State Court, that his Federal Court will then run
6 concurrent with the State charges. I want to make
7 that part of the record, if I may, Your Honor.

8 THE COURT: Yes, sir, please.

9 Have you seen this?

10 MR. HUBBARD: Yes, sir, Your Honor.

11 THE COURT: Thank you.

12 All right, sir.

13 MR. KENNEDY: Your Honor, considering the
14 weight of the evidence against Mr. Carruthers,
15 considering the offer of concurrent time with the
16 federal sentence, considering that the State would
17 drop all other pending charges against Mr.
18 Carruthers and that the State would not indict him
19 for additional charges, it was, after lengthy
20 discussion, determined by Mr. Carruthers and both
21 myself that his guilty plea today is in his best
22 interest.

23 THE COURT: Right.

24 MR. KENNEDY: And that's how that decision
25 came about. Your Honor, Mr. Carruthers does admit

1 to the sexual battery. I want the Court to
2 understand that he denies the multiple instances of
3 penetration that the State alleged.

4 He is only pleading guilty to one
5 count and one count alone. So, although the State
6 says that they have all this evidence, I would like
7 the Court to be reminded that he is only admitting
8 to one count of sexual battery here in this case.
9 And I would ask the Court to consider that when
10 sentencing him.

11 He wanted me to tell the Court that
12 his family misses him. His wife and his daughter
13 miss him tremendously. He says that the reason they
14 moved from Massachusetts to South Carolina was
15 because of his arthritis, that he was very -- has a
16 lot of arthritis and the cold winters up in
17 Massachusetts.

18 They were able to sell their home.
19 Apparently, they made a good bit of money from doing
20 that, and it enabled them to move to South Carolina,
21 to be able to retire without him working further.
22 He told me that he had worked as a custodian in a
23 hospital for seven years, was a parking lot
24 attendant, also a security officer at different
25 places part-time, but that he had been troubled with

29

1 depression for many, many years, which enabled him -
2 - prevented him from seeking more gainful
3 employment.

4 As I told the Court, I have no doubt
5 Mr. Carruthers is a very intelligent man. In fact,
6 he's probably one of the more intelligent people
7 I've ever represented. His understanding of the law
8 is very good.

9 He suggested certain research that I
10 do, certain defenses that might be afforded to him,
11 and I believe completely that he is very cognizant
12 of all of this and understands it completely. He's
13 56 years old, Your Honor, and he does have some
14 severe health problems.

15 As he told you, he is on heart
16 medication and cholesterol medication. And I know
17 that he does have some serious heart problems.
18 Prior to moving to South Carolina, he did live his
19 entire life in Massachusetts.

20 His wife has cerebral palsy and needs
21 help, so she and his daughter moved back to
22 Massachusetts where they have family and they can
23 better care for his wife and his daughter in
24 Massachusetts, because there was no one here to help
25 once he was put in jail.

1 He has told me that he admits to his
2 addiction to this, as he called it, evil over the
3 Internet and that he hopes that whatever sentence
4 the Court does decide to impose on him that he
5 receive as much counseling and help as is available
6 to him in the Department of Corrections --

7 THE COURT: All right.

8 MR. KENNEDY: -- if the Court decides to
9 give him time in the Department of Corrections.
10 Your Honor, he may wish to speak and address the
11 Court. I'm not sure. I think he's contemplating
12 that now.

13 All I would ask, Your Honor, is that
14 he is 56 years of age, and that you consider all
15 this, and give him what you believe would be the
16 appropriate sentence in this matter.

17 THE COURT: Thank you, Mr. Kennedy.

18 Mr. Carruthers, I'll be glad now to
19 hear from you, sir.

20 MR. CARRUTHERS: Thank you, Judge Cooper.
21 I am very, very deeply saddened by this whole past
22 four years things have happened and to a family who
23 didn't deserve all this. These type of cases are
24 the most difficult for everybody. They're
25 difficult, I know, for the Solicitors, the police

1 even, and for the defense attorneys, and for the
2 victims involved, and for myself as well.

3 It seems like we're attacked by
4 everybody trying to understand all of it. And the
5 only thing I could come up with, with understanding,
6 there's nothing in my past experience, other than
7 the prior charge of disseminating pornography to a
8 minor.

9 The only thing that can equate to how
10 a normal life and then, all of a sudden, this
11 happens to this degree in my life, it's almost
12 unexplainable. I equate what happened to an
13 addiction, because drug, alcohol, or pornography
14 does lead a person, when they stay on that, to get
15 further and further involved in it.

16 And I believe that is what probably
17 happened. And because of that, it led to molesting
18 a child. And I never would have thought that I
19 would be facing, but I did. And I'm so very sorry
20 to the State. I didn't come down to South Carolina
21 to do that.

22 I didn't leave Massachusetts to flee
23 from anything. I was off parole, and everything was
24 going okay. Sometimes there's coping mechanisms
25 where you part away from pornography. And then

1 something happens where you're without work, a
2 person like myself that needs help, gets back
3 involved in it.

4 And I had this little girl who would
5 come over, and she looked up to me as an adult,
6 somebody who she did not understand my behavior, I
7 believe, and I'm so sorry for that little girl. And
8 I just wish them well. I'm sorry, Your Honor.

9 THE COURT: Thank you, sir.

10 Mr. Kennedy, anything further?

11 MR. KENNEDY: Your Honor, he has been
12 incarcerated for probably an extended period of
13 time. I'd just ask the Court to --

14 THE COURT: Yes, sir.

15 MR. KENNEDY: -- give him credit for that.

16 THE COURT: He will get credit for time
17 served.

18 Madam Reporter, two things. First of
19 all, if you will make a Court's Exhibit out of this
20 letter.

21 (Court's Exhibit Number
22 One, Letter, was entered in evidence.)

23 THE COURT: Court's Exhibit Number Two
24 will be this notebook, and that is to under seal and
25 not to be opened without the order of a Circuit

1 Judge.

2 COURT REPORTER: Yes, sir.

3 (Court's Exhibit Number
4 Two, Notebook, was entered in evidence.)

5 THE COURT: Madam Clerk, if you'll see
6 that that's put in an envelope and sealed.

7 I can add very little to the gravity
8 of these offenses other than has been submitted by
9 Mr. Hubbard in his presentation, what is revealed in
10 that notebook, and to some extent what is admitted
11 to by Mr. Carruthers.

12 Whether this was a single incident or
13 whether it was many, as there is evidence of, it was
14 not an isolated incident. It was calculated, it was
15 contrived, it was designed, to reach the end that it
16 did. The notebook reveals that. And the testimony
17 of the victim as she has related it to investigators
18 has revealed that. And she has -- in addition to
19 the physical and psychological impact -- lost an
20 innocence that she will never be able to regain,
21 that should not have been taken from her.

22 Mr. Carruthers, the sentence of
23 the Court is that you be committed to the State
24 Department of Corrections for a period of 30 years.
25 You'll get credit for the time that you have served.

1 This sentence will run concurrent to the
2 federal charges. You are to receive counseling as a
3 sex abuser and a pedophile while you're in the
4 Department.

5 We'll be in recess for ten
6 minutes, folks. Thank you.

7 MR. HUBBARD: Thank you, Your Honor.

8 --End of Transcript of Record--

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT THOMAS, OFFICIAL COURT
REPORTER, AND NOTARY PUBLIC IN AND FOR THE STATE OF
SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF
RECORD OF THE PROCEEDINGS HAD AND EVIDENCE
INTRODUCED IN THE ABOVE-CAPTIONED CASE ON FEBRUARY
28, 2008, IN LEXINGTON, SOUTH CAROLINA.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL
NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF
ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS
OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND
AND SEAL AT CHAPIN, SOUTH CAROLINA, THIS THE
EIGHTEENTH DAY OF APRIL, 2008.


REMA K. GANTT THOMAS
OFFICIAL COURT REPORTER
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 11/21/2013

FORM 5

ORIGINAL
FILED
SCANNED

STATE OF SOUTH CAROLINA

COUNTY OF **LEXINGTON**

FILED

IN THE COURT OF COMMON PLEAS

2011 MAR -7 A 8:45

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

Alan Bruce Carruthers, #326809

v.

APPLICATION FOR

State of South Carolina

POST-CONVICTION RELIEF

2011CP3200910

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 Lee Correctional Institution, Bishopville, SC
2. Name and location of Court which imposed sentence General Sessions
Lexington, SC
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2006-GS-32-3422
 - (b) N/A
 - (c) N/A
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) February 28, 2008 - 30 Yrs. to run concurrent to sentence on federal charges; to be given credits for time served; and to be
 - (b) placed on Central Registry of Child Abuse and Neglect.

A TRUE COPY

Revised 3/2003

Lex. Co. C.C.C.P., G.B. & F.C.

- (c) N/A
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty X
- (b) after a plea of not guilty N/A
- (c) after a plea of nolo contendere N/A
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. State of South Carolina Court of Appeals
- ii. N/A
- iii. N/A
- (b) the result in each such Court to which you appealed:
- i. Conviction Affirmed
- ii. N/A
- iii. N/A
- (c) the date of each such result:
- i. Filed June 8, 2010
- ii. N/A
- iii. N/A
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpublished Opinion No. 2010-UP-301
- ii. N/A
- iii. N/A
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A
- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

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2010 MAR - 7 A 8:45

TIA CARRIS

1111

- (a) Ineffective Assistance of Court Appointed Counsel
- (b) Fraud Upon the Court
- (c) Prosecutorial Misconduct
- (a) Credit for Time Served
11. State court in this case for the facts which support each of the grounds set out in (10):
- (a) Misled Applicant as to conditions of plea.
- (b) Misrepresented evidence to verify warranting acceptance of plea.
- (c) Knowingly accepted plea Applicant had insisted his innocence to.
- (d) County Jail Time not Credited Toward Sentencing
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? 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. Direct Appeal from Guilty Plea
- ii. N/A
- iii. N/A
- iv. N/A
- (b) the name and location of the Court in which each was filed:
- i. The South Carolina Court of Appeals, South Carolina
- ii. N/A
- iii. N/A
- iv. N/A
- (c) the disposition thereof:
- i. Conviction Affirmed
- ii. N/A
- iii. N/A

LETIM A. CARRICO
CLERK OF COURT
JANUARY 1, 2011

2011 MAR -7 A 8:45

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- iv. N/A
- (d) the date of each such disposition:
- i. Filed June 8, 2010
- ii. N/A
- iii. N/A
- iv. N/A
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. Unpublished Opinion No. 2010-UP-301
- ii. N/A
- iii. N/A
- iv. N/A
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. N/A
- ii. N/A
- iii. N/A
- (b) the proceedings in which each ground was raised:
- i. N/A
- ii. N/A
- iii. N/A
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) Not allowed to bring issue before the S.C. Court of Appeals.
- (b) Issue was not preserved for the record.
- (c) Issue was not preserved for the record.
17. Were you represented by an attorney at any time during the course of:

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 2011 MAR -7 A 8:45
 JAMES CARRIG
 CLERK OF COURT

- (a) your arraignment and plea? Yes
- (b) your trial, if any? N/A
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Ralph S. Kennedy, Jr., Kennedy Law Firm, LLC, 125 E. Church St.
P. O. Box 2559, Batesburg - Leesville, S.C. 29070
 - ii. M. Celia Robinson, Division of Appellate Defense
1330 Lady Street, Suite 401, P. O. Box 11589, Columbia, S.C. 29211-1589
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Guilty Plea and Sentencing
 - ii. Direct appeal
 - iii. N/A
19. State clearly the relief you seek in filing this application:
Applicant would ask this Honorable Court to set aside his guilty plea and remand for a new trial.
20. Are you now under sentence from any other court that you have not challenged?
Federal Court

FILED
2011 MAR -7 A 8:4
TIA CARROLL
11000000

Revised 3/2003

STATE OF SOUTH CAROLINA

2011CP3200910
VERIFICATIONCounty of Alan Carruthers Lee

I, Alan Carruthers, 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.

Alan B. Carruthers

Alan B. Carruthers, #326809
Lee C.I. - Kershaw S. 1157-T
990 Wisacky Highway
Bishopville, S.C. 29010-1775

SWORN to and subscribed before me this 2
day of Mar 2011.

Sharon Duma (L.S.)
Notary Public

My Commission Expires: 5-16-14

FILED
2011 MAR -7 A 8:46
J. A. CARRUTHERS
NOTARY PUBLIC
SOUTH CAROLINA

2011CP3200910

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

Alan Bruce
Carruthers

I, Alan Bruce Carruthers, 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.

Alan Bruce Carruthers
Applicant

Alan Bruce Carruthers, SCDC#326809

SWORN or affirmed to and subscribed before me this

2 day of Mar, 2011:
[Signature]
Notary Public

My Commission Expires: 5-16-11

FILED
2011 MAR -7 2 8:46
JTH A. CARRIC
CLERK OF COURT
SCDC#326809

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	Case No: 2011-CP-32-0910
	)	
Alan Bruce Carruthers, #326809.	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post-conviction relief (PCR) filed March 7, 2011, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the February 2011 term of the Lexington County Grand Jury for Criminal Sexual Conduct with a Minor 1st Degree (2006-GS-32-3422). Applicant was represented by Ralph S. Kennedy, Esquire. On February 28, 2011, the Applicant pled guilty as charged. The Honorable G. Thomas Cooper sentenced the Applicant to confinement for a period of thirty (30) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Carruthers, Op. No. 2010-UP-301 (S.C. Ct. App. filed June 8, 2010). The Remittitur was issued on June 24, 2010.

Attached herewith and incorporated herein are the records of the Lexington County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina

Department of Corrections, the guilty plea transcript, and the Applicant's records from the prior appeal proceedings. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective Assistance of Counsel – “misled Applicant as to conditions of plea;”
2. Fraud Upon the Court – “misrepresented evidence to verify warranting acceptance of plea;”
3. Prosecutorial Misconduct – “knowingly accepted plea Applicant had insisted his innocence to;”
4. Credit for Time Served – “county jail time not credited toward sentencing.”

III.

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

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

IV.

Respondent interprets Applicant's second allegation as Applicant's plea was involuntary, unknowing, and unintelligent. Respondent submits this allegation is without merit. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that

(1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

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

V.

Applicant's allegation of prosecutorial misconduct raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss this allegation.

VI.

Aside from two matters specifically mentioned in the statute, post-conviction relief is a proper avenue of relief only when the Applicant mounts a collateral attack challenging the validity of his conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000). A credit-related claim or challenge to other conditions of confinement are administrative matters and, thus, cannot be raised in a post conviction relief proceeding. Id. Likewise, a challenge to the conditions upon which parole eligibility is determined or decided is not cognizable in a post-conviction relief application. Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000).

Here, the Applicant complains that the Department of Corrections (SCDC) is not properly calculating his sentence by not applying credit for time served. The statutory right to sentence related credits is a protected “liberty” interest under the Fourteenth Amendment, entitling an inmate to minimal due process to ensure the state-created right was not arbitrarily abrogated. Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Because SCDC’s disciplinary and grievance procedures are consistent with the standards delineated in Wolff v. McDonnell, supra., inmates may seek review of such claims under the Administrative Procedures Act (APA). Al-Shabazz, 338 S.C. 354. Therefore, this Court should summarily dismiss this claim because it is not cognizable in post-conviction relief and the post-conviction relief Court has no jurisdiction to hear or rule on these allegations.

VII.

The State therefore requests that this Court convene an evidentiary hearing solely on the issues of ineffective assistance of counsel and voluntariness of the plea. As to all other allegations, the State moves for summary judgment 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.

VIII.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

IX.

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

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

KAELOE E. MAY
Assistant Attorney General

By: Kaelo May
ATTORNEYS FOR RESPONDENT

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

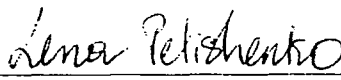
December 16, 2011.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
	)	
	)	2011-CP-32-0910
	)	
ALAN BRUCE CARRUTHERS, #326809	)	
	)	
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** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Theodore N. Lupton , Esquire
140 Gibson Rd.
Lexington, SC 29072

DATED this 16th day of December, 2011



 Lena Pelishenko, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON) COURT OF COMMON PLEAS
) ELEVENTH JUDICIAL CIRCUIT

Alan B. Carruthers,)
)
) Post-Conviction Relief
 APPLICANT,) Hearing
) 2011-CP-32-0910
 -VS-)
)
 State of South Carolina,)
)
 RESPONDENT.)
 _____)

BEFORE THE HONORABLE EDGAR W. DICKSON, JUDGE

AUGUST 14, 2013

LEXINGTON, SOUTH CAROLINA

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

Catherine Johnson, Esq.
 For the Applicant

J. Walt Whitmire, Esq.
 For the State

REMA K. GANTT THOMAS
 CIRCUIT COURT REPORTER

I N D E X

	PAGE NO.
Exhibit List.	3
Opening Remarks	5
Motion.	6
Ruling of the Court	8
Testimony of witnesses	
Ralph Shealy Kennedy, Jr.	
Direct.	9
Cross	47
Redirect.	49
Alan Bruce Carruthers	
Direct.	52
Cross	72
Redirect.	74
Recross	75
Applicant Rests	79
State Rests	79
Court Reporter's Certification.	81

E X H I B I T S

	Page No.
Applicant's Exhibit Number One, Video.	9
Applicant's Exhibit Number Three, Photo.	9
Applicant's Exhibit Number Four, Photo	9
Applicant's Exhibit Number Five, Photo	9
Applicant's Exhibit Number Six, Photo.	9
Applicant's Exhibit Number Nine, Front page of an indictment	48
Applicant's Exhibit Number Ten, Front page of an indictment	48
Applicant's Exhibit Number Eleven, Front page of an indictment	48
Applicant's Exhibit Number Thirteen, Page of an investigative report	48
Applicant's Exhibit Number Fourteen, Page of an investigative report	48
Applicant's Exhibit Number Eighteen, Page of an investigative report	48
Applicant's Exhibit Number Nineteen, Seizure of computer	48
Applicant's Exhibit Number Twenty, Evidentiary chain of custody	48

Applicant's Exhibit Number Twenty-One, Evidence property record.	48
Twenty-Two, One page of a search warrant	48

1 (The defendant, together with counsel, was
2 personally present in the courtroom.)

3 MR. WHITMIRE: The matter before the Court
4 is Alan Carruthers v. State of South Carolina, Case
5 Number 2011-CP-32-0910. Mr. Carruthers was indicted
6 for CSC with a minor in the first degree. Mr.
7 Carruthers was represented by Ralph Kennedy.

8 The Honorable Judge Cooper sentenced Mr.
9 Carruthers to 30 years' imprisonment for those charges.
10 Timely notice of appeal was filed and perfected. The
11 Court of Appeals dismissed and the appeal remittur was
12 sent June 24, 2010.

13 Mr. Carruthers filed a timely application
14 for post-conviction relief and has alleged --

15 One moment, Your Honor.

16 MR. WHITMIRE: -- ineffective assistance of
17 counsel for failure to advise on the terms of the plea
18 offer to on the Court, prosecutorial misconduct, credit
19 for time served. At this time, Your Honor, I would ask
20 for summary judgment for credit for time served, the
21 fourth allegation, pursuant to Alshebaz as to
22 post-conviction relief. I'll turn matters over to Ms.
23 Johnson. I believe she has some matters before the
24 Court.

25 THE COURT: Ms. Johnson, how did you talk Mr.

1 Shaffer out of representing him?

2 MS. JOHNSON: A couple of weeks ago, he and
3 I were on a murder trial together, and he had another
4 murder trial coming up after that. This was my first
5 criminal case ever, the murder trial.

6 THE COURT: Okay.

7 MS. JOHNSON: And he thought that I would
8 have more time to do it than he would, so I agreed to
9 take it.

10 COURT REPORTER: And your first name?

11 MS. JOHNSON: My first name is Catherine.

12 And, Your Honor, today I'm asking the Court
13 for a motion for a continuance. And the reason for that
14 is I would like to give the applicant his best shot at
15 the apple.

16 THE COURT: His only shot.

17 MS. JOHNSON: His only shot at the apple.
18 And I've had this case for just a couple of weeks.
19 While I have prepared as best I can, there are certainly
20 still matters that I'm seeking an answer and I haven't
21 had time to get the answers for yet.

22 I talked to Mr. Carruthers a couple of times.
23 And he says that he's personally ready to go, and he's
24 never going to be more ready to go. But he left it in
25 my discretion to ask for a continuance. And my

1 personal feeling is that I feel like I can't do as good
2 a job as I could if I had a little bit more time.

3 THE COURT: Okay.

4 Mr. Whitmire, do you agree with that?

5 MR. WHITMIRE: I oppose continuance, and I
6 said that to Ms. Johnson earlier in the week. The
7 witness in this case is Representative Kennedy. He can
8 only be present for court twice a year pursuant to his
9 commitments to the General Assembly. Furthermore,
10 this case has been continued a number of times for at
11 least a year and a half. It's been bounced around.

12 When Ms. Johnson took this case, she took it
13 with it being on the roster, full knowledge. She has
14 prepared to the best of her ability and met with her
15 client, who's ready to go forward. And we have victims
16 here on this case. And every time this comes up and
17 it doesn't go forward, it upsets them.

18 Your Honor, the facts of this guilty plea
19 speak for themselves. He has asked me today -- the
20 father of the victim in the case -- wants this over with.
21 And I just wanted to put that on the record.

22 THE COURT: Okay. And it's been on the
23 docket before?

24 MR. WHITMIRE: Yes, Your Honor.

25 THE COURT: Okay, all right.

1 Ms. Johnson, what I'm going to do is I'm going
2 to deny your continuance motion. At the end of the
3 case, if there's something that comes up and you want
4 to request further information into the Court, I'll
5 consider that at that time. But what we'll do right
6 now is I'm going to go forward with this case since it's
7 been scheduled before, okay?

8 MS. JOHNSON: Yes, Your Honor.

9 THE COURT: Thank you, ma'am.

10 MR. WHITMIRE: And, Your Honor, the State
11 would just ask for a date certain on that and the ability
12 to respond, if necessary.

13 THE COURT: That's only if something comes
14 up during the trial. We'll do that if we have to do
15 that.

16 MR. WHITMIRE: Thank you, Your Honor.

17 THE COURT: I don't know that we will have
18 to do that, all right.

19 You want to tell me about it, Mr. Whitmire,
20 or you've told me all you're going to?

21 MR. WHITMIRE: I turn matters over to Ms.
22 Johnson to call her case.

23 THE COURT: Okay.

24 Yes, ma'am.

25 MS. JOHNSON: Your Honor, we'd like to call

1 Mr. Ralph Kennedy to the stand.

2 THE COURT: Mr. Kennedy.

3 (Whereupon, the witness was sworn.)

4 CLERK OF COURT: Have a seat and state your
5 name for the record, please, sir.

6 MR. KENNEDY: Ralph Shealy Kennedy, Jr.

7 THE COURT: All right, Ms. Johnson, your
8 witness.

9 MS. JOHNSON: Yes, sir.

10 RALPH SHEALY KENNEDY, JR., having first been
11 duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MS. JOHNSON:

14 Q Mr. Kennedy, could you please tell us what
15 your duty is to advise a client when you were
16 representing them before a plea?

17 A It was the same duty that any other attorney
18 had when they represent a criminal client, which is to
19 fully prepare the case, fully consult with their
20 client, fully explain things to the client, and take
21 direction from the client if the client wants to give
22 them direction, and also give appropriate legal advice
23 to the client.

24 Q And when you say tell the client what they're
25 facing, it's very typical for people to get false hopes

10

Ralph Kennedy - Direct

1 and you want to be really clear about what it is that
2 they're facing, correct?

3 A Absolutely.

4 MS. JOHNSON: Okay. We have a number of
5 exhibits that were entered as part of the brief, and
6 I have a question for the Court before I go on.

7 THE COURT: Yes, ma'am.

8 MS. JOHNSON: That is, is our brief made a
9 part of the record?

10 THE COURT: Yes, ma'am. If you have a
11 brief, I'd like to have it.

12 MS. JOHNSON: The brief was part of the
13 applicant's initial application. I have a copy of it.
14 And along with that brief, we have a numerous number
15 of exhibits.

16 MR. WHITMIRE: One moment, Your Honor.

17 THE COURT: Okay. I've got a copy of his
18 application for post-conviction relief.

19 MR. WHITMIRE: And, Your Honor, the State
20 would oppose to any of the applicant's actual
21 handwriting to be made part of the record. The
22 applicant is not entitled to hybrid representation of
23 counsel here.

24 THE COURT: I don't know what she's going to
25 show me.

Ralph Kennedy - Direct

1 MS. JOHNSON: Okay, I'm trying to get it for
2 you. I'm sorry, Your Honor.

3 THE COURT: That's okay.

4 MS. JOHNSON: Mr. Carruthers has an
5 additionally copy of it, apparently.

6 THE COURT: Okay.

7 MS. JOHNSON: I wanted to hold my copy
8 because I may need it to question.

9 THE COURT: All right. Ms. Johnson, is that
10 a brief you prepared or a brief that --

11 MS. JOHNSON: This is a brief that he had
12 typewritten as part of his application.

13 THE COURT: The only thing I have is his, I
14 guess five-page application where he lists his grounds
15 for post-conviction relief.

16 MS. JOHNSON: Yes, Your Honor. There's a
17 brief in addition to that that was filed with the
18 Attorney General's Office several years ago. And it's
19 important for my client to have that on the record to
20 be able to rely upon as well as my --

21 MR. WHITMIRE: Your Honor, I'm going to
22 object. Mr. Carruthers has the opportunity to testify
23 in his case in chief. Additionally, the attorney who
24 co-signed Mr. Carruthers' handtyping is no longer on
25 this case. I would ask the attorney who did sign it

12

Ralph Kennedy - Direct

1 to verify pursuant to Rule 11 the contents of it before
2 it becomes part of the Court records.

3 THE COURT: Let me see it. Apparently,
4 Ms. Johnson, this is the legal brief that Mr. Carruthers
5 prepared, I guess perhaps with the assistance of Mr.
6 Luffkin, who was his defense attorney at that time, is
7 that correct, Ms. Johnson?

8 MR. CARRUTHERS: I was going to amend it. I'm
9 not sure if he's done that yet.

10 THE COURT: Okay, all right. This is not
11 evidence, but I will take it as a brief like a memorandum
12 of law, okay? So I will accept it for that purpose,
13 okay?

14 MS. JOHNSON: Thank you, Your Honor.

15 THE COURT: Okay, thank you, ma'am. If you
16 want to resume questioning Mr. Kennedy about his
17 representation --

18 MR. WHITMIRE: One moment, Your Honor.

19 THE COURT: Yes, sir.

20 MR. WHITMIRE: I did inherit the file about
21 a year and a half ago, but I do not have a copy of his
22 brief.

23 THE COURT: Okay. Well, what we'll do is
24 since you will at some other time after this case, after
25 I hear it, we'll make a copy. It's essentially a memo

Ralph Kennedy - Direct

1 of law prepared by Mr. Carruthers.

2 MS. JOHNSON: I'll be happy to give you my
3 copy.

4 THE COURT: We'll work through this, okay?

5 MS. JOHNSON: Okay. I have a number of
6 exhibits that are actually a part of that that I'm going
7 to use here today. Most of them are already marked,
8 but I'll go ahead and stick them in here if that's okay.

9 COURT REPORTER: You want all these marked
10 individually?

11 MS. JOHNSON: Yes, ma'am. There's numerous
12 pages to, for example, one letter. So they're already
13 marked as like this is a two-page letter, so it's
14 already one.

15 COURT REPORTER: I need just a minute, Your
16 Honor.

17 THE COURT: Okay.

18 Ms. Johnson, you gave a copy to Mr. Whitmire
19 so he could review it?

20 MS. JOHNSON: Yes, sir.

21 THE COURT: Okay.

22 MR. WHITMIRE: Yes, Your Honor.

23 THE COURT: Thank you, sir.

24 COURT REPORTER: It's unclear to me where
25 these go or what they might be with.

Ralph Kennedy - Direct

1 Your Honor, I've marked Applicant's Exhibits
2 One through Twenty-Two.

3 (Whereupon, Applicant's Exhibits One
4 through Twenty-Two were marked for identification
5 purposes.)

6 THE COURT: One through 22, okay.

7 And, Mr. Whitmire, have you had an
8 opportunity to review Applicant's One through
9 Twenty-Two?

10 MR. WHITMIRE: Your Honor, I'm reviewing
11 them right. Exhibit Nine is already part of the
12 record.

13 THE COURT: Okay.

14 MR. WHITMIRE: It's the indictment, I
15 believe..

16 THE COURT: Okay.

17 MR. WHITMIRE: Exhibit Twelve, I'm going to
18 have to object on foundation. It's a letter signed by
19 a doctor who I do not know who it is.

20 THE COURT: Okay.

21 MR. WHITMIRE: Who I'm unaware is going to
22 be here to testify today. And any piece of
23 correspondence that Mr. Kennedy signed I can clearly
24 stipulate to.

25 COURT REPORTER: So then you are not

Ralph Kennedy - Direct

1 objecting to one through twenty-two with the exception
2 of nine and twelve?

3 MR. WHITMIRE: Currently. I'm still
4 running through them. Twelve I object to. I will say
5 Exhibit Nine is already part of the record. It's in
6 Your Honor's packet along with some materials that have
7 been provided by Ms. Johnson.

8 Additionally, the investigative report,
9 Exhibit Thirteen, unless this came from Mr. Kennedy's
10 file, he couldn't authenticate it. We don't have the
11 witness here who signed it. So I would object.

12 COURT REPORTER: Okay, and that was what
13 number?

14 MR. WHITMIRE: Exhibits Thirteen, Fourteen,
15 Twelve, additionally Fifteen, a search warrant,
16 Eighteen, Sixteen, Seventeen, Twenty-Two, Nineteen,
17 Twenty, Twenty-One, I'm objecting to all of those for
18 lack of foundation or authentication. And there's a
19 letter sent to Ted Luffkin. This is not the proper
20 witness to get this exhibit in through.

21 COURT REPORTER: What number?

22 MR. WHITMIRE: I'm been looking at it. I'm
23 trying to find it.

24 MS. JOHNSON: I think this was actually
25 withdrawn.

16

Ralph Kennedy - Direct

1 MR. WHITMIRE: Withdrawn, okay.

2 MS. JOHNSON: And, Your Honor, the last
3 objection we believe we can get in through foundation
4 of Mr. Kennedy.

5 THE COURT: Okay.

6 MS. JOHNSON: This came from Mr. Kennedy's
7 file.

8 MR. WHITMIRE: I have no problem --

9 THE COURT: Okay.

10 MR. WHITMIRE: -- pursuant to a proper
11 foundation.

12 THE COURT: All right. Go ahead and ask Mr.
13 Kennedy about these. He's anxious. Let's don't keep
14 him waiting.

15 MS. JOHNSON: I'm sorry. I'm going to get
16 a little bit closer so I can be a little louder.

17 THE COURT: Okay.

18 MS. JOHNSON: And we'll try to go through
19 this.

20 EXAMINATION CONTINUED

21 BY MS. JOHNSON:

22 Q Throughout your representation, you had a
23 number of correspondence. You did an excellent job in
24 writing to the defendant. And what I'm here to
25 challenge you on is some representations you made and

Ralph Kennedy - Direct

1 how they were taken. I will start off with Plaintiff's
2 Exhibit Number One. I would like for you to identify
3 this, if you could, for the Court.

4 MR. WHITMIRE: And, Your Honor, for the
5 record, I'll stipulate to the identification in
6 evidence of all the letters that Mr. Kennedy wrote to
7 Mr. Carruthers.

8 THE COURT: Okay.

9 Q Okay. So this is a letter that you wrote on
10 September 19, 2006, to Rick Hubbard.

11 COURT REPORTER: We need an exhibit number.

12 MS. JOHNSON: Exhibit Number One, I'm sorry.

13 Q And what did you say in that letter to the
14 Solicitor about Mr. Carruthers' feelings of innocence
15 or guilt with respect to this charge that he pled to,
16 CSC?

17 A Would you like me to read the entire letter?

18 Q No, sir. What I'd like you to do is draw your
19 attention to the first paragraph, last line. If you
20 want to read that last sentence of the first paragraph,
21 that'd be good.

22 A "While Mr. Carruthers has expressed to me an
23 interest to plead to other charges against him, he has
24 previously been strong in his feelings about not
25 pleading to the criminal sexual conduct with minors,

Ralph Kennedy - Direct

1 first degree."

2 Q Could you go on to the next sentence of the
3 second paragraph?

4 A "Should Mr. Carruthers continue with his
5 position of not pleading guilty to CSC -- and I have
6 no reason to think he will change his mind, as he
7 maintains he is innocent of that charge -- I need to
8 further the scope of the discovery you furnished me by
9 asking you to make available to me and Mr. Carruthers
10 photographs and computer-generated material gathered
11 in the search warrant of Mr. Carruthers' home or any
12 other similar type material received by law
13 enforcement."

14 Q Now, Mr. Carruthers at no point told you that
15 he was guilty of the charge of CSC, is that correct?

16 A That is not correct.

17 Q Okay. At this point, obviously you're
18 representing to the other person that he has not -- he
19 was innocent of that charge and he maintained his
20 innocence and felt pretty strongly about that, is that
21 correct?

22 A On the letter dated September 19, 2006, to
23 Deputy Solicitor Rick Hubbard, I expressed to him that
24 at the time, Mr. Carruthers had been strong in his
25 feelings about not pleading guilty to that charge --

Ralph Kennedy - Direct

1 not that he was innocent of it but that he did not want
2 to plead guilty.

3 Q Okay.

4 A In fact, numerous times he said, "I don't
5 want to plead guilty to that charge" at that point in
6 time. And he said, "I don't think they can prove it.
7 I'd like to see what they've got." And that is the
8 second part of the first sentence of the second
9 paragraph, where I say, "Should Mr. Carruthers continue
10 with his position of not pleading guilty to the CSC --
11 I had no reason to think he will change his mind, as
12 he maintains he is innocent of that charge -- I need
13 to further the scope of the discovery you furnished me
14 by asking you to make available to me and Mr. Carruthers
15 the photographs and computer-generated material
16 gathered in the search warrant of Mr. Carruthers' home
17 or any other similar type material received by law
18 enforcement," which the Solicitor did do that.

19 Q All right. Thank you for that. Let's move
20 forward to Exhibit Number Two, which is also a letter
21 that you wrote. I'll hand that up to you. I don't
22 actually see the plaintiff's exhibit marker for this,
23 so I have a copy of it which I will hand you.

24 THE COURT: Is that Exhibit Two?

25 MS. JOHNSON: Yes, sir, Exhibit Number Two.

Ralph Kennedy - Direct

1 Q Exhibit Number Two, just one question with
2 regard to that. In that letter, you told Mr.
3 Carruthers that you had found absolutely no evidence
4 to support any defense against him, is that correct?

5 A I'd have to review this letter.

6 Q If I could draw your attention to the second
7 paragraph, the last line --

8 A Okay.

9 Q -- where you say, "I do not see any evidence
10 we have to contradict the State's case."

11 A And I say, "This is not to say you could not
12 put up evidence. However, from what I have been able
13 to ascertain so far, I do not see any evidence we have
14 to contradict the State's case."

15 Q That's all I have from that letter. I'll
16 hand up Exhibit Number Three to let you get acquainted.
17 This is also a letter that you wrote to Mr. Carruthers.

18 MR. WHITMIRE: Your Honor, may we approach?

19 THE COURT: Sure.

20 What I'm going to do is, rather than do this
21 piecemeal, I'm going to let Ms. Johnson provide you with
22 these. You're going to step down, and then I will take
23 care of some other matters to give you an opportunity
24 to review those things so you can stipulate to it or
25 whatever, if you don't mind.

Ralph Kennedy - Direct

1 MR. KENNEDY: Okay.

2 THE COURT: All right.

3 MR. WHITMIRE: Thank you, Your Honor.

4 THE COURT: We'll take a break in this one.

5 And, Ms. Johnson, if you would provide those copies to
6 Mr. Kennedy so he could look through those. I know I've
7 got some other cases that we can move on.

8 You can step down.

9 MR. KENNEDY: Yes, sir.

10 THE COURT: Thank you, Mr. Kennedy. Mr.
11 Kennedy, you realize you cannot talk to the State about
12 your testimony?

13 MR. KENNEDY: Yes, sir.

14 THE COURT: I just wanted to put that on the
15 record --

16 MR. KENNEDY: Thank you.

17 THE COURT: -- that you're aware of it.
18 Okay, thank you, sir.

19 MR. WHITMIRE: Court's indulgence, Your
20 Honor.

21 THE COURT: Yes, sir.

22 (Whereupon, a recess in this
23 case was held.)

24 MR. WHITMIRE: Your Honor, at this time we
25 can resume Mr. Carruthers' case.

Ralph Kennedy - Direct

1 THE COURT: Okay.

2 Mr. Kennedy, have you had a chance to look
3 through the documents?

4 MR. KENNEDY: Some of them, Your Honor. I'm
5 still reading them.

6 THE COURT: Okay, all right.

7 MR. WHITMIRE: Your Honor, if I could just
8 have a few minutes to go try to locate the victim --

9 THE COURT: Okay.

10 MR. WHITMIRE: -- who was here earlier.

11 THE COURT: Okay.

12 Take your time, Mr. Kennedy.

13 MR. WHITMIRE: Your Honor, I just want to
14 note for the record that I have gone outside the
15 courtroom and attempted to locate this victim's father
16 and wasn't able to.

17 THE COURT: Okay. He knew the case wasn't
18 continued?

19 MR. WHITMIRE: I'm hoping so.

20 THE COURT: Okay.

21 Mr. Kennedy, are you ready?

22 MR. KENNEDY: I am, Your Honor.

23 THE COURT: All right, come on back, please,
24 sir, and have a seat. And, Mr. Kennedy, you remember
25 you're still under oath?

Ralph Kennedy - Direct

1 MR. KENNEDY: Yes, sir.

2 THE COURT: Okay. And I appreciate you
3 taking the time to review those documents.

4 MR. KENNEDY: Certainly.

5 THE COURT: Okay.

6 EXAMINATION CONTINUED

7 BY MS. JOHNSON:

8 Q Mr. Kennedy, I'm just going to go ahead and
9 leave these up here with you since they've been
10 stipulated and are on the record. I'm going to ask you
11 some questions since you had some time to look at them.
12 I have some very direct questions to ask you. I'm not
13 trying to make this a personal attack, but I'm just
14 going to shoot and move forward, okay?

15 THE COURT: Mr. Kennedy would probably
16 appreciate that, too.

17 Q Did you ever lie to your client?

18 A No.

19 Q Okay. Did you induce Mr. Carruthers to
20 plead by saying that he would get a reduction in time?
21 I'll rephrase it. Did you induce Mr. Carruthers to
22 plead with the suggestion that he was going to get less
23 than the 30 years that was the maximum that he would
24 get on a sentence?

25 A I did not induce Mr. Carruthers into

Ralph Kennedy - Direct

1 anything. He certainly was fully apprized of all of
2 his options, and he made an intelligent decision. He's
3 a very intelligent man.

4 Q But your job as an attorney, as you have said
5 in the beginning here, is to apprise him of the
6 consequences of the choices that he may make, whether
7 to plead or to go forward with trial. And you're a
8 specialist in that area. You kind of have an ability
9 to anticipate what's going to happen based on your
10 experience in this field, is that correct?

11 A Yes.

12 Q Okay. And from reading those letters there,
13 you represented a few things to Mr. Carruthers. You
14 represented to him that at some point there was an offer
15 on the table from the State?

16 MR. WHITMIRE: Your Honor, I would just ask
17 that Ms. Johnson refers to the letter in question.

18 THE COURT: Which letter?

19 COURT REPORTER: Your exhibit number.

20 MS. JOHNSON: Sure.

21 THE COURT: That might help.

22 MS. JOHNSON: I'm sorry.

23 Q It's one of the earlier letters here. This
24 is Exhibit Number Two. The last sentence on the first
25 paragraph reads -- this is Mr. Kennedy stating to Mr.

Ralph Kennedy - Direct

1 Carruthers -- "The State as part of the plea agreement
2 will make a recommendation that the sentence run
3 concurrent with your federal sentence but will leave
4 the time you receive up to the sole discretion of the
5 presiding judge." When you went to court, did you have
6 a plea agreement?

7 A Yes.

8 Q You did. Was that made a part of the record
9 in the transcript?

10 A I'd have to read the transcript.

11 Q Okay. From my understanding of the
12 transcript, the State did not offer up any kind of plea
13 agreement. You recommended to the judge that the time
14 be served concurrent. I can hand you this. This is
15 a copy of the transcript.

16 THE COURT: Is there a specific line or part
17 of it that you're asking him to look at, or page number?

18 MS. JOHNSON: I believe I could draw your
19 attention to it.

20 THE COURT: That would make it easier.

21 MS. JOHNSON: Okay. Okay, it's line number

22 --

23 THE COURT: What page?

24 MS. JOHNSON: It's on page 27, beginning
25 from line one, is a good place to start.

Ralph Kennedy - Direct

1 A You'd like me to read that?

2 Q Yes, sir, please.

3 A "Your Honor, I would like to pass up a" --
4 who's speaking in this?

5 Q This is you, I believe.

6 MR. WHITMIRE: Your Honor, the guilty plea
7 is part of the record.

8 THE COURT: I'll give Mr. Kennedy an
9 opportunity to review it if you have a question about
10 it. I've got a copy of the transcript for our record,
11 Ms. Johnson. So what's your question regarding that?

12 MS. JOHNSON: The question is Mr. Kennedy
13 represented to Mr. Carruthers that there was a plea
14 agreement, that the State was going to recommend to the
15 judge that he would get a concurrent federal sentence.

16 Q Based on my understanding of the transcript,
17 you're the only one that asked for a concurrent sentence
18 -- is that correct?

19 A I'd have to read the transcript again. It's
20 been years.

21 Q Okay.

22 MR. WHITMIRE: Objection, Your Honor.

23 MS. JOHNSON: It's on the record, so I can
24 move forward.

25 THE COURT: Okay.

Ralph Kennedy - Direct

1 MS. JOHNSON: I'm sorry.

2 THE COURT: That's okay.

3 Q Let's keep on going with this. You
4 represented Mr. Carruthers for four years, is that
5 correct, before the plea?

6 A It was a long time. I'd like to look at my
7 records to say specifically how long it was.

8 Q Okay. Did you ever file a speedy trial
9 motion on behalf of Mr. Carruthers?

10 A I did not.

11 Q Okay. Did you think it was in his best
12 interest to just sit there and --

13 A Everything Mr. Carruthers asked me to do I
14 did for him that was legal and ethical.

15 MR. WHITMIRE: I'm going to object, Your
16 Honor. As I recall, a speedy trial motion is not one
17 of the allegations before this Court.

18 THE COURT: Yes, ma'am. Ask him about what
19 problems that he has complained about, if you don't
20 mind.

21 MS. JOHNSON: Okay, all right.

22 Q One of the major claims in Mr. Carruthers'
23 application is that you misrepresented the actual
24 charges that he was facing. How many charges was Mr.
25 Carruthers facing that he was indicted for?

Ralph Kennedy - Direct

1 A Again, I'd have to go to the record to see.
2 It was numerous charges, but the actual number I'd have
3 to read through the file and add them up. There were
4 a lot.

5 Q Okay. At some point, only three of the five
6 charges that you have listed on your letterhead on every
7 letter that you've written -- only three of the five
8 were actually indicted. So were you aware that two of
9 the charges he was not actually indicted for?

10 A It's a big file. I was aware of everything
11 at the time I was representing Mr. Carruthers. I
12 believe that what I recall is that the Solicitor would
13 have indicted him on everything if he decided to go to
14 trial.

15 Q Did you get a copy of Mr. Carruthers' medical
16 records?

17 A I probably have 2,000 pages -- that's a guess
18 --

19 Q Okay.

20 A -- of material for Mr. Carruthers. I spent
21 over a hundred and some hours on this case. And that
22 was after the Public Defender was relieved and I was
23 court-appointed to him, and they spent more time on this
24 case prior to me being appointed.

25 Q I'm going to straight to the chase on a couple

Ralph Kennedy - Direct

1 of issues that arise out of the transcript since you
2 haven't read it recently and aren't familiar with it.
3 The claim is that you failed to mitigate for Mr.
4 Carruthers' circumstances and that you actually
5 bolstered the State's claim. You know, to paraphrase
6 what you said was, "Judge, Mr. Carruthers has a big-time
7 loser of a case." Was that your job as his defense
8 counsel to say that -- the quote would be something like
9 "There is voluminous evidence." You said "voluminous"
10 numbers of times, maybe like three times. You said,
11 "There's voluminous amounts of evidence here that can
12 convict Mr. Carruthers."

13 MR. WHITMIRE: I'm going to object, Your
14 Honor. Failure to present mitigating evidence at the
15 guilty plea is not one of the allegations before this
16 Court.

17 THE COURT: Well, I realize that it's not.
18 This is his only bite of the apple. I will let her ask
19 the questions about. I'll let it be addressed because
20 otherwise he won't get a chance. But I note your
21 objection on the record.

22 MR. WHITMIRE: Thank you, Your Honor.

23 Q On the record, we do have prosecutorial
24 conduct as a claim, and we have also a claim that is
25 sort of collateral to that is that you didn't object

Ralph Kennedy - Direct

1 to that alleged prosecutorial misconduct.

2 And in addition to that, you bolstered the
3 State's case. You kind of drove it home for them by
4 saying "This is a dead-dog loser case." Why would you
5 -- what was your strategy in being an effective
6 counselor for your client by saying to the judge "This
7 is a dead-dog loser"?

8 MR. WHITMIRE: Objection, Your Honor. Ms.
9 Johnson is testifying to her questions and badgering
10 the witness, judge, as she testifies to her questions.

11 THE COURT: Is there some place in the
12 transcript that you want him to look so he can refer
13 to that?

14 Q Okay, I'll draw your attention to page 26,
15 lines 10 and 16. Can you read those lines out loud?

16 THE COURT: He can just review them, and then
17 you can ask him about them. I can read them. I've got
18 the transcript myself. It's already part of the
19 record. Twenty-six lines what?

20 MS. JOHNSON: Lines 10 and 16.

21 A Okay, I've read it.

22 Q Okay. What purpose did you serve your
23 client in his defense by saying those things?

24 A Well, it's my understanding that an attorney
25 has to be upfront and ethical, that they have to seek

Ralph Kennedy - Direct

1 the cause of justice and not misrepresent things to a
2 Court. And what I said in lines 10 and 16 was exactly
3 the truth.

4 Q Okay.

5 A Mr. Carruthers had, in my opinion as his
6 attorney, received a great benefit from all the charges
7 being dismissed against him but for one and the
8 potential to receive much less than up to 30 years. I
9 told him that it was unlikely -- I think I wrote to him
10 that it was unlikely, but he still had that potential.

11 Q But I guess my question is, is it your job
12 as the defense attorney to substantiate the charge
13 that's going before the judge to be pled to?

14 THE COURT: Ms. Johnson, just for the
15 record, attorneys have a duty to be candid with the
16 Court. I read these pages, and the only thing he's
17 doing is being candid with the court. If you've got
18 something else you want to go into, I'll be glad to hear
19 from you on that, okay?

20 MS. JOHNSON: All right, I understand, Your
21 Honor.

22 THE COURT: Yes, ma'am.

23 Q Are you able to answer any questions from
24 your recollection, or are you going to have to rely on
25 the transcript with respect to the actual plea?

Ralph Kennedy - Direct

1 A It depends on the question.

2 Q Okay. The question here is obviously in
3 this case there were many charges brought up. And part
4 of the plea was that some of them were going to be
5 dismissed. But he's going before the Court on one
6 charge. The question is, did Mr. Hubbard go beyond his
7 duties to substantiate the one claim of criminal sexual
8 conduct which was being pled to?

9 A You're asking my opinion?

10 MR. WHITMIRE: I'm going to object, Your
11 Honor. Unless there's some knowing and voluntary
12 waiver of Mr. Carruthers' rights to confront witnesses
13 against him, it's inappropriate before this Court.

14 Q My question is, in your defense of Mr.
15 Carruthers, if the other side goes beyond their duty
16 to substantiate the claim, the charge that is being pled
17 to, is it your duty to object if they go beyond to
18 substantiate it?

19 A Well, I don't think the prosecutor went
20 beyond any duty or anything from my recollection of what
21 occurred.

22 THE COURT: I hate to interrupt you, Mr.
23 Kennedy.

24 But, Ms. Johnson, if there is a specific
25 place in the transcript that you believe that the

Ralph Kennedy - Direct

1 prosecutor said something that he should have noted to
2 the Court or something like that, do you mind pointing
3 it out to him?

4 MS. JOHNSON: Sure. I think I'm going to
5 withdraw the question, Your Honor.

6 THE COURT: Okay, thank you, ma'am. And,
7 Ms. Johnson, if there are specific things, if you want
8 to point them out in the transcript so he can review
9 it. If you point to that area of the transcript you
10 want to ask him about, give him an opportunity to review
11 it, and then ask him the question about it, I think it
12 will go perhaps a little smoother.

13 MS. JOHNSON: A little better?

14 THE COURT: Yes, ma'am.

15 MS. JOHNSON: Yes, sir. I will still just
16 have a couple more questions.

17 THE COURT: Okay, that's fine.

18 Q So do you remember going over the evidence
19 in this case with the prosecution and Mr. Carruthers
20 present?

21 A Very clearly, yes.

22 Q And can you tell the Court a little bit about
23 that, about what happened there?

24 A Just my general recollection of that?

25 Q Yes, just how you remember it, if you can.

Ralph Kennedy - Direct

1 I'm not asking you to go into the details --

2 A Sure.

3 Q I'm just asking you about your communication
4 with Mr. Carruthers and Mr. Hubbard --

5 A Sure.

6 Q -- in getting to the viewing of the evidence.

7 A I remember that. This is one part I do
8 remember quite clearly because it changed the whole
9 nature of the case, and it changed what Mr. Carruthers
10 was talking with me about. Mr. Carruthers wanted and
11 I suggested that we view voluminous evidence, and
12 that's exactly what it was.

13 The Solicitor was very accommodating and had
14 the Sheriff's Department bring the computers,
15 videotapes, numerous boxes of documents to a conference
16 room in the Solicitor's Office. Mr. Carruthers was
17 brought over, and we sat there and were allowed to
18 peruse that evidence as long as we wanted.

19 We went through a number of items of the
20 evidence. We finally came to some pictures, I recall,
21 of Mr. Carruthers and the victim. And I recall that
22 when he saw those pictures, he ended up saying "That
23 is me, and I'm guilty, and I want to plead guilty."

24 I said, "Do you want to look at anything
25 else?" I said, "There's lots more. We can be here"

Ralph Kennedy - Direct

1 -- we had already been there hours. I said, "We can
2 be here all day, we can come back the next day and look
3 through everything." He said, "It's not necessary. I
4 did it, and I want you to make the deal, and let's do
5 it." And I'm paraphrasing.

6 Q Yes, I understand.

7 A I don't have a transcript when I'm saying
8 that. But it was when he saw the picture of his sexual
9 organ and the victim that he, surprisingly to me,
10 changed how he had been. I took him to the side and
11 asked him if he wanted to talk to me. That's when he
12 went from saying "I don't want to plead guilty to CSC"
13 to "Yes, I want to do that."

14 Q Thank you for that memory. I'm just going
15 to ask you a couple of directed questions about the
16 memory that you have there. There's several letters
17 on the record of you yourself and other people who are
18 there indicating that you advised Mr. Carruthers of his
19 rights when viewing the evidence. You advised him that
20 anything he could say he would be held against him, is
21 that correct?

22 A That is correct.

23 Q Okay, and --

24 A Because he wanted to confess right then to
25 the prosecutor, and I said, "It would be best if you'd

Ralph Kennedy - Direct

1 not say anything. You certainly can if you want to."
2 When he had that epiphany, so to speak, that's when he
3 wanted to go talk to the Solicitor right then.

4 Q He kind of -- you advised him, he looked
5 through the evidence, he had an epiphany, he was ready
6 to admit to something. Did you again advise him,
7 "Let's don't do that." You know, "You're admitting it.
8 It's gone. It's going to be used against you"?

9 A I did. I told him, "We can certainly work
10 on the best deal we can. It's up to you, but I would
11 advise you not to go and confess to law enforcement
12 right now."

13 Q Okay. I have one more line of questioning
14 for you, and I apologize that I've not been a better
15 questioner. This last line goes to the search warrant.
16 And through all the correspondence that I've read that
17 you had in your file, there's some mention of the search
18 warrant. Do you recall anything about the search
19 warrant and where evidence was found?

20 A My recollection, without looking through the
21 documents, materials, is that the evidence was found
22 in some building that Mr. Carruthers had access to I
23 think --

24 Q Okay.

25 A -- that he would take the victim through the

Ralph Kennedy - Direct

37

1 . woods to.

2 Q All right. Do you recall the --

3 A And I'm not positive about that.

4 Q I believe that you are partially correct,
5 that some of the evidence was found in a location on
6 Mr. Carruthers' property that was outside the scope of
7 the warrant, because the warrant --

8 MR. WHITMIRE: Objection, speculation.

9 MS. JOHNSON: I'll be happy to try to develop
10 it from Mr. Kennedy here.

11 MR. WHITMIRE: There's no foundation.

12 MS. JOHNSON: I believe I have a foundation.
13 I can try if you'll give me a chance to establish it
14 here.

15 THE COURT: I'm going to let you try.

16 MS. JOHNSON: All right, I appreciate that,
17 Your Honor.

18 Q Okay, if you'll --

19 THE COURT: If you have the search warrant,
20 have you shown him the search warrant?

21 MS. JOHNSON: Yes, I believe so.

22 THE COURT: Have you seen the search
23 warrant, Mr. Kennedy?

24 MR. KENNEDY: I've seen the cover page of the
25 search warrant, but that is all.

Ralph Kennedy - Direct

1 THE COURT: Okay. Do you have the warrant?

2 MS. JOHNSON: There is Exhibit Number

3 Twenty-Two, is an affidavit of --

4 MR. WHITMIRE: Your Honor, for the record,

5 I believe Exhibits One and Two have been moved into

6 evidence. I've stipulated to any of Mr. Kennedy's

7 correspondence coming in, but I don't think anything

8 else has been moved in at this time.

9 THE COURT: Okay.

10 MS. JOHNSON: I can try to establish it.

11 THE COURT: Do you have Exhibit Twenty-Two.

12 MR. KENNEDY: Yes, sir, I do.

13 THE COURT: Is it more than one page?

14 MR. KENNEDY: No, sir. Twenty-two is one

15 page.

16 THE COURT: Okay.

17 Q Mr. Kennedy, the way I got this file was from

18 the attorney before me who received your files on this

19 case. Is this the file that you received with respect

20 to Mr. Carruthers' search warrant?

21 A You say is this the file. I have no idea what

22 you're talking about.

23 Q Exhibit Number Twenty-Two. Is this

24 document the file that you remember receiving with

25 respect to the search warrant issued?

Ralph Kennedy - Direct

1 A I'd have to look at my file to see if this
2 is the same. I couldn't tell you. I mean, this is an
3 affidavit, Exhibit Twenty-Two. But whether this is
4 what's in my file or not I could not say.

5 THE COURT: The point of your question, I'm
6 assuming, is -- because I've been reading the
7 transcript -- they searched a building on his property
8 that had a mattress and all these other things in there,
9 is that correct, Ms. Johnson?

10 MS. JOHNSON: That's correct.

11 THE COURT: And that's what you're asking,
12 was that an issue for Mr. Kennedy regarding the search
13 warrant?

14 MS. JOHNSON: Correct, was that an issue.

15 Q My question is, at any time did you
16 investigate a search warrant issue in this case?

17 A At any time did I investigate a search
18 warrant in this case. Can you tell me what you mean
19 by investigate a search warrant issue?

20 Q Well, you received the case, and you're
21 looking for ways to defend it.

22 A Right.

23 Q So you're going to investigate the different
24 ways that the evidence comes in. One strategy that
25 defense lawyers use is to try to suppress evidence based

40

Ralph Kennedy - Direct

1 on a violation of the Fourth Amendment. My question
2 to you is, did you investigate this case for an improper
3 search based on a search beyond the scope of the
4 warrant?

5 A Right, okay. I believe that I did. I
6 believe that everything looked to be in order. But,
7 again, I'd have to go through my file and look
8 extensively at all the details of that. I don't recall
9 there being in my mind an issue with the search warrant.

10 MR. WHITMIRE: I'm going to object, just for
11 the record. There's no allegation of failure to
12 investigate a suppression defense.

13 THE COURT: Okay, thank you. I note your
14 objection. Thank you, sir.

15 Anything else? He's answered the search
16 warrant question.

17 MS. JOHNSON: Okay, yes, sir. I'm trying to
18 get another portion on the search warrant issue here.

19 Q You testified that you feel like when you
20 investigated this case, there was not a search warrant
21 issue, is that correct?

22 A That's correct.

23 Q Okay. And you've also stated that your
24 recollection is that a lot of the evidence was taken
25 from the house that is not named in the warrant?

Ralph Kennedy - Direct

1 A No, I did not say that.

2 Q Okay. I think I have established a record
3 of -- it's important for me to try to get these last
4 exhibits in.

5 THE COURT: What are the last exhibits?

6 MS. JOHNSON: The exhibits that the State
7 has not stipulated to, and those are Exhibits Nine
8 through Twenty-Two.

9 THE COURT: Okay.

10 Mr. Kennedy, have you had an opportunity to
11 review Exhibits Nine through Twenty-Two?

12 MR. KENNEDY: If she provided these, I have,
13 yes, sir.

14 THE COURT: Did you get a chance to look at
15 those?

16 MR. KENNEDY: I did, yes.

17 THE COURT: Do you know what they are?

18 MR. KENNEDY: Well, they appear to be part
19 -- nine appears to be the front page of an indictment.

20 THE COURT: Okay.

21 MR. KENNEDY: Ten appears to be the front
22 page of an indictment; eleven also, front page of an
23 indictment. Twelve is a letter from 1997 from some
24 doctor I don't know.

25 MS. JOHNSON: We'll withdraw number twelve.

Ralph Kennedy - Direct

1 THE COURT: Let me go through them. The
2 three indictments -- nine, ten, and eleven -- were those
3 indictments that he was true-billed on, to your
4 recollection -- or you don't know?

5 MR. KENNEDY: It certainly says true-billed
6 on the covers.

7 THE COURT: And those were things that you
8 were representing him on?

9 MR. KENNEDY: Yes, sir.

10 THE COURT: Okay. And he only had to plead
11 to one of those, is that correct?

12 MR. KENNEDY: That's correct, Your Honor.

13 THE COURT: Okay. And as a result of his
14 plea, they nol prossed the other two, is that correct?

15 MR. KENNEDY: That's right, and did not
16 indict him on all the other warrants.

17 THE COURT: All of the others which they held
18 over his head?

19 MR. KENNEDY: Yes, sir.

20 THE COURT: Okay, all right.

21 Which one is the doctor's?

22 MS. JOHNSON: We'll withdraw Exhibit Number
23 Twelve, Your Honor.

24 THE COURT: Okay. Exhibit Number Twelve is
25 withdrawn. Look at thirteen for me, please, sir.

Ralph Kennedy - Direct

1 MR. KENNEDY: Yes, sir.

2 THE COURT: Do you have any idea what
3 thirteen is?

4 MR. KENNEDY: It appears to be one page of
5 an investigate report from the Lexington County
6 Sheriff's Department.

7 THE COURT: Did you get a copy of that? Do
8 you know anything about it -- just yes or no, that's
9 fine.

10 MR. KENNEDY: I assume I got a copy of it,
11 Your Honor.

12 THE COURT: Okay. But you do not recognize
13 that document?

14 MR. KENNEDY: Oh, yes, sir -- I mean, it's
15 about Mr. Carruthers in particular.

16 THE COURT: Okay. So you do recognize it?

17 MR. KENNEDY: Yes, sir.

18 THE COURT: Okay, all right. Do you think
19 there's any likelihood you were provided with a copy?

20 MR. KENNEDY: I think I probably was.

21 THE COURT: Okay, all right.

22 MR. WHITMIRE: Your Honor, I just want to
23 make an objection for the record, noting an objection
24 on authenticity grounds. However, as being part of
25 discovery that Mr. Kennedy reviewed, I have no

Ralph Kennedy - Direct

1 objection.

2 THE COURT: Okay. Well, that's fine. I
3 was trying to find out what he got. Fourteen is?

4 MR. KENNEDY: Fourteen, again, investigated
5 to be logged by Deputy Sims. Your Honor, it's dealing
6 with the victim in the case. I assume I got a copy of
7 it. I couldn't say for sure. It's many, many pages.

8 THE COURT: Oh, yes, you've indicated many.

9 MR. KENNEDY: I may have gotten a copy. I
10 may not have. I assume I did.

11 THE COURT: Okay, all right. How about
12 fifteen?

13 MR. KENNEDY: Fifteen is -- I have no idea
14 what this is, Your Honor.

15 THE COURT: Okay. So fifteen is out, okay.
16 How about sixteen?

17 MR. KENNEDY: Sixteen, again, I have no idea
18 what this is. There's no indication who it's on or what
19 it's about.

20 THE COURT: Okay, fifteen is out for
21 purposes of this witness. What is seventeen?

22 MR. KENNEDY: Seventeen is the same, Your
23 Honor. I don't know what that is.

24 THE COURT: All right, eighteen?

25 MR. KENNEDY: Eighteen, again, appears to be

Ralph Kennedy - Direct

1 a copy of one page of an investigative report from the
2 Lexington County Sheriff's Department on the case I was
3 appointed on.

4 THE COURT: Okay.

5 MR. KENNEDY: I can only assume that I was
6 given a copy of that.

7 THE COURT: Right, okay. What about
8 nineteen?

9 MR. KENNEDY: Nineteen appears to be just
10 basically the Sheriff's Department seized a computer
11 involving this case.

12 THE COURT: Okay. And you think you were
13 probably aware of that?

14 MR. KENNEDY: I think so, yes, sir.

15 THE COURT: Okay. The next one?

16 MR. KENNEDY: Twenty is evidentiary chain of
17 custody. I don't recall seeing that.

18 THE COURT: Okay.

19 MR. KENNEDY: I'm not saying I didn't get it.
20 It says March 9, 000176. That may have been a Bates
21 stamp. It says Rule 5, so I may have gotten it.

22 THE COURT: Okay, all right. What about
23 twenty-one?

24 MR. KENNEDY: Twenty-one, I recall this one
25 specifically. I did get it.

Ralph Kennedy - Direct

- 1 THE COURT: You do recall it?
- 2 MR. KENNEDY: Yes, sir.
- 3 THE COURT: Okay, what is that?
- 4 MR. KENNEDY: That is a Sheriff's Department
- 5 of Lexington County evidence property record showing
- 6 some of the things they seized --
- 7 THE COURT: Okay.
- 8 MR. KENNEDY: -- concerning the things in
- 9 evidence.
- 10 THE COURT: All right. And twenty-two?
- 11 MR. KENNEDY: Twenty-two is one side of I
- 12 suppose a search warrant.
- 13 THE COURT: That's the search warrant. So
- 14 there's only one page?
- 15 MR. KENNEDY: Yes, sir.
- 16 THE COURT: Okay. But not the entire
- 17 document?
- 18 MR. KENNEDY: Yes, sir.
- 19 THE COURT: Okay, all right.
- 20 Those are all the exhibits, Ms. Johnson?
- 21 MS. JOHNSON: Yes, sir. And those are all
- 22 the questions I have. Thank you.
- 23 THE COURT: Okay, all right. And just for
- 24 the record, fourteen, fifteen, and seventeen are not
- 25 in evidence. Thirteen, fourteen, eighteen through

Ralph Kennedy - Direct

1 twenty-two are evidence.

2 COURT REPORTER: But sixteen is not?

3 THE COURT: Fifteen, sixteen, and seventeen
4 are not, and twelve was withdrawn.

5 COURT REPORTER: Thank you, Your Honor.

6 (Applicant's Exhibits Number Nine, Front
7 page of an indictment; Ten, Front page of an indictment;
8 Eleven, Front page of an indictment; Thirteen, Page of
9 an investigative report; Fourteen, Page of an
10 investigative report; Eighteen, Page of an
11 investigative report; Nineteen, Seizure of computer;
12 Twenty, Evidentiary chain of custody; Twenty-One,
13 Evidence property record; and Twenty-Two, One page of
14 a search warrant, were entered in the record.)

15 THE COURT: All right, anything on
16 cross-examination?

17 MR. WHITMIRE: Beg the Court's indulgence
18 just one quick moment, Your Honor.

19 THE COURT: Sure.

20 MR. WHITMIRE: Mr. Kennedy has been very
21 patient today.

22 CROSS-EXAMINATION

23 BY MR. WHITMIRE:

24 Q Just a few questions for you, Mr. Kennedy,
25 regarding the colloquy in front of Judge Cooper. At

Ralph Kennedy - Cross

1 any point during the plea colloquy did Mr. Carruthers
2 indicate unwillingness to enter a guilty plea?

3 A Absolutely not.

4 Q Did you ever have any question regarding his
5 competency?

6 A No. In fact, Mr. Carruthers in my opinion
7 is extremely intelligent.

8 Q And Mr. Carruthers did tell Judge Cooper that
9 he was satisfied with your efforts, is that correct?

10 A He did. And I went to great lengths for the
11 plea to make sure that Mr. Carruthers wanted to do this,
12 that he didn't want a trial.

13 Q And you did present in mitigation evidence
14 and testimony on behalf of Mr. Carruthers?

15 A Absolutely. There was Mr. Carruthers
16 wanting to specifically talk about his wife, his
17 family, the obligations to them, his other things that
18 had happened to him in his life, and that he was
19 remorseful, and that he didn't -- I recall. It will
20 have it in the transcript.

21 MR. WHITMIRE: No further questions, Your
22 Honor.

23 Thank you, Mr. Kennedy.

24 THE COURT: Ms. Johnson, anything on
25 redirect regarding the issues brought up during

Ralph Kennedy - Cross

1 cross-examination by Mr. Whitmire?

2 MS. JOHNSON: I have one further question,
3 Your Honor. I need to pull out the exhibit which I
4 would like to refer to, if you give me your indulgence
5 for a moment.

6 THE COURT: Yes, ma'am. And that regards a
7 question that Mr. Whitmire asked?

8 MS. JOHNSON: Yes, sir.

9 THE COURT: Okay.

10 REDIRECT EXAMINATION

11 BY MS. JOHNSON:

12 Q I'd like to draw your attention to Exhibit
13 Number Three.

14 THE COURT: Do you have it in front of you,
15 Mr. Kennedy?

16 MR. KENNEDY: Yes, sir.

17 THE COURT: Okay, all right.

18 Q Exhibit Number Three on --

19 THE COURT: This is Applicant's Number
20 Three?

21 MS. JOHNSON: Yes, sir.

22 THE COURT: Okay, continue.

23 Q The second full para -- or actually it's the
24 first full paragraph on page two. You tell Mr.
25 Carruthers there what you're going to tell the Court

Ralph Kennedy - Redirect

1 in mitigation. And you tell the Court that you're
2 going to say that "Mr. Carruthers is going to be" --
3 "is very remorseful" and that part of the reason that
4 he is pleading is not to put Amy through this again.
5 Do do you recall saying that in your mitigation?

6 A Do you mean during the plea?

7 Q Yes, sir.

8 A I said what Mr. Carruthers wanted me to say.
9 And Mr. Carruthers once he saw those pictures of his
10 penis and the victim in the evidence room he directed
11 me not to proceed any further. He did not want to look
12 at any more evidence. He directed me not to proceed
13 any further with any other defenses, with any more
14 discovery, didn't even want to view the rest of the
15 evidence. So you're asking about search warrants and
16 not challenging the authenticity of them or whether
17 they applied to whatever.

18 I did what Mr. Carruthers asked me to do,
19 which was do the best that we could for him. I did
20 advise him on all his options, which would have included
21 challenging the evidence through the search warrants
22 and many other areas of the law. This was a very long
23 case.

24 MS. JOHNSON: Am I allowed to ask a follow-up
25 question with regard to what he just said?

Ralph Kennedy - Redirect

1 THE COURT: Yes, ma'am, if it's regarding
2 the litigation issue that he brought up, yes.

3 MS. JOHNSON: I'll withdraw that. Thank
4 you.

5 Thank you.

6 THE COURT: Anything on recross?

7 MR. WHITMIRE: No, Your Honor. I'd ask that
8 Mr. Kennedy be excused.

9 THE COURT: All right, Ms. Johnson, any
10 objection to Mr. Kennedy being excused?

11 MS. JOHNSON: No, sir.

12 THE COURT: Thank you, Mr. Kennedy.

13 MR. KENNEDY: Thank you, Your Honor.

14 THE COURT: All right, Ms. Johnson, are you
15 ready to call your next witness?

16 MS. JOHNSON: Yes, sir. I would like to
17 call the applicant --

18 THE COURT: Okay.

19 MS. JOHNSON: -- Mr. Carruthers.

20 THE COURT: All right, Mr. Carruthers, if
21 you'd come forward, please, sir. Before you sit down,
22 the Clerk has got to swear you in.

23 (Whereupon, the applicant was sworn.)

24 CLERK OF COURT: Okay, have a seat and state
25 your full name for the record, please.

1 MR. CARRUTHERS: My name is Alan Bruce
2 Carruthers. I'm the applicant in this PCR case.

3 THE COURT: All right. Ms. Johnson, he is
4 now seated, and he's ready for you.

5 ALAN BRUCE CARRUTHERS, having first been
6 duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MS. JOHNSON:

9 Q Mr. Carruthers, tell us when you were
10 arrested.

11 A My arrest date was July 6, 2004.

12 Q And to your knowledge, when was your
13 Department of Corrections start date?

14 A It was February 29, 2008.

15 Q Did you admit to committing CSC ever to your
16 attorney?

17 A No.

18 Q To your knowledge, when did you plead?

19 A I pled guilty on February 28, 2008.

20 Q Okay. And did your attorney tell you that
21 you were going to get full jail time for all the time
22 that you had spent previously?

23 A Did I say February 28, 2008?

24 THE COURT: That's what you said.

25 A I think that's correct.

Alan B. Carruthers - Direct

1 Q The question is, basically you spent four
2 years before you went for the plea. Did your attorney
3 tell you you were going to get full credit for that time?

4 A Yes.

5 Q Did you rely on that information in deciding
6 to plead?

7 A Yes.

8 Q Would you have pled if you weren't going to
9 get that full time?

10 A No.

11 MR. WHITMIRE: Your Honor, I renew my motion
12 for summary judgment to any cognizable claim for
13 post-conviction relief.

14 THE COURT: And I'll grant that, okay?

15 MS. JOHNSON: Can I say something about
16 that, Your Honor?

17 THE COURT: Oh, yes, ma'am, you can.

18 MS. JOHNSON: I don't think that we're
19 introducing it for the purpose of getting his credit
20 now.

21 THE COURT: Okay.

22 MS. JOHNSON: We're introducing it for the
23 purpose of showing that Mr. Kennedy misrepresented the
24 possibilities that he was facing.

25 THE COURT: Okay.

Alan B. Carruthers - Direct

1 MR. WHITMIRE: It's still a collateral
2 consequence of a guilty plea verdict.

3 THE COURT: I understand. She's just
4 saying that it's part of the misinformation that you
5 were given, is that correct?

6 MS. JOHNSON: Yes, sir.

7 THE COURT: Okay, I'll let him testify on
8 those issues, okay?

9 MS. JOHNSON: Okay. Thank you, Your Honor.

10 THE COURT: Yes, ma'am.

11 Q What was your understanding of the sentence
12 that you were going to receive? You went before a
13 judge, and a judge told you what the charge was or what
14 the maximum you could get. What was your understanding
15 of what was going to happen there?

16 A Well, my understanding -- and this is in the
17 transcript, but just to kick this off -- that when Mr.
18 Kennedy was asked about how long I was in the detention
19 center, to tell the Court that, to tell the judge how
20 long I was in, instead of saying a number of days that
21 I was in, which was 2,092 days, Mr. Kennedy just said
22 that My client was in detention for an extended period
23 of time.

24 That information didn't tell the judge
25 anything. But pretrial to going to court to plead, I

Alan B. Carruthers - Direct

1 was under the impression that I was going to get my state
2 credit for the time that I did, that four years, almost
3 four years. So that jail time was not given because
4 I don't believe that the Court had enough information,
5 and the sentencing sheet didn't reflect any information
6 on it.

7 THE COURT: Just for the record, I've got a
8 copy of the sentencing sheet dated February 28, 2008,
9 and he said, "The defendant is to get credit for time
10 served pursuant to this action."

11 MS. JOHNSON: Okay, thank you, Your Honor.

12 Q Mr. Kennedy told you some other things about
13 what was going to happen when you pled guilty. What
14 were those other things that he told you?

15 A If I plead guilty, which even when I was in
16 court that day, he wanted me to sign the guilty plea
17 paper because there was not a guilty plea agreement
18 form. It was a no recommendation type of situation in
19 the plea that day. So that being the case, the only
20 reason why I pled guilty was thinking of my family,
21 thinking that I would be able to go back to federal
22 prison in Massachusetts where I could have visits and
23 that he would mitigate a lower sentence to the judge
24 for ten years.

25 Those things were how Mr. Kennedy actually

Alan B. Carruthers - Direct

1 got me into court to go forward and answer all the
2 judge's questions in the right way so I could -- so my
3 plea would be accepted. I did have to say things to
4 the judge when he asked direct questions about, you
5 know, was I threatened in any way or did I have enough
6 time to spend with my attorney and so on --

7 Q Let me stop you right there. You're doing
8 a good job, but I just want to refer to an exhibit here.
9 This is Exhibit Number Three. And this already been
10 admitted. This is a letter that you received from Mr.
11 Kennedy. And can you tell the Court what kind of
12 representations Mr. Kennedy made to you in that letter
13 concerning your sentence?

14 A In paragraph three, it's stating that my
15 guilty plea would be beneficial to me, that they would
16 drop the other charges, and that I would receive a
17 concurrent sentence.

18 THE COURT: What kind of sentence?

19 MR. CARRUTHERS: Concurrent federal
20 sentence.

21 THE COURT: Okay.

22 Q All right.

23 THE COURT: I've got a copy of the sentencing
24 sheet. The sentencing sheet indicates the sentence is
25 to be concurrent with his federal charges.

Alan B. Carruthers - Direct

1 MS. JOHNSON: Okay, thank you.

2 Q Did Mr. Kennedy tell you how to behave at that
3 plea?

4 A Yes, because after I signed it, I was
5 reluctant to go forward. And I told him I wanted to
6 have a bench trial then because I don't agree with the
7 charge he wanted me to plead to. And so I asked him
8 -- I asked my attorney, Mr. Kennedy, if I could ensure
9 those promises. And he said just be honest with the
10 judge and don't make any waves so that the judge will
11 accept my plea. And that's what he told me to do.

12 Q You're saying he told you, Don't make any
13 waves?

14 A Don't make any waves.

15 Q All right. We're going to move on to another
16 issue with the indictments.

17 A Can I just say one more thing? It really is
18 the same thing.

19 Q Go ahead.

20 A The correspondence that Mr. Hubbard and Mr.
21 Kennedy had in relation to the concurrent time,
22 although they said in court -- and Mr. Kennedy said as
23 well -- that the plea would run concurrent for my
24 sentencing, the reason that did not happen is because
25 they had no effect. The only way that would have effect

Alan B. Carruthers - Direct

1 is had Mr. Kennedy have objected to the sentencing,
2 allowing me to go back to federal for sentencing, then
3 coming back for state for sentencing, then I would be
4 in federal --

5 MR. WHITMIRE: I'm going to object, Your
6 Honor. This is really uncorroborated and irrelevant.
7 The question has been asked and answered.

8 THE COURT: I'll note your objection. I'll
9 let him explain what he thinks about that. I do have
10 the sentencing sheets, yes, sir.

11 Q I think what he's trying to say is the
12 strategy of getting convicted in Federal Court, then
13 going to State Court.

14 A Yes, ma'am.

15 Q Coming back to Federal Court to ensure that
16 he wasn't going to be in federal custody like his
17 attorney had told him. Is that what you're trying to
18 say?

19 A Yes, those promises I had.

20 THE COURT: Mr. Kennedy wasn't representing
21 you?

22 A It could be an exhibit really, because it's
23 relevant information.

24 Q Mr. Kennedy wasn't representing you on the
25 federal charges. But he did indicate to you some

Alan B. Carruthers - Direct

1 things that were going to happen with your federal case
2 that were related to this case, such as where you're
3 going to be housed in prison.

4 A Yes, and that --

5 MR. WHITMIRE: I'm going to object, Your
6 Honor.

7 A -- can't happen unless they do it a certain
8 way.

9 THE COURT: Okay, wait one second.

10 MR. CARRUTHERS: I'm sorry.

11 MR. WHITMIRE: I object, Your Honor.

12 Sentencing classification -- goes along with the
13 federal sentencing classification. And the scope of
14 federal representation is completely beyond the scope
15 of what Mr. Kennedy is required to do as Mr. Carruthers'
16 attorney.

17 THE COURT: All right, I do note that on the
18 record.

19 And, Ms. Johnson, I'll let him testify to it
20 since this is his only chance to come to court.

21 MS. JOHNSON: Thank you, Your Honor. And,
22 again, we're not offering it for a fishing expedition.
23 We're simply arguing it for the representation
24 purposes. And I think that it's obvious that Mr.
25 Kennedy does have a duty to not misrepresent what Mr.

Alan B. Carruthers - Direct

1 Carruthers is facing.

2 THE COURT: All right, go ahead.

3 Q Let's move on to the indictments. All the
4 correspondence that you had with Mr. Kennedy
5 represented to you that you were facing five
6 indictments, is that correct?

7 A Yes.

8 Q You later learned that that wasn't true, is
9 that true?

10 A That's true.

11 Q How many were you facing?

12 A He told me I was facing five.

13 Q Right. But how many were you actually
14 indicted for?

15 A Two.

16 Q Three?

17 A Three, thank you.

18 Q Okay. And when you made the decision to
19 plead, was part of your consideration that you had five
20 indictments pending against you rather than three
21 indictments pending?

22 A Yes.

23 Q So you might not have pled had you known you
24 only had three indictments that you were facing?

25 A Yes, I wouldn't have.

Alan B. Carruthers - Direct

1 Q But Mr. Kennedy didn't tell you that two of
2 your --

3 A No. .

4 Q -- indictments weren't processed?

5 A No, and that wasn't in it.

6 Q Okay.

7 MR. WHITMIRE: I'm going to object, Your
8 Honor, as to relevance. Mr. Carruthers only pled
9 guilty to one count, which was properly indicted.

10 THE COURT: Okay.

11 I note your objection.

12 Q We'll move on, and I'm going to ask you about
13 the actual plea when you went before the judge. Mr.
14 Kennedy had told you some things that were going to
15 happen there. What was your -- what did Mr. Kennedy
16 tell you about what he thought was going to happen, and
17 what was your understanding of the plea?

18 A Well, Mr. Kennedy told me that a plea, you
19 know, involves -- before accepting my plea by me
20 answering all the questions, which I did. And it was
21 very stressful because I wanted to tell the judge that
22 -- you know, some of the things that he asked me were
23 questions like, "Did you have enough time to speak with
24 your lawyer prior to leading?" and "Do you feel like
25 has he represented you properly?" And in those two

Alan B. Carruthers - Direct

1 answers, I said yes. But it was the situation, because
2 I thought I would get concurrent time. Instead of 30
3 years, I have 44 years.

4 Q Okay, let's move on to the next issue. Did
5 your attorney ever go over the search warrant with you?

6 A No.

7 Q Never at one time. What's your knowledge of
8 the facts surrounding the search warrant?

9 A My knowledge is that I did see finally in 2009
10 the search warrant. That was after my guilty plea. I
11 noticed that it was earmarked only for the property and
12 the residence. And the outbuilding that's closest to
13 the road, that that was not mentioned at all as
14 something authorized by the Court that they should
15 search.

16 Q So you're indicating to the Court now that
17 there were a couple of issues with the search warrant?

18 MR. WHITMIRE: Your Honor, asked and
19 answered, objection. Also further objection, the
20 issue isn't raised before the Court today in the
21 application.

22 THE COURT: I understand.

23 MR. WHITMIRE: For the record.

24 THE COURT: I've heard your objections when
25 she's been going over the issues. But this is his only

Alan B. Carruthers - Direct

1 choice to be in court, so I will let her address it.

2 MS. JOHNSON: Thank you, Your Honor.

3 THE COURT: Thank you.

4 Q Would you have pled guilty knowing there was
5 a problem with the search warrant such that the evidence
6 that was used against you --

7 A No.

8 Q -- could have been suppressed?

9 A No, I wouldn't have. It was never my desire
10 to plead to that charge, period.

11 Q Why wasn't it your desire to plead to that
12 charge?

13 A Because I'm not guilty of that charge.

14 Q Okay, thank you.

15 A And the evidence doesn't reflect that, that
16 they showed me that.

17 Q All right.

18 A I know that picture Mr. Kennedy was talking
19 about in the evidence, I told Mr. Kennedy that that
20 wasn't me and that was not of the victim. And so that
21 was my grounds for the Court because that was a download
22 from the Internet. That was not one of the camera
23 photos that they offered. That picture probably was
24 evidence of a CSC, but none of the pictures that I had
25 taken were a CSC.

Alan B. Carruthers - Direct

1 Q So what you're saying is they only offered
2 real true circumstantial evidence of the CSC, and the
3 picture that they introduced as you supposedly having
4 sex was not you?

5 A Right. That was a very bad thing. He was
6 a very good judge, and I believe he was of notice that
7 there was no similarity in that picture that was in the
8 notebook.

9 Q Did you tell Mr. Kennedy that wasn't you?

10 A I told Mr. Kennedy and Solicitor Hubbard.
11 But they insisted that was me.

12 Q Okay, let's backstep just a little bit --

13 A I apologize.

14 Q You're doing fine. Let's go back to when you
15 viewed the evidence. You had to come and view the
16 evidence with a bunch of people watching, right?

17 A Uh-huh.

18 Q And tell the Court what happened at that
19 evidence viewing in terms of your attorney's counsel.

20 A I sat there and what I could see -- because
21 there was a table I was at, and then there was two tables
22 before the TV, a 21-inch TV I think it was, so I couldn't
23 see really well. But I could see enough that some of
24 the pictures were the ones of interest for the charge,
25 the CSC.

Alan B. Carruthers - Direct

1 They didn't reflect the CSC, but they were
2 nude and they were inappropriate. And that's all I
3 said to them. I didn't say that, you know, I want to
4 go plead to the CSC because of those pictures. I didn't
5 ever say that to Mr. Kennedy.

6 Q All right. A few more questions, and then
7 I'll give you an opportunity to say anything else you
8 need to say, okay?

9 This is sort of a big problem here, and I just
10 want to ask you straight-on. At the hearing for the
11 plea, you made some pretty big disclaimers about your
12 satisfaction with Mr. Kennedy.

13 You said you were satisfied with his
14 representation, he did what you asked him to do, and
15 that no one promised you anything, and you were willing
16 to give up your defenses. At that time, did you know
17 about these failure to investigate issues?

18 A No, I didn't know that.

19 MR. WHITMIRE: I'm going to object, Your
20 Honor. That's asked and answered. Mr. Carruthers
21 said he made all these statements because Mr. Kennedy
22 told him he had to.

23 THE COURT: Thank you, sir. He can continue
24 to answer the question. I note your objection again.

25 Q And why did you take that plea?

Alan B. Carruthers - Direct

1 A I took that plea because I was in the
2 detention center four years. I did not know my -- and
3 Mr. Kennedy's corresponded that if he was having intent
4 on representing me with his duty to investigate the
5 things I had asked him to do. One letter he sent to
6 me said, I do agree with you that we should have
7 investigated the other party to find out what really
8 happened.

9 I never got another correspondence following
10 that one saying that he had looked into something, and
11 he either still wants me to plead or he thinks that we
12 have a case to deal with in the court. That issue right
13 there is what my writing to him for an extended period
14 of time, almost four years, was about. But Attorney
15 Kennedy's answers to me were never in response to my
16 questions, except for the one where he says, I have the
17 request for defenses.

18 And it appears to me the letter that I sent
19 him, it was just a request for him to talk to me about
20 legal matters.

21 Q You asked Mr. Kennedy to step down at some
22 point, didn't you?

23 A Yes, I wrote a formal letter.

24 Q Why did you ask him to step down?

25 A Because he wasn't representing me by

Alan B. Carruthers - Direct

1 defending my charge. He had to deal with the
2 Solicitor. I understand that this was not a hot case
3 and all but for a defense attorney I think to counter
4 anything like that, don't they need to do their own
5 investigation and not just rely on what the Solicitor
6 has --

7 MR. WHITMIRE: Object, Your Honor. Mr.
8 Carruthers is not an attorney -- improper opinion.

9 THE COURT: I note your objection.
10 Go ahead.

11 A But I need to let to let the State know my
12 side of the story somehow, and I guess today is my only
13 day. Outside of just answering the question. I
14 apologize.

15 THE COURT: This is your only chance to
16 speak.

17 Q Did you feel that the adversarial process was
18 on your mind with your attorney?

19 A I have a mental block for that word right now.

20 Q Let me ask it a different way. Do you think
21 that your attorney was loyal only to you and was not
22 collaborating with the State against you?

23 A No, he wasn't. That was my point when I was
24 trying to convey a few minutes ago. There was always
25 a little twisting in what he had to say in his

Alan B. Carruthers - Direct

1 correspondence. I never got to the point that I asked
2 him to, say, ask questions back in 2006. It never
3 happened. But he could have gotten back to me and said
4 why it didn't happen or something along that line,
5 representation for a defense. But he said he would
6 just always go back to the plea. And that plea was
7 recommended to me before he even saw the evidence in
8 2007. That I didn't understand.

9 Q I want to narrow you just little bit. And
10 what I mean by him collaborating with the State, I just
11 want you to tell the Court about what happened when you
12 went to go view the evidence with respect to Mr. Kennedy
13 and Mr. Hubbard.

14 A I thought that it was a formal viewing. The
15 only thing that -- the reason, the real reason, why they
16 brought me there was they didn't -- my involvement in
17 the evidence with the pictures, okay, had no bearing
18 on support for their CSC charge. The only thing they
19 had to support that CSC charge was that Internet
20 download picture that was in a notebook that Solicitor
21 Hubbard gave to the judge at his presentation,
22 inflaming the judge upon sentencing with that,
23 resulting in a 30-year sentence.

24 Q I'll redirect you and just finish up my
25 question here. And then I know that you wrote an

Alan B. Carruthers - Direct

1 extensive brief, and I probably haven't had time to
2 cover everything that you want me to cover here. I'm
3 trying to do my best for you. So I'm going to give you
4 the chance to say if you can remember or think of
5 anything that you would like to say since this is your
6 one shot. But what's the purpose of you being here
7 today? What do you hope to get out of this?

8 A I hope to be the one -- I guess I'm the only
9 who can -- let the courts know things that weren't known
10 before when the courts -- when the criminal courts were
11 involved, things that didn't get across and put on the
12 record. I want to try to do that today.

13 Q You want to put some things on the record.
14 And when they get put on the record, what do you want
15 the Court to do with it?

16 A Oh, it's not a criminal court, it's a civil
17 court, right? I want the record to be set straight by
18 things that went wrong that we noted in the transcripts
19 and that certain parties are denying in what we brought
20 up today. Maybe I can fix some of those things.

21 Q Let me ask you a direct question. Do you
22 want the Court to vacate this criminal conviction, this
23 criminal plea?

24 A Yes. I think it would be the right thing to
25 do for not just myself but also for the party that --

Alan B. Carruthers - Direct

1 MR. WHITMIRE: Your Honor, objection, asked
2 and answered.

3 Q And my last question is -- this is for my sake
4 to make sure I'm doing the right thing by you
5 -- you're aware that if the Court does vacate this plea
6 based on the record that you've established, you're
7 facing potentially a lot more time than you've got right
8 now. Are you aware of that?

9 A Yes, I'm aware of that. But I'm conscious
10 also of what really happened, and I think criminal court
11 is the place to deal with that.

12 Q So even knowing that you face more time, you
13 still would like, based on your allegation of
14 ineffective assistance of counsel --

15 A Yes.

16 Q -- you want it vacated?

17 A Yes, ma'am.

18 Q Okay. Is there anything that stands out in
19 your mind regarding Mr. Kennedy's ineffective
20 assistance of counsel that you need to bring to the
21 Court's attention now?

22 THE COURT: That he has not argued.

23 Q That you haven't already talked about.

24 A Yes, there is. I really feel that Mr.
25 Kennedy's ineffective assistance of counsel is more

Alan B. Carruthers - Direct

1 serious than I first thought, because he is a very good
2 attorney. When I was at the detention center, I heard
3 some wonderful things with all the --

4 MR. WHITMIRE: Objection, hearsay.

5 THE COURT: Go ahead.

6 A I just think he could have done better in my
7 case. There are a lot of things he overlooked and
8 wouldn't help me, ineffective assistance as far as I'm
9 concerned.

10 Q Okay. So you're saying it was ineffective
11 to the level that if hadn't been --

12 A If I could go through each letter, I could
13 point out things.

14 Q Okay. In conclusion, you're saying that had
15 it not been for what you see as his failings as an
16 attorney to advise you and such, you would not have pled
17 to this charge?

18 A No, ma'am.

19 Q All right, I think that's all the questions
20 I have. Please answer questions from the State.

21 MR. WHITMIRE: Beg the Court's indulgence
22 for just one moment.

23 THE COURT: Take your time, Mr. Whitmire.

24 CROSS-EXAMINATION

25 BY MR. WHITMIRE:

Alan B. Carruthers - Cross

1 Q Mr. Carruthers, didn't you tell your
2 attorney you were pleading guilty because you wanted
3 to spare the victim from trial?

4 A No, those were his words, sir.

5 Q And didn't you admit the guilt of these
6 offenses to Judge Cooper? You admitted your guilt to
7 Judge Cooper, is that correct?

8 A I only thought it was pleading so I could reap
9 the benefit that they were telling me.

10 Q At the end of your plea colloquy, didn't
11 Judge Cooper give you an opportunity to address the
12 Court?

13 A Yes, sir.

14 Q And you admitted remorse, is that correct?

15 A I think I did.

16 Q Now, if you're claiming this is a huge fraud,
17 an injustice, why didn't you tell Judge Cooper that
18 Solicitor Hubbard was making up these facts?

19 A Some of it I'm still kicking myself for now.

20 Q So those 17 pictures that were presented to
21 the Court at the plea colloquy, they didn't come from
22 you, is that what you're saying?

23 A Yes, but they were not reflective of a CSC
24 charge.

25 Q But wasn't one of the pictures showing the

Alan B. Carruthers - Cross

1 defendant and the victim completely naked?

2 A No, sir.

3 MR. WHITMIRE: That's what the record
4 reflects, Your Honor.

5 Q And didn't Solicitor Hubbard say that your
6 hand was in one of the pictures, making an inappropriate
7 gesture?

8 A Not one.

9 Q And if this wasn't true, why didn't you tell
10 Judge Cooper in the trial or in the plea?

11 A I don't believe that Judge Cooper went over
12 what the pictures were.

13 Q But didn't Judge Cooper ask you if you had
14 enough time to speak with your attorney during the plea
15 colloquy?

16 A Yes.

17 Q Did you ever nudge him to let him know that
18 "Hey, this isn't right"?

19 A I really wanted to. And I just kept thinking
20 I could, you know, see my family, and the way to do that
21 was to plead.

22 MR. WHITMIRE: I beg the Court's indulgence.

23 THE COURT: Take your time.

24 Q As I recall from your direct testimony, you
25 said that you never told your attorney or Solicitor

Alan B. Carruthers - Cross

1 Hubbard that that evidence did not -- I'm sorry, I'll
2 rephrase the question. You never told your attorney
3 or Solicitor Hubbard that you were guilty when you
4 viewed the evidence that day?

5 A I never said those things.

6 Q So your attorney came in here and lied today,
7 is that correct, concerning your side of the story?

8 A He said what he had to say.

9 MR. WHITMIRE: No further questions, Your
10 Honor.

11 THE COURT: Anything on redirect related to
12 his cross-examination?

13 MS. JOHNSON: One question.

14 REDIRECT EXAMINATION

15 BY MS. JOHNSON:

16 Q You've been asked through the contradiction
17 where you're saying one thing during saying another
18 thing. What did you tell your attorney -- what element
19 of CSC did you tell your attorney you didn't do?

20 A I didn't do the three elements. The only
21 element was the age requirement in the CSC warrant,
22 The other three elements in that statute did not belong
23 with the evidence they had until that picture they
24 showed in court to Judge Cooper.

25 Q That's all, thank you.

Alan B. Carruthers - Redirect

1 THE COURT: Anything on recross?

2 MR. WHITMIRE: One quick question.

3 THE COURT: Related to her redirect?

4 MR. WHITMIRE: Yes, Your Honor.

5 THE COURT: Okay.

6 RECROSS EXAMINATION

7 BY MR. WHITMIRE:

8 Q Those pictures they showed Judge Cooper, you
9 had an opportunity to view those, correct, before your
10 plea, and your attorney did too. That's on the record.

11 A Yes.

12 MR. WHITMIRE: Thank you, Your Honor. No
13 further questions.

14 THE COURT: All right, thank you, sir. You
15 may step down. I appreciate it.

16 MR. CARRUTHERS: Do I have anything else to
17 say? He said I had one more thing to say, or was that
18 it?

19 THE COURT: Your attorney has already asked
20 you questions. She asked if you had anything else to
21 say. We've gone through redirect and cross.

22 MR. CARRUTHERS: Oh.

23 THE COURT: Okay.

24 MR. CARRUTHERS: Well, I would say something
25 really brief --

1 THE COURT: Okay.

2 MR. CARRUTHERS: -- if I could, if it's all
3 right. And the best way I think I can do that to --

4 MR. WHITMIRE: I would object for the
5 record, Your Honor.

6 MR. CARRUTHERS: -- make my job easier and
7 Your Honor's.

8 THE COURT: Hold on a second. I'm going to
9 note your objection. I'm going to let him --

10 MR. WHITMIRE: Hybrid representation.

11 THE COURT: Thank you, sir.

12 Go ahead and make your statement.

13 MR. CARRUTHERS: If I could start in the
14 reverse with the sentencing and then reaching my point
15 as fast as I can. What happened after the plea where
16 I was promised a better outcome than the one I had, this
17 is what happened.

18 In my sentencing, I have now as standing not
19 five minutes of the federal time counting towards the
20 10 years that I have there. I have no jail time, and
21 many people tell me that was because the number of days
22 was not on the sentencing sheet, so they could not
23 calculate it.

24 I have the four years of detention. I have
25 the 30 years. When I add all that up, I have a 44-year

1 which was not anything that Mr. Kennedy had talked to
2 me about. And so it really did not turn out the way
3 it was supposed in my pleading guilty on that day.

4 And when I pled guilty on that day, as Mr.
5 Kennedy said in one of his letters, that would allow
6 me to have the benefit of those items that's listed here
7 for concurrent federal sentence with jail time. But
8 since that didn't happen, Your Honor, I feel that was
9 not an error of the Court, but that was done in the Court
10 by two men, my attorney and the Solicitor, who knew very
11 well that after I pled guilty that they didn't stop the
12 sentencing part and allow me to go back to federal time,
13 which their letters, their correspondence, in pretrial
14 had told me that that would happen.

15 And they were right. My federal attorney
16 was right too. I was in State custody because I wasn't
17 allowed to go back as the letter of January 10th that
18 was sealed in the State Court that day for the State
19 of South Carolina. That letter said how and what
20 methods to deal with prison with respect to having me
21 in federal custody. And the Solicitor and my attorney
22 both agreed to that.

23 And the reason I'm not is because the Federal
24 Government, after I pled, stopped it. They didn't do
25 the sentencing. They allowed me to go back to State

1 Court conviction. But the State by direction of Mr.
2 Hubbard didn't allow me to go back to the federal for
3 sentencing and put me in federal custody.

4 MR. WHITMIRE: I'm going to object, Your
5 Honor. This is --

6 MR. CARRUTHERS: And that's what the letter
7 --

8 MR. WHITMIRE: -- hearsay. I just want to
9 note my objection.

10 THE COURT: And I note your objection.

11 MR. CARRUTHERS: All those information
12 packets that I got before I pled is what also told me
13 I could make a plea, as well. But those things didn't
14 happen, and the reason they didn't happen is because
15 it wasn't done properly in court. And I want the Court
16 to know that this case was not handled right.

17 THE COURT: I appreciate it, Mr. Carruthers.
18 Thank you, sir.

19 MR. CARRUTHERS: And could we have a 59(e)
20 so that they could go through all the -- Ms. Johnson
21 and somebody can go through the whole brief and put that
22 on record, as well.

23 MS. JOHNSON: The brief is submitted as a
24 memo.

25 MR. CARRUTHERS: That's sufficient, then?

1 THE COURT: Your brief is not evidence in the
2 case. This is the nature of a legal argument as a memo.
3 You understand that?

4 MR. CARRUTHERS: I do.

5 THE COURT: Okay?

6 MR. CARRUTHERS: Okay.

7 THE COURT: All right, thank you, sir.

8 MR. CARRUTHERS: Yes, sir.

9 MS. JOHNSON: I think those are the
10 evidence.

11 THE COURT: Yes, just leave that up there,
12 Mr. Carruthers, okay? Thank you, sir.

13 MR. CARRUTHERS: All right, thank you.

14 THE COURT: All right.

15 MS. JOHNSON: Your Honor, that's all that we
16 have.

17 THE COURT: Okay, all right.

18 (Whereupon, the applicant rests.)

19 THE COURT: Does the State have any
20 witnesses?

21 MR. WHITMIRE: Your Honor, the State rests.

22 THE COURT: Okay, all right.

23 (Whereupon, the State rests.)

24 THE COURT: What I'll do is I will review
25 this, and I will get back with you with my decision.

1 Okay, thank you all very much.

2 MR. WHITMIRE: Thank you, Your Honor.

3 --End of Transcript of Record--

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT THOMAS, OFFICIAL COURT REPORTER,
AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH
CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE
ABOVE-CAPTIONED CASE ON AUGUST 15, 2013, IN LEXINGTON,
SOUTH CAROLINA.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL NOR
KIN TO ANY OF THE PARTIES TO THIS CAUSE OF ACTION, NOR
AM I INTERESTED IN ANY MANNER IN ITS OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND
AND SEAL AT LEXINGTON, SOUTH CAROLINA, THIS THE
NINETEENTH DAY OF FEBRUARY, 2015.


REMA K. GANTT THOMAS
OFFICIAL COURT REPORTER,
STATE OF SOUTH CAROLINA 

131
ORIGINAL

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

ALAN BRUCE CARRUTHERS, #326809

Full name and prison number (if any) of Applicant

v.

State of South Carolina

FILED

IN THE COURT OF COMMON PLEAS

Case No. 2011-CP-32-0910

2014 MAR 10 A 11:30

CLERK OF COURT
LEXINGTON SC

Amended

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 SCDC, Lee Correctional Institution, Bishopville, SC
2. Name and location of Court which imposed sentence Lexington County, Court of General Sessions
3. Name(s) of co-defendant(s) (if any) n/a
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2006-GS-32-3422, CSC w/ a Minor 1st Degree

(b) _____

(c) _____

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

(a) On February 28, 2011, a sentence of 30 years was imposed to run concurrent with

federal sentence; to be given credits for time-served and to be placed on the sex offender registry.

- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty X
- (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?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. The South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmation of conviction and sentence
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. June 8, 2010
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Carruthers, OP. NO. 2010-UP-301
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____

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2014 MAR 14 A 11:30

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

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

(a) Ineffective Assistance of Counsel ("IAC") count 1: Counsel failed to investigate, find or advise client of search warrant defects and warrantless search or challenge evidence obtained by same; IAC 2: Counsel failed to move for a speedy trial; IAC 3: Counsel did not explain that client was indicted on only three of five charges; IAC 4: Counsel wrongfully induced plea by promising client that he could serve his sentence in federal custody closer to his family; IAC 5: Counsel did not represent client's interest at the discovery review or at the plea by bolstering the State's case; IAC 6: Counsel did not require a foundation for the photos at the plea nor did he object to inflammatory comments made by the Solicitor.

(b) Credit for time-served in county; and

(c) Prosecutorial misconduct and fraud upon the Court

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

(a) The police search which found "voluminous" inculpatory evidence was conducted without a search warrant as the search warrant was issued a day after the search took place; the search also exceeded the scope of the warrant issued post-search; Counsel did not advise applicant of challengeability of evidence because he stated on multiple occasions there was no defense and after viewing the discovery with counsel, the applicant acquiesced to plea to a charge he maintained his innocence to, applicant waited four years in pretrial detention without his attorney moving for a speedy trial, such time contributed to the coercive nature of the plea, counsel induced applicant to plead by promising him multiple times in writing he would be in a federal insitution closer to his family, a plea bargain he did not put on the record before the Court; Counsel also failed to conduct attorney-client meeting outside the prescence of law enforcement (to prevent further inculpatory statements by the Applicant that were recorded by law enforcement).

(b) County jail time not credited toward sentencing.

(c) The prosecutor misrepresented evidence and its propriety to verify acceptance of the plea; Prosecutor knowingly accepted plea applicant had insisted innocence to.

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

(a) any petition in a State Court under South Carolina Law? Yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions

relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? 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. Direct appeal from guilty plea

ii. _____

iii. _____

iv. _____

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

i. South Carolina Court of Appeals

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. conviction affirmed

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. June 8, 2010

ii. _____

iii. _____

iv. _____

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

i. Unpublished opinion: 2010-UP-301

ii. _____

iii. _____

iv. _____

FILED

7:00 PM JUN 10 A 11:30

BETH A. GARRICK
CLERK OF COURT
LEXINGTON SC

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

No

FILED

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

(a) which grounds have been presented:

2014 MAR 14 A 11:50

i. _____

ii. _____

iii. _____

RENEA GARRICK
CLERK OF COURT
LEXINGTON SC

(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) PCR is appropriate appeal of ineffective assistance of counsel and other grounds set forth in item 10;

(b) Not allowed to bring issue before South Carolina Court of Appeals.

(c) _____

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

(a) your arraignment and plea? Yes

(b) your trial, if any? _____

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

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. Ralph S. Kennedy, Jr., Kennedy Law Firm, LLC, 125 E. Church Street, P.O. Box 2559, Batesburg-Leesville, SC 29070.

ii. M. Celia Robinson, Office of Appellate Defense, 1330 Lady Street, P.O. Box

11589, Columbia, SC 29211.

iii. _____

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

i. Guilty plea and sentencing; and

ii. Direct appeal

iii. _____

2014 MAR 14 A 11:31

DEBRA J. SARGISS
CLERK OF COURT
LEXINGTON SC

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

Applicant would ask this Honorable Court to set aside his guilty plea and remand for a new trial

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

Yes -- Federal Court

STATE OF SOUTH CAROLINA

County of Lexington

)
)
)

VERIFICATION

FILED

I, Alan Bruce Carruthers, 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.

Alan B. Carruthers

SWORN to and subscribed before me this 4
day of March, 2014.

Debra Jones (L.S.)
Notary Public

My Commission Expires: 11-4-2015

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

FILED

I, Alan Bruce Carruthers, 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.

BETH A. CARRICE
CLERK OF COURT
LEXINGTON SC

Alan B. Carruthers
Applicant

SWORN or affirmed to and subscribed before me this
4 day of March, 2014.

Debra Sines
Notary Public

My Commission Expires: 11-4-2015

ORIGINAL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
Alan Bruce Carruthers,	)	C.A. No. 2011-CP-32-0910
S.C.D.C. No. 326809	)	
Applicant,	)	
v.	)	ORDER OF DISMISSAL
State of South Carolina,	)	(with prejudice)
Respondent.	)	

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on March 7, 2011. Respondent filed its responsive pleadings. An evidentiary hearing into the matter was convened on August 14, 2013 at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Catherine Johnson, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the October 2006 term of the Lexington County Grand Jury for Criminal Sexual Conduct with a Minor 1st Degree. (2006-GS-32-3422). Applicant was represented by Ralph S. Kennedy, Esq. On February 28, 2008, Applicant pled as indicted. The Honorable Thomas G. Cooper sentenced the Applicant to confinement for a period of thirty (30) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Carruthers, Op. No. 2010-UP-301 (S.C. Ct. App. filed June 8, 2010). The

Remittitur was issued on June 24, 2010.

ALLEGATIONS

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

Ineffective assistance of counsel:

- (a) failure to investigate victim's credibility and account of the offense;
- (b) failure to investigate the evidentiary value of the photograph found in the notebook;
- (c) failure to make a motion to suppress evidence obtained outside of the scope of the search warrant;
- (d) failure to adequately advise on terms and conditions of the plea offer; in the alternative failure to make a motion to compel with the terms and conditions of the plea offer;
- (e) failure to object to the State's recitation of the facts of Applicant's guilt and submission of the State's evidence at the plea hearing;
- (f) failure to present an adequate mitigation case at the plea hearing;
- (g) failure to continue the representation where counsel had a conflict of interest that resulted from his loyalty to the solicitor's office.

SUMMARY OF THE PLEA HEARING

At the guilty plea hearing, Applicant was apprised of the constitutional waiver of rights necessary for a valid guilty plea. (Plea Tr. p.4). Counsel notified the Plea Judge of Applicant's mental health history and stated that he had no reason to question Applicant's competency. Counsel also notified the Plea Judge that Applicant understood his waiver of rights. (Plea Tr. p.6). The Plea Judge apprised Applicant of the extent of his exposure to incarceration. (Plea Tr. p.8). Subsequently, Applicant waived all relevant constitutional rights. (Plea Tr. p.9).

The solicitor presented the facts of the offense. Applicant began a process of grooming the victim where he lured her to a nearby abandoned building. The severity of abuse graduated. (Plea Tr. p.14). The victim disclosed the abuse and underwent a forensic interview. (Trial Tr. p.15). Thus, police obtained a search warrant and searched Applicant's residence and found child

pornography and fruits of the crime that corroborated the victim's account. (Plea Tr. p.16). Nude pictures of the victim were recovered by the police from Applicant. (Plea Tr. p.19). As a result of the abuse, the victim was admitted to a psychiatric ward. (Plea Tr. p.22).

Counsel notified the Plea Judge of efforts on Applicant's case and that he agreed "wholeheartedly" with Applicant's decision to plead guilty in light of the overwhelming evidence of guilt. (Plea Tr. pp.25-27). Counsel outlined the terms of the plea agreement. (Plea Tr. p.27). Next, Counsel told the Plea Judge that Applicant indisputably admits to one count of sexual battery but denies multiple instances of penetration. (Plea Tr. p.28).

Applicant admitted his guilt and explained his conduct to the Plea Judge. (Plea Tr. p.31). He further ensured the Plea Judge that he was satisfied with counsel, he was not coerced to plead guilty, and that he did not need additional time to meet with counsel. (Plea Tr. pp.12-13).

The Plea Judge sentenced Applicant to a term of (30) years imprisonment for CSC with a minor, first-degree.

SUMMARY OF TESTIMONY AND EVIDENCE FROM THE PCR HEARING

(a) Applicant's testimony

Applicant testified in support of the allegations in his PCR Application. Applicant testified that he pled guilty because counsel promised him that he would be transferred to a Federal institution near his home commonwealth of Massachusetts in conjunction with promising him that counsel would "mitigate a ten year sentence." Applicant testified that he would have given different answers and assurances to the Plea Judge in retrospect because of the sentence he received. Applicant disputed counsel's representations on the identity of Applicant in inculpatory photographs. He posited that the photographs in question had been "falsified." Applicant testified that he viewed and discussed the photographs in question, and other State's

evidence, with counsel prior to his plea. When viewing the evidence, Applicant explained that he had problems with his vision; however, he stated that the photographs did not implicate him in criminal sexual conduct. Applicant testified that he told counsel that he only possessed illegal child pornography of strangers. He lamented that he should have spoken up on the matter at his guilty plea hearing.

As a matter of personal opinion, Applicant testified that the police exceeded the scope of the search warrant in extending the search to the "outbuilding." Applicant introduced several exhibits on the matter. Applicant again opined that he understood that this was a "hot case" in his condemnation that counsel failed to independently investigate his case. Last Applicant testified that he received ineffective assistance of counsel "much worse than he thought" because counsel was an excellent attorney and held a stellar reputation within the halls of the county detention center.

(b) Counsel's testimony

At the PCR hearing, counsel testified to his course of conduct during the representation. By order of appointment and substitution, counsel took over Applicant's case. He reviewed over two thousand (2000) pages of discovery that related to Applicant's numerous charges in counsel's investigation and evaluation of the State's evidence. Counsel noted that he spent well over a hundred (100) plus hours of labor on the case. Counsel testified that he scrutinized the search warrants and saw no meritorious suppression defenses. He did not believe the execution of the warrant was improper. Applicant introduced numerous exhibits on the matter and extensively questioned counsel on his performance here. Furthermore, counsel noted that the police collected damaging evidence against Applicant in locations where he had no objectively reasonable expectation of privacy.

At first, Applicant communicated his innocence on the CSC charges and his desire to proceed to trial; Applicant did not want to entertain plea negotiations with the State. However, counsel testified that Applicant changed course once he reviewed a particular photograph from the State's evidence that displayed the victim and a male's genitals. Counsel explained that they had spent substantial time at that consultation viewing the volumes upon volumes of the State's evidence. He noted that once Applicant saw the distasteful photograph, he wanted to immediately confess and plead guilty; he didn't even want to view the rest of the State's evidence sitting in front of them that day. However, Applicant changed course after counsel advised him of the implications of confessing his guilt to police.

Counsel testified that he went to great lengths in discussing a plea with Applicant. Counsel was adamant that he never directly or indirectly misadvised Applicant on the sentencing exposure at issue. Counsel noted that Applicant was a very intelligent man and they discussed numerous consequences and implications of pleading guilty. Counsel testified that at the plea hearing he made ethical and accurate representations to the Plea Judge. Counsel testified that the Solicitor's recitation of the State's case was accurate and supported by the evidence. Based on counsel's communications with Applicant and observations of his demeanor at the plea hearing, counsel testified that Applicant did not waiver in his decision to plead guilty and accept guilt. Counsel explained his mitigation strategy that focused on Applicant's wife, family, and his remorse. Counsel testified that he did everything that he could have done for Applicant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to

observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Applicant has entirely failed to produce credible evidence in support of his allegations. Court finds that Applicant was not deprived of effective assistance of counsel. Applicant has not persuaded the court that he was pressured or misled by his attorney. The Court finds that Applicant's plea was freely and voluntarily given, and in any case was not prejudiced by the attorney's performance. The Court finds counsel credible, and does not find Applicant credible. Counsel's decisions to go forward with the plea in the manner that he did, and not to object to the adequacy of the factual basis therefor or object to the introduction of photographic evidence, were reasonable in the circumstances, and did not fall below professional norms of reasonableness. The Court finds that no prosecutorial misconduct took place; the prosecutor's statements were a candid expression of an objectively honest view of the case.

EFFECTIVE ASSISTANCE OF COUNSEL

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). After careful review based on the standard discussed above, the Applicant has failed to carry his burden in this action.

A.

This Court finds Applicant's allegation "(a) Ineffective assistance of counsel: failure to investigate victim's credibility and account of the offense" to be without merit. "Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation

fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Kolle v. State, 386 S.C. 578, 588, 690 S.E.2d 73, 78 (2010). Despite counsel's convincing testimony on the extent of his investigation and labor on Applicant's case, this Court finds the allegation itself is facially defective. See Miller v. Johnson, 200 F.3d 274, 282 (5th Cir. 2000) (A conclusory allegation of ineffectiveness raises no constitutional issue because a petitioner must show how counsel was deficient and how there was prejudice). Regardless, this Court finds Applicant's convictions were supported by graphic overwhelming evidence of his guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). Therefore, this allegation is readily denied and dismissed with prejudice.

This Court finds Applicant's allegation "(b) Ineffective Assistance of counsel: failure to investigate the evidentiary value of the photograph found in the notebook" is without merit. The thrust of the allegation solely rests upon Applicant's testimony that the photograph of the male's genitals with the victim, among other photographs, did not implicate Applicant for CSC. This Court finds Applicant's testimony to be incredible and myopic in the context of the other corroborating identification evidence of Applicant's perversion and horrific exploitation of the child victim. In contrast, this Court finds counsel's textured testimony on the matter to be convincing and dispositive. Regardless, the allegation is doomed because it was solely supported by incredible PCR testimony from Applicant. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). (Failure to conduct an independent investigation does not constitute

ineffective assistance of counsel when the allegation is supported only by mere speculation as to result). Therefore, this allegation is readily denied and dismissed with prejudice.

This Court finds Applicant's allegation "(c) Ineffective Assistance of counsel, failure to make a motion to suppress evidence obtained outside of the scope of the search warrant" to be without merit. "The Fourth Amendment to the United States Constitution protects the people's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; cf. S.C. Const. art. I, § 10." State v. Robinson, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014). At its core, the Fourth Amendment "stands [for] the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Id. (citing Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)). In contrast to counsel's credible testimony and rationale on the matter supported by record, Applicant has wholly failed to meet his most basic burden to produce credible evidence that he even had a privacy interest in the abandoned structure of which he lacked a possessory interest. See State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 728 (Ct.App.2004). Therefore, this allegation is readily denied and dismissed with prejudice.

B.

This Court finds Applicant fell well short of meeting his burden to prove "(d) Ineffective Assistance of Counsel, failure to adequately advise on terms and conditions of the plea offer; in the alternative failure to make a motion to compel with the terms and conditions of the plea offer." Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). "A guilty plea acts as a waiver of

all non-jurisdictional defects and defenses, including claims of constitutional violations.” Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981).

This Court finds Applicant’s testimony that his guilty plea was rendered involuntary because counsel misadvised him on irrelevant matters related to the Federal Bureau of Prisons to be incredible; this Court also finds Applicant’s testimony that counsel apparently promised him that he would receive a ten year sentence if he pled guilty to be dubious and self-serving. In contrast, this Court finds counsel’s testimony that Applicant made the certain decision to plead after viewing the State’s disturbing photographic evidence to be credible and convincing. Alternatively, Applicant signed a sentencing sheet prior to the plea that announced the structure of his plea in certain plain terms. See James v. State, 377 S.C. 81, 85, 659 S.E.2d 148, 150 (2008) (“The plea sheet is instructive because it contains a written manifestation of Respondent’s desire to plead guilty and was executed by Respondent immediately prior to the plea hearing”). Therefore, this allegation is readily denied and dismissed with prejudice.

C.

This Court finds Applicant’s allegation “(e) Ineffective Assistance of Counsel, failure to object the State’s recitation of the facts of Applicant’s guilt and submission of the State’s evidence at the plea hearing” to be wholly without merit.¹ This Court finds counsel’s testimony that he had no reasonable basis to object to the State’s presentation of the factual basis of the plea to be credible. Importantly, Applicant has provided this Court with no compelling, let alone credible, justification to allow Applicant to depart from the presumption of truthfulness in his

¹ This Court notes Applicant erroneously confused a general failure to object to inadmissible evidence, as at issue here, failure to object to a solicitor’s purportedly unfounded representations with the commonly misunderstood and incorrectly pled PCR allegation of prosecutorial misconduct. See State v. T.J.M., ___ A.3d ___, 2015 WL 144929, *8 (2015), the Court recognizes the New Jersey Attorney General’s request that the courts not use the term “prosecutorial misconduct” unless there is a violation of the Rules of Professional Conduct.

statements and assurances to the Plea Judge. See Crawford v. United States, 519 F.2d 347 (4th Cir.1975) (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). This Court notes Applicant's testimony that he remained silent at the plea hearing because he expected to get a more favorable sentence to be entirely inadequate here but otherwise telling to show the general global lack of credibility in Applicant's PCR action. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997) (Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made). Therefore, this allegation is readily denied and dismissed.

D.

This Court finds Applicant fell well short of meeting his burden to prove the allegation: "(f) Ineffective assistance of counsel, failure to present an adequate mitigation case at the plea hearing." "Generally, what motion to make is within the exclusive province of counsel." Leavitt v. Arave, 646 F.3d 605,611 (9th Cir. 2011). "Counsel is not required to file a reconsideration motion to rehash a position once rejected." U.S. v. Tajeddini, 945 F.2d 458, 463 (1st Cir. 1991). This Court finds counsel's course of action here was well within the realm of valid trial strategy. Furthermore, this Court finds Applicant is all but per se precluded from making a sufficient showing of prejudice under Strickland's second prong here in light of Applicant's status as a repeat pedophile in conjunction with the unspeakable torture manifested upon the child victim from his acts of predatory perversion.

E.

This Court summarily dismisses Applicant's allegation "(g) ineffective assistance of counsel, failure to continue the representation where counsel had a conflict of interest that resulted from his loyalty to the solicitor's office." "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). "To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently." United States v. Swartz, 975 F.2d 1042, 1048-49 (4th Cir.1992). This Court finds counsel's testimony credible and Applicant's opinion on the matter to be irrelevant and unfounded. Therefore, this allegation is summarily denied and dismissed with prejudice.

CONCLUSION

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

This Court notes that that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-

conviction relief. Rule 71.1(g), SCRCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 18th day of September, 2015.



EDGAR W. DICKSON
Presiding Judge
Eleventh Judicial Circuit

Orangely, South Carolina

SEP 23 4:11 PM
CLERK OF COURT
JANIS COLE

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP3200910

Alan Bruce Carruthers
#326809

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

9/28/2015

Circuit Court Judge

Judge Code

Date

FILED

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
C/A No.: 2011-CP-332-0910

FILED
CLERK OF COURT
JULIA A. CARRIC
2015 NOV -5 PM 12:54

MOTION TO ALTER JUDGMENT
(S.C. R. Civ. P. 59(e))

Alan Bruce Carruthers, #326809,)
Applicant,)
vs.)
State of South Carolina)
Respondent)

Relief Sought

Applicant, Alan Bruce Carruthers, #326809, moves this court under Rule 59(c) of the South Carolina Rules of Civil Procedure to alter the judgment entered by this court September 23, 2015, and served by acceptance on Applicant's counsel October 30, 2015, to find that Applicant's plea counsel was ineffective, such ineffectiveness prejudiced the Applicant in his plea, and further vacate Applicant's guilty plea.

Grounds for Relief

As more fully explained in the Supporting Memorandum of Law, justice requires that the judgment in this matter be altered as requested in this motion because the Applicant's plea counsel misinformed the Applicant in critical ways, such information having the effect of inducing the Applicant to plea when he otherwise would not have plead. Applicant did not have information necessary to make a free and knowing plea, waiver of rights, and to inform the Court at the time of the plea that counsel was effective because counsel's erroneous evidentiary representations or omissions to Applicant. Without the Applicant's reliance on his counsel's advice, Applicant has

indicated to the Court, emphatically and unequivocally, that he would not have plead.

Further Applicant's plea counsel demonstrated on numerous occasions an ambivalence toward the advocacy and protection of his client's interest, at the review of evidence before law enforcement who recorded client's disclosures to counsel, at the trial court with unnecessary information that did not promote his client's interests, and at other junctions as more fully detailed in Applicant's amended Application and supporting memorandum. Such failure to advocate and protect the Applicant's interests prejudiced Applicant's right to impartial and authentic representation. Applicant further submits a proposed Order representing the Applicant's position on the law and facts.

Record on Motion

This motion is based on this document, the attachments, including the proposed Order of Applicant, the Supporting Memorandum of Law, and all of the pleadings, papers, and other records on file in this action.



Attorney for Applicant
Catherine Johnson, Esq.
SC Bar # 100282
701 Gervais St. Suite 150-318
Columbia, SC 29201
Catherine.Townes.Johnson@gmail.com
(803) 446-8795

This 4th day of November 2015.
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
	)	
Alan Bruce Carruthers,	)	C.A. No. 2011-CP-32-0910
S.C.D.C. No. 326809	)	
	)	
Applicant,	)	
	)	
v.	)	ORDER (PROPOSED)
	)	GRANTING PCR RELIEF
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on March 7, 2011. Respondent filed its responsive pleadings. An evidentiary hearing into the matter was convened on August 14, 2013, at the Lexington County Courthouse. Applicant, Mr. Alan Bruce Carruthers (hereafter Applicant or Applicant) was present at the hearing and was represented by Catherine Johnson, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General.

PROCEDURAL HISTORY

Applicant was indicted at the February 2011 term of the Lexington County Grand Jury for Criminal Sexual Conduct with a Minor 1st Degree (2006-GS-32-3422). Applicant was represented by Ralph S. Kennedy, Esq. On February 28, 2011, Applicant pled as indicted. The Honorable Thomas G. Cooper sentenced the Applicant to confinement for a period of thirty (30) years. Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected.

The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Carruthers, Op. No. 2010-UP-301 (S.C. Ct. App. filed June 8, 2010). The Remittitur was issued on June 24, 2010.

ALLEGATIONS

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

Ineffective assistance of counsel:

- (a) failure to investigate victim's credibility and account of the offense;
- (b) failure to investigate the evidentiary value of the photograph found in the notebook;
- (c) failure to make a motion to suppress evidence obtained outside of the scope of the search warrant;
- (d) failure to adequately advise on terms and conditions of the plea offer; in the alternative failure to make a motion to compel with the terms and conditions of the plea offer;
- (e) failure to object to the State's recitation of the facts of Applicant's guilt and submission of the State's evidence at the plea hearing;
- (f) failure to present an adequate mitigation case at the plea hearing;
- (g) failure to continue the representation where counsel had a conflict of interest that resulted from his loyalty to the solicitor's office.

On March 14, 2014, Applicant amended his application. The following grounds for Ineffective Assistance of Counsel were stated.

1. Counsel failed to investigate, find or advise client of search warrant defects and warrantless search or challenge evidence obtained by same;
2. Counsel failed to move for a speedy trial;
3. Counsel did not explain that client was indicted on only three of five charges;
4. Counsel wrongfully induced plea by promising client that he could serve his sentence in federal custody closer to his family;
5. Counsel did not represent client's interest at the discovery review or at the plea by bolstering State's case;
6. Counsel did not require a foundation for the photos at the plea, nor did he object to inflammatory comments made by the Solicitor;

The Applicant also noted that though his sentencing sheet credited him with time served, the full amount of days he had spent incarcerated were not credited and Counsel did not verify the sentencing sheet for correctness as to the days to be credited, leaving Applicant in a position to not be fully credited with the many years he was incarcerated. Lastly, Applicant raises the issue of prosecutorial misconduct and fraud upon the Court for misrepresentation of evidence and for the acceptance of the plea.

Applicant alleged the following facts in support his amended application.

1. Concerning the search warrant, Applicant states that, "The police search which found "voluminous" inculpatory evidence was conducted without a search warrant as the search warrant was issued a day after the search took place; the search also exceeded the scope of the warrant issued post-search; Counsel did not advise applicant of challengeability of evidence because he stated on multiple occasions

there was no defense and after viewing the discovery with counsel, the applicant acquiesced to plea to a charge he maintained his innocence to”;

2. Concerning pre-plea detention, Applicant states that he “waited four years in pretrial detention without his attorney moving for a speedy trial, such time contributed to the coercive nature of the plea,”
3. Concerning plea inducement, Applicant states that “counsel induced applicant to plead by promising him multiple times in writing he would be in a federal institution closer to his family, a plea bargain he did not put on the record before the Court;”
4. Concerning confidentiality and the avoidance of conflicts of interests, Applicant states that “counsel also failed to conduct attorney-client meeting outside the presence of law enforcement (to prevent further inculpatory statements by the Applicant that were recorded [by law enforcement]).”

SUMMARY OF THE PLEA HEARING

At the guilty plea hearing, Applicant was apprised of the constitutional waiver of rights necessary for a valid guilty plea. (Plea Tr. p.4). Counsel notified the Plea Judge of Applicant's mental health history and stated that had he no reason to question Applicant's competency. Counsel also notified the Plea Judge that Applicant understood his waiver of rights. (Plea Tr. p.6). The Plea Judge apprised Applicant of the extent of his exposure to incarceration. (Plea Tr. p.8). Subsequently, Applicant conveyed his desire to waive relevant constitutional rights. (Plea Tr. p.9).

Counsel notified the Plea Judge of efforts on Applicant's case and that he agreed "wholeheartedly" with Applicant's decision to plead guilty in light of the overwhelming evidence of guilt. (Plea Tr. pp.25-27). Counsel outlined the terms of the plea agreement. (Plea Tr. p.27).

Next, Counsel told the Plea Judge that Applicant indisputably admits to one count of sexual battery but denies multiple instances of penetration. (Plea Tr. p.28).

Applicant admitted his guilt and explained his conduct to the Plea Judge. (Plea Tr. p.31). He further ensured the Plea Judge that he was satisfied with counsel, he was not coerced to enter plead guilty, and that he did not need additional time to meet with counsel. (Plea Tr. pp.12-13). The Plea Judge sentenced Applicant to a term of (30) years imprisonment for CSC with a minor, first-degree.

SUMMARY OF TESTIMONY AND EVIDENCE FROM THE PCR HEARING

(a) Applicant's testimony, exhibits, and brief

(i) Concerning evidentiary issues

Applicant testified he had learned of numerous defects and inconsistent facts surrounding the search of his home, a container and an outbuilding. Applicant introduced several exhibits on the matter, including an exhibit that indicates the search warrant was dated after the search took place and the search went beyond the parameters of the premises to be searched. (¶ Exhibit 22 of the Record and ¶ Unnumbered Exhibit of the Record included in Applicant's brief and initially submitted to the Court at the PCR Hearing as ¶Exhibit 15) On July 6, 2004, Applicant was arrested and his residence and an outhouse close to the residence were searched. (¶Transcript of Plea at page 17) One day after the arrest and search, a search warrant (¶ Exhibit No. 15 of the Record) was issued on July 7, 2004, based on an Affidavit (¶ Exhibit No. 22 of the Record) sworn on July 1, 2004 with the description of the premises to be searched listed as "the residence located at 119

Pallet Dr. ... in the West Columbia area of Lexington County, South Carolina." Substantial incriminating evidence was procured from the search of areas or containers for which Applicant, like any person subject to a search, had a privacy interest protected from a warrantless search. (¶ Exhibit Nos. 19 & 21 of the Record)

Applicant testified that if Counsel had advised him of just even the possibility of potential defects in the search warrant and simply the possibility (whether likely or not) of exclusion through a suppression hearing he would not have plead to the charge but insisted upon going to trial and take his chances on the possibility of exclusion before surrendering his right to have the State prove its case.

According to Applicant, Counsel advised Applicant to plea based on the "great deal of physical evidence" without acknowledging the potential for its suppression (¶ Exhibit 2) in his letters. In written correspondence Counsel mentioned that the fact of Applicant previous charge would be heard by the jury without acknowledging an argument that the charge may excluded as more prejudicial than probative. (¶ Exhibit 2) Applicant stated during the hearing of his post-conviction relief application that he asked Counsel to cease his representation because Applicant felt like Counsel was ineffective.

Applicant conveyed to Counsel his position of innocence to the charge of Criminal Sexual Conduct with a Minor and his desire not to plead guilty to the charge. (¶ Exhibits 1 and 2 of the Record) At the PCR hearing, Counsel concurred and testified that Applicant maintained his innocence of the charge of CSC with a Minor, but decided to plea after viewing the evidence against him in the discovery review where he was not told and never told of even a remote possibility of suppression. Counsel stated he believed there was no defect in the warrant or search, though the search took place after the warrant was issued and inculpatory evidence was found in

Applicant house and personal container, not just an outhouse, where Applicant lacked a protected privacy interest.

(ii) Concerning plea "inducement"

Applicant testified that he pled guilty because counsel suggested that he would be transferred to a Federal institution near his home commonwealth of Massachusetts. Counsel represented to Applicant that he would, if he pled guilty to the State charge, he could request to be "housed in a Federal institution, which could be close to where your family lives." (§ Exhibit 3 of the Record) Counsel suggests that if Applicant plead guilty he would say to the judge that Applicant was remorseful and didn't want to further harm the victim by having to relive the experience with a trial. (§ Exhibit 3 of the Record) These "inducements," so called according to Applicant, though objectively enticing did not blossom into benefits following the plea.

(iv) Concerning confidentiality, zealous advocacy and conflicts of interests

At the plea, Counsel represented to the Judge that the evidence against Applicant was overwhelming, using the words "voluminous" or "voluminous, to say the least," or "the weight of evidence against him" in four instances. (Transcript of the Plea pages 25-27) Without objection from Counsel, the deputy solicitor, Mr. Rick Hubbard stated, "Your Honor, I can't help but think this is probably one of the worst ones I've ever had." (Transcript of the Plea page 21)

Counsel did not require a foundation for photos presented by the deputy solicitor, and based on the testimony of Applicant at the application hearing, allowed the deputy solicitor to implicate to the Judge a picture "of a sexual act" involving the victim when in fact it was a picture downloaded from the internet.

(b) Counsel's testimony

At the PCR hearing, counsel testified to his course of conduct during the representation. Counsel testified that he scrutinized the search warrants and saw no meritorious suppression defenses. He did not believe the execution of the warrant was improper.

At first, Applicant communicated his innocence on the CSC charges and his desire to proceed to trial; Counsel admitted that he viewed the discovery with Applicant in the presence of law enforcement and advised him that what he was saying could be used against him, but allowed the meeting to continue and continued to discuss with Applicant the incriminating evidence in front of law enforcement. Applicant did not want to entertain plea negotiations with the State. However, counsel testified that Applicant changed course once he reviewed a particular photograph from the State's evidence that displayed the victim and a male's genitalia.

Counsel testified that he went to great lengths in discussing a plea with Applicant. Counsel was adamant that he never directly or indirectly misadvised Applicant on the sentencing exposure at issue. Counsel noted that Applicant was a very intelligent man and they discussed numerous consequences and implications of pleading guilty. Counsel testified that at the plea hearing he made ethical and accurate representations to the Plea Judge. Counsel testified that the Solicitor's recitation of the State's case was accurate and supported by the evidence. Based on counsel's communications with Applicant and observations of his demeanor at the plea hearing, counsel testified that Applicant did not waiver in his decision to plead guilty and accept guilt. Counsel explained his mitigation strategy that included focused on Applicant's wife, family, and his remorse. Counsel testified that he did everything that he could have done for Applicant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. This Court has further accepted a supplemental memorandum of law and facts by the Applicant, including exhibits, and allowed Applicant to amend his Application. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Applicant produced credible documentary evidence in support of his allegations. Court finds that Applicant was deprived of effective assistance of counsel. The Court finds that Applicant's plea was not freely and voluntarily given, and in any case was prejudiced by the attorney's performance. The Court finds counsel entirely credible, Applicant, to some degree.

INEFFECTIVE ASSISTANCE OF COUNSEL

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). Persuasive ground for PCR exist when plea counsel prejudices a Defendant by failing to effectuate a valid suppression strategy. Kolle v. State, 386 S.C. 578; 690 S.E.2d 73 (2010).

After careful review based on the standard discussed above, the Applicant has carried his burden in this action. The transcript of the plea, the testimony at the hearing, the evidence presented there, Mr. Applicant's memo in support of his PCR relief, as well as other items in the Record compel this Court in the conclusion that Counsel's representation undermined the adversarial process. Counsel provided ineffective assistance by failing to advise Applicant that evidence could be challenged. Counsel's assessment of the search was erroneous, as Applicant has demonstrated significant issues with the search and warrant. Further counsel's strategy to have Applicant sit in jail awaiting trial or a plea for years, his liberal representations of the beneficial consequences of the plea juxtaposed with his understated merits of favorable evidentiary matters

in his written correspondence to Applicant, his ambivalence toward the protection of Applicant's interest at the discovery review and at the plea, and his non-advocacy on various issues affecting Applicant all further fuel the collapse of the adversarial process.

Because Applicant believed that there was no challenge or defense to the evidence the State would have presented against him, as counsel represented to him in numerous items of written correspondence and affirmed at the PCR hearing, Applicant's guilty plea was not voluntarily, knowingly, and intelligently entered. Both Applicant and counsel asserted that attacking the search warrant was never a strategy, and Applicant unambiguously stated that the decision between overcoming the "voluminous" evidence through trial or surrendering to the indictments by pleading, was no real decision. Had he known about even the possibility of a challenge, he would not have plead, straight up to a charge carrying thirty years. The Respondent put up no evidence to counter the fact of Applicant's prejudice by counsel's failure to find or indicate inconsistencies in the warrant and search. Counsel's constitutionally ineffective performance affected the outcome of the plea process because failing to inform Applicant of the search warrant issues or moving for a suppression hearing fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, Applicant would not have pled guilty, but would have insisted on going to trial.

The other grounds alleged and supported by Applicant in his amended Application for post-conviction relief buttress the deduction that the constitutional process Applicant was entitled to, by the Sixth Amendment of the Constitution, was perverted.

Regardless of the merits of Applicant's innocence or guilt, counsel had a duty of loyalty and advocacy. Time and time again, he overlooked these ethical duties to lead Applicant down a non-adversarial road of pleading. Counsel overlooked serious warrant defects, did not give his client

the information necessary to assess the propriety of making a decision to proceed to trial or to plea. Counsel allowed a discovery review to continue even when his client was incriminating himself, apparently overcome with shame and guilt. Counsel does have a duty of candor before tribunals, but not at the expense of abandonment of his ethical duties to his client. Counsel's correspondence demonstrates that counsel selectively informed Applicant in a systemic attempt to manipulate or lead or induce the client to plea. Counsel's actions and words implicate that counsel wanted the Applicant to plea and was invested in that cause over informing the client and allowing the client to make an informed decision to plea or to proceed to trial. Counsel enticed the Applicant with talk of the Applicant being in a federal institution when counsel apparently lacked sound reason that such nicety could be a reality or would be a remote consequence of the plea. Counsel represented in his subject lines in his correspondence that Applicant faced five charges throughout the representation, when Applicant was indicted on only three. Counsel never made an attempt to speed trial along even though Applicant maintained his innocence and sat in jail for many years with no movement on the case.

Counsel failed in zealous, candid advocacy of Applicant's interests, such failings were prejudicial to the client, and without these representations to Applicant, Applicant, like any reasonable Applicant, unambiguously would have insisted upon proceeding to trial, or in the least, to a suppression hearing concerning the inculpatory evidence illegally obtained against him.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has established constitutional violations or deprivations that require this court to grant his application.

Therefore, this application for post-conviction relief must be granted.

This Court notes that that Respondent must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief is granted; and
2. The Applicant's plea is vacated.

AND IT IS SO ORDERED this ____ day of _____, 2015.

EDWARD W. DICKSON
Presiding Judge
Eleventh Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Alan Bruce Carruthers, #326809,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 2011-CP-332-0910

**MEMORANDUM IN SUPPORT OF
APPLICATION FOR POST
CONVICTION RELIEF**

I. Facts

On July 6, 2013, Applicant, Mr. Alan Bruce Carruthers (hereafter Applicant or Mr. Carruthers) was arrested and his residence and an outhouse close to the residence were searched. (¶ Transcript of Plea at page 17) One day after the arrest and search, a search warrant (¶ Exhibit No. 15) was issued on July 7, 2004, based on an Affidavit (¶ Exhibit No. 22) sworn on July 1, 2004 with the description of the premises to be searched listed as "the residence located at 119 Pallet Dr. ... in the West Columbia area of Lexington County, South Carolina." Substantial incriminating evidence was procured from the search. (¶ Exhibit Nos. 19 & 21)

The Applicant was originally represented by a Public Defender and then Mr. Ralph Kennedy, Jr., Esq. (hereafter Mr. Kennedy or plea counsel) was appointed. (Transcript of Plea at page 25) Applicant conveyed to Mr. Kennedy his position of innocence of the charge of Criminal Sexual Conduct with a Minor and his desire not to plead guilty to the charge. (¶ Exhibit 1 and 2)

Mr. Kennedy advised Mr. Carruthers to plea based on the "great deal of physical evidence" without acknowledging the potential for its suppression, and mentioned that the fact of Mr.

Carruthers previous charge would be heard by the jury without acknowledging an argument that the charge may be excluded as more prejudicial than probative. (§ Exhibit 2)

Mr. Carruthers stated during the hearing of his post-conviction relief application that he asked Mr. Kennedy to cease his representation. Also during the application hearing, Mr. Kennedy admitted that he viewed the discovery with Mr. Carruthers in the presence of law enforcement and advised him that what he was saying could be used against him, but allowed the meeting to continue and continued to discuss with Mr. Carruthers the incriminating evidence in front of law enforcement.

Mr. Kennedy represented to Carruthers that he would, if he pled guilty to the State charge, he would be "housed in a Federal institution, which could be close to where your family lives." (§ Exhibit 3) Mr. Kennedy suggests that if Mr. Carruthers plead guilty he would say to the judge that Mr. Carruthers was remorseful and didn't want to further harm the victim by having to relive the experience with a trial. (§ Exhibit 3) These "inducements" did not materialize.

At the plea, Mr. Kennedy represented to the Judge that the evidence against Mr. Carruthers was overwhelming, using the word "voluminous" or "voluminous, to say the least," or "the weight of evidence against him" in four instances. (Transcript of the Plea pages 25-27) Without objection from Mr. Kennedy, deputy solicitor Mr. Rick Hubbard stated, "Your Honor, I can't help but think this is probably one of the worst ones I've ever had." (Transcript of the Plea page 21) Mr. Kennedy did not require a foundation for photos presented by Mr. Hubbard, and based on the testimony of Mr. Carruthers at the application hearing, allows Mr. Hubbard to represent to the Judge a picture "of a sexual act" though the picture, was not of the victim, but one downloaded from the internet. (Transcript of the Plea page 21 and Transcript of the Hearing)

At the PCR hearing, Mr. Kennedy testified that Mr. Carruthers maintained his innocence of the charge of CSC with a Minor, but decided to plea after viewing the evidence against him in the discovery review. Mr. Carruthers testified that if Mr. Kennedy had advised him of potential defects in the search warrant and the possibility of exclusion through a suppression hearing, he would not have plead to the charge but insisted upon going to trial.

II. Issues and Law

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of these adversarial process that the trial cannot be relied on as having produced a just result.'" *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) 745 S.E.2d 102 (quoting *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052).

As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing *Strickland*, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" (quoting *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970))). "The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 366 (1985). In other words, A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. *Holden v. State*, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009));

In Mr. Carruthers' Memorandum in Support of his PCR, he alleged that Mr. Kennedy was ineffective for several reasons:

1. For failure to move for a speedy trial;
2. For not explaining only three of five charges indicted;
3. For inducing plea by promise to be allowed to serve sentence in a federal institution, closer to his family
4. For failing to represent clients interest in that he went too far in bolstering states case in plea and emphasizing aggravating factors in the case
5. For failing to challenge items found as being outside scope of search warrant and search warrant as overly broad based on the affidavit
6. For not requiring foundation for photos shown to judge in plea
7. For failing to object to deputy solicitors statement that this was one of the worst cases he had, inflaming the Court

The transcript of the plea, the testimony at the hearing, the evidence presented there, Mr. Carruthers' memo in support of his PCR relief, as well as other items in the Record support the

conclusion that the adversarial process was undermined in Mr. Kennedy's advice to Mr. Carruthers to plea. In addition to these causes, Mr. Kennedy provided ineffective assistance of counsel by failing to challenge the evidence obtained pursuant to a warrantless search, and failing to advise Mr. Carruthers that the evidence could be so suppressed.

The Fourth Amendment to the United States Constitution and Article I, § 10 of the South Carolina Constitution protect citizens from unreasonable searches and seizures. Evidence seized in violation of these provisions must be excluded in criminal proceedings. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949).

III. Analysis and Conclusion

Because Mr. Carruthers' believed that there was no challenge or defense to the evidence the State would have presented against him, Mr. Carruthers' guilty plea was not voluntarily, knowingly, and intelligently entered. His counsel's constitutionally ineffective performance affected the outcome of the plea process because failing to inform Mr. Carruthers of the search warrant issues or moving for a suppression hearing fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, Mr. Carruthers would not have pled guilty, but would have insisted on going to trial.

For the above reasons, the Court should grant Applicant's Post Conviction Relief.

Respectfully Submitted,

Attorney for Applicant

South Carolina Bar # 100282
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803-446-8795 ~ 1-803-693-0737 (fax)
Catherine.Townes.Johnson@gmail.com

1/16/2014

Columbia, SC

SRH Exhibit
1

**LAW OFFICES OF
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RALPH S. KENNEDY, JR.
ROBERT M. COOK II

JULIUS H. BAGGETT
RETIRED JUDGE OF THE
30 CIRCUIT COURT
of Kentucky

September 19, 2006

Rick Hubbard, Esquire
Deputy Solicitor
Eleventh Judicial Circuit Solicitor's Office
Lexington County Judicial Center
205 E. Main Street, 3rd Floor
Lexington, SC 29072

In Re: Defendant: Alan Bruce Carruthers / Our File No: 05.7-14-171-2700
Warrant Nos: H-500806, H-500840, H-500841, H-500842 & H-500843
Charges: Criminal Sexual Conduct with Minors, Committing or Attempting Lewd
Act upon Child under fourteen, Disseminating Obscene Material to Minor
Twelve Years of age or younger, Aiding the Exposure of Private Parts in
A Lewd and Lascivious Manner, Engaging Child for Sexual Performance
Date of Arrest: May 1, 2004

Dear Rick:

#1 Thank you for taking your time last Thursday to discuss the case of Alan Bruce Carruthers. After our meeting, I wrote a lengthy letter to Mr. Carruthers explaining to him your offer of pleading to Criminal Sexual Conduct With Minors, first degree, in exchange you would drop all the other charges against him and that any sentence he received you would recommend it run concurrent to his Federal sentence. While Mr. Carruthers has expressed to me an interest to plead to other charges against him, he has previously been strong in his feelings about not pleading to the Criminal Sexual Conduct With Minors, first degree.

#2 Should Mr. Carruthers continue with his position of not pleading guilty to CSC, and I have no reason to think he will change his mind, as he maintains he is innocent of that charge, I need to further the scope of the discovery you furnished me by asking you to make available to me and Mr. Carruthers the photographs and computer generated material gathered in the search warrant of Mr. Carruthers' home or any other similar type material received by law enforcement. I would further this request by asking you to categorize that material which has anything to do with the victim in this case, i.e. the viewing of such material by her and/or material in which she is a participant, and any other material that would be used as evidence should we go to trial. It is my understanding this material is either in your or law enforcement's possession. It may not be conducive right now to make copies of that material; therefore, I would be willing to go to a central location to view it. However, I would like your assistance and cooperation in making the

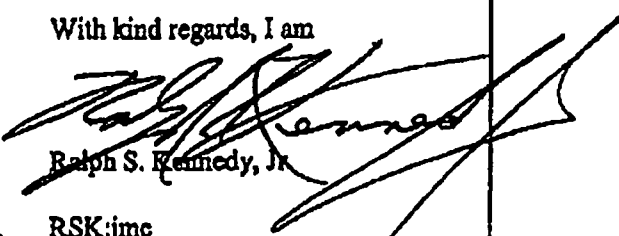
Page 2
September 19, 2006
Rick Hubbard

#1 necessary arrangements with the Sheriff's Office for Mr. Carruthers to be present at that time in order to get his in-put and explanation as to what we are viewing.

#2 As for the State bond we discussed for Mr. Carruthers, I thank you for your willingness to agree that such a bond take place. Right now I am waiting to find out when Mr. Carruthers will be sentenced on his Federal charge and prior to that sentence I will move the State Court for the bond so Mr. Carruthers can be placed in Federal custody.

#3 I look forward to hearing from you as to a time for the viewing of the photographic and computerized evidence, as well as any thoughts you may have regarding this case.

With kind regards, I am



Ralph S. Kennedy, Jr.

RSK:jmc

cc: Alan Bruce Carruthers
Langdon Long, Esq.

LAW OFFICES OF
RALPH S. KENNEDY, JR.

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RALPH S. KENNEDY, JR.
ROBERT M. COON II

JULIUS H. DAGGETT
RETIRED JUDGE OF THE
SC CIRCUIT COURT
of Chester

Exhibit
2

September 14, 2006

Mr. Alan B. Carruthers
P. O. Box 2019 - LCDC
Lexington, SC 29071

In Re: Defendant: Alan Bruce Carruthers / Our File No: 05.7-14-171-2700
Warrant Nos: H-500806, H-500840, H-500841, H-500842 & H-500843
Charges: Criminal Sexual Conduct with Minors, Committing or Attempting Lewd
Act upon Child under fourteen, Disseminating Obscene Material to Minor
Twelve Years of age or younger, Aiding the Exposure of Private Parts in
A Lewd and Lascivious Manner, Engaging Child for Sexual Performance
Date of Arrest: May 1, 2004

Dear Mr. Carruthers:

#1 I had a lengthy meeting today with Deputy Solicitor Hubbard regarding your case. The outcome of those discussions is that the State, in a plea agreement, will drop all charges against you except the "criminal sexual conduct with minors" to which you would be required to plead guilty to. The criminal sexual conduct with minors charge is a criminal sexual conduct in the first degree charge for which the sentence in the statute reads, "Upon conviction, the actor must be punished by imprisonment for not less than ten years nor more than thirty years, no part of which may be suspended or probation granted." The State, as part of the plea agreement, will make a recommendation that the sentence run concurrent with your Federal sentence but will leave the time you receive up to the sole discretion of the Presiding Judge.

#2 Should we go to trial, the State will try all the charges against you for which they have a great deal of physical evidence (some of which we have not seen), as well as testimonial evidence, all of which would be very difficult to overcome. If you take the witness stand, and that decision is yours, to refute the State's evidence, the fact you were previously convicted of a similar charge would be highly damaging and a jury would not look very favorable toward your case after hearing that. If you do not take the witness stand, then the jury would see and hear only evidence from the State's witnesses. This is not to say you could not put up evidence, however, from what I have been able to ascertain so far, I do not see any evidence we have to contradict the State's case.

Page 2
September 14, 2006
Alan B. Carruthers

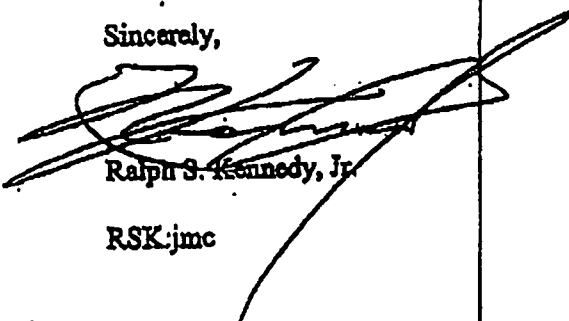
#1 At this time, as I indicated above, I have not seen any of the photographs or other computerized evidence the State has and am going to try to see them as soon as possible.

#2 As for a bond in your case, the State will agree for you to be placed on bond as long as you are placed in Federal custody. When we find out your Federal sentencing date, we will then move the Court for the bond. The reason for waiting is you will still be housed in the Lexington County Detention Center, however, since any State sentence you might receive will be longer than the Federal sentence, by staying under the State jurisdiction you will be making time that can be credited toward your State sentence.

#3 The benefit of being in Federal custody at the time of your Federal sentence is you will then be placed in a Federal institution. You could request of the Federal authorities that you be housed in a location closer to where your family resides instead of being housed in South Carolina. You should discuss this with your Federal Public Defender, Langdon Long, after you get your Federal Presentence Report and prior to your Federal sentence.

#4 Mr. Carruthers, I know this may not be what you wanted to hear since you previously told me you would not plead guilty to the criminal sexual conduct with minors charge and no one is going to force you to do so, however, I would like you to review the discovery material we previously sent you, particularly the section dealing with the forensic interview of the victim in the case and possibly rethink your position. In the meantime, I will continue to work diligently on the case and try to see you in after I have seen the other evidence.

Sincerely,



Ralph S. Kennedy, Jr.

RSK:jmc

Exhibit

3

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RALPH S. KENNEDY, JR.**

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RALPH S. KENNEDY, JR.
ROBERT M. COOK II

JULIA H. BACCHITT
RETIREE JUDGE OF THE
SC CIRCUIT COURT
Of Council

November 17, 2006

Mr. Alan B. Carruthers
P. O. Box 2019 - LCDC
Lexington, SC 29071

In Re: Defendant: Alan Bruce Carruthers / Our File No: 05.7-14-171-2700
Warrant Nos: H-500806, H-500840, H-500841, H-500842 & H-500843
Charges: Criminal Sexual Conduct with Minors, Committing or Attempting Lewd
Act upon Child under fourteen, Disseminating Obscene Material to Minor
Twelve Years of age or younger, Aiding the Exposure of Private Parts in
A Lewd and Lascivious Manner, Engaging Child for Sexual Performance
Date of Arrest: May 1, 2004

Dear Mr. Carruthers:

#1 I am in receipt of your letters of September 18, 2006 and October 9, 2006 and I particular your letter of September 18, 2006 in which you compared the Criminal Sexual Conduct definitions previously supplied to you with the forensic interview report. You requested in your letter that a motion to dismiss and/or a motion to suppress certain evidence be made on your behalf before you plead guilty. In that regard, you indicated, "The ER reports and other evidence does not support this claim, and the initial complaint was, 'touching.'" By "this claim" you mean the CSC 1st.

#2 While we could make a motion in limine to withhold the ER reports and the mention of "touching," I do not believe a judge would exclude either one should the Solicitor be able to link them up in your case, as we would be allowed to cross-examine whoever the person is that would testify to them. As for the ER reports, they could only come in if the person who made the examination testified and was accepted by the Court. Again, we could cross-examine that person.

#3 If we were successful in eliminating those items of evidence, which I don't think we would be, we would still be faced with all the evidence of the many photographs, the testimony of Amy,

Page 2
November 17, 2006
Alan Carruthers

#1 should you take the witness stand your prior conviction for a similar crime. In other words, Mr. Carruthers, we would have a very difficult task in overcoming all the government's evidence, which in my judgment I don't think we could do.

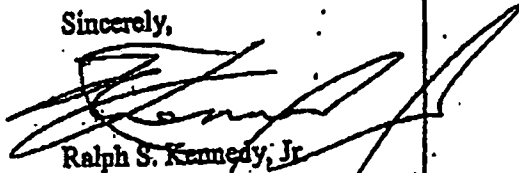
#2 Another reason for not making the motion is if you plead guilty to CSC 1st, I would be justified in saying to the Judge in mitigation of punishment that you are very remorseful for what happened; you didn't want to put Amy through the events that transpired again by having the Solicitor questioning her in preparation for trial and, if we went to trial, having to put her on the witness stand in front of a jury and having to endure cross-examination.

#3 In your case, Mr. Carruthers, the government's offer to you to plead guilty to CSC 1st includes the nol prossing (dismissing) of all the other charges herein against you, recommending a concurrent sentence to the Federal sentence, not to recommend a sentence to the Judge, to grant you a bond so you can begin serving the Federal sentence first and be housed in a Federal institution, which could be close to where your family lives, are all benefits to you which you would lose if you do not accept the Solicitor's offer.

#4 While you might feel this letter has a negative tone to it, that is the nature of this type of case. We cannot sugarcoat the events that transpired. What we can do is try to lessen the final outcome, the sentence for you, and where you could possibly serve that sentence. I think that is where we should concentrate our energy.

#5 As with all my correspondence to you, let me know your thoughts.

Sincerely,



Ralph S. Kennedy, Jr.

RSK:jmc

RULE 5

MAR09 000062

STATE OF SOUTH CAROLINA

County of Lexington

Copy

SEARCH WARRANT

Date 07/07/2004

Officer Sergeant Scottie R. Frier

Exhibit
15

LEXINGTON COUNTY SHERIFF'S OFFICE
INVESTIGATIVE REPORT

RU

Exhibit

18

PAGE 1

AGENCY I.D.
SCO320000

☐ ORIGINAL REPORT

☒ SUPPLEMENTAL REPORT

☐ ADDITIONAL NOTES

☐ ADDITIONAL SUSPECT PROPERTY

☐ STATUS CHANGE

☐ ADDITIONAL OFFENSES

☐ ADDITIONAL RECOVERED PROPERTY

ORIGINAL COMPLAINANT ☐ OR VICTIM ☒	
NAME: DAVIS	DATE OF BIRTH:
STREET ADDRESS:	RACE: SEX:
CITY - STATE - ZIP:	AGE:
INCIDENT TYPE:	
ORIGINAL SUSPECT:	DATE OF BIRTH:
NAME: CARRUTHERS, ALAN	RACE: SEX:
STREET ADDRESS:	AGE:
CITY - STATE - ZIP:	

RECOVERED PROPERTY DOLLAR AMOUNT: \$

CANCEL NCIC ENTRY: YES ☐ NO ☐

MAR 09 000009

ON 7-6-04 THIS OFFICER ALONG WITH DET. POOLE AND SNELGROVE EXECUTED AN ARREST WARRANT AND SEARCH WARRANT ON SUSPECT RESIDENCE LOCATED AT 119 PALLET DR.

DURING THE SEARCH THE FOLLOWING ITEMS WERE SEIZED AS EVIDENCE:

ONE COMPAQ COMPUTER, OLYMPUS DIGITAL CAMERA, SEVERAL PHOTOS OF CHILD PORNOGRAPHY. A BLACK TRUNK LOCATED IN THE MASTER BEDROOM CLOSET THAT CONTAINED SEVERAL PHOTOS OF CHILD PORN TO INCLUDE A BLUE PHOTO BOOK THAT CONTAINED NUDE PHOTOS OF THE VICT WITH THE SUSPECT. ALSO MISC DISKS AND CD'S, PAPERWORK.

THE WARRANT FOR CSC 1ST WAS SERVED BY POOLE AND SUSPECT WAS TRANSPORTED TO LCDC WITHOUT INCIDENT. THE SUSPECT'S 19 YEAR OLD DAUGHTER WAS ALONE AT THE RESIDENCE WHEN OFFICERS ARRIVED TO EXECUTE THE SEARCH WARRANT. SHORTLY LATER SUSPECT ALONG WITH HIS WIFE ARRIVED AND SUSPECT WAS PLACED INTO CUSTODY.

THE EVIDENCE WAS TRANSPORTED BY THIS OFFICER AND SURRENDERED CARE AND CUSTODY TO LCSD EVIDENCE DEPT. ON THE SAME DATE.

ON 7-8-04 THE SUSPECT WAS IN THE BOOKING AREA WHILE I WAS THERE. I SPOKE WITH THE SUSPECT AND ADVISED HIM OF HIS RIGHTS FROM A CARD. HE STATED THAT HE UNDERSTOOD HIS RIGHTS AND ASKED TO SPEAK WITH ME. HE STATED WHILE READING THE CSC WARRANT THAT HE DID EXPOSE HIS PENIS TO THE VICT AND TOOK PICTURES OF HE, BUT HE DID NOT HAVE SEX WITH HER. HE TOLD ME THAT HE HAS FANTASY WITH THE CHILDREN. I ASKED HIM IF THERE WAS ANY ADDITIONAL VICTIMS IN THIS AREA. HE TOLD ME THAT THERE WAS NOT ANY MORE VICTIMS IN THIS AREA. THAT WAS THE END OF OUR CONVERSATION AND HE WENT TO FINISH HIS BOOKING.

SUBJECT IDENTIFIED		SUBJECT LOCATED		☐ ACTIVE	☐ ARRESTED UNDER 18	☐ EX-CLEAR UNDER 18
YES ☒ NO ☐	YES ☒ NO ☐	☐ UNPROCESSED	☐ ARRESTED 18 AND OVER	☐ EX-CLEAR 18 AND OVER		
REASON FOR EXCEPTIONAL CLEARANCE: 1		OFFENDER DEADLY 2		NO PROSECUTION 3		INTERVIEWED & DECLINED COOPERATION 4
REPORTING OFFICER: B SIMS		DATE: 7/8/04	UNIT NUMBER: 303	APPROVING OFFICER:		DATE:
REPORTING OFFICER:		DATE:	UNIT NUMBER:	APPROVING OFFICER:		DATE:

Exhibit

Placed in evidence locker #: 8 Incident Date & Time: 7-6-04 Todays Date & Time (If different than Incident): 7-8-04 1730

04-0047562
Lexington County Sheriff's Department

7-9-a/0834



LEXINGTON COUNTY SHERIFF'S DEPARTMENT

EVIDENCE / PROPERTY RECORD

Exhibit

21

RULE

HOLD AS:

EVIDENCE ☒RECOVERED ☐FOUND ☐

COURT DATE: _____

VICTIM: Davis, AmySUSPECT: 1. Curthers, Alan 2. _____ 3. _____EXACT LOCATION FOUND OR RECOVERED: 119 Dallery DR Black trunk

Placed in evidence locker #:

Incident Date & Time:

Today's Date & Time (If different than Incident)

Item #	Location in Evidence Room	Quantity	Description (Include SERIAL #, MAKE, BRAND, COLOR, MODEL, WHEN APPLICABLE)
1	GR	1	Black Trunk:
1		1	One Red Bag TWA: Containing Sex Toys
		1	Water Color Pad w/ Signs & Photos
		1	Green photo Album w/ pictures (child pornography)
			w/ loose photo's in Black Bag.
		1	white Cus bag Containing (H) Cassette Tapes
		1	white Plastic Bag w/ 6 Cassette tapes
		15	CD Rom's
		1	Loose Audio Tape
		1	Loose Photos
		2	Photo Albums (Empty)
		1	Blue Bag w/ photos, Glows & Misc Items
		1	Black w/ Smiley Faces Discy.

CASE # 04047562

BAR CODE

NOV 02 2007 0030

Found or Recovered by Officer: PRINT NAME

B. Sims

SIGNATURE

ES AND BADGE #

E70672 303

Receiving Custodian: PRINT NAME

SIGNATURE

DATE & TIME

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

AFFIDAVIT

RUI

Exhibit
22

6/11/09

UC

Personally appeared before me, one _____
 who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions
 of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

PORNOGRAPHIC PHOTOS, BOOKS, CHILD PORN, COMPUTER THAT CONTAINS EXPLICIT PHOTOS, MOVIES, AND
CHILD PHOTOS EXPLICIT IN NATURE.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

THE RESIDENCE LOCATED AT 119 PALLET DR. FURTHER DESCRIBED AS A SINGLE DWELLING DOUBLE WIDE
MOBILE HOME CREAM IN COLOR WITH GREEN SHUTTERS AND WHITE TRIM, WITH THE NUMBERS 119
DISPLAYED ON THE DWELLING NEXT TO THE FRONT DOOR. THIS RESIDENCE IS LOCATED OFF PALLET DR. IN
THE WEST COLUMBIA AREA OF LEXINGTON COUNTY, S.C.

REASON FOR AFFIANT'S BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

THAT ON 6-12-04 LCSD CASE # 04-047562, THE VICT STATED THAT ALAN CARRUTHERS WHO LIVES AT 119
PALLET DR. BETWEEN 5-1-04 AND 6-1-04 HAS SHOWN THE MINOR VICT (8 YEARS OF AGE) PORNOGRAPHIC
PHOTOS FROM HIS COMPUTER LOCATED INSIDE THE RESIDENCE AND ALSO STILL PHOTOS THAT ARE LOCATED
IN HIS BEDROOM DRESSER. THAT THE VICT ALSO PROVIDED LAW ENFORCEMENT AS WELL AS THE CHILDREN'S
CENTER DETAILED STATEMENTS OF CARRUTHERS SEXUALLY ASSAULTING HER ON SEVERAL INCIDENTS
BETWEEN THE ABOVE DATES ON THE PROPERTY. A SEARCH WARRANT IS REQUESTED TO ENTER THE
RESIDENCE AND SEARCH FOR EVIDENCE THAT VICT DESCRIBED AND SEIZE THE COMPUTER AND ANY
ADDITIONAL PORNOGRAPHIC MATERIAL FOR FURTHER INVESTIGATION.

0197

Sworn to and Subscribed before me

this

day of

July 20 04
 Signature of Judge

(L.S.)

BRETT B. SHAW

Affiant

Address 521 GIBSON RD
LEXINGTON, S.C. 29072

Phone 359-8230

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Alan Bruce Carruthers, #326809,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 2011-CP-332-0910

**MOTION FOR LEAVE TO AMEND
PCR APPLICATION**

Pursuant to Rule 15(a) of the South Carolina Rules of Civil Procedure, Applicant, through his undersigned counsel, hereby moves the Court for leave to amend his Application items (10) and (11), grounds upon which Applicant is being unlawfully held and supporting facts, to reflect grounds and facts revealed through the Record. Specifically, good cause exists and Applicant asserts that justice so requires the allowance of Applicant adding that he was denied effective assistance of counsel based on counsel's failure to advise of evidence obtained pursuant to a warrantless search, move for a suppression hearing, advising client to plea without the knowledge or benefit of this defense, as well as conducting a discovery review with law enforcement present. At the time of Applicant's initial Application, without the assistance of counsel he was unaware of these grounds and supporting facts.

Respectfully Submitted,

Catherine Johnson
Attorney for Applicant
South Carolina Bar # 100282
701 Gervais Street Suite 150-318
Columbia, South Carolina 29201
803-446-8795 ~ 1-803-693-0737 (fax)
Catherine.Townes.Johnson@gmail.com

1/16/2014

Columbia, SC

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Alan Bruce Carruthers, #326809,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 2011-CP-332-0910

**CERTIFICATE OF SERVICE
BY EMAIL**

I certify that on January 16, 2014, I sent a copy of the Memorandum In Support of Applicant's Post Conviction Relief and Motion for Leave to Amend PCR Application to the Honorable Dickson and Assistant Attorney General Walt Whitmire via email.

Catherine Townes Johnson
Catherine Townes Johnson
Attorney for Applicant
South Carolina Attorney Bar # 100282
701 Gervais St. Sta. 150-318
Columbia, SC 29201
(803) 446-8795 (cell)
1-803-693-0737 (fax)
Catherine.Townes.Johnson@gmail.com

January 16, 2014
Columbia, SC

ORIGINALSTATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Alan Bruce Carruthers, #326809,)

Case No. 2011-CP-32-0910

Applicant,)

v.)

State of South Carolina,)

Respondent.)

**RETURN TO APPLICANT'S
RULE 59(e) MOTION**FILED
2015 DEC -4 A 11:29
CLERK OF COURT
LEXINGTON, SC

Respondent, by and through undersigned counsel, making a Return to Applicant's Motion to Alter or Amend a Judgment, would respectfully show unto this Court:

1. The matter is before the Court by way of a post-conviction relief action filed March 7, 2011.
2. An evidentiary hearing was convened on August 14, 2013, at the Lexington County Courthouse.
3. Applicant was present at the hearing and represented by Catherine Johnson, Esquire. Applicant testified in his own behalf.
4. After a full review of the evidence presented at the evidentiary hearing, this Court issued an order dated September 18, 2015, and filed September 23, 2015, denying the application for post-conviction relief.
5. Applicant – through counsel – submitted a Motion to Alter or Amend Judgment on November 5, 2015. Applicant argues plea counsel misinformed him in critical ways, such as information having the effect of inducing him to plead when he otherwise would not have pled. Further, Applicant argues plea counsel demonstrated on numerous occasions an ambivalence toward

ORIGINAL

the advocacy and protection of his client's interests.

6. Respondent submits Applicant's motion to alter or amend should be denied. Applicant is not requesting either an alteration or amendment to the Order of Dismissal. Rather, Applicant is asking the Court to reverse its decision and grant post-conviction relief. Such a request is more properly addressed through the appellate process. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." (citing Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939))).

7. Respondent submits the post-conviction relief court fully reviewed and properly ruled upon all issues raised in the motion to alter or amend.

FILED
2015 DEC -4 A 11:29
BETH A. CAMPBELL
CLERK OF COURT
LEXINGTON, SC

Therefore, Respondent submits Applicant's Motion to Alter or Amend should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

PATRICK L. SCHMECKPEPER
Assistant Attorney General

By: PLSul
ATTORNEYS FOR RESPONDENT

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

December 2, 2015

FILED
2015 DEC -4 AM 11:29
CLERK OF COURT
EDMUNDSON, SC

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

2015 DEC -4) A 11: 29

2011-CP-32-0910

ALAN B. CARRUTHERS, #326809

BETH A. DARRIGG
CLERK OF COURT
LEXINGTON, SC

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

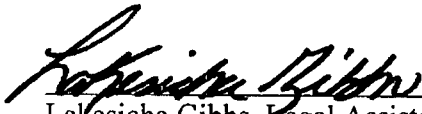
STATE OF SOUTH CAROLINA,

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 to Applicant's Rule 59 (e) Motion** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ms. Catherine T. Johnson, Esquire
Law Office of Catherine Johnson
701 Gervias St.
Suite 150-318
Columbia, SC 29201

DATED this 2nd day of December, 2015.


 Lakesicha Gibbs, Legal Assistant
 For Respondent

1 State of South Carolina) In the Court
2 County of Lexington) Of Common Pleas
3) Indictment No.: 2011-CP-32-0910
4 Alan Bruce Carruthers,)
5 Applicant,)
6 vs.) Transcript of Record
7 State of South Carolina,)
8 Defendant.)
9

10 December 15, 2015
11 Orangeburg, South Carolina

12 BEFORE:

13 The Honorable Edgar W. Dickson, Judge
14

15 APPEARANCES:

16
17 Catherine Johnson, Esquire
18 Attorney for the Applicant

19 Patrick Schmeckpeper, Assistant Attorney
20 General
21 Attorney for the State
22
23
24
25

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INDEX

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PAGE

3

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HEARING Motion to Reconsider

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Certificate of Reporter

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EXHIBITS

12

NO. DESCRIPTION

PAGE

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NONE

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1 Whereupon, the following proceedings were had,

2 MR. SCHMECKPEPER: My name is Patrick Schmeckpeper.
3 I'm with the AG's office.

4 THE COURT: Mr. Schmeckpeper, whose position did you
5 take?

6 MR. SCHMECKPEPER: Walt Whitmire. He moved out to
7 do private practice and make money and I moved in and
8 took over for him for the Tenth and Eleventh Circuits.

9 THE COURT: Okay. And this is Mr. Carruthers?

10 MR. SCHMECKPEPER: Yes, Your Honor. This is Alan
11 Carruthers versus State of South Carolina,
12 2011-CP-32-0910. Mr. Carruthers filed his application in
13 September of 2013, pled guilty to criminal sexual conduct
14 first degree in 2008.

15 Your Honor, you heard this case back in October of,
16 I believe it was - you heard this on September 23rd,
17 2015. I apologize. He filed his application March 7th.

18 Just to refresh your memory, this is a case in which
19 the applicant pled guilty in front of Judge Cooper to
20 raping his neighbor's seven year old daughter back in
21 2008. This is a case involving overwhelming evidence.

22 Apparently there was some reluctance on the
23 applicant's part initially to plead guilty until he saw a
24 picture of the victim along side the applicant's genitals
25 and then he decided he wanted to take a criminal sexual

1 conduct first degree guilty plea. I believe the
2 applicant has a motion right now to alter or amend the
3 order that Your Honor signed dismissing his application
4 so I'll turn this over to opposing counsel, Your Honor.

5 THE COURT: Okay. Yes, ma'am.

6 MS. JOHNSON: Your Honor, my name is Catherine
7 Johnson. I'm here on behalf of applicant Alan Bruce
8 Carruthers, and my motion today is a 59E motion to
9 reconsider the decision that was made to deny Mr.
10 Carruthers' PCR relief.

11 Your Honor, the irony in this case is very strong,
12 but today we are here only on one issue and this whole
13 case is only about one issue, did Mr. Carruthers have
14 effective assistance of counsel. And, Your Honor, it is
15 my motion, it is our position that he did not have
16 effective assistance of counsel and the law says that
17 effective assistance of counsel for a plea is made up of
18 two prongs. The first is was the counselor deficient in
19 some way. The second is did that deficiency prejudice
20 the client and but not for that deficiency would the
21 client have pled.

22 Your Honor, in this case as we have shown through
23 the exhibits, and I have to offer my apology because when
24 I got this case, I had it for two weeks and I went in
25 front of Your Honor and I wasn't as prepared as I should

1 have been and ask for a continuance, but because of the
2 situation it couldn't be granted and so we moved forward.
3 My understanding based on the transcript was because of
4 the untimeliness of my acceptance of the case you would
5 allow me to present a brief and you did that several
6 months after the hearing that we had and it wasn't until
7 that, having a little bit more time to look over and
8 study the situation was I able to find an issue paramount
9 to the deprivation of Mr. Carruthers' Fourth Amendment
10 Constitutional Right and his Sixth Amendment
11 Constitutional Right.

12 Mr. Carruthers and plea counsel both testified at
13 the hearing that it was only after the evidence, viewing
14 the discovery which took place in front of law
15 enforcement officers who were recording the discovery
16 review, it was only at that time that my client decided
17 to plea. He maintained his innocence and the record
18 shows he maintained his innocence to this charge. He was
19 overcome with shame and guilt at that evidentiary
20 hearing.

21 Plea counsel has also testified and in the record
22 and transcript, page 40, he testified he did not see any
23 issues in the search warrant. But, Your Honor, the
24 search that took place that found all of this
25 incriminating and culpatory evidence was conducted

1 without a search warrant and searches that are conducted
2 without a search warrant are presumptively invalid,
3 therefore, there was a great, great suppression issue
4 that was completely overlooked by counsel and was not
5 addressed by counsel, was not brought up, was not raised
6 in the suppression hearing, and Mr. Carruthers relied on
7 the understanding that the evidence that he was viewing
8 at the time was completely admissible. He had no
9 challenges to it because plea counsel had said that there
10 are no issues with the search warrant.

11 Your Honor, one of the major issues that I have and
12 that I'm asking for your indulgence in is the actual
13 search warrant. When we went in front of you in
14 Lexington County in 2013, plea counsel authenticated all,
15 most all of the exhibits in the brief at the time.
16 However, the one document that he - one of the documents
17 that he could not authenticate and, in fact, that he said
18 he didn't know what it was was the search warrant which
19 provides the key evidence that the search was conducted
20 without a warrant and, therefore, there was a good
21 suppression issue. And it was only later on when I
22 submitted my brief that I brought to the court's
23 attention that this exhibit initially labeled exhibit
24 number 15 was not into evidence. It was excluded from
25 evidence because there was no one - or at the time I did

1 not think that it could be authenticated.

2 Your Honor, my client can authenticate that document
3 as a document that he received in his discovery prior to
4 his application to have a post conviction relief, and the
5 search warrant issue I think is the strongest issue. I
6 think that case law demonstrates that failing to be
7 effectual in a valid suppression strategy is grounds for
8 PCR reversal. That is in the case of Coley v. State.

9 And, Your Honor, the case that gives us the standard
10 for PCR review is Strickland and Strickland says that PCR
11 should be granted when the adversarial process is so
12 undermined that it cannot be relied upon for a just
13 result.

14 In this case, Your Honor, the adversarial process
15 was blown out of the water. It was - some of the things
16 that were done indicate to me and I believe to the court
17 that there was a lacking of zealous advocacy. One
18 example is the review of the discovery in front of law
19 enforcement where law enforcement was recording every
20 single word that was said.

21 Now, plea counsel has said that he gave his client
22 some warnings, but I think the standard in that case is
23 don't conduct a discovery review in front of your
24 adversary. If this is an adversarial process, that
25 doesn't make any sense.

1 Another example is at the plea, plea counsel in his
2 candor to the court I believe went beyond candor to the
3 court and emphasized the voluminous evidence in this case
4 on multiple occasions. And, Your Honor, my position is
5 that those representations were not necessary and, in
6 fact, were against his client's interests at the time.
7 And so, Your Honor, that is the basis for our request
8 that the judgment be altered.

9 THE COURT: Okay. Thank you, Ms. Johnson. I
10 appreciate it. Yes, sir.

11 MR. SCHMECKPEPER: Briefly, Your Honor, this is a
12 Rule 59E hearing. Whether or not your order should be
13 altered or amended the state's position is that it
14 shouldn't. Concerning the issue of the search warrant,
15 Your Honor, Your Honor ruled on that and I think ruled
16 correctly that the applicant never really raised the
17 issue of how he had a reasonable expectation of privacy
18 in the area that was looked over. But at this point,
19 Your Honor, the record is closed. The applicant had a
20 hearing. He has had his bite at the apple. Any issue
21 the applicant has with your ruling he can take up on
22 appeal. But at this point I don't think there has been
23 any showing made that your order needs any amendment or
24 any supplementation. The fact that applicant takes issue
25 with your credibility findings in this case is

1 understandable, but still I don't think appropriate for
2 59E. If you have any questions, I'll be happy to answer
3 any.

4 THE COURT: No. But I do think it's interesting
5 that in a fairly recent decision credibility became such
6 a big issue in a PCR case. I thought that was
7 interesting. Once the court makes a finding of
8 credibility they seem to take it pretty seriously now.

9 MR. SCHMECKPEPER: Absolutely, Your Honor. In the
10 PCR forum, the PCR judge is the finder of fact just like
11 you are the finder of fact in General Sessions or in
12 civil proceedings and are given great deference because
13 you had the opportunity to hear witnesses. You had the
14 opportunity to determine whether or not the applicant's
15 testimony is credible or not and the appellate courts
16 don't have that opportunity. And again it's
17 understandable that the applicant takes issue with your
18 credibility finding, but I don't think this is the proper
19 forum to attack that. They are more than welcome to
20 attack it on appeal. The bottom line is I don't think
21 that will go very far.

22 THE COURT: I think he wants you to appeal it.

23 MS. JOHNSON: Your Honor, I definitely -- It's not
24 going to be my case to appeal. I'll turn it back over to
25 the Office of Indigent Defense. My only issue is issue

1 preservation and did I do a good job in preserving the
2 issues so...

3 THE COURT: Okay. Well, I'll look back over your
4 memo. I'll get back to you quickly. Thank you very
5 much.

6 WHEREUPON, THE HEARING WAS CONCLUDED.
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1 CERTIFICATE OF REPORTER

2 (STATE OF SOUTH CAROLINA)

3 (COUNTY OF LEXINGTON)

4

5 I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R.,
6 and Official Circuit Court Reporter for the Eleventh Judicial
7 Circuit in and for the State of South Carolina, do hereby
8 certify that I reported the proceedings in the before
9 captioned case in the Court of Common Pleas in and for the
10 State of South Carolina on the 17th day of December, 2015.

11 I FURTHER CERTIFY that the forgoing 10 pages
12 constitute a true and accurate record of said proceedings.

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

15 IN WITNESS WHEREOF, I have hereunto set my hand at
16 Lexington County, this 5th day of May, 2016.

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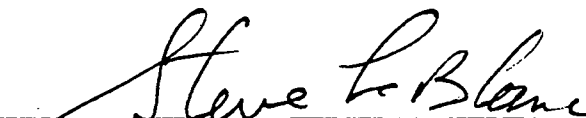
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Steven E. LeBlanc, Sr., R.P.R.
Eleventh Circuit Court Reporter
State of South Carolina.

RECEIVED

MAR 31 2016

ORIGINAL

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

Alan Bruce Carruthers, #326809,)

Plaintiff,)

v.)

State of South Carolina,)

Defendant.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-32-0910

ORDER

FILED
2016 MAR -7 A 11:56
BETH A. CARRUTHERS
CLERK OF COURT
LEXINGTON, SC

This matter comes before this Court by way of a post-conviction relief (PCR) application filed by Alan Bruce Carruthers (Applicant) on March 7, 2011. An evidentiary hearing into the matter was convened on August 14, 2013, at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Catherine Johnson, Esquire. Respondent was represented by Assistant Attorney General Walt Whitmire, Esquire, of the South Carolina Attorney General's Office. This Court issued an Order dated September 18, 2015, and filed September 23, 2015, denying the application for post-conviction relief.

Applicant filed a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on November 5, 2015, in which he asks this Court to alter or amend its Order dismissing his PCR application. Respondent made its return to the motion, requesting this motion be denied.

Based upon careful reconsideration of the evidence in this case, including Applicant's motion, supporting memorandum, and oral argument, this Court is not persuaded to alter or amend its judgment. The Order of Dismissal issued by this Court contains the required findings

of fact and conclusions of law as required by Section 17-27-80 of the South Carolina Code (2014) and Rule 52(a) of the South Carolina Rules of Civil Procedure.

IT IS THEREFORE ORDERED that Applicant's motion be and hereby is denied and dismissed.

IT IS SO ORDERED.



EDGAR W. DICKSON
Presiding Judge

Orangeburg, South Carolina
Feb. 24, 2016

FILED
16th MAR - 7 A 11:50
BETTY A. CANNING
CLERK OF COURT
LEXINGTON, SC

Ralph Kennedy

WITNESSES

LCSD
Sims, Det.

DOCKET NO. 2006-GS-32-3422

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

OCTOBER TERM 2006

THE STATE

vs.

Alan Bruce Carruthers

A-2004-32-01827

9/6/2006 4:04 PM

ARREST WARRANT NUMBER

H500806

TRUE BILL

ACTION OF GRAND JURY

Barry A. Lucas

Foreperson of Grand Jury
Date: 16 Oct 06

VERDICT

Foreperson of Petit Jury

Date:

As charged

CDR# 0385

Indictment for

Criminal Sexual Conduct with Minor Child 1st
Degree

§16-3-655(1)

DONALD V. MYERS, SOLICITOR

*0-30-WS
Violent/Most Ser
Sex Registry
Sex. Vio. Cause
Child Abuse Regist
DMV. F. 16-3-655*

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	Criminal Sexual Conduct with Minor Child 1st Degree
COUNTY OF LEXINGTON	)	
		§16-3-655 (1)

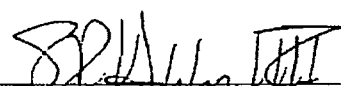
At a Court of General Sessions, convened on OCTOBER, 2006, the Grand Jurors of Lexington County present upon their oath:

That Alan Bruce Carruthers, did in Lexington County between May 1, 2004 and June 1, 2004, commit a sexual battery upon the victim minor _____, a child who was less than eleven years of age, to wit: the defendant did have sexual intercourse with the victim by inserting his penis into the victim's vagina, and/or did intrude, however slight, with any part of his body or with any object into the victim's vaginal or anal openings, in violation of Section 16-3-655 (1) of the South Carolina Code of Laws (1976), as amended.

A TRUE COPY


Lex. Co. C.C.C.P., G.S. & F.C.

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


DEPUTY SOLICITOR