

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Spartanburg County

G. Thomas Cooper, Jr., Circuit Court Judge

JOHN M. KIRBY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000050

APPENDIX

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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT
CASE NOS: 2015-GS-42-0951, 952

STATE OF SOUTH CAROLINA)
vs.) TRANSCRIPT OF RECORD
JOHN MICHAEL KIRBY)

MAY 26, 2016
SPARTANBURG, SOUTH CAROLINA

BEFORE THE HONORABLE MARK HAYES

APPEARANCES:

LINDSAY OVERBY, ASSISTANT SOLICITOR
SPARTANBURG, SOUTH CAROLINA

ATTORNEY FOR THE STATE

MATT SHEALY, ASSISTANT PUBLIC DEFENDER
SPARTANBURG, SOUTH CAROLINA

ATTORNEY THE DEFENDANT

SHIRLEY BROOM
16TH Circuit Court Reporter

1 (WHEREUPON, DOCUMENT MARKED AS STATE'S EXHIBIT
2 NUMBER 1.)

3 MS. OVERBY - May it please the Court, Your Honor.
4 Before you is John Michael Kirby. He is here on two
5 indictments, 2015-GS-42-0951 and 0952. These are two true
6 billed indictments for criminal sexual conduct with a minor
7 in the second degree. There is a recommendation in this
8 case of a concurrent cap of 15 years. The State is also
9 dismissing two accompanying CSC with a minor third degree
10 charges, one relating to each of these victims and arising
11 out of the same set of facts. Mr. Kirby is represented by
12 Matt Shealy. He is pleading under Alford vs. North
13 Carolina.

14 THE COURT - You are Mr. Kirby?

15 MR. KIRBY - Yes, sir.

16 THE COURT - And, sir, please raise your right
17 hand and let the clerk of court swear you in.

18 (WHEREUPON, JOHN MICHAEL KIRBY IS DULY SWORN BY
19 THE DEPUTY CLERK OF COURT.)

20 THE COURT - And, Mr. Kirby, it is your intent to
21 enter a plea to the charges that were announced by the
22 solicitor?

23 MR. KIRBY - Yes, sir, Your Honor.

24 THE COURT - How old are you?

1 MR. KIRBY - Thirty-one, Your Honor. I'll be
2 thirty-two this August, sir.

3 THE COURT - How far'd you go in school?

4 MR. KIRBY - Eleventh -- eleventh grade, Your
5 Honor. I did get my GED through the feds, Your Honor.

6 THE COURT - Are you married, single, divorced,
7 widowed?

8 MR. KIRBY - Single, Your Honor.

9 THE COURT - Do you have children?

10 MR. KIRBY - One, Your Honor.

11 THE COURT - How old?

12 MR. KIRBY - I think she'll be probably about
13 eight or nine. Me and her mother -- I rarely get to see
14 her.

15 THE COURT - Do you -- prior to your being
16 arrested on these charges, did you have a job outside the
17 home?

18 MR. KIRBY - No, sir, I just -- I just got out of
19 the feds.

20 THE COURT - How were you supporting yourself
21 financially at the time?

22 MR. KIRBY - Odd and end jobs, sometimes under the
23 table.

24 THE COURT - Were you living with family?

25 MR. KIRBY - Yes, sir.

1 THE COURT - Ever served in the military?

2 MR. KIRBY - No, sir.

3 THE COURT - And on these charges, how long a time
4 have you been in jail?

5 MR. KIRBY - Eight hundred and forty-five days.

6 THE COURT - Within the last 24 hours, have you
7 consumed any type of substance that is adversely or
8 negatively affecting your ability to understand what we're
9 doing today?

10 MR. KIRBY - No, sir.

11 THE COURT - Have you ever received any type of
12 substance abuse treatment for drug or alcohol problem?

13 MR. KIRBY - Yes, sir.

14 THE COURT - Was that for drugs, alcohol or both?

15 MR. KIRBY - Drugs.

16 THE COURT - And where did you receive that last
17 treatment?

18 MR. KIRBY - SADAC. I was supposed to go to Don
19 Fadra (phonetic) for my federal probation, but I ended up
20 missing it and it was a violation for my federal probation.

21 THE COURT - And when did you go to that SADAC,
22 approximately how long ago?

23 MR. KIRBY - Around about 2005.

24 THE COURT - And was it successful at the time?

25 MR. KIRBY - Yes, sir.

1 THE COURT - Are you satisfied with the work that
2 your lawyer has done?

3 MR. KIRBY - Yes, sir.

4 THE COURT - Do you feel like you've had enough
5 time to talk to him about the facts behinds these cases,
6 the legal elements of the offenses and also any possible
7 defenses you might have?

8 MR. KIRBY - Yes, sir.

9 THE COURT - Has anybody come to you and
10 threatened you in any way or have they made you any
11 promises in order to get you to make the decision to enter
12 this plea?

13 MR. KIRBY - No, sir.

14 THE COURT - Am I correct to conclude that your
15 decision to enter the plea, that it is a free and voluntary
16 decision on your part?

17 MR. KIRBY - Yes, sir.

18 THE COURT - Sir, I need for you to understand
19 that there are other very -- I need for you understand that
20 under the law, you are presumed innocent of both of these
21 charges, and you do have a right to have a jury trial on
22 either or both of these charges. At any jury trial that
23 would take place, it would be the State that has the burden
24 of proof; the State would have to convince all 12 members
25 of a jury that you are, in fact, guilty beyond a reasonable

1 doubt of these charges. Now, do you understand that you
2 have a right to that jury trial?

3 MR. KIRBY - Yes, sir.

4 THE COURT - And do you wish to have a jury trial
5 on either of these charges?

6 MR. KIRBY - No, sir.

7 THE COURT - Sir, I need for you to understand
8 that there are other very important constitutional rights
9 that you are entitled to but that you have to give up in
10 order to enter these pleas. You have to give up your right
11 to confront and cross examine the State's witnesses; you
12 also have to give up your right to present evidence which
13 you or your lawyer might feel would establish a defense,
14 and you have to give up your right of subpoena as well as
15 your right to remain silent. Do you understand all those
16 rights?

17 MR. KIRBY - Yes, sir.

18 THE COURT - And do you wish to give up all those
19 rights?

20 MR. KIRBY - Yes, sir.

21 THE COURT - Mr. Kirby, please listen to the
22 solicitor. She's going to tell us the facts, and then I'll
23 have some more questions for you.

24 MS. OVERBY - Thank you, Your Honor. Recognizing
25 that this plea is entered under Alford vs. North Carolina,

1 the evidence that would be presented at trial is that
2 January 27th of 2014 the Spartanburg County Sheriff's Office
3 received a report of a sexual assault involving a female
4 minor victim. She was 13 years of age at the time of that
5 report. The report came from Spartanburg Regional. The
6 victims in this case are the half siblings to the
7 defendant. Both the victims in this case and the defendant
8 have the same father. The female victim was between 12 to
9 13 years of age at the time of the incidents. The male
10 victim was 14 years of age. Both of these victims have
11 intellectual disabilities. They do not function like those
12 ages. The female victim has intellectual disability
13 moderate with speech and language impairment. The male
14 victim has intellectual disability borderline mild and
15 moderate with speech and language impairment. The female
16 victim was admitted to Spartanburg Regional after
17 complaints of suicidal ideations. The victim's mother
18 reported that the victim was acting aggressively and
19 violent towards her dolls and herself, hitting herself and
20 scratching her face. She had a depressor flat mood,
21 stating that no one loves her. The mother also described
22 the victim would not the mother come into the bathroom
23 where the victim was or see her without any clothes on.
24 The victim was seen by a triage nurse and then a SANE nurse
25 and a psychiatric liaison at Spartanburg Regional to whom

1 she disclosed that the defendant had sexually abused her.
2 The female victim disclosed digital and penile penetration
3 of her vagina occurring at her grandmother's house at [REDACTED]
4 [REDACTED] [REDACTED] She indicated that the last contact she
5 had had with the defendant was two weeks prior to being
6 seen at Spartanburg Regional, and that was at the victim's
7 residence at [REDACTED] [REDACTED] [REDACTED] The victim reported to the
8 psychiatric liaison that the defendant told -- defendant
9 told her she'd be taken away from her mother if she told
10 anyone. At trial the State would -- has filed a motion and
11 would've moved for a ruling regarding the admissibility of
12 the forensic interviews regarding these children. The --
13 both of the children were referred to the children's
14 advocacy center. The female victim was seen for two sets
15 of forensic interviews where she disclosed that her
16 brother, John, engaged in digital vaginal penetration,
17 penile vaginal penetration and penile anal penetration.
18 Regarding those acts she said that it hurt, it happened in
19 her room and in her brother's room, and that her clothes
20 were taken off of her. The defendant told her not to tell
21 her mommy or daddy. She was also exposed to pornography
22 and the defendant engaged in these acts while watching
23 pornography and that was in the brother's room. The
24 brother was seen initially for a collateral interview. He
25 was believed to have witnessed incidents involving the

1 sister. When he went to the children's advocacy center for
2 that interview, he also disclosed sexual abuse occurring to
3 him self. He described that the defendant fondled and
4 rubbed his wienie using his hands. He gestured
5 masturbation with his hand to explain what the defendant
6 did. He described penile anal penetration, also exposure
7 to pornography, and he disclosed that he witnessed acts
8 occurring to his sister. He described, basically, digital
9 vaginal penetration, fondling of her breasts, penile
10 vaginal and penile anal penetration and that the defendant
11 would have the female victim stimulate his penis with her
12 hand. The male victim also described ejaculation and that
13 white stuff went over his sister. The defendant was
14 interviewed by Spartanburg County Sheriff's Officer
15 Investigator Nicki Cantrell. The State is making his
16 statement a part of today's plea hearing, if I may hand up
17 State's Exhibit 1. In a post-Miranda statement, the
18 defendant, basically, told the officer of an incident that
19 occurred at his dad and Judy's house which was [REDACTED]
20 [REDACTED] in Woodruff. The victim asked him to bring
21 her a towel; he did so and dried the female victim off. He
22 also described a second incident occurring at his father
23 and Judy's house in Woodruff. He said that when he was in
24 the boy's room, he digitally penetrated the female victim;
25 he left the house after that incident. He later admitted

1 to the officer that the truth was he was on the bed
2 watching TV, the female victim came into that room, he gave
3 her a hug and a kiss, told her he loved her, the victim sat
4 on his lap and he put his hands on her thighs, rubbed her
5 thighs and began to rub her vagina; he put his hand under
6 her shorts and underwear; the male victim walked in; the
7 defendant described pulling away from the female victim as
8 the male victim walked in. He -- the defendant also again
9 confirmed that he digitally penetrated the female victim
10 further than he initially told the officers. He also
11 described a third incident, a trailer in Pauline, which was
12 known to be [REDACTED] [REDACTED] [REDACTED] he was in the den; the female
13 child came to him, woke him up to give him a hug; he put a
14 movie on in her bedroom, gave her a hug and touched her
15 chest with his hand. He acknowledged what he did to the
16 female victim was wrong; he tried not to be around the
17 house as much. He acknowledged that he had a bit of a sex
18 problem. He denied anything occurring with the male victim
19 and apologized for what he did to the female victim.

20 Regarding the admissibility of the forensic
21 interviews that I mentioned earlier, the State would have
22 occurred the testimony of two school psychologists from
23 Spartanburg School District 6 and 7 and the teachers for
24 these victims during the 2013-14 school years to establish
25 that their cognitive, adaptive and developmental

1 functioning was that of below the age of 12 years old at
2 the time that these out-of-court statements were made.
3 Those professionals would've offered testimony regarding
4 these children's day-to-day functioning, their individual
5 education programs, their testing results. Both of these
6 children were in self-contained classrooms. As to the
7 female victim, the things that she -- the skill-set that
8 she had at that time was this: she knew 15 letters of the
9 alphabet when showed at random; she knew her body parts,
10 could count to 20, but knew only those numbers 80 percent
11 of the time when shown randomly. She could count to 100
12 but needed help through the 10s. As to her behavior and
13 social skills, she was determined to be between the ages of
14 three and a half to five years old on social tasks. As to
15 the male victim, he could compute very simple addition with
16 50 percent accuracy, able to subtract at 10 with 50 percent
17 accuracy, could identify time to the half hour and hour
18 with 50 percent accuracy and needed instruction in reading
19 basic function sight words. I offer that to salvage that
20 while these children were 12 and 13 and 14 at the time of
21 the offenses, they did not function that way. The State
22 would offer information on behalf of the victims and also
23 regarding sentencing at the appropriate time, Your Honor.

1 THE COURT - All right. Mr. Kirby, do you believe
2 that as she stated the facts, that the solicitor is
3 substantially correct?

4 MR. KIRBY - Yes, sir.

5 MR. SHEALY - Your Honor, he would agree that
6 those were the facts that the solicitor would present and
7 that those facts would probably lead to him being
8 convicted.

9 THE COURT - Were you able to hear the statements
10 just made by your lawyer?

11 MR. KIRBY - Yes, sir.

12 THE COURT - Do you agree with what he just
13 stated?

14 MR. KIRBY - Yes, sir.

15 THE COURT - All right. And, sir, do you
16 understand that on these charges that I could sentence you
17 -- that -- do you understand that I'm not bound by
18 recommendation made by the State?

19 MR. KIRBY - Yes, sir.

20 THE COURT - And that I could sentence you up to
21 20 years each on these charges?

22 MR. KIRBY - Yes, sir.

23 THE COURT - Do you also understand that sex
24 offender registration, that that is required under these
25 charges?

1 MR. KIRBY - Yes, sir.

2 THE COURT - And do you also understand that both
3 of these charges, that they are classified as both violent
4 and also most serious?

5 MR. KIRBY - Yes, sir.

6 THE COURT - And have you been able to talk to
7 your lawyer as to the ramifications of these offenses being
8 classified as both violent and most serious?

9 MR. KIRBY - Yes, sir.

10 THE COURT - Understanding the possible sentence I
11 could impose, as well as the sex offender registration
12 that's required, as well as understanding the ramifications
13 the of the classification of violent and most serious, do
14 you still wish to enter these pleas?

15 MR. KIRBY - Yes, sir.

16 THE COURT - Are you, in fact, -- I'm sorry. In
17 regards to the criminal sexual conduct with a minor under
18 Indictment 2015-GS-42-951 and in regards to the charge of
19 criminal sexual conduct with a minor victim 11 to 14 years
20 of age under Indictment 2015-GS-42-952, do you believe that
21 the State could produce sufficient evidence to prove your
22 guilt of those charges beyond a reasonable doubt, and that
23 if you went to trial, a jury would most probably find you
24 guilty of both of those charges?

25 MR. KIRBY - Yes, sir.

1 THE COURT - Have all of your answers to my
2 questions been truthful and honest?

3 MR. KIRBY - Yes, sir.

4 THE COURT - Discovery's been shared with the
5 defense?

6 MS. OVERBY - Yes, sir.

7 THE COURT - Prior record?

8 MS. OVERBY - In 2003, CDV first, 2004, use of
9 vehicle without consent, two counts of that and a petit
10 larceny, 2005, use of vehicle without consent, two counts
11 of that, trespass after notice, three counts of that and a
12 petit larceny, two counts of driving under suspension from
13 2007, as well as an operating uninsured motor vehicle, 2009
14 assault on a female. That is out of North Carolina. That
15 was reduced from a second degree rape charge, just for Your
16 Honor's information, involved a sexual assault on a
17 girlfriend while also watching pornography, and a probation
18 violation. 2010, three counts of fraudulent check, 2011,
19 driving under suspension, malicious injury to personal
20 property, two counts of that, larceny, 2012, federal
21 conspiracy to commit mail fraud. He was sentenced to 27
22 months on that followed by a period of supervision.
23 Immediately upon being released on federal supervision is
24 when he came around the victims' residents and when these
25 allegations would've have occurred.

1 THE COURT - And did you say that you did have --
2 wish to make comments on sentencing?

3 MS. OVERBY - Yes, sir, Your Honor, I have just a
4 few remarks on behalf of the victims and sentencing if
5 you'd like to hear them both now.

6 THE COURT - (Indicating yes)

7 MS. OVERBY - Okay. I would just recognize the
8 victim's mother, July [REDACTED] as well as the victim's
9 sister-in-law are both present for today's guilty plea;
10 they do not wish to address Your Honor. They are extremely
11 concerned with no contact in this case. This defendant
12 while he's been in jail has written letters addressed to
13 the victims. He's written letters addressed to the
14 victim's mother asking her to dismiss these charges, and
15 also the letters to the victims suggesting that he would
16 buy them houses, send them to Disney World, take them
17 shopping. I am extremely concerned regarding that. The
18 State would ask for a no contact provision whatsoever with
19 that family.

20 Regarding sentencing, the State is asking for a
21 sentence of 15 years. These children were particularly
22 vulnerable. The most disturbing aspect about this case is
23 that the defendant did these things under guise of love. I
24 would also like to recognize that the male victim's school
25 resource officer from McCarthy Tessler, Andy Lawson, he's

1 present today, Your Honor. What he would want Your Honor
2 to know is that the male victim in this case is a very
3 happy child who engaged in special Olympics and bocce ball.
4 Now, he is totally changed; he is very fearful, and there
5 were instances where he did not even want to come to school
6 when the school resource officer had to get him out of the
7 car to do that. Investigator Nicki Cantrell could not be
8 here today; she is on assignment with SLED. She does also
9 join the State's request for a 15 year sentence.

10 THE COURT -- Anything else from the State?

11 MS. OVERBY -- Nothing else, Your Honor.

12 THE COURT -- Yes, sir?

13 MR. SHEALY -- Thank you, Judge. To begin to
14 address my client's prior record, as for the assault on a
15 female, it is -- he was initially charged with a second
16 degree rape. He tells me that he was in jail for that for
17 a while and they brought him an assault on a female which
18 was just that. He says that he was in an argument with his
19 girlfriend. He actually says that she woke him up by
20 beating him in the head; he got his stuff and he left, and
21 what he pled guilty to was more akin to a CDV. That's --
22 at least that was the way that it was explained to him. He
23 denies that that was a rape situation; he denies that they
24 would've been able to prove a rape situation, quite
25 frankly, that what that was was just what it's called, an

1 assault on a female and that's why it was dropped down from
2 a -- second degree rape. Again, that's what he tells me he
3 pled guilty to. As for my client, he is of limited
4 intellectual functioning himself. I understand he's told
5 Your Honor that he has a GED, but in dealing with him, it
6 does take a while to speak with him. He has been in some
7 kind of State custody for the vast majority of his life,
8 not necessarily because he's been a bad child but because
9 he has had some mental health issues again him self. Those
10 mental heath issues have been variously diagnosed as things
11 as -- like ADHD but also to bipolar, oppositional defiant
12 disorder, things of that nature. He's been on a number of
13 different medications throughout his life. Judge, he is
14 denying to me this entire time that he committed these
15 acts. I have confronted him a number of times with his
16 statement, and he tells me that he doesn't remember -- he
17 doesn't really remember writing that statement. The
18 problem is that the -- with the medications that he was on,
19 it wouldn't cause amnesia, nothing that I can find -- while
20 he tells me he can't remember it, we would've been hard-
21 pressed at trial to get the statement suppressed, quite
22 frankly. He's been very adamant that that statement was --
23 and it was written for him. His signature is somewhat
24 wild, but again, because this isn't on video or anything
25 like that, you've got to take an officer's -- what an

1 officer would testify to, an investigator would testify to
2 and weigh against what my client would testify to. We
3 wouldn't have independent doctors to be able to come in,
4 because they just can't -- I can't find one that would
5 corroborate that that's the kind of thing that that
6 medicine would occur (sic) or would cause. Having said
7 that, based on my dealings with him, I can see that he may
8 have those kinds of episodes. Judge, he -- he has led
9 something of a peripatetic life. He's been a number of
10 places. He's got -- he's been around children before.
11 This was -- my understanding as to how he came to be with
12 this family, is he was released from federal custody on
13 that mail fraud. He went to live with his great-
14 grandmother -- or just his grandmother ---

15 MR. KIRBY - No. My step-mother's mother ---

16 MR. SHEALY - The step-mother's mother, but then
17 he -- he couldn't stay there; he moved in with his father
18 and his step-mother and his half siblings. That's how he
19 came into this particular home. Judge -- and there were a
20 number of issues I think primarily between he and his step-
21 mother. At trial we would've brought those things out.
22 Again, in a plea I don't believe that it's necessarily --
23 it's necessary to delve too deeply into them, but they
24 didn't seem to get along. We would've also on cross
25 discussed the problems with respect to the intellectual

1 functioning of these children, their ability to separate
2 truth from reality and things of that nature, but the
3 difficulty for them to testify -- I'm trying to be
4 delicate, but I mean I have to tell, Judge, we would've --
5 there would've been some issues with their testimony.
6 There would've -- there are also issues with cognitive
7 function so below their actual age. There are just a lot
8 more hormones running through that you're really ready to
9 do when you function on a 12, 13, 14 year-old level, just
10 imagine the difficulties dealing with those things whenever
11 you're that age, which would then cause certain blurring of
12 reality and fantasy. Your Honor, I believe we would've
13 been able to argue those things. Ultimately, again, we
14 would've had problems with his statement. He would've
15 gotten up and testified that that statement was not
16 voluntarily given, but again, we just couldn't -- I think
17 we would've had a hard time, and that's why -- that's one
18 of the reasons he's pleading guilty. He also -- those
19 letters that you've heard about, they were written;
20 throughout them he denies having done this. That's why
21 throughout he says, you're going to -- you know, you need
22 to go tell the solicitor to drop these charges, because
23 they're lies and that sort of thing. He tells me that in
24 those letters he also expresses his love for his sibling
25 and his desire for -- to be part of their life. I've

1 explained to him -- and I explained to him when those
2 letters were written, or shortly after those letters were
3 written, that he can't do that, that that part of his life
4 is gone and that he just needs to accept that and he did.
5 He didn't write any more letters. He had written, I
6 believe, it's a letter that the solicitor. We -- again, I
7 made sure that he understood he couldn't write that kind of
8 thing, and he stopped. So no contacts not going to be a
9 problem; he understands that. Judge, he's going to almost
10 certainly have a grade A violation of his mail fraud
11 probation. That's going to be probably somewhere around
12 two or three years; he'll have to serve 85 percent of that,
13 too, is my understanding. What we would ask Your Honor to
14 consider is a 10 to 12 year sentence active, split the 15
15 down to that 10 or 12 years, let him go and then once he
16 finished State time, he's going to have to go do that
17 federal time and then allow him to come out on some kind of
18 probation, give him some structure. We talked about a
19 negotiated 12, but that would've been to a CSC third.
20 Quite frankly, CSC third requires a GPS monitor for the
21 rest of his life, though he could petition to be removed
22 from it, and I'm just not convinced my client would be able
23 to pay for that, and you have to pay for it, and if you get
24 behind, I think, six or seven payments, they arrest you, so
25 that would've just been a life sentence 10 years at a time.

1 So, Judge, we would ask that you consider a 10 to 12 year
2 sentence in this case with probation to follow. Thank you.

3 THE COURT - Mr. Kirby, do you agree with the
4 statements just made by your lawyer?

5 MR. KIRBY - Yes, sir.

6 THE COURT - All right. Mr. Kirby, I'm making a
7 record of everything that happens here. This lady beside
8 me is taking everything down. I apologize. I need to back
9 up and ask you -- I want to be sure I phrased these charges
10 correctly. So I'm going to ask you the question again. So
11 I apologize if you're repeating yourself, but I need to be
12 sure that I've got these recorded correctly. Mr. Kirby, in
13 regards to both of these charges, of criminal sexual
14 conduct with a minor -- or attempt -- where a victim 11 to
15 14 years of age second degree, do you believe that the
16 State could produce sufficient evidence to prove your guilt
17 of these charges beyond a reasonable doubt and that if you
18 went to trial, that jury would most probably find you
19 guilty of both of these charges?

20 MR. KIRBY - Yes, sir.

21 THE COURT - Okay. Now, Mr. Kirby, we've heard
22 from your lawyer. Is there anything else that you would
23 like to say or want me to know, sir?

24 MR. KIRBY - Yes, sir, I would like to say some --
25 I just say I'm sorry, you know what I mean, my whole life

1 I've made my mistakes, but when I got out of the feds this
2 time, I wanted to sit there and be with my family but be
3 with my dad and be with my siblings, because I've been in
4 and out, because see as my record was called, and I wanted
5 to sit there and turn over a new leaf, and given the
6 opportunity since me and my step-mom of a prior charge in
7 the past that she has told me a lie on, said she had my
8 back on and I read, well, that prior disagreements that
9 we've had and I just feel like that I just want to be able
10 to given the chance to be able to have a life and not sent
11 down the road, because I know I'm still young, but I want
12 to be able to do the things that I wish anybody else could
13 still do, be able to have a family, be able to work, you
14 know what I mean, pretty much do what America's about, you
15 know what I mean, to have the American dream, you know what
16 I mean, be free, you know what I mean. I'm just --- that's
17 all, Your Honor.

18 THE COURT - Thank you, sir. (Pause)

19 I find that there's a substantial, factual basis
20 for the plea and that the defendant's decision to enter the
21 plea is made freely, voluntarily, knowingly and
22 intellectually by him. On these charges, these will be
23 concurrent sentences, like sentence under each. It'll be
24 15 year sentence at the State Department of Corrections.
25 I've indicated he will receive credit for the 845 days.

1 I've also indicated on the sentencing sheet that there will
2 be sex offender registration and that there's not to be any
3 contact with the victims or the victims' family.

4 Good luck to you, Mr. Kirby.

5 MS. OVERBY - Thank you, Your Honor.

6 (END OF TRANSCRIPT)

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FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF SpartanburgJohn Michael Kirby 319119
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2016-CP-42-3991

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.

CLERK OF COURT
SPARTANBURG COUNTY

2016 NOV -7 AM 9:36
H. ROSE BLANKLEY

1. Place of detention Lee Correctional Institution
2. Name and location of Court which imposed sentence Spartanburg County Judicial Court House
180 Magnolia St. Spartanburg SC 29306
3. Name(s) of co-defendant(s) (if any) NO
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 (a) 2015GS4200951
 (b) _____
 (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 (a) May 26, 2016 15 years cap
 (b) _____

Revised 3/2003

SCANNED
H. ROSE BLANKLEY

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (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?
no
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) plea counsel told me he was not going to appeal
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective counsel
- (b) _____
- (c) _____

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

- (a) Plea counsel coerced me to plea against my will.
- (b) Plea counsel failed to investigate my history of mental health illness.
- (c) Plea counsel failed to conduct pretrial investigation concerning facts of case.

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. Motion to withdraw Alford plea
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Spartanburg County Court house
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. N/A
- ii. _____
- iii. _____

CLERK OF COURT
SPARTANBURG COUNTY
2016 NOV -7 AM 9:36
M. HOPE BLACKLEY

- iv. _____
- (d) the date of each such disposition:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

NO

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

- (a) which grounds have been presented:

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

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

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

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

- (a) plea counsel did not object at trial
- (b) _____
- (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? N/A
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

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. Matthew Wishealy, Public Defender's office
306 N. Church St. Spartanburg SC 29306

ii. _____

iii. _____

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

i. plea hearing

ii. _____

iii. _____

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

The conviction and sentence be reversed, remanded and vacated

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

NO

FILED
 2016 NOV - 7 AM 9:36
 SPARTANBURG COUNTY
 M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)

VERIFICATION

County of)

I, _____, 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.

John Kirby

SWORN to and subscribed before me this 28
day of Oct, 2014.

Debra Eastlund (L.S.)
Notary Public

My Commission Expires: 3/3/2024

CLERK OF COURT
SPARTANBURG COUNTY
2016 NOV -7 AM 9:36
M. HOPE BLACKLEY

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

I, _____, 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.

John Kilday
Applicant

SWORN or affirmed to and subscribed before me this
28 day of Oct, 2014.

John S. Smith
Notary Public

My Commission Expires: 3/3/2024

CLERK OF COURT
SPARTANBURG COURT
2016 NOV -7 AM 9:36
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

John Michael Kirby, #319119,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

SEVENTH JUDICIAL CIRCUIT

2016-CP-42-3991

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on November 7, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted by the March 2015 term of the Grand Jury for Spartanburg County for two counts of criminal sexual conduct ("CSC") with a minor, 2nd degree (2015-GS-42-0951, 0952). Applicant was represented by Matthew W. Shealy, Esquire. Assistant Solicitor, Lindsay H. Overby, prosecuted the case. On May 26, 2016, Applicant pled *nolo contendere* to both charges pursuant to Alford¹, and was sentenced by the Honorable J. Mark Hayes II to imprisonment of fifteen years for both charge with credit for 845 days served. The sentences were to be served concurrently. Applicant was also ordered to register as a sex offender and to avoid contact with the victims or their family. Applicant did not appeal his conviction or plea.

¹ North Carolina v. Alford, 400 U.S. 25 (1970).

II.

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

1. Ineffective Assistance of Counsel / Involuntary Guilty Plea
 - a. "Plea counsel coerced me to plea against my will."
 - b. "Plea counsel failed to investigate my history of mental health illness."
 - c. "Plea counsel failed to conduct pretrial investigation concerning the facts of the case."

Attached herewith and incorporated herein by reference are the records of the Spartanburg County Clerk of Court regarding the subject convictions, the transcript from Applicant's plea, and Applicant's records for the Department of Corrections. Respondent reserves the right to amend its return upon the receipt of other relevant records.

III.

Applicant claims ineffective assistance of counsel in his application. Respondent contends Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 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, 80 L.Ed.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, 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, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, 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, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. 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 further submits Applicant's allegation that his guilty plea was involuntary is without merit. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C.

354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (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, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 106 S.Ct. at 369. Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

Respondent submits the record fully supports the knowing and voluntary nature of Applicant's plea. However, allegations regarding the voluntariness of the plea may raise questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing on this allegation. Sharper, 279 S.C. 264, 305 S.E.2d 247.

V.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel and involuntary guilty plea. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a), SCRCP. All claims should be made well in advance of the evidentiary hearing. If Applicant has is represented by an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits, witnesses, and materials used to produce potential expert witness testimony be provided to Respondent well in advance of the evidentiary hearing. Respondent

reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VII.

Each and every allegation contained within the application not either expressly admitted, qualified, or explained is hereby denied.

VIII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held on the claims of ineffective assistance of counsel and involuntary guilty plea.

Respectfully submitted,

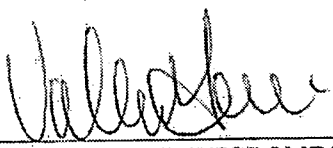
ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

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

By: 
ATTORNEYS FOR RESPONDENT

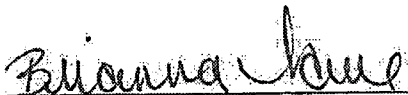
July 3, 2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
	)	2016-CP-42-3991
JOHN MICHAEL KIRBY,	)	
S.C.D.C. No. 319119,	)	
	)	
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 on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Susannah C. Ross, Esquire
Ross & Enderlin, PA
330 East Coffee St.
Greenville, SC 29601

DATED this 3rd day of July, 2017.


 Brianna Arnone, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COMMON PLEAS COURT
3
4 John Michael Kirby,)
5 Applicant,) TRANSCRIPT OF RECORD
6 -vs-) 2016-CP-42-3991
7 The State.) November 14, 2017
8) Spartanburg, South Carolina
9

10 B E F O R E :

11 HONORABLE G. THOMAS COOPER, JUDGE
12
13

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

15 SUSANNAH C. ROSS, ESQUIRE
16 Attorney for the Applicant

17 VALERIE GARCIA GIOVANOLI, ESQUIRE
18 Attorney for the State
19
20

21 Linda D. Moffitt
22 Circuit Court Reporter
23
24
25

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1	<u>EXHIBITS</u>			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
3	A-1	Psychological evaluation	21	
4	S-1	Voluntary statement	47	
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1 THE COURT: Madam Attorney General.

2 MS. GIOVANOLI: Thank you, Your Honor.

3 This is John Kirby vs. the State of South Carolina.
4 It's docket No. 2016-CP-42-3991.

5 We're before the Court on an application for post
6 conviction relief filed November 7th of 2016.

7 Applicant was indicted in March of 2015 for two counts
8 of criminal sexual conduct with a minor in the second
9 degree. Applicant was represented by Matthew Shealy. And
10 on May 26th of 2016 applicant pled no contest to both
11 charges pursuant to Alford. The state made a sentence
12 recommendation of concurrent terms with a cap of 15 years.

13 The state also dismissed two third criminal sexual
14 conducts with minor charges in exchange for applicant's
15 guilty plea.

16 The Honorable J. Mark Hayes, II -- or excuse me -- I
17 think that's -- yes.

18 THE COURT: Dennis -- Mark Dennis.

19 MS. GIOVANOLI: Yes. Pardon the typo. He sentenced
20 him to imprisonment for 15 years for both charges with
21 credit for the 845 days he'd served.

22 The sentences were to be served concurrently. And
23 applicant was also ordered to register as a sex offender
24 and to avoid contact with the victims or their families.

25 Applicant did not appeal his convictions or his guilty

1 plea or sentence.

2 The state is present and ready to proceed. Applicant
3 is also present. He's represented by Susannah Ross to whom
4 I'll hand it over at this point.

5 THE COURT: Ms. Ross.

6 MS. ROSS: May it please the Court, Your Honor.

7 If I may hand up a psychological evaluation by
8 Dr. Karl Bodtorf.

9 THE COURT: Has the state been apprized of this?

10 MS. ROSS: I've got a copy for her as well, and I have
11 discussed the matter with her.

12 THE COURT: When was this done?

13 MS. ROSS: This was done in 2013.

14 THE COURT: 2013. All right.

15 MS. ROSS: Now, while it was sometime ago -- it was
16 three years, two and a half years from the date of the
17 plea.

18 I believe it's -- it was still relevant at the time of
19 the plea and will still be relevant now. It brings up some
20 competency issues that -- that I have concerns about as
21 well. It lists his I.Q. in the range of 52 to 70.

22 This is a man who has been from early childhood back
23 and forth through foster care and had some serious
24 emotional issues, as well as his low I.Q. And he tells me
25 that today he hasn't had his medication for two days, and

1 he says that that is normally Zoloft and Vistaril that he
2 is prescribed on a -- still to this day on a regular basis.

3 THE COURT: Where's he housed?

4 MS. ROSS: He is housed at Lee. He's not housed in
5 mental health housing, and that's sort of a question of
6 this plea as well, is why guilty but mentally ill was not
7 an option, or certainly more in-depth evaluation of his
8 ability to have a knowingly and voluntarily made plea,
9 especially in light of the fact it's Alford and he was
10 denying the charges the whole time.

11 So it just brings in a competency question. And I
12 would -- if you would like to question him as far as
13 competency, I would -- I would open that up. I would also
14 be willing to have him independently evaluated again at
15 this time if you --

16 THE COURT: Are you suggesting prior to going forward
17 with this P.C.R.?

18 MS. ROSS: Yes, yes. I think review of this is very
19 helpful as well, or maybe review if you would like a moment
20 to look over that.

21 THE COURT: I'd like to know what the state thinks
22 about this. Have you seen this?

23 MS. GIOVANOLI: Just now.

24 THE COURT: Just now. Have you read it?

25 MS. GIOVANOLI: Yes, Your Honor. I can go forward.

1 I think the record in this case strongly supports the
2 presumption that the petitioner was competent at the time
3 of entering his guilty plea.

4 And there's a case, State vs. Motts, which is a South
5 Carolina Supreme Court case that they stated, quote, "In
6 assessing a defendant's competency, the South Carolina
7 Supreme Court has recognized that there is a presumption of
8 continued competency once a judicial determination of a
9 defendant's competency has been established."

10 And they actually cited the State vs. Drayton, which
11 was another South Carolina Supreme Court in which the Court
12 held, "Failure of a trial judge to order further
13 examination and a hearing to determine defendant's
14 competency to stand trial did not violate statute
15 authorizing trial judge to order such examinations, nor
16 deprive the defendant of due process where a previous
17 presiding judge had found the defendant was fit to stand
18 trial and there were no additional facts to warrant further
19 examination for a hearing."

20 So based on the presumption and --

21 THE COURT: I understand that, but, factually, I don't
22 know, A, was this available to the plea judge. And I
23 haven't read the transcript. Did he take this into
24 consideration?

25 MS. GIOVANOLI: Sure. But looking at that alone --

1 THE COURT: Sure?

2 MS. GIOVANOLI: Well, no. What I was going to say is
3 that the -- this evaluation was not before the Court.
4 However, there was the whole issue of mental competency and
5 his mental illness, for lack of a better term, was
6 addressed in the record.

7 THE COURT: Was there a separate evaluation done prior
8 to his --

9 MS. GIOVANOLI: No, but that would have come at
10 counsel's request. And counsel had never had any
11 indication that he needed an evaluation.

12 In addition to the ability of his counsel and the
13 judge to communicate with this applicant, he was also -- he
14 also pled guilty in 2012 to federal charges, which that
15 judge found he was contempt, so.

16 THE COURT: Any time there's a competency finding --

17 MS. GIOVANOLI: Well, I'm stating that the judge has
18 -- the only way to accept a guilty plea is that he sees
19 that the defendant is competent.

20 THE COURT: I agree.

21 MS. GIOVANOLI: If during the proceedings he appears
22 to be not competent, of course I don't think any judge
23 would accept a guilty plea.

24 So by virtue of accepting a plea I believe that
25 multiple judges have found this applicant to be guilty and

1 enter guilty pleas.

2 He also violated that federal probation, and in 2014,
3 which he appeared before another judge. There was a lot of
4 allegations that he was smoking a lot of marijuana. And,
5 again, the applicant may very well have a mental illness,
6 but that doesn't equate to incompetency.

7 And I believe that you have to look at it based on
8 counsel's observations of his own client. He never had
9 any -- Mr. Shealy is a very-well experienced attorney. He
10 would have requested an evaluation had he felt the need to
11 have one.

12 And in addition to that -- well, I guess I'll go back
13 to the presumption that he was competent. I believe the
14 record speaks for itself. I know you haven't had the
15 opportunity to read the transcript, but I have. He was
16 able to answer all of the questions.

17 THE COURT: Well, was the issue of competency ever
18 even commented on?

19 MS. GIOVANOLI: No, but mental health was brought up
20 and --

21 THE COURT: Well, show me where that is.

22 MS. GIOVANOLI: Okay. It's on page 19. It's actually
23 the full page. And I'll read some for the Court.

24 THE COURT: Well, let me find it.

25 All right. "He's of limited intellectual

1 functioning," right?

2 MS. GIOVANOLI: Uh-huh. "I understand he's told Your
3 Honor that he has a G.E.D."

4 THE COURT: This is counsel speaking.

5 MS. GIOVANOLI: Yes, Your Honor.

6 THE COURT: "Does take a while to speak with him
7 because he has had some mental health issues himself."

8 MS. GIOVANOLI: Uh-huh.

9 THE COURT: Well, there he -- there's recognition he's
10 had health issues.

11 MS. GIOVANOLI: Sure. A.D.H.D., bipolar, oppositional
12 defiant disorder. None of these things equate to lack of
13 competency. And actually many criminal defendants suffer
14 from these mental illnesses.

15 They're also not defenses to the charges for which he
16 was accused. The record shows that counsel was aware of
17 his mental health.

18 THE COURT: Well, okay. Well, the question today is
19 can he go -- is he competent to go forward today.

20 MS. GIOVANOLI: And, Your Honor, I would also cite the
21 Council vs. Catoe. The Supreme Court has actually held
22 that he doesn't necessarily need to be competent to proceed
23 on his P.C.R. if he's represented by counsel.

24 And that goes back to the relevancy of the evaluation.
25 So are we alleging by doing a competency hearing -- are we

1 using it to claim ineffective assistance of counsel at the
2 time a plea was entered? Because that's pretty difficult,
3 because even if he was rendered incompetent at this point
4 there's no way to prove that he was incompetent prior to
5 entering his plea.

6 And then the second reason for a competency evaluation
7 would be to see if he's competent to proceed today. He
8 is -- he has been appointed counsel. I believe that the
9 state in Council vs. Catoe --

10 THE COURT: And this is his -- this is his -- this is
11 his application.

12 MS. GIOVANOLI: Yes.

13 THE WITNESS: It's not the state's application.

14 MS. GIOVANOLI: And in Council vs. Catoe they say that
15 the issues that require -- let me read over this to make
16 sure I don't misrepresent to the Court. "For issues
17 requiring the petitioner's competence to assist his P.C.R.
18 counsel, such as a fact-based challenges to his defense
19 counsel's conduct at trial, the P.C.R. judge may grant a
20 continuance, staying those -- those issues until," he's
21 established competent again. So you do have the option to
22 stay those issues until competency is regained.

23 But, again, I would submit that there's a strong
24 presumption that he's still competent. And I would
25 actually encourage Your Honor to maybe engage in a colloquy

1 to determine the credibility on these issues and examine
2 the applicant yourself before issuing a state evaluation.

3 THE COURT: Well, let me hear from Ms. Ross.

4 MS. ROSS: Judge, I have been -- I am not a
5 psychologist. I've had a hard time determining competency
6 at times with clients in the past. I can communicate with
7 him. I can speak --

8 THE COURT: You can?

9 MS. ROSS: I can speak to him. He can respond to
10 questions.

11 THE COURT: He knows why he's here?

12 MS. ROSS: I believe so. However, he tells me that he
13 is not competent, that due to the constant medications that
14 he's on and off he doesn't understand what's happening
15 here. And that's why I bring it to the attention of the
16 Court.

17 THE COURT: So this is a temporary thing based on the
18 fact that he's not been medicated?

19 MS. ROSS: Yes. And certainly it was just one that I
20 wouldn't -- even prior to today when he told me he hadn't
21 been medicated for two days, I wanted it to be brought to
22 the Court's attention to have some kind of determination be
23 made prior to going forward, because I think while there
24 are prior adjudications in federal court, right after that
25 his federal agent requested this evaluation be made,

1 clearly having some questions about his levels of
2 mental-health functioning. And that's why this was
3 requested.

4 And then I don't believe a question of competency was
5 brought up prior to this plea that we're here for today on
6 P.C.R.

7 THE COURT: Mr. Kirby, stand up, please.

8 What have you got in your hand there?

9 THE APPLICANT: Papers that I received from her and
10 the Courts here, would help other people to be able to go
11 forward with this because it's taken me a while to sit
12 there and try to comprehend and understand what is
13 happening from me taking the plea and understanding that I
14 felt like I was done wrongfully. I tried to speak to my
15 lawyer.

16 THE COURT: Where -- do you see your lawyer here?

17 THE APPLICANT: Yes, sir.

18 THE COURT: Do you see him? That's him.

19 THE APPLICANT: Yes, sir.

20 THE COURT: When --

21 THE APPLICANT: And try to communicate the best way I
22 can to let him know that this is not right.

23 THE COURT: I understand.

24 Tell me about -- what medications are you taking?

25 THE APPLICANT: I been on a lot of different ones.

1 They got me on Zoloft, Vistaril now. And they're trying to
2 fluctuate it, but I have not been able to take it in the
3 past two days.

4 THE COURT: Well, do you take it every day?

5 THE APPLICANT: Yes, sir.

6 THE COURT: Why haven't you taken it the last two
7 days?

8 THE APPLICANT: I come to find out from the medical
9 nurse, from the county jail, that last night that they did
10 not send it with me for me to be able to keep taking it into
11 my system.

12 THE COURT: Okay. But how long have you been in the
13 county jail?

14 THE APPLICANT: Just for the night.

15 THE COURT: Just for the night. Well, did you take
16 it -- where are you housed -- Kershaw?

17 THE APPLICANT: Yes, sir, yeah.

18 THE COURT: Okay. Did you take it the last day you
19 were there? What does it -- when you don't take it, what
20 does it make you feel like?

21 THE APPLICANT: Like I don't even feel like I can,
22 like -- I don't feel like myself. When I'm on it I'm not
23 like antsy. I kinda see stuff but I don't -- I know it's
24 not there. Just different things. I don't feel like
25 I'm -- like I'm able to socialize.

1 THE COURT: Okay.

2 THE APPLICANT: I kind of ball up.

3 THE COURT: Well, when you take it how do you feel?

4 THE APPLICANT: I feel that I can, like, try to at
5 least have a conversation with somebody and try to keep
6 focused.

7 THE COURT: Okay. Are you in a special unit --

8 THE APPLICANT: Yes, sir.

9 THE COURT: -- in Kershaw? And what kind of -- what
10 is that?

11 THE APPLICANT: They say it's a mental health unit, a
12 medical mental health unit.

13 THE COURT: Okay.

14 THE APPLICANT: It's like -- they're saying it's 24
15 hours. I'm able to talk to a counselor when I need to.
16 But it ain't really been like that. There's been a lot of
17 things going on. And they just let us -- and we just -- my
18 understanding, we just came off a lockdown for something
19 that happened somewhere else.

20 THE COURT: Well, I'm familiar with that. That seems
21 like it happens a lot.

22 You get your medications when you're on lockdown?

23 THE APPLICANT: When they bring it.

24 THE COURT: Yeah. Now, this is your case, and do you
25 want to proceed today?

1 THE APPLICANT: I would like a long writing.

2 THE COURT: Well, you -- the only way to do that is
3 for you to tell me why -- why you feel that way.

4 Now, and now is your opportunity. I can put this case
5 off, but you'll just have to come back here. If you
6 want -- if you want this thing to be heard, you'll have to
7 come back sometime later. And I can put it off so you
8 can -- to make sure you have your medication when you come
9 to court. But as long as you want to pursue this -- in
10 other words, it's your case. It's not the state's case.
11 It's your case. And if you want to be heard, you need to
12 be ready to be heard.

13 Now, if you can -- if you feel like you can explain --
14 I understand that you've got these issues, and I'm
15 sympathetic to the fact that you've not taken your
16 medication or you haven't had your medication to take. But
17 I'm -- as I say, I can put the matter off, but they're
18 going to bring you back to Spartanburg. If you want to --
19 if you want to continue with this thing, they're still
20 going to bring you back to Spartanburg and you're going to
21 just see another judge. That's all.

22 (Pause.)

23 MS. GIOVANOLI: Your Honor, may I just put on the
24 record that he has had one previous continuance and the
25 case is over a year old? So the state would object to any

1 further continuances just for the record.

2 THE COURT: Do you know why it was continued the last
3 time?

4 MS. GIOVANOLI: Yes, on behalf of the applicant. He
5 wanted to obtain the report that they submitted to the
6 Court and the state today.

7 MS. ROSS: At the last one I got medical releases and
8 got releases for records of continuum care where he's been,
9 mental health in Florence, Pat Harris, Baptist Hospital in
10 Columbia.

11 THE COURT: These are --

12 MS. ROSS: Of all of those records this --

13 THE COURT: That are pre --

14 MS. ROSS: It is all pretreatment --

15 THE COURT: Pretreatment.

16 MS. ROSS: -- that he's had. And a lot of it was from
17 a long time ago and they no longer had the records. So
18 really this -- this is the most recent and thorough of any
19 of the medical records that I did receive.

20 THE COURT: All right. Y'all talk about it and let me
21 read this.

22 MS. ROSS: Okay.

23 (Pause.)

24 THE COURT: Ms. Ross, what's your preference?

25 MS. ROSS: I'm going to let him make that decision.

1 I feel if you find that he's competent to go forward,
2 that we should go forward at this time.

3 However, if he does not feel -- he has concern about
4 how effectively he can express himself. I suggested to him
5 the Court might give him some leniency in that regard
6 during his testimony.

7 THE COURT: Well, certainly. I'll certainly do that.

8 The question, the only question, I have is does the
9 fact that he has not taken his medication today affect his
10 ability to move forward.

11 He sounds -- in discussing briefly with me that he
12 knows why he's here and he knows contents of what the
13 documents in front of him are. He knows his attorney. He
14 knows where he's housed. He knows what his medications
15 are. It's not like he is -- well, that being said, I feel
16 that even though his -- well, I won't say that.

17 MS. ROSS: I would -- I would ask him to answer that
18 question because I just simply don't know.

19 THE COURT: All right. Mr. Kirby, do you want to go
20 forward today?

21 THE APPLICANT: I believe I can. I just -- I just
22 don't want to get my words tied up.

23 THE COURT: Well, I'll give you a chance to say what
24 you want to say. I mean, that's why we're here.

25 THE APPLICANT: I only want to speak the truth.

1 That's all. That's all I want to do.

2 THE COURT: That's all -- that's all you're going to
3 be asked to do. Whatever the truth is, you speak. All
4 right?

5 All right. Well, let's go.

6 MS. ROSS: All right. Just to -- a quick overview
7 before we start, again, the reply was not filed within 30
8 days. It's in the prior hearing with it being close to ten
9 months after the allegation.

10 THE COURT: Mr. Kirby.

11 MS. ROSS: So we would move for summary judgment on
12 that basis initially.

13 THE COURT: What's the state's position?

14 MS. GIOVANOLI: Once again, I don't believe Mr. Kirby
15 can prove prejudice against this case. The rule is also
16 procedural. So it's in the Court's discretion to grant
17 summary judgment.

18 THE COURT: Motion is denied.

19 MS. ROSS: All right. Mr. Kirby is alleging
20 ineffective assistance of counsel in that his plea was not
21 knowingly and voluntarily made. There was a failure to
22 challenge a statement.

23 The basis -- the impetus for this plea was that
24 Mr. Kirby gave a statement to law enforcement. He states
25 that he was on a new medication, really didn't know what he

1 was doing.

2 And that is actually -- Mr. Shealy speaks to that
3 during the plea colloquy and says that -- that it was
4 filled out by another officer and signed by Mr. Kirby. And
5 his signature seemed a little funky. But we would argue
6 that that should have been challenged at trial.

7 That there was a failure to investigate or present
8 adequate mental health mitigation or any kind of mitigation
9 during the plea.

10 As you can see from this mental health report, that
11 there was a long background where Mr. Kirby really couldn't
12 take good care of himself and he was placed with his father
13 and stepmother and accused, I believe, without forensic --
14 I don't want to say that -- but the accusation lacks some
15 degree of evidence aside from the statements of the
16 children he was placed with. And that was not effectively
17 flushed out or set up as a defense during the guilty plea.

18 So at this point I would call Mr. Kirby to the stand.

19 THE COURT: Ms. Ross, do you want to make this a part
20 of the record --

21 MS. ROSS: I would if we could make --

22 THE COURT: -- since I -- since you've already asked
23 me to read it.

24 MS. ROSS: Yes.

25 MS. GIOVANOLI: And I'll stipulate to it.

John Michael Kirby
Direct examination by Ms. Ross

1 MS. ROSS: Okay. Then I would ask it -- could we make
2 it a court exhibit or would you like it to be Applicant's
3 Exhibit 1.

4 MS. GIOVANOLI: A court exhibit is fine with me, or
5 applicant's. It's your decision.

6 THE COURT: All right. This is the applicant's
7 exhibit.

8 MS. ROSS: All right. Then --

9 THE COURT: One.

10 (Psychological evaluation marked Applicant's Exhibit
11 No. 1.)

12 THE COURT: Come on around. Mr. Kirby.

13 JOHN MICHAEL KIRBY, having
14 been first duly sworn, testified as follows:

15 DIRECT EXAMINATION BY MS. ROSS

16 Q Okay. Mr. Kirby, pull forward and speak right into
17 that microphone if you can.

18 A Yes.

19 Q Okay. Now, you're going up for post conviction
20 relief. We've talked about this before. You know if you
21 win you're put back in the position you were put in before
22 this plea, is that correct?

23 A I've been explained. That has been explained to me
24 multiple times.

25 Q Do you understand it?

John Michael Kirby
Direct examination by Ms. Ross

- 1 A To a certain extent.
- 2 Q Okay. Now, you feel that your lawyer was ineffective
3 for advising you to plea, is that correct?
- 4 A Yes, ma'am.
- 5 Q What did your lawyer tell you prior to -- advise you
6 about your guilty plea?
- 7 A That pretty much I had no defense in my case and that
8 if I would have went to trial they would have hung me.
- 9 Q Now, do you understand what you were charged with?
- 10 A Of -- after -- after several questions, after I was
11 arrested, the several people that's -- similar charges in
12 my area and -- and come to understanding, yes.
- 13 Q Did you review any of the discovery, the evidence,
14 against you with your lawyer?
- 15 A As I recall, several times, and, like, I tried to
16 comprehend as much as I can of -- of what I do know of a
17 lot of it, is that there were a lot of inconsistencies and
18 stuff that was really overlooked that I tried to point out.
- 19 Q Okay. Can you think of any right now?
- 20 A One that when I was on the street and lived with my
21 dad I remember one time that the siblings of mine were
22 placed in foster home, state care as I was, and that
23 something, I guess, allegedly happened, and it was swept
24 underneath the rug from my understanding.
- 25 Q And how did you -- so do you mean any kind -- sexual

John Michael Kirby
Direct examination by Ms. Ross

1 assaults against your siblings had happened while they were
2 in foster care?

3 A Yes, ma'am.

4 Q How did you know about that?

5 A My stepmother said something about it but I wasn't --
6 it didn't really click to me until I read the paperwork on
7 one of the medical -- medical papers that I was having a
8 friend of mine that was locked up with me at the same time
9 I know from the street help me go over it. And even though
10 I know I'm -- I been told not to share it. But I didn't
11 understand a lot of it, and I needed help, and he brung
12 this to my attention.

13 Q And what was it that --

14 A I don't remember exactly but it -- I don't remember
15 word for word of it, but it was like something about an
16 incident happened while she was in D.S.S.

17 Q And that was --

18 A That's incident.

19 Q So that couldn't have been you.

20 A No.

21 Q How long did you live with your father and stepmother?

22 A Off and on. I got pretty much treated like a dog
23 every time I went there, even when I got out the group home
24 to go stay with them at 17, almost 18, years old. I ended
25 up leaving.

John Michael Kirby
Direct examination by Ms. Ross

1 Q Now, how old were your -- were they step -- they're
2 half-siblings.

3 A Half-siblings.

4 Q How old were they during this time, this period that
5 you lived with your dad when these allegations came up?

6 A Early teens. I know that. I think my sister just
7 turned 13 and my brother was 14 or 15. I'm not sure.

8 Q And during that time do you remember how long you
9 stayed with your father?

10 A Not exactly. I don't remember the stint. But I know
11 it was during Christmas and New Year's.

12 Q Now, and during that time the allegations came against
13 you, what did your lawyer tell you was the -- the strongest
14 evidence against you?

15 A The statement that the detective wrote.

16 Q Now, you've alleged that he should have challenged
17 that statement. Why?

18 A Because I've read the statement over and -- and it has
19 never made no sense to me.

20 Q Did it -- was it made -- made in your handwriting?
21 Did you write it?

22 A No.

23 Q Was it ever recorded? Did anyone record you saying
24 anything?

25 A Not to my knowledge. I think I've asked him several

John Michael Kirby
Direct examination by Ms. Ross

1 times if there was ever a recording of it. And nothing has
2 came about.

3 Q Do you recall making the statement?

4 A No, ma'am.

5 Q Do you think he would have said those things?

6 A No.

7 Q Why not?

8 A Because I -- I know for a fact there's more than just
9 the people that were originally from my household. It was
10 a bunch of people living there. And if I'm going to make a
11 statement like that, I believe that there would have been
12 witness statements with them.

13 Q Okay. Well, let me -- let me just ask you the big
14 question. You pled Alford. Did you do -- did you touch
15 your half-brother or half-sibling in their private parts at
16 all?

17 A No, ma'am.

18 Q And in the statement it said you did. Is that true?

19 A Yes.

20 Q Now, at the time you're saying there were a bunch of
21 other people living in the house that aren't mentioned in
22 the statement.

23 A Yes.

24 Q And -- and you knew that there were a lot of other
25 people living in the house. And you feel that giving that

John Michael Kirby
Direct examination by Ms. Ross

- 1 statement you would have mentioned that as well?
- 2 A Uh-huh.
- 3 Q Now, were you -- what was your mental health state
- 4 when you gave that statement?
- 5 A I was -- at that time I remember being a lot of
- 6 grogginess, tired, sluggishness. I think I had my cousin
- 7 drop me off. I'm not even sure how I even made it.
- 8 Q Did you have any family members there?
- 9 A No, ma'am.
- 10 Q Do you know how long you were in custody?
- 11 A Like there at the place?
- 12 Q Uh-huh.
- 13 A Not really.
- 14 Q So you don't remember how many minutes or hours or
- 15 days you were sitting there. You just don't -- you
- 16 can't --
- 17 A Uh-uh.
- 18 Q Okay. Now, tell me about -- you said something about
- 19 being on new medication at that point. Were you taking
- 20 your medications regularly prior to your arrest when you
- 21 gave that statement?
- 22 A Yes, ma'am.
- 23 Q So at that point you were going to mental health
- 24 treatment?
- 25 A I was going to see a doctor that was, I guess,

John Michael Kirby
Direct examination by Ms. Ross

1 recommended by Mr. Badtorf and that he would give me -- try
2 me out on new medications and that they were switching me
3 from them because of side effects that were taking effect
4 that -- effects that made me feel really uncomfortable.

5 Q Do you know what kind of side effects those were?

6 A Memory, not being able to recall at the moment. It
7 was, like, been so long ago, and I been on different meds
8 and they switched me up since then, I really don't
9 remember.

10 Q Okay. Now, did you mention that to your lawyer?

11 A Yes, sir -- yes, ma'am.

12 Q And what -- what was his response to that?

13 A That it really wouldn't matter and that something
14 about he hadn't -- something about somebody else he has a
15 minor something was on, like, some type of drug and it
16 really didn't matter about the statement, something like
17 that.

18 Q Okay. And did he tell you that you could challenge
19 your statement prior to -- in a hearing prior to going to
20 trial?

21 A No. I -- I was told that another guy was going up to
22 be able to something about having a hearing to where they
23 can challenge evidence. And I was kind of wondering. I
24 was wondering why, you know, I mean, he was able to do
25 that. And several people asked questions about that, told

John Michael Kirby
Direct examination by Ms. Ross

1 me that you can do that. And that I did ask.

2 Q And did your lawyer look into the history of other
3 prior -- other allegations against other people made by
4 your step-siblings?

5 A To my knowledge, no.

6 Q Did you let him know that that had happened?

7 A I showed him the paper.

8 Q Okay. And that was part of your discovery.

9 A Yes. I -- and also it took me a while to be able to
10 get the whole discovery to where I was even able to sit
11 there and even read it myself, because I remember there
12 being multiple, multiple copies of each page of it.

13 Q So it was more confusing to you because there were
14 lots of copies?

15 A Yes.

16 Q But you did say your lawyer did go over them with you,
17 is that right?

18 A Yes, not to the fullest extent that I would have been,
19 like, able to really understand everything, because there
20 was a lot of stuff in there that I wanted to go over with
21 him that I wasn't -- really wasn't able to and able to
22 comprehend.

23 Q And can you tell me? Do you understand what kind of
24 plea you made? It's called an Alford plea.

25 A My understanding, the way it was explained to me by my

John Michael Kirby
Direct examination by Ms. Ross

1 lawyer at the time and several other people, was, like, I'm
2 doing it just for the time to get it done and over with and
3 not really for the crime and that I'm able to still
4 maintain my innocence. But as I got down to where I'm at
5 and had help to be able to put this in and fully ask
6 questions that I need to by people that are able to help
7 me, told me that a guilty plea is pretty much still a
8 guilty plea.

9 Q So you're saying you didn't really -- you thought it
10 was different because you weren't admitting to those facts.

11 A Yes, ma'am.

12 Q Now, could you have admitted to those facts under
13 oath? Did you do what you were accused of doing to your
14 half-siblings?

15 A I did not do it.

16 Q Now, did you tell your lawyer that?

17 A Yes, ma'am.

18 Q And this was a plea. It was ready to go to trial.
19 Why didn't you go to trial?

20 A The day he came and immediately brung me up there I
21 was already in emotional distress state to where I was
22 already having issues that I wasn't able to talk to the
23 counselor that they were letting me see from the county
24 jail and that I, like, the way he was asking, it's, like,
25 this is pretty much what it is. We can go to trial. But I

John Michael Kirby
Direct examination by Ms. Ross

1 was, like, I pretty much was scared. And, like, I didn't
2 know, like, what was really, like, why is he pressuring me.
3 I wanted to ask that, and I know I probably should have,
4 but I didn't, and went and -- and -- and just pretty much I
5 followed his lead, like, when he said hoping and trying to
6 trust him that he was helping me do something that would
7 help me out.

8 Q Do you know? Did you sign medical releases? Did he
9 have all of these -- this prior report of Mr. Badtorf or
10 anything like that?

11 A No. I remember telling him, but he -- he told me
12 something I can't really remember right at the moment. But
13 he was -- there was no show of that even in none of my
14 discovery as I remember -- as I remember it.

15 Q And did he ever talk to you about a plea, something
16 called guilty but mentally ill?

17 A No.

18 Q And did he ever ask you about getting an evaluation of
19 your mental health and intellectual functioning?

20 A No, ma'am.

21 Q And I want to talk about you had a charge that was
22 mentioned by the solicitor during your plea. And they said
23 that you had a prior rape. Can you tell about that context
24 of that -- that prior charge that they referred to during
25 your guilty plea?

John Michael Kirby
Direct examination by Ms. Ross

1 A It was as I -- it was as me being living with a female
2 out of state, and she was on drugs at the time, and that I
3 was -- we were together and that it ended up being a
4 situation between me and her sister. And they wanted me to
5 do stuff that I didn't feel comfortable doing, and I got
6 woken up, again, beat in the back of my head by her.

7 Q All right. Now, what were you -- what were you --
8 what did you plead guilty to at that time?

9 A The lawyer that came back to me was talking about
10 there was no physical evidence of even that, and that being
11 considered with having to waste time would be able to drop
12 it down to, like, from my understanding it'd be, like, a
13 C.D.V.

14 Q And how much time did you get for that?

15 A I think it was like probation.

16 Q And did you have to be on the sex offender registry or
17 anything for that?

18 A No, ma'am.

19 Q And was the allegation -- did you ever plea or admit
20 to any kind of rape?

21 A No, ma'am.

22 Q And was the initial allegation rape? Is that why they
23 said that, or do you know?

24 A Yes. From my understanding it was. But there was
25 no -- from my -- from -- the lawyer explained to me that

John Michael Kirby
Direct examination by Ms. Ross

1 there was nothing that consisted with rape.

2 Q All right.

3 A And both were living together, you know. I mean, I --

4 Q And y'all were the same, kind of the same, age and
5 everything?

6 A She was older.

7 Q All right. Okay. Now, did any of those records --
8 were they ordered or shown to you about that prior? Did
9 you think it was going to come in as a prior rape during
10 your plea?

11 A No, ma'am.

12 Q All right. Is there anything else that you would like
13 to say at this point about your plea?

14 A That I kind of wish that he would have took the
15 opportunity to look into what I did ask for him to do for
16 me and to check into a lot of stuff, because I was treated
17 like a dog.

18 I sat there. I get food stamps. You know, I mean, I
19 do the best I can. And I was putting food in the house. I
20 was trying to do what I was supposed to do to abide by my
21 probation.

22 I was kept at the house. They would not really let me
23 leave the house. If I left the house they would come and
24 look for me and bring me straight back. And I'm, like, I
25 would like -- and I -- and I tried to talk to them and told

John Michael Kirby
Direct examination by Ms. Ross

1 them that sometimes I do need a little space free because I
2 believe there's like a total of, like, nine or ten people
3 living in one 2-bedroom house. That's --

4 Q And so you're talking about your father and
5 step-mother treating you like that.

6 A Yes.

7 Q Do you feel -- why do you think these charges were --
8 came against you?

9 A Because I ended up getting mad and flipping on them,
10 telling them I can't stand this no more. My dad and my
11 brother literally jumped me in the middle of the road.

12 Q And it was after that that these charges came to
13 light?

14 A They kicked me out in the middle of a snow storm about
15 12:00 o'clock at night. And after that, that's when the
16 allegations started coming around.

17 Q All right. And do you think that if you had gone to
18 trial and a jury had heard all about that that would have
19 made a difference in your case? Do you think they would
20 have found you not guilty?

21 A Yes, ma'am, because I believe nobody should have been
22 treated the way they -- the way I got treated there.

23 Q Now, when you pled under Alford you told the judge
24 that you thought that they would -- that they would maybe
25 find you guilty and that's why you were pleading guilty.

John Michael Kirby
Direct examination by Ms. Ross

1 why did you say that then?

2 A That's what she was telling the judge, that they
3 would -- that I was going off of what he was saying, that
4 agreeing to what she was saying that they would find me
5 guilty and that I wasn't thinking that the judge was going
6 to give me the repercussions that he -- that he gave me and
7 that I didn't -- and me not fully understanding and
8 comprehending what Shealy just did, and plus I was crying,
9 I just pretty much bawling my eyes out from the time that
10 it -- from almost a little after the beginning of him start
11 asking me questions from the beginning of it all the way to
12 the end. I walked out of the courtroom crying.

13 Q All right. And -- and why were you crying?

14 A Because I felt like that when everything started
15 getting said and that a lot of things that the solicitor
16 said, and that Shealy did not stand up and try to sit there
17 and say that's not -- that's not right or whatever, I felt
18 like I was just getting screwed.

19 Q Okay. And just, once again, if you didn't -- you
20 weren't guilty of those charges.

21 A No. I'm not guilty of them charges. I loved them
22 with all my heart. I know. I grew up around kids that are
23 like me and like them. I can't -- I've been in -- I grew
24 up in special ed. I grew up. I been to Charles Lea
25 Center. I can't -- I can't even phantom or even, like,

John Michael Kirby
Cross-examination by Ms. Giovanoli

1 comprehend the fact of me even doing something like that.

2 Q All right. Okay. Is there anything else? I've got
3 no further questions.

4 A Not at...

5 Q Okay. Please answer any questions the attorney
6 general has for you.

7 CROSS-EXAMINATION

8 BY MS. GIOVANOLI

9 Q Okay. Good morning.

10 So I just wanted to ask you a little bit about
11 medications that you're taking, because we kinda had some
12 discussions about that prior to you taking the stand. So
13 what medication? You said you take Zoloft and something
14 else?

15 A Vistaril.

16 Q And what -- what exactly are those medications for?
17 What is Zoloft?

18 A I'm not really sure. I was told that it goes with
19 depression, anger, anxiety, several different -- several
20 different things, which I'm not normally -- I don't really
21 know medically about that.

22 Q Does it help you? Does it help you with those
23 things -- depression and anger and anxiety?

24 A It kind of. Most of the time I feel like I still need
25 to have help, kind of like get it worked all out, because

John Michael Kirby
Cross-examination by Ms. Giovanoli

- 1 I've known from the past. I've been on medications where I
2 did not know if I was coming or going.
- 3 Q Okay. And then the other medication -- I can't
4 pronounce it -- I'm sorry -- but do you know what that
5 treats?
- 6 A Not exactly. I kind of figured they give it to me as
7 kind of a stabilizer for the other one.
- 8 Q Okay. So when you're not on those medications do you
9 feel kind of depressed, sad?
- 10 A Yes. My emotions -- I can do a flip-flop. Yeah.
11 Pretty much.
- 12 Q And you understand my questions to you and everything
13 that's going on here?
- 14 A To a certain level, and I'm trying to -- I'm trying to
15 go over them in my head too at the same time.
- 16 Q Okay.
- 17 A And trying to not misinterpret.
- 18 Q Have -- have you been confused by anything so far?
- 19 A Of -- not exactly. It's, like, I just -- I'm just
20 trying to be sure that I can get my words out.
- 21 Q Okay. All right. So you -- you testified earlier
22 when Ms. Ross was asking you some questions that your
23 lawyer didn't pursue any defenses in your case. Do you
24 have any defenses to the cases?
- 25 A Yes. In my defense there's too many -- there have

John Michael Kirby
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1 been too many witnesses.

2 Q Okay.

3 A Me and my stepmother has not gotten along. One
4 defense is that with my brother, I am not, like, I felt
5 like when they brung -- when that was brung up against him,
6 that I did something to him, I felt like they were trying
7 to bring something up against my sexuality or manhood or
8 whatever.

9 Q Sure.

10 A And I don't -- I don't -- I don't oppose people being
11 like that, like saints, whatever, but I -- that is not me.

12 Q Okay. And so when you talked to law enforcement you
13 told them that you did nothing to your brothers, is that
14 correct?

15 A I think so, yeah.

16 Q I mean, in your statement you didn't -- you denied any
17 allegations with regard to your brother.

18 A Yeah.

19 Q Okay. But in your statement to the police officers
20 you did tell them that you digitally penetrated your
21 sister, half-sister?

22 A Not that I -- not that I mentioned. I know I said
23 things, like, that she'd come and wake me up. I'll give
24 her a hug. But a lot of things in there from my
25 understanding, from me reading it, which I was trying to,

John Michael Kirby
Cross-examination by Ms. Giovanoli

1 one, explain to Shealy, was that more likely put out there
2 beyond what I was saying and that the statement -- that a
3 lot of that stuff in there, I know I would not have said,
4 because you know what I mean? If I'm going to sit there
5 and admit the truth to something, I'm going to let it known
6 that if I did it, I did it.

7 Q Okay. Well, the allegations against you are that you
8 raped your sister.

9 A Yes.

10 Q Anally and vaginally. But you didn't admit to that,
11 did you?

12 A No, ma'am.

13 Q You only admitted to the digital penetration.

14 A That -- that -- no. I didn't admit to that neither.
15 It was put in the statement, and that when I was finally
16 got the statement back, because I never received a copy of
17 it. I didn't even -- when I got the discovery, I didn't
18 even know there was a statement really with it.

19 Q Do you remember admitting to law enforcement that you
20 had a sex problem?

21 A No, because I --

22 Q You've seen your statement, and that was included in
23 your statement.

24 A Yes.

25 Q Okay.

John Michael Kirby
Cross-examination by Ms. Giovanoli

1 THE COURT: The statement's not in this record.

2 MS. GIOVANOLI: Excuse me?

3 THE COURT: I said the statement's not in this record.

4 MS. GIOVANOLI: It is, Your Honor. It was admitted on
5 page four as part of the guilty-plea record. However, I do
6 not have those records to supply to this Court. The clerk
7 has them and I can get a copy of them.

8 THE COURT: I don't need it.

9 MS. GIOVANOLI: But it's thoroughly discussed in the
10 recitation of the facts.

11 Q So you do recall talking to law enforcement.

12 A I remember having a conversation, majority of it. For
13 the most part I really don't remember what was really
14 discussed, because, as like a lot of times, I remember when
15 I do start medications or switching back and forth, is that
16 I'm not -- my memory and what I say, I don't really know
17 what's going on. And I try, and I do speak. So it could
18 have been anything. And that I know that what was written
19 down, I know I wouldn't have said it.

20 Q Okay. But you do remember the specifics about the
21 incident that happened in 2009 with your ex-girlfriend,
22 now.

23 A Yes.

24 Q You remember that. And you remember how your dad and
25 your stepmom treated you like a dog in their house, right?

1 And you remember -- you have to answer for the court
2 reporter. Sorry.

3 A Yes, ma'am.

4 Q Okay. And -- and you also remember the confrontation
5 that you had out front of your dad's house when he kicked
6 you out, is that correct?

7 A Yes. I don't think it was -- we wasn't at his house.
8 Not that I recall.

9 Q Okay. Do you remember where you were?

10 A Not exactly. I just know that my brother's best
11 friend's step-mother came and picked me up, because
12 something has happened to my sister and she had to go to
13 the hospital. And I was very concerned.

14 Q Okay. And that happened before your discussion with
15 law enforcement, right?

16 A Yes, ma'am.

17 Q So you remember all of that, but you don't remember
18 talking to law enforcement.

19 A Yes, not having -- not with the extensive conversation
20 that was in the statement.

21 Q Okay. And then regarding that 2009 incident, you were
22 originally charged with raping your girlfriend, but you
23 didn't plead guilty to raping your girlfriend, right?

24 A Yes, ma'am.

25 Q And the solicitor actually said that you pled guilty

John Michael Kirby
Cross-examination by Ms. Giovanoli

1 to assault.

2 A Yes.

3 Q And that was the lesser offense that you pled guilty
4 to, is that correct?

5 A Yes.

6 Q Okay.

7 A And I know I did not lay a finger on her.

8 Q You also when you were questioned by Mr. Ross, she
9 asked you about any discussions that you had with your
10 lawyer regarding your mental health. And y'all didn't have
11 any discussions about that?

12 A I believe I asked them to be able to retrieve stuff,
13 to be able to go into it, yeah. I believe I did.

14 Q Okay. But you didn't address any -- was he familiar
15 with your mental health history?

16 A Not to my knowledge. I believe he told me that he
17 believes that I am competent enough.

18 Q Okay. During your guilty-plea hearing do you remember
19 him informing the judge that you -- you had a G.E.D. but
20 that you're a little bit slow and it's difficult to
21 communicate with you at times and that you had A.D.H.D.,
22 bipolar and oppositional defiant disorder? Do you remember
23 him telling the judge about that?

24 A Yes.

25 Q So he sounded pretty familiar with your mental health

John Michael Kirby
Cross-examination by Ms. Giovanoli

1 history, didn't he?

2 A I was to the point to where I told him that I don't
3 believe I'd even deserve to get my G.E.D. because a lot of
4 things with my education being -- having -- being able
5 to -- learning has been really difficult for me.

6 Q But were those diagnoses correct? Is that what you
7 suffered from -- A.D.H.D. and bipolar and oppositional
8 defiant disorder?

9 A I'm still trying to figure out what the oppositional
10 one is. I've been diagnosed with a lot of different mental
11 things, and, like, it's pretty much varied. They say now
12 that I have anxiety as well. It's where I'm stressing and
13 worrying too much where I don't need to. And I'm kind of
14 figuring out. I don't know if it's dealing with the
15 medication I'm on or -- or what, the environment I'm in.

16 Q And I just have two other questions.

17 MS. GIOVANOLI: Yes, sir.

18 THE COURT: Wind it up, please.

19 Q You testified earlier that you -- you didn't think the
20 judge was going to give you the repercussions that he did.

21 A Yes. I wasn't -- I was going in there, from my
22 understanding, that after I sat there and looked at it and
23 got to where I was at, was able to talk to a caseworker and
24 where I'm at, that they had me to where it's like a very,
25 very serious offense and that I come across people that I

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1 know. I -- I kind of comprehend and understand that every
2 case is different, but a lot of them are kind of related in
3 that they had pled to the same plea and have lesser, a
4 lesser, degree in this, I guess, what you would call like
5 status of like major, serious or whatever.

6 Q Okay. No further questions. Thank you.

7 MS. ROSS: Nothing further.

8 THE COURT: Thank you. You may come down.

9 I want to hear from your lawyer.

10 MS. ROSS: That's our case, Judge. I would ask for
11 leave if you'd like to question. I'm sure you're familiar
12 with the false-confession information, but I'd be happy to
13 provide any information on that as a supplement to this
14 P.C.R. if you so wish at a later date as far as things that
15 could influence a false confession.

16 THE COURT: All right.

17 MS. GIOVANOLI: I understand that they're alleging
18 ineffective assistance of counsel for failure to move to
19 suppress the statement, but I'm a little confused as far as
20 going forward on a theory of false confession. You're
21 alleging ineffective assistance because he didn't pursue a
22 false confession in his defense?

23 MS. ROSS: Just advise that that confession can be
24 challenged. That's the testimony in the case.

25 THE COURT: Okay. State's case?

Matthew William Shealy
Direct examination by Ms. Giovanoli

1 MS. GIOVANOLI: I'd call Matthew Shealy to the stand.

2 MATTHEW WILLIAM SHEALY, having
3 been first duly sworn, testified as follows:

4 DIRECT EXAMINATION BY MS. GIOVANOLI

5 Q Good afternoon, Mr. Shealy.

6 A Good afternoon.

7 Q Just briefly for the record, how long have you been
8 practicing criminal law?

9 A Eight years.

10 Q Okay. And at the time you were appointed to this case
11 you were working with the public defender?

12 A Yes, ma'am.

13 Q Did you review all of the discovery in this case?

14 A Yes, ma'am.

15 Q Can you briefly summarize the discovery against the
16 applicant with regard to the criminal sexual conduct
17 charges?

18 A Well, basically his step-siblings, who I do believe
19 were -- I think it was 14 and 16 -- were both
20 developmentally disabled.

21 THE COURT: Again --

22 THE WITNESS: I'm sorry, Judge.

23 THE COURT: I need to be able to hear what you're
24 saying.

25 THE WITNESS: Yes, sir.

Matthew William Shealy
Direct examination by Ms. Giovanoli

1 A His step-siblings alleged that he had basically had
2 sex with them. And both were -- again, were in the
3 criminal sexual conduct second degree range, age range. I
4 believe it's 14 and 16. They were both developmentally
5 disabled as well.

6 Q Okay. And there was also some further evidence the
7 state had against the applicant, correct?

8 A Well, they had the statements from, obviously, the
9 children. They had a statement from my client. They had
10 some letters.

11 Again, I -- I tell my clients not to write letters --
12 but some letters that were written to Judy that were not
13 necessarily criminatory, but they were kind of threatening
14 in that he said that he -- he wanted the charges dropped or
15 he wasn't going to -- he had a place for them to move to but
16 if the charges weren't dropped they wouldn't be able to move
17 there.

18 So, I mean, it wasn't like I'll come to your house and
19 beat you up or anything like that. It was this kind of if
20 you'll drop the charges I'll guest at your house, basically.

21 Q Okay. And you said Judy. Judy was the mother.

22 A Yes. Judy Holland.

23 Q Okay.

24 MS. GIOVANOLI: Your Honor, can I approach the witness
25 with a document?

Matthew William Shealy
Direct examination by Ms. Giovanoli

- 1 Q This is the statement that was admitted.
2 Handing you a document that you actually gave me from
3 your file. Do you recognize this document?
4 A I do.
5 Q And what is it?
6 A It's the statement. It's three pages. There's a
7 fourth page.
8 Q Okay. And that's the statement that was signed by the
9 applicant?
10 A Yes.
11 Q And this was included in the discovery that you
12 received from the state?
13 A Yes, it was.
14 Q And it hasn't been changed or altered in any way?
15 A He has -- this was his copy. We have been going back
16 and forth. He had some things he wanted me to look over,
17 and this is one of those things.
18 He's noted that he never gave permission to write
19 anything down. I believe that that's -- if I may -- that
20 was the only alteration on the actual statement.
21 Q Is it your understanding that law enforcement actually
22 wrote this statement and he signed and initialed?
23 A Yes, ma'am.
24 Q Okay.
25 MS. GIOVANOLI: I would move to admit this into

Matthew William Shealy
Direct examination by Ms. Giovanoli

1 evidence as State's Exhibit 1.

2 MS. ROSS: No objection. My understanding is it's
3 already part of the court exhibit, it's part of the
4 transcript, but there's not a --

5 THE COURT: It may be. It's not part of the file that
6 I have.

7 MS. GIOVANOLI: Your Honor, I'm not permitted to put
8 things in that file outside of --

9 THE COURT: I understand that.

10 MS. GIOVANOLI: Okay. So I would move this into
11 evidence so that Your Honor can -- can read it.

12 THE COURT: Without objection?

13 MS. ROSS: No objection.

14 (Voluntary statement marked State's Exhibit No. 1.)

15 MS. GIOVANOLI: And after the court reporter has
16 marked it I would request to publish it to the judge.

17 Q Okay. So there's been an allegation that you should
18 have challenged the voluntariness of this statement. Did
19 you see any grounds to challenge, make a motion to suppress
20 the statement?

21 A Well, I mean, we certainly could have done that. I
22 don't think we would have been successful in suppressing
23 the statement.

24 Q So did you see any basis for a challenge?

25 A Again, not really. I mean, he says that -- again, it

Matthew William Shealy
Direct examination by Ms. Giovanoli

1 would have been up to the judge to decide whether he wanted
2 to suppress the statement or not.

3 He said -- would have testified that he didn't
4 necessarily remember making the statement. I couldn't
5 verify as to why he wouldn't be able to because of the
6 medications he was on.

7 I couldn't find any literature that said that they
8 would cause amnesia.

9 There's also -- I have a copy of his presentencing
10 report for his supervisor, release violation. And while it
11 said that he was going to Dr. Badtorf for what they call
12 supportive counseling, I was able to speak with him. He
13 knew who I was. I knew who the -- what the judge was there
14 for. He knew what the solicitor was there for. He didn't
15 complain of any kind of hearing any voices, seeing any
16 hallucinations, anything like that.

17 He had a G.E.D. and he was able to, again, answer
18 questions. He was able to look through his discovery. He
19 gave me copious notes as to what he thought were wrong. He
20 asked me to file certain motions. I explained to him that,
21 yes, we will file those motions at trial, because that's the
22 way that we do motions practice here. I don't know how they
23 do it other places, but here whenever you file or you do a
24 motion to suppress, you do it pretrial, because we have a
25 number of different judges. And you want to make sure that

Matthew William Shealy
Direct examination by Ms. Giovanoli

1 your motion to suppress is done in front of your trial
2 judge.

3 So had he wanted a motion to suppress, we would have
4 done that in front of a trial judge. Again, I thought we
5 would lose that motion but, you know...

6 Q Did you talk to him about the ability to challenge the
7 statement?

8 A Yes, yes. We talked about that a lot.

9 Q Okay.

10 A He pointed out that he wanted or he -- at various
11 times wanted to suppress it. And then when they came at
12 him with a deal, we talked about it, and he wanted to take
13 the deal.

14 Q Okay. And you touched on mental health a little bit,
15 but I'm going to stay focused on this motion-to-suppress
16 issue, and then we'll go on to his mental health.

17 He's testified today that he doesn't remember giving a
18 statement at all. Was that his version of the events
19 whenever you represented him?

20 A He told me that he didn't really remember it very
21 well. And I think I said that in the actual plea.
22 Again --

23 THE COURT: Was -- was the statement Mirandized?

24 THE WITNESS: It was, yes, sir. I think I got the
25 Miranda warnings as well.

Matthew William Shealy
Direct examination by Ms. Giovanoli

1 THE COURT: That's all right.

2 THE WITNESS: He was -- he was certainly Mirandized.

3 THE COURT: You felt that the statement was freely and
4 voluntarily given?

5 THE WITNESS: Yes, sir. And I believe at the -- while
6 it was written in the handwriting of Investigator Cantrell,
7 the very last page he actually would have drawn or he told
8 me that that was his hand that had been drawn out on the
9 piece of paper.

10 There's a line that says, first, that this is how far
11 his pinkie had gone into her vagina. Again, that was done
12 in his handwriting as opposed to Investigator Cantrell's.

13 THE COURT: Go ahead.

14 Q And since we've admitted the statement that was
15 actually from your file, the handwritten note, that was
16 written by your client, correct?

17 A It was.

18 Q And that note indicated that he didn't get the
19 permission to write his own statement.

20 A Well, that he did not give them permission to write
21 the statement down.

22 Q Okay.

23 A In the jail there is a perception that you can tell
24 the police officers things but they can't testify to them
25 unless they're written down. That we all know is

Matthew William Shealy
Direct examination by Ms. Giovanoli

1 incorrect. But I think that that was what he was getting
2 to, was that he didn't give them permission to write that
3 even though he'd signed the statement.

4 Q Okay. He never contested the signature on the page to
5 you?

6 A No. He told me that that was his signature. And
7 because I had other versions of his signature, I asked him
8 about it, well, why did you sign it and we know you signed
9 it because it looks exactly like your other signatures.

10 Q Okay. Aside from reviewing all of the discovery with
11 him, did you do any independent investigation? Did you
12 talk to the victims, the family of the victims?

13 A I did not talk to the -- the family of the victims.
14 That usually ends poorly. We did watch or I watched the
15 CAC videos. I believe I had showed him the CAC videos as
16 well, which were the Children's Advocacy Center videos.

17 As to the factual allegations, we didn't really have
18 any. They weren't any other witnesses other than the two
19 alleged victims.

20 Now, in the statement it mentions that one -- that
21 while he was engaged in some kind of intercourse with --
22 with the daughter, with his step-sister, that his
23 step-brother had walked in and it stopped, it had stopped at
24 that point.

25 So there would have been some question as to whether

Matthew William Shealy
Direct examination by Ms. Giovanoli

1 that stepbrother would have testified to anything. I don't
2 believe that they would have testified -- they would have
3 corroborated each other's events. I could be incorrect on
4 that. But those were the -- the two main fact witnesses for
5 the state.

6 Q But what was his version of the events to you? Did he
7 admit or deny these allegations?

8 A He told me he didn't do it. And I said, well,
9 that's -- that's fine, why would they be making this up.
10 And he told me about how they had treated him poorly there.
11 And I have no doubt that that was true. I do not think
12 that these people were particularly kind to him.

13 He was in and out of state custody. Again, I mentioned
14 that. But, again, we would have cross-examined. He had
15 pointed out that there was some issues between them. We
16 would have cross-examined them on those bases. And I
17 explained to him that that's what cross-examination is for.

18 A lot of clients -- and Mr. Kirby was one of them --
19 would like to have a motion hearing prior to the trial where
20 we call everybody liars, but, obviously, that's not the way
21 it works. You got to cross-examine them first.

22 Q Had he requested a jury trial would you have prepared
23 for trial and conducted a trial?

24 A Yes, ma'am.

25 Q And so it was his decision to plead guilty.

Matthew William Shealy
Direct examination by Ms. Giovanoli

1 A Yes, ma'am.

2 Q Do you recall the plea offer in this case?

3 A Yes, ma'am.

4 Q And it was a global resolution for two different
5 C.S.C. charges with a dismissal of two other C.S.C.
6 charges.

7 A That's what we ultimately pled to. He was also
8 offered in the alternative a negotiated 12 on a C.S.C.
9 third with a minor. We had talked about that. The problem
10 with that is that carries mandatory lifetime G.P.S.

11 Q And the charges to which he pled do not carry a
12 mandatory G.P.S.

13 A Correct.

14 Q Okay. You mentioned a witness list, or not a witness
15 list. Did he ever give you a list or names that you could
16 have investigated and interviewed regarding nine people
17 that were also living in the 2-bedroom house?

18 A He had told me that nine people were living in -- or
19 that a number of people were living in the house. But,
20 again, that may be true, but that doesn't bear into whether
21 these actions happened or not.

22 Q Okay. Did you see any need to investigate those
23 people, talk to those people?

24 A No, because, again, those aren't the people against
25 whom the allegations were made.

Matthew William Shealy
Direct examination by Ms. Giovanoli

1 Q All right. And with regard to his mental health, you
2 did talk to the court a little bit about your knowledge of
3 his mental health.

4 What was the discussion you had with the applicant
5 regarding his mental health?

6 A I asked him what kind of medications he was on. I got
7 his, again, the presentencing report. He had been --
8 again, he'd pled guilty in front of several different
9 judges previously. He had that supervised-release issue.

10 We went over what kind of -- and, again, I believe -- I
11 believe -- I must have gotten some kind of records, or it
12 was in the D.S.S. records, because otherwise we wouldn't
13 have known that his diagnoses were A.D.H.D. and oppositional
14 defiant disorder and things like that, because, obviously,
15 he wasn't able to articulate in opposition defiant disorder.

16 Q Why didn't you pursue a guilty but mentally ill plea?

17 A Well, two reasons. One, we would have had to make a
18 showing that he had committed the crime but was not --
19 either he knew right from wrong or was not able to conform
20 his conduct to right or wrong, or we would have to show
21 that he didn't know the difference between right and wrong.

22 And, one, I don't think either of those would have
23 applied.

24 The other issue would have been I don't know. He
25 didn't want to admit to having done them, so he wouldn't

Matthew William Shealy
Direct examination by Ms. Giovanoli

1 have been able to tell a person, a state evaluator, that he
2 committed these crimes but he didn't know the -- what the
3 difference between right or wrong was or that he couldn't
4 conform his conduct.

5 Q So, essentially, pleading guilty but mentally ill, he
6 would have to admit guilt and he wasn't intending to --

7 A And he didn't want to do that.

8 Q Okay. And the sentence for a guilty but mentally ill
9 isn't -- isn't better or worse than a sentence for a
10 regular guilty plea, is it?

11 A No, ma'am.

12 Q Okay. Do you know what happens when people plead
13 guilty but mentally ill?

14 A My understanding is they send them to Gilliam for a
15 little while. They juice them up and then send them to a
16 regular facility.

17 So it's not like you don't get any -- they give you a
18 whole lot of medication, is my understanding. That's
19 what -- at least that's what my clients have told me who
20 have been at Gilliam. They just basically medicate you to a
21 zombie like state and then send you to a different
22 institution.

23 Q And you -- is there anything else that you would like
24 to add?

25 A No, ma'am.

Matthew William Shealy
Cross-examination by Ms. Ross

1 MS. GIOVANOLI: I have no further questions.

2 CROSS-EXAMINATION

3 BY MS. ROSS

4 Q Okay. Mr. Shealy, you were appointed to the case, is
5 that correct?

6 A Yes, ma'am.

7 Q Approximately how much later was it that Mr. Kirby
8 pled under Alford?

9 A I don't have the answer to that. It was -- he was in
10 jail for 845 days.

11 Q And during that time you did review discovery with
12 him?

13 A Yes, ma'am.

14 Q Now, do you have any independent recollection of
15 reviewing those videos of his half siblings with him at the
16 jail?

17 A I don't. What I usually do is send an investigator to
18 show it to them.

19 Q And --

20 A And allow them to take notes.

21 Q Okay. But those statements by the 14-year-old and, I
22 guess, the 12-year-old siblings -- I think that's 14 and
23 16 -- but they were given under a video, is that correct?

24 A They were.

25 Q And I'll allow the transcript to speak to the exact

Matthew William Shealy
Cross-examination by Ms. Ross

1 ages. I'm not sure of them.

2 Now, going back to Mr. Kirby's statement that was
3 not -- there was no video taken of that, was there?

4 A Correct.

5 Q And -- and it wasn't in his handwriting.

6 A Correct.

7 Q Now, and he had told you about his mental health
8 issues -- and at the time. And was there any other
9 evidence in discovery about the statement being made as in
10 how long he was in custody, whether he was being given
11 medication, anything of that nature?

12 A I'm sure -- I'm sure that that was part of the
13 incident report. They -- ordinarily, that would have been
14 in there as to on such and such a time, at such and such a
15 place I discussed with him. I don't have a copy of the
16 statement. It should list when it was given, what day it
17 was given. And the incident report would be able to tell
18 you when he was arrested.

19 Q Did -- did the jail records show what kind of
20 medications he was being given from the law enforcement
21 center?

22 A I can't speak to that. I don't -- I don't know that
23 he was in jail long enough to have been given any. I think
24 that they picked him up and spoke to him fairly quickly
25 thereafter. So he would have been on the street in order

Matthew William Shealy
Cross-examination by Ms. Ross

1 to get the medications.

2 Q Okay. So any -- did you get the law enforcement
3 center records of the medications he was on during the 800
4 or so days that he was in there?

5 A I don't see them in my file, but I don't -- I don't
6 want to say that I didn't.

7 Q Do you recall whether you got any other records of any
8 mental health history or medical records in your file?

9 A Again, they're not in my file. I do have that he was
10 diagnosed with a number. I mention on the record that he
11 was diagnosed with a number of different things. And I
12 would not have said oppositional defiant disorder unless I
13 had some kind of documentation to back that up.

14 Q And I believe your -- you're suggesting that maybe it
15 was in the D.S.S. records that were provided to you.

16 A It very well may have been.

17 Q Now, as to those D.S.S. records, do they go in -- the
18 half siblings, were they ever in foster care?

19 A Again, I'm not entirely sure. It's been a while.
20 They probably were. But, again, I don't have any
21 independent recollection of that.

22 Q Do you recall anything from the discovery about them
23 having made prior allegations of sexual abuse?

24 A And, again, I don't -- I don't recall that either.

25 Q All right. Now, as far as the D.S.S. records, does it

Matthew William Shealy
Cross-examination by Ms. Ross

1 make mention of how many people were living in that house?

2 A I believe it mentions at least four, but, again, I
3 don't remember. And I'm trying to dig through my file, but
4 I can't get to that quickly.

5 Q How about the grandmother? There was an allegation of
6 this occurring with the grandmother present. Was the
7 grandmother in this house as well?

8 A I believe that she was there. It was -- because it
9 was his father, his stepmother, step siblings. And there
10 were a couple of just people. And then I believe there
11 were extended family members.

12 Q And there was a lot of mention of the step siblings'
13 disabilities as well. Did your investigation ever show
14 whether the step-mother and father were receiving payments
15 through disability for having those children in their home?

16 A That I believe was in the D.S.S. I believe so.

17 Q And --

18 A That's what he --

19 Q Do you recall -- we just heard Mr. Kirby testify that
20 he was getting food stamps, but do you recall whether he
21 was getting any -- bringing any disability check into the
22 home when he was staying there?

23 A He was certainly receiving benefits, but then he
24 was -- he complained to the -- to his probation agent that
25 he wasn't getting enough. So they referred him to other

Matthew William Shealy
Cross-examination by Ms. Ross

1 services.

2 Q Okay. And you said he did mention that he had issues
3 with the -- with his family.

4 A Yes, yeah. They had treated him -- I mean, he used
5 the exact same words, that they treated him like a dog,
6 that they made him clean up, that they were behaving
7 poorly.

8 Q Okay. Now, as far as -- so you did review the plea
9 recommendation with him. And he had a choice between a
10 negotiated 12 with mandatory G.P.S. and a cap of 15. And
11 y'all decided to take the cap of 15, is that --

12 A Yes, ma'am.

13 Q Now, is it true what he testified to that you told him
14 he didn't have a chance at trial due to his statement, his
15 confession essentially?

16 A I told him that his statement was a substantial
17 obstacle to overcome. I don't -- I would never tell
18 somebody they don't have a chance, because I always tell
19 them that there's always a chance. And I've used the
20 Buster Douglas-Mike Tyson analogy before, that, you know,
21 even Buster Douglas could knock out Mike Tyson once every
22 hundred fights. But that the statement really killed us,
23 as well as, again, those -- what they would have testified
24 to. And they would have -- well, I believe they were going
25 to endeavor to enter -- introduce those statements based on

Matthew William Shealy
Cross-examination by Ms. Ross

1 their developmental disabilities. We would have argued
2 about that, as to whether they would have worked or not.

3 Q All right. And isn't it true that whether a statement
4 is knowingly, voluntarily made it goes to the treatment at
5 the time the statement is given but also the mental state
6 when someone gives a statement?

7 A Sure.

8 Q And with the statement, I just can't recall. Do you
9 recall whether it was witnessed by more than one officer or
10 just the officer who wrote the statement?

11 A I don't recall that. I know Investigator Cantrell
12 witnessed it, and she may very well have been the person
13 who wrote it. I'm just not sure.

14 Q And she's the officer that generally takes in most of
15 the sex offender cases?

16 A Yeah. She doesn't do them here any more. I think she
17 works for SLED now.

18 Q All right. But that was her area. She -- she was
19 sort of a child advocate and investigator for the sex --

20 A Well, she was the investigator for the sex crimes. So
21 I hope that she was impartial.

22 Q Okay. I just want to refer to page 16 of the
23 transcript. That's when the solicitor starts referring to
24 the prior rape charge, which actually the conviction was
25 out of North Carolina and didn't show a rape charge. Did

Matthew William Shealy
Cross-examination by Ms. Ross

1 you ever have the records involved in that charge?

2 A I had the N.C.I.C. report. He had explained to me
3 what that actually was. I think that's why I say that it
4 was not actually a rape charge. It was pled to a --

5 Q And you distinguished that, but you didn't object to
6 him bringing that to the Court's attention.

7 A I did not object to it.

8 Q All right.

9 A But, again, I think that that made clear that that
10 wasn't what he had been convicted of, that he'd been
11 convicted of assault on a female.

12 Q Right.

13 A And I also go through the -- again, what he'd
14 testified to, that it was an argument with his girlfriend
15 and things like that.

16 Q And you can't testify for sure whether Mr. Kirby
17 actually saw the forensic videos.

18 A I can't. I'm sure if we had gone -- again, I send
19 somebody. I send one of our investigators generally to
20 show the videos. And if he asked me to, I'm more than
21 happy to show it to him.

22 Q And this was an Alford plea because Mr. Kirby had been
23 talking to you, never admitted any of these allegations.

24 A And that's the way that he wanted to go. I mean, I
25 lay out all of the -- the possibilities and...

Matthew William Shealy
Redirect examination by Ms. Giovanoli

1 Q And -- and so he didn't admit to what he said in his
2 statement. Did you talk to him about his statement and say
3 in the statement you said digital penetration, is that true
4 or not. Did you discuss that with him?

5 A Yes, ma'am. We went over his statement a number of
6 times.

7 Q And at that point did he say he was not guilty?

8 A He did.

9 Q All right.

10 MS. ROSS: No further questions.

11 MS. GIOVANOLI: Just two follow-up questions.

12 REDIRECT EXAMINATION

13 BY MS. GIOVANOLI

14 Q Do you have any reason to investigate his mental
15 health further than what records you have in your file?

16 A I -- no. Based on my conversations with him, I didn't
17 believe that there was any other reason to.

18 Q Did you ever question his competence?

19 A No.

20 Q Well, and as far as the -- the allegations -- the rape
21 charge -- it started out as a rape charge and he pled
22 guilty to assault. The solicitor brought out -- other than
23 explaining that further did you see any basis for an
24 objection for that actually being offered to the Court?

25 A Well, I don't -- I could have objected, I suppose. I

Matthew William Shealy
Redirect examination by Ms. Giovanoli

1 don't think you could have unringed the bell.

2 Q Certainly. But isn't the trial -- a plea judge
3 entitled to know the criminal history before sentencing?

4 A He is -- he is. I mean, usually it's what they've
5 been convicted of.

6 Now, we do object sometimes, but it's, again, unringing
7 the bell. And you just have to explain what the actual
8 conviction is for.

9 Q And the solicitor did say he was convicted of assault
10 on female, that's correct?

11 A That would be correct.

12 Q But/and giving the Court more information surrounding
13 those charges, is that improper?

14 A No, no, that's not improper. They're allowed to do
15 that.

16 Q Okay. Thank you.

17 MS. GIOVANOLI: Nothing further.

18 THE COURT: You may come down.

19 MS. GIOVANOLI: Your Honor, the state would rest and
20 also ask that my witness be excused.

21 THE COURT: Witness be excused without objection.

22 (Whereupon, the witness was excused.)

23 THE COURT: All right. Proposed orders in 30 days.

24 END OF REQUESTED TRANSCRIPT OF RECORD

25

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Spartanburg County, South Carolina, on the 14th day of November 2017.

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

February 10, 2018

A handwritten signature in cursive script, reading "Linda D. Moffitt", written over a horizontal line.

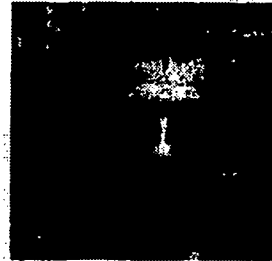
Linda D. Moffitt
Circuit Court Reporter

Karl R. Bodtorf, Psy.D.

302 W. Main Street • Taylors, SC 29687 • Tel 1-864-244-1007 • Fax 1-864-244-4427

PSYCHOLOGICAL EVALUATION

Client Name: John Kirby
Date of Birth: [REDACTED]
Education: 11th/GED
Employment: Unemployed
Date of Evaluation: 09/19/13

**REASON FOR REFERRAL**

John Kirby is a twenty-nine year old single white male who was referred to this office for psychological evaluation via the U.S. Probation Office, Officer Bryanna Rogers. This assessment was requested to determine John's current level of intellectual and emotional functioning as well as to determine what if any psychological services may be indicated at this time.

BEHAVIORAL OBSERVATIONS

Mr. Kirby was found to be dressed casually though appropriately in a short sleeve shirt, tan shorts, white socks, and white sneakers. He has very short black hair and green/hazel colored eyes. He reports a height of 5'5" and a weight somewhere between 150 to 160 pounds. He is right hand dominant. His speech was clear and understandable. He describes his vision as being only "so-so" noting that his distant vision is somewhat "blurry". He notes that, "I am supposed to wear glasses". His hearing would appear to be grossly intact. His gross motor and fine motor skills were age and task appropriate as was his general activity level. It is believed that he understood the instructions to the various tasks administered on this date as well as the questions that were posed. His attitude and motivation was appropriate. Concentration seemed variable. No bizarre behaviors were evidenced. John was found to be reasonably verbal in his interactions with the undersigned and was able to present his circumstances and an understandable fashion.

John misidentified the address of this office as 340 versus 302 though he did know that it was located on West Main Street. He incorrectly indicated that the office was located in Greenville versus Taylors. John was able to provide correct information with respect to: today's date, his date of birth, age, and the name of the current president. He could not recall the name of the most recent past president. John was able to spell his last name both forwards and backwards. He was also able to spell the word 'world' backwards. He began to do serial seven calculations, albeit somewhat slowly, though by the fourth subtraction he became frustrated and gave up. He was able to remember three out of three objects after distraction tasks. This gentleman did not present with any psychotic symptomatology such as bizarre ideations, delusions, or hallucinations. His mood and affect would be described as having been within normal limits. His maturity level appeared to fall below that of his chronological age. John does not possess a driver's license and was brought to the office by his probation officer.

BACKGROUND INFORMATION

Mr. Kirby begins the clinical interview today by responding to some questions about his referral to this office. According to his report he just completed a 27-month prison sentence in connection with his past arrest for "mail fraud". According to his report he was released from prison on August 5th of this year. John indicates that at the time of his offense he was homeless and was approached by individuals who promised him assistance to "help you get a place of your own". John indicates that he only participated in the illegal activity on two occasions and never really received anything for his efforts other than a set of clothes. John relates that he was somehow characterized as having been the kingpin of the operation, which he maintains is far from the truth of the matter.

John acknowledges having had some past issues with his mental health. He has in the past been diagnosed with a bipolar disorder as well as ADHD. He has taken a variety of different psychotropic medications including but not limited to: Zoloft, Ritalin, Klonopin, Risperdal, and Seroquel. According to his report he has not taken any medications for a long number of years. The medications noted above were said to have been prescribed earlier on in his life, ending when he was some eighteen years of age. Mr. Kirby relates that he has had four different psychiatric hospitalizations, two at Patrick Harris and two at the Baptist Hospital. These were said to date back to his teenage years, perhaps into his early twenties. The hospitalizations came about due to suicidal thoughts as well as attempted suicide. With respect to the bipolar diagnosis, John admits to having issues with mood swings noting that he can "...one minute be happy and the next...depressed...". When questioned about his appetite John relates that "...it could be better...". He states that his ability to sleep is only "so-so...". In describing his concentration John relates that he does have a tendency to "zone out...to a certain extent...". John characterizes his energy level as "fluctuating" noting that on some days it is high and some days low. He has had both suicidal thought and intent in the past but denies any current issues in this regard.

Mr. Kirby indicates that he was actually born in Charlotte North Carolina but grew up in Spartanburg South Carolina. He was raised primarily by his great-grandmother, though he does not view her warmly noting that "she wasn't a big help". According to his report John's biological mother was "drug addicted" and at his birth he was said to have had "dope in my system". Mr. Kirby notes that when he was about eleven years of age his grandmother placed him in a group home. He was not entirely sure why this came about. John has lived in a variety of different placements (e.g. Columbia, Anderson, Florence, and Greenville). His verbalizations with respect to his experiences in such placements were largely negative although he notes that there were "good times". John notes that he had some limited contact with his mother when he was younger. His biological father was "locked up" when John was born. He lived with his father briefly at age seventeen to eighteen. In describing his father he notes, "I wouldn't call him a good father". John indicates that he is "just now...getting back to know him...". When asked about his performance in school John relates that he did "...so-so...I did my work...I went to school...". He states that he made "mostly B's...a few F's...". John relates that he took his GED just before leaving prison and just recently learned that he "passed".

John is not employed at this particular point in time. He was asked about his last job and it was interesting to note that he struggled to remember what it was. It finally did come to him that he worked for Liberty Tax as a sign man. This job only lasted about one month. He has also been employed at a Dollar General Store, stocking. He worked on a horse farm for a period of time. His longest period of continuous employment was said to have been about five to six months. He states, "I can't keep my attention span". When asked what he might like to do he notes that he did enjoy working on the farm and would like to do this again. His second choice would be that of construction or lawn care. He mentions in passing that he does experience occasional difficulties with back pain noting that he was involved in a car accident back in 2009.

This gentleman denies having had any particular issues with alcohol or drugs. He admits to some past recreational use of marijuana and notes that under its influence "I feel normal". John denies a history of any significant difficulties with the authorities. He has been charged for use of a vehicle without the owner's consent. He has been charged for trespassing. There was a "rape charge" that was dropped to that of assault on a female. He notes that his "girlfriend" brought these charges against him.

John relates that he is single and has never been married. He has been engaged on three occasions. He is not involved in a relationship at this time. He does not have any children.

John was asked about his interest in counseling and he notes that "it could be helpful...". He finds it difficult to talk with his family because he has found in the past that they have used certain things "against me". Mr. Kirby notes that he has spent the majority of his life "in the system...it is all I know...this is my last and only chance...". He adds that he would like to have a family life and "give them better than I had".

INSTRUMENTS

1. Personality Assessment Inventory [PAI]
2. Carlson Psychological Survey [CPS]
3. Shipley Institute of Living Scale
4. Clinical Interview
5. Collateral Information
 - i. Pre-sentence Investigation Report (25 pp.)

EVALUATION RESULTS

PERSONALITY

Mr. Kirby was given the PAI, a generalized measure of personality. This instrument provides a number of validity indexes that are designed to provide an assessment of factors that could distort the results of testing. Such factors could include failure to complete test items properly, carelessness, reading difficulties, confusion, exaggeration, malingering or defensiveness. For this protocol, the number of

uncompleted items was within normal limits. Unfortunately his test results were found to be invalid due to an elevated score on INC (Inconsistency). His score on this particular scale was found to be more than two standard deviations above the mean. He was found to respond inconsistently to a number of items with highly similar content. A variety of reasons for such a failure to attend would include: reading difficulties, carelessness, and/or confusion.

Mr. Kirby was also given the CPS. This particular test is comprised of fifty items designed specifically for those individuals who have come to the attention of the criminal justice system for one reason or another (i.e. accused or convicted of crimes, or referred for other socially deviant behavior). His profile would be most consistent with a type seven (7) configuration.

Individuals with this type profile are suggestive of a disturbed personality and psychiatric treatment is often recommended. They are often immature and emotionally labile. Individuals with this personality style are, as a group, dependent upon others and desperately need and seek both attention and support from those around them. At the same time, they often drive people away by being so irrational and demanding. Hypochondria is often present in this type. Somatizations in responses to life's pressures are displayed in the form of constant recurring pains. Judgment is poor and guidance is needed in order to control impulses. Motivation for treatment is often low. They accept their behavior on a superficial level but recurring troubles may cause them to withdraw and become passive. They often lack purpose or direction and may have little hope for the future. It is common for their self-image to be poor and they often suffer from guilt, despair, anxiety, and depression. Suicide attempts are not uncommon, but these may only be a means of seeking attention rather than a true attempt at death.

INTELLIGENCE

Mr. Kirby was given the Shipley Institute of Living Scale and his results would suggest very much below average functioning. His WAIS-R estimated IQ is believed to fall in the range of 52-70. His word knowledge skills (very much below average) were found to be significantly less well developed than his abstraction skills (below average). John would be expected to experience difficulties in any environments where academic type skills would be necessary/required.

CONCLUSIONS

John Kirby is a twenty-nine year old single white male who was referred to this office for psychological evaluation via the U.S. Probation Office, Officer Bryanna Rogers. This assessment was requested to determine John's current level of intellectual and emotional functioning as well as to determine what if any psychological services may be indicated at this time.

Mr. Kirby participated in a comprehensive assessment comprised of a clinical interview, mental status examination, psychological testing, and review of collateral records. John was found to be reasonably verbal in his interactions with the undersigned. He was well oriented and free from any apparent psychotic symptomatology. Anecdotal information would suggest that John has had

psychological/behavioral type issues for a long number of years. According to his report his great grandmother placed him in residential care at an early age, where he resided from age eleven-twelve until late adolescence. He has been involved in past counseling, taken psychotropic medications, and has had several psychiatric hospitalizations. His results on a measure of personality were unfortunately invalid as a result of problems with inconsistency. On a brief measure utilized with offender populations, his profile reflects immaturity and emotional lability. He can be expected to be emotionally dependent on others and at the same time is likely to resent the very help that he solicits. Others likely pull away from him due to his requests and demands for assistance.

Mr. Kirby has some limited insight into his circumstances, and realizes that he has spent the majority of his life "in the system". He has a strong desire to function independently though he appears to lack the requisite social skills, cognitive resources, and employment skills to do so. John will likely require above average levels of support (e.g. counseling, vocational rehabilitation, transportation assistance) if he is to ever function on a fully independent level. He would be an appropriate candidate for supportive counseling and does seem to have an appreciation for its importance if he is to move forward in life. I am not inclined to refer him to the psychiatrist at this time, though such an option could be implemented in the future should the need to do so become apparent.

DSM IV DIAGNOSTIC IMPRESSIONS

The following diagnostic impressions are based upon this client's performance on various psychological instruments along with a review of their background history.

Axis I	309.9 Adjustment Disorder, Unspecified
	314.9 Attention Deficit Hyperactivity Disorder, by history
	Rule Out: 296.90 Mood Disorder NOS
Axis II	V71.09 No Diagnosis On This Axis
Axis III	Deferred
Axis IV	Recent Release From Prison/Unemployment
Axis V	Global of Assessment of Functioning Scale
	Current Score: 55-65 (Moderate to Moderately Severe Symptoms)

Karl R. Bodtorf, Psy.D.
e.s.

Karl R. Bodtorf, Psy.D.

CASE# 2014011237	04/14/14 Page 40		PAGE 1 of 3
STATEMENT OF: John Michael Kirby		AGE: 29	DATE: 03-26-14
ADDRESS:			
PHONE #	DOB: [REDACTED]	SSN: [REDACTED]	

This statement is written by Det. N. Cantrell at John Kirby's direction. NEVER gave permission to [REDACTED] anything

One day after I got out of prison, (August 5, 2013)

I was at my dad and Judy's house. Minor [REDACTED]

was in the bathroom yelling she needed a towel.

I took her one. She asked me to dry her off.

I did. Minor [REDACTED] has walked in the bathroom

before while I am masturbating. One day I was

at dad and Judy's house in Woodruff. I was in

the boys room. Minor [REDACTED] came in and grabbed

my hand and put my arm around her. It was

watching a movie. She then took my hand and put

it in her pants. I put my pinky finger barely

in her vagina. I yanked my hand back. She got

mad and started yelling. I left the house until

late that night.

The second time stuff happened with Minor [REDACTED] was at

the trailer in Pauline. Minor [REDACTED] stayed home from

school. I was sleeping in the den. Minor [REDACTED] woke me

I have read this statement consisting of 3 pages(s), and I swear that the statement that I have just given is the truth, the whole truth, and

nothing but the truth, so help me God. I also swear this statement was given freely and voluntarily and I have received a copy of my statement.

This statement was completed at 11:03 A.M. on the 26th day of March 2014.

WITNESS:

N. Cantrell

Signature of person giving voluntary statement

SWORN to before me this 26th

day of March

2014

Notary Public of South Carolina

My Commission expires: 1-3-2020

SH104

04/14/14 Page 41

CASE#	2014 011237	VOLUNTARY STATEMENT		PAGE 2 of 3
STATEMENT OF:	John Michael Kirby	AGE:	29	DATE: 03-26-14
ADDRESS:				
PHONE #		DOB:		SSN:

up giving me a hug. I went and put a movie on in her room. I started cleaning house. I put another movie on for her. I gave her a hug. I touched her chest with my hand.

I did not tell the complete truth about what happened in Woodruff in the boys room with

Minor

The truth is I was on the bed watching TV. S^{Minor} came in and we started playing around. Judy yelled because the bed was squeaking. I left out of the room and then went back in there. I gave ^{Minor} a hug and kiss on the cheek and told her I loved her. Samantha sat on my lap for awhile. My arms were wrapped around her. I put my hand on her thigh. I was rubbing her thigh. She turned around and looked at me and kissed me. My hand went up to her vagina and I started rubbing it. I put my hand under her shorts and underwear. Matthew walked in and I quickly pulled away from her and

I have read this statement consisting of 3 pages(s), and I swear that the statement that I have just given is the truth, the whole truth, and

nothing but the truth, so help me God. I also swear this statement was given freely and voluntarily and I have received a copy of my statement.

This statement was completed at 11:03 A M. on the 26th day of March 2014.

WITNESS:

W. Cantrell

Signature of person giving voluntary statement

SWORN to before me this

day of

Notary Public of South Carolina

My Commission expires:

1-3-2021

SH1104

CASE# 2014011237	VOLUNTARY STATEMENT		PAGE 3 of 3
STATEMENT OF: John Michael Kirby	AGE: 29	DATE: 03-26-14	
ADDRESS:			
PHONE #	DOB:	SSN:	

walked out of the room. I put my pinky finger in her vagina a little further than I originally said. She wasn't wet when I started but then she started getting wet. I am glad Matthew walked in when he did because it could have gone further. I knew what happened was wrong so I tried to not be around the house so much. I do have a bit of a sex problem because of my upbringing. I don't remember much but I have been told a lot by family members. I do remember being at strip clubs with my mom when I was really young. I did not do anything sexual with Matthew. I am sorry for what I did to Minor and I told her that.

I have read this statement consisting of 3 pages(s), and I swear that the statement that I have just given is the truth, the whole truth, and nothing but the truth, so help me God. I also swear this statement was given freely and voluntarily and I have received a copy of my statement. This statement was completed at 11:03 A.M. on the 26th day of March 20 14.

WITNESS: M. Cantrell

[Signature]
Signature of person giving voluntary statement

SWORN to before me this 26th

day of March

[Signature]
Notary Public of South Carolina

My Commission expires: 1-8-2020

SH104

CASE# 2014011237	04/14/14 Page 43		PAGE 1 of 1
STATEMENT OF: John Michael Kirby		AGE: 29	DATE: 03-26-14
ADDRESS:			
PHONE #	DOB:	SSN:	

1st time

I have read this statement consisting of 1 page(s), and I swear that the statement that I have just given is the truth, the whole truth, and nothing but the truth, so help me God. I also swear this statement was given freely and voluntarily and I have received a copy of my statement. This statement was completed at 11:03 A M. on the 26th day of March 20 14.

WITNESS:

W. Cantrell

Signature of person giving voluntary statement

John Michael Kirby

SWORN to before me this

26th

day of

March

Notary Public of South Carolina

(Seal)

My Commission expires: 1-15-2020

SH104

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

John Michael Kirby, #319119,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2016-CP-42-3991

**ORDER OF DISMISSAL
WITH PREJUDICE**

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by John Michael Kirby (Applicant) on November 7, 2016. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on November 14, 2017 at the Spartanburg County Courthouse. Applicant was present and represented by Susannah Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Matthew W. Shealy, Esquire, (Counsel) also testified. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the plea transcript, the PCR application, Respondent's return, and Applicant's supplemental application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted by the March 2015 term of the Grand Jury for Spartanburg County for two counts of criminal sexual conduct ("CSC") with a minor, 2nd degree (2015-GS-42-0951, 0952). Applicant was represented by Matthew W. Shealy, Esquire. Assistant Solicitor, Lindsay H. Overby, prosecuted

the case. On May 26, 2016, Applicant pled *nolo contendere* to both charges pursuant to Alford.¹ The State made a recommendation of concurrent terms with a cap of 15 years and also dismissed two other charges for third degree CSC with a minor, in exchange for Applicant's guilty plea. The Honorable J. Mark Hayes, III, sentenced Applicant to imprisonment of fifteen years for both charges with credit for 845 days served. The sentences were to be served concurrently. Applicant was also ordered to register as a sex offender and to avoid contact with the victims or their family. Applicant did not appeal his conviction or plea.

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

1. Ineffective Assistance of Counsel / Involuntary Guilty Plea

- a. "Plea counsel coerced me to plea against my will."
- b. "Plea counsel failed to investigate my history of mental health illness."
- c. "Plea counsel failed to conduct pretrial investigation concerning the facts of the case."

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 H. HOPE BLACKLE
 CRIMINAL JUSTICE COURT
 WILKES-BARRE COUNTY

At the start of the hearing, Counsel moved to have Applicant mentally evaluated. Counsel provided the Court with a mental evaluation conducted in 2013 requested by the United States Probation Office pursuant to his supervised release from his federal charges. The evaluation was admitted upon stipulation as Applicant's exhibit 1. The State opposed an evaluation and requested this Court engage in a colloquy with Applicant to further assess his ability to proceed with his PCR. This Court questioned Applicant and found he appeared to be aware of what was going on, the purpose of his PCR action, understood the questions asked of him and gave coherent and reasoned answers. Applicant was afforded further opportunity to discuss with his attorney whether or not he desired to proceed with his PCR hearing and

¹ North Carolina v. Alford, 400 U.S. 25 (1970).

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ultimately decided he wanted to proceed with the matter. Additionally, after witnessing Applicant's demeanor and engaging in conversation, this Court finds a mental evaluation is not warranted.

SUMMARY OF TESTIMONY AT PCR

I. Applicant testified to the following:

Applicant testified he pled guilty pursuant to Alford because Counsel told him he had no defense and the jury would hang him at trial. He reviewed the discovery several times with Counsel and attempted to comprehend all of it. He testified he believed there were inconsistencies that were overlooked by Counsel like the fact that the victims had also been placed in foster homes like he had been and suffered sexual assaults like he had. Applicant claimed the female victim in his case had been sexually abused while in DSS. He also testified that while he was living with his father, step-mother, and two half-siblings, he was "treated like a dog."

Applicant recalled Counsel telling him his statement to law enforcement was the strongest piece of evidence against him. Applicant now believes Counsel should have challenged the voluntariness of the statement because the statement never made sense to Applicant. Applicant did not recall if his statement was video or audio recorded. He did not recall ever giving a statement. He does not believe he would have ever said the things in the statement. Applicant believes that because there were other people living in the same home, he would have mentioned that in his statement to law enforcement.

With regard to his mental health at the time of his statement, he testified he felt tired, sluggish and unsure. His family was not present when he gave a statement and he was not sure how long he was there to give statement. He was seeing a doctor that was recommended after

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the 2013 mental evaluation, but was unsure of his diagnosis or what medications he was prescribed at that time. He mentioned his history of mental health to Counsel, but Counsel told him it didn't matter and gave him an example of another client on medication.

Applicant asked Counsel about challenging the evidence against him, but Counsel did not challenge anything. Applicant believes Counsel did not look into whether there were other perpetrators of the sexual abuse. Applicant testified he did not pursue a jury trial because he had emotional issues at the time. Counsel told him, "we can go to trial," but Applicant was scared to go to trial. He felt pressured. Applicant just followed Counsel's lead believing he was helping Applicant. Applicant testified his 2013 mental evaluation was not in discovery. Counsel never discussed with him a guilty but mentally ill plea and did not discuss anything about Applicant's mental health and functioning.

Applicant was concerned with his prior conviction for assault mentioned during his guilty plea. The conviction arose from an incident in which he was accused of having raped his girlfriend at the time. However, he denied he raped her and explained he did not plead guilty to rape, but rather a lesser offense of assault. He believed Counsel should have objected to any mention of this prior incident. Applicant further testifies he does not believe a jury would find him guilty. Applicant expressed dissatisfaction with the amount of time he received.

II. Counsel testified to the following:

Counsel has been practicing criminal law exclusively for eight years. Counsel was an Assistant Public Defender at the time he represented Applicant. Counsel received the discovery and reviewed all of it with Applicant. The half-siblings alleged Applicant had sex with them. Counsel watched the CAC videos of the victims' interviews. There was also a detailed post-Miranda statement given to law enforcement by Applicant, which was admitted

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during the guilty plea proceeding and during the PCR hearing, as State's exhibit 1. Counsel testified there were also letters that could be seen as threatening to the mother of the victims, asking her to drop the charges or he would not buy them a place to live. Counsel testified he certainly could have challenged the statements had Applicant wanted to pursue that, but Counsel believed they would not have been successful. Counsel did discuss with him the option, but again, he was not confident in a positive outcome based on Applicant not recalling giving the statement, but admitting it was his signature on the written statement.

Counsel testified he had some records regarding Applicant's mental health and discussed it with him. However, Counsel testified Applicant did not complain about his mental health. Counsel addressed his concerns regarding mental health on the record during the guilty plea, and specifically mentioned Applicant having been diagnosed with ADHD, bipolar disorder, and oppositional defiant disorder. He did not discuss or consider a guilty but mentally ill (GBMI) plea because Applicant denied the allegations. A GBMI would require Applicant to admit his guilt. Additionally, it would require Counsel to prove he could not conform his behavior or that he did not know the difference between right and wrong – and according to Counsel, that was just not the case.

Counsel did not interview the victims, but he did review the CAC interviews. Counsel testified he advised Applicant to plead guilty based on his view of the evidence, but assured Applicant if he wanted a trial, they would go to trial. There were two offers from the State, one of 12 years to plead to third degree CSC with a minor or 15 years for second degree CSC with a minor. Counsel testified they discussed the two options and opted for the second degree charge because the third degree charge carried with it lifetime GPS monitoring.

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Counsel denied ever telling Applicant he had no chance at trial and testified he would never tell any client that. Counsel admitted that Applicant's statement was one of the biggest obstacles in the case and did not think there was a basis to get it suppressed.

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 had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP).

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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 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, Id. The Applicant must overcome this presumption to receive

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relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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 (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. With respect to guilty plea counsel, 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).

Failure to investigate mental health

This Court notes Applicant's 2013 psychological evaluation, Applicant's exhibit 1 from the hearing, assessed Applicant as having a below average IQ within the range of 52-70. While below average, this Court observed Applicant testify and respond to questions posed by this Court, PCR Counsel, and the State and finds Applicant to be fully capable of giving reasoned answers and engaging in meaningful conversation. Furthermore, the report indicates Applicant to be free from any "apparent psychotic symptomatology," "his profile reflects immaturity and emotional lability," and that he is "emotionally dependent on others." The doctor who administered the evaluation did not recommend Applicant to be referred to a psychiatrist. This Court finds nothing compelling in the report that could lead to a finding of ineffective assistance of counsel for not having obtained and reviewed the report.

Counsel's testimony was very credible. Counsel testified he had other mental health records as part of his file for Applicant and he was sure to mention Applicant's mental health the record during the plea hearing. Counsel did not believe that another psychological evaluation

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of Applicant was warranted or that any benefit could be derived from one. Also, Counsel never considered or discussed a GBMI plea because he found it inappropriate for the situation.

I find that not only was Counsel's assessment of Applicant and his case reasonable, but Applicant has entirely failed to prove how Counsel was deficient for failing to investigate Applicant's mental health. The record shows Counsel was aware of Applicant's mental health history and prior diagnoses. Additionally, none of the evidence presented during the hearing prove Applicant was prejudiced by any alleged deficiency. The record reflects Applicant made the decision to plead guilty pursuant to Alford and that decision was made based on sound advice from Counsel.

Failure to investigate

This Court finds Applicant has failed to prove by a preponderance of the evidence that Counsel was ineffective for failing to investigate. Counsel testified credibly that he reviewed all the discovery including the CAC videos of the children's interviews. He also reviewed the statement Applicant gave to law enforcement and saw no basis upon which he could successfully challenge its admissibility. This Court finds Counsel's investigation of the case reasonable in light of professional norms. This Court also notes Applicant told the plea judge, under oath, he had enough time to talk with Counsel about the facts of his case, the legal elements of the offenses, and any possible defenses. (Tr. p. 7, ll. 4-8). Applicant has failed to provide a sufficient reason to be allowed to depart from the truth of those statements made during his guilty plea proceeding. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975)).

II. Involuntary Guilty Plea

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SPRINGFIELD COUNTY

Applicant also asserts his plea was involuntary. The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton, 376 S.C. 138, 654 S.E.2d at 874 (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton, 376 S.C. at 137-38, 654 S.E.2d at 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138-39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 528 S.E.2d 747 (2000) (citations omitted). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (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, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771.

The record fully supports the knowing and voluntary nature of Applicant's plea. Applicant has failed to give a sufficient reason to be allowed to depart from the truth of his statements made during his guilty plea. Specifically, Applicant told the plea judge, under oath, that no one had threatened him or promised him anything to enter his plea and that his decision to enter his plea was "free and voluntary." (Tr. p. 7, ll. 9-17). To the extent Applicant is attacking his guilty plea based on ineffective assistance of counsel, this Court finds Counsel was in no way ineffective, as more fully addressed above. This Court further finds Counsel's advice to plead guilty was sound in light of the evidence the State had against him and the benefit he received by way of the dismissal of two other third degree CSC with a minor charges and concurrent sentences. Applicant has failed to meet his burden of proving his guilty plea was involuntary.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant

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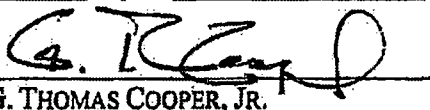
has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

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

AND IT IS SO ORDERED this 12th day of December, 2017.



G. THOMAS COOPER, JR.
Presiding Judge
Seventh Judicial Circuit

C. Cooper, South Carolina

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WITNESSES

Spartanburg County Sheriff's Office

1. SENTENCE HERE ☒

2. REPORT HERE ☒

3. CARD HERE ☒

4. INDEXED ☒

5. COPIES TO WARDEN ☒

6. COPIES TO ATTORNEY ☒

7. ASSOCIATE CLERK ☒

8. JURY ROOM ☒

ARREST WARRANT NUMBER
TRAFFIC VIOLATIONS COPY

Direct Indictment (2014A4210101193)

ACTION OF GRAND JURY

True Bill

MAR 12 2015

Foreperson of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO.

15-GS-42-0952

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

MAR 16 2015

TERM

THE STATE

vs.

John Michael Kirby

Indictment for

CRIMINAL SEXUAL CONDUCT WITH A
MINOR, SECOND DEGREE

SC Code:16-3-0655 (B)

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on MAR 12 2015 the
 Grand Jurors of Spartanburg County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR, SECOND DEGREE

That John Michael Kirby, did in Spartanburg County, on or between the dates of August 5, 2013 and January 27, 2014, commit the crime of Criminal Sexual Conduct with a Minor in the Second Degree in that the Defendant did:

- (1) Engage in sexual battery with the minor, [Minor], who was fourteen (14) years of age or less but who was at least eleven (11) years of age at the time of said incident; or
- (2) Engage in sexual battery with the minor, [Minor], who was at least fourteen (14) years of age but who was less than sixteen (16) years of age at the time of said incident and the Defendant was in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim, [Minor].

Said incident occurred in Spartanburg County, South Carolina, in violation of §16-3-655(B), *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

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


 ASSISTANT SOLICITOR