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October 22, 2018

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

The Honorable Gwen T. Hyatt
Clerk of Court
301 W. Main Street
Dillon, SC 29536

RE: Sammy Scarborough v. State of South Carolina
2017-CP-17-561

Dear Mr. Shearouse and Ms. Hyatt:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

(1) Proof of Service of the Notice of Appeal;
(2) A copy of the Order which is to be challenged on appeal; and
(3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Scarborough in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Scarborough in this appeal.

Yours very truly,

Lance S. Boozer

Enclosures
cc: Johnny E. James, Jr., AAG
Loriene French, OAD
Sammy Scarborough, #141397

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
OCT 24 2018
S.C. SUPREME COURT

APPEAL FROM DILLON COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2017-CP-17-561

Sammy Scarborough, #141397, ...Petitioner,

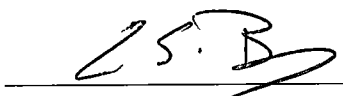
v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Larry B. Hyman, Jr.'s, Order dated October 1, 2018, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on October 20, 2018. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



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PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Johnny E. James, Jr., P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 22nd day of October, 2018.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF DILLON	)	
Sammy Lee Scarborough, S.C.D.C. No. 141397,	)	Case No.: 2017-CP-17-00561
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Sammy Lee Scarborough ("Applicant") on November 2, 2017. Respondent made its return on or about January 31, 2018. The Court convened an evidentiary hearing into the matter on Tuesday, July 24, 2018, at the Darlington County Courthouse in Darlington, South Carolina. Applicant was present at the hearing and represented by Lance S. Boozer, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Kyle M. Hobbs, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Dillon County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dillon County Clerk of Court. Applicant was indicted at the June 2013 term of the Dillon County Grand Jury for two counts of criminal sexual conduct with a minor

(2013-GS-17-00290, -00292), and three counts of disseminating harmful material to minors (2013-GS-17-00291, -00293, -00294). Kyle M. Hobbs, Esq. represented Applicant. W. Shipp Daniel, Esq., of the Fourth Circuit Solicitor's Office, and Kelly W. Hall, Esq., of the South Carolina Attorney General's Office, prosecuted the case. On November 4, 2013, Applicant proceeded to trial before the Honorable Paul M. Burch and a jury. The jury found Applicant guilty of the above five indictments on November 6, 2013. Judge Burch sentenced Applicant to imprisonment for concurrent terms of life for each CSC, and five years for each count of disseminating harmful material.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Kathrine H. Hudgins, Esq., who raised the following issues:

1. Did the trial judge abuse his discretion in refusing to sever seven different indictments naming three different child victims when the State failed to demonstrate that the three groups of alleged offenses were of the same general nature, failed to prove that the offenses arose out of a single chain of circumstances and were provable by the same evidence and the Applicant was prejudiced by the improper joint trial?

2. Did the trial judge err in admitting Rule 404(b) evidence when the State failed to prove that the prior act was relevant and the prior act did not meet the common scheme or plan exception to Rule 404(b)?

3. Did the trial [judge] abuse his discretion in refusing to declare a mistrial after [Victim 2] denied the allegations in one of the indictments and later in the trial the forensic interviewer and the investigator from the Attorney General's Office confirmed that [Victim 2] had denied the allegation contained in the indictment?

4. Did the trial judge err in refusing to direct a verdict of acquittal on the three [counts of] dissemination of obscene material charges when the State did not introduce in evidence any purported obscene material and relied only on the testimony of the child witnesses?

The parties proceeded to oral arguments before the South Carolina Court of Appeals on October 14, 2015. Applicant was represented by Ms. Hudgins. Jennifer Ellis Roberts, of the South

Carolina Attorney General's Office, represented the State. By opinion decided February 24, 2016, the South Carolina Court of Appeals affirmed Applicant's convictions by unpublished opinion. State v. Scarborough, Op. No. 2016-UP-074 (S.C. Ct. App. filed Feb. 24, 2016). Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated May 30, 2017. The Remittitur was issued on June 2, 2017.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Denial of Effective Assistance of Counsel"
    a. "Counsel was ineffective when failing to object to the Prosecution's attempt to introduce prior charges that were never prosecuted by introducing the testimony of Officer Jason Turner and Interviewer Sally Williamson, of which was clearly prejudice to the Applicant and should not have been allowed."
    b. "Counsel was ineffective when failing to object to the repetitive use of questioning by the Prosecution during Direct Examinations of Valerie Williams and Gaye Allen Cook, even though the questions were asked and answered."
    c. "Counsel was ineffective when failing to present the video containing the interviews of the victims [where] the victims admitted that the Applicant had never assaulted them. When counsel agreed to the exclusion of the audio/video, precluding him from mentioning the interviews, violating the Applicant's right to the Effective Assistance of Competent Counsel, even after the Prosecution admitted that the video/audio tapes would be 'damning' to its case."
    d. "Counsel was ineffective for allowing the presentation of pornographic material, even after the investigation revealed no evidence of pornographic material. The allowance of this material is prejudicial to the Applicant and that allowance during Examinations that would determine guilt or innocence, was highly detrimental to the Applicant. Proper Examinations could have resulted in counsel rendering Effective Assistance in accordance with the Rules of Professional Conduct."
2. "Actual Innocence"
    a. "Applicant has maintained his innocence as there does not exist any Direct Evidence and the Circumstantial Evidence that were presented before a

Jury, could be clearly refuted and contradicted, such as the audio/video interview of the alleged victims, were the victims admitted to Law Enforcement that no one had assaulted them, proving the innocence of the Applicant."

Filing by and through counsel on May 24, 2018, Applicant amended his application to allege the following additional grounds for relief:

1. Ineffective assistance of counsel, in that:
    a. "Counsel improperly introduced Applicant's prior charge for CSC.
    b. "Counsel failed to properly object to hearsay."
    c. "Counsel failed to object to testimony that victim was abused at Applicant's home."
    d. "Counsel failed to object to improper vouching for witnesses by the State during closing arguments and inflammatory language calling Applicant a 'predator.'"

Filing by and through counsel on July 11, 2018, Applicant further amended his application to allege the following additional grounds for relief:

1. Ineffective assistance of counsel, in that:
    a. "Applicant believes counsel failed to discharge his duty of due diligence and investigate the facts, witnesses, and evidence in the case."
    b. "Applicant believes counsel failed to have a proper defense for physical evidence in the case."
    c. "Applicant believes counsel failed to have a valid strategy for trial."
    d. "Applicant believes counsel failed to challenge or move to quash the indictments before the jury was sworn; that the indictments were insufficient and the trial court lacked subject matter jurisdiction."
    e. "Applicant believes counsel failed to obtain and show the jury recordings of the victims that provided voluntary statements indicating Petitioner's innocence."

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the

legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

1. Failure to Object to Prior Bad Acts and Improper Introduction by Counsel

Applicant alleges Counsel was ineffective in failing to object to the prosecution's efforts to introduce evidence of prior, unprosecuted allegations of child molestation, and was thereafter further ineffective by introducing the prior allegations himself. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE; see also State v. Lyle, 125 S.C. 406, 118 S.E. 803, 807 (1923); State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). "In order to admit evidence of bad acts not resulting in conviction, the trial court must, as a threshold matter, determine whether the proffered evidence is relevant."

State v. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013) (quotations and formatting omitted). "If the trial judge finds evidence to be relevant, the judge must then determine whether the bad act evidence is admissible under the terms of Rule 404(b) to show, *inter alia*, the existence of a common scheme or plan." Id., 405 S.C. at 497-98, 748 S.E.2d at 241 (quoting State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)) (formatting omitted). "If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it." Id., 405 S.C. at 498, 748 S.E.2d at 241 (citing State v. Gillian, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (20007); Rule 403, SCRE). Nonetheless, as noted above, in a PCR action "when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith, 386 S.C. at 567, 689 S.E.2d at 632.

The parties took up the matter of Lyle evidence pre-trial. (Tr. 17-48). The State sought to introduce the testimony of a fourth victim, aged eight at the time of Applicant's trial, ("Minor") who in 2009 reported to his mother that he had been abused by Applicant. (Tr. 17, ll. 20-23). The matter was not then prosecuted because Minor was only three or four years old at the time. (Tr. 17-18). The trial court then heard Minor's testimony *in camera*, and Minor testified Applicant made him fellate Applicant while in a truck outside of a store. (Tr. 24-28). After Minor finished testifying, the State indicated that although Applicant was not convicted for the allegation, that the Family Court found it occurred by a preponderance of the evidence and had Applicant placed on the sex offender registry. (Tr. 30, ll. 13-21). The State argued Minor's abuse was part of a common scheme or plan and emphasized (a) the oral sex, (b) the extremely young age of the victims, (c) that all the victims were little boys, and (d) that Applicant was in a

position of some authority or control over each of the victims. (Tr. 31-32). Counsel, in reply, provided the trial court a memorandum in opposition to the evidence, argued Minor was not competent to testify, the Minor gave conflicting information during a contemporaneous forensic interview, the State hadn't proven the allegations by clear and convincing evidence, and that Minor's allegation was dissimilar from the charges under at least four of the five factors to weigh. (Tr. 33-41). The trial court found Minor competent, found Minor's testimony clear, concise, and convincing, agreed with the similarities advanced by the State, and granted the State's motion to permit the Lyle evidence. (Tr.46-48). The ruling was final, and later raised to the Court of Appeals, where it was affirmed.

During cross-examination of Investigator Jason Turner, of the Dillon County Police Department, Counsel himself raised the subject of the prior allegations, confronting Turner as to whether he told the forensic interviewer or Queena Murphy about the prior allegations. (Tr. 148-56). Counsel contended to Turner that bringing that information to the attention of the forensic interviewer and a victim's mother tainted their viewpoint and the investigation. (Tr. 150, ll. 6-14; Tr. 152, ll. 3-15; Tr. 154). Counsel maintained the argument through questioning throughout trial that the investigation was tainted from the outset by the prior allegation, and lambasted the investigation in his closing arguments.

At the evidentiary hearing, Applicant testified Counsel never discussed with him his intention to bring out the prior allegations. Applicant claimed he was greatly surprised during Turner's cross-examination when Counsel grilled the investigator on the subject. Counsel testified that since the Lyle evidence was coming in, and since the issue was preserved for appeal, he made the strategic decision to strike at a point of strength in the State's case against Applicant. Counsel explained he wanted to emphasize that Applicant was never charged after

the allegations by Minor. Counsel offered his theory of the case as to the Lyle evidence, as reflected in his questioning above summarized: the allegations were known in the community, led the children to making the allegations against Applicant, and tainted every part of the investigative process. Counsel noted that, but for the Court's final ruling to permit the Lyle evidence, he never would have mentioned the prior allegations, and had different strategies planned out depending on whether the Lyle evidence and whether the forensic interviews were admitted.

The Court finds Counsel's conduct on this issue neither deficient nor prejudicial to Applicant. First, Counsel very clearly and vociferously objected to the admission of the Lyle evidence, such that Applicant's allegation that he failed to do so is factually without merit. Second, Counsel articulated his reasoning for bringing up the Lyle evidence himself as a strategy of attempting to reframe harmful evidence into something potentially beneficial to Applicant; as such, this Court will not deem his conduct ineffective. Third, as the Lyle evidence firmly admitted by the trial court, and its admission has been confirmed as appropriate by the appellate courts, the Court is constrained to find any prejudice against Applicant—Counsel didn't bring it in and there does not appear to have been a means by which he could have kept it out. For all of these reasons, the Court finds Counsel very effectively dealt with the Lyle evidence, and Applicant's request for relief by way of this allegation is **DENIED**.

2. Failure to Object to Repetitive Questioning

Applicant alleges Counsel was ineffective in failing to object to repetitive questioning by the State of witnesses Valerie Williams and Gaye Allen Cook. At trial, Investigator Valerie Williams, of the South Carolina Attorney General's Office, testified that she met with the victims in preparation for trial, and that two of the victims disclosed abuse to her and one of the victims

did not so disclose. (Tr. 341-43). Gaye Allen Cook, a clinical child and family therapist in private practice in Florence, South Carolina, testified as an expert in child abuse assessment. (Tr. 363-87). Cook explained how extremely minor victims of sexual abuse can feed out details of their experiences over time, and reasons why they might give conflicting information about their experiences.

At the evidentiary hearing, Counsel explained that he did not object to questioning of Williams' interviews with the victims because the testimony included a nondisclosure by one of the witnesses, which Counsel prioritized. Counsel generally did not find the questioning by the State to be repetitive, but noted that it frequently could have appeared as much to Applicant and other lay observers because the State had to so narrowly and specifically question witnesses to avoid running afoul of hearsay restrictions.

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. The Court agrees with Counsel's judgment of the questioning in that it was not repetitive, but merely seemed as much due to the nature of the questioning and number of witnesses. As such, objections on that basis would not have been appropriate. The Court recognizes Counsel's articulated strategic reasoning for permitting Williams to again report disclosures and nondisclosures by the victims, and therefore cannot find him ineffective in that regard. The Court also can find no evidence in the record to show how anything at trial would have changed had Counsel objected on this basis at any point. Accordingly, Applicant has failed to satisfy either prong of Strickland, and his request for relief by way of this allegation is **DENIED.**

3. Failure to Introduce Forensic Interview Video

Applicant alleges Counsel was ineffective in failing to introduce and display the video recordings of each victim's forensic interview. South Carolina law provides that in a criminal

proceeding, an out-of-court statement made by a child under the age of twelve is admissible if four requirements are met:

> (1) The statement was given in response to questioning conducted during an investigative interview of the child;
> (2) An audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except [as otherwise provided];
> (3) The child testified at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
> (4) The court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

S.C. Code ann. 17-23-175(A); see also State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015) (affirming constitutionality of statute permitting admission of tape).

At trial, after an aborted plea colloquy, Counsel and the prosecution informed the trial court that the parties had agreed to not introduce the videos of the forensic interviews, but rather the parties would question the forensic interviewer and the victims as to their involvement in the forensic interview. (Tr. 93-94). Accordingly, forensic interviewer Sally Williamson, of the Care House of the Pee Dee, testified to the disclosures and non-disclosures of the victims at length. (Tr. 304-36). During closing arguments, Counsel provocatively began to reference the existence of the forensic interview video, only to be promptly cut off by an objection from the State, after which the jury was sent to the back. (Tr. 423, ll. 10-25). Judge Burch expressed his *considerable* displeasure about the possibility of Counsel arguing the absence of the video after consenting to its exclusion, but concluded he had no means of enforcing the agreement within the confines of the trial. (Tr. 424, ll. 1-8). After extended dispute between the parties as to the contours of their agreement, Judge Burch indicated his intent to speak with the Chief Public Defender "about who gets appointed cases, conflict cases[,]" otherwise permitted the argument, and called the jury back in. (Tr. 425-28). Shortly after Counsel resumed his argument, the Court

interrupted and informed the jury that "[t]here was an agreement that [the videos] would not come in, and that's all I'm going to say." (Tr. 428, ll. 7-22). Counsel's objection to the interruption was overruled.

At the evidentiary hearing, Applicant attested he never saw the forensic interviews, but understood they included denials on the part of the victims. Applicant denied Counsel ever mentioned what his trial strategy was.

Counsel testified that his decision to agree to the exclusion of the forensic interview tapes was a strategic decision: Counsel believed examining the interviewer instead of admitting the tapes would permit him to get the victim's denials on the record without also admitting damning remarks and conduct captured on the videos. For example, Counsel reported that each of the victims mentioned being exposed to pornography, and each of the victims reported seeing other children be sexually battered. Counsel noted that though he could cross-examine the forensic interviewer, he could not cross-examine the interview itself. Counsel recalled talking to Applicant about the videos, reviewing their content with Applicant, and understood Applicant to have seen the videos, but could not specifically recall watching the videos with Applicant.[1] Counsel additionally recalled wishing to grill the prosecution for not bringing in the tapes and recalled the heated colloquy outside of the jury's presence with the solicitor and Judge Burch. Counsel noted that he successfully emphasized the prior denials by the victims through the testimony of the victims, the State's other witnesses, and through the forensic interviewer.

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. Counsel articulated an extraordinarily well thought out strategic reason to favor the testimony of the forensic interviewer over admission of the forensic interview tapes. But for Counsel's strategic

[1] The videos were initially admitted as Applicant's Exhibit #1, but were stricken from the record at the end of the hearing by consent of the parties and stipulation to their contents.

approach, the forensic interview tapes, and the full extent of their damage, would have fallen upon Applicant. The Court will not disturb the valid tactical considerations of Counsel, and his reasoning articulated, cannot find him ineffective. See Smith, 386 S.C. at 567, 689 S.E.2d at 632. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

4. Failure to Object to Presentation of Pornographic Materials

Applicant alleges Counsel was ineffective in failing to object to the presentation of pornographic material. The Court will not belabor this allegation—no pornographic materials were presented at trial. Indeed, the lack of pornographic materials formed the basis of Counsel's motion for a directed verdict on the obscene dissemination indictment. (Tr. 389-95). Applicant has failed to meet his burden of proving either prong of Strickland by way of this allegation, and his request for relief thereto is **DENIED**.

5. Failure to Object to Hearsay – Minor 3's Report on Minor 2's Abuse

Applicant alleges Counsel was ineffective in failing to object to hearsay on the part of Minor 3 during his testimony that he heard about Minor 2's abuse. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter of asserted." Rule 801(c), SCRE; Thompson v. State, 423 S.C. 235, 240, 814 S.E.2d 487, 489-90 (2018). Hearsay is not admissible except where provided the South Carolina Rules of Evidence or by statute. Rule 802, SCRE.

At trial, the State examined Minor 3 as to whether he had ever seen Applicant's genitals, which, Minor 3 initially confirmed before shifting his testimony:

Q. Have you ever seen a grown ups private parts?

A. Yes.

Q. Whose private parts have you seen?

A. Sammy.

Q. Sammy's. When did you see Mr. Sammy's private parts?

A. Suck it – made [Minor 2] suck his wee wee.

Q. Did you see him make [Minor 2] suck his wee wee?

A. Yes, ma'am.

Q. Can you tell me about that?

A. It was when we were living in the other house. [Minor 2] came in and said that.

Q. Did you see it with your eyes? Yes. Where were you?

A. Home.

Q. You were at home. Where was [Minor 2] when that happened?

A. At his house.

Q. Whose house?

A. Sammy.

Q. So you didn't see it. Did you hear about it?

A. Um hum.

(Tr. 230, ll. 2-22). Counsel did not object.

At the evidentiary hearing, Applicant asserted all of the evidence against him was hearsay and entirely fabricated. Counsel conceded the testimony was hearsay, but noted that Minor 3's testimony backtracked on his prior assertion of having personally seen Applicant perform fellatio on Minor 2, which he deemed beneficial to Applicant, so he did not object. Counsel noted that he wanted denials and nondisclosures to come in to evidence, and as such granted some leeway to otherwise objectionable material with that goal in mind. Counsel explained his overarching strategy, after his unsuccessful effort to keep out the Lyle evidence, was to show and argue the victims' allegations and investigation were tainted by the commonly known prior allegations made against Applicant.

The Court finds no ineffectiveness on the part of Counsel. Counsel articulated a valid specific tactical decision as to the testimony at issue, finding the value of Minor 3's denials and recantation outweighed the cost of his hearsay testimony. Counsel additionally articulated a broader strategy in dealing with hearsay testimony aimed to maximize the jury's exposure to denials in exchange for permitting arguably objectionable testimony. Counsel further articulated an overarching theory of the case that the allegations against Applicant were not true, but the result of the children (and law enforcement) hearing talk of other allegations; Minor 3's testimony that he merely heard of abuse would go to support that theory. Each of these strategic explanations independently, let alone altogether, foreclose any finding of ineffectiveness. See Smith, 386 S.C. at 567, 689 S.E.2d at 632. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

6. Failure to Object to Hearsay – "Found out what happened"

Applicant alleges Counsel was ineffective in failing to object to alleged hearsay on the part of witness Hope Owens. At trial, Owens, mother to Minor 1, testified to his disclosure of abuse in Applicant's backyard, but explained she did not immediately go to law enforcement. (Tr. 241, ll. 10-25). The State asked Owens what prompted her to finally go to law enforcement, to which she replied: "I found out what happened to Quinae's two kids, [Minor 3] and [Minor 2]." (Tr. 242, ll. 1-4). Counsel did not object.

At the evidentiary hearing, Counsel explained he did not object because Owens did not state precisely what it was she found out about "what happened." Counsel opined that without saying what it was she found out, Owens' testimony was therefore not hearsay.

The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. The Court agrees with Counsel's read of the testimony—it asserts no truth and reports no out-of-court

statement, but rather vaguely refers to other allegations as the motivation for Owens' decision to report Minor 1's disclosure of abuse. It is, accordingly, not hearsay. Furthermore, the Court does not perceive a reasonable probability that the exclusion of this vague and fleeting testimony would have resulted in a different outcome. Accordingly, Applicant has failed to meet his burden as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

7. Failure to Object to Hearsay – "Mr. Sammy's House"

Applicant alleges Counsel was ineffective in failing to object to alleged instances of hearsay where witnesses, recalling disclosures of the time and place of abuse, indicated the children identified the location of abuse as "Mr. Sammy's House." A statement is not hearsay if:

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident[.]

Rule 801(d)(1)(D), SCRE. The rule limits corroborating testimony to the time and place of the assault(s), and any other details or particulars, including the perpetrator's identity, must be excluded. Thompson v. State, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (citing Watson v. State, 370 S.C. 68, 71-72, 634 S.E.2d 642, 644 (2006)).

At trial, numerous witnesses testified to disclosures by the victims of sexual abuse, usually unclear on time, but consistent that the location of the abuse was "Mr. Sammy's house," "Mr. Sammy's backyard," "Mr. Sammy's barn," or some permutation thereof. (Tr. 123-24; Tr. 124-25; Tr. 128-29; Tr. 164, ll. 14-23; Tr. 241, ll. 10-17; Tr. 323, ll. 3-13; Tr. 341-42; Tr. 342-43). One witness, Natasha Funderburk, recalled her child disclosed abuse occurring in "Uncle Sammy's truck." (Tr. 280, ll. 13-23).

At the evidentiary hearing, as previously noted, Applicant asserted all of the evidence against him was hearsay and entirely fabricated. Counsel testified that the "place" testimony could not be presented more narrowly than "Mr. Sammy's house," and that he did not object to the limited testimony. On cross-examination, Counsel explained Applicant had an open, friendly, and welcoming home. Counsel agreed that "Mr. Sammy's house" was not tantamount to "Mr. Sammy" and that although the location was identified as Applicant's home, it was possible somebody else could have abused the children at that location.

The Court finds no deficiency on the part of Counsel. As indicated by Counsel, corroborative testimony to the location of abuse could not reasonably be more limited. The identity of the owner of the location where abuse occurs is not tantamount to identity of the perpetrator. Importantly, this case pertains to the disclosures of abuse made by extremely minor children, whose conceptions of the surrounding world are still developing. It would be entirely unreasonable, and all but eliminate the applicability of Rule 801(d)(1)(D), to hold a child's disclosure of location must invariably be excluded where the child could only associate the location of abuse with the person in dominion and control of that location, where said person is the alleged perpetrator. Put another way, one cannot expect a three or four year old to disclose the location of their abuse in a particular, narrow form, such as an address or GPS coordinate. Accordingly, Applicant has not met his burden of showing a deficiency on the part of Counsel, and his request for relief by way of this allegation is **DENIED**.

8. Failure to Object to State's Closing Argument – "Predator"

Applicant alleges Counsel was ineffective in failing to object to the State's description of him as a "predator" in its closing argument. "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Brown v. State, 383 S.C. 506,

515, 680 S.E.2d 909, 914 (2009) (quoting Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004)). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. (quoting Von Dohlen, 360 S.C. at 609-10, 602 S.E.2d at 744). However, a solicitor should prosecute vigorously, and the argument must be reviewed in the context of the entire record. State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

At trial, the State invoked the term "predator" in bookends to its opening statement. (Tr. 110, ll. 17-21; Tr. 115, ll. 2-7). The State again turned to the term in to begin its closing argument, defining it in the context of the case:

> The word predator is defined as one who preys, destroys or [devours]. For [Minor 2], [Minor 3], and [Minor 1], Sammy Scarborough wasn't just a neighbor. He was a predator. He preyed on these little children. He destroyed their chance at a normal life, and he devoured their innocence.
>
> The evidence, the true, tough, raw evidence that you heard from that witness stand screamed that Sammy Scarborough is a predator.

(Tr. 402-03). The State described Applicant as a predator once more in the midst of its closing argument, and substantially repeated the start of its closing argument at the end. (Tr. 410, ll. 20-22; Tr. 420, ll. 4-8). The State described Applicant as a predator one final time during sentencing, in arguing the court should sentence Applicant to life in prison. (Tr. 474, ll. 18-22).

At the evidentiary hearing, Counsel expressed his opinion that the use of the word "predator" was not objectionable. Counsel testified the word described the nature and circumstances of the conduct alleged.

The Court finds no deficiency on the part of Counsel. The Court agrees that the term "predator," if it is suitable for use in any argument in any case, is suitable here. The State's use of it was powerful, impassioned, compelling, and entirely supported by the facts in the record. The rules which define the limits of appropriate argument do not foreclose aggressive and rhetorically potent argument, but rather are intended to ensure arguments do not unfairly go beyond the trial record, or otherwise call on the jury to perform some duty other than impose justice on a defendant based on the evidence appropriately admitted through the trial process. See, e.g. State v. Rice, 375 S.C. 302, 335-36, 652 S.E.2d 409, 426 (Ct. App. 2007) (overturned on other grounds by State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011)) (affirming argument that asked jury to give the victim's wife peace and the victim justice); Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010) (reversing imposition of death sentence where solicitor described a Muslim defendant as a "domestic terrorist" and referred to the September 11th attacks was without support in a case that had nothing to do with terrorism); Brown, supra (finding defense counsel should have objected to solicitor's argument calling upon jury to "speak up" for the child victim, but finding no prejudice). The State is entitled to argue in favor of guilt, and to condemn contemptible conduct. As such, there was no basis for Counsel to object, Applicant cannot meet his burden of showing deficiency on the part of counsel, and his request for relief by way fo this allegation is **DENIED**.

9. Failure to Object to State's Closing Argument – Vouching

Applicant alleges Counsel was ineffective in failing to object to alleged vouching in the State's closing argument. "Generally, the assessment of witness credibility is within the exclusive province of the jury." Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016) (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

Thus, solicitors may not make explicit personal assurances or indicate there is information not presented which supports the testimony, i.e. vouch, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. Id., 416 S.C. at 250, 785 S.E.2d at 477 (citing Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004)); Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002)). "Thus, solicitors must confine their closing remarks to the record and the reasonable inferences that may be drawn therefrom." Id. (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)).

At trial, near the end of the State's closing argument, the solicitor asserted: "Let's be real. Five, six, seven and eight year olds don't make this stuff up. They just don't." (Tr. 420, ll. 2-4). Counsel did not object. At the evidentiary hearing, Counsel testified he did not view the argument as vouching, but rather an argument that the young age of the victims meant there must be some basis or source for their claims.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. Counsel is correct in his determination that the argument did not constitute vouching. Prohibitions against vouching in closing argument do not foreclose any arguments for or against the credibility of witnesses. The remark offered no explicit personal assurance, or information beyond the record, but reasonably argued from the age of the victims that the victims should be afforded credibility. As such, there was no basis for objection. Even if the remark was objectionable, the single line at the end of closing argument does not give this Court cause to believe there is a reasonable probability that if the remark were excluded the outcome of trial would have been different. Accordingly, Applicant has failed to meet his burden as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

10. Failure to Investigate

Applicant alleges Counsel was ineffective in failing to adequately investigate the facts, witnesses, and evidence in this case. In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

The Court will not belabor this allegation—Applicant did not present what, if anything, Counsel would have discovered had he more thoroughly investigated the case. To the contrary, review of the complete trial record reveals Counsel developed theories of 3rd party guilt based on prior allegations against another individual in the neighborhood by the name of Stefan, and impeached witness Natasha Funderburk with her own prior claims of abuse which went unprosecuted, tactics which could have only been developed upon considerable independent investigation. Furthermore, Counsel testified briefly to his investigation of the above, and to his investigation of the scene of the crime. For all of these reasons, the Court finds no deficiency on the part of counsel, nor prejudice therefrom, and Applicant's request for relief by way of this allegation is **DENIED.**

11. Failure to Prepare Defense for Physical Evidence

Applicant alleges Counsel was ineffective in failing to have a proper defense for the physical evidence in the case. The Court will not belabor this allegation—a complete review of the trial record reveals there was no physical evidence in the case, as is unfortunately often the case in CSC minor trials. Accordingly, Applicant cannot meet his burden as to either prong of Strickland by way of this allegation, and his request for relief thereby is **DENIED**.

12. Failure to Prepare Strategy for Trial

Applicant alleges Counsel was ineffective in failing to prepare a valid strategy for trial. Applicant claimed at the evidentiary hearing that Counsel never mentioned to him a trial strategy. Applicant did not offer what strategy Counsel should have taken, other than his insistence that Counsel should have introduced the forensic interview videos, previously addressed. Counsel testified he had a long talk with Applicant about the strategies they would pursue at trial, and described a three-goal approach: (1) keep out the Lyle evidence, (2) keep out the forensic interview videos, and (3) get as many of the victims' denials and nondisclosures into evidence as possible. Counsel also articulated an overarching theory of the case, previously noted—the children and law enforcement were tainted by the prior allegations against Applicant. Counsel asserted he enjoyed enough time to adequately prepare for trial.

This Court closely observed each of the witnesses, and has considered their testimony in light of the entire record. The Court affords great credibility to Counsel's testimony and affords no credibility to Applicant. The trial record reflects the strategy Counsel presented at the evidentiary hearing and reflects thorough preparation and strategic consideration. Applicant's allegation is entirely without merit, meets neither prong of Strickland, and his request for relief thereto is **DENIED**.

13. Failure to Quash Indictments for Lack of Subject-Matter Jurisdiction

Applicant alleges Counsel was ineffective for failing to quash the indictments against him for want of subject-matter jurisdiction. The Court will not belabor this ground—Applicant's allegation is without merit. "Circuit courts obviously have subject matter jurisdiction to try criminal matters." State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). As such, Applicant's request for relief by way of this allegation is **DENIED**.

B. Actual Innocence

Applicant alleges he is actually innocent, and that the evidence against him was clearly refuted at trial. Claims by an Applicant that he or she is actually innocent, is not guilty, or that the evidence against him or her was insufficient to prove guilt are not cognizable grounds for post-conviction relief absent a claim of ineffective assistance of counsel or newly discovered evidence. S.C. Code Ann. § 17-27-20(a)(6) ("[T]his section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction."); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975) (interpreting the statute as barring such claims as inappropriate for consideration under the act); Dickson v. State, 247 S.C. 153, 156, 146 S.E.2d 257, 258 (1966) ("The allegation that petitioner is not guilty does not raise a matter for consideration by habeas corpus."). Accordingly, Applicant's request for relief on grounds that he is actually innocent is **DENIED**.

[*Conclusion and signature on following page*]

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 1 **day of** Oct **, 2018.**

LARRY B. HYMAN, JR.
Presiding Judge
Fourth Judicial Circuit

Conway, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF DILLON Sammy Lee Scarborough, Plaintiff(s), -vs- State of SC, Defendant(s).	)))))))	IN THE COURT OF COMMON PLEAS 4th JUDICIAL CIRCUIT CASE NO.: 2017CP1700561 APPOINTMENT OF COUNSEL OR GAL (*Select one.*) ☒ ORDER ☐ AMENDED ORDER

TYPE OF CASE/PROCEEDING: (*Check one.*)

☒ Post-Conviction Relief (PCR)/habeas case	☐ Adoption	☐ Juvenile
☐ SVP case	☐ Custody and/or Visitation	☐ Abuse and Neglect
☐ Minor Name Change	☒ Other: Post Convict Rel 500	

It appears Sammy Lee Scarborough, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (*Select only one.*)

☐ counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.

☐ counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:

☐ counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.

☐ court appointed counsel has obtained , Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.

☐ Other:

Therefore, it is ordered that hereby is appointed as (*Select one.*)

☒ counsel ☐ lead counsel (*if capital PCR case*) ☐ guardian ad litem

for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

☐ (*If Death Penalty PCR Case*) It is further ordered that , Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED
December 4, 2017

☐ Circuit Judge ☐ Clerk of Court

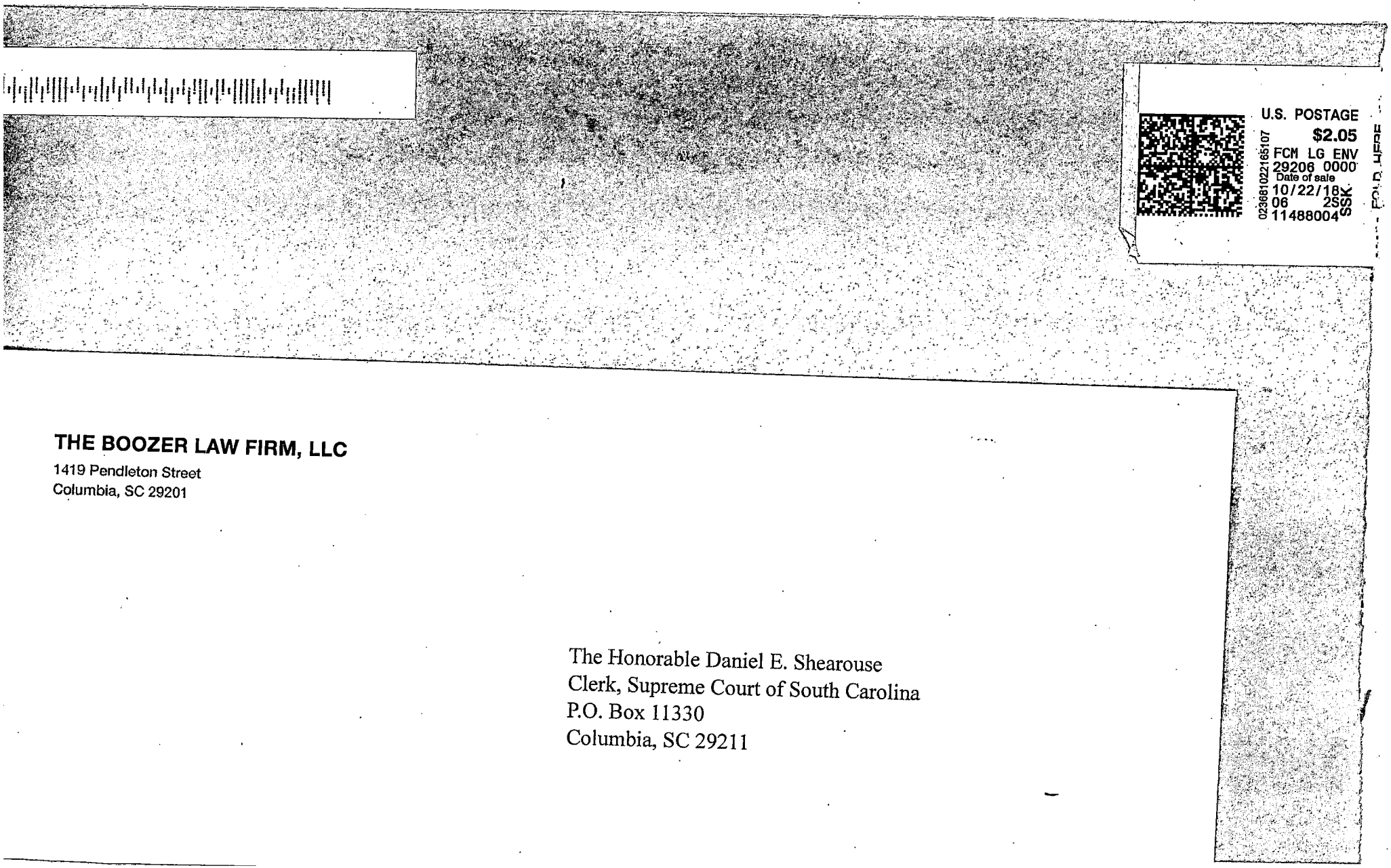
Plaintiff Attorney:

Lance Boozer	
807 Gervais St Ste 203	
Columbia SC	

Defendant Attorney:

State of SC	Johnny Ellis James Jr.
	PO Box 11549
	Columbia, SC 29211

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.



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