VOLUME III OF III

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

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Appellate Case No. 2017-001877
Circuit Court Case No. 2014-CP-32-04769

LANCE AUSTIN WILLIAMS, #345477

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPENDIX

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*Applicant's Exhibits 3-6 are photographs that are not part of this Appendix, but were separately transported.

and Mr. Snell as to what their conversations were. Certainly the way he testified here today I would have liked to have had him. I mean, that would be a crucial piece of testimony.

Q. If he had told in a letter to Mr. Snell that he believed his expert opinion was the defendant's rendition of what happened was accurate and he was not, he didn't commit any sort of sex crime?

A. Well, that would be helpful also. Yes. That in and of itself would have been helpful.

Q. Okay. But you had no expert to counter Dr. Luberoff, correct?

A. That's correct.

Q. And you heard Dr. Friedlander. He would have been an expert to counter Dr. Luberoff, correct?

A. Yes.

Q. She's a pediatrician. He's a pathologist, right?

A. Correct.

Q. She as a pediatrician according to her testimony had a six week course in child abuse, right?

A. Correct.

Q. He's a forensic path -- not a forensic pathologist, but a clinical pathologist who has opinions about what the physical evidence, the injuries to the body, how they occurred, correct?

A. Yes.

Q. Okay. So if you had been aware of Dr. Luberoff -- Forget the conversations for a moment. We can deal with those later on. But the testimony as we heard here today, would you want to have put him on the stand?

A. Yes.

Q. Okay. And was it prejudicial to your case and Mr. Williams' case not to be able to put him on the stand?

A. Well, the testimony would have been beneficial.

Q. But is it prejudicial not to have that testimony?

MS. VALENZUELA: He asked a question. He answered the question.

MR. HARPOOTLIAN: He did not, Your Honor. He obscured a little bit.

BY MR. HARPOOTLIAN:

Q. I know this is tough. You're a friend of Mr. Snell?

A. Yes.

Q. Okay. I don't want to break up a friendship here, but that witness not being - you weren't told about him. You didn't know about him. Was it prejudicial not to have an expert who would have countered Dr. Luberoff?

THE COURT: Hang on. You want to make an objection?

MS. VALENZUELA: Yes. That's my same objection. Asked and answered.

THE COURT: I'm going to let him answer it but I

remember his first answer.

BY MR. HARPOOTLIAN:

Q. Go ahead.

A. I guess it depends on the definition of prejudicial. Did it help his case? Would it have helped his case? I think so. Now, whether the jury would have bought it, I don't know.

Q. Well, that's not what I'm - I'm not asking whether the jury would have bought it. It in terms of preparing and presenting the case, was it prejudicial? That's what I mean by prejudicial.

MS. VALENZUELA: Okay. I'm making a different objection. Calls for a legal conclusion because he's already explained his understanding of the word prejudicial and Mr. Harpootlian doesn't like it and so he's asking for a different definition of prejudicial and that's up to the Court to decide the legal definition based on the testimony that you have heard today.

THE COURT: I'll sustain that one.

MR. HARPOOTLIAN: All right.

BY MR. HARPOOTLIAN:

Q. Now, let me talk to you about a couple of other things. Was there a question from the jury during its deliberations?

A. Yes. I don't remember what it was but there was a

question.

MR. HARPOOTLIAN: Any objection to introducing this into evidence? It's already part of the court exhibit.

MS. VALENZUELA: No. No objection I mean.

(Whereupon, Plaintiff's Exhibit #10 marked for identification.)

BY MR. HARPOOTLIAN:

Q. Plaintiff's 10 is a copy of a court's exhibit number 2 from the trial file. Tell me, there were two - that's a question from the jury. Do you remember that now?

A. Yeah.

Q. Okay. And the first question is what?

A. Can we review that transcript of Dr. Luberoff testimony or the transcript of Dr. Luberoff testimony.

Q. Okay. And the second question is?

A. Can we get a copy of the, I guess, a state law related to criminal sexual conduct. Specifically are interested in words related to penetration.

Q. Okay. So they wanted two things. They wanted a transcript. I suspect all you did was play it back?

A. I assume. I don't recall.

Q. No transcript ready.

MS. VALENZUELA: The transcript says that they offered it. It was not played.

MR. HARPOOTLIAN: It was not played.

MS. VALENZUELA: It was not played. There was no -- Just making sure we are all on the right page. The note comes out and then the jury is brought out and the judge says I don't have a transcript so it would have to be played out for you and then I can do the charges and then the jury sent the second note that you have made part of the same exhibit.

MR. HARPOOTLIAN: No additional information needed.

MS. VALENZUELA: And I'm assuming that that's the same note.

MR. HARPOOTLIAN: Well, I'll live with that. I'll live with that. I'm fine. I'm fine. But they asked for --

THE COURT: The instructions for CSC were given?

MR. HARPOOTLIAN: Yes, sir.

THE COURT: But no testimony was played and no transcript of the testimony was provided.

MS. VALENZUELA: I actually thought that the judge offered to say I can recharge you guys and they went back and then they sent the note without anything being done. But if you give me a second I can --

MR. HARPOOTLIAN: For the purposes of the record I'll concede that's correct.

BY MR. HARPOOTLIAN:

Q. What I wanted to show was the jury had a question

about two things. Luberoff's testimony and we specifically are interested in words related to penetration, okay? So there was a focus by the jury you knew at this point --

MS. VALENZUELA: What was that last thing? What? Focused on what?

MR. HARPOOTLIAN: We are specifically interested in words related to penetration.

THE COURT: That's from the jury note?

MR. HARPOOTLIAN: The jury note.

BY MR. HARPOOTLIAN:

Q. So obviously the intricacies of the law and penetration were in the jury's mind, correct?

A. Yes.

Q. And you knew that was the critical issue?

A. Yeah. I always thought it would be. Yeah.

Q. And there was no dispute that the child was penetrated, correct?

A. Not the vagina but the genital area.

Q. Correct. And it doesn't require penetration of the vagina to violate the statute?

A. Right.

Q. Because penetration of the genital area is a violation of the statute unless as you asked Dr. Luberoff it was a medically recognized procedure, right?

A. Right.

Q. Not that a doctor did it, but it was medically recognized; is that correct?

A. That's correct.

Q. And you even asked her about that in the abstract. But you had nobody there to say in this case it was done for medically recognized, right?

A. That's correct.

Q. And Dr. Friedlander would have been able to say that?

A. That's the way he testified today. Yes.

Q. Right. Okay. Now, from a trial strategy standpoint the SANE nurse, Dr. Clary that put pictures in and testified, she was not identified at any point as an expert witness; is that correct?

A. I don't recall her being an expert.

Q. You objected in the transcript saying she hadn't been identified; is that correct?

A. Whatever it says. I don't recall.

Q. Okay. Well, for purposes of the record I don't think anybody disputes that you objected, saying you objected. You said she hasn't been recognized - she hasn't been named as an expert witness.

A. Okay.

Q. And then it just sort of goes on. Now, if somebody has not been named as an expert witness, what --

MS. VALENZUELA: Objection to relevance. Just the same Rule 15.

THE COURT: Okay. All right.

BY MR. HARPOOTLIAN:

Q. If somebody is not named as an expert witness, what avenues do you have to deal with that?

A. Well, they are not supposed to give opinions at that point.

Q. Right.

A. So you could move to strike any opinions she gave. I mean, she can still testify as to what she saw.

Q. Correct. But no opinions?

A. No opinions.

Q. But she was allowed to give opinions, correct? Right?

A. You know, I did not review that testimony.

Q. Okay. But if she was allowed to give opinions and you did not object to those, you were cross examining her, she was qualified an expert and allowed to give opinions and you raised no objection to that, was that error?

MS. VALENZUELA: Objection.

MR. HARPOOTLIAN: Strike that. Strike that.

BY MR. HARPOOTLIAN:

Q. Was there some strategic reason you didn't do that?

A. No.

Q. Okay.

A. I don't remember what the opinions were, but I assume they weren't helpful to us so... There would be no reason for me not to object to --

MS. VALENZUELA: Well, Your Honor, I object at this point because he has no -- He's saying that he doesn't remember what happened here so he's positing what may --

THE COURT: For the Court's understanding, was this nurse qualified as an expert or not?

MR. HARPOOTLIAN: Yes.

THE COURT: I know she was called as a lay witness and then was --

MR. HARPOOTLIAN: Qualified as an expert. Your Honor, let me find the pages.

THE COURT: That's all right. That's all right. I don't want to see it right now as long as I have that fact in my head.

MS. VALENZUELA: She is qualified but I would ask that he point to where she offers the opinion and let Mr. Floyd review that real quick so he can answer that question.

MR. HARPOOTLIAN: Okay.

THE COURT: That's fine. I don't need to see that

right now. Just a bit curious.

MR. HARPOOTLIAN: Okay. If we go to page 229. It's in the record already, Your Honor. If I could publish this just to educate.

THE COURT: Okay.

MR. HARPOOTLIAN: It says, "Ms. Mayes: Your Honor, at this time the State would offer Marlena Clary as an expert in the field of forensic nurse examination. Mr. Floyd, do you have any voir dire? Mr. Floyd: No, Your Honor. I'm a little surprised because she's not identified as an expert in the State's witness list they provided us. The Court: Well, I'll certainly allow you to voir dire Ms. Clary if you would like on that regard. Mr. Floyd: That's okay, Your Honor. I don't have any questions."

She is then qualified as an expert and then she goes through her examination of the child. And on page 281 she is testifying about the majora. We heard about that. That's a part of the labia. Are these normal or abnormal findings? Abnormal. She describes it. So she gave some opinions. I can't find the sexual abuse opinion. But give me just a second. Let me have my associate look at this so we don't stop. I want to go to another area. Here you go.

BY MR. HARPOOTLIAN:

Q. Let's talk about Dr. Luberoff. Based on the documents we have seen, Dr. Luberoff is designated as an expert and I guess you have to do that in response to Rule 5; is that right?

A. Yes.

Q. I mean, if the process works you serve a Rule 5, criminal rules of procedure 5. They have to give you names of experts, documents, statements, right?

A. Correct.

Q. And then they serve a reciprocal one in which they ask you for basically the same things. Now, as I read Rule 5, they have got to give you that within 30 days, right?

A. Well, that's what it says, but it's not followed very well.

Q. Well, that's the rule?

A. Yeah. I know that rule says that.

Q. Okay. And If they don't give it to you within 30 days, then it has to be done pursuant to further order of the court I believe the rule says. Are we in agreement on that?

A. Right.

Q. Okay. Now, you received designation of her, Luberoff, as an expert five days before trial according to the documents that were introduced.

MS. VALENZUELA: Objection. He has no personal knowledge of that because he wasn't involved in the case

at that time.

BY THE WITNESS:

A. I - I don't -- I see what you're saying but I have no knowledge.

BY MR. HARPOOTLIAN:

Q. Well, let me show you a document.

THE COURT: He stated he has no knowledge. If he wasn't in the case, he wouldn't know. You can show him the document.

MR. HARPOOTLIAN: I know it's an exhibit, but I don't know where it is, Your Honor, without tearing up everything here looking for it.

BY MR. HARPOOTLIAN:

Q. Assume for the purposes of my question that the notice of Dr. Luberoff came five days before you were involved.

MS. VALENZUELA: Your Honor, the witness said that he doesn't know and then I'm sorry that Mr. Harpootlian cannot find the document to refresh his recollection but he can't do that by asking a question that provides that information.

MR. HARPOOTLIAN: Well, let me do this.

THE COURT: It's in the record.

MR. HARPOOTLIAN: Yes, sir.

THE COURT: He was not notified until after Ms.

Mayes took over the case which was within 12 days before trial. We can leave it there. I mean, that's an undisputed fact.

BY MR. HARPOOTLIAN:

Q. I have an e-mail from the Solicitor to -- Here it is right here. I apologize. Plaintiff's exhibit number 1. This is on Tuesday -- Wait a minute. On Friday, March 25th. That's before your - four days before you were involved. This e-mail goes from Suzanne Mayes to James Snell with a list of witnesses. Have you seen this list before?

A. No. I don't think I have ever seen that e-mail.

Q. And it says, denotes expert witnesses as follows. Susan Luberoff, David Ford, Matthew Garber. The only one called was Susan Luberoff, correct?

A. Correct.

Q. Now, the notice five days before trial would violate Rule 5 in your opinion?

A. Yes.

Q. Okay. Did Mr. Snell make you aware of that?

A. No. I had not seen that e-mail.

Q. Okay. If you knew that you were having experts -- Well, first of all, an expert designated five days before trial, would that be grounds to move for a continuance?

A. Yes.

Q. Okay. Let me say this: You got involved in this

case 24 hours or 48 hours beforehand. Would you have wanted a little more time to get ready?

A. Well, it depends on what my role was.

Q. Right.

A. Any more time is always useful, okay?

Q. Right.

A. I didn't feel like I needed more time just to be there and participate in the trial.

Q. And second seat him?

A. Yeah.

Q. I mean, by second seat, I mean, you're gonna sit there and counsel him, correct?

A. Participate to some extent.

Q. But not to the extent that you ended up participating?

A. As long as I was there, you know.

Q. No. No. I guess what I'm saying is when you got hired for $5000.00, did you think you were going to be trying a CSC case or were you gonna be second seating him?

MS. VALENZUELA: Your Honor, this is has been asked and answered. We covered this already.

THE COURT: I agree. He's been asked and answered that.

BY MR. HARPOOTLIAN:

Q. All right. In the context -- What you're saying is

you didn't need anymore time because you were not -- I mean, I need to understand why you didn't think you needed a continuance?

A. I thought my role would be to be a second chair to help with questioning of witnesses as necessary. Whatever needed to be done during the trial, not preparation for the trial.

Q. Right. Second seat. Okay. Now, had you known that your role would have been as extensive as it ended up being, would you have asked for a continuance so that you could have an opportunity to prepare more?

MS. VALENZUELA: Objection. Speculation.

THE COURT: I think it's been asked and answered already. He said more time would be helpful.

MR. HARPOOTLIAN: Yes, Your Honor. Okay.

BY MR. HARPOOTLIAN:

Q. So that's the rational behind not moving for a continuance?

A. Right. I didn't really think I could move for a continuance at that late stage just getting in the case.

Q. But she had only notified you five days before?

A. I understand that. I'm saying, yeah. I didn't feel like I was retained to just go back over everything and make sure all the t's were crossed and the i's dotted.

Q. Okay. And so you didn't go back over and make sure

all the t's were crossed and i's were dotted. After having finished this trial, do you regret not having the ability or opportunity to not go back over and cross all the t's and dot all the i's? Do you regret that?

A. Well, I think the testimony of Dr. Friedlander would have been helpful. There is no question about that.

Q. And that's a t or i that wasn't crossed or dotted?

A. Like I say, I don't know what conversation he had with Mr. Snell, that Mr. Friedlander had. For some reason he wasn't called. Sure, what he said here and what I heard today would have been very helpful.

Q. Okay. Now, let's talk a little bit about your - when you were participating in the trial, there was initially -- Okay. There were exhibits -- Let me get these numbers correct.

MR. HARPOOTLIAN: I'm not going to introduce these into evidence. As I understand it the entire trial record is part of the record here, correct?

MS. VALENZUELA: I would agree with that.

MR. HARPOOTLIAN: Okay. Your Honor, if they are not, I would like an opportunity later on to make these a part of the record here. I believe they are.

THE COURT: They're a part of the record.

BY MR. HARPOOTLIAN:

Q. Okay. So the State offered through Ms. Clary

exhibits 9, 10, and 11. Let me show these to you. 9 which is a sketch, right? With a list of the injuries?

A. Yes.

Q. 10 which is more injuries to the head, mouth, correct?

A. Yep.

Q. And 11 which is a drawing of the vaginal area of the child with injuries listed?

A. Yeah.

Q. And these were done by Nurse Clary who had been qualified as an expert and introduced through her, correct?

A. I think so. I don't have an independent recollection.

Q. Do you remember objecting to these?

A. I think we did object to them. They were admitted over our objection.

Q. Why did you object to them?

A. I don't remember the argument that I made there. I thought they were too graphic.

Q. Too graphic. And you thought they were prejudicial, correct?

A. Prejudicial.

Q. And so the prejudicial value would outweigh any probative value?

A. 403.

Q. Rule of evidence 403. And yet you did not object to State's exhibit 20, 19, 17, and 16, correct?

A. That's correct.

Q. And if those were too prejudicial, prejudicial outweighs the probative, why were those not prejudicial, a picture of a 15 month old vagina with bruising on it?

A. Well, almost all evidence produced by the State is prejudicial.

Q. Absolutely.

A. The difference -- I didn't have any major trial strategy to not object. I did feel that the difference would be that was created by someone else. You know, kind of their interpretation of the situation whereas these were actually photographs of the injuries.

Q. Well, if you look at this photograph of the baby's vagina -- I'm sorry. We're not calling it a vagina. I'm doing the same thing now. Vaginal genital area, these two pictures, what's a jury going to learn from this? What probative value do they have? I mean, the laymen can't look at this and say anything, can they?

A. Well, I'm not sure if those are bruises I see on there or not, you know. I had no major trial strategy to not object, okay?

Q. But you did object to the drawings?

A. Yes.

Q. But not to the pictures?

A. Right.

Q. Okay. Let me point you to your closing argument. And you did the closing argument for the defendant? Mr. Snell did not, correct?

A. Correct.

Q. Page 553 of the transcript. Let me read this to you. He, you're referring to Mr. Williams, then asked about some bruising in the lower part of the area of the labia and hymen and clitoris. The only way he'd explained that is from the poopy diaper that he changed.

Now, you have heard Dr. Luberoff on that point. What did she say? Yes. It's appropriate for an adult to touch a child's private areas. A female child's private area, the genitalia while cleaning a diaper. That's not a sexual act. That's an act of hygiene and that's what he was doing. Maybe he was too rough and he freely admits it because there was some bruising, caused some bruising but that doesn't make him a sexual molester. You know why it's not a sexual act? You know where there's no bruising on the interior of the vagina, there's no bruising on the interior of the vagina. You heard Dr. Luberoff talking about, you know, taking us back into the various areas of the vagina itself.

So what you have got is bruising caused by being too rough wiping the child's diaper, wiping the child off, getting

between the folds too rough with it and it caused bruising.

MS. VALENZUELA: Objection. If he's gonna publish this part to you, it's actually a pretty important part that he just skipped. He skipped a few lines about, she had testified that there was no bruising on the vagina, on the interior of the vagina.

MR. HARPOOTLIAN: I'll read that.

BY MR. HARPOOTLIAN:

Q. "You heard Dr. Luberoff talking about, you know, taking us back into the various areas of the vagina itself. No bruising on the vagina, on the interior of the vagina and if it was a sexual act, then there would have been penetration of the vagina."

Now, let's stop right there. She's reporting about that. Is your defense in this case -- I mean, does it have to be a sexual act?

A. No.

Q. Okay. So why are you arguing that?

A. I guess just to emphasize it to the jury that it's not a sexual act.

Q. But the State doesn't have to prove it's a sexual act?

A. No. It doesn't.

Q. So the judge is gonna tell them it doesn't have to be and does tell them in the charge it doesn't have to be a

sexual act, right?

A. Right.

Q. So when you're arguing that to them, you're arguing to them inconsistent with the law that the judge is gonna tell them?

A. Well, we talked about penetration earlier.

Q. Right.

A. And so, no. I don't see any problem with that there, Mr. Harpootlian.

Q. Okay. You probably didn't. "So what you have got is bruising, being too rough, wiping the child's diaper, wiping the child off, getting between the folds, too rough with her causing bruising. How else do we know it's not a sexual? There's no forensics to reveal any type of sexual act. So what, I guess, I'm asking is this: Your defense was the injury was caused doing something that was medically necessary which you quote Dr. Luberoff and which is consistent with his statement."

And I guess I get back to wouldn't it have been nice to have Dr. Friedlander's testimony to be able to cite in your final argument?

A. Yes. I would have emphasized that.

Q. And then there would have been a dispute of fact, correct?

A. That's correct.

Q. During the trial, was there any discussion as to whether or not to put Mr. Williams on the stand between you and Mr. Snell?

A. Yes. We always talk about that.

Q. Right.

A. Yes. That was talked about.

Q. He had given a statement describing what happened so what was the purpose in putting him on the stand?

A. I guess just to see the jury - you know, to see, have the jury see him and evaluate him.

Q. Now, if you hadn't put up Mr. Williams or the DSS worker, would you have gotten last argument?

A. Yes.

MS. VALENZUELA: Objection, Your Honor. Just the same Rule 15, relevance argument.

THE COURT: Continue. Objection overruled. I'm gonna allow it.

BY MR. HARPOOTLIAN:

Q. Is that a strategic decision you have to make?

A. Yes.

Q. And in this case y'all sat down and made that strategic decision. Better to put him and the woman up from DSS than get last argument?

A. Yes.

Q. You have a distinct memory of doing that with Mr.

Snell?

A. Yeah. We discussed whether or not to call him.

MR. HARPOOTLIAN: No further questions. I believe the Attorney General may have a couple questions.

MS. VALENZUELA: One thing I just want to clarify. So earlier -- I looked up the transcript. Earlier I said that the judge had not recharged the jury but what they did is by agreement they sent three pages of the actual jury charge back with the jury. I just wanted to correct myself.

THE COURT: Okay. That's a common practice that I use, too, so that makes sense.

MR. HARPOOTLIAN: For purposes of my questioning that wasn't really why -- What happened is what they asked.

THE COURT: Okay. What Judge Young did, he and I have discussed that before. We both have that practice of sending any portion of the charge to the jury if they have certain questions.

CROSS EXAMINATION

BY MS. VALENZUELA:

Q. Mr. Floyd, how are you?

A. I'm good. How are you?

Q. Can I get you a glass of water?

A. I'm okay.

Q. Okay. So I want to talk a little bit about -- Let me see -- your statements on how Dr. Friedlander may have been helpful to you. When you do your closing argument, when you think about the strategy of what you're gonna present in your case, is it more helpful to be able to use language or words from the State's witnesses in support of your case or more helpful to rely solely on your witnesses' statements when speaking to the jury?

A. Well, you want anything that's helpful to you. Yeah. Sure. If a State's witness basically exonerates your client, you're going to certainly harp on that. You use anything that's beneficial to your client.

Q. So you would harp on a State's witness giving you favorable testimony?

A. Yes. But I wouldn't overlook my own witness either.

Q. I understand that. And so if you had testimony which in this case you personally on your cross you got Dr. Luberoff to agree that the vagina is not actually, the vagina, you have to pass the hymen to get to the vagina; is that correct?

A. That's correct.

Q. And you got her to agree that there was no indication on this child that the, that there had been any penetration past the hymen to get to the vagina?

A. That's correct.

Q. And Mr. Snell argued in directed verdict that one of the statutory elements here is that there has to be penetration, however slight there has to be penetration and that the State's witness had agreed that there was not actually penetration into the vagina, correct?

A. Yes.

Q. And then earlier you were asked about your closing and why you would have been talking about the penetration point. Were you also trying to convince the jury that that statutory element of intrusion into the vagina had not, as y'all argued, that it required intrusion into the vagina and that had not been met?

A. Well, you're trying that and I think also you want to dispel any notion the jury may have that this was a sexual act.

Q. And why is it? Like why would you prefer that the jury think of it as your client being angry versus your client being sexually attracted to the child that you would want to leave the jury with one of those impressions more than the other?

A. Well, because if the jury feels that it's a sexual act, they are not really going to give your client any benefit of the doubt, you know.

Q. And so that was also part of -- I take it that you

are explaining that that was part of your strategy in the closing?

A. Yes.

Q. Was one, to address the elements of the statute and then two, to try to dispel any sort of idea that your client was attracted to children or had done this for sexual reasons?

A. Yes.

Q. Okay. We talked about, you were asked about these exhibits and your objection to them and you couldn't quite remember and so what I would like to do is I would like to give you a chance to look over when this was admitted and the objection that you made just to see if you feel like it needs to be clarified as to what the basis of your objection was. And I'm turning to page 239, Mr. Floyd, and I'm looking down at line 19 but, of course, please look at the whole page and make sure that this is the same area.

A. Well, it looks like I objected at that point on the fact that it's a blown up copy of something they had.

Q. Is it fair to say that your objection there, you didn't say that this is more prejudicial than it is probative. You said why does it need to be blown up to such a size that's going to give additional import to the jury that I don't think is appropriate?

A. Yeah.

Q. Okay. And would that have been your same objection for each of these blown up exhibits? I'm looking at State's exhibit 9, 10 and 11 when I say that.

A. Yes.

Q. Okay. And then I'm just holding up for the record State's exhibit 20, 19, 16 and 17 which are the photographs of the child's genitals. Are these the same size as exhibits 9, 10, and 11?

A. No.

Q. No. Are they, in fact, significantly smaller?

A. Yes.

Q. Okay. Now, some of the things that Mr. Harpootlian covered over my objection I just want to touch on very briefly. When you think about the stage that you entered into this representation, did you feel ready to start this trial when you did? Did you feel prepared?

A. Yes. Through the role I was to play.

Q. Okay. And did you feel that you needed a continuance either at the beginning of the trial or any time during the trial?

A. No.

Q. Were you satisfied with the representation that you gave Mr. Williams during the trial?

A. Well, I did the best I could for him. I like Mr. Williams. His family is very nice.

Q. I want to talk a little bit about what you were given in preparation because on direct there were some references to what materials you might have had, what reports you might have had and you and I had discussed this. What did Mr. Snell give you and how was that organized prior to you starting the trial?

A. I don't remember in detail all the material.

Q. You can speak generally. I don't need a laid out list. I just need like he gave me the file in the case.

A. He had it separated into various things like Dr. Luberoff's reports, and I forget the other. I turned that all over to Mr. Harpootlian.

Q. Okay. And understanding that, but do you remember talking to me and saying that Mr. Snell had given you a very well organized file with all the different folders laid out?

A. Yes. It was organized. Yes.

Q. Did you in reviewing that have a sense that there had been a lot of preparation put into this case in the year that Mr. Snell had represented the applicant?

A. Yes. I thought so.

Q. Now, I want to just go back to Dr. Friedlander's testimony. You said earlier that you were in the courtroom and you said that you thought his testimony would be helpful. Do you remember when Dr. Friedlander explained that he had told Mr. Snell that he would not be able to testify that there

had not been an intrusion into the vulva of the child?

A. Yeah. I remember that part.

Q. Okay. And, in fact, Mr. Snell had been trying to figure out a way to do it he had said. And then again he - - - confirmed here with me when we were talking about the photographs, Dr. Friedlander confirmed that the injuries to the child indicated that there was a penetrating injury to the child's hymen?

A. Yes. He found some evidence of injury to the hymen.

Q. Okay. Do you remember using some of the evidence that the State presented in terms of the photos of the child to describe how anatomically a 15 month old's vaginal area is a lot smaller and kind of everything is closer together and lumped together than a human woman's vaginal area?

A. I don't specifically recall that but I may have.

Q. And I think I can point that out to you. Okay. I'll come back to that at the end if I find it so I'm gonna move on. I know that you said that you don't remember that. Would it be - would one of the things that you would want to show the jury include trying to show them that the way that the child's vagina is set up could easily lead to jury when you're just trying to wipe feces from between the vaginal lips?

A. Sure.

Q. Now, the State in this case, if you had made an objection on more prejudicial versus probative from the photographs, the State in this case needed to prove that there had been a penetrating injury into the vaginal area, correct?

MR. HARPOOTLIAN: Objection, Your Honor. Misstates the law. Doesn't require intrusion into the vaginal area. It requires penetration into the genital area according to the statute.

THE COURT: The Court takes notice of the statute.

BY THE WITNESS:

A. Yeah. I think it's the genital area.

BY MS. VALENZUELA:

Q. Okay. So was the State required to prove that there was a penetration into the genital area of the child?

A. Yes.

Q. And then there were two different charges here that the State had to prove, correct?

A. Yes.

Q. And there were different injuries to the head and to the arms of the child but then injuries to the private parts of the child as well?

A. Mm-hmm.

Q. And the injuries, when we are talking about the private parts, I'm kind of using that more generally because

there were at least some injuries that were outside of the genital area. So, for example, on the pubic bone area of the child, correct?

A. Yes.

Q. And then I think this was one of the photos earlier but, and we referenced this in Dr. Friedlander's testimony. I'm taking up State's exhibit 6. Plaintiff's exhibit 6. Excuse me. So there is a bruising that can be seen over the child's like where her lips start on the pubic bone area, correct?

A. Yes.

Q. And this is, of course, the outside of the, or arguably the outside of the genital area of the child?

A. That's correct.

Q. The State needed to prove that this was - the theory of your client, what your client had been saying in his written statement and then what he ended up testifying to was that he was changing the child's diaper and so the State needed to prove that these injuries were not consistent with changing a child's, removal the feces from in between a child's vaginal lips?

A. Yes. Because that would be a defense certainly.

Q. Okay. So they needed to show the extent of the injuries, correct?

A. That would be one issue.

Q. The type of the injuries, correct?

A. That's correct.

Q. And they also needed to establish a timeline for the case, right?

A. Well, yeah. That's always part of a case.

Q. Okay. And when I say a timeline just to make sure that you and I are on the same page, they needed to establish that the child received these injuries from the defendant and so if the defendant was in contact with her alone, you know, months ago and these are fresh injuries, then obviously you can't line that up with the defendant. But if the defendant was in contact with her within the last 24 hours and these are fresh injuries, then that would be the type of evidence that they would want to show to try to link that up with him, correct?

A. That's correct.

Q. And then in this case the State was dealing with a situation where several different people had had access to the victim in between the defendant having her and her being taken to the hospital, correct?

A. That's correct.

Q. Okay. And one thing that we haven't gone into too much but the diaper, the dirty diaper in this case, diapers were collected in this case and photographs of those diapers were presented to the jury?

A. I think so but I really don't remember that.

Q. I'm showing you State's exhibit 23.

A. Okay.

Q. Do you remember that exhibit?

A. Yeah. I remember.

Q. And that exhibit is a photograph of a grocery bag with several diapers inside of it. Do you remember challenging the collection of those diapers and how a lay person had gone to the home and collected those diapers and then turned them into law enforcement?

A. Yes.

Q. And you objected to the chain of evidence very strongly that these should not come in. And then do you remember that the State was able to go through those diapers and show that there was not a diaper with fecal matter inside those diapers?

A. Yes.

MS. VALENZUELA: No further questions, Your Honor.

MR. HARPOOTLIAN: Just a few questions, I think.

REDIRECT EXAMINATION

BY MR. HARPOOTLIAN:

Q. Let me let you look at page 325 of the transcript. This is Dr. Luberoff testifying on direct. I'm showing you this to perhaps refresh your memory. On line 9 on page 325 -- Well, first of all, State's exhibit 16, 17, 18, 19 and 20,

those small color pictures there are introduced into the record.

"Question: Dr. Luberoff, I want to first start with any injuries to the head. You have testified previously about an injury or hematoma to the back of the head. What, if any, other points of impact or injury were noted? Answer: Several areas of the forehead which you can see in the photographs that you've just projected."

Does that remind you that these small photographs were projected on a screen for the jury to see?

A. Yes. I think - I thought we had some objection to the way they looked on the screen.

Q. Apparently not. I don't see it.

MS. VALENZUELA: Yes. They did.

MR. HARPOOTLIAN: They did? Where?

MS. VALENZUELA: Okay.

THE COURT: Well, in this courtroom upstairs?

MR. HARPOOTLIAN: Upstairs.

MS. VALENZUELA: It's right after the introduction of the SANE nurse's --

MR. HARPOOTLIAN: No. I'm talking about this specific -- This is with Dr. Luberoff.

MS. VALENZUELA: Page 286 they raise an objection with the judge where they talked about how the photos are looking when they're projected versus how they're looking

--

MR. HARPOOTLIAN: But there's no specific objection to these photographs being projected. You would agree with me?

THE COURT: This is Dr. Luberoff rather than the SANE nurse she's talking about?

MR. HARPOOTLIAN: Correct. This is a separate witness.

MR. VALENZUELA: The SANE nurse came before Dr. Luberoff.

MR. HARPOOTLIAN: Right.

THE COURT: All right. I understand.

BY THE WITNESS:

A. No. I did not object to the photographs being projected.

BY MR. HARPOOTLIAN:

Q. Being projected. Okay.

A. We objected to the way they looked in the projection.

Q. Right. But not with Dr. Luberoff. With the previous witness --

A. Yeah.

Q. -- the SANE nurse. I looked and didn't see any objection.

A. Yes.

Q. Okay. So the fact that you had objected to photographs being projected earlier lead you to believe you did not have to object again?

A. Yes.

Q. Okay.

A. Although I had no real trial strategy to keep them out.

Q. But being projected on a screen four feet by four feet would be more prejudicial than just seeing it like this, right?

A. Yes.

Q. This being --

A. If I recall correctly the projections made the areas look redder.

Q. Right.

A. It was much more vivid red.

Q. And bigger. Redder and bigger. But you didn't object to these?

A. No. Not to the photographs.

Q. Or to the projection of it when Dr. Luberoff testified?

A. I know we objected one time. I don't know if I objected both times.

Q. You would not disagree with me it's not in the record that you objected?

A. No. I don't dispute that.

Q. Okay. So those were projected redder and bigger, four by four on a screen for the jury to see?

A. Yes.

Q. And then the small ones were given to the jury to take back into the jury room?

A. Yes.

Q. A moment ago she asked you about diapers were collected and there were no diapers with fecal matter on them. A police officer did not collect those, correct?

A. That's correct.

Q. Some lay person brought them in. They weren't collected in a scientific way, correct?

A. Yes.

Q. And Mr. Williams was asked about that. He doesn't know who collected them?

A. That's correct. It didn't prove anything anyway.

Q. Right. There was nothing -- There wasn't fecal -- There wasn't a fecal - a poopy diaper as they refer to it in the record in the group picked up by some relative of the baby from a trash can in the house. No police officers, I think your objection was no police officers ever went and looked at all the trash cans or any of the trash cans, correct?

A. That's correct.

Q. Now, let me go to -- Okay. At the directed verdict

stage Mr. Snell -- And starting on page 445 -- asked for directed verdict because there's been quote, "no evidence presented of any penetration into the opening." That's on page 449. The Court says -- look at it here with me -- "into the opening. Snell: Into the genital opening. Court: Genital opening. Snell: Yes, Your Honor. Court: All right."

The testimony, according to Snell the testimony is "there was a bruised hymen and the hymen sits on the outside of the vaginal canal which would be the genital opening. Everything. What are you defining as the genital opening? He says the vagina. There's no vaginal penetration."

Now, this is a motion for directed verdict. Mr. Snell then is saying the genital opening is the vagina. Is that correct, that the genital opening is the vagina?

A. Uhm, no. It came out later. Yeah. That's true. That's not accurate. Yeah.

Q. So when he's arguing to the Court, did you know at the time that was not accurate?

A. I don't recall.

Q. But we know now he's making a legal argument to the judge that's inconsistent with actually what Dr. Luberoff testified to and you know that the genital area begins with the labia and then it goes to the hymen and then it goes to the vagina, right?

A. Yeah. We got quite an education that day.

Q. Well, apparently not enough for Mr. Snell. So when he's arguing to the judge that there is no penetration of the vagina which makes it not a violation of the statute, that the vagina is the same as the genitalia, does that demonstrate a basic lack of knowledge of the physiology of a woman's genital area?

A. Well, I don't know if I would go that far. It's inaccurate. It's an inaccurate argument.

Q. Okay. Is this my penis (indicating)? I wish. But is it? No!

A. No.

Q. No. It's my arm. The vagina is not the genital area on a woman, is it?

A. It doesn't encompass the entire genital area. Right.

Q. Well, let me put it to you this way. An expert that I recently talked to said the labia is the front porch. The vagina, you've got to go down the hallway to the living room. Does that sound right?

A. Yeah.

Q. Okay. So walking in the front door is penetration of the genital area, right?

A. Correct.

Q. You don't have to go down to the living room. So

when he says to the judge that the genital area is the vagina, is he wrong?

A. Assuming that the transcript is correct, that could be wrong.

Q. Well, I think we're all gonna have to assume it's correct because that's what we're stuck with here.

A. Yes.

Q. You don't remember him saying that?

A. No. I don't specifically remember that.

Q. Well, by the end of the State's case the lawyer you're supposed to be second seating is not accurately depicting his understanding, or is not accurately depicting the physiology involved in this case, correct?

A. Well, that's not a correct statement I believe.

Q. Okay. And if that is his understanding of the physiology at this point, would it --

MS. VALENZUELA: Objection, Your Honor. You know, he has explained that he thought it was like an accident and a misstatement and this is -- I don't even understand this line of questioning right now. But he has already said that he thinks it's an accident. He certainly can't sit here and tell you what Snell's knowledge of the genital area is.

MR. HARPOOTLIAN: Your Honor, Snell's knowledge of the genital area is what he told the Court I would

submit.

THE COURT: Right. That would have been a good question for Snell, not Mr. Floyd.

BY MR. HARPOOTLIAN:

Q. Well, but here - here - here's the question. If you'd had an opportunity or Mr. Snell had had -- Well, back that up. When Mr. Snell is talking to the doctor that testified this morning, the people, the doctor we proposed, I mean, there's nothing to indicate -- Well strike that. I don't need to go into that. But you did not interrupt Mr. Snell or ask him to correct this with the judge. You knew at that point there had been penetration, right?

A. Into the genital area. Yes.

Q. Yeah. Because you asked Dr. Luberoff. You're asking Dr. Luberoff is there a medically necessary reason to do that. So what's Snell talking about?

MS. VALENZUELA: Objection if that's a question.

THE COURT: I think the record speaks for itself. You don't have to ask him that.

MR. HARPOOTLIAN: Well, let me strike that.

THE COURT: All right.

BY MR. HARPOOTLIAN:

Q. You and Mr. Snell discussed what his motion for directed verdict would be like? What would be in it?

A. Yes. We discussed it. I don't remember - I don't

remember that statement.

Q. Okay. You were asked by the Attorney General about timeline witnesses. Did you interview any of the people -- I know this is repetitive but I just want to make sure -- any of the timeline witnesses that you cross examined, did you ever meet with them before they got on the stand?

A. No.

Q. To your knowledge did Mr. Snell ever give you any notes or anything that would have allowed you to prepare to examine those witnesses?

A. I don't recall anything being given to me.

MR. HARPOOTLIAN: Thank you. No further questions.

MS. VALENZUELA: Your Honor, I have recross.

THE COURT: Briefly.

RECROSS EXAMINATION

BY MS. VALENZUELA:

Q. Okay. Just focusing on this last section talking about penetration. Was one of the theories of your case to argue that the statutory definition of penetration requires that the intrusion go past the hymen into the vagina?

A. Oh, yeah. That's an argument that we tried to make.

Q. What you had was a client who had given a written statement and then took the stand and said, yes, I caused all

of the injuries that you see here. One of those injuries being to the hymen but not reaching the vagina. And so one of the things y'all were trying to prove is, hey, when the statute defines this, it actually requires that it get past the hymen into the vagina which is what Mr. Snell was arguing there, right?

A. (Witness nodding head.)

Q. You're nodding your head.

A. Yes.

Q. Okay. And then further than that in the directed verdict motion you would be familiar with the hundreds of trials that you have done, when you make a DV motion, sometimes the judge just says denied. Sometimes there's argument. In this case the State had argument and then the court actually listed cases in support of the definition of penetration, correct?

A. Yeah. Judge McMahon would often do that.

Q. When this one -- I think this is -- No. This is Judge McMahon. What was I thinking? And then I was also thinking Judge Young from earlier.

THE COURT: I said that we had one yesterday on Judge Young. If I said that on the record, that was a misstatement by me.

BY MS. VALENZUELA:

Q. Okay. And then the jury questions that Mr.

Harpootlian brought up to you earlier, did it appear from the jury's questions that they had a question about the definition of penetration?

A. They asked about it. Yes.

Q. So your strategy in trial was to see if you could actually get that penetration issue to get your client off the hook and it got the judge thinking enough to have to research the cases and have everything laid out and it got the jury thinking enough to ask a question about whether penetration had really happened in a case where you had the defendant admit to the jury that he had caused a bruise on her hymen?

THE COURT: You asked way too much question. You lost me.

BY THE WITNESS:

A. Yes.

MS. VALENZUELA: I didn't lose my witness. But it's important that I not lose the judge here.

BY MS. VALENZUELA:

Q. So I want to break that down. The statute here required that the intrusion, that the definition of penetration be proven, correct?

A. Yeah. I don't recall the exact wording on the statute right now. Penetration in the genital are.

Q. And so you can either get that by having the jury believe that penetration has not been completed or having by

the judge say that the State hasn't met the elements of the charge, correct?

A. Correct.

Q. And in this case with your advocacy you were able to have the judge render a well thought out decision, not just saying that the directed verdict is denied?

MR. HARPOOTLIAN: Your Honor, I object. She is testifying.

MS. VALENZUELA: Yeah. It's recross.

THE COURT: Yeah. It's recross.

MS. VALENZUELA: Thank you.

MR. HARPOOTLIAN: It's recross. This is not an issue that was raised --

MS. VALENZUELA: It was. You raised this.

THE COURT: Wait. Wait. Wait. Don't argue.

MR. HARPOOTLIAN: Not an issue raised, Your Honor.

THE COURT: Y'all don't argue. I understand the directed verdict motion was either misstated --

MS. VALENZUELA: But it wasn't misstated.

THE COURT: Perhaps it was. The judge denied it and that's in the record. Mr. Floyd didn't argue it. He's presented what he's articulated in the Court's eyes as they were trying to explain the penetration as a needed hygiene. Y'all are -- I think we're splitting hairs on this. I understand what --

MS. VALENZUELA: But that's what's so important --

THE COURT: I know but --

MS. VALENZUELA: -- is the splitting of the hair here because this is the strategy that's being challenged. They're saying, Mr. Floyd, you didn't do what you needed to do on this case. Y'all should have put in another witness in there to say that this is the whole thing and then he just spent time saying that Mr. Snell is a fool because he doesn't know the definition of genital area. But Mr. Snell used the correct terminology here. He was trying to tell the judge that it's not a genital intrusion. And when it goes to the effectiveness, if he's having a judge pause and think and then he's having the jury send out a question on penetration in a case where the defendant testified that he did all this, then it was effective.

THE COURT: I got the facts. I got the facts. His opinions don't matter. The jury's opinion is what matters, and whether it's effective or not I understand. Y'all have presented ample testimony about the penetration however slight and whether it was the vagina, the hymen. I got what happened. I promise you.

MS. VALENZUELA: Okay. Well the way you summarize it it seems very much matching with Mr. Harpootlian.

THE COURT: Well, I'm looking on the floor of the

courtroom to see if there's a dead horse down there because y'all have beat it and I'm just telling you I got it. I've got the facts. It's right there where y'all have been standing. The two of y'all have been kicking the same horse. Mr. Floyd has explained it fully, and he says and I think very accurately they got quite an education in the trial. Are y'all done with him? Because I have heard enough.

MR. HARPOOTLIAN: Judge, I would not want PETA to come in and put me in custody for kicking that horse anymore.

THE COURT: All right. All right. You can step down.

THE WITNESS: Am I excused, Judge?

THE COURT: Yes.

MR. HARPOOTLIAN: Judge, give me two seconds and I think I'm done. I have talked to my client and we rest. We agree we don't need to put him on the stand.

THE COURT: Okay.

MS. VALENZUELA: I don't have any witnesses.

THE COURT: He called them all for you. Excellent. All right. We discussed before we took testimony how to end the case. I think I like the idea of waiting on the record and asking for proposed orders from both sides. I'm in favor of that.

MR. HARPOOTLIAN: We will be happy to order the transcript, pay for the transcript and I think he will submit a copy to the State and they charge them, too. Okay. Well, they got money.

MS. VALENZUELA: We both need to order it from you?

THE COURT: No. From him.

MR. HARPOOTLIAN: And we are happy to do our part to keep these poor court reporters fed.

COURT REPORTER: Thank you.

MS. VALENZUELA: Yes. Us, too.

THE COURT: All right.

MR. HARPOOTLIAN: So, Your Honor, once we get the transcript and notify Your Honor, do you want to give us 30 days to submit a proposed order?

THE COURT: If Ms. Valenzuela or her substitute counsel needs additional time, I'm going to give them latitude on that. 30 days sounds very reasonable but considering she doesn't know who she's handing off to, I will allow her latitude on that.

MR. HARPOOTLIAN: We wouldn't object to any as long as we get the same extension.

THE COURT: Okay. That's fine. You just let me know.

MS. VALENZUELA: I will. The one question I have is so we would be, the State would be preparing a proposed

order that's limited to the first two paragraphs on the PCR amendment. If Mr. Harpootlian is preparing a PCR proposed order that exceeds that, we don't think that's fair because at that point you would have one proposed order that touches on various issues and we wouldn't have the chance to touch on all of those issues. So I think it just needs to be decided what we would be submitting proposed orders on.

MR. HARPOOTLIAN: Your Honor, if you would give us until next Monday if we want to amend in any way based on the testimony heard here, that we would be happy to - if we get them an amendment long before, they can prepare their order.

MS. VALENZUELA: And so I'm gonna object.

THE COURT: All right. Until I see what they say or if they do it at all I'm not going to rule. That issue is not before me yet.

MR. HARPOOTLIAN: Yes, sir. So we'll go ahead and make a motion to amend as we would in any other case and the grounds thereof based on what we have heard. We won't have the transcript, but we think there's a general --

THE COURT: But you may not decide to amend.

MR. HARPOOTLIAN: May not. We're gonna look at it. It's general lack of preparation and that may be

encompassed in the failure to call witnesses but --

THE COURT: And so if you do, then she still has a standing to object to the amendment.

MR. HARPOOTLIAN: Yes, sir.

THE COURT: I want to make sure that she's clear that if the amendment has not been made, if it does, Ms. Valenzuela has a standing objection.

MR. HARPOOTLIAN: We'll do it by next Monday.

MS. VALENZUELA: We are definitely doing it by the 6th which is next Monday?

MR. HARPOOTLIAN: Yes. Absolutely. By close of business on the 6th.

MS. VALENZUELA: With no extensions? I'm just trying to make sure that --

MR. HARPOOTLIAN: We're probably going do it by tomorrow morning if we're gonna do it.

THE COURT: Here is my schedule if y'all need me. I will be in Saluda Monday doing some grand jury qualification first term of court. I will be doing pleas here Tuesday, Thursday and a status conference here on Wednesday. I will be in Pickens on Friday. So it's a General Sessions non jury week that I swept up all these loose ends.

MR. HARPOOTLIAN: Where are you the week after?

THE COURT: Back here doing trial. I'm statusing on

Wednesday. Saluda and then here. Every other week I'm in Lexington. Okay. We're off the record.

WHEREUPON, THE HEARING WAS CONCLUDED AT 1:00 P.M.

CERTIFICATE OF REPORTER

(STATE OF SOUTH CAROLINA)

(COUNTY OF LEXINGTON)

I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R., and Official Circuit Court Reporter for the Eleventh Judicial Circuit in and for the State of South Carolina, do hereby certify that I reported the proceedings in the before captioned case in the Court of Common Pleas in and for the State of South Carolina on the 30th and 31st day of January, 2017.

I FURTHER CERTIFY that the forgoing 248 pages constitute a true and accurate record of said proceedings.

I FURTHER CERTIFY that I am neither related, counsel to, nor of interest to any party hereto.

IN WITNESS WHEREOF, I have hereunto set my hand at Lexington County, this 20th day of March, 2017.

Steven E. LeBlanc, Sr., R.P.R.
Eleventh Circuit Court Reporter
State of South Carolina.

James Snell

From: Mayes, Suzanne [SMayes@lex-co.com]
Sent: Tuesday, March 29, 2011 11:03 AM
To: 'James Snell'
Subject: RE: State v. Lance Williams

Hi Jim,

There are no written statements from Mr. or Ms. Hutto. Ms. Hutto is a witness to certain events which occurred on the day the child was injured. Her home is adjacent to Lee Ann Harvey's home. She states that Mr. Williams did not come outside with the child. Both Mr. & Mrs. Hutto state having concerns that Lance Williams volunteered to bathe victim as well as other young female family members.

I do have prints of the photos, you can view them this afternoon if you would like or tomorrow.

Suzanne

Suzanne Mayes
Eleventh Circuit Solicitor's Office
Phone: (803) 785-8257
Fax: (803) 785-8431

From: James Snell [mailto:jamessnell@snelllaw.com]
Sent: Tuesday, March 29, 2011 9:59 AM
To: Mayes, Suzanne
Subject: RE: State v. Lance Williams

Do you know if written statements were taken from the Huttos? If not do you know what they are expected to testify to?

Also do you have prints made of all of the photographs in this case for use in trial?

From: Mayes, Suzanne [mailto:SMayes@lex-co.com]
Sent: Friday, March 25, 2011 2:21 PM
To: 'James Snell'
Subject: State v. Lance Williams

Dear Jim:

Please find attached the State's potential witness list.

Suzanne

Suzanne Mayes
Eleventh Circuit Solicitor's Office
Phone: (803) 785-8257
Fax: (803) 785-8431

PLAINTIFF'S EXHIBIT
#1 1-30-11
2015CP32-544

State v. Lance Williams

State's Potential Witness List:

1. Brittany Brown, Lexington, SC
2. Kevin Brown, Lexington, SC
3. Katie Cooper, Wagener, SC
4. Lee Ann Harvey, Swansea, SC
5. Tommie Hutto, Swansea, SC
6. Edward E. Hutto, Swansea, SC
7. Rebecca Jones, Neeses, SC
8. Michael Cooper, Neeses, SC
9. Linda Cooper, Neeses, SC
10. *Dr. Susan Luberoff, Palmetto Richland, Columbia, SC
11. *Dr. David Ford, Palmetto Richland, Columbia, SC
12. *Dr. Matthew Garber, Palmetto Richland, Columbia, SC
13. Sarah C. Leaphart, R.N., Palmetto Richland, Columbia, SC
14. Mariana Clary, R.N., Palmetto Richland, Columbia, SC
15. Adrienne Riley, SLED, Columbia, SC
16. Mildred Moore, Lexington, SC
17. Det. Eddie Prestigiacomo, LCSO
18. Shelby Derrick, LCSO
19. Beth Harmon, LCSO
20. Candy Kyzer, LCSO
21. Deputy B. Marthers, LCSO
22. Erica Owens, LCSO
23. Det. Shawn Grant, LCSO
24. Sgt. Palkoski, LCSO

*Denotes expert witnesses as follows: Susan Luberoff, M.D – forensic pediatrics including child abuse assessment.; David Ford, M.D.; Matthew Garber, M.D. – pediatrics and/or emergency medicine

Witness list subject to later additions as necessary

Williams, Mr. Lance A.	Case Type: CRM	DOI: 4/16/2010	LIM Date: N/A
Case #: 200002 (1363)	Class: NEG	Assigned: BRITTANY	Date Opened: 4/17/2010

Case Note - Page 1 of 62

Date: 04/17/2010 11:56 AM **Staff:** JIM **Topic:** Jail Visit **Case Status** ☐

Met with client at the jail. He is on suicide precations. Very emotional. Wants his mother to handle his case for him. Not able to talk or provide details about specifics.

PLAINTIFF'S EXHIBIT
#7 1-30-17
2015CP32-544

Case Note - Page 2 of 62

Date: 04/28/2010 03:07 PM **Staff:** JIM **Topic:** Status **Case Status** ☐

Attended client's bond hearing in General Sessions today. Heard by Judge Newman.

There was media coverage from local TV.

Client did not want to withdraw motion and wait for better opportunity, but wanted to go forward.

Discussed with client & mother (Lynn Williams) about good idea to remain silent and not comment on facts. Thery however did make comments.

Judge denied bond.

Will be ordering transcript.

Williams, Mr. Lance A.	Case Type: CRM	DOI: 4/15/2010	LIM Date: N/A
Case #: 200002 (1363)	Class: NEG	Assigned: BRITTANY	Date Opened: 4/17/2010

Case Note - Page 3 of 62

Date: 04/30/2010 02:02 PM **Staff:** JIM **Topic:** Status **Case Status** ☐

Met with Lynn Williams (client's mother) and her boyfriend Marc in the office today.

Marc asked me if all my clients were in jail and if I had ever had bond set on a case before.

Ms. Williams is very upset and emotional about the case. She maintains that the child is not injured or not substantially and intentionally injured, Lance did nothing wrong, and that all charges should be immediately dismissed.

Case Note - Page 4 of 62

Date: 05/03/2010 06:01 PM **Staff:** JIM **Topic:** Jail Visit **Case Status** ☐

Meeting at LCDC with client.

He is still very stressed about his case and everything going on. Very concerned about how this is effecting his mother and other family. Misses his daughter.

Understands that once bond is denied in GS it is a waiting game. Reviewed allegations again, legal charges, possible penalty ranges, as well as potential defenses. Talked about his statement - wanted to know if it had to be used in court by prosecutor. No unusual circumstances given, no threats, etc.

Wants his mother to make decisions, but reviewied with him that it is his case and he is the one who

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Date: 05/26/2010 04:42 PM **Staff:** JIM **Topic:** Status **Case Status** ☐

Notes from 3:00 P.M. meeting with Lance Williams

Polygraph concluded.

Dr. Watson is doing an evaluation

Chris Brown may call to make appointment

Possible physicians provided by Ms. Williams:

Dr. Ann Abel
Charleston, S.C.
(843) 792-2618

Dr. William E. Sumner
Montgomery, Alabama
(334) 288-8222

Williams, Mr. Lance A.	Case Type: CRM	DOI: 4/15/2010	LIM Date: N/A
Case #: 200002 (1363)	Class: NEG	Assigned: BRITTANY	Date Opened: 4/17/2010

Case Note - Page 6 of 62

Date: 06/01/2010 05:47 PM **Staff:** JIM **Topic:** Status **Case Status** ☐

Meeting with Lynn Williams this afternoon.

Discussed case in general. Asked about when he might be able to get out of jail and have a bond hearing again. Not happy with the way the system works on the charges that are against her son. Doesn't think he would hurt a child or be rough with one. He is a good father and loves children -knows not to hurt them.

Williams, Mr. Lance A.	Case Type: CRM	DOI: 4/15/2010	LIM Date: N/A
Case #: 200002 (1363)	Class: NEG	Assigned: BRITTANY	Date Opened: 4/17/2010

Case Note - Page 7 of 62

Date: 08/04/2010 10:38 AM **Staff:** JIM **Topic:** Status **Case Status** ☐

Met yesterday afternoon with Lynn Williams. She remains concerned - beleives that the child's family may be intentioanlly witholding information or exagerating it to get attention and make the situation more dramatic for everyone. No actual proof of this or way to verify it - just her thought on the matter.

Otherwise she is concerned that Lance is not holding up well, and she is definately not holding up well. Very hard on everyone concerned. Looking forward to the day that this is over and he can walk out of jail. Feels the police tricked them by having him voluntarily come to the Sheriff's Department to answer questions.

Williams, Mr. Lance A.	Case Type: CRM	DOI: 4/15/2010	LIM Date: N/A
Case #: 200002 (1363)	Class: NEG	Assigned: BRITTANY	Date Opened: 4/17/2010

Case Note - Page 8 of 62

Date: 02/11/2011 03:05 PM **Staff:** JIM **Topic:** Client Called **Case Status** ☑

Client's mother called to remind us that her son was in jail. She wanted to know if the prosecutor being out of work would effect his case or be cause to have it dismissed.

Case Note - Page 9 of 62

Date: 02/15/2011 04:53 PM Staff: JIM **Topic: E-Mail** **Case Status** ☐

From: James Snell
To: 'Moore, Debra'
CC:
Subject: Lance Williams
Received: 02/15/2011 4:40:37 PM

Ms. Moore:

I hope you are doing well.

Have you had a chance to review my letter about Lance Williams? Can you tell me where you are with that case?

James R. Snell, Jr.

Law Office of James R. Snell, Jr., LLC

316 South Lake Drive

Lexington, South Carolina 299072

(803) 359-3301

(803) 359-7691 (facsimile)

jamessnell@snelllaw.com

Case Note - Page 10 of 62

Date: 02/16/2011 04:52 PM **Staff:** JIM **Topic:** E-Mail **Case Status** ☐

From: James Snell
To: 'Lynne Williams'
CC:
Subject: Accounting
Received: 02/16/2011 5:47:58 PM

Ms. Williams: Please find attached the Accounting Summary for Lance's case.

4.19.10 $ 3000 paid by Ms. Lumpkin

4.17.10 $ 1000 paid by Ms. Williams for Dr. Watson

4.29.10 $ 500 paid by Ms. Lumpkin

5.5.10 $ 425 paid by Ms. Williams for polygraph

5.27.10 $ 500 paid by Ms. Lumpkin

6.24.10 $ 500 paid by Ms. Lumpkin

7.26.10 $ 500 paid by Ms. Lumpkin

7.21.10 $ 82.81 paid by Ms. Williams for Transcript

8.24.10 $ 500 paid paid by Ms. Lumpkin

9.27.10 $ 500 paid by Ms. Lumpkin

10.28.10 $ 500 paid by Ms. Lumpkin

11.23.10 $ 500 paid by Ms. Lumpkin

12.27.10 $ 500 paid by Ms. Lumpkin

1.24.11 $ 500 paid by Ms. Lumpkin

Please do not hesitate to call me if you have any questions. Lee

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Case Note - Page 10 of 62

Case Note - Page 11 of 62

Date: 02/16/2011 04:52 PM **Staff:** JIM **Topic:** E-Mail **Case Status** ☐

From: James Snell
To: 'Lynne Williams'
CC:
Subject: Motion for Bond Hearing
Received: 02/16/2011 5:35:00 PM

Ms. Williams:

Please find attached a copy of the bond motion I will be filing in the morning.

As soon as I hear back from the prosecutor I will let you know. If the prosecutor doesn't cooperate with me on having the motion scheduled I will directly contact the judge for assistance.

I will be going to see Lance this week.

Thank you again.

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Attachments: 2011_02_16_17_20_37.pdf

Williams, Mr. Lance A.	Case Type: CRM	DOI: 4/15/2010	LIM Date: N/A
Case #: 200002 (1363)	Class: NEG	Assigned: BRITTANY	Date Opened: 4/17/2010

Case Note - Page 12 of 62

Date: 02/16/2011 05:51 PM **Staff:** JIM **Topic:** Client Called **Case Status** ☐

Today I called back Lynn Williams to talk about the status of her son's case. The prosecutor is still apparantly out of work. I e-mailed her a copy of the bond motion and told her I would be filing it right away.

Case Note - Page 13 of 62

Date: 02/18/2011 04:49 PM **Staff:** JIM **Topic:** Jail Visit **Case Status** ☐

This afternoon I visited with client for about one hour at LCDC. I provided him with a copy of the filed bond motion and the letter to the prosecutor.

Client advised that he had a history of gang affiliation with the Bloods out of Tampa. This is what the star tattoos he has are for.

Client reports that he is doing ok and seemed to understand the process. He does not want to go to trial and would like to have his case resolved. He is still having some trouble with his ears and recently had a CAT scan.

Case Note - Page 14 of 62

Date: 02/20/2011 05:58 PM **Staff:** JIM **Topic:** E-Mail **Case Status** ☐

From: James Snell
To: Moore, Debra
CC:
Subject: Lance Williams
Date Sent: 02/20/2011 5:53:01 PM

Ms. Moore:

I have filed a motion for a (second) bond hearing in the Lance Williams case. Mr. Williams has been incarcerated now for since April 16, 2010 (310 days). Bond was first denied by Judge Newman on April 28, 2010 (298 days). Please let me know what a good date for you would be to have this scheduled.

I would prefer to have this case resolved with finality. Have you had a chance to consider my letter of January 26, 2011?

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Attachments: Bond Motion.pdf

Case Note - Page 15 of 62

Date: 02/28/2011 11:24 AM **Staff:** JIM **Topic:** E-Mail **Case Status** ☐

From: Lynne Williams
To: James Snell Law
CC: lynne.mark5@yahoo.com; MewLumpkin04@aol.com
Subject: FW: PTI
Received: 02/27/2011 1:59:06 PM

Hi Mr. Snell,

Lance said you mentioned that it was a possibility to him at your last visit. That is why I questioned it. Until my conversation with Lance I didn't know PTI existed.

Thanks,

Lynne

From: James Snell [mailto:jamessnell@snelllaw.com]
Sent: Sunday, February 27, 2011 12:24 PM
To: Lynne Williams
Subject: RE: PTI

Ms. Williams:

Although PTI would be a great option for Lance unfortunately by statute the charge here are not eligible for PTI (because it carries a possible life sentence).

PTI, or pre-trial intervention, is a diversion program run by the Solicitor's office. It is designed primary for first time offenders charged with minor offenses. The program consists of 30-50 hours of community service, a book report, drug tests and at least 2 counseling sessions. Completion of the program results in the charges being dismissed and the record of the arrest being expunged. PTI isn't part of a plea – it is a referral made by the prosecutor as an alternative to a plea or trial.

I still don't have a response from the prosecutor. I am going to be following up on this next week and will notify you and Lance as soon as I hear something.

James R. Snell, Jr.

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jamessnell@snelllaw.com

From: Lynne Williams [mailto:lynne.williams@flyasa.com]
Sent: Saturday, February 26, 2011 2:44 PM
To: James Snell Law
Cc: lynne.mark5@yahoo.com
Subject: PTI

Hi Mr. Snell,

Lance mentioned "PTI" on our last conversation. Is this something that we can ask the Prosecutor to consider as part of the plea?

Thanks,

Lynne

Deborah Lynne Williams

Atlantic Southeast Airlines, Inc.

CAE Maintenance 7027150

803-822-0019 x63211

Picture (Device Independent Bitmap)

Visit our new website at www.flyasa.com

Attachments: image001.png

Case Note - Page 18 of 62

Date: 03/02/2011 10:53 AM **Staff:** JIM **Topic:** E-Mail **Case Status** ☐

From: Barry Moore, Debra
To: James Snell
CC:
Subject: RE: Lance Williams
Received: 03/01/2011 8:03:21 PM

I am in a trial this week but can meet with you next week. I haven't talked to the victims in a few months but will contact them to come in early next week, if possible so I can see how they feel now. I will let you know...

From: James Snell [jamessnell@snelllaw.com]
Sent: Tuesday, March 01, 2011 5:58 PM
To: Barry Moore, Debra
Subject: Lance Williams

Ms. Moore:

Are you in the office tomorrow? I need to speak to you about resolving the Lance Williams case or setting it for a bond hearing. Thank you.

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jamessnell@snelllaw.com

Case Note - Page 19 of 62

Date: 03/02/2011 10:55 AM **Staff:** JIM **Topic:** E-Mail **Case Status** ☐

From: James Snell
To: 'Lynne Williams'
CC:
Subject: Response
Received: 03/02/2011 10:55:20 AM

I've received this response from Lance's prosecutor by e-mail late last night:

I am in a trial this week but can meet with you next week. I haven't talked to the victims in a few months but will contact them to come in early next week, if possible so I can see how they feel now. I will let you know...

This indicates to me that she has put his file on her "back burner" and probably hasn't reviewed anything in some time. I'll let you know after I receive some feedback from her.

I am going to copy and send this e-mail to Lance.

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Case Note - Page 20 of 62

Date: 03/04/2011 04:47 PM **Staff:** JIM **Topic:** Call to Client **Case Status**

I returned Lynn Williams' call this afternoon. She says that the e-mail from Debra Moore made Lance angry because it was not specific.

I reiterated to her that the e-mail was favorable and that she did not say "no" to our 3 year plea offer. I will try to call the prosecutor next week.

Case Note - Page 21 of 62

Date: 03/09/2011 01:10 PM **Staff:** JIM **Topic:** E-Mail **Case Status** ☐

From: Lynne Williams
To: James Snell, Attorney
CC:
Subject: Lance Williams
Received: 03/09/2011 12:41:44 PM

Hi Mr. Snell,
Could you please update me with any information concerning hearing from the Prosecutor this week?
I am to visit Lance in the morning and would like to be able to tell him something.
Thanks,
Lynne

Case Note - Page 22 of 62

Date: 03/13/2011 05:12 PM **Staff:** JIM **Topic:** E-Mail **Case Status** ☐

From: James Snell
To: 'Moore, Debra'
CC:
Subject: Williams, Lance
Received: 03/13/2011 5:07:23 PM

Ms. Moore:

Please find enclosed a scanned copy of my letter of March 13, 2011.

In the letter I am asking to have this case added to the docket for the week of the 28th. This should be either Judge McMahon or Judge Keesley. I am likely going to be in the Richland County Magistrate Court all day Monday but if you are going to be in later next week I will try to come see you again.

Thank you again.

James R. Snell, Jr.

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Attachments: Letter to Prosecutor.pdf

Case Note - Page 24 of 62

Date: 03/14/2011 06:36 PM **Staff:** JIM **Topic:** Call to Client **Case Status** ☐

This afternoon we called Lynn Williams and had a 52 minute phone call.

She is very frustrated. She is concerned that the prosecutor is not ready to voluntarily dismiss her son's case. She does not beleive he is guilty of putting his fingers inside of the child.

I reviewed with her that the prosecutor has unlimited discretion with any plea bargaining and that in the alternative to waiting and trying to work his case out Lance always has the right to demand a speedy trial. I told her I thought the prosecutor would have a fairly straightforward case and that if convicted Lance would get decades of prison time.

I will be going to see Lance this evening or tomorrow morning.

Case Note - Page 25 of 62

Date: 03/14/2011 09:00 PM **Staff:** JIM **Topic:** Jail Visit **Case Status** ☐

This evening from 8:00 - 8:45 P.M. Lee and I visited Lance Williams at the Lexington County Detention Center.

Lance reports that he does not want to go to trial, but he is very anxious about having to remain in jail. He approved me contacing Judge McMahon directly in the event that Ms. Moore does not cooperate with us in scheduling either a plea or bond hearing for him. Understands that if you ask for a bond hearing prosecutor may choose just to call case for trial - and this would not be in his best interests. Willling to accept that risk.

He is concerned that his daughter is struggling with his continued incarceration. He is very tired of sitting in the jail and he does not want to have any outbursts directed at me.

He has envelopes and stamps that he could use to write me if he needed to. He also does not need anything else from me at this time.

Williams, Mr. Lance A.	Case Type: CRM	DOI: 4/15/2010	LIM Date: N/A
Case #: 200002 (1363)	Class: NEG	Assigned: BRITTANY	Date Opened: 4/17/2010

Case Note - Page 26 of 62

Date: 03/18/2011 09:20 AM **Staff:** JIM **Topic:** Client Called **Case Status** ☐

Lynn Williams called this morning. She wanted to follow up with me regarding her discussions with Chris Brown and her e-mail from last night.

Case Note - Page 27 of 62

Date: 03/18/2011 09:46 AM **Staff:** JIM **Topic:** E-Mail **Case Status** ☐

From: Lynne Williams
To: James Snell, Attorney
CC:
Subject: Lance Williams
Received: 03/17/2011 10:18:00 PM

Hi Mr. Snell,
Chris B[redacted] called me back this evening stating he talked with his dad Kevin B[redacted] about what he had read on Brittany's facebook. He did not mention that he had talked with me today. Anyway he asked about what was going on. Kevin stated that Brittany and Adam were called into talk with the Prosecutor and told that Lance and his family wanted to go to trial. He asked him if any plea was mentioned or made....Kevin said "no". Just told them Lance wanted to go to trial. Kevin said he wasn't sure they would except a plea anyway and Chris asked why not....said "would you?" Chris said, "but you don't even know Lance did anything."
Chris said he was going to call his sister Brittany and talk with her and let me know something tomorrow.
I thought maybe this information would be helpful when you talk to the new Prosecutor. Maybe she didn't get the plea that was sent to Ms. Moore. Praying anyway!!!!!!
Best Regards,
Lynne Williams

ps. Tomorrow is my Monday so I will not be able to check this e-mail from work. You can reply back to this one I just won't get it until 8:30pm. Call me if you need me right away or have important update.

Williams, Mr. Lance A.	Case Type: CRM	DOI: 4/15/2010	LIM Date: N/A
Case #: 200002 (1363)	Class: NEG	Assigned: BRITTANY	Date Opened: 4/17/2010

Case Note - Page 28 of 62

Date: 03/18/2011 12:26 PM **Staff:** BRITTANY **Topic:** Jail Visit **Case Status** ☐

JRS and I went to visit Lance to follow up on why the motions hearing was cancelled today. JRS and Lance talked about the upcoming trial date set for March 28th. JRS gave Lance a clocked in copy of the filed motions hearing requesting the alleged victims medical records. JRS asked Lance if he was "ok" with considering an offer of anything less than a mandatory minimal 25 years and Lance agreed. Lance was very persistant about not being put on the sex offenders registry but did say that he would agree to being put on it if it meant him serving less time. Lance asked JRS if there was any way if he could ask the prosecutor if he could go back and "just sit" and JRS said that he already tried but that she replied that this case was straight forward and east to try, so there's no need to wait. JRS told Lance that he would be in touch and keep him informed.

There was other small talk about the correspondence from the Brown family and Williams family and about how Lance couldn't understand how the new prosecutor could try his case so quickly after only having his file for a few days.

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Date: 03/18/2011 02:30 PM **Staff:** JIM **Topic:** Expert **Case Status**

This afternoon I spoke with Dr. Selman Watson about Lance's upcoming trial. Dr. Watson confirmed again for me his strong opinion that Lance is not a sex offender or someone who can't be helped with some counseling.

I asked Dr. Watson about any possibility of exploring a defense of not criminally responsible and about his statement. He said that Lance clearly was responsible. He would not meet any of the objective criteria.

Case Note - Page 30 of 62

Date: 03/20/2011 05:18 PM **Staff:** JIM
Topic: E-Mail
Case Status ☐

From: mewlumpkin2@aol.com
To: jamessnell@snelllaw.com
CC:
Subject: Lance Williams' Case - A Special Request
Received: 03/19/2011 2:40:51 PM

Dear Mr. Snell,

At 3/19/2011 8:24:40 A.M. Central Daylight Time I sent Lynne a text message. Content of text was, Ask Mr. Snell if it's possible to request Closed Hearing to avoid an influx of Brown's/Cooper's Facebook Friends & request no media being in courtroom? Lov U

Lynne first replied okay. Then she sent me a second text at 8:26 A.M. and told me, U can send to him. ~ Lynne~

Mr. Snell, as you know Lance has a very small family and no abundance of friends to be there for him if he does have to go to trial. This is so frightening to Lance, Lynne and me that another prosecutor has been put on the case at this point that likes to go to trial. Lynne said you were there when she went to visit Lance on March 17, 2011 with the bad news. You are aware of his emotional state. I'm very concerned about Lance's emotional state of mind. I don't know if any of us will be able to hold up in a courtroom filled with uncaring spectators. I feel it will be so much worse on Lance and also us, since there are only three or four people to be there for Lance. We don't have a family and friend network to give us emotional support during such a trying situation. I'm sure Lance feels all alone at this time. He has never felt worse. I don't know if we can even hold up in a Closed Hearing.

The main reason for my note/letter: "Is it possible for you to request a Closed Hearing to avoid an influx of Brown's and/or Cooper's Facebook Friends & request no media being in courtroom?" Will you please try? Lynne and I both are very emotional. Lance tries to hold his emotion back. What if we break down sobbing or Lance gets emotional too?

Two more questions. Why would a prosecutor tell the parents Lance had asked for a trial when Lance didn't and you haven't, other than the prosecutor has control? I feel any and all prosecutors should consider a Plea. Where does this leave Lance if he goes to prison for an extended length of time and the next case similar or worse than Lance's gets 3 - 5 years because a Plea was offered and accepted?

Mr. Snell, please do not feel you have to make a detailed reply to me. Lynne keeps me informed with your updates and correspondences. Please reply to Lynne pertaining to my above questions.

Lynne had written me in detail on March 15, 2011 of her long conversation with you the evening before. You were giving Lance and us so much hope about a possible Plea and reduced sentence. Thursday the 17th was bad news day. We know you were requesting a Plea or Bond hearing by March 28, 2011 and not a court trial day.

The next three short paragraphs contains a very short opinion pertaining to switch of prosecutors, Lance anger, stress, anxiety, and the bruises on the child.

I know Lynne as expressed her feelings to you pertaining to the original prosecutor turning Lance's case over to another prosecutor after all this time while Lance sits in jail. I feel the same way Lynne does. It seems to me the first prosecutor could have given the newer cases that had been turned over to her after the previous prosecutor left the DA's office. To me, it seems very unfair that Lance has a prosecutor involved that likes to go to trial and does not consider offering your proposed Plea for Lance to the parents of the child. Lynne has already told me there's nothing you can do about prosecutor's shuffling their cases around to others.

We know Lance was suffering from anxiety and stress prior to his babysitting for Miss B[redacted] Lance was left with a responsibility that day that he really didn't want to have and was aggravated about the situation. We, including Lance realize things got out of hand and he stuck the child due to a build up of stress, anxiety, and a build up anger. Although Lance was wrong when he popped the child's head, it was and is the mother's responsibility to take care of the child. She should not have dumped that responsibility on Lance in order to be away from the child that particular day.

responsibility on Lance in order to be away from the child that particular day.

The other bruises on the child's body could have been caused by anyone that had been in contact with the child. The Browns or Coopers or any other member of the family may have struck the child previously or on the very same day. If questioned, others involved can deny they ever yelled, lashed out at, spanked or hit the child. Everyone else can be untruthful, or plain lie and get away with it. Lance can't lie about anything. He has admitted to popping the child's head and changing her diaper roughly. Lance made a terrible mistake that day. He knows it and we know it as well.

Thank you Mr. Snell for your time and patience with me, a third party. Thank you for working so hard to help Lance get his life back and have a second chance. Thank you for the time you have spent visiting with Lance, talking with Lynne, giving both encouragement, and keeping her informed.

Our support group is very small. If it's not unethical for a defense attorney, will you please ask for special prayer for your client, Lance Austin Williams from any family, friends, and church prayer network that you have? We all need special prayers at this very critical time in Lance's life.

If I have made typos or repeated myself, just overlook them.

Thank you again for working with my very special loved ones.

Sincerely,

Minnie Evelyn Lumpkin
Lance's Grandmother

Case Note - Page 31 of 62

Date: 03/21/2011 08:54 AM **Staff:** JIM **Topic:** E-Mail **Case Status** ☐

From: mewlumpkin2@aol.com
To: jamessnell@snelllaw.com
CC: lynne.mark5@yahoo.com
Subject: Lance Williams' Case - Very PRIVATE - for Mr. Snell ONLY
Received: 03/20/2011 8:35:19 PM

Dear Mr. Snell,

I sent to Lynne to read and give her approval for me to send to you. Lynne replied and gave me permission to send to you.

Mr. Snell, I am not trying to make excuses for Lance's behavior in April 2010. I'm telling you something that will give you a better understanding of Lance and some sources of his anger. Lynne and Lance do not like to talk about the hurtful past. They have both been hurt emotionally. Lynne and I both get emotional and cry very easily. It's also hard to talk about the painful present.

In Dr. Watson's report he mentioned that while Lance was living in Florida he was involved in drugs and alcohol. When I read that report I told Lynne there were discrepancies in Dr. Watson's report. He made it sound as if Lance was a drug addict or alcoholic the whole time he was living in Florida. After reading that report I asked Lynne how long Lance was involved with any drugs. She said about six months. And I guess that was the six months prior to his moving to SC in 2004.

Sometime in 2002 Lynne started taking a course for Airplane Mechanic. After she graduated in the year 2003, the only job available for her was in Columbia, SC. She left Tampa early November, 2003 to take a job in Columbia. Her household belongings were left in Tampa for several months. She made frequent trips by car, to visit Lance and she would bring a few items back for car. This went on for several months.

Lance graduated in Tampa in 2003 prior to Lynne's move to SC. Lance was employed after graduation. After his mom took the job in SC, Lance was living with someone he was working with. I don't remember how many months she made those trips back and forth by herself. I don't remember the exact month but she and Lance both made a final move to SC in 2004. I went to visit them in Swansea, SC just prior to Thanksgiving November 2004. At that time Lance told me he had to get out of Tampa because he had been sampling a drug. He felt he had to leave Tampa in order to avoid the drugs.

Another person in Lynne's life was detrimental to Lance's emotional health. I don't know if that person physically abused Lance or not. He never told me of any specifics, neither did Lynne. The other person was overbearing, ridiculed, and belittled Lance for 12 years. I know these things cause a person to have anger, low self-esteem, and lack of self-confidence. It's hard to trust anyone when you get beat down while growing up. He has trouble expressing himself due to all the above.

Lance's father wasn't involved in his life due to his physical disability and distance after Lance moved to Tampa. At times he and Lance exchanged phone calls and cards. Lance also visited his father when Lance lived in Alabama or came to visit me after they moved to FL. His dad has told Lance he loved him, but it's hard to feel that love without frequent contact. We feel the dad could have made a better effort to keep in touch with and even go visit Lance out of state.

Over the course of the years, Lynne has done all she can to encourage Lance. She has tried to encourage him to go to college, look for a higher paying job, etc. Since he has low-self esteem and lack of confidence in trying to advance himself, he kept working the current job. He was/is a good employee and worked hard at any job he's ever had. He is very good at what he does and better than some others that have done the same type work.

Is it possible for you to argue that Lance is not a person that has a criminal history and argue Lance did not get up that particular morning with a premeditated intent to harm the child? Can you argue in his behalf that there have been occasions that Lance would do what friends asked him to when he really didn't want to in order to have a continued friendship/relationship? He wanted someone to love and to be loved in return. He was/is vulnerable to others request due to the emotional abuse and intimidation he suffered from his childhood and teens years from a non-family member.

Case Note - Page 31 of 62

Was another infant also left with Lance that particular day for him to look after? As the day progressed he was going through more stress and aggravation due to being stuck with childcare of a girlfriend's toddler and possibly another infant. Lance knows he made a major mistake. He lashed out at the child instead of the real source of his anger, which he certainly regrets.

Lance is a very good and caring person. He has been a very good son and grandson.

Thank you for your continued efforts to get a Plea agreement and a greatly reduced sentence for Lance.

Yours truly,

Minnie E. Lumpkin
Grandmother of Lance

Case Note - Page 32 of 62

Date: 03/22/2011 11:47 AM **Staff:** JIM **Topic:** E-Mail **Case Status** ☐

From: James Snell
To: 'Mayes, Suzanne'
CC:
Subject: RE: State v. Lance Williams
Received: 03/22/2011 9:15:07 AM

Thank you for following up with me about the child's medical records. Did you find out anything about the follow up evaluation and the rape kit?

I've also been speaking with Mr. Williams about any available plea options. He wants to accept responsibility and does not want to go to trial. The mandatory minimum on the CSC though prevents the ability to plea him as charged. Do you think that there would be any other options? I know if the CSC was reduced to ABHAN (the lesser included) and he then plead straight up to both charges that would automatically place him on the abuse and neglect registry and could carry up to 10 years on each charge.

Thank you again.

James R. Snell, Jr.

Law Office of James R. Snell, Jr., LLC

316 South Lake Drive

Lexington, South Carolina 299072

(803) 359-3301

(803) 359-7691 (facsimile)

jamessnell@snelllaw.com

From: Mayes, Suzanne [mailto:SMayes@lex-co.com]
Sent: Friday, March 18, 2011 12:45 PM
To: 'jamessnell@snelllaw.com'
Subject: State v. Lance Williams

Re: State v. Lance Williams

Dear Mr. Snell:

Case Note - Page 32 of 62

We are in the process of speaking with the child's mother about signing a medical release form for the information you have requested. I will keep you updated.

Sincerely,

Suzanne Mayes

Suzanne Mayes

Eleventh Circuit Solicitor's Office

Case Note - Page 33 of 62

Date: 03/22/2011 04:56 PM **Staff:** JIM **Topic:** E-Mail **Case Status** ☐

From: Mayes, Suzanne
To: 'James Snell'
CC:
Subject: RE: State v. Lance Williams
Received: 03/22/2011 4:34:40 PM

Hi Jim ,

Unfortunately it does not appear that we'll be able to resolve this case through a plea. After meeting with the family members and thoroughly reviewing the case, the current charges do seem to fit the crime. The family is opposed to a lesser plea and the victim was hospitalized for 4 days. She bled profusely due to the vaginal injuries and the degree of injury indicates excessive force.

There do not appear to be any follow up exam records from Dr. Luberoff or the ARC (Assessment & Resource Center). A follow up exam was originally scheduled for June 7, 2010 but it was later cancelled. The Assessment & Resource Center indicated they have no medical chart on Victim [redacted]

The rape kit was previously unanalyzed, but has been submitted for screening. We expect results within 48 hours and I will advise you as soon as we receive that information.

Sincerely,

Suzanne Mayes

Suzanne Mayes

Eleventh Circuit Solicitor's Office

Phone: (803) 785-8257

Fax: (803) 785-8431

From: James Snell [mailto:jamessnell@snelllaw.com]
Sent: Tuesday, March 22, 2011 9:15 AM
To: Mayes, Suzanne
Subject: RE: State v. Lance Williams

Thank you for following up with me about the child's medical records. Did you find out anything about the follow up evaluation and the rape kit?

I've also been speaking with Mr. Williams about any available plea options. He wants to accept responsibility and does not want to go to trial. The mandatory minimum on the CSC though prevents the ability to plea him as charged. Do you think that there would be any other options? I know if the CSC was reduced to ARHAN (the lesser included) and he then plead straight up to both charges that

[illegible] was reduced to Assault (the lesser included) and he then pleaded straight up to both charges that would automatically place him on the abuse and neglect registry and could carry up to 10 years on each charge.

Thank you again.

James R. Snell, Jr.

Law Office of James R. Snell, Jr., LLC

316 South Lake Drive

Lexington, South Carolina 299072

(803) 359-3301

(803) 359-7691 (facsimile)

jamessnell@snelllaw.com

From: Mayes, Suzanne [mailto:SMayes@lex-co.com]
Sent: Friday, March 18, 2011 12:45 PM
To: 'jamessnell@snelllaw.com'
Subject: State v. Lance Williams

Re: State v. Lance Williams

Dear Mr. Snell:

We are in the process of speaking with the child's mother about signing a medical release form for the information you have requested. I will keep you updated.

Sincerely,

Suzanne Mayes

Suzanne Mayes

Eleventh Circuit Solicitor's Office

Case Note - Page 33 of 62

Case Note - Page 50 of 62

Date: 03/29/2011 09:54 AM **Staff:** JIM **Topic:** E-Mail **Case Status** ☐

From: James Snell
To: 'Abel, Anne S'
CC:
Subject: RE: request from Anne Abel, MD
Received: 03/29/2011 9:45:53 AM

Dr. Abel:

You can forward your bill to me and I'll deliver it to Lynn Williams – however payment is the responsibility of the Williams' family. I am not holding any money in retainer or trust to cover any expenses of the case. I spoke to his mother who said that they will tender a retainer\deposit for your services. Please let me know how much of a retainer\deposit you think is appropriate and I will get that from them.

James R. Snell, Jr.

Law Office of James R. Snell, Jr., LLC

316 South Lake Drive

Lexington, South Carolina 299072

(803) 359-3301

(803) 359-7691 (facsimile)

jamessnell@snelllaw.com

From: Abel, Anne S [mailto:abela@musc.edu]
Sent: Tuesday, March 29, 2011 9:23 AM
To: 'James Snell'
Subject: RE: request from Anne Abel, MD

Mr. Snell,

I do not recall agreeing to communicate with the family of the defendant. My bill will go to you. I have printed and reviewed all of the photos you sent on the CD which I received yesterday – no photos of hymen – those photos were taken by others and I have seen those previously. I will review your questions and respond online within the next few days.

Anne Abel, MD

From: James Snell [mailto:jamessnell@snelllaw.com]
Sent: Monday, March 28, 2011 6:57 PM
To: Abel, Anne S
Subject: RE: request from Anne Abel, MD

Dr. Abel:

I hope you have received the supplemental disc I sent overnight last week. The prosecutor's office has called another case ahead of Mr. Williams. We are only very tentative now for this week. If you are needed it won't be likely until Thursday or Friday.

Mr. Williams' grandmother has come up from Alabama. If you have not already sent an invoice or a retainer request to Lynn Williams you should do so now. The grandmother is the one financially responsible for this case.

I am preparing a cross examination of Dr. Luberoff as well as the other providers. I would like to know your thoughts on:

1. Whether or not the bruises to the child's mons pubis area look like teeth or bite marks (41 & 42);
2. Do they appear consistent with bruising caused by three fingers pressing down together?
3. What the protocol should be to actually test for a bite mark or make a further determination?
4. How significant is it that one of the assistants to the initial examination appears to have rough, jagged fingernails and is not wearing gloves (Img_3265)? Could this be related to the scratching on the labia minora?
5. How likely is it that an intentional, specific effort by an assailant would be to only bruise a hymen rather than tear or cause more significant damage?
6. Exactly how far inside would the hymen be in a fifteen month old? For example would it be a half inch, full inch or more?
7. Would the injuries sustained by the child in this case be expected to fully heal and her make a complete physical recovery?
8. Is there anything in this case, other than the location of the child's injuries, that makes it seem like it would be sexually motivated?
9. Is it possible to determine from the medical evidence alone whether or not only a finger\hand was used, a penis or another object?
10. How significant was it that there was no follow up performed by Dr. Luberoff or any other sort of assessment center as recommended?

If it is suitable to you I may follow up with you by telephone. Thank you again.

Case Note - Page 50 of 62

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Case Note - Page 51 of 62

Date: 03/29/2011 03:22 PM **Staff:** JIM **Topic:** Attorney **Case Status** ☐

This afternoon Lynn Williams came in to the office (dropped in). She told me that she did not want to hurt my feelings but that she and her mother wondered if I would want to have co-counsel for Lance's trial. This was the first time anything that had been mentioned by them before. I explained that while I was fully prepared to go forward I would certainly never turn down any additional assistance - and that I would find out if there was someone suitable available.After she left I called Wayne Floyd. Mr. Floyd agreed to help and then we called Ms. Williams back. She delivered a certified check for $5,000 to Wayne Floyd to my office. I carried it, and a copy of all discovery and reports we received to Mr. Floyd office and met with him that evening. We also conferred by phone with Cindy Hurley (nurse consultant).

Case Note - Page 52 of 62

Date: 03/30/2011 09:17 PM **Staff:** JIM **Topic:** Jail Visit **Case Status** ☐

This evening Wayne Floyd and I visited Lance Willlams at the Lexington County Detention Center. We reviewed the day's events in Court. Lance seemed to appreciate what we were doing in Court.

Lance is preparing to testify. He has been reviewing the proposed direct examination and timeline I provided.

Case Note - Page 53 of 62

Date: 04/04/2011 10:08 AM **Staff:** JIM **Topic:** Jail Visit **Case Status** ☐

This morning Lee and I went to the Lexington County Detention Center and visited with Lance. He seemed to be doing ok but expressed severe levels of disappointment with the law and the judicial system.

His mother had called and e-mailed me this morning. I callhed her back to discuss the post-trial motions. She proceeded to tell me that the trial made her son out to be a villan and that not enough was done to make him look like a good person. She also expressed her beleif that he may not be competent to stand trial and/or had the capacity to conform his behavior. This was based in part on his possible bi-polar condition.

I explained to her that I reviewed this with Dr. Watson who clearly found that he did have capacity and the ability to conform his conduct. I also never noticed anything with regard to Lance that indicated that he did not have the capacity to understand what was going onto him.

Ms. Williams was very upset - and spent a portion of the 15 minute call crying into the phone. I reiterated to her that I was doing everything I can to help her son and that I would be foccusing on the remaining legal issues. She concluded the call by thanking me and the call ended politely.

Williams, Mr. Lance A.	Case Type: CRM	DOI: 4/15/2010	LIM Date: N/A
Case #: 200002 (1363)	Class: NEG	Assigned: BRITTANY	Date Opened: 4/17/2010

Case Note - Page 54 of 62

Date: 04/05/2011 11:18 AM **Staff:** JIM **Topic:** Attorney **Case Status** ☐

This morning we made Lance's post-trial motions as well as sentencing presentation in Court. We had been moved from the 4th floor courtroom to the 3rd floor and we went in front of the pleas and other matters. Wayne Floyd was also present.

The Court heard from Lynn Williams, Heather Rogers, Minnie Lumpkin and Marc Rosenburg. I also had the judge hear from Selman Watson. Finally Lance Williams spoke. The judge found him credible and remorseful and gave him the minimum amount of time possible - 25 years to run concurrent with the 10 years on the unlawful neglect charge.

I came back to the office and prepared the notice of intent to appeal for the Court of Appeals. Copies are being mailed to the Division of Appellate Defense, Lynn Williams, Lance Williams, Wayne Floyd, Suzanne Mayes, and Donnie Myers. I also mailed Lance a file closing letter.

Case Note - Page 55 of 62

Date: 04/06/2011 11:17 AM **Staff:** JIM **Topic:** Client Called **Case Status** ☐

From: Lee B. Snell
To: staylor@lcsd.sc.gov
CC: James Snell
Subject: RE: Lance Williams
Received: 04/06/2011 11:06:25 AM

Sgt. Taylor: I was directed to you by Lt. Jones. Mr. Snell represents Mr. Lance Williams. He is currently awaiting transportation to Broad River as Judge McMahon sentenced him yesterday. He failed to ask for visitation for this week. His family being his mom (Lynne Williams) and (Minnie Lumpkin) grandmother would like to be able to visit him before he leaves for prison. Would this be possible?
Lee B. Snell
Legal Assistant to James R. Snell, Jr.
Law Office of James R. Snell, Jr., LLC.
316 South Lake Drive
Lexington, South Carolina 29072
(803) 359-3301 Telephone
(803) 359-7691 Fax
snelllaw.com
cdvlawyer.com
midlandsinjurylawyer.com

--- On Tue, 4/5/11, JONES, KEVIN <KJONES@lcsd.sc.gov> wrote:

From: JONES, KEVIN <KJONES@lcsd.sc.gov>
Subject: RE: Lance Williams
To: "Lee B. Snell" <leebishopsnell@yahoo.com>, "TAYLOR, SHERALET" <STAYLOR@lcsd.sc.gov>
Cc: "James Snell" <jamessnell@snelllaw.com>
Date: Tuesday, April 5, 2011, 2:31 PM

Sgt Taylor will facilitate this request.

Thank you,

From: Lee B. Snell [mailto:leebishopsnell@yahoo.com]
Sent: Tuesday, April 05, 2011 11:20 AM
To: JONES, KEVIN
Cc: James Snell
Subject: Lance Williams

Dear Lt. Jones:

Mr. Lance Williams was sentenced this morning before Judge McMahon. He failed to request SNELL_SUBPOENA_000161
visitation for this week. Is there anyway possible that his mother and grandmother be put on the

visitation for this week. Is there anyway possible that his mother and grandmother be put on the visitation list this week? Thanks.

Lee B. Snell

Legal Assistant to James R. Snell, Jr.

Law Office of James R. Snell, Jr., LLC.

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Attachments: image001.jpg

Case Note - Page 56 of 62

Date: 04/06/2011 01:46 PM **Staff:** LEE **Topic:** Client Called **Case Status** ☐

Lynne Williams called to followup regarding a visit with Lance before he is transported to prison. I called LCDC and was told that Lance was taken to R and E this am. Lynne requested that I send her the link to SCDC and that was done. Email to lynne.mark5@yahoo.com

Case Note - Page 57 of 62

Date: 04/12/2011 04:33 PM **Staff:** JIM **Topic:** Client Called **Case Status** ☐

Lynn Williams called this afternoon at about 4:30 to ask if the disc with Lance's file was ready. She spoke to Brittany would said it would be ready the next day.

I called her back a few minutes later and shared with her what I had found out about her request for pictures. I had spoken this afternoon with Harry Stokes, a lawyer I know in the General Counsel's office for the Department of Corrections. He confirmed for me that Lance would not be allowed to have the photographs from this case since they show a victim, especialy since this is a sex crimes case and there are close ups of her private areas.

I told Ms. Williams that I could not give her the pictures because of their content. I told her that I would forward them to his PCR or Appellate attoreny or any other lawyer upon request. Further I offered to let her come to my office to look at the photographs on the computer here. She made an appointment to do so tomorrow at 1:00 P.M.

Williams, Mr. Lance A.	Case Type: CRM	DOI: 4/15/2010	LIM Date: N/A
Case #: 200002 (1363)	Class: NEG	Assigned: BRITTANY	Date Opened: 4/17/2010

Case Note - Page 58 of 62

Date: 04/12/2011 07:36 PM **Staff:** JIM **Topic:** Attorney **Case Status** ☐

I have finished preparing the disc copy of the client file as requested by Ms. Williams. Total time it took me was about five hours. It was a total of 486 pages. I included all motions, correspondence, discovery, medical records, Dr. Burke testing, Dave Lawrence narative, bond hearing transcript, Selman Watson report and Johnny Hartley materials. This is everything requested - and everything I would have to offer.

I am putting the disc for her to pickup tomorrow at 1:00 P.M. when she comes in to meet with Brittany and look at the pictures.

Case Note - Page 59 of 62

Date: 04/13/2011 03:33 PM **Staff:** JIM **Topic:** Client Called **Case Status** ☐

This afternoon Lynn Williams came into the office. She meet with Brittany. She also picked up the disc copy of Lance's file she had requested. I had setup a laptop so that she could look at Lance's discovery photographs. She looked at them for a few minutes - had no other requests and then left.

Case Note - Page 60 of 62

Date: 04/17/2011 03:08 PM Staff: JIM **Topic: E-Mail** **Case Status** ☐

From: Lynne Williams
To: James Snell
CC:
Subject: Lance and motions
Received: 04/17/2011 1:13:52 PM

Hi Mr. Snell,

I have another question....Did you ask for a motion of continuance while in court? I know you made several motions, but I couldn't hear everything that was stated to the Judge.

Thanks,

Lynne

From: James Snell [mailto:jamessnell@snelllaw.com]
Sent: Sunday, April 17, 2011 12:43 PM
To: Lynne Williams
Subject: RE: Reference Diane's 04-06-11 E about Criminal Appeals in South Caroling

The transcript will be ordered (and paid for) by Appellate Defense as part of the appeal.

From: Lynne Williams [mailto:lynne.williams@flyasa.com]
Sent: Sunday, April 17, 2011 12:37 PM
To: James Snell Law
Cc: lynne.mark5@yahoo.com
Subject: FW: Reference Diane's 04-06-11 E about Criminal Appeals in South Caroling

Hi Mr. Snell,

Mother ran across your article which states the defendant must order a copy of the transcript from the Court reporter. Is that something you did already or does that still need to be done?

Thanks,

Lynne

From: mewlumpkin2@aol.com [mailto:mewlumpkin2@aol.com]
Sent: Sunday, April 17, 2011 12:19 PM
To: Lynne Williams
Cc: lynne.mark5@yahoo.com
Subject: Reference Diane's 04-06-11 E about Criminal Appeals in South Caroling

Hello Lynne,

In the third paragraph of the article she sent to you and you made me a copy, said the defendant must order a copy of the transcript from the Court reporter. Do you know if the transcript has been ordered?

order a copy of the transcript from the Court reporter. Do you know if the transcript has been ordered?

I didn't find the same article that Diane sent, but I found the one below from ezine article and it looks identical to me. It appears that it was submitted by Snell.

I love you,

Mother

http://ezinearticles.com/?South-Carolina-Criminal-Appeals&id=3927118
<http://ezinearticles.com/?South-Carolina-Criminal-Appeals&id=3927118>

Appeals from South Carolina's highest level of criminal Court, General Sessions, are taken to the South Carolina Court of Appeals. The only exception is in cases where the death penalty was imposed the first appeal is to the South Carolina Supreme Court. Appeals are initiated by the filing and service of a Notice of Intent to appeal with both the Court of General Sessions and the Court of Appeals within ten days of the sentencing. The defendant must order a copy of the transcript from the Court reporter. There is no filing fee to the Court of Appeals. The Court reporter has between 90-180 days to prepare the transcript. Further extensions are only by Order of the Supreme Court. After the transcript is finally prepared the Defendant and the State will submit their written briefs.

James R. Snell, Jr. is a criminal defense trial attorney who represents clients throughout South Carolina. His practice includes representing clients who are appealing their conviction. He is a member of the South Carolina Association of Criminal Defense Lawyers and the South Carolina Association for Justice. He is admitted to practice before the South Carolina Supreme Court, the U.S. District Court for South Carolina, the Fourth Circuit Court of Appeals and the U.S. Supreme Court. For more information about his practice please visit his web site at http://www.snelllaw.com <http://www.snelllaw.com/> .

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The information contained in this article is for general informational purposes only. Questions regarding your specific legal situation or case should be directed to a licensed attorney.

Article Source: http://EzineArticles.com/?expert=James_Snell
<http://ezinearticles.com/?expert=James_Snell>

Case Note - Page 61 of 62

Date: 04/19/2011 12:25 PM **Staff:** JIM **Topic:** E-Mail **Case Status** ☐

From: James Snell
To: 'Lynne Williams'
CC:
Subject: RE: Lance Williams
Received: 04/19/2011 11:14:46 AM

Ms. Williams:

Thank you for e-mailing again, I am sorry I missed your previous e-mail. There was not a pre-trial motion made for a continuance. We ended up not having the legal grounds to make that request by the start of the trial. Please let me know if you have any other questions.

James R. Snell, Jr.

Law Office of James R. Snell, Jr., LLC

316 South Lake Drive

Lexington, South Carolina 299072

(803) 359-3301

(803) 359-7691 (facsimile)

jamessnell@snelllaw.com

From: Lynne Williams [mailto:lynne.mark5@yahoo.com]
Sent: Tuesday, April 19, 2011 9:51 AM
To: James Snell, Attorney
Subject: Lance Williams

Hi Mr. Snell,

I had sent you another e-mail on Sunday inwhich I didn't get a response. So, I thought maybe you didn't get it since you responded so quickly to the first one.

I had asked you if during your motions before the trial if you had asked for a "motion of continuance"? I couldn't hear everything said so I am uncertain of what was asked and what wasn't.

Thank you for taking time to answer my questions,

Lynne

Case Note - Page 62 of 62

Date: 07/08/2016 09:13 AM **Staff:** JIM **Topic:** Status **Case Status** ☐

PCR hearing set for August 2nd.

Client is represented by Dick Hartpootlian.

He called 7/7. I returned call this morning. he is in a mediation in california. Could not speak to him.

Mr. Hartppotlian called back and set appointment with me for next Monday @ 2:30 P.M.

KANSAS CITY UNIVERSITY
OF MEDICINE & BIOSCIENCES

COLLEGE OF OSTEOPATHIC MEDICINE

COLLEGE OF BIOSCIENCES

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E-mail jamessnell@snelllaw.com

Dear Mr. Snell:

Thank you for opportunity to examine the case files on Larry Wilson. I have received on your disk, and examined:

The police reports
The accounts of Mr. Williams' statements
The photos of the child, including the SANE nurse exam photo

What appears to have happened is classic. A man in a relationship with a woman is made caregiver to her child by another man. He becomes frustrated with the situation, and while changing a diaper loses control of himself and takes out his anger physically on the child.

The case summary is in error. The vagina was not visualized, and the hymen was not seen well enough to photograph. There is a pair of visible abrasions of the vulva (which is not the vagina) which are quite consistent with the defendant's account of having gripped the child here forcefully while he was out of control and he was trying to clean her. The SANE nurse has documented and photographed these well.

I see no intent here to commit an act of sexual gratification. Nor do I see anything, anywhere on the body, that should damage the child physically in the long run. I cannot address how this act may damage the child's long-term ability to trust others -- being roughed-up like this by a caregiver who she may well have come to love must be terribly confusing. But there is no true science in the popular claims that the slightest inappropriate touch to the outer genitalia must cause terrible emotional problems later.

I am not a psychiatrist, but I have the education that a general physician has on sex crimes against children. A pedophile bent on committing a sex crime against this baby would have initiated the relationship with the mother for this purpose, and done his mischief much more subtly with the intention of evading detection. What Mr. Williams did isn't the work of a scheming mind, or even something that the defendant would premeditate.

I look forward to receiving the entire set of medical records. There are certain genetic diseases – most famously, a mutant monoamine oxidase – that causes people to suddenly lose control when even slightly stressed. Life has taught me that this happens to many normal people from time to time, often leaving them with lifelong deep regrets. I am not a lawyer, but it seems to me that the interests of the people of South Carolina is best served by making sure that Mr. Williams doesn't continue trying to care for children, and that he get a good psych evaluation and perhaps appropriate re-education in anger management. To put him on trial for a sex crime would be expensive and unjust, and to put him away for the long-term would waste his potential and cost a huge amount of taxpayer money for no good purpose.

If there's something else that I don't know that would affect my thinking, then I do need to see it. There is no charge for this review. I am board-certified in anatomic and clinical pathology. Anatomic pathology includes the study of wounds and the effects of violence. I am licensed to practice medicine in Kansas and Missouri. All this is true to a reasonable degree of medical certainty and on my word as a Christian gentleman.

Sincerely,

Ed Friedlander MD

Edward R. Friedlander, M.D.
Chairman, Department of Pathology

(363 Lance Williams

FAX TRANSMISSION

E. Selman Watson, Ph.D.
Clinical Psychologist
1720 Main Street
Suite 101
COLUMBIA, SOUTH CAROLINA 29201
PHONE: (803) 256-6863

To: Jim Snell Date: 9-5-2010

Fax #: 359-7691 Pages: 4 Including This Cover Sheet

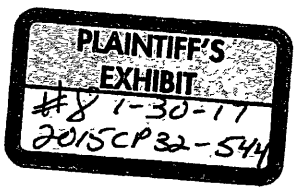
From: S. Watson

Subject: Abel Results

COMMENTS:

Jim: I don't think these results are reliable!

Selman W



PLAINTIFF'S EXHIBIT
#8A 1-30-17
2015CP32-544

1003444

Lexington County Sheriff's Department
Statement Form

DATE APRIL 16th, 2010 PLACE LEXINGTON COUNTY SHERIFF'S DEPARTMENT INTERVIEW Room #1 TIME STARTED 7:00 P M

I, the undersigned, LANCE AARON WILLIAMS, am ____ years of age, my date and place of birth being the 18th day of APRIL, 19 85, at ALABAMA

My present address is ____

I completed 12 grade(s) in school. I can read and write. LW (Initials)

CONTACT NUMBERS: H) W) C)

ALTERNATE CONTACT: Name ____ Phone Numbers: ____

Before answering any questions or making any statements, ED PRESTIGIACOMO / JEFF PALKOWSKI a person who identified him/herself as a DETECTIVE / SGT - LCSD. duly warned and advised me that:

1) I HAVE THE RIGHT TO REMAIN SILENT. LW

2) ANYTHING I SAY, CAN AND WILL BE USED AGAINST ME IN A COURT OF LAW. LW

3) I HAVE THE RIGHT TO TALK TO A LAWYER FOR ADVICE BEFORE ASKED ANY QUESTIONS AND TO HAVE HIM OR HER PRESENT WITH ME DURING QUESTIONING. LW

4) IF I HAVE NO MONEY FOR LAWYER'S FEES, THE COURT WILL APPOINT ONE TO REPRESENT ME WITHOUT COST TO ME IF I WISH. LW

5) IF I DECIDE TO ANSWER QUESTIONS NOW WITHOUT A LAWYER PRESENT, I WILL STILL HAVE THE RIGHT TO STOP ANSWERING QUESTIONS AT ANY TIME. I ALSO HAVE THE RIGHT TO STOP ANSWERING QUESTIONS AT ANYTIME UNTIL I TALK WITH A LAWYER. LW

I HAVE READ THIS STATEMENT OF MY RIGHTS AND I UNDERSTAND WHAT MY RIGHTS ARE. LW I MAKE THE FOLLOWING STATEMENT:

On 9/15/10 Victim was in my care. She has two bruised ears which is the result of 2 slaps to each ear. Once for decipline cause She was throwing toys everywhere, the other ear do to her throwing her cup around. The bruses on her head are from falling outside on rough terrain while playing. The bruses on her arms are do to lifting her by her elbows. The bruse on her neck occured sometime while playing outside, I might have grabed her shirt collar to catch her and bring her back. The bruising around her privates is from the cream I applied for her dry skin, as I applied to much force do to lack of feeling in hand. I gave her a bath around afternoon due to her sweating in her sleep.

DET. [illegible] 4/16/2010 @ 2025 HRS
Witness

Person giving Statement
4/16/10
Date

Notary Public 04/01/2010 My Commission expires

21 of 68

LE Case # 1003444

LCSD 173, Revised 11/04

(OFF GIVENER_WILLIAMS_04162010) Page 1 of 2 pgs

1003444B

VOLUNTARY STATEMENT

Page 2 of 2 pages. LANCE AUSTON WILLIAMS

Q: How many diapers did you change yesterday?

A: Five

Q: What kind of cream did you put on her vagina?

A: Aveno lotion

Q: Where did the blood come from?

A: Butt

Q: (SP) Do you spank Victim ?

A: Yes

Q: Do you have an anger problem?

A: Yes

Q: What happened to Victim Vagina (bruises)?

A: Was angry that the poop got in between her and used excessive force to clean (wipe) her. Poop got in between her lips, used excessive force to clean her.

End of statement 4/16/2010

I have read this page, initialed corrections or changes, if any, and received a copy of this page. I certify that the facts contained herein are true and correct to the best of my knowledge.

WITNESS: DET [illegible] 4/16/2010 @ 2025 HRS Signature of person giving voluntary statement

COPY GIVEN TO WILLIAMS SNELL

James Snell

From: James Snell [jamessnell@snelllaw.com]
Sent: Thursday, June 17, 2010 7:20 PM
To: 'scalpel_blade@yahoo.com'
Subject: Lance Williams - SC criminal case
Attachments: 2010_05_28_12_40_16.pdf

Dr. Friedlander:

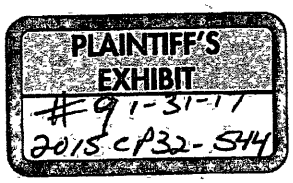
Lynn Williams, mother of Lance Williams, has asked me to forward you some information about the medical examination in her son's case. I am sending you a summary I prepared along with the medical report. The police have not turned over any other medical records or photographs to the prosecutor although we expect them shortly.

Please let me know if you have any further questions about the case. If you would like to make a proposal for evaluative services in this case I would be happy to forward it to Ms. Williams along with my client.

Thank you for your time & any assistance you may be able to offer.

James R. Snell, Jr.
Attorney at Law
316 South Lake Drive
Lexington, South Carolina 29072
803-359-3301
803-359-7691 (facsimile)
jamessnell@snelllaw.com

CERTIFIED CIRCUIT COURT MEDIATOR



James Snell

From: Ed Friedlander [scalpel_blade@yahoo.com]
Sent: Monday, July 19, 2010 10:45 PM
To: James Snell
Cc: gdodd@Kcumb.edu
Subject: RE: Lance Williams - SC criminal case

Thanks. I did my 60th autopsy for the year today -- my "street cred" is really high.

--- On Mon, 7/19/10, James Snell <jamessnell@snelllaw.com> wrote:

From: James Snell <jamessnell@snelllaw.com>
Subject: RE: Lance Williams - SC criminal case
To: "'Ed Friedlander'" <scalpel_blade@yahoo.com>
Date: Monday, July 19, 2010, 2:23 PM

Dr. Friedlander:

I am mailing you a disc today containing the documents and photographs we have received from the prosecutor's office. Thank you.

James R. Snell, Jr.

Attorney at Law

316 South Lake Drive

Lexington, South Carolina 29072

803-359-3301

803-359-7691 (facsimile)

jamessnell@snelllaw.com

CERTIFIED CIRCUIT COURT MEDIATOR

From: Ed Friedlander [mailto:scalpel_blade@yahoo.com]
Sent: Monday, June 21, 2010 9:40 AM
To: James Snell
Cc: gdodd@Kcumb.edu
Subject: Re: Lance Williams - SC criminal case

I forgot to give you my address!! Sorry

Ed Friedlander MD
KCUMB Pathology
1750 Independence Avenue
Kansas City MO 61046

816-283-2202 (Gwen)

--- On Thu, 6/17/10, James Snell <*jamessnell@snelllaw.com*> wrote:

From: James Snell <jamessnell@snelllaw.com>
Subject: Lance Williams - SC criminal case
To: scalpel_blade@yahoo.com
Date: Thursday, June 17, 2010, 6:20 PM

Dr. Friedlander:

Lynn Williams, mother of Lance Williams, has asked me to forward you some information about the medical examination in her son's case. I am sending you a summary I prepared along with the medical report. The police have not turned over any other medical records or photographs to the prosecutor although we expect them shortly.

Please let me know if you have any further questions about the case. If you would like to make a proposal for evaluative services in this case I would be happy to forward it to Ms. Williams along with my client.

Thank you for your time & any assistance you may be able to offer.

James R. Snell, Jr.

Attorney at Law

316 South Lake Drive

Lexington, South Carolina 29072

803-359-3301

803-359-7691 (facsimile)

jamessnell@snelllaw.com

CERTIFIED CIRCUIT COURT MEDIATOR

1) CAN WE REVIEW THE TRANSCRIPT OF DR. LUBEKOFF TESTIMONY

2) CAN WE GET A COPY OF YOUR STATE LAW (WORDS) RELATED TO CRIMINAL ~~SEXUAL~~ SEXUAL ~~CONTACT~~ MISCONDUCT TO IND. WE SPECIFICALLY ARE INTERESTED IN WORDS RELATED TO PENETRATION.

JEFF ARCHIE

COURT'S EXHIBIT NO. 2
IDENTIFICATION/EVIDENCE
DKT. #
DATE:

PLAINTIFF'S EXHIBIT
#1 01-31-17
2015CP32-544

Trial_Exhibits_000005

1118

No Additional Information needed.

Jane Adams

COURT'S
EXHIBIT NO.
DATE

Trial_Exhibits_000006

1119

MUSC
Children's Hospital

9/30/2010

Child Abuse and Neglect
135 Rutledge Avenue
MSC 566
Charleston SC 29425
Tel 843 792 2618
Fax 843 792 3022

David M. Habib, MD
~~Division Director~~
Anne Abel, MD
~~Medical Director~~
Michelle Amaya, MD, MPH
Sara Schuh, MD
Karlayne Toole, RN, MSN, CPNP
Tracy Williams, RN, MSN, CPNP
Linda Walton
Administrative Specialist

Violence Intervention & Prevention Center
Tel 843 723 3600

Nancy Saldutte
Administrative Assistant

James Snell, Jr.
Attorney at Law
316 South Lake Dr.
Lexington, SC, 29072

Re: Victim , DOB [redacted]

Mr. Snell:

I am writing at your request regarding the question of whether or not Victim might have Lichen Sclerosus. There is no evidence of Lichen Sclerosus in her case. Lichen Sclerosus affects the skin of the labia majora, labia minora, peri-anal skin and the skin of the perineal body (the area between the introitus and the anus). In children, Lichen Sclerosus rarely affects the hymen, which is part of the vagina. Lichen Sclerosus is not related to eczema. Further, the first sign of Lichen Sclerosus in the genital area of a female child is paper-thin skin with a white shiny appearance, often in an hourglass configuration going around the vulvar introitus and peri-anus with the narrow part of the hourglass shape in the perineal body area. Then in the typical course of Lichen Sclerosis there is minor bleeding in this very thin skin causing red-purple bruises - purpura or sometimes what would commonly be called "blood blisters" and sometimes minor bleeding thru this abnormal skin. Lichen Sclerosus is a remitting and relapsing condition and it is not a one-time illness.

In this case there is both acute genital trauma and acute general physical trauma, as confirmed by many observers and photos

Best regards,

Anne Abel MD

Anne Abel, MD, FAAP

Director, Violence Intervention and Prevention Division

Dept. of Pediatrics

MUSC

"An equal opportunity employer, promoting workplace diversity"

DEFENDANT'S EXHIBIT
#1 1-30-17
2015CP32-544

muschealth.com

SNELL_SUBPOENA_000173

1120

ORIGINAL

FILED
2017 FEB 6 PM 2:18
LISA COMER
CLERK OF COURT
LEXINGTON, SC

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS
Lance Austin Williams (SCDC No. 345477), Applicant, vs. State of South Carolina, Respondent.	C/A No.: 2014-CP-32-04769 **MOTION TO AMEND PLEADINGS**

Applicant Lance Austin Williams filed this post-conviction relief (PCR) action challenging his continued detention by the State of South Carolina as offensive to the United States Constitution's guarantee of effective assistance of counsel.

Having held an evidentiary hearing in this matter, he now moves the Court pursuant to Rule 15(b) of the South Carolina Rules of Civil Procedure for leave to file a Second Amended Application conforming his pleading to the evidence. The copy of Applicant's proposed second amended application for PCR relief is attached here as **Exhibit A.**

As explained below, this motion should be granted because (1) it falls squarely within the circumstances contemplated by Rule 15; (2) the State cannot demonstrate prejudice and, even if it could, the remedy is a continuance to allow the State to present rebuttal evidence; and (3) the proposed second amended application *narrows* the issues, thus simplifying number of matters in dispute and on which the Court will have to rule.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This action was filed on December 31, 2014. The State filed a Return on August 13, 2015. On April 4, 2016, Mr. Williams moved to conduct discovery (attached as **Exhibit B**) pursuant to

South Carolina Code § 17-27-150, arguing the Court's authorization of discovery "will expedite Applicant's preparation for the hearing, thus saving time and state resources." Specifically, Applicant cited the need to subpoena trial counsels' files prior to the hearing. The State opposed the motion (attached as **Exhibit C**), and no discovery was had.

On October 25, 2016, Mr. Williams filed an Amended Application (attached as **Exhibit D**) raising three grounds for relief, specifically alleging: (1) trial counsel failed to make contemporaneous trial objections to the introduction of unfairly prejudicial photographs that inflamed the jury's passions and prejudices and invited a verdict on an improper basis; (2) trial counsel failed to call key witnesses, including an expert witness that would have testified that the alleged injuries were consistent with Applicant's trial testimony; and (3) trial counsel failed to properly contest the admissibility of Applicant's out-of-court statement. The State never filed an amended return.

On January 30 and 31, 2017, the Court held an evidentiary hearing that included testimony from an expert witness trial counsel failed to call at trial, as well as Mr. Williams' trial counsel, James R. Snell, Jr. and H. Wayne Floyd. Applicant subpoenaed trial counsels' files to the hearing. Mr. Snell provided his complete file on January 26 and Mr. Floyd provided his on January 30.

During the evidentiary hearing, trial counsel testified concerning a number of matters related to a general lack of preparation. Collectively, trial counsel had spoken only to a single witness, a police investigator, prior to trial. Mr. Floyd, who was retained less than 48 hours before trial and spent approximately one hour with applicant prior to trial, believed he would merely be assisting Mr. Snell as a second chair. In fact, Mr. Floyd conducted 11 of 13 cross-examinations of key State witnesses. He asked no questions during the *voir dire* of one State expert and only a single question of another. Both experts were qualified by the trial court; offered severely

damaging and inaccurate or incomplete evidence; and were used by the State to introduce inflammatory photographic evidence. When asked why he failed to object to the admissibility of graphic photographs of a 15-month old child's bruised vagina, Mr. Floyd admitted there was "no trial strategy" motivating that failure to act.

The State presented no evidence at the PCR hearing and, while it lodged a continuing objection as to relevance, the State did not move for a continuance or offer a proffer concerning evidence unavailable to it.

STANDARD OF REVIEW

A motion to amend is addressed to the sound discretion of the trial judge. Harvey v. Strickland, 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002). Generally, leave to amend should be freely granted when justice so requires and amendment prejudices no other party. Id. (citing Rule 15, SCRCP; Foggie v. CSX Transp., Inc., 313 S.C. 98, 431 S.E.2d 587 (1993)). This includes motions seeking leave to amend to conform to the proof, which "should be liberally allowed when no prejudice to the opposing party will result." Id. (citing Soil & Material Eng'rs, Inc. v. Folly Assoc., 293 S.C. 498, 361 S.E.2d 779 (Ct.App.1987)). "[T]he party opposing the motion has the burden of establishing prejudice." Id.

"Upon allowing any such amendment or evidence the Court shall state in the record the reason or reasons for allowing the amendment or evidence." Rule 15(b), SCRCP. "In the event the Court should try issues not raised by the pleadings, it shall state in the record all such issues tried and the reason therefor." Id.

ARGUMENT

This motion should be granted to allow Mr. Williams to conform his application to the proof before the Court for three reasons.

First, the amendment sought here is authorized by Rule 15(b) of the South Carolina Rules of Civil Procedure. Amendment to conform the pleadings to proof is permitted when issues not raised by the pleadings are tried by the consent of the parties or when the evidence is objected to but resolving the merits of a claim is furthered by allowing the amendment and the objecting party fails to show prejudice. See Rule 15(b), SCRCP. Specifically, the rule provides:

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended *and shall do so freely* when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

Id. (emphasis added). Notably, the rule presumes amendment will be allowed (see id. ("...shall do so freely...")), while imposing a burden on the objecting party to demonstrate why the evidence and amendment are prejudicial.

Here, the gravamen of Mr. Williams' claim is ineffective assistance of counsel. Some of trial counsels' failures were apparent on the face of the trial record, and those issues were previously joined. However, because the State opposed discovery, Mr. Williams had no opportunity to learn other critical facts that touch on an ineffective assistance claim, such as counsels' failure to interview 12 of 13 State witnesses.

In Soil & Material Engineers, Inc. v. Folly Associates, the court of appeals reversed and remanded a case for a new trial after the trial court refused to allow the plaintiff to amend its pleading to conform to the evidence. In so doing, the court explained that a trial court's prejudice analysis must "consider whether the opposing party has had the opportunity to prepare for the issue now being raised formally[,]" and that amendment serves as "no just cause to complain if the opposing party is afforded full opportunity to introduce testimony bearing on the subject of the amendment." Soil & Material Engineers, 293 S.C. at 501, 361 S.E.2d at 781 (quotation omitted).

Here, the State has been afforded such an opportunity as the Assistant Attorney General conducted extensive cross-examination of trial counsel over two days. Moreover, a claim of prejudice is not self-executing, but requires the State to come forward and identify matters it could not previously address as a result of the amendment. See id. at 501, 361 S.E.2d at 781 (trial court abused discretion where it made no finding of prejudice and claimant made no showing). Here, the State has not bothered to file an amended return to Mr. Williams' pending Amended Application so requiring it to file one in response to the proposed second amended application imposes no additional burden. Moreover, after Mr. Williams rested, the State also rested without calling a single witness. To the extent it intends to oppose this motion, the State bears the burden of specifically identifying the evidence it was unable to present to rebut the evidence relied on by the proposed amendment.

Second, assuming, for the sake of argument, that the State has suffered some prejudice, the proper remedy is a continuance to allow the State to present rebuttal evidence, not denying Mr. Williams leave to amend. Had the State moved for a continuance (or were it to do so now), the rule requires the Court to grant the State leave to present evidence: "The court *shall* upon motion grant a continuance reasonably necessary to enable the objecting party to meet such evidence." Rule 15(b), SCRCP (emphasis added). Thus, if the State wishes to present evidence to rebut Mr. Snell and Mr. Floyd's testimony concerning their lack of preparation, it should represent to the Court what that evidence is and Mr. Williams *may* consent to that evidence being heard. However, the undersigned are hard pressed to conceive of *any* evidence that could rebut trial counsels' testimony concerning their own preparation (or lack thereof) and trial strategy. In the absence of any such evidence, the State cannot meet its burden and a continuance is unwarranted.

Third, this amendment is in the interest of judicial economy because it seeks to narrow the issues before the Court. Applicant's proposed second amended application seeks to proceed under

three theories: (a) failure to contemporaneously object to the admission of unfairly prejudicial photographs; (b) failure to call an expert witness to testify that the victim's injuries were consistent with Applicant's statement and testimony, which would have constituted a medically recognized treatment of the child, and thus a legal defense; and (c) that trial counsels' lack of preparation was both specifically prejudicial, as contemplated by Strickland v. Washington, 466 U.S. 668 (1984), but also constituted a total breakdown of the adversarial process as recognized in United States v. Cronic, 466 U.S. 648 (1984). With the exception of item (c), these issues are identical or more narrowly drawn than those presently joined.

Item (a) is an issue previously joined. Item (b) is an issue previously joined, but substantially narrowed to abandon any challenge to trial counsels' failure to call an expert concerning the voluntariness of Mr. Williams' statement to police. Moreover, as presently formulated, the item (b) is rephrased with far greater specificity, which seeks to focus the State and the Court on the legal issue raised by Dr. Edward Frielander's testimony that he was available and willing to testify at trial and would have given an opinion that would have explained to the jury that Mr. Williams' conduct constituted a "medically recognized treatment" as contemplated by South Carolina Code § 16-3-651, and thus given Mr. Williams a legal defense to the charge of criminal sexual conduct with a minor.

With respect to item (c), this item replaces an issue voluntarily abandoned concerning trial counsels' failed to properly argue against the admissibility of out-of-court statements. See Ex. D. In its place, Mr. Williams seeks to be heard on an issue—counsels' lack of trial preparation—first discovered by Mr. Williams during the PCR hearing. While his Amended Application makes reference to "individual failure[s] and the combination of failures and their cumulative effect on the outcome of the trial," as a basis for relief (see Ex. D), the proposed second amended application

climinates this vague reference and expressly identifies the issue as presented by trial counsels' testimony at thc PCR hearing and links that testimony to precedent (Strickland and Cronic) recognizing a right of rclief.

Since the scond amcnded application constitutes a far more focusd presentation of the issues on which this Court will have rule, Mr. Williams submits it is in the interest of the State, thc Court, and his own to permit this amendment.

CONCLUSION

For the reasons set forth here, Applicant Lance Austin Williams requests this motion be granted and he be authorized to file thc second amended application attached to this motion, which narrows the issues in dispute and conforms the plcadings to the evidence before the Court.

Respectfully submitted by,

Richard A. Harpootlian (SC Bar No. 2725)
Christopher P. Kenney (SC Bar No. 100147)
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)
rah@harpootlianlaw.com
cpk@harpootlianlaw.com

ATTORNEYS FOR APPLICANT
LANCE AUSTIN WILLIAMS

February 3, 2017
Columbia, South Carolina.

EXHIBIT A

(Applicant's Proposed Second Amended Application for PCR Relief)

FORM 5

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
	)	
	)	
Lance Austin Williams, SCDC # 00345477 Full name and prison number (if any) of Applicant.	)	
	)	**SECOND AMENDED**
v.	)	
	)	**APPLICATION FOR**
State of South Carolina	)	**POST-CONVICTION RELIEF**
	)	

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Broad River Correctional Institution

2. Name and location of Court which imposed sentence Lexington County Court of General Sessions

3. Name(s) of co-defendant(s) (if any) None

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 2010-GS-32-01860: Unlawful Neglect of a Child

   (b) 2010-GS-32-01861: Criminal Sexual Conduct First Degree

   (c) ____

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

(a) April 5, 2011

(b) April 5, 2011

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty _x_

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. South Carolina Supreme Court

iii. _____

(b) the result in each such Court to which you appealed:

i. Convictions and sentences affirmed

ii. Petition for Writ of Certiorari denied

iii. _____

(c) the date of each such result:

i. July 24, 2013 (petition for rehearing denied September 19, 2013)

ii. July 24, 2014

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013)

ii. Denial of Petition for Writ of Certiorari was unpublished

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

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

custody unlawfully:

(a) See Attachment A

(b) ____

(c) ____

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

(a) See Attachment A

(b) ____

(c) ____

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

(a) any petition in a State Court under South Carolina Law? Except as set forth in response to questions 7 and 8 above, no.

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

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? 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. N/A

ii. ____

iii. ____

iv. ____

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

i. ____

ii. ____

iii. ____

iv. ____

(c) the disposition thereof:

i. ____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

No

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

(a) which grounds have been presented:

i. N/A

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) Applicant's claims of ineffective assistance of trial counsel could not have been presented on direct appeal.

(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? Yes

(c) your sentencing? Yes

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

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

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

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

i. James R. Snell, Jr.

ii. H. Wayne Floyd

iii. Richard A. Harpootlian

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

i. Arraignment and trial

ii. Arraignment and trial

iii. Appeal to South Carolina Court of Appeals and Petition for Writ of Certiorari to the South Carolina Supreme Court

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

Vacation of my convictions and a new trial.

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

No

Respectfully submitted by,

Richard A. Harpootlian (SC Bar No. 2725)
Christopher P. Kenney (SC Bar No. 100147)
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)
rah@harpootlianlaw.com
cpk@harpootlianlaw.com

ATTORNEYS FOR APPLICANT
LANCE AUSTIN WILLIAMS

February 1, 2017
Columbia, South Carolina.

ATTACHMENT A

10. Applicant is being held in custody unlawfully because he was denied effective assistance of trial counsel in violation of the Fifth, Sixth, and Fourteenth Amendments of the Constitution.

11. With the exception of item c (citing Cronic, infra), each of the following errors by trial counsel fell below an objective standard of effective representation and was prejudicial within the meaning of Strickland v. Washington, 466 U.S. 668 (1984), such that Applicant is entitled to have his convictions vacated. Applicant seeks relief under three theories:

a. Applicant's trial counsel failed to contemporaneously object at trial to the introduction of prejudicial evidence including, but not limited to, photographs that were not relevant to any matter in dispute. These photographs were highly prejudicial and served the sole purpose of inflaming the passions and prejudices of the jury, and invited a verdict based on factors other than the admissible evidence. In its opinion affirming Applicant's convictions, the Court of Appeals found any error in admitting the photographs was not preserved for review on direct appeal because trial counsel failed to contemporaneously object to their admission.

b. Trial counsel failed to call an expert witness or witnesses to testify that the victim's injuries were consistent with Applicant's statement to police and testimony at trial and would have constituted a "medically recognized treatment" as contemplated by South Carolina Code § 16-3-651, and thus constituted a legal defense to the charge of criminal sexual conduct with a minor.

c. Trial counsels' lack of trial preparation, including the failure to interview virtually any State witness or to comprehend and appreciate facts that entitled Applicant to a legal defense, falls below that of a reasonable, competent lawyer. Trial counsels' lack of preparation is both a specific error and omission within the meaning of Strickland, but also a total failure to function as a meaningful State adversary such that prejudice can be presumed, as contemplated by United States v. Cronic, 466 U.S. 648 (1984).

EXHIBIT B

(Applicant's Motion for Leave to Conduct Discovery)

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Lance Austin Williams #00345477

Applicant,

vs.

The State of South Carolina

Respondent.

C/A No.: 2014-CP-32-04769

MOTION FOR LEAVE TO CONDUCT DISCOVERY

Applicant Lance Austin Williams ("Williams"), by and through his undersigned counsel, hereby moves this Court for an Order granting leave to conduct discovery pursuant to South Carolina Code § 17-27-150, and would respectfully show unto the Court as follows.

On December 31, 2014, Williams filed an application for post-conviction relief due to ineffective assistance of counsel alleging that trial counsel was deficient for numerous errors throughout the course of Applicant's trial including their failure to object to the introduction of prejudicial photographs, failure to call key witnesses, and failure to cross-examine the State's leading witness after he offered inconsistent testimony. At the conclusion of Applicant's trial, on April 1, 2011, a jury found Williams guilty of first degree criminal sexual conduct with a minor and unlawful conduct with a child, and he was sentenced to twenty-five years' imprisonment and a concurrent term of ten years' imprisonment. The deficiencies in defense counsel's performance at trial were highly prejudicial to the outcome of Williams's case, and but for these errors the result of the proceeding would have been different.

Applicant Williams seeks leave from the Court to conduct discovery that will permit Applicant to obtain necessary information through means other than in-court proceedings. The use of these procedures will expedite Applicant's preparation for the hearing, thus saving time and

state resources. Specifically, Applicant would like to issue a subpoena to trial counsel for their files and to the Lexington County Clerk of Court's Office for all trial exhibits.

For these reasons, Applicant respectfully requests the Court grant this motion and grant Applicant leave to conduct discovery in this matter.

Respectfully submitted,

Richard A. Harpootlian (SC Bar No. 2725)
RICHARD A. HARPOOTLIAN, PA
1410 Laurel Street (29201)
Post Office Box 1090
Columbia, South Carolina 29202
Telephone: (803) 252-4848
Facsimile: (803) 252-4810
rah@harpootlianlaw.com

ATTORNEY FOR LANCE AUSTIN WILLIAMS

April 4, 2016
Columbia, South Carolina

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

Lance Austin Williams #00345477

Applicant,

vs.

The State of South Carolina

Respondent.

C/A No.: 2014-CP-32-04769

CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for the Applicant, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on April 4, 2016, served by having the below document hand delivered to the following mentioned person:

Document: Motion for Leave to Conduct Discovery

Served: Patrick Schmeckpeper, Assistant Attorney General
South Carolina Attorney General's Office
Post Office Box 11549
Columbia South Carolina 29211

Holli Miller

EXHIBIT C

(Return to Motion for Leave to Conduct Discovery)

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
Lance Austin Williams, #345477, Applicant, v. State of South Carolina, Respondent.	2014-CP-32-04769 **RETURN TO MOTION FOR LEAVE TO CONDUCT DISCOVERY**

This matter comes before the Court by way of Applicant's Motion for Leave to Conduct Discovery filed April 4, 2016. The Respondent submits that the Applicant's discovery motion is without merit and should be denied without a hearing.

I.

The Uniform Post Conviction Procedure Act comprehends and takes the place of the statutory writ of habeas corpus found in S.C. Code Ann. Sec. 17-17-10 (1985), *et seq.*, under which this action has been filed. *See* S.C. Code Ann. Sec. 17-27-20(b). The Uniform Post-Conviction Procedure Act does not allow for discovery in a non-capital post-conviction relief case without good cause and order of the circuit court permitting discovery requests. S.C. Code Ann. § 17-27-150(A) states:

> A party in a non-capital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for the effective utilization of discovery procedures, counsel may be appointed by the judge for an applicant who qualifies for appointment pursuant to Section 17-27-60 or similar applicable provisions of law.

The conviction being challenged by the Applicant in this action arises from a non-capital offense.

II.

First, the Applicant has failed to state a specific reason for requesting to invoke the discovery process. Respondent submits that it has given opposing counsel every document within its custody and control, including the clerk's records,[1] SCDC records, and the PCR application. Respondent does not have custody or control over the Solicitor's file or any other records from the trial not mentioned above.

III.

Finally, Respondent submits that discovery should not be permitted because the Applicant has not made the requisite showing of good cause. The Applicant's grounds for discovery involve nothing more than speculation about what he might find and where he might find it. Such speculation cannot support a finding of good cause. *See, e.g.,* Strickler v. Greene, 527 U.S. 263, 286, 119 S.Ct. 1936, 1950-1950 (1999) ("Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review.") On information and belief, the Applicant has not provided a showing of good cause.

IV.

The Respondent therefore objects to the Motion for Leave to Conduct Discovery and requests that the Court deny the Applicant's Motion.

[1] Trial exhibits have been requested from the Clerk's Office and will be submitted to opposing counsel upon receipt.

WHEREFORE, the State requests that this Court deny the Motion for Leave to Conduct Discovery.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

BY: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

May 4, 2016.

EXHIBIT D

(Applicant's Amended Application for PCR Relief)

FORM 5

COPY

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)

Lance Austin Williams,
SCDC # 00345477
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

AMENDED

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Kirkland Correctional

2. Name and location of Court which imposed sentence Lexington County Court of General Sessions

3. Name(s) of co-defendant(s) (if any) None

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 2010-GS-32-01860: Unlawful Neglect of a Child

   (b) 2010-GS-32-01861: Criminal Sexual Conduct First Degree

   (c) ____

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

(a) April 5, 2011

(b) April 5, 2011

(c) ____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty ____

(b) after a plea of not guilty _x_

(c) after a plea of nolo contendere ____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. South Carolina Supreme Court

iii. ____

(b) the result in each such Court to which you appealed:

i. Convictions and sentences affirmed

ii. Petition for Writ of Certiorari denied

iii. ____

(c) the date of each such result:

i. July 24, 2013 (petition for rehearing denied September 19, 2013)

ii. July 24, 2014

iii. ____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013)

ii. Denial of Petition for Writ of Certiorari was unpublished

iii. ____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) ____

(c) ____

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

custody unlawfully:

(a) See Attachment A

(b) _____

(c) _____

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

(a) See Attachment A

(b) _____

(c) _____

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

(a) any petition in a State Court under South Carolina Law? Except as set forth in response to questions 7 and 8 above, no.

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

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? 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. N/A

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

No

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

(a) which grounds have been presented:

i. N/A

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) Applicant's claims of ineffective assistance of trial counsel could not have been presented on direct appeal.

(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? Yes

(c) your sentencing? Yes

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

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

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

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

i. James R. Snell, Jr.

ii. H. Wayne Floyd

iii. Richard A. Harpootlian

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

i. Arraignment and trial

ii. Arraignment and trial

iii. Appeal to South Carolina Court of Appeals and Petition for Writ of Certiorari to the South Carolina Supreme Court

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

Vacation of my convictions and a new trial.

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

No

Respectfully submitted,

Richard A. Harpootlian
rah@harpootlianlaw.com
RICHARD A. HARPOOTLIAN P.A.
1410 Laurel Street (29201)
Post Office Box 1090
Columbia, South Carolina 29202
Phone (803) 252-4848
Facsimile (803) 252-4810

ATTORNEY FOR PETITIONER
LANCE AUSTIN WILLIAMS

Columbia, South Carolina
October 24, 2016

ATTACHMENT A

10. Applicant is being held in custody unlawfully because he was denied effective assistance of counsel at trial in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

11. Applicant's trial counsel failed to contemporaneously object at trial to the introduction of prejudicial evidence including, but not limited to, photographs that were not relevant to any matter in dispute. These photographs were highly prejudicial and served the sole purpose of inflaming the passions and prejudices of the jury, and invited a verdict based on factors other than the admissible evidence. In its opinion affirming Applicant's convictions, the Court of Appeals found any error in admitting the photographs was not preserved for review on direct appeal because trial counsel failed to contemporaneously object to their admission.

Trial counsel failed to call several witnesses to testify at trial. These witnesses would have testified on several issues key to Applicant's defense, including the frequency and prevalence of false confessions in criminal cases, police tactics used to obtain false confessions, like those tactics employed by police in obtaining Applicant's statement, later introduced at trial to help convict Applicant. Trial counsel also failed to call a witness that would have testified that the alleged victim's injuries were consistent with Applicant's testimony at trial.

Trial counsel failed to raise with specificity the argument that Applicant's out-of-court statement should not have been admitted at trial because the statement was obtained in violation of *Missouri v. Seibert*, 542 U.S. 600 (2004); *State v. Navy*, 386 S.C 294, 688 S.E.2d 838 (2010); and *State v. Evans*, 354 S.C 579, 582 S.E.2d 407 (2003). In addition to not raising the admissibility of Applicant's statement with specificity, trial counsel failed to cross-examine the State's leading witness, Detective Prestigiacomo, after the detective's trial testimony was substantially and

materially different from the testimony he provided during the *in camera Jackson v. Denno* hearing that provided the basis for admitting Applicant's out-of-court statement.

All of trial counsel's failures summarized above fell below an objective standard of effective representation and each of the failures was independently prejudicial to the Applicant. Based on each individual failure and the combination failures and their cumulative effect on the outcome of the trial, Applicant is entitled to have his convictions vacated.

COPY

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Lance Austin Williams, SCDC #00345477

Plaintiff,

vs.

State of South Carolina

Defendant.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

C/A NO.: 2014-CP-32-04769

CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for the Applicant, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on October 25, 2016, served by having the below documents placed in the United States Mail, first class postage affixed, to the following mentioned person:

Document: Amended Application for Post-Conviction Relief

Served: Johanna Valenzuela, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

Holli Miller

ORIGINAL

FILED
2017 FEB -3 PM 2:18
LISA COMER
CLERK OF COURT
LEXINGTON, SC

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

Lance Austin Williams #00345477

Applicant,

vs.

The State of South Carolina

Respondent.

C/A No.: 2014-CP-32-04769

CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for the Applicant, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on February 3, 2017, served by having the below document hand delivered to the following mentioned person:

Document: Motion to Amend

Served: Johanna Valenzucla, Assistant Attorney General
South Carolina Attorney General's Office
1000 Assembly Street
Columbia South Carolina 29201

Holli Miller

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

FILED

) CASE NO.: 2014-CP-32-04769

2017 FEB -3 PM 2:18

Lance Austin Williams, SCDC #345477) **MOTION AND ORDER INFORMATION**
Plaintiff,) **FORM AND COVERSHEET**

vs.

State of South Carolina)
Defendant.)

ORIGINAL

Plaintiff's Attorney:	Defendant's Attorney:
Richard Harpootlian, Bar No. 2725 Address: Post Office Box 1090, Cola, SC 29202 Phone: 803/252-4848Fax 803/252-4810 E-mail: rah@harpootlianlaw.com Other: ____	Johanna Valenzuela, Bar No. ____ Address: Post Office Box 11549 Phone: 803-734-3733 Fax____ E-mail: jvalenzuela@scag.gov Other: ____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Amend Pleadings
Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff /☐ Defendant — February 3, 2017 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: ____
- ☐ Other: ____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE CODE ____
Date: ____

CLERK'S VERIFICATION

Collected by:____ Date Filed: ____
☐ MOTION FEE COLLECTED: $ ____
☐ CONTESTED – AMOUNT DUE: $ ____

SCCA 233 (11/2003)

HARPOOTLIAN
ATTORNEYS AT LAW

RICHARD A. HARPOOTLIAN
RAH@HARPOOTLIANLAW.COM

CHRISTOPHER P. KENNEY
CPK@HARPOOTLIANLAW.COM

JAMIE L. HARPOOTLIAN*
OF COUNSEL
*ADMITTED IN LOUISIANA

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29201

MAILING ADDRESS
POST OFFICE BOX 1090
COLUMBIA SC
29202

DIRECT CONTACT
TELEPHONE (803) 252-4848
FACSIMILE (803) 252-4810
TOLL FREE (866) 706-3997

ONLINE
HARPOOTLIANLAW.COM

February 3, 2017
VIA HAND DELIVERY

FILED
2017 FEB -3 PM 2:18
LISA COMER
CLERK OF COURT
LEXINGTON, S.C.

Beth Carrig, Clerk of Court
Lexington County
205 E. Main Street
Lexington, SC 29072

In re: Lance Austin Williams, #00345477 v. State of South Carolina
C/A No.: 2014-CP-32-04769

Dear Ms. Carrig:

Enclosed please find the original and three copies the Applicant's Motion to Amend in connection with the above-referenced matter. Please clock-in the original and copies and return the copies to my courier.

By copy of this letter, I am serving a copy of the same on Assistant Attorney General Johanna Valenzuela.

Thank you for your assistance in this matter.

With warm personal regards, I am

Sincerely,

Richard A. Harpootlian

/hm
Enclosures
cc: Johanna Valenzuela, Assistant Attorney General

Common Pleas

Clerk : Lisa M. Comer
Lexington County Judicial Center
Lexington, SC 29072
Phone:(803) 785-8212 Fax:(803) 785-8603

From: Harpootlian, Richard A.
PO Box 1090
Columbia, SC 29202

Date 2/ 3/2017
Receipt #. 199320
Clerk: krau

Pa Williams #00345477, Lance Austi
Tr on Type: Payment
Pa Type: Check $25.00
To: $25.00

Reference #: 24071
Comment:
Non-Refundable

Tot eived. $25.00
Cl Due: $0.00

You may check the status of your Lexington case at
http://www.sccourts.org/caseSearch/

se #	Caption	Previous Balance	Amount Paid	Balance Due
3204769	Lance Austin Williams #00345477 VS State of South Carolina	**$25.00**	**$25.00**	**$0.00**

tal Cases:	**1**	**$25.00**	**$25.00**	**$0.00**

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Lance Austin Williams, #345477,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

2014-CP-32-04769

RETURN TO MOTION FOR LEAVE TO AMEND

This matter comes before the Court by way of Applicant's Motion for Leave to Amend filed on or about February 3, 2017. While there were several procedural inaccuracies in Applicant's motion,[1] Respondent believes the record before the PCR Court addressed each of the amended allegations and therefore does not object to the amendments as outlined in Exhibit A of Applicant's Motion (also attached as Exhibit A to this Return).

In this case, Applicant. through counsel, made a motion for discovery, seeking the court exhibits and the defense attorneys' files. Respondent filed a response objecting to the discovery and then followed up with an email to Applicant's counsel stating "we may be able to resolve this motion," assuming "we can confirm those are the only things you are seeking." (Exhibit B.) At a status conference for this case, Judge Keesley asked if a hearing on the motion was necessary. Respondent indicated no objection to Applicant getting his own file from trial counsel and also offered to ensure the exhibits were brought to the PCR hearing; however, Respondent could not consent on behalf of the Solicitor's Office. Applicant's counsel indicated he only sought correspondence dealing with plea offers from the Solicitor's File. Respondent collected that information, and, without a discovery order, provided that information to Applicant's

[1] Respondent believes counsel misstated the procedural history related to the discovery motion by accident.

counsel on August 22, 2016. (Exhibit C) In the letter providing that plea offer correspondence, Respondent confirmed her understanding that Applicant did not wish to proceed forward with the discovery motion and confirmed the hearing was scheduled for November 2016. Applicant's counsel subpoenaed trial counsel's file more than once with the only objection made by Respondent being that she had not been copied on the subpoena and was requesting a copy of the file. (Exhibit D.)

This case was originally scheduled for an evidentiary hearing in August 2, 2016, then again on November 9, 2016, and then finally heard on January 30, 2017. Respondent believes counsel had the opportunity and the information to amend his allegations to include this information prior to the hearing. However, Respondent believes the record and testimony include evidence to counter every amended allegation in Exhibit A and therefore does not object to Applicant's motion.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

BY: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

8 Feb, 2017.

Exhibit A

Lance Austin Williams v. The State
C/A No.: 2014-CP-32-04769
Motion to Amend Pleadings

EXHIBIT A

(Applicant's Proposed Second Amended Application for PCR Relief)

FORM 5

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
Lance Austin Williams, SCDC # 00345477 Full name and prison number (if any) of Applicant.	)	**SECOND AMENDED**
v.	)	**APPLICATION FOR**
State of South Carolina	)	**POST-CONVICTION RELIEF**

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Broad River Correctional Institution
2. Name and location of Court which imposed sentence Lexington County Court of General Sessions
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) 2010-GS-32-01860: Unlawful Neglect of a Child
   (b) 2010-GS-32-01861: Criminal Sexual Conduct First Degree
   (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:

(a) April 5, 2011

(b) April 5, 2011

(c) ____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty ____

(b) after a plea of not guilty _x_

(c) after a plea of nolo contendere ____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. South Carolina Supreme Court

iii. ____

(b) the result in each such Court to which you appealed:

i. Convictions and sentences affirmed

ii. Petition for Writ of Certiorari denied

iii. ____

(c) the date of each such result:

i. July 24, 2013 (petition for rehearing denied September 19, 2013)

ii. July 24, 2014

iii. ____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013)

ii. Denial of Petition for Writ of Certiorari was unpublished

iii. ____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) ____

(c) ____

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

custody unlawfully:

(a) See Attachment A

(b) ____

(c) ____

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

(a) See Attachment A

(b) ____

(c) ____

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

(a) any petition in a State Court under South Carolina Law? Except as set forth in response to questions 7 and 8 above, no.

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

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? 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. N/A

ii. ____

iii. ____

iv. ____

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

i. ____

ii. ____

iii. ____

iv. ____

(c) the disposition thereof:

i. ____

ii. ____

iii. ____

iv. ____

(d) the date of each such disposition:

i. ____

ii. ____

iii. ____

iv. ____

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

i. ____

ii. ____

iii. ____

iv. ____

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

No

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

(a) which grounds have been presented:

i. N/A

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) Applicant's claims of ineffective assistance of trial counsel could not have been presented on direct appeal.

(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? Yes

(c) your sentencing? Yes

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

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

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

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

i. James R. Snell, Jr.

ii. H. Wayne Floyd

iii. Richard A. Harpootlian

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

i. Arraignment and trial

ii. Arraignment and trial

iii. Appeal to South Carolina Court of Appeals and Petition for Writ of Certiorari to the South Carolina Supreme Court

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

Vacation of my convictions and a new trial.

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

No

Respectfully submitted by,

Richard A. Harpootlian (SC Bar No. 2725)
Christopher P. Kenney (SC Bar No. 100147)
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)
rah@harpootlianlaw.com
cpk@harpootlianlaw.com

ATTORNEYS FOR APPLICANT
LANCE AUSTIN WILLIAMS

February 1, 2017
Columbia, South Carolina.

ATTACHMENT A

10. Applicant is being held in custody unlawfully because he was denied effective assistance of trial counsel in violation of the Fifth, Sixth, and Fourteenth Amendments of the Constitution.

11. With the exception of item c (citing Cronic, infra), each of the following errors by trial counsel fell below an objective standard of effective representation and was prejudicial within the meaning of Strickland v. Washington, 466 U.S. 668 (1984), such that Applicant is entitled to have his convictions vacated. Applicant seeks relief under three theories:

a. Applicant's trial counsel failed to contemporaneously object at trial to the introduction of prejudicial evidence including, but not limited to, photographs that were not relevant to any matter in dispute. These photographs were highly prejudicial and served the sole purpose of inflaming the passions and prejudices of the jury, and invited a verdict based on factors other than the admissible evidence. In its opinion affirming Applicant's convictions, the Court of Appeals found any error in admitting the photographs was not preserved for review on direct appeal because trial counsel failed to contemporaneously object to their admission.

b. Trial counsel failed to call an expert witness or witnesses to testify that the victim's injuries were consistent with Applicant's statement to police and testimony at trial and would have constituted a "medically recognized treatment" as contemplated by South Carolina Code § 16-3-651, and thus constituted a legal defense to the charge of criminal sexual conduct with a minor.

c. Trial counsels' lack of trial preparation, including the failure to interview virtually any State witness or to comprehend and appreciate facts that entitled Applicant to a legal defense, falls below that of a reasonable, competent lawyer. Trial counsels' lack of preparation is both a specific error and omission within the meaning of Strickland, but also a total failure to function as a meaningful State adversary such that prejudice can be presumed, as contemplated by United States v. Cronic, 466 U.S. 648 (1984).

Exhibit B

Johanna Valenzuela

From: Johanna Valenzuela
Sent: Wednesday, June 22, 2016 2:54 PM
To: 'rah@harpootlianlaw.com'
Subject: Lance Austin Williams
Attachments: WILLIAMS Lance Austin -Return to Motion for Leave to Conduct Discovery AOS (00982552xD2C78).pdf; WILLIAMS Lance Austin - Applicants 'Clocked' Motion for Leave to Conduct Discovery (00906379xD2C78).pdf

Mr. Harpootlian:

Lance Williams' PCR case is scheduled for status conference next week. After a comedy of errors in trying to get the trial exhibits, I think I am nearing success on that. As I mentioned in my return, we think you can have those without discovery being ordered. As to the defense attorneys' files, those belong to your client; so, again no discovery order should be necessary. If we can confirm those are the only things you were seeking (and not the solicitor's file), we may be able to resolve the motion and plan on having the evidentiary hearing added to the 8/1 term of court.

If I can provide additional information, or if a call between us would be helpful, please let me know. My direct line is below.

Johanna C. Valenzuela
Senior Assistant Deputy Attorney General
Post-Conviction Relief Section
Office of the Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Tel.: 803.734.3733

Exhibit C

ALAN WILSON
ATTORNEY GENERAL

August 22, 2016

Via Electronic and US Mail
Mr. Richard A. Harpootlian
Post Office Box 1090
Columbia, SC 29202
rah@harpootlianlaw.com

Re: **Lance Williams, #345477 v. State of South Carolina**
2014-CP-32-4769

Dear Mr. Harpootlian:

At our most recent status conference, you indicated you did not believe we needed to proceed forward on your motion for discovery. You explained you were seeking only communications in the solicitor's file related to offers made on Mr. Williams' case.

I have reached out to the Senior Assistant Solicitor who handled the case, Suzanne Mayes, as well as defense counsel, James Snell, and attached that plea information to this letter. Please note that I have personally redacted any references to the victim's name in these communications in anticipation of these possibly being made part of a future record. The only redactions I made were to parts of the communications that stated the minor victim's first or last name.

The solicitor's file did not contain the letter from Mr. Snell to Ms. Moore (the assistant solicitor who handled the case prior to Ms. Mayes taking it over) dated February 20, 2011, or March 1, 2011, and does not contain the letter from Mr. Snell to Ms. Moore dated March 13, 2011.

I've included Ms. Mayes' explanation of that, along with her recollection of the reason why a plea offer was never reached between the parties.

If you have additional questions or concerns, please let me know. We are prepared to go forward with our date-certain PCR hearing on November 9, 2016, in Lexington County and would like to address any remaining issues well in advance of that hearing.

As mentioned in prior emails to you, I would also request any amendments to the application, notice of expert witnesses and any written reports by them, and names and dates of birth for any lay witnesses you expect to call at the hearing to be sent to me as soon as possible, but no later than **October 21, 2016.**

Should you have any questions, please call me at (803) 734-3733.

Sincerely,

Johanna C. Valenzuela
Senior Assistant Deputy Attorney General

Enclosures

Exhibit D

Johanna Valenzuela

From: Dick Harpootlian <rah@harpootlianlaw.com>
Sent: Wednesday, November 02, 2016 5:21 PM
To: Johanna Valenzuela
Subject: I don't believe they gave these to you either
Attachments: 2016_11_02_14_39_10.pdf - Adobe Acrobat.pdf

From: Shannon Williamson [mailto:shannon@snelllaw.com]
Sent: Wednesday, November 02, 2016 3:32 PM
To: Dick Harpootlian <rah@harpootlianlaw.com>
Subject: Notes

Mr. Harpootlian,

Please review the attached notes from Mr. Snell. He apologizes for overlooking the subpoena. Should you need further information please let us know.

A lot of these notes are e-mails that you have previously received, but we wanted to be sure to send you everything to be sure you weren't missing any pages.

Thank you!
Shannon

Shannon Williamson
Operations Manager
Law Office of James R. Snell, Jr., LLC
316 South Lake Drive
Lexington, SC 29072
P: 803-359-3301
F: 803-359-7691

Johanna Valenzuela

From: Johanna Valenzuela
Sent: Thursday, January 26, 2017 9:51 AM
To: rah@harpootlianlaw.com; 'holli@harpootlianlaw.com'
Cc: Eleventhcircuitpcr
Subject: Subpoena in Lance Williams case?

Dick:

I called Jim Snell to confirm everything for Monday and was surprised to hear him telling me he was putting documents together for your latest subpoena in this case. I'm surprised because he said the subpoena indicated I was courtesy copied on it, but I have not received it.

I'd like a copy of the materials he is providing to you.

He is about to travel out of town, and I don't want this to delay the hearing on Monday. Are we on track for Monday's hearing?

Please don't read too much into my tone – I tried calling you but you were out, but it feels like groundhog day with your last-minute request going to Jim Snell before every hearing.

Johanna C. Valenzuela
Senior Assistant Deputy Attorney General
Post-Conviction Relief Section
Office of the Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Tel.: 803.734.3733

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON LANCE A. WILLIAMS, #345477, Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	)	IN THE COURT OF COMMON PLEAS 2014-CP-32-4769 AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return to the Motion for Leave to Amend** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Richard Harpootlian, Esquire
PO Box 1090
Columbia, SC 29202

DATED this 8th day of February, 2017.

Johanna Valenzuela,
Attorney For Respondent

ALAN WILSON
ATTORNEY GENERAL

February 8, 2017

The Honorable Lisa M. Comer
Clerk of Court, Lexington County
205 E. Main St., Ste 146
Lexington, SC 29072-3557

Re: **Lance Austin Williams, #345477v. State of South Carolina**
2014-CP-32-4769

Dear Ms. Comer:

Enclosed is the original **Return to the Motion for Leave to Amend Allegations** of the Respondent. in the above-captioned case, for filing in your office.

Respectfully yours,

Johanna C. Valenzuela
Senior Assistant Deputy Attorney General

JCV/jyb

Enclosure

cc: The Honorable Eugene C. Griffith (via email and US Mail)
Richard A. Harpootlian, Esquire (via email and US Mail)

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

FORM 5

ORIGINAL

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)	
)	
Lance Austin Williams,)	2014-CP-32-04764
SCDC # 00345477	
Full name and prison number (if any) of Applicant.)	**SECOND AMENDED**
v.)	**APPLICATION FOR**
)	
State of South Carolina)	**POST-CONVICTION RELIEF**
)	

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Broad River Correctional Institution

2. Name and location of Court which imposed sentence Lexington County Court of General Sessions

3. Name(s) of co-defendant(s) (if any) None

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 2010-GS-32-01860: Unlawful Neglect of a Child

   (b) 2010-GS-32-01861: Criminal Sexual Conduct First Degree

   (c) ____

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

(a) April 5, 2011

(b) April 5, 2011

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty _x_

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. South Carolina Supreme Court

iii. _____

(b) the result in each such Court to which you appealed:

i. Convictions and sentences affirmed

ii. Petition for Writ of Certiorari denied

iii. _____

(c) the date of each such result:

i. July 24, 2013 (petition for rehearing denied September 19, 2013)

ii. July 24, 2014

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013)

ii. Denial of Petition for Writ of Certiorari was unpublished

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

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

custody unlawfully:

(a) See Attachment A

(b) _____

(c) _____

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

(a) See Attachment A

(b) _____

(c) _____

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

(a) any petition in a State Court under South Carolina Law? Except as set forth in response to questions 7 and 8 above, no.

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

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? 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. N/A

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

No

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

(a) which grounds have been presented:

i. N/A

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) Applicant's claims of ineffective assistance of trial counsel could not have been presented on direct appeal.

(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? Yes

(c) your sentencing? Yes

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

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

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

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

i. James R. Snell, Jr.

ii. H. Wayne Floyd

iii. Richard A. Harpootlian

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

i. Arraignment and trial

ii. Arraignment and trial

iii. Appeal to South Carolina Court of Appeals and Petition for Writ of Certiorari to the South Carolina Supreme Court

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

Vacation of my convictions and a new trial.

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

No

Respectfully submitted by,

Richard A. Harpootlian (SC Bar No. 2725)
Christopher P. Kenney (SC Bar No. 100147)
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)
rah@harpootlianlaw.com
cpk@harpootlianlaw.com

ATTORNEYS FOR APPLICANT
LANCE AUSTIN WILLIAMS

April 13, 2017
Columbia, South Carolina.

ATTACHMENT A

10. Applicant is being held in custody unlawfully because he was denied effective assistance of trial counsel in violation of the Fifth, Sixth, and Fourteenth Amendments of the Constitution.

11. With the exception of item c (citing Cronic, infra), each of the following errors by trial counsel fell below an objective standard of effective representation and was prejudicial within the meaning of Strickland v. Washington, 466 U.S. 668 (1984), such that Applicant is entitled to have his convictions vacated. Applicant seeks relief under three theories:

a. Applicant's trial counsel failed to contemporaneously object at trial to the introduction of prejudicial evidence including, but not limited to, photographs that were not relevant to any matter in dispute. These photographs were highly prejudicial and served the sole purpose of inflaming the passions and prejudices of the jury, and invited a verdict based on factors other than the admissible evidence. In its opinion affirming Applicant's convictions, the Court of Appeals found any error in admitting the photographs was not preserved for review on direct appeal because trial counsel failed to contemporaneously object to their admission.

b. Trial counsel failed to call an expert witness or witnesses to testify that the victim's injuries were consistent with Applicant's statement to police and testimony at trial and would have constituted a "medically recognized treatment" as contemplated by South Carolina Code § 16-3-651, and thus constituted a legal defense to the charge of criminal sexual conduct with a minor.

c. Trial counsels' lack of trial preparation, including the failure to interview virtually any State witness or to comprehend and appreciate facts that entitled Applicant to a legal defense, falls below that of a reasonable, competent lawyer. Trial counsels' lack of preparation is both a specific error and omission within the meaning of Strickland, but also a total failure to function as a meaningful State adversary such that prejudice can be presumed, as contemplated by United States v. Cronic, 466 U.S. 648 (1984).

ORIGINAL

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

Lance Austin Williams #00345477

Applicant,

vs.

The State of South Carolina

Respondent.

JA No.: 2014-CP-32-04769

CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for the Applicant, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on April 13, 2017, served by having the below document placed in the U.S. Mail first class postage affixed to the following mentioned person:

Document: Second Amended Application for Post-Conviction Relief

Served: Jessica Kinard, Assistant Attorney General
South Carolina Attorney General's Office
Post Office Box 11549
Columbia South Carolina 29211

Holli Miller

ORIGINAL

FILED

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

2017 APR 13 AM 10:24

LISA M. COMER
CLERK OF COURT
LEXINGTON SC

Lance Austin Williams, SCDC #00345477,

Applicant,

vs.

State of South Carolina

Respondent.

C/A NO.: 2014-CP-32-04769

ORDER GRANTING APPLICANT'S MOTION TO AMEND

Upon motion of Applicant Lance Austin Williams, the Court GRANTS Applicant's motion for leave to file a second amended application for PCR relief.

On January 30 and 31, 2017, the parties appeared before the Court for an evidentiary hearing in this matter. On February 3, 2017, Applicant filed a motion seeking leave to amend his application to conform his pleading to the evidence. On February 8, 2017, the State filed a return indicating the State does not object to Applicant's proposed amendment.

A motion to amend is left to the discretion of the trial judge and should be freely granted when justice so requires and the amendment prejudices no other party. Harvey v. Strickland, 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002); see also Rule 15, SCRCP. Here, Applicant seeks to conform his pleading to evidence presented during the January hearing and the State agrees that the proposed amendment is tailored to that evidence.

THEREFORE, IT IS ORDERED that Applicant's motion is GRANTED and he has leave to file his proposed amendment within 10 days of receiving notice of this order.

[signature page follows]

AND IT IS SO ORDERED.

The Honorable Eugene C. Griffith, Jr.
Circuit Court Judge

March 30th, 2017
Lexington, South Carolina.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP3204769

Lance Austin Williams #00345477		**State of South Carolina**	
PLAINTIFF(S)		**DEFENDANT(S)**	
Submitted by:		**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

		4/27/2017
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box or the 27th day of April, 2017, to attorneys of record or to parties (when appearing pro se) as follows:

Richard A. Harpootlian
PO Box 1090 Columbia, SC 29202

Johanna Catalina Valenzuela
PO Box 142 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Lisa M. Comer / kr

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4

ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014-CP-32-04769

Lance Austin Williams, SCDC #00345477

PLAINTIFF(S)

State of South Carolina

DEFENDANT(S)

Submitted by: Eugene C. Griffith, Jr.	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed: ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

2017 JUN 20 AM 9:1

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2154
Judge Code

06/19/17
Date

For Clerk of Court Office Use Only

This judgment was entered on the 20 day of June 20 17 and a copy mailed first class or placed in the appropriate attorney's box on this 20th day of June 20 17 to attorneys of record or to parties (when appearing pro se) as follows:

Richard A. Harpootlian, Esq.

ATTORNEY(S) FOR THE PLAINTIFF(S)

Melody Brown
~~Johanna C. Valenzuela~~, Esq.

ATTORNEY(S) FOR THE DEFENDANT(S)

Richard Comer/mh
CLERK OF COURT

Court Reporter:

ORIGINAL

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

2017 JUN 20 AM 8:16

LISA M. SOHER
CLERK OF COURT
LEX. CO. S.C.

Lance Austin Williams, SCDC No. 00345477 C/A No.: 2014-CP-32-04769

Applicant,

vs.

State of South Carolina,

Respondent.

OPINION AND ORDER

This is a post-conviction relief action brought by Applicant, Lance Austin Williams, alleging violations of the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. Having had an opportunity to carefully consider the evidence and applicable law, Applicant's petition is **GRANTED** for the reasons explained below.

PROCEDURAL BACKGROUND

Applicant was indicted for unlawful neglect of a child (2010-GS-32-01860) and criminal sexual conduct with a minor in the first degree (2010-GS-32-01861). At trial, Applicant was represented by James R. Snell, Jr., Esquire (Mr. Snell) and H. Wayne Floyd, Esquire (Mr. Floyd). After a plea of not guilty, Applicant was convicted of both counts. On April 5, 2011, the Honorable R. Knox McMahon, Circuit Court Judge, sentenced Applicant to two terms of incarceration, 10 years and 25 years, respectively, to run concurrently and ordered Applicant be placed on the Central Registry of Child Abuse and Neglect and the South Carolina Sex Offender Registry.

Applicant retained his current counsel for his appeal. On July 24, 2013 the Court of Appeals affirmed the conviction. State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013). On July 24, 2014, the Supreme Court denied Applicant's petition for a writ of certiorari.

Applicant's counsel, Richard A. Harpootlian, Esquire (PCR Counsel), filed this action on December 31, 2014, alleging violations of the Sixth Amendment's guarantee of effective assistance from counsel. On August 13, 2015, the State served a return opposing post-conviction relief. On October 25, 2016, Applicant filed an Amended Application.

On January 30 and 31, 2017, the Court held an evidentiary hearing that included testimony from both of Applicant's Trial Counsels and from an expert witness who was not called to testify at trial. After the evidence was presented, PCR Counsel notified the Court that Applicant would seek leave to amend his Application to conform with the evidence. On February 3, 2017, Applicant moved for leave to file a second amended application. That motion was granted and the Second Amended Application, filed on April 13, 2017, joined three issues.

The first issue alleged by Applicant: that Trial Counsels' preparation, both in terms of investigation and legal research, which he argues is a specific error contemplated by Strickland and a total failure to function as a meaningful state adversary such that prejudice is presumed under United States v. Cronic, 466 U.S. 648 (1984).

The second issue alleged by Applicant: that Trial Counsels ran afoul of Strickland by failing to call an available expert witness to testify the victim's injuries were consistent with Applicant's statement to police and testimony at trial which would have established a "medically recognized treatment" defined by S. C. Code Ann. § 16-3-651 and a legal defense to the charge of criminal sexual conduct with a minor.

The third issue alleged by Applicant: that photographs of the victim's vagina inflamed the passions and prejudices of the jury, which invited a verdict based on something other than the evidence. Also Trial Counsels' failure to make a contemporaneously objection preserving the issue

on appeal was ineffective and prejudicial within the meaning of Strickland v. Washington, 466 U.S. 668 (1984).

STANDARD OF REVIEW

The Sixth Amendment guarantees a criminal defendant the reasonably effective assistance of counsel in his defense. U.S. CONST. amend. VI; Strickland, 466 U.S. at 683; Von Dohlen v. State, 360 S.C. 598, 603, 602 S.E.2d 738, 740 (2004). Counsel's assistance is measured by "an objective standard of reasonableness." Weik v. State, 409 S.C. 214, 233, 761 S.E.2d 757, 767 (2014) (quoting Wiggins v. Smith, 539 U.S. 510, 521 (2003)). There are two paths to establish the denial of effective assistance and a violation of the Sixth Amendment.

Under Strickland, a post-conviction relief applicant can establish a claim for ineffective assistance of counsel by proving: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing Strickland, 466 U.S. at 687). An applicant bears the burden of proving both prongs. Id. at 383, 629 S.E.2d at 356. Under the prejudice prong, an applicant must show a "reasonable probability" that, but for counsel's errors, the result of the trial would have been different. Von Dohlen, 360 S.C. at 603, 602 S.E.2d at 740. A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. Id. at 603, 602 S.E.2d at 740–41; Strickland, 466 U.S. at 687–694.

In Cronic, the United States Supreme Court held certain situations so fundamentally undermine the accused's right to the adversarial proceeding guaranteed by the Sixth Amendment such that prejudice is presumed. Cronic, 466 U.S. at 656–59. When "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Id. at

659. Circumstances warranting relief may be present when "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. at 659–60 (citing Powell v. Alabama, 287 U.S. 45 (1932) as an example); see also, United States v. Ragin, 820 F.3d 609, 612 (4th Cir. 2016) (lawyer who slept through portions of trial met Cronic's standard).

FINDINGS OF FACT

A circuit court hearing an application for post-conviction relief must resolve any factual dispute necessary to decide the application. See S.C. Code Ann. § 17-27-70 (2015); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005). As factfinder, a circuit court must weigh the credibility of witnesses and determine what weight, if any, to give the evidence presented. See Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993). In discerning whether relief is warranted, a post-conviction relief court's decision must be supported by probative evidence. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005).

This Court has carefully reviewed the record in this case. That review has included an examination of the trial transcript, live testimony taken during a two-day hearing on January 30 and 31, 2017, and exhibits offered into evidence during that hearing. Having made such a review, the Court makes the following factual findings.

Relevant Trial Testimony

On April 15, 2010, Applicant cared for his girlfriend's fifteen-month-old daughter for about 10 hours. Williams, 405 S.C. at 268–69, 747 S.E.2d at 197. That evening, the child's mother and other family members took her to the emergency room after observing bruises on her face,

arms, and genital area. See id.; see also Trial Tr. 163:1–164:16 (testimony of mother); PCR Hr.'g Tr. 85:2–88:11 (summarizing the State's allegations).

The next day, Lexington County Sherriff's Department (LCSD) Detective Ed Prestigiacomo learned Applicant cared for the child the day her injuries were discovered and contacted Applicant who agreed to meet Det. Prestigiacomo at the LCSD. See Williams, 405 S.C. at 268–70, 747 S.E.2d at 197. Det. Prestigiacomo confronted Applicant with photos of bruising on the child's arm, which Applicant attributed to a hand-injury that caused him to be heavy-handed with the child. See id. at 269, 747 S.E.2d at 197. The detective also confronted Applicant with photos of bruising behind the child's ears, which Applicant explained resulted from two instances when he disciplined the child for misbehaving by slapping her on the ears. See id. Applicant was then shown photos of bruising on the child's forehead and near her genitals, which Applicant explained were the result of a fall and the application of eczema cream. See id. at 270, 747 S.E.2d at 197; see also Trial Tr. 502:16–12. Applicant was placed under arrest.

At trial, Applicant took the stand and conceded he was too rough with the child. He testified that he agreed to watch the child when asked by her mother, his girlfriend, but that he expected to be relieved of that obligation by 1:00 or 2:00 p.m. that afternoon. See Trial Tr. 489:4–490:2. Upon learning his girlfriend would not return until 6:00 p.m., Applicant testified he felt "used". Id. at 496:15–22. Applicant changed several wet diapers that morning, and a "messy diaper," he described as "diarrhea, runny" that afternoon. Id. at 497:24–498:7. Applicant described "poop everywhere" on the child's lower region, which required him to clean the child's genital area by wiping between the lips of the vagina to remove feces. Id. at 498:21–500:22. Applicant conceded he was "[a]ggravated" and "rougher than [he] should have been." Id. at 501:8–16; see also id. at 503:2–5 (explaining his aggravation stemmed from having to watch the child).

Thereafter, the child began throwing toys and misbehaving, and Applicant "popped" her twice, once on each side of the head. See id. at 503:6–16 & 504:4–14. At trial, Applicant conceded he hit her too hard, explaining, "[i]t was very wrong[,]" to hit her like that. Id. 504:3 & 15–17. Applicant also testified the child fell and hit her head while playing outside earlier that day. Id. at 492:6–16.

Two State witnesses offered evidence in support of the criminal sexual conduct charge. The State offered Marlene Clary with Palmetto Health Richland's regional nurse examiner program to testify as an expert in the field of forensic nurse examination. Trial Tr. 223:24–224:7 & 229:13–15. Mr. Snell indicated he had no notice of Ms. Clary, but declined to *voir dire* her before the Court qualified her, without objection, as an expert in forensic nurse examination. See id. at 229:16–230:16. Ms. Clary testified she examined the child and spoke to the child's mother on April 15, 2010. See id. at 231:6–16, 234:6–235:8, 235:20–236:4. At trial, she reported the findings of her examination, referring to a report documenting bruising on the child's neck, head, thigh, elbow, and knee. See id. at 240:24–242:3 & 243:25–249:19. Through Ms. Clary, the State introduced three diagram images—full body, face, and genitals—without anatomical features, that noted the location of "any type of abnormality." See id. at 238:12–239:13 (discussing Trial Ex. 9), 245:20–246:24 (discussing Trial Ex. 10) & 250:10–22 (discussing Trial Ex. 11). Mr. Floyd unsuccessfully interposed objections to the diagrams, arguing the State "can put the report itself in which this actually just a copy of it[,]" but inquired, "Why do they need a blow-up copy of it?" Id. 239:15–240:6; see also, id. at 246:2–21 (raising "the same objection") & 251:1–5 (same).

The child also received a genital exam. See Trial Tr. 254:10–15. Ms. Clary reported observing swollen labia and "an abrasion between the left minora and majora, basically the lips." Id. at 254:18–23. With respect to the child's hymen, Ms. Clary "was not able to visualize all of it

at one time[,]" which prevented her from making a determination as to whether it was all intact. Id. at 267:19–268:11. Nevertheless, she offered the opinion her observations were consistent with trauma. See id. at 267:4–6 & 270:18–271:5. Ms. Clary also testified she collected an unidentified specimen located on the child's foot, buccal swabs for DNA from the child's genital area, a diaper, and clothing. See id. at 242:4–243:24 & 271:22–272:8. That collection of samples failed to reveal any semen. Id. at 261:8–20 (and negative lab results) & 305:6–21.

Finally, the State asked Ms. Clary to authenticate and then offered Exhibits 12, 13, 14, and 15 as photographs of the child taken during her examination. See id. at 275:21–276:6. After being marked, the following exchange occurred:

> [Trial] Court: All right. Mr. Floyd?
>
> Mr. Floyd: No objection, Your Honor.
>
> [Trial] Court: No objection?
>
> Mr. Floyd: No objection Your Honor.
>
> [Trial] Court: All right. State's 12, 13, 14 and 15 are in evidence without objection.

Id. at 276:10–14. When asked about Exhibit 14, Ms. Clary identified the photograph as the child's genitalia and explained:

> Ms. Clary: ... That's her labia minora in the center there, that kind of a V-shaped area pointing down. There's a darkened area in the middle and then the redness on either side of that. And because there's traction there, you can't really appreciate the majora, the outer part, the lips, because I'm spreading that apart so I can better visualize the inner genitalia.

Id. at 281:6–13. Ms. Clary also described Exhibit 13 to show "her mons, her genitalia, her mons and her labia minora and then the folds in between, you know, where her legs meet her genitalia there." Id. at 281:17–21. This Court has reviewed the images and they are graphic.

The State also called Dr. Susan Luberoff, a pediatrician, to testify as an expert in the field of child abuse pediatrics. See Trial Tr. 310:1–15 & 313:3–5. Without objection, the Court qualified Dr. Luberoff as an expert in that field. See id. at 313:6–314:16. Dr. Luberoff testified she was consulted on April 16, 2010 and examined the child and took photographs. See id. at 314:16–317:23. Dr. Luberoff cited bruising discussed by Ms. Clary as evidence of physical abuse. See id. at 321:24–322:23 & 333:1–6. With respect to the child's genitals, Dr. Luberoff testified the child "had injury to her genital area that included a series of bruises in sort of a curved pattern over the front or the pubic area of her diaper area." Id. at 323:5–8; see also id. at 335:7–25 (discussing "arc pattern" of bruising in pubic area). Dr. Luberoff opined further that "[s]he had injuries to her hymen, which is part of the structure of the vagina. She had injuries just under the clitoris, which were some injuries on both sides of torn tissue or torn skin." Id. at 323:8–11. Dr. Luberoff observed an "injury to her hymen" she described as "bruising[.]" Id. at 323:11–12.

Dr. Luberoff's testimony also suggested penetration into, not just the genitals, but the child's vagina. She testified that in her experience "the most common type of sexual abuse that ends up being discovered to be true or that a finding is made involves digital fondling or digital penetration of a child's genital area[,]" and that it was "extremely rare for [her] to find an injury to the child's hymen." Trial Tr. 340:20–341:16. Dr. Luberoff also opined that the arc pattern of bruising on the pubic area and the bruising on the hymen as "diagnostic of vaginal penetration." See id. at 342:25–343:16 ("...And the only way to get there is by penetrating into that area. So these were penetrating injuries."). Dr. Luberoff also identified the arc-pattern bruising on the child's pelvic bone to represent "bite marks." 344:22–345:10.

Dr. Luberoff also authenticated Trial Exhibits 16, 17, 18, 19, and 20 as photographs she took during her exam, all of which were admitted into evidence without objection by Trial

Counsels. See Trial Tr. 324:3–325:6. As with Ms. Clary, the State asked Dr. Luberoff to explain these photographs, which included photographs "where [Dr. Luberoff had] taken the labia and moved them to the side in order to see the internal structures." See id. at 343:20–346:16 (discussing Trial Ex. 19). As with the photos admitted through Ms. Clary, this Court has examined them and they are graphic.

Evidence Presented at the Post-Conviction Relief Hearing

During the PCR hearing, Applicant called both of his former trial counsels and an expert witness to testify. The State called no witnesses.

Mr. Snell testified he was retained by Applicant on April 17, 2010, almost one year before the case was called to trial on March 30, 2011. See PCR Hr.'g Tr. 15:4–20. During his year-long representation of Applicant, Mr. Snell met with him "probably close to 20" times. Id. at 17:3–5. Mr. Snell explained, in his experience on other similar cases, "it would be very likely that a charge like [first degree criminal sexual conduct] would be substantially reduced by the prosecutor's office to something closer to, you know, matching the facts of ten [years]." Id. at 20:2–9; see also id. at 40:1–25 (same). Instead, he was told by the assistant solicitor handling Applicant's prosecution "there would not be any offers." Id. at 20:2–5. Mr. Snell was informed of the State's position 12 days before Applicant's case was called to trial. Id. at 22:13–23:3. When he received the notice, he was not expecting an imminent trial. Id. at 39:17–20; see also id. at 42:3–8 (agreeing it was "certainly surprising.").

Five days before trial, Mr. Snell received an email from the assistant solicitor with a list of 24 possible witnesses. PCR Hr.'g Tr. at 26:16–27:1 & 27:17–19 (discussing Pl.'s Ex. 1). Of these potential witnesses, Mr. Snell had spoken to six of them prior to trial. Id. at 27:23–25. Mr. Snell spoke to Det. Prestigiacomo on two occasions, but made no notes of those interviews. Id. at 28:5–

14. When asked whether he spoke to the child's aunt (and the State's first witness), Mr. Snell explained, "the folks I spoke to were only the law enforcement individuals. As far as the private folks that were the fact witnesses *I didn't speak to any of them.*" Id. at 28:23–29:3 (emphasis added). Pressed further about specific witnesses called at trial, Mr. Snell conceded they were never contacted. Mr. Snell testified neither he nor his investigator spoke with the child's mother (id. at 32:17–20), the mother's friend dispatched from the hospital to retrieve diaper evidence (compare id. at 32:21–24, with Trial Tr. 195:14–197:2), the child's grandmother (PCR Hr.'g Tr. 32:25–33:3), Ms. Clary (see id. at 33:3–8), or Dr. Luberoff. See id. at 33:22–34:25. Mr. Snell testified that Dr. Ann Able, a consulting physician, spoke with Dr. Luberoff while evaluating the case for the Applicant. Mr. Snell was forced to correct himself to explain that the consultant simply reviewed Dr. Luberoff's report and adopted her findings. See id.; see also id. at 35:1–36:5 (equivocating further, then conceding "I don't have a recollection of her saying she went back and had a discussion regarding the merits of the situation."). In fact, Dr. Able, the consulting physician that reported to Mr. Snell, agreed with Dr. Luberoff's opinion, practiced medicine in the same physician practice as Dr. Luberoff. Id. at 82:11–16. Mr. Snell testified he had a "very brief" conversation with LCSD investigator Shelby Derrick one year before trial. Id. at 36:6–13. He had no recollection of LCSD crime scene investigator Troy Crump (id. at 36:18–19), likely because Mr. Crump was not identified on the witness list provided by the State. See id. at 36:20–37:2 (discussing his absence from Pl.'s Ex. 1). He had no recollection of whether he spoke to SLED's DNA analysist, Adrienne Riley-Hefney, one of just two witnesses he cross-examined at trial. Compare id. at 33:9–19, with Trial Tr. 306:13–308:21. He also had no notes or recollection of LCSD evidence custodians, Beth Harmon and Candy Kyzer. See PCR Hr.'g Tr. at 37:3–21.

In short, Mr. Snell's testimony evidenced almost no pre-trial investigation into what State witnesses might say at trial. See id. at 37:22–25 ("Q. Now, I want you to look at page 3 of the trial transcript. The people I have just read off to you are the people that testified for the State in the case, correct? A. Yes, sir."); see also id. 38:1–25 ("Q. And you had no notes prior to the trial of any interview with any of these people" A. Correct. Yes, sir."). Nevertheless, Mr. Snell "didn't see a need for a continuance." Id. at 78:14–19.

Although Mr. Snell had access to several possible experts to aid Applicant's defense, no expert was presented at trial. Applicant's family paid to retain registered nurse Cindy Hurley, but she was not called to testify because Dr. Luberoff "said the same things that Ms. Hurley would have said[,]" namely that the child suffered no life-threatening injuries and that the vaginal injuries were not the type that would have been inflicted by a penis. See Hr.'g Tr. 52:2–53:25. Mr. Snell explained, "a big part of [Ms. Hurley's] review was we talked about diaper changes and how diaper changes were conducted and made since the child's injuries came through or from a diaper change." Id. at 54:1–4. Asked whether this formed the basis for Applicant's defense, Mr. Snell testified, "the defense in this was that it was not a [sic] intentional sexual act or an intentional assault in the genital area of the child. Id. at 54:5–8.

Mr. Snell also consulted with Dr. Edward Friedlander, but did not retain him. Hr.'g Tr. 66:25–67:24. Dr. Friedlander reviewed records provided by Mr. Snell and spoke with him on the telephone. Dr. Friedlander is a medical doctor who practices and teaches pathology[1] at Mississippi State's medical university. See PCR Hr.'g Tr. 125:15–129:15. His training includes conducting sexual assault examinations and he has been qualified as a testifying expert by state and federal

[1] Dr. Friedlander explained the field of pathology as the study of injury and disease and a "bridge discipline between basic medical science and clinical medicine." PCR Hr.'g Tr. At 129:16–25.

courts on approximately 50 occasions. Id. at 130:6–131:21. Dr. Friedlander's work as an expert witness has earned him the Missouri Bar Association's highest non-lawyer recognition for *pro bono* work. See id. at 141:21–142:4. This Court found Dr. Friedlander qualified to offer opinions in the field of pathology. Id. at 140:13–17.

After reviewing the records prior to the trial, Dr. Friedlander sent Mr. Snell a letter indicating this case bore the indicia of a man who became frustrated with having to care for another man's child and "[w]hile changing a diaper loses control of himself and takes out his anger physically on the child." See id. at 67:18–24 & 68:19–69:8. However, in Dr. Friedlander's view the State's case summary was "in error" because "[t]here are a pair of visual abrasions of the vulva which is not the vagina which are quite consistent with the defendant's account of having gripped the child here forcefully while he was out of control when he was trying to clean her." Id. at 69:8–16 (discussing Pl.'s Ex. 7). Mr. Snell conceded this assessment was helpful to Applicant. (id. at 69:23–25) It was consistent with the written statement and trial testimony of Applicant, that he was frustrated because the child defecated and feces had gotten between the lips of her vagina (id. at 70:23–71:19). See id. at 142:12–143:10. Dr. Friedlander agreed touching to clean feces off the genitals is a legitimate and medically necessary act. Id. at 147:5–13; see also id. at 155:8–12 (describing it as part of a child's "basic medical care"). Dr. Friedlander's medical opinion was consistent with what Applicant told police and the jury, which, if believed, would have entitled Applicant to a medical-touching defense.

Mr. Snell was not clear as to why Dr. Friedlander was not retained. See id. at 72:22–73:17 (claiming Dr. Friedlander "would have had a big retainer" but failing to recall how much). After suggesting Applicant's story changed over time, Mr. Snell agreed that Applicant's version of events mirrored his statement to police "weeks or months" before trial, but he still did not contact

Dr. Friedlander or Ms. Hurley to testify. See id. at 74:8– 75:22. Regardless of reason, there is no dispute that no medical expert testified at trial to explain that the injuries to and near the child's vagina were consistent with a diaper change. See id. at 73:18–25.

Mr. Harpootlian:	And that was the defense? The defense was a rough diaper change basically?
Mr. Snell:	Rough diaper change. Yes, sir.
Mr. Harpootlian:	Okay. Dr. Friedlander's opinion was consistent with that?
Mr. Snell:	It was.

Id. at 74:1–6.

During the PCR hearing, Dr. Friedlander testified concerning Trial Exhibits 19 and 20, which he explained were superior images to the ones provided when he reached his initial opinion. See PCR Hr.'g Tr. 147:16–148:3. After reviewing these photos (admitted here as Pl.'s Exs. 5–10), Dr. Friedlander testified "[i]t's clear what's happened." Id. at 148:4–6; see also id. at 163:16–164:9 (same). Using the State's trial exhibits to illustrate his testimony, Dr. Friedlander pointed to two "little scratch[es]" on the vulva and a bruise on the hymen. See id. at 149:3–24 (discussing Trial Ex. 19/Pl.'s Ex. 5). Dr. Friedlander also highlighted "three little bruises consistent with finger impressions[,]" on the child's pubic area. See id. at 150:2–8 (discussing Trial Ex. 20/Pl.'s Ex. 6). While illustrating with his hands, Dr. Friedlander explained:

Mr. Harpootlian:	Are those two injuries that you see in those two photos consistent or inconsistent with your position that these injuries occurred while he was attempting to remove feces from the lips of this little girl's vagina?
Dr. Friedlander:	It's a perfect match. He's holding her down too hard and he's opening the lips here so he can with the other hand remove the feces and this is scratching probably by his nails. These are two parts of the nails where the nails would rub up against and then the impression only on the back half, that's

> where the finger is going to strike [the hymen]. It's a perfect match.

Id. at 150:9–19. While the hymen was bruised, it was not penetrated. Id. at 174:10–15 ("A. Okay. The vulva was penetrated. The hymen is not penetrated."). Likewise, there is no evidence of intrusion into the vagina. Id. at 178:13–15. Dr. Friedlander also testified that the size of the abrasions on the child were consistent with a scratch by an adult fingernail. See id. at 150:20–151:3. Finally, Dr. Friedlander challenged the objectivity of Dr. Luberoff's testimony that the bruises on the child's pubic area, which he identified as finger impressions, were bite marks when a "good fit" for the injuries was what Applicant had described. See id. at 158:19–159:15; see also id. at 171:23–171:9 (using photo exhibit to note the absence of markings consistent with a bite). He was also critical of Dr. Luberoff's description of anatomy of the child's genitals, explaining "[i]t's sloppy usage to call the vulva the vagina" because, while the vulva is an exterior structure to the genitals, the vagina is located behind the hymen. See id. at 144:25–145:13 (explaining, "it's common speech but it's not scientific.").

As for the child's other injuries, Dr. Friedlander believed the child "was manhandled[,]" which he conveyed to Mr. Snell prior to trial and again to this Court. See PCR Hr.'g Tr. 151:15–22. Dr. Friedlander was available and willing to come to South Carolina to testify and quoted Mr. Snell the modest fee of $1,000 because he believed Applicant had been too rough with the child. See id. at 156:9–157:12. Nevertheless, Dr. Friedlander was disappointed when Mr. Snell failed to contact him again because he believed Applicant "was over charged[,]" and believed he could help explain "what really happened[.]" See id. at 158:5–18.

The day before Applicant's trial began, Applicant's mother gave Mr. Snell $5,000 to retain additional counsel. PCR Hr.'g Tr. 44:20–45:1. A memorandum by Mr. Snell in his file dated March 29, 3:22 p.m. recorded his contemporaneous observation that Applicant's mother "did not

want to hurt [his] feelings" but "wondered if I would have co-counsel for [Applicant's] trial." See id. at 45:5–48:25 (discussing and admitting Pl.'s Ex. 2 into evidence) & 49:16–50:15 (publishing memo). After Applicant's mother left, Mr. Snell contacted Mr. Floyd who agreed "to help", whereupon Mr. Snell obtained a certified check from applicant's mother and delivered it and a copy of all discovery and reports to Mr. Floyd. Id. at 50:9–13. At the time Mr. Floyd was retained—between 12 and 48 hours before trial—he had not met Applicant. Id. at 50:16–24, 51:13–18 (Mr. Floyd's first meeting with applicant was 12 hours before trial...) & 187:22–23 (and Mr. Floyd agreeing with that timeline); but see id. at 61:18–62:8 (second guessing his recollection, but agreeing Mr. Floyd was retained no more than 48 hours before trial).

Mr. Floyd is an experienced criminal defense lawyer with 42 years' experience during which he has tried "hundreds" of criminal cases. See PCR Hr.'g Tr. 185:23–186:4 & 186:25–187:5. Mr. Floyd testified that when he agreed to assist Mr. Snell, he planned to "just help him through the trial[,]" and not serve as primary counsel. Id. at 188:4–16. Prior to jury selection, Mr. Floyd had not spoken with any of the witnesses: "all I had was his file. Whatever he provided me, I reviewed that." Id. at 188:17–22. Mr. Floyd testified that when he handles a case, his practice is to speak with the witnesses. Id. at 188:23–189:7. With respect to lay witnesses, "[y]ou *always* want to try to make contact with them and see what they've got to say." Id. at 189:12–15 (emphasis added). Notwithstanding his limited preparation, Mr. Floyd handled the pre-trial Jackson v. Denno, 378 U.S. 368 (1964) hearing, cross-examined 11 of 13 State witnesses, and delivered closing argument. Id. at 190:2–191:3. When asked how his trial role expanded, Mr. Floyd explained that during trial Mr. Snell "just asked me to continue with the cross examinations and I did." PCR Hr.'g Tr. 191:4–192:1.

At trial Mr. Floyd understood genital penetration for a medically recognized reason gave Applicant a defense to the criminal sexual conduct charge, but he did not ask Mr. Snell whether he retained an expert to address the penetration issue. PCR Hr.'g Tr. 193:4–10. In fact, Mr. Floyd was so cognizant of the import of the factual issue, he intentionally saved this question as his last for Dr. Luberoff. See id. at 193:11–21 ("Q. And it was your defense, right? A. Mm-hmm. It was the main portion of it. Yes."). Mr. Floyd first became aware of Dr. Friedlander's opinion during the PCR hearing:

Mr. Harpootlian:	Okay. Now, you have heard Dr. Friedlander's testimony this morning. Did that testimony corroborate your defense?
[...]	
Mr. Floyd:	Yes.
Mr. Harpootlian:	That is that it would be medically necessary to penetrate the vulva of a 15 month old to clean fecal matter from the lips of the vagina, right?
Mr. Floyd:	Correct.
Mr. Harpootlian:	And that's what Mr. Williams had said in his statement given to the police the day of his arrest, correct?
Mr. Floyd:	Correct.
Mr. Harpootlian:	So that explanation was consistent – inconsistent with what Dr. Luberoff said - but consistent with what Dr. Friedlander said, correct?
Mr. Floyd:	Correct.
Mr. Harpootlian:	So if you had been made aware of Dr. Friedlander -- Did you ever see a written report from Dr. Friedlander?
Mr. Floyd:	No.
Mr. Harpootlian:	That letter that we have introduced into evidence, you ever seen that before?
Mr. Floyd:	No. I don't think I ever saw it.

Mr. Harpootlian: Okay. So Mr. Snell never related to you what you heard here this morning?

Mr. Floyd: Correct.

Id. at 193:22–194:23. Had Mr. Floyd known Dr. Friedlander was available to corroborate Applicant's defense, he would have brought him to trial to offer what he characterized as "a crucial piece of testimony." Id. at 197:3–198:3. Instead, Applicant went to trial with no expert to counter Dr. Luberoff's testimony. Id. at 198:10–12.

Finally, having crossed examined both witnesses through which the State obtained the admission of graphic photos of the child's genitals, Mr. Floyd conceded, "... I didn't have any major trial strategy to not object." PCR Hr.'g Tr. 215:1–23; cf. id. at 213:25–214:22 (explaining he objected to the silhouette images because they were "[t]oo graphic.").

Having carefully examined the record in this matter, the Court now turns to the law.

CONCLUSIONS OF LAW

The Sixth Amendment's right to counsel protects the fundamental right to a fair trial. Strickland, 466 U.S. at 684 (citing Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963)). The Constitutional guarantee of a fair trial "is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Id. The right to counsel is "crucial" to the adversarial system because it is counsel's skill and knowledge that equips a defendant with the tools to meet and defend the government's claims. Id. Because of the import counsel plays in a fair trial, the Sixth Amendment guarantees, not simply the presence of a lawyer, but "effective assistance" by a lawyer loyal to the client's cause, who keeps the client informed, and who brings to bear "such skill and knowledge as will render the trial a reliable adversarial

testing process." Id. at 688. This Application implicates the fundamental right to the effective assistance of counsel in three ways.

I. Trial preparation.

Applicant alleges Trial Counsels' "lack of trial preparation, including the failure to interview virtually any State witness or to comprehend and appreciate facts that entitled Applicant to a legal defense" falls below the constitutional guarantee of effective assistance within the meaning of Strickland and constitutes "a total failure to function as a meaningful State adversary" as contemplated by Chronic. 2nd Am. PCR Appl. ¶ 11.c. The Court agrees and holds that Mr. Snell's lack of preparation fundamentally undermined Applicant's trial in a manner that is actually and presumptively prejudicial. The Court reaches this conclusion for three reasons.

First, a defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. Federal courts have construed this obligation to require an "appropriate factual and legal inquir[y] and to allow adequate time for trial preparation and development of defense strategies." Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir. 1998) (citing Sneed v. Smith, 670 F.2d 1348, 1353 (4th Cir. 1982); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968)). "Trial counsel have an obligation to investigate possible methods for impeaching a prosecution witness, and failure to do so may constitute ineffective assistance of counsel." Tucker v. Ozmint, 350 F.3d 433, 444 (4th Cir. 2003) (citing Huffington, 140 F.3d at 580; Hoots v. Allsbrook, 785 F.2d 1214, 1221 (4th Cir. 1986)).[2] The United States Court of Appeals for the Fourth Circuit has defined the parameters of a successful failure-to-investigate allegation by explaining:

[2] The exception to counsel's investigation obligation is "where counsel is familiar with the substance of their testimony." Huffington, 140 F.3d at 580 (collecting cases).

> The reasonableness of the investigation depends, in part, upon the importance of the witness to the prosecution's case: "Although a lawyer's failure to investigate a witness who has been identified as crucial may indicate an inadequate investigation, the failure to investigate everyone whose name happens to be mentioned by the defendant does not suggest ineffective assistance." Huffington, 140 F.3d at 580. As we noted in Huffington, most of the witnesses whom federal courts have deemed "crucial" were "alibi witnesses *or eyewitnesses critical to the determination of guilt*," such as self-defense witnesses. Id.

Tucker, 350 F.3d at 444 (emphasis added). Thus, while counsel's failure to investigate every possible witness might be excused, failure to investigate all witnesses bearing on guilt or innocence is objectively unreasonable.

The Court holds Mr. Snell was objectively unreasonable in failing to interview, or attempting to interview, any State witness other than the lead detective. Testimony of Ms. Clary and Dr. Luberoff was unquestionably critical to Applicant's conviction, but Mr. Snell made no effort to contact them. Likewise, Mr. Snell recognized the timeline placing the child in Applicant's care was critical to establishing his responsibility for the injuries (see PCR Hr.'g Tr. 107:8–108:6 & 229:3–21), but no lay witness was contacted to test the veracity of these claims or explore avenues for impeachment. Thus, Mr. Snell failed to act on the import ascribed by his own assessment when he failed to interview any lay witnesses. See id. at 117:4–20. Finally, although Mr. Floyd repeatedly challenged the State's efforts to establish a chain of custody for a dirty diaper collected by a friend of the child's mother (see, e.g., Trial Tr. 418:16–25; PCR Hr.'g Tr. 229:22–230:17), he lacked sufficient information to do so having had no opportunity to interview the witnesses prior to mounting that challenge. Notably, but for the unusual circumstances whereby he came to handle the bulk of Applicant's trial work on the eve of trial, Mr. Floyd's practice is to conduct these interviews prior to trial. In short, the facts here indicate that Mr. Snell's failure to interview *all* of these witnesses abdicated counsel's responsibility to investigate critical witnesses determinative of guilt or innocence.

Second, Mr. Snell's representation was deficient because the lawyer who prepared the case for trial labored under a misapprehension of law and fact as to what constituted a legal defense. S. C. Code Ann. § 16-3-655 provides in part that "[a] person is guilty of criminal sexual conduct with a minor in the first degree if: (1) the actor engages in sexual battery with a victim who is less than eleven years of age[.]" S.C. Code Ann. § 16-3-655(A)(1). A "sexual battery" means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or *any intrusion, however slight*, of any part of a person's body or of any object *into the genital or anal openings* of another person's body, *except* when such intrusion is accomplished for *medically recognized treatment* or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (emphasis added). The statute does not require sexual gratification nor does it require *vaginal* penetration. See State v. Morgan, 352 S.C. 359, 365–73, 574 S.E.2d 203, 206–10 (Ct. App. 2002) (construing the inclusion of cunnilingus in the statute and holding "Penetration of the vagina is NOT necessary or required." (emphasis original)).

Mr. Snell repeatedly sought to highlight the lack of vaginal penetration, a fact of no legal consequence to Applicant's defense. For example, when Dr. Friedlander was asked why he was not retained, he recounted a 15-minute conversation with Mr. Snell he described as "perplexing" in which Mr. Snell appears to have misapprehended the utility of Dr. Friedlander's opinion while probing for an opinion that, if given, was of no legal utility. See PCR Hr.'g Tr. 152:4–11.

Mr. Harpootlian: Why was it perplexing?

Dr. Friedlander: After we got - after I made it clear to him that we could not think of any way to defend the idea that this child was manhandled, then he starts trying to explain the law to me.

Mr. Harpootlian: Right. And?

Dr. Friedlander: I don't really understand the law, but he was saying to me that if -- He was trying to get me to say that there was some way that this could not have been done with a, uh – He was - he was trying to get me to say that it was not done by

	penetration of the finger. He said that was there any way that I could say that the finger was in the vulva and I really couldn't.
Mr. Harpootlian:	He was trying to get you to back off the position that there was a penetration of the genitalia?
Dr. Friedlander:	That is what I was trying to say.
Mr. Harpootlian:	Right. And you said clearly there was penetration of the vulva?
Dr. Friedlander:	Yes.
Mr. Harpootlian:	Okay.
Dr. Friedlander:	I couldn't do that and he was trying to explain to me about the law said this and the law said that and I didn't really understand it.

Id. at 153:15–154:12. Mr. Snell never asked Dr. Friedlander whether the removal of fecal matter from the child's vaginal area was a medically recognized treatment. Id. at 155:4–7.

Similarly, when Mr. Snell moved the Trial Court for a directed verdict, he argued a lack of vaginal penetration. See Hr.'g Tr. 448:19–450:22. Citing the "medical testimony" offered by the State, Mr. Snell argued, "there's been no evidence presented of any penetration in to the opening." Id. at 448:21–449:14. When the Trial Court sought clarification, Mr. Snell first explained the "genital opening[,]" but then proceeded to argue, "[t]he testimony is that it was a bruised hymen and the hymen sits on the outside of the vaginal canal, which would be the genital opening." Id. at 449:18–23. When the Trial Court asked, "What are you defining as the genital opening?", Mr. Snell responded, "[t]he vagina." Id. at 449:25–450:2. In denying Applicant's motion, Mr. Snell, correctly, cited Morgan for the proposition that the criminal sexual conduct statute "defines the genital organs not to be only the vagina, and it held that vaginal penetration is not required to be convicted of criminal sexual conduct with a minor." See id. at 456:21–459:1.

The record is uncontradicted that Mr. Snell's apparent view at trial was neither factually nor legally accurate. See, e.g., PCR Hr.'g Tr. 235:13–17 (Mr. Floyd conceding, "That's not accurate.") & 236:2–9 ("It's inaccurate. It's an inaccurate argument."). During the PCR hearing, Mr. Snell correctly defined a sexual battery defined as "any intrusion into a private parts of the *genitalia* for an unrecognized medial purpose." Hr.'g Tr. 72:4–7 (emphasis added). He also agreed there is a statutory defense for a diaper change:

Mr. Harpootlian:	An unrecognized medical purpose?
Mr. Snell:	Right. So we have a diaper change which certainly can be a medical purpose, a legitimate reason for any adult to touch a child's genitalia. The child had injuries. The State charged him with criminal sexual conduct even though I don't believe there was anything sexual or any evidence that it was sexual.
Mr. Harpootlian:	Didn't have to be, did it?
Mr. Snell:	According to the State's version it did not.
Mr. Harpootlian:	Well --
Mr. Snell:	Read the statute. There is no requirement of --
Mr. Harpootlian:	But if there was a medical reason to have an intrusion, it would have been a defense?
Mr. Snell:	Exactly. Such as a diaper change.

Id. at 72:8–21; see also id. at 77:6–78:3 (same). The record before the Court does not demonstrate that this more recent (and accurate) understanding guided Mr. Snell's representation while preparing Applicant's case and representing him at trial. During cross-examination by the Assistant Attorney General, Mr. Snell stated that "basically a lot of folks got an anatomy lesson" from Dr. Luberoff during Applicant's trial. See PCR Hr.'g Tr. 108:16–109:9. To provide an effective defense, Mr. Snell should have armed himself with this knowledge *before* trial.

The Court also holds that the foregoing deficiencies—a failure to investigate, misunderstanding of the penetration requirement and failure to appreciate the significance of the medically recognized treatment defense—were prejudicial to Applicant's defense within the meaning of Strickland. While speculation or conjecture are never sufficient to substantiate that deficient performance was prejudicial, Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995). Here, there is a convincing record that the lawyer charged with preparing Applicant's case failed to conduct any meaningful investigation and misapprehended the relevant legal inquiry. This resulted in a reliance on inaccurate factual and legal claims to the exclusion of a potentially meritorious defense. Prejudice attaches when counsel's performance "has adversely affected the defense." Huffington, 140 F.3d at 578. The Court finds that Applicant's defense was adversely affected. In the parlance of Strickland, there is a reasonable probability here that, but for counsel's errors, the outcome of Applicant's trial might have been different.

Third, in addition to the foregoing, the Court holds that Mr. Snell's overall lack of preparation and legal understanding is presumptively prejudicial to Applicant. In Cronic, the Supreme Court recognized an ineffective assistance claim based on an overall breakdown of the guarantee to counsel rather than a specific omission. The Court identified three situations where the presumption appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659. Second, prejudice is presumed if there is a constructive denial of counsel. Id. Constructive denial occurs when counsel "fails to subject the prosecution's case to meaningful adversarial testing," making "the adversary process itself presumptively unreliable." Id. Third, the Court identified instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate

without inquiry into the actual conduct of the trial." Id. at 659–60 (citing Powell, 287 U.S. 45, as illustrative).

Applicant's case here warrants a presumption of prejudice. This conclusion is supported by a record indicating that while Mr. Floyd is a very seasoned and capable lawyer, he tried the bulk of Applicant's case with no more than one-day's preparation. Mr. Snell explained Mr. Floyd's role as "the family want[ing] someone older to appear in front of the jury[,]" but that explanation is incongruous with the facts. See PCR Hr.'g Tr. 64:17–25. Of the 13 witnesses called by the State, all but two were cross-examined by a lawyer with only a day's involvement in the case. See id. at 65:1–18 & 66:5–22. By Mr. Floyd's description, his expansive role at trial appears to have occurred by happenstance. See id. at 191:4–192:1. The Court concludes these facts implicate Cronic's third situation where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Cronic, 466 U.S. at 659–60.

With respect to Mr. Snell's involvement, it implicates Cronic's second situation: the constructive denial of counsel that occurs when counsel "fails to subject the prosecution's case to meaningful adversarial testing[.]" Cronic, 466 U.S. at 659. This conclusion is supported by Mr. Snell's failure to investigate and misapprehension of the facts and law discussed above.

This lack of adversarial testing is evidenced in other ways. For instance, when the State offered Ms. Clary as an expert without having given the notice required by Rule 5 of the Criminal Rules of Procedure, Mr. Snell failed to object, notwithstanding his awareness of the State's Rule 5 obligations. See Hr.'g Tr. 56:3–57:18.

> Mr. Harpootlian: So and you had been in this case for a year and you were not aware that she was going to be an expert witness until not even that day, until as you're sitting in the courtroom?

Mr. Snell:	Correct. Now, I would have – we would have known that she was – we would have had those reports provided. We knew that she was a potential expert. Excuse me. Potential witness.
Mr. Harpootlian:	Correct.
Mr. Snell:	But as far as the specific questions or things that she would be asked by the prosecutor I did not until she was called as a witness.
Mr. Harpootlian:	And you understand that under Rule 5 you would have had a perfectly good objection to ask her testimony not be allowed?
Mr. Snell:	As far as expert opinion testimony, yes, sir.

Id. at 57:19–58:9; see also id. at 62:9–23. Asked to identify a strategic decision supporting the decision *not* to object to Ms. Clary's expert designation, neither Mr. Snell nor Mr. Floyd were able to provide one. See id. at 58:24–59:5 & 205:24–207:15. Not only did Ms. Clary testify as an expert in forensic nurse examination, but she was the witness through which the State sought and obtained the admission of photographs of the child's vagina into evidence. See id. at 60:7–61:16 (discussing Trial Exs. 16–20, remarked as Pl.'s Exs. 3–6).

Likewise, neither of Applicant's trial counsels raised objection to Dr. Luberoff's testimony who, although the State identified her as a testifying expert, was identified for the first time just five days before trial. See id. at 63:16–23. Rule 5 requires disclosure of physical examinations and scientific tests or experiments within 30 days of a request and authorizes the court to exclude the testimony of undisclosed witnesses in violation of the rule. See Rule 5(a)(1)(D), (a)(3) & (e)(4), SCRCrimP. Mr. Snell agreed that since he filed a Rule 5 motion soon after Applicant was arrested, the State's disclosure of Dr. Luberoff five days before trial was "late." See id. at 64:4–12. Mr. Snell also agreed Dr. Luberoff's untimely identification would have been grounds to seek a continuance. See id. at 64:13–16. When coupled with the other significant evidence detailed

above, the Court concludes Mr. Snell failed to provide Applicant with the adversarial representation the Constitution requires such that prejudice must be presumed.

In summary, the Court holds that Mr. Snell was ineffective in failing to investigate this case and in misunderstanding law and facts that would have provided Applicant a defense. The Court further holds that Strickland prejudice attaches to these deficiencies.

II. Failure to call expert.

Applicant alleged that Trial Counsels' failure "to call an expert witness or witnesses to testify that the victim's injuries were consistent with Applicant's statement to police and testimony at trial was ineffective because it would have constituted a 'medically recognized treatment' ... and thus constituted a legal defense to the charge of criminal sexual conduct with a minor." 2nd Am. PCR Appl. ¶ 11.b. The Court agrees and holds Trial Counsels were ineffective in failing to call an available medical expert to offer testimony the child's injuries were consistent with a rough diaper change. Mr. Snell's decision not to retain Dr. Friedlander was objectively not reasonable because it denied Applicant a defense. As discussed above, Mr. Snell's belief Dr. Friedlander's testimony was not helpful overlooked that it provided the factual predicate to a legal defense. Dr. Friedlander was available and believed he could help Applicant by explaining in his view what happened. This Court found Dr. Friedlander to offer credible alternative theory of how the child sustained the genital injuries during a diaper change—the only person to offer such a view. Mr. Snell's decision is also problematic because it ignored his client's statements about what happened. See Strickland, 466 U.S. at 691 (the reasonableness of counsel's actions may be determined or influenced by defendant's own statements or actions). Nor can Mr. Snell's decision not to retain Dr. Friedlander be justified by a vigorous cross-examination attacking the accuracy of the State's expert evidence (cf. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008)) because

this challenge was never mounted at trial. In the Court's view, Mr. Snell's failure to present this evidence at trial was not objectively reasonable and was ineffective.

The absence of Dr. Friedlander's testimony was prejudicial to Applicant. "A PCR applicant cannot show he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005). Here, the Court holds the failure to call Dr. Friedlander prejudiced Applicant's defense for two reasons.

First, Dr. Friedlander's testimony was critical because it would have given the jury a choice between Dr. Luberoff's testimony and another opinion that corroborated Applicant's statements and testimony. Mr. Floyd agreed that since Applicant's defense (in his mind) was a medically appropriate diaper change, and Dr. Friedlander's testimony demonstrated how the child's injuries corresponded to that claim, he "would have emphasized that [testimony]" had he known about Dr. Friedlander because doing so would have created a dispute of fact. See PCR Hr.'g Tr. 218:10–25. Instead, the only medical testimony on which the jury could rely was that of Dr. Luberoff, which suggested the 15-month old child might have been digitally penetrated and bitten on the pelvic bone. This Court found Dr. Friedlander's explanation as to why Dr. Luberoff was wrong about penetration and the bite mark to be credible and persuasive. A jury should have been afforded an opportunity to do the same.

Second, the record indicates the jury *did* have serious questions about Dr. Luberoff's testimony and was struggling to apply it to the law of criminal sexual conduct. During deliberations, the jury sent the Trial Court a note asking whether there was a transcript of Dr. Luberoff's testimony and for clarification concerning the law of criminal sexual conduct. See PCR Hr.'g Tr. 201:8–18. The jury note is persuasive evidence of a serious debate concerning the

interplay between Dr. Luberoff's testimony concerning penetration and the law. See id. at 203:11–13 ("Q. So obviously the intricacies of the law and penetration were in the jury's mind, correct? A. Yes."). Put differently, there is a reasonable likelihood the jury could have come to a different conclusion had Dr. Friedlander testified.

Therefore, the Court holds that Trial Counsel was ineffective for failing to call Dr. Friedlander at trial and that Applicant's defense was prejudiced because of this omission.

III. Failure to object to photos.

Finally, Applicant argues Trial Counsels' failure to contemporaneously object to "photographs that were not relevant to any matter in dispute[,] ... inflame[ed] the passions and prejudices of the jury, and invited a verdict based on factors other than the admissible evidence." 2nd Am. PCR Appl. ¶ 11.a. The Court agrees and holds Trial Counsels were ineffective in failing to make a contemporaneous objection to graphic images of the child's genitals.

A timely objection is a necessary predicate to the exclusion of evidence. When Applicant challenged the admission of the diagrams and the photos on appeal, the Court of Appeals declined to consider the photos, explaining:

> Williams only objected to the admission of the anatomical diagram enlargements (State's Exhibits 9, 10, and 11). He did not object to the admission of any of the photographs. He contends that any objection to the photographs was futile in light of the trial court's ruling on the diagrams. We disagree. The photographs and anatomical diagrams are not the same thing. He objected to each of the diagrams. He needed to object to at least the first picture to be able to argue that further objections would be futile. *Therefore, the admission of the photographs is not preserved for our review because Williams did not object to their admission.*
>
> As to the diagrams, the nurse used them to point out Victim's injuries. Accordingly, they were relevant and corroborated her testimony. They were not graphic at all; they were simply black and white diagrams of a child's head, body, and vagina. They did not have any prejudicial effect. Therefore, the trial court did not err in admitting the diagrams.

Williams, 405 S.C. at 281–82, 747 S.E.2d at 204 (emphasis added).

Failure to make a timely objection is routinely held as ineffective assistance unless trial counsel can point to a valid trial strategy for failing to object. See, e.g., Stone v. State, 419 S.C. 370, 798 S.E.2d 561, 570 (2017) (rejecting various explanations by trial counsel as failing "to articulate any valid strategic reason for not objecting to important victim impact testimony the trial court had the discretion to exclude."); Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (trial counsel articulated valid strategy); Dawkins v. State, 346 S.C. 151, 156–57, 551 S.E.2d 260, 263 (2001) (explanation that trial counsel did not want to upset jury by objecting was not a valid strategy where evidence improperly bolstered victim's testimony); Vail v. State, 402 S.C. 77, 88–89, 738 S.E.2d 503, 509 (Ct. App. 2013) (admission of inadmissible evidence elsewhere was not a legitimate reason not to object). When trial counsel acknowledges there was no strategy motivating a failure to object, the presumption of adequate representation on that basis disappears. See Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010). As Mr. Floyd candidly admitted, there was no strategy here even though he harbored real concerns about the images offered by the State. See PCR Hr.'g Tr. 233:1–16 (raising concerns the images were "much more vivid red[ ]" in the form shown to the jury, but that he "had no real trial strategy to keep them out."). This is not to suggest a timely objection would necessarily result in exclusion; but "[w]ithout an objection, however, there can be no debate; and the trial court has no opportunity to exercise its discretion." Stone, 419 S.C. 370, 798 S.E.2d at 569–70. Accordingly, the Court holds Trial Counsels were deficient in failing to object to the admission of graphic images of the 15-month old child's genitalia.

The Court holds this deficiency was also prejudicial. To meet Strickland's requirement of a reasonable probability of a different outcome, this Court must find it possible the photographs invited a decision from the jury on an improper basis. The relevance, materiality and admissibility

of photographs fall within the sound discretion of a trial court, not subject to reversal unless admission of the evidence prejudices the defendant based on a "reasonable probability" the verdict was influenced by the evidence. State v. Gore, 408 S.C. 237, 249, 758 S.E.2d 717, 723 (Ct. App. 2014); State v. Kirton, 381 S.C. 7, 24, 671 S.E.2d 107, 115 (Ct. App. 2008). Rule 403, SCRE permits exclusion of relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice[.]" "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). The Court concludes there was reason to exclude the photographs of the child's genitals and the photos may have provoked the jury to decide this case on an improper basis. While the Court is familiar with decisions authorizing autopsy photos to go to the jury, including autopsy photos of children, those decisions turn on the "necessity" to depict a fact in dispute. See, e.g., State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 608 (Ct. App. 2008) ("Furthermore, the photographs were necessary to depict the severity of the bruises and the resulting trauma, which was inconsistent with accidental injury or play."). The State presented testimony from two medical examiners who observed scratches and bruising on the child's genitals. This testimony was bolstered by the admission of the diagrams the Court of Appeals held to have been properly admitted. The severity of any injury to the child's genitals was irrelevant to the criminal sexual conduct charge because all the State had to prove was penetration. Thus, what mattered was the existence of evidence of penetration ever so slight, not a graphic display of the injuries.

This Court cannot know how either the Trial Court or Court of Appeals might have responded to a timely objection. So too, is it mindful that "a trial court is not required to exclude relevant evidence simply because it is unpleasant or offensive." Williams, 405 S.C. at 281, 747

S.E.2d at 203–04. Nevertheless, the Court has reviewed the images in question and has grave concerns with their probative value and whether the jury could set aside any animus that might have been engendered toward Applicant after reviewing the images and refocus its attention on the facts in dispute. For this reason, the Court holds that Trial Counsels' failure to object to the images was prejudicial to Applicant.

Because this Court does not view its role as one to second-guess counsel's strategic choices, it has reviewed the record and Trial Counsels' decisions with the utmost deference. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Even affording both Trial Counsels all due deference, relief is warranted here.

Applicant's representation labored under serious defects that do not fall within the realm of sound trial strategy or the exercise of professional judgment. For these reasons, Applicant's request for post-conviction relief is **GRANTED**. Applicant's convictions for are unlawful neglect of a child and criminal sexual conduct in the first are **VACATED**.

AND IT IS SO ORDERED.

Eugene C. Griffith, Jr.
Circuit Court Judge

June 19th, 2017.
Newberry, South Carolina.

2017 JUN 20 AM 8:16

ORIGINAL

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	ELEVENTH JUDICIAL CIRCUIT
Lance Austin Williams, Petitioner, v. State of South Carolina, Respondent.	Case No.: 2014-CP-32-4769 MOTION TO ALTER OR AMEND

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 31, 2014, amended on October 25, 2016, and amended by motion following the PCR Hearing. An evidentiary hearing into the matter was convened on January 30-31, 2017, at the Lexington County Courthouse. After receipt of proposed orders from both parties, the Honorable Eugene Griffith, Jr. granted relief in an order filed on June 19, 2017, and served upon both parties via email on that same date. Pursuant to Rule 59(e), SCRCP, Respondent requests this Court reconsider its ruling, and amend the Order to reverse the grant of relief. Specifically, Respondent submits the Order should be altered and amended as: the order relies on allegations that were not included in Applicant's amended PCR application and not properly before the Court; the Order omits evidence and arguments presented to the Court that directly contradict the resulting findings made by this Court; and, the Court misapplies legal precedent and Rule 5 in reaching its holdings. In support of its position, Respondent respectfully submits:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. In July 2010, the Lexington

County Grand Jury indicted Applicant for unlawful neglect of a child (2010-GS-32-1860) and criminal sexual conduct (CSC) with a minor, first degree (2010-GS-32-1861). James R. Snell, Jr., Esquire, and H. Wayne Floyd, Esquire, represented Applicant. On March 30-April 1, 2011, Applicant proceeded to a trial before the Honorable R. Knox McMahon and a jury. He was found guilty as indicted. On April 5, 2011, Judge McMahon sentenced Applicant to a term of ten (10) years imprisonment for Unlawful Neglect of a Child and to a term of twenty-five (25) years imprisonment for CSC with a minor, first degree. These sentences were to be served concurrently.

A timely notice of appeal was filed on April 5, 2011, and perfected on Applicant's behalf by Richard 'Dick' Harpootlian, Esquire. The South Carolina Court of Appeals affirmed Applicant's convictions. State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013). Applicant filed a Petition for Rehearing on August 8, 2013. The Court of Appeals denied this Petition on September 19, 2013. Applicant then petitioned for Writ of Certiorari on October 21, 2013. By Order dated July 24, 2014, the Supreme Court denied the petition, and the Remittitur was issued on August 2, 2014.

After the hearing, Applicant's counsel moved to amend the allegations. Respondent did not object. The Court granted Applicant's motion. Those allegations are as follows:

(1) Applicant's trial counsel failed to contemporaneously object to the introduction of prejudicial evidence, including but not limited to, photographs that were not relevant to any matter in dispute,

(2) Trial counsel failed to call an expert witness to testify the victim's injuries were consistent with Applicant's statement to police and testimony at trial and would have constituted "medically recognized treatment" and thus constituted a legal defense to the charge,

(3) Trial counsel's lack of trial preparation, including the failure to interview virtually any State witnesses, falls below the standard of a reasonable, competent lawyer.

ARGUMENT

Respondent requests this Court reconsider and reverse its June 19th Order, granting Applicant's PCR Application because the order relies on allegations that were not included in Applicant's amended PCR application and therefore are not properly before the Court, the Order omits evidence and arguments presented to the Court that directly contradict the resulting findings made by this Court, and the Court misapplies legal precedent and Rule 5 in reaching its holdings.

I. Order Relies on Allegations That Were Not Properly Presented to This Court

The Order relies on allegations that were not made by counsel in his final allegations and were only introduced for the first time in a proposed order that was submitted at the same time Respondent's proposed order was submitted to the Court. Applicant's allegations were limited to failure to object, failure to call and expert witness, and failure to prepare for trial. Yet, in Applicant's proposed order, he inserted allegations related to Rule 5 violations (Order, p. 25) and "failure to appreciate the significance of the medically recognized treatment defense" by "labor[ing] under a misapprehension of law and fact as to what constituted a legal defense."

Applicant had more than two years between the time he filed his application and the hearing to amend his application. Furthermore, this Court granted Applicant great latitude during the PCR hearing to question witnesses outside of the limitations of the then-existing allegations and later allowed Applicant to amend his application after the hearing. Applicant had the opportunity to get those allegations right.

Respondent's only opportunity to argue against new allegations came through a proposed order and relied heavily on the amended allegations, which, again, were limited to failure to investigate with an emphasis on trial counsel's failure to interview witnesses, failure to call an expert witness, and failure to object to the photos.

The Court should rule solely on the allegations made in Applicant's final amendment application and reconsider its ruling. At a minimum, however, Respondent respectfully requests the Court remove references to Rule 5 allegations and the "intrusion into the genitals" defense that were not brought before the Court in any of Applicant's allegations and to which Respondent had no opportunity to respond.

II. The Order Omits Legal Precedent, Misapplies Rule 5, Addresses Allegations that are Not Before the Court, and Omits Evidence and Arguments By Respondent That Were Properly Before the Court

Allegation: Failure to Prepare for Trial (Strickland analysis)

The Order finds trial counsel were ineffective for lack of trial preparation. The Order incorrectly states Trial Counsel Snell spoke only with the lead investigator prior to going to trial. (Order, p. 19.) Trial Counsel Snell testified at the PCR Hearing that he hired a private investigator to talk to all the fact witnesses, (PCR Hearing Tr. p. 31, ll. 12-16), and that he himself spoke with the law enforcement ***witnesses*** prior to the trial, (PCR Hearing Tr. p. 27, ll. 23-25). Trial counsel Snell could not confirm whether he or his investigator spoke with about six of the witnesses listed on the State's witness list. There was no written report by the investigator and Trial Counsel Snell testified he believed this was a decision based on fees and costs associated with that additional step. (PCR Hearing Tr. p. 43, l. 17-p. 44, l. 2.). The Court fails to address Trial Counsel Snell's testimony on this issue without explanation as to why his sworn testimony should be given no consideration and/or weight.

Furthermore, the conclusion Applicant was prejudiced rests on speculative argument, not fact of record. Applicant did not offer a single factual or law enforcement witness for the Court's consideration; Applicant offered zero evidence of how a more in-depth or in person—versus through his investigator—interview would have resulted in a different case. The most the Court was offered in the proposed order to support this allegation is that "no law witness was contacted to test the veracity of [the timeline] claim[] or explore avenues for impeachment." (Proposed Order, p. 19, Adopted at Order, p. 19.) However, Applicant also offered **no lay witnesses** to counter the timeline and **did not offer any evidence** that could have been used for impeachment of either the lay or law enforcement witnesses. Applicant's counsel was faced with the same reality Trial Counsel were faced with: Applicant's written statement to police and then Applicant's sworn testimony on the stand that prevented any defense that someone else had caused the injuries in the victim.

Through the proposed order, Applicant further asked this Court to rule without supporting evidence by arguing that prejudice could be established because – despite Trial Counsel Floyd's challenge to the chain of custody for a dirty diaper – Mr. Floyd allegedly "lacked sufficient information . . . to mount[] that challenge." (See Order, p. 19.) Applicant's argument is wholly unsupported by any evidence that relevant and weighty information was actually available. Applicant failed to offer any witnesses, documents, or other evidence related to the chain of custody or the lay witness who collected the diapers. Thus, he failed in his burden of proof. Porter v. State, 368 S.C. 378, 385, 629 S.E.2d 353, 357 (2006) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result."); Jackson v. State, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998) ("Mere speculation and conjecture on the part of

respondent is insufficient."). See also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application."); Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original).

Jackson v. State, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998) is particularly instructive. In Jackson, the applicant contended counsel was ineffective in failing to investigate possible criminal backgrounds of certain victims and witnesses. Counsel admitted he did not do so at the PCR hearing and even "further admitted it was an error not to investigate the victims and witnesses." 329 S.C. at 349, 495 S.E.2d at 770. The PCR court found counsel was deficient and the applicant was prejudiced. However, on appeal, the Supreme Court of South Carolina disagreed. Though agreeing probative evidence of record supported the finding of deficient performance, the Court found the applicant failed to carry his burden of proof on prejudice:

> ...there is no probative evidence to support the finding of prejudice. While the PCR judge was correct in finding the credibility of the eyewitnesses and victims "would have been critical," no probative evidence was presented at the PCR hearing to show the eyewitnesses and victims were not credible. The only "evidence" that either the victims or eyewitnesses had criminal records were statements and questions by respondent's PCR counsel that one of the victims was incarcerated in another state at the time of respondent's trial and respondent's testimony that he knew this victim was in jail. Respondent failed to substantiate this allegation with any probative evidence. *See Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995) (applicant's allegations, alone, will not support a finding of prejudice when applicant claims counsel was ineffective for failing to investigate witnesses; instead, applicant must show the results of an investigation would have

> resulted in a different outcome at trial). Mere speculation and conjecture on the part of respondent is insufficient. *Id.*

329 S.C. at 349, 495 S.E.2d at 770.

Like the claim in Jackson, without any evidence to establish or even support a finding that Applicant was prejudiced by Trial Counsel's alleged failure to interview fact witnesses directly and not through his investigator, this claim must fail. Applicant is not entitled to any relief.

Allegation: Improper Legal Theory Challenging "Intrusion Into the Genitals"

Separately, and as referenced above in Respondent's first argument, Applicant raises for the first time in his proposed orders and not referenced in his amended allegations, that this Court should find Trial Counsel deficient for having a strategy that challenged the element of "intrusion into a genital opening." Applicant incorrectly argues—and the Court relies on in its Order—that because Trial Counsel attempted this theory, they failed to recognize the medically necessary defense. That finding is directly contradicted by the evidence before the Court and is too speculative to support a finding of prejudice to Applicant.

To the extent the case involved questions of medicine and psychological issues, Trial Counsel was not alone. Trial Counsel Snell testified that not only did he have a year to work on the case before trial, he spent that year working with at least five different experts. The experts working on the case with Mr. Snell were (1) Ms. Cindy Hurley, a registered nurse who was retained to review the records, discuss medical subjects with the attorneys, and testify if necessary (PCR Hearing Tr. p. 52, ll. 3-6 and 24-p. 54, l. 4); (2) Dr. Abel, a medical doctor who spoke with the State's expert witness and reviewed medical records she had prepared on the victim and also advised on whether the victim may have required having cream rubbed on to her

labia due to a medical condition (PCR Hearing Tr. p. 95); (3) someone to conduct a polygraph on Applicant (PCR Hearing Tr. p. 96, ll. 17-21); (4) Dr. Watson, a forensic psychologist dealing with issues involving sexual offenses, who reviewed discovery, interviewed Applicant several times, and provided answers on psychological issues that may or may not be present in the case (PCR Hearing Tr. p. 99, ll. 8-23); and (5) Dr. Burke, who has a Ph. D. in psychology and runs or did run the sex offender treatment program for Department of Probation who conducted an Abel Assessment on Applicant to determine if he had any alternative sexual attractions (PCR Hearing Tr. p. 100, ll. 14-20). The decision not to call any of those experts was a strategy decision based on defense counsel's ability to get helpful testimony from the State's witness. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) ("Where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

The Order not only fails to reference the numerous expert witnesses involved in the defense strategy of this case, it fails to address Trial Counsel Snell's testimony that the medically recognized diaper change was one of their strategies. (PCR Hearing Tr. p. 76, l. 21-p.77, l.12; p. 75, ll. 14-20; p. 73, ll. 18-23; p. 54, ll. 1-4.). Mr. Snell had an expert witness already prepped on that issue: Ms. Cindy Hurley, a registered nurse who was retained to review the records, discuss medical subjects with the attorneys, and testify if necessary. (PCR Hearing Tr. p. 52, ll. 3-6 and 24-p. 54, l. 4). And, Trial Counsel Floyd's cross-examination of the State's expert, Dr. Luberoff, points directly to this being a key strategy of the defense. (Trial Tr. pp. 376-77; PCR Hearing Tr. p. 106, ll. 12-21.).

In sum, Applicant's argument is wholly unsupported by the evidence. The Court erred in accepting same.

Allegation: Failure to Prepare for Trial (Cronic analysis - Mr. Floyd)

As an end-run around his inability to establish prejudice in his case, Applicant next argued in his proposed order that this Court should find a presumption of prejudice pursuant to the United States v. Cronic, 466 U.S. 648 (1984), analysis. The Court accepted the argument finding the fact that Mr. Floyd was hired two days before trial and handled the cross-examination of thirteen of the witnesses implicates "Cronic's third situation where 'the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.'" (Order, p. 24.) This is error.

Such a conclusion is irreconcilable with the established facts of record, in particular, the fact that Applicant had lead counsel, Mr. Snell, and six expert witnesses working with the defense, who had been involved in the case for a year; and, that Mr. Snell was present along with Mr. Floyd throughout the entire trial. The holding is also irreconcilable with Cronic's own language that it is **not enough** that the appointment of a lawyer is delayed:

> In Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940), counsel was appointed in a capital case only three days before trial, and the trial court denied counsel's request for additional time to prepare. Nevertheless, the Court held that since evidence and witnesses were easily accessible to defense counsel, the circumstances did not make it unreasonable to expect that counsel could adequately prepare for trial during that period of time, id., at 450 453, 60 S.Ct., at 324–325. Similarly, in Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), **the Court refused "to fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel."** Id., at 54, 90 S.Ct., at 1982. Thus, only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial.

Cronic, 466 U.S. at 661 62 (internal footnotes omitted) (emphasis added).

Furthermore, the evidence presented to the Court stands in stark contrast to the facts of other cases that have supported a finding that prejudice must be presumed.

The Supreme Court has recognized, in both Strickland and United States v. Cronic, 466 U.S. 648 (1984), that there are a few circumstances where "prejudice is presumed" because prejudice "is so likely that case-by-case inquiry . . . is not worth the cost." Strickland, 466 U.S. at 692, 104 S.Ct. 2052 (citing Cronic, 466 U.S. at 658, 104 S.Ct. 2039); see also, Nance v. Ozmint, 367 S.C. 547, 551–52, 626 S.E.2d 878, 880 (2006) ("[*P*]*er-se* prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer '**entirely fails** to subject the prosecution's case to meaningful adversarial testing,' thus making 'the adversary process itself presumptively unreliable.'" (quoting Cronic, 466 U.S. at 659 (emphasis added))).

In Nance, the South Carolina Supreme Court had the opportunity to review a case under Cronic's second scenario: *per se* prejudice due to constructive denial of counsel. In Nance, counsel was ill and on medication, the petitioner was "in a drug-influenced demeanor during the entire trial," trial counsel told the jury both he and co-counsel did not want to be there, and defense counsel failed to qualify his own expert witness. Id., 367 S.C. 556, 626 S.E.2d at 883. In addition, defense counsel elicited testimony from its own witnesses about petitioner's prior bad conduct involving bad behavior in jail and killing his family's pets and counsel themselves referred to petitioner as "a sick man" in closing argument. Lorenzen v. State, 376 S.C. 521, 527 n.2, 657 S.E.2d 771, 775 n.2 (2008) (summarizing the findings from Nance). The petitioner was convicted and received a sentence of death for murder. criminal sexual conduct in the first degree, assault and battery with intent to kill, burglary in the first degree, and armed robbery. The South Carolina Supreme Court found a "complete failure to conduct a defense by trial

counsel," holding counsel "failed to act as an adversary to the prosecution, but instead helped to reinforce the case against his client." Id., 367 S.C. 558, 626 S.E.2d at 883.

The evidence before this Court showed the defense had clearly articulated defense theories, and their cross-examination, witness selection, and opening and closing arguments reflected that strategy. Admittedly, trial counsel had a hard case to defend; Applicant had confessed in writing and again on the stand that he caused the victim's injuries out of anger while disciplining her and then while wiping her due to a dirty diaper. (Trial Tr. p. 501, 559-30, 535-36.). In direct contrast to the facts of Nance, however, Trial Counsel Snell and Floyd in no way "failed to act as an adversary to the prosecution." They challenged each witness through cross-examination, elicited helpful testimony from the State's witnesses and their own, and used that testimony to support their argument to the jury.

Hiring and using a private investigator to contact fact witnesses (PCR Hearing Tr. p. 31, ll. 12-16), interviewing law enforcement witnesses (PCR Hearing Tr. p. 27, ll. 23-25), meeting with Applicant over twenty times in the course of a year (PCR Hearing Tr. p. 16, l. 25-p. 17, l. 5), hiring seasoned counsel for trial (PCR Hearing Tr. p. 50, l. 1-p. 51, l. 7), consulting with six expert witnesses (to include Dr. Friedlander) (PCR Hearing Tr. p. 52, ll. 3-6 and 24-p. 54, l. 4; p. 95; p. 96; p. 99; p. 100), and preparing for multiple defense theories in a case where the client was changing his version of the story (PCR Hearing Tr. p. 70, ll. 4-14; p. 74, ll. 7-17) and confessed in writing and on the stand is conduct that is well above the standard of a reasonable, competent lawyer.

The record before the Court does not support a finding that Trial Counsel here "entirely fail[ed] to subject the prosecution's case to a meaningful adversarial testing," Cronic, 466, U.S. at 659. Relief is not warranted under Cronic.

Allegation: Rule 5 Allegation

As referenced above in Respondent's first argument, this allegation is not properly before the Court, was not available to be addressed by Respondent in the hearing or in its proposed order, and should therefore be stricken and disregarded by the Court, particular given the grave prejudice to Respondent. See Harvey v. Strickland, 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002) ("The circuit court is to freely grant leave to amend when justice requires and there is no prejudice to any other party."). See also Arnold v. State, 309 S.C. 157, 173–74, 420 S.E.2d 834, 843 (1992) (upholding denial of motion to amend where "petitioners failed to present to the circuit court facts and circumstances to show why the new grounds were not and could not have been presented in the prior petitions ....").

Furthermore, while correctly stating that Rule 5 of the South Carolina Rules of Criminal Procedure only requires the disclosure of physical examination and scientific tests or experiments within 30 days of a request and **not the disclosure of who will be designated an expert witness**, see Rule 5(a)(1)(D), (a)(3), and (e)(4), SCRCrimP, the Order incorrectly relies on the State allegedly identifying Dr. Luberoff as an expert witness "just five days before trial" and focusing on not objecting "to Ms. Clary's expert designation" (Order, p. 25). The Order does not reference a failure to disclose any reports. Testimony in the PCR Hearing never suggested a failure to disclose a report. In fact, testimony by Trial Counsel Snell was that he was aware of the two expert witnesses at issue, Mr. Clary and Dr. Luberoff, and even had the report by Dr. Luberoff reviewed by their own expert witnesses in advance of trial. (PCR Hearing Tr. p. 34, ll. 1-5; ll. 22-25.)

This factual disconnect prevents Applicant from showing he is entitled to relief under the allegation. Relief is not warranted.

Allegation: Expert Witness

The Order also finds Applicant's conviction should be reversed because had Dr. Friedlander been called to testify, it "would have created a dispute of fact." (Order, p. 27.) The Order suggests the jury would have found Applicant not guilty if only they had heard Dr. Friedlander, instead of only the State's witness, testify that it was medically necessary to wipe fecal matter out of the vulva. (Id.)

As an initial matter, the Order makes no reference to the reasoning behind why Mr. Snell did not elect to hire Dr. Friedlander. The Order does not acknowledge Applicant's own role in the reason why Dr. Friedlander was not asked to testify.

Trial Counsel Snell testified he provided some documents and materials to Dr. Ed Friedlander, reviewed a letter written by Dr. Friedlander to him discussing the case, and also had a phone conversation with Dr. Friedlander before ultimately deciding not to retain him. (PCR Hearing Tr. p. 67, ll. 18-24.).

At the time they were considering Dr. Friedlander, Applicant was denying to Trial Counsel Snell that his statement to police was correct and denying he had caused the injuries to the child's vagina because he was angry or upset. (PCR Hearing Tr. p. 71, ll. 3-7.). Trial Counsel Snell testified that at the time he was talking to Dr. Friedlander, he discussed with Applicant a defense that the victim's injuries were caused by a "rough diaper change," and Applicant did not agree with that defense, claiming then that he was not angry and did not cause those injuries. (PCR Hearing Tr. p. 74, ll. 7-17.). Trial Counsel Snell testified the theory of the case changed throughout his representation of Applicant due to Applicant's changing version of events. (PCR Hearing Tr. p. 70, ll. 4-14.). While Applicant admitted to police that he intentionally caused the injuries to the victim, he denied doing anything to the victim's vaginal area when he first met

with Trial Counsel Snell. (Id.) Based on Applicant's version of events, the theory of the case was that someone else left the marks or that the injuries were not as extreme as the charges indicated. (PCR Hearing Tr. p. 70, ll. 18-22.). Eventually, as trial approached, a few weeks out, Applicant reverted back to his original statement and admitted to his counsel that he had intentionally caused the injuries to the victim, claiming they were caused by anger and not sexual gratification. (PCR Hearing Tr. p. 74, l. 21- p. 75, l. 15.).

When Applicant's story changed again, Trial Counsel Snell testified he did not reach back out to Dr. Friedlander; he already had Nurse Hurley on retainer who could testify as to the injuries and how they related to a diaper change. (PCR Hearing Tr. p. 75, ll. 14-20; p. 73, ll. 18-23; p. 54, ll. 1-4.). However, despite having discussed potential testimony with Dr. Abel and Nurse Hurley, the ultimate decision was not to call either because the State's witness already admitted on the stand in front of the jury that cleaning feces out of the genitals was medically necessary. (PCR Hearing Tr. p. 76, l. 21- p. 77, l. 12.). In fact, the trial record shows the State's witness, Dr. Lubcroff, ended up testifying that she agreed with Trial Counsel Floyd that touching genitals to clean for a diaper is appropriate, which was exactly what he was hoping to present through Nurse Hurley's testimony. (Trial Tr. pp. 376-77; PCR Hearing Tr. p. 106, ll. 12-21.).

The Court has also completely omitted the fact of Dr. Friedlander's own testimony at the PCR Hearing that he had been trained to treat the genitals "**with the greatest care.**" (PCR Hearing Tr. p. 173, ll. 15-23.). Dr. Friedlander would not have been able to, and at the PCR Hearing did not ever say, that it was **medically necessary** to hold a child down with such force

as to leave fingerprint[1] bruises across her pubic bone, rake his fingernails down the inside of her labia to leave fresh scratch marks, or use such force as to bruise the hymen in order to remove fecal matter and offer medically necessary aid to the child. (PCR Hearing Transcript, p. 150, ll. 9-19.). It being medically necessary to change a baby's diaper and to do so with the force and violence Applicant used are two wholly different things. Applicant testified he caused these injuries in anger, and that he was responsible for causing these injuries.[2] (Trial Tr. p. 501, 559-30, 535-36.).

This evidence when considered in its totality shows Applicant failed in his burden of proof. Relief is not warranted.

Allegation: Objecting to the Photographs

Without analyzing or discussing the probative value of the photographs at issue, the Order supports its reversal of Applicant's convictions by expressing its "grave concerns with their probative value" (Order, p. 31) and notes that it has reviewed the images and "they are graphic" (Order, p. 7.). Respondent does not dispute the photos are graphic. But that alone is not dispositive: "Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder." State v. Collins, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014). In Collins, the Supreme Court of South Carolina reversed the Court of Appeals' finding that pre-autopsy photographs of a mauled and partial eaten child were not admissible.

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[1] Respondent uses Dr. Friedlander's explanation of the bruises, but notes that Dr. Friedlander reached this conclusion, and rejected the State's expert's conclusion that these could have been teeth marks, before he ever saw Applicant's hands or teeth for comparison purposes.

[2] To the extent the argument is that Applicant would not have changed the victim's diaper while he was so angry had it not been medically necessary for him to do so immediately, Respondent notes there was no testimony offered by Applicant, his witnesses, nor Dr. Friedlander as to the time requirement to change a child's dirty diaper and therefore no support for that theory.

The Court resolved that though it was understandable that the Court of Appeals panel would register "revulsion for the evidence," the photographs were nonetheless admissible as "highly probative, corroborative, and material in establishing the elements of the offenses charged [and] its probative value outweighed its potential prejudice...." Id.

The allegations in this case involved several fresh bruises and scratch marks to an eighteen month old victim's genitals. That is understandably difficult for most individuals to see; however, that does not render the photographs inadmissible. A trial court does not abuse its discretion if the photographs serve to corroborate testimony. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997). Moreover, "[u]nfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal quotation marks omitted). "All evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (internal quotation marks omitted); State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997) (finding that: "Even if the descriptive testimony of the prosecution's witnesses adequately conveyed the brutality and malice of the crime and these photographs were unnecessary, they were harmless surplusage.")

At the PCR hearing, Trial Counsel Floyd agreed he did not object to the photographs. He claims not to have any strategy in not objecting. However, as recognized by Trial Counsel Floyd, the photographs were highly relevant to the matters in dispute. The undisputed theory in the case as outlined by both trial counsel was to challenge whether an intrusion into the genital area had occurred and to argue the injuries had been sustained as part of a medically necessary diaper change. (PCR Hearing Tr. pp. 108-110; p. 221, l. 17-p. 223, l. 8; p. 239-242.). To support the

theory and their directed verdict motion that there was no "intrusion" as the statute required, **defense counsel** used images of the child's vulva and vaginal area to show the vagina was past the hymen. (PCR Hearing Tr. p. 109, ll. 5-18.).

Additionally, the State was required to prove as an element of the two pending charges or to defend against the defense's theory of the case that there was penetration into the genital area of the victim (PCR Hearing Tr. p. 227, l. 14-16), the timeline of the case to show the victim's injuries came from Applicant and not someone else (PCR Hearing Tr. p. 229, ll. 3-16), and the extent of the injuries in order to show that the injuries on the victim were not consistent with changing a child's diaper or removing feces from in between her vaginal lips (PCR Hearing Tr. p. 228, ll. 15-25). Another defense theory as outlined by both defense counsel was to try and challenge the timeline of the case in order to suggest the injuries were caused by someone else. (PCR Hearing Tr. pp. 108-110.). Before Applicant took the stand and admitted to causing the injuries, the State had to narrow the timeline by highlighting how recent and acute the injuries were. Therefore, even if an objection was made, it is not likely the Court would have sustained it based on the highly probative value of the photographs.

Thus, Applicant failed to carry his burden of proof. Relief is not warranted.

Overwhelming Evidence

Finally, the Order fails to address the presence of overwhelming evidence in the record before the Court. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); see also, Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). Applicant was not prejudiced by any alleged deficient representation because there was overwhelming evidence of his guilt.

The State presented evidence of physical injuries to the victim's body, acute injuries to her vulva and her hymen, and evidence that there were no diapers with fecal matter in what they collected from the home. (Trial Tr. pp. 323, 330, 334-34, 343-45, 348.). Applicant admitted to law enforcement in a written statement that he caused the injuries, claiming he had no feeling in his hand, claiming he had been applying cream to the child's genital area, and then finally claiming he caused the injuries because he was angry while changing her diaper. Applicant testified at trial that he caused the injuries to the child's genital area because he had ***angrily*** wiped her. (Trial Tr. p. 501, 559-30, 535-36.).

Like the applicant in Ford, Applicant has not shown prejudice resulting from any alleged deficient representation and can therefore not support a reversal under a Strickland analysis.

CONCLUSION

Because the Order relies on allegations that were not before the Court; lacks numerous critical references to evidence of record; incorrectly supports its findings of prejudice with only speculation; misapplies Rule 5; and failed to consider the overwhelming evidence presented in this case, Respondent respectfully requests the Court reconsider its findings and conlusions, amend the Order, and deny Applicant's PCR application.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

[signatures continued on next page]

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By: _____
MELODY J. BROWN
SC Bar No. 14244

June 29, 2017.
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT

[3] The undersigned acknowledges the foregoing motion was substantially written by former Senior Assistant Deputy Attorney General Johanna C. Valenzuela.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE ELEVENTH CIRCUIT
COUNTY OF LEXINGTON	)	
	)	2014-CP-32-4769
LANCE AUSTIN WILLIAMS	)	
Applicant,	)	
vs	)	CERTIFICATE OF SERVICE
STATE OF SOUTH CAROLINA,	)	
Respondent	)	

The undersigned hereby certifies that a true copy of the **Motion to Alter or Amend** has been served upon counsel for the applicant via United States Postal Service, postage prepaid, addressed to:

Richard A. Harpootlian, Esq.
P.O. Box 1090
Columbia, SC 29202

DATED this 29th day of June, 2017

Melody J. Brown,
Senior Assistant Deputy Attorney General
Attorney for the Respondent

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)

Lance Austin Williams
☐ Plaintiff

v.

State Of South Carolina
☒ Defendant.

2017 JUL -5 AM 8:24

CASE NO.
2014-CP-32-4769

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
Richard A. Harpootlian, Bar No.	Melody J. Brown, Bar No. 14244
Address:	Address:
P.O. Box 1090	P.O. Box 11549
Columbia, SC 29202	Columbia, SC 29211
phone: fax:	phone: (803) 734-6305 fax: (803) 734-4035
e-mail: other:	e-mail: other:

☑ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Rule 59(e) - Motion to Alter or Amend
Estimated Time Needed: Court Reporter Needed: ☑ YES / ☐ NO

SECTION II: Motion/Order Type

☑ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached ~~proposed order~~ motion.

Melody J. Brown
Signature of Attorney for ☐ Plaintiff / ☒ Defendant

June 29, 2017
Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by:

☐ MOTION FEE COLLECTED:
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (11-03)

ORIGINAL

FILED

2017 JUL 18 AM 10:05

LISA COMER
CLERK OF COURT
LEXINGTON, SC

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

Lance Austin Williams, SCDC No. [redacted], C/A No.: 2014-CP-32-04769

Applicant,

vs.

State of South Carolina,

Respondent.

Applicant's memorandum of law in opposition to the State's motion to alter or amend

On June 19, 2017, the Court issued an Opinion and Order ("Order") granting Applicant Lance Austin Williams' post-conviction relief (PCR) and vacating convictions for unlawful neglect of a child and criminal sexual conduct in the first degree. Applying Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronic, 466 U.S. 648 (1984), the Court held:

1. "that Mr. Snell's lack of preparation fundamentally undermined Applicant's trial in a manner that is actually and presumptively prejudicial[,]" (Order, 18);

    a. "Mr. Snell was objectively unreasonable in failing to interview, or attempting to interview, any State witness other than the lead detective[,]" (id. at 19);

    b. "Second, Mr. Snell's representation was deficient because [as] the lawyer who prepared the case for trial[, he] labored under a misapprehension of law and fact as to what constituted a legal defense[,]" (id. at 20);

    c. Counsel's failure to investigate the facts and apprehend the law was "prejudicial to Applicant's defense within the meaning of Strickland[,]" (id. at 23);

    d. And presumptively prejudicial as contemplated by Cronic, (id. at 23);

2. Trial Counsel was ineffective "in failing to call an available medical expert to offer testimony the child's injuries were consistent with a rough diaper change[,]" (id. at 26), and the failure to introduce this evidence was prejudicial to Applicant, (id. at 27); and

3. Trial Counsels "were ineffective in failing to make a contemporaneous objection to graphic images of the child's genitals[ ]" (id. at 28) and this deficiency meets Strickland's prejudice requirement. Id. at 29.

The State seeks reconsideration, contending error. The motion should be denied.

STANDARD OF REVIEW

Rule 59(e) of the South Carolina Rules of Civil Procedure allows a party to ask a court to alter or amend its judgment within 10 days of receiving notice of the order. While it contains no such language, the rule has long been construed as vehicle to ask a court for "reconsideration" of its order. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21–22, 602 S.E.2d 772, 778–79 (2004). Accordingly, the rules contemplate two situations warranting a Rule 59(e): when the court "has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issues," or when "an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Id. at 780.

ARGUMENT

The State's claim for reconsideration confuses a claim, theory, or *grounds* for relief with *facts* that might inform such an analysis. A PCR application must "specifically set forth the grounds upon which the application is based, and clearly state the relief desired." See S.C. Code Ann. § 17-27-50. Applicant's *grounds* for relief are expressly stated in the second amended application and accurately summarized in the Court's Order as:

> The first issue alleged by Applicant: that Trial Counsels' preparation, both in terms of investigation and legal research, which he argues is a specific error contemplated by Strickland and a total failure to function as a meaningful state adversary such that prejudice is presumed under United States v. Cronic, 446 U.S. 648 (1984).

> The second issue alleged by Applicant: that Trial Counsels ran afoul of Strickland by failing to call an available expert witness to testify the victim's injuries were consistent with Applicant's statement to police and testimony at trial which would have established a "medically recognized treatment" defined by S.C. Code Ann. § 16-3-651 and a legal defense to the charge of criminal sexual conduct with a minor.
>
> The third issue alleged by Applicant: that photographs of the victim's vagina inflamed the passions and prejudices of the jury, which invited a verdict based on something other than the evidence. Also Trial Counsels' failure to make a contemporaneous[ ] objection preserving the issue on appeal was ineffective and prejudicial within the meaning of Strickland v. Washington, 466 U.S. 668 (1984).

See Order, 2 3. After a two-day hearing, the parties urged the Court to construe the evidence consistent with their respective views of what controlling precedent required. The Court adopted Applicant's view and supported the legal holdings outlined above with a 31-page Order that makes specific findings of fact and applies those facts to the law. A colorable claim for reconsideration turns on an argument that the court either misconstrued the facts or misapplied the law.

The State has not made a colorable argument supporting reconsideration. The State claims reconsideration is warranted because the Order (1) relies on allegations not properly presented, (2) omits legal precedent, (3) misapplies Rule 5 of the criminal rules, (4) addresses allegations not before the Court, (5) omits evidence and arguments presented by the State. See Def.'s Mot., 3–4. For example, the State claims Applicant made a "Rule 5 Allegation" and then argues Applicant is not "entitled to relief under the allegation." See id. at 12. But Applicant made no such allegation and the Court did not order relief under such a theory. Instead, as part of an eight-page discussion concerning Trial Counsels' lack of preparation, the Order cites the failure to seek relief under Rule 5 as *an example* of how the representation failed to meaningfully challenge the prosecution. See Order, 24–25 ("This lack of adversarial testing is *evidenced* in other ways. For instance, ..." (emphasis added)). Implicit in each of the State's arguments is the unstated contention that *any*

fact this Court might point to as evidence of a Sixth Amendment violation *must* be plead in the application. The State cites no authority supporting this view and there is none.

The State's position here is troubling. Its assertions and contentions improperly attempt to muddle the record without giving the Court's Order a fair reading or presenting argument squarely addressing its substance. The State's role "in a criminal prosecution is not that it shall win a case, but that justice shall be done." State v. Moses, 390 S.C. 502, 516, 702 S.E.2d 395, 402 (Ct. App. 2010). This motion falls short of this obligation by prioritizing preservation of a flawed conviction above all else. It is unjust and a poor use of the Court's time. In denying the motion, Applicant respectfully submits, the Court should say as much.

1. **In granting relief based on grounds stated in the second amended application, the Order relies on facts in the record.**

The State contends "[t]he Order relies on allegations that were not made by counsel in his final allegations and were only introduced for the first time in a proposed order that was submitted at the same time Respondent's proposed order was submitted to the Court." Resp. Mot., 3. In support of this assertion, the State cites two examples:

> Yet, in Applicant's proposed order, he inserted allegations related to Rule 5 violations (Order, p. 25) and "failure to appreciate the significance of the medically recognized treatment defense" by "laboring under a misapprehension of law and fact as to what constituted a legal defense."

Resp. Mot., 3. The State contends these constituted "new allegations" to which it was afforded no opportunity to respond and that the Court should either "rule solely on the allegations" in the second amended application or "[a]t a minimum, ... remove references to Rule 5 allegations and the 'intrusion into the genitals' defense[.]" Id. at 4. These complaints should be rejected.

As explained, the State's argument is predicated on a misrepresentation of the Court's findings of fact and conclusions of law. The two examples cited above are facts that rightly

informed the conclusion that Trial Counsel lacked sufficient preparation to protect Applicant's rights at trial. After an extensive discussion of Mr. Snell's performance supported with citations to the trial and PCR hearing transcripts, the Court summarized its view of the preparation issue, explaining:

> The Court also holds that the foregoing deficiencies—a failure to investigate, misunderstanding of the penetration requirement and failure to appreciate the significant of the medically recognized treatment defense—were prejudicial to Applicant's defense within the meaning of Strickland. While speculation or conjecture are never sufficient to substantiate that deficient performance was prejudicial, Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995). Here, there is a convincing record that the lawyer charged with preparing Applicant's case failure to conduct any meaningful investigation and misapprehended the relevant legal inquiry. This resulted in a reliance on inaccurate factual and legal claims to the exclusion of a potentially meritorious defense.

Order, 23. The Court also find this "overall lack of preparation and legal understanding is presumptively prejudicial[,]" and cites additional facts supporting that conclusion, including the Rule 5 issue discussed above. See id. at 23–26. The State's contention that Trial Counsel's misunderstanding of the relevant legal standard and Rule 5 were separable theories of relief is simply untrue as it reflects neither Applicant's presentation of the issues nor the Court's consideration of those issues.

II. The State's assortment of other complaints should be rejected.

The State offers a host of complaints unsupported by the record and the law.

First, the State claims "[t]he Order incorrectly states Trial Counsel Snell spoke only with the lead investigator prior to going to trial (Order, p. 19.)" Resp. Mot., 4. That is *not* what page 19 of Order says. It states:

> The Court holds Mr. Snell was objectively unreasonable in failing to interview, or attempting to interview, any State witness other than the lead detective. Testimony of Ms. Clary and Dr. Luberoff was unquestionably critical to Applicant's conviction, but Trial Counsel made no effort to contact them. Likewise, Mr. Snell recognized the timeline placing the child in Applicant's care was critical to

> establishing his responsibility for the injuries (see PCR Hr.'g Tr. 107:8–108:6 & 229:3–21), but no lay witness was contacted to test the veracity of these claims or explore avenues for impeachment. Thus, Mr. Snell failed to act on the import ascribed by his own assessment when he failed to interview any lay witnesses. See id. at 117:4–20. Finally, although Mr. Floyd repeatedly challenged the State's efforts to establish a chain of custody for a dirty diaper collected by a friend the child's mother (see, e.g., Trial Tr. 418:16–25; PCR Hr.'g Tr. 229:22–230:17), he lacked sufficient information to do so having had no opportunity to interview the witnesses prior to mounting that challenge. Notably, but for the unusual circumstances whereby he came to handle the bulk of Applicant's trial work on the eve of trial, Mr. Floyd's practice is to conduct these interviews prior to trial. In short, the facts here indicate that Mr. Snell's failure to interview *all* of these witnesses abdicated counsel's responsibility to investigate critical witnesses determinative of guilt or innocence.

Order, 19 (emphasis original).

The State's contentions on this point take great liberty with the facts. The State claims Mr. Snell "testified at the PCR Hearing that he hired a private investigator to talk to all the fact witnesses, (PCR Hearing Tr. p. 31, ll. 12-16), and that he himself spoke with the law enforcement ***witnesses*** prior to trial (PCR Hearing Tr. p. 27, ll. 23-25)." Resp. Mot., 4 (emphasis original). The transcript pages cited by the State read as follows:

> Q. Right. Well, did the investigator talk to her?
>
> A. I *believe* all the fact witnesses were reached out by the investigator.
>
> Q. What's his name?
>
> A. Dave Lawrence.

PCR Hr.'g Tr. 31:12–16 (emphasis added). However, the State's memorandum attributing error to this Court's conclusions does *not* cite the very next page of the transcript:

> Q. Okay. Brittany B[redacted], did you speak with her?
>
> A. No, sir.
>
> Q. Did Mr. Lawrence?
>
> A. Not to the best of my knowledge. No, sir.

Q. Lee Ann Harvey, did you talk to her?

A. No, sir.

Q. Did Mr. Lawrence to the best of your knowledge?

A. No, sir.

Q. Tommy Hutto. Did you speak to Tommy Hutto?

A. No, sir.

Q. Did Mr. Lawrence to the best of your knowledge?

A. No, sir.

Q. Marlena Clary. Did you speak to Ms. Clary?

A. No, sir.

Q. Did Mr. Lawrence speak to Ms. Clary to the best of your knowledge?

A. No, sir.

Q. Adrienne Riley-Hefney. Did you talk to speak to Ms. Riley-Hefney? Do you know who that is?

A. I don't know who that is and I don't see the name on the list. I was wanting to refer to make sure it wasn't a law enforcement officer. I don't recall who that individual is. I don't recall the name.

Q. Okay. So to your knowledge you didn't interview her? She wasn't on the list provided by --

A. Yes.

Q. And you had been investigating this case for a year?

A. Correct. And I don't - I don't recall - I don't recall the name.

Q. Okay. Dr. Susan Luberoff. Did you speak with Dr. Luberoff?

A. No, sir.

Q. Did your investigator Mr. Lawrence?

A. No, sir. I believe Dr. -- We had a doctor consulting. That doctor I believe spoke to Dr. Luberoff.

PCR Hr.'g Tr. 32:17–34:2. Likewise, the State cites the following excerpt:

Q. Prior to getting the notice for trial, how many of those witnesses did you interview?

A. We had an investigator.

Q. No. How many did you interview? How many did you talk to?

A. I believe six.

PCR Hr.'g Tr. 27:23–25 (emphasis added). The Order acknowledges as much, but then goes on to explain:

> Five days before trial, Mr. Snell received an email from the assistant solicitor with a list of 24 possible witnesses. PCR Hr.'g Tr. at 26:16–27:1 & 27:17–19 (discussing Pl.'s Ex. 1). Of these potential witnesses, Mr. Snell had spoken to six of them prior to trial. Id. at 27:23–25. Mr. Snell spoke to Det. Prestigiacomo on two occasions, but made no notes of those interviews. Id. at 28:5–14. When asked whether he spoke to the child's aunt (and the State's first witness), Mr. Snell explained, "the folks I spoke to were only the law enforcement individuals. As far as the private folks that were the fact witnesses *I didn't speak to any of them.*" Id. at 28:23–29:3 (emphasis added). Pressed further about specific witnesses called at trial, Mr. Snell conceded they were never contacted. Mr. Snell testified neither he, nor his investigator spoke with the child's mother (id. at 32:17–20), the mother's friend dispatched from the hospital to retrieve diaper evidence (compare id. at 32:21–24, with Trial Tr. 195:14–197:2), the child's grandmother (PCR Hr.'g Tr. 32:25–33:3), Ms. Clary (see id. at 33:3–8), or Dr. Luberoff. See id. at 33:22–34:25. Mr. Snell testified that Dr. Ann Able, a consulting physician, spoke with Dr. Luberoff while evaluating the case for the Applicant. Mr. Snell was forced to correct himself to explain the consultant simply reviewed Dr. Luberoff's report and adopted her findings. See id.; see also id. at 35:1–36:5 (equivocating further, then conceding "I don't have a recollection of her saying she went back and had a discussion regarding the merits of the situation."). In fact, Dr. Able, the consulting physician that reported to Mr. Snell [that she] agreed with Dr. Luberoff's opinion, practiced medicine in the same physician practice as Dr. Luberoff. Id. at 82:11–16. Mr. Snell testified he had a "very brief" conversation with LCSD investigator Shelby Derrick one year before trial. Id. at 36:6–13. He had no recollection of LCSD crime scene investigator Troy Crump (id. at 36:18–19), likely because Mr. Crump was not

> identified on the witness list provided by the State. See id. at 36:20–37:2 (discussing his absence from Pl.'s Ex. 1). He had no recollection of whether he spoke to SLED's DNA analysist Adrienne Riley-Hefney, one of just two witnesses he cross-examined at trial. Compare id. at 33:9–19, with Trial Tr. 306:13–308:21. He also had no notes or recollection of LCSD evidence custodians Beth Harmon and Candy Kyzer. See PCR Hr.'g Tr. at 37:3–21.

Order, 9–10 (emphasis original, brackets added). The State's selective citation of the record creates the inaccurate impression the Court overlooked critical facts when an honest reading of the record supports the Court's conclusion: "Mr. Snell's testimony evidenced almost no pre-trial investigation into what State witnesses might say at trial." Order, 11 (citing PCR Hr.'g Tr. 37:22–25 & 38:1–25 to show the aforementioned individuals were the State's testifying witnesses). Thus, the State's claim here—that "[t]he Court fails to address Trial Counsel Snell's testimony on this issue without explanation as to why his sworn testimony should be given no consideration and/or weight[,]" (Resp. Mot., 4)—is a false statement. The Court cited Mr. Snell's testimony for the proposition he failed to interview or attempt to interview any State witness other than the lead detective, which is precisely what the transcript reflects.

The State suggests the Court's conclusion is speculative because Applicant did not call un-interviewed witnesses to the stand during the PCR hearing. See Resp. Mot., 5 ("...Applicant offered zero evidence of how a more in-depth or in person– versus through his investigator—interview would have resulted in a different case."). The State misses the point. The Court's holdings under Strickland (and Cronic) turned not on an unexamined witness, but on counsels' failure to prepare for *any* witness. See Order, 19 ("Thus, while counsel's failure to investigate every possible witness might be excused, failure to investigate all witnesses bearing on guilt or innocence is objectively unreasonable."). Cases cited by the State to suggest Applicant needed to call un-interviewed witnesses do not require such a conclusion, but simply demonstrate the need to connect counsel's deficiency to prejudice when making a Strickland claim. Compare Resp. Mot.

5–6, with Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 357 (2006) (no prejudice in failure to file Brady motion where prosecution did not possess undisclosed evidence); Jackson v. State, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998) ("speculation and conjecture" insufficient to find prejudice in failure to check witness's criminal record). The Order makes such a connection with its Strickland lack-of-preparation holdings by pointing to Mr. Snell's failure to interview any witness and misapprehension of the law resulting in Applicant not presenting an otherwise viable rough-diaper-change defense. See Order, 18–23 ("The Court also holds that the foregoing deficiencies—a failure to investigate, misunderstanding of the penetration requirement and failure to appreciate the significance of the medically recognized defense—were prejudicial to Applicant's defense within the meaning of Strickland.").

Second, the State argues Applicant made an untimely claim that "Trial Counsel [was] deficient for having a strategy that challenged the element of 'intrusion into a genital opening.'" Resp. Mot., 7. This assertion fails to squarely confront Applicant's allegation. The defect in Trial Counsel's performance was not adopting a strategy that ultimately proved unsuccessful, but that he failed to comprehend a distinction that is critical predicate to formulating *any* defense. The Order details a fundamental misapprehension by Mr. Snell concerning whether criminal sexual conduct required genital or vaginal intrusion. See Order, 20–23 ("Mr. Snell repeatedly sought to highlight the lack of vaginal penetration, a fact of no legal consequence to Applicant's defense."). The State's suggestion that Mr. Snell had "a strategy that challenged the element of intrusion into a genital opening'" misleadingly suggests Mr. Snell held a level of comprehension that resulted in a strategic decision when there is no evidence to support this inference. See, e.g., id. at 22 ("The record is uncontradicted that Mr. Snell's apparent view at trial was neither factually nor legally accurate." (detailing record evidence)). Applicant alleged lack of preparation both as to Trial

Counsel's factual investigation and legal research. The State points to no conclusion of fact or principal of law inconsistent with the conclusion that this claim is meritorious.

The State suggests that so long as Trial Counsel does *something*, albeit ineffectual or incomplete, it cannot be held ineffective assistance. The State argues, "Trial Counsel Snell testified that not only did he have a year to work on the case before trial, he spent that year working with a least five different experts[,]" and that "[t]he decision not to call any of those experts was a strategy decision based on defense counsel's ability to get helpful testimony from the State's witnesses. See Resp. Mot., 7–8 (citing Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) ("Where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.")). This reasoning is deeply flawed. The strategic-decision-of-counsel doctrine requires a *valid* reason, not any reason. See Matthews, 350 S.C. at 276, 565 S.E.2d at 768 ("counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial." (collecting cases)). Because Mr. Snell did not understand the offense with which his client was charged, he failed to recognize that one of the five experts he spoke to—Dr. Friedlander—was capable of challenging the State's expert because he concluded injuries to the child were consistent with a medically accepted diaper change. See Order, 20–21 (discussing Mr. Snell's consultation of Dr. Friedlander). The Court cited Mr. Floyd's testimony as persuasive evidence Dr. Friedlander's testimony would have been helpful to Applicant's defense:

> Mr. Floyd agreed that since Applicant's defense (in his mind) was a medically appropriate diaper change, and Dr. Friedlander's testimony demonstrated how the child's injuries corresponded to that claim, he "would have emphasized that [testimony]" had he known about Dr. Friedlander because doing so would have created a dispute of fact. See PCR Hr.'g Tr. 218:10–25. Instead, the only medical testimony on which the jury could rely was that of Dr. Luberoff, which suggested the 15-month old child might have been digitally penetrated and bitten on the pelvic bone. This Court found Dr. Friedlander's explanation as to why Dr. Luberoff was

> wrong about penetration and the bite mark to be credible and persuasive. A jury should have been afforded an opportunity to do the same.

Order, 27. The State's argument turns on the notion that Mr. Snell's decision not to call any expert witness, including Dr. Friedlander, was a strategic one. This Court found otherwise and the State points to no fact to warrant disturbing that conclusion.

Third, the State contends Mr. Floyd's retention just one day before trial fails to raise concerns that even a fully competent lawyer could provide effective assistance such that prejudice is presumed. See Resp. Mot. 9–11. The State makes a number of claims in support of this conclusion. It argues this conclusion "is irreconcilable with the established facts" that Mr. Snell was lead counsel and was "present along with Mr. Floyd throughout the entire trial." See id. at 9. But this argument fails to recognize that the Court found Mr. Snell's own performance to implicate Cronic. See Order, 23–24 ("... Mr. Snell's overall lack of preparation and legal understanding is presumptively prejudicial to Applicant."). The notion that Mr. Floyd's lack of preparation caused by his belated retention is remedied by assistance from an unprepared Mr. Snell defies credulity. The State contends the Order is "irreconcilable" with Cronic's warning that tardy appointment is not *per se* prejudicial (Resp. Mot., 9), but overlooks the fact that the Court did not apply a *per se* rule, but cited testimony indicating the circumstances whereby Mr. Floyd came to handle the overwhelming bulk of Applicant's trial was happenstance. See Order, 15 & 24.

Citing Nance v. Ozmint, 367 S.C. 547, 626 S.E. 2d 878 (2006), the State suggests the facts in this case fall short of the breakdown to the adversarial process required by Cronic. See Resp. Mot., 10–11. Nance "represents one of the rare cases where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." Nance, 367 S.C. at 553, 626 S.E.2d at 881 (quotation omitted). That decision turned on one trial counsel suffering from a host of illnesses while taking medications that potentially impacted performance and co-trial counsel with just 18

months' experience practicing law. See id. at 553, 626 S.E.2d at 881. Trial counsels' "investigation" was limited to interviewing the defendant's mother. Id. During the guilt phase, the defense presented just three witnesses: a correctional officer that testified the defendant threw urine on female correctional officers, an unqualified expert that opined the defendant resembled a guilty but mentally ill criminal, and a family member that testified the defendant killed family pets. Id. at 554, 626 S.E.2d at 88. While Applicant agrees his Trial Counsel did not elicit the sort of self-injurious testimony that caused the Supreme Court to describe Nance counsel as "inept", all other facts bearing on Nance's conclusion align with the operative facts here. Moreover, lawyer conduct need not border on malice to constitute a total breakdown in the adversarial process. This Court rightly pointed to United States v. Ragin, 820 F.3d 609, 612 (4th Cir. 2016) as an example where a sleeping lawyer's representation warranted Cronic's presumption. See Order, 4. Applying the State's apparent rule by rejecting Cronic's application to any facts less egregious than Nance means Ragin was also wrongly decided. This is not the law and the State points to no fact here warranting reconsideration of the Court's conclusion a fundamental breakdown occurred here.

The State claims Trial Counsel "had clearly articulated defense theories, and their cross-examination, witnesses selection, and opening and closing arguments reflected that strategy." Resp. Mot., 11. This claim overlooks the Court's "uncontradicted" finding that "Mr. Snell's apparent view at trial was neither factually nor legally accurate[,]" or that his "recent (and accurate) understanding" of a criminal sexual conduct charge did not guide Mr. Snell's representation while preparing Applicant's case and representing him at trial." Order, 22 (detailing record evidence). Indeed, when Mr. Snell moved the Trial Court for a directed verdict, he incorrectly argued the criminal sexual conduct charge should be dismissed because the State failed to present evidence of vaginal penetration, a proposition directly at odds with the plain language of South Carolina

Code § 16-3-655 and State v. Morgan, 352 S.C. 359, 365–73, 574 S.E.2d 203, 206–10 (Ct. App. 2002). See Order, 20–21. Not surprisingly, the State's contention that Trial Counsel pursued a "clearly articulated" defense makes no mention of precisely what that defense was, nor does it direct the Court to the portion of the trial or PCR hearing transcript that evidences this so-called strategy.

Fourth, the State misconstrues the Court's Order and the second amended application to state a Rule 5 violation as a theory warranting relief. As explained above, it is not—but it is a fact that can, and should, inform the Court's conclusions. The State agrees that Rule 5 requires disclosure of any medical report or examination (see Rule 5(a)(1)(D), SCRCrimP), but disputes the suggestion that the State is required to specifically identify expert witnesses pursuant to Rule 5. See Resp. Mot., 12 ("... and **not the disclosure of who will be designated an expert**, ..." (emphasis original). To be clear, the Order quotes Mr. Snell's testimony explaining he had no notice the State would offer Ms. Clarey as an expert until the State called her to the stand. Mr. Snell explained, "we would have known that she was – we would have *had those reports provided.* We knew that she was a potential expert. Excuse me. Potential witness." Order, 24 25 (emphasis added) (quoting PCR Hr.'g Tr. 57:19–58:9 & 62:9–23); see also Hr.'g Tr. 58:2–5 ("But as far as the specific questions or things that she would be asked by the prosecutor I did not until she was called as a witness."). The reports referenced by Mr. Snell—which every party agrees must be furnished pursuant to Rule 5—were cited by Ms. Clary during her testimony. See, e.g., Trial Tr. 236:18–20 (relying on a note to identify the examination time), 237:3–12 (testifying about what she "documented" in her notes) & 238:4–24 (citing "portions" of the protocol exam that were previously provided), 240:9–13 (referring to Ms. Clary's notes as a testimonial aid). As for Dr. Luberoff, Mr. Snell agreed "the only time" he received notice Dr. Luberoff would be offered as an

expert was through an email sent five days before trial. See PCR Hr.'g Tr. 56:19–57:7. This belated notice is troubling, not because of the State's (objectionable) failure to make a timely disclosure, but because Trial Counsel failed to avail themselves of any argument or procedural protection that would have afforded Applicant an opportunity to obtain expert reports and respond accordingly. The Court cited this fact as evidence that Mr. Snell's approach to the representation was a constructive denial of counsel that failed to meaningfully test the State's case. See Order, 24. The Court should adhere to this conclusion.

Fifth, the State claims the Court "suggests the jury would have found Applicant not guilty if only they had heard Dr. Friedlander, instead of only the State's witness, testify that it was medically necessary to wipe fecal matter out of the vulva." Resp. Mot., 13 (citing Order, 27). That is *not* what the Order concludes. The Court concluded Dr. Friedlander's testimony was "critical" because it "would have given the jury *a choice* between Dr. Luberoff's testimony and another opinion that corroborated Applicant's statements and testimony[ ]" by demonstrating "how the child's injuries corresponded" to or were consistent with a rough diaper change. See Order, 27 (emphasis added). While the Court found Dr. Friedlander's testimony "credible and persuasive[,]" the Court did not conclude the jury would have returned a not guilty, but that the jury "should have been afforded an opportunity" to consider the testimony. See id.

The State points to Mr. Snell's testimony that Applicant's statements to him (Mr. Snell) evolved during the representation, presumably as evidence the decision not to call Dr. Friedlander was reasonable. See Resp. Mot., 14. However, the transcript indicates the only written statement from Applicant was the one he gave to police (see PCR Hr.'g Tr. 70:23–71:19) and Dr. Friedlander's testimony corroborated Applicant's statement by explaining the injuries to the child's genital area were consistent with a rough diaper change. See id. at 72:22–73:25. In fact,

whatever Applicant may have told Trial Counsel is irrelevant because Mr. Snell agreed Applicant's theory at trial was a rough diaper change: "Q. And that was the defense? The defense was a rough diaper change basically? A. Rough diaper change. Yes, sir. Q. Okay. Dr. Friedlander's opinion was consistent with that? A. It was." PCR Hr.'g Tr. 74:1–6. And while Mr. Snell claimed his former client "would not have been in agreement with retaining a witness like this or presenting this type of defense[,]" he was forced to concede that Applicant's statement to police and trial testimony supported the rough diaper change theory. See id. 74:7–23 ("Q. And when you put him on the stand during the trial, that's exactly what he said? A. Correct. Yes, sir."). Faced with this record, the Court correctly concluded the failure to call Dr. Friedlander was unreasonable and prejudicial to Applicant's defense.

Sixth, the State concedes that images of the child's genitals shown to the jury are graphic, but maintains they could be properly admitted to corroborate testimony or establish intrusion into the genital area. See Resp. Mot. 15–17. This misses the point. The question here is whether Trial Counsel's failure to make a contemporaneous objection was ineffective assistance. See Order, 28 (holding counsel was "ineffective in failing to make a contemporaneous objection to graphic images of the child's genitals."). There is no dispute trial courts are routinely asked to weigh an image's probity against the risk of undue prejudice to the defendant. The Trial Court here was never asked to conduct such an analysis because no objection was raised. As this Court explained, "[w]ithout an objection, however, there can be no debate; and the trial court has no opportunity to exercise its discretion." Order, 29 (quoting Stone v. State, 419 S.C. 370, 798 S.E.2d 561, 569–70 (2017)). On appeal, Applicant urged the Court of Appeals to conduct such an analysis, arguing Trial Counsel's objection to the anatomical diagrams should extend to the photos themselves. The Court of Appeals rejected that argument and held the issue unpreserved because Trial Counsel

failed to interpose a timely objection. See State v. Williams, 405 S.C. 263, 281, 747 S.E.2d 194, 204 (Ct. App. 2013). The only court to consider whether the photos might improperly engender an emotional response from the jury is this Court (see Order, 29–30) and the State now concurs with the Court's assessment of those images. Trial Counsel acknowledged there was no strategic decision that motivated his failure to object and such a concession is routinely held to be ineffective assistance. See Order, 29 (collecting cases). The State's emphasis on its need of the evidence (see Resp. Mot. 16–17) is not responsive to the Order's reasoning. To the contrary, the State's view that the photographs were essential to establishing elements of the offense and a timeline implicating Applicant merely underscores the gravity of Trial Counsels' error in failing to object.

Seventh, the State asks that the Court apply the overwhelming-evidence doctrine. See Resp. Mot., 17–18. The State misunderstands the doctrine as it is not applicable here. For example, where trial counsel's rejection of an alibi charge was deficient, but DNA evidence placed the defendant at the scene, trial counsel's deficiency would not have altered the outcome of the proceeding. See Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994). Likewise, wearing a prison jumpsuit during trial did not alter the outcome where an eyewitness identified the defendant and his clothing at the time of the robbery in great detail, the defendant was seen driving the truck that matched the getaway vehicle, and stolen items were located in the backseat of the patrol car the defendant was removed from. See Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 865–66 (2001). The doctrine is inapplicable here because the record indicates a real dispute concerning the operative facts - most notably, whether the injuries to the child's genital area are consistent with a medically necessary touching. Put differently, because Trial Counsels' errors and omissions implicate the possibility of a different outcome, the Court cannot paper over those defects by merely citing *some* evidence suggestive of guilt.

CONCLUSION

For the reasons set forth here, the State's motion should be denied.

Respectfully submitted by,

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LANCE AUSTIN WILLIAMS

July 18, 2017
Columbia, South Carolina.

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July 18, 2017
VIA HAND DELIVERY

Lisa M. Comer, Clerk of Court
Lexington County
205 E. Main Street
Lexington, SC 29072

In re: Lance Austin Williams, #00345477 v. State of South Carolina
C/A No.: 2014-CP-32-04769

Dear Ms. Comer:

Enclosed please find the original and three copies of the Applicant's memorandum of law in opposition to the State's motion to alter or amend. Please clock-in the original and copies and return the copies to my courier.

By copy of this letter, I am serving opposing counsel with a copy of the same.

Thank you for your assistance in this matter.

With warm personal regards, I am

Sincerely,

Richard A. Harpootlian

/hm
Enclosures
cc: Jessica Kinard, Assistant Attorney General

FILED

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

2017 JUL 18 AM 10:04

LISA COMER
CLERK OF COURT
LEXINGTON, SC

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Lance Austin Williams #00[illegible]

Applicant,

vs.

The State of South Carolina

Respondent.

C/A No.: 2014-CP-32-04769

CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for the Applicant, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on July 18, 2017, served by having the below document placed in the U.S. Mail first class postage affixed to the following mentioned person:

Document: Applicant's memorandum of law in opposition to the State's motion to alter or amend

Served: Jessica Kinard, Assistant Attorney General
South Carolina Attorney General's Office
Post Office Box 11549
Columbia South Carolina 29211

Holli Miller

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

FILED
2017 AUG 18 AM 10:28
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

Lance Austin Williams,
Petitioner,

vs.

State of South Carolina,

Respondent.

ORDER DENYING DEFENDANT'S MOTION TO ALTER OR AMEND

Civil Action No.:
2014-CP-32-4769

On June 19, 2017, this Court granted post-conviction relief to the petitioner. This matter then came before the Court on the Respondent's Motion to Alter or Amend under Rule 59(e), SCRCP, asking the Court to reconsider its grant of post-conviction relief on June 19, 2017. While considering the Motion to Reconsider and the Memorandum submitted by the State, the Memorandum submitted by the applicant, and while considering the applicable laws of the state of South Carolina, this Court respectfully denies the Respondent's Motion to Alter or Amend the Judgement.

IT IS SO ORDERED.

Eugene C. Griffith, Jr.
Presiding Judge
Eleventh Judicial Circuit

August 18, 2017
Newberry, SC

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP3204769

Lance Austin Williams #00345477		**State of South Carolina**	

PLAINTIFF(S) **DEFENDANT(S)**

Submitted by: **Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

_____ _____ 8/18/2017
Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on **18th August 2017**, and a copy mailed first class or placed in the appropriate attorney's box or **18th August 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Richard A. Harpootlian
PO Box 1090 Columbia, SC 29202

Melody Jane Brown
PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Lisa M. Comer/jp

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
FEB 09 2018
S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
COURT OF GENERAL SESSIONS
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

---

Appellate Case No. 2017-001877
Circuit Court Case No.: 2014-CP-32-04769

CERTIFICATE OF SERVICE

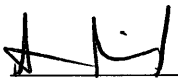
I, Alphonso Simon, Jr., hereby certify that a true copy of the Appendix to the Petition for Writ of Certiorari has been served upon opposing counsel by depositing one (1) copy in the United States mail, postage prepaid, to each the following:

Richard A. Harpootlian, Esq.
Richard A. Harpootlian, PA
P.O. Box 1090
Columbia, South Carolina 29202

and

Christopher P. Kenney, Esq.
Richard A. Harpootlian, PA.
P.O. Box 1090
Columbia, South Carolina 29202

This 9th day of February, 2018.



ALPHONSO SIMON, JR.
Assistant Attorney General
Counsel for Petitioner
Bar No. 74713