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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Saluda County

Honorable R. Keith Kelly, Circuit Court Judge

KENDAL SUDDUTH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000955

APPENDIX

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1 State of South Carolina
 2 County of Saluda Court of General Sessions
 3
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 5 State)
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 7 V.) Partial Transcript
 8 Kendal Sudduth) of Record
 9) 13-GS-41-205A
 10) 13-GS-41-206A
 11) 13-GS-41-217A
 12)
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 25)

July 17, 2013
 Saluda, South Carolina

B E F O R E:

The Honorable J. Michael Baxley, Judge; and a jury.

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

Laura Suzanne Mayes, Assist. Solicitor
 Kate W. Usry, Assist. Solicitor
 Attorneys for the State

 Paul Andrew Anderson, Esquire
 Attorney for the Defendant

Stacy L. Sheppard, RPR
 Circuit Court Reporter

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I N D E X

WITNESSES

DIRECT

CROSS

REDIRECT

RECROSS

(There were no witnesses during the
requested portion of transcript of record.)

1

E X H I B I T S

2

NO.DESCRIPTIONID.EVD.

3

4

5

(There were no exhibits marked and admitted

6

during the requested portion of transcript of

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record.)

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1 (The following requested portion of
2 transcript of record was reported as follows.)

3 (The following proceedings were held on July
4 17, 2013.)

5 **THE COURT:** All right. Are we ready to
6 proceed?

7 **MS. MAYES:** Yes, sir, Your Honor. Before the
8 Court is the case of State versus Kendal Sudduth.
9 At this time, Mr. Sudduth has indicated the intent
10 to enter a plea. This would be to indictment number
11 2013-GS-41-205A, sexual exploitation of a minor
12 second degree; indictment 2013-GS-41-206A, sexual
13 exploitation of a minor third degree; and indictment
14 2013-GS-41-217A, contributing to the delinquency of
15 a minor.

16 Your Honor, there -- through negotiations,
17 there would be a maximum exposure in this case to 15
18 years. We realize he'd be looking at 23 years if he
19 were pleading straight up; through negotiations, the
20 maximum exposure we agreed upon is 15 years.

21 **THE COURT:** All right. And the other charges
22 which are pending, what is the status?

23 **MS. MAYES:** Yes, sir, Your Honor. All other
24 pending indictments related to this case and
25 investigation would be nol prossed in consideration

1 of his plea to these charges.

2 **THE COURT:** All right. And let me ask, Ms.
3 Mayes, obviously you represent the State and the
4 victim, and is the victim satisfied with this
5 arrangement?

6 **MS. MAYES:** Yes, sir, Your Honor. She was made
7 aware this morning. She is -- she does wish to
8 address the Court at the appropriate time concerning
9 sentencing.

10 **THE COURT:** All right. And, Counsel, what I
11 would propose that we do at this point is out of the
12 presence of the jury, take the preliminary questions
13 and issues and discussion with the defendant about
14 accepting a plea. And once the decision is made to
15 accept the plea, then give the jury an opportunity
16 to come in and view the sentencing portion, and that
17 is the part that would involve counsel making
18 argument as to sentencing, the victim being heard,
19 the defendant being heard if he wishes, because the
20 jury has invested three days in this case as well.

21 Is there an objection to that procedure? What
22 says the State?

23 **MS. MAYES:** No objection, Your Honor.

24 **THE COURT:** And what says the defense?

25 **MR. ANDERSON:** If I object, it wouldn't matter

1 I don't think.

2 **THE COURT:** Well, I'll be glad to do it over
3 your objection, but I'll give you an opportunity to
4 speak if you wish.

5 **MR. ANDERSON:** I wouldn't object, Judge.

6 **THE COURT:** All right. Very good. Then let's
7 do this, Counsel, for this portion of the plea, if
8 you would step up to the bar, please, Mr. Sudduth
9 and Mr. Anderson, and then a representative of the
10 State would be fine at this point.

11 All right. Now, Mr. Anderson, have you had
12 ample time to discuss with your client the elements
13 of these three charges to which he is pleading, the
14 defenses he may have to these three charges, the
15 penalties for these charges, the various factors
16 that impact whether he wishes to stand his trial
17 down and enter a plea; and have you had sufficient
18 time to discuss these matters with him?

19 **MR. ANDERSON:** Yes, Your Honor.

20 **THE COURT:** All right. And has he, in your
21 opinion, understood the various things you've
22 explained to him about these three charges and about
23 where he finds himself today?

24 **MR. ANDERSON:** Yes, sir, Your Honor.

25 **THE COURT:** All right. And understanding these

1 things, how does he plead to these three charges
2 just published by the State?

3 **MR. ANDERSON:** Guilty, Your Honor.

4 **THE COURT:** All right. And in your belief, is
5 this in his best interest?

6 **MR. ANDERSON:** I believe so, Your Honor.

7 **THE COURT:** All right. Do you believe, as his
8 counsel, that there is a likelihood that he may be
9 convicted of these charges, as well as the greater
10 charges, if he proceeds further to a jury decision
11 in this case?

12 **MR. ANDERSON:** I think there's a high
13 likelihood on these charges. I think we had an
14 interesting issue on the two sexual exploitation. I
15 was going to make an argument to Your Honor that he
16 couldn't be convicted of both statutes for the same
17 items, but it's an issue that I don't know how Your
18 Honor would have ruled upon. But I believe at least
19 one of the child porns would have stuck and I
20 believe the contributing would have stuck and maybe
21 both child porns would have stuck.

22 **THE COURT:** All right. And so then, again, do
23 you believe this is in his best interest?

24 **MR. ANDERSON:** I definitely think it's in his
25 best interest, Your Honor.

1 **THE COURT:** All right. Now, Mr. Sudduth, I'm
2 going to ask you, if you would, sir, to accept the
3 oath of a witness from our Clerk.

4 KENDAL SUDDUTH,
5 having been duly sworn, testified as follows:

6 **THE COURT:** All right. Mr. Sudduth, you have
7 heard your attorney discuss with me what he's talked
8 with you about. And I ask you have you understood
9 the various things he's explained to you about where
10 you find yourself today and these three charges?

11 **DEFENDANT:** Yes, sir.

12 **THE COURT:** All right. Have you understood the
13 things that he has explained to you?

14 **DEFENDANT:** Yes, sir.

15 **THE COURT:** And do you understand that these
16 three charges, these alone, carry up to 23 years in
17 prison? The State has recommended a cap of 15, and
18 thus the Court would accept that recommendation, but
19 that you have 15 years exposure in entering this
20 plea on these three charges. Do you understand
21 that?

22 (Pause.)

23 **MR. ANDERSON:** He does, Judge. This was such a
24 long question.

25 **THE COURT:** All right. Well, let's go back and

1 do it again. These charges add up to 23 years in
2 prison if they were sentenced consecutively. The
3 State has agreed to cap your exposure at 15 years.
4 The Court has agreed to accept that cap. And I ask
5 you, sir, do you understand you're pleading guilty
6 to charges with that cap that would put you in
7 prison for up to 15 years?

8 **DEFENDANT:** Yes, sir.

9 **THE COURT:** And understanding that, do you
10 still wish to go forward in the plea?

11 **DEFENDANT:** Yes, sir.

12 **THE COURT:** All right, sir. I want to make
13 sure today as you make this decision in the
14 courtroom, are you under the influence of any
15 alcohol or drugs?

16 **DEFENDANT:** No, sir.

17 **THE COURT:** Do you have any medications in your
18 system?

19 **DEFENDANT:** No, sir.

20 **THE COURT:** And do you have any type of mental
21 or emotional condition that prevents you from
22 understanding what we're doing here?

23 **DEFENDANT:** Not that I'm aware of.

24 **THE COURT:** All right, sir. And you realize
25 that these charges will be on your record

1 permanently and indeed you will go to corrections as
2 a result of this plea today, and do you understand
3 that?

4 **DEFENDANT:** Yes, sir.

5 **THE COURT:** All right. Now, in this courtroom,
6 when you come forward to enter a guilty plea, you
7 give up some significant rights. I'm going to
8 discuss these rights with you. Each right I'm
9 getting ready to mention you're waiving, giving up,
10 by pleading guilty today and you don't have to do
11 that.

12 First of all, you have the right to a jury
13 trial, and we're in the middle of your jury trial as
14 you are aware. You have the right to remain silent
15 and not incriminate yourself, which is what a guilty
16 plea does. And, furthermore, you're presumed
17 innocent of these charges. So do you realize you're
18 waiving these constitutional protections by pleading
19 guilty?

20 **DEFENDANT:** Yes, sir.

21 **THE COURT:** All right, sir. In this trial, if
22 you wanted to proceed with it, of course, you've
23 already helped us in picking a jury, striking the
24 jury, people you thought might oppose you, but you
25 would further have the right not only to confront

1 the witnesses against you, which you've already done
2 to some extent through counsel, you'd have the right
3 to bring others in here with a subpoena to testify
4 on your behalf to the jury; you'd have the right to
5 testify, if you wish, to tell your version of these
6 events. And so do you realize you're waiving these
7 trial protections, your ability to participate in
8 this trial by pleading guilty at this point?

9 **DEFENDANT:** Yes, sir.

10 **THE COURT:** All right, sir. And, furthermore,
11 I said a moment ago you're presumed innocent. And
12 as you know, I've already told the jury that you are
13 presumed innocent, but what that really means is is
14 at the end of this case when I charge the jury, I
15 would say to them again that you have nothing to
16 prove; that the State has a high burden of proof,
17 which is beyond a reasonable doubt on all of the
18 charges that are pending against you; that if they
19 cannot meet that burden by convincing all 12 jurors
20 unanimously on each charge, you would not be
21 convicted of the particular charge that they could
22 not convince the jury on. And even if you were
23 convicted, you'd have the right to appeal the jury's
24 decision, and you're giving up that right as well
25 today.

1 Do you understand you're waiving all of these
2 rights by pleading guilty?

3 **DEFENDANT:** Yes, sir.

4 **THE COURT:** All right. Now, so this decision
5 to do this is it yours or someone else's?

6 **DEFENDANT:** Yes, sir, it's mine.

7 **THE COURT:** I know you've had discussions with
8 counsel today about whether to stand this plea down
9 and -- I mean, the trial down and take a plea.
10 We've even stopped the trial so you could have an
11 opportunity to make this discussion with your lawyer
12 and your family who's here. And have you had ample
13 time to make this decision?

14 **DEFENDANT:** Yes, sir, I have.

15 **THE COURT:** And this decision that you're
16 making you tell me it's yours. Has anyone tried to
17 force you to do this?

18 **DEFENDANT:** No, sir.

19 **THE COURT:** Has anyone offered you some reward
20 or even some -- if you did or some penalty if you
21 didn't to enter this plea?

22 **DEFENDANT:** No, sir.

23 **THE COURT:** So you're telling me this decision
24 to enter this plea is a voluntary decision that you,
25 yourself, have made?

1 **DEFENDANT:** Yes, sir.

2 **THE COURT:** All right, sir. Now, are you
3 satisfied with Mr. Anderson's services?

4 **DEFENDANT:** Yes, I am.

5 **THE COURT:** Do you think that he's done a good
6 job for you in this trial?

7 **DEFENDANT:** Yes, I do.

8 **THE COURT:** Do you have any complaints at all
9 about the way he's represented you, because now is
10 the time to tell me if you do?

11 **DEFENDANT:** No.

12 **THE COURT:** All right, sir. And so tell me
13 what is it then, we began this trial and you pled
14 not guilty, we're in the trial, you're putting up a
15 defense, what is it that's made you change your mind
16 and enter a guilty plea?

17 **DEFENDANT:** It's just not looking good.

18 **THE COURT:** All right. So, in other words,
19 you're telling me that you believe it's in your best
20 interest, just based on the risk you face, to enter
21 this plea at this time?

22 **DEFENDANT:** I've done the math and it don't add
23 up, so I think this is the best thing.

24 **THE COURT:** All right, sir. And, again, I ask
25 you are you guilty of these three charges that

1 you're pleading to?

2 **DEFENDANT:** Yes, sir.

3 **THE COURT:** Very good.

4 Now, Madame Solicitor, do you want to just
5 briefly tell us the factual basis of these three
6 charges? Then I want to ask Mr. Sudduth about that.
7 Once we have that answer, then make a decision
8 whether to take the plea and bring in the jury. So
9 tell us what the facts are that you allege on each
10 of these three charges.

11 **MS. MAYES:** Yes, sir, Your Honor. As to
12 indictment 2013-GS-41-205A, that is sexual
13 exploitation of a minor second degree, that images
14 were received of minors participating in activity
15 that would meet the statutory definition of sexual
16 activity under the South Carolina Code, and that
17 those images were received on or between December
18 20th, 2006 and February 23rd of 2007, which contain
19 minors and/or a visual representation of minors.
20 Your Honor, those images were recovered from the
21 Dell desktop computer that was seized from the home
22 pursuant to the search warrant, which has already
23 been the subject of the pretrial hearing.

24 In addition to that, Your Honor, indictment
25 number 2013-GS-41-206A, sexual exploitation of a

1 minor third degree, that is for possession of
2 materials, whether films or images, containing
3 minors engaged in sexual activity also between the
4 dates December 20th, 2006 through February 23rd,
5 2007. Those images also were recovered from the
6 Dell desktop computer in the home of the defendant
7 during the execution of the search warrant on March
8 15th, 2007.

9 In addition, indictment 2007-GS-41 -- sorry --
10 indictment 2013-GS-41-216A -- I'm sorry -- 217A that
11 is contributing to the delinquency of a minor, Your
12 Honor, that on or between January 1st, 2005 through
13 March 15th, 2007, while Minor was under the
14 age of 18, that the defendant, who is over 18,
15 engaged in behavior that would encourage, aid, cause
16 or influence a minor in a way that would endanger
17 her morals, that included exposure to pornographic
18 images including child pornography.

19 **THE COURT:** All right. So, now, those three
20 separate events, which are contributing to the
21 delinquency of a minor, possessing materials that
22 showed a minor engaging in sexual activity, as well
23 as downloading or reproducing material that has a
24 visual representation of a minor engaged in sexual
25 activity, as well as showing that to others, do you

1 agree that the facts given to us by the Solicitor,
2 is what she said true?

3 **DEFENDANT:** I agree.

4 **THE COURT:** Very good. Then based on that, I
5 find these charges have a valid, factual basis. In
6 other words, these are valid criminal charges
7 brought against you, that you made this decision
8 yourself voluntarily after a discussion that you and
9 I have had to enter these pleas, that you've done
10 this with advice of a capable lawyer and you tell me
11 you're satisfied with your lawyer.

12 **DEFENDANT:** Oh, yeah.

13 **THE COURT:** So for all of these reasons, I'm
14 going to accept the plea.

15 Now, the question is what is the appropriate
16 sentence? And I'm going to have you, sir, return to
17 your seat, if you will. Counsel, you may return to
18 your seat. And I'm going to have Mr. Sudduth taken
19 into custody at this time. You can place the
20 handcuffs in front of him if it's more comfortable
21 for where he's sitting.

22 (Pause.)

23 **THE COURT:** I'm going to let you be seated,
24 Mr. Sudduth. And what I would propose to do is
25 bring in the jury at this time, discuss with them

1 what has just happened in the courtroom, give those
2 jurors an opportunity to leave who wish to leave and
3 then proceed with the matter. So, please, bring in
4 the jury.

5 (The jury returns to the courtroom.)

6 **THE COURT:** All right. Ladies and gentlemen,
7 welcome back to the courtroom. I hope you had a
8 nice lunch. Thank you for your patience. We are a
9 few minutes late starting here, and I wish to tell
10 you why. It's the same reason that we were late
11 this morning when we began this proceeding.

12 There have been discussions between the State
13 and the defendant about entering a plea to certain
14 of these charges, and they have reached an
15 agreement. And the defendant has decided to come
16 forward and plead guilty to certain of the charges
17 which will end this jury trial.

18 Now, while you have been out, what I've done is
19 I discussed with the defendant, he's come up and
20 he's stood right here in front of the bar, and I
21 talked with him about several things: First of all,
22 I discussed with him the fact that and to ensure
23 that he was not under the influence of any alcohol
24 or drugs or any medications that may cloud his
25 thinking. I discussed with him -- and which he

1 tells me he's not.

2 I discussed with him the constitutional rights
3 that he's waiving by coming forward and pleading
4 guilty. And I'm going to go over those with you
5 while we're sitting here together because he has the
6 right, and I explained to him, to have a jury trial,
7 which we're in the middle of a jury trial, but to
8 finish the jury trial; he has the right to remain
9 silent in this courtroom; he has the right not to
10 incriminate himself, which is what a guilty plea
11 does when you come forward and admit guilt; and that
12 he's presumed innocent; and that he's giving up
13 these rights.

14 I explained to him that as part of our trial
15 process, which he is aware and you are as well, he'd
16 have the right to help participate in picking and
17 selecting a jury; he'd have the right, once we had a
18 jury impanelled, to confront the witnesses against
19 him, which we've seen done right here in this
20 courtroom; and he'd have the right to put up his own
21 evidence and testify himself to you to tell his
22 version of events.

23 He could use a subpoena to bring others in here
24 to testify to you on his behalf so that you would
25 hear his version of this event. You've heard the

1 State's version somewhat already, but you'd hear his
2 version as well.

3 I explained to him that the State has the
4 burden of proof. And when I say he's presumed
5 innocent, what I mean by that, he has nothing to
6 prove here because the State bears the burden of
7 proof beyond a reasonable doubt, which means that
8 the State must convince each of you, all 12 sitting
9 and voting jurors, on each charge unanimously that
10 he's guilty or he would not be convicted of that
11 charge. Even if he was convicted by you, the jury,
12 he could appeal the jury's decision. And he's
13 waiving that right as well.

14 We've discussed all of these rights. He has
15 voluntarily waived the rights that he has -- that
16 are accorded to him as a defendant and it's been a
17 knowing and informed decision. He tells me that he
18 is satisfied with his lawyer, the representation of
19 his lawyer, that he's had effective counsel, and
20 thus he's made the decision to voluntarily himself
21 to stop this trial and enter this plea.

22 Now, let's just stop a moment and let me say
23 this to you about that decision: First of all, I
24 don't want any juror to think, well, my goodness, I
25 have wasted my time here. I've come up here and

1 spent three days and now we get right in the middle
2 of the thing and decide to stop it and end it in a
3 particular way.

4 Well, I will tell you that any time a case is
5 ended by agreement, it's a better solution because,
6 first of all, it's tremendously expensive to run the
7 court system. And we stop right now, we have a more
8 efficient use of public resources if the parties
9 come into accord. Secondly, we avoid any appeal of
10 the proceeding and thus there is some finality to
11 it.

12 But even more than that, there's some give and
13 take in this. And the family and our victim,
14 Ms.Minor , has participated in the discussions
15 between counsel. And so in a way, and hopefully in
16 a perfect world, this is the beginning of a healing
17 process because there's more to this than just
18 what's happening in this courtroom. There are
19 people whose lives go on beyond this day. And,
20 hopefully, somehow, somewhere down the road, there
21 can be some accord that this family, fractured as it
22 is, can go forward in some fashion and this is a
23 first step toward that.

24 And so I don't want you to think you hadn't
25 done your job. The fact that you're here ready to

1 decide, in fact, given already three days of your
2 time and willingly to decide ultimately, up or down,
3 what would happen in these cases, that's what's
4 brought this matter to resolution.

5 This case is seven years old. You heard that
6 in the testimony. That's unusual for a case to be
7 that old, and there are many reasons for that. This
8 matter has been pending long enough, far too long in
9 fact, and today it comes to a resolution.

10 Now, after talking with the defendant, before
11 we brought you out, because I couldn't bring you out
12 and then start into the guilty plea and then somehow
13 make a decision halfway through the process that it
14 wasn't appropriate, this is why I spoke with
15 Mr. Sudduth outside of your presence to ensure that
16 he was aware of the rights he was giving up, that he
17 was doing this voluntarily, that he felt it was in
18 his best interest. And in a moment, you may hear
19 why, because the harshest charges, that is that
20 carry the greatest penalties, have been dismissed by
21 the State for pleas to some of the lesser charges
22 that are pending. So it's been an arrangement that
23 has benefits for both sides.

24 But we're going to talk now about sentencing
25 and make a sentencing decision. But I don't require

1 you to sit and remain where you are for this.

2 Your job as the judge of the facts has been
3 ended. I'm glad for you to stay. What I'd like for
4 you to do, though, is I'm going to give you the
5 opportunity to leave. And the way I'm going to do
6 that is I'm going to come down and as you depart the
7 jury box, I'm going to shake your hand and tell you
8 thank you as my personal expression and gratitude.

9 And in a few days, the county is going to send
10 you a small check, which is not going to be enough
11 to retire on, but that's the county's expression of
12 gratitude, but I'm going to give you mine. If you
13 wish to remain, then what I'd ask you to do is just
14 be seated out in the courtroom, that will let you
15 leave at any time and also will not have you right
16 in the middle of the imposition of the sentence.

17 And let me say one more thing about this,
18 ladies and gentlemen, and we'll all move on, I want
19 you to understand that in our system, there's a
20 division of responsibility, you're the judge of the
21 facts and I'm the judge of the law, and one of the
22 responsibilities of the judge of the law is to
23 impose sentence.

24 In fact, in South Carolina, in every case other
25 than a death penalty, because in a death penalty

1 case, which clearly this is not, the jury makes the
2 decision of whether to impose the death penalty,
3 it's a difficult decision, but in every other case,
4 the judge makes the decision, and thus the
5 responsibilities are accorded in that way because
6 we're in the courtroom every day, we have an
7 understanding of the corrections procedures and
8 perhaps time credits that may be available to an
9 inmate and understanding of what the norms are for
10 sentencing for particular offenses, and thus it's
11 the Court's responsibility to sentence.

12 And I don't want you, as a juror, somehow as
13 you leave, whether you think the sentence was light
14 or heavy or somewhere in between, to feel
15 responsible somehow for the sentence that was
16 imposed. You've done your job as the judges of the
17 facts and now it's the Court's responsibility to
18 impose sentence.

19 Now, with that, ladies and gentlemen, what I'd
20 like to do is come down and shake your hand and say
21 thank you and give you the opportunity, we'll give
22 you a moment to get resettled, if you have something
23 in the jury room and you want to pick it up and
24 bring it with you back in the back. Wherever you
25 sit in the back, doesn't mean you're sitting on one

1 side of the courtroom or the other, you're just
2 simply having a seat back in the back.

3 I ask you this, not to delay you, but are there
4 questions or comments that any of the jurors wish to
5 make? If so, I have no objection to something that
6 some of you may wish to say if you have something
7 you wish to say after three days of this experience.

8 Yes, sir.

9 **JUROR:** Your Honor, I tell you one thing I do
10 appreciate, due to this process, I like the way you
11 explain every little bit of detail that goes on
12 because until now, I've been -- I never served on a
13 jury, but now I've got a little bit experience
14 thanks to you, sir.

15 **THE COURT:** Well, now, you're kind. Thank you
16 for that compliment. I have realized that while I'm
17 here every day, you -- most of our jurors are not,
18 and their one time to get called for jury duty or
19 two or three times or however many in a lifetime it
20 would occur may be your only experience. And so I
21 hope when you leave, that you've had some
22 understanding of not only the proceedings, but the
23 nuances of what's happening about the rules of
24 presenting a witness or things of that nature. So
25 that's why many times I'll stop and make sure we

1 understand what it is we're talking about.

2 But the real reason I do that is, and our Chief
3 Justice says it better than I do, is that the
4 ability of our court system to administer justice in
5 this state, that the authority to do that, it
6 reposes in the confidence of the citizenry. If
7 tomorrow somehow the courts lost the confidence of
8 the citizens, our justice system would immediately
9 stop in its ability to provide security, safety and
10 justice here in our court.

11 So when the jurors leave, I hope you have a
12 positive impression of what we do, that the laws and
13 rules we enforce are based on common sense, not
14 something that we just pull out of the air and throw
15 out there and shock people with, and that the
16 judicial system, one of the three coequal branches
17 of government is, while we don't often think about
18 it, is a pivotal part of what we do here and how we
19 live our lives every day even though we may not be
20 in the courtroom every day.

21 So I'm grateful because, as I said to you when
22 we began, if I came out here on a Monday morning and
23 nobody was sitting out there, nobody answered the
24 jury summons, our court would collapse, the business
25 of it would come to a stop. So I'm going to return

1 the comment to you, Mr. Close, that without your
2 cooperation and participation, we would not be able
3 to accomplish justice as best humans can accomplish
4 justice here in these proceedings.

5 Anything further? Any other comments?

6 All right. Well, give me just a moment and
7 what we're going to do is we're going to let you
8 file out and go back to the jury room because you
9 may have some possessions in there, then just come
10 right back through the door, if you wish, or go
11 right out the door to your home, if you prefer, all
12 right. Just one moment.

13 (The jury was excused.)

14 **THE COURT:** All right. Ladies and gentlemen,
15 welcome in the courtroom, those who have remained.
16 I also want to recognize that we have our Solicitor,
17 Mr. Donnie Myers, our elected Solicitor here
18 throughout this judicial circuit.

19 Welcome to the courtroom, Mr. Myers.

20 And now we will enter a sentencing proceeding.
21 And let's begin with the State giving us the
22 sentencing parameters and then your position on
23 sentencing, we'll hear from the defendant, and then
24 the last person we'll hear from, if she wishes to
25 speak, will be Ms. Minor and then the Court will make

1 a decision.

2 MS. MAYES: Yes, sir, Your Honor. The
3 sentencing parameters are that although he pled
4 guilty to three different indictments, which would
5 expose him to a maximum of 23 years, through
6 negotiations, the State has agreed to -- the State
7 and defendant have agreed to a maximum exposure of
8 15 years with the understanding, the full
9 understanding, that the State would be requesting
10 that maximum exposure of 15 years, in other words, a
11 15-year sentence to be imposed on Mr. Sudduth.

12 Your Honor, in terms of the facts, obviously,
13 after the disclosure by Minor to law
14 enforcement March 15th, 2007, they acted promptly.
15 Detective Charles Holloway, who is present in the
16 courtroom, responded before closing hours that day.
17 Having gathered information and sat in on the
18 interviews that were conducted with Minor by
19 the victim advocates, he was able to establish
20 probable cause.

21 He went to a magistrate, presented that
22 magistrate with information that Minor had
23 provided him about the Dell computer, which would be
24 located in the living room area of that Corley
25 Street home. And specific details were given to

1 Detective Holloway about the sexual acts that
2 occurred at that home at the hands of the defendant
3 through a number of years. And she also disclosed,
4 at that point in time, that she believed she had
5 been around seven years old when sexual abuse by the
6 defendant first began.

7 Your Honor, the search warrant was executed
8 that day, executed by members of the Saluda Police
9 Department. Chief Farmer was present, as well as
10 Detective Charles Holloway and other officers.

11 Your Honor, when they got there to the
12 residence, they did discover the Dell computer
13 exactly where Ms. Minor had told them it would be in
14 the living room area there of Mr. Sudduth's home.
15 They seized that computer, followed protocol, had it
16 submitted to the State Law Enforcement Division for
17 forensic analysis to see what, if any, evidence
18 could be recovered.

19 Meanwhile, Ms. Minor eight days later, was
20 referred for a forensic interview by SLED Agent Lori
21 Caldwell Harris. Your Honor has already seen that
22 forensic interview. It's been published on the
23 record and made -- actually marked as evidence by
24 the defense.

25 One thing I'd like to add about that, Your

1 Honor, is that Ms. -- or Agent Caldwell Harris was
2 expected to testify either later this afternoon or
3 tomorrow concerning not just that interview, but the
4 fact that Minor , in her situation, delayed
5 reporting abuse is not uncommon at all for a child
6 in that situation. One of the things she's going to
7 explain is -- or had intended to explain to the
8 Court and to the jury is how frequently she sees a
9 delay in report when a child is abused by their
10 father or stepfather or someone dear to them within
11 the home and that is, in fact, quite normal and to
12 be expected.

13 In addition to that, Your Honor, the State had
14 a tremendous amount of evidence to be offered
15 through Agent McKellar, that is Agent Lucinda
16 McKellar currently with the Internet Crimes Division
17 of the Office of the Attorney General here in South
18 Carolina, but previously an agent with the State Law
19 Enforcement Division. At this time, I'm going to
20 defer to Agent McKellar. She's going to address you
21 specifically about the images that were recovered,
22 and not just recovered in which he was in possession
23 of, but that he had actively taken specific overt
24 measures to download, receive, things of that
25 nature. There's absolutely no room for mistake

1 here.

2 During the execution of that search warrant by
3 law enforcement, the defendant had arrived at the
4 scene. One of the things he said to law enforcement
5 officers was that he had downloaded pornography
6 including child pornography, but that he had then
7 deleted it.

8 The evidence that the State was going to
9 present is that this was a collection or pattern of
10 intentional acts over the course of days and
11 absolutely unmistakable where intent is concerned.
12 We know that images were accessed December 18th,
13 December 20th, December 21st, December 24th,
14 December 22nd and December 23rd.

15 We're limited in how much child pornography we
16 can actually charge for because under South Carolina
17 law, the child has to actually be engaged actively
18 in a sex act. So just having a nude child or
19 something related to a child being sexually
20 exploited on its own is not enough, that child has
21 to actually be engaged in sexual activity. So those
22 are the specific images that we charged for;
23 however, there was clear evidence that there had
24 been an intent to access things related to child
25 pornography beyond that.

1 Your Honor, before Agent McKellar addresses the
2 Court, I want to add that we were going to have come
3 into court and testify tomorrow concerning that
4 level of intent by the defendant that he was
5 accessing most of these child pornography images
6 through sort of an underground website called
7 Thunder News. Thunder News is a subcomponent of
8 something called X News. It's an unedited,
9 uncensored user net group, which is known to be
10 frequented by people who might want to exchange
11 things like child pornography and not be caught or
12 not be tracked because it is virtually uncensored.

13 In this particular case, I believe all of the
14 images that we were actually offering into evidence
15 were accessed through that Thunder News website.
16 The defendant had used his e-mail account to
17 register for membership at Thunder News. That
18 e-mail account is the [REDACTED]@earthlink.net that
19 had been previously testified to concerning an
20 e-mail that had been offered by the defense as a
21 defense exhibit.

22 I'm going to pass up to the Court, at this
23 time, an e-mail where it's actually sent to the
24 defendant giving him his membership details to that
25 Thunder News, and that was sent on December 18th,

1 2006.

2 **THE COURT:** Thank you. And, Counsel, anything
3 further from you before we hear from others?

4 **MS. MAYES:** Briefly. Your Honor, I'll add that
5 once that information was obtained about his
6 membership at Thunder News, also coming into court
7 to testify tomorrow was a representative of
8 Community First Bank out of Lexington, that is the
9 bank where the defendant had his primary checking
10 account. Bank records show that his account was
11 actually being debited for December and January with
12 a monthly fee that is attributed directly to
13 ThunderNews.com, which is that website I just
14 referenced. And I'm going to turn it over now to
15 Agent McKellar.

16 **THE COURT:** And, Counsel, what is the amount of
17 that monthly fee?

18 **MS. MAYES:** Seven twenty-nine, \$7.29.

19 **THE COURT:** Very good.

20 And, ma'am, would you please accept the oath of
21 a witness from our Clerk?

22 LUCINDA MCKELLAR,

23 having been duly sworn, testified as follows:

24 **THE COURT:** Please speak up so we can all hear
25 you, if you would.

1 **AGENT MCKELLAR:** Yes, sir. If it please the
2 Court. I'm Special Investigator Lucinda McKellar
3 with the South Carolina Attorney General's Office.
4 During this investigation, I was a special agent
5 with the South Carolina Law Enforcement Division
6 assigned to the computer crime center and also part
7 of the Internet Crimes Against Children task force
8 here in South Carolina.

9 In the beginning of this case, I was actually
10 the person assigned to do computer forensic
11 examination on the evidence seized in this case and
12 submitted to the South Carolina Law Enforcement
13 Division. Through the forensic examination,
14 ironically the Advanced Keylogger that the defendant
15 put on his computer was actually what captured him
16 breaking the law. We actually had -- all of the
17 evidence that we had in this case from the computer
18 were screen captures from the Advanced Keylogger
19 that he was using to spy on our victim in this case.
20 And I think it's very important for me to go through
21 this to help her with her healing process to show
22 that what she was telling everyone was the truth,
23 that that's what this evidence is.

24 The first screen that we had, again his
25 Keylogger actually captured, was the screen captures

1 that our victim told us about, a screen capture
2 which is basically like the software was taking a
3 picture of the screen at the time, shows the search
4 for Thunder News through a Google search. Another
5 screen capture -- and this is on December the 18th,
6 sir.

7 Another screen capture shows the home page of
8 Thunder News and it advertises: Welcome to Thunder
9 News. Thunder News is a leading provider of premium
10 access to fast, uncensored, unlogged, unfiltered
11 user net user groups. Whatever your interest, our
12 user net feed carries the news groups that you want.

13 Through my training and experience for 15 years
14 of law enforcement, ten of that has been associated
15 with Internet Crimes Against Children associated
16 with the solicitation of minors and the trade of
17 child pornography via the Internet, news groups like
18 Thunder News and previously testified to by our
19 victim, mIRC, which is Internet Relay Chat, a lot of
20 our predators are using that to actually access news
21 groups and other people with similar interests and
22 actually obtain child pornography and upload and
23 trade child pornography.

24 Once Mr. Sudduth, as we mentioned, purchased
25 Thunder News, he actually had to download Thunder

1 News to his computer. Again, a screen capture
2 captured by the Advanced Keylogger, this is the
3 computer speak where Thunder News is actually
4 talking to his computer, pinging his port, basically
5 knocking on the door saying, hey, we got this
6 program we want to put on your computer, that was
7 actually captured by the screen capture. So now
8 that we know that Thunder News is communicating with
9 Mr. Sudduth's computer and the program is being
10 added to his computer. All of this, Your Honor, is
11 on December 18th.

12 On December the 18th, we see the beginnings of
13 his search for child pornography. There are search
14 terms in here that, through my training and
15 experience, that I know are usually associated with
16 the trade of child pornography.

17 This particular image here in the bottom is not
18 something that we can charge on, unfortunately, in
19 South Carolina because the child is not engaged in
20 sexual activity, but this is a known series that
21 myself and numerous investigators across the nation
22 know this little girl to be named Vicki. And she,
23 herself, has been abused by her father for years and
24 video taped. This is a known victim.

25 The titles in the top of this, again the screen

1 capture captured by the Keylogger placed on the
2 computer by Mr. Sudduth, Vicki PTHC, which is
3 preteen hardcore, that's a word that we see
4 associated with child porn, Little Lolita, which is
5 another word that we associate with child porn. And
6 our victim did not know how to pronounce that word,
7 so she wrote out L-o-l-i-t-a, which is Lolita.
8 This, again, leads credence to what she was telling
9 us was happening to her and what she was viewing.
10 Again, this is on December the 18th.

11 We go further into the screen captures found on
12 Mr. Sudduth's computer. We see the tab here for
13 Thunder News, that Thunder News is open. We see X
14 News, which is a subgroup of Thunder News. And here
15 is a find box, which is basically a search box.
16 People using this can type in a search term that
17 they are interested in. If you're interested in Tom
18 Petty music, you can put in Tom Petty.

19 In this case, the word hussy is typed in.
20 Hussy is a word that we know is associated with
21 child pornography. This screen capture on several
22 different days is captured with hussy being used on
23 several different occasions to search for child
24 pornography. Again, Advanced Keylogger was what
25 captured this picture for us.

1 Another picture captured by the Advanced
2 Keylogger showed X News open. It shows Thunder News
3 again being accessed, and there's a tab here for
4 hussy. And this is one of the images that
5 Mr. Sudduth was charged with, which is a minor -- a
6 female child and a perpetrator with his penis on her
7 buttocks.

8 Again, this was on December the 20th, 2006. So
9 this is not just one occasion where the subject
10 accidentally downloaded. These are actual overt
11 acts that the perpetrator had to go through to find
12 this child pornography.

13 Another screen captured by X News, again the
14 screen capture from the Advanced Keylogger placed on
15 the computer by Kendal Sudduth, again, Thunder News
16 is accessed, and, again, a search has been conducted
17 for hussy once again. And this is on December 20th.

18 This screen from December the 21st shows not
19 only that the user is accessing Thunder News, but
20 now he's looking for other things like hussy and a
21 key word Christy. And we're unaware or unsure if
22 Christy might have been a series that he was
23 interested in, that maybe he formed a bond in his
24 mind with Christy and he felt like he needed to
25 continue to download child pornography associated

1 with Christy.

2 On December the 21st, we had another screen
3 capture. This time it's Thunder News. There's a
4 search for cream pie, which is a sexual act. I'm
5 not going to get into great detail with that, but
6 cream pie is a sexual act that we sometimes see
7 associated with child pornography. It's not
8 completely associated with child pornography, but we
9 see that quite often. We also see the word hussy
10 again and the word Christy.

11 The most disturbing part about this image for
12 me is that it is a minor child performing oral sex
13 on a subject. And this child looks to be about the
14 same age as our victim when this abuse started with
15 her, and she looks very similar to one of the
16 pictures that I saw of our victim when she was a
17 child.

18 The download of child pornography did not stop
19 when our victim left the home. We actually found a
20 movie that was located on his computer, Lolita,
21 wrote PTHC, which is again that preteen hardcore,
22 another word we associate with child pornography,
23 Ragol {phonetic} hussy fan, again key words that we
24 associate with child pornography. And this movie
25 was not only -- it was -- the file was actually

1 created on February 22nd when our victim was out of
2 the home.

3 And what we found interesting about this, the
4 program, through my forensic experience and training
5 through undercover operations of this type, I
6 believe that Lime Wire was used to download this.
7 Lime Wire was found on the defendant's computer,
8 which is another file sharing program.

9 Lime Wire gives you the opportunity, when it
10 starts to download a file, it tags it with T and a
11 group of numbers and then a title. If the person
12 downloading this decides they want to take a sneak
13 peek of it, a preview of it, it then tags and
14 creates another copy of that so that you can preview
15 it without slowing your download. And we have
16 preview T and a string of numbers and then the
17 title. So this, again, shows that that was not an
18 accident, that the person downloading this
19 downloaded it, took a sneak peek and continued to
20 let it download.

21 And this movie, we have a screen capture from
22 this movie, is another child, I believe, through my
23 training and experience, to be no more than 13 years
24 of age, 14 years of age due to her development, but
25 this is a continuous movie of this little girl

1 masturbating and then performing oral sex on an
2 adult male.

3 We also found through the forensic exam --
4 forensic analysis, there was also a program on
5 there, Evidence Eliminator. We found a screen
6 capture of that. And this was right in line with
7 what our victim told us, that he would access the
8 porn and he would go click on an icon on the desktop
9 when he was done and delete the images. I believe
10 had this Evidence Eliminator not been used on the
11 computer, that we would have found remnants of these
12 movies or files of child pornography out there.

13 Unfortunately, used to, before the Internet was
14 as fast as it was, some of our perpetrators would
15 keep their files for a long time because it was hard
16 for them to amass that amount of a collection again.
17 With the Internet growing as fast as it was and him
18 purchasing a actual subscription to Thunder News,
19 that allowed him more access to Thunder News, better
20 bandwidth through Thunder News. So he was able to
21 use Evidence Eliminator, get rid of all the child
22 pornography, and then whenever he felt like it, he
23 could go back out, access Thunder News and download
24 the files again to amass his collection. And in
25 this case, not only amass the collection, but use it

1 to bring our victim, to ultimately sexually assault
2 our victim.

3 **THE COURT:** All right. Thank you, ma'am, for
4 your presentation.

5 And then, Madame Solicitor, one last point from
6 the State, the greatest charges, the most serious
7 charges faced by the defendant were the criminal
8 sexual conduct, which carried 25 years to life at 85
9 percent service requirement, tell me why the State
10 made the decision, after putting up evidence on
11 those issues, to drop those charges.

12 **MS. MAYES:** Yes, sir, Your Honor. Looking at
13 the dates on that CSC with a minor first degree, it
14 looks like the actual sentencing range that would
15 have been in effect at the time of these offenses
16 would be either up to 30 -- would most likely be up
17 to 30, but violent nonetheless, and the CSC with a
18 minor second degree would be 20. So the combination
19 therein would be 50 -- would be looking at 50 years
20 on violent crimes, as well as the lewd act on a
21 child.

22 With that said, Your Honor, we did have
23 discussions with the victim in this regard. We
24 briefly discussed with her all the things involved
25 in an appeal and potential repercussions of appeals.

1 And for that reason, we believe that a plea under
2 these circumstances may be the best way to resolve
3 this; however, we are asking for 15 years. We've
4 made that clear to the defendant.

5 **THE COURT:** All right. Thank you.

6 And then, ladies and gentlemen of the jury, I
7 will tell you that when a crime occurs and you are
8 charged with a crime, then the penalty associated
9 with that charge on the date of the occurrence is in
10 effect no matter if the trial is some years later.
11 So, for example, even though the penalties for
12 criminal sexual conduct with a minor may have been
13 made more harsh by the Legislature in the last seven
14 years, the defendant would be entitled to what was
15 in effect at the time the events are alleged to have
16 occurred.

17 Now, anything further from the State other than
18 Ms. Minor speaking, if she wishes, before we go to
19 the defendant?

20 **MS. MAYES:** No, sir, Your Honor. Agent
21 McKellar is going to pass up those exhibits for the
22 Court's review.

23 **AGENT MCKELLAR:** May I approach?

24 **THE COURT:** You may. Thank you.

25 All right. Now, from the defendant, is there

1 anything that you wish to say on behalf of your
2 client?

3 **MR. ANDERSON:** Your Honor --

4 **THE COURT:** And I'm going to ask you, make sure
5 that microphone is on so that everyone in the
6 courtroom can hear you.

7 **MR. ANDERSON:** I know I talk too softly often.

8 **THE COURT:** A little bit. The air conditioner
9 is on, so, please, make sure that the jury can hear
10 you.

11 **MR. ANDERSON:** Judge, these cases in particular
12 are very difficult because everybody's trying to
13 interpret every little detail to try to put
14 themselves back in time and figure out what
15 happened. So as a defense attorney doing this case,
16 the things I looked at, Judge, is, number one, this
17 was a very weird relationship he had with this young
18 lady as I said in my opening statement.

19 My client started his relationship with this
20 young lady when he was very young himself. When he
21 was, I believe, 15 is when he started dating this
22 young lady's mom and he was married at 18 to her.
23 So I think what ended up happening was they just
24 kind of grew up together. It was weird, and it --
25 so, as a defense attorney, you look at that

1 weirdness, then you look at her leaving and coming
2 back, leaving and coming back, staying. And you can
3 see in some of the documentation with some of the
4 officers questioning, you know, why would you stay
5 when your mom left when there was no legal reason
6 for that?

7 And so then what you do, what I did, I look at
8 that forensic interview. And I don't want to
9 slander somebody who's not here, but the purpose of
10 that forensic interview, Judge, is to vet out the
11 issues, to look for credibility. And that forensic
12 interview is not this young lady's fault. You know,
13 like she said to me in trial today, the interviewer
14 asked her the questions, but what the interviewer
15 failed to do was to get it done credibly. She threw
16 her softballs. She was asking her specific
17 questions. And if that interview had been done
18 better, I just don't think we would have as many
19 issues in the case.

20 So then, as a defense attorney, I'm looking at
21 taking advantage of some of these issues. And I'm
22 not saying it's a game, and I don't take this stuff
23 lightly, but as a defense attorney, there are legal
24 issues in the case.

25 So then I've actually, Judge, retained a very

1 nice lady who has actually testified for the State,
2 who is a forensic interviewer, who's an abuse
3 specialist, who counsels people, she's testified for
4 both sides, she seems very credible, who is going to
5 say that the forensic interview was bad. Now, she
6 can't read tea leaves and say whether or not this
7 young lady is telling the truth or lying, but it
8 raises all these issues.

9 And, you know, as an attorney, we're trying
10 this case, we've got this nice jury sitting here,
11 and I'm wondering how is the jury taking this
12 information? What are they thinking? Because it
13 was awful strange, Judge, that the girl was out,
14 then she came back in and then she's out and she
15 came back in, but I don't know how they're taking
16 it.

17 **THE COURT:** So your complaint is that the
18 forensic interviewer led the witness by suggesting
19 her answers with the questions that were posed?

20 **MR. ANDERSON:** Judge, she kind of led her and
21 she kind of -- she helped her too much I think.

22 **THE COURT:** All right. What other points would
23 you make on behalf of your client, sir?

24 **MR. ANDERSON:** Well, Judge, I'm just trying to
25 allow the Court to understand and maybe the jury to

1 understand, because we don't -- I wasn't there, I
2 don't know if he did it or not, so I'm trying to
3 assess the credibility of the case.

4 The other thing we did, Judge, seated in the
5 middle is our computer expert, who's a very smart
6 man. If I say something wrong, I'm going to look at
7 him to make sure I've said it right.

8 What happened is, in this case, for a very long
9 time, the hard drive was locked up. We were given
10 access to that hard drive, I don't remember exactly
11 when, I want to say February, but the only way we
12 could have this computer hard drive was to have it
13 given to SLED, and Mr. Johnson has a little cubicle
14 at SLED, and we can go to SLED only and look at it
15 there during their operating hours and try to figure
16 out what's what with that computer. We can't take
17 any pictures. We can't print anything. We can't
18 take any of that bad stuff out. So that is very
19 limiting. So we had two opportunities to do that.

20 The last time, we were actually on the phone
21 with these prosecutors trying to make sure we're
22 looking at the right images because the evidence we
23 get, everything bad is just blank. So we're trying
24 to figure out what we are, what we got.

25 A couple interesting things that Mr. Johnson

1 told me, and it's a lot like Ms. Lucinda testified
2 to, but these Keylogger photos, Judge, they can't
3 prove that that was downloaded into the computer,
4 which made it another legal issue. They're screen
5 shots, but that screen shot is a picture from
6 another computer. So I liken it to a felon who's
7 not allowed to have a handgun on the computer and
8 looking at guns, but not actually getting the gun.
9 But there's absolutely no question that those images
10 were up on the screen.

11 Now, the other issue we had and why it was so
12 important to the State for Minor to testify about
13 it is because there is no password on this computer,
14 so anybody could have been on the computer.

15 So as things evolved in the case, these ladies
16 worked very diligently on the case, they send me a
17 time card from my client's job. And on the date
18 that some of this stuff was done, my client happened
19 to be off work. Well, you know, that was not
20 helpful. And there were a couple instances of
21 things like that.

22 We actually thought we had an alibi because my
23 client's bank statement said on December 21st,
24 they're at the Bowery, my client was with his wife
25 at the Bowery. The problem is, and honestly to his

1 credibility and his family's credibility, I said, We
2 need verification of that and not just your bank
3 statement, because we couldn't be sure the bank
4 statement accurately reflected the date, turned out
5 it was on the 18th. So that's disappointing. But
6 as the lawyer, I'm trying to explore these issues,
7 Judge.

8 And then -- so it's entirely possible, Judge,
9 that legally speaking those images were not in the
10 computer. There's no file in the computer of those
11 images. Now, the State's reply to that was,
12 Everything was erased. Well, Mr. Johnson informs me
13 that almost all computers now have that kind of
14 program, that is very common for that to go on.
15 Now, it had it in this case, and she said he was
16 erasing it, which gave her very much credibility
17 when they looked at the computer, but these images
18 were not actually possessed in the computer.

19 The other interesting thing we had, Judge, is
20 the video they showed you is in German. And, again,
21 we're not allowed to take pictures of this stuff,
22 nobody else can see the stuff. But at the beginning
23 of the video, there's a scroll down of all these
24 German words just like at the beginning of a regular
25 movie. And it's like, what do those words mean?

1 And I wrote down a few of them, and, again, our time
2 was very limited, came back and my wife actually
3 googled the words, and it intrigued me, went back
4 the second time and wrote every word down. And what
5 it was, basically, was a copyright and a "don't let
6 anybody under 18 see it". So we were trying to
7 arrange for a German translator to come.

8 And the other thing, and it sounds kind of, I
9 don't know, perverted, but Mr. Johnson and I are in
10 that little cubicle watching that video that has
11 this scrolling down, and it's like, why in the world
12 would somebody have the illegal child porn and put
13 all those disclaimers on there? So it made us
14 wonder, maybe this isn't illegal child porn.

15 Now, there's no question it's a very slender
16 girl, she's young. But honest to goodness, if you
17 watch it in full-time, which I'm not asking you to
18 watch it, we cannot say for sure that that girl was
19 under 18. So I think with the combination of the
20 copyright and the warnings and that issue, I felt
21 like we had a legal issue with that, too.

22 So what the State did was they got all this
23 other stuff supporting the searches, everything they
24 said about the searches Mr. Johnson agrees to, but
25 that search wasn't possession of child porn either.

1 So, certainly, we had -- we had legal issues with
2 all of that. So that's how we got here as far as
3 the law goes, Judge.

4 And as you heard, as you know, this is a weird
5 relationship that got out of hand. It sure got out
6 of hand. And we don't want to try to blame this
7 girl, and I don't say the stuff about him getting
8 with her mom when he was young as a defense by any
9 way, Judge, it's just as an explanation for how
10 something got so just inappropriate.

11 **THE COURT:** All right, sir. And I ask you does
12 your client have something he wishes to say?

13 **MR. ANDERSON:** Well, he does very briefly,
14 Judge. If I could just -- it'll take him a second
15 to come up here. He's joined by his family and
16 friends. And he has lost his two kids. Since this
17 charge, he's not been able to see his two children
18 with Minor 's mom. His family has been deprived
19 of those two children because of what he's done, and
20 that's very painful to him. It's his fault.

21 But all these people love him. They don't
22 support what he did. And the crazy thing is in
23 talking to these people, they all knew it was a
24 funky relationship. They all knew it was weird.
25 And nobody's blaming them either. It just kind of

1 happened and everybody went along and nobody ever
2 did anything about it and here we stand today,
3 Judge.

4 So my client would ask if he could address you
5 briefly.

6 **THE COURT:** Mr. Sudduth, I'm going to let you
7 come to the microphone, sir, and, please, speak up
8 so we can all hear you. And remember you remain
9 under oath from our earlier discussion this
10 afternoon. And do you have something you wish to
11 say, sir?

12 **DEFENDANT:** Yes, sir. I just wanted to
13 apologize to Minor .

14 **THE COURT:** I'm going to let you turn and do
15 that, sir.

16 **DEFENDANT:** I'm sorry, Minor . And, also, to
17 my family. Thank you.

18 **THE COURT:** All right, sir. Very good. Do you
19 need a moment, sir, or have you completed your
20 comments?

21 Very good.

22 And then, Ms. Minor, ma'am, you've been under
23 testimony, direct and cross, you may have nothing
24 further you wish to say. If you wish to speak,
25 we'll be glad to hear from you, but we do not

1 require it. And, please, come forward to the
2 microphone and, please, remember that you remain
3 under oath, ma'am.

4 Minor : I just wanted to say that I didn't
5 come forward with any of this with any intentions to
6 hurt anybody or to ruin anybody's life. I simply
7 saw my final way to end something that has affected
8 me my entire life, not only my ability to trust
9 anybody that I come in contact with, it has affected
10 every relationship I've had with anybody, friend,
11 family. Me and my mom don't have the same
12 relationship that we should have.

13 I do, I apologize to his family that we have to
14 go through this. I don't want to do it anymore than
15 anybody else does. I'm glad it's over. And I
16 just -- I do want him to pay for what he did to me.

17 **THE COURT:** All right. Thank you, ma'am.

18 Ms. Minor I'll say this for you, ma'am, and to
19 you, I think probably if our jurors could speak,
20 they would say the same thing, because I sat here
21 and observed their demeanor during your testimony,
22 this is a very sad situation, but I was amazed at
23 your poise and your candor and just the credibility
24 and believability, although I'm not the judge of the
25 facts, that I perceived from your testimony.

1 First of all, it was consistent with itself and
2 you've told the same thing for seven years. Someone
3 who's making up a story cannot do that. But, also,
4 it was corroborated by evidence that was discovered
5 on the computers, the location that you gave. It
6 was correct information that you provided.

7 And so you have nothing to be ashamed of;
8 although you've come in here in front of a room full
9 of strangers to tell some of the most intimate
10 details of an inappropriate advance and assault upon
11 you, ma'am. And so I leave this proceeding, when I
12 will leave it, impressed with you, that you've come
13 from that and you have enough poise to get up here
14 in this courtroom and testify as you did to
15 withstand cross-examination. All of which tells me
16 that in spite of what might have been a difficult
17 start, you've got a bright future, you understand a
18 proper relationship between a parent and child. So
19 I feel good about the next generation, your child
20 who's coming along with you.

21 And I think I speak for everyone here in saying
22 that you're a brave person, that we have much
23 respect for you. I'm grateful that you were willing
24 to come forward to see that justice was done.

25 Criminal sexual conduct with a child is a

1 secret crime and unless someone comes forward and
2 goes against the social norm to publicly discuss a
3 private and uncomfortable matter, it is not
4 prosecuted. And I'm grateful that you had not only
5 the courage to do that, but the fortitude to stick
6 with it for seven years when many people would have
7 given up long ago. So just as a citizen, but also
8 as an officer of this court, I find that impressive,
9 ma'am, and I commend you for the way you have
10 conducted yourself in these proceedings.

11 Minor : Thank you.

12 **THE COURT:** Yes, ma'am.

13 Mr. Sudduth, I do have one question for you,
14 sir, because criminal sexual conduct with a child is
15 about control, if you had an intention to plead
16 guilty, why would you put Ms. Minor to the rigors of
17 a direct and cross-examination and humiliation in
18 front of all this room when, in your mind, you knew
19 that you either would plead or could plead or should
20 plead to some of these charges? Why would you do
21 that, sir?

22 Because we began this morning with you
23 discussing plea negotiations before
24 cross-examination occurred and it's just one more
25 insult that has happened to your victim here. So

1 tell me why would you do that, sir?

2 **DEFENDANT:** It's a hard decision to make. It
3 was just hard. I had to talk it over with my family
4 and I had to think about it. He hit me with it this
5 morning. I mean, I couldn't just {indicating} say
6 it like that.

7 **THE COURT:** Well, the real question is then,
8 since you've admitted some of this conduct, when do
9 you give your victim some relief, sir? When do you
10 stop hounding her and controlling her and forcing
11 her to go through this procedure when indeed, based
12 on what you're doing now, you tell me that you're
13 guilty, maybe not of criminal sexual conduct, you've
14 not admitted that, that charge has been dismissed,
15 but these other things to which she testified, not
16 only was she corroborated by the other independent
17 evidence, now you're telling us it's true as well,
18 so why would you do that to her, sir? Tell me why.

19 **DEFENDANT:** I don't know. I'm sorry.

20 **THE COURT:** Yes, sir. Just one moment.

21 Anything further now from the State before the
22 Court imposes sentence?

23 **MS. MAYES:** No, sir, Your Honor.

24 **THE COURT:** And from the defense?

25 **MR. ANDERSON:** Just in regards to what you just

1 said, Judge.

2 **THE COURT:** Yes, sir.

3 **MR. ANDERSON:** This has been very stressful.
4 And to hit him with that this morning, and I wasted
5 a lot of court time this morning because we were so
6 close, and I just think it overwhelmed him, Judge,
7 and then he's got his family pulling him in one
8 direction and you've got time constraints. And I'm
9 sorry for that and I'm a lot to blame for that.

10 **THE COURT:** Well, I understand that, Mr.
11 Anderson. I don't dispute that and I don't dispute
12 that the State has the burden of proof and that he
13 must -- as a defendant, has every right to put the
14 State to that burden of proof, but caught up in that
15 process was a crushing impact on a young lady who
16 acquitted herself very well when she was forced to do
17 it.

18 But if you know -- I just am concerned because
19 what happened here in this courtroom today is yet
20 another corroborating event to what the witness,
21 Ms. Minor, is saying, that the defendant was
22 controlling, that he was self-concerned only, and
23 we've watched it play out right here. And so that's
24 just my question, for which I do not -- have not
25 received an answer as to why, on a final act on the

1 way out of the door to the department of
2 corrections, he would just pound this victim one
3 more time.

4 **MR. ANDERSON:** I don't believe that's what he
5 intended to do. I just think it was an overwhelming
6 thing. And I can -- I can tell you this, Judge, in
7 dealing with Kendal and his family and his wife,
8 they're all nice people, all these people love
9 Minor and I believe Kendal loved Minor. The
10 relationship just got so screwed up, obviously.

11 **THE COURT:** Very good.

12 **MR. ANDERSON:** Thank you.

13 **THE COURT:** Just one moment, please. Have you
14 calculated how much time the defendant has already
15 been in jail on this charge?

16 **MR. ANDERSON:** Judge, it's just been days at
17 various times.

18 **MS. MAYES:** Your Honor, I believe it's only two
19 days, the two days before the Court right now.

20 **THE COURT:** So when first arrested, the
21 defendant was not retained until he met a bond and
22 kept in jail?

23 **MS. MAYES:** He made bond that same day.

24 **DEFENDANT:** Your Honor, I --

25 **THE COURT:** Go ahead.

1 **DEFENDANT:** I did spend the night two nights in
2 August last year.

3 **THE COURT:** Just one moment, please.

4 All right then, with regard to -- I'm going to
5 ask the defendant to please rise. And with regard
6 to the charge of sexual exploitation of a minor in
7 the second degree, I find that you have been
8 adjudged guilty by this Court based upon your entry
9 of a guilty plea to this charge. I sentence you to
10 ten years in the department of corrections for that
11 charge, that will require you, upon release from the
12 department of corrections, to have lifetime
13 mandatory Sex Offender Registry.

14 I further sentence you, with regard to the
15 sexual exploitation of a minor in the third degree,
16 to a consecutive five-year sentence.

17 And then for contributing to the delinquency of
18 a minor, a concurrent three-year sentence. That is
19 a total of 15 years in the department of
20 corrections. When you are released, as I have
21 stated previously, you will be required to register
22 for the Sex Offender Registry.

23 And what is the State's position on the
24 Registry for Child Abuse and Neglect? Is there a
25 position?

1 **MS. MAYES:** Yes, sir, Your Honor. I believe,
2 based on these charges, that he should be entered
3 into the central registry as well.

4 **THE COURT:** Based upon the evidence before me,
5 the Court finds it appropriate to require you to
6 register also on the Central Registry for Child
7 Abuse and Neglect, as well as the Sex Offender
8 Registry.

9 I'm going to credit you five days which you
10 have served during the course of this prosecution
11 for time in jail against that 15-year sentence.
12 And, at this point, I commend you to Saluda County
13 Detention Center for transport to the department of
14 corrections.

15 **MR. ANDERSON:** Could I say one thing I forgot
16 to mention, Judge?

17 **THE COURT:** All right. Mr. Sudduth, right
18 there where you are.

19 What is it, Mr. Anderson?

20 **MR. ANDERSON:** It was that last question, and
21 it did strike me, Judge, Department of Social
22 Services did bring an action against him very early
23 on, and this kind of relates to your last
24 admonishment, he actually did capitulate in that.
25 He acquiesced. He didn't fight that at all, and he

1 allowed that to happen. And he already is on the
2 sexual registry through that DSS action.

3 **THE COURT:** Very good. Then he shall remain
4 there. And that is the sentence of the Court.

5 Mr. Sudduth, I'm going to release you now to
6 the department of corrections.

7 (Defendant leaves the courtroom.)

8 **THE COURT:** All right. Ladies and gentlemen
9 here in the courtroom, families, parties, lawyers,
10 jurors, I simply would say this, this is a sad
11 event, but hopefully today is the beginning of a new
12 chapter, that we can close this door, move forward,
13 move toward healing, move toward a reuniting of this
14 family as best as is possible. And to that end, I
15 adjourn this court.

16

17

END OF PROCEEDINGS

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C E R T I F I C A T E

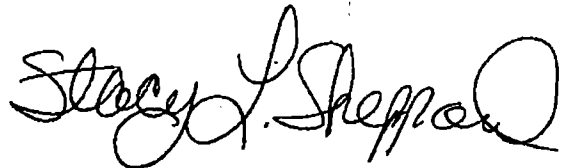
STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

I, the undersigned, Stacy L. Sheppard, Circuit Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and partial transcript of record of all the proceedings had and the evidence introduced in the guilty plea of the captioned cause, relative to appeal in the Criminal Court for Saluda County, South Carolina, on the 17th of July, 2013.

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

February 8, 2014



Stacy L. Sheppard, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Kendal Sudduth #356184

v.

State of South Carolina

FILED

2013 NOV 18 AM 11:39

CLERK OF COURT
SALUDA CO. S.C.

IN THE COURT OF COMMON PLEAS

2013-CP-41-236

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 Allendale Correctional Institution, Fairfax, S.C.
2. Name and location of Court which imposed sentence Saluda County
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2013 GS 41 00205A
 - (b) 2013 GS 41 00206A
 - (c) 2013 GS 41 00217A
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) July 17, 2013; 10 years consecutive
 - (b) July 17, 2013; 5 years consecutive

Revised 3/2003

- (c) July 17, 2013; 3 years concurrent
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty X
 - (b) after a plea of not guilty
 - (c) after a plea of nolo contendere
7. Did you appeal from the judgment of conviction or the imposition of sentence?
No
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - i. N/A
 - (b) the result in each such Court to which you appealed:
 - i. N/A
 - (c) the date of each such result:
 - i. N/A
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. N/A
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Trial counsel failed to advise applicant of right to appeal.
 - (b) Court failed to notify applicant of right to appeal.
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Trial counsel was ineffective for failing to conduct an adequate pretrial investigation and a lack of preparation.
 - (b) Trial counsel was ineffective by failing to challenge the chain of custody of alleged evidence.
 - (c) Trial counsel was ineffective for failing to challenge the sufficiency and the manifest weight of the evidence.
 - (d) Trial counsel was ineffective for failing to provide information to the applicant that is essential to a knowing and voluntary plea.
 - (e) Trial counsel was ineffective for allowing applicant to plea under a "Sham Legal Process".

(f) Trial counsel was ineffective by failing to challenge the court on the Proportionality Doctrine during sentencing; applicant's sentence is cruel and unusual punishment.

(g) Trial counsel was ineffective by failing to advise the applicant of his right to appeal.

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

(a) Trial counsel was ineffective for failing to conduct an adequate pretrial investigation and a lack of preparation. Counsel failed to investigate and uncover facts about the applicant's case that, had the facts been considered, would have created a substantial impact on the case. [See People v. LaBree, 34 N.Y.2d 257, 259–61, 313 N.E.2d 730, 731–32, 357 N.Y.S.2d 412, 413–15 (1974).] Applicant gave his trial counsel the names of potential witnesses and their contact information well in advance of the trial so that they may be approached and prepared for trial, however, counsel failed to investigate or interview any potential witnesses. Counsel waited until the first day of trial to name witnesses for the defense, and failed to subpoena witnesses that could have made an impact on the outcome of the hearing. Counsel advised the applicant to use expert witnesses for trial, one of which was never subpoenaed, nor did she even consult with the applicant on any of her expert testimony. No official notes or correspondence were ever provided from this expert by counsel either. Their testimony could have greatly changed the outcome of the applicant's trial. (See Bryant v. Scott 28 F.3d 1911; see Kemp v. Leggett, 635 F. 2d 453, 454; see also Gaines v. Hopper 575 F.2d 1147.) An attorney must engage in a reasonable amount of pretrial investigations and, at a minimum, interview potential witnesses, and make an independent investigation of facts and circumstances in the case.

On the day before jury selection for the trial, screenshots that were being used as evidence and being entered by the prosecution for trial on evidence boards were being viewed and discussed. Counsel admitted to receiving the screenshots during discovery, but in digital form, and that they were so small he could not figure out what was on them. Since they were digital evidence, he could not enlarge to view what was on them. He stated he did not think they were important since there were not any pictures on them, so he did not question the ability to enlarge them before trial. These screenshots were later used by the prosecution during sentencing to portray the applicant as a sexual offender, and counsel had no prepared defense other than an

expert witness, who was never called to testify or argue during sentencing.

As mentioned in People v. Riley 101 A.D.2d 710, 711, 475 N.Y.S.2d 691, 692-93 (4th Dept. 1984), counsel pursued a highly prejudicial cross-examination of the alleged victim in the case, and did not ask several of the key questions that were shown to the applicant for review before cross-examination. After his first and unsuccessful attempt at bargaining on the second day of the trial, counsel stuttered extensively and maintained a confused and prejudiced demeanor throughout the remainder of the trial and sentencing, thus making him highly ineffective.

(b) Trial counsel was ineffective by failing to challenge the chain of custody of alleged evidence. As mentioned in Benton V. Pellum 232 S.C. 26, 32, 100 S.E.2d 534, 537, while the proof of the chain of custody need not negate all possibility of tampering, but must establish a chain as far as practicable, it is generally held that the party offering evidence is required to establish a complete chain of evidence, tracing possession from the time evidence was collected to the final custodian by whom it is analyzed.

Trial counsel was notified by applicant of essential details concerning the chain of custody and failed to investigate or challenge the court on those details, which may have greatly affected the outcome of this case. Chief David W. Farmer was documented as custodian of evidence for Saluda Police Department on the chain of evidence. Collected evidence was placed on Chief Farmer's desk on Thursday, March 15, 2007. The janitor of the Saluda Police Department entered the office on Sunday, March 18, 2007, witnessing the said evidence on the desk and contacting the applicant to inquire on the whereabouts of said evidence, informing applicant that the evidence was not properly locked in an evidence room. Similarly to Benton v. Pellum, there was no documentation that the custodian of evidence took any precautions against tampering. He simply placed the evidence in question on his desk. Just how long it remained there or by whom it was manipulated, is not known.

As stated in Rogers v. Commonwealth 197 Va.527, 90 S.Ed 257, 260, where substances had passed through several hands, the evidence must not leave it to conjecture as to who had and what was done with it between the collection and the analysis. Also, the changing of hands from Chief Farmer to "SLED" that is documented on the chain of custody is too broad of a recipient to determine the protection of sensitive, and easily manipulated, digital evidence.

When applicant requested counsel to investigate the chain of custody, counsel stated that no judge would hear it or consider it. [See People v. Jenkins, 68 N.Y.2d 896, 897, 501 N.E.2d

586, 586–87, 508 N.Y.S.2d 937, 937–38 (1986).] Applicant finds this as a failure to investigate and use the findings of crucial evidence or information, solely on attorney's erroneous assumption of its inadmissibility, and deems counsel to be prejudicial and ineffective.

(c) Trial counsel was ineffective for failing to challenge the sufficiency and the manifest weight of the evidence. Applicant's attorney failed to challenge the prosecution's alleged supporting evidence for indictment number 2013-GS-41-205A in pretrial motions or during sentencing. (See Jackson v. Virginia 443 U.S. 307, 99, S. Ct.2781, 61 L. Ed. 2d 560.) The evidence brought against the applicant was not sufficient enough to warrant a second degree charge of sexual exploitation of a minor, being that it did not factually prove the applicant knew the character or content of said evidence, nor did it prove that he recorded, photographed, filmed, developed, duplicated, produced, or created digital electronic file material that contained a visual representation of a minor engaged in sexual activity; nor that he distributed, transported, exhibited, received, sold, purchased, exchanged, or solicited material that contained a visual representation of a minor engaged in sexual activity. The evidence presented was a series of screenshots taken from a key logger program that showed someone searching for and viewing three separate visual representations of child pornography, however the screenshots do not factually prove that the applicant was the person using the computer at the times noted on the searches, or that any of the files searched for were even downloaded to the computer.

(d) Trial counsel was ineffective for failing to provide information to the applicant that is essential to a knowing and voluntary plea. In the case Purdy v. United States, 208 F.3d 41, 46-48 (2d Cir. 2000) it was noted that an attorney should inform his client of the probable costs and benefits of accepting a plea bargain, but he need not advise client explicitly to either plead guilty or not. Applicant's attorney coerced applicant into making a plea during the middle of a trial by repeatedly making the comment that the judge was strongly encouraging the defendant to take a plea because the judge thought the jury was going to find him guilty. This statement was witnessed by several family members, in addition to two non-family members who were present, and is highly prejudiced, deeming counsel ineffective.

While the applicant was debating whether to take the plea bargain or not, counsel failed to provide information about the plea that would have made a difference in applicant's decision. Counsel failed to explain the repercussions of a violent charge, thus making the applicant unknowingly and involuntarily agreeing, being that he was not fully informed. (See Herring v. Estelle 491 F.2d 125; Lamb v. Beto 423 F.2d 85, 87; Walker v. Caldwell, Supra 476

F.2d 224; and Colson v. Smith, Supra 438 F.2d 1081.)

(e) Trial counsel was ineffective for allowing applicant to plea under a "Sham Legal Process". The applicant's indictments were of a "Sham Legal Process" that failed to confer subject-matter jurisdiction upon the trial court. Issues of subject-matter jurisdiction may be raised at any time (State v. Wells, 519 S. E. 2d 793, S.C. App. 1999). Courts can always consider questions as to subject-matter jurisdiction whenever raised and even sua sponte (U.S. v. White, 139 F.3d 998, 4th Cir. 1998, 119 S. Ct. 343).

Accordingly, applicant continues that his indictments, 2013-GS-41-205A, 2013-GS-41-206A, and 2013-GS-41-217A, all dated July 9, 2013, are of a "Sham Legal Process" that did not confer subject-matter jurisdiction upon trial court to convict him.

S.C. Code of Laws 16-17-735 defines a "Sham Legal Process" in relevant part as follows:

"...The issuance display...reliance on as lawful authority, or otherwise of an instrument that is not lawfully issued, whether or not the instrument is produced for inspection or actually exists, which purports to...assert jurisdiction or authority over or determine or adjudicate the legal or equitable status, rights, duties, powers, or privileges of a person or property..."

Applicant submits that his indictments indicate that during the July 2013 term of General Sessions Court for Saluda County, he was indicted specifically on July 9, 2013. Conversely, under S.C. Code of Laws 14-5-760, the S.C. Legislature has the term schedule for convening Eleventh Circuit General Sessions Court for Saluda County on July 15, 2013.

Here, as there are no provisions by the S.C. Legislature set forth by statutory law in S.C. for a term of General Sessions Court in Saluda County on July 9, 2013, the applicant asserts that his indictments, dated July 9, 2013, operate as a "Sham Legal Process" that did not confer subject-matter jurisdiction upon trial court to convict him. (S.C. Statutes 14-9-170 and 14-9-210, Supra S.C. Constitution Article 1 Section 11). The applicant submits that as a threshold matter, his conviction and sentence was based on a fraudulent indictment that legally could not support trial court jurisdiction to convict and sentence him.

(f) Trial counsel was ineffective by failing to challenge the court on the Proportionality Doctrine during sentencing; applicant's sentence is cruel and unusual punishment. (See Enmund v. Florida; also Solem v. Helm 463 U.S. 277.) The court sentenced the applicant based solely on the alleged victim's testimony, heard previously during trial and focused on previously dismissed charges, and on statements made by the prosecution during sentencing. According to the Proportionality Doctrine, set forth in Solem v. Helm, all courts must do three things in order to

determine if a sentence is proportioned to a specific crime:

“Compare the nature and gravity of the offense and the harshness of the penalty, compare the sentences imposed on other criminals in the same jurisdiction; i.e., whether more serious crimes are subject to the same penalty or to less serious penalties, and compare the sentences imposed for commission of the same crime in other jurisdictions. “

According to United States v. Stern, “criminal sentencing is a three-step procedure. [See also United States v. Baird, No. 8:07-CR-204, 2008 U.S. Dist. LEXIS 2338, at *10-14 (D. Neb. Jan. 11, 2008) (Bataillon, C.J.).] A district court must begin by calculating the sentence recommended by the United States Sentencing Commission. Id. at 10; Rita v. United States, 127 S. Ct. 2456, 2465 (2007) (“[A sentencing court must] normally begin by considering the presentence report and its interpretation of the Guidelines.”). To make this calculation, a court determines both the classification of the crime for which the defendant has been convicted and the defendant’s criminal history.” (Also note 18 U.S.C. § 3553.)

In addition, the applicant was advised by counsel, when deciding to make the plea, that the plea sentencing would be arguable, but counsel did not call the applicant to argue on his own behalf, nor did counsel call any expert or character witnesses that were already present in court to argue the determination of sentence. Applicant was advised only to apologize to the alleged victim in the hopes that the judge would not impose the maximum sentence. Counsel did not argue in front of the court the points discussed with applicant when the decision was made to take the plea, such as consideration of applicant’s criminal history, which is none, his character, or the fact that applicant had been out on bond for six years and 3 months during the duration of the investigation and the unnecessary extension of this case. Instead, counsel argued to the notion that the applicant and the alleged victim grew up together and the whole case just got out of hand, a statement which is presumptive and seemingly prejudiced. The sentencing judge commented that guilt lied with the applicant on previously dismissed charges, which was explained as the reasoning behind the maximum imposed sentence of fifteen years for the charges on the plea. The lack of evidence for sentencing basis and the court’s prejudice should have been grounds to challenge the sentence imposed of fifteen years on the applicant. Counsel was ineffective for not raising these grounds.

(g) Trial counsel was ineffective by failing to advise the applicant of his right to appeal. As addressed similarly in Roe v. Flores-Ortega, 528 U.S. 470 (2000), “counsel has a constitutionally imposed duty to consult with defendant when there is reason to think either that

a rational defendant would want to appeal, or that the defendant reasonably demonstrated to counsel an interest in appealing". After sentencing in the applicant's case, counsel did not advise applicant of his right to a direct appeal, nor did the court advise the applicant of his right to an appeal during sentencing. Both court and counsel deprived applicant of his right to an appeal, according to South Carolina Judiciary Rule 201(b). During discussions prior to accepting a plea, the applicant was under the assumption that a plea was the last resort and that there were no post-sentencing options. He was not made aware of any possibility to reconsider. After further research months later, the question was raised to counsel about filing a motion to reconsider the sentence, counsel stated it was too late and "it would not have mattered anyway".

Legal Citations and Arguments:

The standard by which to evaluate the effectiveness of counsel is well established. A defendant has a Constitutional right to counsel reasonably likely to render and reasonable rendering effective assistance. (See *U.S. v. Burrough*, 659 F.2d 595; and *Washington v. Estelle*, 648 F. 2d 276).

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires that the defendant first show that the deficient performance of counsel prejudiced the defendant so as to deprive the defendant of a fair trial. (*Sosebee v. Leeke*, 362 S.E. 2d 22, citing *Strickland v. Washington*, 466 U.S. 668; see also *Butler v. State*, 334 S.E. 2d 813; and *Hill v. Lockhart* 474 U.S. 52, 106 S.Ct. 366)

12. Prior to this application have you filed with respect to this conviction:
 - (a) any petition in a State Court under South Carolina Law? 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

- (b) the name and location of the Court in which each was filed:
 - i. N/A
 - (c) the disposition thereof:
 - i. N/A
 - (d) the date of each such disposition:
 - i. N/A
 - (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. N/A
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
 - i. N/A
 - (b) the proceedings in which each ground was raised:
 - i. N/A
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) All grounds listed in (10) were not previously presented because of ineffective assistance of counsel.
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? No
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:

- i. P. Andrew Anderson, 211 York Street N.E., Aiken, SC 29801
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial
 - ii. Plea Bargain
 - iii. Sentencing
19. State clearly the relief you seek in filing this application:
Vacate conviction or new trial
20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA)

County of Saluda)

VERIFICATION

I, Kendal Sudduth, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



SWORN to and subscribed before me this 14
day of November, 2013.

Virginia Sudduth (L.S.)
Notary Public

My Commission Expires: 12-12-12

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

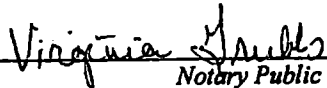
I, Kendal Sudduth, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Applicant

SWORN or affirmed to and subscribed before me this
14 day of November, 2013.



Notary Public

My Commission Expires: 12-12-22

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
SALUDA COUNTY	)	
	)	C.A. No. 2013-CP-41-236
	)	
Kendal Suddath,	)	
S.C.D.C. No. 356184,	)	
	)	
Applicant,	)	RETURN
	)	
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post-conviction relief filed November 18, 2013 would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Saluda County Clerk of Court. The Applicant was true bill indicted at the July 2013 term of the Saluda County Grand Jury for sexual exploitation of a minor, second-degree (2013-GS-41-205(A)); sexual exploitation of a minor, third-degree (2013-GS-41-206(A)); contributing to the delinquency of a minor (2013-GS-41-217(A)). P. Andrew Anderson, Esq., represented Applicant. On July 17, 2003, Applicant entered a guilty plea pursuant to the State's recommendation to cap the sentence at fifteen (15) years imprisonment. Asst. Solicitor Suzanne Mays, Esq., and Asst. Solicitor Kate W. Usry, Esq., represented the State. The Honorable J. Michael Baxley sentenced Applicant to ten (10) years imprisonment for sexual exploitation of a minor, second-degree, three (3) years imprisonment for contributing to the delinquency of a minor. Those convictions were to be served concurrently. Judge Baxley further sentenced Applicant to five (5) years imprisonment for sexual exploitation of a minor,

third-degree to be served consecutively. Applicant's aggregate term of imprisonment was fifteen (15) years.

Attached herewith and incorporated herein by reference are the records of the Saluda County Clerk of Court regarding the subject conviction, the guilty plea transcript, and Applicant's records from the South Carolina Department of Corrections. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective Assistance of Counsel:

- a. failure to prepare and conduct adequate pre-trial investigation;
- b. failure to make a motion to suppress State's evidence based upon a defective chain-of-custody;
- c. failure to challenge the sufficiency and evidentiary weight of the State's evidence;
- d. failure to adequately advise Applicant on the terms and consequences of entering a guilty;
- e. failure to object the sentence as unconstitutionally disproportionate;
- f. failure to advise Applicant of his right to an appeal;
- g. failure to object to a "sham legal process."

Any claims not specifically enumerated in the post-conviction application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. **All amendments should be made well in advance of an evidentiary hearing by counsel of record.** Rule 11, SCRCP.

III.

In a post-conviction relief proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). First, a

post-conviction relief applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115 at 117, 386 S.E.2d 624 at 625 (1989), *citing Strickland*.

Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; Alexander, 303 S.C. at 541-42, 402 S.E.2d at 485. The Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *Id.* Applicant must overcome this presumption in order to receive relief. Cherry, *Id.*

Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985); Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the post-conviction relief hearing. Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

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

247 (1983).

IV.

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

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the issue of ineffective assistance of counsel and whether the Applicants plea was involuntary.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

WALT WHITMIRE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

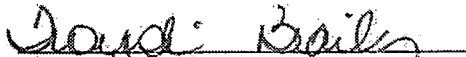
April 29th, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE ELEVENTH CIRCUIT
COUNTY OF SALUDA	)	
	)	2013-CP-41-236
	)	
KENDAL SUDDATH	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Kristy Grafton Goldberg, Esquire
1720 Main St, Ste. 301
Columbia, SC 29201

DATED this 29th day of April, 2014


 Troyesh Brailey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA)

IN THE COURT OF COMMON PLEAS
2013-CP-41-236

KENDAL SUDDUTH)
SCDC # 356184,)
Applicant,)

vs.)

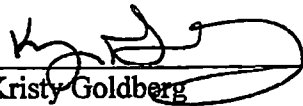
AMENDED APPLICATION
FOR POST CONVICTION RELIEF

STATE OF SOUTH CAROLINA,)
Defendant.)

Based upon further investigation and research, the Post-Conviction Relief Application filed on behalf of the above named Applicant is hereby Amended as follows:

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

- (a) Ineffective assistance of trial counsel – counsel as ineffective for failing to object when the Applicant received improper and inadequate notice of the charges he would be facing at trial.
- (b) Ineffective assistance of trial counsel – counsel was ineffective for failing to object pre-trial to the fact that Applicant was charged with and later convicted of Sexual Exploitation of a Minor in the Second Degree and Third Degree.
- (c) Ineffective assistance of trial counsel – counsel was ineffective for coercing the Applicant to plead guilty.
- (d) Ineffective assistance of trial counsel – counsel was ineffective for failing to adequately prepare to present a defense at trial.
- (e) Ineffective assistance of trial counsel – counsel was ineffective for failing to notify Applicant of his right to appeal and failing to file a notice of appeal.


Kristy Goldberg
Attorney for Applicant

Kristy Goldberg
Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303

Columbia, SC 29201
803-667-6633
803-799-4059 (fax)
kristy@kristygoldberglaw.com

Columbia, South Carolina

This 27th day of October, 2016

STATE OF SOUTH CAROLINA)
 COUNTY OF SALUDA)

KENDAL SUDDUTH)
 SCDC # 356184,)
 Applicant,)

vs.)

STATE OF SOUTH CAROLINA,)
Defendant.)

IN THE COURT OF COMMON PLEAS
 2014-CP-41-236

CERTIFICATE OF SERVICE

I certify that on this date I served the Amended Application for Post-Conviction Relief in this case on The State of South Carolina by delivering a copy of this application to the Office of the Attorney General via U.S. mail at Post Office Box 11549, Columbia, South Carolina 29211-1549.


 Kristy Goldberg
 Attorney for Defendant

Kristy Goldberg
 Law Office of Kristy Goldberg, LLC.
 1720 Main Street, Suite 303
 Columbia, SC 29201
 803-667-6633
 803-799-4059 (fax)
 kristy@kristygoldberglaw.com

Columbia, South Carolina

This 07th day of October, 2016

1 State of South Carolina Court of Common Pleas
2 County of Saluda Eleventh Judicial Circuit
3

4 Kendal Sudduth,) Transcript of Record
5 Applicant,)
6 vs.) 2013-CP-41-00236
7 State of South Carolina,)
8 Defendant.)

9
10 November 8, 2016
11 Lexington, South Carolina

12 B E F O R E:

13 The Honorable R. Keith Kelly, Judge,
14

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

16 Kristy G. Goldberg, Esquire
17 On behalf of the Applicant

18 Johanna C. Valenzuela, Esquire
19 On behalf of the State of South Carolina
20

21
22 Stacy S. Johnson
23 Circuit Court Reporter
24
25

I N D E X

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Kendal Sudduth

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Lori Lantz

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Cross-Examination by Ms. Valenzuela

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P. Andrew Anderson

Direct Examination by Ms. Valenzuela

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Certificate of Reporter

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E X H I B I T S

NO EXHIBITS WERE INTRODUCED

1 (Whereupon, the following proceedings were held
2 November 8, 2016, beginning at 9:03 AM.)

3 **THE COURT:** What's the first matter we have.

4 **MS. VALENZUELA:** The first one we have is Kendal
5 Sudduth, Your Honor.

6 **THE COURT:** Okay. Kendal Sudduth. Yes, ma'am.

7 **MS. VALENZUELA:** I just did want to point out with
8 this one we sent a disc, but we also had late amended
9 allegations. Not -- not late as in we're objecting to
10 them, but that we e-mailed them to you later.

11 **THE COURT:** Okay.

12 **MS. VALENZUELA:** Okay, Your Honor. Are you ready?

13 **MS. GOLDBERG:** Yes.

14 **MS. VALENZUELA:** This is the case of Kendal Sudduth
15 versus the State of South Carolina. This is a Saluda
16 County case, 2013-CP-41-236. The Applicant in this case
17 filed his application in November of 2013, Your Honor, and
18 that application was filed. He is currently incarcerated
19 in the Department of Corrections and this is after he was
20 indicted by the July 2013 term for sexual exploitation of a
21 minor, second degree, and sexual exploitation of a minor,
22 third degree, and contributing to the delinquency of a
23 minor. The return does not include that he was also facing
24 additional indictments that he proceeded to trial on. He
25 proceeded to trial with Andrew Anderson representing him at

1 the trial and then halfway through the trial the Applicant
2 decided to plead and the return notes the three indictments
3 that he ended up pleading to, Your Honor. He ended up
4 pleading on July 17th of 2003 {sic}. The State recommended
5 a cap of fifteen years and Judge Baxley ended up sentencing
6 the Applicant to ten years for sexual exploitation of a
7 minor, second degree, with a consecutive five-year term on
8 the second sexual exploitation of a minor, third degree,
9 and then a concurrent three-year term for a total sentence
10 of fifteen years. There was no plea appeal filed in this
11 case.

12 The allegations in this case have been amended by
13 Ms. Goldberg, who is representing the Applicant, and both
14 are present in the courtroom today. And, Your Honor, our
15 understanding of those allegations is that the Applicant
16 is alleging that there was -- that counsel was ineffective
17 for failing to object when the Applicant received improper
18 and inadequate notice of the charges that he would be
19 facing at trial, that he was -- that counsel was
20 ineffective for failing to object pre-trial to the fact
21 that the Applicant was charged with and later convicted of
22 sexual exploitation of a minor in the second and third
23 degree, that counsel was ineffective for coercing the
24 Applicant to plead guilty, that counsel was ineffective for
25 failing to adequately prepare a defense -- or prepare to

1 present a defense at trial and then, finally, that counsel
2 was ineffective for failing to notify Applicant of his
3 right to appeal and then failing to file a notice of
4 appeal.

5 **THE COURT:** All right.

6 **MS. GOLDBERG:** Thank you, Your Honor. May it please
7 the Court? That amended application that she read was
8 correct. That was filed October 28th. We're prepared to
9 go forward on it now. At this time I'll call my first
10 witness.

11 **THE COURT:** Yes, ma'am.

12 **MS. GOLDBERG:** At this time I'd call Kendal Sudduth.

13 **THE COURT:** Mr. Sudduth, come up and be sworn, sir.

14 (Whereupon, Kendal Sudduth was duly sworn by the Clerk
15 of Court.)

16 **THE WITNESS:** Kendal Harold Sudduth.

17 **THE COURT:** All right. Spell your last name, please.

18 **THE WITNESS:** S-U-D-D-U-T-H.

19 **THE COURT:** U-T-H?

20 **THE WITNESS:** (Nods head.)

21 **THE COURT:** Yes, ma'am.

22 **MS. GOLDBERG:** Thank you, Your Honor. May it please
23 the Court?

24 KENDAL SUDDUTH,

25 having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. GOLDBERG:

Q. All right, Mr. Sudduth. Where are you currently housed?

A. Allendale Corrections.

Q. And what offenses are you serving time for?

A. Sexual exploitation of a minor, second degree, third degree, and contributing to the delinquency of a minor.

Q. When were you first arrested for this -- this incident -- all of these offenses?

A. April -- I think I turned myself in April 2, 2007.

Q. When you were arrested at that time in 2007, do you recall what charges you were actually arrested for at that time?

A. Yes, ma'am.

Q. What was it?

A. Criminal sexual conduct with a minor, second degree, disseminating harmful material, two counts, and contributing to the delinquency of a minor, two counts.

Q. Did you stay in jail or did you bond out?

A. I bonded out.

Q. And who was your attorney?

A. At that time I had hired Chip Truitt.

Q. Okay. At a later point in time did your attorney change?

1 A. It did.

2 Q. Was that your choice?

3 A. The first time, no.

4 Q. Okay.

5 A. I don't know what happened in the mix of all of it,
6 but -- I don't know if Chip quit or got fired, I don't
7 know, but they assigned me to Jamie Walters.

8 Q. Okay. The Court appointed Jamie Walters?

9 A. No, the -- the firm.

10 Q. Oh, okay.

11 A. The firm.

12 Q. The firm changed the attorney?

13 A. Yes, ma'am.

14 Q. Okay. And then what happened with his representation?

15 A. He would not do what I asked him to do and ultimately
16 in 2000 --

17 **MS. VALENZUELA:** Your Honor, we'd just make an
18 objection to be clear that there are no allegations that
19 reach this counsel just for clarity.

20 **MS. GOLDBERG:** There are no allegations against this
21 attorney. It's just procedural history.

22 **THE COURT:** Okay.

23 BY MS. GOLDBERG:

24 Q. Go ahead.

25 A. In 2012, he wasn't doing what I asked him to do and he

1 kept trying to force me to plea and I told him when I hired
2 him I was not gonna plea and I fired him.

3 Q. That was Jamie Walters?

4 A. Yes, ma'am.

5 Q. And then you hired another attorney?

6 A. Yes, ma'am. Andrew Anderson out of Aiken.

7 Q. And when was that about?

8 A. Between January and February of 2013.

9 Q. And you were still on bond at that time?

10 A. Yes, ma'am.

11 Q. Were you ever -- and I'm not talking about when trial
12 started, prior to that were you ever taken back into
13 custody or arrested a second time?

14 A. Yes, ma'am. In 2000 -- I'm sorry, it's been so
15 long. In 2012, they brought me -- I went to rollcall and
16 they rearrested me at rollcall and said they had more
17 indictments.

18 Q. Do you know what you were arrested -- what charges
19 those were for?

20 A. Those were the -- I think -- I want to say one was a
21 criminal sexual conduct, first degree, with a minor and
22 forty-six counts of second and third degree exploitation of
23 a minor, and I really don't remember the rest.

24 Q. Did your bond change or did you just get back -- did
25 you have to post bond again or did they let you out?

1 A. That was a big confusion.

2 Q. Uh-huh.

3 A. The judge said everything would be fine based on the
4 bondsman allowing it.

5 Q. Right.

6 A. No one could ever get ahold of the old bondsman, so
7 what we did is we had another judge just let us post
8 another bond.

9 Q. Okay. When did you finally end up going to court to
10 dispose of pending charges?

11 A. My first trial date was July 13, 2007.

12 Q. 2007?

13 A. I'm sorry. I'm sorry. 2013.

14 Q. Okay. So on that day -- July 2013, did you walk in
15 off the street?

16 A. Yes, ma'am.

17 Q. Okay. You weren't transported from jail or anything
18 like that?

19 A. No, ma'am.

20 Q. And while you had been at home on bond, you had
21 Mr. Anderson representing you for about how long?

22 A. Between February and July.

23 Q. All right. So maybe five months?

24 A. Yes, ma'am.

25 Q. Did you meet with Mr. Anderson during that time?

1 A. Yes, ma'am.

2 Q. And prepare for trial?

3 A. Yes, ma'am.

4 Q. Did you know you'd be going to trial that day?

5 A. Yes, ma'am.

6 Q. Did you know what charges you were gonna be tried on?

7 A. Honestly, the night before they kept faxing
8 indictments, so really we didn't know until we got there.

9 Q. Did you know how many indictments -- pending
10 indictments you had?

11 A. Eighty-four.

12 Q. And you didn't know which charges they were going
13 forward on until you got to court?

14 A. No, ma'am. When I spoke with Mr. Anderson, he said
15 that he has no idea why they indicted me so many times on
16 these charges and he don't know what they got going on.

17 Q. Did you understand what all of the indictments or
18 charges against you were or what they meant?

19 A. I did not.

20 Q. When you went to court that morning for -- knowing
21 that it was gonna be a jury trial, did you feel like you
22 were prepared for the jury trial?

23 A. No.

24 Q. You did actually pick a jury and start a jury trial,
25 correct?

1 A. Yes.

2 Q. What charges did they actually begin trial on?

3 A. The CSC with a minor first, CSC with a minor second,
4 lewd act with a minor, I think the second and third degree
5 exploitation, and the contributing. I believe that's
6 correct.

7 Q. And when the trial began a few witnesses actually
8 testified in front of the jury before the trial ended in a
9 plea; is that right?

10 A. That's right.

11 Q. Why did you -- what led up to the decision to stop the
12 trial and plea instead?

13 A. I felt like I was under duress to take the plea. I
14 felt like Mr. Anderson when he -- we took a break on the
15 17th, we took a lunch break, and we was in the -- the
16 holding room, my family and everyone, and he come in the
17 room and he made the comment that the judge said the jury
18 is gonna find me guilty, I better take a plea. I didn't
19 even know there was a plea on the table and I told him no,
20 we went back, we were gonna proceed with trial, he asked
21 the judge to hold on a minute and then he sat there and
22 kept talking to me and finally he -- he got me to take the
23 plea.

24 Q. Was there anything that he said to you in those
25 conversations that you thought was inappropriate or

1 improper?

2 A. I felt like he shouldn't have known what the judge or
3 the jury was gonna say. That was not his -- his knowing or
4 decision.

5 Q. Is there anything he said that specifically coerced
6 you into your decision to plea?

7 A. That the judge said the jury was gonna find me guilty.

8 Q. In addition to that conversation, is there anything
9 that happened at trial or leading up to trial that -- that
10 played into your decision to plea?

11 A. Yes, ma'am. We didn't know -- we didn't know who our
12 witnesses were gonna be until the day of trial. He never
13 contacted anyone, he didn't subpoena anyone. He called a
14 deputy sheriff that had no idea he was gonna be a -- a
15 witness on my side. He did not prepare anyone. He told
16 my ex-wife to be prepared the night before, which he had
17 told her she wasn't gonna testify, then he told her that
18 she was. I really felt like he wasn't prepared at all.

19 Q. Is there anything that you asked him to do that he
20 specifically didn't do?

21 A. I asked him to contact the other witnesses that we
22 had. They were school teachers that were at a restaurant
23 that we were in because of a date that they kept giving us
24 that all of our -- my bank statements and receipts proved
25 that I was in Aiken County on that day and he told us that

1 it didn't -- it didn't matter.

2 Q. Okay. And just so the record is clear, the sexual
3 exploitation of a minor charge, there were several dates
4 offered by the State -- or multiple dates offered by the
5 State as to when certain images may have been downloaded
6 onto your computer. You're basically explaining that you
7 had an alibi for one of those dates?

8 A. Yes, ma'am.

9 Q. Okay. And you asked him to prepare witnesses --

10 A. Yes, ma'am.

11 Q. -- accordingly? And he refused. Is that what you're
12 saying?

13 A. Yes, ma'am. His statement was that I don't feel like
14 that's enough.

15 Q. Is there anything else that played into your decision
16 to plea instead of go forward with the trial?

17 A. Yes, ma'am. I asked him to question the chain of
18 custody and he refused -- he flat-out refused to question
19 it.

20 Q. Did you have a chain of custody issue?

21 A. Yes, ma'am.

22 Q. What was that?

23 A. On -- on the chain of custody -- well, let me back up.

24 **MS. VALENZUELA:** Your Honor, I'm just gonna object
25 because this is not one of the allegations that we were

1 provided notice with. There was no reference to a chain
2 of custody issue or to a failure to object to that.

3 **MS. GOLDBERG:** Your Honor, I think he's saying that
4 this is -- it wasn't something presented at trial, it was
5 part of his conversations with his lawyer that led him to
6 believe his lawyer wasn't prepared.

7 **THE COURT:** Well, I'll listen to it for what it's
8 worth. Go ahead.

9 **MS. GOLDBERG:** Thank you, Your Honor.

10 BY MS. GOLDBERG:

11 Q. Go ahead.

12 A. We -- we asked him to contact a witness that was the
13 janitor of the Saluda Police Department. The janitor had
14 told me that my stuff was in the chief's office and he went
15 in --

16 **MS. VALENZUELA:** Objection to hearsay.

17 **THE WITNESS:** Oh.

18 BY MS. GOLDBERG:

19 Q. You can't say what someone else told you, okay?

20 A. Okay. All right. Issues of fact. The chain of
21 custody when it was signed over to SLED, there's no name
22 on it, who signed it. All it says is SLED. And then my
23 other issues were someone named Lucinda McKeller, there's
24 no evidence where she signed my computer out of the
25 evidence room and did any review of it and signing it back

1 in, but I have reports of everything, but no chain of
2 custody on it.

3 Q. Is there anything else that your lawyer could have or
4 should have explained to you that would have helped you
5 understand what charges you were facing before you went to
6 trial? What do you think you didn't understand or didn't
7 know?

8 A. I really didn't know what I was facing.

9 Q. What do you know now that you didn't know then?

10 A. I know now that the second degree exploitation that
11 I pled to is a violent crime. I did not know that. I did
12 not know that it carried two to ten and not zero to ten.
13 The contributing, I do understand why they got that one,
14 but I couldn't understand why they did the second and third
15 degree because the way I felt, he -- the way Mr. Anderson
16 told me is that he felt like the second and third degree
17 was double jeopardy.

18 Q. He told you that?

19 A. He told me that, but he never brought it up. And the
20 more that I'm -- I feel like I'm learning, I believe that
21 he's correct.

22 Q. You believe he should have brought this up --

23 A. Yes, ma'am.

24 Q. -- during the trial?

25 A. Yes, ma'am.

1 Q. Did you and your lawyer ever talk about your right to
2 appeal?

3 A. No.

4 Q. Not before, during or after court?

5 A. No, ma'am.

6 Q. Did you file a notice appeal?

7 A. No, ma'am.

8 Q. Why not?

9 A. I didn't know I could appeal.

10 Q. You -- and I want to be clear here. Are you saying
11 that you didn't know if you could or not or are you saying
12 that you thought you could not?

13 A. I thought I could not based on I took a plea.

14 Q. Okay. Did -- what made you believe that you could not
15 appeal?

16 A. My understanding of the law system. I thought the
17 only way you could appeal was by trial, a conviction. I
18 didn't know you could appeal a plea sentence.

19 Q. Your lawyer never told you otherwise?

20 A. No, ma'am.

21 Q. And the judge never told you otherwise?

22 A. No, ma'am.

23 Q. Is there anything that you believe should have been
24 appealed? Any issues?

25 A. Yeah, I -- I believe that -- that he should have -- he

1 should have questioned the search warrant more, that that
2 should have been on the table.

3 Q. And to be fair, for the record the transcript shows
4 that the search warrant was challenged pre-trial, correct?

5 A. Correct.

6 Q. There was a motion that your lawyer presented
7 regarding the search warrant?

8 A. Correct.

9 Q. And that motion was lost by him? He lost the issue?

10 A. Correct.

11 Q. So you think that's something that could have been
12 appealed?

13 A. I think that's something that should have been
14 appealed.

15 Q. Okay. Anything else?

16 A. The question of second degree and third degree I don't
17 believe was ever -- I don't know -- I don't know if we
18 could have appealed that or not --

19 Q. Okay.

20 A. -- being it wasn't on any type of record of appeal.

21 Q. Because it wasn't presented?

22 A. Right.

23 Q. Anything else that comes to mind?

24 A. That's all I can think of.

25 Q. If you had known that you had a right to appeal, would

1 you have asked your lawyer to file a notice of appeal?

2 A. Yes, ma'am.

3 **MS. GOLDBERG:** No further questions.

4 **THE COURT:** Yes, ma'am.

5 **MS. VALENZUELA:** May it please the Court?

6 CROSS-EXAMINATION

7 BY MS. VALENZUELA:

8 Q. Okay. Good morning, Mr. Sudduth.

9 A. Good morning.

10 Q. Let's get started back at the beginning of your trial.
11 You said that as the trial started you knew that you were
12 going forward with the contributing to the delinquency of
13 a minor charge?

14 A. I believe that was on there, yes.

15 Q. Okay. And when you were arrested, were you informed
16 -- did you know that it was based on the fact that you were
17 -- it was alleged that you were allowing children under --
18 eighteen or under to see porn on your computer?

19 A. That's what the -- the affidavit said. I really
20 didn't understand it.

21 Q. But you knew that that was what the allegations were
22 against you --

23 A. Right. Correct.

24 Q. -- already before you got to trial, right?

25 A. (Nods head.)

1 Q. And then you knew that your stepdaughter was alleging
2 that you had had improper sexual -- actually just sexual
3 conduct that was improper because of the age that she was
4 with her?

5 A. Right.

6 Q. That you had actual vaginal contact with her when you
7 were her stepfather and she was under the age of seventeen?

8 A. Right, I knew that was the allegation.

9 Q. And you knew that. And you knew that she was alleging
10 that that had happened as early as when she was seven years
11 old?

12 A. No.

13 Q. You did not know that?

14 A. No. Not -- not vaginal, no. Me nor Mr. Anderson
15 thought that.

16 Q. Okay. But you knew that there were allegations that
17 you had had contact with her -- sexual contact with her as
18 early as the age of seven?

19 A. According to one statement, yes.

20 Q. Okay. So you knew that. And then you knew that --
21 that there were allegations that Courtney -- I'm sorry,
22 I'm misplacing her name -- but that **Minor** 's friend from
23 high school, Courtney, had been at the house and she was
24 claiming that she had seen porn on a computer?

25 A. Right. Right.

1 Q. You knew that going into trial?

2 A. Right.

3 Q. Okay. And you knew that the allegations of Minor ,
4 your stepdaughter, were that the sexual conduct -- contact
5 by you continued from the age of seven to seventeen,
6 correct?

7 A. According to her statement.

8 Q. And you knew that going into trial?

9 A. According to her statement.

10 Q. Yes? That's a yes, you knew that going into trial?

11 A. Yes.

12 Q. Thank you. Okay. And then -- so going into trial,
13 you were aware of the allegations that had been made --
14 that were presented throughout the trial, the portion of
15 the trial that you got through?

16 A. Yes.

17 Q. Okay. And you weren't expecting your stepdaughter to
18 show up at trial, correct?

19 A. Oh, I knew she was.

20 Q. You knew?

21 A. Yes.

22 Q. Okay. Had you been in contact with her?

23 A. No, we got a phone call from a deputy that said she'd
24 been in court all week.

25 Q. Okay. So when did you know that she was gonna show up

1 to testify?

2 A. When she walked in the courtroom.

3 Q. Okay. So -- but leading up to the trial, you did not
4 expect that she was gonna be there?

5 A. Like I said, I -- we knew she was coming.

6 Q. Okay. And did you know that Courtney was gonna
7 testify?

8 A. No.

9 Q. And Courtney, in fact, lived in another state,
10 correct?

11 A. I have no idea where she lives.

12 Q. Okay. And that's --

13 **MS. VALENZUELA:** Your Honor, that's part of the
14 transcript that's before the Court and -- the part of the
15 trial transcript.

16 BY MS. VALENZUELA:

17 Q. Okay. Let's talk a little bit about what you saw in
18 the trial. You saw your stepdaughter testify in front of
19 the jury, correct?

20 A. I did.

21 Q. And you heard her say that you had had sexual contact
22 with her -- vaginal contact at the age of -- as early as
23 seven years old?

24 A. I don't remember her saying that.

25 Q. And that she also said that she had sexual contact

1 with you between the ages of eleven and fourteen?

2 A. I don't remember her saying that.

3 Q. Okay. And that she had had a sexual relationship with
4 you from the age of seven until seventeen when she finally
5 left the home that she shared with you?

6 A. I don't remember her saying that.

7 Q. And she testified to how when her mother separated
8 from you she was left in the unusual circumstance of her
9 mother moving out with your two -- the children you had
10 with her mother and her, a stepdaughter who was under the
11 age of seventeen, actually staying and living with you in
12 the home?

13 A. Yes, I do remember that.

14 Q. Okay. And you heard her testify about how there was
15 a computer that was left in the family room?

16 A. Yes.

17 Q. And how she had observed you looking at pornography
18 that had an image of an adult with a female -- with a
19 female child?

20 A. Yes.

21 Q. She testified to that?

22 A. Yes.

23 Q. And how you -- she described the interaction between
24 you viewing pornography and you participating in sexual
25 behavior with her?

1 A. Yes. I noticed her description was -- was of a
2 program that the SLED agents didn't even mention.

3 Q. But she did testify to all that?

4 A. Yes.

5 Q. Okay. And then you remember her testifying to how
6 there was an inappropriate -- she believed that there was
7 an inappropriate stalking relationship from you?

8 A. I don't remember that.

9 Q. Okay. Do you remember how she talked about how you
10 knew what happened on her MySpace account?

11 A. Oh, of course. Yes. Yes.

12 Q. And she said that the reason why you knew how to get
13 into her MySpace account was because the computer that you
14 had in the family room you had installed a key logger
15 program on that computer, correct?

16 A. The program was on the computer, but that's not how I
17 -- I never logged into her account.

18 Q. But that's what -- those were her -- that's what she
19 testified to at trial?

20 A. That's her allegations, yes, ma'am.

21 Q. And so you did have a key logger system that you had
22 on that computer?

23 A. Yes, ma'am.

24 Q. And the key logger system works in a way so that
25 whatever people are typing you can find whatever -- you

1 know, what they typed, whether it's a password or a
2 website, et cetera, you can find that in the history?

3 A. The key logger was put on my computer because so many
4 people used it. I didn't know what they were doing.

5 Q. Understanding your argument, you agree with me that
6 your computer did have a key logger system that did track
7 what people did on that computer?

8 A. Yes.

9 Q. And then that key logger system was used by the State
10 to present a case against you?

11 A. Yes. I wasn't even aware it even worked, but, yes.

12 Q. Okay. And then your stepdaughter also testified that
13 there was a program that you had on the computer that would
14 specifically wipe history -- computer history on the
15 computer?

16 A. She just kept saying I formatted the hard drive.

17 Q. Right, so that you could -- she was testifying to a
18 way that you would hide the child pornography. You had
19 ways that you would try to hide the child pornography on
20 your computer?

21 A. I don't remember her testifying to that.

22 Q. Okay. And she testified to the actual visual way
23 that the child porn, the pornography system that you were
24 using, how it looked, how when it came up it had, you know,
25 screens on the side that would show you a clip that you

1 would select from?

2 A. I remember her saying that. She was describing a
3 program called mIRC, which no porn was ever downloaded on,
4 and you can't select anything on the side. It's only user
5 names of people offering movies and music.

6 Q. Okay. Well, you certainly know a lot of details about
7 the system that --

8 A. That one program, yes, ma'am.

9 Q. Yes. And she also knew a lot of details about the
10 system?

11 A. Not that program.

12 Q. That she testified to?

13 A. Yes, ma'am.

14 Q. Okay. And then Courtney, her friend that came in,
15 you heard her -- actually, let me back up. You also heard
16 your attorney cross-examine Minor , correct?

17 A. Yes, ma'am.

18 Q. Okay. And you watched that entire cross-examination?

19 A. Yes, ma'am.

20 Q. Okay. And then you also saw and heard Courtney
21 testify?

22 A. Yes, ma'am.

23 Q. And Courtney was your stepdaughter's friend in high
24 school?

25 A. Yes.

1 Q. And you heard Courtney testify that she had observed
2 what she thought was an inappropriate relationship between
3 you and Minor , very touchy-feely?

4 A. Yes.

5 Q. And she also said that you would say things like
6 Minor had a landing strip, meaning you were talking
7 about the way that Minor formatted or shaved her pubic
8 hair on her vagina?

9 A. I never heard her say that in court, but that was on
10 the affidavit of the arrest warrant.

11 MS. VALENZUELA: Okay. And that is, Your Honor, in
12 the transcript under Courtney's testimony. I'm sorry. If
13 I could just have one moment, Your Honor. And that's
14 Page 255 in the trial portion transcript of that.

15 BY MS. VALENZUELA:

16 Q. And you -- Courtney also testified about how you would
17 encourage her and Minor to kiss each other?

18 A. I don't remember that either.

19 Q. Okay.

20 MS. VALENZUELA: And that's also on Page 255, Your
21 Honor.

22 BY MS. VALENZUELA:

23 Q. And then Courtney also testified that you would show
24 them porn and comment on it. And when she was saying you
25 would show them, she meant -- Courtney testified that you

1 would show Courtney and Minor porn and you would comment
2 on it.

3 A. I only remember -- I vaguely remember the trial.

4 Q. And that's on Page 257.

5 A. Okay.

6 Q. And then you watched your attorney cross-examine
7 Courtney also throughout the trial?

8 A. Yes.

9 Q. Okay. And so -- and it was a little unique because
10 the State did a direct examination of the victim and then
11 put Courtney up and then after Courtney had gone up your
12 attorney did both a cross-examination of Courtney and put
13 the victim back up and cross-examined her, correct? But
14 you remember hearing cross-examination?

15 A. I remember the cross-examination, yes.

16 Q. Okay. And so it was after you -- both Minor and
17 Courtney had testified and you had seen both the direct and
18 cross-examination of that that you decided to plead guilty?

19 A. No.

20 Q. What part of that is incorrect?

21 A. The -- what -- the testimony did not persuade me to
22 plead guilty.

23 Q. No, but timeline-wise.

24 A. Oh, timeline, yes. Yes.

25 Q. After Minor , your stepdaughter, testified and after

1 her friend from childhood comes in and testifies supporting
2 **Minor** 's story and that is all laid out in front of the
3 jury. It is after that point that you entered a plea of
4 guilty.

5 A. After that point in the timeline, yes.

6 Q. Okay. And then let's talk a little bit about your
7 guilty plea, okay? So do you remember standing in front of
8 the judge taking about the charges that you were facing?

9 A. I do.

10 Q. You do remember that? Okay. And do you remember that
11 there was a negotiated cap of fifteen years?

12 A. When Mr. Anderson presented it to me, he told me it
13 was gonna be a zero to fifteen plea.

14 Q. Okay. So a cap. So it wouldn't go over fifteen
15 years, right?

16 A. Yes.

17 Q. But the charges that you were pleading to could
18 actually go up to a sentence of twenty-three years, right?

19 A. Yes.

20 Q. So you were receiving a benefit from the State?

21 A. Yes.

22 Q. Yes. And, additionally, the State was dismissing the
23 other charges, the more serious charges that alleged that
24 you actually had vaginal contact with your stepdaughter
25 from the age of seven to seventeen, correct?

1 A. Yes.

2 Q. And those were dismissed as part of this plea deal?

3 A. Yes.

4 Q. So you were certainly getting a benefit there?

5 A. Yes.

6 Q. Okay. And then you heard that your -- the Court
7 asked your attorney if he had discussed the elements of
8 the defenses and had sufficient time to speak to you about
9 this before going -- before you entered a plea?

10 A. Had sufficient -- would you say that again?

11 Q. Had sufficient time to speak with you. Your attorney
12 said that.

13 A. We entered the plea within fifteen minutes maybe.

14 **MS. VALENZUELA:** And, Your Honor, that's on Page 346
15 where there's an exchange with his attorney.

16 BY MS. VALENZUELA:

17 Q. But you were present in the courtroom whenever the
18 Court was talking to your attorney and your attorney was
19 answering at the beginning of the plea?

20 A. Yes.

21 Q. Okay. Great. And then you heard your attorney
22 explain that this was because there was --

23 **MS. VALENZUELA:** And actually, Your Honor, if I could
24 just have a moment.

25 BY MS. VALENZUELA:

1 Q. Okay. And you heard your attorney explain that the
2 reason why he thought this plea was a good idea was because
3 there was a high likelihood of conviction and he thought
4 that the State may have been able to win on the criminal
5 sexual conduct, although he was not sure, but at least one
6 of the child porns and contributing with the possibility of
7 two of the child porns sticking?

8 A. I don't remember him saying that, but I did read that
9 in the transcript.

10 Q. Okay. And that's Page 346. And -- but you were
11 standing beside your attorney when he was saying that to
12 the judge, right?

13 A. Yes, ma'am.

14 Q. And then the Court asked you if you understood and
15 you understood that you had a cap of fifteen and you
16 indicated that you did, right?

17 A. I did, yes.

18 Q. The Court specifically asked you if you were guilty
19 of the crimes you were pleading to and you indicated to the
20 Court that you were?

21 A. I did.

22 Q. And you are today confirming that you are guilty of
23 the crimes that you --

24 A. No.

25 Q. Today you are not?

1 A. No.

2 Q. So under your sworn testimony to the Court then you
3 admitted that you were guilty, but you today you are not?

4 A. I did what I was coerced to do.

5 Q. Okay. So are you telling the truth today or were you
6 telling the truth then?

7 A. I'm telling the truth today.

8 Q. Okay. And then you were asked if there were any
9 promises or threats made to you and you indicated that
10 there were not?

11 A. There was no promises, no.

12 Q. Okay. But you indicated to the Court that there was
13 not any -- any threat to you, correct?

14 A. No, I didn't feel threatened.

15 Q. You did not feel threatened. And when the Court asked
16 you if you were entering this freely and voluntarily, you
17 indicated that you were?

18 A. Yes.

19 Q. Okay. You indicated that you understood all of the
20 constitutional rights that you were waiving by entering
21 your plea of guilty, correct?

22 A. Yes.

23 Q. The Court let you know that you were waiving the right
24 to continue going forward with the trial?

25 A. Yes.

1 Q. And that how --

2 A. I do remember him saying that, yes.

3 Q. And you remember him saying how it had to be a
4 unanimous verdict of the jurors in order for you to be
5 found guilty and you were waiving that right as well?

6 A. I do -- I do remember saying that, yes.

7 Q. Okay. And even after talking all through the rights,
8 you still indicated to the Court that you wanted to go
9 forward with your plea --

10 A. I did.

11 Q. -- and you did want to waive all those constitutional
12 rights?

13 A. At that time, yes.

14 Q. Yes. And part of what -- one of the things that the
15 Court said is that you were also waiving your right to
16 present defenses, correct?

17 A. Correct.

18 Q. And you agreed that you understood you were waiving
19 that right and you still wanted to plead guilty?

20 A. Correct.

21 Q. And you said that under oath?

22 A. Correct.

23 Q. Okay. And you indicated to the Court that you were
24 testified with your attorney?

25 A. If that's what you want to call it, yes.

1 Q. No, I don't want to call it anything. I want to go
2 back to the words that you said to the Court when you were
3 under oath.

4 A. Yes, at that time I was satisfied, yeah.

5 Q. Okay. And the Court specifically asked you if you
6 felt like you had had ample time to make your decision and
7 you indicated to the Court that you had?

8 A. Yes. I felt like I had to answer the questions that
9 was presented with what they wanted to hear.

10 Q. Okay. So -- but when you were sworn to tell the
11 truth, you understood that you were swearing to tell the
12 truth that day?

13 A. I understand that, yes.

14 Q. Okay. And so when the Court asked you why you wanted
15 to enter the plea of guilty, did you not say with your own
16 words that it's just not looking good and that's why you
17 decided to change your plea from not guilty to guilty?

18 A. That statement was made because of the statement
19 Mr. Anderson made to me, that the judge said the jury was
20 gonna find me guilty. I was scared. What else was I
21 supposed to do?

22 Q. Okay. But -- so when the judge asked you why you were
23 changing your -- your plea, did you indicate to the judge
24 that it was based on a rumor you had heard that the jury
25 was gonna find you guilty?

1 A. I did not say that.

2 Q. You did not. You, in fact, said it's just not looking
3 good, correct?

4 A. Right.

5 Q. And this is after you heard your stepdaughter and her
6 friend testify and be cross-examined?

7 A. It had nothing to do with that.

8 Q. But it was after that?

9 A. It was after that, but it had nothing to do with that.

10 Q. And then you agreed with the statement of the facts
11 that were laid on the record?

12 A. Say that again.

13 Q. You agreed with the statement of the facts that the
14 State put on the record?

15 A. Statement of the facts?

16 Q. So when the Court asked the prosecutor and Lucinda
17 McKeller, who was one of the investigators, to lay out the
18 facts that supported the charges you were pleading to, were
19 you standing there and did you hear that?

20 A. I agreed that the computer belonged to me and the home
21 was mine. That's the only thing I agree with.

22 Q. Okay. And so -- and this might be a little easier.
23 Just listen to the question I'm asking you. Did you hear
24 the State go through the facts that supported the
25 allegations you were pleading to? Were you standing there

1 when the Solicitor talked to --

2 A. You're talking about during sentencing or during the
3 trial?

4 Q. Yes, during the sentencing.

5 A. Yes. During sentencing, yes.

6 Q. You were standing there. And then the Court turned to
7 you and said do you agree with what they just said?

8 A. I don't remember that.

9 Q. Okay.

10 **MS. VALENZUELA:** And, Your Honor, that's on Page 354
11 to 355 where the Court asked the Defendant and he said that
12 he agrees with the facts.

13 BY MS. VALENZUELA:

14 Q. And before the end of -- before the judge sentenced
15 you, he gave you an opportunity to speak to the Court,
16 correct?

17 A. Correct.

18 Q. And you turned to the victim and you apologized to her
19 for what you did?

20 A. I said exactly what Mr. Anderson told me to say.

21 Q. What was that?

22 A. To apologize and maybe he won't give me the full
23 fifteen.

24 Q. Okay. So you didn't apologize. You said you were
25 actually taking responsibility for what you had done to

1 victim?

2 A. Exactly. I apologized because my attorney told me to
3 do it.

4 Q. Okay. But you did all of that under oath?

5 A. Yes.

6 Q. And you did all of that without once telling the judge
7 that you were only saying things because your attorney told
8 you to say them?

9 A. Exactly.

10 Q. And you never mentioned to the judge what you are
11 suddenly claiming today, which is that someone told you
12 that the jury was definitely gonna find you guilty?

13 A. Right, and that's why we're here today.

14 Q. Do you remember an expert named Al Johnson?

15 A. Yes.

16 Q. Okay. And who was that?

17 A. He was a private investigator that I hired.

18 Q. Okay. And you hired him as part of your defense?

19 A. Yes.

20 Q. And he worked with your attorney, Mr. -- with Andy?

21 A. Yes.

22 Q. Okay. And you -- he looked at the hard drive and the
23 computers that were at issue?

24 A. Yes.

25 Q. And he did all of that prior to you guys going to

1 trial?

2 A. Yes.

3 Q. And so your attorney had the foresight with you to
4 hire an expert who looked at the computer so that they
5 could challenge the charges of kiddie porn?

6 A. Yes.

7 Q. Okay. And you had communicated to your attorney at
8 least some form of alibi investigation claim, right?

9 A. Right.

10 Q. And your attorney had indicated to you that he had
11 looked at those, but that those were not gonna pan out?

12 A. Right. According to the date that they give us,
13 December 18th, that was the reason why I kept wanting him
14 to -- to go forth with that.

15 Q. Because the State kept giving you December 18th as one
16 of the dates that kiddie porn had been downloaded, you
17 wanted your attorney to look at that?

18 A. Yes, ma'am.

19 Q. And he did look at that and told you it was not gonna
20 pan out as an alibi defense?

21 A. He said it was not enough.

22 Q. Okay. He did talk to you about how he had called the
23 restaurant and this is a restaurant specifically that
24 writes down names as they sign in and that there was
25 nothing in there indicating that you had signed in at the

1 time the kiddie porn had been downloaded?

2 A. I don't remember him calling. I want to -- I thought
3 my wife called.

4 Q. Okay. So -- but you did get information that the
5 restaurant had a way to verify what time you were there
6 and that the documents that the restaurant had did not
7 support that you were in the restaurant at the time that
8 the kiddie porn was being downloaded?

9 A. The receipt we had -- the receipt we had supported
10 the day we were there.

11 Q. But you did have other information that the restaurant
12 was not able to give documented proof that you were there
13 at the time that the kiddie porn was downloaded, correct?

14 A. They just said they don't keep a ledger.

15 Q. So someone told you that there was no ledger?

16 A. Right.

17 Q. So there was an investigation into that alibi?

18 A. Yes, with my family. Not my lawyer.

19 Q. Okay. And then, additionally, wasn't there a time
20 that you indicated to your attorney that you were at work
21 during one of those porn -- during the incident that the
22 porn was downloaded?

23 A. At work? Probably so.

24 Q. Yes. And that there was a time clock that you could
25 show that you were at work at that time?

1 A. Sometimes there is, yes.

2 Q. And that the State actually ended up getting the time
3 card and showing that you had clocked out early enough to
4 get home and look at kiddie porn?

5 A. Yes. There was no -- I was not at work, but that
6 didn't mean I was at home.

7 Q. Okay. And then -- let's see. You did know going into
8 the plea that you were looking at a cap of fifteen years?

9 A. Yes.

10 Q. Okay. And that the same judge who had heard the
11 evidence presented at the trial was going to be presiding
12 over your guilty plea?

13 A. Yes.

14 Q. Okay. And after the plea -- or during the plea, did
15 you indicate to your attorney that you wanted to --
16 actually let me back up. Did the judge sentence you to a
17 sentencing range that was within the recommendation that
18 you were aware of as you walked into the courtroom?

19 A. He sentenced me to a ten, five and a three.

20 Q. Okay. And that ended up adding up to because of the
21 consecutive sentence to fifteen, right?

22 A. Yes.

23 Q. An aggregate sentence of fifteen?

24 A. Yes.

25 Q. And fifteen matches up with what you knew the cap was

1 that you were agreeing to plea to?

2 A. Right.

3 Q. So the sentencing judge did not give you a sentence
4 that exceeded the recommendation -- or the cap that you
5 were aware of going into the plea?

6 A. Right.

7 Q. Okay. And then did you -- did you indicate to your
8 attorney that you wanted him to appeal the guilty plea?

9 A. I didn't know I could.

10 Q. Okay. So that's a no, you never said to your
11 attorney --

12 A. That's a no.

13 Q. -- that you wanted him to appeal the guilty plea?

14 A. That's correct.

15 Q. Okay.

16 **MS. VALENZUELA:** Your Honor, if I could just have one
17 brief moment.

18 **THE COURT:** Yes, ma'am.

19 **MS. VALENZUELA:** Your Honor, nothing further.

20 **MS. GOLDBERG:** Briefly, Your Honor.

21 **THE COURT:** Okay.

22 **MS. GOLDBERG:** I beg the Court's indulgence.

23 REDIRECT EXAMINATION

24 BY MS. GOLDBERG:

25 Q. Mr. Sudduth, I believe you said on cross-examination

1 that you pled guilty because your attorney said that the
2 judge said the jury was gonna find you guilty and I think
3 you -- you ended that phrase with "and that's why we're
4 here today"?

5 A. Yes, ma'am.

6 Q. Is that what you said?

7 A. (Nods head.)

8 Q. What did that mean to you?

9 A. Because I felt like I wasn't in the right state of
10 mind at the time.

11 Q. Explain further.

12 A. Because I'm sitting here fixing to go to prison for
13 fifteen years. I didn't know what I was doing. When he
14 told me that, what I was facing, I got scared because I
15 didn't know if the judge was persuading the jury or what
16 was going on. I just knew I was scared. And, like I said,
17 I didn't take it at first. We had to sit back down and
18 before we were seated he did ask for a brief moment and he
19 leaned in and he said I think this is the best thing for
20 you to do, you know. He says the judge said the jury is
21 gonna find you guilty.

22 Q. Did you take that to mean -- did you believe that the
23 judge had talked to the jury?

24 A. At that moment I didn't know what was going on.

25 Q. Okay. And on cross-examination you went into the

1 December 18th issue, the State made a point about how the
2 restaurant may have not had any records, but you had
3 witnesses that were present with you that night?

4 A. Yes, ma'am.

5 Q. Including your ex-wife?

6 A. Yes, ma'am.

7 Q. And your lawyer knew all of this?

8 A. Yes, ma'am.

9 Q. And he told you that he wasn't gonna present that
10 information at trial?

11 A. Yes, ma'am.

12 Q. When did he tell you that?

13 A. Oh, he -- he told us that the week before trial.

14 Q. You knew that all along?

15 A. Yes.

16 **MS. GOLDBERG:** No further questions.

17 **MS. VALENZUELA:** No, Your Honor.

18 **THE COURT:** Okay. Sir, you may step down. Please be
19 careful.

20 (Witness excused.)

21 **MS. GOLDBERG:** Your Honor, at this time the Applicant
22 would call Lori Lantz.

23 (Whereupon, Lori Lantz was duly sworn by the Clerk of
24 Court.)

25 **THE CLERK:** Have a seat and state your full name for

1 the record.

2 **THE WITNESS:** Lori Lantz, L-A-N-T-Z.

3 LORI LANTZ,

4 having been duly sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MS. GOLDBERG:

7 Q. All right. Ms. Lantz, tell the Court what is your
8 relationship to Kendal Sudduth.

9 A. Kendal and I were married for approximately four
10 years. We had been together since 2006 as a romantic
11 couple and then we divorced in 2014.

12 Q. So you were married in 2010?

13 A. Yes, ma'am.

14 Q. You were with him, either married or in a romantic
15 relationship, while these charges were pending?

16 A. Yes, ma'am.

17 Q. Were you present in court when he was in court?

18 A. Yes, ma'am.

19 Q. And how many days did you go to court?

20 A. I went to rollicall a couple of times, but during the
21 trial every day. I was there every day.

22 Q. When he was on bond and he would go meet with his
23 lawyer or prepare for the case in any way, did you go with
24 him?

25 A. Yes, ma'am.

1 Q. Were you involved in -- in that preparation?

2 A. Yes, ma'am.

3 Q. One of Mr. Sudduth's allegations was that his attorney
4 didn't adequately prepare to present any defense at trial.

5 Do you have any personal information from your personal
6 observations that you can share with the Court on that
7 subject?

8 A. I felt like there was a lot of information presented
9 to Mr. Anderson that he didn't look into. As previously
10 stated, there were a lot of times when he would call me or
11 notify me asking me to prepare a list of witnesses or asked
12 my opinion on this or that, certain situations, you know.
13 He asked me several times about taking a plea and what I
14 thought about it and I stated that it was not up to me,
15 that they pretty much already knew how myself and the
16 family felt about it, so.

17 Q. Was there anything specific regarding preparation for
18 trial that he was asked to do that he didn't do?

19 A. I do know the witnesses that we had asked him to call
20 were never subpoenaed. It was discussed a couple of times
21 and then he kind of went back and forth with it. The night
22 before I remember getting a phone call. We were trying to
23 make a list of people that we could call at the last minute
24 and I just came back to the same list of witnesses, but
25 none of them were ever called or subpoenaed.

1 Q. Were they present in court?

2 A. A couple of them were present. Some of them were
3 waiting to be called before they actually showed up.

4 Q. Mr. Sudduth -- there's been some talk today regarding
5 the preparation for trial about this December 18th date.
6 Are you familiar with that?

7 A. Yes, ma'am.

8 Q. What can you tell the Court about December 18th?

9 A. My school was hosting a Christmas dinner at an Aiken
10 restaurant, so I met with a large group of my coworkers.
11 He attended this dinner with me. Since this -- these
12 allegations had happened so far, you know, past that, I
13 was able to get in contact with one of the coworkers who
14 was there. He still had the receipt and had the actual
15 date on it which, in turn, pushed me to investigate with
16 the actual restaurant. I was the one that called to find
17 out if they had a record of reservations, which they did
18 not, and at this point it had been several years later so
19 I knew they would not have it. And then I also was in
20 contact with the bank trying to figure out if they had any
21 way of verifying that date with his bank statements.

22 Q. But you were actually present with him that evening?

23 A. Yes, I was.

24 Q. Do you remember the timeframe?

25 A. I would say between maybe five and eight as far as

1 actually leaving my house, attending the dinner and
2 returning to my house.

3 Q. Did he return to your house with you?

4 A. Yes, he did.

5 Q. Did he stay at your house?

6 A. Yes, he did.

7 Q. So he was not at his house at all that night?

8 A. No, ma'am.

9 Q. And you would have testified accordingly at trial?

10 A. Correct.

11 Q. Mr. Sudduth has also presented an allegation that he
12 was coerced to plead guilty by his lawyer. Is there
13 anything that you personally observed that would add
14 towards that allegation?

15 A. I do remember in the holding room between -- the
16 trial went over the course of two days. It started late
17 and then we finished up the next morning before the guilty
18 plea, but before he took the plea he came into the holding
19 room and did mention, you know, it's not looking good, we
20 probably need to think about taking this plea bargain, the
21 jury's gonna find you guilty. I don't remember the quote
22 unquote, but something along that line what was mentioned.

23 Q. Was anything said that appeared to be improper?

24 A. Not other than strongly encouraging the guilty plea.

25 **MS. GOLDBERG:** All right. No further questions.

1 **THE COURT:** Yes, ma'am.

2 **MS. VALENZUELA:** May it please the Court?

3 CROSS-EXAMINATION

4 BY MS. VALENZUELA:

5 Q. Ms. Lantz, I'm sorry. You spelled your name earlier,
6 but I was not writing fast enough. Can you spell it one
7 more time?

8 A. Yes, ma'am. L-A-N-T-Z.

9 Q. T-Z. Okay. And so, Ms. Lantz, I just want to go
10 through what you were just describing to your ex-husband's
11 attorney real quick. When you were talking about how
12 Mr. Anderson, your ex-husband's attorney, would reach out
13 to you and ask you to prepare a list of witnesses and then
14 keep you involved and ask you questions, did you understand
15 that your ex-husband -- I guess he was your husband at the
16 time, right?

17 A. Right.

18 Q. Did you understand that your husband did want you to
19 be involved in his defense or had he indicated that he
20 really didn't want you involved?

21 A. Yes, ma'am, he did want me involved.

22 Q. He did want you involved?

23 A. Uh-huh.

24 Q. And so was Mr. Anderson's behavior in involving you
25 the investigation, keeping you up-to-date in the defense,

1 consistent with what you and your husband wanted him to do
2 at the time?

3 A. Yes, ma'am.

4 Q. Okay. And so -- and that's what he was doing, was
5 keeping you up-to-date in terms of discussions about taking
6 a possible plea?

7 A. I felt overwhelmed with the -- I felt pressured into
8 coming up with things at some points, but information I
9 wasn't aware of or that I didn't know or I didn't know
10 where I was gonna get it from, I felt like I was doing more
11 investigating sometimes, but that's just my -- you know,
12 how I felt about the situation.

13 Q. So Mr. Anderson was -- was consistently interested in
14 getting your help to try to build your husband's defense?

15 A. Yes, ma'am.

16 Q. To the point where you felt a little pressure to try
17 to find more witnesses to help your husband's defense?

18 A. Not necessarily more witnesses, but trying to get him
19 to investigate the ones that we originally mentioned to
20 him.

21 Q. Okay. And then you talked about how you had provided
22 that list of witnesses, and -- and I wanted to make sure I
23 understood this, and you said that you and your husband had
24 talked to Mr. Anderson prior to the trial about some of
25 those witnesses were not panning out?

1 A. Not that they weren't panning out, that they were
2 never called to make a statement, that no affidavits were
3 ever taken from any of the witnesses, and that's what we
4 discussed.

5 Q. And this was all with plenty of -- with at least
6 twenty-four hours -- more than twenty-four hours from
7 before the trial was gonna start?

8 A. We had mentioned to contact these witnesses plenty of
9 time in advance, yes, ma'am.

10 Q. Okay. And so -- but it was more than twenty-four
11 hours before the trial so that Mr. Anderson still could
12 have subpoenaed those witnesses?

13 A. Yes, ma'am.

14 Q. Okay. And, in fact, you said that some of those
15 witnesses were present in the courtroom during the trial?

16 A. I would say one of or two of them, yes.

17 Q. And then when you and Mr. Anderson and your husband
18 were preparing before trial, Mr. Anderson asked to try to
19 find more witnesses and you just confirmed that you weren't
20 able to find any more than the ones you had already been
21 discussing up to that point?

22 A. The night before the second day of the trial because
23 on the second day he was gonna cross-examine the victim and
24 he asked me to come up with a list of questions that he
25 could possibly ask her or me, if I were to be called. He

1 still was unsure if he was gonna call me as a witness, a
2 character witness basically. And he also asked me to
3 brainstorm any other witnesses or to brainstorm a list to
4 make sure we had everybody, but nobody was ever called or
5 subpoenaed on that list.

6 Q. Okay. And so part of the discussion that he was
7 having with you was preparing you for your testimony?

8 A. Part of it, yes.

9 Q. Yes. And your husband ended up deciding to plead
10 guilty -- to enter a plea of guilty before the State even
11 ended its case, correct?

12 A. Correct.

13 Q. Okay. And so your husband's decision to plead guilty
14 prevented your husband's attorney from even putting up a
15 case at trial?

16 A. I'm assuming it was.

17 Q. Yes.

18 A. As far as I'm understanding, I guess.

19 Q. And then you were talking about that school dinner
20 on December 18th. Your husband -- the allegations by the
21 State was not that your husband had viewed kiddie porn one
22 time, it was that he had downloaded or viewed or shared
23 pornography more than one -- that kiddie -- that child
24 pornography more than one time, correct?

25 A. From my understanding there were three specific dates

1 that the State brought up. One of those dates was the
2 December 18th. I don't remember if we had any alibis for
3 the other two dates because they were all in question. I
4 think one of them was the work timestamp thing, we couldn't
5 verify specifically where he was, but that's only three --
6 I remember there being three dates that they were bringing
7 up, you know, specifically.

8 Q. Okay. But then the State was able to get Minor ,
9 the victim, to testify that she had personally observed
10 your husband watching child pornography on the computer?

11 A. She testified to that, yes.

12 Q. She did testify to that. And then when Mr. Anderson
13 came in to talk to you guys and to talk to your husband
14 about pleading guilty, you had been there for the whole
15 trial?

16 A. Yes, ma'am.

17 Q. And did you feel like the jury was getting a very
18 positive impression of your husband and his behavior as it
19 involved what he did on the computer and what he had done
20 with the two minor children, Courtney and Minor ?

21 A. No, ma'am. I do believe that on the first day of
22 trial where the victim, Minor , first made her statements
23 and allegations, I think the first day went well in our
24 favor in my opinion. We left there knowing that she would
25 be cross-examined the next day, so that kind of left a bad

1 feeling with us knowing that she had time overnight and
2 then the next morning I felt like the whole demeanor of
3 Mr. Anderson was completely different. His demeanor was --
4 it seemed anxious, he stuttered a lot. The questions that
5 we came up the night before he never tended to any of them.
6 I just felt like he was very -- the second day was very
7 much different than the first and that was the day -- he
8 actually also called me that morning and asked me if he
9 thought that Kendal would take a plea bargain on his way to
10 the courthouse.

11 **MS. VALENZUELA:** Your Honor, if I could just have a
12 brief moment. Nothing further, Your Honor.

13 **THE COURT:** All right. Anything?

14 **MS. GOLDBERG:** No, Your Honor.

15 **THE COURT:** Ma'am, you may step down. Please be
16 careful.

17 (Witness excused.)

18 **MS. GOLDBERG:** That's all the Applicant's witnesses,
19 Your Honor.

20 **THE COURT:** All right.

21 **MS. VALENZUELA:** I'm sorry, Your Honor. The State
22 would call Mr. Anderson to the stand.

23 **THE COURT:** Mr. Anderson, come up and be sworn, sir.

24 (Whereupon, Paul Andrew Anderson was duly sworn by the
25 Clerk of Court.)

1 **THE COURT:** Mr. Anderson, tell us who you are and
2 spell your last name, please.

3 **THE WITNESS:** I am P. Andrew Anderson, Paul Andrew
4 Anderson, A-N-D-E-R-S-O-N, and I go by Andy, A-N-D-Y.

5 **THE COURT:** Yes, ma'am.

6 **MS. VALENZUELA:** Thank you, Your Honor.

7 PAUL ANDREW ANDERSON,
8 having been duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MS. VALENZUELA:

11 Q. Mr. Anderson, can you tell the Court a little bit
12 about your background in criminal history -- criminal
13 defense?

14 A. I was a public defender for about two years and I was
15 a prosecutor for about six years and I've been in private
16 practice since then.

17 Q. And in your private practice, do you do criminal
18 defense?

19 A. I do.

20 Q. And how long is since then?

21 A. Probably about sixteen years, seventeen years.

22 Q. Okay. So if I'm doing my math right, somewhere around
23 twenty-five years in criminal practice?

24 A. I graduated in '91.

25 Q. Okay. And you were hired by the Applicant to

1 represent him in this case?

2 A. Yes.

3 Q. Okay. And leading up to -- I want to go over how --
4 how you ended up preparing for trial. Can you talk to us
5 about what you did to investigate the allegations that were
6 made against your client before trial?

7 A. Well, I talked to Kendal a bunch. He was very active,
8 very engaging and, you know, it was a little -- it was a
9 little hard taking over a case that somebody else had
10 worked on and, frankly, the case had sat around for so long
11 and I honestly feel like it had gotten personal between
12 Kendal and the prosecutor a little bit, so it is -- it is
13 hard to kind of jump on -- on a boat midstream. But we
14 talked. I mean, the main thing we did was talk repeatedly
15 about the case and then I had never had a child porn case
16 where there were issues -- well, I'll say substantial
17 issues with who it belonged to because Kendal's computer
18 was in a -- in a house with a lot of traffic and it was not
19 password protected. So we -- we determined we were gonna
20 get an expert and we ended up with Al Johnson, who was
21 brilliant, and he was our forensic guy on the computer. So
22 it was Al, us. Kendal's wife Lori was very, very smart.
23 She's a school teacher. She's very nice, cared very much,
24 so she was very helpful.

25 Q. Let's focus on -- did I cut you off?

1 A. I don't know. I ramble.

2 Q. Well, let's talk about Al Johnson, the forensic expert
3 that you had hired.

4 A. Okay.

5 Q. Now you told us he was great, but tell us a little bit
6 about, you know, why was it that y'all decided to hire him
7 to do an investigation of this sort.

8 A. Well, number one is I did not fully understand -- I'm
9 not very computer savvy, but the key logger was interesting
10 and what -- in talking to -- I don't remember if it was
11 Lucinda McKeller or one of the investigators or the
12 prosecutor, but basically all she had to do was go to that
13 program and just, you know, find the images. She didn't
14 really go that deep into the computer.

15 Q. And when you say "she", you're saying some -- some
16 investigator for the State really could just use the key
17 logger to pull up the kiddie images -- the kiddie porn
18 images on the computer that belonged to the Applicant?

19 A. That's right, so she really didn't go deep into the
20 computer to ferret things out. My memory is she just went
21 to that key logger, saw several images and picked them,
22 basically what she would do -- and Al gave us some insight
23 on this -- was, you know, normally you get a few images
24 and that's enough to get your conviction, so they don't
25 really put that much effort into it because Al and I -- I

1 mean, my memory is we spent two full days at SLED with the
2 hard drive looking at that stuff and I doubt that these
3 investigators have that much time on every case.

4 Q. I just want to make sure that I'm understanding this
5 correctly. So the -- what Al, your expert, is telling you
6 is that when the State needs to prove allegations that
7 someone's been looking at or downloading kiddie porn, if
8 they've got, you know, two or three images they're golden,
9 so they don't spend a lot of time trying to get every
10 single image that they can pull off a computer?

11 A. (Nods head.)

12 Q. And so the idea here is your client made it a little
13 bit easier by having a key logger system improved on his
14 computer, the State used that and the State had kind of
15 easy pickings but hadn't gone in-depth into the hard drive?

16 A. I think that's accurate.

17 Q. Okay. And then was there anything that you did with
18 Al Johnson in those two full days at SLED that went a
19 little bit deeper than what the State had done in their
20 investigation?

21 A. Well, my idea was that if we could get, I guess, the
22 continuity of the downloads because there was no doubt that
23 there was child porn on the computer. There's no password,
24 many people had access to it, so I wanted to try to get to
25 know the person that was downloading it by the other stuff

1 that they downloaded contemporaneously with the child porn.

2 Q. Is that what you mean when you said the continuity of
3 it?

4 A. Yeah. I don't know if that's the right word, but,
5 yes.

6 Q. Okay. But just so that we all understand what you're
7 explaining is what someone downloads immediately before and
8 then immediately after the kiddie porn helps you get kind
9 of a profile of the person who's looking at the kiddie porn
10 based their interests at that time?

11 A. That was my thought.

12 Q. Okay. And was that also -- I mean, was Al Johnson,
13 your expert, in line with looking at that information?

14 A. Well, he thought that was a good idea, so we did that
15 and we -- you know, what we ended up doing was finding a
16 whole bunch more child porn that the State didn't find and
17 then the con -- whatever, the continuity or whatever the
18 word is, that really didn't seem to help us either because
19 -- you know, I was hoping -- Minor was on MySpace all
20 the time --

21 Q. Uh-huh.

22 A. -- and she and her friends had all of these
23 inappropriate -- I don't know what you call them,
24 conversations or whatever on the computer, so I was hoping
25 we would find Minor 's fingerprints on the downloads,

1 you know, teen kind of things right before and after, and
2 we didn't find any of that.

3 Q. And we're still talking about -- I mean, I know that
4 you said it's not like the formal term, but the continuity
5 theory where you were hoping you would find, you know, an
6 interest in fashion or child porn and then maybe MySpace
7 postings made by the victim side by side in terms of the
8 downloads?

9 A. Right.

10 Q. And you did not find that?

11 A. We did not find that.

12 Q. Okay. What did you find instead when you looked at
13 what was being downloaded in and around the time that
14 kiddie porn was being downloaded?

15 A. Honestly we kind of found stuff that wasn't really
16 helpful.

17 Q. And what do you mean by that?

18 A. Like we found some tattoo stuff and Kendal had an
19 interest in tattoos. We found some of that. We found some
20 weightlifting stuff. Kendal was into bodybuilding. Just
21 we didn't find stuff that was inconsistent with us doing
22 it.

23 Q. Not inconsistent with your client being the one who
24 had downloaded the kiddie porn?

25 A. Right.

1 Q. Okay. So not helpful in order for you to be able to
2 present that at trial?

3 A. Right.

4 Q. To argue that someone else had done that?

5 A. Right. And I was very excited. We -- one of the
6 things was this video and it was in German and it was a
7 girl and it was kind of -- child porn is not a real
8 exciting venue to investigate, but there was one girl in
9 this video and it was German that she was of marginal age
10 and she was wearing a ring on her left wedding ring finger
11 and I'm thinking hey, this is an adult girl, she just looks
12 young, and it was in German so I got somebody to translate
13 the German and it says something like you can't copy this
14 and then I talked to a German person who said that the
15 wedding ring on the left hand is not German, that it didn't
16 really mean anything that this person had a ring on her
17 left ring finger, but I just remember, you know, little
18 things popped up throughout the case that I thought were
19 gonna be helpful and then nothing ended up being helpful.

20 Q. Okay. And so that -- that whole video, you were --
21 you were distinctly trying to challenge the State's case
22 that this was a minor who was in the video which would make
23 it not qualified as child pornography?

24 A. Right. We just needed her to be eighteen and you
25 couldn't tell. And they ended up -- I don't think they

1 ended up using that one.

2 Q. That video? Well, the State did end up presenting
3 their whole case, correct?

4 A. I just don't remember if they were gonna use that one
5 or not because we -- Kendal and I got the preview. They
6 had everything on poster boards that they were gonna use
7 and so we kind of got a preview. I don't remember if they
8 were gonna use that video or not.

9 Q. Okay. But you did know from the poster boards that
10 you viewed before trial what they were going into trial
11 with, you just right now can't remember which -- whether
12 that was one of them?

13 A. Because we looked -- they were in the courtroom.

14 Q. Okay. Now still talking about -- when you said that
15 you and Al Johnson spent two days at SLED looking at the
16 hard drive and that y'all found additional downloads of
17 child pornography that the State had not yet been able to
18 find --

19 A. Yes, ma'am.

20 Q. -- or, you know, may not have found, those different
21 downloads would have given additional dates and times that
22 your client would have had to account for his whereabouts
23 if the State had found those?

24 A. I guess so.

25 Q. Okay.

1 A. The other thing Al was doing was looking for downloads
2 versus just viewing and I remember that being a very
3 strange issue because with the key logger, you know, you
4 didn't have to hit download because if it was on the screen
5 it would -- it would save it. And like Kendal said, he
6 didn't even realize that it was working, so he had that
7 thing on there and didn't -- didn't know it was activated
8 or working.

9 Q. Your client didn't know that the key logger was --

10 **THE COURT:** Excuse me, Counsel. Excuse me.

11 Okay. We understand we need to take a break. We've
12 got some technical difficulty going on and so we need to
13 let maintenance come in. Something's wrong with surge
14 protector equipment or something, so let's take -- I'm
15 sorry to interrupt you, but let's take fifteen minutes or
16 so and let maintenance come in and check things out.

17 Mr. Anderson, you know you can't talk to anyone?

18 **THE WITNESS:** Yes, sir. I do.

19 (Recess taken.)

20 **THE BAILIFF:** All rise. Court's now in session.

21 **THE COURT:** Thank you. Thank you. Please be seated.
22 Come back up here, Mr. Anderson.

23 (Whereupon, the witness returns to the witness stand.)

24 **THE COURT:** All right.

25 BY MS. VALENZUELA:

1 Q. Okay. I think where we left off -- I think where we
2 left off, Mr. Anderson, you were talking about Al looking
3 at downloads versus viewing. Can you explain what you
4 meant by that?

5 A. Well, not -- Al could explain it way better than I,
6 but not everything was downloaded but everything that was
7 viewed was getting -- not everything because it's not a
8 constant picture of everything streaming, it's intermittent
9 pictures of what's on the screen, so some of the stuff
10 wasn't downloaded.

11 Q. Okay. And so he was looking at trying to make that an
12 issue, but the key logger was also supporting the State's
13 case?

14 A. Yes.

15 Q. Okay. I want to turn briefly to -- and still
16 focussing on the allegation of your failure to investigate,
17 there was something that came up earlier about you failing
18 to investigate the alibi in terms of your client being in
19 different places at the time that the State alleged he was
20 downloading the porn.

21 A. We were excited about two potential alibis. One was
22 the timecard and we were disappointed that he had left work
23 early that day. And the other one, my memory is that --
24 because it was at the Bowery. They had a Christmas party
25 for her school, but my -- my memory was I called the owner

1 of the Bowery and he pulled the ledger and I thought the
2 party was the day before or the day after.

3 Q. Okay. And so you -- you specifically followed up with
4 the owner?

5 A. I did -- did follow up and that's my memory of it.

6 Q. Okay. And so that was not -- if it was the day before
7 or the day after, it wasn't gonna help establish the
8 timeline?

9 A. It wasn't the date, right. I think the date was the
10 18th and it wasn't -- the party wasn't on the 18th. I
11 don't remember seeing the receipt. Obviously if they have
12 a receipt for the 18th -- because I'm pretty sure the 18th
13 was a big day on the child porn issue.

14 Q. Okay. But you never saw it?

15 A. I don't remember seeing the receipt.

16 Q. Okay. Did you know anything about the receipt prior
17 to today?

18 A. I don't remember.

19 Q. Okay.

20 A. I just remember how helpful Lori was and I just can't
21 imagine if we had a receipt we didn't make more hay of that
22 for the right date.

23 Q. Okay. And then just to kind of focus on making hay of
24 that, that would have been when you presented your case and
25 you never got to that point because your client elected to

1 plead guilty?

2 A. Right. But, I mean, Kendal's right. I -- I didn't
3 think it was going well and the judge I will say was --
4 I've never been treated exactly that way by a judge. So we
5 go there for court the first day, we're not even starting
6 the trial, we're doing our motions, and, dang, if the
7 judge didn't revoke his bond the day before trial started.
8 I've never had that happen. Because I had warned Kendal
9 that would happen on Tuesday, I think, when we started the
10 trial and he did it on Monday and it was -- it was very
11 surprising. And he was against us -- I mean, I don't know.
12 I don't want to say anything improper. I felt like he was
13 against us out of the gate and it was -- it was rather
14 stressful.

15 Q. And we'll get to the plea decision. I just want to
16 wrap up the allegations of the investigation. There was
17 also talk about witnesses and did you feel that you had
18 subpoenaed or secured the attendance of any witnesses that
19 -- that you were aware of prior to going into the trial?

20 A. Yeah, we talked about -- some of the witnesses --
21 like there was a -- there was some drama at a grocery store
22 and we were talking about -- because it didn't play out
23 exactly the way the girl said and I just -- I think some
24 of that was a two-edged sword, so some of the drama would
25 be potentially -- I thought could be detrimental to us.

1 Getting her in the lie was helpful to us, but I don't
2 remember any specific witnesses that we neglected to get
3 there that were gonna be for sure helpful. You know what
4 Kendal said about the -- there was -- I believe that the
5 computer was unsecured in the chief's office, you know, I
6 believe that's the case, but I think that the forensics
7 and everything else were enough to overcome that.

8 Q. Talking about the -- so just wrapping up that witness,
9 you have no recollection of any witnesses that you were not
10 able to secure and then you specifically have recollection
11 of investigating the witnesses provided to you and making
12 strategic decisions about whether they would be more
13 harmful or helpful or potentially harmful to your client's
14 case?

15 A. I mean, I think that sums it up. We certainly talked
16 about many, many, many things. See, basically there's
17 not gonna be any witness to him allegedly having sex with
18 this girl and there's not gonna be any witness to him
19 downloading pornography if he downloaded pornography, so
20 we didn't really have any, you know, smoking gun witness
21 that we could call.

22 Q. But you did look into like times where the State was
23 alleging that porn was downloaded where he could have been
24 at a different place and those just did not pan out?

25 A. Those -- those two things -- because we didn't have

1 anything -- I think there were five dates and we didn't
2 have anything on the other -- on the other dates.

3 Q. Okay. Now going into trial, did you feel like you had
4 -- that you were prepared to go into the trial when y'all
5 started?

6 A. I mean, I felt we were prepared, but are you ever a
7 hundred percent perfectly prepared for a trial? I mean,
8 I don't think you could ever be perfectly prepared. I
9 felt prepared. I mean, if I may just say my biggest
10 regret is, and I've heard Kendal say I pressured him on
11 this plea, I wish I had pressured him on the -- we had a
12 plea for contributing and I wish I had pressured him
13 harder on that.

14 Q. Okay. Well, let's take that -- that detour real
15 quick. What was the plea offer that the State had offered
16 on contributing?

17 A. Just everything -- what was hard for Kendal was this.
18 Like I said, I think there was something personal between
19 he and the prosecutor and the prosecutor took a hard line
20 approach to it and said ten years, that's the best you're
21 ever gonna get, and then he came down and down and it got
22 down several more times and I do think Kendal -- maybe
23 Kendal thought it was gonna keep getting better, but that
24 contributing was -- plead straight up to contributing with
25 Judge Russo and be done and that would have covered

1 everything.

2 Q. Okay. So -- and if you plead straight up to one
3 contributing charge, that's a maximum of three years?

4 A. Yes, ma'am.

5 Q. And so he was facing a max of three years to one
6 contributing charge and what did your client indicate to
7 you when you made that -- when you conveyed that offer?

8 A. You know, he really vacillated and we -- my wife
9 joined us, my wife is an attorney as well, and I remember
10 the four of us talking in our office about it hard. I
11 mean, we were talking hard about it and I did tell him that
12 I thought Judge Russo would probably give him the whole
13 three years and he didn't want to go to prison and I didn't
14 blame him for not wanting to go to prison.

15 Q. And so what was his answer on the plea?

16 A. He vacillated and then he said no.

17 Q. He said no, he did not want to take that offer?

18 A. Yeah.

19 Q. Okay. And so let's just go back to -- you indicated
20 you did feel prepared or as prepared as you usually do
21 going into trial?

22 A. Yes.

23 Q. And then did you feel like you had -- you and your
24 client had adequate notice of the charges that he ended up
25 going to trial on?

1 A. And when we did it was confusing because they kept on
2 -- like Kendal said, it was weird. They kept on sending
3 more charges and faxing more charges and basically what
4 they were doing was -- I mean, they ended up with just
5 dozens of charges, but then they boiled it down to just
6 the handful that they were going forward with. And I
7 don't really know why they kept doing that, but they did.
8 It was odd.

9 Q. And so even with this odd behavior, you still -- you
10 and your client understood the allegations and the charges
11 that you were going into trial on and you didn't feel like
12 it prejudiced the case at all that you were able to put
13 forth?

14 A. I don't think that -- that didn't impact anything.
15 It was just -- it was just odd.

16 Q. Let's talk about when your client decides to plead
17 guilty. Did you --

18 A. Can I go back to one thing?

19 Q. Of course.

20 A. I do think that Ms. -- Ms. Mayes was in a similar
21 situation as I because she took the case over at the very
22 end.

23 Q. And Ms. Mayes is the prosecutor in this case?

24 A. Yes, ma'am. Because she didn't -- the prosecutor
25 that had a beef with Kendal wasn't she, so then she took it

1 over at the end and I think she was trying to clean up what
2 she felt had been done wrong on their end.

3 Q. And so you ended up going into trial with fewer
4 charges than you would have that you believed at one
5 point?

6 A. I mean, I wasn't -- I wasn't surprised by what we
7 ended up going to trial on. I mean --

8 Q. Okay. So turning to when your client decides to
9 plead guilty, did you think that -- that your level of
10 persuading him at that time when y'all were in the middle
11 of the trial to plead rose to the level of you coercing
12 your client to plead?

13 A. I don't believe that it was coercion, but I did -- I
14 did recommend that he do it. I mean, I thought that it
15 was going bad, the judge was definitely against us. I
16 don't remember saying per se the judge said the jury's
17 gonna convict, but, I mean, the judge certainly thought we
18 were guilty, thought we were gonna lose, I mean, and he was
19 not -- I don't think he was helpful in any way whatsoever
20 for us, for our side during the trial. And, you know,
21 there was even -- there was some issue at the very end that
22 he might get a little less than fifteen and we both said,
23 you know, he's gonna -- he's gonna give us the max.

24 Q. When you say "we both said", you and your client
25 understood that it was probably gonna be fifteen?

1 A. Yeah, because we -- I mean, we talked about it. It
2 was like a hope. And I do remember I said if you would be
3 acceptance -- accepting responsibility, maybe the judge
4 would give you a bone, but he wouldn't -- he -- he did not.
5 He did not.

6 Q. So your -- your understanding going into that guilty
7 plea was that it was your client -- although you had
8 recommended to him that he should plead, that it was your
9 client's decision to enter his plea of guilt that day?

10 A. Well, it was. And I would say that it was very
11 stressful. It was -- and what made it worse was the judge
12 was so impatient. So the prosecutor and I were talking
13 about working the case out and the judge said -- and I
14 forget the exact period of time he gave us, but it was
15 like I'll give you ten minutes, but in ten minutes we're
16 starting, and we were very close in this -- you know
17 getting, the case done and the ten minutes or whatever it
18 was was up and he's like all right, we're gonna go. And
19 then when we ended up pleading, I remember the judge being
20 mad that we didn't plead before the cross-examination.

21 Q. Of the victim?

22 A. Because the cross-examination of the alleged victim
23 was not pleasant and he was -- he seemed almost mad at us
24 that we went through that and then pled, but, you know, I
25 felt like if we had had a little more time we might could

1 have had a little more relaxed and pleasant experience
2 there that morning. But, yeah, it was -- it was tense.
3 And then he had some friends there, some family there,
4 his mom was very upset, I think his dad was there, he was
5 upset, and then he had a really, really, really nice
6 friend who was helpful who -- I mean, we were all talking
7 and it was stressful.

8 Q. And -- and you just -- you mentioned if y'all had had
9 a little bit more time it might have been more relaxed,
10 but it would not have been a different decision. It still
11 was just -- you were just saying a little bit more time,
12 it still would have been a guilty plea, it just would have
13 not been that -- that kind of hurry up if you're gonna
14 plead or not.

15 A. I think so. I mean, I think so. Well, in the end
16 the girl gets cross-examined and I think they redirected
17 her and we took another break and then it was after that
18 that we ended up pleading.

19 Q. Okay.

20 A. But it was just a -- it was not a pleasant morning.
21 It was very stressful and I don't doubt that he felt, you
22 know, pressured. I felt pressured, but I think that was
23 the right thing to do at the time. I just wish we had
24 taken the contributing before court.

25 Q. And the pressure that you're talking about is the

1 pressure of the evidence and the facts that had been
2 presented to the jury?

3 A. Yes, and -- and, you know, the whole setting and the
4 judge was impatient.

5 Q. But you do not recall ever saying to the Applicant
6 that the judge told you that the jury is definitely gonna
7 come back guilty?

8 A. I mean, I -- I'm sure I said something akin to that,
9 but, I mean, the judge had no way of knowing.

10 Q. Okay.

11 A. But the judge was against us. I mean, there's no
12 doubt the judge thought we were -- it seemed to me that
13 the judge thought we were wasting everybody's time, but
14 at the beginning of the trial we really didn't know we
15 were -- we didn't know what was gonna happen because the
16 girl was a wild card. You know, she had given --

17 Q. When you say "the girl", you mean **Minor** , the
18 victim?

19 A. The victim. She was a wild card and she came in and
20 did a -- did a pretty decent job for the State in her
21 testifying, but we really didn't know how she was gonna
22 come across and then once she -- I really felt like her
23 testimony got the child porn into evidence and then once
24 that jury saw that child porn, I really thought it was
25 gonna go, you know, super bad.

1 Q. I want to move along to after the plea. Did your
2 client ever indicate to you during or after the plea that
3 -- did he ever say to you that he wanted an appeal --

4 A. No.

5 Q. -- of his guilty plea?

6 A. No, I don't think we even talked about an appeal. I
7 don't think it ever even came up.

8 Q. Okay. So he does not ask you that he wants you to
9 appeal the guilty plea. Did you see -- you were present
10 during the guilty plea, right?

11 A. I was.

12 Q. Did you see any appealable issues taking part in that
13 guilty plea?

14 A. No. I mean, I didn't think the judge would cut us
15 any break. I figured the judge would give him the whole
16 fifteen.

17 Q. And so the plea went as you expected it to go?

18 A. It was still frustrating, but, yes.

19 **MS. VALENZUELA:** Please answer any questions opposing
20 counsel has.

21 **THE WITNESS:** Okay.

22 **MS. GOLDBERG:** May it please the court?

23 **THE COURT:** Yes, ma'am.

24 CROSS-EXAMINATION

25 BY MS. GOLDBERG:

1 Q. Good morning.

2 A. Hello.

3 Q. Mr. Anderson, I believe my client testified that
4 at one point in time there were eighty-four pending
5 indictments against him?

6 A. That doesn't sound wrong. That's -- that's -- that
7 could be right.

8 Q. And then by the time the trial came, it was all
9 condensed down to five?

10 A. That sounds right. Ms. -- Ms. Mayes boiled it down
11 to the basics.

12 Q. Was Mr. Sudduth aware of all these new indictments as
13 they were coming in?

14 A. Well, I mean, it was a joke. I mean, we would get --
15 I swear there was a period where we were getting something
16 almost every day from her. And we were in close contact,
17 so it was, you know, what did we get today.

18 Q. Did this make it confusing for you or him as to what
19 the charges he'd be facing were?

20 A. I mean, I don't think it was confusing, but it was
21 just -- it was odd.

22 Q. Were the indictments typically new allegations, were
23 they duplicative? What was the situation with the
24 indictments?

25 A. Without looking I think they were cumulative. I think

1 what Ms. Mayes did was boil them down and put everything
2 into just a few indictments, but I -- I could be wrong.
3 But I think -- I mean, that was the gravamen of it was
4 there's all this stuff and she was just gonna get it down
5 to the basics is the way I saw it.

6 Q. On the day of court -- you knew you were going to
7 court for a jury trial that week, correct?

8 A. Yes.

9 Q. Had you met with Mr. Sudduth and his wife leading up
10 to that to prepare?

11 A. Yes.

12 Q. Okay. Did Mr. -- did you understand at that time
13 what charges he would be facing at trial?

14 A. Yeah. Yes, ma'am.

15 Q. Did he understand what charges he would be facing at
16 trial?

17 A. I mean, I think he did. I mean, basically -- I like
18 to try to keep things simple, but the girl's saying that
19 he messed with her and there was child porn. I mean, that
20 was the basic gist of the case.

21 Q. And you were all aware of any particular dates
22 involved in any of that?

23 A. I just remember there were these -- I want to say
24 five dates that were so important on these downloads and
25 most of these -- in child sexual abuse cases usually the

1 prosecutors have these broad windows where they're not
2 really pinpointed down, so that's not unusual, but with
3 the -- with the child porn there was specific dates that
4 we were -- of which we were aware.

5 Q. That you were looking into alibis and things for?

6 A. Yes, ma'am.

7 Q. You said that you looked into the December 18th alibi
8 issue, but there were actually witnesses you could have
9 presented regarding that, correct?

10 A. I swear -- I mean, it's been a while, but I swear I
11 talked to the owner of that restaurant who said that party
12 was on another -- like the day before. It was like on
13 the 19th or the 17th because I just remember us being
14 disappointed that -- because we thought we had something.
15 And, again, if there was a receipt, I swear we would have
16 done something with the receipt.

17 Q. Okay. But you would agree that an alibi -- an alibi
18 defense doesn't necessarily need to be presented by
19 documentation, it could be presented by witnesses alone,
20 correct?

21 A. Well, sure.

22 Q. And there were several people who were with
23 Mr. Sudduth at that dinner who may have been willing to
24 testify, including his ex-wife, who testified here earlier
25 today?

1 A. Well, sure.

2 Q. Were you ever -- did you ever intend to use her as a
3 witness in trial to present that information?

4 A. I mean, my memory is that it was dismissed in my mind
5 as an issue because it was the wrong day.

6 Q. During the guilty plea you put several things on the
7 record, issues that you had looked into with the case that
8 you just thought needed to be presented to the Court on the
9 record regarding why you had originally proceeded to trial
10 versus a plea. One of those, you said that you were going
11 to make an argument that he couldn't be convicted of both
12 statutes, sexual exploitation of a minor second degree and
13 third degree for the same items. Do you remember telling
14 the judge or putting that on the record?

15 A. Vaguely.

16 Q. Okay. What -- why didn't you make a motion pre-trial
17 as to that?

18 A. I don't know.

19 Q. Do you remember what your argument was?

20 A. I assume it's just that if you -- if you have it --
21 and I don't know that I've ever had one that was actual
22 distribution, but the way they -- the way that statute is
23 interpreted by the State is if you have it available for
24 somebody else to take it, that's the same as distributing
25 it. So you can have it and then have it open in a

1 peer-to-peer sharing system so it's available for somebody
2 else to take it and that does seem a little duplicitous to
3 me. I mean, so I guess that's what I was thinking.

4 Q. That that would be a legal argument that the trial
5 shouldn't have gone forward on both of those charges,
6 correct?

7 A. I guess so. I mean, there was no allegation that he
8 distributed any porn to anybody seeing that the one has two
9 to ten and the other is a zero to ten.

10 Q. And you don't recall any particular reason you didn't
11 make that legal argument pre-trial?

12 A. I don't.

13 **MS. GOLDBERG:** I beg the Court's indulgence.

14 **THE COURT:** Yes, ma'am.

15 BY MS. GOLDBERG:

16 Q. You never spoke with Mr. Sudduth about appeal prior to
17 or after his plea?

18 A. I don't think we did. I don't think we did.

19 Q. Okay.

20 **MS. GOLDBERG:** I beg the Court's indulgence. No
21 further questions, Your Honor.

22 **THE COURT:** Anything further?

23 **MS. VALENZUELA:** Nothing, Your Honor.

24 **THE COURT:** Okay, sir. You may step down. Please be
25 careful.

1 **THE WITNESS:** Thank you, Judge.

2 (Witness excused.)

3 **MS. VALENZUELA:** Your Honor, I did have one case that
4 I wanted to hand up and bring to your attention and if I
5 could just have one moment.

6 **THE COURT:** Yes, ma'am.

7 **MS. VALENZUELA:** May I approach?

8 **THE COURT:** Yes, ma'am.

9 **MS. VALENZUELA:** And a copy was provided to opposing
10 counsel before we started the hearing, Your Honor.

11 And then just -- just to add to that record, Your
12 Honor, what was just handed up to you is Jones versus
13 State, 382 SC 589, and this case is one that talks about
14 a belated appeal when it's related to a guilty plea, Your
15 Honor. And turning to -- it's right above pin cite 597
16 -- or, excuse me, it's right underneath pin cite 596. It
17 says that counsel has a constitutionally-imposed duty to
18 consult with the defendant about an appeal when there's
19 either reason to think, one, that a rational defendant
20 would want an appeal; for example, there were non-frivolous
21 grounds for appeal, or, two, that the particular defendant
22 reasonably demonstrated to counsel that he was interested
23 in appealing, and I wanted to -- because this factors into
24 the belated appeal question, I wanted to make sure and
25 bring that to the Court's presentment.

1 And then I'm happy to do argument on the other
2 allegations if opposing counsel or the Court wants.

3 **THE COURT:** Yes, ma'am.

4 **MS. GOLDBERG:** Thank you, Your Honor. May it please
5 the Court? Several of the issues in the amended
6 application I think it's safe to stand on the testimony
7 for. Both the witness, Mr. Anderson, and Mr. Sudduth
8 testified very similarly regarding the situation with the
9 indictments and Mr. Sudduth did testify that he didn't
10 understand what he would be facing at trial. They both
11 testified somewhat similarly as to the conversations that
12 lead up to him pleading guilty, so I don't think I need to
13 elaborate further on the testimony presented.

14 There are a couple of things I do want to address.
15 Obviously the defense would argue that Mr. Anderson --
16 some of Mr. Anderson's strategy in preparing for trial
17 was inadequate and unreasonable. Mr. Sudduth did have
18 witnesses who could testify that he was -- did have a
19 solid alibi for at least one of the dates in question.
20 If it can be presented at a jury trial that there is an
21 alibi for one date, it can definitely be argued to the
22 jurors that the other dates may not be as reliable. That
23 wasn't even looked into as a defense. Mr. Sudduth would
24 argue that that would just go into the lack of preparation.

25 But, Your Honor, I do want to focus a lot on the

1 appeal. There are several excerpts in the transcript from
2 the plea that I'm just gonna cite for the record and I'm
3 citing to -- does Your Honor have both transcripts?

4 **MS. VALENZUELA:** The larger one is in the e-mail I
5 e-mailed.

6 **MS. GOLDBERG:** Here, this is what I'll do. I believe
7 in the record there are two transcripts. One includes all
8 of the pre-trial testimony, trial testimony and the guilty
9 plea. The smaller transcript is only the guilty plea
10 portion and those are the page numbers that I have in front
11 of me, so that's what I'm citing to.

12 **THE COURT:** I have a partial transcript.

13 **MS. GOLDBERG:** That would be the guilty plea.

14 **THE COURT:** Okay.

15 **MS. GOLDBERG:** So on Page 11 of that, the judge says
16 to Mr. Sudduth on Line 23, even if you were convicted,
17 talking about a jury trial, you have the right to appeal
18 the jury's decision, you're giving up that right today.
19 Later the judge calls in the jurors and explains to the
20 jurors what is going on. On Page 19, the judge tells
21 the jurors even if he was convicted by you, the jury, he
22 could appeal the jury's decision and he's waiving that
23 right. On Line 20 the judge says to the jurors, secondly,
24 we want to avoid any appeal of the proceedings and thus
25 there is some finality to it. And on Page 41, we brief

1 -- the Solicitor says we discussed all things with her --
2 with the victim involved in an appeal and potential
3 repercussions of appeals.

4 Your Honor, the point in citing to those is that
5 it's clear from the testimony there was no conversation
6 regarding right to appeal whatsoever between Mr. Anderson
7 and Mr. Sudduth. Typically in a guilty plea a judge will
8 advise a defendant that you have ten days to file notice
9 of appeal. In this case, the statements that were made
10 were actually incorrect. They pretty much informed
11 Mr. Sudduth that he had no right to appeal because he was
12 entering a guilty plea. Now it is true, and there is a
13 case -- I don't have that in front of me -- but I can --
14 but I don't think that the State would dispute this, that
15 a defendant can waive their right to a guilty plea, but it
16 does need to be done so voluntarily, intelligently, very
17 specifically. It has to be a part of the agreement, part
18 of the negotiation. He never waived his right to a guilty
19 plea, not specifically. That wasn't a part of the
20 negotiation. Nobody ever asked him if he was agreeing to
21 waive his right to a guilty plea. He was instead --

22 **THE COURT:** Right to appeal.

23 **MS. VALENZUELA:** Yeah, you're saying guilty plea.

24 **THE COURT:** Right to appeal.

25 **MS. GOLDBERG:** Sorry. Yes, appeal. And instead he

1 was essentially informed that he did not have a right to
2 appeal. I asked him today if he had known he had a right
3 to appeal, would he have asked his lawyer to file notice
4 and he said yes. I think he was misinformed legally in
5 that regard. He testified that he believed he did not
6 have that right and so I think he should be given that
7 right at this time.

8 **MS. VALENZUELA:** And, Your Honor, just going through
9 those in the same order as Ms. Goldberg briefly. May it
10 please the Court?

11 **THE COURT:** Yes, ma'am.

12 **MS. VALENZUELA:** So the indictments, Ms. Goldberg
13 rests on the testimony that was presented before you and
14 I would just remind the Court that when the Applicant was
15 questioned if he had a full understanding of the
16 allegations when he was going into court that day and he
17 said when we went through each one that he understood the
18 allegations that he was facing when he went in there.
19 His attorney testified that although it was odd, there
20 was no confusion, they knew what they were going into,
21 it didn't affect their preparation going into the trial.
22 And certainly all of those defendants -- all of those
23 indictments weren't even an issue when the Applicant
24 decided to enter a plea of guilty to those three specific
25 indictments that he ended up pleading about.

1 There was testimony by the Applicant that counsel
2 told him that the judge said the jury is gonna find you
3 guilty, but the Applicant's own witness, his ex-wife, also
4 testified and her testimony was that Mr. Anderson told his
5 client that he needed to plead guilty, he should plead
6 guilty. Maybe he was gonna be found guilty, but his own
7 witness, his ex-wife, did not testify at all that there
8 was any comment about the judge saying that he needed to
9 plead guilty or that the judge said that this is what was
10 going to come to it.

11 And then, additionally, you know, the Court can rely
12 on sworn statements that were made by the Applicant and
13 the Applicant confirmed today that he was under oath when
14 he told the Court that he was pleading of his own freewill,
15 voluntarily and freely, there were no threats made against
16 him, and when he was asked specifically by the Court why is
17 it that you are changing your guilty pleas, he indicated,
18 that it was not looking good for him. And, of course, this
19 was after he had just seen two -- you know, two of the
20 female victims come in and testify in front of the jury.

21 As to whether the investigative strategy was
22 inadequate, specifically you heard testimony today and
23 indications that to investigate an alibi you don't need
24 documented proof, you can also put that forward with
25 witnesses and they brought in a witness, the Applicant's

1 ex-wife, to testify that there was a Christmas party that
2 day. And the argument that was just presented to you was
3 that that was not looked into well enough by the trial
4 counsel, plea counsel. Plea counsel testified today that
5 he did look into those issues. He reached out to the
6 restaurant and his -- his understanding, his confirmation,
7 was that it was -- that the party was on different day and
8 so you wouldn't, you know, put up witnesses.

9 Further than that, he hadn't even got to the point
10 where he would put up his witnesses. He had witnesses in
11 the courtroom. Everyone who testified before you today
12 confirmed that there were defense witnesses in the
13 courtroom and that the supposed alibi witness that they
14 presented to you today was in the courtroom available to
15 testify but they did not get to that point because
16 Applicant decided that he was gonna plead guilty.

17 And you also heard testimony that plea counsel looked
18 into other -- a separate alibi for a different date, but
19 that, you know, records indicated that the Applicant had
20 left work early, so that one didn't end up working out
21 either.

22 And they hired an expert that even the Applicant
23 agrees was very invested in the defense of his case and
24 plea counsel testified they spent two days looking at the
25 hard drive alone, but unfortunately for the Applicant it

1 only ended up being more negative information to him than
2 positive due to the evidence that they had to deal with.

3 And then, finally, focussing on the appeal itself,
4 Your Honor, case law is very clear when it comes to an
5 appeal that it is different than a trial because you're
6 going into an appeal and you are telling the Court okay,
7 I know what I'm pleading to. He knew exactly what his
8 sentence was gonna be, it was a cap of fifteen. Did he
9 go in there and get exactly what he wanted? Yes, he got a
10 cap of fifteen.

11 Were there any other unusual issues that would have
12 indicated that a plea -- an appeal needed to be filed?
13 No. Plea counsel today testified that he was present
14 during the plea and did not find any reason why they
15 needed to appeal that guilty plea. The only reasons
16 provided to you today, and it's the Applicant's case to
17 make to you, was that if he had had a chance to appeal
18 that the appealable issues he would have made was that he
19 would have challenged the search warrant determination
20 that was made at the trial. As Your Honor is aware, a
21 court of -- an appellate court would not have been able to
22 look and review the decision of the trial court on the
23 search warrant when the Applicant had decided to plead
24 guilty because that was not gonna reach the plea. It
25 doesn't reach whether that would have changed the -- the

1 Applicant's mind. He waived that right. He told you
2 today, and he said under oath that he -- he testified
3 today that he told the judge under oath that he was
4 waiving any defenses.

5 And he also argued that he would have appealed the
6 two charges perhaps -- two separate indictments that were
7 based on the same conduct, but he didn't really understand
8 that argument. Today you have had nothing presented to
9 you that makes that even a credible argument as to why
10 that would have been an issue and certainly when he was
11 pleading there that would not have been valid either.

12 So there's no possible prejudice shown, there's no
13 impact shown as to how this guilty plea appeal would have
14 survived, how there was any possible thing that would
15 have indicated to plea counsel that he needed to appeal
16 and then certainly if the Applicant didn't even ask for
17 an appeal, then nothing falls into the case law that
18 indicates that he should get a belated appeal in this
19 case, Your Honor. Thank you.

20 **THE COURT:** Okay. All right. Ladies and gentlemen,
21 how we do things is by e-mail, so we'll be -- it's under
22 advisement. We'll talk about it, read some case law and
23 we'll be notifying you by -- counsel by e-mail that's on
24 the AIS website, okay? So I'm sure everybody keeps that
25 current, right?

1 **MS. VALENZUELA:** Yes.

2 **MS. GOLDBERG:** Yes.

3 **THE COURT:** I say that because I just moved, and I
4 had changed mine, so you've got to make sure you keep
5 your contact information current.

6 All right. Thank you.

7 (Whereupon, the proceedings were concluded at
8 11:14 AM.)

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C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 8th day of November, 2016.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

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

August 7, 2017

ISI Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Kendal Sudduth, SCDC No. 356184,)

C/A No. 2013-CP-41-00236

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

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Applicant, Kendal Sudduth, filed a *pro se* application for post-conviction relief with the Saluda County Clerk of Court on November 18, 2013. On November 8, 2016, pursuant to S.C. Code Ann. § 17-27-80, the action came before this Court for an evidentiary hearing at the Lexington County Courthouse. Applicant was present and represented by appointed counsel Kristy Goldberg, Esquire. Senior Assistant Deputy Attorney General Johanna Valenzuela appeared on behalf of Respondent. This Court concludes relief must be denied and sets forth the following in support of its decision:

I. Procedural History

Applicant is presently confined in the Allendale Correctional Institution pursuant to orders of commitment of the Saluda County Clerk of Court.

a. The Underlying Prosecution

On July 9, 2013, the Saluda County Grand Jury indicted Applicant for criminal sexual conduct with a minor, first degree (2011-GS-41-317A); criminal sexual conduct with a minor, second degree (2011-GS-41-313A); committing or attempting a lewd act upon a child (2013-GS-41-216A); sexual exploitation of a minor, second degree (2013-GS-41-205A); sexual exploitation of a minor, third degree (2013-GS-41-206A); and contributing to the delinquency of a minor (2013-GS-41-217A). Applicant was called to trial on these charges on July 15, 2013,

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before the Honorable J. Michael Baxley. Applicant retained the representation of P. Andrew ("Andy") Anderson, Esquire. Assistant Solicitors Suzanne Mayes and Kate Usry of the Eleventh Circuit Solicitor's Office prosecuted the case.

The State presented its case over two days of trial, then Applicant changed his plea to guilty, accepting a plea bargain from the State to the following charges: sexual exploitation of a minor, second degree (2013-GS-41-205A); sexual exploitation of a minor, third degree (2013-GS-41-206A); and contributing to the delinquency of a minor (2013-GS-41-217A). The State dismissed the criminal sexual conduct and lewd act charges. Also as part of the plea agreement, the State recommended and the court accepted a sentencing cap of fifteen years. (Plea Tr. p. 4).

Judge Baxley accepted Applicant's plea and sentenced him to a total of fifteen years' imprisonment –ten years for the second degree exploitation charge; five years, consecutive, for third degree exploitation charge; and, three years, concurrent, for contributing to the delinquency of a minor. (Plea Tr. p. 58).

Applicant did not appeal his convictions and sentence.

b. The Instant PCR Action

Applicant presented the following initial claims for PCR, supporting each claim with additional facts alleged in the *pro se* application:

(a) Ineffective Assistance of Counsel

- 1) failure to conduct an adequate pretrial investigation and a lack of preparation;
- 2) failure to challenge the chain of custody of alleged evidence;
- 3) failure to challenge the sufficiency and the manifest weight of the evidence;
- 4) failure to provide information to the applicant that is essential to a knowing and voluntary plea;
- 5) allowed applicant to plea under a "Sham Legal Process";
- 6) failure to challenge the court on the Proportionality Doctrine during sentencing; applicant's sentence is cruel and unusual punishment;

7) failure to advise the applicant of his right to appeal.

Following the *pro se* PCR application, Respondent filed its Return on April 30, 2014, requesting an evidentiary hearing.

Applicant was appointed Kristy Goldberg, Esquire, as counsel. Counsel Goldberg filed an amended application on May 19, 2014. In accord with Rule 71.1, SCRCP, the amended application included the following claims which were pursued at the evidentiary hearing before the undersigned:

Ineffective assistance of trial counsel--

- (a) failure to object when the Applicant received improper and inadequate notice of the charges he would be facing at trial;
- (b) failure to object pre-trial to the fact that Applicant was charged with and later convicted of Sexual Exploitation of a Minor in the Second Degree and Third Degree;
- (c) coerced the Applicant to plead guilty;
- (d) failure to adequately prepare to present a defense at trial;
- (e) failure to notify Applicant of his right to appeal and failing to file a notice of appeal.

II. The PCR Evidentiary Hearing

At the hearing, this Court had before it the Saluda County Clerk of Court records pertaining to Applicant's indictments and sentencing, Applicant's South Carolina Department of Corrections records, the *pro se* and amended PCR applications, the State's Return, and the transcript of Applicant's guilty plea and sentencing proceeding.

When the evidentiary hearing convened, the parties clarified that the claims going forward at the hearing would be those pursued within the amended PCR application PCR counsel Goldberg filed on Applicant's behalf. *See* Rule 71.1(d), SCRCP. (PCR Tr. pp. 4-5). Applicant, his ex-wife Lori Lantz, and his trial counsel Andy Anderson testified at the hearing.

a. Applicant's Testimony

Applicant testified on his own behalf, recalling that he retained counsel, Mr. Anderson, in January or February of 2013 after being dissatisfied with the representation of two prior counsel. (PCR Tr. pp. 6-8). Applicant remained out on bond pre-trial, meeting with counsel between February and July of 2013, knowing that trial was slated to begin on July 13 of that year. (PCR Tr. pp. 8-10). Applicant recalled that the night before trial, the State "kept faxing indictments" to counsel's office, which affected his recognition of the charges upon which we would be tried as well as his feeling of preparedness for trial. (PCR Tr. p. 10). However, Applicant was aware prior to trial that he was accused of contributing to the delinquency of a minor due to his allowing minors to see that he had downloaded child porn to his computer. (See PCR Tr. pp. 18-20, 22). Applicant testified that he was also aware prior to trial that his charges pertained to additional sexual contact alleged to have occurred between him and his stepdaughter when she was between the ages of seven and seventeen.¹ (PCR Tr. p. 19).

As to counsel's preparation for and performance at trial, Applicant testified that "at that time [he] was satisfied." (PCR Tr. p. 33). Applicant testified that he hired a private investigator to work with counsel to examine the hard drive and computers at issue in the investigation, as well as to find facts to corroborate an alibi for one of the dates that child porn was downloaded to his computer. (PCR Tr. pp. 36-37). Applicant testified counsel advised that the information obtained from investigation as to the December 18th date was "not enough" to defend him in front of the jury on alibi. (PCR Tr. p. 37). He stated his family, and not his lawyer, investigated the alibi defense. (PCR Tr. pp. 38, 42). Applicant also agreed that at trial, the State established

¹ Both the stepdaughter and her friend who also witnessed the pornographic material testified at trial. (PCR Tr. pp. 21-23). Their testimony detailed the computer programs Applicant would use to view and delete the child pornography on his computer. (PCR Tr. pp. 23-28).

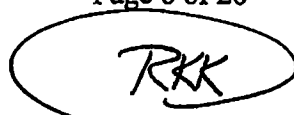
when Applicant clocked out of work on one instance where child porn was downloaded. This contradicted Applicant's alibi for this instance, wherein he said was at work and was not at home to download the illicit material. (PCR Tr. pp. 38-39).

Applicant also testified that the defense witnesses were not settled upon until the day of trial, and counsel did not subpoena or call anyone to be present at trial. (PCR Tr. p. 12). Nor did counsel prepare any witnesses, including, specifically, a group of school teachers Applicant suggested as witnesses who could allegedly testify that Applicant was in Aiken at a dinner during one of the charges he faced. (PCR Tr. pp. 12-13). Applicant also testified counsel "flat-out refused to question" the chain of custody on Applicant's computer which was seized and housed at SLED. (PCR Tr. p. 13).

During trial, Applicant changed his plea to guilty, but testified at PCR that he "felt like [he] was under duress to take the plea." (PCR Tr. p. 11). Applicant testified that during a break in the trial, counsel informed him "that the judge said the jury is gonna [sic] find me guilty, I better take a plea." (PCR Tr. p. 11; see also pp. 33 and 41). He advised Applicant should accept the plea. Applicant further testified that after he told counsel "no," counsel "asked the judge to hold on a minute and then he sat there and kept talking to [him] and finally he – he got [Applicant] to take the plea." (PCR Tr. p. 11). Applicant testified he did not believe counsel should have "known what the judge or the jury was gonna [sic] say." (PCR Tr. p. 12). He admitted that he informed the plea judge he was pleading guilty because the case was "not looking good," but testified, "[t]hat statement was made because of the statement Mr. Anderson made to me, that the judge said the jury was gonna [sic] find me guilty. I was scared." (PCR Tr. p. 33; see also p. 41 (... I got scared because I didn't know if the judge was persuading the jury or what was going on. I just knew I was scared.")).

As to the charges and penalties faced at the plea, Applicant testified at PCR that he did not know that second degree exploitation of a minor was a violent crime carrying two to ten years—he believed it carried zero to ten years. (PCR Tr. p. 15). Applicant also testified that at the time of the plea, counsel expressed that he “felt like the second and third degree [charges] was double jeopardy,” and that the more Applicant learned about his charges post-plea, he felt counsel should have argued that during trial. (PCR Tr. p. 15). Applicant also testified, though, that he knew he was receiving a benefit from pleading guilty because the State was dismissing the more serious charges pertaining to the physical acts conducted with his stepdaughter, and was also agreeing to lower the maximum potential sentence from twenty-three to fifteen years. (PCR Tr. pp. 28-29). He agreed the judge sentenced him to the agreed-upon cap. (PCR Tr. pp. 39-40). Applicant testified that he recalled the stages of the plea colloquy with the judge. (PCR Tr. pp. 29-30).

Applicant testified at the PCR that, in contrast to his admission during the plea, he was not guilty of the offenses. (Compare PCR Tr. pp. 30-31 with Plea Tr. pp. 13-14). In addition to his prior assertion of guilt – and, as previously referenced above – Applicant also asserted at the time of the plea that he was pleading guilty specifically because it appeared that the trial was not going to hold a promising end for him. (PCR Tr. p. 33; see also Plea Tr. p. 13, “It’s just not looking good” and “I’ve done the math and it don’t add up...”). Applicant conceded in his PCR testimony that he had waived his trial rights, but asserted he did so because he “was scared,” and posited, “What else was I supposed to do?” (PCR Tr. p. 33). In some explanation of the answers given at the plea, Applicant testified he “felt like [he] had to answer the questions presented with what they wanted to hear,” regardless of his understanding that he was sworn to tell the truth.

A handwritten signature consisting of the letters 'RKK' in a cursive style, enclosed within a hand-drawn oval.

(PCR Tr. p. 33). Applicant stated he apologized to the victim during sentencing because his "attorney told [him] to do it." (PCR TR. p. 36).

As to the possibility of appealing the plea's outcome, Applicant testified defense counsel never talked to him about that, nor filed notice of appeal. (PCR Tr. p. 16). Applicant stated his belief at the time of the plea was that an appeal was not a possibility: "I thought the only way you could appeal was by trial, a conviction. I didn't know you could appeal a plea sentence." (PCR Tr. p. 16). Applicant further stated that he believed counsel should have appealed the court's ruling regarding the search warrant leading to Applicant's arrest, which was subject to a pre-trial motion, as well as the double jeopardy issue he had already vaguely and summarily referenced previously in the PCR hearing regarding the convictions of sexual exploitation of minor, second degree, and sexual exploitation of minor, third degree, though he conceded the issue was never argued in court. (PCR Tr. pp. 15-17). Applicant testified he would have requested an appeal had he been notified of his right to do so. (PCR Tr. p. 18).

b. Lori Lantz's Testimony

Applicant's ex-wife, to whom he was married during the pendency of his charges, also testified on his behalf. (PCR Tr. p. 43). Lantz testified that she attended trial and was involved in the preparations for trial. (PCR Tr. pp. 43-44). She stated she felt "that there was a lot of information presented to Mr. Anderson that he didn't look into," such as potential witnesses and potential alibis. (PCR Tr. pp. 44-46, 50-51). Lantz testified Applicant wanted her involved in trial preparation with his attorney, which caused her personally to feel "pressured into coming up with things at some points" to get to counsel to get him to investigate, but Ms. Lantz indicated that no affidavits were ever taken of the witnesses and they were not subpoenaed to court (though she admitted "one of or two of them" were actually in court). (PCR Tr. pp. 47-49; see

also p. 45 ("A couple of them were present. Some of them were waiting to be called before they actually showed up."). She also acknowledged counsel spent time preparing her to testify at trial even though he was unsure if he was going to call her. (PCR Tr. p. 50). Lantz testified, had she been called as a witness, she would have testified that she was with Applicant on December 18th at a dinner in Aiken between approximately 5:00 pm to 8:00 pm. (PCR Tr. pp. 45-46). However, she also testified: "there were three specific dates ... I don't remember if we had any alibis for the other two dates...." (PCR App. p. 51). Ultimately, Lantz testified counsel did not reach the point of having to call any witnesses to testify because Applicant pled guilty before the end of the State's case. (PCR Tr. p. 50). Lantz stated she thought the first day of trial went well for Applicant, but counsel appeared anxious in court the next day and called Lantz prior trial reconvening that morning to ask whether Applicant may take a guilty plea. (PCR Tr. p. 52). Lantz recalled counsel advised as to the trial, "it's not looking good," and "strongly encouraging the guilty plea." (PCR Tr. p. 46).

c. Trial Counsel Anderson's Testimony

The State then presented counsel, Mr. Anderson, who testified first as to his background. Counsel testified that prior to entering private practice in criminal defense, he was a public defender for two years and a prosecutor for six, and had approximately twenty-five years of criminal trial experience. (PCR Tr. p. 53). Counsel recalled that when he took on Applicant's case, he identified issues concerning who could have accessed Applicant's computer who could have downloaded the illicit files because the computer was not password protected. He hired an investigator to forensically examine the computer because the State had utilized a key logger (input-tracking) program Applicant had installed on his own computer to pull up the images with which he was charged. (PCR Tr. pp. 54-57). Counsel stated that as a result of that investigation,

"what we ended up doing was finding a whole bunch more child porn that the State didn't find and . . . that didn't seem to help us." (PCR Tr. p. 57).

He testified that as part of that investigation, which took place over a two-day period at SLED, they examined the stepdaughter's friends' social media posts made from Applicant's computer, hoping to find someone else's "fingerprints on the downloads," or "teen kind of things." (PCR Tr. pp. 57-58). This did not pan out. (PCR Tr. pp. 58-59). The investigator, instead, found timestamped searches for things that Applicant had interests in, like tattoos, accessed simultaneous to the child porn download. (PCR Tr. pp. 57-58). As a result of this and other investigative leads followed into the child victims who appeared in specific pornographic materials, counsel recognized that it was not an available defense to argue that someone else had access to Applicant's computer and downloaded the illicit material. (PCR Tr. pp. 59-62).

Counsel likewise testified that he investigated potential alibis, one being Applicant's timecard at work which may have removed him from his home at the time of one illicit download, and another being his attendance at a holiday dinner for his wife's school, but those dates and times ultimately did not provide Applicant with an alibi as hoped. (PCR Tr. pp. 62-63, 76-77). Counsel recalled reaching similar dead-ends when he spoke with witnesses named by Applicant and Lantz. (PCR Tr. pp. 64-66).

In sum, counsel testified he felt as prepared for trial as he usually did, but that as an attorney, one never feels "perfectly prepared." (PCR Tr. pp. 66-67). He testified that he was not surprised by the charges that they ended up proceeding to trial upon. (PCR Tr. p. 69). He also stated that the extra indictments faxed by the prosecutor on the eve of trial were boiled down to the basics by the time trial began, and that leading up to and during trial Applicant and counsel

both knew the nature of the charges: that "the girl's saying that he messed with her and there was child porn." (PCR Tr. pp. 74-75).

In regards to the plea decision, counsel noted Applicant's previous decision to turn down a plea offer to one contributing to the delinquency of a minor charge which carried a mere three-year sentence. (PCR Tr. pp. 66-67, 71). He opined that "maybe Kendal thought it was gonna [sic] keep getting better," so he rejected that offer even after a frank discussion with counsel, counsel's wife (also an attorney), and Lantz. (PCR Tr. pp. 66-67). As to the plea deal Applicant ultimately accepted, counsel testified he did not believe he coerced Applicant, but he "did recommend that he do it. . . . the judge certainly thought [Applicant was] guilty, . . . he was not [] helpful in any way whatsoever for [them] during the trial." (PCR Tr. p. 69; *see id.* at 72). Counsel testified that he and Applicant both understood at the time of the plea that the judge would likely give him the agreed-upon maximum of fifteen years. (PCR Tr. pp. 69-70). He stated it was a stressful decision for his client to make to plead, and the judge was impatient and gave them only about ten minutes to make the decision. (PCR Tr. p. 70). Counsel testified the judge's frustration appeared to stem from Applicant's decision to take the plea being made after the victim had testified and been cross-examined: "I remember the judge being mad that we didn't plead before the cross-examination ... [b]ecause the cross-examination of the alleged victim was not pleasant" (PCR Tr. p. 70).

Counsel testified that he did not think he talked to Applicant about an appeal after the plea, Applicant did not ask him to appeal, nor did Anderson think there was any appealable issue as a result of the outcome of the plea. (PCR Tr. p. 73). As to the failure to move pre-trial to bar prosecution on the second-degree and third-degree charges for sexual exploitation of a minor for distribution of the same items, counsel testified that it may "seem a little duplicitous" to charge

twice for a single item which is shared through a peer-to-peer sharing system online. (PCR App. pp. 77-78). He said “there was no allegation that he distributed any porn to anybody.” (PCR Tr. p. 78).

III. Findings of Fact and Conclusions of Law

After considering the allegations raised in the amended application, hearing the testimony presented at the evidentiary hearing, considering the record in this action incorporated by way of the State’s Return, and after reviewing of the transcript of the PCR proceedings occurring on October 14, 2014, the undersigned denies the application.

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

a. Standard of Review

When an applicant “enters a plea on the advice of counsel, [he] may only attack the voluntary and intelligent character of the plea” by fulfilling a two-prong test established regarding proof of ineffective assistance of counsel. *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370 (1985) (adopting seminal ineffective assistance of counsel standard from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984), and applying to cases resolved via guilty plea)). “A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel’s performance was deficient; and second, evidence that the applicant was prejudiced by that deficiency.” *Stalk v. State*, 383 S.C. 559, 560–61, 681 S.E.2d 592, 593 (2009) (citing *Hill v. Lockhart*, *supra*). In regards to the first prong, “[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms.” *Strickland v. Washington*, *supra* at 688, 104 S.Ct. at 2065. In order to satisfy the

prejudice requirement, “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pled guilty and would have insisted on going to trial.”

Hill v. Lockhart, *supra* at 59, 106 S.Ct. at 370.

At all times during the proceeding, the Applicant maintains the burden of establishing that he is entitled to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Moreover, the proceeding is coupled with “a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). Therefore, Applicant must demonstrate that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 441(1985) (quoting *Strickland v. Washington*, *supra* at 686, 104 S. Ct. at 2064).

b. The Merits of the Allegations

The totality of Applicant’s claims relate to the performance of defense counsel, Mr. Anderson. As a matter of general impression, this Court finds not credible Applicant’s testimony and assertions. In contrast, this Court finds counsel’s testimony credible and persuasive on all matters. These credibility findings have been applied to the Court’s findings and conclusions set forth below.

Also as a matter of first impression, this Court finds applicable the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgement in his representation of Applicant at all stages of Applicant’s trial and plea. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*, *supra*). “[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed

ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis in original). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Thus, any post-conviction relief court must be wary of second-guessing trial counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

This Court additionally finds at the outset all claims from the *pro se* petition not duplicated in the amended application waived and abandoned as they were not addressed at the evidentiary hearing. S.C. Code Ann. § 17-27-90.

Proceeding on the claims raised in the amended application, this Court finds each without merit and addresses them in the order raised within that application:

1. Counsel's Failure to Object to Alleged Inadequate Notice of the Charges Faced at Trial

This Court finds Applicant and counsel were aware and informed of the nature of the charges in advance of the trial. This Court concludes counsel did not provide deficient representation in failing to object to the alleged inadequate notice of such charges, and also that Applicant failed to show any prejudice, because there was no basis upon which to object. See *Strickland v. Washington*, *supra*; *Hill v. Lockhart*, *supra*. Applicant could not prevail on any objection the indictments against him so long as the State's notice of the charges was "stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon." *Carter v. State*, 329 S.C. 355, 362-63, 495 S.E.2d 773, 777 (1998); S.C. Code Ann. § 17-19-20 (allegations sufficient for indictment).

Some testimony at PCR indicated the State altered the charges against Applicant on the eve of trial by faxing a number of additional indictments to Counsel's office, leading Applicant to uncertainty as to the charges which would be brought against him at trial. (PCR Tr. p. 10). But counsel, with over twenty years of criminal trial experience, credibly testified that he was prepared for Applicant's trial and that he was not surprised. (PCR Tr. pp. 67-69). Counsel also noted that the charges were ultimately condensed to five. (PCR Tr. p. 74). Regardless of the number of indictments, this Court finds counsel knew that the nature of the charges concerned Applicant's sexual interactions with his stepdaughter as well as child pornography identified on his computer. (PCR Tr. pp. 74-75). Applicant himself further corroborated counsel's recollection of the charges at trial. (PCR Tr. pp. 18-22).

In light of counsel's preparation for and awareness of the charges, as well as Applicant's admissions that he was at all times aware of the nature of the charges against him, this Court finds Applicant fails to show counsel was deficient in failing to object on the basis that he had insufficient notice of any charge levied at the time of trial, or that Applicant was prejudiced from lack of objection. Since Applicant fails to meet his burden of establishing the first and second prong of ineffective assistance of counsel under *Strickland* and *Hill* the undersigned denies and dismisses this claim with prejudice.

2. Counsel's Failure to Raise Pre-Trial Objection to Applicant Being Charged with Second Degree and Third Degree Sexual Exploitation of a Minor

Applicant testified at PCR that counsel expressed a belief the State's charging him with both second degree and third degree sexual exploitation of a minor constituted double jeopardy, but he never presented this argument to the trial court. (PCR Tr. p. 15). This Court finds no

deficient performance and resulting prejudice in relation to this second claim for relief. *Strickland v. Washington, supra; Hill v. Lockhart, supra.*

Counsel stated at the guilty plea that while he believed there was a “high likelihood” that Applicant would be found guilty of the charges pled had trial continued, but that he “was going to make an argument to Your Honor that he couldn’t be convicted of both statutes for the same items” (Plea Tr. p. 7). That argument was not made; however, counsel credibly testified at PCR that he considered arguing an interpretation of the statute which would bar prosecution for both second and third degree exploitation when the underlying facts concern distribution of child porn through an online peer-to-peer sharing system. (PCR Tr. pp. 77-78).

This Court finds counsel exercised a reasonable professional decision in choosing not to pursue this argument in light of Applicant’s decision to plead guilty because counsel could not prevail in his argument. *Ard v. Catoe, supra; Lounds v. State, supra.* The Double Jeopardy Clause of the United States Constitution “protects only against the imposition of multiple *criminal* punishments for the same offense.” *Hudson v. United States*, 522 U.S. 93, 99, 118 S.Ct. 488, 493 (1997) (emphasis in original). “Under traditional double jeopardy analysis, multiple punishment is not prohibited where each offense calls for proof of a fact that the other does not.” *State v. Cuccia*, 353 S.C. 430, 438, 578 S.E.2d 45, 49 (Ct. App. 2003); *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932). “A mere overlap in proof does not constitute a double jeopardy violation.” *Id.*

This Court finds counsel’s purported, but un-argued, challenge does not provide a basis upon which he could prevail. Applicant’s charges contain distinct elements such that double jeopardy does not apply. Applicant’s indictment for third degree sexual exploitation of a minor reads:

that he did unlawfully and while knowing the character or content of the material, did possess material that contained a visual representation of a minor engaging in sexual activity, to wit: photograph(s) and/or digital image(s) and/or digital electronic file(s) and/or film(s) of a minor child engaged in sexual activity and/or a visual representation of a minor child engaged in sexual activity as defined in Section 16-15-375(5), in violation of S.C. Code of Laws Section 16-15-410.

Applicant's indictment for second degree sexual exploitation of a minor reads:

that he did unlawfully and while knowing the character or content of the material, (1) record, photograph, film, develop, duplicate, produce, or create digital electronic file material that contains a visual representation of a minor engaged in sexual activity; or (2) distribute, transport, exhibit, receive, sell, purchase, exchange, or solicit material that contains a visual representation of a minor engaged in sexual activity, to wit: did duplicate, create, solicit or receive a photograph or digital image or digital electronic file(s) or film of a minor engaged in sexual activity and/or material containing a visual representation of a minor engaged in sexual activity as defined in Section 16-15- 375(5), in violation of South Carolina Code of Laws Section 16-15-405.

Because a mere overlap in proof cannot constitute double jeopardy and because each charge contains elements that the other does not, this Court finds counsel was not ineffective for failing to argue that the charges were duplicative before the trial court. *Blockburger v. United States, supra*; *State v. Cuccia, supra*.

This Court further finds counsel's decision not to pursue that argument caused Applicant no prejudice. There exists no reasonable probability that the result of the proceeding would have been different had counsel argued his purported motion. Applicant was not prejudiced by counsel's representation because there is no reasonable likelihood of a different result had counsel acted in the manner complained of—double jeopardy does not act as a bar to Applicant's charges for second and third degree exploitation of a minor. *Id.*

Since Applicant further fails to meet his burden of establishing he is entitled to relief upon either prong of this claim of ineffective assistance of counsel under *Hill* and *Strickland*, this claim for relief is denied and dismissed with prejudice.

3. Petitioner's Alleged Involuntary Guilty Plea

The undersigned also finds Applicant pled guilty freely, knowingly, and voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 (1969). "In addition to the requirements of *Boykin*, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000).

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000).

A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a defendant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Blackledge v. Allison*, 431 U.S. 63, 97 S. Ct. 1621 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from their truth. *Blackledge v. Allison*, *supra*; *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975).

This Court finds meritless any contention by Applicant that he did not plead guilty knowingly and voluntarily. This Court finds very credible counsel's testimony regarding his preparation and advice concerning the charges, the plea offers rendered by the State, Applicant's rejection of a more favorable plea deal, and Applicant's acceptance of the plea deal entered after

the State had presented a large part of its case at trial. (PCR Tr. pp. 66-71). The plea transcript corroborates that counsel did address with his client the elements of the charges pled and the benefit of accepting the plea bargain, as well as the rights waived by deciding to withdraw from the ongoing trial and enter the plea. (PCR Tr. pp. 6-8).

This Court conversely finds Applicant's testimony on this topic not credible. (*See generally* PCR Tr. pp. 11, 15, 30-33). The PCR record instead bears out that Applicant was aware of the benefit received from accepting the plea deal obtained, that he recalled accepting the guilty plea in front of the judge by engaging in the plea colloquy, and that he agreed to the sentencing cap of fifteen years. (PCR Tr. pp. 28-30, 39-40). Specifically on the allegation of coercion, Applicant's ex-wife testified that she witnessed Applicant's and counsel's consideration of the guilty plea prior to its acceptance and believed counsel was only "strongly encouraging" Applicant to accept the plea. (PCR Tr. p. 46).

This Court also finds the plea court specifically reviewed the potential sentences with Applicant and that he was accepting the fifteen-year cap on sentencing. Applicant responded that he understood, that he wished to plead guilty, and that he was making that plea without the influence of drugs, alcohol, or medication. (Plea Tr. pp. 8-9). This Court finds the record reflects Applicant was advised of the waiver of his constitutional rights by the plea court, including his right to continue with trial by jury. (Plea Tr. pp. 10-12). This Court finds Applicant on three occasions answered the plea court that the decision to plead was his own, and that no one forced him to do so. (Plea Tr. pp. 12-13 ("Yes, sir, it's mine")). Applicant informed the plea court he changed his plea to guilty because it was "just not looking good," that he had "done the math and it d[idn't] add up," so he believed that accepting the plea offer was "the best thing." (Plea Tr. p. 13).

This Court finds Applicant failed to meet his burden in proving he pled guilty involuntarily and unknowingly. *Blackledge v. Allison, supra*. The record reflects Applicant admitted his guilt to the plea court after being fully informed of the nature and consequences of his plea by his attorney and by the plea court. (Plea Tr. p. 14). The record further reflects and this Court further finds Applicant entered his plea on his own accord, (Plea Tr. p. 11), while acknowledging the waiver of his right to trial, including the cross-examination of witnesses and the presentation of witnesses, if any, though he would be presumed innocence. (Plea Tr. pp. 10-11). This Court also finds that in regard to the length of sentence received, Applicant cannot prove prejudice for the reasons stated within the remainder of the undersigned's Order, specifically in regards to the sentence exposure Applicant faced had he proceed through to the close of trial and been found guilty. *Infra* at 21-22. This Court therefore denies and dismisses with prejudice any allegation that Applicant pled guilty involuntarily.

4. Counsel's Alleged Failure to Prepare an Adequate Defense

Applicant claims that counsel did not adequately prepare to defend him. Ultimately, counsel did not attain the phase of trial necessitating his presentation of witnesses on behalf of Applicant's defense. As found above, Applicant entered a knowing and voluntary guilty plea prior to the conclusion of the trial. But the record bears out and the undersigned finds that counsel conducted a detailed investigation in preparation for trial meeting the demands of *Ard v. Catoe, supra*.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011); *see also McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) ("A criminal

RKK

defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.”). Our courts have additionally cautioned not to lose sight “of the reasonableness standard regarding counsel’s duty to investigate. *Id.* “Indeed, it would be an absurdity to require criminal defense lawyers to interview *every* potential witness when they can articulate reasonable grounds not to. When counsel makes such a reasonable decision, he will have fulfilled the duty he owes to his client.” *Id.* at 457, 710 S.E.2d at 64–65.

Counsel credibly testified at PCR that he spent time thoroughly investigating the contents of Applicant’s computer at SLED with the assistance of a private, technologically-adept forensic investigator. (PCR Tr. pp. 54-58). Counsel prepared as his theory of defense that Applicant’s computer was not password-protected and that the victim and her adolescent friends had equal access to the computer and could have been downloading the pornographic material. (PCR Tr. pp. 56-58). Counsel’s investigation did not aid in preparing that defense, as it only led to the discovery of more instances of child porn that Applicant had not been charged with, and as it also uncovered searches conducted simultaneous to the pornographic downloads that pertained to Applicant’s other personal interests. (PCR Tr. p. 58-59). Further, counsel attempted to identify the child victims featured in the illicit downloads to verify their age and origins in an effort to create an additional defense to the child porn charges. (PCR Tr. pp. 59-62). Thus, despite counsel’s development of a theory of defense, his investigation into the hard drive appeared only to corroborate the State’s case.

Counsel also investigated Applicant’s potential alibis with the input and assistance of Applicant and Lantz. (PCR Tr. pp. 62). However, the two alibis alleged could not, according to counsel’s credible testimony, be corroborated. Applicant stated he was at work during one

alleged pornographic download, but counsel testified Applicant's timecard showed that he clocked out early that day. (PCR Tr. p. 62). After another investigation, Applicant's alibi that he was at a Christmas party during the time of one alleged incident (as offered by Lantz at the PCR proceedings, see PCR Tr. p. 45), did not pan out because, according to counsel's testimony (which is admittedly in tension with Lantz), the dinner receipt was actually for another day. (PCR Tr. pp. 62-63). Lantz had testified that a co-worker still had his receipt with a date on it, which spurred her "to investigate with the actual restaurant" and to see if she could other proof; however, she testified the restaurant did not have "a record of reservations" adding "it had been several years later" when she asked. (PCR Tr. p. 45). However, in his testimony, trial counsel testified the restaurant records were available in his investigation ("I called the owner of the Bowery and he pulled the ledger..."), but did not help as "the party was the day before or the day after." (PCR App. p. 63; see also pp. 76-77, acknowledging witnesses alone could offer testimony on alibi, but counsel's "memory is that it was dismissed in my mind as an issue because it was the wrong day."). Trial counsel acknowledged and credited Lantz with being helpful, but credibly testified, "... I just can't imagine if we had a receipt we didn't make more hay of that for the right date." (PCR Tr. p. 63). This Court notes no exhibits were introduced at the PCR hearing. (See PCR Tr. p. 2). Where a PCR applicant fails to proffer evidence in support of the alleged deficient investigation, he fails to meet his burden of proof. *Edwards, supra*, 392 S.C. at 459, 710 S.E.2d at 66; *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995); *Cherry v. State*, 300 S.C. 115, 118-19, 386 S.E.2d 624, 625-26 (1989). The absence of the receipt (which counsel testified he did not ever recall seeing, PCR Tr. p. 63), does not help Applicant in his burden of proof for this action, and actually tends to lend more credibility to counsel's testimony.



Moreover, the Court notes that the contemporaneous record of the plea demonstrates Applicant advised the plea judge that he was, at that time, satisfied with counsel, (Plea Tr. p. 13), a representation he acknowledged during his PCR testimony, (PCR Tr. p. 33).

Considering the foregoing, this Court finds counsel conducted a reasonable investigation into the facts giving rise to the charges, but the investigation essentially dead-ended, or worsened the case against Applicant, at each turn. This Court finds Applicant has failed to demonstrate on the part of trial counsel due to the extent of the investigation. *See Strickland, supra; Hill v. Lockhart, supra*. Additionally, this Court finds Applicant has failed to demonstrate prejudice due to the damaging fruits of counsel's private investigation. *See id.* Having presented no evidence to the contrary, the allegation is denied.

5. Applicant's Notice of his Right to Appeal

This Court notes at the outset the plea transcript reflects the plea judge asked if Applicant understood he was waiving his right to an appeal, which Applicant agreed he so understood. (Plea Tr. pp. 11-12). The plea judge also advised the jury, after acceptance the plea and in explanation of the process, that had Applicant been convicted by them, the jury, Applicant still could have appealed, but that "he's waiving that right as well." (Plea Tr. p. 19; see also p. 20, "we avoid any appeal of the proceeding and thus there is some finality to it."). The solicitor, in explanation of the plea after substantial trial proceedings, noted "we did have discussions with the victim in this regard. We briefly discussed with her all the things involved in an appeal and potential repercussions of appeals. And for that reason, we believe that a plea under these circumstances may be the best way to resolve this...." (Plea Tr. pp. 41-42). Thus, the plea record reflects that Applicant either would not have thought he could appeal at all, as a term of the agreement and/or result of the plea, or would have reasonably understood any appeal would

have been limited by his decision to enter the plea. Even so, the precise issue raised challenges counsel's advice and is addressed in that context.

"[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 120 S.Ct. 1029, 1036 (2000). "Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." *Jones v. State*, 382 S.C. 589, 596, 677 S.E.2d 20, 23 (2009). "The bare assertion that a defendant was not advised of appellate rights is insufficient to grant [post-conviction] relief. *Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995).

This Court finds Applicant's case does not fall within those imposing a duty upon counsel to consult regarding an appeal under *Roe v. Flores-Ortega*, *supra*, and its state-law equivalents. This Court finds that due to the significant benefit obtained as a result of the guilty plea entered, no rational defendant would have continued with trial or sought to appeal that plea following the testimony that had already been presented at trial. *See Jones*, 382 S.C. at 596-97, 677 S.E.2d at 24. Applicant proceeded to trial for criminal sexual conduct with a minor first and second degree, committing or attempting a lewd act upon a child, sexual exploitation of a minor second and third degree, and for contributing to the delinquency of a minor. Trial continued through the State's presentation of the victim of the criminal sexual conduct charges before Applicant changed his plea to guilty. (Plea Tr. pp. 54-55). In exchange for the plea, the State dropped the most serious of charges faced at trial, as Applicant pled only to sexual exploitation

of a minor second and third degree and to contributing to the delinquency of a minor. (Plea Tr. p. 58).

The record also shows Applicant's sentencing exposure was greatly reduced by the guilty plea obtained. Applicant faced a potential maximum of fifty-plus years of given consecutive sentences on the charges faced at trial. (Plea Tr. p. 41). Even on the charges pled, Applicant faced a maximum of ten years for each second degree and third degree sexual exploitation, and three years for contributing to the delinquency of a minor. S.C. Code Ann. §§ 16-15-405, -410, -490 (2013). But the State and the plea court agreed to cap Applicant's sentence at fifteen years. (Plea Tr. p. 42). Thus, Applicant received significantly less time than other possible alternative resolutions. Accordingly, under the first application of *Roe*, this Court finds no rational defendant would wish to appeal the outcome of his guilty plea due to the severity of the charges which were dropped even after the victim had already testified at trial. *Roe v. Flores-Ortega*, 528 U.S. at 480, 120 S.Ct. at 1036.

Moreover, and also under the first application of *Roe, supra*, this Court finds the record is void of nonfrivolous grounds for appeal. As found within the remainder of this Order, Applicant knowingly and voluntarily pled guilty. A guilty plea "constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." *State v. Rice*, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485 (2013). Moreover, no objections appear in the plea record from which Applicant could raise a properly preserved appellate issue. *State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (2005). This Court thus finds that the record contains no nonfrivolous basis for appeal upon which post-conviction relief, or a belated appeal, could arise. *Roe, supra*; *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) (proscribing procedure for



belated appeal stemming from allegations of ineffective assistance of counsel for failure to file notice of appeal).

Finally, this Court finds Applicant did not demonstrate to his counsel that he desired to appeal the outcome of his guilty plea. *See Roe, supra* (relief may be appropriate when an applicant "reasonably demonstrated to counsel that he was interested in appealing" and counsel did not do so); *Weathers v. State, supra*. This Court finds credible counsel's testimony that Applicant did not inquire about the appellate process after the plea. (See PCR Tr. p. 73; p. 78). Accordingly, the undersigned denies the application for post-conviction relief on this ground.

Conclusion

Upon consideration of the testimony presented at the evidentiary hearing, a review of the pertinent portions of the file made part of this record by way of attachment to the State's Return, and the applicable case law, the undersigned finds that Applicant has failed to meet his burden of establishing error and prejudice, or that he entered an unknowing, involuntary guilty plea. Even if Applicant had put forth sufficient evidence that plea counsel's performance was unreasonable under prevailing professional norms, which this Court finds he did not, Applicant has failed to present any evidence that would tend to establish that he was prejudiced by some act or omission of counsel, or that had counsel not acted in the manner complained of, that Applicant would not have pled guilty and would have instead proceeded to the conclusion of trial. Applicant additionally failed to put forth any evidence sufficient for this Court to find that he did not have a full understanding of the plea deal into which he entered.

IT IS THEREFORE ORDERED THAT:

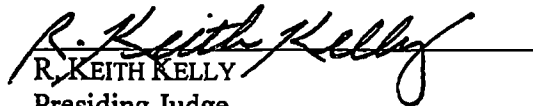
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and,



2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

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

AND IT IS SO ORDERED this 7th day of May, 2018.


R. KEITH KELLY
Presiding Judge

, South Carolina

197

WITNESSES

SCSO

CLARKE

ARREST WARRANT NUMBER

DIRECT

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: JUL 09 2013

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2013-GS-41-217A

The State of South Carolina

County of SALUDA

COURT OF GENERAL SESSIONS

JULY TERM 2013

THE STATE

vs.

KENDAL SUDDUTH

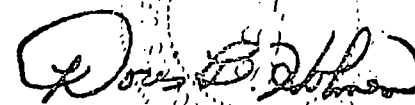
CDR#0048

Indictment for

CONTRIBUTING TO THE
DELINQUENCY OF A MINOR

DONALD V. MYERS, SOLICITOR

ATTEST: TRUE COPY

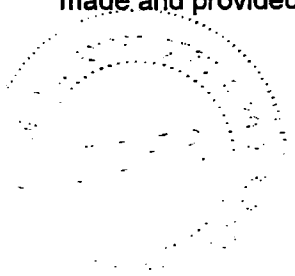

Clerk of Court
Saluda, S. C.

STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA) INDICTMENT FOR
CONTRIBUTING TO THE DELINQUENCY OF A
MINOR

At a Court of General Sessions, convened on July 9, 2013 the Grand Jurors of Saluda County present upon their oath:

That **Kendal Sudduth**, a person over the age of eighteen years, did in Saluda County, on or about January 1, 2005 through March 15, 2007, knowingly and willfully encourage, aid, or cause, or do any act to cause or influence a minor to violate any law or to so deport herself as to willfully injure or endanger her morals or health or the morals or health of others, to wit: did encourage, aid, or cause or influence a minor child, Minor , DOB [REDACTED] 1989 to engage in sexual behavior, whether with himself or with another, and/or did expose the minor child to sexually explicit images, including but not limited to images of adults and/or minors, in violation of S.C. Code Section 16-17-490, S.C. Code of Laws, 1976, as amended.

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



SOLICITOR

199

WITNESSES
SPD
HOLLOWAY

ARREST WARRANT NUMBER
DIRECT

ACTION OF GRAND JURY

THE BILL

Foreperson of Grand Jury
Date: JUL 09 2013

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2013-GS-41-206A

The State of South Carolina

County of SALUDA

COURT OF GENERAL SESSIONS

JULY TERM 2013

THE STATE
vs.

KENDAL SUDDUTH

CDR#0381

Indictment for

SEXUAL EXPLOITATION OF A MINOR
3RD DEGREE

DONALD V. MYERS, SOLICITOR

ATTEST: TRUE COPY
Ross B. Barber
Clerk of Court
Saluda, S. C.

STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA)

INDICTMENT FOR
SEXUAL EXPLOITATION OF A MINOR
3RD DEGREE

At a Court of General Sessions, convened on July 9, 2013 the Grand Jurors of Saluda County present upon their oath:

That **Kendal Sudduth**, did in Saluda County, on or about December 20, 2006 through February 23, 2007, commit the offense of third degree sexual exploitation of a minor, in that he did unlawfully and while knowing the character or content of the material, did possess material that contained a visual representation of a minor engaging in sexual activity, to wit: photograph(s) and/or digital image(s) and/or digital electronic file(s) and/or film(s) of a minor child engaged in sexual activity and/or a visual representation of a minor child engaged in sexual activity as defined in Section 16-15-375(5), in violation of S.C. Code of Laws Section 16-15-410, 1976, as amended.

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


SOLICITOR

201

WITNESSES

SPD

HOLLOWAY

ARREST WARRANT NUMBER

DIRECT

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: 09 09 2013

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2013-GS-41-205A

The State of South Carolina

County of SALUDA

COURT OF GENERAL SESSIONS

JULY TERM 2013

THE STATE

vs.

KENDAL SUDDUTH

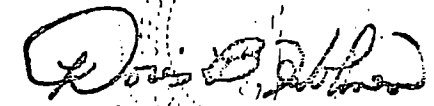
CDR#0380

Indictment for

SEXUAL EXPLOITATION OF A MINOR
2ND DEGREE

DONALD V. MYERS, SOLICITOR

ATTEST: TRUE COPY



Clerk of Court
Saluda, S. C.

STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA)

INDICTMENT FOR
SEXUAL EXPLOITATION OF A MINOR
2ND DEGREE

At a Court of General Sessions, convened on July 9, 2013 the Grand Jurors of Saluda County present upon their oath:

That **Kendal Sudduth** did in Saluda County, on or about December 20, 2006 through February 23, 2007, commit the offense of second degree sexual exploitation of a minor, in that he did unlawfully and while knowing the character or content of the material, (1) record, photograph, film, develop, duplicate, produce, or create digital electronic file material that contains a visual representation of a minor engaged in sexual activity; or (2) distribute, transport, exhibit, receive, sell, purchase, exchange, or solicit material that contains a visual representation of a minor engaged in sexual activity, to wit: did duplicate, create, solicit or receive a photograph or digital image or digital electronic file(s) or film of a minor engaged in sexual activity and/or material containing a visual representation of a minor engaged in sexual activity as defined in Section 16-15-375(5), in violation of South Carolina Code of Laws Section 16-15-405, 1976, as amended.

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


SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Saluda

VS.

Kendal Carol Sudduth

AKA:

Race: Sex: M Age: 36

DOB: 1977 SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Saluda, SC 291380000

DL#: [REDACTED] SID#: [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Contributing to Delinquency of Minor

INDICTMENT/CASE#: 2013GS4100217A

A/W#: 2013GS4100217A

Date of Offense: 7/9/2013

S.C. Code §: 16-17-0490

CDR Code #: 0048

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADSTO: Contributing to Delinquency of Minorin violation of § of the S.C. Code of Laws, bearing CDR Code # 0048☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

USMays, 64191
Solicitor64191
SC Bar#Kendal Sudduth
DefendantPA Anderson
Attorney for Defendant64131
SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 3 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 13-65-41-205A
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 0☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:	\$	
§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 39.0
TOTAL	\$	\$ 133.90

Clerk of Court/Deputy Clerk

Court Reporter: Stacy Sheppard

SCCA/217 (03/2011)

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code: 2021Sentence Date: 7/17/13

ATTES TRUE COPY

[Signature]
Clerk of Court
Saluda, S.C.

204

STATE OF SOUTH CAROLINA

COUNTY OF: Saluda

STATE VS.

Kendal Carol Sudduth

AKA:

Race: Sex: M Age: 36

DOB: -1977 SS#: [REDACTED]

Address:

City, State, Zip: Saluda, SC 291380000

DL#: [REDACTED] SID#: [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Sexual Exploitation of Minor 3rd Degree

in violation of § 16-15-0410(A) of the S.C. Code of Laws, bearing CDR Code # 0381

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

J.S. Mayes
Solicitor64191
SC Bar#Karl S. Slat
DefendantR.A. Anderson
Attorney for Defendant64131
SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,

for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 13-65-41-205A

☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 0

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 320
TOTAL		\$ 13320

Clerk of Court/Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Key 0-10 yrs
IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS4100206A

A/W#: 2013GS4100206A

Date of Offense: 7/9/2013

S.C. Code § : 16-15-0410(A)

CDR Code #: 0381

SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADS

in violation of § 16-15-0410(A) of the S.C. Code of Laws, bearing CDR Code # 0381

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

R.A. Anderson
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,

for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 13-65-41-205A

☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 0

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge

Judge Code: 2021

Sentence Date: 7/17/13

ATTEST: TRUE COPY
Clerk of Court
Saluda, S.C.

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Saluda

VS.

Kendal Carol Sudduth

AKA:

Race: Sex: M Age: 36

DOB: -1977 SS#:

Address:

City, State, Zip: Saluda, SC 291380000

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Sexual Exploitation of a Minor - 2nd degree

INDICTMENT/CASE#: 2013GS4100205A

A/W#: 2013GS4100205A

Date of Offense: 7/9/2013

S.C. Code § : 16-15-0405(A)

CDR Code #: 0380

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS

in violation of § 16-15-405(D) of the S.C. Code of Laws, bearing CDR Code # 0380

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

R. Smayes
Solicitor64191
SC Bar#Kendal Sudduth
DefendantPA Anderson
Attorney for Defendant64131
SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 5 days☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
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§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 133.90

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

PTUP days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge

Judge Code: 2121

Sentence Date: 7/17/13

ATTEST: TRUE COPY

Clerk of Court
S. C.