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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
D. Craig Brown, PCR Judge

Appellate Case No. 2018-001994

EDWARD MAURICE DUNN, JR.,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUE

Whether trial counsel provided ineffective assistance of counsel when he failed to object to the admission of Petitioner's DNA which was held in an illegal database operated by the Richland County Sheriff's Department, whether a DNA match between DNA found on a "washrag" at the scene of the incident and Petitioner's illegally retained DNA was the only way Petitioner became a suspect and all of the evidence that followed stemmed from that illegal DNA match?

RESPONDENT'S STATEMENT OF ISSUE

The PCR court correctly found trial counsel was not ineffective for failing to object to the admissibility of Petitioner's DNA because trial counsel articulated a reasonable strategy for suppressing the DNA evidence, and the evidence obtained thereafter, by arguing and preserving whether law enforcement exceeded Petitioner's scope of consent to use his DNA in violation of the Fourth Amendment.

STATEMENT OF THE CASE

In July 2011, Edward Maurice Dunn, Jr. (Petitioner) was indicted for assault with intent to commit first-degree criminal sexual conduct (CSC) (2011-GS-40-3518), armed robbery (2011-GS-40-3525), kidnapping (2011-GS-40-3526), and first-degree burglary (2011-GS-40-3527). He was represented by Victor Li and Deon O'Neil (Counsel), Esquires. On May 21–24, 2012, Petitioner proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr. The jury acquitted Petitioner of first-degree CSC, but convicted him as indicted on the remaining charges. Judge Cooper sentenced Petitioner to serve concurrent terms imprisonment of thirty years for armed robbery, kidnapping, and first-degree burglary. Applicant appealed.

Appellate Defender David Alexander perfected an appeal on Petitioner's behalf. On appeal, Petitioner raised the following issue: "Whether the trial court erred in refusing to suppress all evidence flowing from the retention and subsequent usage of [Petitioner's] DNA profile, which was taken when he was a juvenile and maintained in a database not authorized by state law, exceeded the scope of the contractual consent given by [Petitioner], and was otherwise illegal under state law?" The Court of Appeals affirmed finding the trial court did not err in refusing to suppress the DNA evidence as an unconstitutional search because Petitioner voluntarily consented to the search; however, the Court of Appeals found Petitioner's remaining arguments—(1) the contract for taking Petitioner's DNA was voided and illegal; (2) Petitioner never ratified the contract as an adult; and (3) the Richland County Sheriff's Department DNA database was illegal—were unpreserved. *State v. Dunn*, Op. No. 2014-UP-249 (S.C. Ct. App. filed June 25, 2014) (App. 601-02). The case was remitted back to the circuit court on July 11, 2014.

Petitioner commenced this action for post-conviction relief (PCR) on March 17, 2015. The State submitted its return on July 8, 2015, requesting an evidentiary hearing. An evidentiary

hearing convened on July 11, 2016, before the Honorable D. Craig Brown. Petitioner was represented by Jonathan D. Waller, Esquire. Assistant Attorney General Jessica E. Kinard represented the State. The PCR court denied applicant's allegations and dismissed the action with prejudice. Applicant appealed the PCR court's decision.

STATEMENT OF THE FACTS

Sometime between two and three a.m. on May 28, 2011, seventy-four-year-old Indira Lonsdale was in her sitting room in her bathrobe drinking coffee and listening to music when a male intruder entered her home, came from behind, grabbed her by the shoulders, and ordered her to do what he said or he would kill her. The man led Lonsdale to her bedroom, removed the sash from her bathrobe, which was the only article of clothing she was wearing, used the sash to tie her hands behind her back, and told her to bend over the bed. Lonsdale could see a gun in the man's hand. The man then unzipped his pants, put his penis between Lonsdale's legs and, without penetrating her, thrust several times until he ejaculated. Next he made Lonsdale put a pair of her own underwear over her head before leading her to the bathroom.

In the bathroom, the man gave her a washcloth and told her: "wash yourself good." Lonsdale wiped the ejaculate from her vaginal area, after which the man rinsed the washcloth in the sink and told her to wash again. She wiped herself again and left the used washrag in the sink. The intruder then led Lonsdale to her bedroom and made her lay face down on the floor while he went through her dresser drawers looking for money. In fear that she would be shot if the intruder was not able to find any money, she told him she had $120 in her wallet and told him where to find it. He then asked Lonsdale for her car keys and left the house. Lonsdale got up, ran to the phone, and called 9-1-1. When she was later interviewed by the police, Lonsdale described the intruder as a young, small built, black male with a northern accent and curly hair that hung over the side of his face. (App. 199–213; 229–30).

The Richland County Sheriff's Department collected the washcloth from Lonsdale's sink and developed a DNA profile from seminal fluid detected and extracted from the cloth. (App. 289–93; 336–38; 344–46). Applicant's DNA profile was already on file with the Sheriff's

Department as a result of his providing a sample in September of 2010, in an unrelated matter. (App. 311–13). Although the washcloth contained a mixture of DNA, the major contributor of that DNA was matched within a reasonable degree of scientific certainty to be seminal fluid from Petitioner. Indeed, the frequency of seeing the contributor's profile in the African-American population was approximately one in 140 quintillion. (App. 345–46; 362–63). Based on the DNA match, warrants were obtained for Petitioner's arrest.

After Petitioner was arrested he was told his DNA was found on the washcloth discovered in Lonsdale's house. (App. 389). Petitioner then gave an oral statement admitting his participation in the burglary but denying participation in the attempted sexual assault. (App. 391–93). Petitioner subsequently gave a written statement repeating his explanation. (App. 399). In those statements he claimed he was outside serving as a lookout while a co-defendant named "Shorty" was inside committing the burglary. (App. 401). Petitioner said after about fifteen or twenty minutes he walked into the house and discovered Shorty in Lonsdale's bed: "fucking her from the back." (App. 401). Petitioner said: "I got a little excited, so I started to jack off. I used the towel to clean up. I saw it on the ground. I went back outside by the gate and kept watching." (App. 402). Petitioner gave a similar story in a telephone call to his mother from the jail. (App. 418–19).

Motion to Suppress

Prior to trial, Petitioner, through Counsel, made a motion "to suppress the DNA profile that was used for comparison in this case." (App. 24). Counsel articulated two grounds. First, Counsel argued Petitioner did not voluntarily consent to giving the DNA sample. Second, Counsel argued even if Petitioner's consent was voluntary, the use of the DNA sample in the subsequent criminal investigation was outside the scope of his consent. Counsel argued that since the DNA match should be suppressed, all other evidence obtained as a result of that match would be fruit of the

poisonous tree, and should also be suppressed. (App. 24). Counsel handed up a written motion in support of the arguments which was marked as Court's Exhibit No. 2. (App. 24–25). The State responded by providing the trial court with a copy of *State v. McCord*, 349 S.C. 477, 562 S.E.2d 689 (2002). (App. 25).

The trial court conducted a suppression hearing on Petitioner's motion. The State called Deputy John Carwell to the stand. (App. 84). Carwell testified he worked in the burglary unit in September of 2010 and was in charge of a particular burglary that brought him into contact with Petitioner. (App. 85). On September 21, 2010, the day after that burglary, he obtained a "petition" for Petitioner and had Petitioner brought to headquarters. (App. 86). Carwell read a DNA consent form to Petitioner, after which Petitioner signed the form and provided a swab from his mouth as a DNA sample. (App. 87–89). Carwell testified he did not make any promises to Petitioner about what would happen if he provided the DNA sample and did not threaten or coerce him into giving consent. (App. 88). Carwell did not give Petitioner any kind of qualifications about how the DNA sample would be used, kept, maintained, or what it would be compared against. (App. 88). Carwell testified Petitioner understood what was being asked of him in providing the DNA sample and did not appear to be under the influence of any drugs or alcohol. (App. 89).

On cross-examination Carwell acknowledged he asked Applicant to give a sample of his DNA to compare it against DNA from the scene of a particular burglary and never mentioned it would be put in the Richland County DNA database. (App. 91). Carwell recognized Applicant was sixteen years old when he gave consent but explained that regardless of the age of a suspect there was no requirement or internal policy to get parents involved before seeking consent for a DNA sample. (App. 93–94). Carwell further explained that when a crime victim provides a DNA sample, his or her profile is not stored in the Richland County DNA lab. (App. 94).

On re-direct, Carwell testified he made no promises about what the Sheriff's Department would do with Petitioner's DNA profile after the conclusion of the investigation or that they would destroy the DNA profile if it did not match anything in the 2010 burglary investigation. (App. 95). Indeed, on re-cross Carwell testified the point of seeking Petitioner's DNA was to compare it to items from the 2010 burglary and to enter it into the database. (App. 96).

Next, Petitioner testified on his own behalf. (App. 97). Petitioner said that when he gave the DNA sample in 2010, Carwell never told him they were going to put his DNA profile in the DNA database in Richland County or that law enforcement was going to store his DNA data. (App. 97). Petitioner testified if the police had told him they were going to store his DNA, he would not have given the sample. (App. 97). In regard to the current case, Petitioner testified that if the police had not told him they had a DNA match, he would not have given statements to Investigator Mauldin. (App. 97–98). On cross-examination, Petitioner confirmed the State's suspicion that if he had not been told the police had a DNA match, he would have simply claimed he was never at Lonsdale's home. (App. 98). Petitioner then acknowledged his signature on the DNA form and admitted the form said nothing about the sample being used only for the 2010 case or about the sample being destroyed after the initial comparison. (App. 98–99).

The trial court then heard arguments from Counsel and the State. Counsel argued Petitioner's situation could be distinguished from *McCord* because the consent form in *McCord* included additional language that does not appear on the Richland County consent form. (App. 102). Counsel further argued the State limited the scope of any consent Petitioner might have given by telling Petitioner it wanted his DNA for a particular reason. (App. 102). The State responded that the Richland County consent form was sufficiently broad and similar to the form in *McCord* to demonstrate consent, and that *McCord* controlled because once the DNA was

obtained for a legitimate purpose, and there is no restriction on that purpose, the State could use the DNA to compare it to the unknown sample. (App. 103). The trial court questioned whether a sixteen-year-old is capable of giving consent, and the State noted age was simply a factor like any other factor that must be considered in making the determination. (App. 103). The State argued Petitioner had no reasonable expectation of privacy in the DNA profile once it had been given for a legitimate purpose. (App. 104–05). The State further argued that even if consent was not valid for some reason, Petitioner's statements should not be suppressed because the police would have inevitably discovered he was involved in the crimes though other means. (App. 106–09). The following morning the trial court heard additional arguments from Counsel and the State, further explaining their respective positions. (App. 116–26). Ultimately, the trial court denied Petitioner's motion to suppress and ruled the DNA results were admissible. (App. 126–27).

Trial

At trial, Carwell described the Richland County Sheriff's Department's "Consent to Search for D.N.A. Evidence" form which was signed by Petitioner before Petitioner provided a DNA sample in 2010. (App. 310–12). Carwell testified Petitioner gave voluntary consent and then provided a sample swabbed from his mouth. (App. 312). The signed form was admitted into evidence, subject to Counsel's previous objection. (App. 312).

Forensic scientist John Barron with the Richland County DNA lab identified the buccal swab given by Petitioner and testified he extracted DNA from that swab. (App. 324–31). The swab was admitted into evidence over Counsel's objection. (App. 331). Forensic scientist Gray Amick with the Richland County DNA lab identified the washcloth from the Lonsdale's house and testified he extracted DNA from seminal fluid on that cloth. (App. 334; 343–45). Counsel renewed his previous objection to the results of that testing; however, the objection was overruled

and Amick testified the fluid was a DNA match to Petitioner. (App. 338; 345–46).

Investigator Josh Mauldin described Petitioner's arrest and the various statements Petitioner provided in regard to the crimes. (App. 388–420). Counsel renewed his previous objections to each statement, and his objections were overruled. (App. 391; 395; 400; 411; 417; 419). After the State rested, and again after the defense rested, Counsel renewed all of his previous motions and objections. (App. 441-43; 46-47; 454).

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694).

ARGUMENT

The PCR court correctly found trial counsel was not ineffective for failing to object to the admissibility of Petitioner's DNA, and the evidence obtained thereafter, because trial counsel articulated a reasonable strategy for suppressing the DNA evidence, and the evidence obtained thereafter, by arguing and preserving whether law enforcement exceeded Petitioner's scope of consent to use his DNA in violation of the Fourth Amendment

Petitioner argues Counsel was ineffective for failing to argue during the suppression hearing Petitioner's DNA and the evidence that followed from it should be suppressed because the Richland County Sherriff's Office's DNA database was illegal. While this is a compelling argument in hindsight, at the PCR hearing, Counsel articulated his strategy to suppress the DNA evidence, and the evidence obtained thereafter, was to argue the DNA evidence should be suppressed because law enforcement exceeded the scope of Petitioner's consent by using his previously obtained DNA in violation of the Fourth Amendment. (App. 649-51). Petitioner contends his argument, at this stage, is more compelling than what Counsel argued and preserved at trial. This assertion illustrates precisely why the use of hindsight is not to be applied in PCR. Because Counsel articulated a reasonable strategy for attacking the DNA evidence used against Petitioner at trial, Counsel was not constitutionally ineffective. Therefore, certiorari should be denied as to this issue.

Strickland requires trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his

action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Petitioner attempts to enhance the distorting effects of hindsight by asserting Counsel should have argued the DNA and evidence obtained thereafter should have been suppressed because the DNA database was illegal instead of Counsel's alternative argument for suppression of the evidence based on a violation of the Fourth Amendment. Petitioner's argument focuses on the legitimacy of the DNA database, but ignores the reasoning of Counsel's strategy to suppress the evidence. Petitioner's focus is on what he wishes could have been argued in his direct appeal, rather than what is a proper ground for relief in a PCR action. This is evinced by Petitioner's assertion, "[Counsel] made multiple objections to the DNA's admission, just not the right one." (PWC 11). The focus of inquiry in this case is whether Counsel articulated a reasonable strategy for making the Fourth Amendment argument, not whether Counsel used the strategy Petitioner and his appellate counsel wish he had used.

Counsel articulated his strategy for suppressing the DNA and evidence obtained thereafter as follows: Counsel tried to suppress the DNA and keep it from coming into evidence "by alleging that by keeping the sample, the State exceeded the consent [Petitioner] originally gave by giving

up the sample." (App. 650). Counsel based this strategy "off basic consent law." (App. 650). Counsel argued defendants have a right to limit their consent, and by agreeing to only give the DNA for the specific burglary case, Counsel's position that Petitioner limited his consent to that case and that case only. (App. 650-51). The trial court disagreed with Counsel's argument. (App. 127). However, trial counsel properly preserved the argument for direct appeal. (App. 601-03). Counsel articulated a reasonable strategy for suppressing the DNA and the subsequently obtained evidence by utilizing the law regarding searches and seizures—the Fourth Amendment. Counsel's strategy was reasonable.

In the instant case, law enforcement identified Petitioner as a suspect through a DNA match of Petitioner's DNA with DNA found on the washcloth recovered from Lonsdale's home. Law enforcement matched the DNA on the washcloth to a DNA profile it had of Petitioner's DNA stored in the Richland County DNA database. In *State v. McCord*, 349 S.C. 477, 562 S.E.2d 689 (2002), our Court of Appeals was asked whether the trial court erred in failing to suppress DNA evidence because it "was based in part on an analysis of [McCord's] blood, which was seized in violation of the [F]ourth [A]mendment." 349 S.C. at 483, 562 S.E.2d at 692. In *McCord*, McCord's DNA was obtained through the FBI's blood sample database where the FBI obtained his DNA pursuant to a written consent form. *Id.* Similar to Petitioner's case, the DNA used to match McCord's DNA was obtained and stored from a prior investigation of a different crime. *Id.* The *McCord* court held the DNA evidence was properly admitted and no improper search or seizure occurred as the defendant's "expectation of privacy was extinguished when he voluntarily gave the blood sample to federal authorities without any limitation on the scope of his consent." *Id.* at 485, 562 S.E.2d at 693.

Counsel attempted to distinguish Petitioner's case from *McCord*, arguing Petitioner limited the scope of his consent to the use of his DNA for the prior burglary investigation only. (App. 102). However, the trial court admitted the evidence stating that it would leave whether Petitioner limited the scope of his consent to use of the DNA for another court to decide. (App. 127). This issue was properly preserved for appellate review, and the Court of Appeals affirmed Applicant's conviction on the merits of that issue. (App. 601–03). Counsel made a strategic decision to attempt to distinguish Petitioner's case from *McCord* in an attempt to suppress the DNA evidence that identified Petitioner as a suspect in this case. Because Counsel articulated a reasonable trial strategy for attempting to suppress the DNA evidence based on the exclusionary rule because of a Fourth Amendment violation argument, Counsel was not deficient.

Counsel's alleged deficiency did not prejudice Petitioner because even if Counsel had argued and preserved the Richland County DNA database was illegal in his motion to suppress, it is unlikely the result would have been different.

"The Fourth Amendment protects the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Amendment says nothing about suppressing evidence obtained in violation of this command." *Davis v. U.S.*, 564 U.S. 229, 236 (2011). Thus, the United States Supreme Court created the exclusionary rule to "'compel respect for the constitutional guaranty.'" *Id.* (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). "The rule's sole purpose . . . is to deter future Fourth Amendment violations." *Id.* at 236–37.

Here, Petitioner's argument Counsel should have argued the Richland County DNA database was illegal ignores that the suppression of evidence is controlled by a violation of the Fourth Amendment. However, Counsel recognized the argument for the suppression of evidence

must be framed as a Fourth Amendment violation, and thus, Counsel was not deficient for making such argument. Instead, Counsel arguably would have been deficient for making the argument championed on appeal, and at PCR, because the argument fails to show how the State violated Applicant's right to be free from unreasonable searches and seizures. Because the argument the DNA should have been suppressed because the DNA database was illegal fails to rely on a Fourth Amendment violation it is unlikely to have succeeded on appeal; therefore, Petitioner was not prejudiced from Counsel's failure to make such argument.

However, even if Petitioner's DNA data was illegally retained by the Richland County Sheriff's Department, that finding would not automatically exclude the DNA evidence, and Petitioner failed to show the evidence would have been excluded based on the deterrence factor of the exclusionary rule analysis. "Real deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one." *Davis*, 564 U.S. at 237 (quoting *Hudson v. Michigan*, 547 U.S. 586, 596 (2006). "The analysis must also account for the 'substantial social costs' generated by the [exclusionary] rule." *Id.* (quoting *U.S. v. Leon*, 468 U.S. 897, 907 (1984)). "Exclusion exacts a heavy toll on both the judicial system and society at large. . . . [and] [i]t almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence[,] [a]nd its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *Id.* (internal citations omitted). "[S]ociety must swallow this bitter pill when necessary, but only as a 'last resort.'" *Id.* (quoting *Hudson*, 547 U.S. at 591). "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Id.*

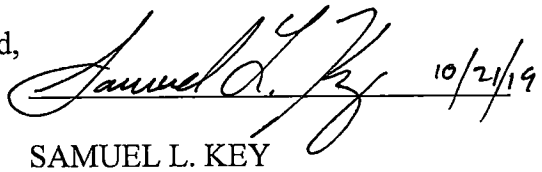
Petitioner makes no argument to account for the substantial social costs generated by the exclusionary rule, *i.e.* the deterrence benefits of suppression outweighs its heavy costs. As such, Petitioner has ignored this element of the exclusionary rule and this argument should be deemed

abandoned on appeal. Accordingly, Petitioner has failed to show prejudice resulted in failing to show why the exclusionary rule would apply even if Petitioner's DNA data was illegally retained. For all the forgoing reasons, Counsel was not ineffective and certiorari should be denied.

CONCLUSION

Based on the foregoing argument, Counsel was not constitutionally ineffective. Counsel articulated a reasonable trial strategy for suppressing the DNA evidence because he based his argument the evidence should be suppressed because it violated Petitioner's Fourth Amendment rights. Petitioner was not prejudiced because the argument he asserts Counsel should have made instead is without merit, as it does not premise the suppression of the evidence as a violation of the Fourth Amendment. Petitioner also fails to show prejudice as he fails to argue the second element of the exclusionary rule would preclude the introduction of the DNA evidence. As such, the evidence would not have been suppressed if the argument had been made by Counsel. Therefore the State requests certiorari be denied.

Respectfully submitted,



10/21/19

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STATE OF SOUTH CAROLINA, RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by placing one copy in the United States Mail, addressed to:

Mr. Victor R Seeger
1330 Lady Street
Suite 401
Columbia, SC 29201

This 21st day of October, 2019.

Erik Marcusson
Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
OCT 21 2019
S.C. SUPREME COURT

October 21, 2019

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Edward Maurice Dunn, Jr. v. State of South Carolina
Appellate Case No.: 2019-001994

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Samuel L. Key
Assistant Attorney General
S.C. Bar # 103206

SK/em
Enclosures

cc: Victor R. Seeger, Esquire
Victim Advocacy Division