

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Honorable Roger E. Henderson, Circuit Court Judge

KRISTOPHER WILMONT BERRY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000100

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHNNY ELLIS JAMES, JR.
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

RECEIVED

NOV 17 2017

S.C. SUPREME COURT

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED JULY 18, 2011	1
INDICTMENT AND SENTENCING SHEET	523
APPLICATION FOR POST-CONVICTION RELIEF FILED DECEMBER 19, 2013	526
RETURN DATED NOVEMBER 19, 2014	551
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED JANUARY 11, 2016	557
ORDER OF DISMISSAL FILED NOVEMBER 28, 2016	643

THE STATE VERSUS KRISTOPHER W. BERRY

501

1 **CLERK OF COURT:** Thank you. My records reflect that
2 that would be all twelve jurors. If your name was not called,
3 would you please stand. Thank you.

4 **THE COURT:** Thank you, Mr. Clerk. Now, all the jurors
5 have responded in the affirmative to both questions. Are
6 there questions while in the presence of the jury from
7 defense?

8 **MR. CANNARELLA:** No, Your Honor.

9 **THE COURT:** All right. Very good. Then ladies and
10 gentlemen, we are going to go into a sentencing proceeding
11 now. But, I always give the jury the option of remaining or
12 departing. You are not required to be here for the sentencing
13 proceedings. You may wish to, but again that is your
14 decision.

15 What I am going to do is I am going to come down and
16 speak to you though. I am going to let you leave the jury
17 box, go back to the jury room, and then if you wish to come
18 back and have a seat in the back of the courtroom, which would
19 allow you to leave at any time if you wish, then we will give
20 you that opportunity.

21 In a few days -- and in fact, Mr. Suggs, do you have
22 everything ready?

23 **CLERK OF COURT:** I do, Your Honor.

24 **THE COURT:** The county has a small check for your per
25 diem, and for your service here. It is certainly not enough

SENTENCING HEARING

502

1 to retire on. But that is the county's expression of
2 gratitude. I am going to come down as you exit the jury box,
3 and shake your hand as my personal expression of gratitude for
4 justice in this case as you have determined justice to be. A
5 job well done, ladies and gentlemen. Let me come and say
6 goodbye to you. Again, if you wish to, if you would go back
7 for a moment or two with the clerk, we will wait here. If
8 anyone wishes to join us, you may come to the back door and be
9 seated.

10 (Whereupon, the jury exits the courtroom at
11 3:20 p.m.)

SENTENCING HEARING

13 **THE COURT:** All right. Ladies and gentlemen, so that
14 we will all be of the same understanding, it would be my
15 intention in the Sentencing Hearing, and we will hear from the
16 attorneys. We will give the defense an opportunity to speak.
17 We will also have a representative of the Minor , whomever you
18 wish to speak, whether it is ■Minor , or someone else
19 from your family, we will be glad to hear from you as well.
20 We will give you that opportunity. We don't require it, and
21 we don't demand it. But we will give you that opportunity to
22 speak if you wish.

23 **(PAUSE.)**

24 **THE COURT:** Thank you. All right. Let's begin this
25 proceeding with the State. I will be glad to hear from the

SENTENCING HEARING

503

1 State. And I would like for you to begin by putting on the
2 record what is the maximum penalty for this charge. And what
3 are the collateral consequences, if any, for a conviction on
4 this statute.

5 Go ahead, Ms. Burch.

6 STATEMENT BY MS. BURCH ON BEHALF OF THE STATE

7 MS. BURCH: Thank you, Your Honor. Criminal
8 Solicitation of a Minor carries zero to ten years. It does
9 require the Sex Offender Registry, DNA Database, and The Child
10 Abuse Registry.

11 Your Honor, this has been a very interesting case for our
12 side. It is unlike any other sexual in nature type of case
13 that the three of us have ever heard, because we always get
14 it, after you know some sort of molestation, or sex act has
15 happened, that has happened. And law enforcement and the
16 family caught this on the front end. We actually got him
17 while he was still grooming the child. And thank God the
18 second week in February did not get here, or we might be here
19 for something more serious.

20 Your Honor, I think our office has really enjoyed working
21 with the Johnson family, being able to meet them. I hate it
22 was under these circumstances. They have been very
23 understanding throughout this whole time. This happened well
24 over a year ago, and I know they have had a difficult time
25 dealing with it.

SENTENCING HEARING

504

1 Your Honor, I guess before we got into this trial we were
2 considering Probation, and the more that came out, the more
3 that we heard, I think jail time would probably be the most
4 appropriate.

5 **THE COURT:** Let me ask you, Ms. Burch. You tell me
6 that there has been a discussion of Probation with the
7 defendant in order for the defendant to plead guilty. Of
8 course the court was not involved in any way in those
9 discussions. But let me ask, the Minors in the case, did
10 they consent to that disposition?

11 **MS. BURCH:** Your Honor we discussed it. And they ---
12 the most important thing to them was the Sex Offender
13 Registry. And if we did not have to go to trial, and their
14 child be put through testifying, you know, whatever sentence
15 we could come up with was fine, the way I understood it, as
16 long as Sex Offender Registry was in place.

17 **THE COURT:** Very good. Is there anything else from the
18 State that you would like to place on the record? If not, we
19 will hear from the defense, and then come back and give the
20 Minors an opportunity to speak if they wish.

21 **MS. BURCH:** Your Honor, one other thing, and, of
22 course, it did not get brought out in trial. We spent lots of
23 time contacting people that Mr. Berry had come into contact
24 with over the years. Lyle minor did come forward, and just
25 so Your Honor is aware, this is not his first time at the

SENTENCING HEARING

505

1 rodeo as they would say. She experienced almost the same
2 exact thing that Minor did as far as the text messages go, the
3 sexually explicit text messages. And, Your Honor, I just hope
4 that the defendant can come out from this and maybe learn
5 something. And know that this is just not appropriate, and it
6 will not be tolerated.

7 THE COURT: All right. Thank you.

8 MS. BURCH: Thank you, Your Honor.

9 THE COURT: Mr. Cannarella, what do you have to say for
10 your client?

11 STATEMENT BY MR. CANNARELLA ON BEHALF OF THE DEFENDANT

12 MR. CANNARELLA: Well, Your Honor, I first want to say
13 to the family, because I know the mother and father were not
14 in here when their daughter testified, but you can ask anybody
15 in here, I did as much as I could do for my client within my
16 ethical and professional boundaries, but I don't think that I
17 disabused, or was abusive to her daughter. And, I really
18 tried to make it as light and as lenient as I possibly could
19 on her. But, at the same time zealously represent my client.
20 And I feel like through that dialogue that she and I had on
21 the witness stand, I was able to establish to the satisfaction
22 to myself and to my client the picture that I wanted to create
23 in building my theory of defense. And to some extent it
24 showed in the verdict, although I would have liked to have had
25 two not guilty's, but it didn't happen that way. But, I just

SENTENCING HEARING

506

1 want to let them know that I don't feel like I was abusive, or
2 insulting toward a child, regardless of what they might have
3 had to hear me say. But at the same time, zealously represent
4 Mr. Berry, who has no criminal history, Your Honor.

5 He comes from a good background. We all know who his
6 Grandfather was. I went to school with his father. I am sure
7 that is important why he came to me to get me to help him. He
8 has always been hard working. He supports and provides for
9 his family. He has done a great deal for people that I have
10 come in contact with, in genuinely trying to help them.

11 I cannot ignore the fact of the context, and the
12 reasonable instruction that anybody could apply to what the
13 intent was behind those messages. And okay, I will concede
14 thank goodness nothing happened that was any worse that we see
15 take place. But, he has no prior record. And I understand
16 that the family was going to be gracious enough, and kind
17 enough, to let him get probation if their daughter didn't have
18 to go through this traumatic event. Well, I tried as much as
19 I could, within the bounds of professionalism in representing
20 my client ethically and zealously, and believing in him, to
21 make it as least traumatic upon that child as I possibly
22 could. So, I am asking the court, if you will listen to other
23 people who have good things to say about Kris, in spite of the
24 context of those text messages, it might just be that on the
25 punishment penalty for exercising his right to a jury trial,

SENTENCING HEARING

507

1 and getting convicted and putting him in jail for that, or is
2 there some reasonable alternative, or is there just going to
3 be too much public pressure on the system, given the nature of
4 what the evidence was that came out. Is the public system
5 going to put so much pressure on you that he has to go to
6 jail? Because, there is, some alternatives. A man with, no
7 prior history; obviously pretty intelligent, consider some
8 alternatives for him short of sending him to prison, but let
9 him stay out and support his family. He is on Sex Offender
10 Registry. He is going to be tightly guarded by Probation in
11 whatever he does. Require him to successfully attend and
12 successfully complete, even if it is at his own expense,
13 sexual predator therapy with some of the best known clinical
14 psychological, child psychiatrists in the State, like Dr.
15 Martin. And as a condition of his probation that he would not
16 get in there, and if he would not admit that it appears that
17 he has a problem as a potential sexually violent predator,
18 start with, if he won't admit that, that he won't successfully
19 complete that program while on probation. And if he doesn't
20 successfully complete that program while on probation the
21 first thing that is going to happen is that I'm going to get a
22 call from Chris or Susan and they are going to violate his
23 probation for not successfully completing the terms of his
24 probation by requiring him to go through this counseling, part
25 of which is saying, yes, I admit I've got a problem if a

SENTENCING HEARING

508

1 problem is recognized by the psychiatrist. And if you won't
2 or if you can't successfully complete it, his probation will
3 be revoked, and then he will go to jail.

4 I ask you to hang the maximum amount of time over his
5 head. Make him go to therapy. Make him successfully complete
6 therapy. And he's got a life sentence already with Sex
7 Offender Registry. Wherever he goes, wherever he and his
8 wife, his son, and his child goes, their next door neighbors
9 are always going to be able to look on a computer and say, he
10 is a sex offender. He lives right beside of us. And the
11 impact that it is going to have on those innocent children.
12 He is in jail for the rest of his life regardless of how much
13 physical incarceration you put on him.

14 I just ask you to give him a chance, because they were
15 willing to do it. I know it was bad that the child went
16 through what she did. But, I tried to make it as least
17 traumatic on her as I possibly could. So, if one day I was
18 standing here, I could ask them to show some mercy.

19 **THE COURT:** All right. Mr. Cannarella, let me respond
20 to one thing that you said before we hear from Mr. Berry,
21 which is this.

22 A person is not punished for going to trial, or
23 exercising their trial rights at any time in this Court. But
24 here is what happens.

25 That was brought out because the fact that probation may

SENTENCING HEARING

509

1 have been a discussion between the parties at some point, the
2 court is not involved; because to me it shows the over ---
3 really overwhelming compassion that the Minors had for the
4 defendant. After all of this then they would consent to some
5 punishment that would involve probation only, and no
6 incarceration for the defendant.

7 What happens though, is that when people exercise their
8 trial rights from time to time, the court and the jury hears a
9 lot more detail that is disconcerting and disturbing, and it
10 ends up that based upon the multitude of facts which then
11 would not be investigated or brought out in a brief guilty
12 plea setting, the defendant finds that, and the court becomes
13 aware of as does the jury, a much greater involvement in the
14 crime than simply a guilty plea and an admission of guilt
15 would have. That is what happened. It is not punishing
16 anyone for exercising their trial rights. And I don't want
17 anyone to leave this courtroom and think that that is indeed
18 what has happened here.

19 Now, Mr. Berry, if you have something you wish to say,
20 please remember you remain under oath from yesterday. We will
21 give you the opportunity to speak if you wish.

STATEMENT BY MR. KRISTOPHER WILMONT BERRY

23 **MR. BERRY:** Yes, Your Honor. I sent the text
24 messages. Whether they were a bad joke, whether they were
25 solicitation, I still sent them. And all the hurt that I have

SENTENCING HEARING

510

1 done to everyone associated with this, including you guys, I
2 am sorry. I abused your authority. I should have never done
3 that. You are her parents with absolute rights. And by
4 giving Minor a phone, I am sorry that I did that. It was not
5 my right to do so, and I am sorry, truly.

6 I understand that I am responsible for my actions, and I
7 understand that others are still going to have to suffer more
8 now because of them. And for that, I am sorry too.

9 I don't think I have anything else to say, Your Honor.

10 **THE COURT:** All right. Very good. Thank you, sir.
11 Please be seated.

12 Ladies and gentlemen, I want us all to understand that in
13 our system of justice, we have a clear division of
14 responsibility. Those who are either victims of crime, or the
15 jury should not take responsibility for any sentence that is
16 imposed by this Court; whether you believe it to be too harsh,
17 or to light, or somewhere in between. The jury are the judges
18 of the facts. The victims come forward to give their version.
19 And the judge makes the sentencing decision because we are in
20 the courtroom every day, and consistently, sadly consistently
21 involved with issues that are similar in nature. So, I don't
22 want anyone in the courtroom on the jury, or in the Minor 's
23 family to have some concern that whatever judgment comes out
24 of this they somehow have a responsibility for it.

25 Now, let me first say, to the Johnson's, before I ask if

SENTENCING HEARING

511

1 you wish to speak, that I was very proud of your daughter for
2 the way that she testified in this trial. Of course, I am not
3 the judge of the facts, but I cannot help but watch as a
4 witness testifies, and what I saw was a mature, intelligent
5 individual. And I think everyone on the jury would agree with
6 me who didn't come in here with some axe to grind, or finger
7 to point, who actually attempted to protect the perpetrator in
8 this case, who just requited herself very well in this
9 courtroom far beyond the issues and merits in this case. You
10 have a wonderful daughter. You have raised her well. And you
11 should be very proud. I did not require that you leave this
12 courtroom, because this is a major watershed event in your
13 family's life, which you were gracious enough to do. In fact,
14 you were gracious enough to agree that if the defendant would
15 plead guilty, and avoid all of this for everyone, then you
16 would consent to probation, which I think is overwhelmingly
17 gracious. But I didn't want you to leave this proceeding
18 thinking somehow that your daughter didn't do well here in
19 this courtroom, because just the purity of her life came
20 through, and it came through well. And so, you can leave here
21 knowing that you have done a good job. And there is not
22 anyone who comes to a parent, I guess, and slaps them on the
23 back and say, Sir, you have done a good job here. Life
24 doesn't work that way. But, today I tell you that I know that
25 you have. And I think everyone who observed the testimony of

SENTENCING HEARING

512

1 your daughter would feel the same.

2 What I saw in this case was a very mature young lady who
3 redirected and refocused a predator who was just working on
4 her, and she had the sense of self, and presence of mind to
5 change the subject, and switch it out, and push it back, and
6 that is a high mature level of someone of her age in dealing
7 with someone two, going on three times her age, and it was
8 very impressive. But for her reluctance, and for her
9 responses, this case --- we may have been trying something
10 here far worse, and I am glad that we were not.

11 And finally I would say to you, I don't want you to take
12 the jury's decision of a not guilty on a lewd act, and somehow
13 believe that the jury rejects your versions of facts, or
14 doesn't accept what you say, or find you not to be a credible
15 witness. I think there was a substantial question of whether
16 or not a kiss is a lewd act under South Carolina law. The
17 jury reached the decision on the facts. I respect that
18 decision, but I don't want you to receive it somehow as a
19 repudiation on that issue, because it clearly is not.

20 Now, with that, do you have something that you wish to
21 say?

22 STATEMENT BY MR. TRENT JOHNSON

23 MR. JOHNSON: Yes, sir. I am very proud of Minor J.

24 THE COURT: Let me say to you, please remember you
25 testified, so you remain under oath from the time you

SENTENCING HEARING

513

1 testified. Go ahead, sir.

2 **MR. JOHNSON:** We have never been vindictive people. My
3 first words to Susan when all of this came out, my very first
4 night with Susan, I am sorry for what it is going to do to
5 your family. We are not vindictive people.

6 But there are a couple of points that I would like to
7 make, and would want you to consider.

8 **THE COURT:** May I, because we have some people in here,
9 could I get you to speak up just a little bit. If you want to
10 turn --

11 **MR. JOHNSON:** I will, and I am a little nervous and
12 shaking a little bit.

13 I understand that the State and this Court had a
14 presumption of innocence. Kris knew he was guilty from day
15 one. He had an opportunity to plea out. And honestly, I
16 can't say that was genuine grace that you are trying to place
17 on us. But from the very beginning we were interested in
18 protecting Minor and protecting other children who would be in
19 his path in the future. Because we knew about some of the
20 other people, and the other people that the jury did not get
21 to hear all about. We have heard a lot of evidence. And we
22 have also heard proof that it was a child. So, it was
23 important to us just to stick with this and to push it
24 through.

25 Somehow the defense made it out that perhaps there was

SENTENCING HEARING

514

1 some alternative motive. We have done nothing but lost here.
2 And according to the defendant's own words, Minor] was on the
3 college track. It is over. And she will never see a college
4 scholarship. She will never be able to pursue her desire to
5 become a competitor status again. All of that is over. She
6 worked very hard for it. It has cost her a great deal. You
7 know, for what it is worth, we made a huge investment of time
8 and energy, and money, and those choices. And it did nothing
9 but cost us. What other possible motive would we have other
10 than to protect a childlike Minor] in the future? We were
11 proactive. According to what we know, the text messages
12 started Tuesday, and I found out about them by Thursday. We
13 were engaged. We were proactive. We were not as removed from
14 the circumstances as Mr. Berry would have the court to believe
15 we were. We were very engaged. And I felt that it was
16 because of our engagement, and because of God's genuine grace
17 that we were able to discover the phone, and to get involved
18 when we did. There is no question in my mind that had we not
19 it would have escalated.

20 And a couple of other things. The entire basis, I really
21 did not hear very much of a defense. And the defense that I
22 did hear was that Jerry is older, and if you look at the rule
23 of law perhaps if Kris had committed a lewd act then perhaps
24 this guy had committed a lewd act. And honestly, you know,
25 perhaps that is a decision for somebody to make. Well, what

SENTENCING HEARING

515

1 in the world does that have to do with this particular trial?
2 The entire case was based at pointing it at somebody else, and
3 not accepting responsibility for myself. Even as he stands
4 over there, he still --- it may be inappropriate. I don't
5 believe he has the capacity to understand that I am a danger,
6 and that I have done anything wrong. I believe that he is. I
7 believe if you put him back on the street today --- I don't
8 believe he is an idiot. I don't believe he is as intelligent
9 as he thinks he is. But I don't think he is in any position
10 himself in a way --- And we have seen, and I have seen dozens
11 of pictures of him with various women. That could have easily
12 refuted the testimony given here in this courtroom today. He
13 is a sexual deviant. He is a sexual deviant. And, I believe
14 he is a dangerous person.

15 My wife is a school teacher. My wife is a school
16 teacher, and this --- and this has flipped our world upside
17 down from day one. They say nothing more has happened.
18 Nothing more has happened. For the Johnson family, this has
19 been a very traumatic experience.

20 Just a couple of months ago back in February, on my
21 wife's school's Facebook page, an organization within the
22 school's Facebook page, the family of various people started
23 posting comments about, oh, we are going to get to post about
24 a teacher and a student that goes to your high school. If you
25 want more information, send me your contact information, and I

SENTENCING HEARING

516

1 will send you some trashy stuff about this teacher and her
2 students. And we didn't respond. We contacted the
3 Solicitor's Office, and just let them look. We didn't
4 respond. We didn't retaliate. It was very damaging. Who
5 knows what was done? Who knows how many people contacted her?
6 Who knows what sort of lies, because we haven't been out
7 there. You know, we could have gone out, we could have
8 contacted --- we could have contacted anybody at the gym. We
9 could have gone out and started rallying our case in the eyes
10 of the public. But in our eyes, this is very intimate, a very
11 private matter. And we have tried to keep it that way. This
12 is not something that we are proud to be here about today. We
13 were forced to be here today. And so, while he is out
14 declaring his innocence to people who used to be great friends
15 with us, and while we remained silent because we wanted the
16 jury to be the ones who spoke for us. And we stayed quiet.
17 And we just wait. And we just wait. I could have contacted
18 Sally Richardson. I could say, hey, look at this stuff,
19 Sally. And perhaps she might have changed her mind? But this
20 is not something that we are proud to be here. **Victim** is an
21 excellent person. The defense asked if she had the same moral
22 capability --- of course a fourteen-year-old, needs a parent
23 from time to time to guide her. But you can see in the text
24 messages she is trying to push back, trying to push back, and
25 he is trying to open her up. He is trying to manipulate her.

SENTENCING HEARING

517

1 There have been no convictions. Thank God for his plea,
2 I guess it was a plea. But the Court martial he agreed to a
3 plea. It is interesting that the women there --- that there
4 were women involved there too. I think he is a deviant. And,
5 while I have nothing but sympathy for his family, in some
6 strange way sympathy to him and it is all because I don't feel
7 like he had the moral capacity to understand that even now I
8 committed a very serious crime. A lewd act took place. It
9 took place. And I understand what the jury --- they had to
10 weigh the evidence, and make up their own mind. But it took
11 place. So we --- These are some of the first experiences that
12 our fourteen-year-old daughter got to have. And I am sure
13 there are a thousand other things, but I will stop here.

14 Thank you, Your Honor.

15 **THE COURT:** All right. Thank you, Mr. Johnson for your
16 comments.

17 All right. Ladies and gentlemen, one comment I will make
18 before I sentence the defendant. There was a reference to a
19 witness just a moment ago that was made in the courtroom. The
20 State, before this case was called to trial attempted to put
21 in some evidence, what we call prior bad acts. There was a
22 young lady who came forward and said that she had had a
23 similar experience with the defendant. But I excluded that
24 evidence, because under South Carolina Rules of Evidence, it
25 has to be similar in almost every respect. That young lady

SENTENCING HEARING

518

1 was not a gym student. She was not the recipient of a
2 telephone or a camera from the defendant. There were several
3 dissimilarities. That conduct had never been charged. That
4 is, there were no criminal charges that had ever been brought.
5 Thus, under prevailing precedence, the court did not permit
6 it. That was a reference that was just made by Mr. Johnson as
7 to that witness. Again, it is not that we are attempting to
8 hide things from the jury. It is just an opportunity --- or
9 at that point a responsibility on the court to protect the
10 rights of the defendant to prevent unconvicted conduct
11 allegations really from coming before the jury. Because the
12 real question was, did this occur? Were these allegations
13 proved by the Solicitor to the jury.

SENTENCE OF THE COURT

14
15 **THE COURT:** All right. Mr. Berry, sir, you know, you
16 are not charged with robbery here, but really this is what it
17 was, because, you have stolen the innocence of a young girl.
18 You have stolen the privacy of a family. And you have stolen
19 the dignity of a young girl and her family. To have your
20 first crush published here in the courtroom for all the public
21 to see, and the embarrassment of all that what you might call
22 private drama in a fourteen-year-old's mind, is a very
23 demeaning thing. And you took the position throughout this
24 trial that all that you did was in the sense of and an
25 opportunity to protect Minor when really that was inconsistent

SENTENCING HEARING

519

1 with the very fact that you chose to go forward to trial. To
2 air all of this out with overwhelming and substantial evidence
3 against you, and not only damage those who are the Minors
4 here, but damage your family who is seated behind you. In
5 other words, as I look around you, sir, I see people in deep
6 distress all around you, while you sit there in a sea of calm
7 over actions that you have taken. And I hope you will listen
8 to what Mr. Johnson has said, because there is accuracy in his
9 words that you need to be aware sir that what you have done is
10 a serious crime. And you have not only committed solicitation
11 of a minor, but again you have stolen the dignity and the
12 innocence and really the young and tender years of at least
13 one person, and perhaps others.

14 For those reasons, I sentence you to ten years in The
15 Department of Corrections. I provide that after you serve
16 five of those, you will be place on Probation.

17 I am going to require you to pay a five thousand-dollar
18 fine.

19 And while you are on Probation, I am going to require you
20 to follow the rules of Probation. And one of those rules
21 shall be that you shall have no social or business contact
22 with any female under the age of twenty-one-years.

23 I am going to remand you now to the custody of the
24 Detention Center for transport to The Department of
25 Corrections.

SENTENCING HEARING

520

1 Good luck to you, sir.

2 All right. As we close this record, is there anything
3 further now from defense?

4 **MR. CANNARELLA:** Your Honor, would you repeat that
5 sentence one more time.

6 **THE COURT:** The sentence is ten years, suspended upon
7 --- requiring him to serve five. Then, after service of five
8 he shall be on Probation for five-years. During that
9 probation, he will be required to serve all of the rules of
10 probation, including this rule that I am adding which is, no
11 social or business contact with any female under the age of
12 twenty-one-years while he is on Probation.

13 **MR. CANNARELLA:** A split sentence.

14 **THE COURT:** It is a split sentence.

15 **MR. CANNARELLA:** Five-years suspended to five --

16 **THE COURT:** A ten-year sentence, five of which he must
17 serve actively, the other five on Probation. Again, he is
18 going to be required to register as a sex offender. He is
19 going to be on the Child Abuse Registry. And also, Mr.
20 Cannarella, you should inform you client that he is subject to
21 a Sexual Violent Predator Proceeding, when he reaches the end
22 of his sentence from the Attorney General's Office, if they
23 believe that to be appropriate, which would keep him in
24 detention longer than he would have to serve under the five
25 year sentence.

SENTENCING HEARING

521

1 All right. Anything further now from the State?

2 MS. BURCH: No, Your Honor. Thank you.

3 THE COURT: From the defense?

4 MR. CANNARELLA: No, Your Honor.

5 THE COURT: All right. Hearing none, then ladies and
6 gentlemen, to the Berry family, I am sorry that it has ended
7 this way. I wish you well, ladies and gentlemen.

8 And to the Johnson family, as you close this chapter and
9 move forward, best wishes to you.

10 This Court is now in recess.

11 (Whereupon, these proceedings were concluded at
12 5:53 p.m. on Thursday, July 21, 2011.)

13 --- END OF TRANSCRIPT ---

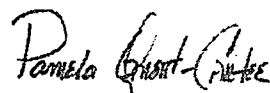
CERTIFICATE OF REPORTER

522

I, the undersigned, Pamela Ozment-Cartee, official Court Reporter for the Fourth Judicial Circuit of South Carolina, do hereby certify, that the foregoing is a true, accurate and complete Transcript of Record in the above captioned case, relative to appeal, in The Court of Common Pleas in Darlington County, South Carolina, on the 18th, 19th, 20th, and 21st days of July 2011.

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

February 26, 2014.

A handwritten signature in cursive script, reading "Pamela Ozment-Cartee".

Pamela Ozment-Cartee
Circuit Court Reporter

WITNESSES

David Young

Darlington County Sheriff

Law Enforcement Case #: 201001-0668

863

WAIVER OF PRESENTMENT

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to:

Defendant

ARREST WARRANT NUMBER
J653835

ARRESTED ON: 2010-01-30

ACTION OF GRAND JURY

Grand Jury Foreperson

Date

SEP 02 2010

VERDICT

TRUE BILL

Petit Jury Foreperson

Date

DOCKET NUMBER:
2010-GS-16-1364

The State of South Carolina

County of Darlington

COURT OF GENERAL SESSIONS

Term:
September 2010

THE STATE

vs.

Kristopher Wilmont Berry

INDICTMENT FOR

Criminal Solicitation of a minor

§16-15-0342

CDR Code: 2999

TRUE CERTIFIED COPY

CLERK OF COURT/RMC
DARLINGTON COUNTY, SC

William B. Rogers, Jr., Solicitor

STATE OF SOUTH CAROLINA)

INDICTMENT FOR

COUNTY OF DARLINGTON)

Criminal Solicitation of a minor

§16-15-0342

At a Court of General Sessions, convened on September 20, 2010, the Grand Jurors of Darlington County present upon their oath:

CRIMINAL SOLICITATION OF A MINOR

CDR: 2999 16-15-342(A)(E)

That Kristopher Wilmont Berry, a person eighteen years of age or older, did in Darlington County, on or about January 11, 2010 thru January 29, 2010, knowingly contact or communicate with or attempt to contact or communicate with Minor J [REDACTED], a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5), or with the intent to perform a sexual activity in the presence of that person, in violation of Section 16-15-342, S. C. Code of Laws, 1976, as amended.

TRUE CERTIFIED COPY. 7

Scott B. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, SC

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

William B. Rogers, Jr.
WILLIAM B. ROGERS, JR.
SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Darlington
STATE VS.Kristopher Wilmont Berry

AKA:

Race: Sex: M Age: 36DOB: -1974 SS#: Address: City, State, Zip: Hartsville, SC 29550DL#: SID#: *CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Criminal Solicitation of a minorINDICTMENT/CASE#: 2010-GS-16-1364A/W#: J653835Date of Offense: 1/11/2010S.C. Code § : 16-15-0342CDR Code #: 2999

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-15-0342 of the S.C. Code of Laws, bearing CDR Code # 2999☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☒ §17-25-45
w/minor 1st or Lewd Act)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.ADJEST: Burch, Kendall 76339 SC Bar# Defendant Attorney for Defendant 1104
SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 18 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 5 days/months/years and/or payment
of \$ 5,000; plus costs and assessments as applicable*; the balance is suspended with probation for 5months/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.☒ 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 PTUP TRUE CERTIFIED COPY
Total: \$ plus 20% fee: \$
Payment Terms:
☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$ 5,000.00
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 5375.00
§ 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	\$
§ 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	\$
3% to County (if paid in installments)	\$	\$ 315.15
TOTAL		\$ 15,820.15

 days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. ☐

May serve W/E

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: NO SOCIAL OR BUSINESS CONTACT
WITH ANY FEMALE UNDER AGE OF 21

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.Clerk of Court/ Deputy Clerk Donna CoulterCourt Reporter: Pamela CarterPresiding Judge Judge Code: 2121Sentence Date: 07/21/11

FORM 5

STATE OF SOUTH CAROLINA)

County of Darlington)Kristopher W. Berry 347006)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

14-CP-16-0

APPLICATION FOR

POST-CONVICTION RELIEF

FILED
2013 DEC 19 MAIL: 17
CLERK OF COURT
DARLINGTON COUNTY, S.C.**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 Evans Correctional Institute
2. Name and location of Court which imposed sentence Darlington County
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2014-GS-16-1364
 - (b) _____

TRUE CERTIFIED COPY: 7
Scott B. Suggs
 CLERK OF COURT/RMC
 DARLINGTON COUNTY, SC

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) July 21, 2011 10 years to be released from...
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeal was denied (Case Affirmed)
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. Heard Sep 17, 2013, Filed Oct 30 2013
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. unknown
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

2013 DEC 19 AM 11:17
SCOTT B. SUTTS
CLERK OF COURT
ROCK HILL, S.C.

FILED

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of Counsel
- (b) Rule 5 and 6 Violations by State
- (c) Brady and progeny violations by State...
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Counsel for the applicant was severely deficient...
- (b) The State failed to disclose evidence that...
- (c) Brady v Maryland and its progeny state...
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
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. That the Commission on Lawyer Conduct did...
- ii. That the Commission on Lawyer Conduct did...
- iii. That Good time was taken unduly by SCOC...
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. US District Court, District of SC
- ii. Same
- iii. Same
- iv. _____

2013 DEC 19 AM 11:17
 SCOT. B. SUGGS
 CLERK OF COURT / R.D.
 BERLIN COUNTY, S.C.

FILED

(c) the disposition thereof:

- i. denied
- ii. denied
- iii. pending
- iv. _____

(d) the date of each such disposition:

- i. unknown (information lost)
- ii. unknown (information lost)
- iii. pending
- iv. _____

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

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

FILED
 2013 DEC 19 AM 11:17
 SCOTT B. SUGGS
 CLERK OF COURT/R.O.D.
 DARLINGTON COUNTY, S.C.

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?

Yes, Federal Court 42 U.S.C. Section 1983
State Civil Law Suit Filed

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

(a) which grounds have been presented:

- i. Perjury and Subornation of Perjury of the
- ii. Defamation, Filing a False Police Report, Perjury
- iii. Rule 403 Rules of Evidence

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

- i. 1983 Civil Rights / Constitutional Rights Violations
- ii. Civil Litigation Darlington County
- iii. SC Appellate Court

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) Other Such grounds are only Subject in PCR
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
No, Pro Se litigant

2013 DEC 19 AM 11:17
 SCOTT B. SUGGS
 CLERK OF COURT/R.O.D.
 DARLINGTON COUNTY, S.C.

FILED

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

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

i. 17a) b) c) was Paul Cannarella
 ii. 17d) was Dayne Phillips to prepare and
Carmen Garjesan to argue
 iii. _____

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

i. Case No: 10-G-S-16-1364 was Paul
Cannarella pre trial, during, and sentencing
 ii. Appeal was Dayne Phillips and Carmen
Garjesan.
 iii. _____

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

Whereas, the applicant request the vacation
of the Conviction and either further prosecution
be barred or New Trial instituted. In the...

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

No.

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Darlington)

I, Kristopher Wilmont Berry, 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 4th
 day of December, 2013.

Diane B (L.S.)
 Notary Public

My Commission Expires: Feb 7th 2023

FILED
 2013 DEC 19 AM 11:17
 SCOTT B. SUGGS
 CLERK OF COURT/R.O.D.
 DARLINGTON COUNTY, S.C.

Revised 3/2003

5) Continued... in Carceration upon Completion of Five (5) years and a Fine of \$5,000 with Five (5) years probation. To be placed on Central Registry of Child Abuse and Neglect. Special written instructions are, "No Social or business Contact with any Female under 21"

10)d) Criminal Violations of SC Code of Law § 16-9-10 Perjury and Subornation of perjury by the State as well as Rules 407(8.4) and 402 (K) violations.

10)e) Rule 403 violation of Rules of Evidence.

10)f) Rule 609 (b) violation of Rules of Evidence.

10)G) Sentencing guidelines Violation.

11)a) Continued... that Counsel was not functioning as guaranteed by the Sixth Amendment, and this deficient performance was so serious that it deprived the applicant a fair trial. 1) Counsel failed to properly research and investigate cell phone technology in order to understand the simple difference between keypad texting and touchscreen texting. At no time did Counsel have even the slightest grasp on the difference between the two. This lack of competence and understanding hampered his ability to explain

Additional Pg 10 R18

SCOTT B. SUGGS
CLERK OF COURT/RJ
DARLINGTON COUNTY

2013 DEC 19 AM 11

FILED

FILED

11) a) continued... the mistakes made in the applicant's texting. Counsel also failed to research or investigate the text messages on the applicant's cell phone. Despite applicant telling Counsel numerous times that there were valuable text messages on his phone it was not until the first day of his trial that the applicant was told that there were no texts on his cell phone. This confusion led the applicant to believe the phone showed to him was, in fact, not his and he denied ownership because the phone he surrendered was full of text messages. Had Counsel been diligent, he could have discovered that SLED had taken nearly four months to search the applicant's phone. The applicant's cell phone manual was searched by his sister and the phone has an automatic 30 day text deletion feature. Had the Counselor acted properly this loss of exculpatory evidence issue could have been addressed under Brady and progeny and the trial would have proceeded far differently. The applicant has two witnesses who both read the exculpatory text messages on the applicant's cell phone the very evening he was arrested. This loss of

Additional Pg 2 of 18

11)a) continued... evidence will be discussed further in 11)b). Without this evidence or even the jury's knowledge of its existence the applicant was denied a fair trial. 2) Counsel and applicant worked only 3 days prior to trial and developed an agreed upon strategy. From opening statement to closing argument this strategy was never adhered to. Firstly, applicant requested several times that a Speedy Trial motion be put in. Counsel never did so. The alleged ^{Minor} in the case gave exculpatory statements in her forensic interview. Counsel along with applicant and two other planners knew that should this interview be played and Counsel point out these exculpatory statements, the trial would possibly had a different result. However, Counsel decided, against the applicants expressed wishes, that the interview only be made available during jury deliberations, "in the interest of time." This deficient performance denied the applicant of a fair trial and failed to subject the prosecution's case to meaningful adversarial testing. Secondly, several witnesses for the State could have been impeached. The applicant gave the Counselor questions that should be asked of these witnesses.

Additional Pg 30 of 18

ii) a) continued... They were never asked these questions. Witnesses for the applicant were to be asked specific questions to impeach several of the State's witnesses. They were never asked these questions. The applicant put his daughter on the stand to impeach the alleged victim and she was never asked the questions to do so. By doing this, Counsel misrepresented the applicant. Counsel also told applicant he could only have three character witnesses and yet he never called them to the stand. The jury was denied valuable insight by the Counselor. Thirdly, Counsel severely misrepresented the applicant during closing arguments by arguing that the applicant merely stated he "wanted to" but never "asked to" and that he should be judged by the same standard as Jerry Hall (the alleged Minor's 19 year old boyfriend). Counsel misled the jury in his closing argument and basically asked for leniency rather than stating the applicant's innocence. Lastly, Counsel argued against allowing a "Lyles" witness to take the stand during a pre trial hearing which is the exact opposite of what the applicant desired.

Additional Page 4 of 18

- 1) a) Continued... This witness was easily impeachable and the applicant knew that the State had suborned the perjury of this witness. Had Counsel questioned this witness her alleged evidence would not have been able to be used in sentencing without being confronted.
- 3) Counsel attempted to extort the applicant for more money by saying repeatedly, "If we had \$100,000, we could win this case." He even said this at the beginning of the applicant's trial. The applicant's wife witnessed these statements. In essence, the applicant's poverty was a key factor in his conviction.
- 4) Counsel failed to research and/or use any of the applicant's awards, citations, or decorations from his 13 years in the Marine Corps. He was unsure how to read the applicant's DD-214 and was woefully ignorant on using the applicant's service during trial which would have shown the jury the applicant's numerous years working with children without complaint. These awards and decorations should have also been used by Counsel as mitigating circumstances to sentencing.
- 4) Counsel did not object to the State's use

Addition Pg 5 of 18

11) a) continued... of his military discharge as a means to impeach despite there never being a Conviction. Additionally, Counsel's ignorance of Rule 609(b) prevented him from objecting and therefore Counsel failed to preserve the Rule Violation for appeal. Had Counsel been diligent neither the applicant's Summary Court Martial, which was more than 10 years old and therefore inadmissible; nor his discharge which was not a Conviction of any type, would have been relevant nor allowed. Counsel's lack of Competence violated the applicant's right to a fair trial. 5) Counsel failed to file a Motion for Reconsideration within the 10 days allotted to do so, despite knowing the Court had sentenced the applicant harshly for a first time offender and beyond allowable sentencing guidelines. In failing to do so, Counsel effectively and permanently denied the applicant the ability for reconsideration violating his due process rights. Counsel also failed to inform applicant that he may be subject to Dangerous Sexual Predator Assessment, as told to him, in the applicant's absence, by the Court. 6) Counsel failed to object to the

Additional Pg 6 of 18

FILED

2023 DEC 19 AM 11:18
CLERK OF COURT
DARLINGTON COUNTY, SC
J. SCOTT B. SUGGS, D.

11) a) Continued... State's use of unfounded evidence used during sentencing, which in itself, violates the applicant's Sixth Amendment right to confront any accusers against him. Since there was no objection, it was preserved for appeal. Counsel's inaction have contributed to a harsher sentence for the applicant. 7) Counsel knew that the applicant's student records had been subpoenaed by the State. Counsel also knew, by way of the applicant, that nearly all of the interviews were in favor of the applicant, if not all of the interviews. Furthermore, Counsel knew the Rule 5 Discovery was incomplete due to the absence of these interviews. Counsel did nothing to obtain these interviews, did not object to their absence, and did not preserve the issue for appeal. Due to Counsel's incompetence before, during, and since trial, the applicant has been denied due process and fairness throughout the entire trial process. Counsel's actions and inactions constitute significant ineffective assistance of Counsel.

11) b) had been subpoenaed from the Gymnastics
Additional Pg 7 of 18

FILED
DEC 19 AM 11:18
CLERK OF COURT
SOUTH BAY
DO NOT SIGN
DO NOT SIGN

11).b) continued... Center of Hartsville. The State had interviewed numerous of the applicant's student's parents. Most if not all of these interviews were positive and in favor of the applicant. The applicant also knows that the Solicitor, Patti McKenzie-Parker, was in charge of these interviews. The applicant was also told by his Counselor that Ms. Parker was new and "looking to make a name for herself." Since the interviews were overwhelmingly positive in favor of the applicant and an established motive was present and malice can be assumed; Ms Parker intentionally frauded the Court by intentionally suppressing these interviews and did not turn over the same after a request was made by the applicant for all said evidence. This is extrinsic fraud in that the State failed to disclose evidence that would show the applicant in a positive light. Since these interviews were vastly in the applicant's favor, Ms Parker/the State intentionally suppressed them so that the jury would not be able to hear them. There is vast case law which supports the applicant's case.

Additional Pg 8 of 18

FILED
2013 DEC 19 AM 11:18
SCOTT B. SUGGS
CLERK OF COURT / R.O.D.
HARRINGTON COUNTY, S.C.

11)c) continued... that all evidence must be turned over to the Defense by the State with or without specific request. As discussed in 11)b) the interviews were intentionally suppressed because of their positiveness toward the applicant. The other evidence the State failed to disclose was the text messages on the applicant's phone. The applicant told the Darlington County Sheriff's Office that there were texts on his phone, upon surrendering said phone. It was placed into evidence on January 30th 2010 at 0130 am. The phone was not searched until May 20, 2010, nearly 4 months after the applicant's phone was seized. During trial, Russ Harrell stated that "...you treat all phones in a forensically sound manner and gather data as quickly as possible." The applicant's phone has a 30 day text deletion feature. Had SLED adhered to Russ Harrell's line of thought, Exculpatory text messages would have been extracted. Furthermore, the texts would have given further evidence that a boy, Jerry Hall, was guilty of Criminal Sexual Conduct with a minor. Brady, Trombetta, Augurs, Youngblood

Additional Pg 9 of 18

FILED
2010 DEC 23 AM 11:10
CLERK OF DISTRICT COURT
DARLINGTON COUNTY, S.C.

11) (c) Continued... Bagley and many others stipulate that once evidence has been lost, destroyed, or suppressed in such a manner, whether intentionally or inadvertently, and this discovery has been made since the trial ended, the Court at the very least must set aside the verdict and institute a new trial based on this newly discovered evidence or at the most overturn the verdict and bar further prosecution or suppress the State's most probative evidence. The applicant has two witnesses to the texts and both have written affidavits to the contents of those texts. The applicant has also filed a Motion for New Trial on December 7, 2011 which has yet to be placed on any docket to the applicant's knowledge.

11) d) The State violated SC Code of Law § 16-9-
 10 Perjury and Subornation of perjury in at least one occasion. Kendall Renee Burch submitted a document to the Court "Memorandum in Support of prior Bad Act Evidence" on July 11, 2011. She knew this document to contain fraudulent information concerning the age of the alleged witness within named Lauren King. Burch States

Additional Pg 10 of 18

FILED

2013 DEC 19 AM 11:18

SCOTT B. SUGGS
 CLERK OF COURT / R.O.D.
 DARLINGTON COUNTY, SC

11) d) continued... that King was 15 when she met the applicant and he began to solicit King. Burch knew that King met the applicant at a Christmas Play rehearsal in 2005. Burch knew King was born October 24, 1989 which would make King 16 when they met at the beginning of November for rehearsal. King did not know but Burch did that if a child is 16 and gives Consent to be solicited it is a defense. Knowing this, Burch convinced King to say she was 15 when the applicant met and began to solicit her. Without this age setback, Burch would have no "Lyle's" witness as King continued to act in plays with the applicant until her graduation and then remained friends until her second year in college. Since King did not know that she must be 15 for any crime to have been committed, it is reasonable to assume Burch was the source as her name existed on the fraudulent document, and she argued in pre-trial for the evidence to be admitted. During Sentencing, Burch used the uncontroverted evidence of King's alleged solicitation to seek harsher Sentencing for the applicant. In doing all of this the State violated the applicant's Sixth, Fourth, and Fourteenth Amendment

Additional Pg 11 of 18

FILED

2013 DEC 19 AM 11:18

SCOTT B. SUGGS
CLERK OF COURTS
DAKOTA COUNTY, S.D.

FILED

2013 DEC 19 AM 11:18

CLAYTON B. SUGGS
CLERK OF COURT
DARLINGTON COUNTY, S.C.

11) d) Continued... Rights by not allowing the applicant to face any accuser against him denied him due process procedures. Furthermore, Borch and Parker's actions constituted extrinsic fraud upon the Court. "The Subornation of Perjury by an attorney and/or the intentional concealment of documents (interviews) by an attorney are actions which constitute extrinsic fraud. ... Where an attorney - an officer of the Court - suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party of having his day in Court. These actions by an attorney constitute extrinsic fraud" Chewning v Ford Motor Co. 346 S.C. 28, 550 S.E. 2d 584 (Ct App 2001) It is reasonable to assume that State could have obtained King's birth certificate to ascertain her age and since King, herself, knew that she met the applicant for the first time at the play rehearsal, on stage, at the beginning of ^{KWB} ~~February~~ November the only conclusion that could be drawn was that King was 16 when she met the applicant. The State needed to defeat the consent defense so it logically backed up King's age one year to age 15. The State had the applicant's DD-214 so it also knew the applicant was in the Marine Corps

Additional Pg 12 of 18

11)d) continued-- until March of 2005. Not only has the State, namely Burch, violated SC Code Law § 16-9-10 by encouraging King to back her age up one year in order to "Create" and "Fabricate" evidence against the applicant but she has violated her own oath of office (Rule 402(k)) and under Rule 407 she has committed professional misconduct as under Rule 8.4 "It is professional misconduct for a lawyer to a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; c) commit a criminal act involving moral turpitude; d) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; e) engage in conduct that is prejudicial to the administration of justice..." As there is an additional two more stipulations and only two more; five out of seven is more than sufficient to assert misconduct by way of subornation of perjury, perjury, fraud, and general dishonest behavior that is unbecoming of her post. Since "Fraud upon the Court" is an affront to the administration of justice, a litigant

Additional Pg 13 of 18

FILED
2013 DEC 19 AM 11:18
CLERK OF COURT
SCOTT B. SUGGS
DARLINGTON COUNTY, S.C.

11) d) continued... who has been defrauded need not establish prejudice" Hazel-Atlas Glass Co v Hartford Empire Company, 322 U.S. 238 (1944) and that "... the perpetrator of the fraud [upon the Court] should not be allowed to dispute the effectiveness of the fraud after the fact" Dixon v Commissioner Internal Revenue, 2003 WL 1216290 (9th Cir 2003)

11) e) Rule 403 of the Rules of Evidence was violated by the Court during trial. Due to the State deleted the applicant's text messages, the applicant doubted the cell phone in question was his. When he denied the ownership of phone, the State pulled a picture from the phone which was of the applicant nude covering his genitalia. The applicant is now sure there were other, less prejudicial pictures on his phone, yet the State chose this highly suggestive picture. The State offered to crop the photo, the Court stated that it was disinclined to accept the State's offer to crop the almost nude photo to nothing but the applicant's face to prove ownership and nothing more. The Court stipulated to the jury that it was to use this photo for nothing other than to prove

Additional Pg 14 of 18

FILED
2013 DEC 19 AM 11:18
CLERK OF COURT
HARRIS COUNTY, TEXAS

11) e) continued... ownership of the phone and establish believability of the applicant. The State, namely John Holt, went on to suggest that the applicant was using this picture to entice the alleged victim as she "liked men with abs." At no time was it revealed to the jury or the Court that the cellphone that the alleged victim possessed was unable to send or receive multimedia texts (pictures). Use of the picture in a manner that was outside of the Court's intentions and the Court's lack of impartiality in the admission of the picture shows prejudice by the Court and denied the applicant a fair trial. Furthermore, the State's failure to disclose the fact that the alleged victim's phone could not receive or send pictures almost certainly led to a faulty connection between the picture and the applicant's intentions to send it to alleged victim.

11) F) The State Violated Rule 609 of the SCRE in that it used the applicant's Summary Court Martial, which took place in 2009. Rule 609(b) states, "... evidence of a Conviction more than 10 years old, as calculated herein, is not

Additional Pg 15 of 18

2013 DEC 19 AM 11:19
 SEBOTT B. SUGGS
 CLERK OF COURT/R.O.D.
 DARLINGTON COUNTY, S.C.

FILED

11)f) continued... admissible unless the proponent gives to the adverse party sufficient advance written notice of the intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence" The State did not provide written advance notice in any capacity therefore it should never have used the applicant's Summary Court Martial for impeachment. Furthermore the State used a not Conviction for impeachment purposes concerning the applicant's other than honorable discharge. The applicant was never charged, tried, or convicted of anything, however, the State sought to use the issues surrounding the applicant's discharge and the discharge itself as evidence for impeachment. This is in violation of Rule 609 and created a due process violation against the applicant.

11)g) The Court overstepped its authority when sentencing the applicant. In addition to the sentencing guidelines, the Court added, "No social or business contact with any female under 21." This is extremely harmful to the applicant as his own daughter, nieces, and inlaws are under 21. Furthermore, it is harmful in that

Additional Pg 16 of 18

2013 DEC 19 AM 11:19
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

FILED

11)g) Continued... the applicant is a Personal Trainer and his livelihood will be harmed with this additional stipulation with no apparent expiration. This Stipulation was beyond Sentencing guidelines.

13)a)i. ^{10th} Conduct a proper investigation concerning the possible misconduct of the applicant's trial lawyer. A Habeas Corpus was requested.

13)a)ii. Not conduct an investigation into the applicant's allegations of Subornation of perjury and fraud upon the Court by Solicitor Kendall Renee Burch. A Habeas Corpus was requested.

13)a)iii. While applicant was under involuntary protective concerns after a sexual assault occurred at Evans. Applicant Filed Habeas Corpus to return lost Good time, or Good time that would be earned.

15)a)i. Solicitor Kendall Renee Burch. Case No. 4:13-648-RMG-BHH

15)a)ii misdemeanor against Lauren King
Case No: 13 CP160236.

Additional Pg 17 of 18

2013 DEC 19 AM 11:19
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

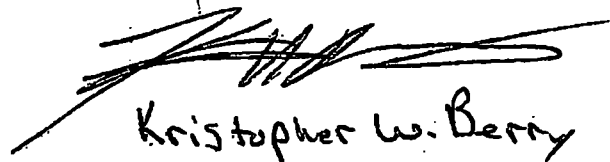
FILED

15)a)iv Rule 609 Violation

15)b)iv SC Appellate Court

19) continued... issue of going beyond sentencing guidelines, the applicant requests the vacation of the instructions, "No social or business contact with any female under 21."

This completes the Additional Pages. No other information is beyond the applicant's Signature.


Kristopher W. Berry

FILED
2013 DEC 19 AM 11:19
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

Additional Pg 18 of 18

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

I, Kristopher Wilmont Berry, 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
4th day of December, 2013.


Notary Public

My Commission Expires: Feb 7th 2023

FILED
2013 DEC 19 AM 11:19
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON	)	FOR THE FOURTH JUDICIAL CIRCUIT
Kristopher W. Berry, #347006,	)	Case No. 2013-CP-16-1002
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent, making its Return to the Application for Post-Conviction Relief filed December 19, 2013, would respectfully show this Court:

I.

In September 2010, the Darlington County Grand Jury indicted Applicant for criminal solicitation of a minor (2010-GS-16-1364) and lewd act (2010-GS-16-1363). Paul V. Cannarella, Esquire, represented Applicant. On July 18, 2011, Applicant proceeded to trial before the Honorable J. Michael Baxley and a jury. On July 21, 2011, the jury found Applicant guilty as indicted. Judge Baxley sentenced Applicant to ten (10) years imprisonment, suspended upon the service of five (5) years active service and five (5) years of probation.

Applicant filed a timely notice of appeal. Dayne C. Phillips, Esquire, and Carmen V. Ganjehsani, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on October 30, 2013. State v. Berry, Op. No. 2013-UP-396 (S.C. Ct. App. filed October 30, 2013). The remittitur was returned to the circuit court on November 18, 2013.

Applicant filed a Petition for a Writ of Habeas Corpus in the United States District Court for the District of South Carolina on March 18, 2013. On May 22, 2013, the Honorable Richard M. Gergel dismissed the petition without prejudice to allow Applicant to exhaust his state remedies.

II.

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

1. "Ineffective assistance of counsel"
2. "Rule 5 violations by the State"
3. "Brady and progeny violations by State"

Applicant elaborated on his claims in an eighteen (18) page attachment to his applications. Any claims not specifically enumerated in the Application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP.

Attached to this Return and incorporated herein are the records of the Darlington County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, the trial transcript, and Applicant's appellate records. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent submits Applicant's allegation of ineffective assistance of counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance

of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits 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.

Respondent interprets Applicant's other allegations as ones of prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-27-20(b). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised the issue of prosecutorial misconduct on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794 (1989).

V.

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

VII.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held on those issues so requiring one.

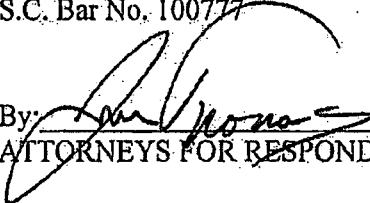
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

Nov 19, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF DARLINGTON)

IN THE COURT OF COMMON PLEAS

2013-CP-16-1002

KRISTOPHER W. BERRY, 347006)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

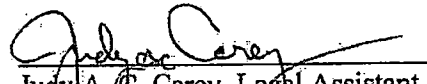
STATE OF SOUTH CAROLINA,)

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 of the Respondent in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Tristan M. Shaffer, Esquire
Axelrod & Associates, PA
4701 Oleander Drive
Myrtle Beach SC 29577**

DATED this 19th day of November, 2014.


Judy A. C. Carey, Legal Assistant
For Respondent

I N D E X

WITNESSESPAGE

Kristopher Berry:

Direct Examination by Mr. Shaffer 17

Cross Examination by Ms. Kinard 40

Redirect Examination by Mr. Shaffer 46

Paul Cannarella:

Direct Examination by Mr. Shaffer 49

Cross Examination by Ms. Kinard 60

Redirect Examination by Mr. Shaffer 69

Re-cross Examination by Ms. Kinard 72

Rebecca B. :

Direct Examination by Mr. Shaffer 73

I N D E X

NO.DESCRIPTIONEV.

(NO EXHIBITS INTRODUCED DURING HEARING)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 MS. KINARD: May it please, the Court?

2 THE COURT: Yes, ma'am.

3 MS. KINARD: This case is before the court on an
4 application for post conviction relief filed December 19,
5 2013 by Kristopher W. Berry, case number 2013-CP-16-1002.
6 In September of 2010 the Darlington County grand jury
7 indicted the applicant of criminal solicitation of a minor
8 and a lewd act on a minor. Paul V. Cannarella represented
9 the applicant. On July 18, 2011, the applicant received a
10 trial before the Honorable J. Michael Baxley and the jury.
11 On July 21, 2011 the jury found the applicant guilty as
12 indicted. Judge Baxley sentence the applicant to ten years
13 of imprisonment suspended upon the service five years of
14 active service and five years of probation. He filed a
15 timely notice of an appeal. Dayne C. Phillips and Carmen V.
16 Ganjehsani of the Office of Appellant Defense perfected the
17 appeal. The South Carolina Court of Appeals affirms
18 applicant's conviction on October 3, 2013. The remittitur
19 returned to the Circuit Court November 18, 2013. Applicant
20 filed a petition for a Writ of Habeas Corpus in the United
21 States District Court for the District of South Carolina on
22 March 18, 2013 and on May 22, 2015 the Honorable Richard M
23 Gergel dismissed the petition without prejudiced to
24 applicant to exhaust his state remedies. In this
25 application he alleges he's been held in custody

1 unlawfully, for ineffective assistance of counsel, Rule 5,
2 excuse me, Rule 5 violation by the state, Brady and progeny
3 violation by the state. It is the state's understanding
4 that the applicant has several motions upon he would like
5 to proceed. The state is ready to proceed on those motions
6 as well as case in chief.

7 MR. SHAFFER: Your Honor ---

8 THE COURT: Yes, sir.

9 MR. SHAFFER: Thank you, Your Honor. We actually are
10 moving for discovery in this case. This is an abnormal
11 case because I believe it's very, very, rare that I would
12 ever actually asked for discovery in a PCR. Given the fact
13 that he's made these allegations related to Rule 5
14 violations and prosecutorial misconduct, essentially, we
15 believe that discovery is essential. My client ran a or
16 worked at a gymnastics -- he was a gymnastics coach and,
17 basically, there was a student that was, that had accused
18 him of inappropriate behavior which is the basis of his
19 charge. While he was being investigated it appears that
20 the solicitor's office actually subpoenaed the, subpoenaed
21 the records from the gymnastic studio and -- Your Honor, if
22 you wouldn't mind, may I consult with my client just
23 briefly?

24 THE COURT: Yes, sir.

25 MR. SHAFFER: Your Honor, I apologize I will

1 continue. These records were never turned over. There --
2 what we would like to do is actually talk with or first of
3 all, get these records. Get what came back from the
4 subpoena. Speak with the people or have an investigator go
5 out and speak with some of these individuals concerning
6 what exactly was conveyed to them by the solicitor's
7 office. Your Honor, there might be another issue, may we
8 approach?

9 (Whereupon, a bench conference was held off the record)

10 MR. SHAFFER: Your Honor, I'll continue. What we
11 would like to do is actually go and speak with these
12 individuals or at least have an investigator go speak with
13 them. They're parents of other students that he coached
14 during this time period. We believe that, that would be --
15 the substance of their conversation is probably Brady
16 material given the fact that it was not introduced and what
17 was, at least one individual, that they attempted to
18 introduce them for, 404(b), information some, Lyles
19 information with but the other individuals, I believe, are,
20 would be Brady -- it could possibly lead to Brady material
21 that was not uncovered or disclosed by the state. It is
22 our understanding that none of these conversations or the
23 substance of those conversations were ever conveyed to
24 trial counsel. We got that impression by, I guess, trial
25 counsel told my client that he was unaware of that as well.

1 There's also an issue with the one individual that they did
2 attempt to proffer as Lyle evidence, a lady named Lyle minor

3 What we would like to do is to actually depose her
4 concerning her conversations with the solicitor's office.
5 In addition to that, Your Honor, he does have several other
6 individuals that he would like an investigator to speak
7 with. He had given me a list of about four or five of
8 these individuals and that's the basis of our motion for
9 both limited discovery and an investigator, funding for an
10 investigator, Your Honor.

11 THE COURT: Ms. Kinard?

12 MS. KINARD: Thank you, Your Honor. First of all,
13 the state opposes these motions. This is a 2013 case.
14 There has been plenty of time before now to have these
15 motions brought before the court. Additionally, the state
16 has no notice of these motions in writing. The motion for
17 discovery is an unusual one. We believe that it is a basis
18 for a fishing expedition to try and find out as much as
19 information as possible to in essence retry this case
20 before the PCR cart. He's already filed a petition for
21 Habeas Corpus which was suspended or actually denied with
22 prejudice, ah, without prejudice, forgive me, so he could
23 exhaust his remedies. He's already gone through a trial,
24 full-length trial. Counsel filed a motion for new trial
25 and this is just -- this feels like a situation where Mr.

1 Berry won't stop until he finds some remedy but this court
2 is not the place for that remedy. We would oppose the
3 motion for discovery as well as any motion for funding or a
4 motion for continuance that may be wrapped up together
5 with. The language that Mr. Shaffer use was that this
6 could possibly lead to Brady material, this is information
7 that may have been available at the time of the trial but
8 it's not being presented as new discovery evidence. It
9 does not meet the burden to be presented as newly discovery
10 evidence and the state would argue that there is no reason
11 for any of these motions to be granted now or in the
12 future. Thank you.

13 THE COURT: Yes, sir.

14 MR. SHAFFER: Your Honor, in brief reply. Although
15 the motion for discovery, limited discovery, is very rare
16 in a PCR case. I would say that the request funding for
17 your investigator it's not very rare, you know, it's, I
18 wouldn't say it's granted in every case but most of the
19 time whenever there's a legitimate reason and there are
20 quite a few witnesses that he wanted me to talk to. There
21 were at least five that he definitely wanted me to talk to
22 along with probably half a dozen other ones that were
23 related to this, or are parents of people that he had
24 previously coached that he would want to talk to. I guess
25 to address briefly the reason that this case is where it is

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Let me interrupt you. What does he contend that these parents would offer now that he didn't know about at the time of the trial?

MR. SHAFFER: Well, I believe that some of the parents would have testified that he would not have, that he, essentially, never did anything, that they never saw any inappropriate behavior ---

THE COURT: Well, why weren't they called at the time of the trial then? He knew who they were then.

MR. SHAFFER: Well, Your Honor, I guess that would be the ineffective assistance of trial counsel, that's part of that.

THE COURT: We don't have to have them to testify for him to prove that.

MR. SHAFFER: And, Your Honor, also I think he was unaware of the subpoena until later. It's my understanding he was unaware of it until later. That it was ever disclosed to his trial counsel that they had subpoenaed all the records to talk to of the parents. I think that would go to the Brady issue. There is also, I guess, the -- the one witness that they presented that they were going to offer for Lyle information, there's been several civil lawsuits associated with this so he's learn information afterwards and I think that, that might -- that, basically,

1 those -- that he had learned some information through that
2 and that one witness, some of the statements that she's
3 made after she actually had a chance to testify, are
4 different than what he knew about at the time which would
5 give him rise to actually have somebody go talk to her or
6 give him reason to have someone go talk to her.

7 THE COURT: This has been pending since 2013?

8 MS. KINARD: Yes, sir. This is a 2013 case.

9 THE COURT: What's been the delay? Either one of
10 you can answer that.

11 MR. SHAFFER: I can. The return came in late in 2014
12 from the state. At that point, I received the return
13 probably it was within about a month of the first time it
14 appeared on the docket. At that point, Josh, the previous
15 Attorney General handling it had consented to a
16 continuance. It showed back up on the docket during the
17 fall term which would've been the last time for PCR court
18 and the continuance at that point was granted because I was
19 the original appellate counsel on this case. I didn't
20 realize that until after I sort of got knee-deep into it
21 and, at the time, I didn't know for a fact that whether or
22 not the case was going to -- I didn't know whether or not
23 he would be moving to relieve me based off the fact that I
24 was the appellate defender before the two appellate
25 defender's listed on there and I was the original attorney

1 working on the appeal. But he ended up not moving to
2 relieve me during that time period but there was a question
3 as to whether or not he would so you got continued at that
4 point. I also, you know, Mr. Berry and I had some
5 communications issues around that time period as well that
6 probably created some problems. So we sat down afterwards,
7 we sorted it all out, we come up with a game plan as to
8 what we were planning on doing. I attempted to implement
9 what we were planning on doing and, Your Honor, I,
10 basically, need more time to do so.

11 MS. KINARD: The state would argue that although
12 what he says is correct, this case has been on the docket
13 twice and it's time to put this to bed. This family does
14 not need to live through this again and we would like to go
15 and get it over. They have been here all morning and have
16 been very patient and the state would like to continue on
17 today.

18 THE COURT: It just appears to me, I mean, you may
19 have some other witnesses or whatnot, I don't know why if
20 you had or your client had the names of these folks, those
21 people could have already been interviewed by you it looks
22 like. You wouldn't have to have an investigator to contact
23 these people. You don't need, you know, we don't need to
24 take their depositions to find out what they're going to
25 testify to if you're going to present that at the PCR

1 hearing. I can tend to agree with Ms. Kinard, you're
2 trying to retry the case in front of the PCR court. That's
3 not, actually, the issue. I mean, if he contends that
4 there witnesses out there that would've said this or that I
5 mean, he certainly can present that. We just sat through a
6 trial, you know, a hearing that dealt with the same issues
7 somewhat. I'm going to respectfully deny the request for
8 discovery and investigator and for a continuance. We'll
9 take a lunch break and we'll come back and try this.

10 MS. KINARD: Thank you, Your Honor. What time?

11 THE COURT: It's 1:00 -- let's be -- we can run to
12 the drug store and get a quick sandwich, we don't need an
13 hour so we can get moving on. Why don't we -- why don't we
14 say -- what time is that 1 o'clock? We'll say 1:45 to get
15 back. Take about 45 minutes. We won't take long.

16 (Whereupon, the court and staff broke for a short lunch)

17 MS. KINARD: Would you like me to call the case
18 again?

19 THE COURT: Yes, ma'am.

20 MS. KINARD: May it please, the Court? This is the
21 matter of Kristopher W. Berry versus the State of South
22 Carolina, case number 2013-CP-16-1002. It's an application
23 for post-conviction relief that was filed December 19,
24 2013. On September, 2010, the Darlington County grand jury
25 indicted the applicant for criminal solicitation of a minor

1 and a lewd act upon a minor. Paul V. Cannarella
2 represented the applicant. On July 18, 2011 the applicant
3 proceeded to trial before the Honorable J. Michael Baxley
4 and a jury. On July 21, 2011 the jury found the applicant
5 guilty as indicted. I think that is actually incorrect.
6 He was nol pros on the lewd act claim and -- is that
7 correct?

8 MR. SHAFFER: Acquitted.

9 MS. KINARD: Acquitted, excuse me. And found guilty
10 of the strong solicitation charge. He received ten years
11 imprisonment, suspended to the service of five years active
12 service and five years probation. He filed a timely notice
13 of an appeal on which he was represented by Dayne C.
14 Phillips and Carmen V. Ganjehsani. The South Carolina
15 Court of Appeals affirmed the applicant's conviction on
16 October 30, 2013 and a remittitur was returned to the
17 Circuit Court on November 18, 2013. Since then the
18 applicant has filed a petition for a Writ of Habeas Corpus
19 in the United States District Court for the District of
20 South Carolina that was filed on March 18, 2013. On May
21 22, 2013 the Honorable Richard M. Gergel dismiss the
22 petition without prejudice to the applicant to exhaust his
23 state remedies. Since then he has filed the incident
24 application alleging ineffective assistance of counsel,
25 Rule 5 violation by the state, and Brady and progeny

1 violations by the state. The state is ready to proceed.
2 The applicant is here and is represented by Tristan
3 Shaffer.

4 THE COURT: Anything on the preliminary basis, Mr.
5 Shaffer, before we proceed?

6 MR. SHAFFER: Yes, Your Honor. I had mentioned this
7 to the court earlier but I just want to put it on the
8 record, Mr. Berry had filed suit against -- was prosecuted
9 by Kendall Burch and filed a lawsuit against her in federal
10 court. My client also told me that Judge Burch had
11 relieved himself or recused himself from a couple of
12 different cases that have been involved with it. Given the
13 fact that your law clerk is related to Judge Burch,
14 obviously, and Kendall Burch as well, I'm not sure -- I
15 mention it to the court, I don't know if the court finds it
16 to be a problem but what I would like to do is ask that Mr.
17 Burch not participate in any part of the decision writing
18 or anything else for this case or research, Your Honor.

19 THE COURT: All right. I was going to -- I'm glad
20 that you raised that because after you brought it to the
21 court's attention, I was going to make the record clear
22 that Judge Burch and Mrs. Burch, are brother and son, is in
23 fact, my law clerk, it would have no bearing on what I
24 would decide with regards to this case. What was the
25 status of the lawsuit against Mrs. Burch, is it still

1 pending in federal court?

2 MR. SHAFFER: It's been dismissed, Your Honor. It's
3 been dismissed.

4 THE COURT: It's been dismissed?

5 MR. SHAFFER: Yes, Your Honor.

6 THE COURT: Okay. By the federal court, okay. So
7 there is no longer a suit pending. Okay. I see that at
8 the trial that there were three solicitors involved,
9 Kendall Burch, Patty McKenzie Parker, and John Holt, is
10 that correct?

11 MS. KINARD: Yes. Correct.

12 THE COURT: Who was the chief prosecutor, does
13 anybody know?

14 MS. KINARD: Mrs. Burch.

15 THE COURT: Okay.

16 MS. KINARD: She is not available to testify today,
17 however, Mrs. Parker is in the courtroom should we need her
18 testimony.

19 THE COURT: Okay. As to any participation by my
20 law clerk, Mr. Burch, there would be no participation of
21 any order writing or anything else. If there is an order
22 that results from this hearing I'll either have you do it
23 Mr. Shaffer or I'll have Ms. Kinard do the order.

24 MR. SHAFFER: Thank you, Your Honor.

25 THE COURT: Any decision-making will be my decision

Kristopher Berry- Direct Examination by Mr. Shaffer: 16

1 and solely my decision. All right. You may proceed.

2 MR. SHAFFER: Thank you, Your Honor. I would call
3 Kristopher Berry.

4 THE COURT: Mr. Berry, come around please and be
5 sworn.

6 THE CLERK: Place you left on the Bible and raise
7 your right. You swear the testimony you give this Court be
8 the truth, the whole truth, and nothing but the truth so
9 help you God?

10 MR. BERRY: Yes.

11 THE COURT: Hang on just a minute, Mr. Shaffer.
12 (Whereupon, the court took a brief pause on the record)

13 THE COURT: All right. Mr. Berry?

14 MR. BERRY: Yes, sir.

15 THE COURT: What relief are you seeking as a result
16 of this application for post-conviction relief?

17 MR. BERRY: A new trial, Your Honor.

18 THE COURT: A new trial. Okay, sir. All right,
19 sir. You understand that if I were to grant your
20 application that you go back and have a new trial and then
21 you could be sentenced to serve more time than you did
22 originally, you can be sentenced to ten years?

23 MR. BERRY: Your Honor, I've already served five of
24 them.

25 THE COURT: I understand that but you could be

Kristopher Berry- Direct Examination by Mr. Shaffer: 17

1 sentenced -- you were sentenced to ten -- let me find the
2 sentencing sheet, you were sentenced to ten years and then
3 provided upon the service of five and a \$5,000 fine and you
4 were given probation for five years. It could be that the
5 sentencing judge could give you an additional, you know,
6 five years to serve, give you another straight ten year
7 sentence.

8 MR. BERRY: Yes, Your Honor, I understand.

9 THE COURT: You understand that?

10 MR. BERRY: Yes, sir.

11 THE COURT: Okay. All right, sir. Okay. You may
12 proceed.

13 MR. SHAFFER: Thank you, Your Honor.

14 KRISTOPHER BERRY, first being
15 duly sworn, testified as follows:

16 Direct Examination by Mr. Shaffer:

17 Q. Mr. Berry, where you from, sir?

18 A. I'm from Hartsville, South Carolina.

19 Q. And tell us a little bit about your life, where did
20 you go to school?

21 A. I grew up in Hartsville. I went to middle school,
22 high school. I had to, due to unfortunate events, I ended
23 up, graduating from St. John's. I had to go to summer
24 school so that I can join the Marine Corps.

25 Q. Okay. Now, how long did you serve in the Marine

1 Corps?

2 A. Thirteen years.

3 Q. And after getting out of the Marine Corps what did you
4 do?

5 A. I ended up getting a job as an exterminator with
6 Terminix and when my daughter, she had been doing
7 gymnastics in Rhode Island and the other places we went,
8 she started going there and realized how expensive
9 gymnastics was, I offered to volunteer to supplement her
10 tuition as a coach.

11 Q. And how long did you do that before you were arrested?

12 A. From 2006 to 2010, so roughly, four years.

13 Q. Now since being arrested and convicted, obviously,
14 where have you been working since getting out of prison?

15 A. Basically, it's very difficult to find any work. I
16 found one job at Marshall's Freeman Collision as inventory
17 manager and another job that I'm currently working at in
18 Florence with Auto Body Works as an inventory manager.

19 Q. Given what the judge had just said, do you still want
20 to proceed and go before with this PCR?

21 A. Yes, I do.

22 Q. Okay. Now, tell us a little bit initially, you were
23 represented by Paul Cannarella?

24 A. Yes.

25 Q. Tell us a little bit about the first time you met him?

Kristopher Berry- Direct Examination by Mr. Shaffer: 19

1 A. Well, I give Paul all the credit in the world for
2 dealing with me. I really do because I still had that
3 Marine mentality. I was pushy. I was obnoxious. I wanted
4 this. I wanted that. I wanted the other. I didn't really
5 understand the legal system that well. Why, why, why, why,
6 why, and he tried his best to explain it to me but it --
7 it's very difficult, you know, to walk a mile in another
8 pair shoes unless you've done it so I didn't understand
9 what he was coming from and he didn't understand why was
10 coming from but I knew what I wanted as far as
11 representation. And it just seemed that the closer
12 everything got the less and less he wanted to defend me.
13 So it just -- he said, you know, we can win this case if we
14 had \$100,000. In my mind, I didn't understand why he
15 couldn't win it with the retainer fee of \$10,000 that I had
16 paid him. I didn't understand all that. I brought in
17 witnesses. I brought in people to help him. My daughter
18 helped him. Some of my friends helped him with research as
19 much as we possibly could. I simply couldn't afford to pay
20 anything else because I was released from Terminix whenever
21 I got charged. I did everything I could. I filed for
22 unemployment. Did work as a personal trainer. I just, I
23 did everything I possibly could just to make sure my family
24 was still floating. I just, to me it felt like, it felt
25 like I was rolling the dice and I don't -- I went through

1 the trial and it's all -- I'm having flashbacks up here as
2 a matter of fact but it's, it felt as though Paul didn't
3 believe anything I was saying.

4 Q. And I might back up a little bit. Tell us a little
5 bit briefly about what the state had alleged that you did?

6 A. The state alleged that, one, it was original criminal
7 solicitation of a minor based on evidence and the -- what's
8 the word I'm looking for where the trial you go over to the
9 court initially -- the first trial -- the first hearing
10 proof of cause, probable cause hearing. You know, I can
11 look at that and go, you know what, there was -- I can
12 argue with it now but there's no point. There was probable
13 cause to be charged. But I was charged with lewd act and I
14 was charged with criminal solicitation of a minor. The
15 lewd act was a kiss, allegedly a kiss. So that's what I
16 was charged with. That's what I was presented with. I
17 only knew about the first. I did not know about the second
18 until later on after the probable cause hearing.

19 Q. The criminal solicitation, a lot of the evidence
20 against you, am I correct in saying, was from the text
21 messages and camera, correct?

22 A. No. The camera had no evidence. It wasn't even
23 admitted.

24 Q. All right.

25 A. Everything was deleted from that.

Kristopher Berry- Direct Examination by Mr. Shaffer: 21

1 Q. Okay. But I mean ---

2 A. The text messages, yeah ---

3 Q. The text messages, yes.

4 A. Yes. That was where most of the evidence came from,
5 yes.

6 Q. Okay. And tell us a little bit about the text
7 messages, what were the substance of them?

8 A. If I detach myself from it and read them, I don't
9 blame you guys for anything. I really don't. I would've
10 proceeded almost in the exact same manner. They were me
11 being a Marine trying to accomplish the mission at any cost
12 and that mission was to help get rid of a dangerous boy and
13 I didn't realize what I was doing -- I realized the ends
14 justify the means and so the text messages that I sent were
15 irresponsible as a coach, immoral as a coach. They were
16 wrong. But they weren't within the bounds of illegality.
17 They were ---

18 Q. Well, let's go a little bit to your defense. What did
19 you want your defense to be? What did you talk to Paul
20 about wanting your defense to be?

21 A. I talked to Paul because a lot of this was going to
22 end up being character witnesses. This was going to be
23 witnesses talking about what my intent was and what my
24 intent was not. Basically, my background here, my
25 background there, I guess, the state found a witness that,

Kristopher Berry- Direct Examination by Mr. Shaffer: 22

1 I guess, I'll discuss that later, they found a witness as a
2 Lyles witness who I had no contact with this girl whenever
3 I was in Massachusetts since she was in Hartsville when I
4 allegedly met her. But I wanted to prove what my intent
5 was.

6 THE COURT: Hang on just a minute. I realize Mr.
7 Cannarella is not in here. Do you want Mr. Cannarella
8 present?

9 MS. KINARD: Yes. I thought I saw him earlier. Does
10 anybody see him back there?

11 THE CLERK: I'll go look.

12 MS. KINARD: Thank you.

13 THE COURT: He is going to have to respond to this.
14 Sorry to interrupt you.

15 MR. SHAFFER: It's alright, Your Honor, I understand.

16 MS. KINARD: Thank you, Your Honor.

17 (Whereupon, Mr. Cannarella entered the courtroom)

18 MS. KINARD: We got him. Thank you.

19 Q. Mr. Berry, just to go back. What -- well, did you
20 give a statement to police?

21 A. Yes, I did.

22 Q. Okay. What was the substance of that statement,
23 briefly?

24 A. The substance of that statement was, it was,
25 basically, the truth. I was going overboard with jokes and

Kristopher Berry- Direct Examination by Mr. Shaffer: 23

1 I have no place to do that. I'm not trying to justify
2 anything that I've done as far as the morality of it
3 because the morality of it was wrong. Like I said, please
4 don't think that I'm trying to justify sending those
5 messages. It was the intent behind it. That was what it
6 was and that's what I wanted to try to prove by the nature
7 of the law with the intent.

8 Q. So you never denied making, sending the text messages,
9 correct?

10 A. No, I don't deny ever sending those text messages and
11 never denied it in court. I sent those messages. I sent
12 other messages to that were on another phone that were on
13 my phone but I never denied sending those messages. I
14 didn't. I denied the intent that the state try to say
15 that, you know, I was trying to, I was trying to groom her
16 in trying to, basically, have sex with her.

17 Q. So you had -- did you discuss that with your attorney?

18 A. I did and I understand -- I'd listen to Paul today and
19 I understand, you know, certain trial strategies and things
20 like that but I feel these things should have been
21 addressed to me and not been gone solo. I didn't do it. I
22 didn't do it. I didn't do it, it just doesn't pan out, it
23 just doesn't work. Well, what can you prove? What can you
24 show? And that's where my daughter would've come in if Mr.
25 Cannarella would have called and ask her pertinent

1 questions because if anybody knows about, once again, not
2 justifying my sense of humor to anyone, if anybody knows
3 about my sense of humor is that girl over there.

4 Q. So you wanted your daughter to testify about your
5 sense of humor?

6 A. And to testify about -- and to testify about perjury
7 of the victim.

8 Q. What you mean by perjury of the victim?

9 A. And it could be, and it may be my mistake or however
10 it was, every time that Minor was in the gym so was
11 Rebecca. And like I said, it doesn't matter in the long
12 run, it doesn't but when you're up here you're expected to
13 tell the truth and Minor had trained double backs and she
14 claimed that she had not and Rebecca was in the gym when
15 she did train double backs. Rebecca could also testify to
16 the amount of time that the parents spent in the gym versus
17 what they actually testify to.

18 Q. So you wanted them -- you wanted your daughter to be
19 able to impeach the victim?

20 A. Yes. That was her goal and that's what I explained to
21 Mr. Cannarella sitting there at the table, call her up
22 there and ask her this, ask her this, ask her this because
23 we originally weren't going to call her. But I sat down at
24 that table over there and I said call her, ask her this,
25 ask her this, ask her this, ask her this.

Kristopher Berry- Direct Examination by Mr. Shaffer: 25

1 Q. What did your attorney want the trial strategy to be?

2 A. I'm not really sure because he didn't call any of my
3 character witnesses but he told me I could only have three.
4 Only three character witnesses to testify as to who I was
5 but the state was pulling up all kinds of evidence here and
6 there about, basically, trying to set up me as a pattern of
7 this type of misconduct. Like I said, they brought a
8 witness in as a Lyles witness who I really wanted to get on
9 the stand because she could have been impeached with three
10 documents.

11 Q. You're talk about Lyle minor ?

12 A. Lyle minor , yes.

13 Q. But she, she never got -- she never actually testified
14 in front of the jury?

15 A. Not in front of the jury but Mrs. Burch used her for
16 sentencing. She said, Your Honor, this is not the first
17 time he's done this and it was take into account because
18 the denial of my appeal bond. It was mentioned that there
19 was at least one other victim and Lyle minor I didn't even
20 know her. Never have met her until she was sixteen.

21 Q. What witnesses did you want your attorney to call?

22 A. Two of the witnesses that were called, Kim Walters and
23 Victoria Moore. They were called, basically, just to give
24 information about the gym but these people that I talked to
25 were my character witnesses. Karen MacMillan was my other

Kristopher Berry- Direct Examination by Mr. Shaffer: 26

1 character witness and she was never called. She was never
2 put on the stand. He says I'm not going to call your
3 character witnesses and none of the other ones were asked
4 -- none of the other witnesses were asked about my
5 character.

6 Q. And, Karen MacMillan, why was she -- what would she
7 have testified to do you think?

8 A. She had known me. I was a personal trainer first and
9 so she spent a lot of time around me and her son had been,
10 I had trained him and got him ready for the Citadel and
11 everything like that so she was just going to testify to,
12 basically, how I am, who I am around her and around her
13 children, and everything like that. It's just a
14 characterization of me which would've led to proof of
15 intent later on.

16 Q. Why did Mr. Cannarella not like to call any of your
17 character witnesses, did he say that to you?

18 A. He never gave me a reason. He just says I'm not going
19 to call your witnesses. I'm not going to call your
20 character witnesses.

21 Q. And you said you talk to him about calling your
22 daughter to talk about your sense of humor. Explain that a
23 little bit more?

24 A. I have and I realize this now and I've grown. My
25 sense of humor is not accepted. I have a very, a very

Kristopher Berry- Direct Examination by Mr. Shaffer: 27

1 sexual sense of humor that I make jokes and allude to that.
2 It's -- with Rebecca she understands that it's funny and it
3 also lightens the mood about a lot of things and her
4 boyfriend, ever since all this is happened to me, he's
5 understanding that sense of humor just as well. But it
6 lightens things up and allows you, it opens doors. I
7 didn't -- I don't know -- I guess I didn't know but I
8 should've known that it doesn't work with everybody and I
9 can't -- I should not have use that approach with someone
10 else. It was, like I said, irresponsible of me. Wrong.
11 It's just a sense of humor that not everybody accepts.

12 Q. So your daughter would have gone to your defense about
13 intent, correct?

14 A. Intent and, like I said, the perjury issues.

15 MS. KINARD: Objection, Your Honor. That is
16 speculation at this point. We have no idea what she would
17 testify about.

18 MR. SHAFFER: I'll call her ---

19 THE COURT: I'll sustain the objection.

20 Q. You have made various allegations about, in your
21 application, about Brady issues, correct?

22 A. Yes.

23 Q. And Rule 5 violations?

24 A. Yes.

25 Q. Right?

Kristopher Berry- Direct Examination by Mr. Shaffer: 28

1 A. Yes, that is correct.

2 Q. Explain briefly, one in particular involves a, a
3 subpoena you never got a response from?

4 A. Yes. Well, not a response to, Mrs. Parker, she
5 subpoenaed the records from the gymnastics center of
6 Hartsville and then parents started calling, Ashley
7 Richardson, the owner, saying I'm getting calls from her
8 about, she's asking questions about -- she identified who
9 she was, you know, so it's all in the up and up but we
10 never received any of that. We never received the
11 subpoena. We never received the records. We never
12 received the interviews. To the best of my knowledge Mr.
13 Cannarella sent me everything in prison with the exception
14 of pictures that he could not send and I'm assuming since I
15 didn't get it, it was never given over to us. It was never
16 given to us.

17 Q. Had the parents had favorable things to say to you
18 would you have wanted Mr. Cannarella to call them as
19 witnesses?

20 A. Absolutely. Simply because it would show intent,
21 character. They say that, you know, this is ---

22 MS. KINARD: Objection. Speculation.

23 THE COURT: I sustain the objection.

24 MR. SHAFFER: Your Honor, May I rephrase that to make
25 it a little more clear?

Kristopher Berry- Direct Examination by Mr. Shaffer: 29

1 THE COURT: Okay. You can try.

2 Q. Had the information been disclosed to you it would've
3 been favorable, would you have requested that your attorney
4 call those witnesses?

5 A. Absolutely. Because they could not be impeached by
6 the state because the state had already talk to them.

7 Q. And I think we might go a little bit more into what we
8 had talked about before and I just wanted to get the yes
9 out of you, basically ---

10 A. Okay. Look -- yes, because it would've helped prove
11 intent.

12 Q. Okay. Now you had also argued that your -- tell us
13 about the time when you were discharged from the Marine
14 Corps?

15 A. And I've covered this in my testimony in the trial but
16 I was discharged from the Marine Corps because I blew the
17 whistle. I blew the whistle on the recruiting commander
18 and how things were being done. And I was investigated and
19 I was investigated. And I was suspended from recruiting
20 duty and I fought because what I was doing I felt was the
21 right thing to do because we were teaching kids how to lie.
22 And we were teaching kids to do that to get into the
23 military. And I said, enough, I want to have a soul when I
24 leave this place and I nearly -- I've learned not to be as
25 narcissistic about this it's more survivor's guilt. I put

Kristopher Berry- Direct Examination by Mr. Shaffer: 30

1 a girl to go to the Marine Corps and she was in a tragic
2 accident at which she will be seventeen for the rest of her
3 life, mentally. I said enough. We're done with this. I
4 fought. They fought. We ended up coming to a
5 administrative agreement because I believe in all honesty
6 about this, Your Honor, with all the stress and everything
7 and me not been the greatest husband in the world, I ended
8 up cheating on my wife which of the military is, it's a
9 chargeable offense, adultery. And there was nothing I
10 could do to fight that. There's nothing I should've done
11 to fight that, I did it. So, therefore, I said I'll take
12 administrative discharge but it was under other than
13 honorable conditions. So I took the administrative
14 discharge. No conviction. And I left. That was the
15 discharge from the Marine Corps.

16 Q. And that came up during your trial, correct?

17 A. Yes, it did.

18 Q. Do you think your attorney was prepared for that?

19 A. No, I don't think my attorney was prepared for it. I
20 don't think he was really prepared for any of the things
21 dealing with my military. He had no copy of my DD, 214.
22 This stuff was not -- I had to write the state and ask for
23 their copy of the stuff -- no, wait, it was in the packet
24 that Mr. Cannarella sent me because the state had divulged
25 it to him, I guess, at the very beginning but he wasn't

Kristopher Berry- Direct Examination by Mr. Shaffer: 31

1 prepared for those things. But since it's not a conviction
2 it should've been objected to even though it was not
3 objected to and it was used as an impeachment in front of
4 the jury it was, it should've been objected to.

5 Q. Okay. And that's one of the basis for the PCR
6 hearing?

7 A. Yes, it is.

8 Q. But your attorney did not object to it?

9 A. Did not object to it. Did not preserve it appeal and
10 that's the reason, the only way I could bring it up is in
11 the PCR.

12 Q. You also had raised an issue related to another
13 conviction, tell us about that?

14 A. Whenever I was in -- I was a close combat instructor I
15 think it was in 1994-95, I had wrongfully appropriated a
16 computer for use in my close combat school. So what I did
17 was I pled to that. I took that medicine because that's
18 what I did. I got that conviction but it was, being that
19 it was more than ten years old, the state should have been
20 obligated to let us know they were going to use that and to
21 my, they did not. I don't have any written information
22 about that at all, anywhere, as what I remember as my Rule
23 5.

24 Q. Okay. So your attorney has never given you any
25 information that indicated to you that he was aware of that

1 prior to ---

2 A. Prior to trial, no.

3 Q. Did your attorney object to that at trial?

4 A. No, he did not object to it either.

5 Q. Now, Mr. Berry, if you could I know that I touched on
6 the discovery issue related specifically to the response
7 from the state's subpoena, not been disclosed. Do you have
8 any other indication that any other discovery violation
9 took place?

10 A. As far as what the state should have turned over I've
11 read, and I've read, and I've read, those interviews I
12 think were very important. I mean, there's evidence that I
13 disclosed in the state tort about, basically, fraud on the
14 court. I don't really know, we weren't given any part of
15 statements on what Lyle minor had said, what was being,
16 other than the Lyles evidence, it was just very basic but
17 it was a statement from ^{Lyle minor}.

18 Q. And speaking specifically about Lyle minor ?

19 A. Yes.

20 Q. She did not testify at your hearing. Explain to the
21 court why you think that, that played some sort of role
22 later on?

23 A. To understand this a little background, is that Ms.
24 Lyle minor alleged that I had solicitor her whenever she was
25 fifteen- years- old. I researched this and I found

Kristopher Berry- Direct Examination by Mr. Shaffer: 33

1 statues of criminal solicitation of a minor and by no means
2 do I even justify this but solicitation is, for a sixteen-
3 year-old, as long as there is consent, is a defense.

4 Lyle minor claimed that I met her in January. I was
5 stationed in Massachusetts until March of the same year and
6 did not meet her until after her sixteenth birthday in a
7 play. When I found out -- I found out about this the
8 weekend before that Lyle minor was going to be there, I
9 had no idea what was going on, what was being said or
10 anything like that. So what I did was I filed a federal
11 1983 civil rights violation and the federal court said this
12 is not an arena for this to be held and they dismissed it
13 without prejudice. But there's more to it is that where
14 did Lyle minor come from. I mean, I've known -- I know
15 Lyle minor and at twenty-years-old when her second year in
16 college, yes, I did talk to her in a sexual manner. But
17 twenty-years-old, you know, I've known her since she was
18 fifteen. She's acted in plays. And she begged me to act
19 in plays with her so that she wouldn't have to stage kiss
20 an old man. She made suggestions, sexual suggestions to my
21 daughter and my son about me.

22 MS. KINARD: Objection.

23 THE COURT: Sustained.

24 Q. And I'm specifically asking about, you know, when she
25 came in and what you actually observed. She came into

1 testify, correct ---

2 A. She came ---

3 Q. --- she attempted to?

4 A. Her testimony would've been for Lyles. Her testimony
5 would've, basically, set a pattern.

6 Q. And that's what they were attempting to introduce it
7 for common scheme then?

8 A. Yes.

9 Q. A common ---

10 A. Yes.

11 Q. Okay. And the judge did not allow that, correct?

12 A. He did not allow -- well, no -- he allowed. If you
13 would like to proffer your witness, go ahead, but Mrs.
14 Burch put her back. He said Mr. Cannarella I find that
15 this is relevant.

16 Q. But Judge Baxley did not allow her to testify in front
17 of the jury, correct?

18 A. No. Mrs. Burch did not allow her to testify in front
19 of the jury.

20 Q. But there was a ruling by the court that she wasn't
21 going to testify in front of the jury? If the transcript
22 reflected that, would you disagree with it?

23 A. If the transcript reflected that, then it happened.

24 Q. Okay.

25 A. It's like what Mr. Cannarella said, if is in the

Kristopher Berry- Direct Examination by Mr. Shaffer: 35

1 transcript, it happened.

2 MR. SHAFFER: Okay. Now, and I think that's around
3 page 67, Your Honor, I believe that's the discussion of
4 this matter is. I may have overstated that. It might have
5 been sooner than that.

6 THE COURT: It's not on sixty-seven.

7 MR. SHAFFER: Your Honor, I apologize. It maybe
8 sixty-four. And the end of his ruling is on sixty-six,
9 Your Honor. If you look at the top of sixty-six it say,
10 "so for those reasons the court excludes it and this ruling
11 will be regarding the Lyles evidence."

12 MS. KINARD: It starts on Page 58, Your Honor, when
13 it first mentions Miss King.

14 (Whereupon, the judge took a moment and read the
15 transcript)

16 THE COURT: All right. It appears from my reading
17 the transcript it reads that Judge Baxley would not allow
18 that testimony.

19 MR. SHAFFER: Thank you, Your Honor.

20 Q. Now, despite the fact that never came in front of the
21 jury, you said, your argument is that it is still
22 prejudicial to you, correct?

23 A. Yes, it is.

24 Q. How so?

25 A. Whenever the sentencing phase came about and

1 everything, Mrs. Burch stood up there and said, Your Honor,
2 we've talk to many people and this is not his first time at
3 the rodeo. We had one other person come forward and we
4 just want to let him know that this isn't appropriate,
5 sexual text messages of the sexual nature. So, basically,
6 I was prejudiced by not being able to confront an accuser
7 and yet the evidence was put out there in sentencing. I
8 was not given the right to face my accuser.

9 Q. And that evidence was specifically referenced by Judge
10 Baxley in his order denying your appeal bond, correct?

11 A. The order was, at least one other victims came forward
12 and it would better serve the community for me not to have
13 an appeal bond.

14 Q. Now, I know we've touched on several different issues.
15 I want to give you a chance to, basically, let me know
16 essentially if there's anything that I haven't touched on
17 that you specifically want to bring up in this PCR?

18 A. Brady and progeny, the cell phone issue.

19 Q. And I apologize, yes. Tell us a little bit about the
20 cell phone issue?

21 A. My cell phone was seized at the same time -- well,
22 when I was arrested my cell phone was seized and placed
23 into evidence. And I told them I said you're going to find
24 the same kind of text messages on my phone. My son had
25 read the same text messages. My wife had read the text

Kristopher Berry- Direct Examination by Mr. Shaffer: 37

1 messages that were on my phone and yes, they were very the
2 same messages that Minor had, had but hers had stopped and
3 mine kept going. There were text messages on my phone that
4 talked about the second weekend in February being a meeting
5 at the gym with my daughter and her to train double backs.
6 She was going to train double twist. Minor was going to
7 train double backs. An even said so -- Minor even said so
8 she did know how she was going to get to the gym. Okay.
9 But these text messages were on my phone and Bart Cave or
10 Russ Harrell, I don't know which one of these individuals
11 it would be, said that it was important to forensically
12 handle a phone in a timely fashion. Her phone was searched
13 immediately. Good for them. My phone took four months for
14 them to get a search warrant for and that phone is equipped
15 with a thirty day text deletion feature. Which is why I
16 deny that the phone was mine and we went through round and
17 round about phone identify ability and things like that
18 because my phone was full of text messages. I told Paul I
19 had text messages on my phone. I told him I had very
20 damning text messages on my phone about some of the things
21 that Minor had admitted to. But all of mine -- the moment
22 they powered up my phone four months later they deleted
23 every single text message I had on there and at the time
24 text messages once they were deleted were gone. We went
25 through all kinds of problems trying to locate text

1 messages that were out there. It's impossible.

2 Q. And where did you -- where were you when these text
3 messages were deleted, in prison?

4 A. It was four months after the phone was seized so I was
5 still out but I did not know this until I was in prison and
6 my sister sent me -- she didn't send me the manual, she
7 looked through the manual and said that your phone has a
8 thirty day text feature.

9 Q. And specifically where was the phone at during this
10 time?

11 A. It was in the possession -- it was in sled -- sled had
12 it.

13 Q. Okay.

14 A. Sled deleted it. Sled inadvertently or I doubt it was
15 intent, I really doubt it was intentional, but their
16 inadvertent actions deleted exculpatory evidence that
17 would've helped me.

18 Q. Okay. And what text message is, did you send? I'm
19 not talk about what other people said, but, specifically
20 what text messages do you believe were exculpatory that
21 were on that phone?

22 A. The one was the meeting -- the meeting for the second
23 weekend in February to train double backs and to train
24 double twist. That was very important because the
25 testimony in the transcript says that I was trying to get

Kristopher Berry- Cross Examination by Ms. Kinard:

39

1 her to come there to have sex. And then she also said that
2 she didn't know how she was going to get there. They don't
3 go together but talking with my daughter going back and
4 forth, it also talked about another boy that was at the
5 trial. His name was Jerry Hall, about things she had done
6 sneaking out while she was staying at her Papa's house and
7 I really don't want to get ---

8 Q. Let's not go into stuff that is not exculpatory
9 specifically, but, tell me about -- you said they were
10 damning text messages on that phone as well. Tell me what
11 you meant but there are damning text messages on that
12 phone.

13 A. They're not damning to me.

14 Q. Okay.

15 A. They're damning to her.

16 Q. But they're not -- they were not harmful to you in any
17 way?

18 A. Not to me but to Jerry Hall ---

19 Q. That's all I'm asking, okay?

20 A. Yes.

21 Q. Now, are there any other issues that I have not
22 addressed previously that you want to raise in your PCR?

23 A. In the closing argument with Paul it was as though he
24 was trying to do a plea deal in trying to find leniency
25 with the court, with the jury. Hey, these parents have

1 already let one boy do it, you know, and what's the
2 difference, you know, it wasn't as though he was defending
3 me, he was trying to fight for leniency, when I was on
4 trial in the closing arguments. That's counterproductive
5 and I just -- I don't -- that's not how I want to be
6 represented. There were times whenever when Regina was on
7 the stand and she got flustered up here and I don't want to
8 be up here either, but they were times that they claimed to
9 have -- to be in the gym fifteen to twenty hours a week
10 when their children only had six hours worth of classes
11 together. They were always in the same class. I told him
12 go, talk, but he didn't pursue it. Didn't pursue it. So
13 it just -- it just didn't seem that he had my interest at
14 heart in representing me the way I wanted to be
15 represented. I understand his court strategies but it's me
16 that's been represented and there's -- and it wasn't how I
17 wanted to be represented, even close.

18 MR. SHAFFER: No further questions.

19 THE COURT: Ms. Kinard?

20 MS. KINARD: Thank you, Your Honor.

21 Cross Examination by Ms. Kinard:

22 Q. Good afternoon, Mr. Berry.

23 A. Good afternoon.

24 Q. To get back to the bases of how all this came about,
25 you said you were a man on a mission, who asked you to

Kristopher Berry- Cross Examination by Ms. Kinard:

41

1 conduct this mission?

2 A. Man on a mission?

3 Q. Yeah, you have to take care of Minor ?

4 A. Her mother did.

5 Q. Her mother?

6 A. Yes.

7 Q. Okay. Was that testified to at the trial?

8 A. It was testified by me but it was denied.

9 Q. Okay. You talked a little bit about -- never mind I
10 won't get into that -- you talked a little bit about Mr.
11 Cannarella and how much information he had, for example,
12 not having a copy of your DD 214. Whose duty would it be
13 to provide him with that information?

14 A. It is my understanding as my counsel he's supposed to
15 act in my best behalf and try to knock down every door and
16 try to get every piece of information that would help. He
17 knew I was in the military.

18 Q. Did you help him find any of that?

19 A. As much as I could. I actually had my daughter and
20 Angie and several other people helping us with the trial
21 strategy a week before trial.

22 Q. So you admit there was a strategy in place and you are
23 working toward it as well as Mr. Cannarella was?

24 A. We had a strategy that he did not adhere to from day
25 one.

1 Q. Can you elaborate slightly more? Is there anything
2 that you didn't say on direct examination just now that you
3 would have said?

4 A. We were trying to prove intent and when ever
5 impeachable moments came up, he shied away from them. I
6 said the objections, failure to prepare for that. The fact
7 that he ask, he said, you know, if we had \$100,000 we can
8 win this case, which ---

9 Q. What's wrong with that?

10 A. What's wrong with that? Poverty should not be a
11 reason that I should be convicted.

12 Q. Agreed. Neither should anybody else in your
13 situation, however, that happens. I don't -- do you think
14 that is an example of ineffective assistance of counsel to
15 making that comment?

16 A. No. I think it's a problem with the entire system.

17 Q. Unfortunately, that's not an issue we can fix today.
18 So, we spoke briefly about introduction of your court-
19 martial as well as the prior conviction regarding the
20 computer.

21 A. I'm afraid you're going to have to elaborate on that a
22 little more.

23 Q. The conviction while you were in the Marines for
24 misappropriation of the material?

25 A. But there was never a court-martial.

Kristopher Berry- Cross Examination by Ms. Kinard:

43

1 Q. I'm sorry, I use the wrong word. That was my fault.
2 It was a conviction though, is that correct?

3 A. Yes.

4 Q. Okay. Do you remember that coming up at trial?

5 A. Yes, it did.

6 Q. And do you remember the outcome of that ruling?

7 A. I think it was just admitted as impeachable evidence.

8 Q. Do you remember Mr. Cannarella making an argument ---

9 A. No, I do not.

10 Q. --- in your favor?

11 MS. KINARD: Okay. I called the court's attention
12 to pages 341 through 346 during which there is a back and
13 forth between both parties regarding that information.

14 Q. You stated that you filed a 1983 claim?

15 A. I filed two of them.

16 Q. Can you please elaborate on those and when they were
17 filed?

18 A. As far as the dates go, I don't know when they were
19 filed exactly. They were file while I was incarcerated.

20 Q. While you were incarcerated?

21 A. Yes, I was.

22 Q. Okay. Regarding your phone and the automatic deletion
23 feature you just testify to, do you think it's reasonable
24 to assume that the text message between both parties would
25 be the same on each end? In other words, each phone would

1 contain the same message.

2 Q. No. Because her phone features, you have to have a
3 certain amount of text for a certain amount of minutes and
4 then they were also text that were deleted from that. She
5 has to delete a certain amount -- her bank in that phone
6 only holds so many texts so she has to selectively delete
7 them in order to get more text or get more minutes. Mine
8 did not have that limit, so, therefore, I had more text
9 messages on my phone than she had on her phone because she
10 has to delete in order to get more.

11 Q. Okay. Now, can we summarize quickly the things that
12 Mr. Cannarella did not do that you ask him to do?

13 A. I think the largest things were the failure to object,
14 which was brought up in my appeal. The fact that the state
15 is supposed to give written notice that they're going to
16 use convictions that's more than ten years old and they try
17 to use my administrative discharge as a conviction and it
18 was not argued against. As far as that goes, the closing
19 statement he made condemn me because it, basically, said he
20 did this but look at the parents they've let somebody else
21 do it before so what does it matter, you know, why don't
22 you treat them the same way. The fact that he didn't
23 continue -- he didn't question my daughter like I asked him
24 to question her because she is a key witness and she was
25 just brought up here, in my opinion, just to look pretty

Kristopher Berry- Redirect Examination by Mr. Shaffer: 45

1 and talk as my daughter whenever she had key evidence.
2 Whenever Ms. Johnson was up here and she was talking about
3 the hours that she spent in the gym which were not the
4 right amount of hours. It was impeachable things -- it
5 were the things that he avoided. He came and sat down
6 whenever he should have continued cross-examining, impeach,
7 and he did not.

8 Q. Did you ask him to do these things?

9 A. Yes, I did.

10 Q. During the trial?

11 A. Yes, I did.

12 Q. At the table?

13 A. Yes, I did.

14 Q. Why did you hire Mr. Cannarella?

15 A. I hired Mr. Cannarella for two reasons. One, my bail
16 bondsman said that he was the best one for this. And two,
17 him and my father played high school ball together and they
18 knew each other. And my dad said that was probably the
19 best thing to do.

20 Q. What was the most important thing for you to
21 accomplish in this trial?

22 A. In this trial or that trial?

23 Q. In the underlying trial?

24 A. I'm sorry please ---

25 Q. To be acquitted? To be not on the sex offender

Kristopher Berry- Redirect Examination by Mr. Shaffer: 46

1 registry? What was the most important thing to you?

2 A. To be able to go on with my life.

3 Q. Okay. Why did you turn down plea offers?

4 A. Because I didn't do what they said I did.

5 MS. KINARD: Okay. That's all I have at this point,
6 Your Honor. Thank you.

7 THE COURT: Mr. Shaffer?

8 MR. SHAFFER: Thank you.

9 Redirect Examination by Mr. Shaffer:

10 Q. We had talked briefly about the objection under 609
11 for the or the, I guess, the 609 evidence of
12 misappropriation prior bad act, right?

13 A. Yes.

14 Q. Your issue here today is the fact that they did not
15 disclose that to you, correct?

16 A. Yes. The initial one of my conviction that I got and
17 the fact that they try to use a non-conviction as a
18 conviction for the same reason, for the prior bad act even
19 though it an administrative discharge.

20 Q. Okay. So your objection related to misappropriation of
21 the computer is a, basically, a failure to disclose that
22 evidence?

23 A. Failure to disclose, yes.

24 Q. Okay. And the administrative discharge you don't
25 believe should have been admissible because it was not a

Kristopher Berry- Redirect Examination by Mr. Shaffer: 47

1 conviction?

2 A. Absolutely. And it was an appeal but it was never
3 preserved so it was not accepted in my appeal.

4 Q. You mentioned that there was a strategy that he did
5 not adhere to, whose strategy was it?

6 A. The conglomerate of people that we had, with my
7 daughter, another friend name, Sheila, and me and we sat
8 there and we talked about all these things. The biggest
9 thing was the video of Minora's interview. The fact that,
10 that right there she is, I must be crazy what am I doing.
11 That was never shown to the jury and never explained. They
12 got to see that in deliberations. That was never presented
13 as a piece of evidence to explain, to allow me to explain,
14 to allow anyone to explain. The jury saw that in their own
15 time in the jury room. And it was -- and Mr. Cannarella's,
16 "in the interest of time". And that's on the transcript,
17 "in the interest of time, we're going to let the jury see
18 that in the jury room, in deliberations."

19 MS. KINARD: I just want to object to clarify, Your
20 Honor, that was a piece of evidence in the trial. It was
21 not played in the courtroom but it was admitted into
22 evidence in the trial.

23 THE COURT: Do you know where that is in the
24 transcript?

25 MS. KINARD: I'll find it for you.

Kristopher Berry- Redirect Examination by Mr. Shaffer: 48

1 THE COURT: Okay. You can go ahead while she's
2 looking for it.

3 MR. SHAFFER: Thank you, Your Honor.

4 Q. Did Mr. Cannarella ever tell you what his strategy for
5 the solicitation charge was going to be?

6 A. No. We never -- we sat there and we talked about the
7 importance of that CD, of that interview and how it would
8 play and that we would play it and then we would ask
9 questions about it. We would play it for the jury and then
10 we would ask questions about it. It was never done. And
11 that CD, that interview is extremely important and
12 especially if the jury is watching it on their own accord
13 but there's things that they don't know about, why would
14 you say this? What would you say about this? What would
15 you say about that? Even to have me sit and talk about it,
16 even to have Minor sit and talk about it, it was just
17 played as a CD. It was never admitted.

18 Q. It was admitted into evidence?

19 A. Yes, I'm sorry. That's my mistake. It was evidence.
20 It was a piece of evidence but it was never shown in open
21 court. It was only given to the jury as, here you go.

22 Q. Okay.

23 MR. SHAFFER: No further questions.

24 MS. KINARD: No further questions, Your Honor.

25 THE COURT: Okay. You can step downs, sir.

Paul Cannarella- Direct Examination by Mr. Shaffer:

49

1 MR. BERRY: Thank you.

2 MR. SHAFFER: I would like to call Paul Cannarella.

3 THE COURT: All right.

4 The CLERK: Place you left hand on the Bible and
5 raise right. You swear the testimony you give this court
6 be the truth, the whole truth, and nothing but the truth so
7 help you God?

8 MR. CANNARELLA: I do.

9 PAUL CANNARELLA, first being
10 duly sworn, testified as follows:

11 Direct Examination by Mr. Shaffer:

12 Q. Mr. Cannarella?

13 A. Yes, sir.

14 Q. You represented Kris Berry, obviously, correct?

15 A. Yes, sir.

16 Q. Okay. Tell us a little bit about your take on the
17 allegations against him. What were the allegations against
18 him?

19 A. You want me to give you a snapshot?

20 Q. Yes.

21 A. Okay. Here's what I'm dealing with. I got a guy who,
22 Kris, immediately begins to apologize to the family. What
23 was tough for me to overcome was the fact he, Kris, gave
24 the child a camera and he gave her a cell phone and her
25 parents didn't know about it. Okay. And then the contents

1 of the text messages. It was really hard to -- and the
2 strategy that Kris wanted me to use was that, in spite, of
3 how risqué the context of the text were, that he was doing
4 that in a way to try to help the child he was coaching
5 because she had gone through a bad relationship with
6 another boy and he was trying to help her in that regard.
7 So, you know, it was going to be tough. The camera was
8 embedded with naked pictures of Kris, himself. So I say
9 well -- the solicitor says, Judge Baxley, I think we ought
10 to be able to show those pictures to the jury to establish
11 what Kris's intent was in given that camera to the child
12 that he was coaching at the gym. And well, I said, judge,
13 it's to prejudicial. I think that could've gone either way
14 to show intent behind the camera. The child can never see
15 the pictures because they were embedded, they were pulled
16 out from a computer forensics guy or whatever. Okay. And
17 so I thought I did pretty good in keeping that out. I kept
18 a Lyle witness out and that's not always that easy to do
19 with Judge Baxley. Okay. Then you got the cell phone and
20 the contents of that. You have to read it to see what I'm
21 talking about but I can't remember anything in specific.
22 But when Kris is talking about when I was arguing to the
23 jury and it looked like I wanted to plea bargain with the
24 jury, I think it was Kris's words, what I told the jury was
25 -- the reason the jury turned Kris loose of the lewd act is

Paul Cannarella- Direct Examination by Mr. Shaffer:

51

1 because -- because he was alleged -- it was alleged that
2 Kris tried to, I guess, French kiss the child that was
3 making these accusations -- that were involved in the text
4 messages but I compared -- see when the boyfriend, the
5 other boyfriend that was on the witness stand, he testified
6 that he french kiss with this girl. Okay. And so I'm
7 saying well, you know, if the parents kinda knew that the
8 child that, that person was having, was french kissing
9 another guy, well they've already kind of ruled out or
10 defined what's not, what's not a lewd act to me. So they
11 found him not guilty for that reason that's what I think.
12 Well, if she's going to french kiss this person then french
13 kissing ain't all that bad so that's really not a lewd act.
14 I never thought that was really a lewd act anyway. But
15 they found him not guilty of that. It's real -- it was
16 real hard to try to develop a strategy. Kris said, you
17 know, I was using this language in these text messages to
18 really as for some therapeutical purposes, I guess, you
19 might say, in working with this child he was trying to
20 help. What I really ended up saying in the closing
21 arguments was I said, look, you know, the context of this
22 speech and the text messages it's really, if anything, it's
23 Kris is saying something he might wished for, he didn't ask
24 for it. And not -- and then -- I felt like the jury listen
25 to that because the jury came back out later and they

1 wanted to have a charge on the solicitation law so at least
2 I thought I got their attention with that may be, you know,
3 and may be they may have not liked what he said but may be
4 they didn't felt it a rose to the level of criminal act in
5 meeting the elements of the definition of a lewd act. I
6 can keep on narrating or do you want me to stop? You want
7 to ask me more questions? I'll stop ---

8 Q. I'll ask you a couple more.

9 A. Okay.

10 Q. You obviously filed a Rule 5 in this case?

11 A. Right. Right.

12 Q. Obviously, yeah. And they responded with a discovery
13 packet, correct?

14 A. Right.

15 Q. Did that discovery packet include any written
16 information about his prior conviction?

17 A. I, you know, I don't -- I can't really remember if it
18 did or not. If you've got a -- I can't -- I know it didn't
19 include any thing immediately about that military. I don't
20 think it did. Now if it included something about a prior
21 conviction would that have been, what, for petty larceny or
22 something ---

23 Q. Yeah, misappropriation of the computer.

24 A. Yeah. Yeah. I don't remember -- I don't remember
25 seeing that on the background check or we would've talked

Paul Cannarella- Direct Examination by Mr. Shaffer: 53

1 about it and if -- I just don't remember that if it was in
2 the Rule 5 or not, you know.

3 Q. Mr. Berry, wrote you whenever he was in prison,
4 correct?

5 A. Mmm, hmm.

6 Q. And he asked for a complete copy of his file, right?

7 A. Right.

8 Q. If that information had been in your discovery, would
9 you have mailed it to him?

10 A. I would send it to him anyway even though -- yeah, I
11 would have sent it to him. I probably -- yeah, I would
12 have sent everything to him I had. I don't ever remember
13 seeing a -- I don't ever remember seeing anything with a
14 conviction on it because I don't ever remember talking
15 about any convictions until -- I would've remember that
16 unless y'all brought it up today. I would remember the
17 military thing but I don't remember when we were provided
18 -- I think the week before trial we might've been provided
19 with the military stuff or even before that or the day of
20 trial. I don't remember.

21 Q. Okay. Now, Mr. Berry mentioned that he wanted to call
22 several character evidence for lack -- I mean, character
23 witnesses for lack of a better term.

24 A. Okay.

25 Q. Why didn't you call those witnesses?

1 A. I -- it was -- I don't know if I called any character
2 witnesses or not. Okay. And I don't have any explanation
3 for that. I've, you know, at the time Kris testified. He
4 did a good job at testifying. I don't know. It just seems
5 like to me if I was supposed to call them and he would've
6 demanded that I do it, I mean, knowing his personality the
7 way I do, either we would've agreed not to do it or, I
8 mean, I can think of, we would agree not to do it or he
9 would've forced me to do it. So I think on balance we
10 must've discussed it because I remember talking to other
11 people that he thought would be character witnesses for him
12 and I tried to get them. I couldn't get them here. It's
13 just that if I didn't do it maybe in retrospect I should've
14 done it. But if I didn't really want to do it -- I just
15 didn't feel like we would benefit from it in anyway and I
16 thought we might have a -- I thought we had a shot at
17 getting a not guilty verdict, you know, but, obviously, I
18 wish he had taken the plea offer because then the only
19 thing he would have to do is sex offender registry, I
20 guess. I don't know. I don't really have an explanation,
21 a good explanation for that. I'll say that. I don't have
22 a good explanation for that.

23 Q. What was the plea offer, just so we know?

24 A. Zero -- well, the family involved on the other side,
25 they were willing to accept the plea to probation on both,

Paul Cannarella- Direct Examination by Mr. Shaffer: 55

1 on both -- well -- they were going to drop -- they agreed
2 to drop -- the solicitor's office offered with a consent of
3 family on the other side was to drop the lewd act and plea
4 to probation on solicitation. So, you know, what the jury
5 ended up doing, not guilty on one. Guilty on the other.
6 He gets half of the time which I thought was pretty good
7 considering who the sentencing judge was.

8 Q. Now, with the -- your strategy were you primarily
9 focused on lewd act or the solicitation?

10 A. Well, I had, obviously, I had to deal with both of
11 them. I just think -- I just didn't really ever in my
12 heart believe that the jury would believe what Mr. Berry
13 wanted trial strategy to be, it was part of -- he testified
14 fully. It was part of -- you know, like coaching, I mean,
15 why did you use that language to accomplish what
16 therapeutical results you want to accomplish in helping a
17 child, I mean, it was just a struggle -- it's just a
18 struggle to get twelve people to believe that, you know, I
19 don't care how articulate anybody is, it's just a struggle
20 to get them to believe that. When I can walk him out of
21 here -- guaranteed -- you know, it wasn't too bad that his
22 daddy and somebody else recommended me because I could've
23 walked him out of here. You know, I did the best I could
24 do with those text messages. May be it was not so good to
25 not go over the videotape of the forensic interview but,

1 you know, that right there just letting them hear the same
2 thing over again, the same testimony, they're going to hear
3 it twice. They get to sit up there and the screen even
4 though she was maybe lolly, you know, not acting real ---

5 Q. Serious?

6 A. Sad or, yeah -- you know, they could see that on the
7 video. I just didn't want her to be able to repeat her
8 testimony through the video so, I mean, by, you know, the
9 forensic video. So maybe it would've -- maybe we would've
10 gain some benefit off of playing the video out here, maybe
11 we would have. But it's still dealing with the context of
12 those text messages and what was said and you have to read
13 them to know what I'm talking about.

14 Q. Now, so you didn't have much faith in the strategy for
15 the solicitation?

16 A. You're talking about like saying, in other words,
17 Kris's strategy was that, hey, look her mother, the
18 Minor 's mother and father, know that I'm going to be
19 coaching her and working with her on the side and so far as
20 overcoming this issue she had with the breakup of this
21 boyfriend. Okay. But all of those messages to her,
22 sounded one way from Kris to her of a sexual nature but
23 there was a theory behind the way he worded those text
24 messages because it was his effort for them to have, for
25 that language to have some therapeutical value. Well, you

1 know, I guess may be we could have gotten somewhere with
2 that. May be, just may be, but, see the camera embedded
3 with the nude photographs and the cell phone being given to
4 the child that he was coaching and her parents didn't know
5 it, that right there was real, real tough, real, real,
6 tough to sell. That made it tougher to sell the argument
7 that I was doing, that Kris was doing this for
8 therapeutical purposes. It just didn't feel like it fit
9 right.

10 Q. Okay.

11 A. And that hundred thousand dollar thing, that's -- I
12 might have said that -- I might've said that. But if you
13 take it into context of what it would have cost us to go
14 get Dr. Martin in Columbia who counsels sexually violent
15 predators when they serve their time. If we hired somebody
16 like that he cost us \$15,000/ \$20,000 to come here to
17 testify to the jury if he thought he could be beneficial.
18 Most of the time I usually tell them I don't care how much
19 money you pay me I can't guarantee -- I can't get you out
20 of this or I can't guarantee you any results. I might have
21 flipped the other way they said, he said that, but it
22 would've been in the context to the cost of providing me
23 expert witnesses who will testify for Kris and say hey, I'm
24 with him, I'm with Kris on the therapeutical value of these
25 messages or whatever. He's not somebody that has a

1 propensity to behave this way.

2 Q. Now, did you hire any investigator at any point?

3 A. No.

4 Q. Did you speak to any of the parents of the other
5 children?

6 A. No. I don't think -- no. I don't know. Well, I
7 don't think I did. If I did -- I know I spoke -- I think I
8 might have spoke with one or two of them. I can't
9 remember. But those were the ones that we wanted to come
10 testify for us. There were some people we wanted to
11 testify for us but they backed out.

12 Q. Okay.

13 A. I can't remember who they were but I remember talking
14 to them, they backed out. I can't remember who it was.
15 It's in the file though.

16 Q. Now, did you receive any information from the
17 solicitor's office related to their interviews with the
18 parents?

19 A. No. You mean like if I -- no. Any kind of -- no,
20 sir. You talk about a summary or a copy or -- no, I never
21 got any information from them.

22 Q. Were you ---

23 A. I don't think I did.

24 Q. Were you aware of them subpoenaing the studio for
25 information?

Paul Cannarella- Direct Examination by Mr. Shaffer:

59

1 THE COURT: Subpoena who?

2 MR. SHAFFER: The studio, Your Honor.

3 A. Yeah. I think -- you know, I think I was aware of
4 that because I think Kris complained to me about that. And
5 I don't remember, you know, I don't remember what -- yeah -
6 - I mean, they would've given me anything that would have
7 hurt me, you know what I mean. The solicitor's office
8 would've given anything that would've hurt me, you know,
9 and I just kinda assume that may be -- I didn't know if
10 there was anything there that would help me or not.

11 Q. Okay.

12 A. Do you know what I mean?

13 Q. Do you know if they gave you anything related to that?

14 A. I don't -- you mean, something I could touch?

15 Q. Yeah.

16 A. Put my hand -- tangible? Pieces of paper or
17 something?

18 Q. Yeah.

19 A. If they did it's in the file.

20 Q. Okay. And that file would have been sent to Kris?

21 A. Yeah. I think I sent him the file.

22 Q. Okay.

23 A. I think I did, yeah.

24 MR. SHAFFER: Court's indulgence.

25 THE COURT: Yes, sir.

1 MR. SHAFFER: No further questions, Your Honor.

2 THE COURT: Ms. Kinard?

3 Cross Examination by Ms. Kinard:

4 Q. Mr. Cannarella, do you agree with Mr. Berry's
5 statement that you were retained by him on the
6 recommendation of his father and others?

7 A. Yes, ma'am.

8 Q. Is that you what you remember?

9 A. I take him at his word for that. Yeah.

10 Q. Okay. Starting with your representation, did you
11 discuss the elements of the charges and what the state was
12 required to prove?

13 A. Yes, ma'am.

14 Q. Did he discuss his version of the facts with you?

15 A. Yes, ma'am.

16 Q. And is that consistent with the idea that it was, I
17 think you use the word, therapeutic?

18 A. Yeah, those are my words. I don't know what words
19 were used but, yes, helping a child through a difficult
20 time.

21 Q. And did he say he did this in his role as a coach?

22 A. He has -- his what role ---

23 Q. Did he do this in his role as a coach or as a friend
24 or did he give you a description for that.

25 A. I think -- well -- I think he did it in his role as

1 somebody who said that they care about this individual and
2 they wanted to help her.

3 Q. Okay. Did you discuss possible defenses with him?

4 A. I'm sure I did. I mean, we went through the law and I
5 read the case law and may be -- yeah, I'm sure I did. But
6 I don't -- it's hard to know exactly what defense you're
7 going to use in the context of what the evidence was, you
8 know, so it goes back to why were these texts worded the
9 way they were and sent to the child.

10 Q. Okay. And ---

11 A. And a lewd act I never really thought about the lewd -
12 - you know, when you think about a lewd act you don't think
13 about a kiss, you know, not lip to lip, you know, you think
14 something else besides a lewd act so I never really did
15 think that, that was serious anyway. But there were some
16 cases I found where lip to lip was, could be construed is a
17 lewd act.

18 Q. So it was a possibility?

19 A. Right. Right.

20 Q. How old was Mr. Berry at the time of these incidents?

21 A. I -- was he thirty-two?

22 Q. Thirty-six, sound right?

23 A. Yeah, well, that might -- yeah. He looks young for
24 his age.

25 Q. And do you remember how old Ms. Johnson was?

1 A. Was she fourteen?

2 Q. I believe that's correct. Did you have any problems
3 getting the discovery material? At the time, did you think
4 there was anything missing?

5 A. No, I don't -- I didn't think there was a conspiracy
6 to hide Rule 5, Brady material, no.

7 Q. And the definition of Rule 5, is that the state has to
8 disclose anything that would affect your client ---

9 A. Right.

10 Q. --- correct?

11 A. Right.

12 Q. And that's what you meant when you said you didn't
13 receive anything that was harmful to him?

14 A. Right. From the interviews of all the family members
15 or students at the gym.

16 Q. At the gym, correct?

17 A. Right.

18 Q. So you don't see any issue there?

19 A. No, I didn't -- no, I didn't -- not really.

20 Q. Okay.

21 A. Because -- I don't -- I wasn't worried about any that
22 information because I didn't think any of it would be good
23 whether they'd ever formulated an opinion about Kris or
24 not, I didn't think anybody at the gym was really going to
25 be on his side except those people that we might've talked

1 with and hope to get them here and they wouldn't come.

2 Q. Do you remember why they didn't come?

3 A. They just didn't really want to get -- I don't think
4 they really wanted to get involved in it.

5 Q. But you did speak to all of the individuals that he
6 named as potential witnesses?

7 A. I'm sure I did. I guess, I know I did. No -- well, I
8 don't know. Who did the name? I don't know. I think we
9 met -- well, we met a lot in my opinion when we were
10 noticed ---

11 Q. One thing -- I'm sorry ---

12 A. But I ---

13 Q. One thing - - -

14 A. But I -- but if I didn't call any character witnesses
15 I can't imagine I sat there and told him no I'm not calling
16 any character witnesses but I might have said that to him.
17 But I didn't believe that those character witnesses were
18 going to do us any good. He did a good -- Kris did a good
19 job testifying on his own behalf, in my opinion, because he
20 stood up -- he withstood cross-examination of John Holt and
21 I thought John Holt did a pretty good job at cross-
22 examining Kris but Kris held his own.

23 Q. So he felt that any witnesses that were there or may
24 have possibly been there, couldn't have helped him very
25 much?

1 A. I think that probably affected my decision and what I
2 can, you know, whether I was right or whether I was wrong,
3 you know, in my opinion a character witness wasn't going to
4 make any difference to them, to the jury, I just didn't
5 think it would. I just think it would get closer and
6 closer to the theory not passing the giggle test. You know
7 you had -- so I said look, he was wishing for something, he
8 wasn't asking for anything. That's all I could -- and I
9 thought -- you know, I mean, to me that was better than
10 trying to convince twelve people that these words, the
11 words he used in texting this child, were intended to help
12 her, not do something inappropriate especially when you
13 combine the cell phone and the -- and the camera with what
14 was embedded in it. That was hard, I mean, that was just
15 hard for anybody. I don't care if you're Lee Bailey. I
16 don't care if you are F. Lee Bailey. I don't know what F.
17 Lee Bailey could have done.

18 Q. So that's your explanation of what Mr. Berry is
19 complaining about regarding the closing arguments why you,
20 in his words, are you for leniency instead of innocence?

21 A. Well, it was -- I guess -- yes, I mean, you know, he
22 might have been wishing for something but he wasn't asking
23 for something because you've gotta present something to
24 them -- you gotta have a fact driven theory of defense. If
25 you don't have a fact driven theory of defense that they

Paul Cannarella- Cross Examination by Ms. Kinard:

65

1 are going to believe, then you're not going to get off
2 first base with them. Okay. I can't stand up there and
3 tell them something that's not going to pass the giggle
4 test and, you know, that's -- I can repeat it but I think
5 you know what I mean.

6 Q. Yes, sir. During the state's case, do you believe you
7 brought out relative, excuse me, relevant and consistency
8 during cross-examination?

9 A. Well, if there were any inconsistencies to bring out.
10 I don't know what inconsistencies there might have been
11 that would've been so, so, so effective that it would've
12 had a great impact on the jury's decision to find him not
13 guilty.

14 Q. Did you have ample time to prepare for trial?

15 A. Yes.

16 Q. As part of that preparation, did you go through the
17 care house video that's been described?

18 A. We went through it.

19 Q. And you went through that carefully with the state and
20 was that changed at all?

21 A. No.

22 Q. Was it redacted at all?

23 A. I don't think so. It might've been -- I don't
24 remember. I don't remember if it was redacted or not.

25 Q. My memory from reading the transcript and I can find

1 the pages is that y'all argued ---

2 A. Redaction? I did that?

3 Q. Mmm, hmm.

4 A. Okay. And judge -- okay. He ruled -- so we -- so I
5 broke it all down and did it line by line trying to object
6 to what -- okay ---

7 Q. Yes, sir.

8 A. I don't remember.

9 Q. That's in the transcript. There some, some
10 conversation outside of the jury and I can find that for
11 you in a moment, Your Honor. Did you do similar project
12 with the text messages?

13 A. Yeah, I think we did. I think we did. Yeah, where I
14 was in control on cross about what came up and what didn't?

15 Q. Yes, sir.

16 A. I -- I might have. I don't remember.

17 Q. Okay. Can you describe very briefly the plea offer
18 that was given to the defendant?

19 A. Well, all I know is they were going to drop the lewd -
20 - they were going drop the lewd act and let Kris plea to
21 solicitation and get probation. Now -- yeah, that's what
22 the deal was. Now, I don't remember about however many
23 suspended -- how much probation time. I don't remember.

24 Q. Okay.

25 A. And I don't even remember if back then if -- we

Paul Cannarella- Cross Examination by Ms. Kinard:

67

1 couldn't have pled to the lewd act -- we didn't want to
2 plead to lewd act because it might've involved -- I don't
3 know if it involve monitoring or not but it might have -- I
4 couldn't do that if it did.

5 Q. Do you remember why he turned down that plea?

6 A. Well -- okay, I'll say two things. One, is he said,
7 he wasn't guilty. And another one, he said he wasn't going
8 to be on the sex -- he didn't want to be on the sex
9 offender registry. I mean, if there was no sex offender
10 registry involved I believe he would have -- I believe I
11 would, I could convinced him that it was in his best
12 interest to plea because if we got convicted Judge Baxley
13 was going to put him in jail.

14 Q. Okay.

15 MS. KINARD: I beg the court's indulgence.

16 Q. Regarding the prior bad act evidence that was the
17 conviction by misappropriation of the computer, were you
18 aware that before trial?

19 A. Well, if I was I don't remember it. I only remember
20 something about something happening in the Army and it was
21 involving something off base for something, at some place
22 off of the base he was stationed on or something but it was
23 that inappropriate conduct that he, that Kris, testified to
24 earlier.

25 Q. Would you mind if we refresh your memory briefly?

1 A. That'd be fine.

2 MS. KINARD: I'm showing Mr. Cannarella pages 341
3 through 346 in the transcript.

4 Q. If you could just read this and see if -- read this to
5 yourself ---

6 A. Where do you want me to start at ---

7 Q. Start 341 ---

8 A. --- on page 341?

9 Q. --- of this motion.

10 A. Okay.

11 Q. See if your discussion of that makes you think that
12 you had it all in your head?

13 (Whereupon, Mr. Cannarella takes a moment to read
14 transcript)

15 A. Okay. I'm explaining to the judge why I am objecting
16 to the, to these things whether or not they are actually
17 crimes of dishonesty.

18 Q. How would that affect ---

19 A. Honorable discharge -- what the crime of dishonesty?

20 Q. Yes, sir.

21 A. How would it affect?

22 Q. How would it affect the trial?

23 A. Well, it would go to his issue of credibility, right,
24 so whatever -- so the jury, "I ain't gonna believe him,
25 he's a thief".

Paul Cannarella- Redirect Examination by Mr. Shaffer: 69

1 Q. Okay.

2 A. Or the state would be able to impeach my client and to
3 -- credibility -- okay, it was called misappropriation. I
4 argue that -- it looks like I argued that to the jury, I
5 mean, to the judge.

6 Q. Yes, sir.

7 A. I try to keep it out.

8 Q. Yes, sir.

9 A. Didn't I?

10 Q. Yes, you did. It's my reading of the transcript that
11 you made, in fact, an argument on the record. You believe
12 the ruling that they were let in because they involved all
13 crimes of dishonesty, that's pages 345, line 18 and 19. Is
14 there anything else you would like to present to the court
15 regarding your defense of Mr. Berry?

16 A. I can't think of anything.

17 MS. KINARD: Thank you, Mr. Cannarella.

18 THE COURT: Mr. Shaffer?

19 MR. SHAFFER: Thank you.

20 **Redirect Examination by Mr. Shaffer:**

21 Q. So, essentially, how he you worded the or what he
22 meant whenever he was wording the text messages was the
23 only issue in this case, for ---

24 A. For that crime?

25 Q. --- that crime?

1 A. Well, I think -- yeah, I mean, what -- yeah, as it
2 might reflect on what his intent was ---

3 Q. Okay.

4 A. --- by the language that he used.

5 Q. So, essentially, it wasn't who did it, it was why he
6 did it, right?

7 A. Well, yeah, I mean, there was never any issue about
8 the phone -- during trial when -- if that's where we're
9 headed about whether or not those text messages came from
10 Kris, that was never an issue but at trial something came
11 up, something came up at trial, I can't remember what it
12 was, about whether or not that was -- oh, did they have the
13 right phone and if they had the right text messages because
14 I'm not savvy about technology, phone technology, I don't
15 know. I don't know if that's what you're asking me or not.

16 Q. Well, and I guess what I'm saying is, essentially,
17 y'all were, the strategy was to negate the intent, right?

18 A. Yeah.

19 Q. Okay.

20 A. Yeah. Right. I mean, -- yes, yes.

21 Q. Okay. And the misappropriation, was there anything
22 that you read that makes you think that you are aware that
23 there was disclosed to you prior to trial?

24 A. What do I believe from my memory ---

25 Q. Yes.

Rebecca B. - Direct Examination by Mr. Shaffer:

72

1 direction during -- see, it's kinda of a dicey situation,
2 you know, I got a go by -- I gotta do what the client wants
3 to do but there's just no, there's just no -- other than
4 what he says, there's no real basis to try to use that to
5 persuade a jury and turn him loose. You know, so I just --
6 I didn't totally not adopted it that's why I let him
7 testify in full on direct examination and Kris did on
8 cross-examination. So we laid out Kris's credibility to
9 the jury for them to judge whether or not they wanted to
10 believe what Kris said, in so far, him trying to help this
11 child with the language he used.

12 Q. Okay.

13 A. That's what I thought. Now, I just ---

14 Q. That's all.

15 A. Okay.

16 MR. SHAFFER: Thank you, Your Honor.

17 MS. KINARD: Just a brief question I forgot to ask,
18 Your Honor.

19 **Re-cross Examination by Ms. Kinard:**

20 Q. Did you file a motion for new trial?

21 A. I did. I filed a motion for new trial just based on -
22 - he let -- I know what it was, the judge, Judge Baxley,
23 let a self nude picture come into evidence because it, it
24 became -- because I was forced to object to that being his
25 phone or whatever so the judge says, okay, here's a nude

1 A. --- about that misappropriation question, which was -
2 - does that mean -- what does that really mean, stealing an
3 item from the government, is that what they ---

4 Q. Yes, sir. I believe that's ---

5 A. Okay. It was like stealing a laptop computer or
6 something ---

7 Q. Yes.

8 A. --- is that what he was accused of? I don't -- I
9 believe that I first saw that at trial. I might be wrong
10 but I don't really believe -- if I knew about it before
11 then -- I don't ever remember talking about that but -- I
12 just don't remember. I just don't remember talking about
13 that.

14 Q. And you mentioned not passing the giggle test, his
15 versions of the facts basically, right?

16 A. Yes, sir. It's just hard to try to convince a jury
17 that those messages sent to this child were somehow
18 intended to help her get over her a problem she was
19 suffering from.

20 Q. So you didn't really adopt that as your strategy in
21 the case, right?

22 A. Well, you know, I kind of -- I have to say no, I did
23 not. No, I didn't.

24 Q. All right.

25 A. I really didn't but if it was gonna flow in that

Rebecca B. - Direct Examination by Mr. Shaffer:

73

1 picture that came out of it, is a nude picture of Kris, so
2 I was stuck with the photo then to show where the cell
3 phone came from. That was something that he wanted me to
4 do and I really didn't want to do that.

5 Q. What was the result of that motion?

6 A. It was denied. The motion for a new trial was denied.

7 MS. KINARD: That's all I have, Your Honor. Thank
8 you very much.

9 THE COURT: All right. You can step down, Mr.
10 Cannarella. Any other witnesses, Mr. Shaffer?

11 MR. SHAFFER: Your Honor, I would call Rebecca B.
12 to the stand.

13 THE COURT: Come forward please.

14 THE CLERK: If you can place your left on the Bible
15 and raise right. You swear the testimony you give this
16 Court will be the truth, the whole truth, and nothing but
17 the truth so help you God?

18 MISS B. : Yes, ma'am.

19 REBECCA B. , first being
20 duly sworn, testified as follows:

21 Direct Examination by Mr. Shaffer:

22 Q. Miss B. , where are you from?

23 A. I was born in ---

24 THE COURT: Let's get her full name first.

25 MR. SHAFFER: Thank you.

1 A. My full name is Rebecca B.

2 Q. And you are Kristopher Berry's daughter, correct?

3 A. Yes, sir.

4 Q. Well, I'll skip ahead to, how long have you lived in
5 this area?

6 A. Roughly I want to say this year will be like ten --
7 no, 2004 we moved here.

8 Q. Okay. And it's my understanding that you did
9 gymnastics training around the same time that the alleged
10 Minor did, is that correct?

11 A. She was there before I was. I was in a different
12 gymnastics center. I was in Florence and whenever my dad
13 was exterminating the building he heard about it so he
14 called me and told me to come down to see if I could do a
15 tryout. It was closer, you know, Florence to Hartsville
16 living in Hartsville so I tried out and made the team the
17 same day.

18 Q. Okay. And you actually trained with alleged Minor ,
19 correct?

20 A. Yes.

21 Q. And tell us a little bit -- you were present during
22 the trial, correct?

23 A. Mmm, hmm.

24 THE COURT: Say yes or no please when you answer
25 these questions.

Rebecca B. - Direct Examination by Mr. Shaffer:

75

1 A. Oh, sorry. Yes.

2 Q. And you also testified?

3 A. Yes.

4 Q. And tell us if there were, if you were aware of any
5 inconsistencies with the scheduling of how the alleged
6 Minor testified at the trial?

7 A. Could you elaborate more than that?

8 Q. Did she -- was her testimony concerning the scheduling
9 of when her gymnastics classes, was that accurate?

10 A. We had three practices, Friday was optional.

11 MS. KINARD: Objection, Your Honor. I want to
12 object to this whole line of questioning from the witness.
13 She did testify at trial. She had an opportunity to
14 testify to all of this.

15 THE COURT: She did testify at the trial?

16 MS. KINARD: Yes, sir.

17 MR. SHAFFER: But she was never asked these
18 questions, Your Honor, and this is part of one of his
19 allegations is that his trial counsel never asked her
20 questions to the impeached ---

21 THE COURT: All right. I'll overrule the
22 objection. I'll let you go into it. Thank you, Your
23 Honor.

24 MS. KINARD: Thank you, Your Honor.

25 A. We had practice on supposedly three days a week,

1 Friday was optional, about two hours per practice. So
2 about six hours altogether, if not, four.

3 Q. Okay. Now, if you can tell us a little bit about your
4 father's sense of humor?

5 A. It's really hard to say the normal typical family
6 wouldn't understand. Being military background, you have
7 different kind of people around you all the time. Of
8 course, military people are more prone to be vulgar but the
9 way that me and my dad would relate to each other is, you
10 know, crack a joke, theater, break a leg ---

11 MS. KINARD: I want to renew my objection at this
12 point. I don't see how it's relevant.

13 THE COURT: I don't understand how this is
14 relevant, Mr. Shaffer.

15 MR. SHAFFER: And, Your Honor, I guess it would tie
16 in, Mr. Berry had ask that he present a defense or that his
17 attorney adopted a strategy which was essentially, I was
18 trying to help her and the intent of my words were not to
19 solicit and I believe that he had testified that he wanted
20 his daughter to testify concerning his sense of humor and
21 that is trial counsel did not allow it or did not ask her
22 about those, about how his sense of humor is and how he
23 conducts himself around her.

24 THE COURT: It's sort of a stretch.

25 MS. KINARD: I agree, Your Honor. I believe this

Rebecca B. - Direct Examination by Mr. Shaffer:

77

1 gets into the territory of attempting to retry the prior
2 case.

3 THE COURT: Yeah. I mean, your client has already
4 testified to this fact. Maybe it's only bolstering his
5 testimony somewhat but, I mean, if she was present when
6 they were discussing the trial strategy and she is aware
7 and knows that certain things were requested of Mr.
8 Cannarella And they weren't complied with, you can ask her
9 that. We're not going to retry the case. We're not going
10 to get into that. I'll give you some, a little bit of lead
11 way the way I've just told you but

12 MS. KINARD: Thank you, Your Honor.

13 MR. SHAFFER: And, Your Honor, I think the primary
14 purpose for me calling her is for the prejudice problem, I
15 guess, because a lot of times in orders And things like
16 that, whenever you, you don't call the witness or don't ask
17 them the questions you want them to, that it's un-
18 preserved. Is there any way that I proffer it because my
19 understanding is she was not present for the discussions on
20 the actual trial strategy. Would you mind if I proffer her
21 testimony very quickly about what she -- about her father's
22 sense of humor And what she would've testify to if she
23 would've been asked? I'm not trying to argue with the
24 court's ruling. I just don't want to be said that I have
25 not preserve something.

1 THE COURT: I think you just preserved it right
2 here with what you just said.

3 MR. SHAFFER: Okay.

4 THE COURT: I mean, I'm not allowing it but you're
5 preserving it so....

6 MR. SHAFFER: Okay.

7 THE COURT: I'm going to sustain the objection.

8 MR. SHAFFER: Thank you, Your Honor.

9 THE COURT: I don't think this is relevant at a PCR
10 hearing.

11 MR. SHAFFER: Thank you, Judge.

12 Q. Were you present during any conversations made with,
13 between Paul Cannarella And your father concerning this
14 trial?

15 A. I believe I was there for maybe one time that my dad
16 was there And that was to discuss what part I had to do
17 with gymnastics And that was about it.

18 Q. Okay.

19 A. It lasted about five minutes.

20 Q. Okay.

21 MR. SHAFFER: Court's indulgence.

22 Q. My understanding is you, trained double back with the
23 alleged Minor, correct?

24 A. Correct.

25 Q. Explain to us what a double back is, just, briefly?

Rebecca B. - Direct Examination by Mr. Shaffer:

79

1 A. A general idea is a back flip, two in the row in the
2 air without touching your feet so one, two, And then you
3 land.

4 Q. And were you present when the alleged Minor was
5 training?

6 MS. KINARD: I would like to renew objection, Your
7 Honor.

8 THE COURT: Yeah, I agree. What's the relevance of
9 this what a double ---

10 MR. SHAFFER: And, Your Honor ---

11 THE COURT: --- back flip is?

12 MR. SHAFFER: She apparently could have impeached
13 trial testimony from the alleged Minor ..

14 THE COURT: She could have what?

15 MR. SHAFFER: She could have impeached trial
16 testimony from the alleged Minor related to how long she
17 was in the gym And what they were training at the time. I
18 can move on, Your Honor.

19 THE COURT: Yeah, I think so. I think your client
20 established that. That's his allegations.

21 MR. SHAFFER: No further questions.

22 THE COURT: Anything, Ms. Kinard?

23 MS. KINARD: No questions, Your Honor.

24 THE COURT: You can step down.

25 MR. SHAFFER: The applicant rest, Your Honor.

1 MS. KINARD: The state has no further witnesses.
2 However, we would request a brief closing.

3 THE COURT: Certainly. All right. Mr. Shaffer, I
4 will allow you and opposing counsel to make any arguments,
5 if you so desire.

6 Arguments by Mr. Shaffer:

7 MR. SHAFFER: Your Honor, and I'm only gonna touch on
8 couple of things. One thing primarily, is the failure to
9 preserve the issue related to the discharge, Your Honor. I
10 believe it was used to attack his credibility. Obviously,
11 Mr. Cannarella had testified that, you know, basically,
12 what the defense was about was intent. Therefore, I
13 believe his credibility was crucial to determine what his
14 intent was and to allow something that never should have
15 came in, a non-conviction come in, was ineffective and I
16 think affected his credibility as Mr. Cannarella had said
17 that, you know, prior bad acts affected his credibility.

18 Also, Your Honor, just to clarify I wasn't saying that
19 the judge's ruling on the misappropriation charge was
20 wrong, I'm not necessarily saying that and whether or not
21 is admissible. The reason what -- the basis of his claim
22 is that it wasn't disclosed to him prior to trial so he
23 wasn't able to prepare for it prior to the hearing. I
24 believe that, you know, there was testimony that, you know,
25 either he didn't call -- either that the character

1 witnesses were not going to be helpful or that he didn't
2 call them. Essentially, what we have here, Your Honor, I
3 guess, you know, the defense didn't really buy into what
4 his version of the facts was and, Your Honor, I believe
5 that had, you know, if they had the character witnesses to
6 bolster his credibility and bolster his character, had him
7 testify there would've been at least a reasonable
8 likelihood that the jury might have found a different way
9 or might have believed him that his intent was not actually
10 solicited, you know, sexual acts to the child.

11 And, Your Honor, I'm happy to touch on any of the
12 other allegations. I just thought I would highlight the
13 primary ones, Your Honor.

14 THE COURT: This is your argument. I'll be glad to
15 entertain anything you want to argue.

16 MR. SHAFFER: And, Your Honor, my client would like
17 for me to talk about the cell phone, as well here. The
18 cell phone issue, I guess, primarily is a destruction of
19 evidence. It was destroyed through being held with the --
20 law enforcement had it and they, basically, held the thing
21 and destroy the messages as a result of that. I believe he
22 said it was in sled custody at the time. That's another
23 issue that he wanted to bring out. He raises it as a Brady
24 issue and, I guess, Brady sort of touches on the somewhat
25 subject but it's a little bit different as a due process

1 violation related to, related to the destruction of
2 evidence.

3 THE COURT: These issues weren't raised on appeal?

4 MR. SHAFFER: No, Your Honor.

5 THE COURT: Why not?

6 MR. SHAFFER: They were on preserve, Your Honor.

7 THE COURT: Okay.

8 MR. SHAFFER: Nothing further, Your Honor.

9 THE COURT: Okay. All right. Ms. Kinard?

10 MR. SHAFFER: Thank you, Your Honor.

11 Arguments by Ms. Kinard:

12 MS. KINARD: A lot has been said today on different
13 issues and the bulk of it comes back to ineffective
14 assistance of counsel because that is what we here for.
15 That's what the PCR court hearing says as you know. In
16 order to prove ineffective assistance of counsel we still
17 hold that as standard of Strickland vs. Washington. And
18 that is two-pronged just as Mr. Shaffer mentioned. That he
19 has to be prejudicial and deficient. There are no
20 particular set of detail rules for counsel's conduct that
21 can be satisfactory and he's faces deranged legitimate
22 decisions regarding how best to represent the criminal
23 defendant. In this case, Mr. Cannarella, made the best
24 decision possible. He had, what he has stated, as a
25 demanding client and, I believe, Mr. Berry himself alluded

1 that he is a demanding client. He did a lot of this by his
2 admitting with himself and his family and Mr. Cannarella.
3 So it in some way it -- excuse me, that took away some of
4 the authority that Mr. Cannarella had in preparation and in
5 the courtroom. Mr. Berry complained about issues that he
6 could have easily helped Mr. Cannarella with, such as
7 finding a DD 214, finding other witnesses, helping with the
8 investigations. All this is not solely the duty of defense
9 counsel. Mr. Cannarella stated that Mr. Berry was
10 demanding and hard to talk to and as, Your Honor, is aware
11 you can only do as much as your client will allow you to
12 and I don't think that in this case Mr. Cannarella had the
13 easiest case to deal with. He did the best with what he
14 had. He was trying to get his client the best relief he
15 could based on what he admitted was a difficult case that
16 was hard to pass the giggle test. There was a
17 preponderance of evidence in many cases and in many ways
18 against Mr. Berry, given the camera with embedded pictures.
19 The cell phone -- knowledge. The text messages that were
20 craftily worded to potentially benefit Mr. Berry but all of
21 which wouldn't laid out in front of the jury, came back to
22 be considered criminal solicited, excuse me, solicitation
23 of a minor.

24 There are -- I have a list of at least fifteen
25 different allegations of ineffective assistance of counsel

1 not all of which I believe have been touched on today. But
2 some that have, for example, the failure to preserve the
3 issue regarding discharge. I believe that the transcript,
4 as we discussed pages 341 through 346, Mr. Cannarella
5 argued that properly and the judge just simply didn't agree
6 with him. That's not something that can be faulted or held
7 against him. And as far as the cell phone being an issue
8 potential obstruction of evidence, I don't think that's an
9 issue before a PCR court either. However, it was used and
10 it was admitted at trial. There was no issue with it
11 there.

12 So for all of these things I think involved they
13 really do not point to any way that Mr. Cannarella was
14 deficient or any way prejudiced Mr. Berry. He tried this
15 case to the best of his ability with resources that he had
16 and with a set of facts that he had. He did it in front of
17 a jury. He did over three days. And he did the best work
18 possible to try and get the best outcome for Mr. Berry.

19 There are other issues surrounding Mr. Berry's
20 litigation as well as other litigation and actions that
21 he's filed and I don't care to go into for the sake of the
22 deform. However, I do believe that there are many
23 considerations outside of this case. This case needs to be
24 solved, whatever that may be, by, Your Honor, and it's time
25 for all of this to be finished.

1 So I would ask, Your Honor, again to remember the
2 Strickland test as well as the case of Roseboro v. State
3 which is when counsel articulates a valid strategic reason
4 for his action or inaction his performance should not be
5 found ineffective. And that's exactly what Mr. Cannarella
6 has done. Every allegation thrown at him he has stated why
7 he did or did not do something and it also all painted a
8 picture of the valid trial strategy. So for those reasons
9 the state would ask that you deny any relief that Mr. Barry
10 is seeking. Thank you.

11 THE COURT: Thank you, Ms. Kinard. Any reply?

12 MR. SHAFFER: No, Your Honor. I stand by my previous
13 argument.

14 THE COURT: All right. Thank you, counsel. I am
15 going to take this matter under advisement so I can review
16 everything and I'll let you hear from me in the next few
17 days.

18 MR. SHAFFER: Thank you.

19 THE COURT: Okay. Thank you.

20 (CONCLUSION OF THE HEARING ON JANUARY 11, 2016)

21
22
23
24
25

CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Fourth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Fourth Circuit Court for Darlington County, South Carolina, on the 11th day of January, 2016.

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

Lisa S. Carter

Lisa S. Carter
Circuit Court Reporter

June 11, 2017

643
[Handwritten signature]

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON	)	FOR THE FOURTH JUDICIAL CIRCUIT
Kristopher W. Berry, #347006,	)	Case No. 2013-CP-16-1002
Applicant,	)	
v.	)	ORDER OF DISMISSAL
State of South Carolina,	)	
Respondent.	)	

This matter came before the Court by way of an Application for Post-Conviction Relief ("PCR") filed December 19, 2013. Respondent filed a return on or about November 19, 2014. The Court convened an evidentiary hearing into the matter on January 11, 2016 at the Darlington County Courthouse. Applicant was present and represented by Tristan M. Shaffer, Esquire. Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented respondent.

Applicant and Applicant's trial counsel, Paul V. Canarella, testified at the hearing. The Court had before it a copy of the trial transcript, the records of the Darlington County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings.

Prior to the beginning of the presentation of the cases in chief, Applicant moved for a motion for discovery alleging that, because a prosecutorial misconduct allegation was raised, it was essential to discover what exactly was produced and whether it had been turned over to defense counsel. Applicant expressed a desire to speak to parents of other students, depose Lyle¹ witnesses, and so on. Respondent opposed this motion, arguing that Applicant essentially wished to re-try the facts of the case. This Court denied the motion and order that the hearing proceed because the Applicant was

¹ State v. Lyle, 118 S.E. 803 (S.C. 1923) 125 S.C. 406 (regarding the use of witnesses to establish prior bad acts).

[Handwritten signature]

aiming to produce information from witnesses that had already been heard. Applicant also noted for the record that the Honorable Paul M. Burch, Jr. previously recused himself from hearing this case because his daughter was a prosecutor in the matter; Applicant similarly requested that this Court's current clerk not being involved, as he is the son of Judge Burch. This was acknowledged and granted.

I.

In September 2010, the Darlington County Grand Jury indicted Applicant for criminal solicitation of a minor (2010-GS-16-1364) and lewd act (2010-GS-16-1363). Paul V. Cannarella, Esquire, represented Applicant. On July 18, 2011, Applicant proceeded to trial before the Honorable J. Michael Baxley and a jury. On July 21, 2011, the jury found Applicant guilty as indicted. Judge Baxley sentenced Applicant to ten (10) years imprisonment, suspended upon the service of five (5) years active service and five (5) years of probation.

Applicant filed a timely notice of appeal. Dayne C. Phillips, Esquire, and Carmen V. Ganjehsani, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on October 30, 2013. State v. Berry, Op. No. 2013-UP-396 (S.C. Ct. App. filed October 30, 2013). The remittitur was returned to the circuit court on November 18, 2013.

Applicant filed a Petition for a Writ of Habeas Corpus in the United States District Court for the District of South Carolina on March 18, 2013. On May 22, 2013, the Honorable Richard M. Gergel dismissed the petition without prejudice to allow Applicant to exhaust his state remedies.

II.

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

1. "Ineffective assistance of counsel"
2. "Rule 5 violations by the State"
3. "Brady and progeny violations by State"

Applicant elaborated on his claims in an eighteen (18) page attachment to his applications.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court finds Counsel's testimony credible and Applicant's testimony less than credible. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003). Furthermore, this Court finds that Applicant abandoned all allegations except for those specifically addressed below.

A. Summary of Testimony

Kristopher Berry, Applicant

Applicant testified first, and stated that he was seeking a new trial and was well aware of the potential consequences, including that he could return to prison even though he has served his sentence. He testified briefly about his life before and after his conviction, particularly that he lost his job as a result of it, and was no longer allowed to volunteer at the gymnastics center where the incident occurred. Applicant spoke kindly of trial counsel, and admitted that he was a pushy client who got more worried about his trial as it drew closer. He further testified that he tried to take some of the work off of trial counsel by helping to prepare, and he began to feel like trial counsel did not believe his version of events. He stated that he was unsure of what the trial strategy actually would

be, and felt like it was a conglomeration of many different strategies. Applicant testified regarding many legal points, such as whether the testimony of Lyle, supra, witnesses should have been allowed, and whether this prevented him from exercising his right to face an accuser. He further discussed his thoughts on the investigation into his cell phone, and whether that constituted a Brady² violation. Applicant believed that the failure of SLED to analyze the phone in a timely manner, and thus allow the text messages to be erased by an auto-delete feature, kept him from receiving exculpatory evidence; however, he acknowledged that trial counsel tried very hard to get the phone analyzed and his text messages pulled. He further testified that there were several witnesses that he mentioned to trial counsel who were not called, but may have been able to speak to his good character. He also testified that he believed that records were subpoenaed from the gymnastics center, but were not received. Applicant's last complaint was that, during closing argument, trial counsel seemed to be seeking leniency from the jury, and felt that this was counterproductive to the strategy of finding him innocent.

Applicant also testified about some factual issues that he believed were misrepresented in his case. He admitted that the interactions he was undertaking with the Minor would have provided probable cause for law enforcement to investigate; however, he characterized his actions as those of a Marine trying to accomplish a mission. The mission, as he understood it, was to remove a dangerous boy from the life of one of his students. To accomplish this, he provided her with a cell phone and digital camera, and requested that she not tell anyone about them. Applicant admitted to discussing this with his daughter, who understood his sometimes crude and sexual sense of humor. He testified that he found that his sense of humor helped his gymnastics students to open up. Separately, Applicant testified that he was unprepared for the fact that his time in the Marine Corps

² Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

may be mentioned at trial. Applicant was questioned regarding the indiscretions alleged, such as misappropriating a computer and sleeping with a potential recruit, and admitted to both of these, as well as to receiving an administrative or other than honorable discharge.

Trial counsel

Regarding overall strategy and the facts at hand, trial counsel testified that there was no contesting the facts that Applicant gave the Minor the camera and phone, and that her parents did not know about them. He further testified that Applicant wanted the strategy to be that he was doing all of this to help the Minor get over a relationship, but trial counsel could not get around the fact that the digital camera contained nude photos of Applicant. Trial counsel believed that he was very successful by keeping out many potentially harmful images, as well as keeping out a Lyle, supra, witness. Part of the strategy involved informing the jury that the Minor had already been intimately involved with someone that was legally considered an adult. Overall, however, the strategy was to negate any intent that the jury may have thought Applicant had to commit these crimes.

Trial counsel testified that he felt Applicant did a good job of testifying, as well as that they must have agreed not to call character witnesses, or the Applicant would have forced him to. Trial counsel admitted that a different attorney may have called the character witnesses, but he did not feel that their testimony would be beneficial. Similarly, he did not speak to the parents of other children involved at the gymnastics center because he did not feel it would be beneficial. Trial counsel also testified that some of the witnesses he did contact backed out of testifying because they did not want to become any more involved in the case. However, trial counsel did believe that they received all discovery from the state.

Regarding specific evidence, trial counsel testified that he decided not to play a tape of the Minor's forensic interview because it would have been repetitive testimony of the Minor. Even

though pieces here and there may have been beneficial, overall it essentially provided the jury another chance to hear from the Minor. The text messages sent by the Applicant were characterized by trial counsel as sounding sexual in nature, but there was a theory behind how Applicant worded them. However, when combined with the explicit photos, the fact that Applicant gave a phone and camera to the Minor, and the lack of parental knowledge of these occurrences, trial counsel did not believe that a jury would agree that Applicant was only trying to help the victim.

Trial counsel also testified that he "could've walked him out of there," as there was a plea offer that would have allowed Applicant to serve probation only, along with the collateral consequences that most sexual offenses carry, such as monitoring and registries. At trial, trial counsel did not testify as to whether he recommended this offer to Applicant, though he implied at the post-conviction relief hearing that he strongly advised Applicant to plead.

Rebecca B.

Applicant's daughter, Rebecca B. , was called by the Applicant to testify. PCR counsel began to question her about her father's sense of humor, as well as some factual issues in the case. Respondent objected to all of these questions based on relevance, and this objection was sustained. This Court felt that Applicant was attempting to retry the underlying case rather than to focus on the collateral issues at hand.

B. Ineffective Assistance of Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove trial 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." *Id.* (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. *Id.* (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. *Id.* at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. *Id.* Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." *Id.* (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18, 386 S.E.2d at 625.

This Court finds Applicant has failed to show Counsel's performance fell below an objective standard of reasonableness. Counsel's testimony indicated he was extremely familiar with the facts of Applicant's case. This Court finds Counsel met with Applicant an adequate number of times and was familiar with the discovery materials. Counsel indicated he explained Applicant's constitutional rights, and he explained the differences between going to trial and entering a guilty plea, especially in light of the favorable plea that was placed on the record. Counsel indicated he never had trouble

communicating with Applicant, and he never had any concern that Applicant did not fully understand their conversations.

Counsel refuted all allegations that Applicant made in his application as well as during his testimony including, but not limited to, issues regarding Applicant's cell phone and text messages; their differing views of strategy; the fact that, though counsel is hired by Applicant and should respect his wishes, counsel should be trusted to try the case to the best of his or her ability; that trying a case costs money and more money means more resources at hand; issues regarding sentencing; issues regarding prior charges; and discovery matters. This Court finds that, through the presentation of evidence at the post-conviction relief hearing, Applicant has failed to demonstrate both deficiency by trial counsel, as well as any prejudice caused by trial counsel's actions. Therefore, this allegation is denied and dismissed with prejudice.

C. Discovery Violations

This Court finds Applicant's allegation that the solicitor failed to turn over any required evidence is without merit. An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*, 434 S.E.2d at 268. This Court finds Applicant failed to prove that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose exculpatory material that would indicate that Applicant was not guilty of the crimes with which

he was charged. In fact, Applicant failed to produce any evidence tending to show that that prosecution withheld information that may have helped him or change the outcome of the case. Therefore, this allegation is denied and dismissed with prejudice.

D. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

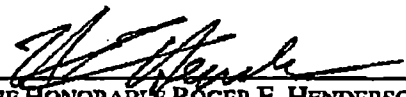
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice. The Court notes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

Remainder of page intentionally left blank.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice.

AND IT IS SO ORDERED this 10th day of November, 2016.


THE HONORABLE ROGER E. HENDERSON
Presiding Judge
Fourth Judicial Circuit

, South Carolina

FILED
2016 NOV 28 PM 2:39
SC2019 SUGGS
CLERK OF COURT/R.D.D.
DARLINGTON COUNTY, S.C.