Tristan M. Shaffer
Attorney at Law

January 14, 2020

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

Re: Justin McBride v. State 2018-CP-45-0107

Dear Mr. Shearouse,

Please find the enclosed Notice of Appeal, Certificate of Service, and Order Granting a Belated Appeal in the above referenced case.

Sincerely,

Tristan M. Shaffer

CC: Williamsburg County Clerk of Court
Janell Gregory

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No. 2018-CP-45-0107

Justin McBride #357648,

Petitioner,

v.

The State of South Carolina, Respondent.

NOTICE OF APPEAL

Petitioner appeals the order granting denying him post-conviction relief. This order was filed November 25, 2019 and received by Petitioner on December 16, 2019.

January 14, 2020

Tristan M. Shaffer (SC Bar # 77565)
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Other Counsel of Record:
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Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

RECEIVED
JAN 22 2020
S.C. SUPREME COURT

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Justin McBride #357648,

Petitioner,

v.

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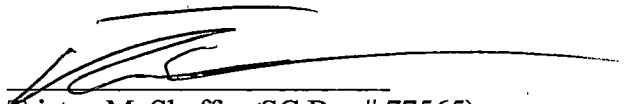
CERTIFICATE OF SERVICE

I certify that on the date below I served the Notice of Appeal on The State of South Carolina by mailing a copy to the Respondent at the address below.

January 14, 2020



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STATE OF SOUTH CAROLINA COUNTY OF WILLIAMSBURG	)	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT
Justin McBride, #357684, Applicant, v. State of South Carolina, Respondent.	)	2018-CP-45-107 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed on February 22, 2018, by Justin McBride (Applicant) and amended on March 15, 2019. The State (Respondent) filed a Return on June 27, 2018, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on March 26, 2019, at the Sumter County Courthouse. Applicant was present at the hearing and represented by Tristan Shaffer, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf and presented testimony from his neighbor, Gladys Evans. Derrick Mobley (Counsel), Assistant Solicitor Kimberly Barr (Barr), and Appellate Counsel Wendy J. Keefer (Appellate Counsel), also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Applicant was indicted at the March 2012 term of the Williamsburg County Grand Jury for first-degree criminal sexual conduct with a minor and assault with intent to commit first-degree criminal sexual conduct with a minor

(Amended 2010-GS-45-0283). The charges stem from an incident on June 21, 2010, in which Applicant, who was sixteen years old, forced his nine-year-old cousin to perform oral sex on him. Immediately afterwards, Applicant attempted to penetrate the victim's rectum. Tr. 90-101.

Counsel represented Applicant and Barr prosecuted the case. On October 28-30, 2013, Applicant proceeded to a jury trial before the Honorable John C. Hayes, III, and was found guilty of first-degree criminal sexual conduct with a minor. Applicant was acquitted of assault with intent to commit criminal sexual conduct with a minor in the first degree. Judge Hayes sentenced Applicant to imprisonment for twenty-five years.

Applicant filed a timely notice of appeal, and appeal was perfected by Wendy J. Keefer, Esquire, and Adam Owensby, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction in an opinion dated February 17, 2016. Applicant petitioned for rehearing on February 23, 2016, and Respondent filed a return dated April 25, 2016. On May 25, 2016, the Court of Appeals withdrew its opinion and substituted a new opinion affirming the convictions. Applicant's appellate attorneys were relieved as counsel, and Applicant proceeded *pro se*, filing an amended petition for writ of certiorari to the South Carolina Supreme Court. Respondent filed a return on October 11, 2016. The Supreme Court denied certiorari on June 16, 2017. The remittitur was issued on June 30, 2017.

SUMMARY OF FACTS

Victim was just shy of her tenth birthday when she was sexually assaulted by Applicant. She was thirteen years old at the time of the trial. (Trial Tr. 89.) Applicant was sixteen years old at the time he sexually assaulted Victim, who was his cousin. (Trial Tr. 108.)

Victim was attending summer school. For the first time, she was riding the bus, which she was excited about. It was her second day of summer school and her second day riding the bus.

The other children on her bus told Victim that her mom was not home, which made Victim upset. She went to a neighbor's house, but when she saw the neighbor had company, she went to her Aunt Tina's house instead. Aunt Tina is Applicant's mother. She knocked on the door and Applicant answered and let her in.[1] She was alone in the house with Applicant. Applicant was watching television. Victim commented that it was a show with bad words, so they should turn the television off. That prompted Applicant to begin a violent sexual assault. (Trial Tr. 90-94.)

Applicant took out his penis and told Victim to "jerk it." (Trial Tr. 95, lines 5-6.) He grabbed Victim's hand and put it on his penis. Applicant grabbed Victim's head and pulled her toward his penis. (Trial Tr. 95-96.) Victim testified as follows on this point:

> Q: He grabbed your head hard?
>
> A: Yes, ma'am.
>
> Q: And pulled it down to his manhood; is that right?
>
> A: Yes, Ma'am.
>
> Q: And then did what?
>
> A: He then he grabbed my head. Then he told put . . . my mouth on his manhood. And I put – I had my hand on his stomach and then pushed him away from me. And that's when the white stuff and clear stuff came out his manhood. It was in my mouth and on my shirt. And I ran in the bathroom.
> Q: You said you saw and white and clear stuff come out of his manhood?
>
> A: Yes, ma'am.
>
> Q: And it went in your mouth?
>
> A: Yes, ma'am, on my shirt.
>
> Q: What did that taste like?

[1] Detective Trena Hamlet noted that McBride's and Victim's houses were side by side with nothing but a small patch of grass between them. (Trial Tr. 181)

A: Nasty.

Q: And it went on your shirt. Is that a yes?

A: Yes, ma'am.

Q: Okay. And then you did what?

A: Then I ran into the bathroom and wipe it off, and spit it out of my mouth.

(Trial Tr. 97, lines 5-16.) Victim testified she spit out in the bathroom sink and wiped the semen off her shirt with a tissue. She put the tissue in a trash can. (Trial Tr. 97-98.)

When Victim came out of the bathroom, Applicant was spraying perfume all around the living room. (Trial Tr. 100.) Applicant tried to pull down her pants; he would pull them down, and Victim would pull them back up. (Trial Tr. 100.) Victim testified that Applicant tried to put his penis in her butt. Victim testified it hurt. (Trial Tr. 100 line 25 – 101, line 8.)

Victim pushed Applicant off her, and she ran to the front door. Applicant blocked her and "sucked" his teeth. She instead ran for the back door and ran out of the house. She went home and kicked on the door. Victim's mother was there. When her mother asked what was wrong, Victim did not reply. She was scared Applicant would come over to the house. But Victim's mother smelled "man perfume" and went next door. Victim testified she had deodorant on her shirt. She testified it was from when Applicant had his arm around her neck. She hurt the next day when she was making a bowel movement. (Trial Tr. 101-108.) Specifically, Victim testified she yelled to her mother she could not use the bathroom because "[h]e put his manhood in the back of my butt." (Trial Tr. 107, lines 3-8.)

Detective Trena Hamlet responded to a call regarding a female victim at Victim's residence. Several other officers and family members were already present. While speaking with

Victim and her family, Detective Hamlet noticed a white smear on the shoulder of Victim's shirt. After she spoke with Victim, Detective Hamlet spoke with Applicant to hear his side of the story. (Trial Tr. 176-179.)

Detective Hamlet testified that Applicant gave the following statement:

> He opened the door and asked why she was over there. Stated that her mom was not at home. She sat on the couch and they were watching TV. He stated that at one point he got up to go to the restroom. And while he was in there, she came in on him. He concealed, tried to conceal himself from her, because he was in the midst of using the restroom. Yelled at her to get out. And she went back in the living room and sat down. And shortly thereafter, she wanted to leave. He said that she didn't want to go to front door because a bug was on the door, so she went to go out the back. The back door was locked. So he had to unlock it. She couldn't unlock it, he had to unlock it for her to leave.

(Trial Tr. 181, line 13 – 182, line 2.) Detective Hamlet testified to the statement without objection from Applicant.

Victim's mother testified she arrived at home on time for the bus, or at least she thought so. However, Victim's mother did not hear the bus. She became agitated when her daughter did not come home – more so when the middle school and then high school buses came (Victim's bus should have arrived first). But after a while, she was startled by Victim kicking and beating on the door. Victim's mother became concerned because Victim was not talking, even after she asked Victim where she had been. Victim was excited to ride the bus the day before, but now Victim walked by her mother without discussion. Victim's mother grabbed Victim and smelled the cologne. Victim pointed to her Aunt's house when Victim's mother inquired about where she had been. Victim's mother testified Victim also had a stain on her shirt that smelled like deodorant. (Trial Tr. 225-232.)

Victim's mother went next door and asked Applicant what happened. Applicant claimed Victim walked in the bathroom on him. Victim's mother told Applicant that she did not believe him. Victim's mother decided it was best to leave at that point, since Applicant's mother was not home. Samantha Cooper, Victim's aunt, called the police. (Trial Tr. 234-237.)

Later that night, Victim's mother was trying to finish her school work – she was having trouble due to the stress of the day – when she heard Victim scream from the bathroom. Victim told her mother it hurt when she was trying to go to the bathroom. (Trial Tr. 237-238, 243.)

Law enforcement failed to take Victim's clothing during the interview. Victim's mother and her sister put Victim's clothing in a bag and were told to bring the bag with them to the Durant Center in Florence when they brought Victim for her appointment. The Durant Center told them to take the bag of clothes to the police. She left the clothes with an officer at the Kingstree police station. (Trial Tr. 245-248, 258.)

Lieutenant Thomas Dean McCrea testified that the officer described by Victim's mother as the officer receiving the clothes must have been Sergeant Grant Huckabee, who was an investigator, K-9 handler, and evidence custodian at the time. The only other person with access to the evidence room was Chief Ford. Both Huckabee and Ford are no longer employed with the Kingstree Police Department. Lieutenant McCrea was under the impression the clothing was sent to SLED for testing, but no record of this exists, and it appears the clothing was lost. This was not the first instance of Huckabee losing evidence before. No evidence intake sheet was located. (Trial Tr. 269-270.)

Samantha Cooper, Victim's aunt, testified she confronted Applicant with Victim's allegations, and he told her he did not mean to do it. Cooper understood Applicant's comments to be a confession. Cooper was enraged. She went running after Applicant, and he ran inside his

house. Cooper collected herself sufficiently enough to walk away rather than act on violent urges. Thereafter, she called the police. (Trial Tr. 275-282.)

ALLEGATIONS RAISED

During the evidentiary hearing, Applicant proceeded on the following allegations:

1. Ineffective Assistance of Counsel:
    a. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to challenge the jurisdiction of the Court of General Sessions to hear the case.
    b. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to move for Applicant's case to be remanded to the Family Court.
    c. Given the fact that Applicant was 16 at the time of the alleged offense, the twenty-five year sentence is cruel and unusual and violates the Eighth Amendment of the United States Constitution.
    d. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the mandatory minimum sentence pursuant to the Eighth Amendment of the United States Constitution.
    e. Given the fact that Applicant was 16 at the time of the alleged offense, the twenty-five year sentence is cruel and unusual and violates Article I Section 15 of the South Carolina Constitution as applied to Applicant.
    f. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the mandatory minimum sentence pursuant Article I Section 15 of the South Carolina Constitution.
    g. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the entirety of his statement pursuant to Jackson v. Denno.
    h. To the extent that Trial Counsel properly objected to the mandatory minimum sentence, Applicant submits that he was denied his Sixth Amendment right to effective assistance of Appellate Counsel for failing to brief the issue on appeal.
    i. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly review discovery documents and advise Applicant of the evidence against him.
    j. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to adequately impeach the alleged victim with inconsistencies in her statements.

k. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to call Dr. Luberoff to testify.

l. Applicant was denied his Sixth Amendment right to effective assistance of appellate counsel when Appellate Counsel failed to brief the trial court's erroneous ruling that prohibited Applicant from presenting evidence of why Officer Huckabee had left the police department.

m. Alternative to l, Applicant was denied his Sixth Amendment right to effective assistance of counsel when his Trial Counsel failed to adequately preserve the issue raised in subsection l.

n. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel allowed the jury to be charged that Applicant could be found guilty of criminal sexual conduct for unindicted conduct.

o. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to burden shifting statements in the State's closing argument.

p. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the State's closing argument that was designed to inflame the passion and the prejudice of the jury.

q. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the State's argument that anal or vaginal sex was sufficient to result in a finding of guilty for Count I of the indictment.

r. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Samantha Cooper's testimony pursuant to Rule 5 and Brady.

s. Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to adequately investigate and call witnesses to contradict Samantha Cooper.

APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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, 300 S.C. 115.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, direct appeal records, and Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the post-hearing briefs submitted by the attorneys and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to challenge the jurisdiction of the Court of General Sessions to hear the case and failed to have the case remanded to Family Court.[2]

Applicant alleges his case should not have been heard in General Sessions because Applicant was sixteen years old at the time of the incident.

Counsel testified he approached Assistant Solicitor Barr a couple of times requesting Applicant's case be moved to Family Court. Counsel testified Barr declined his request and Counsel testified there was no hearing or proceeding he could request to force the case be remanded to Family Court.

Barr testified Applicant was not a child based on the definition set forth in §63-19-20 S.C. Code Ann. Barr testified she did not move the case to Family Court because Victim's mother told her this was not the first time something of this nature occurred between Applicant and Victim, and Barr was concerned Applicant was a predator. Barr testified it was within her discretion whether the case was heard in Family Court or General Sessions.

[2] Allegations a and b in Applicant's amended application.

Applicant's argument is contradicted by the plain meaning of the applicable statutes and case law. "Child" is defined as follows under S.C. Code Ann. §63-19-20(1):

> (1) "Child" or "juvenile" means a person less than seventeen years of age. "Child" or "juvenile": does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen year or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor.

Criminal sexual conduct with a minor in the first degree is a felony with a penalty of twenty five years' imprisonment or life imprisonment. S.C. Code Ann. §16-3-655(D)(1). Therefore, under the plain language of the statute, Applicant was not a child when he sexually assaulted Victim. The Supreme Court found that a sixteen year old charged with A, B, C, or D felonies is not a "child" as defined by statute and, therefore, may be charged in circuit court without first bringing the charges in family court. State v. Graham, 340 S.C. 352, 532 S.E.2d 262 (2000).

Additionally, the statute is undoubtedly constitutional. The protection of family court to juveniles is provided by our legislature as a privilege, and not as a matter of right. State v. Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980); see also C.J.S.2d Constitutional Law § 1432 ("Courts have upheld statutes divesting a juvenile court of jurisdiction of proceedings against children of a specified age for particular violations or crimes . . . ."). No constitutional infirmity exists where a state has determined a class of offenses requires the juvenile to be treated as an adult. See Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977) (noting "several of our sister circuits have upheld the constitutionality of statutes similar to Florida's which permit juveniles to be treated as adults without a hearing in certain instances"). In the instant case, Applicant committed an offense the legislature ranks high in terms of severity. It is one of the few non-homicide crimes to be

punishable by up to life imprisonment. Applicant violently assaulted Victim in such a manner that evidences his danger to society and requires long-term incarceration. No constitutional issue exists in the legislative determination that sixteen-year-olds who rape children under the age of eleven should be prosecuted as adults. General Sessions had jurisdiction under due process of the law over Applicant's charges.

This Court finds the testimony of Counsel and Barr as to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient for failing to have his case remanded to Family Court as jurisdiction was proper in General Sessions. Applicant has also failed to establish any resulting prejudice from Counsel's alleged deficiency. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

Applicant's twenty-five year sentence is cruel and unusual and violates the Eighth Amendment of the United States Constitution and Article I Section 15 of the South Carolina Constitution. Applicant was denied effective assistance of counsel when Counsel failed to object to the mandatory minimum sentence pursuant to the Eighth Amendment of the United States Constitution and Article I Section 15 of the South Carolina Constitution.[3]

Applicant alleges his sentence violates the United States Constitution and the South Carolina Constitution because it imposes a mandatory minimum sentence on Applicant and does not allow the Court to consider Applicant's age at the time of the offense. Applicant cites Miller v. Alabama, 567 U.S. 460 (2012), in support of this allegation.

Counsel testified he did not object to Applicant's twenty-five year sentence because he did not believe he had grounds to object as a twenty-five year sentence for a juvenile has not been

[3] This section addresses allegations c, d, e, and f of Applicant's amended application.

declared unconstitutional by the courts. Counsel testified if Applicant had received a life sentence he would have objected.

In criminal cases, a trial judge has broad discretion in imposing a sentence within the statutory limits. State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974); see State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) ("A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed."). Generally, appellate courts will only interfere with the discretion of a judge in the imposition of a sentence in rare and unusual circumstances. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952). "Absent partiality, prejudice, oppression, or corrupt motive, [the appellate court] lacks jurisdiction to disturb a sentence that is within the limits prescribed by statute." State v. Barton, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997).

Notwithstanding a trial judge's authority to impose a sentence falling within the statutory limits, the Eighth Amendment of the United States Constitution prohibits the imposition of cruel and unusual punishment. See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Likewise, the Constitution of the State of South Carolina prohibits the imposition of cruel and unusual punishment. See S.C. Const. Art. I, §15 ("Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained."). Pursuant to the Eighth Amendment, punishments must not be "inherently barbaric" and must be graduated and proportioned to the offense. Graham v. Florida, 560 U.S. 48, 59 (2010); see Atkins v. Virginia, 536 U.S. 304, 311 (2002) (instructing it is

a precept of justice the punishment for a crime should be graduated and proportioned to the offense). However, "[t]he Eighth Amendment does not require strict proportionality between crime and sentence." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). Instead, "it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id. (citations omitted).

Here, Applicant alleges his twenty-five year sentence for criminal sexual conduct with a minor in the first-degree is violative of the United States and South Carolina constitutional prohibition against cruel and unusual punishment. However, both the United States Supreme Court and the South Carolina Supreme Court have recognized even a sentence of life without parole is constitutionally permissible for a juvenile convicted of homicide. See Montgomery, __ U.S. __, 136 S. Ct. 718, 733 (2016) (recognizing a sentencing judge may encounter a rare juvenile offender for whom a life without parole sentence is justified); Miller v. Alabama, 567 U.S. at 479 ("the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders."); Aiken v. Byars, 410 S.C. 534, 545, 765 S.E. 2d 572, 578 (2014) (recognizing a sentencing judge "[w]ithout question" could still properly determine life without parole was an appropriate sentence for a juvenile murderer following an individualized hearing in which "the mitigating hallmark features of youth" were fully explored and noting the legislature's decision authorizing life without parole sentences for juveniles who committed murder would be honored on appeal).

On April 3, 2019, the South Carolina Supreme Court issued an opinion addressing the practices of juvenile sentencing. State v. Slocumb, S.C. Sup. Ct. Order dated April 3, 2019 (Shearouse Adv. Sh. No 14). The petitioner, Conrad Slocumb, was thirteen years old at the time he incurred charges that led to a thirty year prison sentence. Three years after that conviction, the petitioner escaped from custody and in the forty-five minutes he was free, he forced his way into

the victim's residence, claimed he was armed and forced the victim to give him money, keys, cigarettes, clothes, jewelry, and beer. The petitioner then raped the victim. After he was recaptured, the petitioner was eventually convicted of 1st degree burglary, first-degree criminal sexual conduct, robbery, and escape. The petitioner was sentenced to an aggregate term of 130 years because the sentences were run consecutively. The petitioner appealed on the basis that he received a *de facto* life sentence in violation of the Eighth Amendment of the United States.

In the Slocumb opinion, the Court identifies three cases – Roper v. Simmons [4], Graham v. Florida [5], and Miller v. Alabama[6] - that have addressed juvenile sentencing practices and conducts an extensive analysis of those cases. At the conclusion of their lengthy analysis, the Court held, "Neither Graham nor the Eighth Amendment, as interpreted by the Supreme Court, currently prohibits the imposition of aggregate sentences for multiple offenses amounting to a *de facto* life sentence on a juvenile nonhomicide offender." Slocumb, Op. No. 27877 (S.C. Sup. Ct. filed April 3, 2019).

This Court finds Counsel's testimony with respect to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient for failing to object to Applicant's sentence since the sentence was constitutional. Applicant's argument that his sentence was unconstitutional based on the Court's holding in Miller is a non-starter as Applicant was sentenced to twenty-five years imprisonment, not a life sentence. Applicant's sentence cannot even be classified as a *de facto* life sentence as he received an individual sentence of twenty-five years and will only be approximately forty-four years old upon his release. Applicant's argument

[4] 543 U.S. 551 (2005).
[5] 560 U.S. 48 (2010).
[6] 567 U.S. 460 (2012).

that the holding in Miller should apply to a juvenile sentenced to twenty-five years is wholly without merit.

This Court finds Applicant has also failed to establish any resulting prejudice from Counsel's alleged deficiency. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of counsel and, therefore, this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the entirety of his statement pursuant to Jackson v. Denno.[7]

Applicant alleges Counsel should have challenged his entire statement to law enforcement during the pre-trial Denno hearing.

Counsel testified he only challenged Applicant's initial statement to law enforcement at the hearing because the remaining portions of Applicant's statement were his version of the facts. Counsel testified this statement would have been consistent with Applicant's testimony had he testified at trial. Counsel testified the remaining portions of the statement coming in gave them the opportunity to get Applicant's side of the story out before the jury without Applicant having to testify at trial. Counsel testified he moved to suppress Applicant's initial comment to law enforcement because he did not want the jury to hear anything from Applicant regarding Victim's allegations. Counsel testified he was successful in getting the initial statement suppressed.

The initial statement Applicant made to Det. Hamlet was in response to her asking Applicant if he knew why law enforcement was at his residence. Det. Hamlet testified during the Denno hearing that Applicant responded, "[T]hey were trying to say that [I] touched [my] cousin."

[7] 378 U.S. 368 (1964)

(Trial Tr. 31.) Counsel was successful in getting that statement suppressed. Det. Hamlet testified to the remaining portion of Applicant's statement to law enforcement was as follows:

> He stated he was home. He heard a knock on the door. His cousin was at the door. And he asked why she was there. And she said no one was at home; that her mother wasn't at home. And he allowed her to come in. He said that she looked like she was mad. Sat down on the couch. They watched TV. [A]t some point he got up, and went into the restroom. And then shortly after she came up . . . and he said he tried to, he was using the restroom and he tried to conceal himself from her. And yelled at her to, you know, leave the bathroom. He stated a short while later she was ready to go home. But she didn't want to go out the front door because there was a bug on the door. . . . She went to the back door, but it was locked. She was unable to lock it, so he unlocked the door for her, and she went home.

(Trial Tr. 31-32.)

This Court finds Counsel's testimony as to this allegation very credible. Applicant has failed to meet his burden on this allegation as Counsel testified it was part of his trial strategy to allow Applicant's statement in so the jury could hear his version of the facts. Applicant has failed to show how Counsel was deficient for not moving to suppress Applicant's entire statement. Applicant has also failed to show how he was prejudiced by this alleged deficiency since he has failed to show how the suppression of his statement would have changed the outcome of his trial. Accordingly, Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

To the extent that Trial Counsel properly objected to the mandatory minimum sentence, Applicant submits that he was denied his Sixth Amendment right to effective assistance of Appellate Counsel for failing to brief this issue on appeal.

Appellate Counsel testified that she was lead counsel on the appeal and Adam Owensby was assisting her to get appellate experience. Appellate Counsel testified she made all of the decisions on what issues to raise on appeal and she was the proper attorney to respond to the issues raised by Applicant in his post-conviction relief application.

Appellate Counsel testified she briefed all meritorious issues that were preserved for appeal. On cross-examination, Appellate Counsel testified she did not brief the issue regarding Applicant's twenty-five year sentence because it was not preserved for appeal, and the appellate courts in South Carolina have not found a sentence cruel and unusual for juveniles unless it was a life sentence.

This Court finds Appellate Counsel's testimony as to this allegation very credible. Applicant has failed to meet his burden on this allegation as Applicant was sentenced to twenty-five years by the trial court, which is clearly not tantamount to a life sentence as Applicant will be approximately forty-four years old upon his release. Applicant's allegation that Appellant Counsel was deficient for failing to brief this issue is without merit as Appellant Counsel testified it was not preserved, nor would it have been a meritorious claim to raise on appeal. Applicant has also failed to show how he was prejudiced by Appellate Counsel's failure to brief this issue as he has failed to establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013). Accordingly, Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly review discovery documents and advise Applicant of the evidence against him.

Applicant argues Counsel was ineffective for failing to obtain the color copy of a photograph showing a white stain on Victim's shirt that was introduced by the State during the trial. Applicant further argues his rejection of the plea offer was not knowingly and intelligently entered because Applicant had not had the opportunity to view the color photograph prior to rejecting the offer.

Applicant testified he did not see the color photograph unless Counsel had it at trial. Applicant testified he reviewed discovery with Counsel but it did not include a color copy of the photograph or anything about his statement to Samantha Cooper. Applicant testified he turned down the plea offer because he was under the assumption that there was no evidence against him. Applicant testified Counsel gave him a copy of the police report and he recalled telling police nothing sexual happened. Applicant testified had he known about the color photograph he most likely would have pled. On cross-examination, Applicant testified he viewed the forensic interview of Victim prior to trial.

Counsel testified he drove to the solicitor's office two or three times in order to review the solicitor's file and obtain a copy of the forensic interview of Victim. Counsel testified the color photograph was not in the file on any of the occasions when he viewed the file. Counsel testified he had a photocopy of the photograph in his file that was mostly black with a white stripe across it. Counsel testified when the color photograph was introduced during the trial he objected. (Trial Tr. 153.) Counsel testified when the trial court allowed the photograph to come in he moved for a mistrial. (Trial Tr. 174.) Counsel testified he later moved to exclude the photograph after Det. Hamlet could not identify Victim in the photograph or lay proper foundation for its admission. (Trial Tr. 202-203) Counsel testified he did not ask for a continuance when the color photograph was introduced because he was able to cross-examine law enforcement on their inability to collect evidence and was able to impeach Det. Hamlet on the stand. Counsel testified he was also worried if he requested a continuance the shirt would be found and tested and he believed the results would have been detrimental to Applicant. Counsel testified the photograph was "absolutely not" the most compelling evidence against Applicant at trial.

Counsel testified prior to trial the State provided a plea offer to Applicant. Counsel testified he advised Applicant to take the plea offer. Counsel testified Applicant rejected the plea offer and Counsel had Applicant sign a waiver form indicating he was rejecting the offer contrary to Counsel's advice. Counsel testified at that time of the rejection Applicant had not seen the color photograph that was introduced at trial. Counsel testified Applicant had viewed all of the evidence against him that Counsel possessed, including Victim's forensic interview. Counsel testified he, Barr, Applicant's mother, and Applicant discussed the plea offer prior to trial and Counsel explained it was in his best interest to take the offer. Counsel testified he told Applicant he was young and the risk of going to trial was too high. Counsel testified the Victim's allegations against Applicant were corroborated during the forensic interview, which Applicant viewed. Counsel testified he believed Applicant came from a good family and believed if Applicant took the plea offer that he could go before the court and ask for probation. Counsel testified Applicant did not want to take the plea offer because it was not negotiated and he did not want to accept an offer where he would possibly go to prison and have to register as a sex offender.

Barr testified she provided a copy of the photograph in her file to Counsel prior to trial. Barr testified her copy of the photograph was not in color and was similar to what Counsel had received. Barr testified that is how she received the photograph from police. Barr testified she received the color copy either right before trial or during trial. Barr testified the color photograph provided more detail. Barr testified the photograph was not a compelling piece of evidence against Applicant because the law enforcement agency had lost all of the evidence and the photograph was the only piece of evidence they kept. Barr testified her administrative assistant sends a request to the law enforcement agency for a copy of everything in their file. Barr testified the photograph was not inculpatory in her view. Barr testified the photograph helped only because all of the other

evidence was lost. Barr testified the photograph corroborated a portion of Victim's testimony, but the case did not rise or fall on the photograph.

Barr testified she offered Applicant a reduced charge to Lewd Act with a possible sentence range of 0-15 years. Barr testified she had a conversation over the phone and in person with Counsel regarding the offer. Barr testified she met with Applicant and Counsel about the plea offer and explained the penalties Applicant faced if he went to trial. Barr testified if he took the plea offer she could not recommend probation but would not oppose it. Barr testified she told Applicant if he took the plea offer he would still have to register as a sex offender and Applicant told her he might as well be in prison if he has to register as a sex offender. Barr testified she told Applicant that was easy for him to say now, but on his way to SCDC he would feel differently. Barr testified she asked Applicant if his mother could come into their meeting and he agreed. Barr testified she let Counsel, Applicant, and Applicant's mother discuss the plea offer outside of her presence. Barr testified when she went back into the room, Applicant's mom told her it was Applicant's decision and he wants to reject the offer. Barr testified the plea offer would have been a fair resolution to the case. Barr testified she does not recall the offer expiring. Barr testified she may have increased the offer had Applicant wanted to accept a plea during the trial. Barr testified she does not recall Counsel coming to her during the trial for a plea offer and she would not have extended another plea offer because she believed the testimony of Victim and her mother.

In Strickland, the Supreme Court held, "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." Strickland, 466 U.S. at 670. Here, although Counsel was not deficient with regards to this allegation, this allegation can be easily disposed of on a prejudice analysis alone. In order for Applicant to prevail

on this allegation he must show "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 695.

Applicant has failed to show how Counsel obtaining the color photograph prior to trial would have changed the outcome of the trial. Both Counsel and Barr testified the photograph was not the most compelling evidence against Applicant at trial. Barr testified specifically that the case did not rise or fall on the photograph. Additionally, Counsel testified he was able to impeach Det. Hamlet regarding the photograph during his cross-examination. Counsel testified during cross-examination Det. Hamlet could not even identify whether the person in the picture was Victim. Counsel further testified his trial strategy would not have changed had he had the color photograph ahead of trial. Counsel and Barr testified Victim and Victim's mother testified at trial and Victim's mother was the most compelling witness against Applicant.

Applicant claims if he had seen the color photograph prior to trial he would have changed his mind and accepted the plea offer from the State. First, Applicant was aware the photograph existed as Counsel had a black and white copy of the color photograph – although poor quality- in his file. Applicant also had a copy of the incident report, which referenced the photograph. Second, Applicant testified he viewed the forensic interview of the Victim prior to declining the plea offer. It is unreasonable to believe the photograph – which was an insignificant piece of evidence- would have swayed Applicant's decision to accept the plea offer when viewing Victim's forensic interview, which is arguably of much more significance in this case, did not have that affect. Finally, Counsel advised Applicant to take the plea offer and explained to Applicant it was in his best interest to plead guilty. Counsel and Barr testified they both met with Applicant and discussed the plea offer with Applicant and his mother and Applicant was hesitant about the plea offer because he did not want to register as a sex offender or go to prison. Again, it is unreasonable

to believe a color photograph showing a black shirt with a white mark on it would have been a great motivator for Applicant to take a plea offer that would have required him to register as a sex offender, especially since the State could not provide the shirt or any additional evidence regarding the shirt at trial because it had been lost prior to trial and no testing was ever conducted on the shirt or other clothing submitted by Victim.

This Court finds the testimony of Counsel and Barr with respect to this allegation very credible whereas the testimony of Applicant is not credible. This Court finds Applicant has failed to show that the outcome of his trial would have been different had Counsel obtained the color copy of the photograph prior to trial as Counsel was effective in impeaching Det. Hamlet regarding the photograph. Counsel was also successful in getting testimony from other witnesses showing the State lacked any evidence derived from the shirt in the photograph because the shirt and other such evidence was lost by law enforcement and never tested. As Barr testified, the trial did not rise or fall on the photograph. Based on the standard set forth in Strickland, this Court finds Applicant has failed to meet his requisite burden and this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to adequately impeach the alleged victim with inconsistencies in her statements.

Counsel testified his trial strategy was to impeach Victim and show the jury the State had no DNA or physical evidence corroborating Victim's story. Counsel testified he believed he handled the cross-examination of Victim well during the trial. Counsel testified during cross-examination he confronted Victim on inconsistent statements and also cross-examined Det. Hamlet on Victim's inconsistent statements. The record also supports Counsel's testimony that he cross-examined Victim and Det. Hamlet on Victim's inconsistent statements. (Trial Tr. 121-122, 130, 134, 209-210, 212.)

This Court finds Counsel's testimony as to this allegation very credible. This Court also finds Applicant has failed to meet his burden on this allegation as Counsel's testimony and the record shows Counsel did cross-examine Victim on her inconsistent statements and Applicant has failed to show what Counsel should have or could have done differently to change the outcome of his trial. As such, this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to call Dr. Luberoff to testify.

This allegation was expressly waived by Applicant during the evidentiary hearing. As such, this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of appellate counsel when Appellate Counsel failed to brief the trial court's erroneous ruling that prohibited Applicant from presenting evidence of why Officer Huckabee had left the police department.

Appellate Counsel testified she raised every preserved meritorious issue she could in her appeal.

This Court finds Appellate Counsel's testimony with regards to this allegation very credible. This Court also finds Applicant's allegation is meritless as this issue was not preserved for appeal during the trial and, therefore, could not have been raised by Appellate Counsel on appeal. This Court finds this allegation is denied and dismissed with prejudice.

Alternative to l, Applicant was denied his Sixth Amendment right to effective assistance of counsel when his Trial Counsel failed to adequately preserve the issue raised in subsection l.

Counsel testified Officer Huckabee was the evidence custodian at Kingstree Police Department during the case. Counsel testified he had learned Officer Huckabee was terminated because he lost evidence while in that position. Counsel testified during the trial the State objected to a question he asked Lt. McCrea regarding the reason Officer Huckabee left the Kingstree Police Department. Counsel testified he did not believe he needed to preserve that issue for appeal

because he got the answer he wanted in a follow up question from Lt. McCrea. Counsel testified he was able to get Lt. McCrea to testify that Officer Huckabee had lost evidence.

During the cross-examination of Lt. McCrea, the following exchange occurred:

> Counsel: . . . Do you know why officer Huckabee left the department?
>
> Lt. McCrea: Yes, I know why.
>
> Counsel: Can you disclose to the court why?
>
> State: Judge we would object on relevance grounds.
>
> Court: I sustain the objection.
>
> Counsel: Okay. During officer Huckabee's tenure with your department, has there been other instances where evidence has been lost?
>
> Lt. McCrea: Yes, sir.
>
> Counsel: Was it ever recovered?
>
> Lt. McCrea: No.

(Trial Tr. 274-275.)

The record establishes Counsel was able to elicit the testimony he wanted the jury to hear from Lt. McCrea regarding Officer Huckabee and therefore Counsel did not need to preserve this issue for appeal. Additionally, the inference was clearly noted by the South Carolina Court of Appeals as the opinion states, "[Lt. McCrea] admitted other evidence in the department had been lost during Huckabee's tenure with the department." State v. McBride, 416 S.C. 379, 786 S.E.2d 435 (2016).

This Court finds Counsel's testimony as to this allegation very credible. This Court also finds Counsel was not deficient for failing to preserve this issue for appeal as he got the testimony he wanted from Lt. McCrea despite the State's objection. Applicant has also failed to show how

he was prejudiced by Counsel's failure to preserve this issue as he has failed to establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013). Accordingly, Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel allowed the jury to be charged that Applicant could be found guilty of criminal sexual conduct for unindicted conduct.

Applicant alleges Counsel was ineffective for allowing the jury to be charged that Applicant can be found guilty of criminal sexual conduct for unindicted conduct.

Counsel testified he did not object to the court providing a full description of sexual battery in the jury charge. Counsel testified the jury was properly instructed as to what each count required for Applicant to be found guilty. Counsel testified he believed the jury was properly instructed and he would have objected if they were not. Barr also testified the jury was properly instructed regarding Count 1 of Applicant's indictment.

The trial court properly explained to the jury that Applicant was charged with first-degree criminal sexual conduct with a minor. The trial court instructed the jury as follows:

> It's alleged that he committed this offense by engaging in oral sex with a minor. Here the state must prove beyond a reasonable doubt that [Applicant] engaged in sexual battery with the victim. The term sexual battery which is includes [sic] fellatio, which is oral sex. The state must prove beyond a reasonable doubt the victim was less than 11 years old at the time of the sexual battery and that the sexual battery of course occurred.

(Trial Tr. 367, line 7-17.)

Barr and Counsel both addressed Count 1 of Applicant's charges during their closing arguments. Barr stated, "Now Count 1 of the indictment, relates to the testimony regarding oral

sex. Count 2, is assault and battery or assault with intent to commit criminal sexual conduct in the first degree. . . . Sexual battery can mean oral sex." (Trial Tr. 320-321.) Counsel stated, "[The trial judge] is going to go over the actual accusation itself, it says oral sex." (Trial Tr. 358.) Additionally, the jury had the indictment and the verdict form during deliberations, both explain Count 1 of Applicant's charges pertains to the victim performing oral sex on Applicant.

This Court finds Applicant's allegation that Counsel failed to object to the jury being instructed that they could find Applicant guilty of unindicted conduct is meritless. This Court finds Barr and Counsel's testimony as to this allegation very credible. The record before this Court also clearly refutes this allegation as the jury was properly instructed that Count 1 pertained to oral sex and Counsel testified he would have objected had the jury been instructed otherwise.

This Court finds Counsel was not deficient for failing to object to the jury instruction because the jury was properly instructed. This Court finds Applicant has also failed to establish any resulting prejudice from this alleged deficiency. Accordingly, Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to burden shifting statements in the State's closing argument.

Counsel testified he did not recall any objectionable comments made by Barr during her closing arguments. Counsel testified he did not believe Barr's closing argument shifted the burden of proof to Applicant. Barr testified she is allowed to argue evidence and reasonable inferences from evidence during her closing argument.

The allegation that the State's closing argument shifted the burden to Applicant is meritless. Counsel stated in his closing argument that the State has to meet their burden of proof beyond a reasonable doubt. (Trial Tr. 352, 356, 357, 359) Additionally, the trial court properly

instructed the jury on the State's burden of proof and that Applicant was entitled to the benefit of any reasonable doubt. (Trial Tr. 362-363, 364, 367, 368, 372.)

This Court finds Applicant's allegation that Counsel failed to object the State's closing argument is meritless. This Court finds Barr and Counsel's testimony as to this allegation very credible. This Court finds Counsel was not deficient for failing to object to the State's closing argument as the comments highlighted by Applicant were not objectionable. Applicant has also failed to establish any resulting prejudice from this alleged deficiency. Accordingly, Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to the State's closing argument that was designed to inflame the passion and the prejudice of the jury.

Counsel testified he recalled Barr talking about searching for the truth during her closing argument but did not object. Counsel testified he did not believe any of Barr's statements were objectionable. Counsel testified it was part of his trial strategy to have the last closing argument and he believed it was effective since Applicant was found not guilty on Count 2. Counsel also testified the trial judge instructed the jury that their verdict cannot be based on passion, sympathy, public opinion, prejudice, or matters outside the record. (Trial Tr. 370-371.) Counsel testified the jury was properly instructed on burden of proof and presumption of innocence.

Barr testified that in her closing she is allowed to argue the evidence she presented during trial and any reasonable inferences from the evidence.

An appellate court will review the alleged impropriety of a solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. State v.

Rudd, 355 S.C. 543, 586 S.E.2d 153 (2003). "A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (citing State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999)). "Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Smith v. State, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

Applicant highlights two statements from Barr's closing argument that he alleges were objectionable as they were designed to "inflame the passion and prejudice of the jury." Those two statements are as follows:

1. Do you all remember on yesterday morning when the Clerk of Court sworn you all in and what she asked you to do, and what you agreed to do by your oath, is to well and truly try the case of the State of South Carolina versus Justin McBride under Indictment 2010-GS-45-283, and render a true verdict according to the law and according to the evidence so help you God. That was a pledge you all gave to this court and this case when you took your oath.

2. If a trial is the search for the truth, and if you all took an oath to render a true verdict according to the law and the evidence what do you do now. Do you say well, I believe that girl. I believe everything she said. I believe the defendant did it. But the state shouldn't have lost the evidence. Does that now mean that he's not held to account for his actions. Does that mean that at the end of the day this family and the State of South Carolina, doesn't seek justice. Does that now mean that you don't' render a true verdict in the case. Folks, I urge you all not to do that.

In the first statement, Barr is referring to the juror's oath that they took the day before when they were sworn in by the clerk. This statement in no way was prejudicial to the Applicant as the jurors were instructed regarding rendering a verdict according to the law and according to the evidence by the clerk and the judge prior to opening statements. After being sworn in, the judge addressed the jury and explained opening statements, closing arguments, his role as the judge, and told the jurors their role is to, "[d]etermine the true facts and apply the law and you can be in a position to return a verdict that speaks the truth."[8] (Trial Tr. 73-75.) Barr's comments, especially when viewed in light of the entire record, are in no way objectionable or prejudicial to Applicant.

In her second statement, Barr properly argues the inferences the jury could draw from the evidence presented in this case. "A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking." (State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999) (internal citations omitted). Here, Barr does not urge the jury to find Applicant guilty on any improper grounds. Barr even states, ". . . I don't want you to find [Applicant] guilty because you feel sorry for Victim. Victim's mom and dad didn't want you to find [Applicant] guilty because you feel sorry for her." (Trial Tr. 343.) Barr's closing, especially when viewed in light of the entire record, does not inflame the passions or prejudice of the jury nor does it "so infect the trial with unfairness as to make the resulting conviction a denial of due process." DeChristoforo, 416 U.S. at 643.

Additionally, Counsel had the last closing argument at trial and, as Counsel testified, the jury was properly instructed by the trial court prior to deliberations. The jury was clearly not so

[8] This case was tried in October of 2013, which is well before the South Carolina Supreme Court's decision in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), which instructed trial judges to omit language like "just verdict" and "search for the truth" from their comments to the jury.

swayed by Barr's allegedly inappropriate comments as they found Applicant not guilty on one of his charges.

This Court finds Applicant's allegation that Counsel failed to object to statements during the State's closing that were designed to inflame the passions and prejudice of the jury meritless. This Court finds Barr and Counsel's testimony as to this allegation very credible. This Court finds Counsel was not deficient for failing to object to the State's closing argument as the comments highlighted by Applicant were not objectionable. Applicant has also failed to establish any resulting prejudice from this alleged deficiency. Accordingly, Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to properly object to the State's argument that anal or vaginal sex was sufficient to result in a finding of guilty for Count I of the indictment.

Applicant alleges Counsel was ineffective for failing to object when the State informed the jury that Applicant could be convicted of Count 1 if there was vaginal or anal intercourse.

Both Counsel and Barr testified that the jury was properly instructed regarding Applicant's charges and what was required in order to find Applicant guilty of each charge.

During Barr's closing argument she states,

> Now Count 1 of the indictment, relates to the testimony regarding oral sex. Count 2, is . . . assault with intent to commit criminal sexual conduct in the first degree. You all also may also recall on yesterday, I told the law actually defines what sexual battery is. Sexual battery can mean oral sex. It can mean anal sex or anal intercourse. I shouldn't use the word sex, because it implies that it was consensual. But anal intercourse, vaginal intercourse. Count 2, specifically relates to testimony by Victim that the defendant attempted to put his penis in her behind. So if you find [Applicant] committed both of these acts, then your verdict should be that of guilty on both counts.

(Trial Tr. 320-321.)

This Court finds Barr's comments during closing clearly state Count 1 of the indictment relates to oral sex and Count 2 of the indictment relates to the allegation that Applicant attempted "put his penis in her behind." Additionally, the jury was properly instructed by the trial court on both counts, and the verdict form also states Count 1 relates to oral sex and Count 2 relates to "anal intercourse" with Victim.

This Court finds Barr and Counsel's testimony as to this allegation very credible. This Court finds Applicant has failed to show how Counsel was deficient for failing to object to the State's closing argument regarding Count 1 of Applicant's charges as the comments highlighted by Applicant were not objectionable. Applicant has also failed to show any resulting prejudice from the alleged deficiency. Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to object to Samantha Cooper's testimony pursuant to Rule 5 and Brady.

Applicant testified had he known about Cooper's testimony prior to trial he most likely would have taken the plea offer.

Counsel testified he was not aware of any statement Applicant made to Samantha Cooper (Cooper) prior to trial. Counsel testified he is not sure the statement was a confession. Counsel testified the gist of Cooper's testimony was, "[Applicant] said I did not mean to do it. We need to talk." (Trial Tr. 282.) Counsel testified Cooper's testimony never defined what Applicant meant by "it." Although Counsel did object to Cooper's statement at trial, Counsel testified it was a statement against interest and he was not able to keep it out. (Trial Tr. 280.) Counsel testified Cooper's testimony was that she came over to confront Applicant after she talked to Victim and was in possession of a gun at the time. Counsel testified it would have been better to know about the statement prior to trial rather than being caught flatfooted. Counsel testified Applicant never

told him he had a conversation with Cooper prior to his arrest. Counsel testified if he had been aware of the statement it would not have changed his trial strategy. Counsel testified he cross-examined Cooper and did not believe Cooper came off credible in her testimony. Counsel testified a deputy told him after court that Cooper did not do very well. Counsel testified Cooper's testimony was not material to Victim's testimony. Counsel testified the Victim's mother's testimony was very convincing because she corroborated part of the Victim's story.

Barr testified Cooper is the sister of Victim's mother. Barr testified she did not disclose the statement to Counsel prior to trial. Barr testified Cooper's statement was separate from what Counsel reviewed in her file because it was work product. Barr testified her file contained everything she received from law enforcement. Barr testified Cooper's statement was oral and not written and was not given to law enforcement officers or to an agent of the solicitor's office. Barr testified Cooper was on her witness list she provided for trial. Barr testified she was not required to provide the statement to Counsel.

"The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness's demeanor and asses his credibility." State v. Dinkins, 339 S.C. 597, 529 S.E.2d 557 (2000) (citation omitted). "The Brady disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments. It requires the prosecution to disclose evidence that is: 1) in its possession; 2) favorable to the accused; **and** 3) material to guilt or punishment." State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 219-220 (1998) (emphasis added) (citing United States v. Bagley, 473 U.S. 667 (1985), United States v. Agurs, 427 U.S. 97 (1976), Brady v. Maryland, 373 U.S. 83 (1963)). "Rule 5(a)(1)(A), S.C.R. Crim.P., provides . . . upon the request of the defendant, the State must disclose the substance of any oral statement made by the defendant

in response to interrogation. However, where a defendant does not make an oral statement in response to interrogation, the State is not required to disclose the statement, and no error is committed by allowing testimony regarding it." Clark v. State, 311 S.C. 314, 428 S.E.2d 870 (1993) (citing State v. Hoffman, 285 S.C. 130, 328 S.E.2d 631 (1985)).

Here, the statement Applicant made to Cooper prior to his arrest is not favorable to Applicant and was not made to law enforcement or an agent acting on behalf of law enforcement. Barr did not violate Brady or Rule 5, S.C. R. Crim.P. by not disclosing this statement to Counsel. Further, Counsel testified he was able to cross-examine Cooper and did not believe she came off credible to the jury. Counsel testified he felt he was effective in his cross-examination of Cooper. Counsel also addressed Cooper's testimony during his closing argument. Counsel argued, ". . . they wanted to end with a boom with [Cooper]. She served no purpose. She didn't see anything." (Trial Tr. 354.)

Applicant testified he most likely would have accepted the plea offer had he known about Cooper's statement prior to trial. Counsel testified he advised Applicant numerous times that it was in his best interest to accept the plea offer. Counsel testified if Applicant pled guilty he felt confident he could provide mitigation on Applicant's behalf and would request probation. Barr testified she told Applicant she could not recommend probation, but would not oppose it. Applicant, even after observing Victim's forensic interview and meeting with the Counsel, Barr and his mother, decided to reject the offer. Barr and Counsel both testified Applicant did not want an offer that would require him to register as a sex offender or serve jail time. Both Counsel and Barr testified Applicant was aware of the mandatory minimum sentence of twenty-five years prior to rejecting the plea offer. It is unreasonable to believe Applicant would have changed his mind about the plea offer had he been aware of Cooper's testimony, which Counsel and Barr testified

was not the most persuasive evidence against Applicant. It is evident from the testimony at the post-conviction relief hearing that Applicant was thoroughly warned about proceeding to trial, was informed of the risks and potential sentence he faced if convicted and yet chose to proceed to trial despite those warnings. It is unreasonable to think he would have changed his mind had he been aware of Cooper's statement.

This Court finds the testimony of Counsel and Barr to be very credible whereas Applicant's testimony is not credible. This Court finds Applicant has failed to show how Counsel was deficient regarding this allegation as Applicant was thoroughly warned about the risk of proceeding to trial, was told by Counsel multiple times he believed it was in his best interest to take the plea offer, and Applicant still chose to proceed to trial. As such, Applicant has failed to meet his burden as set forth in Strickland and this allegation denied and dismissed with prejudice.

Applicant was denied his Sixth Amendment right to effective assistance of counsel when Trial Counsel failed to adequately investigate and call witnesses to contradict Samantha Cooper.

Applicant alleges Counsel was deficient for failing to call Gladys Evans (Evans) to rebut Cooper's testimony at trial.

Evans testified on behalf of Applicant at the post-conviction relief hearing. Evans testified she has known Applicant for thirteen years. Evans testified she lived next door to Applicant. Evans testified her door is about ten feet from Applicant's door. Evans testified she did not watch Victim or her siblings. Evans testified she was never asked by Victim's mother to watch Victim on the date of the incident. Evans testified she has arthritis and on the date of the incident decided to walk to her door to get some sunshine. Evans testified she saw Victim sitting on Applicant's porch and invited her in, but Victim refused. Evans testified she told Victim to knock on Applicant's door and she did. Evans testified Applicant opened the door and asked Victim why she was beating on the door. Evans testified Victim went into Applicant's house and she went

back inside her house, shut the door, and watched television. Evans testified she did not see Applicant anymore until two hours later when she saw all of the people in the neighborhood outside. Evans testified she did not see Applicant again until law enforcement brought him out. Evans testified she would have heard someone screaming and she did not hear anything that day. Evans testified she made a statement to police officers who came to her residence that day. Evans testified she told the officers she did not have company that day. Evans testified she never spoke to anyone else regarding the incident. Evans testified she did not hear Applicant's "confession" to Cooper and if it had happened she would have heard it. Evans testified she has known Applicant for a long time, but would not lie for him. On cross-examination, Evans testified she does not know Cooper, but knows she is Victim's aunt. Evans testified she does not know what Cooper looks like.

Counsel testified he was not aware prior to trial what Cooper would be stating in her testimony. Counsel testified he met with Applicant and his family prior to trial and they did not provide him any leads or witnesses to investigate. Counsel testified the only mention of Evans in the police report was one sentence where Victim states she went to Evans' residence prior to going to Applicant's residence. Counsel was recalled to the witness stand during the post-conviction relief hearing after hearing Evans' testimony and Counsel testified Evans' testimony would not have changed his trial strategy. Counsel testified he would have consulted with Applicant and his family about whether to call Evans had they known about Cooper's testimony. Counsel testified he did not feel a rebuttal witness was necessary after Cooper's testimony because he felt his cross-examination was effective. Counsel testified his trial strategy was to show the jury the terrible job Kingstree Police Department did handling this case.

"The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements." Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). In Thornes, the petitioner alleged his counsel was ineffective for failing to interview the victim. Id. at 308, 426S.C.2d at 765. At the post-conviction relief hearing, Thornes and the victim testified to demonstrate that the victim's testimony would have been sufficient to sway the outcome of the trial or Thornes' decision to pled *nolo contendere*. Id. at 309, 426 S.C.2d at 765. Thornes argued his counsel did not interview victim prior to his plea, and as a result, failed to have a realistic appraisal of Thornes' chances at trial. Id. The Court held, "This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Id. at 309-310, 426 S.C.2d at 765. "The attorney, in the case at bar, unless clairvoyant, could not have reasonably known that any benefit would accrue to his client." Id. at 310, 426 S.E.2d at 766.

Here, Counsel could not have known to call Evans as a rebuttal witness because he did not know about Cooper's testimony prior to trial. Counsel testified Applicant did not give him any witnesses or leads to investigate in this case. Counsel testified the law enforcement report had one sentence about Evans and it only pertained to the Victim contacting her prior to Victim going to Applicant's residence. As in Thornes, Counsel here cannot be found deficient as he could not have reasonably known Evans' testimony would be necessary to rebut Cooper's testimony as he did not know what Cooper was going to say at trial. Applicant and his family did not provide any witnesses or leads for Counsel to pursue prior to trial. Applicant's own statement to law enforcement puts him in the house with Victim at the time of the incident. Counsel was not investigating an alibi defense and did not have an affirmative defense in this case. As the parties stated numerous times on the record, this case came down to the credibility of Victim. Counsel

had no reason to believe Evans would have provided any assistance to the defense since, even by Applicant's own statement, only Applicant and Victim were in the residence at the time of the incident.

Applicant has also failed to show how he was prejudiced by Counsel's alleged deficiency. Evans' testimony at the post-conviction relief hearing was not persuasive on the issue of whether Applicant was confronted by Cooper. First, Evans testified she did not know Cooper and did not know what she looked like. Second, Evans testified after Victim went into Applicant's residence, she went back inside, shut the door, and watched television. Evans testified she did not come back to the door until two hours later when she observed all of the people in the neighborhood outside. Based on Cooper's testimony, her confrontation occurred after she talked to Victim shortly after the incident took place and prior to her calling the police. (Trial Tr. 278-284.) At that time, according to Evans' testimony, she would not have seen Applicant or Cooper as she was back inside of her residence watching television. Cooper's testimony also indicated the confrontation did not take place inside Applicant's residence or on his porch. Cooper testified Applicant was standing on the grass when she confronted him. (Trial Tr. 281) Cooper also testified Applicant ran to his door and locked it and she did not pursue him because he was a minor. (Trial Tr. 283.) Based on Evans' testimony at the post-conviction relief hearing, it is entirely possible for the confrontation to have occurred outside of her presence, thus making Evans' testimony inconsequential to Applicant's case.

Lastly, Counsel testified he was effective in his cross-examination of Cooper and testified she did not come off credible at trial. Counsel testified he did not believe a rebuttal witness would have been necessary at trial. As the trial judge stated when he denied Counsel's motion for a new trial, "[I]t's a credibility question whether they believed particularly the young victim or not. And

they obviously believed her." (Trial Tr. 381.) This case did not hinge on Cooper's testimony or a color photograph, it came down to the credibility of Victim and her mother. As both Counsel and Barr testified, Victim's mother was the most compelling witness at trial.

This Court finds the testimony of Counsel and Barr to be very credible as to this allegation. This Court finds Applicant has failed to show how Counsel was deficient as Applicant did not provide Counsel any leads or witnesses to investigate, and Counsel credibly testified he successfully cross-examined Evans and did not feel Cooper's testimony would have made a difference in Applicant's trial. This Court also finds Applicant has failed to show any resulting prejudice as to this allegation as he failed to establish how calling Cooper to testify would have changed the outcome of his trial. The testimony Cooper provided during the evidentiary hearing would not have impeached or negatively impacted the Victim's mother's testimony, who both Barr and Counsel credibly testified was the most compelling witness at trial. As such, Applicant has failed to meet his burden as set forth in Strickland and this allegation is denied and dismissed with prejudice.

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 days from post-conviction relief 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, post-conviction relief 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.

IT IS THEREFORE ORDERED THAT:

1. The application for post-conviction relief is denied and dismissed with prejudice; and

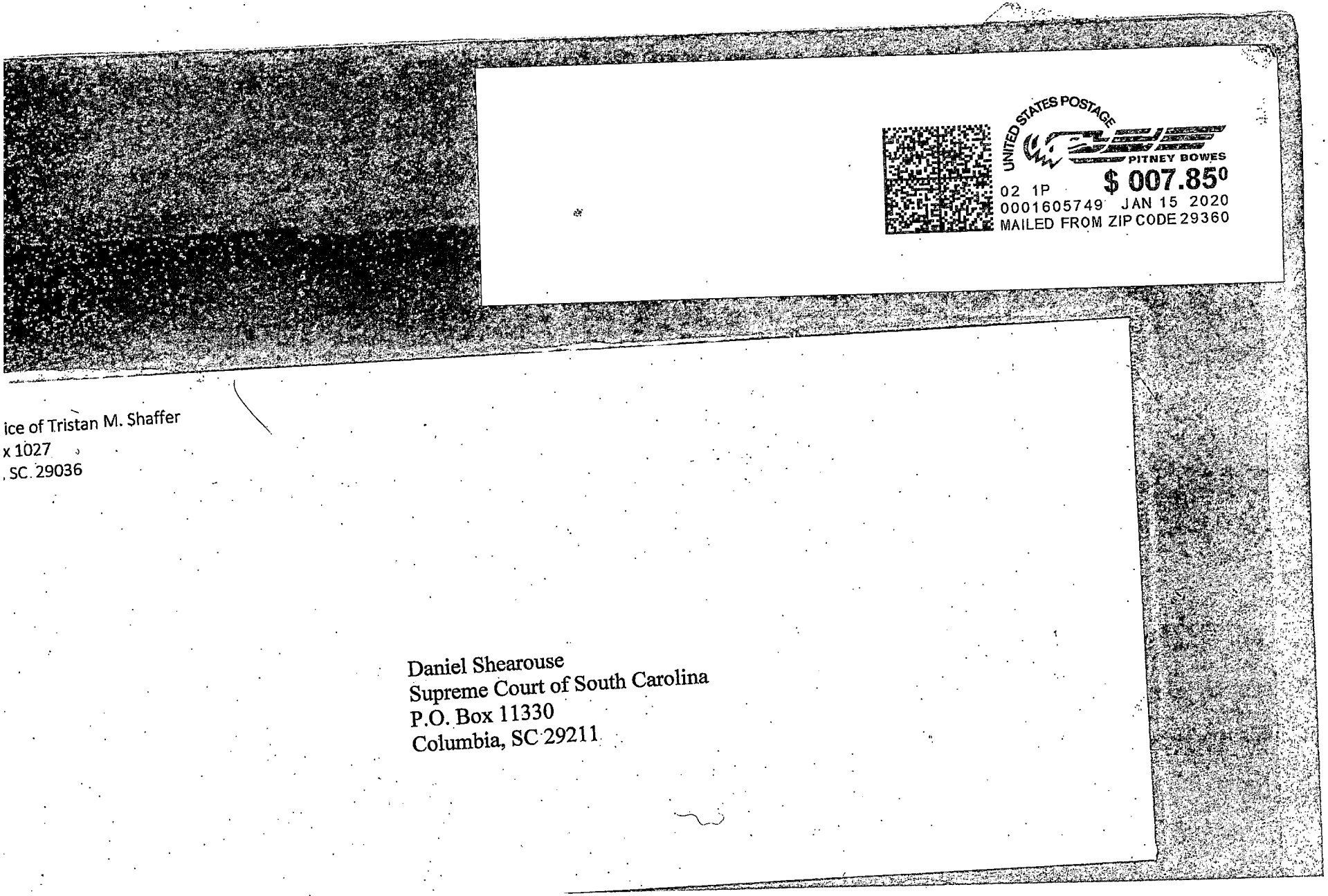
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 22nd day of November, 2019.

Kristi F. Curtis

KRISTI F. CURTIS
Presiding Judge
Third Judicial Circuit

Sumter, South Carolina



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