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RE-BRIEF

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S.C. SUPREME COURT

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SC Court of Appeals

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Certiorari to Darlington County  
Court of Common Pleas  
G. Thomas Cooper, Jr., Circuit Court Judge

\_\_\_\_\_  
Appellate Case No. 2016-002364  
\_\_\_\_\_

LARRY JAMES TYLER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA

RESPONDENT.

\_\_\_\_\_  
SUPPLEMENTAL APPENDIX  
\_\_\_\_\_

ALAN WILSON  
Attorney General

VICTOR R. SEEGER  
Appellate Defender

MEGAN HARRISON JAMESON  
Senior Assistant Deputy Attorney General

South Carolina Commission on  
Indigent Defense  
Division of Appellate Defense  
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JOHNNY ELLIS JAMES, JR.  
S.C. Bar No. 101260  
Assistant Attorney General

ATTORNEY FOR PETITIONER

Post Office Box 11549  
Columbia, South Carolina 29211  
(803)734-3737

ATTORNEYS FOR RESPONDENT

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STATE'S AMENDED RETURN.....1

STATE OF SOUTH CAROLINA )  
 COUNTY OF DARLINGTON )

IN THE COURT OF COMMON PLEAS  
 FOURTH JUDICIAL CIRCUIT

Larry James Tyler, #354459, )

Case No. 2015-CP-16-0016

Applicant, )

v. )

**AMENDED RETURN**

State of South Carolina, )

Respondent. )

Respondent, making its Amended Return to the Application for Post-Conviction Relief filed January 2, 2015, would respectfully show this Court:

**I.**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. In February 2013, the Darlington County Grand Jury indicted Applicant for criminal solicitation of a minor (2013-GS-16-603), second-degree sexual exploitation of a minor (2013-GS-16-604), contributing to the delinquency of a minor (2013-GS-16-605), and disseminating harmful material to minors (2013-GS-16-606). J. Richard Jones, Esquire, represented Applicant. On February 25, 2013, Applicant proceeded to trial before the Honorable Paul M. Burch and a jury. On February 27, 2013, the jury found Applicant guilty as indicted. Judge Burch sentenced Applicant to concurrent terms of imprisonment of eight years for each charge, except contributing to the delinquency of a minor, for which Judge Burch sentenced him to three years imprisonment.

Applicant filed a timely notice of appeal, and Robert M. Pachak, Esquire, of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's

conviction on January 14, 2015. State v. Tyler, Op. No. 2015-UP-025 (S.C. Ct. App. filed January 14, 2015). The remittitur was returned to the circuit court on January 30, 2015.

## II.

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

1. "Defendant's trial counsel rendered ineffective assistance by failing to object to the consolidation of trials defendant was entitled to have severed."
2. "Defendant's trial counsel rendered ineffective assistance by failing to challenge the validity of the search of appellant's home, computer, and e-mail as well as the admissibility of any evidence seized as a result of said search."
3. "Defendant's trial counsel rendered ineffective assistance by failing to object, specifically to the admission of any photos obtained from defendant's e-mail account which is not on his computer, all of which were irrelevant and inflammatory."
4. "Defendant's trial counsel rendered ineffective assistance by failing to remedy the double jeopardy violations with respect to defendant's criminal solicitation of a minor and contributing to the delinquency of a minor conviction."
5. "Defendant's appellate counsel rendered ineffective assistance on appeal by abandoning on appeal defendant's properly preserved motion for directed verdict on all counts due to insufficient evidence, and by refusing to submit defendant's argument on appeal as to the sufficiency of the evidence."

Respondent filed a Return and Motion to Dismiss without Prejudice on or about May 15, 2015. Respondent hereby withdraws that return and substitutes this amended return.

Respondent denies Applicant is entitled to relief on any of these claims, and demands strict proof thereof. 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 further amend this Amended Return upon receipt of any relevant materials.

### III.

Respondent submits Applicant's allegation of ineffective assistance of trial counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in the 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, the 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 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 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). 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 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 further submits Applicant's allegation of ineffective appellate counsel is without merit. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537, 397 S.E.2d at 526; Strickland, 466 U.S. at 687. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the

presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. Sharper, 279 S.C. 264, 305 S.E.2d 247.

V.

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

VI.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held.

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

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

Sept. 16, 2015

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF DARLINGTON )  
 )  
 )  
 )  
 LARRY JAMES TYLER, 354459 )  
 )  
 Applicant, )  
 )  
 vs )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

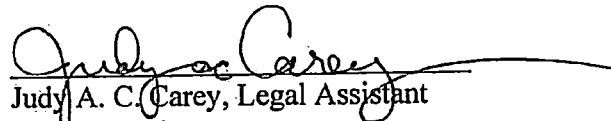
2015-CP-16-0016

AFFIDAVIT OF SERVICE BY MAIL

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

**Lance S. Boozer, Esquire**  
**The Boozer Law Firm, LLC**  
**807 Gervais Street; Suite 203**  
**Columbia SC 29201**

DATED this 10th day of September, 2015.

  
 Judy A. C. Carey, Legal Assistant  
 For Respondent

STATE OF SOUTH CAROLINA  
In the Supreme Court

CERTIORARI TO DARLINGTON COUNTY  
Court of Common Pleas  
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016-002364

LARRY TYLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari, Motion to Supplement Appendix, and Supplemental Appendix** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Victor R. Seeger, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211-1589**

This 1<sup>st</sup> day of March, 2019.

  
CARSON KIRK  
Legal Assistant for Respondent

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S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

March 1, 2019

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

**RE: Larry Tyler v. State of South Carolina**  
**Appellate Case No. 2016-002364**  
**Lower Court Case No. 2015-CP-16-0016**

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SC Court of Appeals

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari, Motion to Supplement Appendix, and Supplemental Appendix** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny E. James Jr.  
Assistant Attorney General  
S.C. Bar No. 101260

JEJ/ck  
Enclosures

cc: Victor R. Seeger, Esquire