

STATE OF SOUTH CAROLINA
In The Supreme Court

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JAN 29 2018

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

S.C. SUPREME COURT

D. GARRISON HILL, Circuit Court Judge
2015-CP-22-00209

Appellate Case No. 2017-001689

PRENTISS W. LOVE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

TARA DAWN SHURLING
Attorney and Counselor at Law

ROBERT BOLCHOZ
Chief Deputy Attorney General

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Senior Assistant Deputy Attorney General

JOHNNY E. JAMES, JR.
Assistant Attorney General
Post Office Box 11549
Columbia, S. C. 29211
(803) 734-3737

ATTORNEY FOR PETITIONER.

ATTORNEYS FOR RESPONDENT.

**APPENDIX INDEX
PRENTISS W. LOVE**

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STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions
D. GARRISON HILL, Circuit Court Judge

CASE NO: 2011-GS-22-00432

FILED
GEORGETOWN COUNTY, S.C.
2012 MAY -3 PM 1:24
ALMA Y. WHITE
CLERK OF COURT

The State, ... Respondent,

V.

PRENTISS LOVE, ... Appellant.

RECEIVED

MAY 07 2012

NOTICE OF APPEAL

SC Court of Appeals

PRENTISS LOVE, appeals the conviction and sentence in this case. The sentence was imposed by the Honorable D. GARRISON HILL, on April 26, 2012.

May 3, 2012

Eric Fox

Eric Fox
Public Defender
Georgetown County Public Defender Office
Post Office Box 2898
Georgetown, SC 29442
843-545-3671
Attorney for Appellant

Other Counsel of Record

Candice Lively
Solicitor
Post Office Box 1688
Georgetown, SC 29442
843-545-3169
Attorney for Respondent

STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions
D. GARRISON HILL , Circuit Court Judge

CASE NO: 2011-GS-22-00432

FILED
GEORGETOWN COUNTY, S.C.
2012 MAY -3 PM 1:24
ALMA Y. WHITE
CLERK OF COURT

The State, ... Respondent,

V.

PRENTISS LOVE Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of the Notice in the United States Mail, postage prepaid, on May 3, 2012, addressed to the attorney of record:

Candice Lively
Solicitor
Post Office Box 1688
Georgetown, SC 29442
Attorney For Respondent

RECEIVED

MAY 07 2012

SC Court of Appeals

May 3, 2012


Eric Fox
Public Defender
Georgetown County Public Defender Office
Post Office Box 2898
Georgetown, SC
843-545-3671
Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Georgetown
 STATE VS.
Prentiss Wayne Love

AKA: _____

Race: WHITE Sex: M Age: 31

DOB: _____ SS#: _____

Address: _____

City, State, Zip: _____

DL#: _____ SID#: _____

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

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

FO: Lewd Act on a Minor <16 (0-15)in violation of § 16-15-0140 of the S.C. Code of Laws, bearing CDR Code # 2468☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS☒ Mandatory GPS (CSC §17-25-45)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: Lively, Candice SCB12123 SC Bar# Defendant D. SPB 17723WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections; ☐ County Detention Center,for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of

probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied

by the State Department of Corrections.

☒ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal

Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine: _____

§ 14-1-206 (Assessments 107.5 %) \$ _____

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

§ 56-5-2995 (DUI Assessment) \$12 \$ _____

§ 56-1-286 (DUI Breath Test) \$25 \$ _____

Proviso 47.9 (Public Def/Prob) \$500 \$ _____

§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

§ 14-1-213 (Drug Court Surcharge) \$150 \$ _____

§ 50-21-114 (BUI Breath Test Fee) \$50 \$ _____

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

Proviso 90.5 (SCCA Surcharge) \$5 \$ 5.003% to County (if paid in installments) \$ 3.90TOTAL \$ 133.40Clerk of Court/Deputy Clerk Sharonne WilsonCourt Reporter: Henry YoungINDICTMENT/CASE#: 2011GS2200432A/W#: 2011GS2200432Date of Offense: 9/11/2010S.C. Code §: 16-15-0140CDR Code #: 2468

SENTENCE SHEET

ALMA Y. WHITE

CLERK OF COURT

2012 MAY -3 PM 1:24

FILED

GEORGETOWN COUNTY, S

Plea: CONVICTED OF orMandatory GPS (CSC §17-25-45)

w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: Lively, Candice SCB12123 SC Bar# Defendant D. SPB 17723WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections; ☐ County Detention Center,for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

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Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

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Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

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Proviso 90.5 (SCCA Surcharge) \$5 \$ 5.003% to County (if paid in installments) \$ 3.90TOTAL \$ 133.40Clerk of Court/Deputy Clerk Sharonne WilsonCourt Reporter: Henry YoungPresiding Judge Man InJudge Code: 2138Sentence Date: April 26, 2012

WITNESSES

Georgetown County Sheriff's Office

DOCKET NO. 2011GS2200432

The State of South Carolina

County of Georgetown

Candice Lively

10G01123

COURT OF GENERAL SESSIONS

MAY, 2011 TERM

REST WARRANT NUMBER

11GS2200432

R: 2468 §16-15-0140

I: September 11, 2010

THE STATE

vs.

PRENTISS WAYNE LOVE

B Will Go Avenue

Murrells Inlet, SC 29511

DOB:

SSN:

W/M

RETURN OF GRAND JURY

ATTORNEY: Colvin, Richard F.

Indictment for

LEWD ACT ON A MINOR CHILD

ORIGINAL

J. Gregory Hembree, Solicitor

TRUE BILL

Richard C. Holman

Representative of Grand Jury

File:

5-18-11

INDICT

Representative of Petit Jury

File:

FILED
GEORGETOWN COUNTY, S.C.
2012 MAY -3 PM 1:24
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CLERK OF COURT

STATE OF SOUTH CAROLINA)

COUNTY OF GEORGETOWN)

INDICTMENT

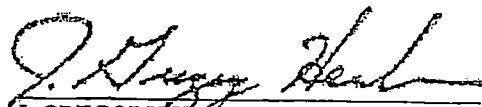
At a Court of General Sessions, convened on May 18, 2011, the Grand Jurors of Georgetown County present upon their oath:

LEWD ACT ON A MINOR CHILD

CDR: 2468 16-15-0140

That Prentiss Wayne Love, being over fourteen years of age, did in Georgetown County between December 31, 2009, and September 11, 2010, willfully and lewdly commit a lewd or lascivious act upon or with the body of a child, less than sixteen (16) years of age, to wit: B.B., age 14, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of said defendant or of the victim, in violation of Section 16-15-0140, S. C. Code of Laws, 1976, as amended.

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


J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF GEORGETOWN) OF THE FIFTEENTH JUDICIAL CIRCUIT
)

STATE OF SOUTH CAROLINA) AMENDED
) CERTIFICATE OF REPRESENTATION
- VS-) (APPOINTING AS COUNSEL)
) ATTORNEY: ERIC FOX

PRENTISS LOVE

DEFENDANT)
))

FILE NO: 22A11-00000209

TO: Clerk of Court of General Sessions of the Fifteenth Judicial Circuit
Office of the Solicitor
Appointed Counsel
Defendant

FILED
GEORGETOWN COUNTY, S.C.
2012 JAN 11 AM 11:25
ALMA Y. WHITE
CLERK OF COURT

This certifies that the above captioned Defendant is eligible for the services of the Public Defender, such determination having been made regarding the charge(s) of:

J-517191 Sex / Criminal sexual conduct with minor - victim 11 to 14 yrs of age inclusive
- Second deg.

2011-22-432 Sex / Lewd Act, committing or attempting on child under 16

The Defendant's Counsel is

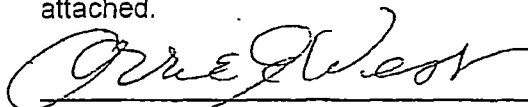
ERIC FOX.

210 Elm Street

Conway SC 29526

PHONE: 8432486075

The office of the Public Defender requests on the Defendant's behalf any and all evidence in the possession of you and or your agents pursuant to S.C. Criminal Practice Rule 5, and Brady v. Maryland 373 U.S. 383 (1963). The formal Motion for Discovery is attached.



ORRIE E. WEST
FIFTEENTH CIRCUIT
PUBLIC DEFENDER

GEORGETOWN, SC
DATE: January 9, 2012

FILED
GEORGETOWN COUNTY, S.C.
2012 JAN -3 PM 1:24
ALMA Y. WHITE
CLERK OF COURT

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSION
COUNTY OF GEORGETOWN) OF THE FIFTEENTH JUDICIAL CIRCUIT
)
STATE OF SOUTH CAROLINA) NOTICE AND MOTION FOR PRODUCTION
) OF SPECIFIC EVIDENCE AND
-VS-) DISCLOSURE OF WITNESSES
) AND REQUEST FOR A SPEEDY TRIAL
)

PRENTISS LOVE

DEFENDANT

ATTORNEY: ERIC FOX

WARRANTS: J-517191; 2011-22-432

FILE NO: 22A11-00000209

SSN::

FILED
GEORGETOWN COUNTY, S.C.
2012 JAN 11 AM 11:25
ALMA Y. WHITE
CLERK OF COURT

TO: SOLICITOR FOR THE FIFTEENTH JUDICIAL CIRCUIT

YOU WILL PLEASE TAKE NOTICE that unless the prosecution responds to the Defendant's request for disclosure within 30 days, or within such time as may be ordered by the Court, Counsel for the Defendant will move this Court for an Order compelling that the State:

1. Make available for Defendant any and all written and oral statements by the Defendant which are, or may come to be, in the possession of the State.
2. Make available for purposes of inspection, and copying, any and all police reports relating to the investigation and circumstances surrounding the crime which the Defendant is charged with, including any and all statements taken from witnesses and the Defendant.
3. Make available to the Defendant all tangible objects obtained during the investigation of this case, including, but not limited to:
 - (a) All tangible objects obtained from the scene of the crime; and
 - (b) All tangible objects obtained from the State's witnesses in this case
 - (c) All tangible objects the State intends to introduce into evidence at Trial which are relevant to the offense charged.
4. Make available any witnesses known to the State who have knowledge of facts which might be favorable to the Defendant.
5. Make available any promises made or actions taken by the State which caused or might have caused any witnesses for the State to testify on behalf of the State.
6. Make available any inconsistent statements made by witnesses for the State or any statements made by witnesses for the State which tend to exculpate the Defendants or to negate participation by the Defendants in the alleged crime.
7. Make available to the Defendant all results of laboratory tests, scientific tests, or physical examinations conducted in connection with this case, including but not limited to:
 - (a) Analysis of handwriting
 - (b) Photographs secured of the scene of the crime
 - (c) Comparison of fingerprints
8. Make available any facts which tend to exculpate the Defendant.

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GEORGETOWN COUNTY, S.C.
2012 MAY -3 PM 1:24
ALMA Y. WHITE
CLERK OF COURT

9. Make available any and all scientific or medical, psychiatric, legal or other information, reports or records which might tend to reflect on the credibility or competence of any of prospective witnesses for the State.

10. Make available to the Defendant the names and addresses of all persons who have knowledge of this case or who have been interviewed by the investigating officers in connection with this case.

11. Make available to the Defendant, the SLED, FBI, and local arrest and conviction records of all persons, including the Defendant, named in connection with this proceeding.

12. Make any chemist, analyst, and all persons within the chain of custody appear in Court for the purpose of personally testifying. Attorney for the Defense thus objects to the introduction of any chemist's or analyst's report pursuant to Rule 6, S.C. Rules of Criminal Procedure.

This information is requested pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure. This information is further requested pursuant to Brady vs Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), U.S. vs Agurs, 427 U.S. 97, 49 L Ed 2nd 342, 96 S. Ct. 2392 1976, State vs Mixon 274 S.E. 2nd 406 (1981). Further this information is requested on the grounds that it is essential to insure the Defendant's right to a fair trial, right to confrontation of witnesses, the right to effective Counsel and due process of law guaranteed by the South Carolina Constitution, and the United States Constitution.

ADDITIONALLY DEFENDANT REQUESTS A SPEEDY TRIAL:

The Defendant demands that he be indicted and tried during the next term of General Sessions Court in this County pursuant to his right to a speedy trial under the United States and the South Carolina Constitutions and under 17-23-90. Pursuant to 17-23-90, the defendant requests that if the defendant "shall not be indicted and tried the second term after his commitment.... he shall be discharged from his imprisonment".

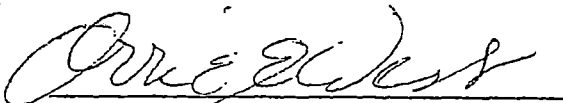
WHEREFORE, Defendant prays:

(a) That the Solicitor be Ordered to produce all information described herein and allow the Defendant the right to examine, inspect, copy and photograph, such materials and information at a specific time and place to be fixed by the Court.

(b) That the information be provided no later than 30 days from the date of this request, as reflected by the Clerk of Court's time-stamp appearing on the face of this Document.

(c) That the Court enter an Order requiring the Solicitor's Office to make continuing disclosure of all matters requested herein up to and during the Trial of the charges against the Defendant.

RESPECTFULLY SUBMITTED,



ORRIE E. WEST
PUBLIC DEFENDER
FIFTEENTH CIRCUIT

GEORGETOWN, SOUTH CAROLINA
DATE: January 9, 2012

FILED
GEORGETOWN COUNTY, S.C.
2012 MAY -3 PM 1:24
ALMA Y. WHITE
CLERK OF COURT

Fifteenth Circuit Public Defender

HORRY & GEORGETOWN COUNTIES

HORRY
Edward "Ed" Chrisco
 CHIEF PUBLIC DEFENDER
 203 LAUREL STREET
 P.O. BOX 1666
 CONWAY, SC 29526



Orrie E. West
 CIRCUIT PUBLIC DEFENDER

GEORGETOWN
Ronald Hazzard
 SENIOR TRIAL ATTORNEY
 401 CLELAND STREET
 P.O. BOX 2898
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 FAX: 843-915-6385

WWW.HGCDEFENDER.ORG

May 3, 2012

TEL: 843-545-3671
 FAX: 843-545-3673

The Honorable Jenny Abbott Kitchings
 Clerk of the South Carolina Court Of Appeals
 Post Office Box 11629
 Columbia, South Carolina 29211

RECEIVED
 MAY 07 2012

SC Court of Appeals

RE: STATE OF SOUTH CAROLINA VS. PRENTISS LOVE
 CASE NO: 2011-GS-22-00432

Dear Ms. Kitchings:

Enclosed for filing is a Notice of Appeal in the above criminal case. Also enclosed are the following:

1. Proof of Service of the Notice of Appeal on the Respondent.
2. A copy of the Order(s)/ Sentence Sheet(s) which is/are to be challenged on appeal.
3. Self-addressed stamped envelope

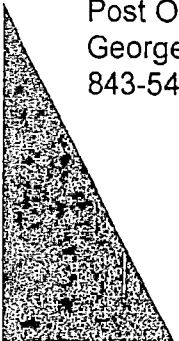
I would appreciate your filing the Notice of Appeal, as well as the Proof of Service, and returning to me the date-stamped copies in the enclosed self addressed envelope.

If you have any questions concerning this matter please contact me.

Sincerely,

Eric Fox
 Eric Fox

Georgetown County Public Defender
 Post Office Box 2898
 Georgetown, South Carolina 29442
 843-545-3671



ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

AUG 02 2013

Appeal from Georgetown County
D. Garrison Hill, Circuit Court Judge

SC COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

PRENTISS LOVE,

APPELLANT

APPELLATE CASE NO. 2012-212037

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES

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Rules

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Rule 601, SCORE..... 5

STATEMENT OF ISSUE ON APPEAL

Did the trial court err, pursuant to Rule 601, SCRE, in refusing to admit a recording of a telephone conversation between the Appellant and his wife when the State only questioned the wife about a portion of the conversation dealing with perjury and without hearing the conversation as a whole, the State's questioning implied that the wife was trying to improperly influence the testimony of Appellant?

STATEMENT OF THE CASE

In May of 2011, the Georgetown County Grand jury indicted Appellant for criminal sexual conduct with a minor second degree and lewd act on a minor, indictments #2011-GS-22-431, 432. On April 23, 2012, Appellant proceeded to jury trial before the Honorable D. Garrison Hill. Attorney Jonathan Eric Fox represented Appellant at trial. Attorney Candice A. Lively prosecuted the case on behalf of the State. On April 25, 2012, the jury returned a verdict of not guilty for criminal sexual conduct with a minor second degree. The jury returned a verdict of guilty for lewd act. Judge Hill sentenced Appellant to fifteen (15) years. A timely notice of intent to appeal was served on May 3, 2012. This appeal follows.

ARGUMENT

The trial court erred, pursuant to Rule 601, SCRE, in refusing to admit a recording of a telephone conversation between the Appellant and his wife when the State only questioned the wife about a portion of the conversation dealing with perjury and without hearing the conversation as a whole, the State's questioning implied that the wife was trying to improperly influence the testimony of Appellant.

The minor witness testified to three general instances of improper behavior by Appellant. According to the minor witness, the first incident took place on New Year's Eve, 2009. (R. pp. 149-152). The minor witness testified that additional incidents took place during two or three fishing tournaments. (R. pp. 153-157). According to the minor witness, the last incident took place on September 11, 2010. (R. pp. 159-162). Appellant's wife, Tabitha Love, testified that on September 11, 2010, she was with her husband the whole day. She testified that they went to the Dead Dog Saloon earlier in the day, came home and watched a Carolina football game and Appellant never left the house. (R. pp. 287 – 292).

The evening of the second day of trial, after Appellant's wife testified, the State obtained a recording of a phone conversation between Appellant and his wife. (R. pp. 304 – 322). The next day, the judge reviewed the phone conversation, marked as Court's Exhibit #5, and, over objection, allowed the State to recall Tabitha Love and question her about the phone conversation the night before. (R. pp. 313 – 322).

The State asked Mrs. Love, "And in your exact testimony isn't it true that you told him, 'No, you did not go back to the Dead Dog Saloon on September the 11th,' whenever he told you he thought he had?" (R. p. 328, line 25 – p. 329, lines 1-3). Mrs. Love answered, "He asked me, 'Did I,' and I said 'No, you didn't,' because I did not remember and I just clarified, 'No, you didn't.'" (R. p. 329, lines 4-6). The State then asked, "Okay. And clearly in your response to him you said, 'If you say you went, then I'm going to jail for perjury.'"

Didn't you say that?" Mrs. Love responded, "I'm not sure if those were the exact words but I told him to say what he believed, I did not tell him to lie, I told him to, 'Say what you believe,' and I said, 'But if you do change it they will get me for perjury.'" (R. p. 329, lines 10-14). Mrs. Love later testified, "It was not me saying what he needed to say, I told him to say what he believed in. I did tell him, you know, 'No, you didn't go to Dead Dog,' but I told him to stay calm, I told him you know, he was with me, just to keep going, you know, don't give up, but it was never exactly saying for him not to say certain things or get n the stand and lie or anything like that." (R. p. 332, lines 1-8). The final question from the State was, "The exact words regarding testimony of September the 11th, 2010, your husband was asking you, 'Didn't I go back to Dead Dog with Tony and A.J.,' and you said, 'No, you did not. If you say you went, then I'm going to jail for perjury.' Are those the words that you used?" (R. p. 333, lines 14-19). Mrs. Love answered "That is the words that I recall but I did not say right after that fact but yes, those words were in that area." (R. p. 333, lines 20-22).

Counsel for Appellant questioned Mrs. Love and then moved to publish the recording of the phone conversation to the jury. (R. pp. 334-336). The State objected. (R. p. 336, lines 13-14). Counsel for appellant argued that the whole conversation was relevant to "show the whole picture." (R. p. 338, line 3). Counsel argued, "She's been asked about this conversation, about her statements regarding perjury and I think the jury is entitled and we're entitled to present the entire picture of that conversation, have that testimony put in context, so I think it is clearly admissible and we can easily address the question of redacting that small portion is concerned." (R. p. 338, lines 3-10).

The trial judge found the recording inadmissible pursuant to Rule 613(b) and 801(d), SCRE. (R. p. 340, lines 1-14). The trial judge erred. The recording should have been admitted pursuant to the rule of completeness found in Rule 106, SCRE.

Rule 106, SCRE provides:

When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

In State v. Cabrera-Pena, 361 S.C. 372, 377-378, 605 S.E.2d 522, 524-525 (2004) the South Carolina Supreme Court, citing State v. Jackson, 265 S.C. 278, 217 S.E.2d 794 (1975) wrote:

In State v. Jackson, it was held:

When part of a conversation is put into evidence, an adverse party is entitled to prove the remainder of the conversation, so long as it is relevant, particularly when it explains or gives new meaning to the part initially recited. "All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and therefore the plainest principles of justice requires that if one of the statements is to be used against the party, all of the other statements tending to explain it or to qualify this use should be shown and considered in connection with it."

265 S.C. at 284, 217 S.E.2d at 797 (emphasis supplied; internal citations omitted).

In Cabrera-Pena the State questioned an officer about statements made to him by the defendant. The trial court, however, did not allow the defendant to cross examine the officer about remaining self serving statements. A majority of the South Carolina Supreme Court found that the trial court erred in limiting the cross examination. The Court wrote, "Under Jackson, once the state elected to utilize Officer Membreno's

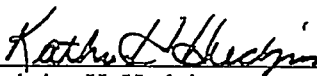
testimony to elicit incriminating statements made by Cabrera-Pena, justice required that his remaining statements tending to explain or qualify those statements should have been considered in connection therewith. Accordingly, we find Cabrera-Pena's cross-examination of Membreno was improperly limited." 361 S.C. at 378, 605 S.E.2d at 525.

In the present case, the rule of completeness found in Rule 106, SCRE, requires admission of the recording of the entire phone conversation. Justice requires that the statements elicited by the State in regard to perjury needed to be heard in the context of the whole conversation. The trial judge abused his discretion in not allowing the jury to hear the whole conversation. The error was not harmless and requires reversal.

CONCLUSION

Based on the above argument, Appellant's conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PRENTISS LOVE,

APPELLANT

APPELLATE CASE NO. 2012-212037

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Prentiss Love states:

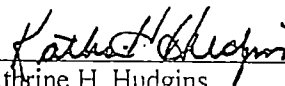
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge D. Garrison Hill, which was held on April 26, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Prentiss Love.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
D. Garrison Hill, Circuit Court Judge

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SC Court of Appeals
RESPONDENT,

THE STATE,

V.

PRENTISS LOVE,

APPELLANT

APPELLATE CASE NO. 2012-212037

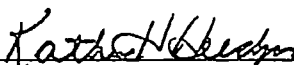
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment and sentencing sheet;
- (2) Entire Trial Transcript;
- (3) Court's Exhibit # 4 (Regina Frye statement);
- (4) Court's Exhibits #3 and #8 (Juror notes);
- (5) Court's Exhibit #5 (Detention center Phone Records) – to be transported.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 2nd, 2013.


Kathrine H. Hudgins
Appellate Defender

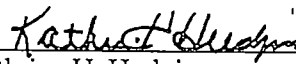
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 2, 2013


Kathrine H. Hudgins
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

RECEIVED

AUG 02 2013

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
D. Garrison Hill, Circuit Court Judge

RECEIVED

AUG 02 2013

SC COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

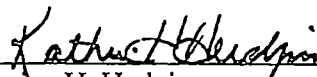
PRENTISS LOVE,

APPELLANT

APPELLATE CASE NO. 2012-212037

CERTIFICATE OF SERVICE

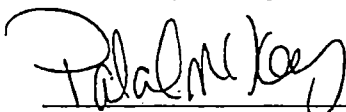
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Prentiss Love, #315271 at Macdougall Correctional Institution, 1516 Old Gilliard Road Ridgeville, SC 29472 this 2nd day of August, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of August, 2013.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF APPEALS
	)	
APPEAL FROM GEORGETOWN COUNTY	)	
	)	
D. Garrison Hill	)	
Circuit Court Judge	)	Docket No. 2012-212037
THE STATE,	)	
	)	
RESPONDENT,	)	
	)	
vs.	)	APPELLANT'S PRO SE
	)	ANDERS' BRIEF
PRINTISS LOVE,	)	
	)	
APPELLANT.	)	

In compliance with the Court of Appeals' directive dated August 5, 2013, the Appellant, Prentis Love, submits his Pro Se brief under Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), addressing those issues Appellant respectfully requests the Court to consider.

GROUND'S FOR APPEAL

1. At the opening of Appellant's trial the State requested a voir dire on whether any member of the jury had ever been the victim of a violent crime. (Tran. p.5, LL.17-24). The defense also requested voir dire on this same issue. (Tran. p.6, LL.4-10). However, the trial court failed to charge the jury on this issue, thereby denying the Appellant a qualified jury.

2. On two separate occasions in Appellant's trial, and during critical testimony of witnesses, one or more jurors were sleeping. (Tran. p.99, LL.2-5; and p.242, LL.20-25). These sleeping jurors denied Appellant a constitutionally adequate trial.

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SC Court of Appeals

3. The victim's mother, Shannon Bellamy, testified that she confiscated her daughter's cell phone after her daughter was caught with cigarettes and a vicodin pill. (Tran. p.115, L.14 thru p.117, L.3). After confiscating the victim's cell phone, the mother searched the phone to discover her daughter's contacts. (Tran. p.117, LL.19-22). Upon searching the phone, the mother discovered that her daughter (the victim) had texted the Appellant many times. (Tran. p.121, L.18 thru p.123, L.10). The mother then testified she printed out a copy of the volume of texts between the victim and the Appellant. (Tran. p.124, LL.2-17). When the state moved to introduce the alleged phone records into evidence, the defense objected. (Tran. p.124, L.22 thru p.125, L.5). The trial court sustained the defense objection to introduction of the alleged computer phone records, but but did not forbid the jury's consideration of the testimony regarding the volume of calls alleged by the mother.

This was error, for the jury left with the impression that the mother's calculation of the volume of calls was correct, without the substantiating evidence of the actual records. The alleged number of calls between the victim and Appellant supported a theory of impropriety. No one from the cell phone carrier was there to authenticate the alleged records of number of calls between the victim and Appellant. Consequently, testimony regarding what the records contained was improper without authentication.

4. The Appellant was charged with two offenses: Criminal sexual conduct, 2d degree, and lewd act on a minor. (Tran. p.8, L.25 thru p.9, L.22). The lewd act charge arose from events which occurred on a boat during a fishing tournament (Tran. p.153, L.12 thru p.154, L.24), and at the Appellant's home (Tran. p.151, p.14 thru p.152, L.19). The CSC charges stemmed from events which occurred on September 11, 2010, at the victim's home. (Tran. p.161, L.2-22). The CSC events at the victim's home are known as the 9/11 events.

The state rested after the testimony of Dr. Carol Rather, who interviewed the victim based on a referral from the police department. (Tran. p.263, L.25 thru p.264, L.1). The defense then made a directed verdict motion, which the court denied. (Tran. p.264, LL.12-18). The defense then opened with its first witness, Tabitha Love, the Appellant's wife. Ms. Love testified only to the events surrounding the lewd act allegations, which occurred at the Appellant's home. Ms. Love was not questioned, nor did she offer, information with regard to the 9/11 events at the victim's home, or of events surrounding the fishing tournament. (Tran p.277, L.3 thru p.278, L.17).

On cross examination by the State, the prosecutor delved into the 9/11 events and uncovered information which was detrimental to the state's case. Ms. Love testified that the Appellant could not have been at the victim's home on 9/11, because he was at home with Ms. Love. (Tran. p.287, L.5 thru p.292, L.11). The information brought out on cross examination by the state severally undermined the state's version of events.

Once Ms. Love left the witness stand, the state began to

argue that the defense withheld alibi information from the state. (Tran. p.195, L.18), and that it was the defense who opened the subject of the 9/11 events. The Defense accused the state of opening the 9/11 event testimony. (Tran. p.313, L.20 thru p.314, L.8). The trial court examined the record and determined that it was the state who opened the 9/11 event testimony; not the defense. (Tran. p.317, L.17 thru p.319, L.6).

Notwithstanding the fact that the state broached the subject of the 9/11 events with Ms. Love, the trial Court permitted the state to re-open their case. Ms. Love was recalled as a witness (Tran. p.324, L.23). The state sent out investigator's and produced an entirely new witness never seen or heard before (Tran. p.412, L.6), and introduced telephone recordings from the county jail between the Appellant and his wife. (Tran. p.328, L.10 thru p.344, L.1). The defense objected to each of the state's attempts to unfairly and prejudicially re-open their case based on facts which the state brought out.

As Appellant's attorney argued to the court, the state could blame no one but themselves for bringing out the 9/11 information during Ms. Love's testimony, and therefore they were stuck with the answer. (Tran. p.313, L.20 thru p.317, p.4). In spite of defense arguments, the trial court allowed the state to go back and retry their case. All issues raised related to credibility, which was key to the Appellant's defense. The jury found Appellant not guilty of the CSC allegations, which verify some belief in the Appellant's testimony. Had the state not been allowed to improperly re-open their case, the jury would have also found the Appellant not guilty of the lewd act allegations.

CONCLUSION

The Petitioner respectfully moves this Court to vacate Appellant's conviction and sentence, and remand this case to Georgetown County for further proceedings.

Respectfully submitted,

Dated: 9-11-13.

/s/ Prentiss Love

Prentiss Love, Appellant

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Prentiss Love, Appellant.

Appellate Case No. 2012-212037

Appeal From Georgetown County
D. Garrison Hill, Circuit Court Judge

Unpublished Opinion No. 2014-UP-195
Submitted March 1, 2014 – Filed May 21, 2014

APPEAL DISMISSED

Appellate Defender Kathrine Haggard Hudgins, of
Columbia; and Prentiss Love, pro se, for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General Salley W. Elliott,
both of Columbia, for Respondent.

PER CURIAM: Dismissed after consideration of Appellant's pro se brief and review pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.¹

APPEAL DISMISSED.

WILLIAMS, KONDUROS, and LOCKEMY, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 16, 2014

The Honorable Alma Y. White
PO Box 479
Georgetown SC 29442-0479

REMITTITUR

Re: The State v. Prentiss Love
Lower Court Case No. 2011GS2200432
Appellate Case No. 2012-212037

FILED
GEORGETOWN COUNTY, S.C.
2014 JUN 18 AM 10:15
ALMA Y. WHITE
CLERK OF COURT

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

The following exhibit filed in this case is being returned to you:

Court's exhibit #5 (Denention center phone records)

Please sign and return the enclosed copy of this letter acknowledging receipt of this item.

Very truly yours,

V. Claire Allen, Deputy

CLERK

RECEIVED

JUN 20 2014

SC Court of Appeals

cc: Salley W. Elliott, Esquire
Kathrine Haggard Hudgins, Esquire

Receipt Acknowledgement

Name: Jamie M. Smith Deputy Date: 6-18-14

FORM 5

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)
PRENTISS WAYNE LOVE, 315271)

v.)

STATE OF SOUTH CAROLINA)

2015-CP-22-00209
IN THE COURT OF COMMON PLEAS

APPLICATION FOR
POST-CONVICTION RELIEF

FILED
GEORGETOWN COUNTY, S.C.
2015 FEB 24 AM 10:20
ALBA WHITE
CLERK OF COURT

INSTRUCTIONS READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Ridgeland Correctional Institution, P. O. Box 2039, Ridgeland, SC 29936
2. Name and location of Court which imposed sentence Georgetown County Court of General Sessions, 401 Cleland Street, Georgetown, SC 29440.
3. Name(s) of co-defendant(s) (if any) n/a
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011-GS-22-432- Lewd Act On A Minor Child
 - (b) Found not guilty on 2011-GS-22-431 for 2nd Degree CSC with a Minor
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) April 26, 2012- Fifteen (15) years
6. Check whether a finding of guilty was made:

- (a) after a plea of guilty _____
 - (b) after a plea of not guilty Yes
 - (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered yes to (7), list:
- (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. N/A
 - iii. N/A
 - (b) the result in each such Court to which you appealed:
 - i. Appeal Dismissed
 - ii. N/A
 - iii. N/A
 - (c) the date of each such result:
 - i. May 21, 2014
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. Unpublished Opinion No. 2014-UP-195
 - ii. _____
 - iii. _____
9. If you answered no to (7), state your reasons for not so appealing:
- (a) N/A
 - (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Applicant's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, was violated before and during his trial.

- (b) The errors and omissions of Trial Counsel, both prior to and during Applicant's trial, violated Applicant's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, and were prejudicial to Applicant to a degree that they violated his right to a fair trial in that the result of his trial would likely have been different but for Trial Counsel's deficient representation.

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

- (a) Trial Counsel failed to object to testimony and jury arguments highly prejudicial to Applicant, concerning text communications between him and the alleged victim where the evidence in question was erroneous and the misrepresentations in question were known to the parties and documented in cell phone records previously ruled inadmissible by the Court.
- (b) Trial Counsel failed to adequately impeach the State's witnesses at trial, failed to make appropriate objections, motions and legal arguments during Applicant's trial and failed to request appropriate curative charges during Applicant's trial.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? n/a
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? n/a
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? n/a
- (d) any other petitions, motions or applications in this or any other Court? Yes

13. If you answered yes to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

- iv. _____
- (c) the disposition thereof:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____
- (d) the date of each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____
- 14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? NO
- 15. If you answered "yes" to (14) identify:
 - (a) which grounds have been presented:
 - i. N/A
 - ii. _____
 - iii. _____
 - (b) the proceedings in which each ground was raised:
 - i. N/A
 - ii. _____
 - iii. _____
- 16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
 - (a) Allegations raised herein would not have been properly heard on direct appeal.

Collateral review through PCR presented the first appropriate opportunity to address these claims.

- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
- (b) your trial, if any? X
- (c) your sentencing? X
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? X
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? n/a
18. If you answered yes to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Jonathan Eric Fox, Fifth Circuit Public Defender's Office 203 Laurel Street,
Conway, SC 29526
- Kathrine H. Hudgins, SCCID, P. O. Box 11589, Columbia, SC 29211
- ii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial and sentencing
- ii. Direct Appeal.
- iii. _____
- iv. _____
19. State clearly the relief you seek in filing this application:
Reversal of Applicant's judgment and sentence and remand for a new trial.

20. Are you now under sentence from any other court that you have not challenged?
No

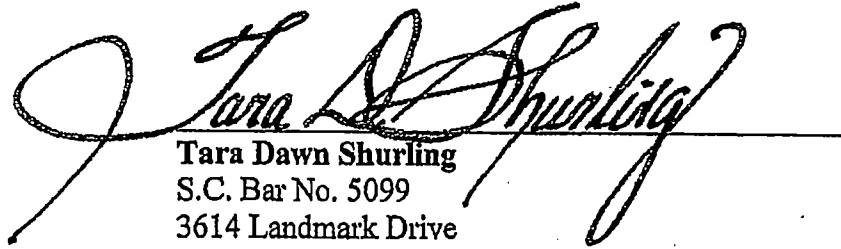
STATE OF SOUTH CAROLINA)

County of Georgetown)

2015-CP-22- 00209

VERIFICATION

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



Tara Dawn Shurling
S.C. Bar No. 5099
3614 Landmark Drive
Suite A
Columbia, SC 29204
(803) 738-8622
Fax (803) 738-1600
tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT

SWORN to and subscribed before me this 5th
day of February, 2015.

Durianne Graham (L.S.)
Notary Public for the State of South Carolina

My Commission Expires: 2/28/24

FILED
GEORGETOWN COUNTY, S.C.
2015 FEB 24 AM 10:20
ALMA Y. WHITE
CLERK OF COURT

LAW OFFICE OF ATTACHMENT E

14913
1.82201
1.9021

TARA DAWN SHURLING, PA

Attorney and Counselor at Law

3614 Landmark Drive

Suite A

Columbia, South Carolina 29204

E-Mail: tdslaw@shurlinglaw.com

(803) 738-8622

(Fax) (803) 738-1600

February 4, 2015

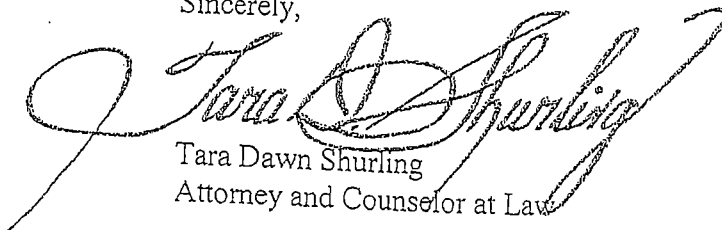
The Honorable Alma White
Clerk of Court for Georgetown County
401 Cleland Street
Georgetown, SC 29440

RE: Prentiss Wayne Love, 315271 v. State of South Carolina.

Dear Ms. White:

Please find enclosed an original and two (2) copies of an Application for Post-Conviction Relief in the above referenced matter. Please note I am *retained* in this case and therefore *you do not need to appoint a lawyer*. I have had problems in the past when lawyers were inadvertently appointed in Post-Conviction Relief cases I filed as retained counsel. If you would be so kind as to have a member of your staff file the original of this application and return the two clocked copies to my office in the enclosed self-addressed stamped envelope provided for your convenience, I would be most grateful. If you should have any questions or concerns, please feel free to contact my office. Thank you for your time and attention to this matter. For now, I remain,

Sincerely,



Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosures

cc: Josh Thomas, Assistant Attorney General (w/enclosure)
Prentiss Wayne Love, #315271 (w/enclosure)
Lorraine Buckwell (w/enclosure)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
	)	
Prentiss Wayne Love, #315271,	)	Case No. 2015-CP-22-00209
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent, making its Return to the Application for Post-Conviction Relief filed February 24, 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 Georgetown County Clerk of Court. In May 2011, the Georgetown County Grand Jury indicted Applicant for second-degree criminal sexual conduct with a minor (2011-GS-22-431) and lewd act on a minor (2011-GS-22-432). Jonathan Eric Fox, Esquire, represented Applicant. On April 23, 2012, Applicant proceeded to trial before the Honorable Garrison D. Hill and a jury. On April 25, 2012, the jury found Applicant guilty of lewd act on a minor and innocent of second-degree criminal sexual conduct with a minor. Judge Hill sentenced Applicant to fifteen (15) years imprisonment for lewd act on a minor.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an Anders¹ brief. The South Carolina

¹ Anders v. California, 386 U.S. 738 (1967).

Court of Appeals dismissed the appeal on May 21, 2014. State v. Love, Op. No. 2014-UP-195 (S.C. Ct. App. filed May 21, 2014). The remittitur was returned to the circuit court on June 16, 2014.

II.

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

1. Ineffective Assistance of Counsel
 - a. "Trial Counsel failed to object to testimony and jury arguments highly prejudicial to Applicant, concerning text communications between him and the alleged victim where the evidence in question was erroneous and the misrepresentations in question were known to all parties and documented in cell phone records previously ruled inadmissible by the Court."
 - b. "Trial Counsel failed to adequately impeach the State's witnesses at trial, failed to make appropriate objections, motions and legal arguments during Applicant's trial and failed to request appropriate curative charges during Applicant's trial."

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

III.

Respondent submits Applicant's allegation of ineffective assistance of 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 denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

V.

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

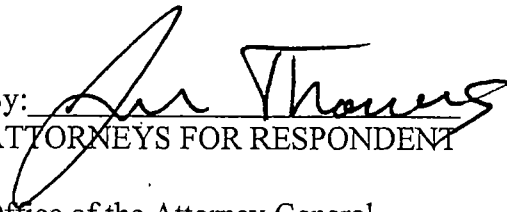
Respectfully submitted,

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

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

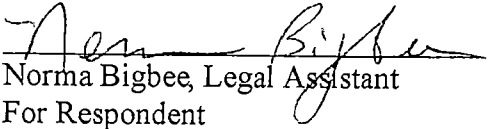
June 25, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	
	)	
	)	2015-CP-22-209
	)	
PRENTISS WAYNE LOVE, #315271	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

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

Tara Dawn Shurling, Esquire
 3614 Landmark Dr., Suite A
 Columbia, SC 29204

DATED this 25TH day June, 2015 .


 Norma Bigbee, Legal Assistant
 For Respondent

FORM 4

AUG 22 2016

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP2200209

Prentiss Wayne Love

South Carolina State of

PLAINTIFF(S)

DEFENDANT(S)

Attorney for: ☐ Plaintiff ☐ Defendant

Submitted by: Clerk of Court

☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
- ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
- ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

PCR Hearing is CONTINUED.

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may

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GEORGETOWN COUNTY, SC
2016 AUG 18 PM 2:13
ALMA Y. WHITE
CLERK OF COURT

563

be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

W/2/14
Circuit Court Judge

2131

8/10/2016

Judge Code

Date

For Clerk of Court Office Use Only

8/18/16

8/19/16

This judgment was entered on 8/18/16, and a copy mailed first class or placed in the appropriate attorney's box on 8/19/16 to attorneys of record or to parties (when appearing pro se) as follows:

Franklin D Pyatt ,
Daniel A. Selwa II 1053 London St. Suite A Myrtle Beach, SC
29577

Alan McCrory Wilson PO Box 11549 Columbia, SC 29211-
1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter Dixie Eubank

Gayle Bailey Deputy
Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271)
Applicant,)
v.)
STATE OF SOUTH CAROLINA,)
Respondent.)

2015-CP-22-00209

AMENDED POST-CONVICTION RELIEF
APPLICATION

FILED
GEORGETOWN COUNTY S.C.
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ALMA Y. WHITE
CLERK OF COURT

The Applicant alleges that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the U. S. Constitution, as well as Article I, § 14 of the South Carolina Constitution was violated, prior to and during his trial proceeding. The Post-Conviction Relief Application previously filed on February 24, 2015 under docket number 2015-CP-22-00209 is hereby amended to include the following additional allegations:

1. Trial Counsel was ineffective in that he failed to object to a portion of the State's opening argument in which the prosecution erroneously advised the jury that Applicant was charged with committing sexual battery upon the Victim beginning when he first met the Victim when she was thirteen. Tr. p. 52, ll. 14-24.
2. Trial Counsel was ineffective in failing to object to testimony from Anthony E. Carter, concerning the fact that Applicant and his wife knew about Victim getting caught in possession of a pain pill and a cigarette by her step-mother and kept that information from him and Victim's mother, his fiancée, where said testimony bore no logical relevance to the issues before the jury and was highly prejudicial to Applicant. Tr. p. 83, l. 16- p. 84, l. 12. (Carter); Tr. p. 274, ll. 13-23 and other witnesses, (T. Love); Tr. p. 283, l. 22- p. 286, l. 24 (T. Love); Tr. p. 364, ll. 17- p. 366, l. 18 (Applicant).
3. Trial Counsel was ineffective for failing to object when the prosecution expressly solicited hearsay testimony from witness Carter which went beyond the report of place and time of a sexual assault. Tr. p. 84, l. 19- p. 85, l. 18.
4. Trial Counsel was ineffective for failing to object the first and every time the State sought to introduce hearsay testimony from witnesses concerning

statement's allegedly made by Victim beyond the scope of the times and places of the sexual assault and lewd acts alleged.

5. Trial Counsel was ineffective for failing to make a motion for a mistrial when it was reported to the Court that one of jurors was napping during the trial, and had his eyes closed during a significant portion of the trial testimony and instructions by the Court. Tr. p. 99, l. 2- p. 100, l. 22; Tr. p. 103, l. 17- p. 104, l. 8.
6. Trial Counsel was ineffective for failing to file a Motion *in limine* to prohibit the State from introducing phone records concerning Victim's cell phone without proper authentication under the business records rule.
7. Trial Counsel was ineffective for failing to make a timely objection when Victim's mother first approached the subject of cell phone records she allegedly "printed out" concerning activity on her daughter's cell phone. Tr. p. 121, l. 18 – p. 124, l. 21.
8. Trial Counsel was ineffective for failing to request that prior testimony regarding the cell phone records be stricken from the record.
9. Trial Counsel was ineffective for failing to object to the State being allowed to question the Victim's mother being asked to testify concerning the content of the cell phone records that had been expressly ruled to be inadmissible by the Court. Tr. p. 131, l. 1- p. 133, l. 13.
10. Trial Counsel was ineffective for failing to object to testimony from Victim's mother, Shannon Bellamy, that Victim gave a statement to Children's Recovery Center, after which the Recover Center recommended that Victim receive counseling, where said testimony raised the impermissible inference that the Center found her statement to be credible. Tr. p. 136, l. 1- p. 148, l. 5.
11. Trial Counsel was ineffective for failing to object to when State improperly bolstered Victim's testimony by leading her about statements made by her to the Children's Recovery Center. Tr. p. 166, l. 25- p. 167, l. 13.
12. Trial Counsel was ineffective for neglecting to object to the hearsay testimony from State witness, **MINOR**, which went far beyond permissible reports of the time and place of the alleged sexual assaults. Tr. p. 177, l. 1- p. 187, l. 10.
13. Trial Counsel was ineffective for neglecting to object when a witness claimed that there were hundreds of text messages between Applicant and Victim in September, 2010 where the jury was likely to infer that figure was based on cell phone records which had not been authenticated as required by the business records rule, and where the records in question would not have supported that claim if they had been admitted. State Ex. No. 5 for ID only.

14. Trial Counsel was ineffective for failing to make a motion to strike all testimony pertaining to information referenced as coming from cell phone records ultimately ruled inadmissible by the Court pursuant to Rule 803(6), SCRE.
15. Trial Counsel was ineffective for failing to make a motion for a mistrial following the receipt of information that multiple witnesses had reported the same jurors previously admonished continuing to sleep during Applicant's trial, for failing to request that the entire jury be questioned concerning sleeping, or closing their eyes, during Applicant's trial and, at minimum, for failing to request a cautionary charge to the entire jury where Applicant reported that more than one juror appeared to be closing their eyes during this trial. Tr. p. 243, l. 20- p. 247, l. 22.
16. Trial Counsel was ineffective for failing to investigate the use of Applicant's cell phone to establish the harmless nature of text communications between Applicant and Victim.
17. Trial Counsel was ineffective for failing to make a motion for a mistrial following the claim by Victim's mother that the cell phone records she claimed were the basis for her testimony showed *hundreds* of text messages between Victim and Defendant in September, 2010, when they in fact showed less than 100 texts between them, and where said records had not been authenticated under the business records rule found in Rule 803 (6), SCRE.
18. Trial Counsel was ineffective for neglecting to object to testimony in which law enforcement witness Ginger Pop stated that Applicant was arrested on the same day she interviewed him thereby implying admissions made by him resulted in the decision to arrest. Tr.p. 232, ll. 10-23.
19. Trial Counsel was ineffective for neglecting to establish on cross-examination of Officer Pop that Applicant had in fact denied any inappropriate physical contact with the alleged victim in this case.
20. Trial counsel failed to provide Applicant reasonable professional assistance of counsel where he failed to cross-examine witness, *MINOR*, the Victim's best friend, as to whether she had been charged criminally for distributing Vicodin, a controlled narcotic painkiller, to victim? See testimonial admission, Tr.p. 185, l. 20 - p. 286, l. 22.
21. Trial Counsel was an effective for neglecting to cross-examine witness *MINOR* to whether the state had advised her she could be charged with a crime for distributing vicodin and the potential consequences of such a charge.

22. Trial Counsel failed to provide Applicant reasonable professional assistance of counsel where he neglected to adequately cross-examine witness **MINOR** concerning whether she was given any consideration for her testimony against Applicant.
23. Trial Counsel was an effective for failing to cross- examine Victim concerning her alleged theft of a prescription narcotic pain medication from her mother's fiancé, and the criminal charges that she could have faced for that theft and possession, as well as for obtaining the same drug from her best friend. Tr.p. 144, l. 23 - p. 145, l. 22; Tr.p. 164, ll. 9-25; Tr.p. 172, 23 - p. 174, l. 4, Tr.p. 174, l. 25 - p. 175, l.6; Tr.p. 272, ll. 1 - 22.
24. Trial Counsel was ineffective for failing to make a motion for mistrial when the prosecution elicited perjured testimony from Victim concerning her claim that she and Applicant had texted each other *hundreds* of times on September 11, 2010, where that claim was readily refuted by State's Exhibit for ID No. 5 which reflected far fewer text communications between her and Applicant on that date. Tr.p. 163, ll. 3 - 15.
25. Trial Counsel was ineffective for neglecting to cross-examine state witnesses concerning who had deleted text communications on victim's cell phone. See, Tr.p. 198, l. 15 - p. 200, l. 7; State's Ex. No. 10 and 11.
26. Trial Counsel failed to provide Applicant reasonable professional assistance of counsel where counsel failed to object to repeated references to state witness Dianne Nordeen as a "forensic" interviewer where this witness was not qualified as any sort of expert by the Court and where the use of the term "forensic" interviewer were improperly inferred scientific expertise and thereby, improperly bolstered the credibility of the witness in question. Tr. p. 201, l. 1 - p. 213, l. 21; Tr.p. 217, l. 21 - p. 219, l. 11; Tr.p. 259, l. 7 - p. 260, l. 19.
27. Trial Counsel was an effective for failing to object to the State's description of the person who interviewed Victim at the children's recovery center as "the therapist or doctor in" where there was no evidentiary foundation for the assertion that the interviewer was either. Tr.p. 173, l. 24 - p. 174, l. 1.
28. Trial Counsel failed to provide Applicant reasonable professional assistance of counsel where he himself referenced the individual who interviewed the victim at the Children's Recovery Center as a "forensic interviewer". Tr.p. 211, ll. 12 - 16.
29. Trial Counsel was ineffective for characterizing earlier testimony from Applicant's wife, in which she indicated that the Victim had called her on one occasion, admitted being high on Vicodin and "she was on a roof and about to jump off" as Victim being "open to the idea of suicide". Tr. p.272, ll.1 - 4; Tr. p. 273, ll. 17 - 20.

30. Trial Counsel neglected to provide Applicant reasonable professional assistance of counsel where he failed to adequately cross-examine Victim concerning her alleged threat to jump off a roof in order to refute the inference that her behavior was related to her having been sexually molested.
31. Trial Counsel failed to provide Applicant with reasonable professional assistance of counsel where he failed to summarize Applicant's case in a manner consistent with his role as an advocate for the Applicant by conceding matters in his closing argument that were adverse to his client's best interest and which weakened the Applicant's defense.
- A. Trial counsel argued "there is no logical explanation for it I don't have one for you. I don't have any reason why she would lie" Tr.p. 456, ll. 7 - 10.
- B. Trial Counsel actually argued against the only apparent motive the victim had to lie. Tr.p. 453, ll. 13 - 28; Tr.p. 455, ll. 7 - 13.
- C. Trial Counsel argued that he did not personally believe that the fact that the Applicant's accuser had just gotten in trouble for possession of a narcotic was an explanation for why she would lie against Applicant and thereby, bolstered the credibility of the prosecution's subsequent argument that "no one has a motive to lie". Tr.p. 474, ll. 10 - 18.
32. Trial Counsel was ineffective for neglecting to object to numerous portions of the state's closing argument in which the prosecution made improper and prejudicial arguments, improperly referenced matter is not in evidence and/or misrepresented the testimony adduced at trial in a manner that was particularly prejudicial to Applicant.
- A. "He is texting Victim hundreds of times a day." Tr. p. 470, ll. 4 - 8; Tr.p. 473, ll. 9 - 11.
- B. Argument essentially inviting the jury to find guilt based on Applicant, and his wife's, prior record for a felony thereby violating the character evidence rule by asking the jury to find Applicant guilty because he and his wife were bad people. Tr.p. 473, ll. 18 - 23.
- C. Arguing that among the state's witnesses, "no one has a criminal record." Tr.p. 474, ll. 14 - 16.
- D. Arguing that on September 11th the Victim's cell phone had been taken away from her for the cigarette and pill that she had been caught with where the record did not support that assertion. Tr.p. 478, ll. 1 - 10.

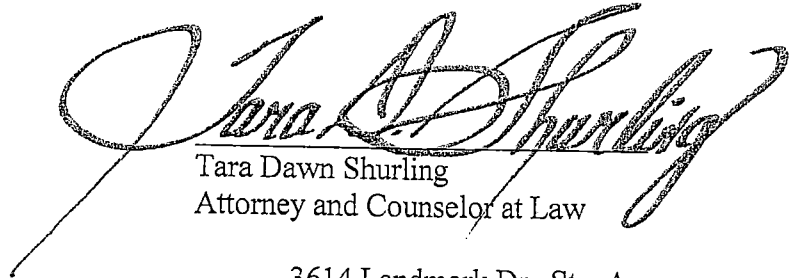
- E. Characterizing statements made by Applicant's wife as telling him that if he made certain statements she could get "caught" for perjury where the record in fact indicated that the statement made by her was that, "if you say you went with them, I'm going to jail for perjury." Tr.p. 479, l. 21 - p. 480, l. 11.
 - F. References to the individual who interviewed the victim as conducting a "forensic interview" . Tr.p. 482 ll. 9 - 15.
 - G. Claims that the victim was afraid her mother "was going to kill her" and that "she was scared" arguing Victim had no reason to fabricate her claims. Tr.p. 484, ll. 20 - 25.
 - H. "She had already deleted some things". Tr.p. 480, ll. 3 - 5.
 - I. Improper argument that Applicant was a convicted felon. Tr. p. 473, ll. 18-23.
 - J. Improper argument in which the prosecution implied that Applicant's wife was a convicted felon. Tr. p. 473, ll. 18-23.
 - K. Improperly advising jury of his personal opinion that Applicant and his wife were liars. Tr. p. 480, ll. 3-5.
- 33. Trial Counsel was ineffective for failing to asking Applicant an open ended question about his prior criminal record thereby eliciting testimony concerning a prior conviction for assault and battery of a high and aggravated nature which would not have been admissible for impeachment purposes pursuant to Rules 404 or 609, SCRE. Tr. p. 363, ll. 5-11.
 - 34. Trial Counsel was ineffective for neglecting to assertions made by the State during the sentencing phase of Applicant's trial concerning Applicant's prior record for ABHAN. Tr. p. 510, l. 6- p. 513, l. 1.
 - 35. Trial Counsel was ineffective for failing to object to the prosecution questioning Applicant concerning whether he was "a convicted felon". Tr. p. 363, ll. 16-21.

The Applicant has no further amendments at this time. For the reasons set forth herein, as well as those set forth in his original application, the Applicant asserts that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States



Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to and during his trial proceeding in the Court of General Sessions. Copy of these amendments has been served on opposing counsel, Patrick Schneckpeper, Assistant Attorney General, as well as on trial counsel, Eric Fox, Assistant Public Defender.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Dr., Ste. A
Columbia, SC 29204
803-738-8622
803-738-1600 (Fax)

ATTORNEY FOR APPLICANT.

This 14th day of November, 2016.

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271,)
Applicant,)

2015-CP-22-00209

v.)

CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA,)
Respondent.)

The undersigned attorney hereby certifies that the Amended Post-Conviction Relief Application was served on Assistant Attorney General, Patrick Schmeckpeper and Trial Counsel, Eric Fox, Senior Public Defender, by email on this the 14th day of November, 2016 to:

Patrick Schmeckpeper, Assistant Attorney General
South Carolina Attorney General's Office
P: O. Box 11549
Columbia, SC 29211
pschmeckpeper@scag.gov

Eric Fox, Senior Trial Attorney
15th Circuit Public Defender's Office
203 Laurel Street
Conway, SC 29526
eric.fox@hgcddefender.org

Tara Dawn Shurling
Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

FILED
GEORGETOWN COUNTY, S.C.
2016 NOV 15 PM 4:13
ALMA Y. WHITE
CLERK OF COURT

3614 Landmark Dr., Ste. A
Columbia, SC 29204
(803) 738-8622
(803) 738-1600 (Fax)
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 14th day of
November, 2016.

Doranne Graham (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN) IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271) 2015-CP-22-00209
Applicant,)
v.) SECOND
STATE OF SOUTH CAROLINA,) AMENDED POST-CONVICTION RELIEF
Respondent.) APPLICATION

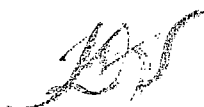
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2016 NOV 15 PM 4:16
ALMA Y. WHITE
CLERK OF COURT

The Applicant alleges that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the U. S. Constitution, as well as Article I, § 14 of the South Carolina Constitution was violated, prior to and during his trial proceeding. The Post-Conviction Relief Application previously filed on February 24, 2015 under docket number 2015-CP-22-00209 is hereby amended to include the following additional allegations:

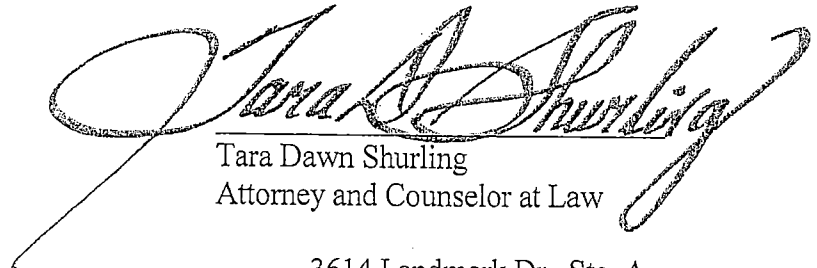
36. Trial Counsel was ineffective for failing to object to the State cross-examining concerning "over 140 text messages" allegedly made between Applicant and Victim or Tabitha Love and Victim, where there was no evidentiary foundation laid for the number of text messages claimed by the State and where this unsupported claim was highly prejudicial to Applicant. Tr. p. 288, ll. 13-23.

The Applicant has no further amendments at this time. For the reasons set forth herein, as well as those set forth in his original application, the Applicant asserts that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to and during his trial proceeding in the Court of General Sessions. Copy of these amendments has been served on opposing counsel, Patrick Schneckpeper, Assistant Attorney General, as well as on trial counsel, Eric Fox, Assistant Public Defender.

Signature on page 2.



Respectfully submitted,

A large, stylized handwritten signature in cursive script, reading "Tara Dawn Shurling". The signature is written in dark ink and is positioned above the printed name and title.

Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Dr., Ste. A
Columbia, SC 29204
803-738-8622
803-738-1600 (Fax)

ATTORNEY FOR APPLICANT.

This 14th day of November, 2016.

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271,)
Applicant,)

2015-CP-22-00209

CERTIFICATE OF SERVICE

v.)

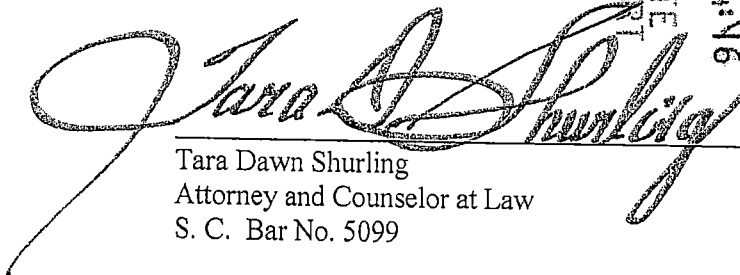
STATE OF SOUTH CAROLINA,)
Respondent.)

The undersigned attorney hereby certifies that the Second Amended Post-Conviction Relief Application was served on Assistant Attorney General, Patrick Schmeckpeper and Trial Counsel, Eric Fox, Senior Public Defender, by email on this the 14th day of November, 2016 to:

Patrick Schmeckpeper, Assistant Attorney General
South Carolina Attorney General's Office
P. O. Box 11549
Columbia, SC 29211
pschmeckpeper@scag.gov

Eric Fox, Senior Trial Attorney
15th Circuit Public Defender's Office
203 Laurel Street
Conway, SC 29526
eric.fox@hgcddefender.org

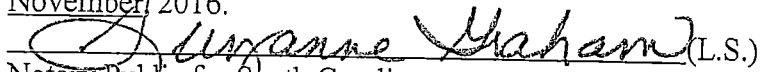
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ALMA Y. WHITE
CLERK OF COURT


Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Dr., Ste. A
Columbia, SC 29204
(803) 738-8622
(803) 738-1600 (Fax)
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 14th day of
November, 2016.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP2200209

Prentiss Wayne Love

South Carolina State of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Clerk of Court

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court

ORDER INFORMATION

PCR Hearing was held. Relief is UNDER ADVISEMENT.

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

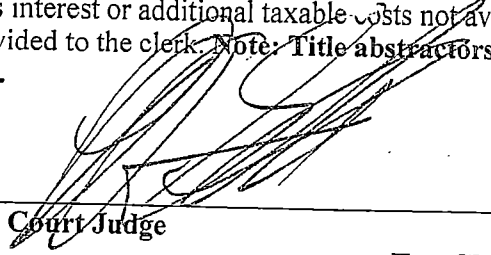
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed

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GEORGETOWN COUNTY, SC
2016 MAY 28 PM 12:27
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CLERK OF COURT

such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**


Circuit Court Judge

2139

Judge Code

11/16/2016

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

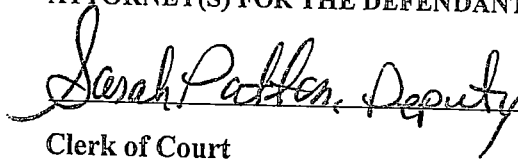
Christopher E Smith
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1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter Natalie Dahl


Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

1 STATE OF SOUTH CAROLINA) TRANSCRIPT OF RECORD
2 COUNTY OF GEORGETOWN) CASE NO.: 2015-CP-22-0209

3 -----

4 BEFORE: The Honorable Brooks Goldsmith

5 -----

6 PRENTISS LOVE,

7 Applicant,

8 vs.

9 THE STATE OF SOUTH CAROLINA,

10 Respondent.

11 -----

12

13 APPEARANCES:

14

15 Tara Shurling, Esq.
16 Attorneys for the Applicant.

17 Patrick Schmeckpeper, Esq.
18 Attorneys for the Respondent.

19

20 Official Court Reporter

21 Natalie Dahl, RPR

22

23

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25

I N D E X

WITNESS

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Redirect Examination by Ms. Shurling..... 94

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APPLICANT'S

MARKED

ADMITTED

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1 STATE OF SOUTH CAROLINA) TRANSCRIPT OF RECORD
2 COUNTY OF GEORGETOWN) CASE NO.: 2015-CP-22-0209
3 **CONTAINS ONLY TESTIMONY OF J. ERIC FOX. THIS IS NOT
4 A COMPLETE AND FINAL TRANSCRIPT**

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I N D E X

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APPLICANT'S

MARKED

ADMITTED

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P R O C E E D I N G S

MR. SCHMECKPEPER: I'm Patrick Schmeckpeper.

This is Prentiss Love versus South Carolina 2015-CP-22-0209. Appellant was indicted by the Georgetown Grand Jury for second degree criminal sexual conduct with a minor and a lewd act on a minor. He was represented by Jonathan Eric Fox. On April 23, 2012, the Applicant proceeded to trial before the Honorable Garrison Hill and a jury. He was found guilty on April 25, 2012 of lewd act on a minor. He was acquitted of second degree criminal sexual conduct with a minor. Judge Hill sentenced him to 15 years in prison.

Following an Anders appeal, South Carolina Court of Appeals dismissed the applicant's appeal on May 21, 2014. Remittitur was sent on June 6, 2014, and this application was filed February 24, 2015. Your Honor, I'll turn matters over to opposing counseling.

MS. SHURLING: Good morning, Your Honor. Your honor has copies in your packet of an amended application for post-conviction relief, and a second amended application with one issue that was left out. As we go through these today, it will become apparent there the vast majority of them are interconnected of probably nine or ten core issues with multiple

1 allegations that sort of track the issue from
2 different angles, so it is not quite as daunting as it
3 first appears.

4 I would note for the record as we begin that my
5 client had explained to him the fact that
6 post-conviction relief includes within its scope the
7 right to bring a claim of ineffective assistance of
8 appellant counsel. I explained to him how the process
9 of Anders versus California affects that, however, and
10 the fact that an Anders brief was submitted in this
11 case means that -- along with it was submitted an
12 affidavit from the appellant lawyer asking to be
13 relieved as counsel, and as part of the procedure
14 approved by the U.S. Supreme Court in Anders and
15 followed for many years by our own appellant courts,
16 they can't grant the motion to be relieved as counsel
17 until they have reviewed the entire record from cover
18 to cover and determined that they concur with counsel
19 on the fact that there is no meritorious issues that
20 the attorney seeking to be relieved as appellant
21 counsel has neglected to address. For that reason,
22 the possibility of raising any meritorious claims in
23 the circuit court of ineffective assistance of
24 appellant counsel were virtually non-existent, and so
25 for that reason we focused our attention on

J. ERIC FOX - DIRECT EXAMINATION

1 ineffective assistance of trial counsel. I just
2 wanted the record to reflect we had that colloquy
3 concerning appellate counsel, and he is aware of why
4 I'm not proceeding at this time with claims of
5 ineffective assistance of appellant counsel as well.

6 Your Honor, in the interest of time and
7 organization, I'm going to proceed by calling trial
8 counsel Eric Fox to the stand. I would ask for the
9 Court's patience and some degree of latitude with
10 questioning. I'll try not to lead, but in order to
11 try to get us through here today without being here
12 too long, I would ask for some patience and
13 consideration on that particular score. At this time
14 I would call Eric Fox.

15 MR. SCHMECKPEPER: I request -- because Mr. Fox
16 was my witness -- that I would be given to call him
17 during my case in chief.

18 MS. SHURLING: Absolutely, and I have no
19 objection to that.

20 (JONATHAN ERIC FOX, having been duly sworn,
21 testified as follows:)

DIRECT-EXAMINATION

22
23 BY MS. SHURLING:

24 Q I was going to ask you to state your name and
25 spell it for the record, but I think we can all manage

J. ERIC FOX - DIRECT EXAMINATION

1 P R O C E E D I N G S

2 (JONATHAN ERIC FOX, having been duly sworn,
3 testified as follows:)

4 DIRECT-EXAMINATION

5 BY MS. SHURLING:

6 Q I was going to ask you to state your name and
7 spell it for the record, but I think we can all manage
8 your name.

9 A You'd be surprised, but thank you.

10 Q Mr. Fox, do you recall representing Prentiss
11 Wayne Love?

12 A I do.

13 Q At that time were you with the Public Defenders
14 Office?

15 A Yes. At that time I guess we had gone to the
16 circuit-wide system at that point. I think I was still
17 under contract, but, yes, I was with the Public
18 Defenders Office.

19 Q Are you still with the Public Defenders Office at
20 this time?

21 A I am now. I work in the Conway office.

22 Q And I noticed that your title is Senior
23 Defender -- Senior Assistant Public Defender, I
24 believe?

25 A Yes.

J. ERIC FOX - DIRECT EXAMINATION

1 Q How many years have you been a public defender?

2 A It will be 23 in January.

3 Q For a very long time.

4 A Yes.

5 Q At the time this case went to trial, how many
6 cases approximately did you try, not a hard number,
7 just general trial experience?

8 A More than I can count. Dozens, maybe more than a
9 hundred, I'm not sure exactly.

10 Q Had you handled child abuse, child sexual assault
11 cases prior to this trial?

12 A Yes.

13 Q And in connection with allegations of criminal
14 sexual conduct with a child, and even criminal sexual
15 conduct with an adult, were you familiar with State v.
16 Mullen and subsequent cases, Jolly and Vail, that talk
17 about the latitude concerning hearsay and reports made
18 by alleged victims?

19 A Yes. Not by case names. The way my brain works,
20 I don't tend to remember case names, but in terms of
21 case law, yes.

22 Q And you'll find that that is about the end of my
23 memory of case names as well, so don't feel rained on.
24 I've asked my paralegal to E-mail you a copy of the
25 application and amended applications in this case; did

J. ERIC FOX - DIRECT EXAMINATION

1 you get a chance to glance over that?

2 A I did.

3 Q We'll go through that sort of in order and try
4 not to skip. Do you have a copy of that?

5 A I don't. I have them in E-mail form, but did not
6 print them out however.

7 Q Would you like a copy?

8 A Yes, it is helpful. Thank you.

9 MS. SHURLING: Sorry, Your Honor, one moment,
10 getting a copy out for myself.

11 Q Do you have a copy of the trial record at the
12 stand with you?

13 A I do.

14 Q Great. You will notice after each allegation I
15 tried to list a reference to the record, and it is not
16 necessarily an exhaustive list, but some references to
17 portions of the record that would be relevant to the
18 allegations. So as we go through these, it might be
19 helpful if you could reference that.

20 Okay. Let's start with the beginning. In the
21 opening argument, the Solicitor informed the jury that
22 from the time the Applicant first met the alleged
23 victim, he commenced committing sexual battery against
24 her; do you remember that?

25 A Well, I see it in the transcript. I don't have a

J. ERIC FOX - DIRECT EXAMINATION

1 specific memory, but I see it in the transcript, what
2 you are referring to.

3 Q Do you know whether or not you noticed that at
4 the time the argument was made?

5 A I don't recall that standing out, I don't.

6 Q And do you recall that not being consistent with
7 the evidence as it was revealed to you even pretrial in
8 the discovery materials?

9 A That was not my impression that it began the
10 minute he met her, so, yes. Yes. I did not believe
11 from the evidence that from the time Mr. Love met this
12 young girl -- even though there are allegations -- that
13 there was any abuse, so, yes.

14 Q In fact, as the record unfolds, there really was
15 not an allegation that it was a thing that developed
16 even early on with the relationship with the family,
17 was it?

18 A No. I think these events were alleged to have
19 happened a year or more from -- they first met in 2010,
20 I think these were related to events in 2011, so that
21 is correct.

22 Q Would the statement that he began preying on this
23 young girl, even in opening argument, had set the stage
24 for a very negative view of your client?

25 A Perhaps.

J. ERIC FOX - DIRECT EXAMINATION

1 Q If you had noticed this particular assertion by
2 the prosecutor in opening, would you have objected to
3 it?

4 A If I had taken it that way. I won't say I didn't
5 notice. When I read that, it didn't jump out the same
6 way, but I see how you see -- that that suggestion is
7 there. Yes, if I had thought that is what was being
8 implied, that from the day he met her he was doing
9 inappropriate things, certainly. I didn't get it at
10 the time.

11 Q And, of course, the correlator on that is that if
12 the abuse began very shortly, if not immediately after
13 he met the girl, it also would have been -- if the
14 allegations were somehow motivated by some bias or
15 motive to lie on the part of this girl, it would be
16 hard to imagine her having such a bias or motive when
17 she just met the man, right?

18 A I'm not sure exactly what -- yes.

19 Q And in retrospect, would you have objected to
20 that portion of the argument if you had looked at it
21 this way?

22 A If I had thought that that was the tone, of
23 course you have the black and white words, and then
24 there is the way things are said in the context of the
25 whole argument, opening statement, then, yes, I would

J. ERIC FOX - DIRECT EXAMINATION

1 have, if I thought that was prejudicing my client.

2 Q Thank you very much. In the testimony of one of
3 the first state witnesses, Anthony Carter --

4 MS. SHURLING: To set the stage, Your Honor, the
5 victim's mother lived with and was engaged to Anthony
6 Carter, who testified that they all lived as a family
7 unit and that he considered the victim to be sort of a
8 pseudo step-child.

9 Q (MS. SHURLING) Is that fair to say?

10 A Yes, they were close with the family.

11 Q Okay. Mr. Carter testified to the fact that the
12 Applicant and his wife knew about the victim being
13 caught with a pain pill and a cigarette by her
14 step-mother, and they concealed that information from
15 the victim's mother and from him; do you recall that
16 testimony?

17 A Yes.

18 Q Did you consider objecting to that?

19 A Well, I don't recall if I did or didn't, but I
20 didn't object, so.

21 Q What logical relevance did that have to the
22 charges before the court?

23 A Well, from the State's point of view, I know
24 their position would have been -- they were insinuating
25 that it showed his control over her, that by -- sorry,

J. ERIC FOX - DIRECT EXAMINATION

1 you are talking about Mr. Carter. Let me back up.
2 That may have been -- her making these allegations was
3 somehow a way to avoid any trouble that may have come
4 from having that pain pill and -- what was the other --
5 the cigarette.

6 Q Let me redo the question. I don't think I made
7 it clear.

8 A Sure, please.

9 Q What the step-father is saying is that sometime
10 prior when the child made the allegations against our
11 mutual client, she had gotten in trouble by being
12 caught by her actual step-mother, who lived with the
13 biological father --

14 A Right.

15 Q -- for being in possession of a narcotic pain
16 pill and a cigarette?

17 A Right. Yes.

18 Q And he was allowed to testify that our client and
19 his wife knew about the girl getting caught with the
20 cigarette and the narcotic pill and didn't share that
21 information with her mother and pseudo step-father?

22 A Correct.

23 Q My question is: In what way was that relevant to
24 the girl's allegations against your client?

25 A I don't know that it was.

J. ERIC FOX - DIRECT EXAMINATION

1 Q Would you agree that it, yet again, casted your
2 client in a very negative view to the jury for someone
3 who would not share such pertinent information with the
4 mother?

5 A I don't know how the jury took that. Is that one
6 possible outcome? Yes.

7 Q And, once again, if you had considered that as a
8 possible prejudice to your client arising from
9 testimony concerning the fact that the wife and your
10 client didn't bust the girl, so to speak, with her mom
11 and step-dad, would you have objected to it?

12 A Yes.

13 Q Moving on.

14 MS. SHURLING: Your Honor, on 3 we alleged trial
15 counsel was ineffective for failing to object when the
16 prosecution expressly solicited hearsay testimony from
17 Witness Carter which went beyond the scope of place
18 and time of a sexual assault. I followed up with a
19 catch-all allegation because I quickly discerned that
20 this was a pattern, as they say, in passim, throughout
21 this record.

22 Q But starting with Mr. Carter, he was allowed to
23 testify to details, including the identity of the
24 person who supposedly assaulted her, wasn't he?

25 A I haven't read back through this transcript, so

J. ERIC FOX - DIRECT EXAMINATION

1 give me a moment.

2 Q Can I point to something specific?

3 A Page 84, Line 19.

4 Q I'll be embarrassed if I didn't get my numbers
5 right, but I think that is right.

6 A At that particular location he gives a place, on
7 the river in the boat; time, New Year's Eve and 9/11.
8 So I didn't object on that particular instance. I
9 don't believe it went beyond what was permissible.

10 Q Well, doesn't the testimony, in fact, reflect she
11 conveyed to him the time and place where sexual contact
12 took place between her and the defendant?

13 A Yes.

14 Q In fact, wasn't that the theme throughout the
15 testimony of various state witnesses, they talked about
16 her giving details about where Wayne Love had sexual
17 contact with her identifying him specifically?

18 A They did.

19 Q Is that not inconsistent of the perimeters of
20 allowable hearsay concerning sexual assaults, both with
21 adults and with minors, under Munn, Jolly and Vail?

22 A I did not object.

23 Q Thank you. In retrospect, should you have
24 objected to the State being allowed throughout the
25 proceeding to bolster the creditability of the victim

J. ERIC FOX - DIRECT EXAMINATION

1 with hearsay testimony concerning the fact that she
2 repeatedly identified the defendant as her assailant?

3 A I did not object.

4 Q Did you consider making a motion or an objection
5 any time that the State's witnesses specifically
6 addressed that same subject matter?

7 A Truly, I couldn't tell you whether or not, but
8 the record is clear I didn't object. The reasoning, I
9 can't go back and recreate that moment.

10 Q I understand. And please understand I'm not
11 trying to be difficult.

12 A Oh, I know. I understand.

13 Q Okay. There came a point very early in the trial
14 when it was reported by the State that one of the
15 jurors was napping during testimony and instructions
16 from the Court; do you recall that?

17 A I did -- hold on, let me find that. I remember
18 it being -- I think a bailiff initially brought it to
19 our attention.

20 Q Look at Page 99, Line 2. I believe the record
21 reflects it was the victim advocate that reported it to
22 the Solicitor, who then brought it to the attention of
23 the Court?

24 A Yes.

25 Q Did you consider making a motion for a mistrial

J. ERIC FOX - DIRECT EXAMINATION

1 at that point?

2 A No.

3 Q Or motion to have that juror relieved and the
4 alternate seated?

5 A No.

6 Q Do you recall a time later in the trial where the
7 issue arose again concerning the nodding juror, and at
8 that time you reported to the Court that it might even
9 be more than one juror?

10 A Yes.

11 Q The Court questioned the juror, that is first
12 being discussed early on in the trial, and the Court
13 questioned that juror concerning what was going on,
14 right?

15 A I believe so, yes.

16 Q And he said he was -- loving the old
17 expression -- resting his eyes, right?

18 A Yes.

19 Q But he was listening?

20 A Yes.

21 Q Would you agree with me that a person's demeanor
22 and impression they give off while they are testifying
23 is additionally part of what the jury is to consider
24 when determining creditability of a witness?

25 A Yes.

J. ERIC FOX - DIRECT EXAMINATION

1 Q Is it harder to determine those factors that go
2 to creditability if your eyes are closed?

3 A You certainly would shut off any visual cues, but
4 you could still hear tone, hesitation, things of that
5 nature, argumentive. I would just say, generally
6 speaking, that is not certainly the first time in a
7 trial. Some people -- I had no indication from my own
8 observation or anything that he was asleep and missed
9 anything. I think he was questioned about that.

10 Could I have asked him to be replaced or ask for
11 a mistrial? Perhaps. In terms of asking for a
12 mistrial, I try to avoid that if possible, but
13 regardless, I did not feel like he needed to be
14 removed.

15 Q Once later in the trial -- and I'm sorry, I can't
16 find the place at this moment, but later in the trial
17 when the State was concerned enough to bring to the
18 Court's attention that someone else mentioned that this
19 man was nodding again, and at that point you
20 forthrightly told the Court it might be more than one
21 person, my client passed me a note and said more than
22 one person was sleeping; do you remember that?

23 A I do.

24 Q At that point did you consider asking the Court
25 to voir dire the entire jury on the subject of sleeping

J. ERIC FOX - DIRECT EXAMINATION

1 or being too tired to be an attentive juror?

2 A Again, I don't remember, but it is clear if I did
3 or didn't. Apparently, I did not, so I don't know if
4 it crossed my mind or not, but I didn't.

5 Q And, again, the record reflects that the Court
6 did inquire of the juror that was originally brought to
7 the Court's attention, but once you, yourself, made the
8 disclosure to the Court that your client had sent you a
9 note saying that more than one person was nodding off,
10 there was no examination, according to the record, that
11 the balance of the jury was questioned or admonished
12 concerning that issue, was there?

13 A That is correct.

14 Q In retrospect, is that something you should have
15 done?

16 A I didn't see others. Mr. Love handed me that
17 note. After the initial juror, I didn't see that
18 again. That doesn't mean it didn't happen, but I paid
19 attention, as much as you can in a trial, looking at a
20 jury, but I, myself, didn't see any more. But Mr. Love
21 apparently thought he did, or did, because he passed me
22 that note.

23 MS. SHURLING: A moment's indulgence, Your Honor.

24 (A brief pause in the proceedings.)

25 Q (MS. SHURLING) I assume you received all of the

J. ERIC FOX - DIRECT EXAMINATION

1 discovery sent by the Solicitor pursuant to your
2 properly filed discovery motions filed in this case?

3 A Anything they sent, I received, yes.

4 Q And those records included cell phone records;
5 did they not?

6 A They did.

7 Q Were you aware at the time you were reviewing
8 those records that they were, in fact, records that had
9 been researched and printed out, if you will, by the
10 complaining witness' mother, not by the Solicitor's
11 Office?

12 A At some point. I don't know that I knew that at
13 the time I received them. It might had been at the
14 trial. They don't always tell me the providence of
15 things. At some point that came out, they told me, but
16 it came out that at some point they were gathered and
17 collected by the mother rather than by an investigator.

18 Q Did they give you that information before the
19 trial began; do you know?

20 A I don't recall. I don't recall. I know there
21 was nothing indicating at the time when I received it.
22 It was a very large stack, a document dump.

23 MR. SCHMECKPEPER: I hate to object, but I would
24 like to object. Sounds like counsel is getting into
25 some non-disclosure issue. If that is the case, I

J. ERIC FOX - DIRECT EXAMINATION

1 would like to have the opportunity to call the
2 Solicitor.

3 MS. SHURLING: No, Your Honor, I'm addressing the
4 failure to make a motion in limine before the mother.
5 opened her mouth about the records in front of the
6 jury.

7 A My recollection is that I was not aware who had
8 obtained those records before the trial. I'm not
9 positive, but I know at the time I received them there
10 was no indication. It was just, Here are the records
11 that we, the State, have that were provided in
12 discovery. There was nothing to indicate at the time
13 we received them in discovery who gathered them, I do
14 know that.

15 Q You would have known from the arrest warrant the
16 date that your client was arrested, right?

17 A Yes.

18 MS. SHURLING: Your Honor should have a copy of
19 the Clerk of Court records in your folder. They
20 reflect that the Applicant was arrested on November 2,
21 2010.. May I approach?

22 THE COURT: You may.

23 MS. SHURLING: Your Honor, I've handed the
24 witness a copy of State's Exhibit for ID only No. 5.

25 Q (MS. SHURLING) Do you recognize those?

J. ERIC FOX - DIRECT EXAMINATION

1 A Looks like the phone records I was given in
2 discovery.

3 Q In fairness to you, they show T-Mobile up at the
4 top, right?

5 A Yep.

6 Q May I please? I don't want to be evading your
7 space.

8 A Not at all.

9 Q But they reflect that the information was printed
10 out on September 29, 2010, correct?

11 A That is the date there. I don't know -- I
12 wouldn't have known that that is when it was printed,
13 but I see that date on there.

14 Q Okay. And it is the only date on --

15 A It is, yes. Yes.

16 Q On this information?

17 A Yes.

18 Q Which was preceded by several days when your
19 client was arrested?

20 A Yes.

21 Q And the testimony in the trial record reflects
22 that he was arrested the same day he was interviewed by
23 law enforcement?

24 A Yes.

25 Q Do you have any recollection prior to trial of

J. ERIC FOX - DIRECT EXAMINATION

1 being concerned about or having curiosity about where
2 these records came from or anything?

3 A I don't, not prior to trial. My impression was
4 they dumped 20, 30 pages of single spaced records that
5 was every phone call on that number or phone. The
6 majority was not relevant. It struck me as a document
7 dump with some relevant material.

8 Q Trust me, if I didn't need glasses before this
9 record, I would now.

10 A Yes.

11 Q Do you recall when the victim's mother was
12 testifying the fact that she began testifying to the
13 fact that she had pulled off -- gone on the computer
14 and pulled off records of all the text communications
15 between her daughter and your client?

16 A Yes.

17 Q And began testifying about it?

18 A Started to, yes.

19 Q Why didn't you object immediately when she began
20 addressing those records?

21 A Well, that was something she had done. Now, we
22 did object. Her putting the records in through the
23 mother was not allowed. She did try to introduce them
24 herself, the Solicitor did, through the mother, and I
25 did object to that coming in because she couldn't

J. ERIC FOX - DIRECT EXAMINATION

1 authenticate them. So I felt she could have had
2 firsthand knowledge. I went and looked in this account
3 and started doing such-and-such at the moment they are
4 trying to introduce the actual records to substantiate
5 to what she was testifying to and then I did object.

6 Q Let's look at her testimony the first time the
7 subject matter came up.

8 A Sure.

9 Q Page 121, Line 18. Doesn't the question, in
10 fact, indicate that she pulled up the information --
11 "she" being the mother, not the girl?

12 A Yeah, that's right, the mother. Yes.

13 Q And then she proceeded to talk about the number
14 of incoming and outgoing texts that she was seeing in
15 those records, correct?

16 A Yes.

17 Q And I draw your attention to Page 121, Line 18
18 through 124, Line 21.

19 A Yes.

20 Q And at that point the records were not in
21 evidence, were they?

22 A No.

23 Q And they were hearsay concerning a business
24 record?

25 A I didn't take it that way. The record is clear

J. ERIC FOX - DIRECT EXAMINATION

1 from there. She could look on the account, and I think
2 it was the mother's account. I'm not positive about
3 that, but she could access and look. She testified she
4 knew numbers. I didn't think his number was hearsay,
5 so I, didn't feel it was. I did not object, although I
6 objected to the records themselves coming in, but I
7 also felt that I could have addressed in
8 cross-examination, you know -- I know the hunt, we're
9 going to get to the number of messages, but I felt they
10 were okay up to that point, in terms of testimony.

11 Q Very shortly after that, the State attempted to
12 introduce the phone records and question State's
13 Exhibit 5, correct?

14 A Yes.

15 Q And when they did, you raised the objection that
16 it was a business record and it had not been
17 authenticated by anyone with the authority to do so?

18 A That's correct.

19 MS. SHURLING: Your Honor, that goes from 124,
20 Line 22, to 132 approximately Line 8.

21 Q And the records were kept out, correct?

22 A Yes.

23 Q Subsequently, when the mother began to testify
24 about all these observations from the record, you did
25 object, didn't you?

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1 A Yes.

2 Q What were you told by the Court?

3 A Can you refer me? Let me get back to that.

4 Q Do you recall the Court advising you that you did
5 not object?

6 MR. SCHMECKPEPER: I think it is around the end
7 of 131.

8 MS. SHURLING: Thank you.

9 A Yes. I see -- in other words, she already
10 testified at that point, yes.

11 Q (MS. SHURLING) So the testimony about the volume
12 already came in without objection?

13 A Yes.

14 Q So the record, would you agree, seems to reflect
15 that the Court was -- that you were not in a position
16 to object to her referencing what was in the records
17 because you didn't object the first time it came on?

18 A Perhaps. I did not object, and I wasn't renewing
19 the objection at that point, you know what I mean? I
20 don't necessarily agree with your characterization, but
21 I can see where you are heading.

22 Q I'm not trying to be --

23 A I know you are not.

24 Q Was there any forensic evidence in this case?

25 A Forensic, in what sense?

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1 Q Was the fact of the alleged assault recorded
2 immediately after any of the alleged assaults?

3 A No. You mean forensic in terms of physical
4 evidence of an assault?

5 Q Correct.

6 A No, there was not, and they were not reported
7 immediately.

8 Q And, in fact, this young lady did not record
9 allegedly being abused by your client until after she,
10 herself, had gotten caught with narcotic drugs, right?

11 A That is exactly right.

12 Q So would you agree that the sheer number of
13 communication -- text communications between your
14 client and this young teenage girl was an important
15 bullet in the Solicitor's gun, so to speak? I mean,
16 that was an important part of the their case, arguing
17 that that mass amount of communication verified some
18 untoward relationship?

19 A That was their theory, yes, for sure.

20 Q So you didn't object when it first came up
21 because you didn't see it as objectionable?

22 A Yeah, that the mother could testify about her
23 firsthand knowledge in investigating some of those
24 things, in terms of this is what I saw. Perhaps the
25 records weren't legitimate and couldn't be admitted as

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1 a business record, but I felt she could testify that I
2 went and looked, this was the account I looked at, this
3 is what I saw. That is firsthand knowledge, I thought.

4 Q Would you agree that the record is clear in
5 circumstances during this trial when she and other
6 witnesses were talking about the number of calls, they
7 are referencing these records, not looking at the phone
8 and counting them?

9 A They definitely referenced the records. I don't
10 recall whether there was references to the actual
11 phone. At one point I thought the officer did, but no
12 question they were referencing these records for some
13 of their testimony, no question.

14 Q Thank you. Once the objection was made to
15 State's ID 5 and the Court sustained your objection,
16 did you consider making a motion to strike any prior
17 testimony that utilized those records as a basis for
18 statistical information provided?

19 A Again, I didn't. I don't recall if that played
20 out in my mind or not, but I didn't make that objection
21 or that request.

22 Q And with regard to Question No. 9, with regard to
23 your failure to object to the State being allowed to
24 question the mother, once the ruling was made by the
25 Court and the State was trying to get clarification, if

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1 you will, an understanding of where that ruling had
2 left the prosecution. The prosecution articulates the
3 fact that, well, I'm just going to ask her about what
4 she saw in the records or what she had reviewed; do you
5 recall that?

6 A Yes.

7 Q At that point did you consider objecting to the
8 State being allowed to conduct any further questioning
9 concerning the content of records that had been ruled
10 in as inadmissible?

11 MR. SCHMECKPEPER: I object, asked and answered.
12 He said he didn't think the witness' testimony was not
13 admissible, so we're beating a dead horse at this
14 point.

15 MS. SHURLING: I'm trying not to do that, but as
16 an appellant lawyer I'm stuck with an ocean of cases
17 that say if I haven't asked the exact right question,
18 my client is at a disadvantage on appeal. I'll try to
19 keep it brief.

20 THE COURT: Overruled.

21 A Again, I don't recall the thought process, but I
22 didn't apparently. So I did not object to that further
23 line of questioning.

24 Q (MS. SHURLING) Could you look at 136, Line 1,
25 the testimony from the victim's mother, Shannon

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1 Bellamy?

2 A Yes.

3 Q Concerning the fact that once the Children's
4 Recovery Center had seen her daughter, that they
5 recommended that she receive counseling?

6 A I see that testimony. It goes to the next page,
7 but, yes, I see.

8 Q Did you consider that that testimony could raise
9 an inadmissible inference that the center found the
10 young woman's statements, to them, to be credible?

11 A Again, didn't make any objection to that, so I
12 don't recall what my recollection was at the time, but
13 the record is clear I did not make any objection or
14 seek to limit that.

15 Q Just taking a problematic approach for a moment,
16 would a listener think that there is any inclination
17 not to believe the statement and then refer the child
18 to counseling?

19 MR. SCHMECKPEPER: Object to speculation.

20 A I don't know.

21 Q (MS. SHURLING) We'll move on. Go to 166, Line
22 25. The State is questioning the young lady, and they
23 are talking about her testimony to the Children's
24 Recovery Center; do you recall that?

25 A Yes.

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1 Q Did you consider objecting to the State asking
2 that she agree with the details of the statement that
3 she proffered to the Children's Recovery Center?

4 A Again, I don't -- even if that were -- I think
5 they could have gotten the same place by a different
6 route, so I didn't object. I think they could have
7 gotten the same exact information from a different
8 route if that, in fact, was objectionable.

9 Q Now, *MINOR*, the record will reflect,
10 considered herself to be the young girl's closest
11 friend, correct?

12 A Yes.

13 Q Would you agree that her testimony concerning
14 what all she had been told about having been assaulted
15 went far beyond reporting that she had been assaulted,
16 and when and where it had happened?

17 A Well, whatever is reflected. If you can point me
18 to something specific.

19 Q So in passim, as they say, throughout her
20 testimony, Page 177, Line 1 through 187, Line 10 talks
21 about specific sexual interaction between the girl and
22 the defendant at a trial, correct?

23 A She did.

24 Q And talks about how the victim talked about him
25 like he was her boyfriend and saw nothing wrong with

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1 the behavior?

2 A Yes. That was separate from reporting. That
3 testimony, technically, wasn't about the assault. It
4 painted the picture of the relationship.

5 Q The totality of her testimony certainly
6 identified the defendant as someone she had been told
7 was improperly touching her friend?

8 A Yes.

9 MS. SHURLING: Your Honor, with regard to Item
10 No. 13, I'm going to skip over that for just a moment.
11 I'm trying to avoid being redundant.

12 Q Once the records were ruled inadmissible, did you
13 consider objecting to her being allowed to give
14 statistical estimates on the record based on the
15 content of the records that had been ruled in
16 inadmissible.

17 A Well, I didn't. So, again, I don't recall, but I
18 did not.

19 Q And did she, to your recollection, give any
20 testimony concerning any other basis for knowing the
21 number of communications, other than those records?

22 A No.

23 MS. SHURLING: Backtrack, Your Honor. Allegation
24 No. 15 is where the reference is made at 243, Line 20
25 through 247, Line 22 concerning the possibility that

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1 multiple jurors were, in fact, sleeping or closing
2 their eyes during the testimony, and we already have
3 beaten that horse enough and won't re-cover that.

4 Your client was arrested on November 2, 2010, and
5 his personal possessions were taken at the jail like
6 everyone else that is arrested, right?

7 A Yes.

8 Q Did you consider at that time or any subsequent
9 time utilizing my client's cell phone as a basis for
10 establishing what the nature of the text communications
11 between the girl and your client was?

12 A I know I discussed that with him, what we would
13 see on there. So I did not go and get the phone and do
14 that, but I know Mr. Love and I had discussions about,
15 obviously, the texting and the content back and forth.

16 Q He did not indicate to you -- so the record
17 reflects, as I do with all PCR clients, my client was
18 fully advised of the degree to which attorney/client
19 privilege is waived when you waive an allegation, so it
20 is with full knowledge of that that we proceed with
21 this line of questioning.

22 He did not at any point indicated to you that
23 there was anything in those text messages that there
24 was anything to be afraid of, had he?

25 A No.

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1 Q And the State's only expert -- we'll get to in a
2 little while -- said that one of the reasons he would
3 have had trouble getting to the text messages on the
4 girl's phone was that her phone wasn't a smartphone,
5 right?

6 A I don't recall, but I trust that that is what was
7 testified to.

8 Q Let me be more accurate. He didn't believe that
9 it was a smartphone of any sort and that hindered him?

10 A I think that is correct, yeah.

11 Q Did you question your client as to whether or not
12 his phone was, in fact, a smartphone?

13 A I don't recall if I did or not.

14 Q Did you talk to anyone about whether or not
15 smartphones store text messages for longer than regular
16 cellular analogue devices?

17 A No.

18 Q Did you ask your client whether his phone
19 maintains text messages going back for a myriad of
20 time?

21 A I don't recall. I know we had discussions about
22 the messages, the contact and whatever relationship he
23 had with the girl. He certainly said it was innocuous,
24 so I don't recall if we talked about that particular
25 point, I just don't.

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1 MS. SHURLING: I believe 17 was covered by
2 previous testimony, Your Honor.

3 Q (MS. SHURLING) If you could, look at 232, Lines
4 10 through 23.

5 A Yes.

6 Q In this testimony, the State establishes through
7 this witness that she was able to meet with and spoke
8 to your client?

9 A Yes.

10 Q And that it wasn't until after that interview
11 that she got a warrant for him and arrested him, right?

12 A Correct.

13 Q Did you consider objecting to that testimony on
14 the ground that it improperly raised the inference that
15 he made admissions during the interview when that was
16 inconsistent with the evidence in the discovery and
17 before the Court?

18 A I don't recall thinking that. It certainly
19 perhaps could. I didn't see that as the issue. I get
20 that in almost every trial, and I guess I should object
21 in every trial, where they talk to him. He was going
22 to be arrested before she ever talked to him. No, I
23 don't recall thinking that, and I certainly didn't make
24 the objection.

25 Q Once this was asked and answered, did you

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1 cross-examine her about the fact that his statement
2 didn't have anything to do with it, with the decision
3 to arrest?

4 A No, that just wasn't -- it is a point, but that
5 wasn't a point I was pursuing.

6 Q Did you cross-examine her concerning the fact
7 that he steadfastly denied any improper contact with
8 the victim?

9 A I do not recall. It would be very apparent in
10 the transcript.

11 Q Thank you, sir.

12 MS. SHURLING: That gets us through No. 19, Your
13 Honor.

14 Q The young girl's testimony, . MINOR , the
15 best friend of the victim, testified that she had given
16 her best friend Vicodin, correct?

17 A Yes.

18 Q The record will speak for itself. Why didn't you
19 question her as to what, if any, consideration she had
20 been given in exchange for her testimony?

21 A I don't recall. I don't believe that she was
22 even threatened -- there was no any indication that she
23 would be prosecuted for that, for either possessing or
24 distributing it, handing it to somebody. That is not
25 something that would typically be awarded for someone

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1 in that age in Georgetown County at that time. So, no,
2 I didn't even ask her about it.

3 Q She is admitting to distributing a narcotic drug?

4 A No question.

5 Q And she is certainly -- at the age she was --
6 could have been subject to juvenile petition in the
7 family court, if not tried as an adult, charged as an
8 adult?

9 A Possibly. Again, no indication that that was
10 ever even suggested at any point, let alone before I
11 got involved, that at any point that was something she
12 had to worry about.

13 Q Did you interview her?

14 A Prior, no.

15 Q And you didn't ask her on the stand?

16 A I did not.

17 Q How would you have had any indication if they
18 told her you could get charged with these drugs?

19 A You're right.

20 Q Obviously, not being questioned concerning
21 potential ramifications and consequences of that would
22 be part and parcel of that.

23 MS. SHURLING: That Covers 20 and 21, Your Honor,
24 and 22.

25 Q Do you recall the fact that her best friend, as

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1 well as I believe the client's wife, referenced the
2 fact that she had said that she had been taken Vicodin
3 and she had been getting some prescriptions from her
4 step-father, Mr. Carter?

5 A Yes.

6 Q Why didn't you cross-examine the victim
7 concerning the fact that she had been stealing,
8 essentially, and possessing narcotic pain medication
9 prior to raising these allegations?

10 A I would have to give a general answer, I don't
11 know with that specific thing. In the context of this
12 whole trial, you evaluate both the evidence going in
13 and how you believe witnesses, how things are going
14 during the trial. My strong impression during this
15 trial was that the friend was not a very credible
16 witness. She was a young, scared girl. There wasn't a
17 lot to be gained in drilling her possessing Vicodin,
18 that this girl, the victim, the same thing, I didn't
19 see a lot of points to be scored by picking fights with
20 her. You want to be careful about making them even
21 more sympathetic. My experience tells me that the
22 jurors want to be sympathetic when allegations like
23 these are out there. So I'm not trying to avoid the
24 question, but taking all of these decisions and
25 everything that is going on in this trial in the

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1 context of I don't think it is going the way the
2 Solicitor wants it to go, I think these allegations are
3 not near as effective as they hope they are, and why
4 give something back.

5 Now, I don't disagree that many of these things
6 could have been done, objected to, et cetera. But I
7 would say that they have to be taken in the context of
8 how I'm evaluating the entire trial as it plays out.
9 So the very long-winded answer is, no, I didn't object
10 in this case.

11 Q And, likewise, you did not question her
12 concerning the amount of trouble she could have been
13 in, the kind of charges that could have been brought
14 against her or the consequences of prosecution for both
15 stealing the prescription medications from her
16 step-father, pseudo step-father, Mr. Carter, and
17 possessing?

18 A I did not, that is correct.

19 Q Look at Page 198, Line 15 going over to Page 200,
20 Line 7. In the testimony of John Gregory, who is an
21 investigator with the Georgetown City Police
22 Department, on cross-examination he indicated that the
23 type of phone that was used had a lot to do with
24 whether or not you could retrieve deleted items?

25 A He did say that, yes.

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1 Q And, in fact, the State introduced as State's
2 Exhibit 10 and 11 I believe -- and I have copies for
3 Your Honor -- there are reports that they were able to
4 do showing some limited activity on this young woman's
5 cell phone, but conveniently none of the communications
6 to the defendant, right?

7 MS. SHURLING: Your Honor, here is a copy.

8 A I do not recall, but I take your word for it. I
9 don't recall.

10 Q (MS. SHURLING) Do you recall that the mother
11 testified that when she found out about the Vicodin
12 and the cigarette, the girl was put on restriction,
13 among other things, and the cell phone was taken away?

14 A Yes.

15 Q And do you recall that even after she reported
16 the alleged sexual battery, the phone was never given
17 back to the child, was not given back to her?

18 A Don't recall that, but.

19 Q Why didn't you cross-examine any of the State's
20 witnesses, either the girl or her mom, step-father
21 about who deleted all of those text messages, and why?

22 A I didn't. I couldn't -- again, the context of
23 where I thought the important points were, where I was
24 having the most success and most points to be gained, I
25 did not. I couldn't tell you the reasons behind it

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1 today specifically four years later, to be honest.

2 Q Looking back on it, and I realize hindsight,
3 where the State was making a pretty big deal out of the
4 volume of communication, didn't get into the bottom of
5 who had deleted all of those messages and why, that
6 appears to be an important tool for the defense?

7 A Could be.

8 Q Which raises another point. Your client's wife
9 testified about the child confiding in her, being
10 close, even one occasion where she was really messed up
11 taking Vicodin and threatening to jump off a roof; do
12 you remember that?

13 A Yes.

14 Q There was limited testimony from various
15 witnesses about there being a lot of fighting going on
16 in the child's household; do you recall that?

17 A Not specifically, but, again, I'm sure it's in
18 the transcript. I don't specifically remember that
19 part, but.

20 Q Do you recall the child -- I mean, pardon me, the
21 best friend referencing at some point that she was
22 upset a lot about the fighting going on at household?

23 A Yes.

24 Q Why didn't you cross-examine harder the pseudo
25 step-father and the mother about the chaotic nature of

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1 the household in which this young girl lived?

2 A I don't recall.

3 Q When the defendant's wife testified to the fact
4 the girl was threatening to jump off a roof and was
5 messed up on drugs, did it occur to you to
6 cross-examine her concerning why the child was that
7 upset, why the child was threatening to jump off the
8 roof?

9 A Again, don't recall the thought process. It's
10 clear that I didn't.

11 Q Without clarification of the nature of the reason
12 or the child's state of mind at the time, did it occur
13 to you that the jury might infer that that was a young
14 person tormented by having been abused?

15 MR. SCHMECKPEPER: Objection, speculation.

16 A I don't recall what I was thinking --

17 THE COURT: Overruled.

18 A I crafted my cross-examination based on the
19 information that I had, my investigation and reading of
20 how the trial was going. On any particular subject, it
21 is virtually impossible for me to go back and say this
22 is why I did or didn't, so I can't tell you. Why I
23 didn't is hard for me to go back and explain why. I'm
24 not trying to avoid the question, I don't have an
25 explanation.

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1 Q (MS. SHURLING) And I'm not trying to be
2 difficult.

3 A I don't think you are.

4 Q We'll go back for a moment. The jury heard --
5 MS. SHURLING: I will find it for the Court, I
6 left my page reference.

7 Q (MS. SHURLING) -- a couple of lines of very
8 brief testimony about her being upset a lot about
9 fighting going on in her house?

10 A Yes. Yes.

11 Q Other than that, they didn't hear anything about
12 a household that was full of that kind of domestic
13 disharmony, did they?

14 A No.

15 Q Would you agree with me that a jury hearing that
16 a young girl threatening to kill herself might have
17 been viewed by the jury as evidence that something
18 horrible was going on in that young person's life?

19 MR. SCHMECKPEPER: Objection, argumentive and
20 speculative.

21 THE COURT: I'll sustain.

22 Q (MS. SHURLING) Let's talk about a subject term
23 that the Court of Appeals has been very fond of in
24 recent years, the whole concept of these forensic
25 interviewers in child abuse cases. Let's look at the

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1 testimony of Diane Nordeen.

2 MS. SHURLING: Your Honor, I listed several page
3 references, but this is another matter that is
4 specifically -- as better legal writers than me would
5 say -- is in passim throughout the record. She is
6 referred to as a forensic interviewer.

7 Q They are talking about the need for getting a
8 forensic interview, correct?

9 A Oh, yeah.

10 Q Was she qualified as any kind of expert in this
11 case?

12 A No.

13 Q Was she asked any questions about her background,
14 her education, any certificates or accreditation that
15 she had?

16 A No.

17 Q What in the legal sense of the word would you
18 believe the definition of the word "forensic" to be?

19 A Scientific with some verifiable replicable
20 information data to support it.

21 Q Would you agree with me that characterizing this
22 woman's interviews and her status as a forensic
23 interviewer would imply to the jury a level of
24 expertise and even scientific certainty that just flat
25 didn't exist in this case?

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1 A Yes. They love that word for that very reason.

2 Q Did you consider objecting to that reference?

3 A I did not. I don't recall if this came at the
4 front-end when the appellate courts began to really
5 clamp down on this. It was around that time, it might
6 have been just after, but, no, I did not.

7 MS. SHURLING: Moment's indulgence.

8 Q This case was tried in April of 2012?

9 A Yes.

10 Q We can take a look at Vail, which was admittedly
11 decided in March of -- October 2012, so it was after
12 this trial, but the rulings in Vail were based, were
13 they not, on long-standing principles concerning
14 hearsay testimony and opinion testimony with regard to
15 credibility?

16 MR. SCHMECKPEPER: I object to anything of Vail
17 because it was decided after this case. In any event,
18 I think if we're going to talk about case law, we need
19 to argue it to Your Honor instead of testimony.

20 MS. SHURLING: I can do that, Your Honor. We'll
21 move on.

22 THE COURT: Sustained.

23 Q (MS. SHURLING) Take a look at 173, Line 24
24 through 174, Line 1.

25 A Yes.

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1 Q The Solicitor referred to the person who had
2 interviewed the girl at the Children's Recovery Center
3 as the therapist or doctor who interviewed her?

4 A Yes.

5 Q Is there any evidence that this woman was either
6 one of those things?

7 A Well, she was -- not introduced at trial, put it
8 that way.

9 Q Was there anything on the record establishing
10 this woman was a therapist or a doctor?

11 A No.

12 Q Would you agree that someone characterizing
13 someone as a therapist or a doctor implies an education
14 or expertise that was not established on the record?

15 A On the record, no, I would agree.

16 Q And would you agree that imparting someone with
17 such titles tends to give them an inherit creditability
18 with the listener?

19 A It can.

20 Q I'll move on. Are you aware at some point --
21 Page 211 through Line 16, you, yourself, referred to
22 the woman that interviewed the child as a forensic
23 interviewer?

24 A If it is there, I did.

25 Q Is that something you would do today?

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1 MR. SCHMECKPEPER: Objection, relevance.

2 THE COURT: Sustained.

3 Q (MS. SHURLING) Did it occur to you to object --
4 pardon me, asked and answered.

5 Did it occur to you not to perpetuate that title
6 by adopting that title in your own references to the
7 woman?

8 A I don't recall, but it is clear how I referred to
9 her, but I don't recall how that came to be.

10 Q Having not cross-examined the girl or family
11 members about either why she would have been at an
12 emotional upheaval at the time she was threatening to
13 jump off a roof on Vicodin, did it occur to you to
14 object to the characterization that she was on the roof
15 and, quote, open to the idea of suicide?

16 A Again, don't recall.

17 Q That reference may have been in one of your own
18 questions, so if it was, do you have any reason for why
19 you would have had to sort of adopted into the idea
20 that that is what she was trying to do, commit suicide?

21 A I disagree with that characterization. What you
22 can't get off of the black and white transcript is the
23 this is done. To me, this young girl was, for whatever
24 reason, less than credible. There were other ways to
25 attack her. I wasn't agreeing with that principle. I

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1 think the tone and demeanor and attitude from the jury,
2 that is not what I was -- I don't agree that I was
3 conceding that point, but I would agree that in black
4 and white that is what it says.

5 Q Again, at that point in the trial, no alternate
6 explanation for the behavior had been provided,
7 correct?

8 A No.

9 Q No alternate -- if, in fact, there was evidence
10 of suicidal ideation, no alternate explanation for that
11 had been put in front of the jury?

12 A No. Again -- and no doubt, it had not. In
13 defending a case, I'm under no burden of prove to
14 establish anything. I find it can be a trap sometimes
15 to offer explanation when I have no burden of proof.
16 The State has their theory, the elements they have to
17 prove, and they have a theory of things so they'll
18 characterize things a certain way. I find it can be a
19 trap to offer alternative explanation, because although
20 it is not proper, the jury thinks he didn't prove that,
21 so the State's theory must be correct. So sometimes
22 that is something that goes on, that the State is going
23 to rise and fall on their theory of the case, and I'm
24 under no obligation to provide an alternative theory.
25 So that is -- can't say on each of the points you raise

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1 that is exactly what I was thinking at that moment. In
2 a big picture sense, this is something that is going
3 on, and there is no getting around it.

4 Q You did not cross-examine the child concerning
5 that?

6 A No, I did.

7 Q By the time the child -- we're talking about a
8 14, 15 year old, somewhere in that area. She's not a
9 little kid?

10 A No. No. Correct.

11 Q And you didn't interview her best friend before
12 the trial, and you didn't examine the friend about it
13 either?

14 A That's correct.

15 Q Let's talk about your own closing argument for a
16 few minutes. You didn't get the last argument because
17 you introduced some defense, so you went before the
18 State?

19 A Yeah, because the client exercised his right to
20 testify, which is his sole choice, and so that cost us
21 the last close.

22 Q The discovery materials that you would have been
23 provided confirmed that these allegations of abuse were
24 not known until after this young girl had gotten in
25 trouble for posing and using narcotic pain medication,

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1 right?

2 A That is correct.

3 Q Why would you tell the jury in your own closing
4 argument, There is no logical explanation for it, I
5 don't have one for you, I don't have any reason why she
6 would lie?

7 A I absolutely said those words. There is a lot
8 before and after. I also said -- and because I
9 believed -- I did not think the Vicodin was based on
10 her fear for getting in trouble for that Vicodin, and
11 that could be completely wrong, but I didn't leave it
12 at just that. Yes, I said those words, but there is a
13 bigger context. So, no, I didn't bring up the Vicodin.

14 Q This case hinged entirely on the creditability of
15 this young girl; did it not?

16 A In very large measure, and also on the
17 creditability of Mr. Love and also on a very
18 damaging -- what was portrayed as a very damaging phone
19 call during the trial between he and his wife from the
20 jail; that did not help. So in large part it hinged on
21 the creditability of the girl.

22 Q And the girl had not gotten in trouble for
23 skipping school or taking the parents' car for a spin
24 when she didn't have permission. She got in trouble
25 for narcotic pain pills, right?

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1 A She did.

2 Q And having never reported any improper behavior
3 by this gentleman before, she suddenly did after she's
4 in big trouble over the drugs?

5 A That's the timing, yes.

6 Q And there was no other factual information in the
7 record that tended to provide an explanation for why
8 this girl would lie about your client, was there?

9 A Not specifically. Again, what you don't see is
10 the demeanor of everybody. I did what I did. I did
11 not explore that. I did not think that is where my
12 best chance lay. The record is clear with regard to
13 what I did or didn't do.

14 Q Isn't it a fact that you went on to not only say
15 you didn't have an explanation for why she would lie,
16 but to basically argue against the only tenable
17 explanation for why she would lie against him?

18 A Again, tenable is your characterization of where
19 that was. I did not see it that way. I did not argue
20 against that. I think in my own -- very hard to assess
21 your own closing argument. I think I tied together the
22 threads and the explanation in the manner that I wished
23 to based on everything that was going on, everything
24 that was heard and testified to. I went about it the
25 way I thought was appropriate based on everything that

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1 happened in court, and I could only surmise that the
2 jury must have thought there was something to it since
3 they found him not guilty of the more serious charge.
4 In other words, the only way they could have found him
5 not guilty of CSC with a minor is if they did not
6 believe the girl. So they must not have swallowed her
7 story whole.

8 Q And if they had further question about her
9 creditability, they might not have found him guilty of
10 anything, correct?

11 A Perhaps. That is true. Or it might have been a
12 compromised verdict; we will never know.

13 Q Move on to the State's closing argument. This
14 gets a little tricky because State's Exhibit No. 5 was
15 not allowed into evidence, introduced as ID only, but
16 you did have it and you had access to it, right?

17 A The phone records, correct.

18 Q Right?

19 A Yes.

20 Q And having reviewed that, you certainly knew that
21 the record did not support the Solicitor's claim that
22 he was texting *Victim* hundreds of times a day?

23 A It was more than a handful. I don't recall
24 counting the actual number. No, that didn't give me a
25 lot of pause. He clearly had -- it was clearly more

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1 than an odd text here and there. But hundreds --
2 anyway, I did not object to that statement.

3 Q And, in fact, those records reflect that although
4 there were massive numbers of -- good many text
5 messages between the two, that, by in large, more of
6 them from her to him than the other way around? There
7 were more outgoing than incoming?

8 A As a strict -- that may be true. There was
9 plenty going both ways, but I don't dispute that.

10 Q In any event, there was no testimony at trial,
11 was there, that supported the claim by the Solicitor
12 that he was texting her hundreds of times a day?

13 A A day, no. The mother testified that there were
14 hundreds of texts, but not a day, so you are correct.

15 Q And would that argument not have bolstered the
16 idea that your client was somehow obsessed with this
17 young girl?

18 MR. SCHMECKPEPER: Object, I think it's
19 argumentative and not proper testimony.

20 MS. SHURLING: I think it's the obligation of
21 defense counsel to think of not only the apparent
22 arguments made, but the reasonable inferences that a
23 jury might draw from them, and if you are telling the
24 jury that the defendant is texting someone hundreds of
25 times a day, my position is that defense counsel

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1 should have objected to him arguing matters not on the
2 record in consideration of the fact that that argument
3 could readily have been interpreted by the jury as
4 some sort of information that this guy was obsessed
5 with that girl.

6 MR. SCHMECKPEPER: And, briefly, Your Honor, it
7 is this Court's determination whether or not it
8 constitutes bolstering the witness.

9 THE COURT: Overrule. Go ahead.

10 Q (MS. SHURLING) I'll move on. Your client had a
11 prior conviction of assault and battery and breach of
12 trust, correct?

13 A Yes.

14 Q In connection with the same incident, his wife
15 had assault and battery of a high and aggravated nature
16 as well, right?

17 A I don't recall that, but now that you -- yes. I
18 didn't recall that, but.

19 Q As a defender, I know you deal more than I do
20 with rules of evidence that have to do with impeaching
21 witnesses.

22 A Yes.

23 Q And the Rule 404(b) and -- sorry, Your Honor, it
24 is not rolling off the top of my tongue -- 607, I
25 believe, about impeaching non-defendant witnesses?

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1 A Yes.

2 Q Obviously, if you are impeaching a defendant, you
3 can go into matters that involve creditability, matters
4 of moral turpitude and so forth, correct?

5 A Correct.

6 Q And, of course, if it is a non-defendant witness,
7 if it carries more than a year, you can question them
8 about it, right?

9 A Yes.

10 Q Anywhere in any of those rules does it allow you
11 to inform the fact finder, the jury, that it is a
12 felony?

13 A I don't believe so.

14 Q In fact, doesn't the case law in this state
15 prohibit the Solicitor from diving into the particular
16 facts of a given prior judgment?

17 A Or either side for that matter, yes. Yes.

18 Q Okay. Without any authority for characterizing a
19 crime as a felony, is there any reason why you would
20 not have objected when the State argued -- essentially
21 inviting them to not believe anything that the
22 defendant and his wife said because they were felons,
23 they were convicted felons?

24 A Sorry, what was the specific question? I think
25 the answer is, no, there is no reason I shouldn't have

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1 done that.

2 Q And you were on, some degree, notice that that
3 was a tactic the State was approaching, weren't you?

4 A In what sense?

5 Q Why --

6 A I was aware of his conviction.

7 Q When the defendant and his wife were questioned
8 about their prior record, the Solicitor -- at least
9 with regard to the defendant -- went out of his way to
10 say you have been convicted -- you are a convicted
11 felon, aren't you?

12 A If that is in the transcript, I'm sure she did.
13 I don't recall that, but, yes.

14 Q To which your client responded, Assault and
15 battery with intent to -- pardon me, Assault and
16 battery of a high and aggravated nature and breach of
17 trust?

18 A Yes.

19 Q And the jury, of course, then subsequently heard
20 the wife say assault and battery of a high and
21 aggravated nature as well?

22 A Yes.

23 Q So the Solicitor had skillfully laid the
24 groundwork for establishing that there was a felony
25 involved there, right?

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1 A She used that word, yes.

2 Q And did you consider making a motion in limine or
3 objecting quickly at the time when the Solicitor began
4 to argue their status as felons, as a factor that
5 should be taken into consideration when determining
6 creditability?

7 A I'll give you another big picture. No, and
8 sometimes doing that, unless you are prepared to get
9 the mistrial, which I don't think I would have gotten,
10 it only emphasizes. I'm not saying that is an excuse,
11 but sometimes my thought process is if I object and
12 say, Judge, don't let them say "felony," and the judge
13 comes back and says, Disregard felony, all I did was
14 reemphasize that. Again, I would agree that "felony"
15 should not have been used to characterize -- that is
16 beyond the rule, in my opinion.

17 Q Okay. And so, I assume -- did you have a reason
18 for not objecting when the prosecutor was questioning
19 your client about that?

20 A Using that word "felony"?

21 Q Right.

22 A Again, I don't specifically recall what I was
23 thinking that moment, but I know sometimes it is a
24 consideration. Again, the record is clear. I did not,
25 and I think that is outside of the scope of the rules.

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1 Q Okay. Having heard -- and I'm backtracking a
2 little, because I'm trying to get the record straight.
3 Having heard the Solicitor elicit statements about the
4 record constituting a felony, couldn't you have
5 addressed that, and at the time of the, say, charge
6 conference when they are talking about what is going to
7 be charged and the jury is out of the room, couldn't
8 you have asked then that, Your Honor, he's referring to
9 my client's record as a felony, I ask that you admonish
10 him not to do so in closing arguments?

11 A Yes.

12 Q And what would have been the harm -- the jury is
13 not in the room.

14 A Correct.

15 Q So there is no potential prejudice to your client
16 in at least trying to get the Court to not allow that
17 improper reference, correct?

18 A That is correct.

19 Q And, apparently, you just didn't consider doing
20 that?

21 A Didn't do it.

22 Q Okay. All right. Look at Page 474, Lines 14
23 through 16 where the prosecution argues -- talking
24 about his own witnesses and, he says -- bearing in mind
25 he's going to really hammer your client's prior record

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1 and the prior record of his wife, who was a defense
2 witness, he says "no one has a criminal record" when
3 he's talking about his own witnesses, right?

4 A Yes.

5 Q Isn't it a fact that this record is silent on the
6 question whether or not any of his witnesses had a
7 prior record?

8 A Yes.

9 Q Is it proper for the Solicitor to argue matters
10 not in evidence?

11 A No, and if I ever have a trial where they don't,
12 I'll be a happy man. But, no, it is not proper.

13 Q And, again, creditability of all parties
14 concerned was central in this case given the lack of
15 physical evidence?

16 A Yes, it was.

17 Q And the lack of contemporaneous reporting?

18 A Yes.

19 Q And the fact that the young woman had been in
20 trouble for a serious thing immediately before
21 disclosing?

22 A They are all there.

23 Q So creditability was an issue, and the State was
24 allowed to bolster the creditability of his witnesses
25 by referring to matter not on the record, right?

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1 A They definitely argued matters not on the record.

2 Q Moving along. There is an unusual assertion on
3 Page 478, Lines 9 through 10 where the Solicitor says
4 that on September 11th the victim's cell phone had
5 been taken away from her for the cigarette and the
6 pill?

7 A Right.

8 Q Did you consider objecting to that?

9 A Again, I can't tell you what I was thinking at
10 that moment. The record is clear I didn't object.

11 Q Pardon?

12 A I said, again, I can't tell you what I was
13 thinking at that instant, but the record is clear, I
14 did not object.

15 Q And, in fact, the record does not reflect the
16 chronology, the timing with which she had gotten in
17 trouble over the pill with reference to 9/11, but
18 certainly reflects that when she got in trouble with
19 the pill and shortly thereafter reported these
20 incidents, it was after the things she then told her
21 mother about, right?

22 A Yes. Another big picture answer, yes, it is
23 correct. I did not object. But I also find when
24 Solicitors -- sometimes they do it deliberately,
25 sometimes they are human and get things incorrect, that

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1 if I object to timeline type of things, in effect then
2 we get into a retrying of the case, it happened this
3 way or didn't happen that way. That is deeply frowned
4 upon by the courts, trial courts, because you get back
5 into a very much, She said this, no, he said it that
6 way, and then we're into whose memory is better. I've
7 been in that situation, actually. Anyway, I didn't
8 find this particular instance to be a fruitful
9 objection to make.

10 Q Let's go to for a moment. There was things that
11 your client's wife and your client testified to that
12 the State was able to come back and say weren't
13 truthful because they presented a rebuttal witness that
14 was talking about it was a different weekend or
15 mistaken when she was there?

16 A I would love to take about that rebuttal witness,
17 but, yes, they did bring up -- yes, they did.

18 Q And the argument that you would hope -- or the
19 position you would hope the jury would reach is that
20 everyone gets confused about stuff sometimes, right?

21 A Yes.

22 Q It wasn't necessarily that they were deliberately
23 lying, just confused, right?

24 A Depends what you are asking about. If you are
25 referring to the witness we called down here, and I

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1 forget her name, who was a dumpster fire of a witness,
2 but if you would clarify perhaps what you are getting
3 at.

4 Q The State's job in closing arguments is to
5 summarize the pieces of the puzzle that fits their
6 theory of the case, correct?

7 A Yes.

8 Q And although this particular thing may not seem
9 to be one of the big pieces of the puzzle, isn't it
10 valuable to the defense if you were able to establish
11 that -- you know, object and say, you know, objection,
12 that is not what the record reflects, Your Honor, and
13 at least draw to the jury's attention that the
14 Solicitor is not exactly right about everything he's
15 claiming in his closing argument?

16 A No question. Have done that in other trials; did
17 not do it in this instance.

18 Q Okay. Thank you.

19 A Yes.

20 Q Let's talk about telephone calls for a minute.
21 Essentially, your client called his wife, and there is
22 some discussion where he's asking, Did I come back --
23 did I go back to the bar that night?

24 A Yeah.

25 Q He's trying to get her to help him remember,

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1 because they're telling him and people are telling him
2 that he went back, and he said, Did I go back there
3 that night, and she says words to the effect of, no,
4 and if you say that now, I'm going to jail?

5 A Not to the effect, that is exactly what she said,
6 yeah.

7 Q In his closing argument, the State says that he
8 told her -- pardon me, that he characterized the wife's
9 testimony and statements on the recording as saying she
10 could get, quote, caught for perjury if he said that?

11 A Those are the words she used, the Solicitor used.

12 Q All right. I understand. That, again, is 479,
13 21 through 480, Line 11.

14 Now, she had given a statement saying that he
15 didn't go there that night, right, he stayed home?

16 A That's correct.

17 Q And there is no indication from anything that
18 that is not what she believed to be the truth, is
19 there?

20 A No.

21 Q In fact, it is consistent with what she testified
22 to at trial?

23 A Correct.

24 Q Now, then, she says in a conversation with her
25 husband, You say that now and I'm going to jail for

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1 perjury, could that also be interpreted just as easily
2 as, you know, you say that and they are going to think
3 I lied to them and charge me with perjury?

4 A I think it was clear from the tone and when you
5 played the recording. Yes, I agree with you.

6 Q So at no point did she say, You open your mouth
7 and say that, I'm going to be caught lying, did she?

8 A No.

9 Q She didn't say anything that implied, even
10 indirectly, that she willfully not told the truth to
11 the authorities?

12 A I would agree with you. It was seen with
13 people's different viewpoints -- the Solicitor heard
14 very different things, I can tell you, but I agree with
15 you.

16 Q So you agree that his characterization of her
17 having said that she could get caught for prejudice was
18 not a fair argument from facts and evidence?

19 A I wouldn't agree with that.

20 Q Let me differentiate.

21 A In my mind, it was an interpretation. I heard
22 one thing in tone, and agree with your
23 characterization. It was certainly -- in bringing that
24 out, the Solicitor certainly sought to characterize it
25 in her testimony and closing a different way. I saw it

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1 as her interpretation of the evidence, so I would say
2 that.

3 Q I'm not suggesting a Solicitor would not have an
4 opportunity to argue, I submit to you this recording
5 demonstrates she's afraid she's going to be caught
6 lying, or something to that effect.

7 A Right.

8 Q But when she says to the jury that it isn't every
9 day you hear someone -- you have a recording where
10 someone is admitting they are going to be caught
11 committing prejudice, isn't that a different issue in
12 the sense it implies she's admitting prejudice?

13 MR. SCHMECKPEPER: Object. It is argumentive and
14 asked and answered I think three times now.

15 MS. SHURLING: Sorry, Your Honor, it just
16 appeared that he didn't understand the question.
17 There was a distinction.

18 A I didn't see it that way. I understand your
19 question. I didn't see it that way. I saw it as her
20 interpretation and her characterization of things that
21 had been in evidence. So I get your point, I do see --
22 to me, I guess it is a distinction without a reference
23 whether that is true. The judge can see it, but that
24 is how I saw it at the time.

25 Q (MS. SHURLING) That is fair -- I don't mean

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1 fair, but adequately explained. So we have beaten
2 this horse to death, but you didn't object to the
3 Solicitor having referred to the interview at the
4 children's center and the interviewer as forensic in
5 nature throughout the trial, when he did it in closing
6 argument, you didn't object?

7 A I did not.

8 Q Also in the closing argument is arguing against
9 her having a motive to lie. He says, Not only does she
10 not have a motive to lie, she was scared to death that
11 she was going to get in trouble about this and that she
12 was afraid, her mother was, quote, going to kill her,
13 she was scared, Page 484, Line 20 through 25. Was that
14 the testimony at trial?

15 A Well, the record will be clear about that. I
16 don't recall any testimony to those specific words, I
17 was scared to death. I think that was your phrase. It
18 was throughout the testimony of the girl that there was
19 fear, but those were not the words used in testimony.

20 Q Was there any testimony that her mother was going
21 to kill her?

22 A Literally, no.

23 Q In fact, there was testimony that the mother
24 would kill somebody else, but not her?

25 A I believe that the testimony -- taken in a big

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1 picture -- portrayed that the girl had fear of
2 repercussions. I wouldn't have characterized it that
3 way.

4 Q Going back to the cell phone records that we
5 submit were so important, the Solicitor argued that she
6 already deleted some things, Page 480, Line 3 through
7 5. Other than the State's expert testifying to how
8 difficult it was to recover deleted items, was there
9 any testimony at this trial concerning who was
10 responsible for deleting all of these E-mails off of
11 this file?

12 A No.

13 Q So that is another matter not in the record
14 argued by the State in closing, right?

15 A Yes.

16 Q And we've covered the fact that you didn't object
17 during questioning to the characterization of the
18 record of both the defendant and his wife as a felony,
19 and you didn't, likewise, object during State's
20 argument, and we've covered that-- excuse me.

21 A It's all right.

22 Q Are Solicitors supposed to give their opinion
23 about the fact that the witnesses are lying?

24 A No.

25 Q Would you take a look at the closing argument on

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1 Page 480, Lines 3 through 5. You can put whatever spin
2 you want on it, they are lying to you. Did you
3 consider objecting to that as a statement of the
4 prosecutor's personal view, that they were not being
5 truthful?

6 A I did not object.

7 Q At the time of this trial was assault and battery
8 of a high and aggravated nature an impeachable offense
9 for a defendant?

10 A Yes. It carried a possible punishment of more
11 than a year.

12 Q That applies to non-defendant witnesses?

13 A It applies to any witness. A defendant who has a
14 record of something that could get them punished by
15 more than year of prison could be cross-examined with
16 that.

17 Q The rule will speak for itself.

18 MS. SHURLING: I'm addressing 404 of course and
19 its relevant components, Your Honor, and more
20 specifically 609, which refers to crimes carrying more
21 than one year being used for impeachment for
22 non-defendant witnesses.

23 A I will say categorically, in 24 years of
24 practice, and maybe judges have had it wrong for 24
25 years, but that always has been the practice of a

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1 testifying defendant, that that rule encompasses. A
2 witness includes a testifying defendant. I get the
3 separate rule for non-defendant witnesses, but the
4 practice has been -- since 1990 when I started -- that
5 if you are a defendant who testifies, you are a
6 witness, and you are under that rule that you can be
7 impeached with a conviction that carries a possible
8 punishment of a year or more, and ABHAN absolutely had
9 more than a year punishment at that time.

10 Q (MS. SHURLING) And the supreme court regularly
11 reminds me when I'm wrong too, but I'm just addressing
12 the language of the rule.

13 A I understand.

14 Q Let's talk about Allegation 34, specifically 510,
15 Line 6 through 513, Line 1. The Solicitor brings
16 before the Court information that he's got a prior
17 record for ABHAN and breach of trust, and we think it
18 is real important that the Court knows that that ABHAN
19 was a situation involving a minor and inappropriate
20 sexual behavior with a minor involving him and his
21 wife, and that is one reason we're really concerned
22 about this case and asking for harsh punishment; do you
23 remember all of that?

24 A Yes, I do.

25 Q In the discovery materials you were provided,

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1 were you not, with the records from the prosecution
2 concerning the name of that prior charge, weren't you?

3 A I got the NCIC which showed the original arrest
4 charge as well as the disposition.

5 Q You actually had all of the discovery, right?

6 A Yes.

7 Q And gave me a copy of it, right?

8 A Yes. I didn't recall that I had all of those
9 but I remember that.

10 Q Thank you, by the way.

11 MS. SHURLING: Your Honor, if we could have a
12 moment's indulgence, the State had not seen that
13 particular document.

14 THE COURT: Okay.

15 MS. SHURLING: I apologize, I thought we sent him
16 everything.

17 (A pause in the proceedings.)

18 MR. SCHMECKPEPER: I'm looking at this for the
19 first time. Are you trying to introduce this?

20 MS. SHURLING: Probably.

21 MR. SCHMECKPEPER: My only objection is this is
22 referring to Tabitha Love, the applicant's wife, and I
23 understand Mr. Love has implicated in the
24 investigative report --

25 MS. SHURLING: There is another one in here I'll

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1 find for you.

2 MR. SCHMECKPEPER: I just haven't seen it before,
3 so I'm not sure, really, whether this is the same
4 charge we're talking about right now.

5 MS. SHURLING: It is. I'll clear it up in a
6 moment. Your Honor, I may need to dig in here and
7 find those records over -- whenever we finally get to
8 take a break, if I may. One moment, please. May I
9 approach?

10 THE COURT: Certainly.

11 MS. SHURLING: Thank you.

12 Q (MS. SHURLING) I'll hand you a couple of
13 documents from the discovery materials.

14 A Right. (Witness examines document.) Yes.

15 Q You recall seeing those?

16 A I recall the -- yes, I do.

17 Q Okay.

18 MS. SHURLING: Your Honor, I would ask that these
19 be introduced as Applicant's 1 and 2.

20 MR. SCHMECKPEPER: No objection.

21 (Applicant's Exhibit 1 and 2 marked and
22 admitted.)

23 Q (MS. SHURLING) Who knows, I might run for
24 president one day and I don't want to be accused of
25 not being sympathetic with child sex victims, but the

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1 records -- the police investigative reports that were
2 just marked -- indicate that the incident in Lexington
3 ton involved a young woman who was, what, under 17?

4 A Yeah. I'm not sure -- I didn't read it word for
5 word. I'm not sure that they gave us an age, but, yes,
6 under 17.

7 Q Turned out to be under 17?

8 A Turned out to be under 17, correct.

9 Q That had met the accused, the defendant and his
10 wife, at a bar and ended up going home with them for a
11 three-some?

12 A Correct.

13 Q And, subsequently, when someone found out about
14 it, your client and his wife found out she lied about
15 her age?

16 A Yes.

17 Q And she was not 17?

18 A Right.

19 Q And they were charged initially with criminal
20 sexual conduct with a minor, and it was reduced to
21 ABHAN?

22 A Yes.

23 Q Can we agree that that is a somewhat different
24 portrayal of the prior record of the defendant than the
25 Solicitor was able to give the judge in sentencing?

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1 A I would have to look. Let me look quickly at
2 exactly what she said.

3 Q Do you need a page number?

4 A No. It is referenced, 510.

5 Q I'll hand them so the Court can see them and get
6 a copy. Can you tell me specifically -- I'm not going
7 to try to get -- I'm sorry. The reality is that the
8 State basically said he had been in trouble for
9 criminal sexual conduct with a minor before and it got
10 reduced to ABHAN, and that is why we are so worried
11 about him getting an appropriate penalty this time,
12 words to that effect?

13 A Yes.

14 Q I'm not suggesting that what the defendant and
15 his wife were accused of is not criminal, per se.
16 Obviously if she's underage, it doesn't matter how it
17 happened, it happened. I get that, but someone under
18 the age of 17 socializing and engaging in sexual
19 behavior with adults who were at the time very little
20 older than her, that is very different from a predator
21 behavior involving young children, isn't it?

22 A Yes. I did not -- no way defending the
23 Solicitor, but I didn't take her comments that way. I
24 don't think she went out of bounds. You are correct,
25 she didn't go into the details, so I didn't object. I

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1 did not see it as anything that was not factual, and I
2 figured the judge could read between the lines, between
3 what was charged and what was pled to, but I didn't
4 object.

5 Q How? Without filling in the pieces, how would
6 the judge have reached that conclusion if you didn't
7 fill them in?

8 A I'm not talking about the specifics, just the
9 fact that my experience is when the State has CSC with
10 a minor, and they feel they have a strong case, no
11 problems with the witness or evidence, they don't budge
12 with that very often, so that is what I meant by that.

13 Q To be fair, I didn't say that the Solicitor
14 mischaracterized the evidence, did I?

15 A No, you didn't.

16 Q Sometimes what you don't say is as important as
17 what you do, right?

18 A Can be, yes.

19 Q And in this case all the Solicitor provided the
20 judge was that the original charge was criminal sexual
21 conduct with a minor, and I don't believe it was even
22 said what degree --

23 A Did not.

24 Q And that it was reduced to ABHAN, correct?

25 A Yes. Yes.

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1 Q As you just very accurately pointed out, there
2 was a lot of reasons why charges could be reduced?

3 A There are.

4 Q Problems with the State's case?

5 A Yes.

6 Q Contaminated evidence, uncorroborated victim?

7 A Long list. That is all true.

8 Q So there could be any number of reasons other
9 than it not being of a certain ilk why the Solicitor
10 would reduce a charge?

11 A True.

12 Q And without being provided any further
13 information concerning the facts and circumstances
14 involved in that charge, or those charges, the Court
15 had no way of knowing. All they knew -- all the judge
16 was provided was that this was not the first time this
17 man had been accused of sexually messing with a child?

18 A Which was true. The problem was he didn't know
19 -- I know what you are getting at. I don't know why
20 they reduced that charge. It may not have been because
21 there was a problem. It might not have been -- for all
22 I know, the Solicitor who agreed to that plea bargain
23 in Lexington felt that he didn't have a problem with a
24 witness, that it wasn't a credibility issue. I don't
25 know. I don't think it was really worth reminding the

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1 Court that my client, you know, had allegations of
2 being with a young woman consensual or not. Consent is
3 irrelevant, but consent was an underlying theme in his
4 trial in Georgetown. The jury came back with a
5 question even, asked to be recharged on lewd act, does
6 consent excuse or is it a defense to a lewd act. They
7 clearly saw -- and I having watched the whole trial --
8 that -- I think they believed that that young girl was
9 a willing participant in everything. Unfortunately,
10 not relevant. I did not see any points to be gained by
11 reminding the Court or suggesting that what happened in
12 Lexington was okay. I just didn't see any point in it.
13 I didn't think that the Solicitor was being
14 disingenuous or factually inaccurate. I just didn't
15 see a point being gained to emphasize that my client
16 gets in trouble with relationships with underaged
17 girls.

18 Q This incident allegedly occurred June 16 -- in
19 June 2004?

20 A Yes.

21 Q Which was six years earlier than the incident
22 alleged with the victim in this case, correct?

23 A Yes.

24 Q And in this case, it was alleged that the victim
25 was under 17?

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1 A As I recall, no indication of how old she was.
2 My impression is that she wasn't 13 or anything, but
3 under 17.

4 Q Would it not have been imperative, if you hoped
5 to get anything less than the maximum for the one
6 offense the jury found him guilty of, to say, at least,
7 Your Honor, I'm not condoning the behavior, but I think
8 it is important that I point out that the other
9 incident involved someone who turned out under 17 in a
10 situation starkly different, and if necessary, provide
11 him -- give him what the State gave you in discovery?

12 MR. SCHMECKPEPER: Object, asked and answered.

13 A I don't mind. I would like to. I read that
14 differently than you do, I would say that.

15 THE COURT: Sustained the objection.

16 A Sorry.

17 MS. SHURLING: Can I have one moment with my
18 client?

19 THE COURT: Okay.

20 (A brief pause in the proceedings.)

21 MS. SHURLING: No further questions. Thank you.

22 MR. SCHMECKPEPER: Your Honor, I apologize, could
23 we take a brief recess?

24 THE COURT: I think so. Five minutes.

25 (A recess was taken. The following was had out of the

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1 presence of Mr. Love.)

2 MS. SHURLING: Would Your Honor allow us to
3 submit written Miranda instead of closing arguments
4 covering everything.

5 MR. SCHMECKPEPER: I have no problem with that,
6 Your Honor.

7 THE COURT: 10 days and 10 days; otherwise, sit
8 here for two months, responses and replies.

9 MS. SHURLING: If it weren't coming up
10 Thanksgiving in short order, I would be able to do
11 that. Is there any way we could make it after
12 Thanksgiving, which I don't have my calendar with me,
13 but like 20 days instead of 10?

14 THE COURT: 15 days.

15 MS. SHURLING: Does that get me after
16 Thanksgiving?

17 THE COURT: Tuesday after Thanksgiving would be
18 the 29th.

19 MR. SCHMECKPEPER: I can do it whenever.

20 THE COURT: You can respond this week, can't you?

21 MS. SHURLING: I have a hearing tomorrow and at
22 a maximum security prison all day Friday.

23 THE COURT: Okay.

24 MS. SHURLING: Thank you, Your Honor, very much.
25 If you can bring my client back up, can I have a word?

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1 Can I be allowed one brief follow-up question to trial
2 counsel?

3 THE COURT: One brief follow-up question, okay,
4 over objection.

5 MS. SHURLING: There is something I forgot, I
6 admit.

7 Q (BY MS. SHURLING) You were not the original
8 attorney in this case, were you?

9 A I do not recall. That could be, I don't recall.

10 Q And, I'm sorry, I guess it is two. Did you have
11 adequate time between when the previous lawyer was
12 relieved and you were appointed to prepare for this
13 case?

14 A I felt that I did.

15 MS. SHURLING: No further questions, Your Honor
16 thank you.

17 THE COURT: Cross-examination.

18 CROSS-EXAMINATION

19 BY MR. SCHMECKPEPER:

20 Q Good morning, Mr. Fox.

21 A Good morning.

22 Q Forgive me if I jump around, I'll hit as much as
23 possible. Let's start from the beginning. I think :
24 Ms. Shurling asked you briefly, if you could describe,
25 roughly, your experience in criminal law.

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1 A Graduated from University of South Carolina
2 School of Law and passed the bar in November of 1990.
3 I clerked for a year with Judge Jim Steven in
4 Spartanburg, circuit judge, came back and in private
5 practice about two years.

6 Q Criminal law?

7 A It was not. Criminal law started January of
8 1994, is when I began working as a public defender in
9 Georgetown as well as having a private practice that
10 was devoted 90 percent, plus, to criminal.

11 Q This wasn't your first felony trial?

12 A No.

13 Q This wasn't your first criminal sexual
14 conduct/lewd act trial?

15 A No.

16 Q Let's talk about your representation of the
17 Applicant. I know there is some question whether or
18 not he had a prior attorney, but, roughly, how far
19 ahead of this trial did you represent him? How much
20 time did you have between representing him and starting
21 of the trial?

22 A I don't have the exact date, but I believe
23 January of 2012, and we were in trial by April.

24 Q And just to make sure it is in the record, what
25 were the allegations in this case? I know it was

J. ERIC FOX - CROSS-EXAMINATION

1 criminal sexual conduct and lewd act?

2 A Yes.

3 Q What was the factual allegations?

4 A There were multiple -- victim alleged multiple
5 events that would have arisen to those. There was kind
6 of two groups, in my mind. There might have been two
7 or three incidents, but the girl and Mr. Love would go
8 in a boat on the river fishing and different things,
9 fishing tournaments and things they would have on the
10 weekends. Sometimes it was the two of them and
11 sometimes with other people. She alleged that on, I
12 think it was, three separate -- maybe two separate
13 occasions where he committed sexual battery, including
14 digital penetration with his finger. So there was that
15 group, and then the incident you heard -- there was a
16 New Year's Eve party and then 9/11 kind of -- not
17 celebration, but memorial. So there was like three
18 groups of events.

19 Q To take a step back for a moment, setting aside
20 the allegations of sexual abuse, in this case what was
21 the relationship of the Applicant's family and the
22 victim's family?

23 A Friends.

24 Q So the victim and the Applicant had a
25 relationship other than this sexual abuse?

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1 A They did.

2 Q Could you describe what -- you mentioned fishing
3 tournaments, did they hang out together?

4 A Yeah. The families hung out, cookouts and New
5 Year's Eve parties, go to restaurants and bars, fishing
6 tournaments. So the adults were friends, and then,
7 honestly, I don't recall if Mr. Love had children, but,
8 again, the families were friendly with each other.

9 Q Would it be fair to say that the State's case,
10 more or less, was that the Applicant took advantage of
11 the relationship with the family to find opportunities
12 to molest the victim?

13 A Yeah, that was their overarching theory, yes.

14 Q You testified about -- a lot about trial
15 strategy, in terms of specific objections, which ones
16 you made or didn't make and how the trial was going.
17 Talk about at the outset of the case, what was your
18 theory or strategy of the case?

19 A Innocence. It wasn't going to be one of these
20 they-can't-prove-the-elements kind of thing. So Ms.
21 Shurling is absolutely right, the creditability of the
22 witnesses, particularly the little girl, *Victim*, and
23 Mr. Love, because he did testify. It was going to be
24 -- that was it. There was a lot of testimony -- well,
25 the short answer is innocence.

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1 Q Now, you also testified and you've tried cases
2 before, would it be fair to say that at least you think
3 you know how to read a jury to some extent?

4 A I flatter myself I can, but you definitely get,
5 as in any trial, kind of the temperature of the room.
6 I mean, you get the tone from the Solicitor, the
7 attitude from the judge, the posture of jurors, and,
8 yeah, you kind of get -- sometimes it is very, very
9 hostile for your client, sometimes it's more
10 sympathetic and mostly it is in between.

11 Q Does that form how you try a case and objections
12 you make?

13 A Without a doubt.

14 Q With this case specifically, how did you feel the
15 jury was going?

16 A I felt some of the things we talked about today
17 was outside noise. It was relevant, phone records and
18 things, no question that there were issues. One thing
19 I know for sure is you never can tell what a jury is
20 going to seize on. That being said, I felt generally
21 it was going well. I didn't think the impact of the
22 girl's friend or the other witnesses was anywhere near
23 what the State thought they would be. I thought the
24 girl was -- she was a nervous, young girl.

25 Q You testified about the phone records, and the

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1 rest of the testimony, the pain pills and whether or
2 not you should have impeached the victim and her friend
3 about the Vicodin, just to put these issues into
4 context, what did the Vicodin and the phone records
5 have to do with this case and the victim disclosure?

6 A Well, they didn't. And I get the argument why
7 they shouldn't have even been discussed.

8 Q How did they come in, or how did they relate when
9 the victim disclosed?

10 A It came after. The pain pill she was discovered
11 with, the one friend had given her, and then there was
12 -- around this time, and I don't remember the exact
13 time frame, but going on the roof to threaten to kill
14 herself, and then the disclosure came after that.

15 Q Would it be fair to say that the victim was
16 caught with pain pills by her parents?

17 A Yes.

18 Q And afterwards the victim was placed on
19 restriction and phone taken away?

20 A Yes.

21 Q And during the course of that restriction, the
22 victim's mother decided to look at her phone records?

23 A I believe, yes. I think that was after all of
24 this, restriction and so forth, and was looking at the
25 records.

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1 Q As a result of the phone records, did she notice
2 anything suspicious?

3 A She said she did. You know, she said there was
4 all this contact between them, and she claimed to have
5 known Mr. Love's number. They were family friends.
6 There wasn't much doubt that she probably recognized
7 that number, and so she thought there was an unusual
8 amount of activity, regardless of the number, between
9 her daughter and Mr. Love, at least the phone number
10 that was assigned to him.

11 Q Seeing that, she confronted her daughter, Why are
12 you texting so much back-and-forth with a 30-year-old
13 man, and she disclosed it at that point?

14 A Yeah, I don't recall the time line, but I don't
15 recall that the daughter said right then, okay, here is
16 what is happening.

17 Q Looking at the Vicodin, I think you just
18 testified as to reading the jury and what your tragedy
19 was and outside noise. Let me ask you this, if you
20 thought grilling the victim and her friend about
21 Vicodin would have helped your client, helped their
22 credibility or your client's creditability, would you
23 have addressed it?

24 A Yes.

25 Q Go back and talk about closing arguments and

J. ERIC FOX - CROSS-EXAMINATION

1 where you thought the jury was at the time of closing
2 arguments.

3 A Creditability was still going to be the issue.
4 Again, there is no physical evidence in this case, and
5 I'm not sure there would have been anyway. Under the
6 allegations that were made, I'm not sure there would be
7 physical findings, but you didn't have that or an
8 eyewitness or anything like that. You know, there was
9 no rape kit. Anyway, creditability that hadn't
10 changed. The focus of the trial took a shift towards
11 the end when the phone call between Mr. Love and his
12 wife from the jail the night before came in, and this
13 other witness came up. So the focus seemed to change
14 mid-trial, to me, but the creditability was still the
15 bottle line.

16 Q What were the contents of the phone conversation?

17 A Just exactly as Ms. Shurling asked me awhile ago.
18 Mr. Love is trying to -- really, the trial kind of
19 ended up focused on the events at 9/11, this
20 commemoration they were going to go to, and then go to
21 the bar and watch a ball game afterwards. That was in
22 2010, so a year or so before. There was discussions
23 about the incident on the boat, but it seemed as if the
24 Solicitor shifted, and all their focus became to all
25 those things that go into a trial, what does the jury

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1 seem to be getting, what is our best chance. It seemed
2 to shift all to this 9/11, and there was this witness.
3 I managed to talk myself right out of remembering what
4 the question was. You are talking about closing
5 argument?

6 Q Where you thought the jury was.

7 A I felt optimistic. The trial took a turn and
8 there was still a creditability issue.

9 Q I think during Ms. Shurling's testimony of you,
10 the topic of your closing argument came up, and the
11 question was why didn't you emphasize the fact that the
12 victim had a reason to lie and that should have been
13 impressed. If you could express to the Court your
14 theory of the closing argument to the jury.

15 A Well, you know, again, I think the tone that was
16 -- that is one explanation for sure, the Vicodin and
17 the fear of punishment and all of that. That is an
18 explanation and it is a plausible one. I do think
19 sometimes it is a trap for a lawyer to go there.
20 Juries seem to put the burden of proof on you. I don't
21 recall having that exact thought process in this case.
22 My thought was I don't know why -- like I told the
23 jury -- I don't know why she lied, little girls lie
24 sometimes for their own reasons, and I don't have to
25 prove to you why she would lie, but look at the other

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1 things.

2 Q Is it fair to say you expressed to the jury that
3 you can't think of this minor child victim as though
4 she's a rational adult?

5 A I did, yes. Right.

6 Q If you would have thought at the time of the
7 trial, in reading the jury, that attacking her with
8 Vicodin would have been more strategy, would you have
9 pursued that instead?

10 A Well, yes, I would hope so. Yes, I think I would
11 have.

12 Q Your term, I think it was "background noise", you
13 kind of set that aside because you didn't think there
14 were many points to be gained there. Where do you
15 think the most points to be gained in this trial was,
16 in terms of testimony?

17 A It all came down to the credibility of that girl.
18 Certainly one avenue to attack her creditability and
19 motive to lie would have been that pill, but I didn't
20 think it was a believable case. In terms of closing
21 argument, the trial we started with and ended up with
22 was fairly different. The allegations were the same,
23 but you had the noise from the phone call from the
24 jail, this witness who came down to supposedly destroy
25 his alibi about not being where he said he was on 9/11,

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1 and those had to be addressed. They took up space. I
2 couldn't ignore them. Those were not things I would
3 have anticipated on Monday when we started, so that is
4 part of the reason why the closing argument went the
5 way it did.

6 Q I'll go through the allegations to make sure I
7 hit on everything, so I apologize and beg the Court's
8 indulgence, just want to make sure I hit everything.
9 There was a lot of questions about opening and closing
10 arguments, whether the Solicitor said something that
11 wasn't consistent with the facts. Do you think it is a
12 fair characterization of the record that the judge told
13 the jury what was and wasn't in evidence?

14 A Yes.

15 Q And the judge told the jury that lawyers are not
16 witnesses, and their arguments are not evidence?

17 A Yes, he did.

18 Q And, again, turning your attention to 490, is it
19 fair to say that the judge said, Jury memories control
20 over lawyer memories?

21 A He did.

22 Q So if the Solicitor said something incorrect
23 factually, the judge made it clear to the jury that the
24 jury is the ultimate finder of fact, and they have the
25 controlling memories in terms of finding fact?

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1 A I think he did.

2 Q There are allegations concerning hearsay, and you
3 specifically failed to object to things that might not
4 necessarily have been covered by the exception, time
5 and place. I think specifically it was the Applicant's
6 name was included, is it your understanding in the
7 hearsay rule that they can say time and place, but not
8 the name of the accuser?

9 A Honestly, off the top of my head, I can't tell
10 you. I know it is limited to time and place. At that
11 time, trying that case, I would have been boning up
12 much more on the applicable rules, but the record is
13 clear I did not object.

14 Q But the Applicant was on trial and being accused
15 of committing these crimes?

16 A He was.

17 Q So the jury didn't need someone else to
18 corroborate the fact that he was the one being accused
19 of committing these crimes?

20 A Identity was not an issue.

21 Q Concerning the fact of the obligation of the
22 juror that was napping, and I think you testified to
23 this, but I want to emphasize and point out or see if
24 you remember whether or not the judge issued any sort
25 of curative instruction telling the jury they need to

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1 pay attention or remain alert?

2 A I don't recall. The record is clear, but I don't
3 recall whether he issued an admonishment or not.

4 MR. SCHMECKPEPER: I call the Court's attention
5 to Page 103 to 104.

6 Q (MR. SCHMECKPEPER) The judge specifically spoke
7 to one juror about the allegations that he had been
8 sleeping, what did the juror say?

9 A I think he said he rested his eyes and he was
10 able to -- I didn't have any indication that he hadn't
11 heard anything, but he was there for awhile there with
12 his eyes closed, for sure.

13 Q And the judge heard him say that and found him to
14 be credible?

15 A He left him on the jury.

16 Q And even specifically made a creditability
17 finding.

18 A Yes.

19 Q Concerning bolstering and the allegation that you
20 were ineffective for failing to object to the forensic
21 interviewer being referred to as a forensic
22 interviewer, what was the job title of the forensic
23 interviewer?

24 A I honestly don't recall what her official title
25 or title was, self-claimed title was.

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1 Q But she conducted a forensic interview, fair to
2 say?

3 A She conducted an interview at Children's Recovery
4 Center, what we call that now -- she definitely
5 conducted an interview based on her training.

6 Q At the time of the trial, did you find anything
7 objectionable about the State referring to her as a
8 "forensic interviewer"?

9 A Not under the state of law at the time -- no.

10 Q I understand there is some argument that her
11 testimony was bolstered by calling her a "forensic
12 interviewer," and referring to her at one point as a
13 "doctor" or "therapist." I guess my first question is,
14 do you remember or would the record reflect whether or
15 not she offered any opinion testimony?

16 A She did not.

17 Q What did she testify to?

18 A Basically, the fact that she conducted the
19 interview.

20 Q And there was a disclosure made, and the time and
21 location of the disclosures?

22 A Yes.

23 Q I think you were asked at one point whether or
24 not you should have elicited testimony from the
25 Applicant that he denied to law enforcement that he

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1 committed these crimes; did the applicant testify in
2 this case?

3 A Yes, Mr. Love did testify.

4 Q Did he deny committing these crimes to the jury?

5 A He did.

6 Q And did anyone testify that he at one point
7 admitted to law enforcement to committing these crimes?

8 A No, there was no confession.

9 MR. SCHMECKPEPER: Beg the Court's indulgence.

10 Q (MR. SCHMECKPEPER) Briefly, turning to
11 sentencing, you talked about this a lot, so I want to
12 clarify for the record. The Solicitor said Applicant
13 had a prior record of ABHAN and it involved sex with a
14 minor?

15 A Yes.

16 Q And the evidence presented today reflects the
17 Applicant had a prior record of ABHAN that involved sex
18 with a minor?

19 A Yep.

20 Q Was there anything objectionable about that, that
21 you recall?

22 A Not in my mind.

23 Q At a certain point there was testimony and
24 questioning about the victim being on a roof,
25 apparently she had a rough home; that testimony was

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1 before the jury, is that fair to say?

2 A I don't recall if there is any testimony about
3 the home life. I mean, yes, she was on the roof. I
4 don't recall whether there is any testimony about her
5 home situation.

6 MR. SCHMECKPEPER: No further questions.

7 MS. SHURLING: Your Honor, it is my understanding
8 of the scope of the materials before the Court that
9 the full record of the trial, as well as exhibits that
10 were introduced during the trial are part of the
11 record, but for the convenience of the Court, I have
12 referred to exhibits to -- State's Exhibits 10 and 11
13 and have copies of each of those for Your Honor.
14 Simply for convenience should the case go up on
15 appeal, I would ask to introduce them as exhibits here
16 today.

17 MR. SCHMECKPEPER: My understanding is they are
18 part of the record, otherwise, I'm not sure it is
19 appropriate to introduce them on redirect.

20 MS. SHURLING: All that it is going to do is
21 enable me to give them to the Court should the
22 occasion need to come up for an appeal readily as
23 items demonstrating they were before the Court.
24 Clearly the Court knows they were technically part of
25 the record, I just want to be able to establish that

J. ERIC FOX - REDIRECT EXAMINATION

1 Your Honor had physical access to them.

2 THE COURT: Overrule the objection.

3 (Applicant's Exhibits 3 and 4 marked and
4 admitted.)

5 THE COURT: Let me interrupt you. You previously
6 gave me the same thing in color (indicates).

7 MS. SHURLING: Yes, sir. I'm sorry, I was giving
8 you one for your law clerk to have as well. If you
9 don't need two copies, I'll pick the other back up.

10 THE COURT: I'm fine. Go ahead.

11 MS. SHURLING: Thank you.

12 REDIRECT-EXAMINATION

13 BY MS. SHURLING:

14 Q With regard to whether or not you thought it
15 prudent to -- I believe Respondent's characterization
16 was attack the girl about the Vicodin -- it was, in
17 fact, part of the story of the case that was before
18 them, that she had gotten in trouble over a discovery
19 of Vicodin, correct?

20 A Yes.

21 Q But the testimony of the pseudo step-father,
22 Mr. Carter, and the girl's biological mother was that
23 she had gotten in trouble for having one Vicodin pill,
24 remember that?

25 A Yes.

J. ERIC FOX - REDIRECT EXAMINATION

1 Q And subsequent testimony, however, of her best
2 friend and even admissions of the victim in her own
3 testimony established that this was hardly a problem
4 over one pill, that she had been taking Vicodin and
5 getting it from other sources other than her best
6 friend as well, chiefly her stepfather's prescriptions?

7 A She didn't say that, but there is no indication
8 that the mother of the family knew that. So you are
9 right, the friend did say that, but there was no
10 indication or testimony that more than one pill came to
11 the attention of the family, I don't believe.

12 Q Well, there was testimony on the part of the
13 mother that they didn't learn about her Vicodin use
14 until after the one pill was discovered; is that not a
15 more accurate statement?

16 A Yes, that's correct.

17 Q Okay. Now, the records do, in fact, reflect that
18 the mother after that event said she went and looked up
19 cell phone records, right?

20 A Yes.

21 Q And then we have the copious amounts of testimony
22 we talked about concerning the volume of calls back and
23 forth between the two people, right?

24 A Yes.

25 Q Now, there was testimony from the best friend --

J. ERIC FOX - REDIRECT EXAMINATION

1 and to a lesser extent the victim -- concerning the
2 mother and step-father arguing and her being upset
3 about that on occasion, the record will speak for
4 itself on that, but did you consider it necessary to
5 develop that theme in order to explain her behavior as
6 opposed to the inference that her bad behavior was
7 likely related to her being an abuse victim?

8 A Well, I didn't. I honestly don't recall what I
9 was thinking at that moment, but I didn't pursue that,
10 but the record is clear.

11 Q And there was questions about the exact nature of
12 the testimony from the examiner -- I won't call her a
13 forensic interviewer, but the examiner, the interviewer
14 from the Children's Center, she, in fact, testified in
15 a manner that made it very clear that the girl was
16 saying that these events, New Year's Eve, on the boat,
17 9/11 involved the defendant, correct?

18 A Yes.

19 Q The other people who were allowed to testify that
20 the child had not only reported being assaulted, but
21 identified the Applicant as the person who had done
22 these things to her, were all people with potential
23 biases, correct?

24 A Some of them, yes, for sure.

25 Q Well, let's go through them.

J. ERIC FOX - REDIRECT EXAMINATION

1 A The mother.

2 Q Step-father --

3 MR. SCHMECKPEPER: Object, outside the scope of
4 cross-examination.

5 MS. SHURLING: Your Honor, he acknowledged he was
6 questioned about creditability being an issue.

7 THE COURT: Go ahead. Overruled.

8 MS. SHURLING: Thank you.

9 Q (MS. SHURLING) Step-father -- or pseudo
10 step-father, correct?

11 A Yes.

12 Q Would be on the child's side, is my point?

13 A He clearly was there for the child, yes.

14 Q The mother, biological mother, that goes without
15 saying, and the other girl who identified herself as
16 "best friend," right?

17 A Right.

18 Q So, the so-called forensic interviewer was the
19 only person who was testifying to prior reports that
20 the Applicant was an individual who had abused her, was
21 the only person that the jury might have perceived as a
22 neutral provider of information, correct?

23 A Potentially, yes.

24 Q So to higher her stature, and the more she's
25 viewed as an expert or someone with special skills and

J. ERIC FOX - REDIRECT EXAMINATION

1 training, the more important her testimony may become
2 in the eyes of the jury, right?

3 A Potentially. For sure.

4 Q Okay. You were asked about the event, the New
5 Year's Eve incident and the prior incidents on the boat
6 involving French kissing and touching her breasts over
7 and under her clothing, and attempting in one scenario
8 to put his hand down her pants, maybe, and she says she
9 stopped him; do you recall that?

10 A I do.

11 Q So the escalating event, the event the night of
12 9/11 was the only one where there was even an
13 allegation of anything that would qualify as a sexual
14 battery under our definition of battery?

15 A Correct.

16 Q With regard to the various things I pointed out
17 to you, about the State's closing argument, isn't it
18 true that there is a large body of case law very
19 specifically saying prosecutor's may not argue matters
20 not in evidence?

21 A Yes.

22 Q And Respondent asked you about the fact that the
23 judge, in fact, charged the jury that arguments aren't
24 evidence, and you have to use your own memory, right?

25 A He did, yes.

J. ERIC FOX - REDIRECT EXAMINATION

1 Q And that is pretty much a long-standing jury
2 instruction, isn't it?

3 A During my practice, yes.

4 Q Okay. But isn't it true even when such a charge
5 is given, a large body of case law found that --

6 MR. SCHMECKPEPER: Object to the question. I
7 think she's asking the witness to testify as matter of
8 law.

9 MS. SHURLING: I was asking if he was aware at
10 the time he didn't make an objection that it was a
11 principal of law.

12 THE COURT: Overruled.

13 A Yes.

14 Q (MS. SHURLING) Hasn't the court found on
15 numerous occasions, both U.S. Supreme Court and our
16 supreme court, that juries, when they hear a Solicitor
17 say something that is not based on the record, they
18 are likely to infer that he knows even more than he's
19 been able to tell them?

20 A No question. My own experience also has been far
21 more often than not, and of course there is preserving
22 rights for appeal, but at the trial level, far more
23 often than not when I make that objection I'll be told,
24 Mr. Fox, duly noted, Solicitor be careful, carry on,
25 the end. Different issue as to whether it is effective

J. ERIC FOX - REDIRECT EXAMINATION

1 in terms of protecting Appellant's rights and so forth,
2 but I didn't see anything that caused me to stand up
3 and object, for sure.

4 Q Okay.

5 A Yes.

6 Q When you presented your closing arguments, you
7 knew you weren't going to get a chance to stand back up
8 and argue again, right?

9 A That's right.

10 Q So did you say anything in your closing argument
11 about any factual representations that the State makes
12 in their closing, you know, be sure and evaluate them
13 carefully and rely on your own memory, don't take just
14 what he says for granted.

15 A Not this time. I certainly have made that. It's
16 a double-edge sword, it applies to me as well. I don't
17 like telling the jury disregard anything I am about to
18 tell you.

19 Q Certainly. But let me ask you this, since you
20 already argued, you didn't have the last argument?

21 A Right.

22 Q You weren't going to get a chance to tell the
23 jury that a lot of what he said or portions of what he
24 said were not accurate, as far as the record was
25 concerned, or were not reflecting evidence there was no

J. ERIC FOX - REDIRECT EXAMINATION

1 way you were going to tell them that, was there?

2 A Right.

3 Q Unless you objected?

4 A Correct.

5 Q So if you objected, the jury would know, at
6 least, that it was your objection, Objection, Your
7 Honor, arguing facts not in evidence. Objection, Your
8 Honor, not in evidence. Isn't there a value to the
9 jury knowing that it is your position that that
10 Solicitor is going outside the evidence so they will
11 discuss that and will closely examine it when they
12 deliberate?

13 A I wouldn't disagree with that, yes.

14 MS. SHURLING: Nothing further.

15 MR. SCHMECKPEPER: Nothing from the State.

16 THE COURT: Thank you. You may step down. Call
17 your next witness.

18 MS. SHURLING: I have discussed my client's right
19 to testify should he so desire. I have explained to
20 him that absolutely his right is to be fully heard on
21 collateral review, just like it was his right to be
22 fully heard at trial. I explained how post-conviction
23 relief works, and when someone enters a guilty plea
24 and has a PCR, it is usually imperative that I put the
25 applicant on the stand, because the standard in such

J. ERIC FOX - REDIRECT EXAMINATION

1 cases is but for the ineffective assistance of
2 counsel, the defendant would have exercised his right
3 to a jury trial and not pleaded guilty.

4 Obviously, where there is a jury trial, I don't
5 have that point to establish through the testimony of
6 my client. It is my position that the issues that I
7 have argued here today are all legal and factual in
8 nature and will be decided by this Court. I know that
9 based on the record and the law, that in my judgment
10 there is nothing I need to add to the record I've made
11 from the testimony of the Applicant. In the interest
12 of a full record, I would ask that Your Honor question
13 him about having been advised of these matters and let
14 him state for the record what I believe to be his
15 decision, which is that he is going to rely on my
16 position that his testimony is not necessary or
17 warranted, and not testify.

18 THE COURT: I don't think it is actually
19 necessary for me to do it, but I will ask, Mr. Love,
20 you have heard your attorney's statements to the Court
21 a moment ago about your decision not to testify, do
22 you agree with what she said?

23 MR. LOVE: Yes, sir.

24 THE COURT: Do you disagree with anything she
25 just told me?

J. ERIC FOX - REDIRECT EXAMINATION

1 MR. LOVE: No, sir.

2 THE COURT: You wish not to testify?

3 MR. LOVE: Yes, sir.

4 MS. SHURLING: One further thing. I have
5 specifically questioned you, Mr. Love, as to who
6 whether I presented each and every one of the issues
7 that you wanted me to present today?

8 MR. LOVE: Yes.

9 MS. SHURLING: Are you satisfied that I presented
10 all the issues that you wanted reviewed by the Court?

11 MR. LOVELL: Yes.

12 MS. SHURLING: Thank you. Nothing further, Your
13 Honor.

14 MR. SCHMECKPEPER: State doesn't have anything.

15 THE COURT: All right. Applicant is going to
16 submit a brief to me by the 29th of November, State
17 replies within 10 days thereafter. Court is in
18 recess.

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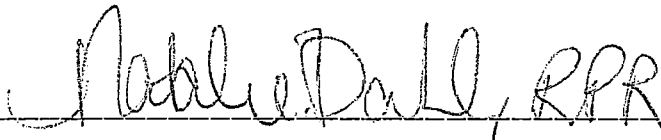
1 CERTIFICATE OF REPORTER

2
3 State of South Carolina)
4 County of Georgetown)
5

6 I, Natalie Dahl, Official Court Reporter for the
7 State of South Carolina, do hereby certify that the
8 foregoing is a true, accurate Transcript of Record of
9 the proceedings THAT WERE REQUESTED, BUT DOES NOT
10 CONSTITUTE A FULL AND COMPLETE TRANSCRIPT, and
11 evidence introduced in the captioned case, relative to
12 appeal, for Georgetown County, South Carolina, on the
13 16th day of November, 2016.

14 I do further certify that I am neither of kin,
15 counsel, nor interest to any party hereto.
16

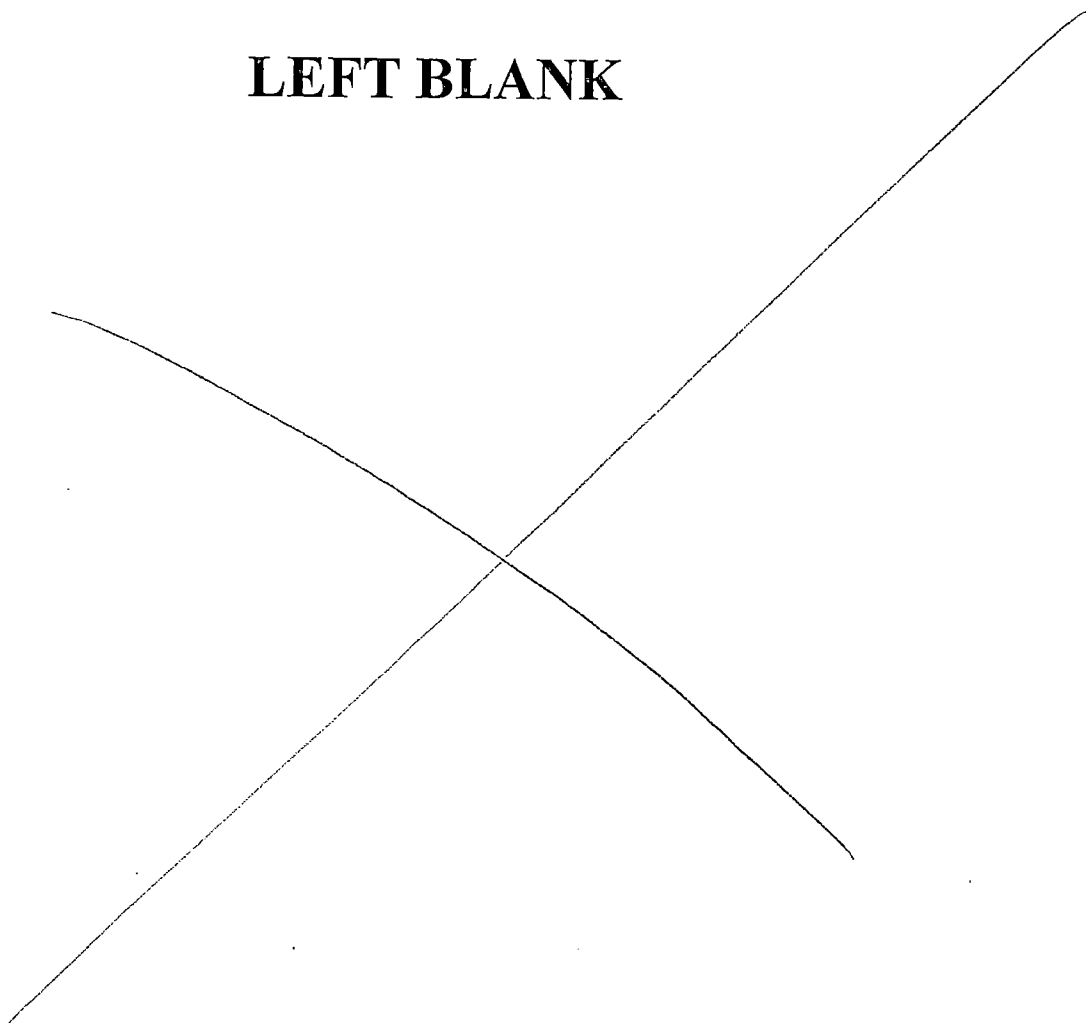
17 November 24, 2016
18

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21 Natalie Dahl, RPR

22 Court Reporter
23
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AGENCY LD.
SCO320000

 LEXINGTON COUNTY SHERIFF'S OFFICE
0103519

INVESTIGATIVE REPORT

 CASE NUMBER
Q4046980

☐ ORIGINAL
REPORT

☐ SUPPLEMENT
REPORT

☐ ADDITIONAL
VICTIMS

☐ ADDITIONAL
STOLEN PROPERTY

☐ STATUS
CHANGE

☐ ADDITIONAL
OFFENSES

☐ ADDITIONAL
RECOVERED PROPERTY

PAGE 2 of 3 PA

 ORIGINAL COMPLAINANT ☐ OR VICTIM ☒

NAME

STREET ADDRESS

CITY - STATE - ZIP

INCIDENT TYPE

Sex Offense

DATE OF BIRTH

RACE

W SEX

15 AGE

ORIGINAL SUSPECT:

NAME

Love, Tabitha Lynn

STREET ADDRESS

Old Dunbar Road, Lot 102

DATE OF BIRTH

CITY - STATE - ZIP

West Columbia, SC 29172

RACE

W SEX

20 AGE

RECOVERED PROPERTY DOLLAR AMOUNT: \$

CANCEL NCIC ENTRY: YES NO

Tabitha stated that she, Wayne and [REDACTED] did have a threesome and that the reason it all started was because [REDACTED] had been flirting with them and had come up to them and asked them about having a threesome because she thought that they were really cute. Tabitha stated that [REDACTED] told her, and other people that she was 17 years of age. Tabitha stated she did not find out [REDACTED]'s real age until after the sexual encounter. Tabitha stated that in no way did they force [REDACTED] to participate in any of the sexual acts, that she participated of her own free will.

Tabitha stated that after the three of them got back from the bar that night, the three of them started playing around in the bedroom, which included having sex with [REDACTED] and she kissing [REDACTED] and having [REDACTED] eat her out, which was her term for [REDACTED] performing oral sex on her, and also Wayne eating [REDACTED] out and then all of them fondling each other, fingering each other and playing with toys. Tabitha did not elaborate on what kind of toys that they played with.

Wayne provided the I/O with a written statement. Wayne stated pretty much the same thing as Tabitha. He stated all three of them had gotten together and that [REDACTED] was telling them and others that she was 17 years of age and that it was [REDACTED] that wanted to have a threesome with Tabitha and him. Wayne stated that night they did go to a club called the Triple Crown. After they got back home, Tabitha went and took a bubble bath. [REDACTED] got into the tub with her and after they got out, they started playing around together and he stated that [REDACTED] wanted to "ride" him, his way of saying [REDACTED] wanted to have sex with him. She did have sex with him.

Wayne did not go into very much detail as far as what actually took place during the sexual encounter. However, he did say that [REDACTED] was not forced in any way, that she consented and it was his opinion that it was all her idea to begin with.

SUBJECT IDENTIFIED

 YES ☐

 NO ☐

SUBJECT LOCATED

 YES ☐

 NO ☐
☐ ACTIVE

☐ UNFOUNDED

☐ ADMINSTR
CLOSED

☐ ARRESTED UNDER 18

☐ ARRESTED 18 AND OVER

☐ ACTIVE

☐ EX-CLEAR 18 AND OVER

 REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENSE DEATH 2. ☐ NO PROSECUTION 3. ☐ VICTIM/WITNESS DECLINED COOPERATION 4. ☐ EXTRADITION DENIED 5. ☐ JUVENILE NO ARREST

 REPORTING OFFICER
PRITCHARD, D.L.

DATE

09-21-04

UNIT NUMBER

302

APPROVING OFFICER

DATE

UNIT NUMBER

AGENCY I.D.
 SCO320000

LEXINGTON COUNTY SHERIFF'S OFFICE

10103519

INVESTIGATIVE REPORT

 CASE NUMBER
 04046980

☐ ORIGINAL
REPORT

☒ SUPPLEMENT
REPORT

☐ ADDITIONAL
VICTIM

☐ ADDITIONAL
STOLEN PROPERTY

☐ STATUS
CHANGE

☐ ADDITIONAL
OFFENDERS

☐ ADDITIONAL
RECOVERED PROPERTY

PAGE 3 of 3 P/

 ORIGINAL COMPLAINANT ☐ OR VICTIM ☒

NAME

STREET ADDRESS

DATE OF BIRTH

CITY-STATE-ZIP

RACE

SEX

INCIDENT TYPE

Sex Offense

15 AGE

ORIGINAL SUSPECT:

NAME

Love, Tabitha Lynn

STREET ADDRESS

Old Dunbar Road, Lot 102

DATE OF BIRTH

CITY-STATE-ZIP

West Columbia, SC 29172

RACE

SEX

20 AGE

RECOVERED PROPERTY DOLLAR AMOUNT \$

CANCEL NCIC ENTRY: YES NO

Based on the statements that I/O was provided by the victim and both suspects, the I/O presented the facts of the case to Judge Reinhart on 07/14/04.

Judge Reinhart issued three warrants against Tabitha Love for Criminal Sexual Conduct with a Minor and one for Contributing to the Delinquency of a Minor.

Judge Reinhart issued three warrants against Wayne Love for Criminal Sexual Conduct with a Minor, one for Lewd Act upon a Minor, and one for Contributing to the Delinquency of a Minor.

Both subjects turned themselves in.

This case is being cleared by the arrest of the two suspects.

SUBJECT IDENTIFIED

SUBJECT LOCATED

 YES ☐

 NO ☐

 YES ☐

 NO ☐
☐ ACTIVE

☐ ARRESTED UNDER 18

☐ ACTIVE

☐ UNFOUNDED

☐ AGAINST CLOSED

☐ ARRESTED 18 AND OVER

☐ EX-CLEAR 18 AND OVER

 REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ VICTIM / WITNESS DECLINES COOPERATION 4. ☐ EXTORTION DENIED 5. ☐ JUVENILE NO APPEAL

REPORTING OFFICER

PRITCHARD, D.L.

DATE

09-21-04

UNIT NUMBER

302

APPROVING OFFICER

DATE

UNIT NUMBER

AGENCY I.D.
 SCO320000

LEXINGTON COUNTY SHERIFF'S OFFICE

INVESTIGATIVE REPORT

 CASE NUMBER
 04046980

☐ ORIGINAL
 REPORT

10103519

☐ SUPPLEMENT
 REPORT

☐ ADDITIONAL
 VICTIMS

☐ ADDITIONAL
 STOLEN PROPERTY

☐ STATUS
 CHANGE

☐ ADDITIONAL
 OFFENSES

☐ ADDITIONAL
 RECOVERED PROPERTY

PAGE 1 of 3 PA

 ORIGINAL COMPLAINANT ☐ OR VICTIM ☒

NAME

STREET ADDRESS

CITY-STATE-ZIP

INCIDENT TYPE

Sex Offense

ORIGINAL SUSPECT:

NAME

Love, Tabitha Lynn

STREET ADDRESS

Old Dunbar Road, Lot 102

CITY-STATE-ZIP

West Columbia, SC 29172

DATE OF BIRTH

RACE

SEX

15 AGE

DATE OF BIRTH

RACE

SEX

20 AGE

RECOVERED PROPERTY DOLLAR AMOUNT: \$

CANCEL NCIC ENTRY: YES NO

Suspect #2: Love, Prentiss Wayne

Old Dunbar Road, Lot 102

West Columbia, SC 29172

W

M

23

On 06/16/04 I/O made contact with the victim and her mother at the Lexington County Sheriff's Department. I/O needed to clarify a few things with the victim. [redacted] stated that Tabitha put her finger inside of her vagina. Also that Tabitha performed oral sex on her and she performed oral sex on Tabitha. Wayne performed oral sex on her and Wayne inserted his finger in her vagina at least two times and had intercourse with her at least two times. She also stated that Wayne sucked on her breasts.

I/O asked [redacted] if there was anyone home when all this was going on. She stated that their roommate Allen was home, but he was asleep during all this, so he has no knowledge of what happened.

[redacted] also stated that Wayne, Tabitha and a friend of theirs provided her with beer and Smirnoff the night before the incident occurred. She also stated she smoked marijuana with one of Wayne's friends, but she does not know the name of that friend.

I/O asked [redacted] if everything she had written in her statement was true and if she had omitted anything. She stated everything was true and that she had not left anything out. I/O asked her if she willingly participated in the sexual acts with Tabitha and Wayne. She stated that she was not forced in any way and that she did willingly participate, however, she was scared not to.

On 07/12/04 at 2130 hours, I/O made contact with Tabitha and Wayne at the Lexington County Sheriff's Department and they provided written statements.

SUBJECT IDENTIFIED

 YES ☐

 NO ☐

SUBJECT LOCATED

 YES ☐

 NO ☐
☐ ACTIVE

☐ UNFOUNDED

☐ ADJUDICATED

☐ CLOSED

☐ ARRESTED UNDER 18

☐ ARRESTED 18 AND OVER

☐ EX-CLEAR 18 AND OVER

☐ ACTIVE

 REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ VICTIM / WITNESS DECLINES COOPERATION 4. ☐ EXTORTION DENIED 5. ☐ JUVENILE NOARRE

REPORTING OFFICER

PRITCHARD, D.L.

DATE

09-21-04

UNIT NUMBER

302

APPROVING OFFICER

DATE

UNIT NUMBER

SC0320000

010351

COUNTY SHERIFF'S OFFICE

04046980

CASE NUMBER

INVESTIGATIVE REPORT

☐ ORIGINAL REPORT☒ SUPPLEMENT REPORT☐ ADDITIONAL VICTIMS☐ ADDITIONAL STOLEN PROPERTY☐ STATUS CHANGE☐ ADDITIONAL OFFENSES☐ ADDITIONAL RECOVERED PROPERTY

PAGE 2 of 3 PAGES.

ORIGINAL COMPLAINANT ☐ OR VICTIM ☒

NAME

STREET ADDRESS

CITY - STATE - ZIP

DATE OF BIRTH

RACE

W SEX

F

INCIDENT TYPE

Sex Offense

15 AGE

ORIGINAL SUSPECT:

NAME

Love, Tabitha Lynn

STREET ADDRESS

Old Dunbar Road, Lot 102

DATE OF BIRTH

CITY - STATE - ZIP

West Columbia, SC 29172

RACE

W SEX

F

20 AGE

RECOVERED PROPERTY DOLLAR AMOUNT: \$

CANCEL NCIC ENTRY: YES NO

Tabitha stated that she, Wayne and [redacted] did have a threesome and that the reason it all started was because [redacted] had been flirting with them and had come up to them and asked them about having a threesome because she thought that they were really cute. Tabitha stated that [redacted] told her, and other people that she was 17 years of age. Tabitha stated she did not find out [redacted] s real age until after the sexual encounter. Tabitha stated that in no way did they force [redacted] to participate in any of the sexual acts, that she participated of her own free will.

Tabitha stated that after the three of them got back from the bar that night, the three of them started playing around in the bedroom, which included having sex with [redacted] and she kissing [redacted] and having [redacted] eat her out, which was her term for [redacted] performing oral sex on her, and also Wayne eating [redacted] out and then all of them fondling each other, fingering each other and playing with toys. Tabitha did not elaborate on what kind of toys that they played with.

Wayne provided the I/O with a written statement. Wayne stated pretty much the same thing as Tabitha. He stated all three of them had gotten together and that [redacted] was telling them and others that she was 17 years of age and that it was [redacted] that wanted to have a threesome with Tabitha and him. Wayne stated that night they did go to a club called the Triple Crown. After they got back home, Tabitha went and took a bubble bath. Tiffany got into the tub with her and after they got out, they started playing around together and he stated that [redacted] wanted to ride him, his way of saying [redacted] wanted to have sex with him. She did have sex with him.

Wayne did not go into very much detail as far as what actually took place during the sexual encounter, however, he did say that [redacted] was not forced in any way, that she consented and it was his opinion that it was all her idea to begin with.

SUBJECT IDENTIFIED

SUBJECT LOCATED

YES ☐ NO ☐YES ☐ NO ☐YES ☐ NO ☐YES ☐ NO ☐☐ ACTIVE☐ ARRESTED UNDER 18☐ ACTIVE☐ UNFOUNDED☐ COMPLETED☐ ARRESTED 18 AND OVER☐ EX-CLEAR 18 AND OVERREASON FOR EXCEPTIONAL CLEARANCE: ☐ OFFICER DEATH ☐ NO PROSECUTION ☐ VICTIM/VICTIM'S DECLINES COOPERATION ☐ EXTRADITION DENIED ☐ JUVENILE NO ARRESTREPORTING OFFICER
FRITCHARD, D.L.DATE
09-21-04UNIT NUMBER
302

APPROVING OFFICER

DATE

UNIT NUMBER

REPORTING OFFICER

DATE

UNIT NUMBER

APPROVING OFFICER

DATE

UNIT NUMBER

AGENCY I.D.
SCO320000

LEXINGTON COUNTY SHERIFF'S OFFICE

CASE NUMBER
04046980

10103519

INVESTIGATIVE REPORT

☐ ORIGINAL
REPORT☒ SUPPLEMENT
REPORT☐ ADDITIONAL
VICTIMS☐ ADDITIONAL
STOLEN PROPERTY☐ STATUS
CHANGE☐ ADDITIONAL
OFFENDERS☐ ADDITIONAL
RECOVERED PROPERTY

PAGE 3 of 3 PAGES

ORIGINAL COMPLAINANT ☐ OR VICTIM ☒

NAME

STREET ADDRESS

DATE OF BIRTH

CITY-STATE-ZIP

RACE W SEX F

INCIDENT TYPE Sex Offense

15 AGE

ORIGINAL SUSPECT

NAME

Love, Tabitha Lynn

DATE OF BIRTH

STREET ADDRESS

Old Dunbar Road, Lot 102

RACE W SEX F

CITY-STATE-ZIP

West Columbia, SC 29172

20 AGE

RECOVERED PROPERTY DOLLAR AMOUNT \$

CANCEL NCIC ENTRY: YES NO

Based on the statements that I/O was provided by the victim and both suspects, the I/O presented the facts of the case to Judge Reinhart on 07/14/04.

Judge Reinhart issued three warrants against Tabitha Love for Criminal Sexual Conduct with a Minor and one for Contributing to the Delinquency of a Minor.

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Both subjects turned themselves in.

This case is being cleared by the arrest of the two suspects.

SUBJECT IDENTIFIED

SUBJECT LOCATED

YES ☐NO ☐YES ☐NO ☐☐ ACTIVE☐ ARRESTED UNDER 18☐ ACTIVE☐ LAUNCHED☐ ADMINT. CLOSED☐ ARRESTED 18 AND OVER☐ EX-CLEAR 11 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1 ☐ OFFENDER DEATH 2 ☐ NO PROSECUTION 3 ☐ VICTIM WITNESS DECLINES COOPERATION 4 ☐ EXTORTION DENIED 5 ☐ JUVENILE / NO ARREST

REPORTING OFFICER

PRITCHARD, D.L.

DATE 09-21-04

UNIT NUMBER 302

APPROVING OFFICER

DATE

UNIT NUMBER

REPORTING OFFICER

DATE

UNIT NUMBER

APPROVING OFFICER

DATE

UNIT NUMBER

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271)
 Applicant,)
)
 v.)
 STATE OF SOUTH CAROLINA,)
 Respondent.)
 _____)

2015-CP-22-00209

MEMORANDUM IN SUPPORT OF
 POST-CONVICTION RELIEF

FILED
 GEORGETOWN COUNTY, SC
 2017 JAN -3 PM 1:11
 ALBANY WHITE
 CLERK OF COURT

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. In May, 2011, the Georgetown County Grand Jury indicted Applicant for second-degree criminal sexual conduct with a minor (2011-GS-22-431) and lewd act on a minor (2011-GS-22-432). Jonathan Eric Fox, Esquire, represented Applicant. On April 23, 2012, Applicant proceeded to trial before the Honorable Garrison D. Hill and a jury. On April 25, 2012, the jury found Applicant guilty of a lewd act on a minor and innocent of second-degree criminal sexual conduct with a minor. Judge Hill sentenced Applicant to fifteen (15) years imprisonment for lewd act on a minor.

Applicant filed a timely Notice of Appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense perfected Applicant's direct appeal by filing of an *Anders*¹ brief. The South Carolina Court of Appeals dismissed the appeal on May 21, 2014. *State v. Love*, Op. No. 2014-UP-195 (S.C. Ct. App. filed May 21, 2014). The Remittitur was returned to the circuit court on June 16, 2014.

Applicant filed his initial Application for Post-Conviction Relief on February 24, 2015 and an Amended Application filed on November 15, 2016. A Second Amended Application for Post-Conviction Relief was also filed on November 15, 2016. The State filed its Return on June 29,

¹ *Anders v. California*, 386 U.S. 738 (1967).

2015. An evidentiary hearing was convened on November 16, 2016, during which Applicant was present and represented by Tara Dawn Shurling, Esquire, and the State was represented by Assistant Attorney General, Patrick Schneckpeper. At the conclusion of this proceeding the Court granted leave for both sides to submit memoranda in support of their perspective positions in lieu of closing arguments.

ALLEGATIONS RAISED

The Applicant has alleged generally that he received ineffective assistance of counsel prior to and during his trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14, of the South Carolina Constitution.

In support of that claim he has raised the following specific allegations:

1. Applicant's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, was violated before and during his trial.
2. The errors and omissions of Trial Counsel, both prior to and during Applicant's trial, violated Applicant's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, and were prejudicial to Applicant to a degree that they violated his right to a fair trial in that the result of his trial would likely have been different but for Trial Counsel's deficient representation.
3. Trial Counsel failed to object to testimony and jury arguments highly prejudicial to Applicant, concerning text communications between him and the alleged Victim where the evidence in question was erroneous and the misrepresentations in question were known to the parties and documented in cell phone records previously ruled inadmissible by the Court.
4. Trial Counsel failed to adequately impeach the State's witnesses at trial, failed to make appropriate objections, motions and legal arguments during Applicant's trial and failed to request appropriate curative charges during Applicant's trial.

In Applicant's Amended Application he raised the following specific allegations:

1. Trial Counsel was ineffective in that he failed to object to a portion of the State's opening argument in which the Prosecution erroneously advised the jury that Applicant was charged with committing sexual battery upon the Victim beginning when he first met the Victim when she was thirteen. Tr. p. 52, ll. 14-24.
2. Trial Counsel was ineffective in failing to object to testimony from Anthony E. Carter, concerning the fact that Applicant and his wife knew about Victim getting caught in possession of a pain pill and a cigarette by her step-mother and kept that information from him and Victim's mother, his fiancée, where said testimony bore no logical relevance to the issues before the jury and was highly prejudicial to Applicant. Tr. p. 83, l. 16- p. 84, l. 12. (Carter); Tr. p. 274, ll. 13-23 and other witnesses, (T. Love); Tr. p. 283, l. 22- p. 286, l. 24 (T. Love); Tr. p. 364, l. 17- p. 366, l. 18 (Applicant).
3. Trial Counsel was ineffective for failing to object when the Prosecution expressly solicited hearsay testimony from witness Carter which went beyond the report of place and time of a sexual assault. Tr. p. 84, l. 19- p. 85, l. 18.
4. Trial Counsel was ineffective for failing to object the first and every time the State sought to introduce hearsay testimony from witnesses concerning statement's allegedly made by Victim beyond the scope of the times and places of the sexual assault and lewd acts alleged.
5. Trial Counsel was ineffective for failing to make a motion for a mistrial when it was reported to the Court that one of jurors was napping during the trial, and had his eyes closed during a significant portion of the trial testimony and instructions by the Court. Tr. p. 99, l. 2- p. 100, l. 22; Tr. p. 103, l. 17- p. 104, l. 8.
6. Trial Counsel was ineffective for failing to file a motion *in limine* to prohibit the State from introducing phone records concerning Victim's cell phone without proper authentication under the business records rule.
7. Trial Counsel was ineffective for failing to make a timely objection when Victim's mother first approached the subject of cell phone records she allegedly "printed out" concerning activity on her daughter's cell phone. Tr. p. 121, l. 18 – p. 124, l. 21.
8. Trial Counsel was ineffective for failing to request that prior testimony regarding the cell phone records be stricken from the record.

9. Trial Counsel was ineffective for failing to object to the State being allowed to question the Victim's mother being asked to testify concerning the content of the cell phone records that had been expressly ruled to be inadmissible by the Court. Tr. p. 131, l. 1- p. 133, l. 13.
10. Trial Counsel was ineffective for failing to object to testimony from Victim's mother, Shannon Bellamy, that Victim gave a statement to Children's Recovery Center, after which the Recovery Center recommended that Victim receive counseling, where said testimony raised the impermissible inference that the Center found her statement to be credible. Tr. p. 136, l. 1- p. 148, l. 5.
11. Trial Counsel was ineffective for failing to object when State improperly bolstered Victim's testimony by leading her about statements made by her to the Children's Recovery Center. Tr. p. 166, l. 25- p. 167, l. 13.
12. Trial Counsel was ineffective for neglecting to object to the hearsay testimony from State witness, *MINOR*, which went far beyond permissible reports of the time and place of the alleged sexual assaults. Tr. p. 177, l. 1- p. 187, l. 10.
13. Trial Counsel was ineffective for neglecting to object when a witness claimed that there were hundreds of text messages between Applicant and Victim in September, 2010 where the jury was likely to infer that figure was based on cell phone records which had not been authenticated as required by the business records rule, and where the records in question would not have supported that claim if they had been admitted. State Ex. No. 5 for ID only.
14. Trial Counsel was ineffective for failing to make a motion to strike all testimony pertaining to information referenced as coming from cell phone records ultimately ruled inadmissible by the Court pursuant to Rule 803(6), SCRE.
15. Trial Counsel was ineffective for failing to make a motion for a mistrial following the receipt of information that multiple witnesses had reported the same jurors previously admonished continuing to sleep during Applicant's trial, for failing to request that the entire jury be questioned concerning sleeping, or closing their eyes during Applicant's trial and, at minimum, for failing to request a cautionary charge to the entire jury where Applicant reported that more than one juror appeared to be closing their eyes during this trial. Tr. p. 243, l. 20- p. 247, l. 22.
16. Trial Counsel was ineffective for failing to investigate the use of Applicant's cell phone to establish the harmless nature of text communications between Applicant and Victim.

17. Trial Counsel was ineffective for failing to make a motion for a mistrial following the claim by Victim's mother that the cell phone records she claimed were the basis for her testimony showed *hundreds* of text messages between Victim and Defendant in September, 2010, when they in fact showed less than 100 texts between them, and where said records had not been authenticated under the business records rule found in Rule 803 (6), SCRE.
18. Trial Counsel was ineffective for neglecting to object to testimony in which law enforcement witness Ginger Pop stated that Applicant was arrested on the same day she interviewed him thereby implying admissions made by him resulted in the decision to arrest. Tr. p. 232, ll. 10-23.
19. Trial Counsel was ineffective for neglecting to establish on cross-examination of Officer Pop that Applicant had in fact denied any inappropriate physical contact with the alleged Victim in this case.
20. Trial counsel failed to provide Applicant reasonable professional assistance of counsel where he failed to cross-examine witness *MINOR*, the Victim's best friend, as to whether she had been charged criminally for distributing Vicodin, a controlled narcotic painkiller, to Victim. *See testimonial admission*, Tr. p. 185, l. 20 - p. 286, l. 22.
21. Trial Counsel was ineffective for neglecting to cross-examine witness *MINOR*; to whether the state had advised her she could be charged with a crime for distributing vicodin and the potential consequences of such a charge.
22. Trial Counsel failed to provide Applicant reasonable professional assistance of counsel where he neglected to adequately cross-examine witness *MINOR* concerning whether she was given any consideration for her testimony against Applicant.
23. Trial Counsel was ineffective for failing to cross-examine Victim concerning her alleged theft of a prescription narcotic pain medication from her mother's fiancé, and the criminal charges that she could have faced for that theft and possession, as well as for obtaining the same drug from her best friend. Tr. p. 144, l. 23 - p. 145, l. 22; Tr. p. 164, ll. 9-25; Tr. p. 172, l. 23 - p. 174, l. 4, Tr. p. 174, l. 25 - p. 175, l. 6; Tr. p. 272, ll. 1 - 22.
24. Trial Counsel was ineffective for failing to make a motion for mistrial when the Prosecution elicited perjured testimony from Victim concerning her claim that she and Applicant had texted each other *hundreds* of times on September 11, 2010, where that claim was readily refuted by State's

Exhibit for ID No. 5 which reflected far fewer text communications between her and Applicant on that date. Tr. p. 163, ll. 3 - 15.

25. Trial Counsel was ineffective for neglecting to cross-examine state witnesses concerning who had deleted text communications on Victim's cell phone. See, Tr. p. 198, l. 15 - p. 200, l. 7; State's Ex. No. 10 and 11.
26. Trial Counsel failed to provide Applicant reasonable professional assistance of counsel where counsel failed to object to repeated references to state witness Dianne Nordeen as a "forensic" interviewer where this witness was not qualified as any sort of expert by the Court and where the use of the term "forensic" interviewer improperly inferred scientific expertise and thereby, improperly bolstered the credibility of the witness in question. Tr. p. 201, l. 1 - p. 213, l. 21; Tr. p. 217, l. 21 - p. 219, l. 11; Tr. p. 259, l. 7 - p. 260, l. 19.
27. Trial Counsel was ineffective for failing to object to the State's description of the person who interviewed Victim at the Children's Recovery Center as "the therapist or doctor" where there was no evidentiary foundation for the assertion that the interviewer was either. Tr. p. 173, l. 24 - p. 174, l. 1.
28. Trial Counsel failed to provide Applicant reasonable professional assistance of counsel where he himself referenced the individual who interviewed the Victim at the Children's Recovery Center as a "forensic interviewer." Tr. p. 211, ll. 12 - 16.
29. Trial Counsel was ineffective for characterizing earlier testimony from Applicant's wife, in which she indicated that the Victim had called her on one occasion, admitted being high on Vicodin and "she was on a roof and about to jump off" as Victim being "open to the idea of suicide." Tr. p. 272, ll. 1 - 4; Tr. p. 273, ll. 17 - 20.
30. Trial Counsel neglected to provide Applicant reasonable professional assistance of counsel where he failed to adequately cross-examine Victim concerning her alleged threat to jump off a roof in order to refute the inference that her behavior was related to her having been sexually molested.
31. Trial Counsel failed to provide Applicant with reasonable professional assistance of counsel where he failed to summarize Applicant's case in a manner consistent with his role as an advocate for the Applicant by conceding matters in his closing argument that were adverse to his client's best interest and which weakened the Applicant's defense.

- A. Trial counsel argued "there is no logical explanation for it. I don't have one for you. I don't have any reason why she would lie" Tr. p. 456, ll. 7 - 10.
 - B. Trial Counsel actually argued against the only apparent motive the Victim had to lie. Tr. p. 453, ll. 13 - 28; Tr. p. 455, ll. 7 - 13.
 - C. Trial Counsel argued that he did not personally believe that the fact that the Applicant's accuser had just gotten in trouble for possession of a narcotic was an explanation for why she would lie against Applicant and thereby, bolstered the credibility of the prosecution's subsequent argument that "no one has a motive to lie." Tr. p. 474, ll. 10 - 18.
32. Trial Counsel was ineffective for neglecting to object to numerous portions of the State's closing argument in which the Prosecution made improper and prejudicial arguments, improperly referenced matter not in evidence and/or misrepresented the testimony adduced at trial in a manner that was particularly prejudicial to Applicant.
- A. "He is texting Victim hundreds of times a day." Tr. p. 470, ll. 4 - 8; Tr. p. 473, ll. 9 - 11.
 - B. Argument essentially inviting the jury to find guilt based on Applicant, and his wife's prior record for a felony thereby violating the character evidence rule by asking the jury to find Applicant guilty because he and his wife were bad people. Tr. p. 473, ll. 18 - 23.
 - C. Arguing that among the State's witnesses, "no one has a criminal record." Tr. p. 474, ll. 14 - 16.
 - D. Arguing that on September 11th the Victim's cell phone had been taken away from her for the cigarette and pill that she had been caught with where the record did not support that assertion. Tr. p. 478, ll. 1 - 10.
 - E. Characterizing statements made by Applicant's wife as telling him that if he made certain statements she could get "caught" for perjury where the record in fact indicated that the statement made by her was that, "if you say you went with them, I'm going to jail for perjury." Tr. p. 479, l. 21 - p. 480, l. 11.
 - F. References to the individual who interviewed the Victim as conducting a "forensic interview." Tr. p. 482 ll. 9 - 15.

- G. Claims that the Victim was afraid her mother "was going to kill her" and that "she was scared" arguing Victim had no reason to fabricate her claims. Tr. p. 484, ll. 20 - 25.
- H. "She had already deleted some things." Tr. p. 480, ll. 3 - 5.
- I. Improper argument that Applicant was a convicted felon. Tr. p. 473, ll. 18-23.
- J. Improper argument in which the Prosecution implied that Applicant's wife was a convicted felon. Tr. p. 473, ll. 18-23.
- K. Improperly advising jury of his personal opinion that Applicant and his wife were liars. Tr. p. 480, ll. 3-5.
33. Trial Counsel was ineffective for asking Applicant an open ended question about his prior criminal record thereby eliciting testimony concerning a prior conviction for assault and battery of a high and aggravated nature which would not have been admissible for impeachment purposes pursuant to Rules 404 or 609, SCRE. Tr. p. 363, ll. 5-11.
34. Trial Counsel was ineffective for neglecting to object to assertions made by the State during the sentencing phase of Applicant's trial concerning Applicant's prior record for ABHAN. Tr. p. 510, l. 6- p. 513, l. 1.
35. Trial Counsel was ineffective for failing to object to the Prosecution questioning Applicant concerning whether he was "a convicted felon." Tr. p. 363, ll. 16-21.

In Applicant's Second Amended Application he raised the following specific allegation:

36. Trial Counsel was ineffective for failing to object to the State cross-examining concerning "over 140 text messages" allegedly made between Applicant and Victim or Tabitha Love and Victim, where there was no evidentiary foundation laid for the number of text messages claimed by the State and where this unsupported claim was highly prejudicial to Applicant. Tr. p. 288, ll. 13-23.

III.

STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Petitioner in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000); *Rule 71.1(e), SCRPC*. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that Defense Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). In other words, the Petitioner must show that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. *Id.*; *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. *Ard v. Catoe*, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007). Under the *Strickland Standard*, it is not necessary that an Applicant prove that counsel's deficient performance more than likely altered the outcome of his trial, but rather he is required to establish a probability sufficient to undermine confidence in that outcome. *Strickland, supra*, 466 U.S. at 697.

On the one hand, where Defense Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters

of trial strategy or tactics. In the case of *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

On the one hand, where Defense Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

IV.

EVIDENCE BEFORE THE COURT

In deciding this collateral action it is the understanding of Applicant that the Court has before it a copy of the trial record, a copy of the sentencing record dated April 26, 2012, a transcript of the portion of the PCR hearing, held on November 16, 2016, containing the testimony of Trial Counsel, J. Eric Fox, Esquire, and all exhibits introduced during that proceeding, the Applicant's records from the South Carolina Department of Corrections and the records of the Georgetown County Clerk of Court regarding the subject conviction and sentence. Applicant requests this Court's findings of fact and rulings of law, as required by S.C. Ann. §17-27-80, on all the allegations advanced by him in his pleading as well as the testimony and evidence presented by him at his Post-Conviction Relief Proceeding

DISCUSSION

The Applicant has submitted in numerous specific allegations that he received ineffective assistance of counsel prior to, and during, his jury trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United State's Constitution, as well as Article I, §14, of

the South Carolina Constitution. For all the reasons set forth below, Applicant respectfully submits that he has met his burden of proof concerning his claims and should be granted a new trial. For purposes of discussion and analysis, Applicant has grouped related allegations together in the arguments presented below. The complaining witness in this case shall be referenced throughout this memorandum as Victim. Anthony E. Carter, the fiancé of Victim's mother, will be referenced throughout as Victim's step-father inasmuch as he lived with Victim and her mother. Victim's mother, Shannon Bellamy, will be referenced as Victim's mother.

A. FAILURE TO OBJECT TO HEARSAY

First Amended Application: Allegations No. 3, 4 and 12

Trial Counsel was ineffective for failing to object when the Prosecution expressly solicited hearsay testimony from witness Carter which went beyond the report of place and time of a sexual assault. Tr. p. 84, l. 19- p. 85, l. 18.

Trial Counsel was ineffective for failing to object the first and every time the State sought to introduce hearsay testimony from witnesses concerning statement's allegedly made by Victim beyond the scope of the times and places of the sexual assault and lewd acts alleged.

Trial Counsel was ineffective for neglecting to object to the hearsay testimony from State witness, Ashley Jenkinson, which went far beyond permissible reports of the time and place of the alleged sexual assaults. Tr. p. 177, l. 1- p. 187, l. 10.

Throughout Applicant's trial the State was allowed to introduce hearsay testimony from multiple prosecution witnesses concerning previous statements made by the Victim identifying Applicant as the individual responsible for sexually assaulting her. The instances cited by Applicant in his Allegations 3, 4 and 12 found in his first Amended Application are an illustrative, although by no means exhaustive, list demonstrating a pattern found throughout this trial. *See*, Tr. 84, l. 19- p. 85, l. 18, and Tr. p. 177, l. 1--p. 187, l. 10. During the testimony of the so-called "forensic interviewer", Dianne Nordeen, even she exceeded the permissible boundaries for such testimony by identifying the places where alleged assaults

occurred as being the property of the Applicant. For example, rather than say an incident occurred at the home of a family friend or a neighbor, she quoted the Victim as reporting the incident taking place in *“the living room in the home of Wayne and Tabitha Love.”* Later, rather than saying the girl reported being assaulted on a boat on the Intracoastal Waterway, this witness was allowed to testify that three incidents took place *“on Wayne Love’s boat ... on the Intracoastal Waterway.”* Thus, although the State instructed this witness to answer their questions *“without revealing anything other than time and place,”* this professional witness did, through the back door, that which she was expressly instructed not to do. Tr. p. 208, l. 6- p. 209, l. 2.

Trial Counsel failed to object to any of the hearsay testimony in question. During the PCR hearing held in this case, Trial Counsel acknowledged that throughout Applicant’s trial various State witnesses testified to what the Victim told them about the incidents and specifically identified Applicant as the person who had sexual contact with her. PCR p. 10, l. 14- p. 11, l. 18. When asked repeatedly whether he ever considered objecting to this line of testimony, Trial Counsel would provide no answer beyond, *“I did not object.”* PCR p. 11, l. 19 – p. 12, l. 3. Ultimately, Trial Counsel stated,

Truly, I couldn’t tell you whether or not, but the record is clear I didn’t object. The reasoning, I can’t go back and recreate that moment.

PCR p. 12, ll. 7-9. It is therefore clear that Trial Counsel did not assert any strategic or tactical reason for why he failed to object to this testimony.

In each instance where this type of testimony was introduced, the State made pretense of camouflaging the hearsay being introduced. For example, during the testimony of Victim’s step-father, the Prosecutor expressly asked him if Victim had disclosed to him *“anything regarding her contact between her and the defendant?”* Tr. p. 84, ll. 19-24. After the witness responded, “yes” to that inquiry, the Prosecutor went on to ask,

Okay. Now, in that information she provided to you are you aware of timing and place regarding any type of *contact between her and the defendant*?

Tr. p. 84, l. 25- p. 85, l. 2. (Emphasis added). Once the witness answered that question affirmatively, the Prosecution went on to ask the witness to “*tell the jury just in relationship to time and place what she told you.*” Tr. p. 85, ll. 3-5. (Emphasis added) Thus, the step-father’s testimony in response to that question clearly asserted what the Victim told him about the identity of the person who had sexual contact with her. Tr. p. 85, l. 6- p. 96, l. 19. Interestingly, Trial Counsel made an isolated objection on the ground of hearsay after the step-father quoted the Victim as telling him, “*Mama’s gonna kill Wayne.*” Tr. p. 86, ll. 4-9. That objection, which was sustained, evidences the fact that Trial Counsel did not recognize the hearsay nature of the earlier testimony from this witness despite the Prosecutor asking the witness to tell the jury what Victim has said to him during a conversation the Prosecution characterized as being about “*contact between her and the defendant.*” Tr. p. 84, ll. 21-23. In his hearsay objection to the testimony that the Victim said, “*Mama’s gonna kill Wayne,*” Trial Counsel stated, “*we are getting into hearsay now.*” Tr. p. 86, ll. 6-7 (Emphasis added).

This veiled hearsay testimony continued after Trial Counsel’s one objection. Tr. p. 88, ll. 10-19. Despite the contorted format of this testimony, it contains obvious direct references to knowing what Applicant allegedly did based upon what Victim told him and what the mother informed him Victim had told her, which would of course be hearsay on hearsay. The testimony of the Victim’s mother was similarly structured. The mother’s testimony clearly asserts what her daughter told her had happened between her and Wayne, the Defendant. Tr. p. 134, l. 14- p. 135, l. 25.

In the testimony of both the step-father and the mother it was established that these claims of sexual contact with Victim were not reported to either of them by Victim until after she had gotten in trouble for

being in possession of a narcotic pain pill² and a cigarette. Tr. p. 81, l. 8- p. 84, l. 18, Tr. p. 115, l. 14- p. 124, l. 13 and Tr. p. 133, l. 14- p. 137, l. 9. Although Victim testified that the punishments imposed on her were not lifted after the claims of assault were made, Applicant would note that her testimony did not negate the possibility that she had fabricated these claims in order to adopt the cloak of Victim in hopes of getting out from under punishments loath to any teenager; restriction, loss of her cell phone and loss of her iPad. Tr. p. 116, l. 23- p. 117, l. 5; Tr. p. 165, l. 21- p. 166, l. 4.

Ashley J.³, Victim's best friend, was allowed to testify to similar hearsay statements attributed to Victim which identified Applicant as someone with whom she had sexual contact. Her testimony is distinguishable from that of the step-father and mother in that she claimed Victim told her about the incidents shortly after they happened. Tr. p. 179, l. 2- p. 193, l. 1. It is however clear that she, like Victim, never reported these alleged incidents until after Victim got in trouble for having Vicodin which she herself gave Victim. Tr. p. 187, l. 15- p. 188, l. 20.

Ashley testified that she was best friends with the Victim and had known her since they were two years old. Her testimony essentially mirrored that of her best friend; the Victim. She claimed Victim told her about her relationship with Applicant as it unfolded. The State's cross-examination of this witness indicated that the Prosecution either did not fully understand the scope of the rules of evidence as they pertain to prior consistent statements, or, willfully flaunted them. As with previous witnesses,⁴ the Prosecution asked questions of this witness framed as inquiries concerning time and place of the alleged sexual abuse, but conducted the examination in such a manner as to clearly identify Applicant as the perpetrator within the questions posed to this witness. Tr. p. 179, l. 2 – p. 187, l. 11. Ashley admitted in her testimony that Victim had gotten in trouble for having Vicodin that she had given her. She was asked by the Prosecution

² Tr. p. 139, ll. 4-21.

³ Hereafter, Ashley.

⁴ Step-father, Tr. p. 84, l. 19- p. 85, l. 18; Tr. p. 86, ll. 11-19; Mother, Tr. p. 133, l. 12-p. 138. l. 5.

whether she got in trouble for this incident and she replied "yes." Tr. p. 185, l. 20 - p. 186, l. 6. Ashley was further allowed to testify, without objection, that she knew that Victim had told her parents about the relationship between her and the Defendant. She went on to testify that, *"it was when she got in trouble she told everything."* Tr. p. 186, l.17- p. 187, l. 4. On cross-examination by the defense, Ashley admitted that she would do anything she could to protect Victim. Tr. p. 187, l. 15 - p. 188, l. 20.

State witness Dianne Nordeen, testified that she was employed by the Children's Recovery Center as a *"forensic interviewer."* Tr. p. 202, ll. 1-23. In examining this witness, the Solicitor worded his questions in terms of *"time and place"*, yet clearly elicited testimony from this witness wherein she testified to having been told by Victim that two out of three of the reported incidents occurred on property clearly identified as belonging to Applicant; *"The living room in the home of Wayne and Tabitha Love"* and *"which occurred on Wayne Love's boat."* Tr. p. 208, ll. 6-17 and Tr. p. 208, ll. 18-25.

Similarly, Investigator Ginger Pop, testified that after the report of sexual assault involving a minor, she spoke with Victim's mother. Investigator Pop identified the suspect determined from that interview as Applicant. This witness went on to testify that she next recommended Victim for a quote *"forensic interview"* and proceeded to gather as much information as she could about the Defendant. Tr. p. 213, l. 25 - p. 218, l. 23. Ultimately, Investigator Pop testified, once again without objection, that her review of the audio tape of that interview, conducted by witness Nordeen, showed that Victim *"revealed several incidents that the child had revealed to the interviewer of events between the Defendant and the child."* Tr. p. 219, ll. 12-24. See also, Tr. p. 223, l. 8 - p. 226, l. 24.

In his Post-Conviction Relief testimony, Trial Counsel stated that, although he was not familiar with cases by name, he was familiar with South Carolina case law concerning the latitude allowed concerning hearsay and reports made by alleged Victims in Criminal Sexual Conduct cases. PCR p. 4, ll. 13 - 21. When questioned concerning why he did not object to hearsay testimony which exceeded the parameters set by that case law, Trial Counsel repeatedly simply testified that *"I did not object."* When asked to examine one specific instance, Trial Counsel acknowledged that the step-father testified to what Victim had told her mother, not only to the time and place where the sexual contact took place, but the identity of Applicant as the perpetrator. Despite this fact, he specifically testified that he did not believe the testimony in question *"went beyond what was permissible."* PCR p. 10, l. 14 - p. 11, l. 13.

Trial Counsel acknowledged that throughout the State's case various State witnesses talked about Victim having informed them of details concerning the alleged sexual contact which included identifying Applicant as the perpetrator. When asked if this testimony was inconsistent with the parameters of allowable hearsay concerning sexual assaults under South Carolina case law, Trial Counsel responded, *"I did not object."* PCR p. 11, l. 14 - 22. When asked whether, in retrospect, he now believed he should have objected to the State being allowed to bolster the credibility of the Victim with hearsay testimony concerning the fact that she had previously identified Applicant as her assailant, Trial Counsel once again repeated, *"I did not object."* When asked whether he had considered making a motion or an objection at any time when the State's witnesses specifically addressed that same subject matter, Trial Counsel stated, *"[t]ruly, I couldn't tell you whether or not, but the record is clear I didn't object. The reasoning, I can't go back and re-create that moment."* PCR p. 12, ll. 4-9. With regard to the testimony of Ashley

Jenkinson, Trial Counsel admitted that she testified, without objection, concerning what Victim had told her about sexual contact with Applicant. PCR p. 27, l. 9- p. 28, l. 8

Applicant respectfully submits that Trial Counsel failed to provide him reasonable professional assistance of counsel by failing to object each and every time the State sought to introduce hearsay testimony concerning prior consistent statements attributed to the Victim in this case which went beyond the permissible scope of such testimony. In this Post-Conviction Relief action, Applicant asserts that Trial Counsel was ineffective for failing to object to statements made by State witnesses which went beyond identifying the time and place of an alleged sexual event. *State v. Munn*, 292 S.C. 497, 357 S.E.2d 461 (1987). While Trial Counsel's PCR testimony indicated that he was familiar with South Carolina law on this point, his PCR testimony indicates that he was not. In his PCR testimony, Trial Counsel expressly testified that statements by witnesses revealing that Victim had told them Applicant was the perpetrator did not go "*beyond what was permissible*" evidence. Applicant submits that this testimony demonstrates a fundamental lack of understanding of the limited scope of hearsay testimony permissible under South Carolina law in Criminal Sexual Conduct cases. PCR p. 11, ll. 2-13.

It has long been established in South Carolina that the rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. *Munn, supra*; *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994). As established in *Munn, supra*, when a victim testifies, and is subject to cross-examination, the State may introduce testimony from other witnesses that the victim complained of the sexual assault. Such testimony however, is limited to the time and place of the assault and may not include details beyond those factors. *Munn, supra*. Testimony of other witnesses regarding a

victim's identification of the defendant as the perpetrator does not fall within the recognized exceptions of statements concerning time and place. *Munn, supra*; *State v. Barrett*, 299 S.C. 485, 386 S.E. 2d 242 (1989). The rule that the particulars or details of statements made by a victim are not admissible, but rather only so much of the complaint as identifies the time and place of the conduct alleged maybe shown, in fact significantly pre-dates *Munn, supra*. See, *State v. Sharpe*, 239 S.C. 258, 122 S.E.2d 622 (1961), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) ; *State v. Cox*, 274 S.C. 624, 266 S.E.2d 784 (1980).

In *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001), our Supreme Court found that "improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless." Id at 156, 551 S.E.2d at 263. In both *Dawkins, supra*, and *Jolly, supra*, the Court recognized that "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration."

As in *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010), the State's case against Applicant was entirely contingent upon the credibility of the Victim. As in *Smith, supra*, there was a lack of otherwise overwhelming evidence of Applicant's guilt. There was no physical evidence of sexual assault in this case. Tr. p. 261, ll. 16 - 25. There were no eyewitnesses to any of the improper conduct alleged by Victim. Further, as summarized above, the testimony clearly documented that Victim did not make the allegations in question until after she had gotten in trouble for possession of Vicodin; a narcotic painkiller.

In *Vail v. State*, 402 S.C. 77, 738 S. E.2d 503 (2013), the South Carolina Court of Appeals reversed the order of the circuit court denying Post-Conviction Relief on this precise issue. There are remarkable correlations between the *Vail* case and Applicant's. *Vail* was charged with multiple counts of criminal sexual conduct with a minor and one count of lewd act

on a minor. The jury ultimately convicted *Vail* of one count of criminal sexual conduct with a minor 2nd degree and lewd act with a minor. He was however, acquitted of two additional accounts of Criminal Sexual Conduct with a minor. Applicant was charged with Second Degree Criminal Sexual Conduct with a Minor and Lewd Act on a Minor. He was acquitted on the more serious count of Criminal Sexual Conduct with a Minor. In *Vail*, as in Applicant's trial, the State relied heavily on evidence of a large volume of cell phone communications between *Vail* and his alleged Victim. In his Post-Conviction Relief testimony the trial attorney in *Vail* stated that "he had a '*huge mountain to overcome*' when the jury was presented with evidence of 30 hours of telephone calls between *Vail* and the victim, many of which were late at night." *Id.*, 496 S.C. at 83. As will be discussed further *infra*, in Applicant's case the State relied heavily on testimony concerning a large volume of text communications between Victim and Applicant. In *Vail*, *supra*, the Court of Appeals stated that,

[i]n a CSC case, the testimony of a witness regarding the Victim's out-of-court statement is *not* hearsay when: 'the declarant testifies at the trial ...and is subject to cross-examination concerning the statement, and the statement is ... consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged Victim and the statement is *limited to the time and place of the incident.*'

Vail, 402 S.C. at 84-85, 738 S.E.2d at 509, citing, *Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629, 631-32 (quoting Rule 801(d)(1)(D), SCRE). "Any other details or particulars, including the perpetrator's identity, must be excluded." *Watson*, 370 S.C. at 71-72, 634 S.E.2d at 644 (citing *Dawkins*, 346 S.C. at 156, 551 S.E.2d at 262-63). *Id.*, 402 S.C. at 84. As noted in *Vail*, where Trial Counsel articulates a valid reason for a particular trial tactic or strategy that conduct will not be deemed ineffective of assistance of counsel. Where Trial Counsel fails to articulate a

valid reason for failing to object to otherwise inadmissible hearsay testimony, his error will be deemed to fall below the professional norms. *Vail*, 402 S.C. at 87-88, 738 S.C.2d at 509-510.

Applicant submits the Trial Counsel's failure to object to numerous admissions of improper hearsay testimony clearly satisfies the first prong of the *Strickland* standard. Trial Counsel has failed to provide the Court with any reasonable strategic or tactical reason for his failure to object each and every time such testimony was introduced during Applicant's trial. In truth, Trial Counsel made no effort to provide this Court with any explanation for his failure to raise proper objections to this prejudicial testimony. Therefore, Applicant submits that he has met his burden of proof with regard to his allegation that Trial Counsel was ineffective for failing to object to this line of testimony introduced through multiple witnesses.

Assuming, for the sake of argument, testimony that the Victim did not report the behavior at issue during Applicant's trial until after she got in trouble for drug possession would suffice to give rise to an implication of fabrication, the testimony in question exceeded the parameters for admissible testimony under the exception to the hearsay rule found at 801(d)(1)(B), SCRE; i.e., time and place of the incident(s) alleged. Applicant would, however, assert that there are two problems with Rule 801 (d)(1)(B), SCRE, even being applied to the testimony in question. First, the testimony in question, as outlined above, was introduced *by the State* during its direct examination of these witnesses and therefore, was not introduced in response to any effort to imply that the accusations were fabricated. Further, it was the State, not the Defense, who introduced testimony establishing that the accusations were not made until after the complaining witness got in trouble for drug possession. Perhaps most importantly, in *Jolly, supra*, our Supreme Court expressly held that *"because the witness is the Victim in the case, she could not have made the prior consistent statement regarding her assault before she had a "relation to*

the cause." *Id.*, 314 S.C. at 29, 443 S.E.2d at 568 (Emphasis added). Nevertheless, even if the challenged testimony would support impeachment under this exception to the hearsay rule, the testimony in dispute exceeded references to statements by Victim concerning the time and place of the alleged assaults and therefore was improper.

As in *Vail, supra*, the evidence against Applicant was far from overwhelming. As in *Vail*, the jury heard testimony concerning what was alleged to be an inordinate amount of cell phone communication between Victim and Applicant. As in *Vail* and *Dawkins*, the jury did not convict Applicant of all the charges against him. The jury actually acquitted Applicant of the most serious charge against him. Therefore, the fact that Applicant was acquitted on the charge of second-degree Criminal Sexual Conduct with a Minor, is not an appropriate measure as to whether Trial Counsel was ineffective. Applicant would argue that his acquittal on that charge is some indication that the jury did not find Victim's testimony to be entirely credible. He submits that the improper corroboration of her testimony cannot be harmless on the facts of this case. The Supreme Court in *Jolly, supra*, specifically found that such improper corroboration testimony that is merely cumulative to a victim's testimony cannot be harmless. Our Supreme Court has consistently found that it is the very cumulative effect of this type testimony which enhances the devastating prejudicial impact of improper corroboration. *See, Jolly*, 314 S.C. at 21, 443 S.E.2d at 569; *Dawkins*, 346 S. C. at 157, 551 S.E.2d at 263; *Vail*, 402 S.C. at 90, 738 S.E.2d at 510.

For all the above reasons, Applicant respectfully submits that he has met his burden of proof with regard to his allegations concerning Trial Counsel's ineffectiveness for failing to object to the improper corroboration testimony introduced during his trial. He asks for this Court's finding that his right to effective assistance of counsel, as guaranteed by the Sixth and

Fourteenth Amendments to the United States Constitution, were violated by Trial Counsel's failure to raise appropriate objections to the testimony in question. He respectfully asserts that Counsel's failure to object to this improper corroboration testimony irreparably prejudiced his ability to receive a fair trial and that the outcome of his trial would likely have been different but for Counsel's errors and omissions regarding this evidence. For these reasons, he argues that his judgment and sentence must be reversed and that his case should be remanded for a new trial.

B.

Trial Counsel's Failure to Make Proper Objections and Motions Regarding Cell Phone Records Generated by Victim's Mother

**First Amended Application: Allegations No. 6, 7, 8, 9 and 14.
Original Application, Allegation 4**

Trial Counsel was ineffective for failing to file a motion *in limine* to prohibit the State from introducing phone records concerning Victim's cell phone without proper authentication under the business records rule.

Trial Counsel was ineffective for failing to make a timely objection when Victim's mother first approached the subject of cell phone records she allegedly "printed out" concerning activity on her daughter's cell phone. Tr. p. 121, l. 18 – p. 124, l. 21.

Trial Counsel was ineffective for failing to request that prior testimony regarding the cell phone records be stricken from the record.

Trial Counsel was ineffective for failing to object to the State being allowed to question the Victim's mother being asked to testify concerning the content of the cell phone records that had been expressly ruled to be inadmissible by the Court. Tr. p. 131, l. 1- p. 133, l. 13.

Trial Counsel failed to adequately impeach the State's witnesses at trial, failed to make appropriate objections, motions and legal arguments during Applicant's trial and failed to request appropriate curative charges during Applicant's trial.

During the trial testimony of Victim's mother, she testified that near the end of October, 2010, Victim had gone to see her father and got in trouble when she was found in possession of a cigarette and a pill. Her mother went on to testify that following the discovery of this incident she went through her daughter's cell phone and ultimately accessed her cell phone records by computer. The testimony concerning what she found when she accessed her daughter's cell phone records by computer was not objected to by Trial Counsel. The trial record establishes that the Solicitor elicited the testimony in dispute by questioning the mother concerning whether she had gone on the computer and pulled up the records for her daughter's phone. Victim's mother was allowed to testify at length, without objection, concerning the content of the cell phone records she retrieved off the computer. Her testimony included statements concerning the hundreds of text messages which she claimed those records reflected were exchanged between her daughter and Applicant in September, 2010. Tr. p. 117, 14 - p. 119, l. 8 and Tr. p. 121, l. 18 - p. 124, l. 18. Trial Counsel did not object to any of the testimony concerning the content of these cell phone records until the Prosecution moved to introduce the print out of those records produced by the mother into evidence. Then, and only then, did Trial Counsel object on the ground that the records had not been authenticated by the keeper of the business records in question. Tr. p. 124, l. 19 - p. 125, l. 5. The Prosecution was actually allowed to make a lengthy statement concerning the cell phone records, and what they contained, before the jury was excused from the courtroom. Tr. p. 125, l. 6 - p. 126, l. 10. After further lengthy debate, the trial court ultimately sustained Applicant's objection to the print out of the cell phone records produced by Victim's mother. The trial court found that these records were hearsay and inadmissible. Tr. p. 130, ll. 6-25.

In response to this ruling, the Prosecutor asked the Court for clarification concerning what testimony she would be able to elicit from the mother concerning the contents of the cell phone records that had been ruled inadmissible. At that point, the trial court correctly noted that previous testimony concerning the content of the cell phone records had already come into evidence without objection. Tr. p. 131, ll. 1-23. Without any further objection, or even comment, from Trial Counsel, the jury returned to the courtroom and the Prosecution resumed questioning of the mother concerning the content of these cell phone records. Thus, not only did Trial Counsel neglect to object when the State first approached this line of questioning with the Victim's mother, but it also neglected to make any kind of argument against the Prosecution being allowed to ask further questions concerning what information the Mother claimed to have read in those records. Tr. p. 131, l. 1- p. 133, l. 18. The record of Applicant's trial clearly establishes that Trial Counsel make no effort whatsoever to object to any additional testimony from the mother in which she testified to information she claimed was derived from these cell phone records which had been found to be inadmissible.

In Trial Counsel's Post-Conviction Relief testimony he acknowledged having given Post-Conviction Relief Counsel access to his trial file and having provided PCR Counsel a complete copy of the discovery materials provided to him by the State in connection with these charges. He ultimately testified that he did not object to the mother's testimony because he did not view her testimony about the content of those records to be objectionable despite his own position that the records themselves were inadmissible unless properly authenticated under the rules of evidence pertaining to business records. Trial Counsel offered no basis for his belief that the mother could testify to the content of these records when the records themselves were found to be inadmissible. PCR p. 15, l. 25 - p. 24, l. 13. Trial Counsel offered no strategic or tactical

explanation for failing to make a motion to strike any prior testimony pertaining to the content of the records in question once they were found to be inadmissible. According to his testimony, he could not recall whether, *"that played out in my mind or not, but I didn't make that objection or that request."* PCR p. 24, ll. 14-21. Furthermore, Trial Counsel could not recall his *"thought process"* in not objecting to additional testimony from the mother concerning the content of the records in question after they had been found to be inadmissible. PCR p. 24, l. 22 - p. 25, l. 23. Trial Counsel was asked if, once cell phone records were ruled inadmissible, he ever considered objecting to the mother being allowed to give statistical testimony addressing the number of text communications between Applicant and her daughter based upon the content of those records. Consistent with his other testimony concerning this and other issues, Trial Counsel simply acknowledged that he did not object, saying, *"again, I don't recall, but I did not."* Trial Counsel did admit that the mother gave no testimony indicating any other basis for knowing the number of text communications that took place other than these cell phone records. PCR p. 28, ll. 9-22.

As previously discussed, the State's case against Applicant was far from overwhelming. The facts established by the trial testimony show,

- The complaining witness did not report these alleged incidents until after she got caught in possession of a narcotic drug;
- That Victim had by her own admission been using Vicodin prior to getting caught by her step-mother;
- There were no eye witnesses in this case to any inappropriate behavior between Applicant and the Victim;
- There was no physical evidence tying Applicant to these assaults, nor was there any forensic evidence that an assault had even taken place.

Given these facts, the State's case relied heavily on the existence of the alleged inappropriate volume of cell phone communication between Applicant and Victim.

It is Applicant's position that Trial Counsel was ineffective for failing to make a motion *in limine* asking the trial court to exclude from evidence any records, and testimony concerning the content of records concerning Victim's cell phone account, unless the State presented a witness to properly authenticate those business records. At trial, the lower court ultimately ruled that cell phone records accessed by Victim's mother on the computer were not admissible under the business records exception to the hearsay rule. As noted above, that ruling was not made until after Victim's mother had already given significant testimony concerning the content of those records. Ultimately, the Prosecution was allowed to offer further testimony from this witness concerning the content of these records despite them having been ruled inadmissible, due to Counsel's failure to object when this witness first began to testify concerning the content of these records. It is Applicant's position that Trial Counsel was ineffective for neglecting to make a motion *in limine* to avoid the jury ever hearing anything about the records in question until if and when they were found to be admissible following proper authentication of these cell phone records. Trial Counsel admitted in his PCR testimony that he had a copy of the contested records prior to trial. He indicated that he could not remember when he became aware of the source of those records. The record further indicates that the limited information the State's experts were able to download from Victim's phone was likewise contained in the discovery package. That information was ultimately introduced at trial as State's Exhibits No. 10 and 11, and was introduced during the Post-Conviction Relief proceeding as Applicant's Exhibits 3 and 4. PCR p. 90, l. 20 - p. 91, l. 4. Thus, it was clear from the cell phone reports provided in the discovery packet, that the information law enforcement had been able to

obtain from Victim's cell phone contained a fraction of the information contained in the T-Mobile records ultimately marked as State's Exhibit 5 for ID at trial.

Applicant would respectfully assert that the discovery materials provided to Trial Counsel gave him reason to explore the question of whether or not the State could properly authenticate the cell phone records found in the discovery materials. For example, the records marked State's Exhibit for ID No. 5, were dated September 29, 2010, Trial Counsel acknowledged that he would have known the date Applicant was arrested from the arrest warrant. PCR Counsel noted that the records of the Clerk of Court reflected that Applicant was not arrested until November 2, 2010. PCR p. 17, l. 3 - p. 18, l. 17. Thus, Trial Counsel had reason to question the origin of these records based on their date and based upon the fact there was a glaring discrepancy between the amount of information law enforcement had been able to produce concerning activity on this same cell phone account and what was contained in the T-Mobile records provided, without provenance, in the discovery materials. Applicant would additionally note that Trial Counsel not only failed to file an appropriate motion concerning these records, but once he finally did raise an objection to these records, he allowed the State to argue its position concerning the admissibility of these records *in the presence of the jury* without objection. Tr. p. 124, l. 19 - p. 126, l. 10. Had Trial Counsel filed a motion *in limine* asking the trial court to prohibit the State from introducing any cell phone records which were not obtained from T-Mobile and properly authenticated under Rule 803(6), SCRE, the jury would never have heard the discussion concerning these cell phone records. Counsel's failure to address this matter in a motion *in limine* no doubt ultimately resulted in the jury hearing discussions which created the impression in their minds that the defense was hiding something.

Having failed to properly present this issue for the trial court's ruling *in limine*, Trial Counsel exacerbated the error by neglecting to object the first and every time the mother began to

testify to the content of these records. Trial Counsel further compounded the prejudice arising from this omission by neglecting to request that he be heard on his objection to the introduction of the printed records outside the presence of the jury. The trial record reflects that it was actually the trial judge who interrupted the discussion concerning the admissibility of these records and instructed the jury to retire to the jury room. Tr. p. 124, l. 19 - p. 126, l. 10. Unfortunately, the jury was not removed from the courtroom until after the Prosecutor had made a lengthy argument in favor of the reliability and admissibility of these records.

Respondent will no doubt argue that Trial Counsel would not have wanted to make a motion *in limine* concerning these records for the reason that the motion itself may have provoked the State to obtain a witness to supply the authenticating testimony required by Rule 803(6), SCRE. The record of the Post-Conviction Relief hearing in this matter reveals that the more likely explanation lies in Counsel's belief that the mother could testify to the content of these records regardless of whether the records themselves were found to be admissible. Tr. p. 15, l. 25 - p. 20, l. 5. Applicant would further note that if Trial Counsel was going to allow the mother to testify in detail, without objection, to what she read in these inadmissible records he may as well have not challenged the records at all.

South Carolina law clearly indicates that Trial Counsel's understanding of the admissibility of the mother's testimony concerning the content of the cell phone records was erroneous. While the plain language of Rule 803(6) allows for the admission of business records which are properly authenticated by testimony of the custodian, or other qualified witness, the exception to the hearsay rule found at Rule 803(6), SCRE, does not apply to admit live testimony offered to prove the contents of a record containing hearsay when that record *is not admitted into evidence*. *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 773 S.E.2d 607 (2015). In the case of

Deep Keel, supra, our Court of Appeals concluded that a witness could not testify to the contents of documents, and conclusions reached by him based on those documents, where he had no personal knowledge of any of the transactions reflected in those documents. Where the witness's testimony addressed a conclusion based only on statements he read in those documents, his testimony was offered to prove the truth of the statements made by the witness and the Court of Appeals found his testimony was inadmissible hearsay. While the *Deep Keel* case was decided after Applicant's trial, the decision of the Court of Appeals rested on its earlier decision in *Twelfth RMA Partners, L.P. v. National Safe Corp.*, 335 S.C. 635, 518 S.E.2d 44 (Ct App 1999), wherein the court recognized that a person is a "qualified witness" under the meaning of Rule 803(6), if the testimony conveys information from a person "with knowledge" *at the time the records were created*. *Id.*, 335 S.C. at 642, 518 S.E.2d at 48. Applicant submits that Victim's mother clearly was not in possession of knowledge concerning the content of the record in question at the time the record was created.

In *State v. Rich*, 293 S.C. 172, 359 S.E.2d 281 (1987), the Supreme Court of South Carolina addressed an appeal from a General Sessions ruling concerning the application of the business records exception to the hearsay rule to evidence offered in a criminal trial. In the *Rich* decision, the Supreme Court relied on *State v. McFarlane*, 279 S.C. 327, 306 S. E.2d 611 (1983), for the fact that the exception to the hearsay rule found in the business records exception did not absolve the offering party from the usual requirements of authentication. The Court also cited with approval the case of *State v. Foster*, 284 N.C. 259, 200 S.E.2d 780 (1973), wherein the North Carolina Supreme Court found that whether a fingerprint card from a master file was actually introduced into evidence or not, testimony concerning it, "with out evidence as to when and by whom the card was made and that the prints on the card were in that those of this defendant, violated the hearsay rule and should have been excluded." *Foster*, 284 N.C. at 273, 200 S.E.2d at 793. As noted above, South Carolina

case law provides that an individual qualified to testify concerning the content of a business record must be conveying information from a record of which he had knowledge at the time the record was created. *Twelfth RMA Partners, supra*. In Applicant's case, the mother clearly would not have qualified as an authenticating witness under Rule 803(6). Accordingly, her testimony concerning data which was directly drawn from these cell phone records was inadmissible hearsay. Her testimony regarding the information found in those records was clearly offered for the truth of the matter asserted inasmuch as this witness repeatedly asserted facts concerning the volume of text communications between Applicant and her daughter based upon the statistical information she acknowledged that she obtained from those records. As previously noted, this witness established that she had researched the cell phone records concerning her daughter's cell phone number on the computer because she could not determine the information she was seeking from the phone itself because the records had been deleted from the phone. As in *Rich, supra*, this witness "should not have been allowed to testify about data contained in an unauthenticated document." 293 S.C. at 174, 359 S.E.2d at 282.

In summary, the cell phone records addressed by Victim's mother in her trial testimony were a part of the discovery materials received by Trial Counsel prior to trial. Given the volume of text communications documented in those records between the Victim and Applicant, Trial Counsel could, and should, have anticipated that the State would seek to introduce these records. The fact that the date on these records preceded the date of Applicant's arrest by more than a month should likewise have been readily apparent to Trial Counsel. The record before the Court confirms that this case first came to law enforcement on October 26, 2010, almost an entire month before the date of the records in question. Tr. p. 215, ll. 5 – 14. These factors alone should have prompted Trial

Counsel to question the origin of these records; particularly since they were so much more detailed and lengthy than the records obtained by law enforcement from any other source.

Applicant submits that he has met his burden of proof concerning the fact that Trial Counsel was ineffective for neglecting to file an appropriate motion *in limine* prohibiting the Prosecution from introducing testimony concerning these records until such time as they had been properly authenticated. Any argument that Trial Counsel would not have wanted to file such a motion for fear that he would prompt the Prosecution to produce such a witness, is simply not supported by this record. There were, as noted above, telltale signs that the records in question may not have come directly from the cell phone service provider. The fact that Trial Counsel was not unduly concerned about the jury hearing about the content of these records is apparent from Trial Counsel's failure to raise any objection to the mother's testimony concerning the data she obtained from those very records. Likewise, it is obvious from Trial Counsel's testimony concerning the issues surrounding the cell phone records that he did not adequately research the law concerning the business records exception to the hearsay rule prior to Applicant's trial in anticipation of the State's predictable desire to introduce these records.

Having failed to file a motion *in limine*, and subsequently failing to object when the mother first approached the subject of these cell phone records, Trial Counsel erred in failing to argue that previous testimony concerning the content of these inadmissible records should be stricken from the record and was ineffective for neglecting to request that Applicant's jury be instructed to disregard that testimony in their deliberations. Having failed to take any of the actions discussed above, Trial Counsel exacerbated the prejudice arising from his deficient representation by failing to argue that the Prosecution should not be permitted to illicit *further* testimony from Victim's mother concerning information she obtained from these records once they were ruled to be inadmissible hearsay.

The prejudice to Applicant arising from these errors and omissions by Trial Counsel cannot be overstated. The weight of the entire case for the Prosecution rested almost entirely on the credibility of Victim. The only other evidence produced by the Prosecution which even arguably tended to support the State's theory of the case, was the existence of what was characterized as an abnormal level of communication between Victim and Applicant, a close family friend, by text message. Due to Trial Counsel's deficient performance, the State was able introduce testimony from the mother concerning the fact that there were hundreds of text messages between her daughter and Applicant during September, 2010. Because of the manner in which Trial Counsel handled the legal debate concerning these records, the jury was left to infer that there were in fact cell phone records available which supported the mother's assertions, but that the defense had succeeded in keeping that information out of evidence.

Ironically, due to the deficient manner in which Trial Counsel handled the issues surrounding these cell phone records, the State ultimately ended up with the best of both worlds. The mother was able to testify that these records revealed that hundreds of text messages had been sent between her daughter and Applicant in the month of September, 2010. While the jury heard this testimony, without objection, they did not have for their review a copy of the cell phone records in question. Those records were ultimately marked as State's Exhibit No. 5, for ID only, after being excluded from evidence. While those records would have indicated that there were hundreds of individual text transmissions between Applicant and Victim during this time period, a review of the records themselves would have demonstrated the fact that the emphasis placed on the *number of transmissions* was extremely misleading. This is particularly true where some of Applicant's jurors may not have been familiar with communication by text. For example, *a string of a dozen* text transmissions within a few minutes, would indicate *a single* short conversational text exchange

between two parties and would not be the equivalent of 12 separate conversations. When these records are analyzed in terms of how many groups of texts going back and forth between Victim and Applicant took place in the space of mere minutes, it is readily apparent that the raw numbers, concerning the number of text transmissions, do not fairly reflect the duration and frequency of these communications between Applicant and his alleged Victim. In addition, a review of the records themselves would have revealed the fact that many, if not the majority, of these text conversations were in fact initiated by the Victim, not Applicant.

For all the above reasons, Applicant respectfully submits that he has met his burden of proof with regard to his allegations addressing the deficient representation he received in connection with the issues in his case relating to Victim's cell phone records. Given the significance of the mother's testimony concerning the sheer volume of text messages between her daughter and Applicant, it is impossible to underestimate the potential prejudice arising from Counsel's errors and omissions concerning these records. For that reason, Applicant respectfully submits that he is entitled to relief on these grounds, that his judgment and sentence should be reversed and his case be remanded to the Court of General Sessions for a new trial.

C.

Trial Counsel's Failure to Make Proper Objections and Motions Concerning Revelations that Multiple Jurors Were, or Appeared to be, Sleeping during Applicant's Trial.

First Amended Application: Allegations No. 5, 15

Trial Counsel was ineffective for failing to make a motion for a mistrial when it was reported to the Court that one of jurors was napping during the trial, and had his eyes closed during a significant portion of the trial testimony and instructions by the Court. Tr. p. 99, l. 2- p. 100, l. 22; Tr. p. 103, l. 17- p. 104, l. 8.

Trial Counsel was ineffective for failing to make a motion for a mistrial following the receipt of information that multiple witnesses had reported the same jurors previously admonished continuing to sleep during Applicant's trial, for failing to request that the entire jury be questioned concerning sleeping, or closing their eyes, during Applicant's trial and, at minimum, for failing to request a cautionary charge to the entire jury where Applicant reported that more than one juror appeared to be closing their eyes during this trial. Tr. p. 243, l. 20- p. 247, l. 22.

Fairly early in Applicant's trial, the State informed the Court that the Victim advocate had informed the Prosecution that a juror on the front row was taking a nap during Applicant's trial. At that point, the Prosecution asked that the Court address the issue noting that the following day the jury would be hearing lengthy testimony all day long. Both Trial Counsel and the State deferred to the Court's judgment on how to address the problem, but joined in a request that the jury be admonished. The following day when Applicant's trial reconvened the trial judge admonished the entire jury panel concerning how important it was to pay attention and remain alert. The Court also asked that everyone pay attention make note if "your neighbor" is having trouble focusing. Interestingly, the Court actually instructed the jury that if they noticed a fellow juror having trouble focusing *"you can certainly maybe assist them in maintaining alertness throughout the trial."* Tr. p. 103, l. 9 - p. 104, l. 8. The jury panel was clearly not questioned about this issue at the time of the initial revelation.

Much later in this trial, after a significant amount of testimony had been heard, the Prosecutor advised the Court that several people kept bringing it to her attention that they had noticed *"a certain juror has continued to nod off."* The Prosecutor specifically asked that the Court bring that particular juror back and question him concerning the fact that he was shutting his eyes during the testimony. Trial Counsel then spoke up and indicated that he had not observed the problem with this juror being raised by the Prosecution, but allowed for the fact that

he may have been too focused on what he was doing to notice. He did specifically indicate, however that Applicant had written him a note and brought to his attention that there was more than one juror at issue with regard to this kind of conduct. Trial Counsel specifically acknowledged that Applicant had written him a note saying that *"it was more than one person"* who appeared to be sleeping. Following this revelation, the Court questioned one juror, Franklin Lincoln, concerning the fact that he had been sitting with his eyes closed during the trial testimony. This juror stated that he was *"just kind of tired."* He claimed, however, that he was *"paying attention but my eyes have been messing with me."* He went on to specifically state, *"I wasn't sleeping, I wasn't sleeping, but my eyes were closed, I was paying attention."* Tr. p. 246, ll. 15-16.

After juror Lincoln was questioned, Trial Counsel was asked if there was anything further he wish to add on this issue. He responded, *"no, your honor, that's sufficient."* The trial judge then proceeded to state for the record it's finding that the juror in question had not been engaged in any kind of "juror misconduct" and further that the juror had stated that he had not missed any of the proceedings and had heard all the testimony. Tr. p. 247, ll. 1-18.

At no point during the discussion concerning this issue did Trial Counsel ask that the entire jury panel be questioned concerning whether any of them were having difficulty remaining awake during the trial testimony. At no point during the trial court's interaction with juror Lincoln was this juror admonished that he needed to not only listen to the testimony, but watch the witnesses as they presented their testimony. Trial Counsel did not request that the Court investigate further to determine whether any of the other jurors were having difficulty remaining awake during Applicant's trial. There was no discussion on this record concerning whether an

alternate juror should be substituted for the juror having consistent problems staying awake during Applicant's trial.

During the jury instructions given at the conclusion of Applicant's trial, this jury was instructed concerning its role in deciding the credibility of the witnesses presented during the trial. Tr. p. 491, l.10 - p. 492, l.22. In that charge on the law as it pertained to Applicant's case, the Trial Court referenced earlier instructions given to the jury at the beginning of the trial concerning their role in determining the credibility of witnesses. In that earlier instruction, the Court had expressly instructed the jury concerning some of the factors that they could take into account in determining the credibility of the witnesses who would testify in Applicant's trial. Among those factors, the jury was instructed that, *"you can consider their demeanor on the stand."* Tr. p. 45, l. 14 - p. 46, l. 9.

Trial Counsel was questioned about the sleeping juror issue during his Post-Conviction Relief testimony. His testimony clearly indicates that he recalled the incident. He further indicated that he recalled, much later in Applicant's trial, the issue being raised yet again concerning a sleeping juror. He acknowledged that Applicant had given him a note indicating that there was more than one juror involved. Trial Counsel admitted that someone listening to testimony with his eyes shut, *"would certainly shut off any visual cues in,"* but offered no explanation as to why he had not asked if the juror in question should be replaced or for a mistrial. As with other issues in this case, Trial Counsel declined to offer any explanation for why he did not request that *the entire jury* be questioned concerning whether anyone was having difficulty remaining awake once Applicant brought to his attention the fact that there appeared to be more than one juror involved. PCR p. 12, l. 13 - p. 15, l. 22. It is significant to note that the Prosecutor in Applicant's trial actually brought to the Court's attention the fact that *"my Victim's*

family and other individuals actually tell me" about one certain juror who continues to nod off during the trial. Tr. p. 242, l. 20 - p. 243, l. 8.

As the Trial Court's instructions to the jury emphasize, both at the outset of the trial and after the close of testimony, a jury is able to take into account many factors in determining the credibility of witnesses. Among those factors is the demeanor of witnesses as they testify. Where at least one of the jurors at Applicant's trial was obviously sitting through a significant portion of the trial with his eyes closed, there is a danger that he was in fact sleeping during the trial testimony. Even if this juror was not sleeping he was, to use Trial Counsel's own words, "missing visual cues" which may have factored in a determination of credibility.

Given the fact that there was no physical evidence in this case, and no eye witness testimony concerning any inappropriate conduct by Applicant, the credibility of the teenager accusing Applicant was a pivotal issue at his trial. This is particularly true where the complaining witness did not raise these accusations until after she had gotten in trouble for possession of a narcotic drug. Indeed, Applicant asserts that her credibility was the most important issue at his trial. For this reason, he now respectfully submits that Trial Counsel was ineffective in the manner in which he handled the subject of one or more jurors sleeping, or at minimum listening to testimony with eyes closed, during his trial. Trial Counsel did not ask the Court to consider seating an alternate in place of the juror who had demonstrated an inability to be alert through out Applicant's trial. Once it was brought to Trial Counsel's attention that more than one juror may have been involved, Trial Counsel did not ask the Court to question the entire jury to determine if any of the other jurors were having difficulty staying awake and paying attention in Court. With regard to juror Lincoln, this was clearly not an isolated incident. The Prosecution, not Trial Counsel, brought this problem to the Court's attention early in the trial and

it did so again once it became apparent that there was an ongoing problem with this juror. Statements made on the record by the Prosecutor clearly establish the fact that multiple people, including some of Victim's family members, continued to bring to her attention the fact that this juror was nodding off.

In light of the above factors, Applicant respectfully submits that Trial Counsel was ineffective for failing to discuss the possibility of replacing juror Lincoln with an alternate juror, particularly after juror Lincoln displayed a pattern of inattentiveness from near the beginning of the trial forward until a much later point in the proceeding even after being admonished by the Court. Trial Counsel has not put forth any strategic or tactical explanation for his failure to ask that this juror be replaced or that the entire jury panel be questioned concerning this issue. Applicant asserts the Trial Counsel's representation on this issue fell short of the standard of reasonable professional assistance of counsel required of attorneys representing clients in criminal matters in South Carolina. For that reason, Applicant asks that this Court grant his Application for Post-Conviction Relief on these grounds, overturn his judgment and sentence and remand his case for a new trial.

D.

Failure to Investigate use of Applicant's Cell Phone as Tool for the Defense.

Amended Allegation 16

Trial Counsel was ineffective for failing to investigate the use of Applicant's cell phone to establish the harmless nature of text communications between Applicant and Victim.

Trial Counsel acknowledged that Applicant's cell phone was taken from him at time of his arrest and was put in with his other personal effects at the jail. When asked if he considered using Applicant's cell phone to establish the innocent nature of Applicant's text communications with

Victim, Trial Counsel recalled discussing with Applicant what might be seen on his cell phone. Trial Counsel admitted that Applicant at no point indicated that there was anything in any of his text messages with the Victim to be afraid of. PCR p. 29, ll. 4-25.

Trial Counsel could not recall whether he ever discussed with Applicant whether his cell phone was a “smart phone” or whether his phone may have stored text messages for a long time. He recalled discussions with Applicant concerning the relationship he had with the girl who was accusing him of these things. He acknowledged that, *“he certainly said it was innocuous”* but couldn’t recall discussing the specific points about the phone with Applicant. PCR p. 30, ll. 1-25. All that being said, Trial Counsel offered no explanation for not pursuing the use of Applicant’s phone to support his claim of the innocent nature of his relationship with the Victim. Given the emphasis the State placed on the text message communications between Applicant and Victim, Applicant submits that Trial Counsel was ineffective for neglecting to discuss using information potentially retrievable from his cell phone to combat the negative inferences the jury might draw from the testimony the State was likely to produce concerning the volume of text communications between Applicant and Victim.

E.

**Failure to object to improper implication that Applicant
had made admissions which prompted his arrest.**

Amended Allegations 18 & 19

Trial Counsel was ineffective for neglecting to object to testimony in which law enforcement witness Ginger Pop stated that Applicant was arrested on the same day she interviewed him thereby implying admissions made by him resulted in the decision to arrest. Tr. p. 232, ll. 10-23.

Trial Counsel was ineffective for neglecting to establish on cross-examination of Officer Pop that Applicant had in fact denied any inappropriate physical contact with the alleged Victim in this case.

Investigator Pop testified that despite having otherwise completed her investigation in this case, an arrest warrant for Applicant's arrest was not obtained until after her interview with him on November 2nd. Tr. p. 232, ll. 10-23. Her testimony indicated that efforts to obtain data off Victim's phone had been unsuccessful. Investigator Pop confirmed that they had not been able to retrieve data concerning the volumes of text messages and calls associated with her phone. Tr. p. 232, ll. 5-9. Her testimony went on to confirm that she did not get a warrant and arrest Applicant until after her interview with him. Tr. p. 232, l. 10-22. Her testimony *did not* inform the jury that Applicant consistently denied any improper relationship or physical contact with Victim. She did not testify to anything said by Applicant during the interview.

As previously noted, Trial Counsel acknowledged in his PCR testimony that Applicant had always described his relationship with Victim as innocuous. Applicant was listed in the contacts on Victim's phone as "Big Brother." Tr. p. 235, l. 19- p. 237, l. 4. In his PCR testimony, Trial Counsel was questioned concerning Investigator Pop's testimony in which she asserted that she did not get a warrant for Applicant until after her interview of him. When specifically asked if he considered objecting to this testimony on the ground that it improperly raised the inference that Applicant had made admissions during the interview which prompted his arrest, and where that inference was totally inconsistent with the evidence in the discovery and before the Court, Trial Counsel responded, *"I don't recall thinking that. It certainly perhaps could. I didn't see that as the issue. I get that in almost every trial, and I guess I should object in every trial, where they talk to him. He was going to be arrested before she ever talked to him. No, I don't recall thinking that, and I certainly didn't make the objection."* PCR p. 31, ll. 18-24.

After Investigator Pop's direct testimony, Trial Counsel did not cross-examine her concerning the fact that Applicant's statement to law enforcement had in fact had nothing to do with

the decision to arrest, nor did he question her concerning the fact that Applicant had vehemently denied any improper contact with the Victim. When questioned about these omissions during the PCR hearing, Trial Counsel stated, “[N]o, that just wasn’t – it is a point, but that wasn’t a point I was pursuing. ...I do not recall. It would be very apparent in the transcript.” PCR p. 31, l. 25- p. 32, l. 10.

Applicant respectfully submits that Trial Counsel was deficient in his representation of Applicant where he failed to object to this testimony which implied that the decision to arrest Applicant was not made until after his interview by Investigator Pop. That testimony could easily have been erroneously interpreted by Applicant’s jury to mean that he had made admissions during this interview. Trial Counsel was ineffective for neglecting to object to this testimony. At minimum, Trial Counsel should have cross-examined this witness in such a manner as to establish that Applicant had made no admissions of improper conduct with Victim and had always vehemently denied any sort of improper relationship with Victim; a close friend’s daughter. In a case that was a true, “she said, he said” situation, any suggestion that Applicant had said things in his interview with law enforcement which cinched their decision to arrest him, was prejudicial. Where that implication was totally unfounded, it was the obligation of Trial Counsel to object and to set the record straight.

F.

Failure to cross-examine state witness, Ashley,
regarding potential impeachment information.

Amended Allegations 20, 21 & 22

Trial counsel failed to provide Applicant reasonable professional assistance of counsel where he failed to cross-examine witness Ashley Jenkinson, the Victim’s best friend, as to whether she had been charged criminally for distributing Vicodin, a controlled narcotic painkiller, to Victim? See testimonial admission, Tr.p. 185, l. 20 - p. 286, l. 22.

Trial Counsel was ineffective for neglecting to cross-examine witness Jenkinson as to whether the State had advised her she could be charged with a crime for distributing vicodin and the potential consequences of such a charge.

Trial Counsel failed to provide Applicant reasonable professional assistance of counsel where he neglected to adequately cross-examine witness Jenkinson concerning whether she was given any consideration for her testimony against Applicant.

Ashley, as previously noted, expressly admitted giving Victim Vicodin; a narcotic pain pill. She testified, in response to questions by the State on direct examination, that she and Victim had *“gotten in trouble”* over the incident. Trial Counsel did not question this witness concerning the legal consequences she could have been facing as a result of her distribution of this controlled substance to Victim. Nether did Trial Counsel question this witness concerning what consideration she had been given on that potential charge in exchange for her testimony at Applicant’s trial.

When questioned concerning his failure to pursue this line of inquiry with this witness, Trial Counsel initially brushed off the question with the blanket claim that such a charge just would not have been pursued against someone in Georgetown County for *“either possessing or distributing it, handing it to somebody.”* Trial Counsel repeatedly asserted that there was no indication that she would be prosecuted for that, however he admitted that he did not interview her prior to Applicant’s trial, and she was not questioned about this subject at trial. Ultimately, taking these facts into account, Trial Counsel acknowledged that he had no basis for knowing whether or not this witness had been told she could be charged for distributing Vicodin to Victim. PCR p. 32, l. 18-p. 33, l. 22.

An accused’s right to confront all the witnesses against him is fundamental. Cross-examination of government witnesses has been recognized as *“the principal means by which the believability of a witness and the truth of his testimony are tested.”* *Davis v. Alaska*, 415 U.S. 308, 316 (1974). In *Delaware v. VanArsdall*, 475 U.S. 673 (1986), the high court recognized that

infringement on the accused's right to cross-examine a witness against him, like all other Confrontation Clause errors, is subject to harmless error analysis under *Chapman v. California*, 386 U.S. 18 (1967). It is well established law that an accused is entitled to cross-examine a witness against him with evidence of consideration given to that witness in exchange for their testimony. *Gigglio v. United States*, 405 U.S. 150 (1972). In *State v. Brown*, 303 S.C. 169, 399 S.E.2d 593 (1991), our Supreme Court found reversible error in the lower court's limitation of cross-examination of cooperating witness concerning his "*deal*" with the prosecution. This witness's testimony was prejudicial to Applicant inasmuch as she was the only witness that claimed Victim told her about the alleged misconduct by Applicant *before* Victim got in trouble for drug possession.

G.

Failure to question Victim concerning her theft of Vicodin from her father in addition to the isolated incident testified to by her step-father and mother wherein she got the same drug from her best friend.

Amended Allegation 23

Trial Counsel was ineffective for failing to cross-examine Victim concerning her alleged theft of a prescription narcotic pain medication from her mother's fiancé, and the criminal charges that she could have faced for that theft and possession, as well as for obtaining the same drug from her best friend. Tr. p. 144, l. 23 - p. 145, l. 22; Tr. p. 164, ll. 9-25; Tr. p. 172, l. 23 - p. 174, l. 4, Tr. p. 174, l. 25 - p. 175, l. 6; Tr. p. 272, ll. 1 - 22.

Trial Counsel admitted that he did not question Victim concerning the allegation that she had not only gotten Vicodin from Ashley, but had also been stealing that same drug from her mother's fiancé. He admitted that he did know why he didn't specifically cross-examine Victim concerning that issue, but testified that he generally felt there is nothing to be gained by attacking a young victim. PCR p. 33, l. 25- p. 35, l. 18. The trial record in this case shows that the only real defense strategy employed by Trial Counsel was to emphasize that Victim never

contemporaneously reported her claims and only ultimately did so after getting in trouble for possession of a Vicodin pain pill. In the testimony of the step-father and the mother, it is reported that Victim got in trouble for possession of a single pill and a cigarette she had obtained from her friend, Ashley. Tr. p. 81, l. 8 – p. 84, l. 18; Tr. p. 115, l. 14 – p. 116, l. 17; Tr. p. 139, ll. 4 – 19. The mother expressly denied knowing whether there were any other instances where Victim had Vicodin. She admitted asking Victim if this was an ongoing issue, but claimed she could not remember her daughter's answer. Tr. p. 139, l. 20 – p. 140, l. 4. Testimony from Applicant's wife, in whom Victim often confided, indicated that Victim was getting this same pain medication from multiple sources and that the single pain pill her father's wife had caught her with was not an isolated incident. Tr. p. 272, l. 2 – p. 274, l. 23.

Applicant would respectfully submit that given the defense strategy to demonstrate that Victim never made these claims against him until she got caught with Vicodin, it was crucial to establish just how much trouble she was facing, not just with her parents, but potentially with law enforcement as well. He would submit that it was crucial that Trial Counsel question Victim about the fact that she was getting Vicodin from her step-father's prescription, as well as from Ashley, in order to establish just how serious "the trouble" she was in was and why she legitimately may have feared even more trouble was about to come her way if her step-father figured out she had been taking his medication. Further, there existed a very real possibility that her claims were fabricated to shift attention away from her drug use and to cast herself in the more sympathetic role of victim. Furthermore, her admission that she had in fact been using Vicodin would have, in and of itself, given the jury another reason to question the accuracy of her recall concerning the events in question, in addition to her strong incentive to lie to cover up her own wrong doing. For these reasons, Applicant submits Trial Counsel's failure to cross-examine Victim concerning her theft of

Vicodin from her step-father was highly prejudicial and therefore, should not be found to constitute harmless error.

H.

Trial Counsel's failure to pursue the question of who deleted information on Victim's phone and why.

Amended Allegation 25

Trial Counsel was ineffective for neglecting to cross-examine State witnesses concerning who had deleted text communications on Victim's cell phone. See, Tr. p. 198, l. 15 - p. 200, l. 7; State's Ex. No. 10 and 11.

During the PCR hearing, Trial Counsel recalled the testimony of Investigator John Gregory concerning the fact that the type of phone involved has a lot to do with whether or not they can retrieve deleted items. He testified that he did not recall that the information Investigator Gregory had been able to retrieve from Victim's phone contained none of her communications with Applicant. PCR p. 35, l. 19- p. 36, l. 9. Interestingly, Investigator John Gregory would subsequently specifically testify, *"the data recovery off the phone was very limited in this data recovery report so it was not able to give us, you know, everything that had been deleted or anything like that."* Tr. p. 232, ll. 1-4 (Emphasis added).

The two State's Exhibits containing the limited information Investigator Gregory was able to download from the Victim's phone reflect suspiciously little data particularly in light of the amazing volume of text messaging the records the State tried to introduce reflected. See, State's Trial Exhibits No. 10 and 11, introduced during the PCR hearing as Applicant's Exhibits 3 and 4 and State's Trial Exhibit No. 5, for ID only. Trial Counsel's explanation for failing to cross-examine State witnesses concerning who deleted the alleged large volume of text communications between Victim, and when and why it was done, was as vague as the majority of his testimony

concerning his trial decisions relating to Applicant's Sixth Amendment claims. PCR p. 36, l. 19- p. 37, l. 1. Ultimately, however, he conceded that getting to the bottom of the question of who deleted all of the text messages between Victim and Applicant, and why it was done, could have been a valuable tool for the defense. PCR p. 37, ll. 2-7. In evaluating this allegation, it is important to note that Victim's mother testified that she took her daughter's cell phone and iPad away from her when she got in trouble for possessing a cigarette and a pain pill. Tr. p. 115, l. 14- p. 119, l. 8. Victim expressly denied getting off restriction after she reported the incidents involving Applicant stated that she had *"no phone, no iPad, nothing"* for the two months she was on restriction. Tr. p. 166, l. 25- p. 167, l. 4. No one however, questioned the Victim, concerning when and why thousands of text messages had been deleted from her phone.

In order to fairly assess the potential prejudice arising from Trial Counsel's failure to explore the question of who deleted the text messages off Victim's phone, it is necessary to closely examine the trial record and the exhibits from the trial. Victim's mother testified that after she found out Victim's stepmother had caught her daughter with a cigarette and a pain pill, she put her on restriction and took away her cell phone and iPad. She testified that she looked through her daughter's phone to see who all she had been communicating with. She testified that Victim, *"being a typical teenager"* had erased most of it from her phone. She did not state how she knew data had been deleted from Victim's cell phone. The mother testified that she next accessed the cell phone records for her daughter's phone number on the computer and was amazed to see the number of text messages between Victim and the Defendant. Tr. p. 115, l. 14 - p. 119, l. 8 and Tr. p. 132, l. 13 - p. 134, l. 4. She specifically testified to seeing hundreds of text messages between Victim and Applicant in the cell phone records she accessed. Tr. p. 132, l. 17 - p. 133, l. 13. Victim's mother ultimately acknowledged that in a typical month her daughter had *"thousands"* of

phone calls and text messages on her account. Tr. p. 138, l. 7 – p. 139, l. 3. On redirect, the Prosecution asked the mother whether Victim was exchanging hundreds of text messages with any other 30-year-old man. The mother responded, "*no*" to that question. Tr. p. 142, l. 22 - p. 143, l. 6. Trial Counsel did not question the mother concerning how she was so certain that her daughter was the one who had erased large volumes of data from her phone. Trial Counsel did not question this witness as to whether she had personally deleted any additional text messages on her daughter's phone. Neither did Trial Counsel question how she supposedly knew that none of the thousands of other text messages on her daughter's account reflected large numbers of communications with older men. This is particularly significant in light of the mother's testimony that the record she was able to access did not provide the content of the communications reflected on the statement. She confirmed that the only way she was able to identify the number of incoming and out going text messages between her daughter and Applicant was because she knew his cell phone number. Tr. p. 121, l. 18 – p. 122, l. 17. She was not even asked if she recognized any of the other phone numbers reflecting extensive contact with her daughter during the same time period.

Significantly, Victim's testimony reflects that she was not questioned by Trial Counsel concerning whether she was responsible for the deletion of any of literally thousands of text messages deleted from her phone. Testimony from the State's own witnesses establishes that it was impossible to retrieve the items that have been deleted from Victim's phone. Applicant would assert however, that given the fact that the volume of text message communication between Victim and Applicant was seized upon by the State as some evidence of an inappropriate relationship with Applicant, exploring the nature of the thousands of regular text message communications engaged in by this young girl, and her reason for deleting them, would have been a potentially valuable exercise by the defense.

I.

“Forensic Interviews”

Amended Allegation 26, 27, 28 and 10

Trial Counsel failed to provide Applicant reasonable professional assistance of counsel where counsel failed to object to repeated references to state witness Dianne Nordeen as a "forensic" interviewer where this witness was not qualified as any sort of expert by the Court and where the use of the term "forensic" interviewer improperly inferred scientific expertise and thereby, improperly bolstered the credibility of the witness in question. Tr. p. 201, l. 1 - p. 213, l. 21; Tr. p. 217, l. 21 - p. 219, l. 11; Tr. p. 259, l. 7 - p. 260, l. 19.

Trial Counsel was ineffective for failing to object to the State's description of the person who interviewed Victim at the Children's Recovery Center as "the therapist or doctor in" where there was no evidentiary foundation for the assertion that the interviewer was either. Tr. p. 173, l. 24 - p. 174, l. 1.

Trial Counsel failed to provide Applicant reasonable professional assistance of counsel where he himself referenced the individual who interviewed the Victim at the Children's Recovery Center as a "forensic interviewer." Tr. p. 211, ll. 12 - 16.

Trial Counsel was ineffective for failing to object to testimony from Victim's mother, Shannon Bellamy, that Victim gave a statement to Children's Recovery Center, after which the Recovery Center recommended that Victim receive counseling, where said testimony raised the impermissible inference that the Center found her statement to be credible. Tr. p. 136, l. 1- p. 148, l. 5.

State witness, Dianne Nordeen testified that she was employed by the Children's Recovery Center as a "*Forensic Interviewer*." She was not qualified as an expert witness of any sort prior to her testimony. Although this witness testified generally concerning the concept of a "*forensic interviewer*," she did not testify to her educational background or any training she had received which qualified her to conduct such interviews. Tr. p. 201, l. 9- p. 213, l. 21. Throughout Applicant's trial multiple references were made to witness Nordeen as a "*forensic interviewer*" and to the "*forensic interview*" conducted in this case. Applicant asserts that Trial Counsel was ineffective for neglecting to object to the characterization of witness Nordeen as a "*forensic*

interviewer” and to the interview she conducted as a “*forensic*” interview. It is his position that this characterization of this witness, and the interview she conducted, improperly bolstered the credibility of this witness’s testimony by attributing to her, and the interviews she conducted, a level of scientific discipline, methodology, technique and education totally unsupported by the record in Applicant’s case. The very use of this label likely caused the Applicant’s jury to attribute to her testimony, and her previous recommendations concerning Victim, a level of expertise for which there was no foundation. The Oxford Dictionary defines the adjective form of the word forensic as, “of, relating to, or denoting the application of scientific methods and techniques to the investigation of a crime.” The noun, is defined as, “scientific tests or techniques used in connection with the detection of crime.” Applicant respectfully submits the State introduced nothing in qualification of their witnesses in connection with the subject of so-called “forensic interviews” which in any way supported the assertion that there was a basis for assigning scientific reliability to this process or the individuals associated with conducting the interviews in question. For that reason, Trial Counsel was deficient in neglecting to object to the use of this powerful phrase in connection with this subject at Applicant’s trial. This label was repeatedly used by State witnesses in a manner that was clearly intended to suggest a level of heightened reliability and scientific accuracy which was simply not supported by the evidence. It is significant to note the number of times this jury heard this term used at Applicant’s trial in connection with his accuser’s interview for this organization. Printed below is a chart of those references.

References to word Forensic in Trial Record

FORENSIC INTERVIEW

PAGE NO.

NUMBER OF REFERENCES ON PAGE

FORENSIC INTERVIEWER

26	1
217	1
251	1
263	1

Total references to the word “Forensic
in connection with interview process **37**

Other references to Forensic unrelated to Interview
Process

FORENSIC MEDICAL

202	1

FORENSIC EVIDENCE

233	1

Total	<u>2</u>

The prejudice arising from the use of the term “*forensic*” when attributed to this witness and her work was no doubt exacerbated by several additional errors by Trial Counsel. Specifically,

- Trial Counsel neglected to object to when the Prosecution characterized the person who conducted the Victim’s interview at the Children’s Recovery Center as “*the therapist or doctor*” who was the only person in the room with the Victim when she was interviewed, despite the fact that there was no evidence that Nordeen was either a therapist or a doctor. Tr. p. 173, l. 24- p. 174, l. 1. Clearly, this reference was unsupported by any evidence at trial and should have been objected to by Trial Counsel. Where Nordeen did not testify to her qualifications, this reference by the State may have been interpreted by the jury as signaling the Prosecutor possessed knowledge of Nordeen’s expertise which went beyond the evidence before the jury.

- Trial Counsel reinforced the prejudice arising from the State's misleading use of the term "*forensic*" in connection with the Victim's interview by witness Nordeen, where he himself referenced the person who interviewed Victim at the Children's Recovery Center as a "*forensic interviewer*." Tr. p. 211, ll. 12-16. Thus, Trial Counsel clearly failed to recognize the significance of this issue and contributed to the level of prejudice by signaling to the jury that the defense acknowledged and embraced the "science" of the "*forensic interview*" process.
- Trial Counsel neglected to object to the testimony of Dr. Carol Rahter, the medical director at the Children's Recovery Center, concerning her own training as a "*forensic interviewer*" where this record clearly established that she *was not* the individual from the Center who conducted the Victim's interview in this case and there was no evidence that Nordeen was equally trained. Tr. p. 250, l. 5- p. 251, l. 7. What qualifications this medical doctor may have possessed were totally irrelevant to the education, training and experience level of Nordeen and, as such, should have been objected to as both irrelevant and prejudicial where the jury may have inferred that Nordeen must have been equally qualified in order to perform the same function.
- Trial Counsel failed to object to the mother's testimony that after Victim's interview at the Children's Recovery Center, the Center recommended that she receive counseling where said testimony could have been interpreted by the jury to infer that those dealing with her daughter at the Center believed her statements to them to be truthful. Evidence that such an interviewer believed a complaining witness has been found to be improper. Tr. p. 136, l. 1- p. 148, l. 5. *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 49, 499-500 (2013).
- As previously argued, witness Nordeen was allowed to testify, without objection, that the Victim identified Applicant as the person who sexually assaulted her.

For all these reason, Applicant asserts that he has met his burden of proof with regard to his allegation that Trial Counsel was ineffective for failing to object to the use of the term "*forensic*" and "*forensic interview*" in connection with the interview process and the individual who conducted Victim's interview. As previously established, the Victim's credibility was the most crucial issue at Applicant's trial. The use of the term "*forensic*," in the context in which it was used during Applicant's trial, purposefully implied scientific reliability where there was absolutely no evidence introduced during this trial that the interview process employed by the Children's

Recovery Center adhered to any scientific standards or methodology or that witness Nordeen had any scientific training.

J.

Failure to object to State's opening argument.

Amended Allegation 1

Trial Counsel was ineffective in that he failed to object to a portion of the State's opening argument in which the Prosecution erroneously advised the jury that Applicant was charged with committing sexual battery upon the Victim beginning when he first met the Victim when she was thirteen. Tr. p. 52, ll. 14-24.

During the State's opening argument the Prosecution set the groundwork for portraying the Applicant as a predator who began victimizing the young girl involved in this case beginning when he first met her when she was 13. That assertion is not supported by the trial record. Although the statement in question was made before the introduction of testimony, Trial Counsel could and should have known from the discovery materials that the chronology documented therein did not support that claim. The testimony of Victim's stepfather verifies that Applicant was a close family friend, and that their two families did a great deal together before Victim ever made the accusations which resulted in criminal charges against Applicant. His testimony indicates that Applicant lived only about a half mile away from Carter's house, and that he had a "daily relationship" with the entire family. Tr. p. 59, l. 4 - p. 68, l. 8.

While the remark in question may seem minor at first blush, Applicant would respectfully submit that this inaccurate and prejudicial statement by the Prosecutor set the stage for the jury to view Applicant as an opportunistic predator. He asserts that the argument was prejudicial in that the jury might infer from the remarks of the Prosecutor that it was his belief that Applicant initiated his

relationship with the step-father in order to gain access to Victim; a common practice for a pedophile.

In his Post-Conviction Relief testimony, Trial Counsel testified that he did not specifically recall the opening argument in question. He acknowledged having read the argument in the transcript of the trial proceedings and admitted that the statement was not consistent with the evidence as it had been revealed to him in pretrial discovery materials. When asked if he would have objected to this argument if he had noticed this particular statement, he responded *"yes, if I had thought that is what was being implied, that from the day he met her he was doing inappropriate things, certainly."* PCR p. 5, l.20 - p. 8, l. 1. Applicant submits that the statement was plain and required no particular interpretation. It submitted in unequivocal terms that Applicant began advising this girl as soon as he met her.

K.

Trial Counsel's interjection of unsupported implication that Victim was suicidal.

Amended Allegation 29

Trial Counsel was ineffective for characterizing earlier testimony from Applicant's wife, in which she indicated that the Victim had called her on one occasion, admitted being high on Vicodin and *"she was on a roof and about to jump off"* as Victim being "open to the idea of suicide." Tr. p. 272, ll. 1 - 4; Tr. p. 273, ll. 17 - 20.

During Trial Counsel's direct examination of Applicant's wife, she testified to her knowledge that the Victim had been taking Vicodin pain pills which she got both from her best friend, Ashley and her from her step-father. In this portion of her testimony, this witness indicated that she had a close relationship with Victim and that during that time period, Victim confided in her concerning,

Things that were going on inside the home, things that she did not want to discuss with her mother, that she felt she could confide in me because of the bond that we had, she knew I wouldn't go back to her mom and tell her, I told her she could talk to me about anything. She would tell me about fighting, about the stress that was going on, problems that she was having at school, anything, things that were going on between her and a friend, boyfriend matters, anything, pretty much like two friends or, you know, siblings would even talk about.

Tr. p. 271, l. 7 - 18.

She testified that Victim at one point called her from Ashley's house and told her that she was up on the roof, high on pills and was going to jump off. Tr. p. 271, l. 2 - p. 274, l. 16. During this testimony, Trial Counsel asked, *"problems in her life, and even at least suggesting she was open to the idea of suicide, you never went to her mother or step-dad?"* This witness testified that she kept Victim's confidence because that was what she wanted. Tr. p. 274, ll. 17 - 23. There was previous testimony from this witness to support the inference that her threat to jump off the roof was indicative of suicidal intent. Victim did not testify to the incident in question and was never questioned about it by Trial Counsel.

Applicant asserts that there were other explanations for the incident testified to by Applicant's wife. One of the most obvious possible explanations being the reckless behavior of a teenager high on drugs and thinking she could fly. Trial Counsel's actions in interjecting an assertion that Victim was suicidal, constituted ineffective assistance of counsel where this statement was totally unsupported by the record and could readily have been interpreted by Applicant's jury as evidence that Victim was an emotionally distraught victim of sexual abuse. Clearly, if Trial Counsel was going to suggest the Victim was suicidal, it was imperative what she was that upset about that evening was not related to Applicant in any way. Applicant argues that it is impossible to know the degree to which this remark prejudiced Applicant's case by appealing to the passions and prejudices of the jury and improperly lending credibility to the State's theory of the case.

L.

Failure to adequately represent Applicant during sentencing.

Amended Allegation 34

Trial Counsel was ineffective for neglecting to clarify assertions made by the State during the sentencing phase of Applicant's trial concerning Applicant's prior record for ABHAN. Tr. p. 510, l. 6- p. 513, l. 1.

As is typical in a sentencing proceeding, the Prosecutor at this trial reviewed Applicant's prior criminal record for the presiding judge. Tr. p. 510, l. 4 - p. 513, l. 2. During that summary of Applicant's very limited criminal record, the State reported his prior judgment for breach of trust with fraudulent intent and particularly emphasized his judgment for assault and battery of a high and aggravated nature concerning an incident in 2004 for which he was sentenced on March 15, 2006. The State not only informed the judge of the existence of this prior judgment, but advised the Court that the lead investigator in the current case, Ginger Pop, had investigated the Lexington County ABHAN case and had obtained a copy of the incident reports connected with that case. The Court was informed that Applicant was originally charged with criminal sexual conduct with a minor. The State then proceeded to urge the Court to sentence Applicant harshly noting that even though Applicant had pleaded to the lesser charge of assault and battery of a high and aggravated nature, the original offense did involve a minor and that the existence of this prior *"raised the level of concern for the State in regards to whenever I was in plea negotiations and whenever I was dealing with how to resolve this case, just the idea this, he had pled guilty to something involving indecencies with a female which fits the ABHAN from 2006, of course that raised my concerns greatly."* Tr. p. 510, l. 11 - p. 511, l. 8. The Prosecutor went on to state, *"[s]o, the State definitely has a concern about this particular defendant and his propensity to commit such a crime."* Tr. p. 512, ll. 22-24.

In his own remarks to the Court, Trial Counsel made a vague reference to the fact that *"from the little bit he knew"* the facts in the ABHAN case were different from the case before the Court. Tr. p. 515, ll. 15 - 25. He did not advise the Court of just how different the facts in that case were. In sentencing Applicant to fifteen (15) years for Lewd Act on a Minor, the maximum sentence for that offense pursuant to S.C. Code Ann §16-15-140, the Court expressly noted that it was *"taking into account the jury's verdict and the circumstances of his prior record"*. Tr. p. 516, ll. 12 - 15.

During the Post-Conviction Relief hearing, Trial Counsel was questioned concerning why he did not distinguish the facts in the 2004 incident from those before the Court in the 2010 trial. His response was to say that he felt the judge could *"read between the lines"* because the Criminal Sexual Conduct with a minor charge had been reduced to ABHAN. He did ultimately admit however, that there were many factors which might come into play in the decision to reduce a charge and that the fact of the reduction, in and of itself, would not have given the judge any idea as to why the Prosecutor in that case ultimately decided to reduce the charge. Trial Counsel acknowledged having provided PCR Counsel with a complete set of the discovery materials turned over to him by the State prior to this trial. Ultimately, Trial Counsel recalled seeing two incident reports concerning the Lexington County ABHAN case in those discovery materials. Those incident reports were introduced as Applicant's Exhibits No. 1 and 2 during the evidentiary hearing.

In his Post-Conviction Relief testimony Trial Counsel acknowledged that the Lexington County charge arose out of an incident where Applicant and his wife met a girl in a bar who ended up going home with them and having a consensual threesome. The incident reports indicated that Applicant and his wife subsequently found out that the girl was under 17. Tr. p. 65, l. 14 - p. 68, l. 18. Applicant's Exhibit 2 documents the fact that the victim in that case *"stated that she was not*

forced in any way and that she did willfully participate, however, she was scared not to." These two incident reports revealed that the Lexington County incident took place in June, 2004, approximately *six years* before the alleged conduct addressed in Applicant's current case. Thus, that incident was not only factually distinguishable from the one before the Court, but additionally the incident itself took place when Applicant was much closer to the age of the victim in the previous case. It is Applicant's position that the remarks made by the Solicitor during the sentencing phase of his trial, although technically truthful, were misleading in that without further explanation, they would lead the listener to believe that Applicant had previously engaged in conduct factually similar to that for which he had just been convicted. Applicant respectfully acknowledges that any sexual activity with a minor is punishable by law regardless of whether it was consensual. It is his position, however, that the distinctions between the factual circumstances surrounding the Lexington County charge, and the facts in this case, are significant, and that Trial Counsel was deficient for neglecting to make those facts known to the sentencing charge. As previously noted, the record clearly establishes that the sentencing judge did in fact take "*the circumstances of his prior record*" into account in sentencing Applicant. Trial Counsel made reference to "*what little he knew*" about the circumstances surrounding the Lexington County pleas, but ultimately acknowledged that the incident reports marked as exhibits in this PCR were in fact in the discovery materials provided to him by the State.

For all the above reasons, Applicant respectfully submits that he has met his burden of proof with regard to his claim that Trial Counsel was deficient in his representation of Applicant during the sentencing phase of his trial. It is Applicant's position that Trial Counsel has offered no tactical or strategic explanation for his failure to mitigate the damage done by the State's emphasis on his prior Lexington judgment for ABHAN. The record below confirms that the limited

information provided to the Court by the State concerning the 2004 ABHAN judgment was taken into account by the judge in determining the appropriate penalty in this case and his decision to give Applicant the *maximum* sentence provided for his conviction; fifteen (15) years. Tr. p. 65, l. 14 – p. 73, l. 3 Therefore, Applicant has established prejudice as well.

M.

Improper impeachment of Applicant concerning details of his prior record.

Amended Allegation 35

**Trial Counsel was ineffective for failing to object to the Prosecution questioning Applicant concerning whether he was “a convicted felon”.
Tr. p. 363, ll. 16-21.**

It is well-established law in South Carolina that when a witness is impeached with his prior record, he may not be questioned about the details of offenses used for impeachment purposes. *State v. Bryant*, 369 S.C. 511 633 S.E.2d 152 (2006). In Applicant's case, he had a prior judgment for breach of trust with fraudulent intent and a prior judgment for assault and battery of a high and aggravated nature. On cross-examination, the Prosecution asked Applicant, "*Mr. Love, let's be clear. Your prior convictions make you a felon, isn't that correct, you're a convicted felon?*" Applicant accurately responded, "[c]orrect, for the breach of trust, yes, ma'am." Tr. p. 363, l. 17 - 21. The transcript of Applicant's trial testimony reveals that he had admitted to having a criminal record and specifically acknowledged his prior record for breach of trust under \$5000 and assault and battery of a high and aggravated nature. Tr. p. 363, ll. 5 - 11. Thus, Applicant had already admitted on direct examination the full scope of information permitted for impeachment purposes pursuant to Rule 609(a)(1), SCRE. Clearly, the only purpose to be served by the State's subsequent cross-examination of Applicant, demanding that he acknowledge that his prior convictions made him a "*convicted felon*", was to portray him as a dangerous criminal more likely to have committed

the crime for which he was charged because of his status as a convicted felon. It is precisely that type of evidence which is prohibited by the character evidence rule found in Rule 404 (b), SCRE.

Applicant submits that Trial Counsel was deficient in his representation where he failed to object to this improper line of cross-examination by the State. Trial Counsel acknowledged in his PCR testimony that there was no basis in the rules for questioning a witness about whether a prior conviction is a felony. When asked whether there was any reason why he did not object to this improper line of impeachment, Trial Counsel specifically testified that, *"there is no reason I shouldn't have done that."* Tr. p. 51, l. 2 - p. 52, l. 1.

Having established that Trial Counsel was ineffective for neglecting to object to this line of cross-examination, Applicant asserts that, on the facts of his case, the prejudice potentially arising from this error is obvious. The credibility of the complaining witness, as compared to the credibility of Applicant, was the central issue in this trial. Interestingly, the Solicitor attempted it to get Applicant to acknowledge that his *convictions*, plural, made him a convicted felon. Fortunately, Applicant was astute enough to respond that his conviction for breach of trust did. Tr. p. 363, ll. 17-21. The modern definition of a felony under South Carolina law encompasses hundreds of crimes, some of which are relatively minor and do not carry lengthy prison terms. *See*, S.C. Code Ann. §16-1-90. The term now encompasses such crimes as Unlawful Salvage of Certain Sunken Warships (§54-7-815), Sale of Drifted Lumber or Timber (§49-1-50(c)) and Second Offense, Engaging in Computer Assisted Remote Hunting (§ 50-11-95). Applicant would argue however, that when used in the manner it was invoked by the State in his case, it conjures images more consistent with the definitions found in Webster's Dictionary; villain, one who is cruel or evil. Trial Counsel was ineffective for failing to object to this improper line of impeachment by the State. This is, as previously noted, particularly true where testimony concerning Applicant's prior judgments

had already been properly introduced on direct examination. The fact that the State chose to revisit the issue of Applicant's record in this manner is clear evidence that the State sought not to "impeach" Applicant, but to portray him as someone likely to be guilty because of his prior record. Given the fact that this case was all about the credibility of Applicant versus Victim, this error can not be characterized as harmless.

When questioned about why he did not object to this line of questioning by the Prosecution, Trial counsel, noted, "[t]he record is clear, I did not, and I think that is outside of the scope of the rules." Tr. p. 53, ll. 7 – 25. Applicant should be granted a new trial on this allegation as well as the others addressed herein.

N.

Deficient representation in closing arguments to the jury.

Amended Allegation 31

Trial Counsel failed to provide Applicant with reasonable professional assistance of counsel where he failed to summarize Applicant's case in a manner consistent with his role as an advocate for the Applicant by conceding matters in his closing argument that were adverse to his client's best interest and which weakened the Applicant's defense.

A. Trial counsel argued "there is no logical explanation for it I don't have one for you. I don't have any reason why she would lie." Tr. p. 456, ll. 7 - 10.

B. Trial Counsel actually argued against the only apparent motive the Victim had to lie. Tr. p. 453, ll. 13 - 28; Tr. p. 455, ll. 7 - 13.

C. Trial Counsel argued that he did not personally believe that the fact that the Applicant's accuser had just gotten in trouble for possession of a narcotic was an explanation for why she would lie against Applicant and thereby, bolstered the credibility of the Prosecution's subsequent argument that "no one has a motive to lie." Tr. p. 474, ll. 10 - 18.

Applicant respectfully submits that Trial Counsel's closing argument effectively abandoned his role as an advocate. Throughout Applicant's trial, Trial Counsel emphasized the fact that Victim

did not report any of the actions for which Applicant was criminally charged until *after* she got into trouble for possession of drugs. A close reading of this trial record shows that the only defense advanced by Trial Counsel, on the charge for which Applicant was convicted, was the presentation of testimony which invited the inference that this young girl lied about Applicant's behavior to deflect attention away from her drug use. Applicant argues that his own lawyer's closing argument effectively argued against the only apparent motive Victim had to lie.⁵ Tr. p. 453, ll. 13-28 and Tr. p. 455, ll. 7-14. During his closing argument to the jury Trial Counsel came right out and stated *"there is no logical explanation for it I don't have one for you. I don't have any reason why she would lie."* Tr. p. 456, ll. 7-10.

Trial Counsel went so far as to advise the jury that he personally just did not believe that Victim getting caught with Vicodin was an explanation for why she would lie about these incidents. Tr. p. 454, ll. 6-18. Then, as if to compound the prejudice to Applicant, Trial Counsel went on to note that there had been *"some testimony that maybe there was [sic] some family issues"*, but expressed the opinion that *"again it doesn't sound like really any more than normal teenage stuff."* Tr. p. 454, ll. 19-21. Thus, Applicant's own lawyer minimizes another area of testimony from which this jury may have inferred another reason why Victim's claims against Applicant might be suspect.

Applicant asserts that Trial Counsel's closing argument represented a breach of his duty as an advocate for his client and constituted ineffective assistance of counsel. Once again, Applicant notes that the credibility of this Victim was the pivotal issue in this case. He urges this Court to recognize that these errors were highly prejudicial to Applicant and that there exists a reasonable probability that the outcome of his trial would have been different but for Counsel's errors during

⁵ Applicant does not concede that there were no other reasons why Victim may have fabricated these claims, but rather notes that this particular motive should have been obvious to the jury from the testimony presented at his trial.

the closing argument for the defense. *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005).

Trial Counsel's deficient closing argument additionally prejudiced Applicant in that it bolstered the credibility of the Prosecution's subsequent argument that "*no one has a motive to lie.*" Tr. p. 474, ll. 10-18. Applicant respectfully submits that he has met his burden of proof with regard to these allegations concerning Trial Counsel's closing argument to the jury, and that he has established the prejudicial impact of this line of closing argument. He submits that he should be granted a new trial on these Sixth Amendment claims.

O.

Failure to object to improper closing arguments by the Prosecution.

Amended Allegation 32

Trial Counsel was ineffective for neglecting to object to numerous portions of the State's closing argument in which the Prosecution made improper and prejudicial arguments, improperly referenced matter not in evidence and/or misrepresented the testimony adduced at trial in a manner that was particularly prejudicial to Applicant.

A. "He is texting *Victim*, hundreds of times a day." Tr. p. 470, ll. 4 - 8; Tr. p. 473, ll. 9 - 11.

B. Argument essentially inviting the jury to find guilt based on Applicant, and his wife's prior record for a felony thereby violating the character evidence rule by asking the jury to find Applicant guilty because he and his wife were bad people. Tr.p. 473, ll. 18 - 23.

C. Arguing that among the State's witnesses, "no one has a criminal record." Tr. p. 474, ll. 14 - 16.

D. Arguing that on September 11th the Victim's cell phone had been taken away from her for the cigarette and pill that she had been caught with where the record did not support that assertion. Tr. p. 478, ll. 1 - 10.

E. Characterizing statements made by Applicant's wife as telling him that if he made certain statements she could get "caught" for perjury where the

record in fact indicated that the statement made by her was that, "if you say you went with them, I'm going to jail for perjury." Tr. p. 479, l. 21 - p. 480, l. 11.

F. References to the individual who interviewed the victim as conducting a "forensic interview." Tr. p. 482 ll. 9 - 15.

G. Claims that the victim was afraid her mother "was going to kill her" and that "she was scared" arguing Victim had no reason to fabricate her claims. Tr. p. 484, ll. 20 - 25.

L. "She had already deleted some things." Tr. p. 480, ll. 3 - 5.

M. Improper argument that Applicant was a convicted felon. Tr. p. 473, ll. 18-23.

N. Improper argument in which the prosecution implied that Applicant's wife was a convicted felon. Tr. p. 473, ll. 18-23.

O. Improperly advising jury of his personal opinion that Applicant and his wife were liars. Tr. p. 480, ll. 3-5.

It has long been the rule that, "[i]t is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence, and no part of the evidence to be presented," *Dunn v. United States*, 307 F.2d 883, 885-886 (CA5, 1962). In the *United State v. Rodriques*, 585 F.2d 1934 (CA5, 1978), the Court noted that the rule in *Dunn, supra*, "[i]mposes a duty on the prosecutor to be scrupulous in his argument and to avoid all efforts to obtain a conviction by going beyond the evidence before the jury, or *by putting the sanction of his office* behind the testimony of witnesses." *Id.* at 1243. (Emphasis added). Applicant respectfully submits that the Prosecutor in his case crossed these well recognized boundaries in multiple portions of the State's closing argument and that Trial Counsel neglected to make appropriate objections in response to these improper arguments.

In every criminal case there is the danger that the Solicitor will compromise his role as a seeking of justice when in the heat of trial he becomes too engrossed in his role as a Prosecutor seeking a conviction, and thereby violates the accused's right to a fair trial. See, e.g., *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 6299, 79 L.Ed. 1314 (1935); *People v. Talle*, 111 Cal. App. 2d

650, 245 P.2d 633 (1952); *Rowe v. Commonwealth*, 269 S.W.2d 247 (Ky. 1954); *State v. Davis*, 239 S.C. 280, 122 S.E.2d 633 (1962). In reversing a now classic case of such prosecutorial misconduct, Mr. Justice Sutherland, in 1935, explained the duties of the prosecutor and the danger of overzealous prosecution:

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilty shall not escape or innocent suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the every jury, in a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestion, insinuations and, *especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.* *Berger v. United States*, 55 S.Ct. 629, 633, 79 S.E.2d. 1314, 1321 (1935). (Emphasis added).

The errors committed by the Prosecutor in Applicant's case irreparably prejudiced the Petitioner's right to a fair trial and were not harmless. Trial Counsel failed to protect his client's rights by neglecting to object to the following portions of the State's closing argument in this case.

- First, the Prosecutor argued that Applicant was "*texting Brittany hundreds of times a day.*" Tr. p. 474, 11. 10-18. There simply was no evidentiary basis for this argument in the trial record of this case. This argument was improper as it argued facts not in evidence. Although the mother claimed she had seen records which supported her belief that Applicant was communicating with her daughter by text "*thousands*" of times a month, there was no competent evidence in support of that claim, before Applicant's jury and there certainly was none supporting a claim that Applicant was texting Victim "*hundreds of times a day.*"

- The Prosecutor essentially invited the jury to find Applicant guilty based upon his, and his wife's, prior record for a felony. This argument was not only improper, inasmuch as it violated the character evidence rule, but it additionally erroneously implied that Applicant's wife, a witness for the defense, was a convicted felon as well. Specifically, the Prosecutor stated, "the Defendant Love is a convicted felon, breach of trust over a thousand and assault *and* battery of a high and aggravated nature. He's been in the system, he knows how it works. Tabitha Love, she's got a conviction for assault and battery of a high and aggravated nature." Tr. p. 473, ll. 18-23, (Emphasis added).. The structure of this portion of the State's closing argument was such that it suggested Applicant would be a convicted felon because of *both* his conviction for breach of trust and his conviction for assault and battery of a high and aggravated nature. Assault and battery of a high and aggravated nature was not a felony in South Carolina at the time of Applicant's trial. By implying that both his prior convictions made Applicant a felon, the State invited the jury to believe his wife, a witness for the defense, was also a convicted felon. Thus, there are three reasons why Trial Counsel should have objected to this portion of the State's closing argument. The argument itself obviously invites the jury to convict Applicant based on his prior criminal record and therefore was improper. The argument also erroneously implied that both Applicant and his wife had felony convictions and finally, it interjected an important detail about Applicant's prior record which went beyond the scope of permissible impeachment under Rule 609(a)(1).
- The Prosecutor also argued that among the State's witnesses, "*no one has a criminal record.*" Tr. p. 14-16. In so arguing, the Prosecution stated facts not in evidence. None of the State's witnesses were questioned concerning whether they had prior criminal records. There being no evidence introduced concerning the prior records of the State's witnesses, the Prosecutor clearly improperly bolstered the credibility of those witnesses by advising the jury that "*no one has a criminal record.*" The prejudice arising from this improper argument is particularly acute where the State effectively argued for Applicant's conviction based on his prior criminal record. Once again, Applicant is compelled to note that credibility was the key issue in this case where there was no physical or eyewitness evidence. Clearly, Trial Counsel should have objected to this portion of the State's closing argument as well.
- Arguing that on September 11th the Victim's cell phone had been taken away from her for the cigarette and pill that she had been caught with where the record did not support that assertion. Tr. p. 478, ll. 1 - 10. This portion of the State's closing argument is just plain factually incorrect. The Prosecution even presented evidence concerning the volume of text messages between Applicant and Victim on that specific date. An objection pointing out the inaccuracy of this assertion, would necessarily have made the jury think twice about accepting the Prosecutor's arguments at face value.

- Characterizing statements made by Applicant's wife as telling him that if he made certain statements she could get "*caught*" for perjury where the record in fact indicated that the statement made by her was that, "*if you say you went with them, I'm going to jail for perjury.*" Tr. p. 479, l. 21 - p. 480, l. 11. The record reflects that in a phone call recorded from the detention center Applicant questioned his wife about the accuracy of his memory concerning whether he had gone back out to a bar on September 11th and that she in turn stated, "*if you say you went with them, I'm going to jail for perjury.*" She did not say anything which established that she had lied about Applicant's whereabouts that night. Her statement, more accurately indicated that if Applicant second guessed himself about whether he had gone back out that night, he was going to make her, out to be a liar and that, hence, she was "*going to jail for perjury.*" The State's interjection of the claim that she had said she was going to get "*caught*" for perjury implied that she had admitted willfully lying; a fact clearly not supported by the record. Applicant was acquitted on the charge of CSC with a minor; a crime which was alleged to have occurred on that night. His wife's testimony was, however, valuable to the defense on both charges and therefore, the State's attempt to improperly characterize her as having admitted perjury was prejudicial to Applicant.
- References to the individual who interviewed the Victim as conducting a "*forensic interview.*" Tr. p. 482 ll. 9 - 15. For all the reasons asserted, *supra*, Applicant asserts that this characterization of Victim's interview by the Center was highly improper, bolstered the credibility of the interviewer and Victim and prejudiced Applicant where the interviewer was allowed to testify to prior consistent statements of Victim.
- Claims that Victim was afraid her mother "*was going to kill her*" and that "*she was scared*" arguing against Victim having a reason to fabricate her claims. Tr. p. 484, ll. 20 - 25. This portion of the State's closing argument was improper for two reasons. First, it is factually inaccurate. Victim was quoted by her step-father as saying her mother was "*going to kill Wayne.*" Tr. p. 85, l. 25 - p. 86, l. 5. Secondly, the Prosecutor used this inaccurate statement to improperly imply that despite her fear that her mother "*was going to kill her*" she told the truth and implicated Applicant. The inference invited by the Prosecutor being that if Victim told her mother about these events even though she was afraid her mother was going to kill her when she found out, she must be telling the truth. Thus, this was yet another example of the State improperly bolstering the testimony of a victim whose credibility was weak.
- "*She had already deleted some things*". Tr. p. 480, ll. 3 - 5. While the record reflects that Victim's mother apparently assumed she had deleted some things, there was no competent evidence introduced at trial which proved this point.

- Improper argument that Applicant was a convicted felon. Tr. p. 473, ll. 18-23. Applicant has already argued, *supra*, the reasons why it was improper for the State to improperly impeach Applicant with questions concerning the details of his prior record. It was, for the same reasons, improper for the State to argue this point in closing arguments, and Trial Counsel should have objected to this line of argument.
- Improper argument in which the prosecution implied that Applicant's wife was a convicted felon. Tr. p. 473, ll. 18-23. As discussed previously, there is no evidence that Applicant's wife was a convicted felon and it was therefore, highly improper for the State to attempt to trick the jury into believing she was. Furthermore, even if she had possessed a felony record, it would have been improper for the state to argue that as a detail of her prior record.
- Improperly advising jury of his personal opinion that Applicant and his wife were liars. Tr. p. 480, ll. 3-5. Rule 3.4 (e) of the South Carolina Rules of Professional Conduct, Rule 407, SCRAP, provides, in relevant part, that "*a lawyer shall not...state his personal opinion as to the...credibility of a witness... .*" Applicant respectfully submits the Prosecutor crossed the line and effectively invited the jury to abandon their role as the judges of witness credibility and adopt his own opinion that Applicant and his wife were liars.

When questioned to why he did not object to these portions of the State's closing arguments, Trial Counsel did not testify to any explanation which would constitute a valid tactical or strategic reason for neglecting to object to these highly improper closing arguments by the prosecution. Tr. p. 53, l. 1 – p. 64, l. 6.

P.

**Failure to object testimony concerning prior bad
act not relevant to case which did not involve crimes
of moral turpitude.**

Amended Allegation 2

Trial Counsel was ineffective in failing to object to testimony from Anthony E. Carter, concerning the fact that Applicant and his wife knew about Victim getting caught in possession of a pain pill and a cigarette by her step-mother and kept that information from him and Victim's mother, his fiancée, where said testimony bore no logical relevance to the issues before the jury and was highly prejudicial to Applicant. Tr. p. 83, l. 16- p. 84, l. 12. (Carter); Tr. p. 274,

ll. 13-23 and other witnesses, (T. Love); Tr. p. 283, l. 22- p. 286, l. 24 (T. Love); Tr. p. 364, l. 17- p. 366, l. 18 (Applicant).

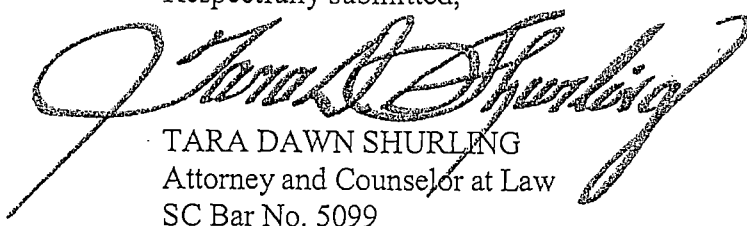
The testimony in question was not relevant to the charges against Applicant. It was not relevant to any exception to the character evidence rule, and was obviously introduced for the sole purpose of portraying Applicant as a bad person. Trial Counsel clearly should have objected to this testimony. His failure to do so constituted ineffective assistance of counsel.

CONCLUSION

Applicant specifically withdraws his allegations numbered 11, 13, 17, 24, 30 and 33 from his Amended PCR Application. He likewise withdraws his Allegation number 36, found in his Second Amended Application. With regard to any other allegation not specifically addressed herein, Applicant relies upon the testimony presented during his PCR hearing. Applicant asserts that he has demonstrated multiple errors and omissions on the part of Trial Counsel which, standing alone, were sufficiently prejudicial to warrant the grant of relief on his Application for Post-Conviction Relief. He submits that the record before this Honorable Court clearly demonstrates that the errors and omissions of Trial Counsel adversely affected his ability to receive a fair trial. *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999). He would assert, however, that the collective prejudice arising from many of the allegations addressed herein is such that they warrant reversal and the grant of a new trial on the basis of cumulative error. Applicant recognizes that the question of whether the grant of relief on collateral review may rest on the cumulative impact of multiple Sixth Amendment claims remains an open question in South Carolina. *Lorenzen v. State*, 376 S.C. 521, 535 n. 3, 657 S.E.2d 771, 779 n.3 (2008). While he asserts that several of the issues raised in this case warrant reversal on their individual merit, he would respectfully assert that if the Court is inclined to find no one issue warrants reversal, the collective prejudice arising from the multiple

errors and omissions presented in this case certainly does and he urges this Honorable Court to so rule. While such a ruling might be appealed by the State, PCR Counsel is confident this case would present the Supreme Court of South Carolina with an opportunity to settle the outstanding question of whether cumulative error may provide the basis for reversal on collateral review. Applicant asks that his conviction and sentence be reversed and that his case be remanded for a new trial.

Respectfully submitted,



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ATTORNEY FOR APPLICANT

This 29th day of December, 2016.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271,)
 Applicant,)

2015-CP-22-00209

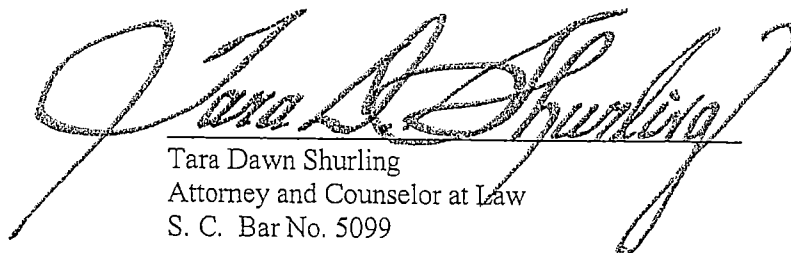
CERTIFICATE OF SERVICE

v.)

STATE OF SOUTH CAROLINA,)
 Respondent.)

The undersigned attorney hereby certifies that the Memorandum in Support of Post-Conviction Relief was served on Assistant Attorney General, Patrick Schmeckpeper, by mail on this the 29th day of December, 2016 to:

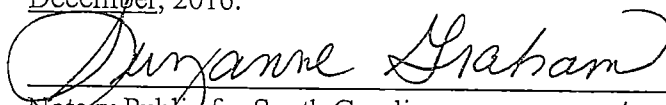
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ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 29th day of
December, 2016.

 (L.S.)
 Notary Public for South Carolina
 My Commission Expires: 2/28/24

FILED
 GEORGETOWN COUNTY, SC
 2017 JAN -3 PM 1:11
 ALMA Y. WHITE
 CLERK OF COURT



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
	)	
Prentiss Wayne Love,	)	
S.C.D.C. No. 315271,	)	C.A. No. 2015-CP-22-0209
	)	
Applicant,	)	
	)	MEMORANDUM OF LAW
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

This matter comes before the court by way of an application for post-conviction relief (PCR) filed November 16, 2016. The State made its responsive pleadings. A hearing into the matter was convened on November 16, 2016, at the Horry County Courthouse, before the Honorable John C. Hayes. The Applicant was present and represented by Tara Shurling, Esquire, but did not testify. Patrick Schmeckpeper, Esquire, appeared on behalf of Respondent. The Applicant's trial counsel, Jonathan Eric Fox, Esquire, testified. Following the evidentiary hearing, the Applicant submitted, through counsel, a post-hearing memorandum filed January 3, 2017. This memorandum follows.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. In May 2011, the Georgetown County Grand Jury indicted Applicant for second-degree criminal sexual conduct with a minor (2011-GS-22-431) and lewd act on a minor (2011-GS-22-432). Jonathan Eric Fox, Esquire, represented Applicant. On April 23, 2012, Applicant proceeded to trial before the

Honorable Garrison D. Hill and a jury. On April 25, 2012, the jury found Applicant guilty of lewd act on a minor.¹ Judge Hill sentenced Applicant to fifteen (15) years imprisonment.

The Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an Anders² brief. The South Carolina Court of Appeals dismissed the appeal on May 21, 2014. State v. Love, Op. No. 2014-UP-195 (S.C. Ct. App. filed May 21, 2014). The remittitur was returned to the circuit court on June 16, 2014.

ALLEGATIONS

The Applicant has raised thirty-six independent allegations of ineffective assistance of counsel, covering nearly every facet of his attorney's representation. In the interest of clarity and brevity, Respondent has adopted the organizational scheme from the Applicant's post-hearing memorandum in drafting this response.

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged 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 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

¹ The Applicant was acquitted of criminal sexual conduct, second degree.

² Anders v. California, 386 U.S. 738 (1967).

judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption 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. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, 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.

A.

The Applicant's first allegation is that counsel was ineffective in failing to object to hearsay, which he argues improperly corroborated the victim's testimony. Given that the alleged improper evidence was cumulative to admissible testimony of witnesses other than the victim, and that its impact was negligible in light of substantial corroborative evidence presented by the state, the Applicant has failed to meet his burden.

Applicable law

A well-settled exception to the general prohibition against hearsay in criminal sexual conduct cases allows limited corroborative testimony. Sanchez v. State, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002). When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration; however, such evidence is limited to the time and place of the assault and cannot include details or particulars or the identity of the perpetrator. Id. Courts have been particularly wary where the only evidence corroborating a minor victim's testimony is inadmissible hearsay. See, e.g., Sanchez, supra.

However, in the context of post-conviction relief, the proper standard for determining ineffective assistance of counsel is still Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). For the following reasons, the Applicant has failed to meet his burden with respect to this allegation.

1.

The alleged improper testimony concerning the Applicant's identity as the perpetrator was merely cumulative to the admissible testimony of *Minor* and Shannon Bellamy, which corroborated the victim's accusation³ by independently establishing that she and the Applicant were in an inappropriate, romantic relationship.

Testimony at trial

Minor, the victim's best friend, and Shannon Bellamy, the victim's mother, each testified to their direct observations at trial. Ms. *Minor* described the victim's relationship with the Applicant as "a normal . . . boyfriend-girlfriend relationship,"⁴ in which "they would talk and flirt and text all the time." Tr. p. 183. She also testified to the victim's demeanor following multiple disclosures, explaining that she acted like she "liked"⁵ the Applicant, like there was "nothing wrong" with the abuse, and treated the Applicant "[l]ike a boyfriend almost." Tr. p. 180-83. Following the final incident of abuse, the victim spent the night with Ms. *Minor*. Tr. p. 183. Ms. *Minor* said she observed the victim texting back and forth with the Applicant "all night long." Tr. p. 184-85.

Ms. Bellamy also noticed improprieties between the victim and the Applicant arising out of the sheer number of text messages they sent to one another. Once, while the victim was put on restriction, Ms. Bellamy confiscated her phone. Tr. p. 115-16. In checking the phone records

³ Specifically with respect to the Applicant's identity as the perpetrator of the abuse.

⁴ The Applicant was thirty years old at the time. The victim was fourteen.

⁵ Given the context, the word "like" here is clearly meant to convey romantic affection, as is normally used by adolescents and children.

on her online account, Ms. Bellamy was able to see the number of incoming and outgoing texts and calls made by the victim. Tr. p. 118. She became concerned by “hundreds” of text messages between the victim, who was fourteen, and the Applicant, who was thirty. Tr. p. 122-23; 133.⁶

Discussion

Given the admissible corroborative evidence clearly indicating an inappropriate, romantic relationship between the victim and the Applicant, any improper references to the Applicant as the perpetrator are clearly not prejudicial. Jolly v. State is instructive, and establishes that while improper evidence that is cumulative to *only* the victim’s testimony is problematic, prejudice is significantly less likely where it is also cumulative to other, admissible corroborative evidence. 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994).

Jolly was convicted of sexually abusing his underage step-granddaughter. At trial, in an attempt to bolster the victim’s shaky testimony, the state elicited testimony – over counsel’s objection – from a social worker that the child had made a prior statement that Jolly abused her. Later, the victim’s uncle testified without objection that the child had previously told him Jolly abused her. Jolly was ultimately convicted.

The Court of Appeals affirmed Jolly’s conviction in a published opinion, finding that any error from the admission of the social worker’s improper testimony was cumulative to the testimony of the victim *and her uncle*, and therefore harmless. State v. Jolly, 304 S.C. 34, 402 S.E.2d 895 (Ct. App. 1991). The Supreme Court denied certiorari.

Jolly then filed a PCR application, and was denied relief at the circuit level. The Supreme Court reversed, finding counsel ineffective for failing to object to the uncle’s

⁶ Those text messages prompted Ms. Bellamy to confront the victim, which ultimately led to the disclosure.

testimony. The Court distinguished the circumstances from the direct appeal where, because of the rules of issue preservation, the Court of Appeals was

precluded from examining the improper admittance of [the uncle's] testimony. Accordingly, the Court of Appeals, affirming Jolly's conviction, held that the admittance of the social worker's hearsay testimony identifying Jolly as the perpetrator was harmless error because the testimony was *merely cumulative to [the uncle's] unobjected testimony and the victim's testimony*.

Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) (emphasis added). The key difference being that in the context of post-conviction relief, the Supreme Court could freely examine the previously unobjected testimony. It specifically found that but for counsel's failure to object to the uncle's testimony, the Court of Appeals could not have held the social worker's testimony was harmless because it would have been "*merely cumulative to the victim's testimony*," rather than the both victim's testimony and additional independent, properly admitted corroborative evidence. 314 S.C. at 21, 443 S.E.2d at 569.

Application to this Case

Turning to the facts of this case, the alleged inappropriate references to the Applicant as the perpetrator were clearly not prejudicial. The actual identity of the victim was not an issue in this case, and any bolstering from improper corroboration was outweighed by and cumulative to the independent, compelling testimony provided by Ms. Minor and Ms. Bellamy which corroborated the victim's testimony on the same point. Their testimony indicates the Applicant and the victim were engaged in an inappropriate romantic relationship, given the victim's demeanor and behavior toward the Applicant, as well as the frequency and nature of their private communications. Because the Applicant has failed to meet his burden to prove ineffective assistance of counsel, this allegation should be denied.

2.

Additionally, in light of the substantial admissible evidence presented in corroboration of the victim's testimony, there is no reasonable likelihood that counsel's failure to object to the alleged hearsay affected the outcome.

Proper Corroboration of the Victim's Testimony

The State presented proper independent testimony and evidence that corroborated the victim's testimony, particularly with regards to her timeline and the opportunities the Applicant had to perpetrate the abuse.

Testimony at trial

a.

The victim testified to multiple instances of abuse by the Applicant. The first time the Applicant sexually abused her was at his house on New Year's Eve of 2009. Tr. p. 149. She was thirteen years old. Tr. p. 149. She testified she spent the night with the Applicant and his family. After the Applicant's wife, Tabitha, went to bed, he and the victim continued to watch television on the couch. Tr. p. 150-51. The Applicant was drinking. Tr. p. 151. At one point, the Applicant started kissing the victim and attempted to put his hand up her shirt. Tr. p. 151. He tried to initiate the abuse again later that night. Tr. p. 152.

The victim's mother was able to corroborate that the victim did, in fact, spend the night at the Applicant's house on New Year's Eve of 2009, and that the Applicant was drinking. Tr. p. 108-09. The victim's step-father, Anthony Carter, testified to the closeness of the two families, and agreed that the victim regularly spent the night at the Applicant's house. Tr. p. 61-74; p. 57.

b.

The victim testified that the next several instances of abuse occurred during multiple fishing trips. The victim, her step-father, and the Applicant regularly participated in fishing tournaments, including during the summer of 2010. The victim said that during a fishing trip following the initial abuse, while she and the Applicant were on a boat alone together, he "started kissing me and he stuck his hand up my shirt and he also tried to get down my pants." Tr. p. 154. The Applicant continued to abuse the victim on several subsequent fishing trips. Tr. p. 156; 57.

Mr. Carter strongly and independently corroborated the circumstances and timeline surround the abuse. He testified that he, the victim, and the Applicant participated in a number of fishing tournaments the summer of 2010. Tr. p. 68. During some of those fishing trips, Mr. Carter explained that the victim would fish alone in a boat with the Applicant, involving "several occasions that they disappeared for twenty minutes, thirty minutes." Tr. p. 70-71. Mr. Carter testified that he was very familiar with the creeks and channels in the area, and explained that it was relatively easy to "lose sight of somebody." Tr. 72-73. Ms. Bellamy also testified that the victim would sometimes fish alone with the Applicant in his boat. Tr. p. 111-13.

c.

The victim testified that the final instance of abuse occurred on September 11, 2010, while she was home alone. Ms. Bellamy was working, and Mr. Carter was at an event at the "Dead Dog Saloon" commemorating fallen firefighters. Tr. p. 158-59. Earlier that day, the Applicant texted the victim multiple times requesting "nude photographs." Tr. p. 158. When the victim's step-father left for the event, the victim stayed home waiting for Ms. ~~Minor~~ mother to pick her up so she could spend the night at their house. Tr. p. 158-60. The Applicant was

supposed to meet Mr. Carter at the Dead Dog Saloon. However, upon learning the victim was home alone, he made a detour. The victim testified that upon arriving, the Applicant “started kissing me, he stuck his hand up my shirt and he also stuck his hand down my pants.” Tr. 161. While digitally penetrating the victim, the Applicant also masturbated. Tr. p. 161-62. After leaving, he and the victim continued texting throughout the night. Tr. p. 163.

As discussed earlier, *Minor* testified that she observed the victim texting back and forth with the Applicant throughout the night following the abuse.⁷ Additionally, Mr. Carter independently corroborated the Applicant’s timeline and opportunity. He testified that on September the 11th, 2010, he went to “Dead Dog Saloon” for an event to salute fallen firefighters. Tr. p. 75. He arrived around 5:00 pm. Tr. p. 75. He explained that the victim stayed home, planning to spend the night with Ms. *Minor*, instead. Tr. p. 76-77.

Mr. Carter said that the Applicant was supposed to meet him at the event, and told him that he was “on the way” when he talked to him. Tr. p. 76. He did not arrive for “40, 45 minutes.” Tr. p. 76. During the interim, Mr. Carter said the Applicant called him multiple times saying “I’ll be there in a minute, I’ll be there in a minute.” Tr. p. 78. Mr. Carter testified that the Applicant did not answer calls “for a period there, until finally he said, ‘I’m about to pull in the driveway, I will be there in two minutes,’ and fifteen minutes later he showed up finally.” Tr. p. 78. Mr. Carter noticed that the Applicant appeared to be “real jumpy,” and saw him on the phone several times that night. Tr. p. 79-80.

Discussion

Given the independent corroborative evidence in this case, there is no reasonable likelihood that but for counsel’s purported deficiency the outcome would have been different.

⁷ Ms. *Minor* also testified that the victim disclosed the abuse upon arriving to spend the night. Tr. p. 184.

The Applicant's argument appears to be that any improper corroboration in a case in which credibility is a key issue is automatically prejudicial. Such an interpretation ignores the fact that the standard for determining ineffective assistance of counsel – even in a criminal sexual conduct with a minor case – is still governed by Strickland. In order to establish prejudice in such a claim, the Applicant bears the burden of proving counsel's error likely contributed to the outcome at trial. Looking at the facts and circumstances of this case, it is clear that he failed to meet that burden. Any impact from the alleged improper identification testimony – where neither identification *nor the consistency of the victim's disclosures* was an issue – was entirely consumed by the substantial amount of admissible corroborative evidence.

Other Appropriate Corroboration

The Applicant also alleges counsel was ineffective for failing to object to testimony elicited from Ginger Pop, the lead investigator, and Dianne Nordeen, the forensic interviewer. Respondent submits that their testimony did not constitute objectionable hearsay. In any event, given the substantial corroborative evidence in this case, the Applicant has not met his burden to prove prejudice.

Investigator Pops testimony was not hearsay because it was not an out of court statement offered to prove the truth of the matter asserted. See, Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000). “An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. Id.; see also Brown v. State, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994). Investigator Pops testified that, after reviewing the forensic interview of the victim, it revealed “several incidents that the child had revealed to the interviewer of events between the defendant and the child.” Tr. p. 219. This, however, was in response to whether he had been able to determine the “time and place of event

[sic] for actually following up with your investigation.” Tr. p. 219 (emphasis added). The purpose of the testimony was to establish a baseline from which Investigator Pops could conduct her investigation. Because this testimony was not hearsay, counsel’s failure to object was not deficient.

The Applicant’s argument with respect to Ms. Nordeen’s testimony is similarly without merit. The Applicant specifically takes issue with the fact that Ms. Nordeen testified that the victim told her the abuse occurred in “[t]he living room in the home of Wayne and Tabitha Love,” and “Wayne Love’s boat.” Tr. p. 208, l. 6-17; 208, l. 18-25.

A well-settled exception to the general prohibition against hearsay in criminal sexual conduct cases allows limited corroborative testimony. Sanchez v. State, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002). When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration; however, such evidence is limited to the time and place of the assault and cannot include details or particulars or the identity of the perpetrator. Id.

Ms. Nordeen’s testimony did not identify the Applicant as the perpetrator. Rather, it conveyed the location of the assaults. This testimony is within the limits of the outcry exception regardless of any additional probative value in inferring the Applicant was the assailant. Because the Applicant has failed to meet his burden to prove a reasonable likelihood that counsel’s alleged errors affected the outcome of the trial, this allegation should be denied.

B.

The Applicant argues counsel should have moved to exclude phone records or testimony concerning phone records of the victim’s cell phone account. This allegation is similarly without merit. The phone records were properly objected to and excluded. Tr. p. 124-30. Ms.

Bellamy's testimony as to what she saw was not hearsay, because it was not admitted for the truth of the matter asserted. Rule 801(c), SCRE. Rather, her testimony was introduced for the purpose of explaining how she became suspicious of the victim's relationship with the Applicant. PCR Tr., p. 80-81. That suspicion caused her to confront the victim, which ultimately led to the disclosure of abuse. Because the records were not admitted into evidence, and Ms. Bellamy's testimony did not constitute impermissible hearsay, this allegation should be denied.

C.

The Applicant argues counsel was ineffective in failing to properly address jurors who were allegedly sleeping during the trial. While there were reports of jurors potentially sleeping, the trial judge specifically advised the jury how important it was to "pay attention throughout the trial and to remain alert," and asked them to assist their fellow jurors in remaining alert. Tr. p. 103-04. A jury is presumed to follow instructions. Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n.1 (1999).

Later during trial, the State brought to the court's attention that several people had seen one juror appear to "nod off" during the trial. Tr. p. 242. That juror was brought before the judge and questioned. Tr. p. 244-45. While under oath, he said that he was paying attention, but that his eyes were "messaging" with him. Tr. p. 245. He said that he was not asleep, had not missed any testimony, and was confident that he had not missed any of the proceedings. Tr. p. 245-46. The trial judge made a specific finding that the juror was credible. Tr. p. 247.

At that time, counsel informed the court that he had not noticed, but conveyed the Applicant's concern that it "might be more than one juror." Tr. p. 243-44. There was no other evidence that any other jurors appeared to have been sleeping, and even the judge pointed out that he had "not seen [anyone] who appeared to be sitting with his eyes closed." Tr. p. 244.

Given the trial judge's credibility finding, as well as the lack of any evidence other than the Applicant's self-serving testimony to support this allegation, Respondent submits he has failed to meet his burden to show ineffective assistance of counsel.

D.

The Applicant argues counsel was ineffective for failing to investigate the use of the Applicant's cell phone as a tool for the defense, particularly to establish the "innocent nature of the Applicant's text communications" with the victim. The Applicant did not present any such evidence at the PCR evidentiary hearing. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (failure to investigate does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result). Having failed to meet his burden, this allegation should be denied.

E.

The Applicant argues counsel was ineffective for "failing to object to improper implication that Applicant had made admissions which prompted his arrest." Specifically, he alleges that counsel should have objected to testimony that the Applicant was arrested following his interview with law enforcement. If Respondent understands the claim correctly, the Applicant appears to be taking issue with the fact that law enforcement officers testified to the events as they chronologically occurred. The Applicant has failed, however, to provide an actual basis for making a nonfrivolous objection. *Obviously* there are multiple inferences possible from the testimony in question. The same is likely true of all testimony. Counsel's failure to make a frivolous objection does not rise to the level of deficient performance. Moreover, the Applicant denied abusing the victim during his trial testimony, refuting any inference that he admitted

doing so to law enforcement. He has therefore failed to meet his burden to prove deficient performance or prejudice.

F.

The Applicant argues counsel was ineffective for failing to cross-examine *MINOR* regarding potential impeachment information. The thrust of this allegation appears to be that counsel should have impeached Ms. *MINOR* with evidence that she could have been charged for distributing the Vicodin to the victim, and was ineffective for failing to introduce evidence any sort of deal in exchange for her testimony.

The Applicant has not presented any evidence that Ms. *MINOR* was given "consideration" in exchange for her testimony. Accordingly, he has failed to show prejudice. See Moorehead, supra.

The Applicant has also failed to prove deficiency, given counsel's credible testimony. Counsel testified at the evidentiary hearing that if he had thought cross-examining Ms. *WINDL* about Vicodin would have helped the Applicant, he would have done it. PCR Tr. p. 81. Counsel said his impression was that the friend was not a very credible witness, and that there was not a lot to be gained in drilling her possessing Vicodin. PCR. p. 34. As the Applicant has failed to meet his burden to prove ineffective assistance of counsel, this allegation should be dismissed.

G.

The Applicant argues counsel was ineffective in failing to question the Victim "concerning her theft of Vicodin from her father in addition to the isolated incident testified to by her step-father and mother wherein she got the same drug from her best friend." Counsel testified credibly as to his trial strategy, emphasizing that he did not believe there was a lot to be gained "in drilling [the victim] possessing Vicodin," and that he did not see a lot of points to be

scored “by picking fights” with the victim. PCR Tr. p. 34. Counsel explained that he wanted to be careful not to make the victim appear more sympathetic. PCR Tr. p. 34. Regardless, the Applicant has failed to show that but for counsel’s failure to press the issue, the outcome would have been different. The victim acknowledged in front of the jury that she had the pill, and admitted that she got in trouble for having it. Tr. p. 163-64. Because the Applicant has failed to meet his burden to prove deficiency or prejudice, this allegation should be dismissed.

H.

The Applicant argues counsel was ineffective in failing to “pursue the question of who deleted information on [the victim’s] phone and why.” The Applicant appears to imply the victim was responsible. Applicant’s post-hearing memorandum, p. 46-47. However, he has not presented any evidence to support such a claim. See, Moorehead, supra. Having failed to meet his burden to show deficiency or prejudice, this allegation should be dismissed.

I.

The Applicant next argues counsel was ineffective in failing to object each and every time the forensic interviewer was referred to as a “forensic interviewer,” as well as a “doctor or therapist.” Additionally, the Applicant argues counsel was ineffective for, himself, referring to the forensic interviewer as a “forensic interviewer.” Seeing as there is no rule against referring to forensic interviewers as forensic interviewers, the Applicant has failed to present any evidence that counsel was deficient in failing to make such an objection.

The Applicant has also failed to meet his burden to prove counsel was ineffective in failing to object when the solicitor referred to the person who conducted the victim’s forensic interview as a “therapist” or “doctor.” The Applicant has failed to show deficiency or prejudice. Even if, as the Applicant argues, such a claim “signal[ed] the Prosecutor possessed knowledge of

[the forensic interviewer's] expertise which went beyond the evidence before the jury,"⁸ the witness did not provide any expert or opinion testimony. PCR Tr. p. 88. Instead, in accordance with the rules, she testified that she conducted an interview. Id.⁹

Inasmuch as the Applicant alleges counsel was ineffective for failing to object to testimony from Ms. Bellamy that the Children's Recovery Center "recommended that she receive counseling where said testimony could have been interpreted by the jury to infer" they believe the victim. A cursory review of the record makes quite clear that the victim's mother "asked the people at the Children's Recovery if they could recommend a counselor" for her. Tr. p. 137.

Because the Applicant has failed to present any inappropriate testimony, he has failed to meet his burden to show ineffective assistance of counsel. This allegation should be dismissed.

J.

The Applicant argues counsel was ineffective for failing to object to the State's opening argument. Specifically, the Applicant takes issue with the solicitor's comment that the victim was thirteen when the abuse started. Looking at the offending passage, the Applicant appears to have misread the record. The solicitor argued:

"the evidence will show that during the time when [the victim] knew [the Applicant] from the time she met him when she was thirteen, until September, October, or September of 2010 he did commit sexual battery on her. **She had turned fourteen by that time but still that is what I have to show you.**"

⁸ Frankly, it appears that the solicitor simply misspoke.

⁹ As part of this allegation, the Applicant argues the forensic interviewer was allowed to testify that the victim identified the Applicant as the person who sexually assaulted her. As discussed in section A, her testimony was limited to the time and location of the events, and while she referred to property owned by the Applicant as the location of the abuse, she did not refer to him as the perpetrator.

Tr. p. 52 (emphasis added). As the solicitor clearly expressed that the abuse began when the victim turned fourteen, the assertion is supported by the evidence.

Additionally, the victim testified as to when the first incident occurred, which was on New Year's Eve of 2009. Tr. p. 149. The trial judge told the jury that they were to "determine what the facts are from the evidence," and that their memory controlled over the lawyers' arguments. Tr. p. 490.

Given the trial judge's correct charge on the jury's role as factfinder, as well as the solicitor's correct statement during opening remarks, the Applicant has failed to meet his burden with respect to this allegation. It should therefore be denied.

K.

The Applicant argues counsel was ineffective for interjecting an implication that the victim was suicidal at trial. The Applicant has failed to show deficiency or prejudice. Counsel testified at the evidentiary hearing that he disagreed with the characterization that the victim was trying to commit suicide, and that he did not concede the point. PCR Tr. p. 43-44. However, he said that the victim was, in his mind, "less than credible," and there were "other ways to attack her." Tr. p. 43-44. The record reveals that he was, in fact, using the incident to attack the victim's credibility. Counsel was clearly attempting to show, through defense witnesses, that the victim regularly communicated with and texted both the Applicant *and* the Applicant's wife because of the close relationship she had with *both* of them. Tr. p. 270-74. In any event, and in response to the Applicant's lamentation that it is "impossible to know the degree to which this remark prejudiced" his case, Respondent submits that it is the Applicant's burden to prove each of his allegations. Having failed to do so with respect to deficiency or prejudice, this allegation should be denied.

L.

The Applicant argues counsel was ineffective for failing to adequately represent that Applicant during sentencing. The Applicant takes issue with counsel's failure to clarify the precise circumstances surrounding a previous criminal sexual conduct charge out of Lexington County, which was ultimately reduced to assault and battery of a high and aggravated nature. Applicant claims counsel should have informed the judge that the sexual conduct in that case was consensual.

Counsel testified that he felt the judge could read between the lines of what was charged and what the Applicant ultimately pled to. PCR Tr. p. 70. Counsel said that in his experience, "when the State has a CSC with a minor, and they feel they have a strong case, no problems with the witnesses or evidence, they don't budge with that very often." PCR Tr. p. 70. Counsel testified that he did not go into the specifics of that charge because he did not think it was "worth reminding the Court that [the Applicant] . . . had allegations of being with a young woman **consensual or not.**" PCR Tr. p. 71-72 (emphasis added). Counsel pointed out that consent had been an "underlying theme" in the current trial, as well, and that the jury had come back and asked whether consent was an excuse or defense to lewd act. PCR Tr. p. 72. "Having watched the whole trial," counsel said he thought the jury believed that the victim was a willing participant in everything. PCR Tr. p. 72. Because such a consideration was not relevant, however, counsel "did not see any points to be gained by reminding the Court or suggesting that what happened in Lexington was okay," or further emphasizing that the Applicant "gets in trouble with relationships with underage girls." PCR Tr. p. 72.¹⁰ Counsel further expressed that he did not believe the solicitor was not being disingenuous or factually inaccurate. PCR Tr. p.

¹⁰ The jury specifically asked whether the victim "had any right to consent to anything" with respect to the lewd act. Tr. p. 504.

72. Given counsel's sound strategy in dealing with this mitigation issue, Respondent submits the Applicant has failed to meet his burden to prove ineffective assistance of counsel.

M.

The Applicant argues counsel was ineffective in failing to object to purported improper impeachment concerning details of his prior record, specifically by questioning him on his prior conviction. The Applicant has failed to show deficiency or prejudice. Specifically, the Applicant has failed to establish an actual breach of the applicable standard of reasonableness. The rules allowed the State to impeach the Applicant with his prior convictions – particularly the crime of dishonesty – on cross-examination. Rule 609, SCRE. The Applicant has not contested the admissibility of the Applicant's conviction for breach of trust. Moreover, the Applicant has not provided any authority to support his argument that counsel should have objected to the question of whether he was a "convicted felon." In addition, Respondent has failed to show prejudice given the impact the crime of dishonesty would have had on his credibility. See State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015) ("In common human experience, acts of deceit, fraud, cheating, or stealing . . . are universally regarded as conduct which reflects adversely on a man's honesty and integrity"). Because the Applicant has failed to show either deficiency or prejudice, this allegation should be dismissed.

N.

The Applicant argues counsel was ineffective in his closing argument to the jury. The Applicant focuses on his attorney's theory that it did not make sense for the victim to lie simply because she had gotten in trouble for possessing Vicodin. Counsel clearly and credibly articulated a valid strategy in making his closing argument. Counsel testified that while the "fear of punishment" could be an explanation for false allegations, "I do think sometimes it is a trap

for a lawyer to go there. Juries seem to put the burden of proof on you.” PCR Tr. p. 83. He testified that he “didn’t know why she lied, little girls lie sometimes for their own reasons, and I don’t have to prove to you why she lied, but look at other things.” PCR Tr. p. 83. Counsel expressed to the jury that it was a mistake to think of the minor child victim as a rational adult. PCR Tr. p. 84.

Understandably, the Applicant now disagrees with counsel’s strategy. Disagreement as to which strategy would have worked best, however, does not support a claim of ineffective assistance of counsel. “There are countless ways to provided effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” Strickland at 689, 104 S.Ct. at 2066. Because the Applicant has failed to meet his burden to show deficiency or prejudice, this allegation should be dismissed.

O.

The Applicant has also raised a number of claims that counsel was ineffective for failing to object to alleged improper comments during the solicitor’s closing arguments. A review of a solicitor’s closing argument is “based upon the standard of whether his comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004). Each of these claims is addressed below.

- Many of the Applicant’s claims with respect to the solicitor’s closing arguments involve comments that are allegedly not supported by the evidence. Respondent submits that none of these comments rise to the level of “so infecting the trial with unfairness as to make the resulting conviction a denial of due process.” Von Dohlen, supra. Additionally, as discussed in section J, the trial judge correctly charged the jury on their role as the factfinders, and specifically told them that their memory controlled over that of the attorneys. Tr. p. 490.
- The Applicant argues counsel should have objected to the solicitor’s comment that the Applicant and his wife had prior convictions because 1) the argument invited the jury to convict the Applicant based on his prior criminal record; 2) it erroneously implied that

both the Applicant has his wife had felony convictions; and 3) it “interjected an important detail about Applicant’s prior record which went beyond the scope of permissible impeachment under Rule 609(a)(1).” In response, 1) the argument merely rehashed what had already been testified to and was limited to the context of credibility; and 2) it did not imply that the Applicant’s wife had a felony conviction, but rather repeated her testimony that she had previously been convicted of assault and battery of a high and aggravated nature. With respect to the third reason the Applicant argues counsel should have objected, Respondent would refer to its explanation in section M.

- The Applicant argues the solicitor mischaracterized statements made by the Applicant’s wife as telling him that if he made certain statements she could get “caught” for perjury. Respondent submits the solicitor properly argued that the jury should draw certain inferences from facts presented at trial. Counsel argued the opposite inferences should be drawn. Tr. p. 444-45. The Applicant has failed to show any actual deviation from the applicable standard with respect to this allegation.
- The Applicant argues counsel should have objected to each reference to the “forensic interview.” For the reasons discussed in section I, this allegation should be dismissed.
- The Applicant alleges counsel should have objected to the alleged improper argument that the Applicant was a convicted felon. For the reasons discussed in section M, this allegation should be dismissed.
- The Applicant argues counsel was ineffective for failing to object to the solicitor “[i]mproperly advising jury of his personal opinion that Applicant and his wife were liars.” The comment was not objectionable where the solicitor was properly arguing the Applicant and his wife were not credible based on the evidence, and did not inject her personal opinion into the matter. See State v. Caldwell, 300 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) (“A solicitor’s argument concerning the credibility of the State’s witnesses based on the record and its reasonable inferences is not error.”).

P.

The Applicant argues counsel was ineffective in failing to object to testimony concerning “prior bad acts not relevant to case which did not involve crimes of moral turpitude.” Evidence was admitted during the trial that the Applicant and his wife were aware the victim had been caught by her step-mother with a cigarette and pain pill, but kept the information from the victim’s parents. First, the evidence was clearly relevant, in that it tended to show a generally inappropriate relationship between the Applicant and the victim. Further, it was not admitted to prove the character of the Applicant, but instead the nature of his relationship with the victim,

and would have been admissible under Rule 404(b) to show evidence of a common scheme or plan. Because the Applicant has failed to establish a meritorious basis for mounting an objection, he has failed to show deficiency or prejudice. This allegation should therefore be denied and dismissed.

CONCLUSION

WHEREFORE, the Respondent respectfully requests the court deny this application for post-conviction relief.

Respectfully submitted,

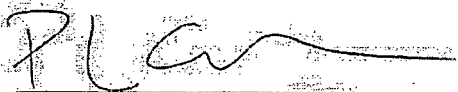
ALAN WILSON
Attorney General

ROBERT BOLCHOZ
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By:


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January 27, 2017

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

PRENTISS WAYNE LOVE, 315271,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

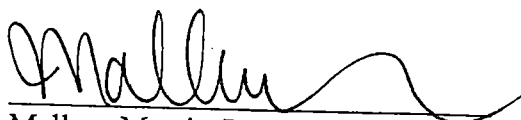
2015-CP-22-0209

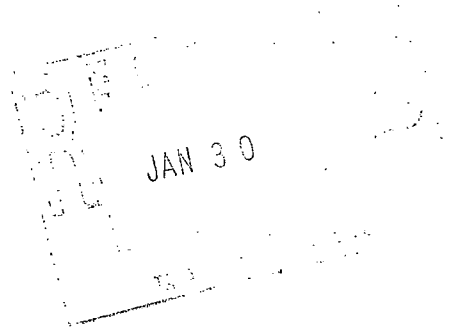
AFFIDAVIT OF SERVICE BY MAIL

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

Ms. Tara D. Shurling, Esquire
 Law Ofc. Of Tara Dawn Shurling, PA
 3614 Landmark Drive, Suite A
 Columbia, SC 29204

DATED this 27th day of January, 2017.


 Mallory Morris, Legal Assistant
 For Respondent



4/31/17
SG

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN) FOR THE FIFTEENTH JUDICIAL CIRCUIT

Prentiss Wayne Love,) Case No.: 2015-CP-22-00209
S.C.D.C. No. 315271,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

FILED
2017 MAY -4 AM 10:08
ALMA Y. WHITE
CLERK OF COURT

This matter comes before the court by way of an application for post-conviction relief (PCR) filed February 24, 2015, and twice amended on November 15, 2016. The State made its return on or about June 25, 2015. The Court convened an evidentiary hearing into the matter on November 16, 2016, at the Horry County Courthouse. Applicant was present at the hearing and represented by Tara Dawn Shurling, Esquire. Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant did not testify; only Applicant's trial counsel, Jonathan Eric Fox, Esquire, testified. At the Court's direction, the parties submitted memoranda in support of their respective positions after the hearing—Applicant filed on January 3, 2017, and Respondent filed on January 30, 2017. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. In May 2011, the Georgetown County Grand Jury indicted Applicant for second-degree criminal sexual conduct with a minor (2011-GS-22-00431) and lewd act on a minor (2011-GS-22-00432). Jonathan Eric

Fox, Esquire, represented Applicant. On April 23, 2012, Applicant proceeded to trial before the Honorable Garrison D. Hill and a jury. On April 25, 2012, the jury found Applicant guilty of lewd act on a minor.¹ Judge Hill sentenced Applicant to fifteen (15) years imprisonment.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense, perfected the appeal with the filing of an Anders² brief. The South Carolina Court of Appeals dismissed the appeal on May 21, 2014. State v. Love, Op. No. 2014-UP-195 (S.C. Ct. App. filed May 21, 2014). The remittitur was issued to the circuit court on June 16, 2014.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witness presented at the hearing, passed upon his credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court's records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys, both through arguments at the hearing and post-hearing memoranda.

Applicant raised thirty-six independent allegations of ineffective assistance of counsel, covering nearly every facet of his attorney's representation. In the interest of clarity and brevity, the Court considers those allegations in the same order as considered in the parties' post-hearing memoranda.

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

¹ The Applicant was acquitted of criminal sexual conduct, second degree.

² Anders v. California, 386 U.S. 738 (1967).

Where ineffective assistance of counsel is alleged 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 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption 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. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, 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.

II.A.

Applicant's first allegation is that counsel was ineffective in failing to object to hearsay, which he argues improperly corroborated the victim's testimony. The Court finds that the alleged improper evidence was cumulative to admissible testimony of witnesses other than the victim, and that its impact was negligible in light of substantial corroborative evidence presented by the state. As such, the Court finds that Applicant has failed to meet his burden.



Applicable law

A well-settled exception to the general prohibition against hearsay in criminal sexual conduct cases allows limited corroborative testimony. Sanchez v. State, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002). When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration; however, such evidence is limited to the time and place of the assault and cannot include details or particulars or the identity of the perpetrator. Id. Courts have been particularly wary where the only evidence corroborating a minor victim's testimony is inadmissible hearsay. See, e.g., Sanchez, supra. However, in the context of post-conviction relief, the proper standard for determining ineffective assistance of counsel is still Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). For the following reasons, Applicant has failed to meet his burden with respect to this allegation.

II.A.1.

The alleged improper testimony concerning the Applicant's identity as the perpetrator was merely cumulative to the admissible testimony of Minor and Shannon Bellamy, which corroborated the victim's accusation³ by independently establishing that she and the Applicant were in an inappropriate, romantic relationship.

Testimony at trial

Minor, the victim's best friend, and Shannon Bellamy, the victim's mother, each testified to their direct observations at trial. Ms. Minor described the victim's relationship with the Applicant as "a normal . . . boyfriend-girlfriend relationship,"⁴ in which "they would talk and flirt and text all the time." Tr. p. 183. She also testified to the victim's

³ Specifically with respect to the Applicant's identity as the perpetrator of the abuse.

⁴ The Applicant was thirty years old at the time. The victim was fourteen.

demeanor following multiple disclosures, explaining that she acted like she “liked”⁵ the Applicant, like there was “nothing wrong” with the abuse, and treated the Applicant “[l]ike a boyfriend almost.” Tr. p. 180-83. Following the final incident of abuse, the victim spent the night with Ms. Minor. Tr. p. 183. Ms. Minor said she observed the victim texting back and forth with the Applicant “all night long.” Tr. p. 184-85.

Ms. Bellamy also noticed improprieties between the victim and the Applicant arising out of the sheer number of text messages they sent to one another. Once, while the victim was put on restriction, Ms. Bellamy confiscated her phone. Tr. p. 115-16. In checking the phone records on her online account, Ms. Bellamy was able to see the number of incoming and outgoing texts and calls made by the victim. Tr. p. 118. She became concerned by “hundreds” of text messages between the victim, who was fourteen, and the Applicant, who was thirty. Tr. p. 122-23; 133.⁶

Discussion

Given the admissible corroborative evidence clearly indicating an inappropriate, romantic relationship between the victim and the Applicant, any improper references to the Applicant as the perpetrator are clearly not prejudicial. Jolly v. State is instructive, and establishes that while improper evidence that is cumulative to *only* the victim’s testimony is problematic, prejudice is significantly less likely where it is also cumulative to other, admissible corroborative evidence. 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994).

Jolly was convicted of sexually abusing his underage step-granddaughter. At trial, in an attempt to bolster the victim’s shaky testimony, the state elicited testimony – over counsel’s objection – from a social worker that the child had made a prior statement that Jolly abused her.

⁵ Given the context, the word “like” here is clearly meant to convey romantic affection, as is normally used by adolescents and children.

⁶ Those text messages prompted Ms. Bellamy to confront the victim, which ultimately led to the disclosure.

Later, the victim's uncle testified without objection that the child had previously told him Jolly abused her. Jolly was ultimately convicted.

The Court of Appeals affirmed Jolly's conviction in a published opinion, finding that any error from the admission of the social worker's improper testimony was cumulative to the testimony of the victim *and her uncle*, and therefore harmless. State v. Jolly, 304 S.C. 34, 402 S.E.2d 895 (Ct. App. 1991). The Supreme Court denied certiorari.

Jolly then filed a PCR application, and was denied relief at the circuit level. The Supreme Court reversed, finding counsel ineffective for failing to object to the uncle's testimony. The Court distinguished the circumstances from the direct appeal where, because of the rules of issue preservation, the Court of Appeals was

precluded from examining the improper admittance of [the uncle's] testimony. Accordingly, the Court of Appeals, affirming Jolly's conviction, held that the admittance of the social worker's hearsay testimony identifying Jolly as the perpetrator was harmless error because the testimony was *merely cumulative to [the uncle's] unobjected testimony and the victim's testimony*.

Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) (emphasis added). The key difference being that in the context of post-conviction relief, the Supreme Court could freely examine the previously unobjected testimony. It specifically found that but for counsel's failure to object to the uncle's testimony, the Court of Appeals could not have held the social worker's testimony was harmless because it would have been "*merely cumulative to the victim's testimony*," rather than the both victim's testimony and additional independent, properly admitted corroborative evidence. Id.

Application to this Case

Turning to the facts of this case, the alleged inappropriate references to the Applicant as the perpetrator were clearly not prejudicial. The actual identity of the victim was not an issue in

this case, and any bolstering from improper corroboration was outweighed by and cumulative to the independent, compelling testimony provided by Ms. *Minor* and Ms. Bellamy which corroborated the victim's testimony on the same point. Their testimony indicates the Applicant and the victim were engaged in an inappropriate romantic relationship, given the victim's demeanor and behavior toward the Applicant, as well as the frequency and nature of their private communications. Therefore, the Court finds that Applicant has failed to meet his burden to prove ineffective assistance of counsel, and the application, to the extent it relies upon these allegations, is **DENIED**.

II.A.2.

The Court finds additionally that, in light of the substantial admissible evidence presented in corroboration of the victim's testimony, there is no reasonable likelihood that counsel's failure to object to the alleged hearsay affected the outcome.

Proper Corroboration of the Victim's Testimony

The Court finds that the State presented proper independent testimony and evidence that corroborated the victim's testimony, particularly with regards to her timeline and the opportunities the Applicant had to perpetrate the abuse.

Testimony at trial

a.

The victim testified to multiple instances of abuse by the Applicant. The first time Applicant sexually abused her was at his house on New Year's Eve of 2009. Tr. p. 149. She was thirteen years old. Tr. p. 149. She testified she spent the night with the Applicant and his family. After Applicant's wife, Tabitha, went to bed, he and the victim continued to watch television on the couch. Tr. p. 150-51. Applicant was drinking. Tr. p. 151. At one point,

Applicant started kissing the victim and attempted to put his hand up her shirt. Tr. p. 151. He tried to initiate the abuse again later that night. Tr. p. 152.

The victim's mother was able to corroborate that the victim did, in fact, spend the night at Applicant's house on New Year's Eve of 2009, and that Applicant was drinking. Tr. p. 108-09. The victim's step-father, Anthony Carter, testified to the closeness of the two families, and agreed that the victim regularly spent the night at Applicant's house. Tr. p. 61-74; p. 57.

b.

The victim testified that the next several instances of abuse occurred during multiple fishing trips. The victim, her step-father, and Applicant regularly participated in fishing tournaments, including during the summer of 2010. The victim said that during a fishing trip following the initial abuse, while she and Applicant were on a boat alone together, he "started kissing me and he stuck his hand up my shirt and he also tried to get down my pants." Tr. p. 154. Applicant continued to abuse the victim on several subsequent fishing trips. Tr. p. 156; 57.

Mr. Carter strongly and independently corroborated the circumstances and timeline surround the abuse. He testified that he, the victim, and Applicant participated in a number of fishing tournaments the summer of 2010. Tr. p. 68. During some of those fishing trips, Mr. Carter explained that the victim would fish alone in a boat with Applicant, involving "several occasions that they disappeared for twenty minutes, thirty minutes." Tr. p. 70-71. Mr. Carter testified that he was very familiar with the creeks and channels in the area, and explained that it was relatively easy to "lose sight of somebody." Tr. 72-73. Ms. Bellamy also testified that the victim would sometimes fish alone with Applicant in his boat. Tr. p. 111-13.



c.

The victim testified that the final instance of abuse occurred on September 11, 2010, while she was home alone. Ms. Bellamy was working, and Mr. Carter was at an event at "Dead Dog Saloon" to commemorate fallen firefighters. Tr. p. 158-59. Earlier that day, Applicant texted the victim multiple times requesting "nude photographs." Tr. p. 158. When the victim's step-father left for the event, the victim stayed home waiting for Ms. Jenkinson's mother to pick her up so she could spend the night at their house. Tr. p. 158-60. Applicant was supposed to meet Mr. Carter at Dead Dog Saloon. However, upon learning the victim was home alone, he made a detour. The victim testified that upon arriving, Applicant "started kissing me, he stuck his hand up my shirt and he also stuck his hand down my pants." Tr. 161. While digitally penetrating the victim, Applicant also masturbated. Tr. p. 161-62. After leaving, he and the victim continued texting throughout the night. Tr. p. 163.

As discussed earlier, *Minor* testified that she observed the victim texting back and forth with Applicant throughout the night following the abuse.⁷ Additionally, Mr. Carter independently corroborated Applicant's timeline and opportunity. He testified that on September the 11, 2010, he went to Dead Dog Saloon for an event to salute fallen firefighters. Tr. p. 75. He arrived around 5:00 pm. Tr. p. 75. He explained that the victim stayed home, planning to spend the night with Ms. *Minor* instead. Tr. p. 76-77.

Mr. Carter said that Applicant was supposed to meet him at the event, and told him that he was "on the way" when he talked to him. Tr. p. 76. He did not arrive for "40, 45 minutes." Tr. p. 76. During the interim, Mr. Carter said Applicant called him multiple times saying "I'll be there in a minute, I'll be there in a minute." Tr. p. 78. Mr. Carter testified that Applicant did not answer calls "for a period there, until finally he said, 'I'm about to pull in the driveway, I will be

⁷ Ms. *Minor* also testified that the victim disclosed the abuse upon arriving to spend the night. Tr. p. 184.

there in two minutes,' and fifteen minutes later he showed up finally." Tr. p. 78. Mr. Carter noticed that Applicant appeared to be "real jumpy," and saw him on the phone several times that night. Tr. p. 79-80.

Discussion

Given the independent corroborative evidence in this case, there is no reasonable likelihood that but for counsel's purported deficiency the outcome would have been different. Applicant's argument appears to be that any improper corroboration in a case in which credibility is a key issue is automatically prejudicial. Such an interpretation ignores the fact that the standard for determining ineffective assistance of counsel – even in a criminal sexual conduct with a minor case – is still governed by Strickland. In order to establish prejudice in such a claim, the Applicant bears the burden of proving counsel's error likely contributed to the outcome at trial. Looking at the facts and circumstances of this case, it is clear that he failed to meet that burden. Any impact from the alleged improper identification testimony – where neither identification *nor the consistency of the victim's disclosures* was an issue – was entirely consumed by the substantial amount of admissible corroborative evidence. Therefore, the Court finds that Applicant has failed to meet his burden to prove ineffective assistance of counsel, and the application, to the extent it relies upon these allegations, is **DENIED**.

II.A.3.

Other Appropriate Corroboration

Applicant also alleges counsel was ineffective for failing to object to testimony elicited from Ginger Pop, the lead investigator, and Dianne Nordeen, the forensic interviewer. The Court finds that their testimony did not constitute objectionable hearsay. In any event, given the



substantial corroborative evidence in this case, Applicant has not met his burden to prove prejudice.

Investigator Pop's testimony was not hearsay because it was not an out of court statement offered to prove the truth of the matter asserted. See, Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000). "An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. Id.; see also Brown v. State, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994). Investigator Pop testified that, after reviewing the forensic interview of the victim, it revealed "several incidents that the child had revealed to the interviewer of events between the defendant and the child." Tr. p. 219. This, however, was in response to whether she had been able to determine the "time and place of event [sic] for actually following up with your investigation." Tr. p. 219 (emphasis added). The purpose of the testimony was to establish a baseline from which Investigator Pop could conduct her investigation. Because this testimony was not hearsay, counsel's failure to object was not deficient.

Applicant's argument with respect to Ms. Nordeen's testimony is similarly without merit. The Applicant specifically takes issue with the fact that Ms. Nordeen testified that the victim told her the abuse occurred in "[t]he living room in the home of Wayne and Tabitha Love," and "Wayne Love's boat." Tr. p. 208, l. 6-17; 208, l. 18-25.

As previously discussed, a well-settled exception to the general prohibition against hearsay in criminal sexual conduct cases allows limited corroborative testimony. Sanchez v. State, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002). When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration;

however, such evidence is limited to the time and place of the assault and cannot include details or particulars or the identity of the perpetrator. Id.

Ms. Nordeen's testimony did not identify the Applicant as the perpetrator. Rather, it conveyed the location of the assaults. This testimony is within the limits of the outcry exception regardless of any additional probative value in inferring the Applicant was the assailant. Applicant has failed to meet his burden to prove a reasonable likelihood that counsel's alleged errors affected the outcome of the trial. Therefore, the Court finds that Applicant has failed to meet his burden to prove ineffective assistance of counsel, and the application, to the extent it relies upon these allegations, is **DENIED**.

II.B.

Applicant argues counsel should have moved to exclude phone records or testimony concerning phone records of the victim's cell phone account. The Court finds that this allegation is similarly without merit. The phone records were properly objected to and excluded. Tr. p. 124-30. Ms. Bellamy's testimony as to what she saw was not hearsay, because it was not admitted for the truth of the matter asserted. Rule 801(c), SCRE. Rather, her testimony was introduced for the purpose of explaining how she became suspicious of the victim's relationship with the Applicant. PCR Tr., p. 80-81. That suspicion caused her to confront the victim, which ultimately led to the disclosure of abuse. Because the records were not admitted into evidence, and Ms. Bellamy's testimony did not constitute impermissible hearsay, the application, to the extent it relies upon these allegations, is **DENIED**.

II.C.

The Applicant argues counsel was ineffective in failing to properly address jurors who were allegedly sleeping during the trial. The Court finds that Applicant has not met his burden

with respect to this allegation. While there were reports of jurors potentially sleeping, the trial judge specifically advised the jury how important it was to “pay attention throughout the trial and to remain alert,” and asked them to assist their fellow jurors in remaining alert. Tr. p. 103-04. A jury is presumed to follow instructions. Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n.1 (1999).

Later during trial, the State brought to the court’s attention that several people had seen one juror appear to “nod off” during the trial. Tr. p. 242. That juror was brought before the judge and questioned. Tr. p. 244-45. While under oath, he said that he was paying attention, but that his eyes were “messaging” with him. Tr. p. 245. He said that he was not asleep, had not missed any testimony, and was confident that he had not missed any of the proceedings. Tr. p. 245-46. The trial judge made a specific finding that the juror was credible. Tr. p. 247.

At that time, counsel informed the court that he had not noticed, but conveyed the Applicant’s concern that it “might be more than one juror.” Tr. p. 243-44. There was no other evidence that any other jurors appeared to have been sleeping, and even the judge pointed out that he had “not seen [anyone] who appeared to be sitting with his eyes closed.” Tr. p. 244.

Given the trial judge’s credibility finding, as well as the lack of any evidence other than the Applicant’s self-serving testimony to support this allegation, the Court finds he has failed to meet his burden to show ineffective assistance of counsel. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

H.D.

Applicant argues counsel was ineffective for failing to investigate the use of the Applicant’s cell phone as a tool for the defense, particularly to establish the “innocent nature of the Applicant’s text communications” with the victim. Applicant did not present any such



evidence at the PCR evidentiary hearing. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (failure to investigate does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result). Therefore, Applicant has failed to meet his burden of proof as to this allegation. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

II.E.

Applicant argues counsel was ineffective for “failing to object to improper implication that Applicant had made admissions which prompted his arrest.” Specifically, he alleges that counsel should have objected to testimony that the Applicant was arrested following his interview with law enforcement. Applicant appears to be taking issue with the fact that law enforcement officers testified to the events as they chronologically occurred. The Court finds that Applicant has failed, however, to provide an actual basis for making a nonfrivolous objection. *Obviously* there are multiple inferences possible from the testimony in question. The same is likely true of all testimony. Counsel’s failure to make a frivolous objection does not rise to the level of deficient performance. Moreover, Applicant denied abusing the victim during his trial testimony, refuting any inference that he admitted doing so to law enforcement. He has therefore failed to meet his burden to prove deficient performance or prejudice. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

II.F.

Applicant argues counsel was ineffective for failing to cross-examine *Minor* regarding potential impeachment information. The thrust of this allegation appears to be that counsel should have impeached Ms. *Minor* with evidence that she could have been charged

for distributing the Vicodin to the victim, and was ineffective for failing to introduce evidence any sort of deal in exchange for her testimony.

Applicant has not presented any evidence that Ms. *Minor* was given "consideration" in exchange for her testimony. Therefore, the Court finds that he has failed to show prejudice. See Moorehead, supra.

The Court finds Applicant has also failed to prove deficiency, given counsel's credible testimony. Counsel testified at the evidentiary hearing that if he had thought cross-examining Ms. *Minor* about Vicodin would have helped the Applicant, he would have done it. PCR Tr. p. 81. Counsel said his impression was that the friend was not a very credible witness, and that there was not a lot to be gained in drilling her possessing Vicodin. PCR. p. 34. As the Applicant has failed to meet his burden to prove ineffective assistance of counsel, the application, to the extent it relies upon these allegations, is **DENIED**.

II.G.

Applicant argues counsel was ineffective in failing to question the Victim "concerning her theft of Vicodin from her father in addition to the isolated incident testified to by her step-father and mother wherein she got the same drug from her best friend." The Court finds that Counsel testified credibly as to his trial strategy, emphasizing that he did not believe there was a lot to be gained "in drilling [the victim] possessing Vicodin," and that he did not see a lot of points to be scored "by picking fights" with the victim. PCR Tr. p. 34. Counsel explained that he wanted to be careful not to make the victim appear more sympathetic. PCR Tr. p. 34. Regardless, Applicant has failed to show that but for counsel's failure to press the issue, the outcome would have been different. The victim acknowledged in front of the jury that she had the pill, and admitted that she got in trouble for having it. Tr. p. 163-64. The Court finds that



Applicant has failed to meet his burden to prove deficiency or prejudice. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

II.H.

Applicant argues counsel was ineffective in failing to “pursue the question of who deleted information on [the victim’s] phone and why.” Applicant appears to imply the victim was responsible. Applicant’s post-hearing memorandum, p. 46-47. However, he has not presented any evidence to support such a claim. See, Moorehead, supra. The Court finds that Applicant has failed to meet his burden to show deficiency or prejudice. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

II.I.

Applicant next argues counsel was ineffective in failing to object each and every time the forensic interviewer was referred to as a “forensic interviewer,” as well as a “doctor or therapist.” Additionally, the Applicant argues counsel was ineffective for, himself, referring to the forensic interviewer as a “forensic interviewer.” Seeing as there is no rule against referring to forensic interviewers as forensic interviewers, the Court finds that Applicant has failed to present any evidence that counsel was deficient in failing to make such an objection.

The Court finds that Applicant has also failed to meet his burden to prove counsel was ineffective in failing to object when the solicitor referred to the person who conducted the victim’s forensic interview as a “therapist” or “doctor.” Applicant has failed to show deficiency or prejudice. Even if, as the Applicant argues, such a claim “signal[ed] the Prosecutor possessed knowledge of [the forensic interviewer’s] expertise which went beyond the evidence before the



jury,”⁸ the witness did not provide any expert or opinion testimony. PCR Tr. p. 88. Instead, in accordance with the rules, she testified that she conducted an interview. Id.⁹

Applicant alleges counsel was ineffective for failing to object to testimony from Ms. Bellamy that the Children’s Recovery Center “recommended that [the victim] receive counseling where said testimony could have been interpreted by the jury to infer” they believe the victim. A cursory review of the record makes quite clear that the victim’s mother “asked the people at the Children’s Recovery if they could recommend a counselor” for her. Tr. p. 137.

Because Applicant has failed to present any inappropriate testimony, he has failed to meet his burden to show ineffective assistance of counsel. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

II.J.

Applicant argues counsel was ineffective for failing to object to the State’s opening argument. Specifically, Applicant takes issue with the solicitor’s comment that the victim was thirteen when the abuse started. Looking at the offending passage, Applicant appears to have misread the record. The solicitor argued:

“the evidence will show that during the time when [the victim] knew [the Applicant] from the time she met him when she was thirteen, until September, October, or September of 2010 he did commit sexual battery on her. **She had turned fourteen by that time but still that is what I have to show you.**”

Tr. p. 52 (emphasis added). As the solicitor clearly expressed that the abuse began when the victim turned fourteen, the assertion is supported by the evidence.

⁸It appears to this Court that the solicitor simply misspoke.

⁹ As part of this allegation, Applicant argues the forensic interviewer was allowed to testify that the victim identified Applicant as the person who sexually assaulted her. As discussed in section II.A, her testimony was limited to the time and location of the events, and while she referred to property owned by Applicant as the location of the abuse, she did not refer to him as the perpetrator.

Additionally, the victim testified as to when the first incident occurred, which was on New Year's Eve of 2009. Tr. p. 149. The trial judge told the jury that they were to "determine what the facts are from the evidence," and that their memory controlled over the lawyers' arguments. Tr. p. 490.

Given the trial judge's correct charge on the jury's role as factfinder, as well as the solicitor's correct statement during opening remarks, the Court finds that Applicant has failed to meet his burden with respect to this allegation. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

II.K.

Applicant argues counsel was ineffective for interjecting an implication that the victim was suicidal at trial. The Court finds that Applicant has failed to show deficiency or prejudice. Counsel testified at the evidentiary hearing that he disagreed with the characterization that the victim was trying to commit suicide, and that he did not concede the point. PCR Tr. p. 43-44. However, he said that the victim was, in his mind, "less than credible," and there were "other ways to attack her." Tr. p. 43-44. The record reveals that he was, in fact, using the incident to attack the victim's credibility. Counsel was clearly attempting to show, through defense witnesses, that the victim regularly communicated with and texted both Applicant *and* Applicant's wife because of the close relationship she had with *both* of them. Tr. p. 270-74. In any event, and in response to the Applicant's lamentation that it is "impossible to know the degree to which this remark prejudiced" his case, the Court finds that it is the Applicant's burden to prove each of his allegations. Having failed to do so with respect to deficiency or prejudice, the application, to the extent it relies upon these allegations, is **DENIED**.

H.L.

Applicant argues counsel was ineffective for failing to adequately represent Applicant during sentencing. Applicant takes issue with counsel's failure to clarify the precise circumstances surrounding a previous criminal sexual conduct charge out of Lexington County, which was ultimately reduced to assault and battery of a high and aggravated nature. Applicant claims counsel should have informed the judge that the sexual conduct in that case was consensual.

Counsel testified that he felt the judge could read between the lines of what was charged and what the Applicant ultimately pled to. PCR Tr. p. 70. Counsel said that in his experience, "when the State has a CSC with a minor, and they feel they have a strong case, no problems with the witnesses or evidence, they don't budge with that very often." PCR Tr. p. 70. Counsel testified that he did not go into the specifics of that charge because he did not think it was "worth reminding the Court that [the Applicant] . . . had allegations of being with a young woman **consensual or not.**" PCR Tr. p. 71-72 (emphasis added). Counsel pointed out that consent had been an "underlying theme" in the current trial, as well, and that the jury had come back and asked whether consent was an excuse or defense to lewd act. PCR Tr. p. 72. "Having watched the whole trial," counsel said he thought the jury believed that the victim was a willing participant in everything. PCR Tr. p. 72. Because such a consideration was not relevant, however, counsel "did not see any points to be gained by reminding the Court or suggesting that what happened in Lexington was okay," or further emphasizing that the Applicant "gets in trouble with relationships with underage girls." PCR Tr. p. 72.¹⁰ Counsel further expressed that he did not believe the solicitor was not being disingenuous or factually inaccurate. PCR Tr. p.

¹⁰ The jury specifically asked whether the victim "had any right to consent to anything" with respect to the lewd act. Tr. p. 504.



72. Given counsel's sound strategy in dealing with this mitigation issue, the Court finds that Applicant has failed to meet his burden to prove ineffective assistance of counsel. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

II.M.

Applicant argues counsel was ineffective in failing to object to purported improper impeachment concerning details of his prior record, specifically by questioning him on his prior conviction. The Court finds that Applicant has failed to show deficiency or prejudice. Specifically, Applicant has failed to establish an actual breach of the applicable standard of reasonableness. The rules allowed the State to impeach the Applicant with his prior convictions – particularly the crime of dishonesty – on cross-examination. Rule 609, SCRE. Applicant has not contested the admissibility of Applicant's conviction for breach of trust. Moreover, Applicant has not provided any authority to support his argument that counsel should have objected to the question of whether he was a "convicted felon." In addition, Applicant has failed to show prejudice given the impact the crime of dishonesty would have had on his credibility. See State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015) ("In common human experience, acts of deceit, fraud, cheating, or stealing . . . are universally regarded as conduct which reflects adversely on a man's honesty and integrity"). Because Applicant has failed to show either deficiency or prejudice, the application, to the extent it relies upon these allegations, is **DENIED**.

II.N.

Applicant argues counsel was ineffective in his closing argument to the jury. Applicant focuses on his attorney's theory that it did not make sense for the victim to lie simply because she had gotten in trouble for possessing Vicodin. Counsel clearly and credibly articulated a valid strategy in making his closing argument. Counsel testified that while the "fear of punishment"

could be an explanation for false allegations, "I do think sometimes it is a trap for a lawyer to go there. Juries seem to put the burden of proof on you." PCR Tr. p. 83. He testified that he "didn't know why she lied, little girls lie sometimes for their own reasons, and I don't have to prove to you why she lied, but look at other things." PCR Tr. p. 83. Counsel expressed to the jury that it was a mistake to think of the minor child victim as a rational adult. PCR Tr. p. 84.

Applicant now disagrees with counsel's strategy. Disagreement as to which strategy would have worked best, however, does not support a claim of ineffective assistance of counsel. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland at 689, 104 S.Ct. at 2066. Because Applicant has failed to meet his burden to show deficiency or prejudice, the application, to the extent it relies upon these allegations, is **DENIED**.

II.O.

Applicant has also raised a number of claims that counsel was ineffective for failing to object to alleged improper comments during the solicitor's closing arguments. A review of a solicitor's closing argument is "based upon the standard of whether his comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004). The Court addresses each of these claims below:

- Many of Applicant's claims with respect to the solicitor's closing arguments involve comments that are allegedly not supported by the evidence. The Court finds that none of these comments rise to the level of "so infecting the trial with unfairness as to make the resulting conviction a denial of due process." Von Dohlen, supra. Additionally, as discussed in section II.J, the trial judge correctly charged the jury on their role as the factfinders, and specifically told them that their memory controlled over that of the attorneys. Tr. p. 490.
- Applicant argues counsel should have objected to the solicitor's comment that Applicant and his wife had prior convictions because 1) the argument invited the jury to convict Applicant based on his prior criminal record; 2) it erroneously implied that both Applicant and his wife had felony convictions; and 3) it "interjected an important detail

about Applicant's prior record which went beyond the scope of permissible impeachment under Rule 609(a)(1)." The Court finds that, 1) the argument merely rehearsed what had already been testified to and was limited to the context of credibility; and 2) it did not imply that Applicant's wife had a felony conviction, but rather repeated her testimony that she had previously been convicted of assault and battery of a high and aggravated nature. With respect to the third reason Applicant argues counsel should have objected, the Court would refer to its explanation in section II.M.

- Applicant argues the solicitor mischaracterized statements made by Applicant's wife as telling him that if he made certain statements she could get "caught" for perjury. The Court finds that the solicitor properly argued that the jury should draw certain inferences from facts presented at trial. Counsel argued the opposite inferences should be drawn. Tr. p. 444-45. Applicant has failed to show any actual deviation from the applicable standard with respect to this allegation.
- Applicant argues counsel should have objected to each reference to the "forensic interview." For the reasons discussed in section II.I, the Court dismisses this allegation.
- Applicant alleges counsel should have objected to the alleged improper argument that Applicant was a convicted felon. For the reasons discussed in section II.M, the Court dismisses this allegation.
- Applicant argues counsel was ineffective for failing to object to the solicitor "[i]mproperly advising jury of his personal opinion that Applicant and his wife were liars." The Court finds that the comment was not objectionable where the solicitor was properly arguing the Applicant and his wife were not credible based on the evidence, and did not inject her personal opinion into the matter. See State v. Caldwell, 300 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) ("A solicitor's argument concerning the credibility of the State's witnesses based on the record and its reasonable inferences is not error.").

II.P.

Applicant argues counsel was ineffective in failing to object to testimony concerning "prior bad acts not relevant to case which did not involve crimes of moral turpitude." Evidence was admitted during the trial that Applicant and his wife were aware the victim had been caught by her step-mother with a cigarette and pain pill, but kept the information from the victim's parents. First, the Court finds that the evidence was clearly relevant, in that it tended to show a generally inappropriate relationship between Applicant and the victim. Further, it was not admitted to prove the character of Applicant, but instead the nature of his relationship with the

victim, and would have been admissible under Rule 404(b) to show evidence of a common scheme or plan. Because the Applicant has failed to establish a meritorious basis for mounting an objection, he has failed to show deficiency or prejudice. Accordingly, the application, to the extent it relies upon these allegations, is **DENIED**.

{Conclusion and signature on following page}

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III. CONCLUSION

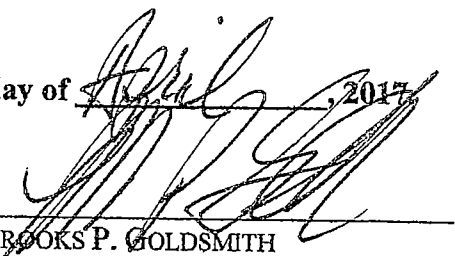
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED** and **DISMISSED** with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 24 day of April, 2017.


 BROOKS P. GOLDSMITH
 Presiding Judge
 Fifteenth Judicial Circuit


 _____, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271)
Applicant,)
)
)
v.)
)
STATE OF SOUTH CAROLINA,)
Respondent.)
_____)

2015-CP-22-00209

**RULE 59(e) SCRCP, MOTION
TO ALTER OR AMEND**

NOW COMES the Applicant in the above-captioned case, acting by and through undersigned counsel, respectfully moving this Court pursuant to Rule 59(e), SCRCPP, to alter or amend its Order of Dismissal filed May 4, 2017. The Application for Post-Conviction Relief in this matter was filed on February 24, 2015 and an Amended Application filed on November 15, 2016. A Second Amended Application for Post-Conviction Relief was also filed on November 15, 2016. The State filed its Return on June 25, 2015. An evidentiary hearing was convened on November 16, 2016, in which the State was represented by former Assistant Attorney General, Patrick Schmeckpeper and Assistant Attorney General Valerie Giovanoli and the Applicant was represented by Tara Dawn Shurling, Esquire. This Court's Order of Dismissal was filed on May 4, 2017, but was not received by Counsel for Applicant until May 10, 2017. Applicant's Rule 59(e) is therefore timely as May 20, 2017 fell on a Saturday. In support of this motion, the Applicant would show unto this Honorable Court the following:

Order Section II. A.

The Order of Dismissal finds that the admission of hearsay statements attributed to the Victim was merely cumulative to the testimony of MINOR and Shannon Bellamy. Applicant respectfully submits that this assertion ignores the fact that any testimony from MINOR and Shannon Bellamy in which they testified to hearsay statements allegedly made by the

Victim concerning the identity of the person she claimed had molested her was likewise improper and should have been objected to by Trial Counsel. Respondent's summary of the testimony of *Minor*, the Victim's best friend, and Shannon Bellamy, the Victim's mother fails to acknowledge that both of these witnesses were allowed, without objection, to testify that the Victim identified Applicant as the person who had sexual contact with her. Respondent did however note that *Minor* testified that the Victim "acted like she 'liked' the Applicant, like there was 'nothing wrong' with the abuse." State's Memorandum p. 4, paragraph 3, citing to Tr. p. 180-183.

Respondent distinguishes Applicant's case from *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994), by noting that *Jolly*, establishes that while improper evidence that is cumulative to only the victim's testimony is problematic, prejudice is significantly less likely where it is also cumulative to other, admissible corroborative evidence." State's Memorandum, p. 5, paragraph 2.

Respondent concludes that because the improper identification testimony at issue "was outweighed by and cumulative to the independent, compelling testimony provided by Jenkinson and Bellamy which corroborated the Victim's testimony on the same point." Again, the testimony of Ms. *Minor* and Ms. Bellamy concerning identity constituted improper bolstering and should have been objected to by Trial Counsel. Any testimony by Ms. *Minor* and Ms. Bellamy concerning statements attributed to the Victim concerning matters beyond time and place of an alleged assault were inadmissible and should have been testimony presented by these two witnesses was not based upon hearsay testimony concerning statements attributed to the Victim, that testimony *did not* corroborate the Victim's claims that sexual contact had taken place. The fact that Applicant may have had a close relationship with the Victim, and that he communicated with her frequently by cell phone, did not prove the elements of the offenses charged.

The corroborating testimony relied upon by the State, outside of inadmissible hearsay, addressed matters entirely consistent with Applicant having an extremely close relationship with the Victim and her entire family. As regards to the issue of Applicant's frequent communication with this girl by text, Respondent fails to distinguish this case from *Vail v. State*, 402 S.C. 77, 738 S.E.2d 502 (2013), which also involved a male with access to the complaining witness, in that case as a coach and teacher at the girl's private school, and evidence of extensive communication with the girl by cell phone; some of which occurred at unusual and inappropriate times of day.

CONCLUSION

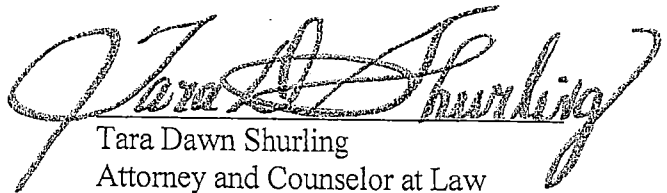
For all the above reasons, the Applicant now prays that this Court might amend its Order pursuant to Rule 59(e), SCRCP, grant relief and remand the Applicant's case to the Georgetown County Court of General Sessions for a new trial. In the alternative, the Applicant would respectfully request that the Court issue an Amended Order of Dismissal making findings of fact and rulings of law, as required by S.C. Ann. § 17-27-80, on the allegations not fully addressed in the previously filed Order of Dismissal. Applicant notes that his allegations are not listed in the Order of Dismissal. The Order notes, however, that the Court in addressing Applicant's allegations in the same Order "as considered in the parties' post-hearing memorandum." Order of Dismissal, P. 2, para. 4. Applicant's Memorandum was filed on January 3, 2017. Respondent's Memorandum was subsequently filed on January 30, 2017. The Order of Dismissal uses the same section captions as contained in Applicant's Memorandum. Neither Respondent's Memorandum, nor the Order of Dismissal, list the specific allegations covered in each section of document beyond a general topical heading. In Applicant's Memorandum, each section specifically states which allegations that section addressed. Inasmuch as the Order indicates the Court's intent to follow the same format,



Applicant interprets the Order to acknowledge that each section in the Order of Dismissal is intended to encompass the Court's findings of fact and rulings of law on all the allegations argued in each corresponding section by Applicant.

Applicant asks that this Honorable Court reconsider its previous rulings and issue an Amended Final Order granting Applicant a new trial. In the alternative, he asks for this Honorable Court to issue an Amended Order of Dismissal fully listing all the allegations being ruled upon in each section of the Court's Order for clarity of the record for any PCR Appeal which might follow.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Dr., Suite A
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(803) 738-8622
(803) 738-1600 (fax)
tdslaw@shurlinglaw.com

This 22nd day of May, 2017.

Attorney for the Applicant

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271,)
Applicant,)

2015-CP-22-00209

v.)

CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA,)
Respondent.)

The undersigned attorney hereby certifies that one copy of the Rule 59(e) SCRCF, Motion to Alter or Amend in the above-entitled cause has been served upon, the Honorable Brooks P. Goldsmith, Circuit Court Judge for the Fifteenth Judicial Circuit, by depositing in the U.S. Mail, postage prepaid, on this the 22nd day of May, 2017 to:

The Honorable Brooks P. Goldsmith
Circuit Court Judge
P. O. Box 895
Edisto Island, South Carolina 29438


TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 22nd day of

May, 2017.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271,)
Applicant,)

2015-CP-22-00209

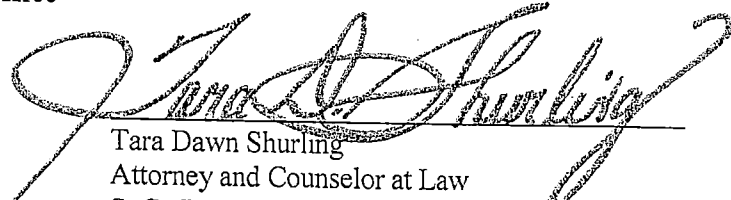
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STATE OF SOUTH CAROLINA,)
Respondent.)

The undersigned attorney hereby certifies that one copy of the Rule 59(e) SCRCPP, Motion to Alter or Amend in the above-entitled cause has been served upon opposing counsel, Johnny E. James, Jr., Assistant Attorney General, by depositing in the U.S. Mail, postage prepaid, on this the 22nd day of May, 2017 to:

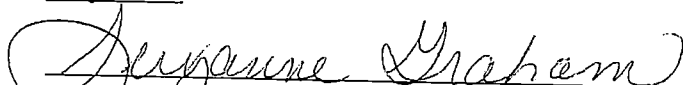
Johnny E. James, Jr., Assistant Attorney General
South Carolina Attorney General's Office
P. O. Box 11549
Columbia, SC 29211


Tara Dawn Shurling
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STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271)
Applicant,)
v.)
STATE OF SOUTH CAROLINA,)
Respondent.)

2015-CP-22-00209

MOTION TO ACCEPT RULE 59(e)
MOTION TO ALTER OR AMEND
AS TIMELY

2017 JUN 15 AM 11:50

NOW COMES the Applicant in the above captioned matter, acting by and through his undersigned PCR Counsel, Tara Dawn Shurling, asking that his Motion to Alter or Amend the Order of Dismissal filed in this matter on be accepted as timely filed as of May 22, 2017, the date on which it was duly served on this Honorable Court and opposing counsel; as well as the date on which it was mailed to the Office of the Georgetown County Clerk of Court for filing. In support of this request, Applicant would show unto this Honorable Court the following.

The Order of Dismissal in the above captioned Post-Conviction Relief action was filed with the Office of the Clerk of Court for Georgetown County on May 4, 2017 and was received by PCR Counsel on May 10, 2017. PCR Counsel served a Motion pursuant to Rule 59(e), SCRCF, on this Honorable Court on May 22, 2017 and served opposing Counsel with the Motion on that same date. See, Attachments A and B, Certificates of Service. The original motion was sent to the Honorable Alma White, Clerk of Court for Georgetown County, for filing on May 22, 2017. On today's date, June 12, 2017, PCR Counsel received her mailing to the Clerk of Court back in the mail marked with a yellow postal label indicating that it was being returned for "insufficient address." The envelope in question had clearly been opened. When mailed by PCR Counsel, the envelope was sealed both with the adhesive on the envelope and with tape. When received back at PCR Counsel's office, the tape on the seal had been stuck back down, however the condition of the flap of the envelope, as well as the manner in which paper is stuck on the tape, indicate that it had been previously opened. PCR Counsel has no knowledge concerning who opened this envelope. The parcel was not opened by PCR Counsel and

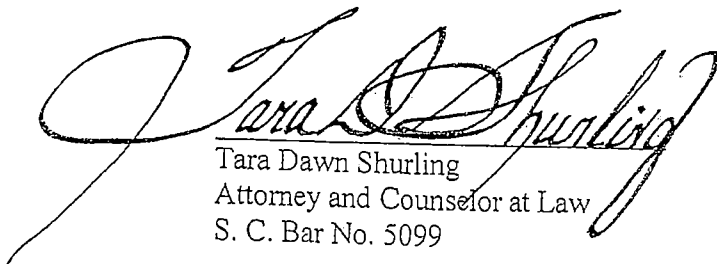


she has confirmed that it was not opened by anyone on her staff. Attachment C, copy of envelope.

The address for the Clerk of Court's Office to which the Motion in question was mailed is identical to the address found in the SC Bar Directory. See, Attachment D. Furthermore, the address to which this motion was mailed is the exact address to which PCR Counsel mailed the PCR Application in this matter. See, Attachment E. That mailing was evidentially received at the address in question inasmuch as PCR Counsel subsequently received a clocked copy of the Application back from the Clerk of Court's Office with a Court of Common Pleas docket number.

In light of the above, Applicant respectfully submits that his Motion to Alter or Amend should be accepted for filing as timely and should be considered timely filed as of the date of the original mailing to the Office of the Georgetown Clerk of Court on May 22, 2017. Applicant seeks this Court's Order directing the Office of the Clerk of Court for Georgetown County to accept the Motion in question for filing and to record this Motion as timely filed as of May 22, 2017; the date the Motion was originally mailed to the Clerk of Court's Office. See, Attachment C.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Dr., Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 (fax)
tdslaw@shurlinglaw.com

Attorney for the Applicant

This 12th day of June, 2017.

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271,)
Applicant,)

2015-CP-22-00209

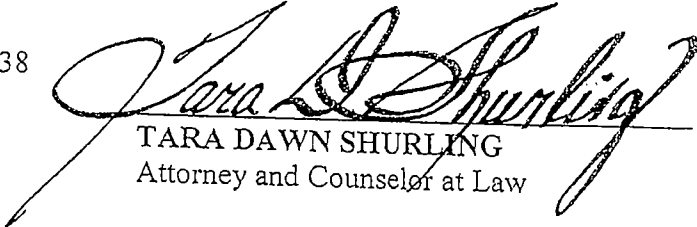
v.)

CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA,)
Respondent.)

The undersigned attorney hereby certifies that one copy of the Motion to Accept Rule 59(e) Motion to Alter or Amend As Timely in the above-entitled cause has been served upon, the Honorable Brooks P. Goldsmith, Circuit Court Judge for the Fifteenth Judicial Circuit, by depositing in the U.S. Mail, postage prepaid, on this the 12th day of June, 2017 to:

The Honorable Brooks P. Goldsmith
Circuit Court Judge
P. O. Box 895
Edisto Island, South Carolina 29438


TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT:

SWORN TO BEFORE ME this 12th day of

June, 2017.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/20

2017 JUN 15 AM 11:50
CLERK OF COURT
J. P. GIBSON

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271,)
Applicant,)

2015-CP-22-00209

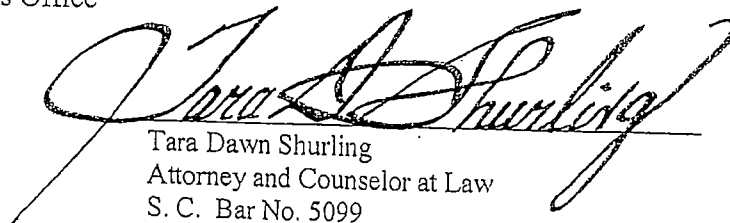
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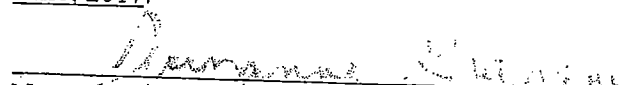
Johnny E. James, Jr., Assistant Attorney General
South Carolina Attorney General's Office
P. O. Box 11549
Columbia, SC 29211


Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

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Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 12th day of
June, 2017.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2018-06-27

FILED
2017 JUN 15 AM 11:50
CLERK OF COURT
JUDICIAL BRANCH

ATTACHMENT A

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271,)
Applicant,)

2015-CP-22-00209

v.)

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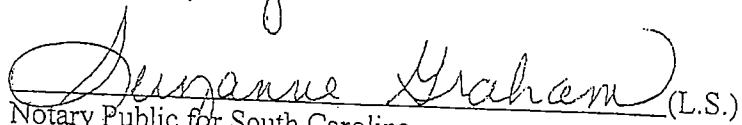

TARA DAWN SHURLING
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ATTORNEY FOR THE APPLICANT.

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My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

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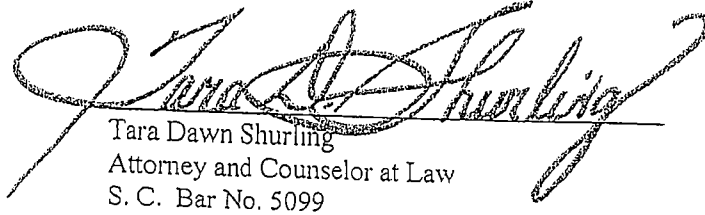
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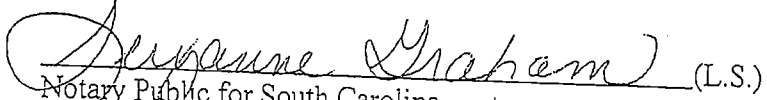
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(803) 738-8622
(803) 738-1600 (Fax)
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 22nd day of
May, 2017.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

PRENTISS WAYNE LOVE, 315271

☒ Applicant,

v.

The State Of South Carolina

☐ Respondent.

ATTACHMENT A

IN THE COURT OF COMMON PLEAS

CASE NO. 2015-CP-22-00209

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:

Tara Dawn Shurling, Bar No. 5099

Address:

3614 Landmark Drive Suite A

Columbia, South Carolina 29204

phone: 803-738-8622 fax: 803-738-1600

e-mail: other:

Defendant's Attorney:

Johnny E. James, Jr, Bar No.

Address:

P.O. Box 11549 Columbia, South Carolina

phone: 803-734-3737 fax:

e-mail: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed:

Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Applicant / ☐ Respondent

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:☒ EXEMPT:

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by:

Chinder

Date Filed:

6/15/17☒ MOTION FEE COLLECTED: *0*☐ CONTESTED - AMOUNT DUE:

JUN 19 2017

LAW OFFICE OF
TARA DAWN SHURLING, PA

Law Office of
TARA DAWN SHURLING, PA

3614 LANDMARK DRIVE, SUITE A
COLUMBIA, SOUTH CAROLINA 29204



The Honorable Alma White
Clerk of Court of Georgetown County
401 Cleland Street
Georgetown, SC 29442

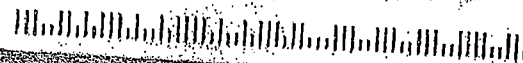
No Rec

NIXIE

294425226-1N

06/02/17

RETURN TO SENDER
INSUFFICIENT ADDRESS
UNABLE TO FORWARD
RETURN TO SENDER



ATTACHMENT C

821

COUNTY OFFICES

As of 6/2/20

**FLORENCE COUNTY—12TH CIRCUIT**

Founded in 1888

Courthouse Address: 180 N. Irby St., Florence 29501
 Family Court: 180 N. Irby St., Florence 29501, 665-3096
 Circuit Court: 180 N. Irby St., Florence 29501, 665-3031
 Probate Court: 180 N. Irby St., Florence 29501, 665-3085
 Contact Number for Visiting Judges: 665-3031
 County Code: 21; Population (2010): 136,885; Area Code: 843
www.florenceco.org

K.G. Rusty Smith Jr.	Administrator	665-3035	180 N. Irby St., MSC-G	Florence	29501
Jack Newsome	Assessor	665-3056	180 N. Irby St., MSC-A	Florence	29501
D. Malloy McEachin Jr.	Attorney	665-0135	2117-C W. Palmetto St.	Florence	29501
Wayne Joye	Auditor	665-3088	180 N. Irby St., MSC-B	Florence	29501
Connie Reel-Shearin	Clerk of Court/Register	665-3031	180 N. Irby St., MSC-E	Florence	29501
Jonathan B. Graham	Planning Director	676-8600	518 S. Irby St.	Florence	29501
Scott Floyd	Public Defender	665-3055	180 N. Irby St., MSC-N	Florence	29501
Kenney Boone	Sheriff	665-2121	6719 Friendfield Rd.	Effingham	29541
Edgar L. Clements III	Solicitor	665-3091	180 N. Irby St., Room 1101	Florence	29501
Paige Holsapple	Tax Collector	665-3041	180 N. Irby St., MSC-Z	Florence	29501
Dean Fowler	Treasurer	665-3041	180 N. Irby St., MSC-Z	Florence	29501

**GEORGETOWN COUNTY—15TH CIRCUIT**

Founded in 1769

Courthouse Address: 401 Cleland St., Georgetown 29440
 Family Court: P.O. Drawer 479, Georgetown 29442, 545-3046
 Circuit Court: P.O. Drawer 479, Georgetown 29442, 545-3041 (Common Pleas),
 545-3054 (General Sessions)
 Probate Court: P.O. Box 421270, Georgetown 29442, 545-3274
 Contact Number for Visiting Judges: 545-3114
 County Code: 22; Population (2010): 60,158; Area Code: 843
www.georgetowncountysc.org

Sel Hemingway	Administrator	545-3006	P.O. Box 421270	Georgetown	29442
Susan Edwards	Assessor	545-3014	P.O. Box 421270	Georgetown	29442
Wesley Bryant	Attorney	545-3194	P.O. Box 421270	Georgetown	29442
Brian Shult	Auditor	545-3023	P.O. Box 421270	Georgetown	29442
Robert Cox	Building Official	545-3119	P.O. Box 421270	Georgetown	29442
Alma White	Clerk of Court	545-3036	401 Cleland St.	Georgetown	29442
L. Boyd Johnson	Planning	545-3158	P.O. Box 421270	Georgetown	29442
Orrie West	Public Defender	915-5385	P.O. Box 1666	Conway	29526
Wanda F. Prevatte	Register	545-3088	P.O. Box 421270	Georgetown	29442
A. Lane Cribb	Sheriff	546-5102	P.O. Box 1292	Georgetown	29442
Jimmy A. Richardson II	Solicitor	915-8610	P.O. Box 1276	Conway	29526
Loretta Washington-Cooper	Treasurer	545-3098	P.O. Box 421270	Georgetown	29442
Joann Ochal	Zoning Administrator	545-3602	P.O. Box 421270	Georgetown	29442

For additional county information go to www.sccounties.org

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	
Prentiss Wayne Love,	)	Case No.: 2015-CP-22-00209
S.C.D.C. No. 315271,	)	
	)	
Applicant,	)	
	)	RETURN TO APPLICANT'S MOTION
v.	)	PURSUANT TO RULE 59(e), SCRC
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

In response to "Rule 59(e) SCRC, Motion to Alter or Amend" filed by Prentiss Wayne Love (Applicant) dated¹ May 22, 2017, Respondent would show this Court:

I.

This matter originally came before the Court by way of an application for post-conviction relief filed February 24, 2015. Respondent made its return on or about June 25, 2015. The Court convened an evidentiary hearing into the matter on November 16, 2016, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and was represented by Tara Dawn Shurling, Esquire. Respondent was represented by Patrick Schmeckpeper and Valerie Garcia Giovanoli, of the South Carolina Office of the Attorney General. Applicant did not testify; only Applicant's trial counsel, Jonathan Eric Fox, Esquire, testified. At the Court's direction, the parties submitted memoranda in support of their respective positions after the hearing—Applicant filed on January 3, 2017, and Respondent filed on January 30, 2017. The Court denied the application by order signed April 24, 2017, and filed May 4, 2017. This motion followed.

¹ As discussed in Section II of this return, the present motion was not properly filed with the Georgetown County Clerk of Court.

II.

As an initial matter, Respondent must note that Applicant's motion has not been filed with the Georgetown County Clerk of Court. Upon courteous inquiry with opposing counsel, Respondent's understanding is that the motion that was mailed to the Clerk of Court was returned to opposing counsel for inadequate postage² on or about June 9 or June 12, 2017. Therefore, the motion was never filed. See Rule 5(e), SCRPC; see also Gary v. State, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001) ("It is clear under South Carolina law that mailing does not constitute filing. When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer.").

Copies of the motion were properly served upon Respondent and the Court. Respondent defers to the sound judgment and discretion of the Court as to whether it should consider or decline to consider the motion. In any event, because the Court has specifically requested a return to the motion, Respondent provides as much herein.

III.

This Court's Order of Dismissal contains the required findings of fact and conclusions of law as required by S.C. Code Ann. §§ 17-27-70(c) and -80 and Rule 52(a), SCRPC. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). This Court properly addressed and ruled on all issues properly raised in the post-conviction relief action, and Applicant's motion should be denied.

IV.

Applicant seeks modification of this Court's Order on the grounds that because the testimonies of *Minor* and S. Bellamy included statements which allegedly constitute

² Applicant's letter dated June 12, 2017 and received by Respondent on June 15, 2017, indicates the problem was an "insufficient address." Upon review of the scanned envelope, Respondent submits the hypothesis that Applicant's use of "401 Cleland Street", rather than P.O. Box 479, was not satisfactory to the postal service.

hearsay,³ the remainder of their testimony cannot serve as a basis for the Court's finding that any instances of alleged hearsay were merely cumulative to unobjectionable evidence. That the *broad* net of Applicant's allegations of improper hearsay testimony falls over *Minor* and S. Bellamy is of no consequence to the reasoning and foundation of the Court's order. The order, as Applicant himself notes, ignores allegedly improper testimony and relies on the unobjectionable observations of the witnesses presented at trial. The alleged improper hearsay statements are not poison pills that invalidate the unchallenged portions of the witnesses' testimony. To the contrary, the foundation of the Court's order is that the unchallenged portions of testimony are adequate antidotes to the alleged deficiencies. Consequently, there is no need for the Court to comb the transcript and render late judgments as to what is and is not hearsay.

Applicant also argues that the unchallenged testimony fails to prove the elements of the offenses charged. In this, Applicant conveniently ignores the testimony of the victim, which is itself sufficient. See State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999) (finding victim's testimony sufficient to support a conviction for lewd act on a minor); S.C. Code Ann. § 16-3-657 ("The testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658.").

As to Applicant's repeated insistence upon Vail v. State, 402 S.C. 77, 738 S.E.2d 502 (Ct. App. 2013), Respondent's affirmative disregard for the comparison is of no consequence to the validity of the Court's order. The Court did not rely upon Vail in its order. In any event, the hearsay statements in Vail were far more detailed and prejudicial,⁴ such that the cases are

³ Applicant does not specify in the motion precisely which portions of testimony by *Minor* and S. Bellamy raise concerns. Rather, Applicant begs the question by vaguely referring to "any testimony . . . in which they testified to hearsay statements allegedly made by the Victim concerning the identity of the person she claimed had molested her[.]" Applicant's Motion, p. 1-2.

⁴ In particular, the Court took issue with a statement from the victim's father in Vail: "Well, there was kind of a real poignant moment where she said, daddy, he took everything, she [sic] took everything I have." Vail at 91, 738 S.E.2d at 510-511.

substantively incomparable. The present matter compares more favorably to State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (Ct. App. 2014), where the substance of the allegedly improper corroboration was put into evidence by other, properly admitted live testimony. Finally, the Court of Appeals, in considering prejudice in Vail, held only to the standard that “improper corroboration testimony that is merely cumulative to the victim’s testimony cannot be harmless.” Vail at 90, 738 S.E.2d at 510 (citing Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 556, 569 (1994)). The Court failed to recognize that a majority of the South Carolina Supreme Court had already rejected that rule in State v. Jennings, 394 S.C. 473, 482-83 716 S.E.2d 91, 95-96 (2011).⁵ See also Hendricks at 536, 759 S.E.2d at 440 (citing Jennings for the proposition that “Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless.”). For all of these reasons, both in fact and in substantive law, Vail is utterly incomparable to the present matter and provides no guidance of merit to resolving the present case.

[Conclusion and signature on following page]

⁵ Justices Kittredge and Hearn, in concurrence, and then Chief Justice Toal, in dissent, together opined that the categorical rule was at odds with longstanding harmless error jurisprudence.

V.

WHEREFORE, having made its Return to the motion, Respondent respectfully requests the Court deny Applicant's Motion to Alter or Amend.

Respectfully submitted,

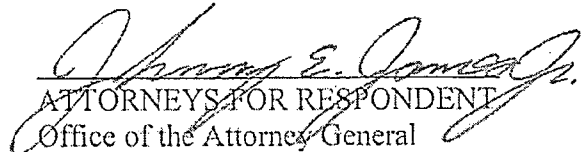
ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN JAMESON HARRISON
Senior Assistant Deputy Attorney General

JOHNNY E. JAMES JR.
Assistant Attorney General

By:


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

June 15, 2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	
	)	
	)	2015-CP-22-0209
	)	
PRENTISS WAYNE LOVE, #315271,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy each of the **Return to Applicant's Motion Pursuant to Rule 59(e)** the order granting post-conviction relief in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tara Dawn Shurling, Esquire
 3614 Landmark Drive, Suite A
 Columbia, SC 29204

DATED this 15th day of June, 2017.



 Mallory Morris, Legal Assistant
 For Respondent

6/15/17
 56

FILE COPY

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271)
 Applicant,)

2015-CP-22-00209

REPLY TO STATE'S RETURN
 TO RULE 59(e) MOTION
 TO ALTER OR AMEND

v.)
 STATE OF SOUTH CAROLINA,)
 Respondent.)

NOW COMES the Applicant, acting by and through his undersigned Post-Conviction Relief Counsel, responding to the State's Return to Applicant's motion pursuant to Rule 59(e), SCRCP.

II

Timeliness of Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP

The Applicant timely served his Motion to Alter or Amend on both opposing counsel and this Court on May 22, 2017. That same date, the original Motion along with Certificates of Service, was sent to the Office of the Clerk of Court for Georgetown County for filing. On June 12, 2017, PCR Counsel received her mailing to the Clerk of Court back in the mail marked with a yellow postage label indicating that it was being returned for insufficient address.¹ The envelope in question had been opened, but there was no indication as to by whom. On June 12, 2017, Applicant sent her Motion to Accept Rule 59(e) Motion to Alter or Amend as Timely to the Office of the Georgetown Clerk of Court for filing. That Motion was filed on June 15, 2017. See, Attachment A. As noted therein, both opposing counsel and this Court have indicated their

¹ Respondent's Return indicates that PCR Counsel had previously reported that the Motion was returned for insufficient postage. The Motion filed by Applicant on June 15, 2017, after PCR Counsel received the Motion back in the mail, clearly refutes that claim. As noted in that Motion, the postal sticker clearly indicated that it was the address which was deemed to be insufficient, not the postage. See, Attachment C, June 15, 2017, Motion (included herein as part of Attachment A to this Reply).

receipt of the copies of the 59(e) Motion mailed to them on May 22, 2017 in subsequent email communications. Thus, as opposing counsel acknowledges, service was timely and complete pursuant to Rule 5(b)(1), SCRCP.

Pursuant to Rule 5(d), SCRCP, the Applicant's Motion should have been filed with the Clerk of Court's Office within five (5) days after service on this Court and Respondent. That Rule further provides that, "upon failure of a party to file other pleadings, motions, or papers, the Court may permit filing or proceed as though the same had not been filed." Therefore, this Honorable Court has the authority to permit the filing of Applicant's Rule 59(e) Motion. For all the reasons set forth in Applicant's previously filed Motion to Accept Rule 59(e) Motion to Alter or Amend as Timely, Applicant now respectfully asks this Honorable Court to exercise its discretion under Rule 5(d) and direct the Clerk Of Court to accept his 59(e) Motion for filing as timely. Applicant would additionally note that pursuant to Rule 5(e), SCRCP, the filing of pleadings and other papers may be accomplished by filing them with the judge who may "permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the Office of the Clerk." Therefore, it is also within the Court's discretion to deem the 59(e) Motion served in this matter timely filed when received by the Court, and to transmit that motion to the Clerk of Court for filing as of the date the Judge received that motion. Applicant submits that such an action by the Court would constitute a sound exercise of judicial discretion on the facts before the Court. Applicant respectfully submits that either pursuant to Rule 5(d) or (e), this Motion should be accepted as timely filed where PCR Counsel made every good faith effort to file this document in a timely manner.²

² As noted in Applicant's Motion filed after the discovery of the problem with delivery, this Motion was mailed to the mailing address provided in the South Carolina Bar's Lawyers Desk Book which is the same address to which PCR had successfully mailed the original PCR Application in this matter.

III

Applicant respectfully asserts that the Order of Dismissal, as filed, failed to adequately set forth all of the precise allegations raised by Applicant in his Post-Conviction Relief action, and further fails to identify which specific allegations are addressed in each of the Court's rulings set forth in the Order of Dismissal. He most respectfully submits that, in the interest of a full and fair ruling, the Order of Dismissal needs to be amended to correct these problems. Our Supreme Court has repeatedly required extreme specificity in both the allegations raised and arguments presented in the circuit court in order to preserve issues for review on appeal. Furthermore, any allegation not expressly addressed in the Order of Dismissal will not be available as the basis for a successful appeal. It is Applicant's position that his ability to appropriately demonstrate which issues were raised, and properly ruled upon, will be hampered on appeal by the manner in which the Order of Dismissal addresses his allegations. While Applicant sincerely prays that this Court will reconsider its ruling and grant relief in this case, in the alternative, he seeks an Amended Order of Dismissal which sufficiently sets forth the many specific issues raised by him on collateral review and the Court's specific rulings thereon.

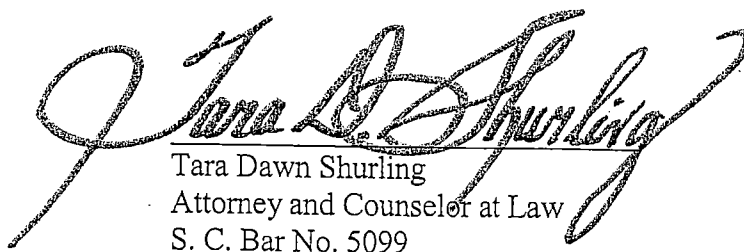
IV

Applicant would once again dispute Respondent's position that the non-hearsay portions of the testimonies of *Minor* and S. Bellamy were sufficient to support a finding that, "any instances of alleged hearsay were merely cumulative to unobjectionable evidence." As Applicant has consistently noted, the remaining portion of the testimony presented by Jacobson and Bellamy did not address the elements of the crimes for which the Applicant was on trial. Likewise, Respondent also asserts that any error would be harmless where the testimony of the victim alone is sufficient to convict in South Carolina. This position ignores the operative

question which is, whether the State was allowed to improperly bolster the testimony of the victim. The remaining testimony of these two witnesses may have been useful to the State to establish that Applicant had a close relationship with the victim, and her family, but it did not corroborate the damning portions of her testimony in which she accused Applicant of committing criminal acts.

With regard to the remaining arguments presented in Applicant's Motion, he would rely upon those arguments and authorities presented in his Rule 59(e) Motion and presents no further specific Reply to the Respondent's Return.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Dr., Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 (fax)
tdslaw@shurlinglaw.com

Attorney for the Applicant

This 26th day of June, 2017.

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271,)
Applicant,)

2015-CP-22-00209

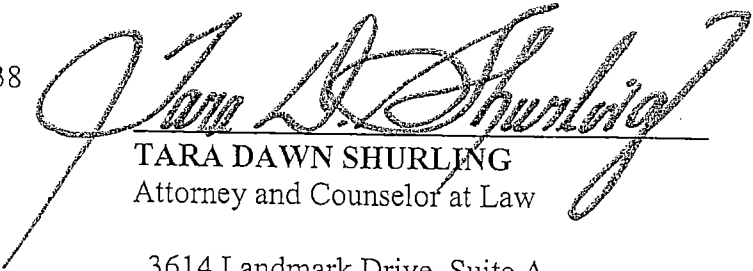
v.)

CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA,)
Respondent.)

The undersigned attorney hereby certifies that one copy of the Reply to the State's Return to the Rule 59(e) SCRCP, Motion to Alter or Amend in the above-entitled cause has been served upon, the Honorable Brooks P. Goldsmith, Circuit Court Judge for the Fifteenth Judicial Circuit, by depositing in the U.S. Mail, postage prepaid, on this the 26th day of June, 2017 to:

The Honorable Brooks P. Goldsmith
Circuit Court Judge
P. O. Box 895
Edisto Island, South Carolina 29438

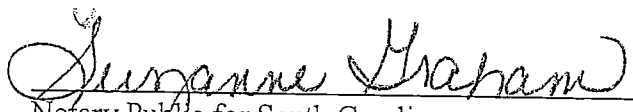

TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 26th day of

June, 2017.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

PRENTISS WAYNE LOVE, #315271,)
Applicant,)

2015-CP-22-00209

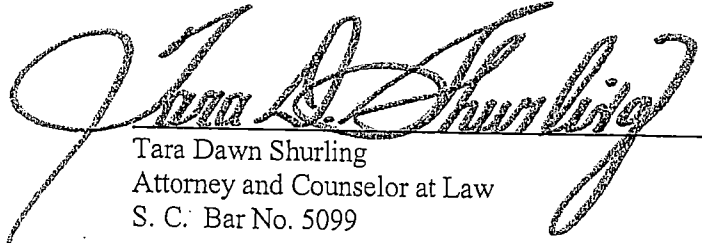
v.)

CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA,)
Respondent.)

The undersigned attorney hereby certifies that one copy of the Reply to the State's Return to the Rule 59(e) SCRCPP, Motion to Alter or Amend in the above-entitled cause has been served upon opposing counsel, Johnny E. James, Jr., Assistant Attorney General, by depositing in the U.S. Mail, postage prepaid, on this the 26th day of June, 2017 to:

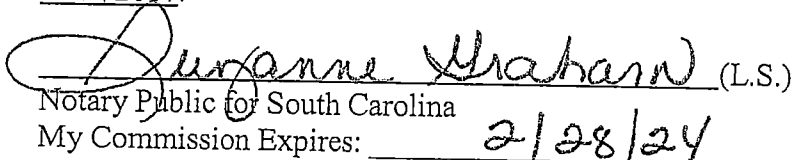
Johnny E. James, Jr., Assistant Attorney General
South Carolina Attorney General's Office
P. O. Box 11549
Columbia, SC 29211


Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Dr., Ste. A
Columbia, SC 29204
(803) 738-8622
(803) 738-1600 (Fax)
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 26th day of
June, 2017.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN) FOR THE FIFTEENTH JUDICIAL CIRCUIT

Prentiss Wayne Love,) Case No.: 2015-CP-22-00209
S.C.D.C. No. 315271,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER DENYING APPLICANT'S MOTION
PURSUANT TO RULE 59(e), SCRPC

2017 JUL 10 AM 8:47

FILED

This matter comes before the court by way of Applicant's "Rule 59(e) SCRPC, Motion to Alter or Amend" dated¹ May 22, 2017. The Court finds as follows:

I.

This matter originally came before the Court by way of an application for post-conviction relief filed February 24, 2015. Respondent made its return on or about June 25, 2015. The Court convened an evidentiary hearing into the matter on November 16, 2016, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and was represented by Tara Dawn Shurling, Esquire. Respondent was represented by Patrick Schneckpeper and Valerie Garcia Giovanoli, of the South Carolina Office of the Attorney General. Applicant did not testify; only Applicant's trial counsel, Jonathan Eric Fox, Esquire, testified. At the Court's direction, the parties submitted memoranda in support of their respective positions after the hearing—Applicant filed on January 3, 2017, and Respondent filed on January 30, 2017. The Court denied the application by order signed April 24, 2017, and filed May 4, 2017. This motion followed.

¹ As discussed in Section II of this Order, the present motion was not properly filed with the Georgetown County Clerk of Court.

II.

As an initial matter, the Court notes that Applicant's motion has not been filed with the Georgetown County Clerk of Court. Upon communication with both parties, the Court's understanding is that the motion that was mailed to the Clerk of Court was returned to Applicant's counsel for inadequate postage² on or about June 9 or June 12, 2017. Therefore, the motion was never filed. See Rule 5(e), SCRCP; see also Gary v. State, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001) ("It is clear under South Carolina law that mailing does not constitute filing. When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer.").

Copies of the motion were properly served upon Respondent and the undersigned. Because the undersigned and the opposing party were properly served, and because the Court has timely received a return to the motion from Respondent, the undersigned hereby considers the motion served upon him to be filed.

III.

This Court's Order of Dismissal contains the required findings of fact and conclusions of law as required by S.C. Code Ann. §§ 17-27-70(c) and -80 and Rule 52(a), SCRCP. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). This Court properly addressed and ruled on all issues properly raised in the post-conviction relief action, and Applicant's motion is denied.

² Applicant's letter dated June 12, 2017 and received by Respondent on June 15, 2017, indicates the problem was an "insufficient address." Upon review of the scanned envelope, Respondent submits the hypothesis that Applicant's use of "401 Cleland Street", rather than P.O. Box 479, was not satisfactory to the postal service.

IV.

Applicant seeks modification of this Court's Order on the grounds that because the testimonies of *Minor* and S. Bellamy included statements which allegedly constitute hearsay,³ the remainder of their testimony cannot serve as a basis for the Court's finding that any instances of alleged hearsay were merely cumulative to unobjectionable evidence. This Court finds that that the *broad* net of Applicant's allegations of improper hearsay testimony falls over *Minor* and S. Bellamy is of no consequence to the reasoning and foundation of the Court's order. The order, as Applicant himself notes, ignores allegedly improper testimony and relies on the unobjectionable observations of the witnesses presented at trial. The alleged improper hearsay statements are not poison pills that invalidate the unchallenged portions of the witnesses' testimony. To the contrary, the foundation of the Court's order is that the unchallenged portions of testimony are adequate antidotes to the alleged deficiencies. Consequently, there is no need for the Court to comb the transcript and render late judgments as to what is and is not hearsay.

Applicant also argues that the unchallenged testimony fails to prove the elements of the offenses charged. The Court finds that the testimony of the victim is itself sufficient. See State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999) (finding victim's testimony sufficient to support a conviction for lewd act on a minor); S.C. Code Ann. § 16-3-657 ("The testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658.").

As to Applicant's repeated insistence upon Vail v. State, 402 S.C. 77, 738 S.E.2d 502 (Ct. App. 2013), Respondent's affirmative disregard for the comparison is of no consequence to

³ Applicant does not specify in the motion precisely which portions of testimony by *Minor* and S. Bellamy raise concerns. Rather, Applicant begs the question by vaguely referring to "any testimony . . . in which they testified to hearsay statements allegedly made by the Victim concerning the identity of the person she claimed had molested her[.]" Applicant's Motion, p. 1-2.

the validity of the Court's order. The Court did not rely upon Vail in its order. In any event, the Court finds that the hearsay statements in Vail were far more detailed and prejudicial,⁴ such that the cases are substantively incomparable. The present matter compares more favorably to State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (Ct. App. 2014), where the substance of the allegedly improper corroboration was put into evidence by other, properly admitted live testimony. Finally, the Court of Appeals, in considering prejudice in Vail, held only to the standard that "improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless." Vail at 90, 738 S.E.2d at 510 (citing Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 556, 569 (1994)). The Court of Appeals failed to recognize that a majority of the South Carolina Supreme Court had already rejected that rule in State v. Jennings, 394 S.C. 473, 482-83 716 S.E.2d 91, 95-96 (2011).⁵ See also Hendricks at 536, 759 S.E.2d at 440 (citing Jennings for the proposition that "Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless."). For all of these reasons, both in fact and in substantive law, Vail is utterly incomparable to the present matter and provides no guidance of merit to resolving the present case.

[Conclusion and signature on following page]

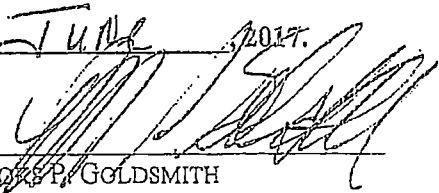
⁴ In particular, the Court took issue with a statement from the victim's father in Vail: "Well, there was kind of a real poignant moment where she said, daddy, he took everything, she [sic] took everything I have." Vail at 91, 738 S.E.2d at 510-511.

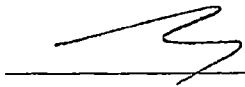
⁵ Justices Kittredge and Hearn, in concurrence, and then Chief Justice Toal, in dissent, together opined that the categorical rule was at odds with longstanding harmless error jurisprudence.

CONCLUSION

Based on all of the foregoing, this Court finds and concludes that Applicant has not established any reason to amend its Order of Dismissal dated April 24, 2017, and filed May 4, 2017. Accordingly, Applicant's Motion to Alter or Amend is **DENIED**.

AND IT IS SO ORDERED this 27 day of JUNE, 2017.


BROOKE P. GOLDSMITH
Presiding Judge
Fifteenth Judicial Circuit


_____, South Carolina

LAW OFFICE OF



RECEIVED

TARA DAWN SHURLING, PA

AUG 14 2017

Attorney and Counselor at Law

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Suite A

Columbia, South Carolina 29204

S.C. SUPREME COURT

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(Fax) (803) 738-1600

E-Mail: tdslaw@shurlinglaw.com

August 9, 2017

The Honorable Daniel E. Shearouse
 South Carolina Supreme Court Clerk
 Post Office Box 11330
 Columbia, South Carolina 29211-1330

Re: Prentiss Wayne Love, #315271 v. State of South Carolina; 2015-CP-22-00209.

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal on behalf of the above-captioned Post-Conviction Relief client. An Order of Dismissal denying this client's Post-Conviction Relief was filed on May 4, 2017 and received by counsel on May 10, 2017. An Order denying my 59(e) Motion was filed with the Georgetown County Clerk of Court on July 10, 2017 and received by counsel on July 12, 2017. The procedural history in this case is somewhat unusual in that my 59(e) Motion was timely served on the presiding judge and opposing counsel. It was mailed that same date to the Office of the Clerk of Court at the address listed in the Bar directory, which was the same address previous pleadings in this case were mailed to. That mail was returned to my law firm for "insufficient address." In his Order denying that 59(e) Motion, Judge Goldsmith ruled that the motion was timely filed and denied it on its merits. I have been *retained* by the family to handle this appeal. I have already received the transcript of the PCR hearing held in this matter and therefore request that the time limits for this appeal be set from the date this Notice of Appeal is filed. The Appellate Division of the South Carolina Commission on Indigent Defense has been copied on this correspondence so they will make note that I am retained in this case, and won't need to send me an inquiry concerning this appeal. With my thanks for your assistance in this matter, as always, I remain,

Sincerely yours,

Tara Dawn Shurling
 Attorney and Counselor at Law

TDS/sg
 Enclosures

cc: Johnny E. James, Jr., Assistant Attorney General (w/enclosure)
 Paula Murdoch, South Carolina Commission on Indigent Defense, Office of Appellate Defense (w/enclosure)
 Prentiss Wayne Love, #315271 (w/enclosure)
 Lorraine L. Buckwell (w/enclosure)

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Brooks P. Goldsmith, Presiding Judge

RECEIVED

AUG 14 2017

2015-CP-22-00209

S.C. SUPREME COURT

PRENTISS WAYNE LOVE, #315271

Applicant,

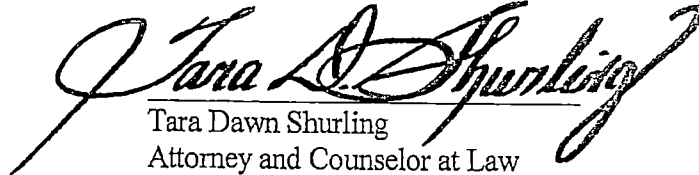
v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Final Order of Dismissal denying his Post-Conviction Relief filed May 4, 2017 and the Order Denying the Applicant's Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, which was filed with the Georgetown County Clerk of Court on July 10, 2017, and received by Counsel on July 12, 2017.



Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

This 9th day of August, 2017.

ATTORNEY FOR APPLICANT

Other Counsel of Record:

Johnny E. James, Jr., Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Brooks P. Goldsmith, Presiding Judge

AUG 14 2017

S.C. SUPREME COURT

2015-CP-22-00209

PRENTISS WAYNE LOVE, #315271

Applicant,

v.

THE STATE OF SOUTH CAROLINA,

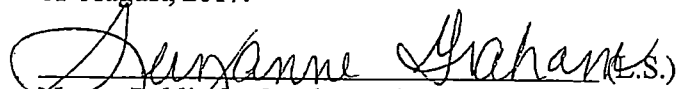
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Johnny E. James, Jr., Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 9th day of August, 2017.


Tara Dawn Shurling
Attorney for Applicant

SWORN TO BEFORE me this 9th day
of August, 2017.


Notary Public for South Carolina
My Commission Expires: 2/28/24

843

11:25:36 Tuesday, March 10, 2015

~CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 03/10/15
OMCOMITA RELEASE DATE SCREEN C056427
SCDC# > 315271 LOC: RIDGELAND
LOVE, PRENTISS WAYNE SCDC CLASSIFICATION...: VIOLENT
OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY...: Y
SEXUAL PREDATOR...: PENDING
DNA STATUS...: COMPLETED
GPS REQUIREMENT...: Y
PREA DECISION...:
CURRENT SENTENCE: 015-00-000 CONSECUTIVE SENTENCE ...: N
015-00-000 CURRENT SENT START DATE: 04/17/2012
PROJECTED COMPLETION DATES
MAXOUT DATE: 11/02/2019 CURRENT EWC ..: 2 F 5
YOA SIX YEAR DATE: / / CURRENT EEC ..: NOT CURRENTLY EARNING EEC
INITIAL PAROLE DATE: 12/12/2015 NEXT PAROLE HEARING DATE: 12/12/2015

TOTAL GT DAYS EARNED: 000660 LABOR CREW/WORK PROG DATE: 99/99/9999
TOTAL EARNED WORK CREDITS ...: 000331 LABOR CREW DISQ REASON:
TOTAL EDUCATION CREDITS: 000000 CURRENT OR PRIOR SEX CONDUCT CONVICT
TOTAL EXTRA EARNED CREDITS ..: 000 SUPERVISED REENTRY DATE...: 00/00/00
TOTAL SERVICE TIME EARNED ...: 001057 ISS.....:

PFKEYS: 5:HISTORY OF DATE CHANGES

South Carolina Department of Corrections

Classification Summary Reports

Date: Tuesday, March 10, 2015

Classification Summary Reports

Inmate Number

Classification Summary Report for LOVE, PRENTISS WAYNE :

[Create PDF](#)

CLASSIFICATION SUMMARY REPORT DATED 03/10/2015

SCDC# 00315271

LOVE, PRENTISS WAYNE

FBI# 192543WB4

OFFENDER ADULT-STRAIGHT
TYPE: SENTENCE

INSTITUTION: RIDGELAND

SECURITY/CUST: 2 MINIMUM IN

CURR INCARC 15 YRS 0 MOS 0
SENT: DAYS

VICTIM 
WITNESS: 

MED MED PROB/WORK
CLASS: RESTRICT

INST 
RESTRICT: 

MENTAL
CLASS: MH-4 (OUTPATIENT)

CURRENT NO CURRENT
PROGRAM: PROGRAM

SEX REGISTRY: Y

DNA: C

AGE: 34



RESIDENT
STABILITY: NA

DORMROOMBUNK_CODE: SA 0049 A

PROJ MAXOUT
DATE: 11/02/2019

PROJ PAROLE DATE: 12/12/2015

EWC JOB: PLUMBER HELPER

ASSIGNMENT: INSIDE MAINTENANCE

EWC
LEVEL: 2F5 EEC LEVEL:

EDUC
PGM: NO CURR EDUC PROGRAM

PREVIOUS NUMBERS:

NO PREVIOUS NUMBERS

CURRENT OFFENSES	YRS	MOS	SENTENCE DYS	COUNTY	START	SENTENCE V/NV	CAT	INDICT
ASSL&BATTERY-HIGH&AGG.NA	5	0	0	LEXINGTON	10/25/2012	N	3	06GS3200583

01/14/2008	LEXINGTON CO	AUTH ABSENCE (AWL)	TO COURT
12/10/2007	CAMPBELL	INCARCERATED	LABOR CREW
09/11/2007	MANNING	INCARCERATED	ADMINISTRATIVE
05/18/2006	ALLENDAL	INCARCERATED	ADMINISTRATIVE
05/03/2006	KIRKLAND	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
PLUMBER HELPER	11/06/2014	-		2F5
WARDKEEPER	06/27/2014	11/05/2014	INMATE REQUEST	2F5
WARDKEEPER	01/03/2014	06/26/2014	MI ELIGIBLE FOR LEVEL 2	3F5
WARDKEEPER	12/31/2013	01/02/2014	ASLT/DRUG/MAJOR DISC	2F5
SENIOR HEAT./A.C. OPER	01/16/2013	12/20/2013	DISCIPLINARY/LOCK-UP	2F5
GENERAL WORKER	10/16/2012	01/15/2013	PROMOTION	2F5
FOOD SERVICE AIDE	08/04/2012	10/15/2012	INMATE REQUEST	2F7
FOOD SERVICE AIDE	07/12/2012	08/03/2012	INMATE REQUEST	2F5
LABOR CREW/WORK PROGRAM	03/22/2008	08/29/2008	RELEASED/PAROLED	2F5
LABOR CREW/WORK PROGRAM	12/12/2007	03/21/2008	INSTIT TRANSFER	2F5
SENIOR HEAT./A.C. OPER	09/27/2007	12/10/2007	INSTIT TRANSFER	2F5
MACHINE OPERATOR	09/13/2007	09/26/2007	INMATE REQUEST	2F5
SANDER	03/22/2007	09/11/2007	INSTIT TRANSFER	2F5
LIBRARY HELPER	05/26/2006	03/21/2007	INMATE REQUEST	2F5
LIBRARY HELPER	05/23/2006	05/25/2006	MI ELIGIBLE FOR LEVEL 2	3F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC DESCRIPTION	START DATE	END DATE	TERMINATION REASON
BONUS 15 OR MORE	08/02/2012	12/20/2013	DISCIPLINARY/LOCK-UP
BONUS 12-14 HR/WK	06/29/2006	09/11/2007	INSTIT TRANSFER

***** END OF REPORT *****

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