

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

Appellate Case No. 2017-001877.
Case No. 2014-CP-32-04769

Lance Austin Williams, SCDC No. 00345477.....Respondent,

v.

State of South Carolina.....Petitioner.

RESPONDENT'S PETITION FOR BAIL
PENDING APPELLATE REVIEW

Richard A. Harpootlian (SC Bar No. 2725)
Christopher P. Kenney (SC Bar No. 100147)
RICHARD A. HARPOOTLIAN, P.A.
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)
rah@harpootlianlaw.com
cpk@harpootlianlaw.com

ATTORNEYS FOR RESPONDENT
LANCE AUSTIN WILLIAMS

October 5, 2017
Columbia, South Carolina.

INTRODUCTION

Respondent Lance Austin Williams has served six years and five months of concurrent 10 and 25-year sentences for unlawful neglect of a child and criminal sexual conduct with a minor in the first degree. Mr. Williams conceded to police and the jury he was too heavy handed when disciplining his girlfriend's child, but explained that bruises on the child's genital region were caused while cleaning feces from the child's vagina: a medically necessary and legally privileged touching of a child. At trial, the State proffered testimony from two experts—one undisclosed prior to trial and another that offered medically inaccurate testimony suggesting vaginal penetration and a bite mark on the child's pubic area. Trial counsel failed to object and never called an available expert witness prepared to explain the bruising was consistent with cleaning feces from the child's genitals, not vaginal penetration or a bite mark. Buccal swabs failed to return a DNA match for Mr. Williams, but he was nevertheless convicted after the jury considered, without objection, graphic forensic photography of the child's genitals.

The PCR court held Mr. Williams was entitled to a new trial for three reasons, any one of which is sufficient to vacate his convictions and sentences. In a detailed order, the PCR court held lead trial counsel failed to adequately investigate and prepare the case, and misapprehended critical facts and law in so doing. Co-trial counsel was retained just one day before trial, but nevertheless handled a pre-trial motion, cross-examined 11 of 13 State witnesses, and delivered closing argument. These findings led the PCR court to conclude trial counsels' performance denied the effective assistance guaranteed by the Sixth Amendment as (1) deficient and prejudicial within the meaning of Strickland v. Washington, 466 U.S. 668 (1984) and (2) a total failure to function as a meaningful state adversary under United States v. Cronin, 466 U.S. 648 (1984). Beyond lack of preparation, the PCR court considered the testimony of a medical doctor that markings on the child

were consistent with what Mr. Williams told police and the jury. Ironically, the expert the PCR court credited with a credible, alternative explanation was the same expert lead trial counsel consulted, but never called in Mr. Williams' defense. Finally, the PCR court found ineffective assistance and prejudice in trial counsels' decision not to object to invasive photographs of the two-year-old child's genitals.

The State is seeking a writ of certiorari to review the PCR court's grant of relief. As explained below, there is no error of law (let alone three) that would warrant issuing the writ and the any-evidence standard of review requires deference to the PCR court's detailed findings. Because the State's forthcoming petition should be denied, and because Mr. Williams is an exemplary candidate for bail, this petition for bail pending appellate review should be granted.

PROCEDURAL BACKGROUND

Mr. Williams' case was called to trial on March 30, 2011 and, on April 1, the jury returned guilty verdicts on both counts. On April 5, 2011, the Honorable R. Knox McMahon, Circuit Court Judge, sentenced Applicant to concurrent 10 and 25-year terms of incarceration and ordered Mr. Williams be placed on the Central Registry of Child Abuse and Neglect and the South Carolina Sex Offender Registry.

On July 24, 2013, the Court of Appeals affirmed the convictions. See State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013). On July 24, 2014, this Court denied Mr. Williams' petition for a writ of certiorari.

On December 31, 2014, Mr. Williams filed the underlying PCR action. The State filed a return in opposition to the PCR action on August 13, 2015. Mr. Williams filed an amended PCR application on October 25, 2016. An evidentiary hearing was held on January 30 and 31, 2017, which included testimony from lead trial counsel, James Snell, Esquire, and co-trial counsel,

Wayne Floyd, Esquire, as well as Dr. Edward Friedlander, an expert qualified in the field of pathology. The State presented no evidence. At the end of the hearing, counsel notified the PCR court that Mr. Williams intended to seek leave to amend his application to conform to the evidence. On February 3, 2017, Mr. Williams moved for leave to file a second amended application joining three issues and the PCR court granted the motion.

The second amended application alleged ineffective assistance based on trial counsels' failure to (1) investigate and perform legal research; (2) call an available expert witness to testify the victim's injuries were consistent with Mr. Williams' statements to police and testimony at trial, which would have established a "medically recognized treatment" defined by South Carolina Code § 16-3-651 and a legal defense to the charge of criminal sexual conduct with a minor; and (3) object to photos of the child's vagina that inflamed the passions and prejudices of the jury and invited a verdict based on something other than the evidence.

On June 20, 2017, the PCR court entered its opinion and order (hereafter, "Order" and attached as **Exhibit A**) granting post-conviction relief and vacating Mr. Williams' convictions. The State moved to alter or amend the Order and the motion was denied on August 15, 2017.

On August 23, 2017, Mr. Williams moved the Lexington County Court of General Sessions for release on bond pending re-trial. On September 13, 2017, the State noticed an appeal. Pursuant to Rule 243(k) of the South Carolina Appellate Court Rules, Mr. Williams agreed to withdraw his motion in the circuit court.¹ This petition followed.

¹ "Where the sentence originally imposed did not exceed imprisonment for ten (10) years, the petition for bail shall be made to the lower court. In all other cases, the petition for bail shall be made to the Supreme Court." Rule 243(k), SCACR.

REASONS TO GRANT BAIL

Mr. Williams should not continue to be detained while the State seeks appellate review of a detailed, well-reasoned Order. He has served seven years and seven months² on the charges that brought him to the custody of the South Carolina Department of Corrections (SCDC). During that time, he has been a model inmate, without disciplinary infractions, dedicated to improving himself and caring for inmates with mental health crisis within SCDC. Prior to incarceration, he accepted responsibility for what he did—telling police and the jury he was frustrated his girlfriend left him to watch her child and he was too heavy-handed when disciplining the child. See Order, 5. Had the State merely charged unlawful neglect of a child, Mr. Williams would have pled guilty and already repaid his debt to society.³ Instead, the State also charged first-degree criminal sexual conduct with a minor: a 25-year offense that requires placement on the sex offender registry.

The PCR court's Order details an alarming breakdown in our adversarial system of justice, whereby Mr. Snell failed to investigate the case and misapprehended the significance of a medically privileged touching that would provide a complete defense to the criminal sexual conduct with a minor charge. Compare S.C. Code Ann. § 16-3-655(A)(1) (criminalizing a “sexual battery” of a victim less than 11 years of age), with id. § 16-3-651(h) (defining a “sexual battery” as “any intrusion into the genital or anal openings ... except where such intrusion is accomplished for medically recognized treatment ...”). After Mr. Williams' mother expressed concern over whether Mr. Snell was prepared for trial, she paid an additional \$5,000 so he could retain Mr. Floyd the day before trial. See Order, 14–15. While Mr. Floyd intended to merely assist, he came

² Including pre-trial detention.

³ Compare S.C. Code Ann. § 63-5-70 (authorizing incarceration for not more than 10 years), with id. §§ 24-13-210(A) (allowing 20 days good-time credit for each month served) & 24-13-230(A) (allowing zero to one day of work or education credit for every two days employed or enrolled).

to handle the pre-trial Jackson v. Denno, 378 U.S. 368 (1964) hearing, cross-examine 11 of 13 State witnesses, and deliver closing argument. See Order, 15. Put differently, the lawyer who presented the bulk of Mr. Williams defense, had just 24 hours to prepare. Two of the most harmful pieces of evidence—graphic images of the child’s genitals and testimony from Dr. Susan Luberoﬀ, a pediatrician—were never contested by trial counsel. For the former, Mr. Floyd conceded there was no strategic reason motivating his failure to object to the images. See id. at 17. For the latter, Dr. Luberoﬀ claimed the child’s vagina was penetrated and that she displayed bite marks on her pelvic area. See id. at 8. Neither statement is true. While Mr. Snell consulted Dr. Friedlander prior to trial and received the exact same opinion Dr. Friedlander shared during the PCR hearing, Mr. Snell never called him to rebut Dr. Luberoﬀ’s claims and corroborate Mr. Williams’ testimony. See id. at 11–14. The PCR court was rightly troubled by these facts and other record evidence supporting its grant of post-conviction relief on all three grounds raised by Mr. Williams.

Having prevailed below, Mr. Williams respectfully seeks bail pending appellate review. The Court’s rules provide that “[a] post-conviction relief applicant may be admitted to bail after the service of the notice of appeal by either the applicant or the State.” Rule 243(k), SCACR. In weighing a request for bail, the Court considers:

[1] the probability the applicant will prevail on appellate review and the nature of the relief he or she will receive; [2] the seriousness of the criminal offense committed; [3] the danger the applicant may pose to the community if he or she is released; [4] the likelihood that the applicant may flee if released; [5] and the character and circumstances of the applicant.

Id. (brackets added). If bail is granted, the Court can require a bond or impose other conditions.

Id. These factors warrant granting bail and are considered *seriatim*.

I. There is no error of law or fact warranting issuance of a writ of certiorari.

Certiorari to review post-conviction relief orders is a matter of grace, not a matter of right. See Knight v. State, 284 S.C. 138, 140–41, 325 S.E.2d 535, 537 (1985). While questions of law are reviewed *de novo*, a circuit court’s factual findings in a post-conviction relief action are upheld if supported by “any evidence” of probative value. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); see also Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984) (“The appropriate scope of review is that ‘any evidence’ of probative value to support the post-conviction judge’s factual findings is sufficient to uphold those findings on appeal.”). Accordingly, the Supreme Court sits to correct errors of law, not second-guess the PCR court’s view of the facts. The first factor—Mr. Williams’ likelihood to prevail on appeal—should weigh heavily in support of granting bail because Mr. Williams prevailed below and the State is yet to identify an error of law or factual finding without evidentiary support.

The State cannot prevail (and a writ should not issue) because the State has not pointed to a question of law warranting discretionary review. The PCR court’s Order reached three dispositive holdings, all of which would have to be reversed on appeal to change the result below:

1. “that Mr. Snell’s lack of preparation fundamentally undermined Applicant’s trial in a manner that is actually and presumptively prejudicial[.]” (Order, 18);
 - a. “Mr. Snell was objectively unreasonable in failing to interview, or attempting to interview, any State witness other than the lead detective[.]” (id. at 19);
 - b. “Second, Mr. Snell’s representation was deficient because [as] the lawyer who prepared the case for trial[, he] labored under a misapprehension of law and fact as to what constituted a legal defense[.]” (id. at 20);
 - c. Counsel’s failure to investigate the facts and apprehend the law was “prejudicial to Applicant’s defense within the meaning of Strickland[.]” (id. at 23);
 - d. And presumptively prejudicial as contemplated by Cronic, (id. at 23);

2. Trial Counsel was ineffective “in failing to call an available medical expert to offer testimony the child’s injuries were consistent with a rough diaper change[,]” (id. at 26), and the failure to introduce this evidence was prejudicial to Applicant, (id. at 27); and
3. Trial Counsels “were ineffective in failing to make a contemporaneous objection to graphic images of the child’s genitals[]” (id. at 28) and this deficiency meets Strickland’s prejudice requirement. Id. at 29.

These legal conclusions flowed from detailed factual findings in a 31-page Order supported by citations to record evidence. Under the any-evidence standard, the State has an insurmountable burden to overcome the PCR court’s factual findings.

When given an opportunity to point the PCR court to an error of law or fact, the State failed to squarely address the PCR court’s holdings. In its motion for reconsideration, the State alleged the Order (1) relied on allegations not properly presented, (2) omitted legal precedent, (3) misapplied Rule 5 of the criminal rules, (4) addressed allegations not before the Court, and (5) omitted evidence and argument presented by the State. See Rule 59(e) Mot., 3–4 (attached as **Exhibit B**). The PCR court correctly rejected these arguments in a one-page order denying the motion, but as the Court weighs Mr. Williams’ likelihood to prevail here, the State’s contentions below are strong indicators it lacks a colorable argument on appeal.

For example, some of the criticism levied below simply misrepresented the PCR court’s findings in an effort to claim error. The State alleged, “[t]he Order incorrectly states Trial Counsel Snell spoke only with the lead investigator prior to going to trial (Order, p. 19.)” Rule 59(e). Mot., 4. The State also claimed Mr. Snell “testified at the PCR Hearing that he hired a private investigator to talk to all the fact witnesses, (PCR Hearing Tr. p. 31, ll. 12-16), and that he himself spoke with the law enforcement *witnesses* prior to trial (PCR Hearing Tr. p. 27, ll. 23-25).” Rule 59(e) Mot., 4 (emphasis original). These are inaccurate claims.

In the transcript pages cited by the State, Mr. Snell testified, “I *believe* all the fact witnesses were reached out by the investigator.” PCR Hr.’g Tr. 31:12–16 (emphasis added) (excerpts attached as **Exhibit C**). However, the State’s motion attributing error to the PCR court’s conclusions fails to cite the next three pages of the transcript in which Mr. Snell was asked about individual witness. See id. at 32:17–34:2. In response, he testified he failed to speak to any of the seven witnesses he was asked about, nor did his investigator (to the best of his recollection). Id. Ascribing error, the State also cited Mr. Snell’s testimony that he “believe[d]” he spoke to six witnesses prior to trial. See PCR Hr.’g Tr. 27:23–25. The PCR court’s Order acknowledges all of the foregoing, but goes on to explain:

Five days before trial, Mr. Snell received an email from the assistant solicitor with a list of 24 possible witnesses. PCR Hr.’g Tr. at 26:16–27:1 & 27:17–19 (discussing Pl.’s Ex. 1). Of these potential witnesses, Mr. Snell had spoken to six of them prior to trial. Id. at 27:23–25. Mr. Snell spoke to Det. Prestigiacomo on two occasions, but made no notes of those interviews. Id. at 28:5–14. When asked whether he spoke to the child’s aunt (and the State’s first witness), Mr. Snell explained, “the folks I spoke to were only the law enforcement individuals. As far as the private folks that were the fact witnesses *I didn’t speak to any of them.*” Id. at 28:23–29:3 (emphasis added). Pressed further about specific witnesses called at trial, Mr. Snell conceded they were never contacted. Mr. Snell testified neither he, nor his investigator spoke with the child’s mother (id. at 32:17–20), the mother’s friend dispatched from the hospital to retrieve diaper evidence (compare id. at 32:21–24, with Trial Tr. 195:14–197:2), the child’s grandmother (PCR Hr.’g Tr. 32:25–33:3), Ms. Clary (see id. at 33:3–8), or Dr. Luberoﬀ. See id. at 33:22–34:25. Mr. Snell testified that Dr. Ann Able, a consulting physician, spoke with Dr. Luberoﬀ while evaluating the case for the Applicant. Mr. Snell was forced to correct himself to explain the consultant simply reviewed Dr. Luberoﬀ’s report and adopted her findings. See id.; see also id. at 35:1–36:5 (equivocating further, then conceding “I don’t have a recollection of her saying she went back and had a discussion regarding the merits of the situation.”). In fact, Dr. Able, the consulting physician that reported to Mr. Snell [that she] agreed with Dr. Luberoﬀ’s opinion, practiced medicine in the same physician practice as Dr. Luberoﬀ. Id. at 82:11–16. Mr. Snell testified he had a “very brief” conversation with LCSD investigator Shelby Derrick one year before trial. Id. at 36:6–13. He had no recollection of LCSD crime scene investigator Troy Crump (id. at 36:18–19), likely because Mr. Crump was not identified on the witness list provided by the State. See id. at 36:20–37:2 (discussing his absence from Pl.’s Ex. 1). He had no recollection of whether he spoke to SLED’s DNA analyst Adrienne Riley-Hefney, one of just two witnesses he cross-

examined at trial. Compare id. at 33:9–19, with Trial Tr. 306:13–308:21. He also had no notes or recollection of LCSD evidence custodians Beth Harmon and Candy Kyzer. See PCR Hr.’g Tr. at 37:3–21.

Order, 9–10 (emphasis original, brackets added). Further, the PCR court found that “Mr. Snell’s testimony evidenced almost no pre-trial investigation into what State witnesses might say at trial.” Order, 11. Thus, the State’s claim below—that the PCR court “fail[ed] to address Trial Counsel Snell’s testimony on this issue without explanation as to why his sworn testimony should be given no consideration and/or weight[]” (Rule 59(e) Mot., 4)—is a false statement. Based on these findings, page 19 of the Order (cited by the State as error) concludes:

The Court holds Mr. Snell was objectively unreasonable in failing to interview, or attempting to interview, any State witness other than the lead detective. Testimony of Ms. Clary and Dr. Luberoff was unquestionably critical to Applicant’s conviction, but Trial Counsel made no effort to contact them. Likewise, Mr. Snell recognized the timeline placing the child in Applicant’s care was critical to establishing his responsibility for the injuries (see PCR Hr.’g Tr. 107:8–108:6 & 229:3–21), but no lay witness was contacted to test the veracity of these claims or explore avenues for impeachment. Thus, Mr. Snell failed to act on the import ascribed by his own assessment when he failed to interview any lay witnesses. See id. at 117:4–20. Finally, although Mr. Floyd repeatedly challenged the State’s efforts to establish a chain of custody for a dirty diaper collected by a friend the child’s mother (see, e.g., Trial Tr. 418:16–25; PCR Hr.’g Tr. 229:22–230:17), he lacked sufficient information to do so having had no opportunity to interview the witnesses prior to mounting that challenge. Notably, but for the unusual circumstances whereby he came to handle the bulk of Applicant’s trial work on the eve of trial, Mr. Floyd’s practice is to conduct these interviews prior to trial. In short, the facts here indicate that Mr. Snell’s failure to interview *all* of these witnesses abdicated counsel’s responsibility to investigate critical witnesses determinative of guilt or innocence.

Order, 19 (emphasis original). In short, the so-called errors cited by the State are based on selective, misleading citation to the record and Order to create an inaccurate impression the PCR court overlooked critical facts. An honest reading demonstrates otherwise.

The State suggested the PCR court’s conclusion is speculative because Mr. Williams did not call un-interviewed witnesses to the stand during the PCR hearing. See Rule 59(e) Mot., 5

(“...Applicant offered zero evidence of how a more in-depth or in person—versus through his investigator—interview would have resulted in a different case.”). The State misses the point. The PCR court’s holdings under Strickland (and Cronic) turned not on an unexamined witness, but on counsels’ failure to prepare for *any* witness. See Order, 19 (“Thus, while counsel’s failure to investigate every possible witness might be excused, failure to investigate all witnesses bearing on guilt or innocence is objectively unreasonable.”). In suggesting Mr. Williams needed to call un-interviewed witnesses to the stand to make his case, the State cited Porter v. State, 368 S.C. 378, 629 S.E.2d 353 (2006) and Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). See Rule 59(e) Mot., 5–6. These cases merely stand for the proposition that a PCR applicant must connect counsel’s deficiency to the prejudice required by Strickland. Compare id., with Porter, 368 S.C. at 384, 629 S.E.2d at 357 (no prejudice in failure to file Brady motion where prosecution did not possess undisclosed evidence), and Jackson, 329 S.C. at 349, 495 S.E.2d at 770 (“speculation and conjecture” insufficient to find prejudice in failure to check witness’s criminal record). The Order makes such a connection with its Strickland lack-of-preparation holdings by pointing to trial counsel’s failure to interview any witness and misapprehension of the law resulting in Mr. Williams’ inability to present a viable defense. See Order, 18–23.

The State claimed Mr. Williams made an untimely claim that “Trial Counsel [was] deficient for having a strategy that challenged the element of ‘intrusion into a genital opening.’” Rule 59(e) Mot., 7. This assertion fails to squarely confront the allegation presented. The defect in trial counsel’s performance was not that he adopted a strategy that proved unsuccessful, but that he failed to comprehend a distinction that is a critical predicate to formulating *any* defense. The Order details a fundamental misapprehension by Mr. Snell concerning whether criminal sexual conduct required genital or vaginal intrusion. See Order, 20–23 (“Mr. Snell repeatedly sought to

highlight the lack of vaginal penetration, a fact of no legal consequence to Applicant’s defense.”). In suggesting Mr. Snell had “a strategy that challenged the element of intrusion into a genital opening[,]” the State misleadingly suggests a level of comprehension by counsel when there is no evidence to support this inference. See, e.g., id. at 22 (“The record is uncontradicted that Mr. Snell’s apparent view at trial was neither factually nor legally accurate.” (detailing record evidence)). In urging the PCR court to reconsider the Order, the State did not point to any factual finding or principle of law inconsistent with Mr. Williams allegation that trial counsel labored under a fundamental misapprehension of law and fact during the representation.

The State also urged the PCR court that so long as trial counsel does *something*, albeit ineffectual or incomplete, it cannot be held ineffective assistance. Pointing to evidence trial counsel had “a year to work on the case” in which he consulted “at least five different experts[,]” the State concluded “[t]he decision not to call any of those experts was a strategy decision based on defense counsel’s ability to get helpful testimony from the State’s witnesses.” See Rule 59(e) Mot., 7–8. This reasoning is deeply flawed. The strategic-decision-of-counsel doctrine requires a *valid* reason, not any reason. See Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) (“counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial.” (collecting cases)). Because Mr. Snell did not understand the elements of the offense with which his client was charged, he failed to recognize that one of the five experts he spoke to—Dr. Friedlander—was capable of challenging the State’s expert and testifying the child’s injuries were consistent with a medically accepted diaper change. See Order, 20–21 (discussing Mr. Snell’s consultation of Dr. Friedlander). The PCR court cited Mr. Floyd’s testimony as persuasive evidence Dr. Friedlander’s testimony would have been helpful to Mr. Williams’ defense:

Mr. Floyd agreed that since Applicant's defense (in his mind) was a medically appropriate diaper change, and Dr. Friedlander's testimony demonstrated how the child's injuries corresponded to that claim, he "would have emphasized that [testimony]" had he known about Dr. Friedlander because doing so would have created a dispute of fact. See PCR Hr.'g Tr. 218:10–25. Instead, the only medical testimony on which the jury could rely was that of Dr. Luberoff, which suggested the 15-month old child might have been digitally penetrated and bitten on the pelvic bone. This Court found Dr. Friedlander's explanation as to why Dr. Luberoff was wrong about penetration and the bite mark to be credible and persuasive. A jury should have been afforded an opportunity to do the same.

Order, 27. The State's argument turns on the notion that Mr. Snell's decision not to call any expert witness was a strategic one. The PCR court found otherwise, and rightly so since Mr. Snell could not have made such a judgment having failed to interview the State's witnesses prior to trial.

The State claimed trial counsel "had clearly articulated defense theories, and their cross-examination, witness selection, and opening and closing arguments reflected that strategy." Rule 59(e) Mot., 11. This claim overlooks the "uncontradicted" finding that Mr. Snell's "apparent view at trial was neither factually nor legally accurate[.]" or that his "more recent (and accurate) understanding" of a criminal sexual conduct charge failed to guide his representation of Mr. Williams in preparing the case and at trial. Order, 22 (detailing record evidence). Indeed, when Mr. Snell moved the trial court for a directed verdict, he incorrectly argued the criminal sexual conduct charge should be dismissed because the State failed to present evidence of vaginal penetration, a proposition directly at odds with the plain language of South Carolina Code § 16-3-655 and State v. Morgan, 352 S.C. 359, 365–73, 574 S.E.2d 203, 206–10 (Ct. App. 2002). See Order, 20–21. Not surprisingly, the State's contention trial counsel pursued a "clearly articulated" defense makes no mention of precisely what that defense was.

The State argued Mr. Floyd's retention just one day before trial fails to raise concerns warranting a presumption of prejudice under Cronic. See Rule 59(e) Mot., 9–11. The State argued the PCR court's conclusion "is irreconcilable with the established facts" that Mr. Snell was

“present along with Mr. Floyd throughout the entire trial.” See id. at 9. This claim fails to recognize the PCR court’s finding that Mr. Snell’s own performance implicated Cronic. See Order, 23–24 (“... Mr. Snell’s overall lack of preparation and legal understanding is presumptively prejudicial to Applicant.”). The notion that lack of preparation caused by Mr. Floyd’s belated retention can be remedied by assistance from an unprepared Mr. Snell strains credulity. The State contended the Order is “irreconcilable” with Cronic’s warning that tardy appointment is not *per se* prejudicial (Rule 59(e) Mot., 9), but overlooks the fact that the PCR court did not apply a *per se* rule, but relied on testimony describing the happenstance through which Mr. Floyd came to handle the overwhelming bulk of Mr. Williams’ trial after just one day’s preparation. See Order, 15 & 24.

The State also misconstrued the second amended application and Order, claiming Mr. Williams made a “Rule 5 Allegation” and then argued he is not “entitled to relief under the allegation.” See Rule 59(e) Mot., 12. Mr. Williams made no such allegation and the PCR court did not order relief under such a theory. Instead, as part of an eight-page discussion concerning trial counsels’ lack of preparation, the Order cites the failure to seek relief under Rule 5 as *an example* of how the representation failed to meaningfully challenge the prosecution. See Order, 24–25 (“This lack of adversarial testing is *evidenced* in other ways. For instance, ...” (emphasis added)). Implicit in each of the State’s arguments below is the unstated contention that *any* fact constituting evidence of a Sixth Amendment violation *must* be plead in the PCR application. The State failed to cite any authority for this view and there is none.

The State claimed the PCR court “suggests the jury would have found Applicant not guilty if only they had heard Dr. Friedlander, instead of only the State’s witness, testify that it was medically necessary to wipe fecal matter out of the vulva.” Rule 59(e) Mot., 13 (citing Order, 27). That is *not* what the Order concludes. The PCR court concluded Dr. Friedlander’s testimony was

“critical” because it “would have given the jury *a choice* between Dr. Luberoff’s testimony and another opinion that corroborated Applicant’s statements and testimony[]” by demonstrating “how the child’s injuries corresponded” to or were consistent with a rough diaper change. See Order, 27 (emphasis added). While the PCR court found Dr. Friedlander’s testimony “credible and persuasive[,]” it did not conclude the jury would have returned a not guilty verdict, but that the jury “should have been afforded an opportunity” to consider the testimony. See id.

The State claims Mr. Snell’s testimony that Mr. Williams’ statements to him evolved during the representation should have been credited, presumably as evidence the decision not to call Dr. Friedlander was reasonable. See Rule 59(e) Mot., 14. The only written statement from Mr. Williams was the one he gave to police (see PCR Hr.’g Tr. 70:23–71:19) and Dr. Friedlander’s testimony corroborated that statement by explaining injuries to the child were consistent with a rough diaper change. See id. at 72:22–73:25. In fact, whatever Mr. Williams may have told Mr. Snell is irrelevant because counsel agreed Mr. Williams’ theory at trial was a rough diaper change: “Q. And that was the defense? The defense was a rough diaper change basically? A. Rough diaper change. Yes, sir. Q. Okay. Dr. Friedlander’s opinion was consistent with that? A. It was.” PCR Hr.’g Tr. 74:1–6. While Mr. Snell disputed whether his former client would have agreed to retain Dr. Friedlander, he conceded Mr. Williams’ statements to police and the jury supported the rough diaper change theory. See id. 74:7–23 (“Q. And when you put him on the stand during the trial, that’s exactly what he said? A. Correct. Yes, sir.”). Faced with this record, the failure to call Dr. Friedlander was unreasonable and prejudicial to Mr. Williams’ defense.

The State conceded images of the child’s genitals that were shown to the jury are graphic, but maintained they could be properly admitted to corroborate testimony or establish intrusion into the genital area. See Rule 59(e) Mot., 15–17. This misses the point. The pertinent question is

whether trial counsel's failure to make a contemporaneous objection was ineffective assistance. See Order, 28 (holding counsel was "ineffective in failing to make a contemporaneous objection to graphic images of the child's genitals."). Trial courts routinely weigh an image's probity against the risk of undue prejudice to the defendant. The trial court here was never asked to conduct such an analysis because no objection was raised. As the PCR court explained, "[w]ithout an objection, however, there can be no debate; and the trial court has no opportunity to exercise its discretion." Order, 29 (quoting Stone v. State, 419 S.C. 370, 798 S.E.2d 561, 569–70 (2017)). On appeal, Mr. Williams urged the court of appeals to conduct such an analysis, arguing contemporaneous objections to anatomical diagrams should extend to the photos themselves. The court of appeals rejected that argument and held the issue unpreserved because of trial counsels' failure to object. See Williams, 405 S.C. at 281, 747 S.E.2d at 204. The only court to consider whether the photos might improperly engender an emotional response from the jury is the PCR court (see Order, 29–30) and the State has concurred in the PCR court's assessment of those images. Mr. Floyd acknowledged there was no strategic decision motivating his failure to object and such a concession is routinely held to be ineffective assistance. See Order, 29 (collecting cases). Thus, the State's emphasis on its need of the evidence (see Rule 59(e) Mot., 16–17) is not responsive to the Order's reasoning. To the contrary, the State's belief the photographs were essential merely underscores the gravity of trial counsels' error in failing to object.

Finally, the State urged the PCR court to apply the overwhelming-evidence doctrine. See Rule 59(e) Mot., 17–18. Precedent explains doctrine is not applicable here. For example, the Court held the doctrine applicable where trial counsel is deficient in rejecting an alibi charge, but DNA evidence placed the defendant at the scene, trial counsel's deficiency would not have altered the outcome of the proceeding. See Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994).

Likewise, wearing a prison jumpsuit during trial did not alter the outcome where an eyewitness identified the defendant and his clothing at the time of the robbery in detail, the defendant was seen driving the truck that matched the getaway vehicle, and stolen items were located in the backseat of the patrol car the defendant was removed from. See Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 865–66 (2001). The doctrine is inapplicable here because the record indicates a real dispute concerning the operative facts—most notably, whether the injuries to the child’s genital area are consistent with a medically necessary touching. Put differently, because trial counsels’ errors and omissions implicate the possibility of a different outcome, the PCR court was correct not to paper over those defects by citing the doctrine in conjunction with *some* evidence suggestive of guilt.

* * *

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. The State’s forthcoming petition will fall short of this standard. No argument raised below is sufficient to dislodge one of the PCR court’s holdings, let alone all three. While the State may have preferred a different result, mere disagreement is not grounds for a writ to issue. Because the writ should not issue, and because Mr. Williams *has prevailed* below, the Court should conclude Mr. Williams is likely to prevail, which in turn supports his request for bond.

II. Mr. Williams poses no danger to the community, is not a flight risk, and has demonstrated good character in facing these charges and serving his time.

Factors two, three, four, and five of Rule 243(k) should weigh in favor of granting Mr. Williams bail. The South Carolina Constitution provides, “[a]ll persons shall be, before conviction, bailable by sufficient sureties[.]” S.C. CONST. art. I, § 15. Likewise, South Carolina Code § 17-15-10 presumes bail will be granted in noncapital cases:

A person charged with a noncapital offense triable in either the magistrates, county or circuit court, *shall*, at his appearance before any of such courts, be ordered released pending trial on his own recognizance *without surety* in an amount specified by the court, unless the court determines in its discretion that such a release will not reasonably assure the appearance of the person as required, or unreasonable danger to the community or an individual will result.

S.C. Code Ann. § 17-15-10(A) (emphasis added). State law presumes, not just release, but release without surety absent a finding it is required to guarantee appearance. Thus, while the State's accusations are admittedly serious, the severity of the claim, without more, cannot overcome the constitutional and statutory presumptions in favor of pre-trial release.

Mr. Williams is not a flight risk. He has family ties to Lexington County, South Carolina, including his mother, stepfather, and 9-year-old daughter, all residing in Lexington. If released, Mr. Williams is able to live with his mother. He has been offered employment as an apprentice carpenter with Exterior Visions, LLC, a remodeling company. See Aff. M. Abbott, Aug. 5, 2017 (attached as **Exhibit D**).

If released, Mr. Williams poses no risk to the community. Aside from this matter, he has no criminal record other than minor traffic infractions. Nor does he have knowledge of the location of the victim or her family. While incarcerated, he has incurred no disciplinary infractions. See Inmate Report, SCDC Website (last accessed, Oct. 4, 2017) (attached as **Exhibit E**). Instead, he has earned a certificate in horticulture completing 1,700 hours of instruction (attached as **Exhibit F**) and an associates' degree in biblical studies from Columbia International University (attached as **Exhibit G**). He has held a number of jobs within SCDC that have placed him in positions of trust. Specifically, he has worked as a counselor ministering to dying inmates and is presently working as a crisis manager and mental health counselor ministering to inmates who have demonstrated self-injurious behavior and are being housed in a critical care unit.

While contesting these charges, and serving his time, Mr. Williams has demonstrated good character. He took the stand at trial and told the truth even though the truth was not fully exculpatory. Within SCDC he has earned positions of trust and performed them with distinction. Thus, the Court should find factors two, three, four, and five all support granting bail.

CONCLUSION

While Mr. Williams acknowledges that the relief sought here is infrequently granted, if bail is *ever* appropriate, it is appropriate here. While repaying his debt to the State, Mr. Williams has been an exemplar inmate—one with no other record and a family waiting to reintegrate him as a productive member of society subject to any conditions the Court deems appropriate. Mr. Williams prevailed below and is likely to again here. Because of trial counsels' errors, he was denied an opportunity to present a legal defense that, not coincidentally, coincided with what he told police and the jury. Under these circumstances, the Constitution requires a new trial. The PCR court agreed in a factually detailed and legally sound decision granting relief under three alternative theories. If bail is ever warranted, it is here.

The petition should be granted and the Court should either order Mr. Williams be released pending appellate review subject to reasonable conditions or refer the matter to a special master for a hearing and decision concerning what conditions will reasonably assure Mr. Williams' presence at any future retrial.

[signature page follows]

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard A. Harpootlian", is written over a horizontal line.

Richard A. Harpootlian (SC Bar No. 2725)
Christopher P. Kenney (SC Bar No. 100147)
RICHARD A. HARPOOTLIAN, P.A.
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)
rah@harpootlianlaw.com
cpk@harpootlianlaw.com

ATTORNEYS FOR RESPONDENT
LANCE AUSTIN WILLIAMS

October 5, 2017
Columbia, South Carolina.

EXHIBIT A

(Order, the Hon. Eugene C. Griffith, Jr., June
19, 2017)

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

2017 JUN 20

ELEVENTH JUDICIAL CIRCUIT

LISA M. JOMER
CLERK OF COURT
JUN 20 2017

Lance Austin Williams, SCDC No. 003454778 C/A No.: 2014-CP-32-04769

Applicant,

vs.

OPINION AND ORDER

State of South Carolina,

Respondent.

This is a post-conviction relief action brought by Applicant, Lance Austin Williams, alleging violations of the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. Having had an opportunity to carefully consider the evidence and applicable law, Applicant's petition is **GRANTED** for the reasons explained below.

PROCEDURAL BACKGROUND

Applicant was indicted for unlawful neglect of a child (2010-GS-32-01860) and criminal sexual conduct with a minor in the first degree (2010-GS-32-01861). At trial, Applicant was represented by James R. Snell, Jr., Esquire (Mr. Snell) and H. Wayne Floyd, Esquire (Mr. Floyd). After a plea of not guilty, Applicant was convicted of both counts. On April 5, 2011, the Honorable R. Knox McMahon, Circuit Court Judge, sentenced Applicant to two terms of incarceration, 10 years and 25 years, respectively, to run concurrently and ordered Applicant be placed on the Central Registry of Child Abuse and Neglect and the South Carolina Sex Offender Registry.

Applicant retained his current counsel for his appeal. On July 24, 2013 the Court of Appeals affirmed the conviction. State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013). On July 24, 2014, the Supreme Court denied Applicant's petition for a writ of certiorari.



Applicant's counsel, Richard A. Harpootlian, Esquire (PCR Counsel), filed this action on December 31, 2014, alleging violations of the Sixth Amendment's guarantee of effective assistance from counsel. On August 13, 2015, the State served a return opposing post-conviction relief. On October 25, 2016, Applicant filed an Amended Application.

On January 30 and 31, 2017, the Court held an evidentiary hearing that included testimony from both of Applicant's Trial Counsels and from an expert witness who was not called to testify at trial. After the evidence was presented, PCR Counsel notified the Court that Applicant would seek leave to amend his Application to conform with the evidence. On February 3, 2017, Applicant moved for leave to file a second amended application. That motion was granted and the Second Amended Application, filed on April 13, 2017, joined three issues.

The first issue alleged by Applicant: that Trial Counsels' preparation, both in terms of investigation and legal research, which he argues is a specific error contemplated by Strickland and a total failure to function as a meaningful state adversary such that prejudice is presumed under United States v. Cronin, 466 U.S. 648 (1984).

The second issue alleged by Applicant: that Trial Counsels ran afoul of Strickland by failing to call an available expert witness to testify the victim's injuries were consistent with Applicant's statement to police and testimony at trial which would have established a "medically recognized treatment" defined by S. C. Code Ann. § 16-3-651 and a legal defense to the charge of criminal sexual conduct with a minor.

The third issue alleged by Applicant: that photographs of the victim's vagina inflamed the passions and prejudices of the jury, which invited a verdict based on something other than the evidence. Also Trial Counsels' failure to make a contemporaneous objection preserving the issue



on appeal was ineffective and prejudicial within the meaning of Strickland v. Washington, 466 U.S. 668 (1984).

STANDARD OF REVIEW

The Sixth Amendment guarantees a criminal defendant the reasonably effective assistance of counsel in his defense. U.S. CONST. amend. VI; Strickland, 466 U.S. at 683; Von Dohlen v. State, 360 S.C. 598, 603, 602 S.E.2d 738, 740 (2004). Counsel's assistance is measured by "an objective standard of reasonableness." Weik v. State, 409 S.C. 214, 233, 761 S.E.2d 757, 767 (2014) (quoting Wiggins v. Smith, 539 U.S. 510, 521 (2003)). There are two paths to establish the denial of effective assistance and a violation of the Sixth Amendment.

Under Strickland, a post-conviction relief applicant can establish a claim for ineffective assistance of counsel by proving: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing Strickland, 466 U.S. at 687). An applicant bears the burden of proving both prongs. Id. at 383, 629 S.E.2d at 356. Under the prejudice prong, an applicant must show a "reasonable probability" that, but for counsel's errors, the result of the trial would have been different. Von Dohlen, 360 S.C. at 603, 602 S.E.2d at 740. A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. Id. at 603, 602 S.E.2d at 740–41; Strickland, 466 U.S. at 687–694.

In Cronic, the United States Supreme Court held certain situations so fundamentally undermine the accused's right to the adversarial proceeding guaranteed by the Sixth Amendment such that prejudice is presumed. Cronic, 466 U.S. at 656–59. When "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Id. at



659. Circumstances warranting relief may be present when “although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” Id. at 659–60 (citing Powell v. Alabama, 287 U.S. 45 (1932) as an example); see also, United States v. Ragin, 820 F.3d 609, 612 (4th Cir. 2016) (lawyer who slept through portions of trial met Cronic’s standard).

FINDINGS OF FACT

A circuit court hearing an application for post-conviction relief must resolve any factual dispute necessary to decide the application. See S.C. Code Ann. § 17-27-70 (2015); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005). As factfinder, a circuit court must weigh the credibility of witnesses and determine what weight, if any, to give the evidence presented. See Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993). In discerning whether relief is warranted, a post-conviction relief court’s decision must be supported by probative evidence. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005).

This Court has carefully reviewed the record in this case. That review has included an examination of the trial transcript, live testimony taken during a two-day hearing on January 30 and 31, 2017, and exhibits offered into evidence during that hearing. Having made such a review, the Court makes the following factual findings.

Relevant Trial Testimony

On April 15, 2010, Applicant cared for his girlfriend’s fifteen-month-old daughter for about 10 hours. Williams, 405 S.C. at 268–69, 747 S.E.2d at 197. That evening, the child’s mother and other family members took her to the emergency room after observing bruises on her face,



arms, and genital area. See id.; see also Trial Tr. 163:1–164:16 (testimony of mother); PCR Hr.'g Tr. 85:2–88:11 (summarizing the State's allegations).

The next day, Lexington County Sherriff's Department (LCSD) Detective Ed Prestigiacommo learned Applicant cared for the child the day her injuries were discovered and contacted Applicant who agreed to meet Det. Prestigiacommo at the LCSD. See Williams, 405 S.C. at 268–70, 747 S.E.2d at 197. Det. Prestigiacommo confronted Applicant with photos of bruising on the child's arm, which Applicant attributed to a hand-injury that caused him to be heavy-handed with the child. See id. at 269, 747 S.E.2d at 197. The detective also confronted Applicant with photos of bruising behind the child's ears, which Applicant explained resulted from two instances when he disciplined the child for misbehaving by slapping her on the ears. See id. Applicant was then shown photos of bruising on the child's forehead and near her genitals, which Applicant explained were the result of a fall and the application of eczema cream. See id. at 270, 747 S.E.2d at 197; see also Trial Tr. 502:16–12. Applicant was placed under arrest.

At trial, Applicant took the stand and conceded he was too rough with the child. He testified that he agreed to watch the child when asked by her mother, his girlfriend, but that he expected to be relieved of that obligation by 1:00 or 2:00 p.m. that afternoon. See Trial Tr. 489:4–490:2. Upon learning his girlfriend would not return until 6:00 p.m., Applicant testified he felt “used”. Id. at 496:15–22. Applicant changed several wet diapers that morning, and a “messy diaper,” he described as “diarrhea, runny” that afternoon. Id. at 497:24–498:7. Applicant described “poop everywhere” on the child's lower region, which required him to clean the child's genital area by wiping between the lips of the vagina to remove feces. Id. at 498:21–500:22. Applicant conceded he was “[a]ggravated” and “rougher than [he] should have been.” Id. at 501:8–16; see also id. at 503:2–5 (explaining his aggravation stemmed from having to watch the child).



Thereafter, the child began throwing toys and misbehaving, and Applicant “popped” her twice, once on each side of the head. See id. at 503:6–16 & 504:4–14. At trial, Applicant conceded he hit her too hard, explaining, “[i]t was very wrong[,]” to hit her like that. Id. 504:3 & 15–17. Applicant also testified the child fell and hit her head while playing outside earlier that day. Id. at 492:6–16.

Two State witnesses offered evidence in support of the criminal sexual conduct charge. The State offered Marlene Clary with Palmetto Health Richland’s regional nurse examiner program to testify as an expert in the field of forensic nurse examination. Trial Tr. 223:24–224:7 & 229:13–15. Mr. Snell indicated he had no notice of Ms. Clary, but declined to *voir dire* her before the Court qualified her, without objection, as an expert in forensic nurse examination. See id. at 229:16–230:16. Ms. Clary testified she examined the child and spoke to the child’s mother on April 15, 2010. See id. at 231:6–16, 234:6–235:8, 235:20–236:4. At trial, she reported the findings of her examination, referring to a report documenting bruising on the child’s neck, head, thigh, elbow, and knee. See id. at 240:24–242:3 & 243:25–249:19. Through Ms. Clary, the State introduced three diagram images—full body, face, and genitals—without anatomical features, that noted the location of “any type of abnormality.” See id. at 238:12–239:13 (discussing Trial Ex. 9), 245:20–246:24 (discussing Trial Ex. 10) & 250:10–22 (discussing Trial Ex. 11). Mr. Floyd unsuccessfully interposed objections to the diagrams, arguing the State “can put the report itself in which this actually just a copy of it[,]” but inquired, “Why do they need a blow-up copy of it?” Id. 239:15–240:6; see also, id. at 246:2–21 (raising “the same objection”) & 251:1–5 (same).

The child also received a genital exam. See Trial Tr. 254:10–15. Ms. Clary reported observing swollen labia and “an abrasion between the left minora and majora, basically the lips.” Id. at 254:18–23. With respect to the child’s hymen, Ms. Clary “was not able to visualize all of it



at one time[.]” which prevented her from making a determination as to whether it was all intact. Id. at 267:19–268:11. Nevertheless, she offered the opinion her observations were consistent with trauma. See id. at 267:4–6 & 270:18–271:5. Ms. Clary also testified she collected an unidentified specimen located on the child’s foot, buccal swabs for DNA from the child’s genital area, a diaper, and clothing. See id. at 242:4–243:24 & 271:22–272:8. That collection of samples failed to reveal any semen. Id. at 261:8–20 (and negative lab results) & 305:6–21.

Finally, the State asked Ms. Clary to authenticate and then offered Exhibits 12, 13, 14, and 15 as photographs of the child taken during her examination. See id. at 275:21–276:6. After being marked, the following exchange occurred:

[Trial] Court: All right. Mr. Floyd?
Mr. Floyd: No objection, Your Honor.
[Trial] Court: No objection?
Mr. Floyd: No objection Your Honor.
[Trial] Court: All right. State’s 12, 13, 14 and 15 are in evidence without objection.

Id. at 276:10–14. When asked about Exhibit 14, Ms. Clary identified the photograph as the child’s genitalia and explained:

Ms. Clary: ... That’s her labia minora in the center there, that kind of a V-shaped area pointing down. There’s a darkened area in the middle and then the redness on either side of that. And because there’s traction there, you can’t really appreciate the majora, the outer part, the lips, because I’m spreading that apart so I can better visualize the inner genitalia.

Id. at 281:6–13. Ms. Clary also described Exhibit 13 to show “her mons, her genitalia, her mons and her labia minora and then the folds in between, you know, where her legs meet her genitalia there.” Id. at 281:17–21. This Court has reviewed the images and they are graphic.



The State also called Dr. Susan Luberoff, a pediatrician, to testify as an expert in the field of child abuse pediatrics. See Trial Tr. 310:1–15 & 313:3–5. Without objection, the Court qualified Dr. Luberoff as an expert in that field. See id. at 313:6–314:16. Dr. Luberoff testified she was consulted on April 16, 2010 and examined the child and took photographs. See id. at 314:16–317:23. Dr. Luberoff cited bruising discussed by Ms. Clary as evidence of physical abuse. See id. at 321:24–322:23 & 333:1–6. With respect to the child’s genitals, Dr. Luberoff testified the child “had injury to her genital area that included a series of bruises in sort of a curved pattern over the front or the pubic area of her diaper area.” Id. at 323:5–8; see also id. at 335:7–25 (discussing “arc pattern” of bruising in pubic area). Dr. Luberoff opined further that “[s]he had injuries to her hymen, which is part of the structure of the vagina. She had injuries just under the clitoris, which were some injuries on both sides of torn tissue or torn skin.” Id. at 323:8–11. Dr. Luberoff observed an “injury to her hymen” she described as “bruising[.]” Id. at 323:11–12.

Dr. Luberoff’s testimony also suggested penetration into, not just the genitals, but the child’s vagina. She testified that in her experience “the most common type of sexual abuse that ends up being discovered to be true or that a finding is made involves digital fondling or digital penetration of a child’s genital area[.]” and that it was “extremely rare for [her] to find an injury to the child’s hymen.” Trial Tr. 340:20–341:16. Dr. Luberoff also opined that the arc pattern of bruising on the pubic area and the bruising on the hymen as “diagnostic of vaginal penetration.” See id. at 342:25–343:16 (“...And the only way to get there is by penetrating into that area. So these were penetrating injuries.”). Dr. Luberoff also identified the arc-pattern bruising on the child’s pelvic bone to represent “bite marks.” 344:22–345:10.

Dr. Luberoff also authenticated Trial Exhibits 16, 17, 18, 19, and 20 as photographs she took during her exam, all of which were admitted into evidence without objection by Trial

Counsels. See Trial Tr. 324:3–325:6. As with Ms. Clary, the State asked Dr. Luberoff to explain these photographs, which included photographs “where [Dr. Luberoff had] taken the labia and moved them to the side in order to see the internal structures.” See id. at 343:20–346:16 (discussing Trial Ex. 19). As with the photos admitted through Ms. Clary, this Court has examined them and they are graphic.

Evidence Presented at the Post-Conviction Relief Hearing

During the PCR hearing, Applicant called both of his former trial counsels and an expert witness to testify. The State called no witnesses.

Mr. Snell testified he was retained by Applicant on April 17, 2010, almost one year before the case was called to trial on March 30, 2011. See PCR Hr.’g Tr. 15:4–20. During his year-long representation of Applicant, Mr. Snell met with him “probably close to 20” times. Id. at 17:3–5. Mr. Snell explained, in his experience on other similar cases, “it would be very likely that a charge like [first degree criminal sexual conduct] would be substantially reduced by the prosecutor’s office to something closer to, you know, matching the facts of ten [years].” Id. at 20:2–9; see also id. at 40:1–25 (same). Instead, he was told by the assistant solicitor handling Applicant’s prosecution “there would not be any offers.” Id. at 20:2–5. Mr. Snell was informed of the State’s position 12 days before Applicant’s case was called to trial. Id. at 22:13–23:3. When he received the notice, he was not expecting an imminent trial. Id. at 39:17–20; see also id. at 42:3–8 (agreeing it was “certainly surprising.”).

Five days before trial, Mr. Snell received an email from the assistant solicitor with a list of 24 possible witnesses. PCR Hr.’g Tr. at 26:16–27:1 & 27:17–19 (discussing Pl.’s Ex. 1). Of these potential witnesses, Mr. Snell had spoken to six of them prior to trial. Id. at 27:23–25. Mr. Snell spoke to Det. Prestigiacomio on two occasions, but made no notes of those interviews. Id. at 28:5–



14. When asked whether he spoke to the child's aunt (and the State's first witness), Mr. Snell explained, "the folks I spoke to were only the law enforcement individuals. As far as the private folks that were the fact witnesses *I didn't speak to any of them.*" Id. at 28:23–29:3 (emphasis added). Pressed further about specific witnesses called at trial, Mr. Snell conceded they were never contacted. Mr. Snell testified neither he nor his investigator spoke with the child's mother (id. at 32:17–20), the mother's friend dispatched from the hospital to retrieve diaper evidence (compare id. at 32:21–24, with Trial Tr. 195:14–197:2), the child's grandmother (PCR Hr.'g Tr. 32:25–33:3), Ms. Clary (see id. at 33:3–8), or Dr. Luberoff. See id. at 33:22–34:25. Mr. Snell testified that Dr. Ann Able, a consulting physician, spoke with Dr. Luberoff while evaluating the case for the Applicant. Mr. Snell was forced to correct himself to explain that the consultant simply reviewed Dr. Luberoff's report and adopted her findings. See id.; see also id. at 35:1–36:5 (equivocating further, then conceding "I don't have a recollection of her saying she went back and had a discussion regarding the merits of the situation."). In fact, Dr. Able, the consulting physician that reported to Mr. Snell, agreed with Dr. Luberoff's opinion, practiced medicine in the same physician practice as Dr. Luberoff. Id. at 82:11–16. Mr. Snell testified he had a "very brief" conversation with LCSD investigator Shelby Derrick one year before trial. Id. at 36:6–13. He had no recollection of LCSD crime scene investigator Troy Crump (id. at 36:18–19), likely because Mr. Crump was not identified on the witness list provided by the State. See id. at 36:20–37:2 (discussing his absence from Pl.'s Ex. 1). He had no recollection of whether he spoke to SLED's DNA analyst, Adrienne Riley-Hefney, one of just two witnesses he cross-examined at trial. Compare id. at 33:9–19, with Trial Tr. 306:13–308:21. He also had no notes or recollection of LCSD evidence custodians, Beth Harmon and Candy Kyzer. See PCR Hr.'g Tr. at 37:3–21.



In short, Mr. Snell's testimony evidenced almost no pre-trial investigation into what State witnesses might say at trial. See id. at 37:22–25 (“Q. Now, I want you to look at page 3 of the trial transcript. The people I have just read off to you are the people that testified for the State in the case, correct? A. Yes, sir.”); see also id. 38:1–25 (“Q. And you had no notes prior to the trial of any interview with any of these people” A. Correct. Yes, sir.”). Nevertheless, Mr. Snell “didn’t see a need for a continuance.” Id. at 78:14–19.

Although Mr. Snell had access to several possible experts to aid Applicant’s defense, no expert was presented at trial. Applicant’s family paid to retain registered nurse Cindy Hurley, but she was not called to testify because Dr. Luberoff “said the same things that Ms. Hurley would have said[,]” namely that the child suffered no life-threatening injuries and that the vaginal injuries were not the type that would have been inflicted by a penis. See Hr.’g Tr. 52:2–53:25. Mr. Snell explained, “a big part of [Ms. Hurley’s] review was we talked about diaper changes and how diaper changes were conducted and made since the child’s injuries came through or from a diaper change.” Id. at 54:1–4. Asked whether this formed the basis for Applicant’s defense, Mr. Snell testified, “the defense in this was that it was not a [sic] intentional sexual act or an intentional assault in the genital area of the child. Id. at 54:5–8.

Mr. Snell also consulted with Dr. Edward Friedlander, but did not retain him. Hr.’g Tr. 66:25–67:24. Dr. Friedlander reviewed records provided by Mr. Snell and spoke with him on the telephone. Dr. Friedlander is a medical doctor who practices and teaches pathology¹ at Mississippi State’s medical university. See PCR Hr.’g Tr. 125:15–129:15. His training includes conducting sexual assault examinations and he has been qualified as a testifying expert by state and federal

¹ Dr. Friedlander explained the field of pathology as the study of injury and disease and a “bridge discipline between basic medical science and clinical medicine.” PCR Hr.’g Tr. At 129:16–25.

courts on approximately 50 occasions. Id. at 130:6–131:21. Dr. Friedlander’s work as an expert witness has earned him the Missouri Bar Association’s highest non-lawyer recognition for *pro bono* work. See id. at 141:21–142:4. This Court found Dr. Friedlander qualified to offer opinions in the field of pathology. Id. at 140:13–17.

After reviewing the records prior to the trial, Dr. Friedlander sent Mr. Snell a letter indicating this case bore the indicia of a man who became frustrated with having to care for another man’s child and “[w]hile changing a diaper loses control of himself and takes out his anger physically on the child.” See id. at 67:18–24 & 68:19–69:8. However, in Dr. Friedlander’s view the State’s case summary was “in error” because “[t]here are a pair of visual abrasions of the vulva which is not the vagina which are quite consistent with the defendant’s account of having gripped the child here forcefully while he was out of control when he was trying to clean her.” Id. at 69:8–16 (discussing Pl.’s Ex. 7). Mr. Snell conceded this assessment was helpful to Applicant. (id. at 69:23–25) It was consistent with the written statement and trial testimony of Applicant, that he was frustrated because the child defecated and feces had gotten between the lips of her vagina (id. at 70:23–71:19). See id. at 142:12–143:10. Dr. Friedlander agreed touching to clean feces off the genitals is a legitimate and medically necessary act. Id. at 147:5–13; see also id. at 155:8–12 (describing it as part of a child’s “basic medical care”). Dr. Friedlander’s medical opinion was consistent with what Applicant told police and the jury, which, if believed, would have entitled Applicant to a medical-touching defense.

Mr. Snell was not clear as to why Dr. Friedlander was not retained. See id. at 72:22–73:17 (claiming Dr. Friedlander “would have had a big retainer” but failing to recall how much). After suggesting Applicant’s story changed over time, Mr. Snell agreed that Applicant’s version of events mirrored his statement to police “weeks or months” before trial, but he still did not contact

Dr. Friedlander or Ms. Hurley to testify. See id. at 74:8–75:22. Regardless of reason, there is no dispute that no medical expert testified at trial to explain that the injuries to and near the child’s vagina were consistent with a diaper change. See id. at 73:18–25.

Mr. Harpootlian: And that was the defense? The defense was a rough diaper change basically?

Mr. Snell: Rough diaper change. Yes, sir.

Mr. Harpootlian: Okay. Dr. Friedlander’s opinion was consistent with that?

Mr. Snell: It was.

Id. at 74:1–6.

During the PCR hearing, Dr. Friedlander testified concerning Trial Exhibits 19 and 20, which he explained were superior images to the ones provided when he reached his initial opinion. See PCR Hr.’g Tr. 147:16–148:3. After reviewing these photos (admitted here as Pl.’s Exs. 5–10), Dr. Friedlander testified “[i]t’s clear what’s happened.” Id. at 148:4–6; see also id. at 163:16–164:9 (same). Using the State’s trial exhibits to illustrate his testimony, Dr. Friedlander pointed to two “little scratch[es]” on the vulva and a bruise on the hymen. See id. at 149:3–24 (discussing Trial Ex. 19/Pl.’s Ex. 5). Dr. Friedlander also highlighted “three little bruises consistent with finger impressions[,]” on the child’s pubic area. See id. at 150:2–8 (discussing Trial Ex. 20/Pl.’s Ex. 6). While illustrating with his hands, Dr. Friedlander explained:

Mr. Harpootlian: Are those two injuries that you see in those two photos consistent or inconsistent with your position that these injuries occurred while he was attempting to remove feces from the lips of this little girl’s vagina?

Dr. Friedlander: It’s a perfect match. He’s holding her down too hard and he’s opening the lips here so he can with the other hand remove the feces and this is scratching probably by his nails. These are two parts of the nails where the nails would rub up against and then the impression only on the back half, that’s



where the finger is going to strike [the hymen]. It's a perfect match.

Id. at 150:9–19. While the hymen was bruised, it was not penetrated. Id. at 174:10–15 (“A. Okay. The vulva was penetrated. The hymen is not penetrated.”). Likewise, there is no evidence of intrusion into the vagina. Id. at 178:13–15. Dr. Friedlander also testified that the size of the abrasions on the child were consistent with a scratch by an adult fingernail. See id. at 150:20–151:3. Finally, Dr. Friedlander challenged the objectivity of Dr. Luberoff’s testimony that the bruises on the child’s pubic area, which he identified as finger impressions, were bite marks when a “good fit” for the injuries was what Applicant had described. See id. at 158:19–159:15; see also id. at 171:23–171:9 (using photo exhibit to note the absence of markings consistent with a bite). He was also critical of Dr. Luberoff’s description of anatomy of the child’s genitals, explaining “[i]t’s sloppy usage to call the vulva the vagina” because, while the vulva is an exterior structure to the genitals, the vagina is located behind the hymen. See id. at 144:25–145:13 (explaining, “it’s common speech but it’s not scientific.”).

As for the child’s other injuries, Dr. Friedlander believed the child “was manhandled[,]” which he conveyed to Mr. Snell prior to trial and again to this Court. See PCR Hr.’g Tr. 151:15–22. Dr. Friedlander was available and willing to come to South Carolina to testify and quoted Mr. Snell the modest fee of \$1,000 because he believed Applicant had been too rough with the child. See id. at 156:9–157:12. Nevertheless, Dr. Friedlander was disappointed when Mr. Snell failed to contact him again because he believed Applicant “was over charged[,]” and believed he could help explain “what really happened[,]” See id. at 158:5–18.

The day before Applicant’s trial began, Applicant’s mother gave Mr. Snell \$5,000 to retain additional counsel. PCR Hr.’g Tr. 44:20–45:1. A memorandum by Mr. Snell in his file dated March 29, 3:22 p.m. recorded his contemporaneous observation that Applicant’s mother “did not



want to hurt [his] feelings” but “wondered if I would have co-counsel for [Applicant’s] trial.” See id. at 45:5–48:25 (discussing and admitting Pl.’s Ex. 2 into evidence) & 49:16–50:15 (publishing memo). After Applicant’s mother left, Mr. Snell contacted Mr. Floyd who agreed “to help”, whereupon Mr. Snell obtained a certified check from applicant’s mother and delivered it and a copy of all discovery and reports to Mr. Floyd. Id. at 50:9–13. At the time Mr. Floyd was retained—between 12 and 48 hours before trial—he had not met Applicant. Id. at 50:16–24, 51:13–18 (Mr. Floyd’s first meeting with applicant was 12 hours before trial...) & 187:22–23 (and Mr. Floyd agreeing with that timeline); but see id. at 61:18–62:8 (second guessing his recollection, but agreeing Mr. Floyd was retained no more than 48 hours before trial).

Mr. Floyd is an experienced criminal defense lawyer with 42 years’ experience during which he has tried “hundreds” of criminal cases. See PCR Hr.’g Tr. 185:23–186:4 & 186:25–187:5. Mr. Floyd testified that when he agreed to assist Mr. Snell, he planned to “just help him through the trial[,]” and not serve as primary counsel. Id. at 188:4–16. Prior to jury selection, Mr. Floyd had not spoken with any of the witnesses: “all I had was his file. Whatever he provided me, I reviewed that.” Id. at 188:17–22. Mr. Floyd testified that when he handles a case, his practice is to speak with the witnesses. Id. at 188:23–189:7. With respect to lay witnesses, “[y]ou *always* want to try to make contact with them and see what they’ve got to say.” Id. at 189:12–15 (emphasis added). Notwithstanding his limited preparation, Mr. Floyd handled the pre-trial Jackson v. Denno, 378 U.S. 368 (1964) hearing, cross-examined 11 of 13 State witnesses, and delivered closing argument. Id. at 190:2–191:3. When asked how his trial role expanded, Mr. Floyd explained that during trial Mr. Snell “just asked me to continue with the cross examinations and I did.” PCR Hr.’g Tr. 191:4–192:1.



At trial Mr. Floyd understood genital penetration for a medically recognized reason gave Applicant a defense to the criminal sexual conduct charge, but he did not ask Mr. Snell whether he retained an expert to address the penetration issue. PCR Hr.'g Tr. 193:4-10. In fact, Mr. Floyd was so cognizant of the import of the factual issue, he intentionally saved this question as his last for Dr. Luberoff. See id. at 193:11-21 ("Q. And it was your defense, right? A. Mm-hmm. It was the main portion of it. Yes."). Mr. Floyd first became aware of Dr. Friedlander's opinion during the PCR hearing:

Mr. Harpootlian: Okay. Now, you have heard Dr. Friedlander's testimony this morning. Did that testimony corroborate your defense?
[...]

Mr. Floyd: Yes.

Mr. Harpootlian: That is that it would be medically necessary to penetrate the vulva of a 15 month old to clean fecal matter from the lips of the vagina, right?

Mr. Floyd: Correct.

Mr. Harpootlian: And that's what Mr. Williams had said in his statement given to the police the day of his arrest, correct?

Mr. Floyd: Correct.

Mr. Harpootlian: So that explanation was consistent -- inconsistent with what Dr. Luberoff said - but consistent with what Dr. Friedlander said, correct?

Mr. Floyd: Correct.

Mr. Harpootlian: So if you had been made aware of Dr. Friedlander -- Did you ever see a written report from Dr. Friedlander?

Mr. Floyd: No.

Mr. Harpootlian: That letter that we have introduced into evidence, you ever seen that before?

Mr. Floyd: No. I don't think I ever saw it.



Mr. Harpootlian: Okay. So Mr. Snell never related to you what you heard here this morning?

Mr. Floyd: Correct.

Id. at 193:22–194:23. Had Mr. Floyd known Dr. Friedlander was available to corroborate Applicant’s defense, he would have brought him to trial to offer what he characterized as “a crucial piece of testimony.” Id. at 197:3–198:3. Instead, Applicant went to trial with no expert to counter Dr. Luberoff’s testimony. Id. at 198:10–12.

Finally, having crossed examined both witnesses through which the State obtained the admission of graphic photos of the child’s genitals, Mr. Floyd conceded, “... I didn’t have any major trial strategy to not object.” PCR Hr.’g Tr. 215:1–23; cf. id. at 213:25–214:22 (explaining he objected to the silhouette images because they were “[t]oo graphic.”).

Having carefully examined the record in this matter, the Court now turns to the law.

CONCLUSIONS OF LAW

The Sixth Amendment’s right to counsel protects the fundamental right to a fair trial. Strickland, 466 U.S. at 684 (citing Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963)). The Constitutional guarantee of a fair trial “is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.” Id. The right to counsel is “crucial” to the adversarial system because it is counsel’s skill and knowledge that equips a defendant with the tools to meet and defend the government’s claims. Id. Because of the import counsel plays in a fair trial, the Sixth Amendment guarantees, not simply the presence of a lawyer, but “effective assistance” by a lawyer loyal to the client’s cause, who keeps the client informed, and who brings to bear “such skill and knowledge as will render the trial a reliable adversarial

testing process.” Id. at 688. This Application implicates the fundamental right to the effective assistance of counsel in three ways.

I. Trial preparation.

Applicant alleges Trial Counsels’ “lack of trial preparation, including the failure to interview virtually any State witness or to comprehend and appreciate facts that entitled Applicant to a legal defense” falls below the constitutional guarantee of effective assistance within the meaning of Strickland and constitutes “a total failure to function as a meaningful State adversary” as contemplated by Chronic. 2nd Am. PCR Appl. ¶ 11.c. The Court agrees and holds that Mr. Snell’s lack of preparation fundamentally undermined Applicant’s trial in a manner that is actually and presumptively prejudicial. The Court reaches this conclusion for three reasons.

First, a defense counsel has a “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691. Federal courts have construed this obligation to require an “appropriate factual and legal inquir[y] and to allow adequate time for trial preparation and development of defense strategies.” Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir. 1998) (citing Sneed v. Smith, 670 F.2d 1348, 1353 (4th Cir. 1982); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968)). “Trial counsel have an obligation to investigate possible methods for impeaching a prosecution witness, and failure to do so may constitute ineffective assistance of counsel.” Tucker v. Ozmint, 350 F.3d 433, 444 (4th Cir. 2003) (citing Huffington, 140 F.3d at 580; Hoots v. Allsbrook, 785 F.2d 1214, 1221 (4th Cir. 1986)).² The United States Court of Appeals for the Fourth Circuit has defined the parameters of a successful failure-to-investigate allegation by explaining:

² The exception to counsel’s investigation obligation is “where counsel is familiar with the substance of their testimony.” Huffington, 140 F.3d at 580 (collecting cases).

The reasonableness of the investigation depends, in part, upon the importance of the witness to the prosecution's case: "Although a lawyer's failure to investigate a witness who has been identified as crucial may indicate an inadequate investigation, the failure to investigate everyone whose name happens to be mentioned by the defendant does not suggest ineffective assistance." Huffington, 140 F.3d at 580. As we noted in Huffington, most of the witnesses whom federal courts have deemed "crucial" were "alibi witnesses or eyewitnesses critical to the determination of guilt," such as self-defense witnesses. Id.

Tucker, 350 F.3d at 444 (emphasis added). Thus, while counsel's failure to investigate every possible witness might be excused, failure to investigate all witnesses bearing on guilt or innocence is objectively unreasonable.

The Court holds Mr. Snell was objectively unreasonable in failing to interview, or attempting to interview, any State witness other than the lead detective. Testimony of Ms. Clary and Dr. Luberoff was unquestionably critical to Applicant's conviction, but Mr. Snell made no effort to contact them. Likewise, Mr. Snell recognized the timeline placing the child in Applicant's care was critical to establishing his responsibility for the injuries (see PCR Hr.'g Tr. 107:8–108:6 & 229:3–21), but no lay witness was contacted to test the veracity of these claims or explore avenues for impeachment. Thus, Mr. Snell failed to act on the import ascribed by his own assessment when he failed to interview any lay witnesses. See id. at 117:4–20. Finally, although Mr. Floyd repeatedly challenged the State's efforts to establish a chain of custody for a dirty diaper collected by a friend of the child's mother (see, e.g., Trial Tr. 418:16–25; PCR Hr.'g Tr. 229:22–230:17), he lacked sufficient information to do so having had no opportunity to interview the witnesses prior to mounting that challenge. Notably, but for the unusual circumstances whereby he came to handle the bulk of Applicant's trial work on the eve of trial, Mr. Floyd's practice is to conduct these interviews prior to trial. In short, the facts here indicate that Mr. Snell's failure to interview *all* of these witnesses abdicated counsel's responsibility to investigate critical witnesses determinative of guilt or innocence.



Second, Mr. Snell's representation was deficient because the lawyer who prepared the case for trial labored under a misapprehension of law and fact as to what constituted a legal defense. S.C. Code Ann. § 16-3-655 provides in part that “[a] person is guilty of criminal sexual conduct with a minor in the first degree if: (1) the actor engages in sexual battery with a victim who is less than eleven years of age[.]” S.C. Code Ann. § 16-3-655(A)(1). A “sexual battery” means “sexual intercourse, cunnilingus, fellatio, anal intercourse, or *any intrusion, however slight*, of any part of a person’s body or of any object *into the genital or anal openings* of another person’s body, *except* when such intrusion is accomplished for *medically recognized treatment* or diagnostic purposes.” S.C. Code Ann. § 16-3-651(h) (emphasis added). The statute does not require sexual gratification nor does it require *vaginal* penetration. See State v. Morgan, 352 S.C. 359, 365–73, 574 S.E.2d 203, 206–10 (Ct. App. 2002) (construing the inclusion of cunnilingus in the statute and holding “Penetration of the vagina is NOT necessary or required.” (emphasis original)).

Mr. Snell repeatedly sought to highlight the lack of vaginal penetration, a fact of no legal consequence to Applicant’s defense. For example, when Dr. Friedlander was asked why he was not retained, he recounted a 15-minute conversation with Mr. Snell he described as “perplexing” in which Mr. Snell appears to have misapprehended the utility of Dr. Friedlander’s opinion while probing for an opinion that, if given, was of no legal utility. See PCR Hr.’g Tr. 152:4–11.

Mr. Harpootlian: Why was it perplexing?

Dr. Friedlander: After we got - after I made it clear to him that we could not think of any way to defend the idea that this child was manhandled, then he starts trying to explain the law to me.

Mr. Harpootlian: Right. And?

Dr. Friedlander: I don’t really understand the law, but he was saying to me that if -- He was trying to get me to say that there was some way that this could not have been done with a, uh -- He was - he was trying to get me to say that it was not done by



penetration of the finger. He said that was there any way that I could say that the finger was in the vulva and I really couldn't.

Mr. Harpootlian: He was trying to get you to back off the position that there was a penetration of the genitalia?

Dr. Friedlander: That is what I was trying to say.

Mr. Harpootlian: Right. And you said clearly there was penetration of the vulva?

Dr. Friedlander: Yes.

Mr. Harpootlian: Okay.

Dr. Friedlander: I couldn't do that and he was trying to explain to me about the law said this and the law said that and I didn't really understand it.

Id. at 153:15–154:12. Mr. Snell never asked Dr. Friedlander whether the removal of fecal matter from the child's vaginal area was a medically recognized treatment. Id. at 155:4–7.

Similarly, when Mr. Snell moved the Trial Court for a directed verdict, he argued a lack of vaginal penetration. See Hr.'g Tr. 448:19–450:22. Citing the "medical testimony" offered by the State, Mr. Snell argued, "there's been no evidence presented of any penetration in to the opening." Id. at 448:21–449:14. When the Trial Court sought clarification, Mr. Snell first explained the "genital opening[,]," but then proceeded to argue, "[t]he testimony is that it was a bruised hymen and the hymen sits on the outside of the vaginal canal, which would be the genital opening." Id. at 449:18–23. When the Trial Court asked, "What are you defining as the genital opening?", Mr. Snell responded, "[t]he vagina." Id. at 449:25–450:2. In denying Applicant's motion, Mr. Snell, correctly, cited Morgan for the proposition that the criminal sexual conduct statute "defines the genital organs not to be only the vagina, and it held that vaginal penetration is not required to be convicted of criminal sexual conduct with a minor." See id. at 456:21–459:1.



The record is uncontradicted that Mr. Snell's apparent view at trial was neither factually nor legally accurate. See, e.g., PCR Hr.'g Tr. 235:13-17 (Mr. Floyd conceding, "That's not accurate.") & 236:2-9 ("It's inaccurate. It's an inaccurate argument."). During the PCR hearing, Mr. Snell correctly defined a sexual battery defined as "any intrusion into a private parts of the *genitalia* for an unrecognized medial purpose." Hr.'g Tr. 72:4-7 (emphasis added). He also agreed there is a statutory defense for a diaper change:

Mr. Harpootlian: An unrecognized medical purpose?

Mr. Snell: Right. So we have a diaper change which certainly can be a medical purpose, a legitimate reason for any adult to touch a child's genitalia. The child had injuries. The State charged him with criminal sexual conduct even though I don't believe there was anything sexual or any evidence that it was sexual.

Mr. Harpootlian: Didn't have to be, did it?

Mr. Snell: According to the State's version it did not.

Mr. Harpootlian: Well --

Mr. Snell: Read the statute. There is no requirement of --

Mr. Harpootlian: But if there was a medical reason to have an intrusion, it would have been a defense?

Mr. Snell: Exactly. Such as a diaper change.

Id. at 72:8-21; see also id. at 77:6-78:3 (same). The record before the Court does not demonstrate that this more recent (and accurate) understanding guided Mr. Snell's representation while preparing Applicant's case and representing him at trial. During cross-examination by the Assistant Attorney General, Mr. Snell stated that "basically a lot of folks got an anatomy lesson" from Dr. Luberoff during Applicant's trial. See PCR Hr.'g Tr. 108:16-109:9. To provide an effective defense, Mr. Snell should have armed himself with this knowledge *before* trial.



The Court also holds that the foregoing deficiencies—a failure to investigate, misunderstanding of the penetration requirement and failure to appreciate the significance of the medically recognized treatment defense—were prejudicial to Applicant’s defense within the meaning of Strickland. While speculation or conjecture are never sufficient to substantiate that deficient performance was prejudicial, Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995). Here, there is a convincing record that the lawyer charged with preparing Applicant’s case failed to conduct any meaningful investigation and misapprehended the relevant legal inquiry. This resulted in a reliance on inaccurate factual and legal claims to the exclusion of a potentially meritorious defense. Prejudice attaches when counsel’s performance “has adversely affected the defense.” Huffington, 140 F.3d at 578. The Court finds that Applicant’s defense was adversely affected. In the parlance of Strickland, there is a reasonable probability here that, but for counsel’s errors, the outcome of Applicant’s trial might have been different.

Third, in addition to the foregoing, the Court holds that Mr. Snell’s overall lack of preparation and legal understanding is presumptively prejudicial to Applicant. In Cronic, the Supreme Court recognized an ineffective assistance claim based on an overall breakdown of the guarantee to counsel rather than a specific omission. The Court identified three situations where the presumption appropriate. First, prejudice is presumed when the defendant is completely denied counsel “at a critical stage of his trial.” Cronic, 466 U.S. at 659. Second, prejudice is presumed if there is a constructive denial of counsel. Id. Constructive denial occurs when counsel “fails to subject the prosecution’s case to meaningful adversarial testing,” making “the adversary process itself presumptively unreliable.” Id. Third, the Court identified instances “when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate



without inquiry into the actual conduct of the trial.” Id. at 659–60 (citing Powell, 287 U.S. 45, as illustrative).

Applicant’s case here warrants a presumption of prejudice. This conclusion is supported by a record indicating that while Mr. Floyd is a very seasoned and capable lawyer, he tried the bulk of Applicant’s case with no more than one-day’s preparation. Mr. Snell explained Mr. Floyd’s role as “the family want[ing] someone older to appear in front of the jury[.]” but that explanation is incongruous with the facts. See PCR Hr.’g Tr. 64:17–25. Of the 13 witnesses called by the State, all but two were cross-examined by a lawyer with only a day’s involvement in the case. See id. at 65:1–18 & 66:5–22. By Mr. Floyd’s description, his expansive role at trial appears to have occurred by happenstance. See id. at 191:4–192:1. The Court concludes these facts implicate Cronic’s third situation where “the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” Cronic, 466 U.S. at 659–60.

With respect to Mr. Snell’s involvement, it implicates Cronic’s second situation: the constructive denial of counsel that occurs when counsel “fails to subject the prosecution’s case to meaningful adversarial testing[.]” Cronic, 466 U.S. at 659. This conclusion is supported by Mr. Snell’s failure to investigate and misapprehension of the facts and law discussed above.

This lack of adversarial testing is evidenced in other ways. For instance, when the State offered Ms. Clary as an expert without having given the notice required by Rule 5 of the Criminal Rules of Procedure, Mr. Snell failed to object, notwithstanding his awareness of the State’s Rule 5 obligations. See Hr.’g Tr. 56:3–57:18.

Mr. Harpootlian: So and you had been in this case for a year and you were not aware that she was going to be an expert witness until not even that day, until as you’re sitting in the courtroom?



Mr. Snell: Correct. Now, I would have – we would have known that she was – we would have had those reports provided. We knew that she was a potential expert. Excuse me. Potential witness.

Mr. Harpootlian: Correct.

Mr. Snell: But as far as the specific questions or things that she would be asked by the prosecutor I did not until she was called as a witness.

Mr. Harpootlian: And you understand that under Rule 5 you would have had a perfectly good objection to ask her testimony not be allowed?

Mr. Snell: As far as expert opinion testimony, yes, sir.

Id. at 57:19–58:9; see also id. at 62:9–23. Asked to identify a strategic decision supporting the decision *not* to object to Ms. Clary's expert designation, neither Mr. Snell nor Mr. Floyd were able to provide one. See id. at 58:24–59:5 & 205:24–207:15. Not only did Ms. Clary testify as an expert in forensic nurse examination, but she was the witness through which the State sought and obtained the admission of photographs of the child's vagina into evidence. See id. at 60:7–61:16 (discussing Trial Exs. 16–20, remarked as Pl.'s Exs. 3–6).

Likewise, neither of Applicant's trial counsels raised objection to Dr. Luberoff's testimony who, although the State identified her as a testifying expert, was identified for the first time just five days before trial. See id. at 63:16–23. Rule 5 requires disclosure of physical examinations and scientific tests or experiments within 30 days of a request and authorizes the court to exclude the testimony of undisclosed witnesses in violation of the rule. See Rule 5(a)(1)(D), (a)(3) & (e)(4), SCRCrimP. Mr. Snell agreed that since he filed a Rule 5 motion soon after Applicant was arrested, the State's disclosure of Dr. Luberoff five days before trial was "late." See id. at 64:4–12. Mr. Snell also agreed Dr. Luberoff's untimely identification would have been grounds to seek a continuance. See id. at 64:13–16. When coupled with the other significant evidence detailed

above, the Court concludes Mr. Snell failed to provide Applicant with the adversarial representation the Constitution requires such that prejudice must be presumed.

In summary, the Court holds that Mr. Snell was ineffective in failing to investigate this case and in misunderstanding law and facts that would have provided Applicant a defense. The Court further holds that Strickland prejudice attaches to these deficiencies.

II. Failure to call expert.

Applicant alleged that Trial Counsels' failure "to call an expert witness or witnesses to testify that the victim's injuries were consistent with Applicant's statement to police and testimony at trial was ineffective because it would have constituted a 'medically recognized treatment' ... and thus constituted a legal defense to the charge of criminal sexual conduct with a minor." 2nd Am. PCR Appl. ¶ 11.b. The Court agrees and holds Trial Counsels were ineffective in failing to call an available medical expert to offer testimony the child's injuries were consistent with a rough diaper change. Mr. Snell's decision not to retain Dr. Friedlander was objectively not reasonable because it denied Applicant a defense. As discussed above, Mr. Snell's belief Dr. Friedlander's testimony was not helpful overlooked that it provided the factual predicate to a legal defense. Dr. Friedlander was available and believed he could help Applicant by explaining in his view what happened. This Court found Dr. Friedlander to offer credible alternative theory of how the child sustained the genital injuries during a diaper change—the only person to offer such a view. Mr. Snell's decision is also problematic because it ignored his client's statements about what happened. See Strickland, 466 U.S. at 691 (the reasonableness of counsel's actions may be determined or influenced by defendant's own statements or actions). Nor can Mr. Snell's decision not to retain Dr. Friedlander be justified by a vigorous cross-examination attacking the accuracy of the State's expert evidence (cf. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008)) because



this challenge was never mounted at trial. In the Court's view, Mr. Snell's failure to present this evidence at trial was not objectively reasonable and was ineffective.

The absence of Dr. Friedlander's testimony was prejudicial to Applicant. "A PCR applicant cannot show he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005). Here, the Court holds the failure to call Dr. Friedlander prejudiced Applicant's defense for two reasons.

First, Dr. Friedlander's testimony was critical because it would have given the jury a choice between Dr. Luberoff's testimony and another opinion that corroborated Applicant's statements and testimony. Mr. Floyd agreed that since Applicant's defense (in his mind) was a medically appropriate diaper change, and Dr. Friedlander's testimony demonstrated how the child's injuries corresponded to that claim, he "would have emphasized that [testimony]" had he known about Dr. Friedlander because doing so would have created a dispute of fact. See PCR Hr.'g Tr. 218:10-25. Instead, the only medical testimony on which the jury could rely was that of Dr. Luberoff, which suggested the 15-month old child might have been digitally penetrated and bitten on the pelvic bone. This Court found Dr. Friedlander's explanation as to why Dr. Luberoff was wrong about penetration and the bite mark to be credible and persuasive. A jury should have been afforded an opportunity to do the same.

Second, the record indicates the jury *did* have serious questions about Dr. Luberoff's testimony and was struggling to apply it to the law of criminal sexual conduct. During deliberations, the jury sent the Trial Court a note asking whether there was a transcript of Dr. Luberoff's testimony and for clarification concerning the law of criminal sexual conduct. See PCR Hr.'g Tr. 201:8-18. The jury note is persuasive evidence of a serious debate concerning the



interplay between Dr. Luberoff's testimony concerning penetration and the law. See id. at 203:11–13 (“Q. So obviously the intricacies of the law and penetration were in the jury’s mind, correct? A. Yes.”). Put differently, there is a reasonable likelihood the jury could have come to a different conclusion had Dr. Friedlander testified.

Therefore, the Court holds that Trial Counsel was ineffective for failing to call Dr. Friedlander at trial and that Applicant’s defense was prejudiced because of this omission.

III. Failure to object to photos.

Finally, Applicant argues Trial Counsels' failure to contemporaneously object to “photographs that were not relevant to any matter in dispute[,] ... inflame[ed] the passions and prejudices of the jury, and invited a verdict based on factors other than the admissible evidence.” 2nd Am. PCR Appl. ¶ 11.a. The Court agrees and holds Trial Counsels were ineffective in failing to make a contemporaneous objection to graphic images of the child’s genitals.

A timely objection is a necessary predicate to the exclusion of evidence. When Applicant challenged the admission of the diagrams and the photos on appeal, the Court of Appeals declined to consider the photos, explaining:

Williams only objected to the admission of the anatomical diagram enlargements (State’s Exhibits 9, 10, and 11). He did not object to the admission of any of the photographs. He contends that any objection to the photographs was futile in light of the trial court’s ruling on the diagrams. We disagree. The photographs and anatomical diagrams are not the same thing. He objected to each of the diagrams. He needed to object to at least the first picture to be able to argue that further objections would be futile. *Therefore, the admission of the photographs is not preserved for our review because Williams did not object to their admission.*

As to the diagrams, the nurse used them to point out Victim’s injuries. Accordingly, they were relevant and corroborated her testimony. They were not graphic at all; they were simply black and white diagrams of a child’s head, body, and vagina. They did not have any prejudicial effect. Therefore, the trial court did not err in admitting the diagrams.

Williams, 405 S.C. at 281–82, 747 S.E.2d at 204 (emphasis added).

Failure to make a timely objection is routinely held as ineffective assistance unless trial counsel can point to a valid trial strategy for failing to object. See, e.g., Stone v. State, 419 S.C. 370, 798 S.E.2d 561, 570 (2017) (rejecting various explanations by trial counsel as failing “to articulate any valid strategic reason for not objecting to important victim impact testimony the trial court had the discretion to exclude.”); Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (trial counsel articulated valid strategy); Dawkins v. State, 346 S.C. 151, 156–57, 551 S.E.2d 260, 263 (2001) (explanation that trial counsel did not want to upset jury by objecting was not a valid strategy where evidence improperly bolstered victim’s testimony); Vail v. State, 402 S.C. 77, 88–89, 738 S.E.2d 503, 509 (Ct. App. 2013) (admission of inadmissible evidence elsewhere was not a legitimate reason not to object). When trial counsel acknowledges there was no strategy motivating a failure to object, the presumption of adequate representation on that basis disappears. See Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010). As Mr. Floyd candidly admitted, there was no strategy here even though he harbored real concerns about the images offered by the State. See PCR Hr.’g Tr. 233:1–16 (raising concerns the images were “much more vivid red[]” in the form shown to the jury, but that he “had no real trial strategy to keep them out.”). This is not to suggest a timely objection would necessarily result in exclusion; but “[w]ithout an objection, however, there can be no debate; and the trial court has no opportunity to exercise its discretion.” Stone, 419 S.C. 370, 798 S.E.2d at 569–70. Accordingly, the Court holds Trial Counsels were deficient in failing to object to the admission of graphic images of the 15-month old child’s genitalia.

The Court holds this deficiency was also prejudicial. To meet Strickland’s requirement of a reasonable probability of a different outcome, this Court must find it possible the photographs invited a decision from the jury on an improper basis. The relevance, materiality and admissibility



of photographs fall within the sound discretion of a trial court, not subject to reversal unless admission of the evidence prejudices the defendant based on a "reasonable probability" the verdict was influenced by the evidence. State v. Gore, 408 S.C. 237, 249, 758 S.E.2d 717, 723 (Ct. App. 2014); State v. Kirton, 381 S.C. 7, 24, 671 S.E.2d 107, 115 (Ct. App. 2008). Rule 403, SCRE permits exclusion of relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice[.]" "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). The Court concludes there was reason to exclude the photographs of the child's genitals and the photos may have provoked the jury to decide this case on an improper basis. While the Court is familiar with decisions authorizing autopsy photos to go to the jury, including autopsy photos of children, those decisions turn on the "necessity" to depict a fact in dispute. See, e.g., State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 608 (Ct. App. 2008) ("Furthermore, the photographs were necessary to depict the severity of the bruises and the resulting trauma, which was inconsistent with accidental injury or play."). The State presented testimony from two medical examiners who observed scratches and bruising on the child's genitals. This testimony was bolstered by the admission of the diagrams the Court of Appeals held to have been properly admitted. The severity of any injury to the child's genitals was irrelevant to the criminal sexual conduct charge because all the State had to prove was penetration. Thus, what mattered was the existence of evidence of penetration ever so slight, not a graphic display of the injuries.

This Court cannot know how either the Trial Court or Court of Appeals might have responded to a timely objection. So too, is it mindful that "a trial court is not required to exclude relevant evidence simply because it is unpleasant or offensive." Williams, 405 S.C. at 281, 747

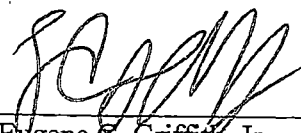


S.E.2d at 203-04. Nevertheless, the Court has reviewed the images in question and has grave concerns with their probative value and whether the jury could set aside any animus that might have been engendered toward Applicant after reviewing the images and refocus its attention on the facts in dispute. For this reason, the Court holds that Trial Counsels' failure to object to the images was prejudicial to Applicant.

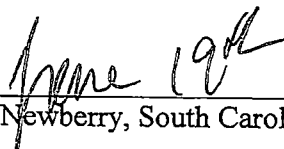
Because this Court does not view its role as one to second-guess counsel's strategic choices, it has reviewed the record and Trial Counsels' decisions with the utmost deference. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Even affording both Trial Counsels all due deference, relief is warranted here.

Applicant's representation labored under serious defects that do not fall within the realm of sound trial strategy or the exercise of professional judgment. For these reasons, Applicant's request for post-conviction relief is **GRANTED**. Applicant's convictions for are unlawful neglect of a child and criminal sexual conduct in the first are **VACATED**.

AND IT IS SO ORDERED.



Eugene C. Griffith, Jr.
Circuit Court Judge


_____, 2017.
Newberry, South Carolina.

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Lance Austin Williams v. The State of South Carolina
Case No.: 2017-001877

EXHIBIT B

(Petitioner's Rule 59(e) motion, June 29, 2017)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
Lance Austin Williams,	)	Case No.: 2014-CP-32-4769
	)	
Petitioner,	)	
v.	)	MOTION TO ALTER OR AMEND
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 31, 2014, amended on October 25, 2016, and amended by motion following the PCR Hearing. An evidentiary hearing into the matter was convened on January 30-31, 2017, at the Lexington County Courthouse. After receipt of proposed orders from both parties, the Honorable Eugene Griffith, Jr. granted relief in an order filed on June 19, 2017, and served upon both parties via email on that same date. Pursuant to Rule 59(e), SCRCP, Respondent requests this Court reconsider its ruling, and amend the Order to reverse the grant of relief. Specifically, Respondent submits the Order should be altered and amended as: the order relies on allegations that were not included in Applicant's amended PCR application and not properly before the Court; the Order omits evidence and arguments presented to the Court that directly contradict the resulting findings made by this Court; and, the Court misapplies legal precedent and Rule 5 in reaching its holdings. In support of its position, Respondent respectfully submits:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. In July 2010, the Lexington

County Grand Jury indicted Applicant for unlawful neglect of a child (2010-GS-32-1860) and criminal sexual conduct (CSC) with a minor, first degree (2010-GS-32-1861). James R. Snell, Jr., Esquire, and H. Wayne Floyd, Esquire, represented Applicant. On March 30-April 1, 2011, Applicant proceeded to a trial before the Honorable R. Knox McMahon and a jury. He was found guilty as indicted. On April 5, 2011, Judge McMahon sentenced Applicant to a term of ten (10) years imprisonment for Unlawful Neglect of a Child and to a term of twenty-five (25) years imprisonment for CSC with a minor, first degree. These sentences were to be served concurrently.

A timely notice of appeal was filed on April 5, 2011, and perfected on Applicant's behalf by Richard 'Dick' Harpootlian, Esquire. The South Carolina Court of Appeals affirmed Applicant's convictions. State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013). Applicant filed a Petition for Rehearing on August 8, 2013. The Court of Appeals denied this Petition on September 19, 2013. Applicant then petitioned for Writ of Certiorari on October 21, 2013. By Order dated July 24, 2014, the Supreme Court denied the petition, and the Remittitur was issued on August 2, 2014.

After the hearing, Applicant's counsel moved to amend the allegations. Respondent did not object. The Court granted Applicant's motion. Those allegations are as follows:

(1) Applicant's trial counsel failed to contemporaneously object to the introduction of prejudicial evidence, including but not limited to, photographs that were not relevant to any matter in dispute,

(2) Trial counsel failed to call an expert witness to testify the victim's injuries were consistent with Applicant's statement to police and testimony at trial and would have constituted "medically recognized treatment" and thus constituted a legal defense to the charge,

(3) Trial counsel's lack of trial preparation, including the failure to interview virtually any State witnesses, falls below the standard of a reasonable, competent lawyer.

ARGUMENT

Respondent requests this Court reconsider and reverse its June 19th Order, granting Applicant's PCR Application because the order relies on allegations that were not included in Applicant's amended PCR application and therefore are not properly before the Court, the Order omits evidence and arguments presented to the Court that directly contradict the resulting findings made by this Court, and the Court misapplies legal precedent and Rule 5 in reaching its holdings.

I. Order Relies on Allegations That Were Not Properly Presented to This Court

The Order relies on allegations that were not made by counsel in his final allegations and were only introduced for the first time in a proposed order that was submitted at the same time Respondent's proposed order was submitted to the Court. Applicant's allegations were limited to failure to object, failure to call and expert witness, and failure to prepare for trial. Yet, in Applicant's proposed order, he inserted allegations related to Rule 5 violations (Order, p. 25) and "failure to appreciate the significance of the medically recognized treatment defense" by "labor[ing] under a misapprehension of law and fact as to what constituted a legal defense."

Applicant had more than two years between the time he filed his application and the hearing to amend his application. Furthermore, this Court granted Applicant great latitude during the PCR hearing to question witnesses outside of the limitations of the then-existing allegations and later allowed Applicant to amend his application after the hearing. Applicant had the opportunity to get those allegations right.

Respondent's only opportunity to argue against new allegations came through a proposed order and relied heavily on the amended allegations, which, again, were limited to failure to investigate with an emphasis on trial counsel's failure to interview witnesses, failure to call an expert witness, and failure to object to the photos.

The Court should rule solely on the allegations made in Applicant's final amendment application and reconsider its ruling. At a minimum, however, Respondent respectfully requests the Court remove references to Rule 5 allegations and the "intrusion into the genitals" defense that were not brought before the Court in any of Applicant's allegations and to which Respondent had no opportunity to respond.

II. The Order Omits Legal Precedent, Misapplies Rule 5, Addresses Allegations that are Not Before the Court, and Omits Evidence and Arguments By Respondent That Were Properly Before the Court

Allegation: Failure to Prepare for Trial (Strickland analysis)

The Order finds trial counsel were ineffective for lack of trial preparation. The Order incorrectly states Trial Counsel Snell spoke only with the lead investigator prior to going to trial. (Order, p. 19.) Trial Counsel Snell testified at the PCR Hearing that he hired a private investigator to talk to all the fact witnesses, (PCR Hearing Tr. p. 31, ll. 12-16), and that he himself spoke with the law enforcement *witnesses* prior to the trial, (PCR Hearing Tr. p. 27, ll. 23-25). Trial counsel Snell could not confirm whether he or his investigator spoke with about six of the witnesses listed on the State's witness list. There was no written report by the investigator and Trial Counsel Snell testified he believed this was a decision based on fees and costs associated with that additional step. (PCR Hearing Tr. p. 43, l. 17-p. 44, l. 2.). The Court fails to address Trial Counsel Snell's testimony on this issue without explanation as to why his sworn testimony should be given no consideration and/or weight.

Furthermore, the conclusion Applicant was prejudiced rests on speculative argument, not fact of record. Applicant did not offer a single factual or law enforcement witness for the Court's consideration; Applicant offered zero evidence of how a more in-depth or in person—versus through his investigator—interview would have resulted in a different case. The most the Court was offered in the proposed order to support this allegation is that “no law witness was contacted to test the veracity of [the timeline] claim[] or explore avenues for impeachment.” (Proposed Order, p. 19, Adopted at Order, p. 19.) However, Applicant also offered **no lay witnesses** to counter the timeline and **did not offer any evidence** that could have been used for impeachment of either the lay or law enforcement witnesses. Applicant's counsel was faced with the same reality Trial Counsel were faced with: Applicant's written statement to police and then Applicant's sworn testimony on the stand that prevented any defense that someone else had caused the injuries in the victim.

Through the proposed order, Applicant further asked this Court to rule without supporting evidence by arguing that prejudice could be established because – despite Trial Counsel Floyd's challenge to the chain of custody for a dirty diaper – Mr. Floyd allegedly “lacked sufficient information . . . to mount[] that challenge.” (See Order, p. 19.) Applicant's argument is wholly unsupported by any evidence that relevant and weighty information was actually available. Applicant failed to offer any witnesses, documents, or other evidence related to the chain of custody or the lay witness who collected the diapers. Thus, he failed in his burden of proof. Porter v. State, 368 S.C. 378, 385, 629 S.E.2d 353, 357 (2006) (“Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result.”); Jackson v. State, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998) (“Mere speculation and conjecture on the part of

respondent is insufficient.”). See also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (“The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.”); Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (“This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.”) (emphasis in original).

Jackson v. State, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998) is particularly instructive. In Jackson, the applicant contended counsel was ineffective in failing to investigate possible criminal backgrounds of certain victims and witnesses. Counsel admitted he did not do so at the PCR hearing and even “further admitted it was an error not to investigate the victims and witnesses.” 329 S.C. at 349, 495 S.E.2d at 770. The PCR court found counsel was deficient and the applicant was prejudiced. However, on appeal, the Supreme Court of South Carolina disagreed. Though agreeing probative evidence of record supported the finding of deficient performance, the Court found the applicant failed to carry his burden of proof on prejudice:

...there is no probative evidence to support the finding of prejudice. While the PCR judge was correct in finding the credibility of the eyewitnesses and victims “would have been critical,” no probative evidence was presented at the PCR hearing to show the eyewitnesses and victims were not credible. The only “evidence” that either the victims or eyewitnesses had criminal records were statements and questions by respondent’s PCR counsel that one of the victims was incarcerated in another state at the time of respondent’s trial and respondent’s testimony that he knew this victim was in jail. Respondent failed to substantiate this allegation with any probative evidence. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (applicant’s allegations, alone, will not support a finding of prejudice when applicant claims counsel was ineffective for failing to investigate witnesses; instead, applicant must show the results of an investigation would have

resulted in a different outcome at trial). Mere speculation and conjecture on the part of respondent is insufficient. *Id.*

329 S.C. at 349, 495 S.E.2d at 770.

Like the claim in Jackson, without any evidence to establish or even support a finding that Applicant was prejudiced by Trial Counsel's alleged failure to interview fact witnesses directly and not through his investigator, this claim must fail. Applicant is not entitled to any relief.

Allegation: Improper Legal Theory Challenging "Intrusion Into the Genitals"

Separately, and as referenced above in Respondent's first argument, Applicant raises for the first time in his proposed orders and not referenced in his amended allegations, that this Court should find Trial Counsel deficient for having a strategy that challenged the element of "intrusion into a genital opening." Applicant incorrectly argues—and the Court relies on in its Order—that because Trial Counsel attempted this theory, they failed to recognize the medically necessary defense. That finding is directly contradicted by the evidence before the Court and is too speculative to support a finding of prejudice to Applicant.

To the extent the case involved questions of medicine and psychological issues, Trial Counsel was not alone. Trial Counsel Snell testified that not only did he have a year to work on the case before trial, he spent that year working with at least five different experts. The experts working on the case with Mr. Snell were (1) Ms. Cindy Hurley, a registered nurse who was retained to review the records, discuss medical subjects with the attorneys, and testify if necessary (PCR Hearing Tr. p. 52, ll. 3-6 and 24-p. 54, l. 4); (2) Dr. Abel, a medical doctor who spoke with the State's expert witness and reviewed medical records she had prepared on the victim and also advised on whether the victim may have required having cream rubbed on to her

labia due to a medical condition (PCR Hearing Tr. p. 95); (3) someone to conduct a polygraph on Applicant (PCR Hearing Tr. p. 96, ll. 17-21); (4) Dr. Watson, a forensic psychologist dealing with issues involving sexual offenses, who reviewed discovery, interviewed Applicant several times, and provided answers on psychological issues that may or may not be present in the case (PCR Hearing Tr. p. 99, ll. 8-23); and (5) Dr. Burke, who has a Ph. D. in psychology and runs or did run the sex offender treatment program for Department of Probation who conducted an Abel Assessment on Applicant to determine if he had any alternative sexual attractions (PCR Hearing Tr. p. 100, ll. 14-20). The decision not to call any of those experts was a strategy decision based on defense counsel's ability to get helpful testimony from the State's witness. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) ("Where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

The Order not only fails to reference the numerous expert witnesses involved in the defense strategy of this case, it fails to address Trial Counsel Snell's testimony that the medically recognized diaper change was one of their strategies. (PCR Hearing Tr. p. 76, l. 21-p.77, l.12; p. 75, ll. 14-20; p. 73, ll. 18-23; p. 54, ll. 1-4.). Mr. Snell had an expert witness already prepped on that issue: Ms. Cindy Hurley, a registered nurse who was retained to review the records, discuss medical subjects with the attorneys, and testify if necessary. (PCR Hearing Tr. p. 52, ll. 3-6 and 24-p. 54, l. 4). And, Trial Counsel Floyd's cross-examination of the State's expert, Dr. Luberoff, points directly to this being a key strategy of the defense. (Trial Tr. pp. 376-77; PCR Hearing Tr. p. 106, ll. 12-21.).

In sum, Applicant's argument is wholly unsupported by the evidence. The Court erred in accepting same.

Allegation: Failure to Prepare for Trial (Cronic analysis - Mr. Floyd)

As an end-run around his inability to establish prejudice in his case, Applicant next argued in his proposed order that this Court should find a presumption of prejudice pursuant to the United States v. Cronic, 466 U.S. 648 (1984), analysis. The Court accepted the argument finding the fact that Mr. Floyd was hired two days before trial and handled the cross-examination of thirteen of the witnesses implicates “Cronic’s third situation where ‘the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.’” (Order, p. 24.) This is error.

Such a conclusion is irreconcilable with the established facts of record, in particular, the fact that Applicant had lead counsel, Mr. Snell, and six expert witnesses working with the defense, who had been involved in the case for a year; and, that Mr. Snell was present along with Mr. Floyd throughout the entire trial. The holding is also irreconcilable with Cronic’s own language that it is **not enough** that the appointment of a lawyer is delayed:

In Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940), counsel was appointed in a capital case only three days before trial, and the trial court denied counsel's request for additional time to prepare. Nevertheless, the Court held that since evidence and witnesses were easily accessible to defense counsel, the circumstances did not make it unreasonable to expect that counsel could adequately prepare for trial during that period of time, *id.*, at 450–453, 60 S.Ct., at 324–325. Similarly, in Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), **the Court refused “to fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel.”** *Id.*, at 54, 90 S.Ct., at 1982. Thus, only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial.

Cronic, 466 U.S. at 661–62 (internal footnotes omitted) (emphasis added).

Furthermore, the evidence presented to the Court stands in stark contrast to the facts of other cases that have supported a finding that prejudice must be presumed.

The Supreme Court has recognized, in both Strickland and United States v. Cronin, 466 U.S. 648 (1984), that there are a few circumstances where “prejudice is presumed” because prejudice “is so likely that case-by-case inquiry . . . is not worth the cost.” Strickland, 466 U.S. at 692, 104 S.Ct. 2052 (citing Cronin, 466 U.S. at 658, 104 S.Ct. 2039); see also, Nance v. Ozmint, 367 S.C. 547, 551–52, 626 S.E.2d 878, 880 (2006) (“[P]er-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer ‘entirely fails to subject the prosecution’s case to meaningful adversarial testing,’ thus making ‘the adversary process itself presumptively unreliable.’” (quoting Cronin, 466 U.S. at 659 (emphasis added))).

In Nance, the South Carolina Supreme Court had the opportunity to review a case under Cronin’s second scenario: *per se* prejudice due to constructive denial of counsel. In Nance, counsel was ill and on medication, the petitioner was “in a drug-influenced demeanor during the entire trial,” trial counsel told the jury both he and co-counsel did not want to be there, and defense counsel failed to qualify his own expert witness. Id., 367 S.C. 556, 626 S.E.2d at 883. In addition, defense counsel elicited testimony from its own witnesses about petitioner’s prior bad conduct involving bad behavior in jail and killing his family’s pets and counsel themselves referred to petitioner as “a sick man” in closing argument. Lorenzen v. State, 376 S.C. 521, 527 n.2, 657 S.E.2d 771, 775 n.2 (2008) (summarizing the findings from Nance). The petitioner was convicted and received a sentence of death for murder, criminal sexual conduct in the first degree, assault and battery with intent to kill, burglary in the first degree, and armed robbery. The South Carolina Supreme Court found a “complete failure to conduct a defense by trial

counsel,” holding counsel “failed to act as an adversary to the prosecution, but instead helped to reinforce the case against his client.” Id., 367 S.C. 558, 626 S.E.2d at 883.

The evidence before this Court showed the defense had clearly articulated defense theories, and their cross-examination, witness selection, and opening and closing arguments reflected that strategy. Admittedly, trial counsel had a hard case to defend; Applicant had confessed in writing and again on the stand that he caused the victim’s injuries out of anger while disciplining her and then while wiping her due to a dirty diaper. (Trial Tr. p. 501, 559-30, 535-36.). In direct contrast to the facts of Nance, however, Trial Counsel Snell and Floyd in no way “failed to act as an adversary to the prosecution.” They challenged each witness through cross-examination, elicited helpful testimony from the State’s witnesses and their own, and used that testimony to support their argument to the jury.

Hiring and using a private investigator to contact fact witnesses (PCR Hearing Tr. p. 31, ll. 12-16), interviewing law enforcement witnesses (PCR Hearing Tr. p. 27, ll. 23-25), meeting with Applicant over twenty times in the course of a year (PCR Hearing Tr. p. 16, l. 25-p. 17, l. 5), hiring seasoned counsel for trial (PCR Hearing Tr. p. 50, l. 1-p. 51, l. 7), consulting with six expert witnesses (to include Dr. Friedlander) (PCR Hearing Tr. p. 52, ll. 3-6 and 24-p. 54, l. 4; p. 95; p. 96; p. 99; p. 100), and preparing for multiple defense theories in a case where the client was changing his version of the story (PCR Hearing Tr. p. 70, ll. 4-14; p. 74, ll. 7-17) and confessed in writing and on the stand is conduct that is well above the standard of a reasonable, competent lawyer.

The record before the Court does not support a finding that Trial Counsel here “entirely fail[ed] to subject the prosecution’s case to a meaningful adversarial testing,” Cronic, 466, U.S. at 659. Relief is not warranted under Cronic.

Allegation: Rule 5 Allegation

As referenced above in Respondent's first argument, this allegation is not properly before the Court, was not available to be addressed by Respondent in the hearing or in its proposed order, and should therefore be stricken and disregarded by the Court, particular given the grave prejudice to Respondent. See Harvey v. Strickland, 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002) ("The circuit court is to freely grant leave to amend when justice requires and there is no prejudice to any other party."). See also Arnold v. State, 309 S.C. 157, 173–74, 420 S.E.2d 834, 843 (1992) (upholding denial of motion to amend where "petitioners failed to present to the circuit court facts and circumstances to show why the new grounds were not and could not have been presented in the prior petitions").

Furthermore, while correctly stating that Rule 5 of the South Carolina Rules of Criminal Procedure only requires the disclosure of physical examination and scientific tests or experiments within 30 days of a request and **not the disclosure of who will be designated an expert witness**, see Rule 5(a)(1)(D), (a)(3), and (e)(4), SCRCrimP, the Order incorrectly relies on the State allegedly identifying Dr. Luberoff as an expert witness "just five days before trial" and focusing on not objecting "to Ms. Clary's expert designation" (Order, p. 25). The Order does not reference a failure to disclose any reports. Testimony in the PCR Hearing never suggested a failure to disclose a report. In fact, testimony by Trial Counsel Snell was that he was aware of the two expert witnesses at issue, Mr. Clary and Dr. Luberoff, and even had the report by Dr. Luberoff reviewed by their own expert witnesses in advance of trial. (PCR Hearing Tr. p. 34, ll. 1-5; ll. 22-25.)

This factual disconnect prevents Applicant from showing he is entitled to relief under the allegation. Relief is not warranted.

Allegation: Expert Witness

The Order also finds Applicant's conviction should be reversed because had Dr. Friedlander been called to testify, it "would have created a dispute of fact." (Order, p. 27.) The Order suggests the jury would have found Applicant not guilty if only they had heard Dr. Friedlander, instead of only the State's witness, testify that it was medically necessary to wipe fecal matter out of the vulva. (Id.)

As an initial matter, the Order makes no reference to the reasoning behind why Mr. Snell did not elect to hire Dr. Friedlander. The Order does not acknowledge Applicant's own role in the reason why Dr. Friedlander was not asked to testify.

Trial Counsel Snell testified he provided some documents and materials to Dr. Ed Friedlander, reviewed a letter written by Dr. Friedlander to him discussing the case, and also had a phone conversation with Dr. Friedlander before ultimately deciding not to retain him. (PCR Hearing Tr. p. 67, ll. 18-24.).

At the time they were considering Dr. Friedlander, Applicant was denying to Trial Counsel Snell that his statement to police was correct and denying he had caused the injuries to the child's vagina because he was angry or upset. (PCR Hearing Tr. p. 71, ll. 3-7.). Trial Counsel Snell testified that at the time he was talking to Dr. Friedlander, he discussed with Applicant a defense that the victim's injuries were caused by a "rough diaper change," and Applicant did not agree with that defense, claiming then that he was not angry and did not cause those injuries. (PCR Hearing Tr. p. 74, ll. 7-17.). Trial Counsel Snell testified the theory of the case changed throughout his representation of Applicant due to Applicant's changing version of events. (PCR Hearing Tr. p. 70, ll. 4-14.). While Applicant admitted to police that he intentionally caused the injuries to the victim, he denied doing anything to the victim's vaginal area when he first met

with Trial Counsel Snell. (Id.) Based on Applicant's version of events, the theory of the case was that someone else left the marks or that the injuries were not as extreme as the charges indicated. (PCR Hearing Tr. p. 70, ll. 18-22.). Eventually, as trial approached, a few weeks out, Applicant reverted back to his original statement and admitted to his counsel that he had intentionally caused the injuries to the victim, claiming they were caused by anger and not sexual gratification. (PCR Hearing Tr. p. 74, l. 21- p. 75, l. 15.).

When Applicant's story changed again, Trial Counsel Snell testified he did not reach back out to Dr. Friedlander; he already had Nurse Hurley on retainer who could testify as to the injuries and how they related to a diaper change. (PCR Hearing Tr. p. 75, ll. 14-20; p. 73, ll. 18-23; p. 54, ll. 1-4.). However, despite having discussed potential testimony with Dr. Abel and Nurse Hurley, the ultimate decision was not to call either because the State's witness already admitted on the stand in front of the jury that cleaning feces out of the genitals was medically necessary. (PCR Hearing Tr. p. 76, l. 21- p. 77, l. 12.). In fact, the trial record shows the State's witness, Dr. Luberoff, ended up testifying that she agreed with Trial Counsel Floyd that touching genitals to clean for a diaper is appropriate, which was exactly what he was hoping to present through Nurse Hurley's testimony. (Trial Tr. pp. 376-77; PCR Hearing Tr. p. 106, ll. 12-21.).

The Court has also completely omitted the fact of Dr. Friedlander's own testimony at the PCR Hearing that he had been trained to treat the genitals "**with the greatest care.**" (PCR Hearing Tr. p. 173, ll. 15-23.). Dr. Friedlander would not have been able to, and at the PCR Hearing did not ever say, that it was **medically necessary** to hold a child down with such force

as to leave fingerprint¹ bruises across her pubic bone, rake his fingernails down the inside of her labia to leave fresh scratch marks, or use such force as to bruise the hymen in order to remove fecal matter and offer medically necessary aid to the child. (PCR Hearing Transcript, p. 150, ll. 9-19.). It being medically necessary to change a baby's diaper and to do so with the force and violence Applicant used are two wholly different things. Applicant testified he caused these injuries in anger, and that he was responsible for causing these injuries.² (Trial Tr. p. 501, 559-30, 535-36.).

This evidence when considered in its totality shows Applicant failed in his burden of proof. Relief is not warranted.

Allegation: Objecting to the Photographs

Without analyzing or discussing the probative value of the photographs at issue, the Order supports its reversal of Applicant's convictions by expressing its "grave concerns with their probative value" (Order, p. 31) and notes that it has reviewed the images and "they are graphic" (Order, p. 7.). Respondent does not dispute the photos are graphic. But that alone is not dispositive: "Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder." State v. Collins, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014). In Collins, the Supreme Court of South Carolina reversed the Court of Appeals' finding that pre-autopsy photographs of a mauled and partial eaten child were not admissible.

¹ Respondent uses Dr. Friedlander's explanation of the bruises, but notes that Dr. Friedlander reached this conclusion, and rejected the State's expert's conclusion that these could have been teeth marks, before he ever saw Applicant's hands or teeth for comparison purposes.

² To the extent the argument is that Applicant would not have changed the victim's diaper while he was so angry had it not been medically necessary for him to do so immediately, Respondent notes there was no testimony offered by Applicant, his witnesses, nor Dr. Friedlander as to the time requirement to change a child's dirty diaper and therefore no support for that theory.

The Court resolved that though it was understandable that the Court of Appeals panel would register “revulsion for the evidence,” the photographs were nonetheless admissible as “highly probative, corroborative, and material in establishing the elements of the offenses charged [and] its probative value outweighed its potential prejudice....” Id.

The allegations in this case involved several fresh bruises and scratch marks to an eighteen month old victim’s genitals. That is understandably difficult for most individuals to see; however, that does not render the photographs inadmissible. A trial court does not abuse its discretion if the photographs serve to corroborate testimony. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997). Moreover, “[u]nfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal quotation marks omitted). “All evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (internal quotation marks omitted); State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997) (finding that: “Even if the descriptive testimony of the prosecution’s witnesses adequately conveyed the brutality and malice of the crime and these photographs were unnecessary, they were harmless surplusage.”)

At the PCR hearing, Trial Counsel Floyd agreed he did not object to the photographs. He claims not to have any strategy in not objecting. However, as recognized by Trial Counsel Floyd, the photographs were highly relevant to the matters in dispute. The undisputed theory in the case as outlined by both trial counsel was to challenge whether an intrusion into the genital area had occurred and to argue the injuries had been sustained as part of a medically necessary diaper change. (PCR Hearing Tr. pp. 108-110; p. 221, l. 17-p. 223, l. 8; p. 239-242.). To support the

theory and their directed verdict motion that there was no “intrusion” as the statute required, **defense counsel** used images of the child’s vulva and vaginal area to show the vagina was past the hymen. (PCR Hearing Tr. p. 109, ll. 5-18.).

Additionally, the State was required to prove as an element of the two pending charges or to defend against the defense’s theory of the case that there was penetration into the genital area of the victim (PCR Hearing Tr. p. 227, l. 14-16), the timeline of the case to show the victim’s injuries came from Applicant and not someone else (PCR Hearing Tr. p. 229, ll. 3-16), and the extent of the injuries in order to show that the injuries on the victim were not consistent with changing a child’s diaper or removing feces from in between her vaginal lips (PCR Hearing Tr. p. 228, ll. 15-25). Another defense theory as outlined by both defense counsel was to try and challenge the timeline of the case in order to suggest the injuries were caused by someone else. (PCR Hearing Tr. pp. 108-110.). Before Applicant took the stand and admitted to causing the injuries, the State had to narrow the timeline by highlighting how recent and acute the injuries were. Therefore, even if an objection was made, it is not likely the Court would have sustained it based on the highly probative value of the photographs.

Thus, Applicant failed to carry his burden of proof. Relief is not warranted.

Overwhelming Evidence

Finally, the Order fails to address the presence of overwhelming evidence in the record before the Court. Where there is overwhelming evidence of guilt, a trial counsel’s deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); see also, Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). Applicant was not prejudiced by any alleged deficient representation because there was overwhelming evidence of his guilt.

The State presented evidence of physical injuries to the victim's body, acute injuries to her vulva and her hymen, and evidence that there were no diapers with fecal matter in what they collected from the home. (Trial Tr. pp. 323, 330, 334-34, 343-45, 348.). Applicant admitted to law enforcement in a written statement that he caused the injuries, claiming he had no feeling in his hand, claiming he had been applying cream to the child's genital area, and then finally claiming he caused the injuries because he was angry while changing her diaper. Applicant testified at trial that he caused the injuries to the child's genital area because he had *angrily* wiped her. (Trial Tr. p. 501, 559-30, 535-36.).

Like the applicant in Ford, Applicant has not shown prejudice resulting from any alleged deficient representation and can therefore not support a reversal under a Strickland analysis.

CONCLUSION

Because the Order relies on allegations that were not before the Court; lacks numerous critical references to evidence of record; incorrectly supports its findings of prejudice with only speculation; misapplies Rule 5; and failed to consider the overwhelming evidence presented in this case, Respondent respectfully requests the Court reconsider its findings and conclusions, amend the Order, and deny Applicant's PCR application.

Respectfully submitted,

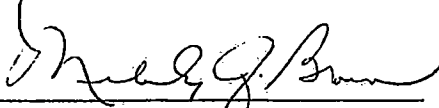
ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

[signatures continued on next page]

MELODY J. BROWN³
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: 

MELODY J. BROWN
SC Bar No. 14244

June 29, 2017.
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT

³ The undersigned acknowledges the foregoing motion was substantially written by former Senior Assistant Deputy Attorney General Johanna C. Valenzuela.

EXHIBIT C

(PCR hearing transcript excerpts, January 30 &
31, 2017)

1	State of South Carolina	)	In the Court
		)	Of Common Pleas
2	County of Lexington	)	Case No.: 2014-CP-32-4769
		)	
3	Lance Austin Williams,	)	
		)	
4	Applicant,	)	
	vs.	)	Transcript of Record
5		)	
	State of South Carolina,	)	
6		)	
	Defendant.	)	
7	_____	)	

8

9

January 30 and 31, 2017

10

Lexington, South Carolina

11

12 BEFORE:

13

The Honorable Eugene C. Griffith, Junior, Judge

14

15 APPEARANCES:

16

17

Richard A. Harpootlian, Esquire
Attorney for the Applicant

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19

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Johanna C. Valenzuela, Assistant Attorney
General
Attorney for the Defendant

21 ALSO PRESENT:

22

Lance Austin Williams

23

24

25

1 extending this beyond this afternoon. And again, since
2 it's before Your Honor, these objections merely delay it
3 and if we could proceed without the sniping, we can get
4 this done.

5 THE COURT: All right. Let's proceed and the
6 objection is noted and the Court will consider as
7 relevant evidence as it can.

8 MR. HARPOOTLIAN: Your Honor, for purposes of the
9 record anything I introduce I will stipulate she's made
10 an objection as to relevance so she doesn't have to do
11 that anymore.

12 THE COURT: Okay. Fair enough. It's admitted.

13 (Whereupon, Plaintiff's Exhibit #1 marked for
14 identification and admitted.)

15 BY MR. HARPOOTLIAN:

16 Q. Okay. So this is an e-mail. Tell me what this is.
17 I don't want to lead you.

18 A. It's an e-mail from the prosecutor to me with the
19 State's potential witness list. That's the first e-mail on
20 the bottom of the first page.

21 Q. What's the date of that e-mail to you?

22 A. March 25th, 2011.

23 Q. That would be five days before the trial started?

24 A. Yes, sir.

25 Q. And then it's got a list of witnesses attached?

1 A. Yes, sir.

2 Q. Okay. We'll get back to this in a little while. So
3 you - about how many days, we figure ten, seven, ten days
4 prior to trial you knew it was going to be a trial?

5 A. Apparently it looks like it might have been closer
6 to at least 12.

7 Q. 12 days. Okay. So 12 days out you knew it was
8 going to be a trial?

9 A. Yes, sir.

10 Q. During those 12 days, what did you do to get
11 prepared for trial specifically if your notes indicate it?

12 A. Let me just say it was everyday work on the file,
13 going through, following up with our experts. We had Dr.
14 Watson. We had a nurse. A consultant that we spoke to.
15 Reviewing the discovery. Meeting with Mr. Williams. Several
16 conversations with his family.

17 Q. Let me ask you specifically. Look at plaintiff's
18 exhibit number 1. There are 24 witnesses listed.

19 A. Yes, sir.

20 Q. Prior to getting the notice for trial, how many of
21 those witnesses did you interview?

22 A. We had an investigator.

23 Q. No. How many did you interview? How many did you
24 talk to?

25 A. I believe six.

1 THE COURT: Objection is noted. I know what you're
2 concerned about so we will be looking and listening.

3 BY MR. HARPOOTLIAN:

4 Q. Okay. So I want to go over the witnesses that
5 testified.

6 A. Yes, sir.

7 Q. Katie Cooper testified. You did not interview
8 her?

9 A. I want to make sure I understand the question. This
10 is not who the investigator talked to? These are the people I
11 personally spoke to?

12 Q. Right. Well, did the investigator talk to her?

13 A. I believe all the fact witnesses were reached out by
14 the investigator.

15 Q. What's his name?

16 A. Dave Lawrence.

17 Q. Dave Lawrence who used to work at SLED?

18 A. Yes.

19 Q. I know Dave. And Dave would have prepared a written
20 report for you?

21 A. I don't believe he did. I'll defer to the -- If he
22 provided one, I don't believe he did. I don't think that was
23 budgeted or provided for.

24 Q. Did you ask for one?

25 A. I spoke to Mr. Lawrence. He's working hourly and

1 things like reports, that would have cost additional money.
2 If there was no benefit to getting the report like witnesses
3 that just wouldn't speak to him, he wouldn't. I don't think
4 we got that.

5 Q. Did you make notes after you spoke to Mr.
6 Lawrence?

7 A. Not - whatever notes I have have been provided. I
8 would be happy to look through and see. There may be a few
9 references but not detailed transcriptions.

10 Q. No. Not detailed transcriptions. Is there a note
11 that says tried to talk to Katie Cooper. She wouldn't talk to
12 us. Is there a note?

13 A. Not in my notes. No, sir.

14 Q. Okay. So you made no notes of what Mr. Lawrence
15 told you?

16 A. Correct. Yes, sir.

17 Q. Okay. Brittany Brown, did you speak with her?

18 A. No, sir.

19 Q. Did Mr. Lawrence?

20 A. Not to the best of my knowledge. No, sir.

21 Q. Lee Ann Harvey, did you talk to her?

22 A. No, sir.

23 Q. Did Mr. Lawrence to the best of your knowledge?

24 A. No, sir.

25 Q. Tommy Hutto. Did you speak to Tommy Hutto?

1 A. No, sir.

2 Q. Did Mr. Lawrence to the best of your knowledge?

3 A. No, sir.

4 Q. Marlana Clary. Did you speak to Ms. Clary?

5 A. No, sir.

6 Q. Did Mr. Lawrence speak to Ms. Clary to the best of
7 your knowledge?

8 A. No, sir.

9 Q. Adrienne Riley-Hefney. Did you talk to speak to Ms.
10 Riley-Hefney? Do you know who that is?

11 A. I don't know who that is and I don't see the name on
12 the list. I was wanting to refer to make sure it wasn't a law
13 enforcement officer. I don't recall who that individual is.
14 I don't recall the name.

15 Q. Okay. So to your knowledge you didn't interview
16 her? She wasn't on the list provided by --

17 A. Yes.

18 Q. And you had been investigating this case for a
19 year?

20 A. Correct. And I don't - I don't recall - I don't
21 recall the name.

22 Q. Okay. Dr. Susan Luberoff. Did you speak with Dr.
23 Luberoff?

24 A. No, sir.

25 Q. Did your investigator Mr. Lawrence?

1 A. No, sir. I believe Dr. -- We had a doctor
2 consulting. That doctor I believe spoke to Dr. Luberoff.

3 Q. Where was that?

4 A. I believe her name is Anne Abel affiliated with
5 MUSC.

6 Q. Okay. And did you get a written report from Anne
7 Abel?

8 A. We got -- No. No. She did a letter. Maybe an
9 e-mail. And then sort of spoke to me by telephone once or
10 twice.

11 Q. Do you have that e-mail?

12 A. I did. It's -- She should -- It was -- I printed
13 out the same materials I provided you.

14 Q. Uhm, so let me ask you this: I'm looking at some
15 e-mails now. Maybe this will refresh your memory. She never
16 actually talked to Dr. Luberoff. She prepared a cross
17 examination for you?

18 MS. VALENZUELA: Objection. Is he testifying, Your
19 Honor? I'm not -- This is definitely a leading question
20 here.

21 BY MR. HARPOOTLIAN:

22 Q. What, if anything, did Ms. Abel do for you?

23 A. She reviewed the medical records, reviewed the
24 report of Dr. Luberoff and basically summarizing she agreed
25 and adopted everything Dr. Luberoff said.

1 A. His name does not appear on the witness list and I
2 don't have a recollection of ever speaking with Mr. Crump.

3 Q. Beth Harmon?

4 A. Again, no notes. My understanding was we would have
5 had a very brief, extremely brief conversation prior to
6 trial.

7 Q. What did she talk about? You have no notes. You
8 have to recollect.

9 A. The law enforcement officers who were on the witness
10 list were individuals who responded, I think, to the original
11 call and they were with Detective Prestigiacomo. But other
12 than that my main source of information from the law
13 enforcement side came from Detective Prestigiacomo.

14 Q. And you would agree -- And Candy Kyzer. Do you know
15 who that is?

16 A. I do and --

17 Q. Did you interview her?

18 A. I actually don't have a specific recollection. No,
19 sir.

20 Q. And you don't know whether your investigator did?

21 A. I do not. No, sir.

22 Q. Now, I want you to look at page 3 of the trial
23 transcript. The people I have just read off to you are the
24 people that testified for the State in the case, correct?

25 A. Yes, sir.

1 Q. And you talked to Dr. Friedlander and he was willing
2 to testify in this case, was he not?

3 A. Arrangements could have been made. Yes, sir.

4 Q. And tell me the gravamen of the defense in this
5 case?

6 A. The first thing, and again --

7 Q. To the criminal sexual conduct?

8 A. And from the - and again sort of the - of the
9 version or the belief from Mr. Williams when he first met with
10 me was different than the version he provided law enforcement
11 during the statement and different when he testified and his
12 story moved during the representation. At this point Mr.
13 Williams wasn't acknowledging intentionally leaving marks,
14 bruises, doing anything with the vaginal area.

15 Q. With the vaginal area?

16 A. Yes, sir.

17 Q. Okay.

18 A. Or any -- Uhm, so it would have either been -- With
19 that being said, it either would have been someone else
20 leaving the marks and the bruises or the marks and bruises
21 weren't as bad as the charges indicated. I don't know how
22 else to phrase it.

23 Q. So Mr. Williams in his statement to the police and
24 in his testimony indicated he became frustrated because the
25 baby had defecated in its diaper and some of that defecation

1 had gotten between the lips of her vagina; is that correct?

2 A. Yes, sir.

3 Q. And Dr. Friedlander was made available because he
4 got the statement, right?

5 A. At the time we had the statement, Mr. Williams'
6 version with me was different than what his version was that I
7 got angry or upset.

8 Q. But that's what he told the police?

9 A. That's what he told the police.

10 Q. And the only written recorded version was that?

11 A. Yes, sir.

12 Q. That he was angry and upset that the child --

13 A. Yes, sir.

14 Q. -- had gotten fecal matter in between the lips of
15 its vagina?

16 A. Yes, sir.

17 Q. And that he had to clean that out and he may have
18 been too forceful in doing that; is that correct?

19 A. Yes, sir.

20 Q. Okay. And Dr. Friedlander felt that explanation was
21 not consistent with criminal sexual conduct?

22 A. His -- Well, let me say this: Dr. Friedlander, of
23 course, doesn't know what the South Carolina standard was on
24 criminal sexual conduct.

25 Q. Did you tell him?

1 A. I don't recall if we had that -- Let me say I would
2 not have - I would not have relied on an out of state doctor
3 to tell me what the legal elements of CSC are.

4 Q. What are the legal elements?

5 A. It's a sexual battery upon a child under 11. Sexual
6 battery is any intrusion into a private parts of the genitalia
7 for an unrecognized medical purpose.

8 Q. An unrecognized medical purpose?

9 A. Right. So we have a diaper change which certainly
10 can be a medical purpose, a legitimate reason for any adult to
11 touch a child's genitalia. The child had injuries. The State
12 charged him with criminal sexual conduct even though I don't
13 believe there was anything sexual or any evidence that it was
14 sexual.

15 Q. Didn't have to be, did it?

16 A. According to the State's version it did not.

17 Q. Well --

18 A. Read the statute. There is no requirement of --

19 Q. But if there was a medical reason to have an
20 intrusion, it would have been a defense?

21 A. Exactly. Such as a diaper change.

22 Q. And that's what Dr. Friedlander gave you?

23 A. Dr. Friedlander would have testified about the --
24 Dr. Friedlander would have testified -- Again, I never met
25 him. Never got anything beyond a letter but he would have --

1 Q. But you had discussions with him?

2 A. I had one conversation with him that was brief and I
3 don't - and I don't -- We had the letter. At that time, of
4 course, he would have had a big retainer.

5 Q. How big?

6 A. I don't recall, but I remember it was - it would
7 have included travel. He's a medical doctor. It would have
8 been whatever that -- I would defer to him.

9 Q. I looked through your notes. I didn't see anything
10 about talking to Dr. Friedlander or a retainer.

11 A. He wasn't retained. I had one phone conversation
12 with him.

13 Q. Or a retainer fee that he offered that he said I
14 would do it for X?

15 A. I don't think he ever gave a specific quote. I
16 think -- I don't recall a specific quote and if he did give me
17 one, I didn't write it down.

18 Q. But correct me if I'm wrong. You had no other
19 medical expert that would testify that the injuries were
20 consistent with a diaper change as Lance Williams explained
21 it; is that correct? No other witness?

22 A. No one testified. We had Sandy Hurley we consulted
23 with and considered having testify.

24 Q. But you didn't call her?

25 A. We didn't call her. No, sir.

1 Q. And that was the defense? The defense was a rough
2 diaper change basically?

3 A. Rough diaper change. Yes, sir.

4 Q. Okay. Dr. Friedlander's opinion was consistent with
5 that?

6 A. It was.

7 Q. Okay. And he was not retained nor called by you?

8 A. Again, at the time that this was discussed and
9 presented, Mr. Williams would not have been in agreement with
10 retaining a witness like this or presenting this type of
11 defense.

12 Q. Did you ask him?

13 A. Yes.

14 Q. And he said don't hire him?

15 A. Mr. Williams said -- Mr. Williams version was I
16 didn't cause it. It wasn't - it wasn't angry. It was -- You
17 know, it wasn't done out of anger. It wasn't done by me.

18 Q. Even though he had a written statement that he had
19 given to the police saying exactly that?

20 A. Correct.

21 Q. And when you put him on the stand during the trial,
22 that's exactly what he said?

23 A. Correct. Yes, sir.

24 Q. And did you talk to him before you put him on the
25 stand?

1 A. I remember that being a thing. I don't remember the
2 specifics of the doctor's testimony or cross.

3 Q. Okay. Earlier you talked about some of the
4 strategies that y'all had considered in terms of defending the
5 defendant. Was one of them that the injuries could have been
6 caused by someone else?

7 A. Well, certainly. Yes, ma'am.

8 Q. Certainly it was. And so timeline was an important
9 part of your defense in your case?

10 A. Yes, ma'am.

11 Q. And did you believe that timeline was equally
12 important to the State in terms of establishing that your
13 client had been the last one to or close to the last one with
14 the victim and most likely caused these injuries?

15 A. Yes, ma'am.

16 Q. And just for the Court's edification there were
17 several people who came in contact with the baby in between
18 your client caring for her for the last time and her being
19 taken to the hospital, correct?

20 A. Yes, sir.

21 Q. There was at least the father's grandparents, the
22 father, uhm, the father of the baby's sister?

23 A. Yes, ma'am.

24 Q. And then the baby was out at a baseball field with
25 people milling about?

1 A. Yes, ma'am.

2 Q. And then the baby was taken back to the home before
3 being taken to the hospital, correct?

4 A. I don't recall. I remember the baseball field and
5 the hospital. I don't recall the home, but I wouldn't
6 disagree if that's the record.

7 Q. Do you remember that part of the strategy in terms
8 of establishing what could have happened to the baby being a
9 cleaning injury versus a sexual injury that part of that was
10 to show the jury how a child's vagina is different from a
11 grown vagina in terms of how close together everything is?

12 A. I believe so and I believe that -- Yes, ma'am.

13 Q. Because you were dealing with a fact that the baby's
14 hymen was actually bruised in this case?

15 A. That's correct. Yes, ma'am.

16 Q. Okay. And one of the technical - the technical, the
17 legal technicalities that y'all were trying to do was that CSC
18 with a minor includes intrusion into, however slight,
19 intrusion into the genitals and so you were trying to
20 establish what the intrusion actually required?

21 A. What was the purpose of the intrusion. Yes, ma'am.

22 Q. But also not just the purpose of the intrusion.
23 Didn't you - didn't Mr. Floyd spend a lot of time with Dr.
24 Luberoff getting her to say that the hymen is actually outside
25 of the vagina? You have to get past the hymen to get into the

1 sexual act, right?

2 A. Right.

3 Q. So when you're arguing that to them, you're arguing
4 to them inconsistent with the law that the judge is gonna tell
5 them?

6 A. Well, we talked about penetration earlier.

7 Q. Right.

8 A. And so, no. I don't see any problem with that
9 there, Mr. Harpootlian.

10 Q. Okay. You probably didn't. "So what you have got
11 is bruising, being too rough, wiping the child's diaper,
12 wiping the child off, getting between the folds, too rough
13 with her causing bruising. How else do we know it's not a
14 sexual? There's no forensics to reveal any type of sexual
15 act. So what, I guess, I'm asking is this: Your defense was
16 the injury was caused doing something that was medically
17 necessary which you quote Dr. Luberoff and which is consistent
18 with his statement."

19 And I guess I get back to wouldn't it have been nice
20 to have Dr. Friedlander's testimony to be able to cite in your
21 final argument?

22 A. Yes. I would have emphasized that.

23 Q. And then there would have been a dispute of fact,
24 correct?

25 A. That's correct.

1 Q. The type of the injuries, correct?

2 A. That's correct.

3 Q. And they also needed to establish a timeline for the
4 case, right?

5 A. Well, yeah. That's always part of a case.

6 Q. Okay. And when I say a timeline just to make sure
7 that you and I are on the same page, they needed to establish
8 that the child received these injuries from the defendant and
9 so if the defendant was in contact with her alone, you know,
10 months ago and these are fresh injuries, then obviously you
11 can't line that up with the defendant. But if the defendant
12 was in contact with her within the last 24 hours and these are
13 fresh injuries, then that would be the type of evidence that
14 they would want to show to try to link that up with him,
15 correct?

16 A. That's correct.

17 Q. And then in this case the State was dealing with a
18 situation where several different people had had access to the
19 victim in between the defendant having her and her being taken
20 to the hospital, correct?

21 A. That's correct.

22 Q. Okay. And one thing that we haven't gone into too
23 much but the diaper, the dirty diaper in this case, diapers
24 were collected in this case and photographs of those diapers
25 were presented to the jury?

1 A. I think so but I really don't remember that.

2 Q. I'm showing you State's exhibit 23.

3 A. Okay.

4 Q. Do you remember that exhibit?

5 A. Yeah. I remember.

6 Q. And that exhibit is a photograph of a grocery bag
7 with several diapers inside of it. Do you remember
8 challenging the collection of those diapers and how a lay
9 person had gone to the home and collected those diapers and
10 then turned them into law enforcement?

11 A. Yes.

12 Q. And you objected to the chain of evidence very
13 strongly that these should not come in. And then do you
14 remember that the State was able to go through those diapers
15 and show that there was not a diaper with fecal matter inside
16 those diapers?

17 A. Yes.

18 MS. VALENZUELA: No further questions, Your Honor.

19 MR. HARPOOTLIAN: Just a few questions, I think.

20 REDIRECT EXAMINATION

21 BY MR. HARPOOTLIAN:

22 Q. Let me let you look at page 325 of the transcript.
23 This is Dr. Luberoff testifying on direct. I'm showing you
24 this to perhaps refresh your memory. On line 9 on page 325 --
25 Well, first of all, State's exhibit 16, 17, 18, 19 and 20,

EXHIBIT D

(Affidavit of Marcus P. Abbott, October 5,
2017)

**STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON**

Lance Austin Williams, SCDC No. 00345477,

Respondent,

v.

State of South Carolina,

Petitioner.

IN THE SUPREME COURT

Appellate Case No. 2017-001877

Case No. 2014-CP-32-04769

**AFFIDAVIT OF
MARCUS P. ABBOTT**

PERSONALLY APPEARED BEFORE ME, Marcus P. Abbott, does hereby state as follows:

1. I am of legal age and sound mind and give this affidavit of my own free will.
2. I am a citizen of South Carolina and resident of Lexington County.
3. I am the owner of Exterior Visions, LLC, a remodeling company located in West Columbia, South Carolina that has been in business for over 25 years serving residential and commercial customers, primarily in Richland and Lexington Counties.
4. I know Lance Austin Williams, I believe in his potential, and I am committed to providing him with employment if he is released on bail.
5. I am prepared to offer Lance employment as an apprentice carpenter with my company. He will be supervised.

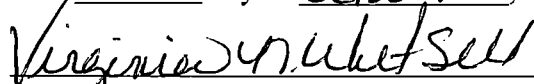
FURTHER AFFIANT SAYETH NOT.



MARCUS P. ABBOTT

SWORN TO BEFORE ME

This 5th day of October, 2017.



Notary Public for South Carolina

My Commission Expires: 7/22/24

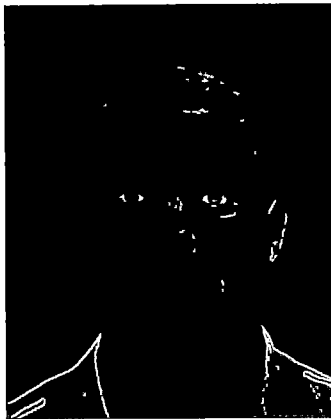
Lance Austin Williams v. The State of South Carolina
Case No.: 2017-001877

EXHIBIT E

(Inmate report, last accessed October 4, 2017)

INMATE SEARCH DETAIL REPORT

WILLIAMS, LANCE AUSTIN (00345477)



INMATE DESCRIPTION		INMATE SENTENCE AND LOCATION	
SEX:	MALE	SCDC ID:	00345477
RACE:	WHITE	SID:	SC01938593
HEIGHT:	6' 00"	OFFENDER TYPE:	ADULT-STRAIGHT SENTENCE
WEIGHT:	220 lbs.	ADMISSION DATE:	04/06/2011
AGE:	32	LOCATION:	BROAD RIVER
CITIZENSHIP:	CITIZEN - NATIVE BORN	DORM-ROOM-BUNK:	GRN-2111-B
BUILD:	LARGE	SECURITY / CUSTODY:	3 / MINIMUM IN
COMPLEXION:	FAIR	EWC LEVEL:	3F5
HAIR COLOR:	BLOND OR STRAWBERRY	EEC LEVEL:	
EYE COLOR:	BLUE	PROJECTED RELEASE DATE:	04/10/2035
PICTURE DATE:	11/21/2016	PROJECTED PAROLE ELIGIBILITY:	NOT ELIGIBLE
		SUP. FURLOUGH ELIGIBILITY:	NOT ELIGIBLE

CURRENT OFFENSES										
OFFENSE	SENTENCE TYPE	YRS	MOS	DYS	COUNTY	START DATE	V/NV	CAT	INDICT	STATUS
CHILD NEGLECT	ADULT-STRAIGHT SENTENCE	10	0	0	LEXINGTON	04/16/2010	N	2	10GS3201860	ACTIVE
CRIM SEX COND.W/MINOR(1S	ADULT-STRAIGHT SENTENCE	25	0	0	LEXINGTON	04/16/2010	V	5	10GS3201861	ACTIVE

ESCAPES
NO ESCAPES DURING CURRENT INCARCERATION

DISCIPLINARIES	SANCTIONS NOT AVAILABLE IN THE AUTOMATED SYSTEM PRIOR TO JANUARY, 2009
NO DISCIPLINARIES DURING CURRENT INCARCERATION	

MOVEMENT			
MOVEMENT DATE	TO LOCATION	STATUS	REASON
08/29/2017	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
08/29/2017	OUTSIDE MEDICAL	AUTH ABSENCE (AWL)	MEDICAL
01/31/2017	BROAD RIVER	INCARCERATED	RETURN FROM COURT
01/31/2017	LEXINGTON CO	AUTH ABSENCE (AWL)	TO COURT
01/30/2017	BROAD RIVER	INCARCERATED	RETURN FROM COURT
01/30/2017	LEXINGTON CO	AUTH ABSENCE (AWL)	TO COURT
12/12/2016	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
07/25/2016	KIRKLAND	INCARCERATED	RETURN FROM COURT
07/25/2016	LEXINGTON CO	AUTH ABSENCE (AWL)	TO COURT
02/16/2016	KIRKLAND	INCARCERATED	ADMINISTRATIVE
02/16/2016	OUTSIDE MEDICAL	AUTH ABSENCE (AWL)	MEDICAL
01/21/2016	KIRKLAND	INCARCERATED	ADMINISTRATIVE
01/21/2016	OUTSIDE MEDICAL	AUTH ABSENCE (AWL)	MEDICAL
10/21/2015	KIRKLAND	INCARCERATED	ADMINISTRATIVE
10/21/2015	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
09/23/2015	KIRKLAND	INCARCERATED	ADMINISTRATIVE
09/23/2015	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
01/15/2015	KIRKLAND	INCARCERATED	RETURN FROM COURT
01/15/2015	LEXINGTON CO	AUTH ABSENCE (AWL)	TO COURT
01/15/2015	KIRKLAND	INCARCERATED	ADMINISTRATIVE
06/25/2014	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
06/25/2014	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
05/20/2014	BROAD RIVER	INCARCERATED	ADMINISTRATIVE

INMATE SEARCH DETAIL REPORT

WILLIAMS, LANCE AUSTIN (00345477)

MOVEMENT			
MOVEMENT DATE	TO LOCATION	STATUS	REASON
05/20/2014	OUTSIDE MEDICAL	AUTH ABSENCE (AWL)	MEDICAL
05/12/2014	BROAD RIVER	INCARCERATED	RETURN FROM COURT
05/12/2014	LEXINGTON CO	AUTH ABSENCE (AWL)	TO COURT
01/02/2014	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
01/02/2014	KIRKLAND	INCARCERATED	MEDICAL
12/12/2013	BROAD RIVER	INCARCERATED	RETURN FROM COURT
12/12/2013	LEXINGTON CO	AUTH ABSENCE (AWL)	TO COURT
12/09/2013	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
12/09/2013	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
08/01/2013	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
08/01/2013	KIRKLAND	INCARCERATED	MEDICAL
06/14/2013	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
06/14/2013	OUTSIDE MEDICAL	AUTH ABSENCE (AWL)	MEDICAL
06/06/2013	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
06/06/2013	KIRKLAND	INCARCERATED	MEDICAL
05/02/2013	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
05/02/2013	OUTSIDE MEDICAL	AUTH ABSENCE (AWL)	MEDICAL
03/01/2013	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
03/01/2013	OUTSIDE MEDICAL	AUTH ABSENCE (AWL)	MEDICAL
01/09/2013	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
01/09/2013	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
12/28/2012	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
12/28/2012	OUTSIDE MEDICAL	AUTH ABSENCE (AWL)	MEDICAL
12/27/2012	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
12/27/2012	KIRKLAND	INCARCERATED	MEDICAL
11/02/2012	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
10/31/2012	OUTSIDE MEDICAL	AUTH ABSENCE (AWL)	MEDICAL
10/31/2012	OUTSIDE MEDICAL	AUTH ABSENCE (AWL)	MEDICAL
10/29/2012	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
10/29/2012	SUMTER CO	AUTH ABSENCE (AWL)	MEDICAL
08/31/2012	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
08/31/2012	OUTSIDE MEDICAL	AUTH ABSENCE (AWL)	MEDICAL
08/10/2012	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
08/07/2012	KIRKLAND	INCARCERATED	MEDICAL
08/07/2012	OUTSIDE MEDICAL	AUTH ABSENCE (AWL)	MEDICAL
07/26/2012	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
07/26/2012	KIRKLAND	INCARCERATED	MEDICAL
07/21/2012	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
07/20/2012	OUTSIDE MEDICAL	AUTH ABSENCE (AWL)	MEDICAL
07/19/2012	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
07/19/2012	OUTSIDE MEDICAL	AUTH ABSENCE (AWL)	MEDICAL
06/12/2012	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
06/05/2012	LIEBER	INCARCERATED	ADMINISTRATIVE
06/05/2012	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
04/30/2012	LIEBER	INCARCERATED	ADMINISTRATIVE
04/30/2012	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
03/23/2012	LIEBER	INCARCERATED	ADMINISTRATIVE
03/23/2012	OUTSIDE MEDICAL	AUTH ABSENCE (AWL)	MEDICAL
06/07/2011	LIEBER	INCARCERATED	ADMINISTRATIVE

INMATE SEARCH DETAIL REPORT

WILLIAMS, LANCE AUSTIN (00345477)

MOVEMENT

MOVEMENT DATE	TO LOCATION	STATUS	REASON
04/06/2011	KIRKLAND	INCARCERATED	NEW ADMISSION

EARNED WORK CREDITS

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LEVEL
PARA-PROF COUNS#1 SKILL	02/28/2017			3F5
CIU PROGRAM	01/16/2015	12/12/2016	INSTIT TRANSFER	3F5
TEACHER ASSISTANT	07/22/2014	01/15/2015	INSTIT TRANSFER	3F5
HORTICULTURE TRAINEE	11/07/2012	07/21/2014	PROMOTION	3F5
WARDKEEPER ASSISTANT	08/22/2012	11/05/2012	INMATE REQUEST	3F5
FOOD SERVICE AIDE	06/15/2012	08/21/2012	INMATE REQUEST	3F5
MECHANIC HELPER	08/29/2011	06/12/2012	INSTIT TRANSFER	3F5

EARNED EDUCATION CREDITS

NO EARNED EDUCATION CREDITS DURING CURRENT INCARCERATION

Lance Austin Williams v. The State of South Carolina
Case No.: 2017-001877

EXHIBIT F

(Horticulture certificate)

Palmetto Unified School District
Presents
This Vocational Certificate

Be It Known that Lance Williams has satisfactorily
completed a 1,700 hour course of instruction in Horticulture - 4
and on the recommendation of the Principal and Faculty the Palmetto Unified School
District awards this certificate

Given at Columbia South Carolina, this 10th day of July 20 14

[Signature]
Vocational Instructor
[Signature]
Principal/Lead Teacher

[Signature]
Vocational Director
[Signature]
Superintendent

COURSE COMPETENCIES CHECKLIST

DIRECTIONS: The student's degree of skill in performing each course competency is evaluated by the rating scale shown in the chart below. The numerical ratings of 3, 2, 1, and N represent the traditional school grading system of A, B, C and D. The numbers represent the skill level demonstrated by the student when performing the course competencies. The different skill levels are defined in the ratings chart.

Rating Scale:

Score	Practical Work Skill Level	
3	Skilled:	Can work independently with no supervision
2	Semi-Skilled:	Performs job completely with limited supervision
1	Limited Skill:	Requires instruction and close supervision
N	No Exposure:	Has no experience or knowledge in this area

Horticulture Level 4 Competencies

3	2	1	N	
✓				A
			✓	B
✓				C
			✓	D
	✓			E
			✓	F
	✓			G
✓				H

Extensive Safety Requirements

Advance Landscape Design

Plant Identification

Hardscapes

Irrigation

Hydroponics

Greenhouse Management

Growing a Greenhouse Project

Lance Austin Williams v. The State of South Carolina
Case No.: 2017-001877

EXHIBIT G

(Columbia International University associates
degree in biblical studies)

Columbia International University

*The Trustees of
Columbia International University
upon the recommendation of the Faculty have conferred upon*

Lance Austin Williams
the degree of
Associate of Arts

with all honors, rights and privileges appertaining thereto.

*Given at Columbia in the State of South Carolina, in this
month of December, in the year of our Lord two thousand sixteen.*


Chairman of the Board of Trustees




President

RECEIVED

THE STATE OF SOUTH CAROLINA
In the Supreme Court

OCT 05 2017
S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

Appellate Case No. 2017-001877
Case No. 2014-CP-32-04769

Lance Austin Williams, SCDC No. 00345477.....Respondent,

v.

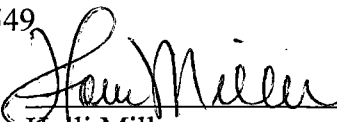
State of South Carolina.....Petitioner.

CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for the Applicant, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on October 5, 2017, served by having the below document placed in the mail, first class postage affixed thereto, to the following mentioned person:

Document: Respondent's Petition for Bail Pending Appellate Review

Served: Melody Brown, Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
Post Office Box 11549
Columbia South Carolina 29211-1549


Holli Miller