

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County

Honorable J. Mark Hayes, Circuit Court Judge

DWAYNE LEE RUDD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000091

APPENDIX

VICTOR R. SEEGER
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JULIE COLEMAN
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

RECEIVED
SEP 21 2018
S.C. SUPREME COURT

INDEX

INDEX	i
TRIAL TRANSCRIPT (DECEMBER 9 – 12, 2013)	1
APPLICATION FOR POST-CONVICTION RELIEF	476
RETURN	507
POST-CONVICTION RELIEF HEARING TRANSCRIPT (SEPTEMBER 18, 2018)	516
PETITIONER’S EXHIBIT 3 (DSS STATEMENT)	648
ORDER OF DISMISSAL	650
INDICTMENTS	676

AFFIDAVIT

POST-CONVICTION RELIEF

Ineffective Assistance of Appellate Counsel.

2. Appellate counsel was ineffective for failing to raise the sufficiency of the indictments, as to, the indictments failed to notify the defendant of any acts or factual allegations, in order, for the defendant to receive sufficient notice of the charges against him to enable him to prepare a defense, further, the indictments failed to give adequate notice of the the dates of the offenses, in fact , the state changed the dates of the offenses without any notice to the defense and without amending the new set of dates, in addition, the indictments are multiplicitous when it charges a single offense as an offense multiple times, in separate counts, when, in law and fact only one crime has been committed See United States v. Walsh (194 F.3d 37).

In State V. Baker 769 SE.2d 860 (2015) The Supreme Court ruled that an indictment must do more than merely recite the elements charged, but must contain sufficient factual allegations, in order for an indictment to be sufficient.

United States V. Thompson (2015 WL 6549590) FN (2) (3)

Typically, to fulfill their Constitutional functions, indictments " need to do little more than to track the language of the statute charged and state the [approximate] time and place....of the allege crime" United States V. Vilar 729 F.3d 62 (2013). But indictments also must contain some factual particularity to ensure that the prosecution will not fill in the elements of its case with facts other than those considered by the grand jury.

AFFIDAVIT**POST-CONVICTION RELIEF****Ineffective Assistance of Appellate Counsel.**

3. Appellate Counsel was ineffective for failing to report to the proper authorities that the state changed the original evidence that was introduced into evidence as exhibits 3 and 4 at trial, for something different at appeal. Appellate counsel should have notified the Court of Appeals that that the state submitted the wrong evidence for appeal before going to oral argument on February 9, 2016.

Appellate counsel was notified prior to oral argument that the state swapped the evidence, but did not report the problem to the court. Appellate counsel proceeded to orally argue the case with knowledge of the misconduct.

POST-CONVICTION RELIEF

Prosecutorial Misconduct.

1. Assistant Solicitor Ashley Hammack of the Second Judicial Circuit failed to comply with Rule 5. South Carolina Rules of Criminal Procedure and prosecution's failure to comply with holdings in Brady v. Maryland, 373 U.S. 83 (1963) by withholding the Forensic Medical Exam Report.
2. Assistant Solicitor Ashley Hammack of the Second Judicial Circuit misled the jury by misrepresenting evidence by taking a photograph of a written message, and using only a portion of the message that reads: " I'm Sorry " to indicate to the jury that the defendant apologized for the crime he was on trial for, in fact , the prosecution knew that this was not the true meaning of the message.
3. Assistant Solicitor Ashley Hammack of the Second Judicial Circuit knowingly used perjury testimony to obtain the conviction of the defendant, and prosecution's failure to correct the false testimony was in violation of the defendant's U.S.C.A. Const. Amend. 14 Due Process Rights to a fair trial.
4. Assistant Solicitor Ashley Hammack of the Second Judicial Circuit misled the Aiken County Grand Jury, and used false evidence to indict the defendant. The defendant was attempting to establish an alibi defense on the original offense dates sworn in the arrest warrants by Detective Kristopher Everson on June 6, 2013. The defendant was granted bond and released on September 3, 2013, October 3, 2013 prosecution presented a brand new set of offense dates to the grand jury without any notification to the defense. November 5, 2013 a hearing was held for substitution of counsel Andy Anderson to Amiee J. Zaroczek. Ashley Hammack filed a motion for defendant to disclose notice of alibi defense on the new set of dates on the same day defendant retained new counsel November 5, 2013. Defense counsel filed a motion objecting to the state's request , and requesting the state give a more definite and certain request for notice of alibi defense, this motion was filed on November 26, 2013. Defendant's trial was set for December 9, 2013, and defendant was sentenced on the original arrest warrant dates December 12, 2013, not the offense dates in the indictments. The defendant was surprised by the change of the offense dates, and was not given adequate notice and unable to combat the states accusations. It would appear the the prosecution was preventing the defendant to establish his alibi defense on the original offense dates sworn under oath in the arrest warrants. This is in violation U.S.C.A. Const. Amend. 14 and S.C. Const. Art. 1, section 11 and 14.

POST-CONVICTION RELIEF

DEFENDANT'S SUBPOENA AND WITNESS LIST.

1. Amiee J. Zmrocezk
2. Ashley Hammack
3. Dr. Christopher Houk
4. Dr. Jeffery Donohoe
5. Kate Chappell
6. Anne Leaver
7. Detective Kristopher Everson
8. Tommy A. Thomas
9. DSS Supervisor Esther Timmermen

POST-CONVICTION RELIEF

STATE OF SOUTH CAROLINA)
 County of Aiken)

VERIFICATION

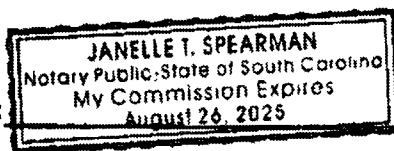
I, Dwayne Lee Rudd, hereby, submit this affidavit with the attached Post-Conviction Relief Application, and submit that under plenty of perjury, all information contained in said Affidavit is correct and true.

Dwayne L. Rudd

SWORN to and subscribed before me this 20th
 day MAY, 2014

Janelle T. Spearman (L.S.)
 Notary Public

My Commission Expires:



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

SECOND JUDICIAL CIRCUIT)

COUNTY OF AIKEN)

CASE NO.: 2016-CP-02-1361)

Dwayne Rudd, #358140)

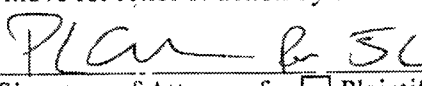
**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff.)

vs.)

State of South Carolina)

Defendant.)

Plaintiff's Attorney: Lance S. Boozer, Bar No. _____ Address: 807 Gervais St; Ste 203 Columbia, SC 2921 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Julie A. Coleman, Bar No. 102214 Address: PO Box 11549 Columbia, SC 29211-1549 Phone: 803-734-3737 Fax 803-734-4113 E-mail: _____ Other: _____
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: ☐ YES / ☐ NO	
SECTION II: Motion/Order Type	
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for ☐ Plaintiff / ☒ Defendant December 16, 2016 Date submitted	
SECTION III: Motion Fee	
☐ PAID - AMOUNT: \$ _____ ☒ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____	

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Dwayne Lee Rudd,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

SECOND JUDICIAL CIRCUIT

2016-CP-02-1361

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on June 10, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was true bill indicted by the October 2013 term of the Aiken County Grand Jury for five counts of Criminal Sexual Conduct with a Minor Third Degree (2013-GS-02-01638, -01639, -01640, -01644, -01645), and five counts of Criminal Sexual Conduct with a Minor Second Degree (2013-GS-02-01642, -01643, -01679, -01680, -01681). Applicant was represented on these charges by Aimee Zmroczek, Esquire. Applicant proceeded to a jury trial and was convicted as indicted of five counts of CSC second degree and two counts of CSC third degree. On December 12, 2013, Applicant was sentenced by the Honorable James R. Barber, III to fifteen years' imprisonment for each charge of CSC second degree, to run concurrently, and five years' imprisonment for both charges of CSC third degree, with one sentence to run concurrently and the other to run consecutively.

A timely notice of appeal was filed on Applicant's behalf by Tommy A. Thomas, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Rudd, Unpublished Opinion No. 2016-UP-088 (S.C. Ct. App. February 24, 2016). The Remittitur was issued March 17, 2016.

Attached herewith and incorporated herein by reference are the records of the Aiken County Clerk of Court regarding the subject convictions, the Record on Appeal, and Applicant's records for the Department of Corrections. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

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

1. Ineffective Assistance of Trial Counsel
 - a. Failure to introduce the May 28, 2013 Forensic Interview Transcripts and DVDs to impeach State's key witnesses.
 - b. Failure to introduce the June 11, 2013 Forensic Medical Exam Reports to impeach State's witnesses.
 - c. Failure to introduce DSS supervisor's written statement to impeach State's witnesses.
 - d. Failure to introduce June 13, 2013 Detective's photographs.
 - e. Failure to subpoena June 11, 2013 Forensic Medical Exam Reports.
 - f. Failure to object to jail phone call conversation to preserve for appellate review.
 - g. Failure to introduce doctor's medical notes from October 16, 2012 surgery and accurately cross-examine witness Dr. Donohoe.
 - h. Failure to subpoena Forensic Interviewer Anne Laver.
 - i. Failure to subpoena Dr. Christopher Houk.
 - j. Failing to contemporaneously object to qualification of juror number seventy-nine to preserve the issue for appellate review.
 - k. Failure to challenge the trial court's lack of subject matter jurisdiction.
 - l. Failure to object to indictments.
 - m. Failure to investigate.
2. Ineffective Assistance of Appellate Counsel

- a. Failure to raise issue of relevancy of State's exhibits 3 and 4.
- b. Failure to raise issue of sufficiency of indictments.
- c. Failure to report State's misconduct when they changed the evidence on appeal.
- 3. Prosecutorial Misconduct
 - a. Rule 5, Brady violation.
 - b. Falsely represented evidence as an admission of guilt by Applicant.
 - c. Knowingly used perjured testimony to obtain conviction.
 - d. Used false evidence.
- 4. Lack of Subject Matter Jurisdiction

III.

Applicant claims ineffective assistance of counsel in his application. Respondent contends Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable'

claim suggested by a client would disserve the very goal of vigorous and effective advocacy...”
Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith,

490 U.S. 794, 109 S. Ct. 2201 (1989). Respondent submits that Applicant has not carried his burden of proving actual prosecutorial misconduct; therefore, this allegation should be summarily dismissed.

VI.

Respondent submits that Applicant's fourth allegation that the circuit court lacked subject matter jurisdiction is meritless. A circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State v. Wilkes, 353 S.C. 462, 464-465, 578 S.E.2d 717, 719 (2003) (citing Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001)). In this case, the Applicant was indicted by the Aiken County grand jury. That indictment was true-billed and signed by the foreman of the grand jury. The said indictment contains all the necessary elements of the offense, and further cites the applicable statute. A presumption of regularity attaches to all proceedings in the courts of this State, and it is incumbent upon one who challenges a proceeding to prove his claims. See, e.g., Tate v. State, 345 S.C. 577, 549 S.E.2d 601 (2001); Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986). Applicant here cannot show any irregularity, because the indictment in question is sufficient on their face. The Court should summarily dismiss this allegation.

VII.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VIII.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

IX.

Each and every allegation contained within the application not either expressly admitted, qualified, or explained is hereby denied.

X.

WHEREFORE, having made its Return, Respondent requests that a hearing be held on the claims of ineffective assistance of counsel and involuntary guilty plea.

[Signature page to follow]

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

JULIE A. COLEMAN
Assistant Attorney General

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

_____, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

DWAYNE L. RUDD, #358140)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

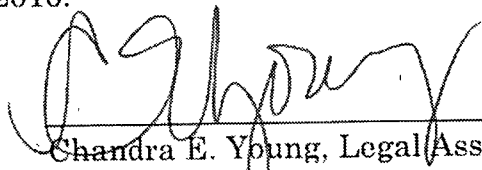
2016-CP-02-1361

AFFIDAVIT OF SERVICE BY MAIL

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

Lance S. Boozer, Esquire
807 Gervais Street; Suite 203
Columbia, SC 29201

DATED this 16th day of December, 2016.



Chandra E. Young, Legal Assistant
For Respondent

1 State of South Carolina) In the Court
2 County of Aiken) Of Common Pleas

3 Docket No. 2016CP02001361
4

5
6 Dwayne Rudd,)
7 Petitioner,)
8 vs.) Transcript of Record
9)
10 State of South Carolina,)
Respondent.)

11
12 September 18, 2018
13 Aiken, South Carolina
14

15 B E F O R E:

16 The Honorable J. Mark Hayes, Judge.
17

18 A P P E A R A N C E S:

19 Lance S. Boozer, Esquire
20 Attorney for the Petitioner

21 Julie A. Coleman, Assistant Attorney General
22 Attorney for the Respondent
23

24 Brenda J. Sigwald, Circuit Court Reporter
25 To The Honorable Doyet A. Early III
P.O. Box 206, Jackson, South Carolina 29831

I N D E XPage

Post Conviction Relief Hearing

Dwayne Rudd

Direct Examination by Mr. Boozer..... 5

Cross-Examination by Ms. Coleman..... 56

Robert Bank

Direct Examination by Mr. Boozer..... 61

Cross-Examination by Ms. Coleman..... 67

Kate Chappell

Direct Examination by Mr. Boozer..... 70

Cross-Examination by Ms. Coleman..... 80

Redirect Examination by Mr. Boozer..... 82

Aimee Zmroczek

Direct Examination by Mr. Boozer..... 85

Cross-Examination by Ms. Coleman..... 108

Redirect Examination by Mr. Boozer..... 118

Ashley Hammack

Direct Examination by Mr. Boozer..... 119

Certificate of Reporter..... 132

E X H I B I T S

<u>Number</u>	<u>Description</u>	<u>Page</u>
P-1	Medical Records (Sealed).....	15
P-2	Medical Records (Sealed).....	15
P-3	DSS Statement.....	20
P-4	Photograph.....	28
P-5	Photograph.....	28
P-6	Photograph.....	28
P-7	Photograph.....	28
P-8	Copy of Photograph.....	37
P-9	Copy of Photograph.....	37
P-10	Photograph.....	119

POST CONVICTION RELIEF HEARING

THE COURT: Yes, ma'am.

MS. COLEMAN: May it please the Court. This is Dwayne Lee Rudd versus the State of South Carolina, Docket Number 2016CP021361. Applicant is presently confined in the South Carolina Department of Corrections pursuant to order of commitment of the Aiken County Clerk of Court. Applicant was true-bill indicted by the October 2013 term of the Aiken County Grand Jury for five counts of criminal sexual conduct with a minor third degree and five counts of criminal sexual conduct with a minor second degree.

Applicant was represented on these charges by Aimee Zmroczek, Esquire and Robert Bank, Esquire. Applicant proceeded to a jury trial and was convicted as indicted of five counts of CSC second degree and three counts of CSC third degree.

On December 12, 2013 applicant was sentenced by the Honorable James R Barber, III to 15 years imprisonment for each charge of CSC second to run concurrently and five years imprisonment for each charge of CSC third, with one degree -- with one sentence to run consecutively.

A timely notice of appeal was filed on applicant's behalf by Tommy Thomas, Esquire. The South Carolina Court of Appeals affirmed applicant's conviction. The remittitur was issued March 17th, 2016.

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 Applicant filed a timely application for post
2 conviction relief on June 10th, 2016 alleging that he was
3 being held in custody unlawfully based on the following
4 allegations: Ineffective assistance of trial counsel
5 ineffective assistance of appellate counsel, prosecutorial
6 misconduct, and lack of subject matter jurisdiction. The
7 State filed its return on December 16th, 2016.

8 And he's present today represented by Mr. Lance
9 Boozer.

10 THE COURT: Yes, sir?

11 MR. BOOZER: Thank you, Your Honor, if it pleases
12 the Court, we would go ahead and call Mr. Dwayne Rudd to
13 the stand.

14 DWAYNE LEE RUDD,

15 having been duly sworn, testified as follows:

16 THE CLERK: Please have a seat in the witness box
17 and state your full name for the Court.

18 THE WITNESS: My name a Dwayne Lee Rudd.

DIRECT EXAMINATION

19
20 BY MR. BOOZER:

21 Q Mr. Rudd, how are you?

22 A Good.

23 Q All right. If you would, just keep your voice up,
24 speak slowly and clearly because Madam Court Reporter needs
25 to take down everything that you're saying today, okay?

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 A Yes, sir.

2 Q All right. And Mr. Rudd, do you know why you're
3 here today?

4 A Yes, sir.

5 Q And why is that? What's brought you to court
6 today?

7 A Well, because my -- my 14th and 6th Amendment right
8 to a -- to due process and effective assistance of counsel
9 has been violated.

10 Q Okay. Now, you've obviously filed a post
11 conviction relief application?

12 A Yes, sir.

13 Q All right. And you and I have certainly had a
14 discussion about what a post conviction relief application
15 is. Do you understand that what you're asking this Court
16 for is a new trial on your original charges?

17 A Yes, sir.

18 Q And we, of course, reviewed both the benefits, as
19 well as the risk associated with that?

20 A Yes, sir.

21 Q And having done that, is it your desire to still
22 proceed and request a new trial in your case?

23 A Yes, sir, it is.

24 Q Okay. Now, where are you currently incarcerated?

25 A Allendale Correctional Institution.

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 Q All right. And what were you charged with?

2 A I was charged with three counts of CSC third and
3 five counts of CSC second.

4 Q And you indicated -- did you go to trial on these
5 charges?

6 A Yes, sir, I did.

7 Q Okay. And who represented you at that trial?

8 A Aimee Zmroczek.

9 Q All right. How long did Ms. Zmroczek represent
10 you?

11 A Well, I believe I -- I hired her sometime in maybe
12 September. I got a substitution of counsel from Andy
13 Anderson to her and I believe at the time she was on a
14 murder trial and I believe a few weeks lapsed before she
15 actually started my case. We were on the docket for
16 November and then it got moved to December 9th of 2013. I
17 believe her representation may have -- may have -- sometime
18 around November I believe it was. So around there.

19 Q Okay. So prior to your trial, she had been on your
20 case for two or three months?

21 A Three months, yeah.

22 Q All right. Did you think that that was sufficient
23 time for her to prepare your case for trial?

24 A Well, no, because that -- when she had taken the
25 case, she had told me that she needed a continuance because

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 she wasn't, you know, ready to -- she wasn't prepared,
2 there was not enough time. They were trying to take me to
3 court within a month. So she had another case like I said
4 that was going -- she was on another case at the time.

5 I came to her office a few times and asked, you
6 know, I guess went over the case and she did work on it a
7 few times, I guess, through the night, you know, I talked
8 to her on the phone about it. She had told me that -- I
9 told her I wanted to wait that I didn't feel that I was
10 prepared yet. And in her office, I do remember one
11 incident where her sec -- I guess her paralegal, Christina,
12 we were standing there talking and she said that she did
13 not -- she did not want to go in front of Judge Early. So
14 she wanted to go in front of Judge Barber. And I was -- it
15 really didn't matter to me, I just didn't want to go right
16 then because I didn't feel like I was prepared. So she
17 insisted that I go with Judge Barber and -- so that's what
18 we did.

19 Q Do you know about how many times you met with
20 Ms. Zmroczek prior to your trial?

21 A Well, I want -- I can't be certain. It was quite
22 some time ago. Probably -- I don't know, three or four
23 times, I'm guessing, in her office. I had drove up there
24 in my truck, you know, went over a couple of things in the
25 office with her.

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 Q Okay. Let me ask you this: What is your
2 understanding of what your defense was or was going to be
3 at trial?

4 A Well, we talked about that too. You know, my wife
5 had a part in the -- in the -- I guess the part of the
6 defense was that my wife had a motive that she was bringing
7 the allegations up for, you know, a -- I guess for a
8 divorce. She had -- a divorce came about at the same time
9 these allegations did. Divorce papers were given to me
10 probably a week after I was -- the accusations came out.
11 And so -- we also found that my wife was cheating with
12 somebody. She'd had an affair with somebody and that was
13 found out also through some phone records that I gave
14 Aimee.

15 So the motive was my wife was bringing the
16 allegations up and I think that was the most -- that was
17 the defense that she was trying to bring up.

18 Q Okay. And what was the nature of those allegations
19 that were levied against you.

20 A That I inappropriately touched my two daughters,
21 one on the bottom, on her butt, one -- both of them on the
22 breast. I squeezed the breast and then I digitally
23 penetrated both of them.

24 Q Okay. And these are your own daughters, correct?

25 A Yes --

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 Q These are your own daughters, correct?

2 A Yes, sir.

3 Q All right. And now did one of your daughters
4 specifically suffer from a sort of rare and unique
5 condition?

6 A Yes, sir.

7 Q Okay. And to your -- what was your understanding
8 of what that condition was?

9 A The condition was called congenital adrenal
10 hypoplasia and what it is, is she was born without a
11 specific hormone that when she's in a fetus, her -- her --
12 I guess after nine weeks (verbatim) of being in a fetus,
13 her genitalia doesn't form properly, it won't form fully.
14 So when she was born, she was born without parts of the
15 vaginal area, one being without a vaginal orifice and the
16 other was an enlarged clitoris and she was born with what
17 they call urogenital sinus and the urogenital sinus was a
18 hole that was where the vagina and the urethra connected to
19 and the doctor had to go in and do surgery and take the
20 vagina and put it in its place, create an opening for the
21 vagina and prepare the clitoris because it was enlarged and
22 create, I guess it's called labia.

23 Q Okay. This is your daughter Minor 1?

24 A Minor 1, yes, sir.

25 Q Okay. And you were just explaining to that. Minor 1

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 had some pretty extensive reconstructive surgery, or
2 corrective surgery I guess we could call it, to repair the
3 condition?

4 A Yes, sir.

5 Q All right. Now, you were basically in between -- I
6 guess you flipped houses and whatnot as part of what you
7 did as your job?

8 A Yes, sir.

9 Q And your wife worked professionally?

10 A Yes, sir.

11 Q So you were the one who really kind of stayed home?

12 A Yes, sir.

13 Q All right. And that was really -- that was also
14 part of your defense, was it not?

15 A That I stayed home.

16 Q That you stayed home and you were kind of the
17 caretaker of the children?

18 A Yes, sir, that was part of it, yeah.

19 Q All right. Now, let's start going through your
20 allegations. You've got one allegation, which is your
21 first allegation in your application that your lawyer was
22 ineffective for failing to introduce some forensic
23 interview transcripts and DVD's of the -- of the girls?

24 A Yes, sir.

25 Q Okay. Is that an alle -- you and I, have been

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 through your application. Is that something that you're
2 pursuing? That specific allegation?

3 A Well, this is an allegation I am pursuing, however,
4 the -- I think at the time I wasn't able to -- I guess
5 wasn't able to get what I needed for that, so I'm going to
6 have to pass on that allegation.

7 Q Okay. Well, you understand that I, of course,
8 reviewed those items, right?

9 A Yes, sir.

10 Q Okay. But you're not proceeding on that
11 allegation?

12 A No.

13 Q Okay. Now, you've also got an allegation that
14 you've got marked as B in your application, which is your
15 attorney was ineffective at trial for failing to introduce
16 some forensic medical exam reports of both children. Is
17 that an allegation?

18 A Yes, sir.

19 Q All right. Prior to your trial and in discovery,
20 were you provided with those forensic medical exam reports?

21 A No, I was not. I never saw a medical report.
22 Never -- just talk -- they just brought it up at trial that
23 there was no physical findings. But it was brought up in
24 trial by -- by Aimee that -- on the transcript, page, I
25 think it's page 43, line 4 through 11 or 44, but she said

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 -- brought up that she didn't get -- what she said, she
2 said she got medical records. She got medical records from
3 the complainant, which was my wife. She got forensic
4 interviews and she got some pictures and that was the only
5 evidence that she received in this case.

6 Q Okay. So it's -- it's your -- let me ask you this:
7 Did you review any evidence at all? Or discovery material
8 through your lawyer prior to trial?

9 A No, I don't recall.

10 Q Okay.

11 A No.

12 Q But you don't recall reviewing specifically any
13 medical --

14 A No --

15 Q -- reports --

16 A -- no medical report at all.

17 Q -- hang on a second. I wasn't --

18 A Oh, I'm sorry.

19 Q -- finished. Let me finish my question.

20 A Sorry.

21 Q Okay. You don't recall reviewing any medical
22 reports at all with your attorney prior to your trial?

23 A No.

24 Q You just know that there was some reference to
25 them?

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 A Yes.

2 Q Okay. Since I have been your attorney, I, of
3 course, have received some documents. Have I shown you
4 medical exam reports of your children?

5 A Yes.

6 Q Okay.

7 MR. BOOZER: Your Honor, I've got two medical exam
8 reports that previously we were ordered by Judge Goodstein
9 that we could have these, however, they were to be marked
10 under seal. I do have those ready and prepared to be under
11 seal.

12 And, Your Honor, if I may -- I can certainly do it
13 through this witness later, go ahead and have these marked
14 as Applicant's Exhibits 1 and 2, the medical report of
15 Minor 1 and Minor 2 ? Under seal, of course.

16 THE COURT: All right. You can go ahead and just
17 have the court reporter mark it.

18 (Petitioner's Exhibit Number 1 and Number 2 were
19 marked for evidence under seal.)

20 MR. BOOZER: Your Honor, may I approach the
21 witness?

22 THE COURT: (The Court nodded head.)

23 BY MR. BOOZER:

24 Q Mr. Rudd, I'm going to hand you a copy of two
25 documents. They've both been marked, 1 obviously is --

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 exhibit -- Applicant Exhibit 1; the second is Applicant's
2 Exhibit 2. The one that's marked Applicant's Exhibit 1, is
3 that a copy of the forensic medical exam report of your
4 daughter Minor2 ?

5 A Yes.

6 Q Okay. And that is not something that you viewed in
7 discovery with Ms. Zmroczek?

8 A No, sir.

9 Q Okay. Now, the second is -- is that a copy of the
10 forensic medical exam report performed for Minor1 ?

11 A Yes, sir.

12 Q Okay. Did you review that with Ms. Zmroczek?

13 A No, sir.

14 MR. BOOZER: Your Honor, at this time, we would
15 move to have those marked as Applicant's 1 and 2, under
16 seal.

17 MS. COLEMAN: No objection.

18 THE COURT: Without objection.

19 What were the other two?

20 MR. BOOZER: I'm sorry, Judge?

21 THE COURT: Those are the same that the court
22 reporter just marked?

23 MR. BOOZER: Yes, sir, I'm sorry.

24 THE COURT: Okay. Without objection.

25 BY MR. BOOZER:

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 Q And Mr. Rudd, who is it -- is it your understanding
2 that your children were medically evaluated, what I call
3 post disclosure, by some -- by a medical professional?

4 A To my knowledge, they were.

5 Q Okay. And who is it your understanding that that
6 was? That examined your children?

7 A As far as the medical exam, Kate Chappell.

8 Q All right.

9 MR. BOOZER: Your Honor, may I approach the
10 witness?

11 BY MR. BOOZER:

12 Q Mr. Rudd, I'm going to grab these documents from
13 you. We're, of course, going to get into the substance of
14 these documents with both your attorney as well as
15 Ms. Chappell who's here to testify as a witness in your
16 case, but why was it that you wanted those two medical
17 records introduced at your trial?

18 A Well, because in my case the only evidence that
19 really -- that they had to convict me was the testimony of
20 my two daughters. And based on those testimonies, the
21 whole case hinged on credibility; that they believe them or
22 they believe me. And it was even instructed to the jury as
23 that was what they were to deliberate on, credibility.

24 The -- the only -- there was no doctor, no experts
25 called on my behalf to examine them; no independent

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 investigation on my behalf as far as to the allegations.

2 So that -- that doctor's report, plus the doctor testifying
3 to no physical findings, it would have helped with my
4 credibility of what I was saying that I did not do -- I was
5 not guilty of the allegations.

6 Q Okay. And obviously, knowing that you're not,
7 obviously, a doctor --

8 A Right.

9 Q -- is it your understanding upon reviewing those
10 medical exam reports, which, of course, we'll get into
11 later with the appropriate witnesses, that there was no
12 positive finding or affirmative finding of physical or
13 sexual abuse on the children?

14 A Yes, sir.

15 Q Okay. Did you have that discussion with your
16 attorney prior to trial?

17 A I don't recall having that discussion. I do recall
18 that she did say that -- that they didn't find anything,
19 but I didn't actually discuss anything in detail about it.

20 Q Okay. Had you had that discussion with her, would
21 you have asked her to call Ms. Chappell as a witness at
22 your trial?

23 A Oh, yes. Yes, sir.

24 Q Okay. Now, as I indicated before, I have
25 investigated Ms. Chappell, you understand that, right?

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 A Yes, sir.

2 Q Okay. And is it your desire to have her testify
3 here at trial -- at your PCR hearing?

4 A Yes, sir.

5 Q Okay. Now, you've also got that your lawyer was
6 ineffective for failing to introduce DSS supervisor, Esther
7 Timmerman's written statement for purposes of impeachment?

8 A Yes, sir.

9 Q Who is Esther Timmerman?

10 A Esther Timmerman is a DSS supervisor that came out
11 at the scene when the police arrived at my house to, I
12 guess remove my kids from the home with my wife's
13 belongings and their belongings. And when she came up with
14 the police officers, she immediately walked up and took a
15 -- asked me questions and started asking me things, and I
16 asked her about the allegations and she took down a
17 statement. She wrote it down as I said it. And in
18 trial --

19 Q Okay. So Ms. Timmerman -- well, let me back up.
20 Were you and your lawyer provided -- well, I think you
21 already answered this. Did you review Ms. Timmerman's
22 statement prior to trial with Ms. Zmroczek?

23 A No.

24 Q Okay. Were you provided that in discovery?

25 A Yes.

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 Q Okay.

2 A May --

3 Q All right.

4 MR. BOOZER: Your Honor, may I approach?

5 THE COURT: Yes, sir.

6 BY MR. BOOZER:

7 Q Mr. Rudd, I'm going to hand you a copy of a
8 document. And if you could, could you identify that for
9 me?

10 A It's a voluntary statement from Esther Timmerman.

11 Q Okay. And you actually attached portions of that
12 statement, or that statement itself in your application for
13 post conviction relief?

14 A Yes, sir.

15 Q All right. Is that a true and accurate copy of the
16 statement as to your knowledge existed in your discovery?

17 A This is page one. There's -- oh, I got that other
18 page right here. Yes, sir. Yes, sir.

19 Q Okay.

20 MR. BOOZER: Your Honor, I move to mark this -- as
21 I stated, it's part of the record, it's part of his PCR
22 application, but I would move to mark this as Applicant's
23 Exhibit 3.

24 MS. COLEMAN: And, Your Honor, I would object with
25 this coming in through this witness. He doesn't know if it

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 came into discovery or not. He said he did not review it
2 with his attorney at the time. So he has no firsthand
3 knowledge of whether or not it was in discovery.

4 THE COURT: I thought he said he did.

5 MS. COLEMAN: He testified that it was, but he
6 stated that he did not review this in the discovery at the
7 time. So he doesn't know.

8 MR. BOOZER: Your Honor, I think he said that he
9 didn't review it with his lawyer, but it was in his
10 discovery is what I thought his testimony was.

11 THE COURT: All right. I'm going -- we'll go ahead
12 and admit it. I believe that's what I recall the testimony
13 was. So for whatever weight it is, I'll give it.

14 MS. COLEMAN: Thank you.

15 (Petitioner's Exhibit Number 3 was marked for
16 evidence.)

17 BY MR. BOOZER:

18 Q Now, Mr. Rudd, did Ms. Timmerman testify at your
19 trial?

20 A Yes, sir.

21 MR. BOOZER: And, Your Honor, specifically on page
22 -- I'll be referencing page 240 of the transcript.

23 BY MR. BOOZER:

24 Q Now, do you recall on direct examination, Mr. Rudd,
25 Ms. Timmerman on page 240, beginning at line 7, she

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 indicated after talking to you that -- and that he said,
2 you know, I'm the father of these girls, so I can touch
3 their vagina if I want to. Do you recall that?

4 A Yes, sir.

5 Q All right. Now we are on cross-examination, did
6 you have -- did Ms. Zmroczek have co-counsel with her
7 representing you at trial?

8 A Yes, sir.

9 Q Who was that?

10 A Mr. Banks.

11 Q Okay. Now, did Mr. Banks, was he cross examining
12 this witness?

13 A Yes, sir.

14 Q All right.

15 MR. BOOZER: And, Your Honor, just for the Court's
16 reference, I'm looking at page 244, beginning at line 15.

17 BY MR. BOOZER:

18 Q You recall on cross-examination on 244, beginning
19 at line 15, your attorney, Mr. Banks, asking Ms. Timmerman,
20 and I wanted to discuss very quickly about a comment or
21 part of the statement that you said, and you can correct me
22 if I'm wrong; did you say that Mr. Rudd said they're my
23 kids and I can touch if I want to? I can touch them if I
24 want to; is that what you said Mr. Rudd said?

25 Answer: I believe what I said, I have written down

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 that I believe I said was that he said to me that I'm their
2 daddy and I can touch their vagina if I want to.

3 Question: Right. He didn't say I'm their father
4 and I can touch it if I need to?

5 Answer: No, that's not what he said to me. I
6 wrote down exactly in my statement in caps in the
7 abbreviations in our system what he said.

8 Now, in looking at Exhibit 3, do you see that
9 Ms. Timmerman states Mr. Rudd also stated that he may have
10 touched her vagina to see, but did not penetrate my finger
11 in her. My finger may have touched her vagina, he never
12 did this as a sexual thing. Mr. Rudd also stated, and
13 these are in quotes, am their father, I can touch my girl
14 vaginas if I have to.

15 A Yes, sir.

16 Q Okay. So what she's testifying to at trial is not
17 correct; is it?

18 A No, sir.

19 Q And yet that's all the jury hears; is it not?

20 A Yes, sir.

21 Q Okay. Did your -- did Mr. Bank or Ms. Zmroczek,
22 either of your lawyers attempt to confront Ms. Timmerman
23 with her own statement she had written?

24 A No, sir.

25 Q Okay. Did you want them to?

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 A Yes, sir.

2 MR. BOOZER: Your Honor, would you care to see
3 Ms. Timmerman's statement.

4 THE COURT: Yes, sir, if you're admitting it into
5 evidence, I would like to.

6 (The document was handed to the Court.)

7 THE COURT: All right.

8 BY MR. BOOZER:

9 Q Now, Mr. Rudd, you also have an allegation that
10 your lawyer was ineffective for failing to introduce some
11 photographs that had been taken at your -- at your house.
12 Is that one of your allegations?

13 A Yes, sir.

14 Q All right. And specifically, were these
15 photographs some pictures of some writings you had made on
16 the bed -- on the girl's bedroom walls?

17 A Yes, sir.

18 Q All right. Now, after these charges were made
19 against you, were you basically ordered to not have any
20 contact at all with your family?

21 A I was.

22 Q Did you attempt to communicate with them in some
23 way?

24 A Yes, I did.

25 Q All right. And what was the way you thought you

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 could do it?

2 A The best way I thought at the time was to write it
3 on the wall. I knew when I was -- I was going to be
4 charged and arrested I was going to leave a message on the
5 wall that they would be able to -- make sure they would be
6 able to get and that my wife wouldn't be able to -- I knew
7 she was upset. I had wrote some, also some paper, some
8 letters on paper and I wrote some things on the wall.

9 Q Okay. And looking back during that time, were you
10 under -- is it safer to say you were under an incredible
11 amount of stress and distraught?

12 A Yes, sir. An incredible amount, yes.

13 Q Okay. And looking at some pictures of writings on
14 the wall, for someone who's not going through that, it may
15 appear kind of out there, would it not?

16 A Maybe.

17 Q But at the time, that's the only way you knew how
18 to communicate with those kids?

19 A At that time. Yes, I tried through other ways. No
20 phone calls and no texting, couldn't get no -- couldn't
21 communicate.

22 Q Now, in pretrial motions --

23 MR. BOOZER: And, Your Honor, I'm looking
24 specifically at page 42 of the transcript.

25 BY MR. BOOZER:

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 Q Your attorney's actually trying to exclude what
2 appears to be, I guess a number of photographs at your
3 trial; is that right?

4 A Yes.

5 Q All right. Do you know why she was trying to keep
6 the photographs out?

7 A Well, yes, because they showed only a cropped
8 portion of the -- of an entire message. The parts where I
9 was saying I was sorry in the end of the message after I
10 had done wrote the message. And they took a picture of
11 just that part and not the entire message. And she didn't
12 want this entire message -- I mean that portion to be used
13 because it was prejudice to me, you know, at trial. And it
14 wasn't the whole message. The jury didn't see the whole
15 thing.

16 Q Okay. And we'll mark those here in just a second,
17 but going onto page 49 of the pretrial motions, your lawyer
18 states, beginning at page 5 -- and what you're talking
19 about is there was some close ups done to where some of the
20 writings on the wall that you had basically had I'm sorry
21 written in there, but they were zoomed in on it, those are
22 the photographs that you're talking about?

23 A Yeah. They -- they only zoomed in on the portion
24 where I said, I'm sorry. And there was a -- the message
25 wasn't what I was about -- what I was in the trial for. If

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 you read the message, you wouldn't have to read into it or
2 infer into it. You read the message, it would tell you
3 exactly what I'm saying sorry for and it was sorry for just
4 things I was going through as a dad. I wasn't there for
5 them in certain parts of their lives. I just started
6 reminiscing about things because I was going through such a
7 traumatic situation and I left some -- I found some cards
8 that my daughter Minor2 had wrote me and I drew that on
9 the wall and I even messed up her marker and said, I'm
10 sorry for messing up your marker.

11 I was just telling them I love them and that I just
12 missed the times that we spent together, but nothing to do
13 with what I was in trial for.

14 Q Okay. And before we get to page 49, actually on
15 page 48, your attorney's arguing, trying to keep those
16 photographs out. She says on 48, line 3, by taking one
17 picture of -- a close-up picture of, I'm sorry, and then
18 trying to say that he's sorry is guilt, is forcing him --
19 and then the Court jumps in and basically says, Well,
20 that's up to the jury. And then the Court goes onto say,
21 Obviously, he wrote on the wall. If you have other walls
22 that you're interested in showing then let's take a look at
23 them.

24 And then further on on page 49, at line 5, your
25 attorney says, I think, Your Honor, if you're going to

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 admit those, we can admit some to tell the rest of the
2 story and I don't think they're objectionable because they
3 gave them to us.

4 A Right.

5 Q Okay. Now were you under the impression that she
6 was going to introduce some other photographs of those
7 messages that had been written on the wall?

8 A Yes, sir.

9 Q All right.

10 MR. BOOZER: Your Honor, may I approach the
11 witness?

12 THE COURT: Yes, sir.

13 BY MR. BOOZER:

14 Q Mr. Rudd, I'm going to hand you five photographs.
15 I just want you to briefly take a moment and look at those
16 five photographs.

17 A (Looking) Okay. This one here -- I don't I -- I
18 don't recall writing that.

19 Q Hang on a second.

20 A I'm sorry.

21 Q Okay. Looking at those photographs, the first --
22 well, let me ask you this: Are those -- what do they
23 depict?

24 A Me apologizing for not spending much -- not --

25 Q Let me cut you off, Mr. Rudd. Mr. Rudd, are those

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 photographs pictures or accurate photographs of the walls
2 as they were in your house at the time you wrote on them?

3 A All except for one.

4 Q Okay.

5 MR. BOOZER: May I approach the witness, Your
6 Honor?

7 BY MR. BOOZER:

8 Q If you would, please show me which photograph
9 you're referring to that you have some disagreement with?

10 A This one. But the rest of them, yes.

11 MR. BOOZER: Your Honor, with regard to the first
12 four photographs, I would go ahead and move to mark those
13 as Exhibits 4 through 7.

14 MS. COLEMAN: No objection.

15 THE WITNESS: That one was in the -- that one was
16 shown at court.

17 BY MR. BOOZER:

18 Q We'll get to this in a second.

19 A I'm sorry.

20 THE COURT: All right. 4 through 7.

21 (Petitioner's Exhibit Number 4, Number 5, Number 6,
22 and Number 7 were marked for evidence.)

23 BY MR. BOOZER:

24 Q Mr. Rudd, I've handed you four photographs that are
25 marked Exhibits 4 through 7. If you could, take a look at

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 the first two, which would be Applicant's 4 and 6. Do you
2 know where those were taken?

3 A In the bedrooms.

4 Q Whose bedroom was that?

5 A My daughter's bedroom.

6 Q Which daughter?

7 A Well, one is -- 6 was Minor2 's and 4 was Minor1 's.

8 Q Okay. How about the other two?

9 A 7 was Minor2 and 5 was Minor1 's.

10 Q And those are the -- those are the writings that
11 you made on their walls?

12 A Yes, sir.

13 Q Okay. Just go through those photos and what --
14 what is it -- what did you write on those walls?

15 A I just wrote that I -- well, right here on this one
16 in Number 5 -- 7, I'm writing to Minor2 just tell her that
17 I -- you know, sorry that I didn't spend too -- I didn't
18 spend time with her. Her and Sissy and Mom. And I told
19 her that I -- I'm really sorry that I always -- I'm really
20 sorry, I always be -- I guess always be my baby girl
21 forever and -- and so much -- I'm in so much pain, Daddy.
22 And that's the part at the bottom of it.

23 And, let's see. I told her I would be there more
24 now than ever before if I could be. That's all that was
25 said, really.

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 Q Okay. Anywhere in those photographs, are you
2 apologizing for the allegations that have been levied
3 against you?

4 A No, sir.

5 Q Okay. Now, did the jury at any time ever see those
6 photographs of the full writings on the wall at your trial?

7 A No, sir.

8 Q Now, on page 353 -- you actually testified at your
9 trial, right?

10 A Yes.

11 Q And did you attempt to sort of -- your lawyer asked
12 you about that writing on the wall and the words I'm sorry
13 on the wall. And you tried to explain that, didn't you?

14 A Yes, sir.

15 Q But you would -- would you agree with me that
16 without the pictures, it didn't come across all that clear,
17 your explanation?

18 A No, sir. Just -- no.

19 Q Okay.

20 MR. BOOZER: If I may hand this to Your Honor.

21 (Handing the exhibits to the Court.)

22 (There was a pause in the proceedings.)

23 BY MR. BOOZER:

24 Q Now, Mr. Rudd, at trial, two photographs were
25 introduced by the State that you alleged were close ups of

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 photographs taken on these walls; is that correct?

2 A Yes, sir.

3 Q And you've indicated to me that you had some
4 dispute about whether they had actually been marked as an
5 exhibit or you believe somehow something got -- something
6 got changed at trial. Can you explain that?

7 A At trial, when Aimee was using the -- I guess,
8 excuse me, the solicitor, Ms. Hammack, when she was showing
9 the jury the picture that she was going to introduce as a
10 picture I'm sorry, I only saw the words I'm and sorry. And
11 that was it. It was a close-up picture of that.

12 Prior to trial, pretrial, Aimee had, in her motion
13 for those pictures to be suppressed, when she actually saw
14 them, they were going to introduce three pictures and the
15 judge excluded one because it was painted over and the
16 other two, they were going to admit as -- as an apology.

17 And when she saw the one that I'm speaking of, the
18 one that said I'm sorry, she addressed it at -- she
19 stressed to the judge, she said, Your Honor, if they're
20 going to just put in that close-up picture of I'm sorry,
21 they got to put in the rest of it.

22 Q And you're referring back to page 48 of the
23 transcript?

24 A Yes, yes, sir. And -- and then that picture got
25 omitted. And I just never seen that picture after that.

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 And so -- it was supposed to be in my appeal and it never
2 was.

3 Q And that's what I was going to ask you. Have you
4 had an appeal in this case?

5 A I did, yes, sir.

6 Q Okay. And now, obviously, as your lawyer, I've
7 been provided with a copy of the record on appeal; is that
8 correct?

9 A Say that again?

10 Q Obviously, as your attorney, I've been supplied
11 with a copy of the record on appeal?

12 A Yes, sir.

13 Q Okay.

14 MR. BOOZER: Your Honor, may I approach the
15 witness?

16 THE COURT: (The Court nodded his head.)

17 BY MR. BOOZER:

18 Q Mr. Rudd, I'm going to show you a copy of a
19 document, and it is a very poor copy. And it's marked --
20 it says Exhibit 3 has a Bates Stamp number.

21 A Yeah.

22 Q And you can kind of make it out, it has Minor 2 ,
23 Daddy's sorry, please forgive me.

24 A Yeah.

25 Q I love you so much, Daddy.

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 A Yes, sir.

2 Q Okay. Is that a copy of the exhibit in your record
3 on appeal that was submitted to Court?

4 A It is.

5 Q Okay. Is that a copy of a photo that you disagree
6 with?

7 A I believe there's a -- may I address the Court with
8 something?

9 Q Tell me your answer.

10 A It is, but I don't believe what they had at the
11 appeal said Minor2 in front of it.

12 Q What do you think it says?

13 A It said Daddy, so sorry, please forgive me.

14 Q Okay.

15 A I love you so much.

16 Q Is that a true and accurate copy of -- and a poor
17 copy -- but is that a true and accurate copy of the
18 photograph that was in your record on appeal that is
19 supposedly or alledgedly marked as an exhibit?

20 A With the exception of the Minor2 , yes.

21 Q Okay.

22 MR. BOOZER: Your Honor, at this time I would move
23 to mark this as Applicant's Exhibit 8.

24 MS. COLEMAN: No objection.

25 THE COURT: Without objection it will be 8.

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 (Petitioner's Exhibit Number 8 was marked for
2 evidence.)

3 BY MR. BOOZER:

4 Q Now, Mr. Rudd, earlier when I had shown you some
5 photographs that were taken of the walls from your
6 children's bedrooms, you had indicated to me that you took
7 issue with one of those photographs; is that correct?

8 A Yes, sir.

9 Q Okay.

10 MR. BOOZER: May I approach the witness, Your
11 Honor.

12 THE COURT: (The Court nodded his head.)

13 BY MR. BOOZER:

14 Q I'm going to hand you a photograph and ask you to
15 identify it for me.

16 A It's the picture that was admitted, Exhibit 3. Is
17 that what you're talking about?

18 Q I'm asking you to -- what is that?

19 A Oh, sorry. It's Minor2 , Daddy's sorry, please
20 forgive me, two exclamation marks. I love you so much, two
21 exclamation marks, Daddy, exclamation marks.

22 Q Okay. So why do you take issue with that
23 photograph?

24 A Well, I just don't remember writing that on the
25 wall like that.

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 Q Okay.

2 A I don't believe it's in the pictures on the wall
3 like that.

4 Q Is that -- well, other than your disagreement with
5 how the photo was written, it --

6 A Yeah, the words were on the wall.

7 Q Those words are on the wall?

8 A Yes, the words are on the wall, but not in that
9 order that I see it in the picture. That I can recall.
10 It's the words on the wall, yes.

11 Q Do you know if that photograph specifically was
12 provided to you in discovery?

13 A No, sir, it was not.

14 Q Okay. Mr. Rudd, going back to what's been marked
15 as Exhibit Number 8, which is a copy -- a very poor copy of
16 an exhibit as it was introduced at trial, which reflects
17 the alleged apology to Minor1. Looking back at Exhibit
18 Number 5, is that the full message you wrote on Minor1's
19 wall?

20 A No, sir.

21 Q Well, now is Exhibit 5 part of the full message you
22 wrote on the --

23 A Oh, part of it, yes.

24 Q -- on her wall?

25 Okay. And so in Exhibit Number 8 that we have

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 handed up and marked as part of your record, it was in your
2 record on appeal. That's what you're saying they zoomed in
3 on and cropped it and only took that out for purposes of
4 trial?

5 A They only zoomed in on the bottom part not the top
6 part.

7 Q Correct.

8 A Yes.

9 Q Okay. And that's what your lawyer was arguing
10 against; is that right?

11 A Right.

12 Q Okay. And as part of your record on appeal, I'm
13 going to hand you another document. And if you would take
14 a moment and identify that for me, if you can.

15 A I can barely even read it. I see Minor 1, Daddy's --
16 I don't see the whole thing. I can't see the readable
17 thing.

18 Q Okay. And that's a poor copy that was in your
19 record on appeal?

20 A Yes.

21 Q But other than that, is -- to your understanding,
22 is that a copy of the exhibit as it was marked in your
23 trial?

24 A As it was marked, I guess, yeah.

25 Q Or was in your record on appeal?

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 A Record on appeal, yeah.

2 MR. BOOZER: Your Honor, I would move to mark this
3 as Applicant's Exhibit 9.

4 MS. COLEMAN: No objection.

5 THE COURT: Without objection, it will be 9.

6 (Petitioner's Exhibit Number 9 was marked for
7 evidence.)

8 (The Exhibit was handed to the Court.)

9 THE COURT: All right.

10 BY MR. BOOZER:

11 Q Mr. Rudd, you also have an allegation that your
12 lawyer was ineffective for failing to issue a subpoena for
13 the forensic medical exam reports performed by
14 Ms. Chappell. I think we've covered that, have we not?

15 A Yes. Well -- forensic medical reports? Yes, sir.

16 Q Okay. You've also got an allegation that your
17 lawyer was ineffective for failing to object, to require
18 the remainder of a jail telephone conversation to be played
19 in full which was done on page 453 of your transcript?

20 A Yes, sir.

21 Q Could you explain that allegation?

22 A Yeah, the conversation in the jail phone that I had
23 with two people, my sister and my -- a friend of mine from
24 my church. He had called -- I had called him and we had a
25 discussion about some things going on with the case and all

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 that. And -- well, he had -- we talked about sins and
2 things that we go through as Christians and how God, you
3 know, regards sin in our lives and a part of the, the
4 portion of that conversation was I had paid greatly for my
5 sins. Just that portion alone to the jury and it was
6 explained that it was me -- by the solicitor in the
7 transcript 442 and 444 that she tells them that I'm -- he's
8 not talking about lying or stealing, about things he did
9 years ago. You know exactly what he's talking about. He's
10 talking about what he did to these girls and the only
11 people that paid for those sins, that man's acts, are his
12 daughters.

13 She said that to the jury and she used that portion
14 to just show that to try to say that I was apologizing to
15 it and then she told them what they should maybe -- believe
16 it to mean that.

17 Q Okay. And what do you believe your lawyer should
18 have done?

19 A Should have objected to those con -- or should have
20 first had them suppressed, my motion to suppress the phone
21 calls; to have them not admitted into the trial and then
22 since she did -- they did admit them or if they did use
23 them, she should have objected to the solicitor's comment
24 in closing with regards to it.

25 Q All right. You have another allegation that you

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 feel like your lawyer was ineffective for failing to
2 introduce Donovoe's medical notes in evidence and one of
3 the diagram that would have illustrated and clarified with
4 regard to the reconstruction surgery. Is that one of your
5 allegations?

6 A Yes, sir.

7 Q Who was Dr. Donohoe?

8 A Dr. Donohoe was the one that did the surgery on my
9 daughter and he was the urologist for her -- for her
10 medical condition.

11 Q And did he actually testify at the trial?

12 A Yes, he did.

13 Q Okay.

14 A I dropped something. I'm sorry.

15 MR. BOOZER: Your Honor, it appears he's dropped
16 something.

17 THE WITNESS: I just dropped my pen --

18 (The pen was retrieved for the witness.)

19 BY MR. BOOZER:

20 Q Okay. What -- what do you believe your lawyer
21 should have done with regard to that particular doctor?

22 A Well, there was -- she should have explained --
23 been able to get -- have something like as far as -- the
24 anatomy of my daughter's genitalia should have been
25 presented in trial so the jury could see what she -- what

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 was presented before and after surgery. And she didn't --
2 she didn't do that. So because of the surgery and the --
3 the condition is so complex and rare that just a layman
4 person would not be able to understand just hearing a
5 doctor explain what he does in a surgery like that. So for
6 her to have -- make it more clear to the jury to a way they
7 would have understood the surgery to have taken place and
8 what she actually had during the allegations -- because of
9 -- he had testified that he had to create a vaginal orifice
10 and I was on trial for penetration of vaginal orifice. And
11 she didn't have one existing at the time of these
12 allegations, so it was a very important that he had -- his
13 testimony and that surgery and what had taken place would
14 have been explained so the jury would have been able to
15 clearly understand what they had to make their decisions
16 on.

17 Q Okay. So you don't believe -- you don't believe
18 your lawyer was clear enough or able to elicit testimony
19 through cross-examination to help the jury understand the
20 condition your daughter suffered from or the surgery that
21 Dr. Donohoe performed?

22 A Yes.

23 Q Okay. Now, you've also alleged that you feel like
24 your lawyer should have issued a subpoena for the forensic
25 interviewer, Ms. Ann Lavor. Could you explain that

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 allegation?

2 A Yes, the -- I guess -- Ann Lavor is the woman who
3 did the interviews of my two children and the reason why I
4 was wanting her to come up and testify because she -- she
5 -- there was some inconsistencies in the interviews and I
6 want -- I needed her to -- she had even stated in trial
7 that there was inconsistencies in the interviews and I
8 needed her to go -- come up and show where they weren't
9 consistent in their testimony.

10 Q Okay. You've also got an allegation that your
11 lawyer should have issued a subpoena to call Dr.
12 Christopher Houck or Houck. Explain that.

13 A Well, Dr. Houck, he would have been vital to the
14 testimony -- or to the trial to testify to that she had --
15 because of her condition -- my whole thing was her
16 condition before surgery was that there was no place for me
17 to do what they said, vaginally penetrate her. So he would
18 have been able to come in and explain what he had saw
19 before surgery; and as a doctor would have also been able
20 to testify that it was impossible for me to do what they
21 said I did. He also did a lot of exams on her through --
22 through -- every four months and all the information that I
23 ever gave them on me checking her or checking them was from
24 Dr. Houck. He was the one that, you know, gave us
25 instructions on what to look for and what to -- what to

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 check for. So he would have been -- it would have been
2 very important for him to come and support my testimony on
3 that -- on that fact.

4 Q Okay. You know if your lawyer spoke to him or not?

5 A I do not know if she spoke to him. She said -- she
6 said she didn't when I was -- when I was at trial. She
7 said she didn't speak to him. There's a motion I even had
8 where she had stated that she couldn't communicate with the
9 doctors, that the solicitor communicated with the doctors
10 and that's the -- from the motion that she had for -- what
11 was it -- for medical records. And she stated she didn't
12 communicate with them. And that motion was done on
13 December 9th at the pretrial.

14 Q All right. You also have an allegation that you
15 feel like your lawyer should have objected to the
16 qualification of Juror Number 79, Kimberly Herber
17 (phonetic).

18 MR. BOOZER: And for the Court's information, Your
19 Honor, this will be on page 66 of the transcript.

20 BY MR. BOOZER:

21 Q If you could, Mr. Rudd, explain the circumstances
22 of how this particular juror and what you felt like your
23 lawyer should have done?

24 A Well, the juror, when she was going through -- the
25 judge was questioning her about if, if Ms. Herber, how do

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 you say, Herber had, you know, in her family with, I guess,
2 a condition similar to my child's, she said she had a
3 family -- somebody in her family that had cerebral palsy
4 and the judge asked her could she -- could she -- could
5 she, excuse me. Said that if -- he said would she be able
6 to give me an impartial, fair juror. And she said she --
7 she honestly -- she said honestly, I can't answer that
8 question. And the judge persisted on and persisted on
9 until she final -- he said you can't guess you've got to be
10 sure.

11 And she just had doubt. She had some hesitation
12 about if she could be fair and impartial and she had
13 someone in her family that was, you know, what the -- with
14 a disease that she had to take care of and she just wasn't
15 sure about being impartial. And she should have objected
16 to that juror.

17 Q Okay. On 66 specifically, you're talking about
18 where she -- the Court asked her could she be fair in
19 listening to the case. She indicates, I can try. And the
20 Court says, Ma'am, we can't guess. If you think you can be
21 -- and then the juror goes onto say, Well you're ask me a
22 question I really can't answer. Honestly, I won't know
23 until we -- I spent a lot of time with them and helped to
24 care for him. You're asking me questions, I'm trying to
25 answer honestly. The Court says can you be -- and the jury

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 says, Will I try to be fair? Yes, sir. The Court: Can
2 you be fair and impartial; and eventually she says yes.

3 A Yeah.

4 Q So you think your lawyer should have done something
5 at that point?

6 A I do.

7 Q Now, is that your -- ultimately one of the members
8 of the jury that convicted you?

9 A Juror Number 12.

10 Q Okay. You also have an allegation that your lawyer
11 failed to challenge subject matter jurisdiction. Explain
12 that, if you would.

13 A Yeah. The indictments that I received, they had --
14 they had on the back of them, they had October 3rd and on
15 the front it said that the grand jury convened on the 7th.
16 And so according to the -- what made me wonder about it was
17 because the grand jury convened the week before general
18 sessions was in court. So when I started looking into it,
19 I feel -- she -- I guess there's a code statute 14-9-260
20 and it talks about the mandatory provisions of the court
21 convening -- a grand jury convening in a general sessions
22 -- during general sessions under a general sessions judge
23 and indictment -- the solicitor is to present the
24 indictment to the grand jury at that time. And it was out
25 of the general -- time of the general sessions. It was an

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 illegal body of the grand jury is what I was speaking of.

2 Q Did you discuss that at all with your lawyer?

3 A No, no.

4 Q Okay. Do you feel like she should have made some
5 sort of motion before the Court to have the charges
6 dismissed at that point?

7 A I believe she should have looked into it, yeah.

8 Q Okay. Now, you've also got -- and this may go
9 along in that same vein as part of that ground that -- you
10 have a part two of that allegation; is that correct?

11 A Yeah. As far as just -- just the legality of it, I
12 was just talking about how it should have -- statute --
13 hold on. It says the county solicitor shall prepare and
14 through presiding judge of a court of general sessions
15 submit to the grand jury while in attendance upon the Court
16 of General Sessions bills of indictments. That didn't take
17 place in my particular issue with my indictments. My
18 indictments did not get presented to the grand jury during
19 -- upon a general sessions judge while attend -- general
20 sessions was in attendance. It was the week before general
21 sessions is when they -- that's what that allegation is
22 about.

23 Q Okay. You've also alleged that you feel like your
24 lawyer was ineffective for failing to object and require
25 the trial court to view the indictments to determine their

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 sufficiency. Is that all sort of the same allegation?

2 A Yes, sir -- well, yes, it is because of the South
3 Carolina statute talks about that it shouldn't be -- okay.
4 South Carolina Constitution, Section 5 -- excuse me 5
5 Section 4 -- Article 5 Section 4 just clarifies that no
6 judge, no supreme judge can promulgate any rules and they
7 have to follow the statutory provisions of the -- of
8 whatever statute that is.

9 Q All right. You've also got an allegation that your
10 lawyer failed to investigate and prepare a defense or
11 request a continuance on your behalf. Explain that.

12 A This is allegation M you're talking about?

13 Q Correct.

14 A Yeah, the continuance -- yeah, because the
15 indictments -- I wanted a continuance so that she can
16 determine the sufficiency of the indictments and the
17 indictments weren't sufficient because they didn't state
18 any factual allegations. Like, they only had statutory law
19 on them. Like, there was no -- what -- there was no -- I
20 wasn't properly appraised of what I was to answer to. I
21 couldn't -- there was no -- like, for example, I guess no
22 facts about if I -- what I penetrated with or -- it was
23 just statutory language they used.

24 Q Okay. Now, after your trial, you had an appeal; is
25 that right?

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 A Yes, sir.

2 Q All right. Who represented you on the appeal?

3 A Tommy Thomas.

4 Q All right. Did you hire Tommy Thomas or was he
5 appointed to represent you?

6 A He was appointed.

7 Q All right. Did you want him to identify or raise
8 some issues that he would not?

9 A Yes, I did.

10 Q Okay. What is your allegation specifically against
11 your appellate attorney?

12 A The appellate attorney, he had -- there were -- the
13 issues were prejudice with the pictures, the pictures were
14 part of the appeal that we discussed here today for the
15 appellate court to review. If they were -- they should
16 have been admitted into the trial or not. He only -- he
17 only argued prejudice, that they prejudiced me and not
18 relevancy. Aimee argued relevancy and prejudice at trial
19 and he didn't argue what she argued. And they had
20 determined, based on the fact that it wasn't relevant, or
21 it was relevant and affirmed the appeal.

22 And I told him if he would have -- if he would have
23 argued the relevancy, which was -- which was the issue. It
24 wasn't relevant. It shouldn't have been admitted into the
25 trial. And so he didn't do that.

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 Q Well is -- is there anything else you think your
2 lawyer should have raised? Our appellate lawyer?

3 A Yeah. He -- there was a issue about the pictures.
4 I didn't see the -- the I am sorry picture. They didn't
5 have that on record. They had something different. The
6 one that says Breanna, I'm so sorry, Daddy loves you, I
7 forgive you -- forgive me. They had that one, not the one
8 that says I'm sorry. And I told him about that because I
9 didn't -- it was supposed to be in my appeal and it wasn't.

10 Q And what was his response to your concern over that
11 issue?

12 A He just ended up telling me that he was going to
13 look into it and he never -- he just went on the oral
14 argument and argued the issue that they had. It was the
15 picture that they had, knowing that I was complaining that
16 it was the wrong one.

17 Q All right. You also have a claim that you feel
18 like your lawyer, your appellate lawyer, should have raised
19 some sort of issue with regard to indictments on appeal?

20 A Say that again.

21 Q Yeah. In your original PCR application, did you
22 have an issue with your attorney not raising the
23 sufficiency of the indictments?

24 A Yeah, that's -- that was what he was supposed to
25 raise. I wanted him -- asked him to raise in the appeal

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 the sufficiency of the indictments where there was no --
2 there was nothing that they -- that we could -- I wasn't
3 properly appraised, like I was saying. They didn't have --
4 I could -- the nature and cause of the accusations, there
5 wasn't -- there was no way to determine that. They only
6 had statutory language. That's what I just spoke about
7 earlier. That's -- the problem was with the sufficiency of
8 the indictments. That way -- there was nothing that I
9 could -- I didn't know what I was supposed to defend
10 against because there was nothing in there determining what
11 exactly I was in -- alleged of doing, in the indictment.

12 Q Well, let me ask you this. You got another
13 allegation that you got four, basically numbered issues
14 that you've labeled in your original application as to what
15 you believe is to be prosecutorial misconduct. I'm going
16 to have you review those for the Court as well. What is it
17 that you believe the solicitor's office did that
18 constituted this conduct?

19 A If you'll give me a minute.

20 Q Sure, it's page 21 of the application?

21 A Sorry, I'm handcuffed and I'm trying to turn pages.

22 Q Take your time.

23 A Can I have some water?

24 Q I'm sorry?

25 A May I have some water?

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 Q Of course.

2 MR. BOOZER: Your Honor, may I approach the
3 witness?

4 (There was a pause in the proceedings.)

5 THE WITNESS: Yeah, the number one is the -- the
6 Rule 5 violation or Brady violation that the medical report
7 was not turned over for trial -- for use at trial.

8 BY MR. BOOZER:

9 Q And that's what we were referring to as Exhibits 1
10 and 2, the reports of Minor1 and Minor2 ?

11 A Yes, sir.

12 Q Okay. It's your position that you don't believe
13 they were turned over prior to trial?

14 A I do not believe they were turned over prior to
15 trial.

16 Q Okay. What's your second allegation about
17 misconduct?

18 A It says the -- she mislead the jury, misrepresented
19 the portion of the photograph. She didn't show the -- all
20 the -- the message that was with the photographs, where she
21 misrepresented it to the jury, wanting them to believe that
22 I used it -- that I was apologizing. I just wrote that and
23 that only on a wall as an apology; and that I was
24 indicating that I was apologizing for those acts and that's
25 not what that was about at all.

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 Q Okay. And what's your third allegation?

2 A That she had used perjured testimony to obtain a
3 conviction through -- with my -- my oldest daughter, she
4 had testified from the age of 12 that -- from the age of 12
5 until the time she was -- had surgery in October of 2012, I
6 believe, and that was like two years time span that she
7 says that I put my finger in her hole and the evidence at
8 trial showed that there was no hole for me put anything in.
9 The doctor said that he had to create a vaginal orifice.
10 There was not one existing and so that testimony was false
11 testimony because it's physically impossible for me to do
12 what she said I did. And the evidence at trial shows that.

13 Q Okay. And your fourth ground of misconduct?

14 A That -- the grand jury indictments that these
15 indictments were done -- that he had got indictments
16 through a -- an illegal grand jury body. That -- that body
17 was illegally convened outside of the Court of general
18 sessions according to the statute at the Aiken County
19 courthouse is under for that particular grand jury term of
20 court. It's supposed to be done during general sessions
21 and not outside of general sessions.

22 Q Okay. Now, you've also got an allegation that you
23 labeled as allegations Q and R; is that correct. The
24 amended application that you sent in pro se --

25 A Yes, sir.

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 Q -- before I was appointed?

2 A Yes, sir.

3 Q All right. If you would, what's your allegation Q?

4 A Q is, in the closing argument of the solicitor, Ms.
5 Hammack that she had stated to the jury that if those girls
6 weren't telling you the truth, then ladies and gentlemen
7 let's give them an academy award.

8 Q Okay. Now, let's stop right there. So basically
9 you're alleging that your lawyer should have objected to
10 some of the solicitor's closing argument?

11 A She was ineffective for not objecting to that
12 solicitor's comment --

13 Q Okay.

14 A -- in closing argument.

15 MR. BOOZER: And, Your Honor, just for the Court's
16 reference, I'm referring to page 443 of the transcript. So
17 specifically, Mr. Rudd, during the closing argument, on
18 443, beginning at line 8, the State tells the jury, if
19 those girls weren't telling you the truth, then ladies and
20 gentlemen let's give them an academy award.

21 A Yes, sir.

22 Q Was any objection made at that point?

23 A No, sir.

24 Q Okay. Now, with respect to issue R?

25 A Yes, sir.

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 Q Explain that to the Court.

2 A Issue R on page 430, Aimee's closing argument, she
3 states that, why didn't Minor1 tell us she didn't have a
4 hole where her vagina was. How is it even possible to be
5 convicted or guilty of a crime until he reads you the
6 elements of penetration, however so slight, she had no
7 vagina to penetrate. A doctor had to create it. Aimee's
8 argument was just that there was no place for me to
9 penetrate and -- and responding to that argument, the
10 solicitor in her argument after Aimee, she says on page
11 441, lines 1 through 10, she says, one of your indictments
12 for Minor1 is from 2011 before she even had surgery and the
13 defense wants to say, Oh well, she didn't even have a hole
14 for him to put anything in. Yes, she did. Y'all sat here
15 and listened. The doctor told you she had a hole. He
16 talked about it being like a flower. She said there was
17 more than one thing connected to it, but there's a hole.

18 And he even told you about the type of instrument
19 he used with that hole, that it was 3 millimeters. It was
20 smaller than a pencil eraser because anything bigger would
21 hurt. You're dang right it hurt.

22 That was the solicitor's argument to Aimee's
23 argument and her closing. What I have an issue with and
24 she should have -- she failed to -- she was ineffective for
25 failing to object to this is because the solicitor is

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 talking about what the urogenital sinus and -- and in
2 closing Aimee's talking about the vagina. I'm there for
3 digitally penetrating a vagina, not a urogenital sinus.
4 And so she's talking about what the doctor's testimony was
5 to that. And the doctor testifies that there's a
6 urogenital sinus and there's more than one thing connected
7 to it. He talks about it being like a branch. You go in
8 one centimeter and it splits. The vagina -- the urogenital
9 comes first, the vagina comes second. This -- these holes
10 are internal. They're inside of her body. This is before
11 surgery.

12 All this testimony that it took -- the solicitor
13 speaks on, she tells them first this is what's before
14 surgery. This testimony that she talks about before
15 surgery is, like I said, the vagina is inside of the body.
16 The holes are inside. She doesn't have an existing hole
17 outside. So -- and she goes on talking about the, what the
18 doctor talks about after surgery when he says that there
19 was an instrument he used that was 3 millimeters, that
20 testimony of the doctor is after surgery that he used this
21 instrument in the newly created hole he just created. And
22 even where he says that it was smaller than a pencil eraser
23 because anything bigger would hurt, that wasn't even his
24 testimony. She added that part to what -- I believe to
25 arouse the passions of the jury. And there was no

Dwayne Lee Rudd - Direct Examination by Mr. Boozer

1 objection on this at all. She elected to -- basically she
2 just let the solicitor tell her -- tell the jury that
3 basically she was not -- she didn't defend me against that.
4 She didn't defend against that. She should have objected
5 or pointed out to the jury that that is incorrect and
6 cleared that up so that -- because, you know, she -- she
7 just got through telling them there was no hole for me to
8 penetrate. And that was the doctor's testimony. And her
9 she's telling the doctor's testimony is there was one,
10 which is not true. That is not his testimony. That is not
11 what he said.

12 Q Okay. Is all of that issue R?

13 A Pretty much.

14 Q Okay. Mr. Rudd, we've been over a number of topics
15 today and I just wanted to make sure we've covered
16 everything. Is there anything that you've alleged in your
17 PCR application or by amendment that we have not covered
18 today?

19 A The -- the part where she had -- the solicitor's
20 closing argument on the -- where she commented to the jury
21 on what I said on the phone call. Did I mention that?

22 Q You did.

23 A Okay. Then I believe that's --

24 Q Mr. Rudd, that's all the questions I have. Please
25 answer any that Ms. Coleman might have for you.

Dwayne Lee Rudd - Cross-Examination by Ms. Coleman

1 THE COURT: Lawyers approach a moment.

2 (There was a bench conference out of the hearing of
3 the Court Reporter.)

4 THE COURT: Yes, ma'am.

5 MS. COLEMAN: Thank you, Your Honor.

6 **CROSS-EXAMINATION**

7 BY MS. COLEMAN:

8 Q Hi, Mr. Rudd?

9 A Hey.

10 Q You testified at the trial, correct?

11 A Yes.

12 Q You took the stand and you told the jury your side
13 of the story; is that right?

14 A Yes.

15 Q So the jury knew that your daughter had a medical
16 condition that -- that you explained that you needed to --
17 you felt the need to inspect; is that right?

18 A Yes.

19 Q Okay. So they heard all about that. You explained
20 to them why you had written what you wrote on the walls; is
21 that right?

22 A Yes.

23 Q Okay. So even though they didn't have the
24 photographs of the full message, you told them what the
25 full message was and why you did that, right?

Dwayne Lee Rudd - Cross-Examination by Ms. Coleman

1 A Yes.

2 Q And your attorney cross-examined your wife when she
3 testified about how there was more to that message; is that
4 right?

5 A I believe so, yes.

6 Q Okay. And I believe that's on 222 of the
7 transcript.

8 What kind of alibi defense did you want your
9 attorney to investigate?

10 A Well, the -- because of the times of the
11 allegations, the dates that were in the warrants, those
12 dates, were, I believe October and April or May and they
13 spanned from 2011 to 2013. In the indictments, they
14 changed from 2000 -- from October, I believe October and
15 April to the dates of my daughter's birthdays.

16 I didn't have an explanation of why that was, but I
17 was made -- I was looking -- I worked as a -- I was
18 flipping houses for a living, so I was all over the road
19 and at that time I was looking for receipts to show where I
20 wasn't at home at these times and they -- maybe they were
21 in school, at school at this time and I wasn't around them
22 at this time.

23 And so at that -- when I got the indictments, they
24 had a different date on them. So I wanted her to look into
25 my times that I was not at work. I couldn't -- I could

Dwayne Lee Rudd - Cross-Examination by Ms. Coleman

1 have been -- I couldn't hardly tell what the dates -- I
2 couldn't go by the dates that they had and I was going by
3 the dates they had in the warrants and so she should have
4 investigated that based on that I flip houses for a living.

5 Q Did you give her any documentation or any potential
6 witnesses to look at to help you establish an alibi?

7 A She didn't ask me for nothing like that. But she
8 got a motion from the solicitor asking for an alibi.
9 That's how it all came about. The solicitor asked for an
10 alibi defense based on those dates in the indictments.

11 Q The juror that you testified about who was seated
12 on the jury who indicated that she was not sure if she
13 could be fair and impartial, she had a friend of the family
14 who had cerebral palsy; is that correct?

15 A That's what she said, yes.

16 Q According to the transcript?

17 A Yes.

18 Q How did that change the outcome of your trial?

19 A How did it change the outcome of the trial? Well,
20 if she's -- if she has any -- if she's biassed in any way
21 that -- it only takes that one juror to be impartial to
22 find me guilty based on her emotional attachment to her --
23 to the person that she's taking care of. She wouldn't be
24 basing her decision based on evidence. It would be based
25 on emotion and that would make her an impartial juror. And

Dwayne Lee Rudd - Cross-Examination by Ms. Coleman

1 she could have been one that had led me to be found guilty
2 with the other jurors. She could have affected the whole
3 panel of jurors, just based on her emotional attachment to
4 that person.

5 Q Did that person's illness have anything to do with
6 your case?

7 A I don't know.

8 Q Because your daughter had a different medical
9 condition, right?

10 A She did.

11 Q Okay.

12 MS. COLEMAN: Beg the Court's indulgence one
13 moment.

14 BY MS. COLEMAN:

15 Q Now, Dr. Donohoe at the trial did explain the
16 medical condition from a diagram, did he not?

17 A The diagram that I believe he was talking about was
18 one of the normal child's genitalia.

19 Q Okay.

20 A And she did not -- my daughter didn't have a normal
21 genitalia. She had a deformed one. And that was why he
22 may have been talking about -- and that wasn't even
23 admitted into evidence any way.

24 Q No, but he used that diagram to explain how she
25 differed from a standard child; is that correct?

Dwayne Lee Rudd - Cross-Examination by Ms. Coleman

1 A He explained what it looked like as a normal one.

2 And he did not state or state -- she did not ask him, well
3 did Minor1 have any of this.

4 Q Okay.

5 A She just -- they just explained what a normal one
6 looked like.

7 Q But he testified about your daughter's condition,
8 right?

9 A He did.

10 Q Okay. And he testified on cross-examination that
11 there was no signs of sexual abuse when he inspected her;
12 is that correct?

13 A He did.

14 Q Okay. So that came out and the jury heard that?

15 A He did, but he's not an expert in that field. He's
16 an expert as a urologist not a medical examiner for signs
17 of sexual abuse.

18 Q Okay. And you're not an expert in that field
19 either, are you?

20 A No.

21 Q Okay. Thank you. Nothing further.

22 THE COURT: Any redirect limited to what she went
23 into?

24 MR. BOOZER: No redirect, Your Honor.

25 THE COURT: Thank you, sir. You may step down.

Robert Bank - Direct Examination by Mr. Boozer

1 All right. Let's take a break for lunch and come
2 back at 2 o'clock.

3 MS. COLEMAN: Thank you.

4 MR. BOOZER: Thank you, Your Honor.

5 (A recess for lunch was observed.)

6 THE COURT: Applicant want to call your next
7 witness.

8 MR. BOOZER: We are, Your Honor. We'd go ahead and
9 call Mr. Robert Bank.

10 ROBERT BANK,
11 having been duly sworn, testified as follows:

12 THE CLERK: Please have a seat in the witness box.
13 State your full name for the Court.

14 THE WITNESS: Robert Bank, B-A-N-K.

15 **DIRECT EXAMINATION**

16 BY MR. BOOZER:

17 Q Mr. Bank, how you doing today?

18 A I'm doing all right, how are you?

19 Q Doing fine. Mr. Bank, did you have an opportunity
20 to be involved or either represent Mr. Dwayne Rudd?

21 A I did.

22 Q Okay. And tell us a little bit -- where are you
23 currently employed?

24 A I work -- I'm an attorney with the Richland County
25 Public Defender's Office.

Robert Bank - Direct Examination by Mr. Boozer

1 Q All right. At the time of Mr. Rudd's trial over
2 here in Aiken, is that where you also worked or where were
3 you working then?

4 A At that time I had just been sworn in. I was
5 working part time, not as a lawyer, but as the clerk with
6 the Richland County Public Defender's Office and also
7 working with an attorney in Columbia named John Delgado who
8 worked a lot of cases with Aimee Zmroczek and -- and so I
9 worked both at the public defender's office and with
10 Ms. Zmroczek and Mr. Delgado.

11 Q Okay. At the time of this trial, how long had you
12 been practicing?

13 A Oh, like two weeks. I had just been sworn in.

14 Q Okay. So would that essentially -- this was
15 probably your first witness even, maybe?

16 A Yes.

17 Q Okay. How did you become involved in the case?

18 A Like I said, I worked closely -- well, I worked for
19 John Delgado who worked closely to Ms. Zmroczek and she --
20 I had helped her on previous cases, both before I was an
21 attorney and then now at the point for this case after she
22 asked me, I don't know, maybe a month or less, in advance
23 if I could help give her a second chair on the case and I
24 told her that I could.

25 Q Okay. Were you involved prior to with meetings and

Robert Bank - Direct Examination by Mr. Boozer

1 whatnot between Mr. Rudd and Ms. Zmroczek?

2 A In some of those.

3 Q In some of those? Okay. Your role at trial, were
4 you limited only to examining this one witness or did you
5 have other witnesses that you examined?

6 A I believe I had multiple witnesses, but
7 Ms. Zmroczek took the vast majority of them.

8 Q Okay. Have you been in the courtroom today
9 throughout Mr. Rudd's hearing?

10 A Yes.

11 Q All right. So obviously, you would be aware that
12 one of his allegations is that you were ineffective for
13 failing to introduce the DSS supervisor Esther Timmerman's
14 written statement for purposes of impeachment?

15 A Yes.

16 Q Do you recall cross-examining Ms. Timmerman?

17 A I do.

18 Q All right. Now, I think early on in the trial, I
19 don't know if you were involved in this or if this is maybe
20 more Ms. Zmroczek, but y'all were actually trying to keep
21 out a lot of what Ms. Timmerman was saying. Do you recall
22 that?

23 A I do.

24 Q And y'all were not successful on that; is that
25 correct?

Robert Bank - Direct Examination by Mr. Boozer

1 A That's correct.

2 Q Now, do you have, or have you looked at recently a
3 copy of the trial transcript?

4 A I have had -- as it relates to Ms. Timmerman, yes.

5 Q Okay. Looking at page 240, and beginning at line
6 7, this is on direct examination by the State.

7 MR. BOOZER: I'm sorry, Your Honor, may I approach
8 the witness with a copy of the transcript?

9 THE COURT: Of course.

10 BY MR. BOOZER:

11 Q Page 240.

12 A 240?

13 Q Yes, sir.

14 A I'm there.

15 Q All right. And specifically at line 7, she
16 testifies in that he said, But, you know, I'm the father of
17 these girls so I can touch their vagina if I want to. And
18 then you go over to -- you go over to 244, beginning at
19 line 15. And this is your question to her: And I wanted
20 you to discuss very quickly about a comment or part of the
21 statement that you said, and you can correct me if I'm
22 wrong, did you say that Mr. Rudd said they're my kids and I
23 can touch if I want to? I can touch them if I want to. Is
24 that what you said -- is that what you said Mr. Rudd said.

25 Answer: I believe what I said, and I had written

Robert Bank - Direct Examination by Mr. Boozer

1 down, what I believe I said was that he said to me that I'm
2 their daddy and I can touch their vagina if I want to.

3 Question: Right. You didn't say I'm they're
4 father and I can touch it if I need to.

5 Answer: No, that's not what he said to me. I
6 wrote down exactly in my statement in caps in our system
7 what he said.

8 Now, at the time when you were questioning her, are
9 you aware that that is not what he said?

10 A Yeah, so in her statement that I had access to,
11 there's a distinction between what she testified to and
12 what the statement said. What she testifies to is I can
13 touch them if I want to. The actual statement that she
14 wrote that I did have access to during the trial and was
15 aware of, it said: I can touch if I have to or need to.
16 It's a different word than if I want to.

17 Q Okay.

18 MR. BOOZER: May I approach, Your Honor?

19 THE COURT: Yes, sir.

20 BY MR. BOOZER:

21 Q Mr. Rudd I'm going to hand you what I think you're
22 referring to, which is now marked as Exhibit 3. Could you
23 take a moment and just look at that?

24 A Yeah.

25 Q And what is that?

Robert Bank - Direct Examination by Mr. Boozer

1 A This is the statement of Ms. Timmerman.

2 Q Okay. And what you were referring to a moment ago,
3 if I may, is that in her statement she actually says that
4 Mr. Rudd stated, I'm their father, I can touch my girl's
5 vagina if I have to.

6 A That's exactly right and she has it in quotation
7 marks to attribute it directly to Mr. Rudd.

8 Q There's a big difference in want and have to; isn't
9 there?

10 A I agree.

11 Q Okay. Because have to or need to, that's sort of
12 -- that goes along with what the whole theory of y'all's
13 case was, was he was doing this for medical purposes,
14 right?

15 A Because he needed to, right.

16 Q And there was no intent sex -- for him to make any
17 sort of sexual advance to the two of them; is that right?

18 A That's correct.

19 Q Okay. But you would agree with me that you didn't
20 go in and impeach her with that statement; did you?

21 A That's correct.

22 Q Okay. And would you agree with me that you could
23 have?

24 A Yes.

25 Q Okay. Do you agree with me that that was a mistake

Robert Bank - Cross-Examination by Ms. Coleman

1 on your part?

2 A Yes.

3 Q Okay. Would you agree with me that that was
4 prejudicial to this case?

5 A Sure, yes.

6 Q Okay.

7 MR. BOOZER: Beg the Court's indulgence.

8 (There was a pause in the proceedings.)

9 MR. BOOZER: Thank you, Mr. Bank, that's all I have
10 for you.

11 **CROSS-EXAMINATION**

12 BY MS. COLEMAN:

13 Q Hi, Mr. Bank, how are you?

14 A I'm well. How are you?

15 Q Fine, thank you.

16 This statement that has been introduced as
17 Applicant's Exhibit Number 3, was this the statement that
18 she took -- that she wrote down immediately following the
19 interview or was this a police statement she gave later?

20 A I believe it's a police statement that she gave
21 later.

22 Q Okay. So this is not the exact report that she
23 typed into her system after the interview?

24 A I believe -- I believe remembering there was a
25 distinction between two different reports or accounts or

Robert Bank - Cross-Examination by Ms. Coleman

1 statements.

2 Q Okay. So her recollection of the interaction may
3 have been different when she --

4 MR. BOOZER: Objection, Your Honor.

5 THE COURT: I'll sustain the objection.

6 MR. BOOZER: Thank you.

7 MS. COLEMAN: Sorry.

8 BY MS. COLEMAN:

9 Q Regardless, did the -- according to your knowledge
10 of this case and preparing this case and the testimony that
11 was presented by the doctors and other testifying witnesses
12 in this case, was there any reason for Mr. Rudd to have to
13 or need to touch his daughter's vagina?

14 MR. BOOZER: Objection, Your Honor.

15 THE COURT: I'll allow it as asked.

16 MS. COLEMAN: Thank you, Your Honor.

17 THE WITNESS: And just so I understand the
18 question, was there any need for him to have to touch the
19 daughter's vagina?

20 BY MS. COLEMAN:

21 Q That's correct.

22 A That's the -- exactly what the defense was, that
23 the doctor -- that she had some type of surgery and that
24 there was, I believe, some type of cream or some type of
25 something that needed to be applied to the daughter's

Robert Bank - Cross-Examination by Ms. Coleman

1 vagina and, I mean that -- that was precisely our defense.

2 Q Uh-huh. But wasn't there testimony from some of
3 the witnesses -- from the State's witnesses saying that
4 they did not recommend that he inspect his daughter at
5 home?

6 MR. BOOZER: Objection, Your Honor, as to
7 relevancy. If there's something she wants to point to in
8 the transcript, I think that's fine, but she's asking a
9 question --

10 THE COURT: I think I agree with the applicant on
11 that.

12 MS. COLEMAN: That's fine. And you actually have
13 my copy of the transcript, so that's all right. I will
14 defer to the transcript in there.

15 But -- no further questions. Thank you.

16 THE COURT: Any redirect limited to what she went
17 into?

18 MR. BOOZER: No, Your Honor.

19 THE COURT: Thank you, sir, you may step down.

20 THE WITNESS: Thank you.

21 MR. BOOZER: Your Honor, our next witness is out in
22 the lobby, if I may grab her?

23 THE COURT: Just bring her in.

24 MR. BOOZER: Your Honor, we'd call Kay Chappell to
25 the stand.

Kay Chappell - Direct Examination by Mr. Boozer

1 THE COURT: Yeah, just come right up here and let
2 the clerk swear you in.

3 KAY CHAPPELL,

4 having been duly sworn, testified as follows:

5 THE CLERK: Please have a seat in the witness box
6 and state your full name for the Court.

7 THE WITNESS: Katherine Chappell, C-H-A-P-P-E-L-L.

8 **DIRECT EXAMINATION**

9 BY MR. BOOZER:

10 Q Ms. Chappell, how are you today?

11 A I'm all right.

12 Q Good. Ms. Chappell, are you aware that I represent
13 Mr. Rudd in his PCR application?

14 A I am.

15 Q And you've been kind enough to discuss this case
16 with me prior to me calling you as a witness?

17 A Yes.

18 Q Okay. Ms. Chappell, where are you currently -- let
19 me ask you this: What do you do for a living?

20 A I am a Clinical Associate Professor at USC in the
21 College of Nursing.

22 Q And how long have you been there?

23 A Ten years.

24 Q And what kind of education did you receive to get
25 to that point?

Kay Chappell - Direct Examination by Mr. Boozer

1 A So I have a Bachelor's Degree in Science of Nursing
2 and a Master's Degree in Primary Care with specialty in
3 pediatrics and I'm currently in school to become a PhD as
4 well.

5 Q Okay. What are you currently studying to become a
6 PhD in?

7 A In nursing.

8 Q In nursing?

9 A Uh-huh.

10 Q All right. Do you have any sort of special area
11 that you are in? Are you in any field like that?

12 A Uh-huh.

13 Q What would that be?

14 A I'm specially trained in forensic medical exams for
15 pediatrics.

16 Q And what sort of training do you have to go through
17 to get that?

18 A So in South Carolina we have a statewide medical
19 network. So we have a little bit more requirements to be
20 in that network than say in another state. So there was a
21 national training that I believe was about three days of
22 didactic; and then we have to spend approximately five days
23 with professionals already in the field. And so I did that
24 training at MUSC and then also at Palmetto Health. And our
25 first 150 cases have to be peer reviewed and then we have

Kay Chappell - Direct Examination by Mr. Boozer

1 ongoing annual requirements as well.

2 Q Okay. And obviously all your requirements and
3 whatnot, everything's current?

4 A Correct.

5 Q Okay. Do you hold any special licenses or
6 certifications?

7 A So as a pediatric nurse practitioner, I am
8 certified by PNCB.

9 Q Okay. Now, as part of your job, do you actively
10 examine children following, I guess, what we'll call sexual
11 abuse disclosures? Is that something you do?

12 A I do forensic medical exams for children with all
13 kinds of child maltreatment allegations.

14 Q Okay. Do you know about how many children you may
15 have examined throughout your career?

16 A Personally in this role, it would be over 500 and
17 then prior to that in my training and as a nurse on the
18 floor, I couldn't say. A lot more.

19 Q Okay. Have you ever testified in court before?

20 A I have.

21 Q Okay. And was that testimony presented through the
22 State? Or tell me about that.

23 A I believe I've been subpoenaed by the State four
24 times.

25 Q Okay.

Kay Chappell - Direct Examination by Mr. Boozer

1 A And once by the defense.

2 Q Have you ever been qualified as an expert?

3 A Yes.

4 Q Okay. And what particular field were you qualified
5 for and what were you qualified as an expert for?

6 A In Aiken, I've been qualified as an expert in
7 developmental and well being exams; and then in Saluda
8 County I've been qualified as an expert in forensic
9 pediatric medical exams.

10 MR. BOOZER: And, Your Honor, at this time we would
11 offer Ms. Chappell as an expert in the area of forensic
12 pediatric medical exams.

13 MS. COLEMAN: I have no objection.

14 THE COURT: Without objection.

15 You may proceed with your questions.

16 MR. BOOZER: Thank you, Your Honor.

17 BY MR. BOOZER:

18 Q Now, Ms. Chappell, back on June 6, 2013, did you
19 have an opportunity to examine two minors by the name of
20 Minor 1 and Minor 2

21 A I did.

22 Q Okay. As a result of that examination, did you
23 prepare a report or reports for that examination?

24 A I did.

25 Q Okay. Do you have your file with you today? And

Kay Chappell - Direct Examination by Mr. Boozer

1 if not, that's okay.

2 A I have it back in my bag.

3 Q Okay.

4 MR. BOOZER: Your Honor, may I approach the
5 witness?

6 THE COURT: Yes, sir.

7 BY MR. BOOZER:

8 Q Ms. Chappell, I'm going to hand you two exhibits.
9 Exhibit -- Plaintiff's Exhibit -- excuse me, Applicant's
10 Exhibit 1 and Applicant's Exhibit 2. And if you could,
11 please, ma'am, identify both of those documents for me.

12 A These are the medical reports for the two children.

13 Q For Minor 1 and Minor 2 ?

14 A Correct.

15 Q Okay. And were those the ones that were conducted
16 in June of 2013?

17 A Correct.

18 Q Okay. And those reports, Exhibit 1 and Exhibit 2,
19 are those true and accurate copies of the examination
20 report that you prepared?

21 A They appear to be, yes.

22 Q Okay. Now, just walk us through exactly what you
23 did in this particular circumstance to examine both Minor 1
24 and Minor 2 ?

25 A So, what I do is I first look at the information

Kay Chappell - Direct Examination by Mr. Boozer

1 that we already have about the case and then I talk to the
2 parent who has come with the child -- and in this case that
3 was the mother -- to get additional history and health
4 information so that I can be sure before I go into the
5 checkup that I'm well aware of anything I need to be aware
6 of.

7 While I'm doing that, I have someone preparing each
8 child separately for the checkup so that they know what
9 steps that are going to be in the checkup and so they get a
10 chance to kind of be in the medical room before I get
11 there.

12 Then I go in and kind of talk to the child for a
13 couple of minutes, just to kind of make friends, make sure
14 they're comfortable, make sure they don't have any big
15 questions that we need to address before we get started,
16 especially with them being a little bit older. And then I
17 begin the physical exam.

18 So I start off with something like hands and feet
19 because that's not very scary or evasive. And then
20 typically they hop up on the exam table and I examine their
21 abdomen and then their private areas and then they get to
22 put their pants back on. And I listen to the heart and
23 lungs, look at the eyes, ears, throat.

24 Q Okay. Now, these reports at the top left have
25 South Carolina Children's Advocacy Medical Response System

Kay Chappell - Direct Examination by Mr. Boozer

1 Child Maltreatment Protocol?

2 A Yes.

3 Q Where is the exam done physically? Where are you?

4 A At the Child Advocacy Center of Aiken.

5 Q Okay. Now, in these instances when you do these
6 types of exams, are you told that we believe these children
7 have been victims of sexual abuse or is it just open ended,
8 here's some children and we want you to exam them? Are you
9 told to look for something?

10 A Nobody tells me what to look for.

11 Q Okay.

12 A You know, I have my own standard of practice. So
13 basically, I get the information beforehand because I need
14 to know what testing to do. So I do get a summary of their
15 disclosure. I do participant in a multidisciplinary team
16 meeting that's going to basically involve everyone
17 investigating that case. That sometimes happens before the
18 exam sometimes; sometimes it happens after. And I think
19 that's it.

20 Q Okay. And I think earlier you told me that you
21 would receive sort of a history from the mother?

22 A Yes.

23 Q Is that something that you receive directly from
24 the mother or something you receive indirectly through
25 someone else?

Key Chappell - Direct Examination by Mr. Boozer

1 A I take all of my information directly.

2 Q Okay. So you had spoken directly with the
3 children's mother at that time?

4 A Yes.

5 Q And did you ever have an opportunity to speak with
6 Mr. Rudd?

7 A No.

8 Q Okay. Would you agree with me just trying to get
9 background information, it's important to try to talk to
10 both parents?

11 A In these circumstances, it's not really possible to
12 do so because we don't allow alleged perpetrators into our
13 building.

14 Q Okay. Now --

15 MR. BOOZER: If I may I approach, Your Honor?

16 THE COURT: Yes, sir.

17 BY MR. BOOZER:

18 Q Ms. Chappell, I'll hand you back Exhibits 1 and 2
19 which are examinations of Minor1 and Minor2 . I will just
20 get right to it. After you conducted your examination,
21 what conclusions did you reach?

22 A So for Minor2 , which is the younger child, her
23 physical exam was normal. Her mom had reports a couple of
24 concerning symptoms as far as her being -- kind of having
25 infrequent stomach aches and having maybe some clinginess

Kay Chappell - Direct Examination by Mr. Boozer

1 or some mild behavior changes. So in my conclusions, I
2 acknowledged that to being potentially due to either trauma
3 or to kind of the instability going on since the
4 disclosures because they had had some change of living
5 situations. And recommended counseling on whatever reason
6 there was for some of that.

7 Q Okay. How about -- well, let me ask you this: Did
8 you find any evidence of physical sexual abuse or trauma to
9 either of the girls as a result of your examination?

10 A So for Minor2 , normal genital findings. And then
11 for Minor1, normal findings in terms of penetrating trauma,
12 but she did have some scarring and other abnormalities made
13 that a little difficult to, you know, 100 percent
14 determine. But I didn't see anything that would be
15 classified as a physical finding.

16 Q And when you're talking about her specifically with
17 the scarring and some abnormal findings, you're aware she
18 did have a congenital condition prior to?

19 A Correct.

20 Q Okay.

21 A And she had reconstructive surgery.

22 Q And so that would be an explanation for the
23 scarring. You couldn't contribute that to any physical
24 sexual abuse, correct.

25 A Correct. What makes that a little difficult is

Kay Chappell - Direct Examination by Mr. Boozer

1 where the scarring from the surgery is, is where there
2 could have been potential signs of sexual abuse, so that
3 makes it a little difficult to say 100 percent whether
4 every single scar was or was not due to the surgery.

5 Q Okay. And in your report, you note some of that,
6 but you note: Today's exam revealed findings consistent
7 with history of reconstructive vaginal surgery including
8 scar tissue to some areas that I certainly can't pronounce.
9 I'll rely on you for that. But the fossa, the vaginalis?

10 A Correct.

11 Q And other areas surrounding the vaginal opening;
12 hymenal tissue, including folds and notching with surgical
13 history is not possible to determine whether any of the
14 current findings are due to abuse or penetrating trauma
15 based on this exam alone. If the post-op images
16 description could be able to make better determination of
17 changes since surgery and the possible causes, right?

18 A Correct.

19 Q Okay. Have you ever examined a child with Minor1's
20 previous condition?

21 A No.

22 Q Okay. Have you ever examined a child that had gone
23 through, I guess, sort of the surgical procedures that she
24 had been through?

25 A No.

Kay Chappell - Cross-Examination by Ms. Coleman

1 Q Okay. So this is a pretty unique circumstance?

2 A Very.

3 MR. BOOZER: Beg the Court's indulgence.

4 (There was a pause in the proceedings.)

5 BY MR. BOOZER:

6 Q Ms. Chappell, is your -- is your examination of the
7 genital area, is it all really -- you don't do anything
8 internally?

9 A Correct.

10 Q Okay. Thank you. That's all the questions I have
11 for you.

12 **CROSS-EXAMINATION**

13 BY MS. COLEMAN:

14 Q Hi, Ms. Chappell.

15 A Hi.

16 Q Just a few questions I have for you about this
17 exam. And he read from the diagnosis and conclusion of the
18 -- and I was going to read some of the same statements,
19 but I'll just look at one of them here. Your report reads,
20 let's see: Absence of findings specific to allegation does
21 not contradict child's FI statement or repeated digital
22 penetration by the alleged perpetrator, biological father,
23 and neither confirmed nor ruled out past abuse or trauma.
24 Is that -- that's part of your report, correct?

25 A Yes.

Kay Chappell - Cross-Examination by Ms. Coleman

1 Q Is that consistent with your findings? It does not
2 contradict her allegations?

3 A Correct.

4 Q Okay. Do you often find in -- in children in
5 situations like this, do you often find signs of abuse?

6 A So because I don't see children in the first 48 to
7 72 hours after abuse has happened, they would have gone to
8 the ER for a checkup there.

9 Q Uh-huh.

10 A And this is soft tissue and it heals very quickly.
11 We expect that even in a disclosure of penetrating trauma,
12 which this was not, that 95 percent of those cases would
13 have a normal physical exam.

14 Q Okay.

15 A Because it's very quickly healing soft tissue.

16 Q Okay. Are you aware of how long after the abuse,
17 the alleged abuse happened, that you conducted this exam?

18 A I believe the interview was one to two weeks before
19 I saw them, so then it would have been however long it took
20 to get the interview scheduled. So more than two and a
21 half weeks would be my guess.

22 Q So it might have been quite a bit of time after the
23 alleged abuse happened?

24 A Yes, ma'am.

25 Q Okay. Your report also says Minor 1's younger

Kay Chappell - Redirect Examination by Mr. Boozer

1 sister, Minor2 , also disclosed this abuse according to the
2 girls. Now, where was that disclosure made? Was that some
3 of the information you gathered before you conducted this
4 examination?

5 A Those were from the summaries of the forensic
6 interview. And I always include if a sibling or other
7 child disclosed because if this child perhaps wasn't able
8 to disclose or, you know, it would be important to include
9 if another child has talked about that child.

10 Q Okay. So basically it's according to your
11 examination and your findings, is it your conclusions that
12 this abuse would have happened even though you didn't see
13 signs of it in your examination?

14 A Correct.

15 Q Okay. Thank you. Nothing further.

16 THE COURT: Any redirect limited to what she went
17 into?

18 MR. BOOZER: Yes, Your Honor.

19 **REDIRECT EXAMINATION**

20 BY MR. BOOZER:

21 Q You indicated a number or a percentage of 95
22 percent. Could you explain that a little bit more?

23 A Meaning?

24 Q I think you had testified that in 95 percent of the
25 cases that you see there will not be any sign of sexual

Kay Chappell - Redirect Examination by Mr. Boozer

1 abuse. Is that what you indicated?

2 A So in 95 percent of cases seen at an expert
3 analysis level, so not just my cases.

4 Q Okay.

5 A But per the guidelines that forensic medical exams
6 follow.

7 Q But that number would be assuming someone who is
8 not Minor1 with sort of this reconstructive vaginal surgery
9 or the condition that she had; is that correct?

10 MS. COLEMAN: Objection. That's speculation.

11 THE COURT: I'll allow it.

12 MR. BOOZER: Thank you.

13 THE WITNESS: As far as I'm aware in the articles
14 that are put together to make that analysis and to make
15 that call within our field, there isn't a specific study
16 for appreciable insufficiency or reconstructive surgery.

17 Q Okay. So it may be that Minor1, she would not fit
18 that 95 percent sort of norm to your knowledge? Because
19 there's no study on it?

20 A I can't speak directly to that because I haven't
21 read the entire inclusion criteria for all of the studies
22 included.

23 Q Would you agree -- well, let me ask you this: In
24 your observation of Minor1, were you able to observe sort of
25 the vaginal opening?

Kay Chappell - Redirect Examination by Mr. Boozer

1 A Yes.

2 Q Okay. Do you recall whether it was much smaller
3 than what a child of her age and size normally would have?

4 A Minus the scar tissue, everything really had a very
5 normal appearance. And again, I saw her post
6 reconstructive, I believe it was in -- within a year
7 perhaps.

8 Q Sure. But you never had an opportunity to examine
9 or look at her before her surgery, correct?

10 A Correct.

11 Q So you wouldn't know what she looked like then,
12 would you?

13 A No. Correct.

14 Q Okay.

15 MR. BOOZER: Beg the Court's indulgence.

16 Thank you, Ms. Chappell. That's all.

17 MS. COLEMAN: Nothing further.

18 THE COURT: Thank you, ma'am. You may step down.

19 THE WITNESS: Thank you.

20 MR. BOOZER: Your Honor, may Ms. Chappell be
21 released from subpoena and excused?

22 MS. COLEMAN: No objection.

23 THE COURT: Without objection, ma'am, you are to be
24 excused. Thank you for coming.

25 Applicant ready to call their next witness?

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 MR. BOOZER: We are, Your Honor. We would go ahead
2 and call Ms. Aimee Zmroczek.

3 AIMEE ZMROCZEK,
4 having been duly sworn, testified as follows:

5 THE CLERK: Have a seat in the witness box. State
6 your full name for the Court.

7 THE WITNESS: Thank you.

8 My name is Aimee Zmroczek, Z-M-R-O-C-Z-E-K.

9 **DIRECT EXAMINATION**

10 BY MR. BOOZER:

11 Q I'm going to try my best to call you Ms. Zmroczek,
12 but I may go off the rails and call you Aimee if that's
13 okay?

14 A Certainly.

15 Q Little shorter and easier for me too.
16 Aimee, did you represent Mr. Rudd in his trial?

17 A I did.

18 Q All right. How did you come about representing
19 him?

20 A So I have been in criminal practice pretty
21 exclusively throughout my career and I had a bunch of cases
22 in Aiken. I had some success in Aiken and I believe that
23 Mr. Rudd had either been there for one of my cases or
24 anyway, he somehow contacted me and said he was not happy
25 with his current -- and that he wished to retain me.

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 Q Do you know when you were officially retained by
2 Mr. Rudd?

3 A Officially was November -- I believe November 3rd.
4 He also had a trial date at that time, so I was able to get
5 a continuance. I know there was a trial date right when I
6 got hired and I made sure to contact the solicitor because
7 I know they don't like when attorneys come in at the last
8 minute to try to elongate the process. And so I made sure
9 with the resident judge and with the solicitor that my
10 representing him would be okay; and certainly needed, you
11 know, a good amount of time to prepare.

12 Q So you went to trial in December of '13?

13 A Correct.

14 Q Okay. So officially, you were on the case not that
15 terribly long?

16 A I'm sorry? Right, that's correct.

17 Q Okay. Did you feel like you had enough time to
18 investigate the case and develop a defense and meet with
19 Mr. Rudd?

20 A I absolutely did. It actually -- what I -- it
21 actually fell with a great time. I was able to dedicate --
22 with the holidays and everything I was able to dedicate
23 24/7 to the case. And in fact, I went back and I looked at
24 my text messages because, obviously, they're saved on my
25 phone, and not only did I have the discovery, but as the

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 record, I think shows, I filed numerous motions, motions to
2 compel, did my own investigation and met with the client
3 November 26th, 29, 12/2, 12/3, 12/4, 12/6, 12/7, and 12/8,
4 and then all the way during trial, so...

5 Q Would these have been meetings that are occurring
6 at the county detention center or at your office?

7 A At my office.

8 Q Okay. Prior to trial, while you were representing
9 Mr. Rudd, was any plea offer made to you?

10 A There was a plea offer extended. And I believe --
11 we didn't put it on the record. I know that there was one
12 even the morning of the -- that we were beginning jury
13 selections and it was a plea to 12 year -- a negotiated 12
14 years, but it was the nonviolent time.

15 Q So it was 12 nonviolent?

16 A Correct.

17 Q Did you discuss that with Mr. Rudd?

18 A I did.

19 Q Okay. And what was his response to that?

20 A He always maintained that he was innocent of these
21 allegations and was not going to plead to something that he
22 did not do.

23 Q What -- do you know where that offer -- you may
24 have already said, but do you know where that offer
25 occurred? Was it made while y'all were in court or when?

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 A I don't recall.

2 Q Okay.

3 A I know that it was certainly made that -- at least
4 that day. And I don't know if we had time to think about
5 it overnight. I imagine that we probably would, but I --
6 certainly since it was offered, I would extend it to him.

7 Q All right. Have you been in the courtroom for all
8 of today for Mr. Rudd's case?

9 A I have.

10 Q Okay. So obviously, I want to go through his
11 allegations. He's alleged that you were ineffective for
12 failing to introduce medical exam reports of Minor 1 and
13 Minor 2.

14 A Right.

15 Q Let me ask you first this: Were you provided those
16 in discovery?

17 A I believe I filed a motion to compel, but I did
18 eventually receive them, yes.

19 Q Okay. Obviously, since you came in a little bit
20 late in the game, were you getting things from Andy's
21 office, or excuse me, Mr. Anderson's office?

22 A I tell you, it's a practice of mine -- sure I like
23 to get things from the previous defense attorneys, but I
24 think if I'm going to challenge the State and hold the
25 State to their standards that I always make them provide me

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 everything. And I believe that Ms. Hammack and I met
2 numerous times because I was quite demanding of her time.

3 Q Okay. And you said you were in the courtroom for
4 Ms. Chappell's testimony previously?

5 A Yes.

6 Q Okay. Did you interview Ms. Chappell prior to
7 trial?

8 A So -- yeah, both Mr. Bank and I had -- once we
9 received her documents, we did an extensive -- I have a,
10 actually, a huge file on her. I got all of her nursing
11 certificates, all the things that she did and -- and --
12 yes, I spoke with her. I learned that she's an advocate
13 and -- and that what she would testify to would be in an
14 expert opinion to get up and say that in 95 -- she would
15 tell the jury, sure I found nothing, but in 95 percent of
16 the cases that's what we expect is to find nothing.

17 And so that -- and -- and actually I filed a motion
18 to keep her testimony out and I even believe there were
19 some e-mails back and forth and Judge Barber agreed with me
20 that if she was just going to testify that she didn't find
21 anything then there was no relevance to her testimony
22 because I couldn't limit what she was going -- I couldn't
23 limit the 95 percent once she got up here.

24 Q Well, would you agree with me that, as in my
25 questions to Ms. Chappell, we've got a little bit of a

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 different scenario where we don't have a child that really
2 falls probably, as to what you'd consider normal, maybe
3 unique as it was called during the trial. Would you agree
4 with me that there may be some wiggle room on that number
5 of 95 percent when we're dealing with Minor 1? She may not
6 fall into that category?

7 A I absolutely would agree with that assessment, but
8 weighing the trial strategy to have someone qualified as an
9 expert even though the judge instructs the jury that
10 they're not to hold their opinions even greater, it's just
11 one more person to put up to say what they were told about
12 the abuse, how many times they were told and so it -- it
13 really did not offer any -- anything positive.

14 Q Did you discuss that -- your thoughts on Ms.
15 Chappell with Mr. Rudd?

16 A You know, I believe that -- we discussed so many
17 things. So the problem with Mr. Rudd is, I think, he's a
18 very desperate individual. And I really believed him and
19 do believe him about the -- the -- what happened in this
20 case and the problem was is that he wouldn't always follow
21 my advice and so while I was talking to him about experts,
22 he actually went off and hired some expert off of the
23 internet who ended up not to be able to help him. But so,
24 I'm trying to focus on the case and he's making things more
25 difficult.

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 Q Have you reviewed the medical exam reports that are
2 marked as Exhibit 1 and Exhibit 2 in this case?

3 A Not recently.

4 Q Okay.

5 MR. BOOZER: May I approach, Your Honor?

6 BY MR. BOOZER:

7 Q I'm going to hand you both medical reports,
8 Exhibits 1 and 2. Just take a moment and look through them
9 and we'll talk about them.

10 A (Looking.) Sure.

11 Q You've looked at them?

12 A Yes.

13 Q Okay. And you may have already said this, but you
14 said you did receive those in discovery?

15 A I did, yes.

16 Q Okay. And do you know if you sat down and actually
17 reviewed those with Mr. Rudd?

18 A I believe that I received them under seal and was
19 ordered by the judge not to let anyone see them including
20 Mr. Rudd; that I could relay to him what that information
21 was, but that he couldn't actually view them. That was my
22 -- that's my -- that's my recollection.

23 Q Was there a hearing that involved that or how did
24 that come about?

25 A I know why it came about. It was because I was

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 filing motions to compel left and right. But that's -- I
2 just recall the judge ordering the -- and I may be wrong, I
3 just recall the judge ordering that it be turned over, but
4 that they were -- I could not share this information unless
5 it was with a medical expert.

6 Q Based on your review of Exhibits 1 and Exhibit 2
7 which are a examination of Minor1 and Minor2 , would you
8 agree with me that there was no affirmative finding of any
9 sort of sexual abuse on either child?

10 A I agree that there was no physical findings, but I
11 also would -- the thing that concerned me was that it also
12 gave recitations of what they had been telling everybody
13 else which were verbal assertions that they were abused and
14 that's what I was concerned about coming out is that I
15 couldn't keep a part of it -- if I just wanted her to say
16 that, that the State would, of course, have free reign to
17 anything that she said.

18 Q Well, we know she's obviously told someone because
19 we have a trial on it so; right?

20 A Right, right, right.

21 Q Okay. Would you agree with me though that this
22 case was really a credibility contest between the two
23 daughters versus what Mr. Rudd was saying?

24 A Oh, absolutely.

25 Q Okay. There was no, obviously, a video of these

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 instances or obviously no physical -- there was no physical
2 exam -- abuse that was able to be shown to the jury, was
3 there?

4 A Correct.

5 Q And, in fact, I think you sort of mentioned if
6 there were any signs of abuse it would have been, y'all
7 would have had it told to the jury?

8 A Right.

9 Q But don't you think that actually having a doctor
10 come in and basically back up Mr. Rudd's claim -- excuse
11 me, not a doctor, but the person who conducted the physical
12 examination able to actually say I did not find evidence of
13 sexual abuse on either child even if -- even if she sort of
14 qualifies it, don't you think that that's beneficial?

15 MS. COLEMAN: Your Honor, he's leading the witness.

16 THE COURT: I'll allow him to ask it.

17 BY MR. BOOZER:

18 Q Do you think that's good?

19 A I tell you, it's a close call. And sure,
20 hindsight, maybe it was or maybe it wasn't, but this was
21 not my first CSC case nor has it been my last. And with
22 all of the issues -- this was also right around when Kromah
23 was being debated back and forth so I was very sensitive to
24 the whole corroboration and bolstering. And so it was
25 really just a sound trial strategy, I think, to -- to limit

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 that. And I believe that actually the -- the testimony
2 that there was no physical evidence, I believe came out in
3 the doctor's report. Somewhere around page 300, I remember
4 reviewing that. So I believe that that information
5 actually did come out just not through Kate Chappell.

6 Q Okay. But that would have been through the actual
7 surgeon who performed the reconstructive surgery, right?

8 A Correct.

9 Q Okay. And he wouldn't have been someone who would
10 have been presumably seeing them after the alleged
11 disclosure, right?

12 A I do believe they actually did go back and forth.
13 They were followed by Dr. Houck, but he -- the other doctor
14 Donohoe, I believe did some followup.

15 Q Now, he's got an allegation that you were
16 ineffective for failing to introduce some photographs that
17 are of the bedroom walls in his house. In discovery, do
18 you recall being provided with a number of photographs that
19 were taken of the family's home?

20 A I do. And additionally, I believe that somewhere
21 around late December or -- excuse me, early December late
22 November, I actually provided the State with probably 40 or
23 so reciprocal photographs as well that we introduced into
24 evidence.

25 Q That you introduced -- you believe that you

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 introduced 40 photographs into evidence?

2 A No, I believe I chose about 10 that displayed
3 Mr. Rudd interacting with his children; four wheelers and
4 things like that just trying to show the nature of their
5 relationship.

6 Q That's right. And looking in my, I guess review of
7 the appellate record, it looks like there were 9 exhibits
8 that were introduced.

9 A Yes.

10 Q There was four photographs from the State, one of
11 which depicted, apparently the house, his room, Mr. Rudd's
12 room in the house, and then two photographs that are
13 devoted contentiously about a apology, the alleged apology
14 of I'm sorry?

15 A Right.

16 Q And then the other photos that were introduced by
17 you guys were a family photo; some photos as you described
18 of them working; of the four wheeler; I think one of a
19 guitar and a note, and then a photo of the bathroom where
20 Minor1 would have to use a special restroom.

21 A And I believe there was one where they do like the
22 measuring height.

23 Q A growth chart.

24 A Yeah, yeah, yeah.

25 Q Correct. Okay. Now, in pretrial motions at page

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 42, you have a copy of the transcript?

2 A I do.

3 Q Okay. Were you attempting to exclude all of the
4 photographs? What were you --

5 A Absolutely. I wanted -- I felt like -- I wanted to
6 exclude them for two reasons. One what they wanted to put
7 in, obviously, they were trying to liken it to an
8 admission, but two, even though he was going to get up and
9 testify, it -- normal people just don't write notes on the
10 wall. And so I felt like it was a poor reflection on
11 'someone who is -- who is in a panicked state. And I --
12 when I was reviewing and preparing this case, I said, one
13 of the things that I wish I would have done is gotten him
14 evaluated, but then I remembered Andy Anderson actually had
15 him evaluated by Dr. Maddox and -- and there were no
16 competency issues.

17 Q Did he explain to you -- and you talked about the
18 messages that are on the walls, right?

19 A Right.

20 Q Did he explain to you or offer any explanation as
21 to why he was writing the messages?

22 A He did and he actually explained it to the jury as
23 well. My concerns, and I don't have the photos in front of
24 me, but I have copies of them, so he wanted me to put all
25 of it in and -- and this -- it's a large writing on the

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 wall. They weren't going to come in as the small
2 photographs, they were -- they were at least 8 by 10 and
3 the thing that concerned me about putting the whole picture
4 in is he makes statements such as, I'm sorry I wasn't
5 around before. I didn't realize and that was contrary to
6 our defense, which was he was, kind of the stay-at-home dad
7 and he did everything for these girls and because of this
8 divorce and some question of infidelity with the estranged
9 wife that that's why these were coming up.

10 And so when he would say things like I'm sorry I
11 didn't notice before, I'm sorry I don't -- I'm sorry I
12 don't hang out with you; I'm sorry I'm not there for y'all,
13 well, that was -- that was contrary to what our defense
14 was, which was that he was doing everything for them,
15 including their medical care. So that -- and, I mean these
16 were -- there was a lot of writing on the walls and it --
17 and it -- although explainable -- it's sometimes -- if
18 you're not going through this very unique situation it's
19 difficult, I think for twelve to fourteen people to kind of
20 grasp that somebody normal would do that, if that makes
21 sense.

22 Q Okay. Now --

23 MR. BOOZER: May I approach the witness, Your
24 Honor?

25 THE COURT: Yes.

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 BY MR. BOOZER:

2 Q I'm going to hand you what's been marked as
3 exhibits -- Petitioner's Exhibits 4 through 7. And just
4 take a moment and look at them.

5 A Yes.

6 Q Okay. Are those some of the photos that reflect
7 the writing on the walls that Mr. Rudd made in their
8 bedrooms?

9 A Yes.

10 Q Okay. Now, ultimately at trial, two photographs,
11 the State wanted them admitted?

12 A Two photographs that the State wanted in were --

13 Q Were admitted?

14 A Admitted. Yes.

15 Q Do you recall the substance of those photographs?

16 A I believe it was focussing in on probably an
17 apology area.

18 MR. BOOZER: May I approach, Your Honor.

19 BY MR. BOOZER:

20 Q I'm going to hand you two very poor copies of
21 photographs that I represent to you, Petitioner's 8 and 9,
22 that I'll represent to you are what -- are what are alleged
23 to have been admitted in trial per, I guess, the appellate
24 court as is what's in the record on appeal. Are those
25 close ups, of basically an apology to each child

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 separately?

2 A Yes.

3 Q Okay. And to your knowledge, are those
4 photographs, Exhibits 8 and 9, they're not the entire
5 original picture, are they?

6 A Correct.

7 Q Okay. So you didn't want those in because it looks
8 like he's apologizing for what it's alleged he did, right?

9 A Correct.

10 Q Okay. And then -- actually on page 49 after you
11 kind of see that that's how it's going to be that those
12 photographs are coming in, you tell the Court at line 5 on
13 49, I think, Your Honor, if you're going to admit those
14 then we can admit some of these other -- the rest of the
15 story?

16 A Right.

17 Q What's the rest of the story?

18 A (Reading:) If they're going to admit those, then
19 we can admit some to tell the rest of the story.

20 So I believe, you know, when I realized that he was
21 going to let a little of it in, then I think I moved to --
22 to -- to have it all in and I guess, you know, obviously,
23 that -- I don't know where it comes up again later, but --
24 I mean, in reading them if -- if -- if they all came in, it
25 -- what it -- and you can obviously read them, Petitioner's

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 4, 5, and 6, but it -- it really presents kind of the
2 different family dynamic than we wanted to present.
3 Because like I said we were presenting that he was super
4 involved, in fact, way more involved because he was the
5 stay-at-home parent.

6 And these were saying things like I'm sorry I
7 didn't notice; he's saying -- I wish we could spend more
8 time together; when we were -- when our defense was he was
9 the one providing all the care. So at that point, I think
10 I had to make a call as to not only just limiting the very
11 unusual behavior of writing these long notes on the wall,
12 but then kind of undermining our defense.

13 Q But specifically on 49, what is it you're referring
14 to: If you're going to admit those then we can admit some
15 to tell the rest of the story? Are you not referring to
16 the other photographs of the writing on the walls?

17 A Yeah, I believe that's what I was referring to.

18 Q Okay. So it appears to me, was it your plan at
19 that point, once 3 and -- what was marked at trial as 3 and
20 4 and what's marked today as 8 and 9, once they were coming
21 in, you kind of switch gears and say, Oh, no, I need to
22 show the rest of this so I can put it into context?

23 A Well, depending on how the trial was going to
24 proceed, that's -- that's what -- that was a thought at
25 that time.

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 Q Okay. And in fact, actually, then, when Mr. Rudd
2 takes the stand, you've sort of got to explain why he wrote
3 that on the wall?

4 A Right.

5 Q Okay. And that's, I believe at 353 that that comes
6 up. Where you actually confront Mr. Rudd on 353 at line
7 13, you say, I'm showing you State's Exhibits 3 and 4 that
8 are already into evidence. Did you write on that? Did you
9 write these? His answer, let me see. Yes, ma'am.

10 Tell the jury why you wrote on the walls. And he
11 goes onto say why he did it. He felt like, you know, she
12 was with me all the time. We fished together, went hunting
13 together, were real close. We did everything together.

14 A And that -- and that was what concerned me because
15 when he testified to that and then if you read these things
16 where it says we never spent any time together, that it was
17 contradictory to what he testified to.

18 Q Okay. Well, don't you think that the benefit of
19 getting those other photos in to show the context of these
20 alleged apologies is more beneficial than sort of, Hey,
21 this doesn't jive with me. How do we say he was with her
22 all the time?

23 A No, I just -- I don't because then you have to have
24 twelve to fourteen people going, Why was he writing all of
25 this on the wall and the -- the thing that's also

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 concerning is that it wasn't like a one-time write, or if
2 it was, he used different colored markers. So he spent a
3 lot of time doing that and -- and taken -- even taken in
4 the context that they are -- that they're given for example
5 Petitioner's Exhibit 5: I won't forget every time I was
6 sitting on the couch just doing something and you would say
7 Love You, Daddy and just always would think, why do you
8 love me. You would say just because. Minor1 Daddy's
9 sorry, please forgive me.

10 So even a picture like that and that being all the
11 context that would have been provided, it -- it -- it was
12 still, I think, better and more explainable without having
13 them pick apart these different writings.

14 Q But wouldn't you agree with me though that the only
15 -- so you agree with me that this was a swearing contest.

16 A Yes.

17 Q Two children's statements against dad's statements.
18 Give it to the jury and which one would they believe?

19 A Yes.

20 Q If there was no other evidence, But when you throw
21 in two close up photographs that appear to be apologies and
22 now you've got two children's statements, dad saying
23 another thing, dad's own -- this is almost arguing to the
24 jury like a statement. He's confessed it. Look, he
25 apologized on the wall. So now we've got a little bit more

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 when it's taken out of context like that. Would you agree
2 with me on that?

3 A I would agree. But again that's why I directed him
4 so plainly and as you say just kind of went after him about
5 it because I felt like that was a bad fact that we needed
6 to just address.

7 Q What was a bad fact?

8 A The -- it was a bad fact that -- about him writing
9 I'm sorry. And then testifying that he's sorry that they
10 don't -- his testimony then didn't match up with the
11 pictures so it just got -- it would have been great fodder
12 for cross-examination.

13 Q Well, aren't the two pictures that's presented with
14 I'm sorry, please forgive me; isn't that great fodder for
15 cross-examination?

16 A It was. And in fact I don't know that Ms. Hammack
17 even cross-examined him on it because I really gave him the
18 opportunity to look the jurors in the eye and explain to
19 them kind of what he was going through and why he did that.
20 And the other problem that I argued too was that -- so
21 these were pictures taken by the law enforcement or the
22 parents -- or the mom -- I can't remember. So by the time
23 that anyone got around to the defense, they had already
24 been covered up, so that was another, I think reason I
25 wanted to try to keep them out. Because I don't know that

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 we got all of -- everything that was on the walls if that
2 makes sense.

3 Q Okay. Let me ask you this: Going back, if you
4 would, to page 48 of the transcript and specifically
5 beginning at line 3. Have you -- understanding Mr. Rudd's
6 testimony today, have you heard that he believes maybe an
7 exhibit was switched out somewhere in the trial or after he
8 -- after the trial and during the appeal?

9 A I heard that testimony, but none of that rings a
10 bell to me.

11 Q You had indicated on page 48, line 3, when you're
12 arguing to the judge: By taking one picture of, a close up
13 picture of I'm sorry and then trying to say he's sorry is
14 guilt, is forcing him -- was there a photo that just said
15 I'm sorry? Or were the photo's, Exhibits 8 and 9 entered
16 in what we've had today?

17 A I have no independent recollection, but I mean, I
18 have no reason to doubt that the exhibits purported to be
19 Petitioner's 8 and 9 are the ones that were put in. The --
20 I know that the court reporters are very meticulous about
21 gathering and holding on to evidence and not letting us
22 touch or switch it, so...

23 Q Switching gears to page 66 of the transcript. Do
24 you recall -- if I may I approach, I'm going to grab these
25 exhibits from you. Do you recall there being a little bit

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 of an issue with a juror who maybe said -- who was kind of
2 waffling about whether she could be fair and impartial?

3 A I do. In fact, I -- so these were where during the
4 voir dire where they come up to the bench, so it's not
5 everybody in the world is hearing their responses, but I
6 didn't remember it until I read it, but yes, I do remember.

7 Q Okay. Is there any reason that you didn't, I
8 guess, for lack of a better word, raise an objection, raise
9 a fuss about that particular juror?

10 A There were two reasons. One is by the time that
11 that juror was selected, I had used all my strikes. So I
12 was -- I was done with strikes by the time that that juror
13 had come up. I had exercised all ten of mine and -- and so
14 because I had pushed for a definite answer about she can be
15 fair, she can't be fair, and then she flat out said she can
16 be fair. The other reason that I actually chose to sit her
17 was she was a caregiver to someone with cerebral palsy and
18 so my thinking was that someone who's a caregiver has to do
19 things that normal people don't have to do and sometimes
20 they're gross and disgusting and embarrassing and I figured
21 that someone in that position who has to take care of
22 somebody may have a better understanding of that.

23 Q Okay.

24 A And be more sympathetic to Mr. Rudd.

25 Q If you would, flip over to page 443.

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 A 443?

2 Q Yes, ma'am. And this would be during the State's
3 closing remarks, at line 8. It's stated: If those girls
4 weren't telling you the truth, then ladies and gentlemen
5 let's give them an academy award?

6 A I absolutely should have objected to that. I --

7 Q Why should you have objected to that?

8 A Because I think that that -- it is -- her -- her --
9 her, Ms. Hammack, the solicitor, and the State for that
10 matter kind of vouching for the witnesses.

11 Q Well, not kind of vouching, but --

12 A Was absolutely vouching, yes.

13 Q Okay.

14 A Yeah.

15 Q Okay. And that's objectionable you believe?

16 A Oh, absolutely. And I didn't do it and I do not
17 know why.

18 Q And in a case like this where as you said it's a
19 swearing contest, right?

20 A Yes.

21 Q Okay. You can't get up and say Mr. Rudd, I know
22 that he's telling the truth, I've investigated, I know he's
23 truthful, you wouldn't say that.

24 A Right, no, I would never say that. So...

25 Q Okay.

Aimee Zmroczek - Direct Examination by Mr. Boozer

1 A Yeah, I don't -- I have no idea how that got by me.

2 Q Okay. Had you objected, would you have asked for a
3 mistrial or how would you have handled it?

4 A I certainly -- the first thing I would have done is
5 ask for a mistrial. And in my experience the judge would
6 have denied that, but I would have asked that it be
7 stricken from the record and ask for a curative instruction
8 and then and then a subsequent jury instruction regarding
9 stricken testimony.

10 Q So the first thing you do is object. And then in
11 your opinion, this rises to such -- sort of egregious level
12 you'd ask for a mistrial?

13 A Absolutely.

14 Q Okay. And of course, like your saying, if you
15 don't do it then it's not -- let's say he overrules you
16 said, I'm going to let it in, whatever. Still you're
17 objecting, objecting to protect on the record and then it
18 can go up to the appellate level, right?

19 A Absolutely.

20 Q So in this case, appellate counsel, even if they
21 wanted to, couldn't have raised any sort of issue with this
22 -- with this item?

23 A You are correct. And I never -- typically in
24 trials, I do hear from appellate counsel. I didn't hear
25 from them in this case.

Aimee Zmroczek - Cross-Examination by Ms. Coleman

1 Q Okay.

2 MR. BOOZER: Beg the Court's indulgence.

3 (There was a pause in the proceedings.)

4 MR. BOOZER: That's all the questions I have at
5 this time. Thank you.

6 THE COURT: Counsel.

7 MS. COLEMAN: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MS. COLEMAN:

10 Q Hi, Ms. Zmroczek?

11 A Hi.

12 Q I think he has gone over the majority of my
13 questions, but there are still some allegations I'd like to
14 address that I don't think we've gotten to yet.

15 You testified that you reviewed all the discovery
16 material with the applicant?

17 A Numerous times.

18 Q Except for the reports, medical reports that you
19 believe were under seal, even to him; is that right?

20 A Yes, and I believe that they came in under the DSS
21 -- there was like a DSS file or it was a specific file that
22 I think these were a part of that were under seal.

23 Q Okay. Is it common or have you ever seen this
24 before for Judge Early to admit certain sensitive documents
25 under seal?

Aimee Zmroczek - Cross-Examination by Ms. Coleman

1 A Oh, yeah, not just Judge Early.

2 Q Several judges.

3 A This was Judge Barber, actually, but yeah.

4 Q Okay. So that wasn't an unusual -- sorry it was
5 Judge Barber. I'm sorry. That was not an unusual
6 situation?

7 A Correct.

8 Q Okay. Did the solicitor's office withhold anything
9 from you?

10 A No. And in fact, so one of the things that I think
11 makes me kind of an annoying defense attorney is that I
12 really -- I should have been an investigator, I guess, in
13 my past life, but I -- I like to have my hands on
14 everything, not just in preparation for the trial, but it
15 also assists in making sure that I'm advising the client
16 because -- in this case specifically when we got the plea
17 offer of -- to 12 nonviolent time, at 65 percent, I know I
18 remember discussing it with him and we had gone over the
19 good, the bad, and the ugly; and I mean, these are just
20 things you don't want to have to talk about in front of
21 twelve strangers. But we, I know, discussed it ad nauseum,
22 really, which is my -- I was sad to0, of course, for
23 Mr. Rudd, have him found guilty, was I felt like Judge
24 Barber's sentence of 15 years after the 12 that was
25 offered, even though it was a difference of 65 and 85

Aimee Zmroczek - Cross-Examination by Ms. Coleman

1 percent was really a fair sentence in this case.

2 Q Okay. And what was you're -- you've already
3 testified some about your trial strategy of this case being
4 to show him as a caregiver and he was the stay-at-home dad
5 who did everything for the girls; is that right?

6 A Absolutely. And -- and the girls -- the problem
7 was that the girls agreed with me and when I went to
8 cross-examine the -- the mother of the children, the soon
9 to be ex-wife, she -- I was all ready to -- because we had,
10 on our own, done some investigation into her phone records
11 and found that a day after, she was contacting Christian
12 Mingle and trying to meet men. And I confronted her about
13 it and she admitted to everything, so it was really -- and
14 I believe Mr. Bank did the opening and he said this is, you
15 know, this shouldn't be the State v Rudd. It should be
16 Rudd v. Rudd. This is a family court matter and that's
17 where it should have stayed.

18 Q Uh-huh.

19 A And that was what we believed the whole time.

20 Q So was that part of your strategy as well, to kind
21 of discredit a wife and give her a motive for telling these
22 girls to lie?

23 A Absolutely.

24 Q Okay. And you argued both of those strategies
25 pretty vigorously to the jury, correct?

Aimee Zmroczek - Cross-Examination by Ms. Coleman

1 A I did.

2 Q Okay. And the jury heard all about his version of
3 the story that he was touching his daughters to medically
4 inspect them; is that correct?

5 A Correct. Well, he had to apply -- so he had always
6 maintained that he had to apply ointment to the older
7 daughter and --

8 Q After her surgery?

9 A Correct.

10 Q But there was testimony from the mother that she
11 and the applicant had discussed this and decided that she
12 -- the daughter was too old for him to be applying the
13 cream and she was going to do it, right?

14 A That's what the testimony was.

15 Q Okay. Was there a viable alibi defense in this
16 case?

17 A Well, so one of the motions that I filed pretty
18 early on was -- and by early on, I mean November -- was a
19 motion for more specific or more definite time period, I
20 think as required under the statute and also because we
21 were trying to establish some alibi issues. So there was a
22 whole 'nother aspect to this case that didn't come up
23 during trial that we were able to keep out that involved an
24 allegation of a third party. And so we were able to keep
25 all of that out and so Mr. Rudd was providing me pictures

Aimee Zmroczek - Cross-Examination by Ms. Coleman

1 and bank records of vacations and things like that, but
2 none of them could seem to fit the time periods. But I
3 remember that some of them did. And the girls -- and the
4 wife, I believe, even testified that they went on vacation.
5 And I think I remember during closing, this -- I know Judge
6 Barber was going crazy because this was an extremely long
7 closing for me, but it felt like, if I remember correctly,
8 I had a demonstrative calendar of the different dates and
9 when they testified as to where they were. And so how some
10 -- and I believe at that point -- at some point some of the
11 indictments were either withdrawn or -- I can't remember
12 exactly what happened.

13 Q And speaking of the indictments, did you see any
14 issues with the indictments in this case?

15 A No, so this indictment argument, it -- I don't know
16 if it's something that's going through the Department of
17 Corrections but -- in fact, I did receive from the clerk of
18 court a list of specific dates that the grand jury met and
19 the grand jury met July 11, 2013, August 1, 2013, September
20 5, 2013 and October 3, 2013 and that's the term, October 3,
21 2013, is the term at which these indictments were presented
22 and I believe I looked up the statute that Mr. Rudd was
23 wanting me to argue. And I believe that applies to State
24 grand jury terms.

25 Q Okay. So you saw no issues with the indictments

Aimee Zmroczek - Cross-Examination by Ms. Coleman

1 before the trial?

2 A None other than the motions I had filed for more
3 specific or definite dates.

4 Q Okay. And that was all cleared up before the trial
5 began, right?

6 A It was.

7 Q Okay.

8 A And I believe some were even withdrawn at that
9 time.

10 Q Could you briefly describe the State's evidence
11 against the applicant?

12 A Sure. Like, Mr. Boozer said, it was simply their
13 -- the children's word against the father's word with this
14 really unique genital adrenal hypoplasia issue which I'd
15 never come across before, so I actually learned a lot of --
16 learned a lot about it.

17 Q Okay. And they also -- there's been testimony
18 today from the applicant about the jail phone calls that
19 were used and obviously the photographs of the writing on
20 the walls and other circumstantial evidence like that.

21 A And the jail phone calls, the problem that I had --
22 obviously, I don't like to put jail phone calls in. The
23 problem is, is that if I put them in, I like to put them
24 all in. I specifically remember there being some things
25 that we did not want in on the jail phone calls, so I

Aimee Zmroczek - Cross-Examination by Ms. Coleman

1 thought it better to have the jury think that the State was
2 trying to hide something from them and just part and
3 parcel, like all of their evidence to try to make him look
4 guilty, which kind of fell in line with the portions of the
5 pictures instead of all of the pictures.

6 Q Okay. So was it a strategic decision not to play
7 the entire jail phone call?

8 A Oh, yes.

9 Q Would the entire jail phone call have been
10 admissible if you'd wanted it in?

11 A Oh, it would have been admissible. Would it have
12 been helpful? No.

13 Q Right. If the State had tried to present the
14 entire phone call, would that have been admissible? Or
15 would you have objected --

16 A No, I would have objected, yeah.

17 Q Okay. I just lost a question I had in my mind.
18 I'm sorry.

19 Okay. So that was a strategy not to put those in?

20 A Yes.

21 Q What other investigation did you do in this case?

22 A So I was very interested in this medical aspect and
23 -- I spent a lot of time preparing and cross-examining the
24 doctor that they did have. So I also contacted the doctor,
25 Dr. Houck, who was kind of the -- the -- I guess really

Aimee Zmroczek - Cross-Examination by Ms. Coleman

1 primary treating physician for this and he was in Georgia
2 and he spoke with me. The problem is that Mr. Rudd had
3 told me that Dr. Houck was the one that told him to apply
4 the medication and when I asked the doctor, he denied that
5 specifically. And so, bringing him would not -- would not
6 have helped the case.

7 Q Okay.

8 A And then there were -- sorry. Then there were --
9 so he had a private investigator when he was with Andy
10 Anderson and so he was still doing some investigation. We
11 were digging into the family court records. We -- and
12 then, of course, Mr. Rudd, on his own was trying to go out
13 and hire experts, none of which could help.

14 MS. COLEMAN: Beg the Court's indulgence.

15 (There was a pause in the proceedings.)

16 BY MS. COLEMAN:

17 Q Now Dr. Donohoe testified at trial and I'm looking
18 around page 300 here. He testified using a demonstrative
19 diagram; is that right?

20 A That's correct.

21 Q Now, is that something that you brought to court
22 and had him explain?

23 A It is.

24 Q Did you try to introduce that as evidence or were
25 you planning to?

Aimee Zmroczek - Cross-Examination by Ms. Coleman

1 A I don't remember. I remember the demonstrative. I
2 had several different options that I provided to the
3 solicitor's office and to the judge and some of them were
4 graphic so this was the least, I think, offensive
5 demonstrative. I don't know why -- I don't know why I
6 didn't enter ID.

7 Q Can you explain to us what the diagram was, just
8 because it's in the transcript, but we don't have a copy of
9 it in front of us.

10 A Yeah, so what -- this is what I remember it being.
11 I thought there was like a normal kind of black and white
12 diagram and then a not normal one, meaning one that
13 exhibits signs of congenital adrenal hypoplasia, but I
14 can't remember. And if it wasn't, it was just the normal
15 one, but then -- I remember he came off the stand and was
16 very meticulous in his explanation.

17 Q Okay. So he explained to the jury how the surgery
18 worked and what the differences were?

19 A Yes.

20 Q Using that demonstrative graphic?

21 A Yes.

22 Q Okay. Ann Laver, I believe is her name, this is a
23 forensic interviewer that the applicant has alleged you
24 should have called to testify about the inconsistencies in
25 the forensic interviews with the two victims in the case.

Aimee Zmroczek - Cross-Examination by Ms. Coleman

1 Why did you choose not to call her as a witness?

2 A Yeah, no. So I know Ann. I've cross-examined her
3 in several other cases. And she is a staunch advocate for
4 victims, alleged victims. They're all victims to her. She
5 -- and plus, again, this was right around when Kromah was
6 being decided and there was -- the judges were trying to be
7 very careful as to what bolstering that was going to
8 happen. And that was going to happen in this case,
9 regardless of whether there was inconsistencies and I did
10 cross-examine the girls on their inconsistencies and I just
11 think that bringing in another sympathetic victim's
12 advocate was not a good trial strategy.

13 Q Okay.

14 A And I also have to direct them and not cross them,
15 which leaves them wide open for the State to be crossed and
16 led.

17 Q The allegations of the applicant made today
18 included several different things about witnesses he wanted
19 you to use, various things of that nature. Did he raise
20 all of these -- did he bring all of these concerns to your
21 attention before the trial?

22 A Oh, he did. He had several witnesses that he
23 wanted me to put up, including his pastor and all those
24 other, what I call character witnesses. So the problem
25 with that is A, the relevance; but also what that would do

Aimee Zmroczek - Redirect Examination by Mr. Boozer

1 is open the door for the allegation that we had been able
2 to keep out from an alleged victim named Jodie who was a
3 friend of one of the girls. And had I put any of those
4 character witnesses up, that would have opened up the door
5 for all of that testimony to come in under Lyle?

6 Q Okay. So you've heard his concerns about most, if
7 not all, of these issues before and you made a strategic
8 decision not to pursue them?

9 A Yes.

10 Q Okay. Thank you. Nothing further.

11 THE COURT: Redirect limited to what she went into?

12 MR. BOOZER: Yes, Your Honor. I neglected to mark
13 as an exhibit one photo which Mr. Rudd cannot identify and
14 Ms. Zmroczek likely could identify. I just ask if she
15 could identify that for me and mark it as an exhibit.

16 May I approach?

17 **REDIRECT EXAMINATION**

18 BY MR. BOOZER:

19 Q Ms. Zmroczek, I'm going to hand you a photograph.
20 If you could, can you identify that?

21 A I'm sure it's one of the photos that I received in
22 discovery.

23 Q Okay. So that's something that you would have
24 received in discovery?

25 A Right.

Ashley Hammack - Direct Examination by Ms. Coleman

1 Q Is that photo a fair and accurate representation of
2 that discovery photo?

3 A Yes.

4 Q Okay.

5 MR. BOOZER: We'd mark this Applicant's Exhibit 10.

6 MS. COLEMAN: No objection.

7 THE COURT: No objection.

8 (Applicant's Exhibit Number 10 was marked and
9 placed into evidence.)

10 MR. BOOZER: And that's all, thank you.

11 THE COURT: And you may step down.

12 MR. BOOZER: Your Honor, that would be the
13 applicant's case.

14 THE COURT: All right. Let's take about a five
15 minute break.

16 (A brief recess was observed.)

17 MS. COLEMAN: Thank you, Your Honor. The State
18 calls Solicitor Ashley Hammack.

19 ASHLEY HAMMACK,

20 having been duly sworn, testified as follows:

21 THE CLERK: Please have a seat in the witness box.
22 State your full name for the Court.

23 THE WITNESS: Ashley Hammack, H-A-M-M-A-C-K.

24 **DIRECT EXAMINATION**

25 BY MS. COLEMAN:

Ashley Hammack - Direct Examination by Ms. Coleman

1 Q Hi, Solicitor Hammack, how are you this morning?

2 A I'm doing well.

3 Q It's not morning is it? Afternoon.

4 Were you involved with the case of Dwayne Rudd?

5 A I was.

6 Q Did you prosecute this case?

7 A I did.

8 Q And I see you brought your entire file with you
9 today. Have you had a chance to review that?

10 A I have.

11 Q Okay. I'll start with his allegations of
12 prosecutorial misconduct against you. One of them is that
13 you failed to comply with Rule 5 by withholding the
14 forensic medical exam reports. Did you turn over this
15 report to Ms. Zmroczek in this case?

16 A I did. I turned it over with all of the discovery
17 upon receiving her notice of representation.

18 Q Okay. Do you recall the date?

19 A We received her notice of representation on
20 November 4th. It was the Monday of a court term. We were
21 actually scheduled to try this case with Mr. Rudd's
22 original attorney, Andy Anderson. She filed a notice of
23 representation and a proposed order substituting counsel on
24 that Monday. At the end of that term of court, I sat down
25 with my paralegal and we made sure to give her all of the

Ashley Hammack - Direct Examination by Ms. Coleman

1 Rule 5.

2 Typically when a new attorney comes into a case,
3 rather than just have the new attorney just get discovery
4 from the public defender's office, we like to provide a
5 complete copy so that we know exactly what they've
6 received. And so we did that on November 8th of 2013 and
7 that did include those medical reports.

8 Q Okay. Were those medical reports admitted under
9 seal? Do you recall?

10 A There was a protective order in place that included
11 DSS records, which is typical in these cases in our
12 jurisdiction. I cannot remember if those medical reports
13 were part of that protective order. It would not surprise
14 me if they were. I just -- I can't remember for sure. But
15 there was a protective order in place for certain documents
16 in this case.

17 Q Were there any Rule 5 materials that you withheld
18 from the defense in this case?

19 A No.

20 Q Okay. I'll jump to the photographs of the writing
21 on the wall. Why did the State choose to present only
22 three photographs of the writings on the wall?

23 A Before the trial began one of the pretrial motions
24 that Ms. Zmroczek had filed was a motion to suppress the
25 State's photographs. We had numerous photographs taken of

Ashley Hammack - Direct Examination by Ms. Coleman

1 both victim's bedrooms, both Minor2 and Minor1. And
2 Ms. Zmroczek had made a motion to suppress all of them.
3 During the course of arguing that motion, Judge Barber
4 actually suppressed the vast majority of those photographs,
5 several of which included photographs of the entire bedroom
6 wall. There was writing all over the entire wall. Judge
7 Barber, in making his decision, said that the pictures that
8 we had of a smaller portion were the relevant photographs.

9 When he wrote all over the wall, it wasn't -- it
10 was like a paragraph form and then there would be writing
11 way over here, and then there would be writing over here,
12 and so the pictures that we ended up using that included
13 the words I'm sorry were actually kind of off by
14 themselves. They weren't in the middle of a paragraph
15 where we subtracted one sentence before or one sentence
16 after. They were off by themselves and so they were a
17 picture kind of, of themselves. And so those were
18 ultimately the ones that Judge Barber ruled that we could
19 use.

20 Q Okay. So did you purposely alter or change the
21 meaning of the statements on the wall by choosing one
22 selective sentence --

23 A No.

24 Q -- of his writings?

25 A No.

Ashley Hammack - Direct Examination by Ms. Coleman

1 Q Okay. Did you use any false evidence in this case?

2 A No.

3 Q Were you aware of any perjured testimony by any of
4 the witnesses that the State presented?

5 A No.

6 Q Okay. What evidence did the State present?

7 A In this case, we presented testimony from the
8 victims themselves. Both girls testified. Due to their
9 age, their forensic interviews were not admissible, so we
10 did not call a forensic interviewer or attempt to admit
11 their videos. But we had the testimony of both girls. We
12 had the photographs from the house. We had several
13 incriminating statements that the defendant made to DSS at
14 his home, to DSS at the jail. Over the course of jail
15 phone calls, and then the writings on the wall that were
16 admitted.

17 Q Okay. And what was the State's strategy in arguing
18 this case to the jury?

19 A Well, this case was one where the defendant had
20 isolated these children away from their mother, away from
21 school. There was testimony both by the children's mother
22 and from the defendant that it was his idea to take these
23 girls out of school and home school them and have him home
24 school them. The mother worked at a hospital here in the
25 area and so he took on the role of caregiver, for lack of a

Ashley Hammack - Direct Examination by Ms. Coleman

1 better word, for these children while mom was outside of
2 the home. So our theory in this case was that he got those
3 girls in a position of isolation away from witnesses, away
4 from help and he actually molested them separately, they
5 weren't ever together when he did this, and tried to
6 normalize it. I believe there was testimony -- one of the
7 things that Minor2 said about when I asked her about not
8 telling her mom, she said I never knew it was wrong.

9 Q Were the indictments proper in the case?

10 A They were.

11 Q Was there any issue with the meeting of the grand
12 jury?

13 A No.

14 Q Okay. Can you tell us about the plea offer that
15 was made before the trial?

16 A When Mr. Rudd was represented by his first
17 attorney, Andy Anderson, I made an offer to him to plea to
18 the criminal sexual conduct with a minor third degree
19 charges. Those carry up to 15 years, but they are non
20 violent. The criminal sexual conduct with a minor second
21 degree charges carry up to 20 years but those are 85
22 percent offenses. In speaking with the mother of the
23 girls, her concern was to allow these girls to grow up and
24 to graduate from high school and reach the age of 18 before
25 they would have to be exposed to their father again. And

Ashley Hammack - Direct Examination by Ms. Coleman

1 so the basis of the offer was to plead to the criminal
2 sexual conduct with a minor third degree for 12 years.
3 That would allow the girls to reach the age of 18 before
4 the defendant was released from prison.

5 I made that offer to Andy Anderson during the
6 course of his representation of the defendant. He informed
7 me that the defendant rejected that offer. We then
8 scheduled this case for trial in November. On the eve of
9 trial, we were informed that Ms. Zmroczek was going to be
10 representing the defendant. I believe she actually asked
11 me if I would hold that offer open for her to convey to the
12 defendant since she did not have that opportunity, but
13 Mr. Anderson had. I told her I would hold it open.
14 Ultimately back in chambers before the trial started. She
15 informed myself and the judge that the defendant had
16 rejected the offer.

17 Q Okay. I'm just going to go down the list of his
18 allegations and try to get the State's perspective of how
19 you would have reacted if trial counsel had objected to or
20 moved to move these into evidence.

21 Starting with the forensic medical exam reports.
22 You testified the girls were too old at this point for
23 those to be admissible; is that right?

24 A Well, that -- they were too old to have their
25 forensic videos admitted at trial. With regards to the

Ashley Hammack - Direct Examination by Ms. Coleman

1 medical reports, a lot of what was included in those
2 reports was hearsay and so that was a hurdle that we could
3 not jump by any rule under the hearsay exceptions. So we
4 could not admit those as evidence.

5 Additionally in calling our witnesses for trial,
6 one of the witnesses we called was Dr. Donohoe who
7 testified that he did not see any signs of abuse with
8 regards to Minor 1. So it was essentially addressed through
9 Dr. Donohoe, but it was no way for us to admit the medical
10 reports and we saw no need to.

11 Q Okay. If trial counsel had moved to admit these
12 medical reports for the defense, what would your reaction
13 have been?

14 A I would have objected.

15 Q Okay. Based on hearsay?

16 A That's correct.

17 Q Okay. And you've already discussed the
18 photographs, they were ruled inadmissible by the trial
19 judge; is that right? Before the trial they were
20 suppressed?

21 A That's correct.

22 Q Okay. Had trial counsel tried to submit more --
23 move more of these photographs into evidence, would you
24 have objected?

25 A Well, during the defendant's own testimony defense

Ashley Hammack - Direct Examination by Ms. Coleman

1 counsel had him go into the substance of what was written
2 on the wall and he explained it. At that point, I don't
3 know that it really would have mattered if they would have
4 put them in because he had already testified to the
5 substance of it. I probably would have not objected
6 because personally I think it helped us. I think the
7 writing all over the wall and some of the substance that
8 was not admitted actually would have helped the State, so I
9 probably would not have objected. But he testified to the
10 substance of it any way.

11 Q Okay. The jail phone calls, why did the State
12 choose to use only a portion of those instead of the entire
13 phone call?

14 A The jail phone calls were extremely lengthy. Most
15 of them, I believe, were about 15 minutes long. A lot of
16 what was said really was irrelevant to this case, talking
17 about, you know, his family, not the family involved in
18 this case. We're talking about vehicles, we're talking
19 about things in the community that had nothing to do with
20 this case. And so a lot of the phone calls were
21 irrelevant, so we selected the relevant portions. We
22 actually met with Ms. Zmroczek before trial. Went through
23 those jail calls and what we intended to get out and worked
24 with her on what she thought should not be admitted and we
25 ultimately were able to stipulate to what was played.

Ashley Hammack - Direct Examination by Ms. Coleman

1 Q Okay. Did Dr. Donohoe use a demonstrative diagram
2 at the trial?

3 A He did.

4 Q And did you object to that for any reason?

5 A After he used the diagram defense counsel attempted
6 to move it into evidence. I objected to it being moved
7 into evidence for lack of foundation. I believe the
8 diagram was supplied by defense counsel. It was not the
9 doctor's diagram. Ultimately Judge Barber allowed it to be
10 used for demonstrative purposes, but it was not entered
11 into evidence after my objection.

12 Q Okay. If trial counsel had subpoenaed and put up
13 Ann Laver as a witness to discuss the forensic interviews
14 with the victims, would you have objected to that?

15 A Had she testified just to the fact that she had
16 done a forensic interview and her observations of the --
17 both girls demeanor, I probably would not have objected,
18 but if defense counsel had tried to elicit any testimony
19 from her regarding the girl's disclosures, that would have
20 been hearsay and would have gone right into Kromah and all
21 of the concerns that the Courts were having at that time.

22 Q Okay. Now, there was some testimony and several
23 allegations that trial counsel was ineffective for failing
24 to object to your closing argument to the jury over some
25 statements that you made, one of which being that the

Ashley Hammack - Direct Examination by Ms. Coleman

1 victims deserved an academy award if they were lying in
2 this case. If trial counsel had objected to that
3 statement, what would your response have been?

4 A In defense counsel's closing argument, she went
5 into -- I mean their theory was mom was the motive: And so
6 their argument in closing, throughout the trial had been
7 that the mother in this case was influencing these children
8 to lie and to get dad in trouble for her own personal
9 reasons. And so as the judge later instructed, the
10 credibility of the witnesses was an issue for the jury to
11 determine. I was speaking in response to defense counsel's
12 argument that the girls were lying.

13 Q Okay. There was also a statement in your closing
14 arguments about the lack of a hole for him to penetrate on
15 the victim, on the daughter. Your statement was, if
16 something more than the size of a pencil eraser had been
17 inserted it would have hurt and so -- I believe that was
18 trial counsel's argument and your response was, You're dang
19 right it hurt. Did you think that was an improper
20 statement for you to make?

21 A No, there was testimony at trial from Minor1, and I
22 believe Minor2 as well, that it did hurt when their father
23 digitally penetrated them. Now, the issue at hand was
24 whether or not he could have digitally penetrated Minor1
25 prior to her surgery. Obviously, Minor2 could have been

Ashley Hammack - Direct Examination by Ms. Coleman

1 digitally penetrated at any time, as she testified to.

2 However, with regards to Minor1, the doctor never said, and
3 Mr. Rudd testified to the same, that there was no opening
4 prior to surgery. Now, Minor1 had -- you can call it a
5 urogenital sinus if you want, but with regards to sexual
6 battery, it was an opening into the body.

7 Now, after that surgery, she had a separate urethra
8 and vagina, however, there was an opening into which the
9 defendant could have digitally penetrated Minor1 before
10 surgery. That was a small hole. The doctor testified that
11 that would hurt if that was penetrated. And Minor1
12 testified that it did hurt.

13 Q Okay.

14 MS. COLEMAN: Beg the Court's indulgence one
15 moment.

16 (There was a pause in the proceedings.)

17 MS. COLEMAN: Nothing further. Thank you.

18 MR. BOOZER: No questions, Your Honor.

19 THE COURT: Thank you, ma'am, you may step down.

20 THE WITNESS: Thank you.

21 MS. COLEMAN: And the State has no further
22 witnesses.

23 THE COURT: Any reply?

24 MR. BOOZER: No reply, Your Honor.

25 THE COURT: All right. Thank you very much, I will

1 let you know.

2 MR. BOOZER: Thank you, Your Honor.

3 THE COURT: Yes, sir.

4 * * * * * END OF TRANSCRIPT * * * * *

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 State of South Carolina)

2 County of Aiken)

Certificate of Reporter

3
4
5
6 I, Brenda J. Sigwald, Official Court Reporter for
7 the Second Judicial Circuit of the State of South Carolina,
8 do hereby certify that the foregoing is a true, accurate,
9 and complete Transcript of Record of the proceedings had
10 and evidence introduced in the trial of the captioned case,
11 relative to appeal, in the Court of Common Pleas in and for
12 the State of South Carolina on 18th day of September 2017.

13 I FURTHER CERTIFY that I am neither kin, counsel,
14 nor of interest to any party hereto.

15 IN WITNESS WHEREOF, I have hereunto set my hand and
16 seal at Aiken County, this 29th day of March, 2018.

17
18
19
20
21 Brenda J. Sigwald

22 Brenda J. Sigwald,
23 Court Reporter and Notary Public
24 For the State of South Carolina
25 My commission expires
January 4, 2020

Aiken County Sheriff's Office

VOLUNTARY STATEMENT

13-028725

Time 10:30 Date 6/11/13Page 1 of 2 pagesLocation where statement was obtained: Aiken Co. CACName: Esther Timmerman

Date of Birth

SC 055

Address: _____

City _____

State _____

Zip _____

I completed the _____ grade in school, and I CAN/CANNOT read and write (Circle one)

I arrived at the scene 743 Willow Lane because
 OSS received a report of sexual abuse by Mr. Wayne
 Rudd. I spoke to Mr. Rudd, I explained to Mr. Rudd
 about the allegations of the report. Mr. Rudd denied
 the allegations he stated that his daughter Kayla had
 surgery last year in 2012, her vaginal opening was not
 developed and she had to have reconstructive surgery.
 Mr. Rudd stated that he would check Kayla out to
 make sure she was healing. Mr. Rudd started talking
 about some type instrument the Dr's will have them
 use to expand the opening. I asked him if the
 Dr's recommend that he check his daughter and he
 said no. Mr. Rudd also stated that he would
 use Brianna to compare the vagina because
 Brianna was normal. Mr. Rudd also stated that he
 may have touched her vagina to see but did not
 penetrate my finger in her, my finger may have
 touched her vagina. He never did this as a sexual

I have read or have had read to me this statement consisting of _____ page(s). This statement is true. I have
 initialed all corrections and initialed the bottom of each page containing the statement. I declare that the voluntary
 statement is made of my own free will, without promise or reward, without fear or threat of physical
 harm/punishment, without coercion, unlawful influence or unlawful inducement.

This statement was completed at 1030 10 a/m/p m on 11 day of June, 20 13

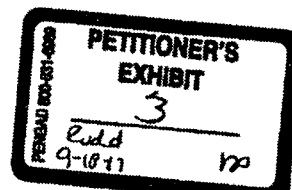
[Signature]
 Signature of person giving voluntary statement

[Signature]
 Witness

 Witness

I have been given a copy of this statement consisting of _____ pages

Initials of person making statement _____



Aiken County Sheriff's Office

VOLUNTARY STATEMENT

13-028725

Time: _____ Date: ____/____/____

Page 1 of 2 pages

Location where statement was obtained: _____

Name: Esther Timmerman Date of Birth: ____/____/____

Address: _____ City: _____ State: _____ Zip: _____

I completed the _____ grade in school, and I CAN/CANNOT read and write. (Circle one)

Thing. Mr Rudd also stated "Am their father, I
 can touch my girls vaginas if I have to." He also
 stated I have sex with my wife. This conversation
 took place on 5-23-13 for DSS interview, officer
 Chris Eason was not involved in this interview

I have read or have had read to me this statement consisting of _____ page (s) This statement is true. I have
 initialed all corrections and initialed the bottom of each page containing the statement. I declare that the voluntary
 statement is made of my own free will, without promise or reward, without fear or threat of physical
 harm/punishment, without coercion, unlawful influence or unlawful inducement.

This statement was completed at 1070 a.m./p.m. on 11 day of June, 20 13

Signature of person giving voluntary statement

Witness

I have been given a copy of this statement consisting of _____ pages

Initials of person making statement _____

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Dwayne Lee Rudd, #358140,

2016-CP-02-1361

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on June 10, 2016. Respondent submitted its return on December 16, 2016. An evidentiary hearing into the matter was convened on September 18, 2017, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Lance Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant testified on his own behalf. Applicant also presented testimony from Robert Bank, Esquire, Kate Chappell, an expert in forensic pediatric medical exams, and Trial Counsel Aimee Zmroczek ("Trial Counsel"). Respondent presented testimony from Assistant Solicitor Ashley Agnew Hammack, Esquire. This Court had before it the records of the Aiken County Clerk of Court regarding the subject convictions, the Record on Appeal, and Applicant's records for the Department of Corrections. The Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was true bill indicted by the October 2013 term of the Aiken County

Grand Jury for five counts of third degree criminal sexual conduct with a minor (2013-GS-02-01638, -01639, -01640, -01644, -01645), and five counts of second degree criminal sexual conduct with a minor (2013-GS-02-01642, -01643, -01679, -01680, -01681). Applicant was represented on these charges by Aimee Zmroczek, Esquire. Applicant proceeded to a jury trial and was convicted as indicted of five counts of CSC second degree and two counts of CSC third degree. On December 12, 2013, Applicant was sentenced by the Honorable James R. Barber, III to fifteen years' imprisonment for each charge of CSC second degree, to run concurrently, and five years' imprisonment for both charges of CSC third degree, with one sentence to run concurrently and the other to run consecutively.

A timely notice of appeal was filed on Applicant's behalf by Tommy A. Thomas, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Rudd, Unpublished Opinion No. 2016-UP-088 (S.C. Ct. App. February 24, 2016). The Remittitur was issued March 17, 2016.

II. ALLEGATIONS

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

1. Ineffective Assistance of Trial Counsel
 - a. Failure to introduce the May 28, 2013 Forensic Interview Transcripts and DVDs to impeach State's key witnesses.
 - b. Failure to introduce the June 11, 2013 Forensic Medical Exam Reports to impeach State's witnesses.
 - c. Failure to introduce DSS supervisor's written statement to impeach State's witnesses.
 - d. Failure to introduce June 13, 2013 Detective's photographs.
 - e. Failure to subpoena June 11, 2013 Forensic Medical Exam Reports.
 - f. Failure to object to jail phone call conversation to preserve for appellate review.

- g. Failure to introduce doctor's medical notes from October 16, 2012 surgery and accurately cross-examine witness Dr. Donohoe.
- h. Failure to subpoena Forensic Interviewer Anne Laver.
- i. Failure to subpoena Dr. Christopher Houk.
- j. Failing to contemporaneously object to qualification of juror number seventy-nine to preserve the issue for appellate review.
- k. Failure to challenge the trial court's lack of subject matter jurisdiction.
- l. Failure to object to indictments.
- m. Failure to investigate.
- 2. Ineffective Assistance of Appellate Counsel
 - a. Failure to raise issue of relevancy of State's exhibits 3 and 4.
 - b. Failure to raise issue of sufficiency of indictments.
 - c. Failure to report State's misconduct when they changed the evidence on appeal.
- 3. Prosecutorial Misconduct
 - a. Rule 5, Brady violation.
 - b. Falsely represented evidence as an admission of guilt by Applicant.
 - c. Knowingly used perjured testimony to obtain conviction.
 - d. Used false evidence.
- 4. Lack of Subject Matter Jurisdiction

Applicant filed an amendment on October 31, 2016, adding an allegation of ineffective assistance of counsel for failing to object to the Solicitor's statements in closing arguments which vouched for the credibility of the State's witnesses and which were misleading to the jury. At the evidentiary hearing, Applicant informed the Court he was abandoning the first allegation of failure to introduce the forensic interview videos of the victims.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant's testimony

Applicant testified that Aimee Zmroczek represented him at trial, and their defense was going to be that Applicant's wife had a motive to lie about the allegations against him because the divorce papers were served on him one week after the allegations came out. He stated one of his daughters, who were both alleged victims in the case, had a medical condition, congenital

adrenal hyperplasia, that required her to have a corrective surgery on her genitalia to create a vaginal opening where there was not one before. Applicant testified he did not recall seeing or discussing with Trial Counsel either of his daughter's medical examination reports before the trial. He stated if those had been used at trial, they would have helped his case because his daughters credibility was at issue, and he could have called Kate Chappell as a witness to testify about the reports.

Applicant testified that Trial Counsel did not impeach witness Esther Timmerman with her prior written statement about whether Applicant told her he was the victim's father and he would touch her vagina if he "wanted to" rather than if he "had to." He stated Trial Counsel was ineffective for moving to keep out most of the photographs of his writings on the wall of their home at the beginning of trial, because the State only admitted a cropped portion of the writings that said "I'm sorry" and did not explain the context of the rest of the writings on the wall. He stated this gave the jury the impression that he was apologizing to his daughters for sexually molesting them, but in reality he was only apologizing to them for not spending more time with them and for ruining their marker by writing on the wall. Applicant stated he testified at trial and explained why he wrote the writings to the jury.

Applicant testified the jail phone calls introduced at trial should have been played in full to get the correct context for the conversation. In the alternative, he stated Trial Counsel should have moved to have the phone calls suppressed. He testified Dr. Donohoe, who testified at trial about his daughter's medical condition, should have had a diagram to show the jury exactly what the condition looked like, and even though Dr. Donohoe did use a diagram at trial, it was not a detailed diagram of the actual condition. Applicant stated Anne Laver should have been used as a witness at trial to show inconsistencies in his daughter's testimony, and Dr. Houk should have



been called as a witness to support Applicant's testimony about his daughter's medical treatment, but neither witness was called.¹

Applicant testified Appellate Counsel Tommy Thomas should have raised the issue of sufficiency of the indictments on his appeal. He stated the dates on the indictment were wrong because the grand jury convened one week before the General Sessions trial. He stated he did not discuss this with Trial Counsel, but she should have looked into it. Applicant testified Assistant Solicitor Ashley Hammack engaged in prosecutorial misconduct by eliciting false testimony from the witnesses. He stated it was physically impossible for him to do what the State alleged he had done because his daughter had no orifice to digitally penetrate because of her condition. He testified the Solicitor's closing argument was improper when she told the jury to give the victims "an Academy Award" for acting if they were lying on the stand, which improperly vouched for the witnesses' credibility.

Robert Bank's testimony

Robert Bank testified that he was the attorney who sat second chair on this case at trial. He stated he worked with the Public Defender's Office in Richland County and did some cases for John Delgato and Aimee Zmroczek, which is how he became involved in this case. He stated he sat in on some meetings with Trial Counsel and Applicant. Bank testified that he cross-examined witness Esther Timmerman, and they strategically wanted to keep out a lot of her testimony because it was harmful to their client. He stated he did not impeach her with her statement to the police, but it may have been helpful if he had pointed out the inconsistency in her statement with her testimony.

¹ The Court notes neither Anne Laver nor Dr. Houk testified at the evidentiary hearing.

Kate Chappell's testimony

Kate Chappell, C.P.N.P., was admitted to testify as an expert witness in the field of forensic pediatric medical examinations. Chappell testified that she performed the medical examinations of the two victims in this case, Applicant's daughters. She stated that when she performs these examinations, nobody tells her what to look for, but she does get a summary of their disclosure before the exam. She stated she spoke directly to the victims' mother, but not to Applicant. She stated that Victim 1's physical exam² was normal, but there still could have been normal findings even without abuse or for other reasons. She stated Victim 2 had some scarring from her surgical procedure, which made it difficult to find potential signs of abuse.

Chappell testified that in 95 percent of cases, there will not be signs of sexual abuse, even if sexual abuse did occur. She stated this statistic is from the forensic guidelines based on all expert examinations in the field, but there were no specific studies based on the same medical condition affecting Victim 2.

Trial Counsel's testimony

Trial Counsel testified that she was retained on November 3, 2013, right before Applicant's trial date. She stated she was able to get a continuance, and she absolutely had enough time to prepare the case for trial; she was able to dedicate "24/7" to the case during the holidays. Trial Counsel testified she filed numerous motions to compel. She stated she did her own investigation on the case, and she met with Applicant several times, and reviewed the discovery with him numerous times. She stated there was a plea offer from the State for a negotiated nonviolent twelve year sentence; she discussed this with Applicant but he maintained his innocence and did not want to plead guilty.

² This Court will refer to the victims as Victim 1 and Victim 2 to protect their identity as minors.



Trial Counsel testified she did get the medical examination reports of the two victims, and she filed a motion to compel to obtain them, but they were given to her under seal and she was not allowed to show them to anyone including Applicant, which is not unusual. She stated she met with the solicitor numerous times to discuss the evidence. Trial Counsel stated both she and Robert Bank spoke with Kate Chappell and had a huge file on her, but they decided not to use her as a witness at trial because her expert opinion testimony was going to be that she would find no signs of sexual abuse in 95 percent of cases, even if there may have been abuse, which did not help her case. She stated she filed a motion to keep Chappell's testimony out and Judge Barber agreed that her testimony was not relevant because she did not find anything in her exam. She stated it was her trial strategy not to use Chappell as a witness at trial because her testimony would not help Applicant's case. Trial Counsel testified that Applicant would not take her advice and made the case more difficult by hiring his own expert.

Trial Counsel testified that the State wanted to introduce all of the photographs of Applicant's writing on the walls of his children's home, and she absolutely wanted to keep them out because they would damage her client. She stated "normal people" don't write notes on the wall, and it made Applicant look bad and placed him in a bad light, and the State was using it as an admission of his guilt. She testified she did not want to admit the rest of the photographs of his writings because in the photographs Applicant made statements that contradicted their defense. She stated his writings included apologies for not being around his children or spending enough time with them, but their theory of defense is that Applicant was the primary caretaker of the children and was always with them and did everything for them, including medical care. Based on this strategy, Trial Counsel moved to suppress the photographs. She stated Andy

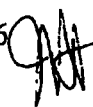


Anderson, who previously represented Applicant, had him evaluated for mental competency, and there were no competency issues.

Regarding the juror selection issue, Trial Counsel testified that she had used all of her jury strikes by the time the juror in question was selected, so she could not have stricken her. She stated the juror told the trial court she could be fair and impartial, and the juror was a caregiver to someone with cerebral palsy, so Trial Counsel opined the juror would have a better understanding of being a medical caregiver and could be sympathetic to Applicant, who claimed he needed to give medical care to his daughter by applying medicine to her genitals.

Trial Counsel testified that she should have objected to the solicitor's statement in closing argument that vouched for the victim's credibility by telling the jury to give them "the Academy Award" if they were lying, and she does not know why she did not object. She stated that, looking back now, she should have asked for a mistrial or at least for a curative jury instruction. Trial Counsel testified that there was a third party aspect to this case, and they were able to keep that out of the trial, and it never came up. She stated she tried her best to present an alibi defense, and she used a demonstrative calendar in her closing argument to support the defense. She stated she did not want to introduce or allow in the rest of the jail phone call recordings because there were some things in the recordings that she did not want the jury to hear her client say.

Trial Counsel testified she contacted and spoke with Dr. Houk, the victim's doctor who treated her condition, but she did not want to use him as a witness at trial because Dr. Houk did not tell Applicant to apply medicine to his daughter's genitals, which contradicted his defense. She stated she did not want Anne Laver to testify at trial because she was sympathetic to the victims and would bolster their credibility.



Solicitor Ashley Hammack's testimony

Solicitor Ashley Agnew Hammack testified that the interviewer and video interviews of the victim were not admissible in this case because of the victim's age. She stated the State presented evidence which included the testimony of both victims, the photographs of the writings on the wall in which Applicant apologized to his daughters, and the jail phone calls in which Applicant stated he needed to be forgiven by God for the sins he committed. Solicitor Hammack testified her strategy was to show the jury that Applicant took his daughters, the victims, out of school to be their caregiver and he isolated them and molested them both separately and tried to normalize his behavior. She stated she made a plea offer to Applicant through former counsel Andy Anderson for third degree CSC nonviolent for a sentence of up to fifteen years.

Solicitor Hammack testified the medical examination reports of the victims were inadmissible hearsay, but Dr. Donohoe addressed the lack of physical signs of sexual abuse in his testimony at trial. She testified that she would not have objected if Applicant had tried to put into evidence all of the photographs of the writings because it helped the State's case. Regardless, she stated Applicant testified at trial about the substance of the statements he wrote on the wall and explained to the jury why he was apologizing. Solicitor Hammack stated the remaining portions of the jail phone calls that were not played at trial were not relevant to the case and inadmissible. She stated Trial Counsel argued in her closing argument that the victims were not credible, so her statement about the "Academy Award" was in response to Trial Counsel's argument.



IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).



V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they should be denied and dismissed with prejudice. Each individual allegation is addressed below.

a. Failure to introduce the May 28, 2013 Forensic Interview Transcripts and DVDs to impeach State's key witnesses.

Applicant voluntarily abandoned this issue at the evidentiary hearing and failed to present any evidence to support the allegation. Accordingly, this allegation is denied and dismissed with prejudice.

b. Failure to introduce the June 11, 2013 Forensic Medical Exam Reports to impeach State's witnesses.

Applicant alleges Trial Counsel was ineffective for failing to introduce the forensic medical examination reports of the victims and call witness Kate Chappell, who conducted the interviews, to show the victims' examinations revealed no physical signs of sexual abuse. This



allegation is meritless, as the report and Kate Chappell's testimony regarding Victim 2 was inadmissible hearsay because she was over the age of twelve, Trial Counsel articulated a valid trial strategy in choosing not to seek to introduce the reports or testimony from Kate Chappell, and none of the evidence would have affected the outcome of the trial.

First, the medical examination report of Victim 2 was inadmissible hearsay under South Carolina law, so Trial Counsel cannot be deficient for failing to introduce the report at trial. S.C. Code Ann. § 17-23-175 provides that the out-of-court statement of a child *under the age of twelve* is admissible when they testify at trial and are subject to cross-examination, the statement is the result of an investigative interview, the statement is preserved on film or tape, and the court finds the circumstances surrounding the making of the statement provide trustworthiness. While those four statutory factors are met here, the victim who gave the statement was fourteen years old at the time the statement was given, and thus because she was over the age of twelve, the statement is not admissible under the statute.

Second, Trial Counsel articulated a valid trial strategy in choosing not to use these reports or call Kate Chappell as a witness, so she cannot be found ineffective. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland, at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312

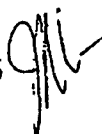


(1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

The information stated in these reports repeats and confirms the testimony of the victims at trial. Trial Counsel credibly testified that she investigated and spoke with Kate Chappell and was aware that she would testify that there are no physical signs of sexual abuse in 95 percent of cases, and it does not mean that no sexual abuse occurred. Trial Counsel explained that this information would not help her case and she strategically chose to file a motion to keep Chappell's testimony out of the trial. The Court finds this was a valid trial strategy, and Trial Counsel was not deficient for making this strategic decision.

Furthermore, this Court finds Applicant has failed to prove any prejudice from the failure to call Kate Chappell as a witness because her testimony and the examination reports of the victims would have not changed the outcome of the trial. Chappell testified that although she found no physical signs of sexual abuse on either victim, Victim 2 was difficult to examine because of the scar tissue from her surgery, and in 95 percent of cases there are no physical signs of sexual abuse. She testified the absence of findings specific to the allegation of sexual abuse does not contradict the child's statements of abuse or determine whether abuse did or did not occur. This Court finds this testimony and the statements made in the reports would not have changed the jury's verdict, and may in fact have hurt Applicant's case.

Therefore, because Applicant has failed to prove that Trial Counsel was deficient or that her deficiency prejudiced his case, this allegation is denied and dismissed with prejudice.



c. Failure to introduce DSS supervisor's written statement to impeach State's witnesses.

Applicant alleges counsel Robert Bank was ineffective when he failed to impeach witness Esther Timmerman on cross-examination with her prior statement. At trial, Timmerman testified that she investigated this case for DSS and took a statement from Applicant at his house, and while doing so, Applicant told her "I'm the father of this, of these girls so I can touch their vagina if I want to. That's pretty much what he said to me." Tr. 240, line 8-10. Counsel Bank then cross-examined Timmerman as follows:

Q: Okay. And I wanted to discuss very quickly about a comment or part of the statement that you said, and you can correct me if I'm wrong. Did you say that Mr. Rudd said, they're my kids and I can touch if I want to? I can touch them if I want to; is that what you said Mr. Rudd said?

A: I believe what I said, I had written down—what I believe I said was that he said to me that I'm their daddy and I can touch their vagina if I want to.

Q: Right. He didn't say, I'm their father and I can touch it if I need to?

A: No, that's not what he said to me. I wrote down exactly in my statement in the CAPS, in our system, what he said.

Tr. 244, line 15 – Tr. 245, line 3.

At the evidentiary hearing, Applicant introduced Applicant's Exhibit #3, the voluntary statement of Timmerman taken by the Aiken County Sherriff's Office on June 11, 2013. Applicant alleged Bank should have used this actual statement to impeach Timmerman's testimony, because the statement read "Mr. Rudd also stated 'Am their father, I can tough my girls vagina if I have to.'" App. Ex. #3, pg. 2.

This Court finds that, although counsel Bank may have been deficient in his cross-examination of Timmerman by failing to specifically use this statement to impeach her, Applicant has not established prejudice given the totality of the evidence presented at the evidentiary hearing and at the trial. This Court finds, even if Bank had impeached Timmerman

with this statement, the outcome of the trial would not have been different, and thus Applicant cannot prove counsel was ineffective in this regard. Therefore, because Applicant failed to meet both prongs of the Strickland test, this allegation is denied and dismissed with prejudice.

d. Failure to introduce June 13, 2013 Detective's photographs.

Applicant alleges Trial Counsel was ineffective for failing to introduce the full set of photographs of the message he wrote on the wall of his children's bedrooms after the allegations against him came out. Trial Counsel moved at trial to suppress the majority of the photographs, and the State introduced only part of the photographs, showing Applicant's apology he wrote to the victims. The writings included the phrase "I'm sorry" written on their walls, and the State used this as an admission and argued to the jury is that he was apologizing for the sexual abuse. At trial, Applicant testified that he was really apologizing for not spending more time with the victims and for ruining their marker by writing on the wall. He now alleges Trial Counsel should have introduced the entirety of the photographs to corroborate his testimony about the substance of the writings.

Trial Counsel credibly testified at the evidentiary hearing that she strategically chose to keep as many of the photographs out as possible to avoid putting Applicant in a bad light before the jury. She testified that "normal people" do not write messages on the walls, and the jury would not take this evidence well against Applicant. She further stated the substance of the writings contradicted her trial strategy, which she articulated was to show Applicant was the victims' primary caretaker who spent all of his time with the girls and did everything for them, including medical care. She stated that showing an apology for not spending enough time with his daughters would harm their defense strategy. This Court finds Trial Counsel articulated a valid trial strategy in choosing to keep these photographs out of trial. Where counsel articulates a

valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Therefore, this Court finds no deficiency for this allegation.

Furthermore, this Court finds no prejudice in failing to introduce the photographs because Applicant testified at trial about the substance of the writings on the wall. The jury heard his account of the writings and was presented with the argument that he was not apologizing for the sexual abuse but for something else. Applicant has not proven that the introduction of these photographs would have changed the jury's verdict, and this Court finds there is no prejudice. Therefore, because neither prong of the Strickland test is met, this allegation is denied and dismissed with prejudice.

e. Failure to subpoena June 11, 2013 Forensic Medical Exam Reports.

Applicant's allegation that Trial Counsel was ineffective for failing to subpoena the June 11, 2013 forensic medical examination reports is meritless. Trial Counsel credibly testified that she did receive the reports from the solicitor and met with her numerous times about the reports. Solicitor Hammack credibly testified that she turned over the complete discovery materials for the case, including the records, on November 8, 2013. Both testified the reports were under a protective order and Trial Counsel was unable to review the reports with Applicant. Because Trial Counsel did have these reports, there was no reason to subpoena them, and Applicant's allegation that she was ineffective for failing to do so is denied and dismissed with prejudice.

f. Failure to object to jail phone call conversation to preserve for appellate review.

Applicant's allegation that Trial Counsel is ineffective for failing to object to the introduction of the jail phone call conversation or, in the alternative, that Trial Counsel should

have introduced the full recording of the conversation, is meritless. At trial, the State admitted a recording of a phone call Applicant made from jail about how he was asking God's forgiveness for his sins. Applicant testified at trial and explained to the jury that his statements in the conversation did not refer to abusing his daughters, but he was only asking God to forgive him for not being close enough to God or being a good enough Christian. Tr. 345, line 6-20. He explained to the jury his statements had nothing to do with touching his daughters inappropriately. Tr. 345, line 21-24.

Solicitor Hammack testified she introduced this hearsay evidence as an admission, and that the rest of the phone calls were not relevant to the case and were inadmissible hearsay evidence. Trial Counsel credibly testified that she did not want to introduce the full recording of the jail phone call because it contained statements by Applicant that she did not want the jury to hear. This Court finds Trial Counsel articulated a valid trial strategy in choosing not to admit the full recording of the phone call, and her choice was not deficient.

Furthermore, this Court finds there was no prejudice from any failure to object to the admission of the jail phone call because Applicant cured any alleged error by testifying at trial about the phone calls. He explained to the jury that he was not admitting to abusing his daughters, but he was asking God's forgiveness for his sins in general, such as not reading his Bible enough or being close enough to God. Therefore, any possible potential error was cured, and there is no prejudice from not having the admission of the phone call reviewed by an appellate court. Accordingly, Applicant has failed to meet either prong of the Strickland test and this allegation is denied and dismissed with prejudice.



g. Failure to introduce doctor's medical notes from October 16, 2012 surgery and accurately cross-examine witness Dr. Donohoe.

This Court finds Trial Counsel was not deficient in her cross-examination of Dr. Donohoe or for failing to introduce medical notes from surgery, and there is no resulting prejudice from any of these actions. The trial transcript shows the jury was fully informed of Victim 2's medical condition and the surgical procedure she underwent. The jury was also presented with testimony that Applicant was required to provide medical care to her by applying medicine to her genitals. Notably, even if the jury did agree that Applicant touched Victim 2 only to treat her medical needs, it is not likely that any further evidence presented about Victim 2's medical condition would not convince the jury that it was necessary for Applicant to touch Victim 1, who did not have a medical condition, so there can be no prejudice regarding any of the charges of abuse against Victim 1. Therefore, this allegation is denied and dismissed with prejudice.

h. Failure to subpoena Forensic Interviewer Anne Laver.

This Court finds Applicant has failed to show Trial Counsel was deficient for failing to call Anne Laver to testify about the forensic interviews of the victims. As discussed above, the examination reports were inadmissible hearsay evidence because Victim 2 was over the age of twelve. Similarly to Kate Chappell, Anne Laver's testimony likely would not have been favorable to Applicant as it probably would have confirmed the victim's testimony. Most importantly, Applicant cannot prove prejudice because he did not introduce Laver's testimony at the evidentiary hearing, so this Court cannot speculate as to what her actual testimony would have been. In order to support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence.

Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id. Accordingly, neither prong of the Strickland test is met, and this allegation is denied and dismissed with prejudice.

i. Failure to subpoena Dr. Christopher Houk

Applicant alleges Trial Counsel was ineffective for failing to call Dr. Houk as a witness, who was Victim 2's primary doctor, to testify about her medical condition and the surgical operation she underwent, which required him to care for her by applying medicine to her genitals. Trial Counsel credibly testified that she spoke with Dr. Houk, and his testimony at trial would be that he did not tell Applicant to apply medicine to Victim 2. This is a direct contradiction to Applicant's defense and trial strategy, and this Court finds Trial Counsel made a valid strategic decision not to call Dr. Houk as a witness.

Furthermore, Dr. Houk did not testify at the evidentiary hearing, so this Court will not speculate as to his testimony, and Applicant cannot prove prejudice. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Therefore, this allegation is denied and dismissed with prejudice.

j. Failing to contemporaneously object to qualification of juror number seventy-nine to preserve the issue for appellate review.

Applicant's allegation that Trial Counsel was ineffective for failing to object to the qualification of a juror who served as a caregiver for a patient with cerebral palsy is meritless. During jury selections, the juror indicated that she could be fair and impartial during the trial. Tr. 66, line 19-20. Trial Counsel credibly testified there was no reason to object to this jury being qualified, as she believed the juror would be sympathetic to Applicant as a medical caregiver, which aligned with his theory of defense. She further testified she did not have any more jury strikes to use by the time this juror was called, so she could not have stricken her even if she

wanted to. This Court finds no deficiency in choosing not to strike this juror. Furthermore, Applicant has failed to prove that this juror changed the jury's verdict in any way. Accordingly, neither prong of the Strickland test is met, and this allegation is denied and dismissed with prejudice.

k. Failure to challenge the trial court's lack of subject matter jurisdiction. / l. Failure to object to indictments.

The Applicant alleges that the indictments in his case were insufficient, and Trial Counsel was ineffective for failing to object. "An indictment is merely a notice document." State v. Baker, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing State v. Gentry, 363 S.C. 93, 102-103, 610 S.E.2d 494, 500 (2005)). Whether or not the indictment could be made more definite and certain is irrelevant. Baker, 390 S.C. at 62, 700 S.E.2d at 442. This Court noted the following:

"Rather, the court must look at "the indictment with a practical eye in view of all the surrounding circumstances. The sufficiency of the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that are intended to be charged.

Id. (citing Gentry, 363 S.C. at 102-103, 610 S.E.2d at 500).

Moreover, "an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." Id. at 63, 700 S.E.2d at 443 (citing State v. Tumbleston, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007.)) A court reviewing an indictment for sufficiency should consider the indictment "'on its face,' and consider the events at trial." State

v. Reddick, 348 S.C. 631, 636, 560 S.E.2d 441, 443 (Ct. App. 2002). In other words, a court should examine "the totality of the circumstances" to determine if Appellant was cognizant of the crimes for which he was charged. Id.

Applicant was true bill indicted by a proper grand jury before his trial, and was properly put on notice of the charges against him. Applicant has failed to prove there was any objectionable defect in the indictments against him. Circuit courts obviously have jurisdiction over criminal cases where there the defendant has been properly indicted. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). Because the indictments against Applicant were proper, the trial court had proper subject matter jurisdiction over him. Furthermore, Trial Counsel *did* challenge the indictments against Applicant based on the lack of specificity in the time period of the crimes. This Court finds no deficiency or prejudice against him. Therefore, this allegation is denied and dismissed with prejudice.

1. Failure to investigate.

Applicant's allegation that Trial Counsel was ineffective for failing to investigate is meritless. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). 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. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for

reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

Trial Counsel credibly testified that she fully investigated Applicant's case and spoke with all potential witnesses that he wished for her to interview. She clearly made strategic choices in choosing which witnesses to call. Applicant has not presented any specific evidence that Trial Counsel failed to investigate that would have affected the outcome of his trial. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to object to Solicitor's closing argument statement vouching for witnesses' credibility

Applicant's allegation that Trial Counsel was ineffective for failing to object to the Solicitor's statement in closing argument that the victims "deserve the Academy Award" if they were lying in their testimony is meritless. Although Trial Counsel may have been deficient for failing to object to this statement, this Court finds there is no resulting prejudice given the totality of the evidence against Applicant. Therefore, this allegation is denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

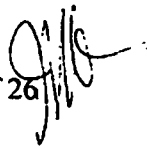
Applicant's allegations of ineffective assistance of appellate counsel are meritless. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise

every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Applicant cannot satisfy neither requirement of the Strickland test.

Applicant alleges Appellate Counsel was ineffective for failing to raise this issue of sufficiency of the indictments. This allegation is meritless, as Applicant has failed to prove the indictments were insufficient. The indictments were true billed, signed by the foreman of the grand jury, and sufficiently law out the allegations against Applicant in a way that put him on notice of the charges against him. Appellate Counsel was not deficient in choosing not to raise this issue, and Applicant can show no prejudice from failing to do so.

Applicant next alleges Appellate Counsel was ineffective for failing to challenge the relevancy of the photographs of the writing on the wall introduced at trial. Before the trial, Trial Counsel objected to the introduction of the photographs based on relevancy. The trial court ruled that they were relevant because one possible interpretation of the jury is that Applicant was apologizing to the victims for abusing them. Tr. 48. This Court agrees with the trial court's finding that the photographs are relevant and finds that any challenge to their relevancy would



not have been successful on appeal. Therefore, Appellate Counsel was not deficient for choosing not to raise this issue, and there is no prejudice because the issue would not have been successful on appeal.

Finally, Applicant alleges Appellate Counsel was ineffective for failing to report the State's "misconduct" when they changed the evidence on appeal and submitted a different picture than the original photographs used at trial. The testimony at the evidentiary hearing suggested that the photograph used as an exhibit on appeal had been altered and was a close-up version of the original photograph entered at trial. Even if this were true, Applicant has failed to show that the use of a slightly different version of the same exhibit used at trial changed the outcome of the appeal in any way. The issue before the appellate court was clear, and there is no evidence that the State intentionally altered the evidence. Therefore, Appellate Counsel cannot be deficient for "failing to report" this alleged misconduct, and Applicant can show no prejudice on this allegation. Accordingly, this Court finds Appellate Counsel was not ineffective, and these allegations are denied and dismissed with prejudice.

PROSECUTORIAL MISCONDUCT

Applicant also alleges prosecutorial misconduct. It is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Applicant has not carried his burden of proving actual prosecutorial misconduct. Applicant has failed to prove that any evidence presented by the State in this case was false or perjured. The introduction of the photographs of Applicant's writing as an admission of his guilt was a valid strategy by the State, and it the question of whether it was an admission to the crime was properly left to the jury to decide. Nothing about the State's actions were improper or stemmed from misconduct. Furthermore, Applicant has failed to prove a Brady violation or Rule 5

violation. The testimony and the exhibits introduced at the evidentiary hearing show Solicitor Hammack turned over all discovery material, including the medical examination reports of the two victims, to Trial Counsel well before the trial. Accordingly, because Applicant has failed to prove any misconduct, these allegations are denied and dismissed with prejudice.

SUBJECT MATTER JURISDICTION

Applicant alleges the trial court lacked subject matter jurisdiction based on a defective indictment. This allegation is meritless. First, the South Carolina Supreme Court has held that a challenge to the sufficiency of an indictment must be made before the jury is sworn. "[I]f an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards." State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005) (citing to S.C.Code Ann. § 17-19-90 (2003) ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards."))).

Circuit courts obviously have jurisdiction over criminal cases where there the defendant has been properly indicted. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). Because the indictments against Applicant were proper, the trial court had proper subject matter jurisdiction over him. This allegation is denied and dismissed with prejudice.

VI. CONCLUSION

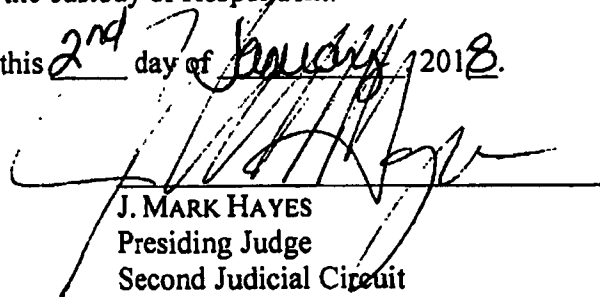
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 2nd day of January, 2018.


J. MARK HAYES
Presiding Judge
Second Judicial Circuit

Aiken, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A
MINOR THIRD DEGREE

§ 16-03-0655(C)

At a Court of General Sessions, convened on October 7, 2013, the Grand Jurors of Aiken County present upon their oath:

That DEWAYNE LEE RUDD, being over the age of fourteen (14) years, did in Aiken County on or about May 20, 2013, wilfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body of [REDACTED] a child under the age of sixteen (16) years, with the intent of arousing, appealing to, or gratifying the lust, passions and sexual desires of himself or such child. All in violation of §16-03-655 of the Code of Laws of South Carolina (1976), as amended.

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


STROM THURMOND, SOLICITOR

WITNESSES

Aiken County Sheriff

Kristopher Evensen

Law Enforcement Case #: 13-28725

DOCKET NO. 2013GS0201638

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

ARREST WARRANT NUMBER

FILED

Oct 3

20 13

OCTOBER TERM 2013

2013A0211000104

C.C. RAGGS

Sherry L. Langley

Deputy Clerk

THE STATE

vs.

DEWAYNE LEE RUDD

ACTION OF GRAND JURY

TRUE BILL

Ronnie M. Hall

Foreperson of Grand Jury

Date: October 3, 2013

VERDICT

CDR #: 3661

Indictment for

CRIMINAL SEXUAL CONDUCT WITH A
MINOR THIRD DEGREE

§ 16-03-0855(C)

J. STROM THURMOND, SOLICITOR

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A
MINOR THIRD DEGREE

§ 16-03-0655(C)

At a Court of General Sessions, convened on October 7, 2013, the Grand Jurors of Aiken County present upon their oath:

That DEWAYNE LEE RUDD, being over the age of fourteen (14) years, did in Aiken County at divers times on or between December 12, 2012 and May 19, 2013, wilfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body of [REDACTED] a child under the age of sixteen (16) years, with the intent of arousing, appealing to, or gratifying the lust, passions and sexual desires of himself or such child. All in violation of §16-03-655 of the Code of Laws of South Carolina (1976), as amended.

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


J. STROM THURMOND, SOLICITOR

WITNESSES

Aiken County Sheriff

Kristopher Evensen

Law Enforcement Case #: 13-28725

DOCKET NO. 2013GS0201639The State of South CarolinaCounty of AikenCOURT OF GENERAL SESSIONSARREST WARRANT NUMBER

2013A0211000105

30 13 OCTOBER TERM 2013THE STATE

vs.

DEWAYNE LEE RUDDACTION OF GRAND JURYTRUE BILLRonnie M. HallForeperson of Grand Jury
Date: October 3, 2013VERDICTCDR #: 3861Indictment forCRIMINAL SEXUAL CONDUCT WITH A
MINOR THIRD DEGREE§ 16-03-0855(C)J. STROM THURMOND, SOLICITORForeperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A
MINOR THIRD DEGREE

§ 16-03-0855(C)

At a Court of General Sessions, convened on October 7, 2013, the Grand Jurors of Aiken County present upon their oath:

That DEWAYNE LEE RUDD, being over the age of fourteen (14) years, did in Aiken County at divers times on or between December 12, 2011 and December 11, 2012, wilfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body of [REDACTED] a child under the age of sixteen (16) years, with the intent of arousing, appealing to, or gratifying the lust, passions and sexual desires of himself or such child. All in violation of §16-03-655 of the Code of Laws of South Carolina (1976), as amended.

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


J. STROM THURMOND, SOLICITOR

WITNESSES

Aiken County Sheriff

Kristopher Evensen

Law Enforcement Case #: 13-28725

DOCKET NO. 2013GS0201640

The State of South Carolina

County of Aiken

ALA

COURT OF GENERAL SESSIONS

ARREST WARRANT NUMBER

Oct 3

2013 OCTOBER TERM 2013

2013A0211000106

Shirley Godard

Clerk

Sherry Langley

Deputy Clerk

THE STATE
vs.

ACTION OF GRAND JURY

*TRUE BILL**Ronnie M. Hall*

DEWAYNE LEE RUDD

not a prosecutor
*12/12/13**Ashley G. Hammack*
Assistant Solicitor

CDR #: 3881

Foreperson of Grand Jury
Date: October 3, 2013

Indictment for

VERDICT

CRIMINAL SEXUAL CONDUCT WITH A
MINOR THIRD DEGREE

§ 16-03-0655(C)

Foreperson of Petit Jury
Date:

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A
MINOR SECOND DEGREE

§ 16-03-0655(B)(2)

At a Court of General Sessions, convened on October 7, 2013, the Grand Jurors of Aiken County present upon their oath:

That DEWAYNE LEE RUDD did in Aiken County on or about May 20, 2013, commit the crime of Criminal Sexual Conduct With A Minor In The Second Degree, in that the Defendant did commit a sexual battery, upon [REDACTED] a minor who was fourteen years of age at the time of the incident, and the Defendant was in a position of familial, custodial, or official authority to coerce the victim to submit or was older than the victim. All in violation of §16-3-655 of the Code of Laws of South Carolina (1976), as amended.

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


J. STROM THURMOND, SOLICITOR

WITNESSES

Aiken County Sheriff

Kristopher Evensen

Law Enforcement Case #: 13-28725

DOCKET NO. 2013GS0201642

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

ARREST WARRANT NUMBER

2013A0211000107

Oct 3 2013 OCTOBER TERM 2013Shirley Godard

C.R. & G.S.

Sherry Langley

(Deputy Clerk)

THE STATE
vs.

DEWAYNE LEE RUDD

ACTION OF GRAND JURYTRUE BILLRonnie M. HallForeperson of Grand Jury
Date: October 3, 2013VERDICTCDR #: 0397

Indictment for

CRIMINAL SEXUAL CONDUCT WITH A
MINOR SECOND DEGREE

§ 16-03-0655(B)(2)

J. STROM THURMOND, SOLICITORForeperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A
MINOR SECOND DEGREE

§ 16-03-0655(B)(2)

At a Court of General Sessions, convened on October 7, 2013, the Grand Jurors of Aiken County present upon their oath:

That DEWAYNE LEE RUDD did in Aiken County at divers times on or between December 12, 2012 and May 19, 2013, commit the crime of Criminal Sexual Conduct With A Minor In The Second Degree, in that the Defendant did commit a sexual battery upon [REDACTED] a minor who was fourteen (14) years of age at the time of the incident, and the Defendant was in a position of familial, custodial, or official authority to coerce the victim to submit or was older than the victim. All in violation of §16-3-655 of the Code of Laws of South Carolina (1976), as amended.

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


J. STROM THURMOND, SOLICITOR

WITNESSES

Aiken County Sheriff

Kristopher Evensen

Law Enforcement Case #: 13-28725

DOCKET NO. 2013GS0201678The State of South CarolinaCounty of AikenCOURT OF GENERAL SESSIONSARREST WARRANT NUMBER

FILED

Oct 32013OCTOBER TERM 20132013A0211000108Lin Godard
C.C.R.A.G.S.Sherry A. Langley
Deputy ClerkTHE STATE

vs.

DEWAYNE LEE RUDDACTION OF GRAND JURYTRUE BILLRonnie M. HallForeperson of Grand JuryDate: October 3, 2013VERDICTCDR #: 0397Indictment forCRIMINAL SEXUAL CONDUCT WITH A
MINOR SECOND DEGREE§ 16-03-0655(B)(2)J. STROM THURMOND, SOLICITORForeperson of Petit JuryDate:

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A
MINOR SECOND DEGREE

§ 16-03-0655(B)(2)

At a Court of General Sessions, convened on October 7, 2013, the Grand Jurors of Aiken County present upon their oath:

That DEWAYNE LEE RUDD did in Aiken County at divers times on or between December 12, 2011 and December 11, 2012, commit the crime of Criminal Sexual Conduct With A Minor In The Second Degree, in that the Defendant did commit a sexual battery upon [REDACTED] a minor who was thirteen (13) years of age at the time of the incident, and the Defendant was in a position of familial, custodial, or official authority to coerce the victim to submit or was older than the victim. All in violation of §16-3-655 of the Code of Laws of South Carolina (1976), as amended.

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


J. STROM THURMOND, SOLICITOR

WITNESSES

Aiken County Sheriff

Kristopher Evensen

Law Enforcement Case #: 13-28725

DOCKET NO. 2013GS0201843

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONSARREST WARRANT NUMBER Oct 3

13 OCTOBER TERM 2013

2013A0211000109

Liz Goddard
CCCP&GS*Denny Langley*
Deputy Clerk

THE STATE

vs.

DEWAYNE LEE RUDD

ACTION OF GRAND JURY*TRUE BILL**Ronnie M. Hall*Foreperson of Grand Jury
Date: October 3, 2013VERDICTCDR #: 0397Indictment forCRIMINAL SEXUAL CONDUCT WITH A
MINOR SECOND DEGREE

§ 16-03-0655(B)(2)

Foreperson of Petit Jury
Date:J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A
MINOR THIRD DEGREE

§ 16-03-0655(C)

At a Court of General Sessions, convened on October 7, 2013, the Grand Jurors of Aiken County present upon their oath:

That DEWAYNE LEE RUDD, being over the age of fourteen (14) years, did in Aiken County at divers times on or between September 24, 2011 and September 23, 2012, wilfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body of [REDACTED] a child under the age of sixteen (16) years, with the intent of arousing, appealing to, or gratifying the lust, passions and sexual desires of himself or such child. All in violation of §16-03-655 of the Code of Laws of South Carolina (1976), as amended.

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


J. STROM THURMOND, SOLICITOR

WITNESSES

Aiken County Sheriff

Kristopher Evensen

Law Enforcement Case #: 13-28725

DOCKET NO. 2013GS0201844

The State of South Carolina

County of Aiken

ALA

COURT OF GENERAL SESSIONS

ARREST WARRANT NUMBER

FILED

Oct 3

2013 OCTOBER TERM 2013

2013A0211000110

C.C. CHAGS.

Deputy Clerk

THE STATE

vs.

ACTION OF GRAND JURY

TRUE BILL

Ronnie M. Hall

DEWAYNE LEE RUDD

not a prosequi
12/12/13Ashley A. Hammack
Assistant Solicitor

CDR #: 3881

Foreperson of Grand Jury

Date: October 3, 2013

Indictment forVERDICTCRIMINAL SEXUAL CONDUCT WITH A
MINOR THIRD DEGREE

§ 16-03-0855(C)

Foreperson of Petit Jury

Date:

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
)

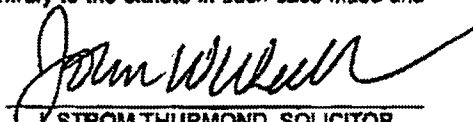
INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A
MINOR THIRD DEGREE

§ 16-03-0655(C)

At a Court of General Sessions, convened on October 7, 2013, the Grand Jurors of Aiken County present upon their oath:

That DEWAYNE LEE RUDD, being over the age of fourteen (14) years, did in Aiken County at divers times on or between September 24, 2012 and May 20, 2013, wilfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body of [REDACTED] a child under the age of sixteen (16) years, with the intent of arousing, appealing to, or gratifying the lust, passions and sexual desires of himself or such child. All in violation of §16-03-655 of the Code of Laws of South Carolina (1976), as amended.

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


J. STROM THURMOND, SOLICITOR

JES

Aiken County Sheriff

Kristopher Evensen

Law Enforcement Case #: 13-28725

DOCKET NO. 2013GS0201645The State of South Carolina
County of Aiken

COURT OF GENERAL SESSIONS

ARREST WARRANT NUMBER

2013A0211000111

OCTOBER TERM 2013

THE STATE
vs.

DEWAYNE LEE RUDD

ACTION OF GRAND JURY

TRUE BILL

Ronne M. Hall

Foreperson of Grand Jury
Date: October 3, 2013

VERDICT

Foreperson of Petit Jury
Date:

CDR #: 3681

Indictment for

CRIMINAL SEXUAL CONDUCT WITH A
MINOR THIRD DEGREE

§ 16-03-0655(C)

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A
MINOR SECOND DEGREE

§ 16-03-0655(B)(2)

At a Court of General Sessions, convened on October 7, 2013, the Grand Jurors of Aiken County present upon their oath:

That DEWAYNE LEE RUDD did in Aiken County at divers times on or between September 24, 2012 and May 20, 2013, commit the crime of Criminal Sexual Conduct With A Minor in The Second Degree, in that the Defendant did commit a sexual battery, upon [REDACTED] a minor who was twelve (12) years of age at the time of the incident, and the Defendant was in a position of familial, custodial, or official authority to coerce the victim to submit or was older than the victim. All in violation of §16-3-655 of the Code of Laws of South Carolina (1976), as amended.

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


J. STROM THURMOND, SOLICITOR

DOCKET NO. 2013GS0201681The State of South Carolina
County of Aiken

WITNESSES

Aiken County Sheriff

Kristopher Evensen

Law Enforcement Case #: 13-28725

COURT OF GENERAL SESSIONS

OCTOBER TERM 2013

ARREST WARRANT NUMBER

2013A0211000112

C.R.A.O.S.

THE STATE
vs.

DEWAYNE LEE RUDD

ACTION OF GRAND JURY

TRUE BILLRonnie M. HallForeperson of Grand Jury
Date: October 3, 2013

VERDICT

Foreperson of Petit Jury
Date:

CDR #: 0397

Indictment for

CRIMINAL SEXUAL CONDUCT WITH A
MINOR SECOND DEGREE

§ 16-03-0655(B)(2)

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A
MINOR SECOND DEGREE

§ 16-03-0655(B)(2)

At a Court of General Sessions, convened on October 7, 2013, the Grand Jurors of Aiken County present upon their oath:

That DEWAYNE LEE RUDD did in Aiken County at divers times on or between September 24, 2011 and September 23, 2012, commit the crime of Criminal Sexual Conduct With A Minor In The Second Degree, in that the Defendant did commit a sexual battery, upon [REDACTED] a minor who was eleven years of age at the time of the incident, and the Defendant was in a position of familial, custodial, or official authority to coerce the victim to submit or was older than the victim. All in violation of §16-3-655 of the Code of Laws of South Carolina (1976), as amended.

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


J. STROM THURMOND, SOLICITOR

WITNESSES

Aiken County Sheriff

Kristopher Evensen

Law Enforcement Case #: 13-28725

DOCKET NO. 2013GS0201680

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

ARREST WARRANT NUMBER

2013A0211000113

OCTOBER TERM 2013

C. CRAGG

THE STATE

vs.

DEWAYNE LEE RUDD

ACTION OF GRAND JURY

TRUE BILL

Ronne M. Hall

Foreperson of Grand Jury
Date: October 3, 2013

CDR #: 0397

Indictment for

CRIMINAL SEXUAL CONDUCT WITH A
MINOR SECOND DEGREE

§ 16-03-0655(B)(2)

VERDICT

J. STROM THURMOND, SOLICITOR

Foreperson of Petit Jury
Date: